



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 340 OF 2012

SYLVESTER ODOUR OYILECLAIMANT

VERSUS

PRIME FUELS (KENYA) LIMITED RESPONDENT

JUDGEMENT

This is a claim dated 1st march 2012 by the claimant Sylvester Odour Oyile for unfair termination of his employment and non-payment of his terminal dues by the respondent Prime Fuels (Kenya) Limited. The respondent filed their response to the claim dated 27th March 2012 where they admit that the claimant was their employee and due to their decision to restructure its business, the claimant's position was phased out, he was offered an alternative position but declined and was therefore terminated.

The matter came up for hearing on 29th October 2012 but the same could not proceed as the Advocate for the respondent was said to be unwell and hearing was postponed to 13th December 2012 on which date Advocate for respondent indicated that the parties were negotiating an out of court settlement and the court placed the matter for mention on 30th January 2013 but on this date parties agreed to postpone the matter as they had not been able to agree until the 30th of March 2013 when they were to record a consent or proceed with hearing.

On 30th march 2013, the respondent was absent, his advocate was absent but Mr. Waiganjo held brief for Mr. Oluoch for the Respondent and indicated that Mr. Oluoch was at the Court of Appeal in Case No. 315 of 2012 and that the parties had agreed to a partial payment of the claim and needed more time. This submission was vehemently opposed by the claimant counsel Mr. Miare noting that a substantial amount had not been resolved and that the responding was stalling the matter on the same reasons. The Court adjourned the matter and directed the respondent to pay costs of Kshs.6, 000.00 noting that the claimant had travelled from Mombasa for the haring had bus receipts to this effect and directed the hearing to proceed on 28th May 2013 however the matter was placed before another court.

A new date was taken for hearing on 6th June 2013, a hearing Notice dated 28th May 2013 was served upon the respondent and dully acknowledged with a stamp dated 29th May 2013 from eh firm of Anthony T. Oluoch Advocate and an Affidavit of Service dated 29th may 2013 sworn by Chrispine Olengo filed.

Despite these efforts to notify the respondent of the hearing dates, they were absent in court on the 6th June 2013. The court called out all the matters and sent this because for hearing at 11a.m. but still the respondent had not appeared not was the advocate present. On this basis the court proceeded with the hearing of the claimant's case.

The claimant stated that on 1st November 1997 he was employed by the respondent as a Maintenance/Technician and placed on probation for 6 months which he did and was later confirmed to this position. He served in that capacity and was promoted through the ranks to Road Transport Manager, Assistant Operations Manager Western Kenya Region with his last pay being kshs.168, 846 per month.

That on 15th September 2011 the respondent wrote to the claimant terminating his employment on the reasons that they were restructuring their business and the position of Assistant Operations manager Western Kenya was removed and that since the claimant was not willing to be transferred to the DRC on an alternative position, he was thus terminated. The claimant however stated that he never refused to be transferred to the DRC as alleged in the letter of termination and thus his termination was unfair, malicious and unlawful. That his computed dues at kshs.1,691,273.00 which was not the total dues and the claimant computed his dues amounting to kshs.3,717,425.00 and thus seek the court to declare that he was unfairly terminated and grant compensation or reinstatement or the payment of terminal dues amounting to Kshs.3,717,425.00

In defence the respondent filed their response and noted that they took a decision to restructure their business portfolio and the position of Assistant Operations Manager Western Kenya was phased out and thus offered the claimant an alternative position at the Democratic Republic of Congo (DRC) but the claimant declined or refused to take it up. Consequently the respondent took the view that the claimant had declined to take up a new posting as directed and thus had no choice but to terminate his employment. That as an employer, there respondent process of restricting was to ensure profitability and entitled to transfer its staff to other stations, which would not amount to a dismissal but where an employee expressly refuses to be transferred, it amounts to gross misconduct or dereliction of duty for which the respondent was entitled to summarily dismiss the claimant but opted to terminate his services with benefits.

As stated above the respondent failed to appear in court. No witness was called in support of the respondent's case.

The claimant gave his sworn evidence in support of his claim and noted that for 13 and 10 months he was an employee of the respondent in various capacities as a trained Mechanical Engineer. Before he started work with them he was an employee of Webcon Engineering Co. and was deployed to work for the respondent under a contract they had with his then employer for periodic maintenance and repairs of their liquefied equipments around August 1996 but all his payments were made by his previous employer but the respondent negotiated with him to be their employee on full time basis. That he was employed by the respondent on 1st November 1997 and placed on probation which he completed for 6 months and was confirmed as a permanent employee where a new letter was issued with terms and conditions specifying the confidentiality and non-engagement in other business that would create a conflict of interest with the respondent business.

That the claimant was paid kshs.13, 200.00 per month. That his work station was Mombasa but with travel to other countries. That he was sent to Tanzania where he served for over 8 years. In 2000 he was based full time in Tanzania to help start the respondent branch there since he was by then well experienced in his job and his expertise was required in this new business. That initially he was in Tanzania on temporary basis as the operations supervisor on a Business Permit that was issued for this purpose paid for by the respondent. That he could then not be issued with a work permit for Tanzania and the Business Permit on his passport covered his stay there in 2000 to 2001. That all his travels to and from Tanzania were sanctioned by the respondent and his passport Number 00006471 and 00003216 was stamped by immigration official upon exit and return.

In 2003 the respondent was able to secure a Resident Permit class C for the claimant which allowed him to work in Tanzania as an employee of the respondent as the Road Coordinator of their business there. He was promoted to Transport Coordinator while in Tanzania. That all his original Work Permits were paid for and kept by the respondent but his passport Number A599338 bears the various stamps from the Immigration offices. That while in Tanzania his performance was outstanding which was acknowledged by the respondent and various congratulatory letters issued honors given during his work reviews. His

salary was also increased as a result of his good performance.

On 15th September 2008 he was transferred back to Mombasa from a communication by the Managing Director in an email dated 3rd September 2008 noting that he had done well while in Tanzania and went back to Mombasa as the Road Transport Manager on the same salary as while in Tanzania. That this was not a demotion but geared towards improving the road transport in Kenya noting that Tanzania business was doing well.

On 27th June 2011 he was promoted to Assistant Managing Director Western Region and was sent to Kisumu in charge of Nakuru, Eldoret and Kisumu as the head office. In January 2011 he was given a bonus equivalent to one month pay due to his good performance.

That during his many functions he was able to travel to Zambia on assignment, he went to Sudan, to Uganda, Rwanda and the DRC, all on official duty as directed by the respondent and as part of his role with eh respondent.

That one of the reasons for his termination was based on the grounds that he had refused and or failed to take alternative transfer to the DRC. That this was not correct and went on to outline that he had travelled to the DRC on instructions by the respondent and upon their invitation and paid for by them. That he got an air ticket to travel to Uganda on 17th January 2011 and he remained in Kampala where he was to get his visa to the DRC on 19th January 2011 which was stamped on his passport Number B067633 and was able to travel to DRC. The General Manager directed him to the respondent office in Uganda where he got the visa for a one month multiple entry visa and the flights were booked by the respondent to this effect. upon his entry to DRC his passport was stamped and for two weeks he crossed over to Uganda by road to guide the resident trucks from across these borders as the drivers were not conversant with the road and that the claimant was required to coordinate with the immigration officers for the clearance of the drivers and trucks which he did.

That his one month multiple visas to DRC expired and he had to come back to Uganda for renewal which was facilitated by the Uganda officers and he got 6 months multiple visas to DRC from 22nd February 2011 to 21st August 2011. That he continued with the roads coordination between Uganda and DRC and through Rwanda and while doing these tasks, the respondent asked the claimant to train another officer with the roads coordination as they were to move to DRC and was thus in Kampala for 25 days from 23rd March 2011 to 20th April 2011.

That while in Kampala, the claimant developed an eye problem that required an operation, he was recalled to Mombasa by the respondent, an air ticket was booked and he travelled and then took time off to attend to his eyes operation and was approved by the respondent and thus was in Nairobi to have this operation.

That he was not able to go back to DRC despite having a visa for 6 months since he needed to have the eye operation. That Human Resource officer granted him leave to attend to his eye operation that was done at Aga Khan Hospital in Nairobi which was paid for by the respondent. That on 9th May 2011 the claimant went back on duty to the Mombasa office and was assigned the duties of Road Transport Manager to help the person acting while he was away in DRC and Uganda.

While back in Mombasa, he was on 27th June 2011 promoted to Assistant Operations Manager and sent to Kisumu regional office. On 13th September 2011 he got an email from the General Manager that required him to report to Mombasa on an urgent matter. He got a bus and on 15th September he was at the office where he was informed that he would be terminated as the respondent had abolished his position as Assistant Operations Manager.

That this was the first time he was learning of the restructuring at the respondent, no notice or warning had been given of the fact that his position was being abolished communicated to him until this date. That

he was shocked with this news as it was unexpected. He had built his career while at the respondent employ, he had served at various stations diligently and he felt the respondent was being unfair to dismiss him in such a manner. On 19th September he got his written notice of termination which was to take effect immediately.

At the time of termination the claimant was earning Kshs.168, 846.00. He was paid for the 19 days worked in September 2011 and for the remainder of the days it was noted that he was absent yet he had been terminated by the respondent and could not be at his place of work or absent on a job that did not exist.

The claimant therefore claim his dues unpaid and that the court should find he was unfairly terminated having spent all his productive years serving the respondent where they were road pioneers in road transport with a fleet of 72 trucks and 130 trucks on Tanzania and has not been able to get another job since his termination. That he had hoped to work for the respondent until his retirement age and the abrupt termination upset his career chances. That he had no disciplinary case or warning of the termination.

The reasons that he refused to go to DRC on alternative position was not true as he had been to DRC before upon directions of the respondent, at the time of his termination his visa to the DRC was still valid and thus this cannot have been a valid reasons for his termination. That the respondent had just promoted him to the position alleged to have been removed in their restructuring and if the respondent had wanted to send the claimant to DRC instead of Kisumu, they had that discretion. That he was phased out and not the position that he held.

That he was owed 56 days of leave at kshs.317,993.00, his notice pay was at kshs.168,846.00 and his service dues were kshs.1,09,499.00 the salary for September 2011 was kshs.106,935.00. That of this amount the respondent has paid him 1,190,981.00 only and a balance of kshs.590, 981.00 owes.

That his claim should be paid with interest and costs of the suit.

Employment creates a special relationship between an employer and an employee as out of this relationship certain rights and obligates emanate that dictate that this relationship should not be treated in a casual manner. This then implies that none of the parties to this relationship should wake up one morning and quick the employment relationship without notice or on a good reason or reasons, which should be not only fair but valid. Once these conditions are violated and or abused by either party to the employment relationship, then the law must frown on them.

The Employment Act, 2007 (the Act) has now come into force to help parties getting into an employment relationship note the procedures applicable when terminating an employment contract. Under section 35 of the Act a written notice must be given by the party terminating the contract with at least 30 days where the contract duration is payable on a monthly basis. Even with that termination notice, the party terminating must give the reason or reasons for termination which reasons must be fair, justifiable and valid. These are the requirements as outlined under section 43 and 45 of the Act.

A fair reason is one that can be justified in the circumstances of each case noting the employment relationship and the culminating factors leading to the termination. A justifiable reason is one that on the face of it a party can understand it and appreciate that indeed either due to performance, conduct, capacity or compatibility with the changing needs of an employer, there are sufficient and compelling reasons for the termination and equally a valid reason is one that due to the legal requirement or on a statutory duty and or obligations an employer or employee has to legal meet this condition and hence cause a termination. Therefore labour should not be just treated as a mere commodity that can be discarded with ease as and when a party is tired with such a commodity. These were the values as outlined under the International Labour Organization in 1944 when the Declaration of Philadelphia was adopted. In this Declaration labour was established not to be a 'commodity' but meant to improve the lives of human being who have a right to fair conditions at work and have a right to be treated fairly as outlined under Article 41 of the Constitution.

These were the same sentiments as expressed by Justice J. Rika who went on to quote the case of ***Industrial Court of Kenya Cause Number 143 of 2007, Kenya Union of Commercial Food and Allied Workers Union [KUCFAW] v. British American Tobacco Limited***, in the case of ***Aviation and Allied Workers Union versus Kenya Airways and others, Industrial Cause No. 1616 of 2012***. That **labour** is composed of human beings who have feelings and special need and the employee rights and needs should be protected and respected. As long as the employment relationship subsists, each party to it must be respected as where need arises and there is a conflict, the law does outline as to how such a relationship is to be terminated.

Under section 41 of the Act before termination an employer is under a statutory obligation pursuant to Section 41(2) to give an audience to the employee who is subject to the dismissal so that the employee can make representations and which representations the employer should consider before making a decision to dismiss the employee.

This is what is universally referred to as procedural fairness within the industrial relations legal framework. Procedural fairness has its antecedents in the rules of natural justice. Basically it requires that before making a decision affecting another person's rights or interests, that other person should be given a hearing.

Section 41(2) of the Act, now makes it obligatory for an employer who wishes to terminate the services of an employee to notify such employee and hear any representations which the employee may wish to make before taking the decision to terminate or not to terminate. The obligation to hear the employee is applicable whether the employer intends to make payment in lieu of notice or not. It is even applicable where the employer is restructuring or reorganizing their business due to economic reasons that require they down size their staff or declare positions redundant.

I note that the claimant served the respondent for over 13 years, he rose through the ranks and his last position was that of a senior officer in the respondent business. I also note the letter of termination was based on the reasons that the respondent was restructuring its business and that the claimant had failed to take up alternative employment in the DRC as a result and that the respondent had no other option than to terminate the employment of the claimant.

Companies restructure not necessarily because they are in financial distress, but for such other reasons as mechanization of the modes of production. The terms *redundancy*, *retrenchment* and *restructuring* are related, but can be separable. There are other terms used in different jurisdictions, to denote this form of employment termination. These include *downsizing*, *rightsizing*, and *de-layering*. Whatever term is used, the decision results in the dissolution of an employment agreement.

This is the situation envisaged as under section 40 of the Act on redundancies. The law sets out the conditions precedent to such a position of redundancy/reorganisation/restructuring that an employer who finds themselves in such a situation must comply with. The provisions of Section 40 are very clear on the procedure regarding redundancies, reorganisation or restructuring. 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.

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.

These are important steps for each employer wishing to pursue redundancies 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?

From the evidence before this court I find that the respondent ignored each and every rule as set out above. The reasons that the respondents were restructuring is not supported by any evidence and it has not been shown that the Labour Officer responsible was notified of this restructuring to be able to advice on the steps and payment applicable in the case of the claimant. The claimant was not invoked in this restructuring in a manner that indicates that indeed his position was the only one in the entire respondent business that became obsolete. Equally the reasons that the claimant refused or failed to take up the deployment to DRC has not been supported and as demonstrated by the claimant, he had travelled to the DRC and had a valid visa with multiple entries to the DRC meaning that he was available to work in the DRC where need arose. His termination was therefore an unfair practice contrary to section 40, 41 43 and 45 of the Act and more fundamentally this was an unfair practice as set out under Article 41 of the

constitution. I therefore find the claimant was unfairly terminated and will award compensation at ten (10) months pay.

On the claim for notice pay, I find from the evidence that the respondent summoned the claimant to their Mombasa office from Kisumu and no notice has been issued before the termination and despite the fact that there was a meeting prior to the issuance of the termination letter; this notice should have been for not less than one month. I will award notice pay of one month at kshs.168, 846.00.

Leave days where due are payable and I will award the leave days as outlined by the claimant. There were 56 days of leave at kshs.317, 993.00.

The claimant worked for 19 days in September 2011 and his dues amount to kshs.106, 935.00. I will grant this amount.

I note that the severance due to the claimant will be based on the 13 complete years that he served the respondent and granted 15 days pay for each year. This amounts to kshs.1, 097,499.00

Of these claims, the claimant admits that he has already received the sum of Kshs. 1,190,981.00, which will be offset from the total claim due to him.

I therefore enter judgement for the claimant against the respondent in the following terms;

1. **A declaration that the claimant was unfairly terminated**
 - a. **Compensation at 10 month salary amounting to Kshs.1,688,460.00;**
 - b. **Severance pay amounting to kshs.1,097,499.00;**
 - c. **One month notice pay amounting to kshs.168,460.00;**
 - d. **19 days worked in September 2011 amounting to Kshs,106,935.00; and**
 - e. **56 leave days amounting to Kshs.317,993.00;**

Total amounting to Kshs.3, 379,347.00

Less received amount of Kshs. 1,190,981.00

Total dues amounting to Kshs. 2,188,366.00

2. **The claimant be issued with Certificate of Service by the Respondent within 14 days.**
3. **Costs of the suit**

Delivered in open court this 13th day of June 2013.

M. Mbaru

Judge

In the presence of

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