



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT MOMBASA

CAUSE NO. 204 OF 2014

MOSES WESONGA EGESACLAIMANT

VERSUS

EMRAT ENTERPRISE LTDRESPONDENT

J U D G M E N T

INTRODUCTION

The claimant has sued the respondent claiming compensation for unfair termination of employment by the respondent on 23/1/2014. The respondent has denied liability and accused the claimant for deserting employment without notice from 30/12/2013.

The suit was heard on 12/7/2014 when the claimant testified as CW1 while the respondent called Mr. Gibson Nzai Msengeti as RW1.

CLAIMANT'S CASE

CW1 was employed by the respondent on 15/5/2008 as a Tarpaulin Attendant where he used to work from 6.00am to 6.00pm. His salary was ksh.350 per day which was the rate for a normal day's service. He worked for 3 months after which he was assigned the duties of a Traffic marshal with a new wage of ksh.400 per normal day of service of 8 hours. He produced payslips for September 2010 and July 2013 (Exhibit 1A.&B.) to prove that his salary was ksh.15180 which he contended that it was exclusive of house allowance.

On 24/12/2013 CW1 was served with a letter dated 1/12/2013 giving notice of redundancy to him on ground that Bamburi Cement Ltd had decided to undertake cost reduction measure. He explained that before the said notice, he had not been accorded any hearing or job evaluation. The letter also offered him casual employment as Tarpaulin Attendant. CW1 declined the offer by not responding to the letter dated 1/12/2013 and instead reported the matter to the labour office. The respondent was summoned to the labour office by letter dated 24/1/2014 and 29/1/2014. While in the labour office on 29/1/2014, CW1 was shown a letter from the respondent dated 28/12/2013 asking him to return to work. CW1 denied even being served with the said letter by the respondent before seeing it at the labour office on 29/1/2014.

He prayed for ksh.15180 being one month salary in lieu of notice. He also prayed for house allowance at the rate of 15% of the basic salary for 67 months served. He further prayed for overtime for the period between 5/5/2008 and 31/7/2008 being 348 hours at the rate of 1 ½ normal pay of ksh.350 per day. He claimed that he used to work every day including Sundays, although occasionally, he pleaded for

rest days. He prayed for 52 rest days per year for 6 years. CW1 prayed for 96 leave days outstanding for the year 2008, 2010 and 2011. He contended that he went for 30 days annual leave in 2009, 2012, and 2013 and produced letter (Exh. 6) to prove that he was entitled to 30 days leave. He also prayed for severance pay for 6 years being ksh.42,377.50. Finally he prayed for compensation for unfair termination of his employment contending that nothing was first explained to him before the redundancy letter. He maintained that he was never accorded any hearing before the termination and he never did anything wrong to warrant the termination. He explained that no dues were paid to him on termination of his employment.

He denied ever being served with the letter dated 28/12/2013 allegedly calling him to resume duty on 30/12/2013. According to CW1 the only letter he received was the notice dated 1/12/2013 which he received on 24/12/2013 which offered him a casual employment which he did not wish to take.

CW1 questioned the genuineness of the letter dated 28/12/2013 and contended that it was a backdated to defeat the summons by the labour officer through the letter served. He therefore prayed for 12 months salary for unfair termination plus ksh.449,581 being the accrued terminal dues.

On cross-examination by the defence counsel, CW1 maintained that his salary was ksh.15180 per month but the same could increase depending on overtime worked. He admitted that the payslip indicated the pay as gross salary. He maintained that the letter dated 1/12/2013 talked of reorganization and stated that CW1 was to go home. He admitted that the letter offered him an alternative employment on casual basis.

He clarified that his statement dated 3-4-2014 and paragraph 5 of the claim were erroneous in stating that he received the letter dated 1/12/2013 on the same date. He maintained that he received the said letter on 24/12/2013 which was a short. CW1 admitted that other employees were served with similar termination letters they were reinstated. CW1 however left work on 29/12/2013 after the termination letter dated 1/12/2013 took effect. He admitted that his payslip reflected NSSF deductions. He maintained that the procedure for his termination was unfair and unlawful. He contended that he received the termination letter after the senior managers had left for December holiday.

CW1 maintained that he never took rest days for the 6 years worked and explained that for the 3 months he worked as casual in 2008 he worked from 6am to 6pm daily. He observed that the letter dated 28/12/2013 was not genuine because the signature was not the same as on the letter dated 1/12/2013. He contended that he signed a delivery book on 24/12/2013 for the receipt of the letter dated 1/12/2013. He insisted that the employment was effectively terminated by the respondent's letter dated 1/12/2013 from 30/12/2013.

DEFENCE CASE

RW1 is a casual worker for the respondent. He is the head Marshal stationed at the Bamburi cement plant. He confirmed that CW1 was employed by the respondent as a Tarpaulin Attendant in 2008 and later in the same year he was appointed a Traffic Marshall. RW1 stated that CW1 left work on 30/12/13. RW1 explained that in 2013, Bamburi cement advised the respondent to reduce staff which led to service of termination letter dated 1/12/2013 to CW1, Alex Parameli, Mutei Kamani, Erick Kieti, David Maitha and Stephen Muriithi. RW1 is the one who served the letter to the affected workers including CW1. According to RW1 the termination letter also offered alternative casual employment on causal basis as Tarpaulin Attendant. The letter also stated that the termination of CW1's employment as a Traffic Marshall was to end on 29/12/2013.

CW1 however never returned to work on 30/12/2013 but the other workers terminated with him continued working. RW1 contended that in 28/12/2013 he served other letter to the CW1 and the other 5 workers terminated with him which letter cancelled the letter dated 1/12/2013. The said letter reinstated CW1 and his colleagues to their employment as Traffic Marshals. RW1 produced the letter dated 28/12/2013 as exh d.1. he insisted that every employee was entitled to annual leave and Bamburi Cement would not allow respondent breach that right. He contended that CW1 went for all his annual leave

earned together with his rest days. He explained that initially the respondent used to pay for the rest days that changed to mandatory rest days.

RW1 explained that CW1 was engaged on 3 months renewable contract during his service and he never raised any complaint about his leave or rest days before the termination.

On cross examination by the claimant's counsel, RW1 admitted that he was only a casual employee of the respondent and not in the management. RW1 did not have anything to prove that he had been authorized to testify for the respondent. He admitted that Alex Paramale left employment with the respondent but Stephen Muriithi was on leave.

RW2 stated that the letters dated 1/12/2013 and 28/12/2013 were signed by the supervisors including Alex Ndambuki and were served in sealed envelopes. According to RW1, there was nowhere to sign for the receipt of the letters by retrenched employees. He admitted that workers were signing daily attendance register but RW1 did not produce it in court. He also admitted that the respondent has a HR Manager at the Nairobi office while a Mr. Onyando was the man on the ground at Mombasa. That Mr. Onyando was the custodian of workers records which are prepared using registers prepared by the supervisors.

RW1 got to know the contents of the letters dated 1/12/2013 and 28/12/2013 from the copies in the office file. RW1 admitted that he had no evidence to prove that Bamburi Cement requested for the reduction of labour in the respondent. He insisted that the request was verbal. RW1 explained that the selection of the retrenched was on grounds of performance and warning letters. He admitted that the retrenchment letter offered an alternative employment on casual basis and only CW1 who did not return to work after retrenchment. RW1 did not know whether CW1 was paid his terminal dues. RW1 however confirmed that the respondent was summoned by labour officer concerning the letter dated 1/12/2013. The respondent send letter dated 28/12/2013 to the labour office to prove that CW1 had been given back his employment.

After the close of hearing, both parties filed written submissions for consideration by the court.

ANALYSIS AND DETERMINATION

The court has carefully perused and considered the pleadings, evidence and submissions by the two parties. It is not disputed that CW1 was employed by the respondent from 5/5/2008 and worked continuously until 29/12/2013 when he was terminated through retrenchment. It is also not in dispute that the retrenchment was done through the letter dated 1/12/2013 and effective 29/12/2013. It is also not in dispute that the termination letter offered an alternative casual employment as a Tarpaulin Attendant. It is also not disputed that his salary was ksh.15180 per month and that he was a contributor to the NSSF. The issues for determination are:

- a. **Whether CW1 deserted employment or he was retrenched by the respondent.**
- b. **If the answer to (a) is retrenchment, whether the retrenchment amounted to unlawful and unfair termination.**
- c. **Whether the offer of alternative employment on casual basis was binding on the CW1.**
- d. **Whether the letter dated 28/12/2013 was ever served on the claimant on the same day and whether it had the effect of reversing or reinstating the terminated contract of employment.**
- e. **Whether RW1 was competent to testify for the respondent on the matters he raised.**
- f. **Whether the claimant is entitled to the prayers sought.**

Desertion Vs Retrenchment

The claimant believes that he was retrenched vide letter dated 1/12/2013 which took effect on 30/12/2013. According to the claimant, he was never served with the letter dated 28/12/2013 and he did not wish to take up the casual employment offered after retrenchment. The respondent contends that the claimant deserted because he declined to accept two offers of employment by her. The respondent

believes that she offered casual employment to the claimant starting 30/12/2013 vide the retrenchment letter but he declined to respond to the offer.

On the other hand, the respondent contends that on 28/12/2013, she served the claimant with another letter dated the same day, cancelling the retrenchment and offer of casual employment as a Tauplin Attendant and instead reinstating the claimant to his former permanent employment as Traffic Marshal. According to the respondent CW1 again remained mute and deserted work without notice from 30/12/2013. The court is persuaded by the claimant's argument. On a balance of probability the court finds that the retrenchment letter dated 1/12/2013 effectively terminated the claimant's employment effective from 30/12/2013. There is no evidence to prove that CW1 was served with the letter dated 28/12/2013 which he contended that he saw it in the labour office when he went there to follow up his complaint on 29/1/2014. Even if the said letter was to be issued for revoking the retrenchment letter, the same ought to have been done formally in an agreement between the claimant and the respondent before the labour office where a complaint had been lodged.

The court's view that the matter had not been settled at the labour office is reinforced by the fact that the labour officer wrote the letter dated 29/1/2014 to the respondent inviting the parties to a conciliation. The respondent's allegation that CW1 deserted work without notice is therefore dismissed in favour of the claimant's contention that he was retrenched vide letter dated 1/12/2013.

Unfair and unlawful termination

It is not in dispute that the termination was through retrenchment. Retrenchment is synonymous to redundancy which refers to termination of employment through no fault on the part of the employee but on grounds of restructuring or abolition of office at employer's own initiative. The law governing the procedure of redundancy in Kenya is Section 40 of the Employment Act which must be read, together with the respective contract of employment. If the procedure followed in retrenching employee is in breach of the said provision of the said Act, the retrenchment becomes an unfair and wrongful termination within the meaning of Section 36 and 45 of the Employment Act.

Section 36 of the Act provides for prior termination notice while Section 45 of the Act provides for a valid and fair reason for termination and fair procedure to be followed. Under Section 40 of the Act, an employer is bound to serve a minimum of 30 days notice to the employee (or his union) and the labour officer before declaring an employee redundant. The said procedure is coined in mandatory terms.

In the present case, no sufficient notice was served. The claimant was served with the retrenchment letter on 24/12/2013. Although the claimant stated in his claim and written statement that service was on 1/12/2013, CW1 corrected that error in his testimony. Even if no formal amendment was made on the pleadings, the court believes the claimant was served on 24/12/2013. The reason for the said belief is because the letter by the labour office dated 10/1/2014 indicated that CW1 had complaint that he was served with termination letter on 24/12/2013. that was way before the pleadings and the statement which were erroneously or otherwise drafted by his counsel.

In addition to the foregoing, the retrenchment notice was never served on the labour office. Nothing from the correspondence produced seem to suggest that the notice had been served on the said labour office before CW1 lodged a complaint on 10/1/2014. The foregoing default to serve the minimum statutory 30 days notice before retrenchment rendered the exercise unfair and wrongful. The matter was made worse by the failure by the respondent to pay the accrued terminal dues on redundancy. Consequently the court finds and holds that the alleged retrenchment of the claimant vide letter dated 1/12/2013 amounted to wrongful and unfair termination within the meaning of Section 36 and 45 of the Employment Act *supra*.

Offer of alternative employment

Although the respondent contended that the offer of alternative casual employment was a show of good faith in the retrenchment exercise, the same was subject to acceptance by CW1. It can not therefore

be a basis for the respondent to successfully contend that CW1 deserted employment. In the courts view the offer lapsed when CW1 failed to communicate his acceptance to the offer. Without that acceptance the appointment to serve as a Tarpaulin Attendant on contract basis never took effect on 30/12/2013 and as such there was no binding obligation created for the CW1 to attend work on 30/1/2013 or any other day thereafter. The court therefore finds and holds that the offer of casual employment in the retrenchment letter did not affect the status of the claimant as a retrenched employee.

Service of letter dated 28/12/2013

As already found above, the letter was never served on the claimant. The court agrees with the claimant that it was backdated to defeat the complaint lodged with the labour office and letter by the said labour office dated 10/1/2014. The claimant's evidence that he only saw the letter at the labour office when he returned there on 29/1/2014 was not contested. One wonders why the letter went there and for what reasons. RW1 did not state whether or not the respondent responded to the letters served on her by the labour officer.

This court is of considered believe that the respondent responded to the said letter by the labour office dated 10/1/2014 and annexed the alleged letter dated 28/12/2013 which she backdated to defeat the claimant's claim. That is the only reasonable presumption to make considering the fact that CW1 was shown the letter by the labour officer during his second visit when the letter for conciliation dated 29/1/2014 was issued.

Competence of RW2

RW1 admitted that he was a mere casual work and head of Traffic Marshals. He admitted that he was not a management staff and did not have any written authority to represent the respondent in this case. Assuming that he had a verbal authority, the question that follows is whether he could competently testify on the human resource issues like the reason for the termination and the fairness of the procedure followed to retrench the claimant.

RW1 alleged that he is the one who served the letter for the retrenchment and the other dated 28/12/2013 but did not prove the date when he served it as already held above. He could also not confirm whether CW1 was paid his dues. He further could not produce any proof to show that Bamburi Cement requested for the reduction of the respondent's staff and especially in the Traffic Marshalling department. According to him the communication was verbal. Lastly he could not produce any work regulations or policy document for the respondent or the attendant registers to contradict claim by CW1 for rest days and overtime worked. The court therefore finds on a balance of probability that RW1 was not a competent witness to testify on behalf of the management on matters reserved for the management staff. His competence was only on the matter of service of the retrenchment notice and the letter revoking the retrenchment dated 28/12/2013 which he failed to prove. The only vital evidence he adduced was to reveal that the letter dated 28/12/2013 was not truthful because the promise of permanent employment to the CW1 as a traffic marshal was not there. The reason being that if it was to be there, RW1 would be a permanent staff after all. One wonders why RW1 is the head Traffic marshal but serving on casual basis!

RELIEFS

Under Section 49 of the Employment Act, an unfairly terminated employee is entitled to pay in lieu of notice, accrued employment benefits plus compensation for unfair termination. In this case he prayed for Ksh.15180 basis plus ksh.2277house allowance. The court has perused the payslips produced as exh 1(a) and it is satisfied that the gross pay was Ksh.15180 per month and that is what CW1 will get in lieu of notice.

In view of the finding that the gross pay was Ksh.15180 per month, the claimants prayer for accrued house allowance of ksh.152,559 is dismissed. Likewise the prayer for overtime of ksh.33,016.50 is dismissed for being time barred. It is also an afterthought on the claimant's part to raise it now after waiting for about 6 years. The claim for rest days is also dismissed for lack of particulars and also for

material contradiction in the CW1's testimony. In his evidence, in chief, he admitted that there are some rest days he took after pleading with the respondent but during cross examination he contended that he never went for any rest day during the whole period of his service. The court is of the view that CW1 took some rest day and worked during others. The particulars of the rest days taken and the ones worked has not been given to the court. Consequently that claim fails.

The claimant is granted the prayer for leave not taken. He will get 2 ½ months pay in lieu of leave of 2008, 2010, and 2011 being Ksh.37950. The prayer for severance is also dismissed because the claimant case is that he was not lawfully declared redundant but rather unfairly terminated. Lastly the prayer for compensation for unfair termination is granted in view of the finding above that the alleged retrenchment of the claimant amounted to unfair and wrongful termination. The court awards CW1 6 months under this heading being (ksh.15180x6) = ksh.91080. In so awarding the court is appreciating that CW1 could have secured a similar paying employment within 6 months.

DISPOSITION

In view of all the findings and reasons stated above judgment is entered for the claimant for ksh.144,210 plus costs and interest.

Orders accordingly.

Dated, Signed and delivered this 26th September 2014

O. N. Makau

Judge