



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT MOMBASA
(BIMA TOWERS)

CAUSE NO. 112 OF 2013

MOSES HANNINGTON AMBANI..... CLAIMANT

v

SOMAK TRAVEL LIMITED.....RESPONDENT

JUDGMENT

1. Moses Hanington Ambani (Claimant) was employed by Somak Travel Ltd (Respondent) on 2 January 2010 as a hotel representative in charge of Cosmos clients', at a salary of £ 150 (to be paid in Kenya Shillings).
2. Through a letter dated 23 July 2012 the Respondent informed the Claimant that it was terminating the employment effective 1 August 2012 because *the tourism industry has in the recent past shown a downturn in business and the situation is not showing a significant improvement within the near future.*

Claimant's case

3. The Claimant felt the termination was in bad faith and on 15 May 2013 he filed a Memorandum of Claim wherein he pleaded that he was terminated on the ground of redundancy and that the termination was not in compliance with section 41(1) of the Employment Act and therefore unfair.
4. The Claimant testified and produced his appointment letter (Exh 1) and stated that the letter provided that he would continue in employment provided Cosmos was in operation. He stated that Cosmos was still in operation.
5. The Claimant further testified that towards the end of July 2012 he was called and told his letter of termination had come (Exh 2) and the reason given in the letter was low business. He confirmed that he was paid one month pay in lieu of notice, service pay, accrued leave and transport allowance totaling Kshs 339,153/-.
6. Regarding the termination, the Claimant testified that it was unfair because Cosmos was still in operation, his colleague Elvis, who had been employed to serve the Cosmos clients' was not terminated and that it was in breach of contract. He stated that he was declared redundant.

Respondent's case

7. The Respondent filed a Statement of Defence on 13 June 2013 and confirmed employing the Claimant on 2 January 2010 as a hotel representative at as a salary of Kshs 20,700/- per month.
8. On the termination, it was pleaded that the due notice and reasons were given to the Claimant before terminating his services, all dues were paid and acknowledged by the Claimant. The termination, it was also pleaded was within the provisions of the employment contract.

9. The Respondent called its General Manager, Coast region Zemira E Fernandes to testify on its behalf.
10. The witness stated that the Claimant was terminated through a letter dated 23 July 2012 after it received information that Cosmos was pulling out and that the reasons were given in the letter and that all dues were paid.
11. After close of hearing the Court directed the parties to file written submissions and both the Claimant and Respondent filed their submissions on 5 September 2012.

Issues for determination

12. From the pleadings, testimony and submissions of the parties, three main issues for determination are whether the Claimant was declared redundant, whether the redundancy was unfair and appropriate remedy.

Whether the Claimant was declared redundant

13. It is not disputed that the termination letter gave the reason for the termination of the Claimant as a downturn in business within the tourism sector and that the Respondent had decided to cut costs. The Respondent in its submissions strongly urged that the Claimant did not adduce evidence that the termination was on the ground of redundancy.
14. Simply put the Claimant was being declared redundant. Section 2 of the Employment Act defines redundancy as

means 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 occupation and the loss of employment

15. The Claimant did not contribute to the termination through misconduct, poor performance or physical incapacity. The termination was involuntary on his part. It was due to the operational requirements of the Respondent.
16. In my view, the Respondent was declaring the Claimant redundant as understood within the definition of redundancy in the Employment Act. It was not a termination pursuant or envisaged under the letter of appointment dated 24 May 2010.

Whether the redundancy was unfair

17. The procedure for redundancy is provided for under section 40 of the Employment Act. The section has set out some 7 conditions an employer must comply with and briefly these are one, notice to the union where an employee is a member of the union and the local labour officer at least a month prior to date of intended termination, two notification to the employee and local labour officer in writing, three, consideration of seniority, skills, ability and reliability of each affected employee, four, consideration of the terms of any collective bargaining agreement in place and not putting non-union employees at a disadvantage, five, payment of outstanding leave in cash, six, payment of one month's pay in lieu of notice and lastly payment of severance pay at the rate of not less than fifteen days pay for each completed year of service.
18. In the instant case there is no doubt that the notice required under condition two above was not complied with. Further the Respondent did not inform the court how the Claimant was chosen for termination over and above Elvis.
19. Under section 45(2)(ii) of the Employment Act, an employer is required to prove the validity and fairness of the reasons for the termination even if the termination is based on an operational requirements of the employer, otherwise the termination would be unfair.
20. Unlike under the civil procedure rules and Evidence Act, the practice and procedure of the Industrial Court, and indeed the regime created by the Employment Act, it is a statutory obligation placed upon employers to prove the reasons for termination (section 43 of the Act), that the reasons were valid and fair (section 45 of the Act) and to justify the reasons for termination

- (section 45(7) of the Act. A Respondent who puts or leaves a Claimant to strict proof does so at its own legal peril.
21. In its submissions, the Respondent submitted that the Claimant had failed to prove his case on a balance of probability. Section 20 of the Industrial Court Act has expressly provided that the Industrial Court is not bound strictly by the rules of evidence.
 22. It was further submitted that the Claimant had failed to produce any evidence that Cosmos was still giving business to the Respondent. This submission is misplaced. It was upon the Respondent to prove the reasons for the termination. That is a duty placed upon employers by the Employment Act.
 23. The Respondent has failed in the instant case to prove the business downturn as a fair and valid reason to terminate the services of the Claimant. There was no evidence that Cosmos had stopped operations nor was the information received by the Respondent that Cosmos was pulling out presented before court.
 24. The termination of the Claimant through redundancy was unfair because the Respondent failed to comply with the requirements of section 40 and it has not proved the reasons for redundancy as required by sections 43,45 and 47(5) of the Employment Act.

Appropriate relief

25. The Claimant abandoned the prayers for salary in lieu of notice, leave allowance and severance pay and sought an award of maximum compensation.

Severance pay

26. Severance pay is one of the entitlements of an employee declared redundant. The Claimant sought Kshs 25,175/- being severance pay for the two and a half years served.
27. The Claimant would be entitled to severance pay for 37 days (thirty days for the two years served and seven days for six months) and using the correct formula he is entitled to Kshs 29,457/- but because he was paid service pay of Kshs 41,880/-, I decline to award him severance pay.

Compensation for loss of employment

28. The equivalent of a number of months' gross wages not exceeding twelve months is one of the primary remedies for unfair termination. But it is a discretionary remedy. I have found and held that the termination of the Claimant through redundancy was unfair.
29. The Employment Act, 2007 has set out some thirteen factors the Court should consider in making an award of compensation. The Court could consider any one, some or all of them. It is good practice for a Claimant to lay a basis or foundation on which of the factors the court should consider in relation to his/her claim. That was, unfortunately not done though the Claimant had the benefit of legal counsel.
30. Some of the factors to consider are the employees length of service with the employer, reasonable expectation of the employee as to the length of time his employment might have continued with the employer, alternative employment (Claimant testified he is currently working with Polmans Ltd), value of severance pay (Claimant was paid service pay which legally is different from severance pay) and the right to press for other claims.
31. Putting into mind the factors cited in the above paragraph it is my considered view that an award equivalent to four months gross wages would meet the ends of justice in this case.

Costs

32. The Claimant was directed to file and serve his submissions on or before 28 August 2013. The submissions were only filed on 5 September 2013. Because of this dilatory approach I decline to make an award of costs.

Conclusion and Orders

33. From the foregoing I do find and hold that the Claimant was declared redundant and the termination of employment through redundancy was unfair and I award the Claimant

a. Equivalent of 4 months gross wages Kshs 82,800/-

34. There will be no order as to costs.

Delivered, dated and signed in open Court in Mombasa on this 11th day of October 2013.

Justice Radido Stephen

Judge

Appearances

Ms. Kayatta instructed by

M. K. Mulei & Co. Advocates for Claimant

Mr. Gakuo instructed by

Muturi Gakuo & Kibara Advocates for Respondent