



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT NAKURU

CAUSE NO. 25 OF 2014

FRANCIS KIPLAGAT KIRUI.....CLAIMANT

V

JADE PETROLEUM LTD (JADE RETAIL LTD).....RESPONDENT

JUDGMENT

1. Francis Kiplagat Kirui (Claimant) was employed by Jade Petroleum Ltd (Respondent) with effect from 18 January 2013 as a Service Centre Attendant through a letter of employment of even date though signed by the Claimant on 5 March 2013 (Claimant contended he started work on 2 January 2013).

2. On 30 November 2013, the Respondent wrote to the Claimant informing him that his services were being terminated with effect from 1 December 2013. The reason given in the termination letter was

numerous challenges in meeting our minimum sales projections. We are therefore unable to sustain our current workforce hence the need to downsize.

3. The letter further informed the Claimant that he would be paid salary in lieu of notice and accrued leave days after clearing with the Respondent.

4. The Claimant was not satisfied with the termination and on 10 February 2014, he commenced legal proceedings against the Respondent alleging unlawful termination contrary to section 40 of the Employment Act, 2007.

5. After service of Notice of Summons, the Respondent filed a Response on 21 March 2014. The Cause was subsequently heard on 8 October 2014.

Claimant's case

6. The Claimant pleaded that he was declared redundant without compliance with section 40 of the Employment Act, 2007. He gave particulars of the non compliance.

7. The Claimant further pleaded that during the tenure of employment he was being underpaid, contrary to the rates prescribed in the Regulation of Wages (General) (Amendment) Orders in force; worked overtime without payment and did not go on leave.

8. The Claimant testified and stated that he joined the Respondent on 2 January 2013 and was terminated on 30 November 2013 and that at the time of hearing he was jobless.

9. On the process followed prior to termination, the Claimant stated that after work on 30 November 2013, he was asked by the Respondent's Station Manager to collect a termination letter the next day. He was not given any notice.

10. As to the reasons for the termination of services, the Claimant stated that the reason given in the termination letter was low business and that he was paid two months' salary in lieu of notice, accrued leave and severance pay.

11. The Claimant also stated that he was not consulted prior to termination and that the termination was not due to misconduct on his part.

12. On contractual obligations, the Claimant stated that he would work from 6.00 am to 6.00 pm but was not getting overtime pay. He also worked Sundays without compensation and did not go on leave. He further stated he was earning Kshs 10,000/- per month.

13. In conclusion, the Claimant stated he was seeking the reliefs set out in the Memorandum of Claim.

Respondent's case

14. The Respondent informed the Court that it would rely on the affidavit of one Samuel Kemboi. The witness was cross examined on the depositions in the affidavit.

15. In the Response, the Respondent pleaded that the termination of the Claimant was in accordance with the law and the employment contract; the Claimant was paid full dues and did not work overtime. The redundancy was also denied.

16. In the affidavit of Samuel Kemboi it was deposed that the Respondent experienced a lot of financial challenges and it became unsustainable to keep all the staff. The Claimant was informed and accepted the termination and was paid all dues and issued with a certificate of service.

17. In cross examination, the witness reiterated the depositions in the affidavit and further stated that the Claimant was not given notice of termination, but the reasons for termination were given in the termination letter and that a hearing was held but minutes were not kept.

18. The witness denied that the Claimant worked overtime.

19. The Claimant filed written submission on 14 October 2014 while the Respondent filed its submissions on 31 October 2014.

Issues for determination

20. The issues arising for determination are, whether the Claimant was declared redundant, whether the termination was fair and if not, appropriate remedies.

Whether Claimant was declared redundant

21. The Claimant pleaded his termination as one of redundancy. The Respondent denied it was a redundancy. The letter of termination was clear on the reason for the termination. The Claimant was being terminated because the Respondent had financial challenges.

22. The termination was therefore involuntary on the part of the Claimant. It was not as a result of *misconduct, poor performance or physical incapacity* on the part of the Claimant. It was a termination due to the operational requirements of the Respondent.

23. Without a doubt, the services of the Claimant were being terminated on the ground of redundancy as defined in section 2 of the Employment Act, 2007.

Whether the termination/redundancy was fair

Procedural fairness

24. Section 40 of the Employment Act, 2007 has set out the process of terminating the services of an employee on account of redundancy. Pursuant to section 40(1) (b) of the Act, the Respondent was under a statutory obligation to notify the Claimant personally in writing one month prior to date of intended redundancy. The Respondent did not even suggest it notified the Claimant in writing one month in advance.

25. Further, the Respondent was under a duty to inform the local Labour Officer of the intended redundancy. The Respondent did not place any evidence before Court to demonstrate the local Labour Officer was informed.

26. The Respondent also did not show how the Claimant was selected for redundancy among other employees. Seniority in time, skill, ability and reliability are factors to be considered. No material was placed before Court to indicate how the Claimant fared in this regard.

27. The Court is satisfied that the termination of the services of the Claimant through redundancy was not in compliance with section 40 of the Employment Act, 2007.

Proof, validity and fairness of reasons for termination

28. But that is not all. Pursuant to section 45(2) (b) (ii) of the Employment Act, 2007, an employer has the obligation to demonstrate that redundancy as a reason for termination was fair and valid and related to its operational requirements.

29. The Respondent did not even attempt to prove that it had financial challenges. It sought to rely on mere depositions without concrete evidence such as financial statements or audited accounts.

30. The Court therefore reaches the conclusion the Respondent has failed to prove redundancy as a valid and fair reason to terminate the services of the Claimant. The termination was substantively unfair.

Appropriate remedies

2 months pay in lieu of Notice

31. The Claimant admitted he was paid two months pay in lieu of notice. The pay slip for December 2013 show the Claimant was paid Kshs 20,000/- under this head of claim. This relief is therefore dismissed.

Pro rata leave

32. The Final Dues statement annexed to the Response indicated that the Claimant was paid Kshs 8,333/33 on account of outstanding leave. This relief is also dismissed.

Underpayments

33. It is not disputed that the Claimant was earning Kshs 10,000/- per month.

34. The Regulation of Wages (General) (Amendment) Order, 2012, Legal Notice No. 71 prescribed minimum wages from 1 May 2012. Under the occupation, *vehicle service worker (petrol and service stations)*, the minimum wage for areas outside Nairobi, Mombasa and Kisumu was set at Kshs 10,384/80 exclusive of house allowance. With 15% house allowance factored in, the wage should have been Kshs 11,941/- from January 2013 to April 2013.

35. The Claimant was thus underpaid by Kshs 7,766/- for the four months.

36. The Regulation of Wages (General) (Amendment) Order, 2013, Legal Notice No. 197 prescribed minimum wages from 1 May 2013. Under the occupation *vehicle service worker (petrol and service stations)*, the minimum wage for areas outside Nairobi, Mombasa and Kisumu was set at Kshs 11,838/65 exclusive of house allowance. With house allowance factored the total wage should have been Kshs 13,613/-.

37. The Claimant was thus underpaid by Kshs 25,295/- for the seven months, May to November 2013.

38. Although the Claimant did not directly testify on his duties/responsibilities or under what occupation a Service Centre Attendant fell, under the Regulation of Wages Orders, the duties as expressed in the letter of employment leave no doubt he falls under *vehicle service worker (petrol and service stations)*.

Overtime

39. The Claimant testified that he would work from 6.00 am to 6.00 pm and thus claimed 3 hours overtime for 26 days multiplied with 10 months. The letter of employment provided that the Claimant would work from 7.00 am to 7.00 pm but subject to adjustments and that overtime would not be paid.

40. The Claimant however, did not anchor this particular head of claim in any particular statutory framework on the prescribing the working hours. The Court declines to award this relief.

Compensation

41. One of the primary remedies where the Court makes a finding of unfair termination is compensation equivalent to not more than 12 months gross wages. The remedy is discretionary and the Employment Act, 2007 has expressly set out the factors the Court ought to consider.

42. The Claimant though did not seek compensation for unfair termination/wrongful dismissal. He had legal advice all through. If he were a lay person acting on his own behalf, the Court would have considered an award of compensation. But counsel must be held to stricter standards. The Court would not make an award of compensation.

Severance pay

43. The Claimant admitted in testimony that he was paid severance pay.

44. Before concluding, the Court wishes to address briefly some legal issues raised in the Respondent's submissions.

45. The first relates to the burden of proof. The Respondent cited section 107(1) of the Evidence Act. The position urged by the Respondent is generally not true with respect to proceedings before the Industrial Court. Section 20(1) of the Industrial Court Act is clear that the Court shall not be strictly bound by the rules of evidence except in criminal matters.

46. Secondly, sections 41, 43, 45 and 47 of the Employment Act, 2007 have placed unambiguous statutory burdens upon employers, who in the majority of complaints regarding unfair termination are the Respondents. The employer is under a statutory duty to prove the reasons for termination, that the reasons are valid and fair and to justify the grounds for termination.

47. The Respondent also raised the issue of parties being bound by their pleadings. That is generally true unless parties lead evidence on non pleaded issues and objection is not taken. But this issue may need serious interrogation in an appropriate case.

48. Without giving any considered or definite views on the issue of parties being bound by their pleadings, I only wish to observe that the Constitution now envisages the Court being approached informally. Further, many of the parties appearing before the Court are lay persons, with no legal training

or knowledge and acting on their own behalf. I say no more.

49. The Court would observe that practitioners in the employment and labour relations field should make themselves conversant with the primary labour statutes and the remedies applicable in different scenarios.

Conclusion and Orders

50. From the foregoing, the Court finds and holds that

- a. The Claimant was terminated through redundancy and that the redundancy was not in compliance with section 40 of the Employment Act, 2007.
- b. The termination through redundancy was unfair.

51. The Court awards and orders the Respondent to pay the Claimant

- a. Underpayments Kshs 33,061/-

52. The reliefs for 2 months pay in lieu of notice pro rata leave and overtime are dismissed.

53. Claimant to have costs.

Delivered, dated and signed in open Court in Nakuru on this 7th day of November 2014.

Radido Stephen

Judge

Appearances

For Claimant Mr. Bichana instructed by Chepkwony & Co. Advocates

For Respondent Mr. Kenei instructed by Gumbo & Associates, Advocates