Odaga v Mijengo Investments Limited (Cause E218 of 2022) [2025] KEMC 51 (KLR) (11 March 2025) (Judgment)

Neutral citation: [2025] KEMC 51 (KLR)

REPUBLIC OF KENYA

IN THE NAKURU LAW COURTS

CAUSE E218 OF 2022

PA NDEGE, SPM

MARCH 11, 2025

BETWEEN

JACKLINE ADHIAMBO ODAGA .... CLAIMANT

AND

MIJENGO INVESTMENTS LIMITED .... RESPONDENT

JUDGMENT

1. By Memorandum of Claim dated 9th December, 2022 and filed on 14th December, 2022 (the Memorandum of Claim), the Claimant avers that she was employed by the Respondent as a General Worker from February, 2016 until 07th July, 2022 earning a monthly salary of Kshs. 8,000/-. That during the period of employment with the Respondent, it neglected to issue her with a formal contract of employment in fragrant disregard of law.

2. The Claimant avers that she served the Respondent diligently and performed her obligations with excellence and utmost competence until such time as she was unlawfully declared redundancy by the Respondent. That the circumstances of the unlawful redundancy is that on 07/07/2022, the Respondent casually informed the Claimant to pass by its offices after work and collect her letter from the Respondent. That the Claimant obliged and collected a letter from the Respondent which terminated her employment on account of redundancy. She avers that the Respondent did not terminate her services in the manner prescribed by section 40 of the *Employment Act*, 2007 which effectively renders such termination unlawful and contrary to express statutory provisions of the law and rules. That during the pendency of her employment, the Claimant was required to perform her designated duties by the Respondent, for which she did but was grossly underpaid. That she was further required to work on all public holidays without any supplementary remuneration for the whole period of time she worked for the Respondent. That she was further required to work on Saturdays for 5 hours instead of 4 as provided for in her employment contract with the Respondent and which she was not paid overtime for the extra 1 hour worked. That she worked for long periods of time but

was never allowed to go for her annual leave as required by law and neither was she given any payment in lieu of leave as required by law. That the Respondent neglected, declined and/or refused to pay her severance pay at the rate of 15 days' pay for each completed year of service which failure to pay was contrary to the express provisions of the *Employment Act*, 2007. The Claimant prays for remedies as follows: -

i. A declaration be made declaring that the decision by the Respondent to terminate the Claimant's services on 07/07/2022 on account of redundancy was unlawful and unfair.

ii. All monies emanating from underpayments for the total period of time worked totaling to Kshs. 458,630/85

iii. 12 months compensation for unlawful and unjustified redundancy as provided for under section 49 (c) of the *Employment Act*, 2007 totaling to Kshs. 209,782/2.

iv. 1 month's pay in lieu of notice as provided in the *Employment Act*, 2007 totaling to Kshs. 17,481/9

v. Payments of dues emanating from overtime which remains unpaid for the period of time the Claimant worked on Saturdays at Kshs. 19,200/02

vi. Payments of dues emanating from working on public holidays totaling to Kshs. 52,512/8

vii. Payment of all dues for leave earned but not taken adding up to Kshs. 11,200/-

viii. Payment of all dues for severance/ service pay calculated at the rate of 15 days for every year totaling to Kshs. 10,085/71

ix. Interest on all the claims

x. Costs of the case

xi. Any other relief as the court may deem necessary to grant.

3. The Claimant filed documents in support of her claim which are annexed to the Memorandum of Claim which included: -

i. A copy of Certificate of Service dated 07/07/2022

ii. Copy of Letter of Termination of Employment dated 07/07/2022

iii. Copy of the Claimant's National Identity Card

iv. Copy of Demand Letter dated 27/09/2022

v. Copy of Letter dated 03/10/2022 in response to the demand letter

vi. Copy of Letter dated 05/10/2022 addressed to the Cunty Labor Office

vii. Copy of Letter dated 06/10/2022

viii. Copies of Pay Slip

4. In addition, the Claimant also filed his witness statement dated 09th December, 2022 on 14th December, 2022 wherein she re-iterated the averments in the Memorandum of Claim.

5. The Respondent filed a Response to the Memorandum of Claim dated 27th February, 2023 (the Reply to the Claim) in which it admitted that the Claimant was indeed employed by it. However, it averred that: -

i. in a final meeting held on 07/07/2022 at its place of business, the Claimant herein and other affected employees were notified, in a plenary and individually, of the plan to reorganize the Respondent's workforce resulting in some positions being declared redundant including the Claimant's herein.

ii. That it took this step, having issued a notice to the Nakuru County Labor Office in a letter dated 06th July, 2022 and having notified the Claimant in compliance with the employment law.

iii. It issued the Claimant herein a Termination of Employment letter dated 07/07/2022 where the reasons, which the Claimant was already aware of, were reduced to writing and properly documented.

iv. The Claimant was paid a lumpsum amount, totaling to Kshs. 20,928/- as severance pay and terminal dues by the Respondent, which amount the Claimant accepted by signing on to a Bank Cheque dated 07/07/2022 in acknowledgement that she had no further claims against the employer.

v. The Claimant was aware of the happenings at the Respondent Company, understood the need for redundancy and was part of the open and transparent consultative process that culminated in the termination of her employment.

6. The Respondent also filed a List and Bundle of Documents contemporaneously with the Reply to the Claim which included: -

i. Copy of Certificate of Service dated 07/07/2022

ii. Copy of Letter of Termination of Employment dated 07/07/2022

iii. Copy of cheque dated 07/07/2022

iv. Copy of a letter to Nakuru County Government dated 06/07/2022

7. The Respondent also filed statements of RW1, Joseph Nyoike, its director, RW2, Matthew Munene Muthui, its accountant and RW3, Julius Asande, its close-cutter machine operator, all dated 27/02/2023. All the witnesses testified.

Submissions

8. The Claimant filed her written submissions dated 09th October 2024. In support of the averments in the Memorandum of Claim and Witness Statement, the Claimant submitted briefly that the conditions set out in section 40 of the *Employment Act* must be followed, failure to which, the termination becomes unfair within the meaning of Section 45 of the Act. That the Claimant was never issued with a timely notice or any notice at all. That the Respondent has not demonstrated that a notice of not less than a month (30 days) was issued to the Claimant and the area labor officer prior to the termination. That the letter dated 07/07/2022 was issued on the same day it was to take effect. In support of his submissions, the Claimant cited several decisions, notable one being the decision in Gerrishom Mukhusti Obayo Vrs DSV Air and Sea Limited (2018) eKLR, where the court held thus: -

> In both sections the provision is that the notice is given to the employee and the Labor Officer, or the union and the Labor Officer. It means that in each case, the Labor Officer must be entitled at least one month's notice before the redundancy is effected, and the employee or union must also be notified at least one month before the redundancy is

affected. The word used is notification. This period of one month is intended for the person receiving the notice to confirm that the preconditions of redundancy have been complied with. These preconditions as set out under Section 40 (1) include the communication of reason for, and extent of, the redundancy, and the selection criteria. The period is necessary for any disputes over these issues to be settled before the redundancy is effected. The period also allows for consultations and any negotiations to take place before the redundancy is carried out, and for the Labor Officer to ensure that the redundancy will be carried out in accordance with the Act.

For a redundancy to be valid, the employer must prove that both the Labour Officer and the employee or the employee's union, where there is one, have been notified at least one month before the redundancy takes place.

9. The Respondent filed its written submissions dated 11th October, 2024. Briefly, its submissions were that it complied with the conditions set out under Section 40 of the *Employment Act*, 20227, particularly on issue of notice. That it carried out the process transparently and responded to all queries from all the employees, including the Claimant, before completing the termination process for all employees. That it informed the Nakuru County Labour office of the impending redundancy in compliance with the law as can be proved by the letter to the Labour Officer dated 06th July 2022, which was more than 2 months after the Respondent had started deliberations with its employees on the restructuring. That in addition, the Respondent issued a general notice of termination to all employees, including the Claimant herein, which elicited consultations between the employer and the employees before finally issuing individual notices to each employee on 07/07/2022. That the Claimant was aware of the happenings at the Respondent Company, understood the need for termination of her employment, and all other employees, and was part of the consultative process that culminated in termination of her employment. That the Claimant attended all the meetings held to discuss the issue, including the final meeting held on 07/07/2022 and was part of the deliberations. That all the employees were finally released on 07/07/2022 and each was issued with a letter and a cheque and each signed on the letter signifying that they were satisfied that they were satisfied that what they had agreed to during the deliberations. That the signing of the letter and the cheques was an indication that the employee had no further claim against the employer. That if the Claimant had any objection to the same, then she could have raised it during the meetings or at the time the letter, cheque and certificate of service were being handed to her. That the termination of the Claimant's employment was therefore both procedurally and substantively fair in accordance with the provisions of Section 40 of the *Employment Act*, 2007. It was further submitted that the redundancy procedures notwithstanding, the parties herein agreed to terminate the employment by mutual consent. That such a termination by mutual consent as had happened herein would cure any non-compliance with the termination procedures anticipated in the contract of employment. On the issue of termination by mutual consent, learned counsel for the Respondent cited several foreign decisions and only one Kenyan decision in William Barasa Obutiti Vrs Mumias Sugar Company Limited (2006) e KLR, which is however pre-2007 *Employment Act*.

Determination

10. There is no dispute that the Claimant was declared redundant. Thus the remaining issues for my determination are whether the redundancy was in accordance with the law and if the Claimant was paid her full terminal dues. Redundancy is provided for in Section 40 of the *Employment Act* as follows:

40. Termination on account of redundancy

(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 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.

(2) Subsection (1) shall not apply where an employee's services are terminated on account of insolvency as defined in Part VIII in which case that Part shall be applicable.

(3) The Minister may make rules requiring an employer employing a certain minimum number of employees or any group of employers to insure their employees against the risk of redundancy through an unemployment insurance scheme operated either under an established national insurance scheme established under written law or by any firm underwriting insurance business to be approved by the Minister.

10. Section 40 sets out the procedure for redundancy. Under Section 40(1)(a) and (b) the employer is required to notify the union and the Labour Officer at least one month before the redundancy is effected, of the intention to declare the employee redundant. Subsection 40(1)(b) required the employee and the Labour Officer to be notified where the employee is not a member of the union.

11. The Court of Appeal in the case of Thomas De La Rue (k) Ltd Vrs David Opundo Omutelema (2013) e KLR found that the notification period of one month provided for in Subsection 40(1)(a) applies to the notification under Subsection 40(a)(b) as well when the court stated –

> ... in our view, a purposive reading and interpretation of the statute would mean the same notice period is required in both situations. We do not see any rational reason why the employee who is not a member of a union should be entitled to a shorter notice.

10. It is clear that in both sections the provision is that the notice is given to the employee and the Labour Officer, or the union and the Labour Officer. It means that in each case, the Labour Officer must be

given at least one month's notice before the redundancy is effected, and the employee or union must also be notified at least one month before the redundancy is effected.

11. The Respondent in its Reply to the Claim contends that it followed due process and complied with the applicable law but has not produced any evidence to show that the requisite one months' notification was issued to both the Claimant and the Labour Officer. The fatality of this inaction by the Respondent is expressed in the Superior Court findings in the case of Gerrishom Mukhutsi Obayo Vrs Dsv Air And Sea Limited, supra, which was impressively cited by the learned counsel for the Claimant as quoted hereinabove.

12. The facts of Gerrishom Mukhusti Obayo case (Supra) are relatively similar to the present case in that while the Respondent contends it communicated to the Claimant during various management meetings of its financial and operational struggles, there is no proof that the said meetings were indeed held or that a notification was issued to the Claimant or the Labour Officer in compliance with the provisions of Section 40(1)(b).

13. The Respondent instead issued a letter titled 'Termination of Employment' which appropriately notified the Claimant of her termination and not the intention to terminate, essentially jumping the gun to effectively terminate the Claimant with immediate effect on account of redundancy. The uncontroverted testimony of the Claimant was that she received the letter on the same day she was terminated. I find all the grievances by the Claimant against the Respondent to have been proved to the required standard. Section 10(6) and (7) as read with Section 74 of the *Employment Act* provides that where an employer fails to produce prescribed records the burden of proving or disproving an allegation by the employee shifts to the employer. In this case there is no evidence of a mutual agreement to terminate, issuance of the notices of intention to terminate by way of redundancy served to the Labour Officer and the Claimant or indeed any other relevant employment records other than the letter of termination. On whether there was termination by mutual agreement, I find no evidence of there being a valid separation agreement between the parties herein as none was exhibited herein, except a termination letter on account of redundancy.

14. On these facts alone, the only conclusion that may be drawn is that the redundancy did not comply with the provisions of Section 40 and amounts to an unfair termination. I need not dwell further into the particulars of the redundancy process and will now proceed to consider the reliefs sought by the Claimant.

Payment in lieu of Notice

10. Taking into account that the Claimant was entitled to both the one month's notice of intention to terminate and a month's notice for termination, I find that the Claimant is entitled to two months' notice and assess the same at KES 34,963/80. She however pleaded for Kshs. 17,481/90, being one month's salary and I am therefore bound by that figure which I do hereby award.

Unpaid Leave

10. The Claimant seeks unpaid leave of 21 days per year for the 2 years. The Respondent has only made a blanket denial of leave days owed to the Claimant but has failed to provide any proof as required under Section 10 as read with Section 74 of the *Employment Act*. The Claimants averments stand uncontroverted to the standards set by the *Employment Act* and I therefore award the Claimant unpaid leave of 42 days which amount to KES 11,200/- as pleaded by the Claimant.

Severance Pay

10. The Claimant prays for Kshs 10,085/71/= as severance pay. Section 40(1)(g) of the *Employment Act* provides for the payment of 15 days' pay for each completed year of service. I award the Claimant KES 10,085/71 as pleaded.

Compensation

10. Having found the Claimant's termination was un-procedural and unfair, I award the Claimant 3 months' salary as compensation amounting to Kshs. 52,445/70. In making this award I have taken into account the Claimant's length of service, her position and the Respondent's conduct in the termination process.

Overtime, Public Holidays and Underpayments

10. I further find no evidence to controvert the Claimant's claim for overtime, public holidays and underpayments. I do hereby award her the amounts claimed of Kshs. 19,200/02, Kshs. 52,512/80 and Kshs. 458,630/85 being payment for overtime, public holidays and underpayments, respectively. Contrary to the learned counsel for the Respondent's submissions on limitation of time, these infringements were continuous in nature and their claims herein are therefore not time-barred as argued.

11. There is overwhelming evidence that the Claimant received a cheque of Kshs. 19,384/-. Thus the amount received shall be deducted from the final award herein. The cheque was exhibited by the Claimant herein as CEXH. No. 7, confirming that she does not dispute its authenticity. It is noteworthy to mention herein that the cheque that was exhibited by the Respondent, alongside other documents for the Respondent related to a different employee and not the Claimant herein.

Conclusion

10. In conclusion an order of declaration be and is hereby made declaring that the decision by the Respondent to terminate the Claimant's services on 07/07/2022 on account of redundancy was unlawful and unfair and judgment is entered in favour of the claimant against the respondent as follows: -

    i. Underpayments....................................Kshs. 458,630/85

    ii. Compensation under Section 49 (c) of the *Employment Act*, 2007.................... Kshs. 52,445/70

    iii. Notice pay.. Kshs. 17,481/90

    iv. Overtime... Kshs. 19,200/02

    v. Public Holidays....................................... Kshs. 52,512/80

    vi. Unpaid Leave... Kshs. 11,200/-

    vii. Severance pay...................................... Kshs. 10,085/71

    Total Award .... KES 621,556/98

    Less... Kshs 19, 384/-

    NET Award .... KSHS 602,172/98

    viii. The Respondent shall pay the Claimant's costs of this suit.

ix. The decretal sum shall attract interest at court rates from date of judgment until payment in full.

DATED, SIGNED AND DELIVERED AT NAKURU ON THIS 11TH DAY OF MARCH 2025

ALOYCE-PETER-NDEGE

SENIOR PRINCIPAL MAGISTRATE

In the presence of;

Claimant's Counsel: Njanja

Respondent's Counsel: Kerubo h/b Mwiti

Claimant: N/A

Kerubo: We seek for 30 days stay of execution

Njanja: No objection

CT: 30 days stay of execution granted.