REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA

AT MOMBASA

CAUSE NO. 246 OF 2013

KIYA KALAKHE BORU.....CLAIMANT

VERSUS

RIFT VALLEY RAILWAYS[K] LTD.....RESPONDENT

J U D G M E N T

INTRODUCTION

The claimant brought this suit against the respondent claiming accrued night shift allowances of Ksh.625,860 plus compensation for wrongful and unjustified severance of his employment. The respondent denied liability and averred that the reason for the claimant's retrenchment was that his services were surplus to the respondent requirements and as such justifiable under the law. She therefore contended that the reliefs sought ought not to issue.

Before the hearing the parties narrowed down the issues for determination to three namely:

a. **Whether the determination of redundancy on the claimant amounted to unfair termination.**
b. **Whether the claimant was entitled to night shift allowance under the employment contract.**
c. **whether the claimant is entitled to Ksh.625,860/ as accrued night shift allowance plus compensation for unfair termination.**

The parties also consented to the admission of all their filed documents as exhibits. The suit was heard on 20/5/2014, and 3/7/2014 when the claimant testified as CW1 and Dorothy Ouko testified for the defence as RW1.

CLAIMANT'S CASE

CW1 was employed by the respondent on 1/11/2006 as Station Master as per the appointment letter dated 26/10/2006. His salary was ksh. 50000 per month. His normal working hours were 8 hours per day between Monday to Friday and between 8am and 5pm. The contract letter however provided for overtime and night shift when required.

CW1contended that he was only assigned night shift throughout his service but he was never paid his night shift allowance. He was however paid for his overtime worked. According to CW1, Clause 6.2 of the respondent's HR Policies and Procedures Manual provided for the formula for calculating night shift allowance which was 10% of the basic salary per day. CW1 contended that Clause 5 of the Collective bargaining Agreement (CBA) provided for shift allowance based on the said HR Manual.

CW1 was discharged from his services on 5/5/2013 through a retrenchment letter which also sent him on terminal leave immediately. He was however paid cash for the leave thereby terminating his services instantly. The reasons cited for the retrenchment was excess labour but CW1 believes that the reason was because he had a disciplinary case pending before the disciplinary committee which involved collision of Wagons.

According to him, the charges relating to the collision of wagons was brought one month after the incidence and when the case came up for hearing on 20/2/013, it was adjourned indefinitely. According to CW1 he should not have been retrenched before the determination of his disciplinary case. After the retrenchment CW1 received a letter dated 17/6/2013 exonerating him from blame on collision of the said wagons. He believes that his retrenchment was related to the disciplinary case. According to CW1 he was not the last Station Master to be employed in the station and as such questioned the procedure followed to terminate his services. He prayed for the night shift allowance accrued.

On cross examination by the defence counsel CW1 stated that he was a shift employee in the Operations Department which worked 24 hours divided into 3 shifts. Referring to Clause 4.3 of the Appointment letter CW1 confirmed that his shift could be changed with a notice of 2 days period. He admitted that he did not serve on 10pm-6am night shift through out his service. Referring to Clause 4.2 of the appointment letter CW1 insisted that excess hours worked could be compensated by both overtime and shift allowance.

CW1 denied that he was told to avail his computation of his dues. Regarding the letter dated 31/5/2013, CW1 stated that he signed it after he was already been retrenched and after being assured that he could raise any complaint later. CW1 contended that in 2009 he was an official of his trade union and continued to make verbal demands for the shift allowances and that is when his problems with the respondents started.

CW1 maintained that Clause 5 of the CBA and Clause 6.2 of the respondents HR Manual provided for night shift allowance. CW1 further maintained that his colleagues including Athuman, Musonik and Wambugu were also agitating for the night shift allowance. He contended that the reason for retrenchment was a mere fabrication necessitated by the pending disciplinary case whereof he was cleared one month after the retrenchment.

According to CW1, a disciplinary charge was supposed to be brought within 72 hours but in his case he was charged after one and half months. He further stated that before the retrenchment CW1 had been evaluated and people younger than him in the station were never retrenched because they had no disciplinary case pending. He maintained that overtime and shift allowance could be earned at the same time. He maintained that overtime was for all workers but night shift allowance was only for those worked in the night shift.

DEFENCE CASE

RW1 is the respondent's Assistant HR Business Partner. She confirmed that CW1 worked for the respondent from 2006 to 2013 as a non management staff. She explained that Clause 4.2 of the appointment letter and Clause 6.2 of the HR Manual provided for compensation of excess time worked. According to RW1, non-management staff like CW1 were not entitled to night shift allowance because they earned overtime. RW1 referred to an internal memo dated 25/6/2012 which limited payment of overtime only to employees who worked in excess of 195 hours per month. She confirmed that the CBA applicable to this case is dated 17/4/2012 which became effective on 1/3/2012. She explained that clause 3.1 of the CBA provided that Section 6 of the HR manual was to apply in compensating for overtime.

RW1 contended that CW1 never complained about the non payment of shift allowance. According to the CW1 was furnished with computation of his dues on termination and signed and received the money as per the letter dated 31/5/2013. RW1 contended that the respondent has done several retrenchment of her staff starting 2006 including one which was done in December 2012. According to RW1, the May 2013 retrenchment was based on a tool of evaluation and decision was made by a committee. She confirmed

that CW1 had a pending disciplinary case during the evaluation and retrenchment. The case was about an accident in 2012 but CW1was cleared of the charges after his retrenchment.

RW1 contended that CW1 was retrenched alongside other workers due to excess labour and not due to the pending disciplinary case. RW1 prayed for the suit to be dismissed.

On cross examination RW1 confirmed that she was part of the evaluation committee. She confirmed that the evaluation included the employees competence. She confirmed that CW1 had a disciplinary case investigating his skill and competence in relation to an accident. She contended that the termination and release letter gave the CW1 the option to sign or not but he opted to sign and receive the money. RW1 confirmed that Clause 6.2 of the HR Manual provided for payment of overtime and shift allowance at 10% of the basic salary. According to RW1, regular working hours was from 8.00 am to 5pm.

After close of the hearing both parties filed written submissions.

ANALYSIS AND DETERMINATION

The court has carefully considered the pleadings, evidence and submissions and proceeds not to answer the aforesaid issues for determination agreed by the parties.

A. Whether the retrenchment was unfair

Retrenchment is synonimous to redundancy which simply means loss of employment through reason beyond the employee in circumstances where an employer wishes to lay off excess labour. In Kenya the procedure of declaring workers redundant is governed by the provisions of Section 40 of the Employment Act.

Under the said provision, an employer who wishes to declare an employee redundant is required in mandatory terms to serve at least one month notice to the labour office and the employee's trade union or on the employee personally if he is not a member of a trade union. The said provision further provides for a fair selection process of the workers to be declared redundant. Lastly, the affected employees must be paid their lawful dues on redundancy.

In the present case, although parties seem not to question the procedure followed, it is obvious that the mandatory procedural requirements of redundancy prescribed under Section 40, *supra* were not complied with. Firstly, the respondent did not prove that she served any notice to the labour office or the claimant's trade union. That procedural requirement is mandatory and is meant to involve the labour office and the union as key stake holders in ensuring fairness and especially in the selection of the employees to be laid off.

Secondly, the speed with which the process was done is not provided for in the said law. An employer has no discretion in complying with the law including serving the minimum 30 days notice to enable the effected employee to adjust himself for the life outside employment. The said period is also meant to allow all stakeholders to participate in the process including the union's representation of workers who are its members like the CW1.

Thirdly, the respondent did not rebut the claimant's evidence that the disciplinary case he was facing and which was a fabrication, placed him at a disadvantage during the evaluation of the workers. According to CW1, having a pending disciplinary case was a factor for consideration in determining competence and suitability to continue working.

The court therefore finds that the procedure followed in retrenching the claimant was in breach of Section 40 of the employment Act and therefore unfair within Section 45 of the said Act. Section 45 *supra* provides that termination of employment which is reached without following a fair procedure is unfair.
On the other hand, the court has considered the issue of the reason for the retrenchment. The respondent has contended that she had excess labour and had embarked on a restructuring exercise between 2012

and 2013 and that the employees had been duly notified. The claimant has however challenged the reason for his selection as being unfair because it was related to a disciplinary case which was pending and of which he was acquitted immediately after his retrenchment. He also contends that the disciplinary case was a frame up in order to put him at a disadvantage when retrenchment selections were being done.

The court has no mandate to decide for the employers how much labour they should retain. However the court has jurisdiction to enforce fairness during such retrenchments and to ensure that they are done according to the law. In the present case the court is satisfied that the claimant was put to a disadvantage during the selection for retrenchment by the pending disciplinary case. The said case was investigating the claimant's competence, which was one of the reasons for retrenchment according to evaluation document produced by the defence as RVR 8. Otherwise the respondent did not prove what other reason she retrenched the claimant and left his colleagues.

The above finding, not withstanding, the court has already made a finding that the retrenchment was indeed an unfair termination by dint of Section 45 of the Employees Act because it breached the mandatory procedural fairness prescribed under Section 40 of the Employment Act.

B. Entitlement to Night Shift Allowance

Clause 5 of the CBA provided for payment of allowance as per the Respondent's HR Manual. Clause 6.2 of the said HR Manual provided payment of night shift allowance at the rate of 10% for working between 10.00 pm and 6.00 am. The court does not agree with the defence that such allowance was for the management staff only at the exclusion of the unionized employee like the claimant. There is nothing in writing to suggest that. If that distinction was needed in the document, the same should have been indicated in writing. Consequently, the court agrees with the claimant that he was entitled to payment of night shift allowance under his contract of employment which is contained in the letter of appointment, CBA and the respondent's HR Manual.

C. Reliefs sought

In view of the earlier findings above, the retrenchment of the claimant is declared to be unlawful, wrongful and unfair. The claimant prays for 12 months salary for unfair dismissal. He confirmed in evidence that he has not been able to secure another employment since his discharge by the respondent. There is no other railway operator in the country other than the respondent and as such he may never get another similar job for a long time. The court therefore grants him 12 months gross salary at the rate of Ksh.50000 per month which works to Ksh.600,000.

The claimant has further prayed for ksh.625,680 as his accrued night shift allowance for the period of 79 months worked. He produced copies of overtime time sheets to prove that he was working in the night shift. He maintains that he was entitled to both overtime and shift allowances. The court has carefully perused the said time sheets and agrees that the claimant worked during night shift and for long hours. However, there are days he used to work during the normal day shift starting 6.00a.m just as he admitted during his cross examination.

The claim before the court is not particularized and lacks material details both in the pleadings and evidence. Consequently the court is not able to understand how the figure of ksh.625,680/ was arrived at. The prayer is therefore not granted for the foregoing reason.

DISPOSITION

For the reasons aforesaid, judgment is entered for the claimant as follows:

a. The retrenchment of the claimant is declared unlawful, wrongful and unfair.
b. Ksh.600,000 as compensation for unfair termination.
c. Costs plus interest.

Orders accordingly

Dated, Signed and delivered this 29th August 2014

O. N. Makau

Judge