



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 1160 of 2012

SALMON OGWELA OTIENOCLAIMANT
VERSUS

STAMET PRODUCTS (K) LTDRESPONDENT

JUDGEMENT

1. By a memorandum dated 9th July 2012, the Claimant Salmon Ogwela otieno states he was employed by the Respondent Stamet Products (K) LTD in 2001 as a Machine Operator at a daily salary on Ksh.550.00. the Respondent was served with summons herein but no appearance or defence to the claim were filed. I note Hearing Notice dated 14th November 2012 was served and acknowledged by the Respondent on 19th November 2012 and an Affidavit of Service by Jackson Ngugi filed in court on 19th November 2012. A further notice was issued and Affidavit of Service filed on 8th October 2012. The Court directed the hearing to proceed based on these records.
2. It was the Claimants case that despite serving the Respondent since 2001 his employment was unfairly terminated in 2012 without notice or payment of dues and claims the following:
 - a. 2 months notice pay at Kshs.28,600.00;
 - b. 20 days service pay for all years worked at Kshs.110,000.00; and
 - c. Compensation for unfair termination.
3. The Claimant gave evidence that since 2001 he had been a diligent employee of the respondent but in 2011 the Respondent sold off its business to a third party and had an agreement with unionized employee for redundancy package where each employee was paid 20 days for each year served, any pending annual leave but the claimant who was not unionized was not paid. He wrote a letter of demand but the respondent refused to pay.
4. The Claimant further produced in his evidence the Agreement that the Union and the Respondent made indicating the nature of payments made to the employees. That this agreement did not cater for the Claimant at all. The union only negotiated the redundancy package for its members. That all his NHIF dues were paid for by the Respondent but his termination was without any benefits being paid to him for the 10 years he worked for the Respondent.
5. That he worked for the Respondent until December 2011 when management changed and on 3rd January 2012 all employees were locked out. No notice had been given before the termination.
6. The Claimant called a witness Mr. Nicholas Otieno Omuga. That he also worked for the respondent

together with the Claimant from 1999 and Claimant joined him in 2001. That in December 2011 when the Respondent closed for the Christmas holidays a few employees was left to do pending work. On 3rd January 2012 when they reported for work, they found the respondent premises closed and therefore had no access. They were not aware on what was going on. That in the ensuing situation, a customer came along and used his motor vehicle to get inside the premises where the Respondent officer asked the employee to have one of their Union representatives enter and make presentations.

7. That Mr. Omuga was a Union official, the KUPRIPUPA Union and he together with others:

John Arogo, the Director of Org.

Kivale Ali Said, Industrial relations officer,

Eric Oginga;
Meshack Wambua Ndambuki;
Alexander Mutunga;
Francis Aula;
David Onyango;
Raphael Musyoka; and
Godfrey Muhambe.

All these people represented the union while the management was

Represented by:
R. shah for Stamet Ltd
Auko Crispino; and

Richard Bisonga both for Beetle Company.

8. At this meeting the management informed the Union representatives that the respondent had outsourced its business to Beetle Company. That they agreed on dues to be paid that all the employees who had served for more than one year were to get 20 days pay for each year worked and pay for outstanding leave days. An agreement was signed between the parties. This Agreement was explained to all employees and Beetle Company gave the staff new contract.

9. That the witness was paid, which payments took time and went late into the evening as each employee was called individually and based not eh agreement, the dues were calculated. That he left soon after being paid and only the following day when he reported to the new employer did he learn that the Claimant was not paid since he was not unionized. That those who had only served for less than a year, were also not paid. That he should have been paid for his years served.

10. In a case where redundancy is declared the procedure is very clear and if not followed, any terminations are deemed unprocedural and unfair. Court notes that the provisions of Section 40 of the Employment Act are very clear on the procedure regarding redundancies. Such termination must be based on the law otherwise the same becomes wrong and if the grounds used to identify the affected employees are not as per the law, the same becomes unfair:

40. (1) an employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions—

(a) where the employee is a member of a trade union, the employer notifies the union to which the employee is a member and the labour officer in charge of the area where the employee is employed of the reasons for, and the extent of, the intended redundancy not less than a month prior to the date of the intended date of termination on account of redundancy;

(b) Where an employee is not a member of a trade union, the employer notifies the employee personally

in writing and the labour officer;

(c) The employer has, in the selection of employees to be declared redundant had due regard to seniority in time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy;

(d) Where there is in existence a collective agreement between an employer and a trade union setting out terminal benefits payable upon redundancy; the employer has not placed the employee at a disadvantage for being or not being a member of the trade union;

(e) The employer has where leave is due to an employee who is declared redundant, paid off the leave in cash;

(f) the employer has paid an employee declared redundant not less than one month's notice or one month's wages in lieu of notice; and

(g) The employer has paid to an employee declared redundant severance pay at the rate of not less than fifteen days pay for each completed year of service.

11. Thus these conditions outlined in the law are mandatory and not left to the choice of an employer. Redundancies affect workers livelihoods and where this must be done by an employer, the same must put into consideration the following:

1. Give notice to the Union or labour officer a month before the process commences
2. For those not unionised, personal letters copied to the labour Officer;
3. Use a criteria of seniority, abilities and reliability of each employee;
4. Where there is a CBA the same should not disadvantage any employee;
5. Leave days due should be paid in cash;
6. One month notice or one month pay in lieu of notice; and
7. Severance pay not less than 15 days for each year of service.

12. These are important steps for each employer wishing to pursue redundancies, layoffs; reorganisation and or restructuring that can be a useful tool.

Did the respondent herein apply these legal guidelines?

Was the respondent in a position to comply with these legal guidelines?

Were there reasonable steps taken to ensure the respondent took these legal guidelines?

13. By virtue of his position with the respondent, the claimant should have been involved in ensuring the legal guidelines were adhered to in any sale of the respondent business and or redundancy process. He was not unionised and therefore stood to lose his years served that were long. Lack of consideration of payment of his terminal dues having worked for over 10 years had no justification and the same was unfair.

14. Under the law thus, the claimant is entitled to 15 days pay for each year work all being 10 year calculated at Kshs.550.00 equals to Kshs.16,500.00 a month and what was payable was Kshs.82,500.00

as severance pay.

15. I note no notice was given and what is due in law is one month notice and I will award the sum of Kshs.16, 500. The Claimant indicated that there were no leave days due.

Based on the reasons above I enter judgement for the Claimant in the following terms:

- i) A declaration that he was unfairly declared redundant.**
 - a. I award three (3) months pay as compensation at Kshs.49,500.00;**
 - b. Severance pay at Kshs.82,500.00;**
 - c. Pay in lieu of notice at Kshs.16,500.00;**
- ii) Costs of the suit.**

These are the orders of this Court.

Delivered in open court at Nairobi this 25th day of March, 2013.

Monica Mbaru

JUDGE

In the presence of

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Court clerk