



Okonjo v Protective Custody Limited (Employment and Labour Relations Cause 812 of 2019) [2024] KEELRC 1756 (KLR) (4 July 2024) (Judgment)

Neutral citation: [2024] KEELRC 1756 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 812 OF 2019**

MN NDUMA, J

JULY 4, 2024

BETWEEN

GEORGE MACKENZIE OKONJO CLAIMANT

AND

PROTECTIVE CUSTODY LIMITED RESPONDENT

JUDGMENT

1. The suit commenced on 2/12/2019 vide a statement of claim seeking the following reliefs by the claimant from the respondent:
 - a. A declaration that the termination of the claimant's employment was wrongful, unfair and in breach of the constitution 2010 and the Employment Act, Chapter 226 of the Laws of Kenya.
 - b. 12 months' salary compensation amounting to Kshs 1,114,224.96 being damages for the wrongful and unfair termination of the claimant's employment.
 - c. Compensation amounting to Kshs 92,852.08 being the one months' pay *in lieu* of notice
 - d. Kshs 58,806.32 for 19 unpaid leave days.
 - e. Kshs 49,742.18 being severance pay for one year
 - f. Costs of this suit
 - g. Interest on b, c, d and e above
 - h. A duly signed certificate of service under section 51 of the Employment Act, Cap 226 of the Laws of Kenya.
 - i. Any other /further relief that this honourable court may deem fit to grant in the interest of justice.



2. CW1, the claimant adopted a witness statement filed on 2/12/2019 as his evidence in chief and produced exhibits '1' to '7' as part of his evidence including his pay slips, bank transfers between the claimant and the respondent for the period December 2018 to June 2019; screen shot showing the claimant's removal for two days from the company's WhatsApp group and short service messages; letter of demand and national identity card of the claimant. The electronic evidence were accompanied by affidavit and certificate of authenticity in terms of section 106B (4) of the *Evidence Act*, Cap 80 Laws of Kenya.
3. The claimant testified that he was employed by the respondent on 15/10/2017 as a regional manager western Kenya. That he was situated at Kakamega county and his role was to oversee operations in the larger Western Kenya Region.
4. That his starting salary was Kshs 50,668.70 but same had risen to Kshs 92,852.08 at the time of separation.
5. CW1 stated that he worked diligently until 10/5/2019 when Head of Operations, one Mr. Shirandula sent the claimant on compulsory leave that was to run up to 4th June 2019.
6. That on the same day the respondent withdrew the company vehicle KCM 144V from the claimant.
7. That while on compulsory leave, the claimant was removed from the company's operations team WhatsApp group and the organization's security IENG PLC WhatsApp group.
8. CW1 said he could no longer access his official work email since it had been denied and deactivated.
9. CW1 said he reported to work on 4th June 2019 as directed. CW1 stated that he engaged the Head of Operations Mr. Shirandula vide an SMS from his personal number 07XXXXXXXXX telling him that he was back. That the operations manager responded from his telephone number 07XXXXXXXXX stating that he was awaiting directives from the Executive. The operations manager followed up with the claimant and told him that the Managing Director (MD) had already communicated to the claimant about his fate. The claimant denied having seen any note from the MD. That the operations manager then responded vide another SMS stating that the claimant had been declared redundant. The electronic messages are before court.
10. By a text message dated 7/6/2019, the respondent terminated the employment of the claimant on account of redundancy. The claimant was paid Kshs 20,902/= via his bank account which the claimant was informed was the final settlement of all terminal dues.
11. That the termination was unlawful and unfair and the claimant be awarded as prayed.
12. Under cross-examination CW1 stated that he did not receive any notice of intended redundancy. That he was not called to any disciplinary hearing. CW1 said he did not get any formal letter of termination with reasons for the termination. That he only received a short SMS terminating his employment.

Defence

13. The respondent called Joash Shirandula to testify on its behalf. RW1 adopted a witness statement dated 31/1/2020 as his evidence in chief. RW1 also produced exhibits '1' to '4' which included a warning letter dated 29/4/2019, leave application form for the period 11/05/2019 to 4/6/2019 a period of 21 days, a job card for motor vehicle KCM 144V and letter of promotion dated 5/12/2018. RW1 stated that the claimant was employed on 15/10/2017 as a regional manager western. That during his employment the claimant was issued with a warning letter.



14. That on or about May 2019, the respondent intended to restructure the Nyanza and Western Region of its operations. That the claimant was requested to take his accumulated annual leave during the restructuring.
15. That the claimant was requested to hand over his duties to the Regional Manager North Rift, John Motari and thereafter go to Nairobi to sign his annual leave forms produced before court.
16. That the claimant handed over all his pending work and company motor vehicle registration number KCM 144V to the said Regional Manger North Rift.
17. That the said vehicle was not in good condition despite that the claimant received allowance to maintain it. That repair costs amounted to Kshs 51,794/= and were deducted from the claimant's salary as per exhibit 1-3.
18. That the claimant had failed to hand over office keys, alarm transmitters/stub antennas and batteries to the North Rift Regional Manager.
19. That the claimant failed to report to the Head office to sign the leave form as instructed and he did not communicate his whereabouts.
20. The respondent removed the claimant from its communication forums and deactivated the claimant's work email to prevent leakage of the company's confidential information.
21. RW1 stated that on 4/6/2019, the claimant contacted him and said he had completed his leave. RW1 asked him whether he had contacted the Managing Director.
22. RW1 stated that the claimant was to report to Head office for redeployment since his region had been merged. RW1 said he did not get any instructions from his supervisor on the matter. RW1 added that he had no mandate to terminate the employment of the claimant and only directors of the company could do that.
23. That the claimant failed to report to head office and the claim for dismissal has no merit.
24. Under cross-examination, RW1 said the claimant was not subjected to any disciplinary proceedings but had been issued with a warning letter. RW1 said Western Region was merged with North Rift Region and both were placed under one regional manager. RW1 said there were no redundancies. The claimant was only asked to take annual leave. RW1 said repair costs were deducted from the claimant's salary in the sum of Kshs 51,794. RW1 admitted that he sent a text to the claimant telling him that he had been declared redundant. RW1 said he had no authority to send that text message.
25. RW1 said the claimant was not served with any letter of termination. RW1 confirmed that the claimant was removed from the company operations WhatsApp group and his official email was deactivated. RW1 said since the claimant had failed to report to head office there was no need to keep him on company communication platforms.

Determination

26. The parties filed written submissions which the court has carefully considered together with the evidence adduced by CW1 and RW1.
27. The issues for determination are:
 - a. Whether the employment of the claimant was terminated by the respondent on grounds of redundancy?



- b. Whether the termination was for a valid reason following a fair procedure
 - c. Whether the claimant is entitled to the reliefs sought.
28. In answer to issue (a) above, the court finds that the claimant has adduced cogent and credible evidence that he was sent on compulsory leave on 10/5/2019 by the operations manager and was to return on 4/6/2019. That while on leave, the claimant was removed from the company's operations WhatsApp group and his official email was deactivated. The claimant also adduced cogent and credible evidence that upon return from leave on 4/6/2019, he was not deployed to any other office by RW1 or the Managing Director. The claimant further tendered cogent and credible evidence that he had no means of communicating directly with the Managing Director. The claimant stated that he received a text message from RW1 to the effect that he had been declared redundant. This evidence was corroborated by RW1 who testified that the Western Region which the claimant served had been merged with the North Rift Region under one manager.
29. The respondent did not produce any letter redeploying the claimant to any other job. Instead, the claimant had been deprived of his working tools and platform and so his employment had been effectively terminated by RW1 on grounds of redundancy.
30. The assertions by RW1 that he had no authority to terminate the employment of the claimant hold no water on the face of compelling evidence that he had terminated the employment of the claimant on grounds of redundancy vide SMS. That SMS messages was the mode of communication RW1 had adopted to send the claimant on compulsory leave and to communicate the termination.
31. The claimant has proved that his employment was terminated on grounds of redundancy the office that he held having been merged with the North Rift Region under one manager. The claimant has proved that he had been instructed to hand over his tools of trade including work motor vehicle to the manager North Rift.
32. With regard to the 2nd issue, the claimant has proved that he was not issued with at least one month notice of termination; was not notified as to why he was selected for termination on grounds of redundancy; he was not paid any severance pay upon termination on grounds of redundancy; was not paid in lieu of leave days not taken; his salary was not paid and part of it was without his permission deducted to pay repair costs of an official motor vehicle and that he never received an official letter of termination detailing the reason(s) for the termination. The respondent did not follow a fair procedure in terminating the employment of the claimant.
33. The court finds that the termination of the claimant violated sections 36, 40, 41, 43 and 45 of the *Employment Act* 2007. The respondent did not prove it had a valid reason to terminate the claimant. In any event, the respondent did not follow a fair procedure in terminating the employment of the claimant. The court notes that the respondent did not notify the labour office of the intended restructuring RW1 testified about. The whole process of restructuring was un-procedural and did not conform to the provisions of section 40(1) of the Act.
34. The claimant has proved that he is owed the terminal benefits set out in the statement of claim.
35. The court has relied on the case of *KUDHEIHA v Roba Road Primary* School Cause No. 231 of 2010 cited in *Jan Khalechi v Oxford University Cress Committee* [2013] eKLR where it was found that the employer may have a valid reason to terminate the employment of the employee for economic reasons, but the employer had however failed the procedural and fairness test.



36. In the present case, the respondent did not prove that it had a genuine case of redundancy but also did not follow the procedure set out under section 40(1) to effect termination of the claimant on grounds of redundancy.
37. The claimant is entitled to compensation for the unlawful and unfair termination of employment in terms of section 49(1)(c) and 4 of *the Act*. In this regard the claimant was not paid all terminal benefits upon termination; the claimant did not contribute to the termination; the claimant intended to continue working but was denied opportunity. The claimant lost career prospects to his loss and detriment. The claimant was not paid any compensation or severance pay upon termination. The respondent instead unlawfully deducted the claimant's salary without his consent. The claimant had served the respondent for a period of about two years as a regional manager.
38. The court having considered the above circumstances awards the claimant the equivalent of five (5) months' salary in compensation for the unlawful termination in the sum of Kshs 464,260.40.
39. In the final analysis the court enters judgment in favour of the claimant against the respondent as follows:-
- a. Kshs 464,260.40 in compensation
 - b. Kshs 49,742.18 severance pay for one year
 - c. Kshs, 58,806.32 *in lieu* of 18 leave days not taken
 - d. Kshs 92,952.08 *in lieu* of one month notice
Total amount Kshs 665,660.98
 - e. Interest at court rates from date of judgment till payment in full
 - f. Costs of the suit.

DATED AT NAIROBI THIS 4TH DAY OF JULY, 2024

MATHEWS NDERI NDUMA

JUDGE

Appearance:

Mr. Okonjo for claimant

Mr. Githinji for respondent

Mr. Kemboi Court Assistant

