



**Thomas & Piron Grand Lacs Limited v Momanyi (Appeal E097 of 2023)
[2024] KEELRC 2186 (KLR) (6 September 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2186 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL E097 OF 2023
NJ ABUODHA, J
SEPTEMBER 6, 2024**

BETWEEN

THOMAS & PIRON GRAND LACS LIMITED APPELLANT

AND

DALVIN BOSIBORI MOMANYI RESPONDENT

((Being an appeal against part of the judgment and decree of Hon. Ms G. M Gitonga issued in Milimani Commercial Courts Court Employment Cause No. E827 of 2020 between Dalvin Bosibori Momanyi Vs Thomas & Piron Grand Lacs Limited delivered on 17th May, 2023))

JUDGMENT

1. Through the Memorandum of Appeal dated 16th June, 2023, the Appellant appealed against part of the Judgment of Hon. G.M Gitonga delivered on 17th May, 2023 in Milimani Chief Magistrates Court Employment Cause No. E827 of 2020 between Dalvin Bosibori Momanyi v Thomas & Piron Grand Lacs Limited.
2. The Appeal was based on the grounds that:
 - i. The Learned Magistrate erred in fact and law in finding that the lawful procedure was not followed in terminating the Respondent’s employment by way of redundancy.
 - ii. The Learned Magistrate erred in law in awarding compensatory damages of Kshs 420,000 and awarding severance pay of Kshs 66,635 at the same time.
 - iii. The Learned Magistrate erred in law in awarding Kshs 46,667 for leave days earned but not taken in the absence of evidence of such leave days not having been taken.



- iv. The Learned Magistrate erred in law and in fact in calculating severance pay using the formula (15/26 days x 35,000 x 3.3 years) arriving at Kshs 66,635 instead of (15/30 days x 35,000 x 3 complete years of service) coming to Kshs 52,500.
3. The Appellant prayed that the appeal be allowed with costs and the Judgment of the trial court awarding compensatory damages of Kshs 420,000, leave days of Kshs 46,667, severance pay of Kshs 66,635 instead of Kshs 52,500 be set aside.
4. The parties by consent on 22nd January, 2024 agreed that the Appellant pays the Respondent uncontested amount of Kshs 122,500/= and costs of the lower court within 21 days and the remainder of the contested amount was to be deposited in joint interest earning account pending the determination of this appeal.
5. The Appeal was disposed of by written submissions.

Appellants' Submissions

6. The Appellant filed written submissions dated 2nd May, 2024 and on the issue of whether the trial court erred in finding that the lawful procedure was not followed in terminating the Respondent's employment by way of redundancy, counsel submitted that the trial court erred. That the Respondent's termination was fair both substantially and procedurally and done in accordance with *Employment Act*.
7. Counsel submitted that the reasons for termination were valid and were communicated to the Respondent and due process followed in terminating the employment as per section 45(2) of the *Act*.
8. The Appellant submitted that an employer is allowed to make his business more efficient for example by automation, abandonment of unprofitable activities, reorganization or other saving steps. Counsel relied on the case of *James Ngunia Kinyua v Oserian Development Company Limited* (2017) eKLR on the same.
9. It was the Appellant's submissions that the reason for the termination of the Respondent's employment was valid based on operational requirements of the Appellant and the trial magistrate erred in not taking this in to account. That on or around April 2020, the appellant undertook a massive process of restructuring and reorganization necessitated by hardships occasioned by prevailing strained financial and operational conditions as a result of Covid-19 pandemic.
10. The Appellant submitted that as a result of the said reorganization the Respondent position was declared redundant which fact was communicated to the Respondent and a meeting was held between the Respondent and itself and officially communicated to the Respondent. That because of swift measures taken by the government to curb the spread of the virus including the dusk to dawn curfew it was making losses faster than it anticipated hence had to move quickly to arrest the situation by declaring redundancy.
11. It was the Appellant's submissions that Covid 19 was a force majeure that made it to declare redundancy at the earliest as it could not continue operations one more month with the kind of obligations it had to all its employees as it was losing business steadily as a result of the pandemic. That it informed the Respondent union as required by law and offered to pay the Respondent all her dues and pending leave days and the union never responded.
12. On the issue of whether the trial court erred in awarding compensatory damages of Kshs 420,000/= and awarding severance pay of Kshs 66,635/= at the same time the Appellant submitted that the trial



- court erred as it ought to have awarded either of them but not both. That severance pay was payable to employee declared redundant under section 40(1) (g) of the *Employment Act*.
13. Counsel submitted that where court finds termination to be unfair on account of redundancy it can only award damages for unfair termination. Counsel relied on the case of *Gas Kenya Limited v Odhiambo* (Appeal E006 of 2022 (2022) KEELRC 3930 (KLR) 22 September 2022 (Judgment)). Counsel insisted that the Respondent was terminated fairly hence entitled to severance pay.
 14. It was the Appellant's submissions that the trial court erred in using the formula (15/26 days x 35,000 x 3.3 years) arriving at Kshs 66,635/= instead of 15/30 days x 35,000 x 3 complete years of service) coming to Kshs 52,500/=. That a month has 30 days with a short month having 28 days. That the formula used was wrong and the same should be calculated on completed years.
 15. On the issue of whether the trial court erred in awarding Kshs 46,667/= for leave days not taken the Appellant submitted that whoever alleges must prove as per section 107 of *Evidence Act*. The Appellant relied on the case of *Jennifer Nyambura Kamau v Humprey Mbaka Nandi* NYR CA civil Appeal No. 342 of 2010(2013) eKLR.
 16. Counsel submitted that the Respondent did not provide evidence before the trial court showing that she had leave days that she did not take. That averments in pleadings are not evidence while relying on the case of *Shaneebal Limited v County Government of Machakos* (2018) eKLR.
 17. The Appellant submitted that if the Respondent was of the opinion that relevant evidence was in the Appellant's possession she ought to have applied to court to have the court issue an order compelling the production of the said evidence. Counsel relied on the case of *Casmir Nyaberi v Mwakikar Agencies Limited* (2016) eKLR.

Respondent's Submissions

18. The Respondent filed her submissions dated 26th March, 2024 and on the issue of whether the trial court erred in declaring that she was terminated unlawfully she submitted that this court should not interfere with the trial court decision which was merited. That she was declared redundant on 31st March, 2020 without any notice and the Appellant refused to pay her terminal dues.
19. It was the Respondent's submissions that the Appellant's allegations that there was a meeting between it and her before termination was not true as the Appellant did not produce evidence to show that such meeting took place. That she was terminated orally and went to her union to complain. The Respondent relied on section 40 of the *Employment Act* on redundancy.
20. Counsel submitted that it was not disputed that the Respondent was terminated on account of redundancy but the Appellant did not prove that the termination was fair as per provisions of law while relying on sections 43 and 45 of the *Employment Act* on prove of reasons for termination and the same to be lawful respectively.
21. The Respondent submitted that the Appellant did not adduce evidence to demonstrate the alleged difficult financial situation at the material time hence the termination was malicious, unfair, unjust and unlawful. Counsel relied on the case of *Kenya Airways Limited v Aviation & Allied Workers Union of Kenya & 3 others* (2014) eKLR on redundancy and submitted that the Appellant did not have proof of the company going through financial difficulties. That the Appellant did not produce the company's financial records to show they were going through hard times. That she was not notified of the redundancy neither her union hence unfair termination.



22. On the issue of if the trial court erred in awarding compensatory damages of Kshs 420,000/= and award of severance pay of Kshs 66,635/= at the same time the Respondent submitted that declaration of redundancy was a process and not an event. That once court finds the termination was unlawful it is supposed to award damages for unfair termination. Counsel relied on the case of *Ken Freight E.A v Benson Nguti*(2016) eKLR.
23. Counsel submitted that an award under section 49 (a) was different from award under section 49(1) (b) (c). That section 49 allows an award to include any of the listed remedies provided that the court making the award exercises its discretion judiciously and is guided by section 49(4) (m). That she was properly awarded 12 months under Section 49(1) for unlawful termination and for unlawful redundancy.
24. On the issue of whether the trial court erred in awarding Kshs 46,667 for leave days the Respondent relied on section 28(1) of the *Employment Act* on leave. That the Appellant should have ensured the Respondent took her annual leave when due or made payment in lieu.

Analysis and determination

25. This court has considered the pleadings by both parties and the submissions. This being a first Appeal the court will proceed to reanalyze the evidence before it as was held in the case of *Selle v Associated Motor Boat Company Limited* [1968] E.A 123 thus:-

An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities.....or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”

26. In this case, the Judgment of the trial court was that judgment was entered in favour of the Claimant as follows:-
 - a. One Month's Salary in lieu of notice Kshs 35,000/=
 - b. Salary for the month of March, 2020 Kshs 35,000/=
 - c. Severance Pay $(15/26 \times 35,000 \times 3.3) = \text{Kshs } 66,635/=$
 - d. Leave days earned but not taken $(1,167 \times 40) = \text{Kshs } 46,667/=$
 - e. Compensatory damages $(35,000 \times 12) = \text{Kshs } 420,000/=$
Total = Kshs 603,302/=
 - f. Costs and interests from the date of filing suit
 - g. Certificate of service to be issued within 45 days.
27. The Appellant was therefore aggrieved by part of the judgment and challenges the decision of the trial court finding the Respondent's termination as unlawful, challenges the award of compensatory damages as well as the severance pay stating that the Respondent was fairly terminated hence entitled to severance pay alone and even if the court finds the termination was unfair not to award both awards.



The Appellant also faults the formula adopted by the trial court in calculation of the severance pay and also challenges the award of leave days not taken.

28. From the pleadings and proceedings herein, this court has come up with three main issues;
 - a. Whether the trial court erred in finding that the Respondent was unfairly terminated.
 - b. Whether trial court erred in awarding compensatory damages and severance pay at the same time.
 - c. Whether the trial court erred in awarding the Respondent leave days not taken.

Whether the trial court erred in finding that the Respondent was unfairly terminated.

29. It is not in dispute that the Respondent was terminated on account of redundancy. Redundancy has been defined under section 2 of the Employment Act and that courts have stated severally that even in cases of redundancy the reason ought to be valid under section 43 of the Employment Act and the employee given a right to be heard under section 41 of the Employment Act hence a termination on account of redundancy will be an unfair termination under section 45 of the Employment Act if it is shown that the employer did not comply with the requirements under section 40 of the Act.
30. In Kenya Airways Limited v. Aviation and Allied Workers Union of Kenya and 3 Others (2014) eKLR, the Court of Appeal pronounced itself as follows:

“Thus, redundancy is a legitimate ground for terminating a contract of employment provided there is a valid and fair reason based on operational requirements of the employer and the termination is in accordance with a fair procedure. As Section 43(2) provides, the test of what is fair reason is subjective. The phrase “based on operational requirements of the employer” must be construed in the context of the statutory definition of redundancy.

What the phrase means, in my view, is that while there be underlying causes leading to a time redundancy situation such as reorganization, the employer must nevertheless show that the termination is attributable to redundancy – that is that the services of the employee has been rendered superfluous or that redundancy has resulted in abolition of office, job or loss of employment.”

31. From the above, it is clear the reason has to be valid and a fair procedure has to be followed. In this case the Appellant stated that it was going through financial difficulties due to Covid-19 pandemic. However, the Appellant did not adduce evidence such as its financial statements to illustrate that it was going through financial difficulties. This reason therefore fails the validity test under section 43 of the Employment Act.
32. On the process undertaken by the Appellant, it is trite law that even in redundancy, the procedure under section 41 of the Employment Act on the right to be heard has to be followed. This court agrees with the trial court that the Appellant did not follow the right procedure in declaring the Respondent redundant. The Respondent was not given notice of the redundancy.
33. Section 40 of the Employment Act is the guiding law on the process of redundancy which provides as follows:-
 - (1) An employer shall not terminate a contract of service on account 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 to 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 the intended date of termination on account 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 time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy;
- (d) where there is in existence a collective agreement between an employer and a trade union setting out terminal benefits payable The *Employment Act*, 2007 47 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 an 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.

34. From the above provision it is clear that the Appellant although stated that they notified the Respondent's union there was no such evidence and in fact it is the union who wrote to it after the Respondent complained. The union was also supposed to be issued with a month's notice of the intended redundancy which never happened. Besides, there was no set down criteria of the employees to be rendered redundant as required by the Act. On the other conditions of notice pay of one month wages were not met by the Appellant as well as severance pay provided by the Act.

35. The Respondent was not notified or given a chance to express her views which is against the clear provisions of the law under section 41 of the *Employment Act*. The Respondent was also not consulted as no evidence was adduced by the Appellant to show that the meeting took place and the Respondent was consulted on the said issue.

36. In conclusion this court agrees with the trial court that the Respondent's termination was not for a fair and valid reason and was procedurally flawed hence unlawful and unfair termination under section 45 of the *Employment Act*.

Whether trial court erred in awarding compensatory damages and severance pay at the same time.

37. The Appellant stated that the trial court ought to have awarded either of the awards and not both. That if the court finds the termination to be unfair it should only award damages for unfair termination alone and not severance pay. This court therefore having agreed with the lower court on the unfairness of the termination asks itself if it should interfere with the trial court discretion on the award of damages.



38. This court as an appellate court can only interfere with such discretion if there was an error on some matters leading to erroneous decision as was held on the case of Kenya Revenue Authority & 2 others v Darasa Investments Limited (2018) eKLR where the court held;

The court ought not to interfere with the exercise of discretion unless it is satisfied that the Judge misdirected himself in some matter and as a result arrived at a wrong decision, or that it be manifest from the case as a whole that the judge was clearly wrong in the exercise of discretion and occasioned injustice.

39. In this case the court has found the termination to be unfair and it is trite law whenever it finds the termination to be unfair it proceeds to award damages for unfair termination under section 49(1)(c) of the Act. Section 49(4) of the *Employment Act* guides this court on the considerations this court ought to take in awarding the damages herein. This court takes note that the Respondent started working with the Appellant in January 2017 and was terminated in March 2020. That this is a period of 3 years three months.
40. The trial court awarded the Respondent 12 months compensation for unfair termination without any justification. The Court of Appeal in *Kenya Broadcasting Corporation v Geoffrey Wakio* (2019) eKLR held that;
- (22) This Court has established the rule that an award of the maximum 12 months' pay must be based on sound judicial principles. In *Ol Pejeta Ranching Limited v. David Wanjau Muboro* [2017] eKLR this Court categorically stated that the trial Judge must justify or explain why a claimant is entitled to the maximum award; that the exercise of discretion must not be capricious or whimsical.
41. This court therefore is of the view that the trial court ought to have awarded an amount which was reasonable in the circumstances. Whereas the Court agreed with the trial Court that the appellant never provided any evidence to show it was undergoing financial difficulties, this court takes judicial notice that Covid-19 negatively impacted on businesses and the world economy at large and it was not farfetched for the appellant to allege that its operations were impacted upon by the pandemic. The Court therefore in the circumstances awards the respondent four months' salary as compensation for unfair termination in substitution for the full twelve months awarded by the trial court. The Respondent is further entitled to one-month notice pay as well as severance pay under the Act.
42. The Court now ventures in to the other question of whether after awarding the award of compensation for unfair termination if it can award severance pay at the same time. This court notes that an award of severance pay is provided for under section 40(1) (g) where an employee is declared redundant. This award is statutory regardless whether the termination is found to be unfair or not. An award under section 49(1)(c) is compensatory and is intended to compensate an employee who has been terminated for invalid reasons and or using an unfair procedure.
43. Regarding the calculation of what is payable under section 40, these are well stipulated. An employee is entitled to 15 days salary for each complete year of service. There is no provision for payment of a portion of the year. That is to say, the Act does not provide for a prorated payment. The Appellant submitted $15/30 \text{ days} \times 35,000 \times 3 \text{ years}$ which equals to Kshs 52,500/=. This is the correct calculation and the trial court therefore erred by using the wrong formula.
44. In conclusion the trial court did not err in awarding both the compensatory damages and severance pay at the same time since both are distinct.



Whether the trial court erred in awarding the Respondent leave days not taken.

45. It is not in dispute that leave is an entitlement under section 28 of the *Employment Act* and an employer must ensure an employee takes it when due. The same was an entitlement under clause 9 of the employment contract herein at 21 working days. However, the same is valid three years before filing of the suit. In the case of Charles Muthusi Mutua v Kathi No Kakoka Services Limited [2022] eKLR the court had this to say:-

Bearing in mind the provisions of Section 90 of the *Employment Act*, I can only grant untaken unpaid for leave days for the three years preceding the date of filing this claim. Not the five years sought by the claimant. Therefore, Kshs. 27,844.50. Leave to employees is a statutory entitlement, and an obligation on the employer to ensure that the right is realized, under section 28 of the *Employment Act*. Where an employee alleges that he did not enjoy this right during the currency of the employment fully or to a certain extent, then it behoves the employer to disabuse the allegation by tendering evidence before the trier. The Respondent as the employer didn't.

46. In this case the Respondent filed her claim in September 2020 the same year she was dismissed in March 2020. Her claim for leave pay for the three years where she was claiming 40 days was therefore valid and not time barred under section 90 of the *Employment Act*. On the issue of burden of proof once the Respondent alleged that she did not take her leave days as per the above case the burden shifted to the Appellant to adduce evidence that she indeed took her leave. The Appellant is the custodian of employment records as provided for under section 74 of the *Employment Act* and it ought to have produced evidence to the contrary without stating that the Respondent must have applied to court for the production of the documents.

47. It was the Appellant's burden to adduce evidence to dispute the Respondent's allegations. The trial court did not therefore err in awarding the Respondent her unpaid leave days.

48. In the upshot the Appeal partially succeeds as follows.

- a. The 12 months' salary compensation for unfair termination is substituted with four months' salary as compensation at Kshs 140,000/=
- b. Severance pay is substituted from Kshs 66,635/= to Kshs 52,500/=
- c. Leave days not taken remains at Kshs 46,667/=

49. The other prayers not challenged in this appeal remain the same and since the appeal partially succeeds each party shall bear their own costs for this Appeal.

50. It is so ordered

DATED AT NAIROBI THIS 6TH DAY OF SEPTEMBER, 2024 DELIVERED VIRTUALLY THIS 6TH DAY OF SEPTEMBER, 2024

ABUODHA NELSON JORUM

JUDGE

