



**China Civil Engineering Construction Corporation (Kenya) Limited v Wanyonyi  
(Appeal E071 of 2024) [2024] KEELRC 2468 (KLR) (11 October 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2468 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
APPEAL E071 OF 2024  
M MBARÚ, J  
OCTOBER 11, 2024**

**BETWEEN**

**CHINA CIVIL ENGINEERING CONSTRUCTION CORPORATION (KENYA)  
LIMITED ..... APPELLANT**

**AND**

**HELLEN NAFULA WANYONYI ..... RESPONDENT**

*([Being an appeal from the judgment of Hon. R. N. Akee in  
Mombasa MCELRC No. E099 of 2020 delivered on 12 April 2024])*

**JUDGMENT**

1. The appeal arises from the judgment delivered on 12 April 2024 in Mombasa MCELRC No. E099 of 2020. The appellant is seeking that the judgment be set aside and substituted with the judgment of this court with costs.
2. The background to this appeal is a claim filed by the respondent herein on the basis that he was employed by the appellant as the office secretary on 9 February 2019 earning a wage of Ksh.26, 340 per month. On 17 January 2020, the appellant terminated employment after accusing the respondent of insubordination. She claimed that such reasons were only meant to justify unfair termination of employment since there was no evidence of misconduct. There was no notice or due process and the appellant failed to pay terminal dues. She claimed the following;
  - a. Notice pay Ksh.26,240;
  - b. Accrued leave days Ksh.9,117;
  - c. Severance pay ksh.15,195;
  - d. 12 months compensation Ksh.316,080;



- e. Costs of the suit.
3. In reply, the appellant admitted that the respondent was an employee earning a wage of Ksh.26, 240 per month. On 17 January 2020, the respondent was issued with a notice terminating employment with effect from 19 February 2020 on the grounds of redundancy. This was upon the appellant completing its project. The respondent was not unionized and a notice was issued to the Labour officer relating to the reasons for the redundancy. Upon the notice, the respondent failed to attend work and the claims made are not justified.
  4. In the judgment delivered on 12 April 2024, the learned magistrate held that there was no due process and the termination of employment was unfair. The trial court made the following awards as claimed.
  5. Aggrieved, the appellant filed this appeal on 10 grounds that the learned magistrate erred in failing to appreciate the evidence before court and that the respondent absented herself from work after receipt of the redundancy notice and hence not entitled to notice pay. The court disregarded the evidence that the respondent was paid for accrued leave days. There were no reasons of justification for the maximum award of 12 months compensation and the awards were not based in law, reasons or merit. The severance paid to the respondent was not taken into account.
  6. Both parties attended and addressed the appeal by way of written submissions.
  7. The appellant submitted that under Section 40(1) of the *Employment Act*, an employer is allowed to terminate employment where there is a redundancy. The appellant issued notice to the respondent and Labour officer giving reasons and grounds for the redundancy after it completed its project where the respondent was employed. In the case of *Rono Cheruiyot & 15 others v S.B.I. International Holding (AG) Ltd* [2019] eKLR the court held that where the Labour officer was informed of the redundancy, the employer had complied with the law. In *China Construction Corporation (K) Company Limited v Lewis Haro* [2023] eKLR, the court held that where the employee was paid in notice before termination of employment on account of redundancy, there was compliance with the law.
  8. The appellant submitted that the trial court awarded both severance pay and compensation which was in error as held in *Martin Mwangi v Protocol Solutions Limited* [2022] eKLR that where a redundancy is not properly addressed, termination of employment is unfair. In this case, the appellant proved payment of Ksh.16, 209 severance pay in February 2020. On this basis, to further award compensation is double payment.
  9. The award of compensation was in error and excessive at 12 months. No reasons or justification is given. In the case of *Kenya Hotels and Allied Workers Union v Desert Rose Resort* [2022] eKLR, an employee who had worked for two years was awarded 2 months compensation. In *Martin Mwangi v Protocol Solutions Limited*, cited above, where the employee had worked for 3 years, he was awarded 3 months' salary in compensation. In this case, the award of 12 months is without any exceptional reasons and not justified.
  10. The respondent submitted that employment was from 9 February 2019 to 17 January 2020 at a wage of Ksh.26, 240 per month. She did not take annual leave as alleged. On 27 January 2020 while at work, the appellant accused her of complacency at work and proceeded to issue notice terminating employment with immediate effect.
  11. The respondent submitted that there was an unfair termination of employment contrary to Section 45(4) and (5) of the *Employment Act*. The summary dismissal through verbal notice was contrary to due process, no notice was issued and she was not called for a hearing. The decision to lay off employees



was not communicated through any method and there was no compliance with Section 40 of the *Employment Act* as alleged. In the case of *Geoffrey Nyabuti Onguko v Blow Plant Limited* [2015] eKLR the court held that under Section 40 of the *Employment Act*, an employer should issue the employee with a general notice and a personal notice under the principles outlined in the case of *Kenya Airways Limited v Aviation & Allied Workers Union* case. In this case, there were no notices issued before the summary dismissal.

12. The award of notice pay was justified and lawful. There is no evidence of the respondent taking annual leave or severance pay. The compensation awarded took into account the circumstances of the case particularly matters; leading to summary dismissal without the due process and the appeal should be dismissed with costs.

### **Determination**

13. This is a first appeal and the court is required to review the entire records. Also, re-assess the evidence and conclude. However, the court is required to take into account that the trial court had the opportunity to hear the witnesses in evidence.
14. The claim by the respondent before the trial court is that she was accused of insubordination leading to summary dismissal on 17 January 2020. The appellant asserts that there was a redundancy and notice issued to the respondent and Labour officer.
15. The respondent did not protest the notice dated 17 January 2020 the reasons that this was a redundancy. Through her advocates, a letter of demand dated 28 January 2020 was issued to the appellant on the basis that there was an unfair termination of employment and terminal dues should be paid. The reasons given in the notice terminating employment were not challenged.
16. The record before the court is that employment was terminated based on the notice dated 17 January 2020 the reasons that the appellant had completed its project and hence the position held by the respondent became redundant. Notice was issued to the Labour officer in this regard.
17. Indeed, when the respondent was called for cross-examination by the appellant, she testified that;  

... I was terminated because they said there was no work. I didn't respond to the notice. I was advised by my advocates. The leave days were for Kshs.12, 170. I received the money in the account. I was paid terminal dues of Ksh.22, 000. I didn't go to work because I was fired. ...
18. Under the provisions of Section 40 of the *Employment Act*, an employer is allowed to terminate employment where there is no work. That is defined under Section 2 of the Act as a redundancy. See *Thomas De La Rue (K) Ltd v David Opondo Omutelema*, Nairobi Civil Appeal No 65 of 2012 (2013) eKLR and *Barclays Bank of Kenya, Barclays Africa Group (SA) Ltd v Gladys Muthoni & 2 Others*, Nairobi Civil Appeals No 296 & 301 of 2016 (2018) eKLR. Upon notice by the employer giving the reasons leading to termination of employment, a redundancy is allowed as a lawful cause.
19. Under the provisions of Section 40(1) of the *Employment Act*, a general notice to the employee who is not unionized is required. The same notice should be issued to the Labour officer. This notice is meant to inform the employee that there exists the noted reasons leading to loss of employment.
20. In this case, the respondent was issued with a notice dated 17 January 2020 stating the reasons. It was to serve as a notice taking effect on 19 February 2020.
21. The respondent testified that she was dismissed. After the notice of 17 January 2020, she did not attend work.



22. This non-attendance at work was not addressed by the appellant. The respondent was left at large. An employee who abandons work even in a case of a redundancy commits gross misconduct under the provisions of Section 44(4) (a) of the Employment Act. The duty is upon the employer to address such gross misconduct.
23. In this case, the appellant cannot justify the failure to address the absence of the respondent without good cause. The notice period for the redundancy though not served, the notice period taken into account, and the payment for one month well compensated the respondent.
- Employment terminated for a lawful cause.
- The claim of unfair termination of employment was without any basis.
24. The respondent admitted that she was paid Ksh.22, 000 in severance pay. Under Section 40(1) of the Employment Act, severance pay is tabulated for every full year served. In this case, the respondent was on the shop floor for under a year. Leaving employment on 17 January 2020 and not 19 February 2020 to allow her to clock a full year negated her claim for severance pay. Severance pay is not prorated.
25. However, the appellant failed to address the misconduct of the respondent being absent from work without good cause from 17 January 2020 to 19 February 2020. This gave the respondent the benefit of time to earn severance pay of 15 days for the year worked.
26. On the wage of Ksh.26, 240 a payment of Ksh.13, 120 is sufficient payment.
27. On the claim for leave, under Section 28 of the Employment Act, the respondent was entitled to 21 days of leave based on the basic wage of Ksh.21, 950.
28. On the award of 12 months, indeed as submitted by the respondent, under Sections 43 and 45 of the Employment Act, where employment is terminated unfairly even where the reasons relate to a redundancy, compensation is available under the provisions of Section 49 of the Act. The due process of Section 40 of the Act must be adhered to and where there is a lapse, the employee is justified in claiming compensation.
29. In the case of *Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others*, the Court of Appeal emphasized these provisions and held that;
- ... Section 40(1) of the EA is merely procedural by its tenor. It has to be read together with sections 43, 45 and section 47(5) of EA. It is implicit from the four sections that to establish a valid defence to a claim for unfair termination based on redundancy, an employer has to prove:
- (I) the reason or reasons for termination.
  - (II) that reason for termination is valid and that
  - (II) the reason for termination is fair reason based on the operational requirements of the employer and
  - (IV) that the employment was terminated in accordance with fair procedure.
30. This position is reiterated in the case of *Cargill Kenya Limited v Mwaka & 3 others (Civil Appeal 54 of 2019)* [2021] KECA. The employer must serve the employee with a notice indicating there is a redundancy. If not unionized, the notice to the Labour officer is adequate. The notice must give the reason(s) leading to loss of employment and fundamentally follow a fair procedure.



31. As analysed above, there was due process leading to loss of employment. This did not relate to the respondent's conduct or after a disciplinary process. The project of the appellant ended leading to loss of employment due to no fault of the respondent.
32. To award 12 months' compensation without giving the exceptional reasons for the maximum award was in error. This position is now addressed by this court and the Court of Appeal. Although Section 49 of the Employment Act gives discretion to the judicial officer to assess and award compensation, reasons must be given as to why the rate applied was necessary. Where this relates to the maximum available at 12 months, the exceptional circumstances of the case must be stated. See Kenya Broadcasting Corporation v Geoffrey Wakio [2019] eKLR; Gas Kenya Limited v Odhiambo (Appeal E006 of 2022) [2022] KEELRC; and Ol Pejeta Ranching Limited v David Wanjau Muhoro [2017] eKLR.

In this case, the court finds no evidence of unfair termination of employment and the award of compensation is without merit.

The dues found justified are;

- a. Notice pay Ksh.26,240;
  - b. Severance pay Ksh.13,120;
  - c. Leave pay Ksh.21,950;
34. On the admission that the respondent has since been paid a total of Ksh.34, 170 parties will take accounts and the balances settled.
  35. Accordingly, judgment in Mombasa MCELRC E099 of 2020 is hereby set aside. Judgment is entered for the respondent against the appellant in the following terms;
    - a. Notice pay Ksh.26,240;
    - b. Severance pay Ksh.13,120;
    - c. Leave pay Ksh.21,950;
    - d. Dues (a), (b), (c ) to be paid less Ksh.34,170;
    - e. Each bears its costs in these proceedings and trial court proceedings.

**DELIVERED IN OPEN COURT AT MOMBASA ON THIS 11 DAY OF OCTOBER 2024.**

**M. MBARŪ**

**JUDGE**

