



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI
CAUSE NO. 995 OF 2013.

TIMOTHY MABETA KAMBUNI CLAIMANT

VERSUS

BEDSON EAST AFRICA LIMITED RESPONDENT

JUDGEMENT

1. The claimant Timothy Mabeta Kambuni filed the claim on 2nd July 2013 for wrongful and unfair termination by the respondent, Bedson East Africa limited. There was also an application filed on the same date under Certificate of Urgency and Notice of Motion filed seeking to restrain the respondent from terminating the claimant and the payment of terminal dues. When the application came for hearing on 8th July 2013, the parties agreed to discuss the matter. On 25th July 2013, Muhanda Advocate and Kimani Advocate for the respondent made appearance and further took a new date where both were present on 23rd August 2013 and consent was recorded as follows;

By consent severance pay of kshs.239,847.72; accumulated leave of 28.4 days be paid at Kshs.151,263.96, one month salary in lieu of notice Kshs.115,500.00; payment for paternity leave Kshs.53,900.00.

Pending for court direction the issue of damages and costs payable is determined by the court.

2. This consent was confirmed by the signatures of Kimani Advocate for the respondent and Muhanda Advocate for the claimant. Parties then agreed to file their written submissions with regard to the damages and costs payable.

3. On these presentations, the court received the claimants written submissions filed on 5th September 2013 and Further Submissions filed on 7th November 2013 whereas Kaplan and Stratton advocates filed written submissions for the respondent on 28th October 2013.

Submissions

4. The claimant submitted that through a contract there was employment of Timothy Mabeta Kambuni by the respondent as the Finance Administrator in December 2009 but the same was terminated on 1st July 2013 without any reason or notice and he thus claims for;

- a. Severance pay at kshs.239,847.72;
- b. Accumulated leave 28.4 days at Kshs.151,263.96;
- c. One month notice at kshs.115,500.00; and

d. Paternity leave at Kshs.53, 900.00.

5. All claims were settled by consent save for the aspect that the termination was unfair. In this regard the claimant submitted that on 1st July 2013 he reported to work, two managers came to his office and informed him that his services had been terminated as his services were no longer required due redundancy and he was thus to surrender all respondent property and vacate the office which the claimant did immediately. That there was no notice or consideration of the contract terms nor was he given a chance to defend himself. That section 40 of the Employment Act was not followed at all. The claimant cited *Alphonse Maghanga Mwachanya versus Operation 680 Limited, Cause No.146 of 2012* where the court held that natural justice must be accorded to an employee before dismissal.

6. That in this case the claimant should have been protected against unjustified dismissal and in this case the court should find that the claimant was unfairly terminated and make the maximum compensation of 12 months.

7. To these submissions the respondent replied that upon the employment of the claimant, business of the respondent did not pick up and it was operating at a loss. As a result on 1st July 2013, the respondent managers informed the claimant of the intended redundancy and requested him to leave the office to enable them deliberate on this matter and if necessary prepare his severance pay as soon as possible. That the claimant having been the Financial Administrator of the respondent, he was handling all bank accounts, cash and financial information and the respondent had to make the difficult commercial decision of not notifying the claimant of the redundancy prior to its occurrence as there was a real risk that it would be exposed to fraud or theft should the claimant have been allowed to continue working and the procedure adopted by the respondent was thus the most suitable under the circumstances.

8. The respondent relied on the fact that they have paid the claimant his severance pay and offered 3 months' salary as damages so as to settle this matter out of court. The respondent relied on the case of *Maria Kagai Ligaga versus Coca Cola East Africa and Central Africa Limited, Cause No.611N of 2009* where the court held that the purpose of employment compensation is not to make an aggrieved employee unjustly rich but to redress their economic injuries in a proportionate way. That in the case of *Transport and Allied Workers Union versus Societe Internationale De Telecommunications Acronatiques [2011] eKLR* the court held that the redundancy process followed for a managerial level employee was procedurally flawed and therefore termination held to be unfair. That this case was filed prematurely and the same should be dismissed and there be no costs awarded to the claimant.

Evaluation

9. The law on redundancy exists for a purpose. That purpose is to guide an employer who is faced with a difficult commercial situation to put in motion measures so as to avoid further difficulties and losses. These measures include systematic lay off of employees whose positions cannot otherwise be sustained due to the commercial difficulties.

10. When an employer cites redundancy as the reason for termination of an employee, the provisions of section 40 of the Employment Act apply. These provisions are mandatory. It is not left to an employer to decide how and when to declare an employee redundant. This is so because redundancy results from a business crisis that is not the fault of an employer or an employee but the employer being the one to assess the economic situation is placed in a position as to know well in advance as to the business returns and to start prior preparations to reduce further losses and hence declare some positions redundant which inevitably must affect some employees. This therefore involves a process that must incorporate the affected employees and where an employer is in doubt, the law provides for consultations with the Labour Officer responsible for that area to be called upon for technical advice as to how to carry out the entire process of redundancy. To suddenly call an employee and say they have been declared redundant is tantamount to summary dismissal which only applies in exceptional cases as under section 44 of the Employment Act and when such termination is contrary to the law, then such an employer has acted without justification, whatever reason is indicated as resulting in the termination is invalid and the same unfair as under section 45 of the Employment Act.

11. This court has now developed firm jurisprudence with regard to how redundancies are to be carried out for the same to be found as meeting the provisions that are allowed in law. In the case of **Henry Kakai and 9 others versus Debendra kamat T/A Swadish Foods, cause No.2449 of 2012**, where an employer failed to inform the Labour officer of the intended redundancy, the same was found to have been contrary to section 40 of the Employment Act and the same was unfair. Equally in a case where a redundancy is declared for the sole purpose of targeting a particular employee, whatever the justification of the process, the same was found to be unfair in the case of **Jane Khalechi Versus Oxford University Press E.A. Ltd, Cause No.924 of 2010**.

12. Therefore the mandatory terms with which section 40 of the Employment Act is outlined must be followed by all employers where there is a case of redundancy. To go contrary to the provisions of section 40, then that is to undertake a flawed process, the same is equivalent to an unfair labour practice and such an employer acts unfairly as held in the case of **Hesbon Ngaruiya Waigi versus Equatorial Commercial Bank Limited, Cause No.60 of 2013**.

13. In this case, the respondent in submissions admit that they were going through difficult economic situation, and due to the nature of the claimant's role, they decided not to let him know of the impending redundancy and thus suddenly ambushed him with this information. This is most absurd as this is not what fair labour relations entail. Far from it. If there is no trust as between an employer and an employee, that goes to the core of their relationship and cannot be changed by using the law to terminate an employee who has no prior knowledge of what is to befall them.

14. As the claimant submitted, he reported to work on 1st July 2013, two managers came to his office and he was told of his termination. There was no fault, there was no misconduct nor was there notice or an indication of whatever nature that the claimant would not continue with his work on the 1st of July 2013 of thereafter. He was simply a diligent employee keen to earn an honest living and therefore was at his place of work when required to do so. To thus be suddenly terminated on the basis of a redundancy that had not been communicated to him before as under section 40 of the Employment Act, this must have resulted into distress and shock. This is most unfair to treat a diligent employee in this manner. No employer should be allowed to undertake such malpractices, even in a case where such is uncalled for. A difficult economic situation is due to nobody fault in an employment relationship. The claimant should not have been made the victim.

15. Where there is an unfair labour practice, this Court is to grant compensation. As outlined above, the respondent has admitted to having not followed the provisions of section 40 of the Employment Act for fear that the claimant would commit acts fraud. There was thus no notice prior to the redundancy. The respondent does not indicate as to whether other employees were affected by the difficult economic situation they were facing. This comes out as a stand-alone picking on the claimant.

16. With the above assessment, I note the respondent was quick to pay part of the claim immediately this case was filed in court. This will be factored while making the award due to the claimant. This Court will grant the nine (9) months' salary in compensation. The claimant was earning Kshs.115, 500.00 per month. This suit would not have been filed had the respondent followed the provisions as outlined under section 40 of the Employment Act. Costs will therefore be awarded to the claimant.

Therefore, Judgment is hereby entered for the claimant as against the respondent in the following terms;

- a. **A declaration that the claimants termination by the respondent was unfair;**
- b. **An award is made equivalent to 12 months' salary all amounting to Kshs. 1,039,500;**
- c. **Costs of the suit.**

Delivered at Nairobi and dated this 18th day of December 2013.

MBARU

JUDGE

In the presence of

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