



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 20 OF 2012

SIMON PATRICE MATIANYI.....CLAIMANT

VERSUS

G4S SECURITY SERVICES(K) LTD.....RESPONDENT

JUDGMENT

By a Memorandum of Claim dated 28th December 2011 and filed in court on 10th January 2012 the Claimant alleges that he was employed by the Respondent as a Sales Manager (Cash Services Department) on 20th April 2009 and that his services were illegally and unlawfully terminated by the Respondent on 26th August 2011. He is claiming shs.71,001,800 on account of salary for unworked years, mileage claim, unclaimed mileage and refund of illegal bonus deductions. He further seeks damages for illegal unlawful termination of employment.

The Respondent filed its Memorandum of Reply dated and filed in court on 24th January 2012 in which it denies unlawfully or unfairly terminating the Claimant's employment and avers that the Claimant was lawfully declared redundant.

The case was first mentioned in court on 29th February 2012 and fixed for hearing on 18th July 2013, when the Claimant did not attend court. The case was fixed for hearing severally thereafter when it did not take off. The case was eventually heard on 3rd June 2013. The Claimant was represented by Mr. Morara instructed by Duke Morara & Company Advocates while the Respondent was represented by Ms. Kirimi instructed by Hamilton Harrison & Mathews Advocates.

The parties thereafter filed written submissions.

The undisputed facts of the case are as follows;

The Claimant was by contract dated 2nd April 2009 employed by the Respondent as Sales Manager within the cash services Department. He worked until 26th August 2011. When he received a letter declaring him redundant with immediate effect. His starting salary was shs.2,400,000/= per annum payable monthly in arrears. The Claimant was under his contract also entitled to car running allowance of kshs.50,000/= per month among other benefits. His retirement date was upon attaining 60 years.

His salary was reviewed to kshs.267,700 by letter dated 18th July 2011 effective 1st July 2011.

At the hearing the Claimant in his testimony contended that he was terminated because he had disagreed with the Cash Services Director. He further contended that section 40 of the Employment Act was not

complied with by the Respondent. He alleged that there were 6 sales managers and he was the only one declared redundant.

The Respondent called 2 witnesses.

RW1 EPIMAC MARITIM, the HR Director testified that he was not aware about any disagreement between the Claimant and the Cash Service Director Mr. Collins Stanley as alleged by the Claimant. He testified that the Claimant was the only one out of 6 sales managers was declared redundant and that the redundancy was in accordance with Section 40 of the Employment Act.

RW 2 BONIFACE NDUNGU NDWOTA, the Employment Relations Coordinator, testified that the Respondent went through a restructuring restructuring program from 2010 to 2011 under which about 100 positions were declared redundant and that the Claimant was one of them. He testified that there was a meeting with all employees on 28th May 2010 when they were advised of restructuring. That the Ministry of Labour was informed by letter dated 28th April 2010. He further testified that the Claimant was paid all his benefits and the company does not owe him any further benefits. He denied that the Claimant was terminated irregularly.

I have considered the pleadings and evidence adduced in court. I have also considered the written submissions and authorities cited.

The issues for determination are the following;

1. Whether the Claimant was unfairly terminated or regularly declared redundant.
2. Whether the claimant is entitled to the prayers sought.

Section 40 of the Employment provides for the procedure for redundancy. An employee must be notified in writing at least one month before the redundancy is effected about the reasons for and the extent of the redundancy. The employer is also under obligation to give due regard to seniority in time, skill, ability and reliability in the section of the employees of the particular class affected by the redundancy.

In the present case no prior notification was given to the Claimant in accordance with section 40 (1)(a) as read together with section 40(1) (b). The claimant was notified of his redundancy on the very day that he was required to leave employment. The RW1 and RW2 both agreed that there were about 6 sales managers. The Respondent did not demonstrate that they complied with the section provided for in section 40 (1) (c) in selecting the Claimant.

For these reasons the Claimant's allegation which was not contested by the Respondent that he was declared redundant because he had a disagreement with the Sales Director who threatened him with loss of employment lends itself to be reasonable explanation for the abrupt manner in which the Claimant was relieved of his employment. The notification to the Labour Officer on 28th April 2010 was issued more than one year and 4 months prior to the Claimant's termination cannot by the widest stretch be deemed to be notification of the Claimant's redundancy. The Respondent did not demonstrate to the court by way of evidence that the redundancy had been ongoing from April 2010. This could easily have been done by appending copies of the letters of redundancy or a summary containing the names of the employees declared redundant and the dates on which they left employment.

Again a reading of the letter of notification for redundancy addressed to the District Labour Officer would prove that the Claimant was not affected by the notification. The relevant part reads "**we shall be terminating the services of about 100 members on our support staff**". The Claimant was a manager and not part of the support staff.

For the foregoing reasons I find that the Claimant was unfairly terminated and the Respondent camouflaged the termination as a redundancy.

2. **Whether the Claimant is entitled to the prayers sought.**

The Claimant has prayed for the following;

1. Salary for unworked years Kshs.54,610,800.
2. Staff retirement benefits Kshs.5,461,080.
3. Mileage claim Kshs.10,200,000.
4. Unclaimed mileage backdated to 2010 Kshs.690,000
5. Illegal bonus deductions (2009)
6. General damages for illegal/unlawful termination of employment.

I will handle the first 3 heads together, that is salary, retirement benefits and mileage claim based on future earnings.

The Industrial Court Act 2011 gives this honourable court jurisdiction to grant the following orders;

(3) In exercise of its jurisdiction under this Act, the Court shall have power to make any of the following orders—

(i) interim preservation orders including injunctions in cases of urgency;

(ii) a prohibitory order;

(iii) an order for specific performance;

(iv) a declaratory order;

(v) an award of compensation in any circumstances contemplated under this Act or any written law;

(vi) an award of damages in any circumstances contemplated under this Act or any written law;

(vii) an order for reinstatement of any employee within three years of dismissal, subject to such conditions as the Court thinks fit to

impose under circumstances contemplated under any written law; or

(viii) any other appropriate relief as the Court may deem fit to grant.

For the court to award future earnings there must be a legal underpinning. The Claimant must demonstrate that the Respondent has compromised his future earning capacity and that therefore he will not be able to participate in any income earning venture to the date of his retirement. This can only arise in my opinion where the employee is injured physically or his reputation has been so injured to an extent that he cannot be able to perform or find any work to earn income. My reason for saying this is because employment is never permanent. All employment contracts must as a matter of course have an exit clause or the law would presume one. There is no guarantee of employment to the date of retirement. Date of retirement is not even provided for in the Employment Act and is a matter of contract. The Law can only interfere if the employer fails to comply with the contract and in such event the Employment Act provides for the remedy under Section 49(1).

For payment of wages and notice that the employee would have been entitled to had the termination been effected according to the law or the employee's contract. In addition the Act provides for compensation for unfair termination. There is no law that I am aware of or of which has been brought to my attention that provides for payment of future earnings beyond the date of termination of employment. The Claimant's contract does not provide for the same.

This was the substantive finding of the Court of Appeal in **KENYA REVENUE AUTHORITY V MENGINYA SALIM MURGANI(2010) eKLR** when it cited with approval the decision of the same court in **CENTRAL BANK OF KENYA V NKABU (2002) EA 34** as follows.

“Although section 13 of the central Bank of Kenya Act empowers the Management board of the Bank to make rules and regulations to govern employment of staff and related matters, such regulations are not in the nature of subsidiary Legislation. If that were so they would have been made part of the Act but they are not That being our view of the matter, we hold that the respondent’s case is not different from those covered by the authorities which Mr. Ougo cited to us. It then follows that in the absence of any other proper basis for departing from those authorities of some which were cited to the trial Judge, the learned trial judge erred by computing damages beyond the notice period. In view of the conclusion we have come to above, we are of the view and so hold that, on the assumption that the respondents dismissal was wrongful he is only entitled to damages equivalent to the salary he would have earned for the period of notice, namely, three months and that the trial Judge erred in awarding him more”

The Claimant’s counsel did not attempt to persuade me otherwise. He did not demonstrate why the Claimant should be awarded payment of salary to the date of retirement when his ability to work and earn a living has not been compromised by the Respondent. He also has not demonstrated that his contract provided that in the event of termination of his employment before reaching retirement age the Respondent would be under obligation to pay for the unexpired contract period. The Claimant referred this court to **Industrial Court Cause No. 665 of 2011 – Beatrice3 Achieng Osir v. Board of Trustees Teleposta Pension Scheme** while the Respondent referred the court to **Kenya airways Crporation Ltd V. Tobias Nbi CA 350 of 2002 (unreported) and Dalmas B. Ogoye v. KNTC Ltd (1996)eKLR.** I have considered the authorities and find the Claimants authority not relevant while those cited by the Respondent were decided before the current law was enacted and are not helpful in interpreting the law as it applies now. They are thus not applicable to this case.

For these reasons, I dismiss the prayers for future salary, retirement benefits and mileage claim.

3. Unclaimed Mileage backdated to 2010

The Claimant has prayed for payment of backdated mileage. During cross examination the Claimant stated that he never made any mileage claim while in employment because it had been scrapped. RW2 testified that the Claimant never applied for payment of mileage, that payment of mileage is not automatic and one has to apply for it by filing the relevant forms and that there was no claim pending in respect of the Claimant.

I find that the Claimant has not proved that he is entitled to mileage claim and the claim is dismissed.

4. Illegal Bonus

The recovery of bonus paid in error was notified to the Claimant by letter dated 15th February 2011. The Claimant has not stated whether he is the only one who was affected by the recovery or all employees who earned the bonus were affected.

Section 19 of the Employment Act authorizes the employer to deduct any money paid to an employee in error. The Claimant has not shown that he raised any objection with the Respondent about the deduction. He has also not demonstrated that the deduction did not fall within the pervue of Section 19 of the Employment Act and that the same was unauthorized. It appears that this was claimed as an afterthought. I find no merit in the claim and dismiss it.

5. General Damages

The Claimant has claimed general damages for unlawful termination. I have already found above that the redundancy of the Claimant was in actual fact on unlawful termination. The Claimant is therefore entitled to compensation for the same. The Employment Act provides for payment of compensation to a maximum of 12 months’ salary. Section 49(4) gives guidelines on the circumstances to be considered in awarding compensation.

I have considered the length of service of the Claimant of about 2 years and 4 months, the manner in which he was terminated and all other relevant considerations. I find that 6 months' salary is reasonable compensation in the circumstances and award him the sum of shs.1,606,200 as compensation.

The Claimant will also have his costs of this case.

Orders accordingly.

Read in open Court this 7TH day of NOVEMBER 2013

HON. LADY JUSTICE MAUREEN ONYANGO

JUDGE

In the presence of:

Morara _____ for Claimant

Makori _____ for Respondent