



Shah v Vitafoam Products Limited (Employment and Labour Relations Cause 342 of 2019) [2024] KEELRC 2278 (KLR) (25 September 2024) (Judgment)

Neutral citation: [2024] KEELRC 2278 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 342 OF 2019
MA ONYANGO, J
SEPTEMBER 25, 2024**

BETWEEN

NIRAJ PRABHULAL SHAH CLAIMANT

AND

VITAFOAM PRODUCTS LIMITED RESPONDENT

JUDGMENT

1. Vide his Memorandum of Claim dated 24th May 2019 and filed in Court on the same day, the Claimant avers that his employment was unfairly terminated by the Respondent and seeks payment of terminal benefits and damages for unfair termination.
2. The Claimant states that he was employed by the Respondent on 1st September 2001 as a finance manager and had worked for a period of almost fifteen years when his employment was unfairly terminated by the Respondent.
3. It is the Claimant's case that on 15th September 2015, the Respondent served him with a letter dated 21st August 2015 purporting to give him one months' notice of intended termination on account of redundancy. That after the said notice lapsed the Respondent requested the Claimant to continue working.
4. According to the Claimant, on 25th November 2015, the Respondent wrote to the Claimant extending the Claimant's employment by a further three months to 24th February 2016 and intimating that the Respondent will recruit its old employees afresh from 1st March 2016.
5. It is the Claimant's case that on 15th February 2016, the Respondent wrote to the Claimant offering him the same job at less than half the Claimant's pay at the time. According to the Claimant this was a confirmation that the purported redundancy was a sham.



6. The Claimant states he continued to work and the Respondent gave him several offers which the Claimant declined as he was expected to perform the same work on a reduced pay package. He worked until 2nd June 2016 when his employment was terminated.
7. He contends that he dedicated his entire time to his work and even did not go on his annual leave on several occasions leading to an accrual of 123 leave days at the time of termination. He further contends that the Respondent failed to make a full remittance of the Claimant's employment dues upon termination of his employment and to issue to the Claimant a Certificate of Service for the 15 years of service.
8. The Claimant avers that the Respondent's actions were unlawful, wrong and amounted to unfair labour practice contrary to sections 20, 28, 40, 41, 45 and 92 of the Employment Act and Article 41 of the Constitution.
9. The Claimant therefore prayed for judgment against the Respondent as follows:
 - a. The Claimant's Certificate of service,
 - b. An itemized pay statement in respect of the Claimant's terminal dues,
 - c. Unutilised leave days Kshs. 3,240,577.00
 - d. Salary for last working day Kshs. 26,347.00
 - e. Damages for unfair termination Kshs. 8,220,000.00
 - f. Exemplary and punitive general damages against the Respondent for unfair labour practice,
 - g. Any further or other orders that the court may deem just and appropriate,
 - h. Costs of this suit,
 - i. Interest on the above sums from 2nd June 2016 to the date the Claimant was terminated from employment.
10. The Respondent in its Memorandum of Defence dated 19th June 2019 and filed in court on 20th June 2019 denied unfairly terminating the Claimant's employment. It averred that there were justified grounds for the termination of the Claimant's employment and the process leading to the termination conformed to the law.
11. The Respondent averred that on 27th June 2015, the Respondent's building and manufacturing plant was completely destroyed by fire which led to a cessation of work at the Respondent's manufacturing plant.
12. The Respondent states that after the fire tragedy it kept the Claimant and other employees informed on the state of affairs of the company and the steps the Respondent's management planned to take to revive the operations.
13. It is the Respondent's case that following a review of the business and appreciating the need to put in place remedial measures in response to the fire tragedy, the Respondent was compelled to carry out a redundancy.
14. It is further averred that in carrying out the redundancy, the Respondent fully complied with all the procedures as set out in the law and the contracts of the employees.



15. According to the Respondent, it issued notice of one month of the intended redundancy to the Claimant and it also issued a notice to the Labour Officer on 21st August 2015 notifying the Labour Officer of the Respondent's intended redundancy. That the notice spelt out the terminal benefits payable to the Claimant if he was declared redundant.
16. The Respondent avers that the termination of Claimant's employment was to take effect on 24th February 2016. That at a meeting held on 15th February 2016, the Respondent made an offer to the Claimant to extend the termination notice to the month of September 2016.
17. The Respondent states that the offer for extension of the termination notice was informed by the need to have the Claimant finalize the Respondent's financial accounts and audit of the previous year.
18. The Respondent further stated that it thereafter made an offer to the Claimant to retain his previous job but on revised terms but the Claimant only agreed to the extension of the termination notice to 31st May 2016.
19. The Respondent states that the Claimant having rejected its offer for re-employment his last day of employment was 31st May 2016.
20. In response to the Claimant's prayer for leave dues, the Respondent contended that under the contract, the Claimant was required to take two thirds of his annual leave during a twelve-month service period and only the balance of a third of the leave accrued was to be carried forward but only for three months after which if not taken the leave was forfeited.
21. The Respondent maintained that the Claimant disregarded the express provisions of the contract on leave. It is averred that at the time of termination, the Claimant had only six (6) leave days due which was paid to the Claimant in cash.
22. The Respondent averred that the Claimant was paid all his terminal dues upon termination. That given the Respondent's financial fluctuation, it urged the Claimant to accept his terminal dues in installments which amount has since been fully paid. The Respondent further stated that it had issued the Certificate of Service to the Claimant.
23. The Respondent urged the court to dismiss the Claimant's claim with costs.
24. The Claimant testified on 19th January 2022 as CW1 in furtherance of his case. The Respondent called its CEO, Rakesh Chandrakant Shah who testified on 28th September 2022 as RW1.
25. After the close of the Respondent's case, the court directed parties to file submissions.
26. Although both parties informed the court that they had filed submissions, only the Claimant's submissions dated 13th October 2022 are on record.
27. In the submissions the Claimant identified the issues for determination to be:
 - i. Was the Claimant's employment unfairly and unlawfully terminated
 - ii. Did the Respondent make payment of the Claimant's redundancy as prescribed by law
 - iii. Did the Respondent engage in unfair labour practices
 - iv. What reliefs, if any is the Claimant entitled to
28. On the first issue, the Claimant submitted that the Respondent failed to adhere to the requirements of section 40 of the [Employment Act](#) which are couched in mandatory terms. According to the Claimant,



the Respondent purported to give a notice of one month on 21st August 2015 but only served the same on the Claimant on 15th September 2015; that the Respondent did not serve a notice on the labour officer; that the Claimant's leave days due were not paid off in cash; and that the respondent failed to give proper notice to the Claimant or to pay the Claimant one month's salary in lieu of notice; that the Respondent failed to pay the Claimant to the last working date.

29. On the second issue, the Claimant submitted that the Respondent failed to provide the Claimant with an itemized statement of pay at the time of termination of the Claimant's employment. According to the Claimant, terminal dues on redundancy are payable before termination and not after. It is the Claimant's case that the Claimant only received Kshs 477,968 at the time of termination and the balance was paid off in piecemeal at the whims of the Respondent.
30. The Claimant also submitted that he was only paid for 6 days yet he had 135 days accrued leave days. The Claimant submitted that the Respondent's contention that the contract provided that leave days not taken were forfeited was untenable in law. In support of this position, reliance was placed on the cases of Joachim Mbithi Mulinge v TransOceanic Projects & Development (K) Limited (2017) eKLR and Rumba Mnyika Nguta v Southern Hills Development Agency Limited t/a Radio Kaya (2020) eKLR.
31. On the third issue, it is the Claimant's submission that the Respondent in its actions undertook a sham redundancy process.
32. Lastly, on what remedies the Claimant is entitled to, the Claimant submitted that he is entitled to the reliefs he is seeking in his memorandum of Claim as he has proved that his employment was unfairly terminated by the Respondent.

Determination

33. Upon considering the pleadings herein, the evidence of the respective parties, the submissions as well as the authorities cited, I find that the issues for determination are:
 - i. Whether the termination of Claimant's employment by way of redundancy was unfair and unlawful;
 - ii. Whether the Claimant is entitled to the reliefs sought.
34. From the pleadings and particularly the evidence on record, it is clear that the Claimant's employment was terminated by way of redundancy after the Respondent's building and manufacturing plant was destroyed by fire thereby affecting its business operations. The Claimant was issued with a notice of intended redundancy dated 21st August 2015 which notice formed part of the Respondent's bundle of documents.
35. Section 2 of the *Employment Act* No 11 of 2007 defines redundancy as:-

“the loss of employment, occupation, job or career by involuntary means through no fault of an employee, involving termination of employment at the initiative of the employer, where the services of an employee are superfluous and the practice commonly known as abolition of office, job or occupational loss of employment.”



36. Section 40 of the *Employment Act* 2007 provides for the procedure to be complied with in event termination of employee on account of redundancy:-

“ 40 (1) An employer shall not terminate a contract of service on amount of redundancy unless the employer complies with the following conditions:-

- (a) Where the employee is a member of a Trade Union, the employer notifies the Union which the employee is a member and the Labour Officer in charge of the area where the employee is employed of the reasons for and the extent of the intended redundancy not less than a month prior to the date of intended date of termination on amount of redundancy .
- (b) Where an employee is not a member of a trade union the employer notifies the employee personally in writing and the labour officer.
- (c) The employer has in the selection of employees to be declared redundant had due regard to seniority in him and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy,
- (d) Where there is an existence of a collective agreement between an employer and a trade union setting out terminal benefits payable upon redundancy; the employer has not placed the employee at a disadvantage for being or not being a member of the trade union.
- (e) The employer has where leave is due to an employee who is declared redundant paid off the leave in cash.
- (f) The employer has paid and employee declared redundant not less than one month's notice or one month's wages in lieu of notice and
- (g) The employer has paid to an employee declared redundant severance pay at the rate of not less than fifteen days pay for each completed year of service.”

37. In the case of *Hesbon Ngaruiya Waigi vs Equitorial Commercial Bank Limited* (2013)eKLR, the court held as follows:

“ 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.”

38. In this case, I have noted that both the Claimant and the Labour officer were served with the redundancy notice. The Redundancy notice read:

21st August, 2015

Mr. Niraj P Shah

Box 32811

Nairobi, Kenya

Dear Niraj Shah,



Intended Termination of Employment With Vitafoam Products Limited on Account Of Redundancy

As you are aware, during the early hours of Saturday, 27th June 2015, the Company's premises located along Mombasa Road in Nairobi suffered a fire tragedy which resulted in the complete destruction of the Company's building and manufacturing plant. Consequently, the Company's normal operations have ground to a halt and this has adversely affected the Company's ability to continue employing its current staff.

For the above reason, it has become necessary for the Company to consider terminating the employment of a large number of its staff. All the employees which includes management staff are likely to be affected with this measure.

In accordance with the provisions of Section 40(1)(a) and (b) of the [Employment Act](#), 2007, the Company hereby gives one (1) month notice of the intended redundancies.

In line with staff appointment letters and/or contracts as read with Section 40 of the [Employment Act](#), 2007 the Company shall pay each of them severance pay at the rate of half a month's pay for each completed year of service, their respective salaries for the period up to and including the date of termination and all their accruing benefits, including any leave days earned but not taken.

Yours sincerely,

Vitafoam Products Ltd

Signed

Rakesh C Shah

Chief Executive Officer

39. From the contents of the above letter, the Claimant was indeed given one month's notice as envisaged by section 40(1)(a) of the [Employment Act](#).
40. The only bone of contention in my view from the Claimant's submission is how the terminal dues were paid.
41. In his submissions, the Claimant stated that section 40 of the [Employment Act](#) provides that terminal dues on redundancy are payable before termination and not after. The Claimant has also submitted that he only received a sum of Kshs. 477,968 at the time of termination and that the balance was paid off in piecemeal over the next several months at the whims of the Respondent.
42. The evidence on record shows that the reason the Claimant was not paid full terminal dues at the point of exit was due to the fact that the Respondent had stopped operations following the fire tragedy which destroyed its manufacturing plant, a matter that the Claimant was well aware of. He had discussed the issue of payment of his dues in installments with the Respondent.
43. The Claimant further submitted that the Respondent only paid for 6 leave days yet the Claimant had 135 leave days. The Respondent in its pleadings denied that the Claimant was entitled to 135 leave days and averred that the Claimant was required to take two thirds of his annual leave during a twelve month service period and that the balance of a third of the leave accrued for the period was to be carried forward for three months after which if not taken, was forfeited.
44. it is evident that the issue of the Claimant's leave was a subject of discussion between the parties. In a letter dated 26th February 2016 filed by the Claimant as Annexure 'G' the Chief Executive Officer of the Respondent addressed the Claimant as follows:

Dear Niraj P Shah



Good afternoon,

We write to you in reference to the Letter given to you on the 15th February 2016, after which we received your reply on 22nd February, thereafter had a meeting on 23rd February and finally a meeting yesterday morning on 25th February 2016.

The following points were on discussion:

1. Salary & Way forward.
2. Leave days
3. Severance pay
4. Vehicle

Re Point No 1:

It was discussed at the meeting on 23rd where by you said that you don't want to carry on working for the company and would like to hand over. This was not acceptable as its Senior position and we didn't expect the same, therefore as discussed in the meeting of 25th February we requested you to carry on till September 2016.

This was not accepted by you and your requested was to hand over and leave in a months' time. As explained this is not possible and as mutually agreed we are already in the process of looking for a new candidate, but as in the meeting we request you to carry on till May 2016.

During this time frame the company is requesting a Gross Remuneration of 550,000/-, We hope given the current situation & conditions you will accept this and appreciate all the previous bonuses, profits and very hefty salary paid to you, We await your reply to this.

Re Point No 2:

Leave days: Your letter Of 22nd February, states that you have 135 leave days accrued, the actual leave days at the end of February is 134. As discussed and points noted by you, the company request to only pay 40 days as has been done to other staff.

This was not agreed by you and it was a point of consideration and payment to be made as per the salary of the consequent year.

The company once again requests you to accept 75 days towards leave days to close the matter. We await your reply to this.

Re Point No 3:

Severance pay- This is in order and will be paid but our only request is to have the payment made in monthly installments of 300,000/- till completion.

Re Point No 4:

The company was considering to offer you the vehicle that you were currently using but you said that you did not need it.

In view of the above and knowing of the company's situation, we appeal you to accept the same and let us know of your decision in writing if the offer made is acceptable to you.

We kindly also request you prepare towards the hand over, with all the relevant notes and formats, in the interim we request you to start handing over to Alex, Senior Accountant.



We look forward to your reply and would appreciate if you can acknowledge this mail.

Yours sincerely,

Vitafoam Products Ltd

Signed

Rakesh C Shah

Chief Executive Officer [Emphasis added]

45. It is clear from the letter that the Respondent indeed acknowledged that the Claimant was owed 134 leave days and that the Respondent tried to persuade the Claimant to accept less days without success.
46. The averment of the Respondent that the Claimant is not entitled to the leave days and the insistence on the contents of the letter of appointment is therefore an afterthought by the Respondent which is in bad faith.
47. The issue of forfeiture of leave days by employees was the subject of litigation in *Rumba Mnyika Nguta v Southern Hills Development Agency Limited t/a Radio Kaya* [2020] eKLR, cited by the Claimant where the court held:

“The *Employment Act* does not support the leave forfeiture clause, contained in Claimant’s contract. The Court does not agree that leave entitlement was forfeited, when it was not utilized. There is no provision in law, supporting forfeiture. Leave, when not taken, becomes an accrued benefit, which is monetized, and paid out, at the request or demand, of the Employee.”

48. The Claimant is therefore entitled to be paid 135 leave days and not 6 days as paid by the Respondent. having been paid 6 days, he is entitled to 129 days which I award him at Kshs. 3,082,500.00
49. Having found that the redundancy was carried out in compliance with the law and for valid reason, and having further found that the Claimant was paid all his terminal dues save for 129 leave days, I award the Claimant the balance of the unpaid leave days.
50. In the end, I enter judgment in favour of Claimant in the following terms:
 - a. Leave days Kshs. 3,240,577.00
 - b. The Respondent is directed to issue a certificate of service to the Claimant.
51. The Claimant is awarded costs and interests at court rates.

DATED, SIGNED AND DELIVERED VIRTUALLY ON

THIS 25TH DAY OF SEPTEMBER, 2024

MAUREEN ONYANGO

JUDGE

