



**Esilaba v Termitterion TCS Limited (Cause 2157 of 2017)
[2024] KEELRC 1977 (KLR) (23 July 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1977 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 2157 OF 2017**

JK GAKERI, J

JULY 23, 2024

BETWEEN

RONARD KISARA ESILABA CLAIMANT

AND

TERMITERION TCS LIMITED RESPONDENT

JUDGMENT

1. The Claimant commenced this suit by a Memorandum of Claim filed on 31st October, 2017 which was subsequently amended on an unidentified date. The Claimant alleges that the Respondent terminated his employment unlawfully and did not pay full terminal dues.
2. The Claimant states that he was employed by the Respondent in 2009 as a File Operator Assistant at Kshs.18,000/= per month but was not given a letter of appointment and served diligently.
3. It is the Claimant's case that he was declared redundant on 28th April, 2017 allegedly owing to the prevailing economic situation and loss of tenancy in the Respondent's premises.
4. The Claimant prays for;
 - i. Notice pay 3 months Kshs.54,000.00
 - ii. Service for 9 years Kshs.162,000.00
 - iii. Underpayments 9 years Kshs.405,000.00
 - iv. General damages for unlawful termination (12 months) Kshs.216,000.00
 - v. Certificate of service.
 - vi. Costs of this claim plus interest.
 - vii. Any other relief the court may deem just.



Respondent's case

5. The Respondent denies having employed the Claimant or paid him any salary but avers that it declared the Claimant redundant lawfully and paid all terminal dues and issued a notice of the redundancy.
6. The Respondent states that it arrived at the decision on the basis of the seniority, ability and reliability of the Claimant in his field and it was its prerogative to structure its business and redesign its organizational structure for purpose of profit making.
7. That the Claimant's position was abolished due to low business and cash flow challenges.
8. The Respondent prays for dismissal of the Claimant's case with costs.

Claimant's evidence

9. On cross-examination, the Claimant confirmed that he was an employee of the Respondent who owned the company which employed him and his duties were fumigation of offices and left employment in 2017.
10. It was his testimony that National Social Security Fund (NSSF) and National Health Insurance Fund (NHIF) dues were not being paid and he was not paying any tax.
11. That his salary was Kshs.18,000.00 per month and the minimum wage was Kshs.12,926.55 per month.
12. The Claimant alleged that his colleagues were earning more although he was unaware of his job description.
13. The witness admitted having received Kshs.33,078.00 as one month's salary.

Respondent's evidence

14. Mr. Juda Kairima confirmed that he issued the letter dated 28th April, 2017 but denied having given the Claimant a 2 days' notice.
15. The witness confirmed that the letter is silent on any discussion with the Claimant and there was no prior notice. He testified that the letter was the final notice.
16. The witness confirmed that he did not know about a certificate of service but was paying NSSF and did not pay severance.
17. The witness admitted that he did not notify the local Labour Officer about the intended redundancy of the 3 employees he had.
18. On re-examination, RWI testified that he raised the issue of redundancy in 2016, was paying National Social Security Fund, all employees were declared redundant and he ceased to carry on business.

Claimant's submissions

19. On termination, the Claimant's counsel submits that as the Respondent did not controvert the Claimant's evidence of employment, his business is still operational and did not issue a notice under Section 40 of the *Employment Act*, 2007 and there were no consultations and the Claimant was unlawfully terminated from employment as there was no redundancy.
20. On the reliefs sought, counsel urges that the Claimant is entitled to notice pay as there was none and service pay.



21. Counsel, however, urges the court to order payment of severance for 9 years under Section 35(5) of the *Employment Act*, 2007.
22. Counsel submits that the Claimant was underpaid by Kshs.3,750/= per month and was thus owed Kshs.405,000.00.
23. Reliance was made on the decisions in *Kenya Airways Ltd V Aviation & Allied Workers Union & 3 others* (2014) eKLR, *Party of Independent Candidate of Kenya & another V Mutula Kilonzo & 2 others* (2013) eKLR to urge the submissions and *Levben Products V Alexander Films (PTY) Ltd* (1957) SA 225 (SR) 227 on costs.

Respondent's submissions

24. On whether the redundancy was fair, counsel urges that since the Respondent had discussed the issue with the Claimants from December 2016 and there was no work, the three employees were declared redundant lawfully.
25. Counsel submits that the Respondent's business collapsed and he gave the Claimants notice and paid him but did not notify the Labour Officer.
26. That the failure to comply with the procedure was inadvertent.
27. Regarding the reliefs sought, counsel urges that the Claimant was paid notice pay, and confirmed on cross-examination that NSSF deductions were being paid and had not proved entitlement to service pay.
28. Reliance was made on *Simeiyu Martin Mumachi & 3 others V Steel Makers Ltd Cause No. 38 of 2016* to urge that the Claimant is not entitled to service pay.
29. Counsel urges that the Claimant tendered no evidence of underpayment and was not entitled to the claim.
30. On compensation, counsel submits that the Respondent had valid reasons to terminate the Claimant's employment and the procedural lapses did not vitiate the process.
31. Counsel urges the court to grant minimum damages, if any.
32. Counsel further submits that the Claimant did not issue a demand letter and the matter could have been resolved at that stage and refused to attend mediation sessions and should not be favoured with costs.
33. Reliance was made on the decisions in *Supermarine Handling Services Ltd V KRA CA No. 85 of 2016*, *Jasbir Singh Rai & 3 others V Tarclochan Singh Rai & 4 others Supreme Court Petition No. 4 of 2012* and *Joseph Oduor V Kenya Red Cross Society* (2012) eKLR where demand notices were not served to urge the court not award costs.

Analysis and determination

34. Having carefully considered the pleadings, evidence adduced by the parties and submissions by counsel, the issues for determination are;
 - i. Whether termination of the Claimant's employment on account of redundancy was unfair.
 - ii. Whether the Claimant is entitled to the reliefs sought.



35. On the 1st issue, parties have adopted contrasting positions with the Claimant urging that it was unfair as the Respondent's business is still operational, no notice was given, no consultations took place and the Labour Officer was not notified as required by the provisions of Section 40 of the [Employment Act](#), 2007.
36. The Respondent on the other hand submits that the Respondent had a valid reason to declare the Claimant redundant but did not follow the prescribed procedure.
37. It requires no belabouring and as explained by Maraga JA (as he then was) in *Kenya Airways Ltd V Aviation & Allied Workers Union (K) & others (Supra)*, redundancy is one of the legitimate approaches to separation between an employers and an employee at the option of the employer in circumstances in which the employee is free from blame.
38. It is grounded on commercial or business imperatives and is typically undertaken to ensure sustainability and growth of the business and may be a consequence of adoption of new technology, reorganization, restructuring or right sizing among others.
39. As explained in *Rop V Unilever Kenya Ltd (2023) eKLR*, redundancy is not an event but a process that has a beginning and an end, typically characterised by discussions by top organs of the organization until a decision is arrived at and attendant processes complied with.
40. For a redundancy to pass muster, it must be demonstrated that the employer had a substantive justification to undertake the process and conducted it in accordance with the provisions of Section 40(1) of the [Employment Act](#), 2007.
41. Put in the alternative, the process must pass the fairness test under Section 45 of the [Employment Act](#), 2007.
42. While Section 2 of the [Employment Act](#) defines the term redundancy, Section 40(1) of the Act prescribes the substantive and procedural requirements to be complied with by the employer.
43. Section 40 of the [Employment Act](#) is couched in mandatory tone to underscore its significance in a redundancy process.
44. In *Freight In Time V Rosebell Wambui Munene (2018) eKLR*, the Court of Appeal emphasized the need to comply with the requirements of Section 40(1) of the Act, as follows;

“In addition, Section 40(1) of the [Employment Act](#) prohibits in mandatory tone, the termination of a contract of service on account of redundancy unless the employer complies with the following seven conditions, namely; . . .
45. These conditions include notice to the union and the Labour Officer if the employee(s) is a member of the union, notice to the employee(s) and the Labour Officer if the employee(s) is not a member of a union. The notice must be issued at least one (1) month before the effective date of the redundancy. Relatedly, the notice must set out the reasons for and extent of the redundancy.
46. Similarly, the employer is required to provide a selection criteria and ensure that in the case of a Collective Bargaining Agreement, membership or non-membership of the union does not adversely affect any employee, payment of all outstanding leave days in cash, one (1) month's notice or pay in lieu of notice and severance pay at not less than 15 days for every completed year of service.



Reason for redundancy

47. While the Respondent urges that it had a valid reason to declare the Claimant and his colleagues redundant, the Claimant submits that the redundancy was unfair.
48. The Respondent's letter dated 28th April, 2017 addressed to the Claimant adverts to "prevailing economic situation and loss of tenancy in the present premises" as the reasons for redundancy.
49. Regrettably, the Respondent tendered no evidence on how the "prevailing economic situation" impacted on his business and what the "loss of tenancy in the present premises" meant.
50. The foregoing statements required unpackaging by verifiable evidence to justify the option of redundancy.
51. The Respondent has not cited his inability to pay salary or other payments and perhaps when the same begun and how he was coping until April 2017.
52. Section 40 of the [Employment Act](#), 2007 requires the notice of redundancy to state the reasons for and extent of the redundancy. In other words, the justification and its scope, such as how many departments or sections are affected and how many employees would be impacted upon.
53. In this case, the notice sent to the Claimant comprises four (4) sentences and is reticent on what actually precipitated the redundancy.
54. Contrary to the Respondent counsel's submission that the Respondent had a valid reason to declare the Claimant redundant, the court is not persuaded that the Respondent has discharged the burden of proof as by law required as he who alleges must prove the allegations.
55. Having found that the Respondent has failed to demonstrate that it had a substantive justification for the redundancy, I will now proceed to consider the procedural aspects.
56. As regards notice, it is common ground the letter dated 28th April, 2017 was the redundancy notice to the Claimant and the redundancy became effective on 30th April, 2017. Clearly, the mandatory one (1) month notice was not given nor was the Claimant paid in lieu of notice as he had already worked for the month of April 2017.
57. Equally, the local Labour Officer was not notified of the redundancy at least one (1) month before the effective date.
58. Contrary to the Respondent's counsel's submission that the failure to send the notice of redundancy was an inadvertent procedural lapse on the part of the Respondent and did not vitiate the process, it did as it amounted to non-compliance with mandatory provisions of Section 40(1) of the [Employment Act](#), 2007. (See *Barclays Bank of Kenya Ltd & another case* (2018) eKLR).
59. From the foregoing, it is the finding of the court that the Respondent's purported redundancy notice was ineffectual for purposes of Section 40(1) (b) of the [Employment Act](#), 2007.
60. Similarly and contrary to the averments in the Amended Response to the Memorandum of Claim, the Respondent adduced no evidence of a selection criteria or payment of outstanding leave days in cash, pay in lieu of notice or severance pay.
61. In sum, the Respondent did not comply with the provisions of Section 40(1) of the [Employment Act](#), 2007 thereby rendering the purported redundancy an unfair and unlawful termination of the Claimant's employment.



62. The totality of the foregoing is that the Respondent has failed to demonstrate that termination of the Claimant's employment on account of redundancy was substantively justifiable or procedurally fair.

Appropriate relief

i. Notice pay

63. It is unclear to the court why the Claimant is praying for 3 months' salary as notice yet he provided neither a written contract of service on the terms of employment nor a copy of a Collective Bargaining Agreement (CBA).
64. The claim for 3 months' pay in lieu of notice lacks a factual or legal justification.
65. The Claimant is awarded Kshs.18,000.00 as pay in lieu of notice.

ii. Service pay for 9 years

66. Although the Claimant alleged on cross-examination that the Respondent remitted neither the National Social Security Fund nor the National Health Insurance Fund deductions, the particulars are conspicuously missing in his claim or witness statements.
67. A statement from the NSSF would have effortlessly demonstrated the true state of affairs bearing in mind that the Respondent testified that he was remitting the deductions.
68. The Claimant did not discharge the burden of proof and the prayer is dismissed.

iii. Underpayment 9 years

69. Neither the claim nor the Claimant's oral or written evidence provide particulars of the alleged underpayment and the relevant Regulation of Wages Order(s).
70. Equally, on cross-examination, the Claimant admitted that he was aware that the minimum salary was Kshs.12,926.55 and his salary was Kshs.18,000.00 per month.
71. The Claimant's counsel, perhaps, having realized that the claim lacked supportive evidence submitted that the Claimant's colleagues were earning Kshs.33,000.00, an allegation the Claimant did not make or substantiate.
72. According to counsel, the Claimant was underpaid by Kshs.3,750/= per month.
73. It is trite that submissions are neither evidence nor pleadings but marketing language as held in *Daniel Toroitich Arap Moi V Mwangi Muriithi & another* (2014) eKLR, *Avenue Carhire & another V Sipha Wanjiru Muthegu* Civil Appeal No. 302 of 1997, *Erastus Wade Opande V Kenya Revenue Authority & another* Kisumu HCCA No. 46 of 2007, *Nancy Wambui Gatheru V Peter W. Wanjere Ngugi NRB* HCCC No. 36 of 1993 and *Ngang'a & another V Owiti & another* (2008) 1 KLR EP 749.
74. The claim lacks supportive material and is dismissed.

iv. 12 months compensation

75. Having found that termination of the Claimant's employment by the Respondent on account of redundancy was unfair for want of a valid and fair reason and procedural propriety, the Claimant is entitled to compensation by dint of Section 49(1)(c) of the *Employment Act*, 2007.



76. As determining the quantum of compensation, the court has taken into consideration that the Claimant was an employee of the Respondent for an unknown duration as he tendered no evidence of the fact of employment in 2009. He could not tell the month or date in 2009.
77. Second, the Claimant was free from blame. Third, the Claimant had no record of misconduct or indiscipline. The Claimant did not express his wish to continue in the Respondent's employment or appeal the decision.
78. In the circumstances, the court is satisfied that the equivalent of 4 months' salary is fair.

v. Certificate of service

79. The Claimant is entitled to a certificate of service by dint of Section 51 of the Employment Act, 2007 as conceded by the Respondent's counsel.
80. In the upshot, judgment is entered in favour of the Claimant against the Respondent as follows;
- a. One month's salary in lieu of notice Kshs.18,000/=.
 - b. Equivalent of 4 months' salary Kshs.72,000/=.
Total Kshs.90,000.00
 - c. Certificate of service.
81. As submitted by the Respondent's counsel, the Claimant did not demand payment before filing the instant suit and parties could not agree despite the appointment of a mediator.
82. In the premises, this is not a proper case to award costs.
83. Parties shall bear their own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 23RD DAY OF JULY 2024

DR. JACOB GAKERI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE

