



REPUBLIC OF KENYA

Industrial Court at Nairobi

Cause 24 of 2012

JAMES MUNGAI MWAURA.....CLAIMANT

VS

GACHEWA MOTORS LIMITED.....RESPONDENT

AWARD

Introduction

1. By a Memorandum of Claim dated 10th January and filed in Court on 11th January 2012, the Claimant sued the Respondent for unlawful termination of employment. The Respondent filed a Reply on 25th January 2012 and the matter was heard between 21st January and 10th April 2013. The Claimant testified on his own behalf and the Respondent called Stephen Kimani Mungai and Beatrice Njoki Wanjiru. The Respondent then filed written submissions.

The Claimant's Case

3. The Claimant was employed by the Respondent as a Security Guard on 22nd October 1996 at a monthly salary of Kshs. 3,000. He testified that he was a night watchman and was not issued with a letter of appointment. From 2005, the Claimant began asking for a salary increment. By the time of his termination, his salary had been increased to Kshs. 8,724. According to the Claimant, his employment was unfairly terminated on 5th November 2011. He claimed to have been on leave at the time of his termination. He was paid Kshs. 212,448.90 as terminal dues. The Claimant further testified that he used to take 21 days annual leave but was entitled to 26 days.

4. The Claimant therefore claimed the following:

- a) House allowance for 1st October 1996 to 30th April 1999..... Kshs. 27,500.00
- b) Underpayment from 1st May 1999 to 31st October 2011.....307,788.10
- c) Balance of annual leave (75 days).....28,074.40
- d) 12 months' compensation @ Kshs. 9,732.45.....116,789.40
- e) Balance of notice pay.....1,008.45
- f) Balance of severance pay (45 days).....14,647.50

- g) Costs and interest
- h) Any other relief the Court may deem just to grant

The Respondent's Case

5. In its reply the Respondent stated that the Claimant's employment was properly terminated on grounds of redundancy. The Claimant was notified of the redundancy personally and a copy of the notice was sent to the Labour Officer. The Respondent was no longer in business having closed down. Consequently all employees had been declared redundant. The Respondent stated that the Claimant was a day watchman and denied underpaying him.

6. Stephen Kimani Mungai, former Human Resource Manager with the Respondent testified that Gachewa Motors Limited was closed down during the expansion of the Thika Superhighway. As a result, all the employees were declared redundant. Mungai testified that the employees had been given a 3 months' notice of termination of employment on account of redundancy. The Claimant's termination letter dated 15th November 2011 was issued after a verbal notice. The Claimant was paid all his dues. Mungai also testified that the Claimant was not underpaid. He took or was compensated for all his leave which was fixed at 21 days per year.

7. Beatrice Njoki Wanjiru, a former employee of the Respondent working in the Sales Department testified that from 2008 Murang'a Road was under construction and the Respondent could not therefore continue with its business of selling motor vehicles since the access to the business premises had been closed. The Respondent closed down completely.

8. In August 2011 the Respondent's Directors and management called a staff meeting during which meeting the staff were informed that due to the declining business, they would be given 3 months' notice of termination of their employment on account of redundancy. All the staff, including the Claimant were at that meeting. On cross examination by the Claimant Wanjiru told the Court that everyone could see that the business was declining.

Findings and Determination

9. The main issue for determination in this case is whether the termination of the Claimant's employment was undertaken within the law. It was not in contest that the Claimant's employment was terminated by way of declaration of redundancy.

10. Section 2 of the Employment Act, 2007 and the corresponding section in the Labour Relations Act, 2007 define redundancy as:

“the loss of employment, occupation , job or career by involuntary means through no fault of an employee, involving termination of employment at the initiative of the employer, where the services of an employee are superfluous and the practices commonly known as abolition of office, job or occupation and loss of employment.”

11. Section 40 of the Act sets out the following conditions precedent to be met by an employer before terminating a contract of service on account of redundancy:

a) where the employee is a member of a trade union, the employer notifies the union of 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 the 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 an employee declared redundant severance pay at the rate of not less than fifteen days pay for each completed year of service.

12. The Respondent called evidence to demonstrate that its business was so adversely affected by the construction of the Thika Superhighway that it could not continue. In fact, according to the evidence of the 2nd Respondent's witness, Beatrice Njoki Wanjiru, the Respondent's employees could see the business declining. The circumstances leading to the decline of the Respondent's business were beyond the Respondent's control. I therefore find that the termination of the Claimant's employment which was effected alongside all the other employees was done for good cause and in good faith.

13. I will now examine whether the Respondent complied with the conditions set out in Section 40 of the Employment Act. Further to a staff meeting held in August 2011, the Respondent wrote to the Claimant on 5th November 2011 informing him of the termination of his employment by way of redundancy and enclosed a cheque for Kshs. 212,448.90 in settlement of his terminal dues. According to the Respondent, this payment included pay in lieu of notice. The letter was copied to the District Labour Officer. Although the Claimant claimed to be a member of the union, he did not produce any evidence to support this claim. In view of the foregoing, I find that the Respondent complied with the law in declaring the Claimant's position redundant. The claim for compensation for unfair termination therefore fails and is hereby dismissed.

14. The Claim for balance of annual leave was based on the Claimant's averment that he was entitled to 26 days annual leave as against the 21 days he was granted by the Respondent. The Court found no basis for the position taken by the Claimant in this regard and the claim therefore fails and is dismissed. The claims for salary underpayment, balance of notice pay and severance pay were not proved and are hereby dismissed. The claim for house allowance is statute barred by dint of Section 90 of the Employment Act and is also dismissed

Each party will bear their own costs.

**DATED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 28TH DAY OF MAY
2013**

**LINNET NDOLO
JUDGE**

In the Presence of:

.....**Claimant**

.....*Respondent*