



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT MOMBASA

CAUSE NO. 1 OF 2013

LTUMASIA LESHORONO

CLAIMANT

v

JAHAZI MARINE LIMITED

RESPONDENT

JUDGMENT

1. Ltumasia Leshorono (Claimant) was employed by Jahazi Marine Ltd (Respondent) with effect from 1 February 1993 as a security guard.
2. On or around 29 October 2012, the Respondent terminated the Claimant's services on account of redundancy with a one month written notice. The notice indicated that the Claimant's last working day would be 30 November 2012 and that the final dues would be paid in accordance with the Employment Act. At the time of redundancy, the Claimant was earning a basic salary of Kshs 7,998/11 and house allowance of Kshs 5,439/-.
3. Through his Advocates demand notice dated 27 November 2012 the Claimant sought Kshs 159,960/- as final dues being severance pay, leave pay for 2012 and underpayments for meal allowances to be computed later. The Respondent replied to the letter through a letter dated 4 December 2012 and informed the Claimant's Advocate that it was ready to pay the Claimant severance pay calculated at the rate of 15 days pay for each year served. According to the Respondent the Claimant was entitled to a gross of Kshs 55,378/90 (net of Kshs 46,702/-) as final dues for the 12 years he had served.
4. In the stated letter, the Respondent further informed the Claimant's Advocate that it had employed the Claimant for 12 years, i.e. from 2000 when it took over Jahazi Marine Ltd.
5. The Claimant did not accept the tabulations by the Respondent who then proceeded to deposit the amount with the Ministry of Labour.
6. Consequently, the Claimant filed a Statement of Claim against the Respondent on the ground that the Respondent did not comply with the dictates of the Employment Act, 2007 and therefore sought one month payment for the redundancy for 19 years, unpaid meal allowances for 6 years and payment in lieu of notice all totaling Kshs 803,840/-.
7. I initially heard the cause on 7 May 2013 when the Claimant's Advocate on record was absent and the Claimant stated he was ready to proceed and adjourned the hearing of the Respondent's case to 16 May 2013. On 16 May 2013 Mr. Atanja and Ms. Oluoch agreed and requested me to hear the case afresh and the Court obliged them.
8. There are several issues which have arisen and I will examine each one of them in turn. I need to mention that the Respondent filed its written submissions on 27 June 2013, one day before delivery of judgment. I have considered the submissions in my reaching my decision.

Whether the redundancy was lawful

9. It is common cause that the Respondent wrote to the Claimant on 29 October 2012 informing him of the redundancy and that his last working day would be 30 November 2012. In testimony he admitted that the Respondent's Human Resources Manager and General Manager informed him and other staff of the impending terminations through redundancy. On his side he testified that he declined to sign the notice letter.
10. Section 40 of the Employment Act has set out the procedures to be followed in termination of employment through redundancy. One of the procedures is the notification of the union where the employee is a member and to the local Labour Officer or notification to the employee and the local Labour Officer in writing.
11. The Labour Office was involved in the redundancy at the Respondent. A Labour Officer, Mr. Katana indeed testified that the Respondent sought his advice in carrying out the redundancy. The Claimant confirmed that the Respondent informed the employees of the intending redundancy. It was followed by individual letters. The Claimant on his part refused to acknowledge his. Under these circumstances I am satisfied that the Respondent complied with the requirement to personally notify the employee and the local Labour Officer.
12. The other requirement is to have regard to seniority in time, skill, ability and reliability of each of the employees. The Claimant did not suggest that the Respondent did not take this requirement in consideration. The Respondent's witness also did not make any reference to the criteria used to select the employees. It was incumbent upon the Claimant to lay basis on the compliance with this requirement in order for the Respondent to be called upon to justify whether it complied. The Claimant did not discharge the burden of proving that this requirement was not complied with.
13. The other requirements relate to payment of cash in lieu of pending leave, wages in lieu of notice and severance pay. I will deal with these when considering appropriate relief.
14. Considering the material placed before me I am satisfied that the Respondent substantially complied with the requirements set out in section 40 of the Employment Act in declaring the Claimant redundant and that the declaration of redundancy was lawful.
15. In any case, the gravamen of the Claimant's complaint was not the lawfulness of the termination of the Claimant through redundancy but the payment of final dues.

When was the Claimant engaged by the Respondent

16. The Claimant pleaded and testified that he was employed by the Respondent with effect from 1 February 1993. For the Respondent it was testified that the Respondent amalgamated with Severin Sea Lodge (East Africa) Ltd with effect from 1 May 2000 when shareholders/directors changed and there was no transfer of liabilities and employees. However, the Respondent's witness admitted that the records it had showed that Claimant had been employed in 1993.
17. For me, it appears that either the Respondent's witness was not forthcoming with information on the status of the employees who were serving prior to the change of directorship/shareholding or he did not know. His testimony that the Respondent is not liable cannot bear scrutiny. There must have been documents kept and I would have expected the Respondent to produce the records. These are facts which would be peculiar to the Respondent.
18. I do find that the Claimant's employment from 1 February 1993 up to time of termination must be considered as continuous and the Respondent must be found to carry the burden for any liabilities in this Cause.

Appropriate relief

Severance pay

19. Section 40(1)(g) of the Employment Act, 2007 decrees that where an employee is declared redundant then s/he should be paid severance pay at the rate of 15 days for each completed year of service. This is the minimum set out by the statute. The parties through their party autonomy can agree to increase it. I was not referred to any contract in which the parties agreed to set it at the equivalent of one month wages for each year of completed service.
20. For failure to show the basis of the more generous demand by the Claimant, I must revert to the statutory provision. I therefore find that the Claimant is entitled to severance pay at the rate of 15

days pay for each completed year of service. The Claimant served the Respondent for 19 years and therefore is entitled to severance pay for 285 days (15 days multiplied by 19 years). Using the correct formula of Basic Salary plus House Allowance divided by 26 to get the daily rate which is then multiplied by the number of days, the Claimant is entitled to severance pay of Kshs 147,296/-.

21. The calculations by the Respondent on the advice of the Labour office were clearly erroneous.

Unpaid meal allowances

22. The Claimant did not ground this head of Claim on a statutory provision. It was also not grounded on any express contractual term. The Claimant was seeking Kshs 468,000/- being meal allowance for 6 years based on practice and custom. The Respondent's witness testified that the Respondent used to provide meals to its employees from 2000 to 2009 but the benefit was removed when the kitchen was closed. In lieu thereof the employees were to be paid Kshs 1000/- per month.

23. The only copy of the Claimant's earning record produced in Court was the salary increment letter dated 1 September 2011. It does not have any details on payment of meal allowance.

24. The Respondent knew it was facing a claim for a meal allowance. Its witness admitted that the employees were to be paid Kshs 1000/- meal allowance per month. It had the responsibility to keep and produce records as may show the terms and conditions of employment. It did not produce any.

25. In the case of *Kenya Chemical & Allied Workers Union v Bamburi Cement Ltd*, Mombasa Cause No. 156 of 2012 I held that

In my considered view if an employer has consistently and persistently paid a 13th month cheque/bonus and such practice or custom is reasonable, certain and notorious, it becomes an implied term of the employment contract which can be legally enforced provided that sufficient and clear evidence is placed before the Court.

26. The provision of meals and later on the payment of a meal allowance by the Respondent had become a reasonable, certain and notorious practice or custom and therefore became an implied term of employment.

27. In *Devenald v Rosser & Sons* (1906) 2KB 728 the legal principle that a custom (practice) could play a role in supplying incidents to the contract of employment which had not been expressly agreed was acknowledged. In that case it was held that *a custom to be good, must be reasonable, certain and notorious*.

28. I have no alternative but to find for the Claimant but on the admitted sum of Kshs 1000/- per month. Provision of meals was stopped in 2009. I would find that the Claimant is entitled to a meal allowance of Kshs 1000/- per month from January 2010 until time of termination 30 November 2012, a period of 35 months. I therefore assess the Claimant's entitlement here to Kshs 35,000/-.

Payment in lieu of Notice

29. I have found that the Respondent informed the Claimant and other staff about the redundancy and that it also wrote personally to the Claimant though the Claimant refused to acknowledge the letter. The Claimant does not merit any relief under this head of claim.

Conclusion and Orders

30. In conclusion I do find and hold that the termination of the Claimant was substantially carried out in compliance with the provisions of section 40 of the Employment Act but that the Claimant is entitled to and is awarded

- a. 15 days severance pay for 19 years (285 days) Kshs 147,296/-
- b. Unpaid meal allowance Kshs 35,000/-

TOTAL

Kshs 182,296/-

- 31.The Claim for pay in lieu of Notice and payment of further gross salary until final payment of redundancy benefits are dismissed.
- 32.The Court was informed that part of the benefits of the Claimant totaling Kshs 46,702/- was deposited with the County Labour Office. The same should be released to the Claimant and the balance of the award paid to him by the Respondent.
- 33.There will be no order as to costs.

Delivered, dated and signed in open Court in Mombasa on this 28th day of June 2013.

Justice Radido Stephen

Judge

Appearances

Mr. Atanja instructed by C K Areba

& Co. Advocates

for Claimant

Ms. Oluoch instructed by Sichangi &

Co. Advocates

for Respondent