



REPUBLIC OF KENYA



KENYA LAW
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**Ngalla v ISL Kenya Limited (Cause 1210 of 2017)
[2024] KEELRC 1256 (KLR) (3 May 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1256 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1210 OF 2017
MA ONYANGO, J
MAY 3, 2024**

BETWEEN

ZAKAYO MWANGI NGALLA CLAIMANT

AND

ISL KENYA LIMITED RESPONDENT

JUDGMENT

1. The Claimant, Zakayo Mwangi Ngalla, brought this claim *vide* a memorandum of claim dated 24th June 2017 against the respondent for;
 - i. A declaration that the Claimant’s termination was unlawful, wrongful and unfair
 - ii. An order directing the Respondent* to pay the Claimant as follows: -
 - a. Days worked Kshs.3,388.00
 - b. Underpayment of service pay Kshs.4,356.00
 - c. Underpayment of salary Kshs.14,762.00
 - d. Gratuity Kshs.39,204.00
 - e. Twelve months’ compensation Kshs.174,240.00
 - iii. Damages for unfair labour practice.
 - iv. Costs of this cause.
 - v. Certificate of service.
 - vi. Interest on 2-4 hereinabove.
 - vii. Any other relief this Honourable Court may deem fit and just to grant.



2. The Claimant contends that he was employed by the Respondent in September 2015 as a general labourer. He was earning Kshs.484.00 per day paid weekly in cash. He was not issued with a contract and was also not issued with payslips. The Claimant's designation was later changed to wire binder machine operator.
3. On 6th March 2017, the Claimant reported to work as usual whereupon he was called by the general manager, one Mr. Raju who informed him and his colleagues that there was no work for them. They were told to leave and go back the following day when they were again informed that there was no work. He was paid Kshs.9,888.00 and told to leave. He was not informed of the reason for termination.
4. The Claimant contended that his dismissal was unlawful, wrongful and unfair for failure to adhere to the law.
5. The Claimant stated that during his employment he was never given a day off. He was not housed by the Respondent and was not paid house allowance.
6. He was not issued with a certificate of service upon termination.

Respondents' Case:

7. The Respondent filed a Statement of Defence dated 4th September, 2017 in which it generally denied all the averments in the memorandum of claim.
8. The Respondent stated that the Claimant was a casual employee. That the Claimant was paid Kshs.9,888.00 being seven days' pay in lieu of notice and service pay due. That the parties agreed that the daily wages were inclusive of house allowance.
9. The Respondent averred that the Claimant was declared redundant and it gave adequate notice of the redundancy to the labour officer, the Claimant's trade union representative and the Claimant and explained the circumstances which led to the Claimant's termination. The Respondent stated that the termination of the Claimant's employment was fair and in compliance with section 40 of the Employment Act and Article 41 of the Constitution of Kenya.
10. In conclusion the Respondent prayed that the Claimant's suit be dismissed with costs.
11. The Claimant filed a reply to the Defence and reiterated the averments in the Memorandum of Claim.
12. The Respondent filed a witness statement by the Assistant Human Resource Manager – Samuel Gicheru dated 10th September, 2017 in which the witness stated that the Claimant was employed by the Respondent as a general labourer in the cutting department. That on 22nd November, 2016, the Respondent received a notice from the Kenya Bureau of Standards notifying the Respondent of the ban imposed on the manufacture on the use of twisted steel bars for the reinforcement of concrete. The Respondent filed the documents to that effect. It also filed a letter dated 31st March, 2017 addresses to the labour officer.
13. The witness also itemised the payments made to the Claimant and filed the terminal dues form which he stated the Claimant acknowledged. He stated that the Respondent did not owe the Claimant any money.
14. The witness concluded by stating that the termination was fair and in compliance with the law and hence the Claimant had no cause of action.
15. The parties gave oral evidence in court and filed written submissions as directed by the court.



Claimant's submissions

16. The Claimant in his submissions set out the issues for determination as follows:
- a. Whether the Claimant's termination is lawful and fair;
 - b. Whether the Claimant merits the reliefs sought;
 - c. Whether the terminal dues form absolves the Respondent from the claims made by the Claimant.
17. Under the 1st head the Claimant submitted that as much as the Respondent through RW1 stated that the termination of the Claimant's employment was on account of redundancy, the Respondent did not notify the Claimant of the reasons for the redundancy as pleaded in paragraph 8 of the Statement of Defence contrary to section 43(1) of the *Employment Act*.
18. The Claimant also submitted that the letter addressed to the labour officer is dated 31.03.17 which was after the termination of the Claimant's employment on 07.03.17. On this, the Claimant relied on section 40 of the *Employment Act* and the case of *Jane I Khalechi V Oxford University Press E.A. Ltd* [2013] eKLR. in which the court held-

“Court is further guided by the provisions of Section 40 of the *Employment Act*, which provisions give the conditions precedent before one is declared redundant: 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.
19. The Claimant also relied on *Hesbon Ngaruiya Waigi v Equitorial Commercial Bank Limited* [2013] eKLR where the court held that:

“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 provisions of the law. This is not a one day process as it must be participatory, consultative and informative. The employer must undertake a process to rationalise the various positions in their productivity and business line, which exercise affect various positions as held by their employees. Thus the positions become redundant and not the employees who are employed with skills needed by the



employer. The process of redundancy does not affect the performance, qualification or conduct of the employees.”

20. The Claimant submitted that the Respondent failed to demonstrate the number of employees that were affected. That the Claimant was performing support roles to all sections manufacturing metal bars and not just the section that was producing twisted bars.

21. He cited the case of *Kenya Plantation and Agricultural Workers' Union v Harvest Limited* [2014] eKLR in which the court held that:

“Section 40(1) (c) of the Act clearly provides that in selecting employees for redundancy, the employer shall have regard to seniority in time and to skill, ability and reliability of each employee of the particular class of employees affected by the redundancy. The court holds that the idea of last in first out satisfies the seniority criterion.”

22. He also relied on *Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others* [2014] eKLR where it was held:

“The notices under this provision are not merely for information. Read together with Part VIII of the *Labour Relations Act*, 2007 which provides for reference to the Minister for Labour of trade disputes, including those related to redundancy (see Section 62(4)) for conciliation, I am of the firm view that the requirement of consultations implicit in these provisions. The purpose of the notice under Section 40(1) (a) and (b) of the *Employment Act*, as is also provided for in the said ILO Convention No. 158-Termination of Employment Convention, 1982, is to give the parties an opportunity to consider “measures to be taken to avert or to minimise the terminations and measures to mitigate the adverse effects of any terminations on the workers concerned such as finding alternative employment.” The consultations are therefore meant to cause the parties to discuss and negotiate a way out of the intended redundancy, if possible, or the best way of implementing it if it is unavoidable. This means that if parties put their heads together, chances are that they could avert or at least minimize the terminations resulting from the employer’s proposed redundancy. If redundancy is inevitable, measures should to be taken to ensure that as little hardship as possible is caused to the affected employees.”

23. The Claimant further submitted that in the case of *Hesbon Ngaruiya Waigi v Equitorial Commercial Bank Limited* [2013] eKLR the court further held that:

“Where redundancy is declared by an employer, the procedure to follow is as set out under the provisions of section 40 of the *employment Act* and where not followed, any termination as a result will be deemed unprocedural and unfair. Any termination of an employee following a declaration of redundancy 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.”

24. The Claimant added that the respondent was in violation of section 40, 43 and 45(1) of the *Employment Act* and quoted the *Jane I Khalechi* (supra) at page 5 where the court stated that:

“I did not find evidence indicating a fair process was employed in the process of re-organisation by the respondent. No records were shared to convince this Court that indeed there were consultations within the respondent’s business to ascertain the purpose and



the need for a re-organisation resulting in some positions being unnecessary thus the termination of the claimant as the only persons affected.”

25. The Claimant concluded by urging the court to find that the Claimant’s dismissal is unlawful, wrongful and unfair and that the respondent has not proved that it had a genuine reason for terminating the Claimant’s employment.
26. On the prayer for payment for days worked the Claimant submitted that the Claimant was not paid for the days worked in September 2016. He further submitted that the terminal dues form does not contain payment for days worked in March 2017. He relied on Part IV, sections 17, 18(4) and 49(1) (b) of the *Employment Act* as read together with section 50 of the *Employment Act* and urged that this Honourable court finds that the Claimant merits the award of Kshs.3,888.00 for payment for days worked.
27. On underpayment of service pay the Claimant submitted that he worked for the respondent for 18 months but the terminal dues form did not reflect payment for the half a year worked. He submitted that the amount should be $(15 \text{ days} \times 484) + (15 \text{ days}/2 \times 484) = 10, 890.00$. That he was underpaid by Kshs.4,356.00 which he urged the court to allow.
28. On payment in lieu of leave the Claimant submitted that he had never gone on leave or off for the entire period worked. He relied on sections 26(1), 28(1) and 74(1) of the *Employment Act*.
29. He further cited the case of *Lawi Wekesa Wasike v Mattan Contractors Limited* [2016] eKLR

“The practice of an employer failing to keep a record of its employees, casual or permanent, on contract terms or open contracts is an act against its interests. Such a practice works against such an employer. It is contrary to the law. Such a record should be maintained at all material times pursuant to Part X of the *Employment Act* and particularly at section 79 These provisions are set out in mandatory terms. They are to be adhered to without exception..... to keep such a record would vilify the Respondent and or help the Court assess the exact relationship between the Claimant and the respondent. The Court is left with the evidence of the Claimant and the Respondent and without any record, the evidence of the Claimant is to be believed.”

30. The Claimant calculated the amount due to him under this head to be Kshs.14,762.00 and urged that the court allows it.
31. On the claim for house allowance the Claimant relied on section 31 and 31 (2) of the *Employment Act* and the case of *Joshua Lihanda v Outdoor Occasions Limited* [2014] eKLR in which the court stated that;

“It cannot be for the Claimant to demonstrate that what was paid to him was not consolidated wage or salary; the law places the obligation of proof of the consolidation provision on the Employer.

In this dispute the Parties agree the Claimant was paid Kshs. 10,000 per month. The Claimant argues this did not take into account house rent allowance, while the Respondent argues this was consolidated. The law tilts the argument in favour of the Claimant. It was for the Employer to show that the salary was consolidated.”

32. He submitted that the Claimant is entitled to Kshs.39,204.00 being 15% of the basic pay.



33. On the prayer for compensation the Claimant relied on section 49(1) of the Employment Act as read together with section 50. They relied on the case of Faiza Mayabi V. First Community Bank Limited [2019] eKLR in which the court awarded the Claimant compensation equivalent to 12 months for unfair and unlawful termination on account of redundancy. He calculated the amount to be Kshs.174,240.00.
34. For the prayer for certificate of service the Claimant relied on sections 51(1), 51(2) and 52(2) of the Employment Act and the case of Mary Rhobi vs Annan Bhamania [2014] eKLR where the court held that;
- “A certificate of service is an employee’s statutory right under section 51 of the Employment Act and the respondent is under a legal duty to issue her with one.”
- Respondent’s submissions
35. The Respondent submitted that the Claimant had not satisfied the burden of proof as provided on section 47(5) of the Employment Act which provides that:
- (5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.
36. The Respondent relied on the decision in Pius Machafu Isindu v Lavington Security Guards Limited [2017] where the court of Appeal held that an employer would only be called upon to justify the grounds of dismissal if foundation had been laid that the employee had been dismissed and that the termination was unfair or wrongful. The Respondent submitted that he Claimant had not proved that the termination of his employment was unfair.
37. It was further the submission of the Respondent that the termination of the Claimant’s employment was consensual, that the company was facing financial problems in the month of March, that on 22nd November, 2016 the Respondent received a notice from Kenya Bureau of Standards banning the manufacture of twisted steel bars for reinforcement of concrete and in the month of March 2017 there was no work.

Analysis and Determination

38. Redundancy is provided for under section 40 of the Employment Act as summarized in the case of Jane I Khalechi V Oxford University Press E.A. Ltd (supra) where the court held-
- “Court is further guided by the provisions of Section 40 of the Employment Act, which provisions give the conditions precedent before one is declared redundant: 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.
1. In the instant case the Claimant's employment was terminated on 7th March, 2017 without notice. The notice to the Ministry of Labour was dated 31st March, 2017 long after the Claimant's employment had been terminated. The notice reads:

To Sub-County Labour Officer,
Box 555-00204
Athi-river/EPZ

Dear Sir,

RE: Notice For Closure Of Business

We refer to the above captioned matter. Sir, we do hereby write this letter informing you of the entire closure of the company. The closure has been entirely affected by the harsh political climate ahead of the general elections in August 2017 and also the government directive to stop the production of twisted reinforcement steel bars.

This directive was posted on the daily newspaper on 22nd November, 2016 (Daily Nation Newspaper) and also through a letter from the Kenya Bureau of Standards (KEPBS) Referenced KEBS/NAR/SM/2391/1 and dated 29th March 2017. Sir, these issues came concurrently forcing us to arrive at this painful decision.

Sir, we are looking forward to install a new TMT Machine that will produce ribbed bars instead of twisted bars and at the same time we are also observing the political climate as time goes by. We therefore hope that you will understand our predicaments and give us a positive reply.

Yours faithfully

Signed

Mr. John Okelo,

Human Resources and Administration Manager

Cc

County Labour Office, Machakos.

40. Upon termination the Claimant was paid 7 days notice, service pay less NSSF and NHIF.
41. From the foregoing it is evident that the Respondent did not comply with the requirements for redundancy as set out in section 40 of the Act. It did not state the extent of redundancy. In fact, there was no proof that any other employee's employment had been terminated besides the Claimant.
42. There was further no evidence that the Claimant was notified of the intention to declare him redundant as provided under section 40(1)(b).
43. The Claimant was further not paid severance pay. Instead he was paid service pay which is paid for termination of employment under section 35(5) of the Act which is consistent with termination of service. The section reads:



- (5) An employee whose contract of service has been terminated under subsection (1)(c) shall be entitled to service pay for every year worked, the terms of which shall be fixed.
44. The wording of section 40 is in mandatory terms that an employer SHALL comply with the provisions thereof before declaring an employee redundant
45. In the instant case I find that there was no redundancy. No proof was adduced by the Respondent that as at the date of termination of employment of the Claimant any action had been taken in preparation for redundancy. The Respondent did not even in the least issue a letter to the Claimant in respect of redundancy. There is no evidence on record that any redundancy was carried out by the Respondent. Neither did the Respondent comply with the requirements of sections 41 and 43 on termination of employment.
46. I find that the Claimant's employment was unfairly terminated and that the Respondent did not prove that it carried out any redundancy.

Remedies

47. I will now consider each of the Claimant's prayers:
- i. Days worked
The Claimant prayed for Kshs. 3,388 on account of days worked for September 2016 which he stated was not paid. The Respondent confirmed that the Claimant was paid 7 days notice of Kshs. 3,388 and service pay of Kshs. 7260. There was no proof that the Claimant was paid for the days worked in September. I thus award the Claimant Kshs. 3,388 as prayed.
 - ii. Underpayment of Service
The Claimant submitted that he worked for 18 months but was paid service for only one year. This prayer fails as section 35(5) provides that service is payable only for completed years of service. There is no provision for prorating the same where an employee has not completed a full year of service.
 - iii. Payment in lieu of Leave
It was the Claimant's averment that for the entire period he worked he was never allowed to go on annual leave. The Respondent did not adduce any evidence that the Claimant took leave or was paid in lieu. It did not deny that the Claimant did not take leave. I award the Claimant annual leave for 18 months at the rate of 1.75 days per month. His daily rate of pay having been Kshs. 484 he is entitled to (484x18x1.75) Kshs. 15,246 which I award him.
 - iv. House allowance
This prayer fails as daily rate of pay is inclusive of house allowance.
 - v. Service pay
In view of the fact that the Respondent did not pay NSSF for the Claimant he is entitled to service pay for each year worked. Having worked for only one full year the Claimant is entitled to 15 days service pay at (15x484) Kshs. 7,260 which I award him.
 - vi. Compensation



Having found the termination of the Claimant's employment unfair, he is entitled to compensation. Taking into account the totality of his case and all the relevant factors under section 49(4) of the Employment Act I award the Claimant 6 months salary at Kshs. 87,120.

I have specifically taken into account the fact that the Claimant was treated as a casual throughout the time he worked and that he had taken home nothing after working for the period he did. I have further taken into account the conduct of the Respondent and the manner in which the Claimant's employment was terminated which was without any fault on his part.

48. In summary, I declare the termination of the Claimant's employment unfair and award him a total of Kshs. 113,014.
49. The Respondent shall bear the Claimant's costs of this suit and the decretal sum shall attract interest at court rates from date of judgment.

DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 3RD DAY OF MAY 2024

MAUREEN ONYANGO

JUDGE

