Onyango v Globology Limited (Appeal E013 of 2024)
[2025] KEELRC 3045 (KLR) (4 November 2025) (Judgment)

Neutral citation: [2025] KEELRC 3045 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

APPEAL E013 OF 2024

NZIOKI WA MAKAU, J

NOVEMBER 4, 2025

BETWEEN

FRANCIS OUMA ONYANGO ..... APPELLANT

AND

GLOBOLOGY LIMITED ..... RESPONDENT

(Being an appeal from the judgment of Hon. E. N. Mwenda (PM) delivered on 18th January 2024 in Kisumu CMC ELRC No. E168 of 2021)

JUDGMENT

1. In a judgment delivered on 18th January 2023 the Trial Magistrate dismissed the Appellant's claim, holding that he had failed to prove his case on a balance of probabilities. The Learned Magistrate found that the Appellant neither pleaded redundancy nor challenged the lawfulness of his termination, and consequently, those issues were not in contention. Further, the Trial Court held that the claims for dues were unsubstantiated as no credible evidence had been adduced in support thereof. Dissatisfied with that outcome, the Appellant lodged this appeal contending that the magistrate erred in law and fact by:

    a. Failing to declare his termination unlawful;

    b. Finding that the Respondent had complied with the redundancy procedure under section 40 of the *Employment Act*;

    c. Failing to award him compensation for assisting in rescuing passengers on 2nd May 2020;

    d. Holding that the rescue was within the scope of his employment;

    e. Finding that his claim for a work place injury was not elicited in the claim;

    f. Dismissing the suit and awarding costs to the Respondent;

g. Being biased against him.

2. On the strength of these grounds, the Appellant urged this Court to allow the appeal, set aside the decision of the Trial Court, and substitute it with an order allowing his claim as prayed.

3. In compliance with court directions both parties filed written submissions.

Appellant's Submissions

4. The Appellant identified three issues for determination, namely:

   i. whether the withholding of his dues was illegal and unfair;

   ii. whether the declaration of redundancy and subsequent termination was lawful; and

   iii. whether he is entitled to costs.

5. On the first issue, the Appellant submitted that the decision to withhold a portion of his salary and other dues due to the adverse effects of the Covid-19 pandemic and the sinking of MV Ringiti, which it alleged had disrupted its operations was unlawful and contrary to the provisions of the *Employment Act*. He highlighted the letter dated 28th May 2020, in which the Respondent placed him on compulsory paid leave at half salary. The Appellant relied on the case of Kenya Union of Commercial Food and Allied Workers v Tusker Mattresses Limited [2020] eKLR, where the Court held that the Covid-19 pandemic did not constitute an act of God capable of frustrating an employment contract. The Court in that case emphasized that employers remained bound by the *Employment Act* and could not unilaterally vary terms of employment without consultation or due process. The Appellant further relied on sections 17 and 19 of the *Employment Act*, which oblige employers to pay full wages for work done and only permit deductions in the limited circumstances prescribed under the law. He maintained that none of those statutory grounds justified the withholding of his wages on account of the pandemic or operational challenges. Accordingly, he urged that he was entitled to the dues sought in the claim. To support this position, the Appellant cited the decision in the case of Daniel Mburu Muriu v Hygrotech East Africa Ltd [2021] eKLR, where the Court observed that the maximum award of twelve months' gross salary is appropriate in exceptional cases involving malice, discrimination, or other improper motives in termination.

6. On the second issue the Appellant submitted that the Respondent failed to satisfy both the substantive and procedural requirements for redundancy as set out under section 40 of the *Employment Act*. He asserted that his employment contract was valid until March 2021, but was prematurely terminated without justification. It was his further submission that no credible evidence such as audited financial statements or operational records was produced to demonstrate a genuine reduction in business or inability to sustain him in employment. He maintained that under section 2 of the *Employment Act*, redundancy denoted the involuntary loss of employment through no fault of the employee due to abolition of office or reduced operational requirements. In view of the foregoing, he contended that the Respondent had failed to prove a valid and fair reason for termination as required by section 45(2)(b)(ii) of the Act.

7. Regarding the procedure adopted in his termination, the Appellant submitted that the Respondent failed to adhere to the mandatory procedure prescribed under section 40(1) of the *Employment Act*, which require an employer contemplating redundancy to notify both the Labour Officer and the affected employee (or their union) at least one month before termination, engage in consultations, apply objective selection criteria, and pay all terminal dues promptly. The Appellant maintained that whereas the Respondent notified the Labour Officer by a letter dated 1st July 2020, it proceeded to

terminate his employment on 15th July 2020, only fifteen days later contrary to the statutory thirty-day notice period. The Appellant further asserted that he was never personally served with a redundancy notice and only became aware of the Labour Officer's letter after filing the suit.

8. In support of his position he cited numerous authorities, firstly on the case in Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others [2014] eKLR, where the Court of Appeal emphasized that redundancy must be both substantively justified and procedurally fair, observing that the essence of notice is to allow room for consultation and consideration of alternatives to termination. He then cited the decision in the case of KUDHEIHA v Aga Khan University Hospital Nairobi (Cause No. 815 of 2015) as cited in Bernard Misawo Obora v Coca Cola Juices Kenya Limited [2015] eKLR, where the Court reiterated that compliance with section 40 is mandatory and any deviation renders the redundancy unfair and unlawful. Thirdly, he cited the case of Addah Adhiambo Obiro v Ard Inc [2014] eKLR, where the Court similarly held that failure to issue both the employee and the Labour Officer with at least one month's notice before redundancy contravenes the law. Fourthly, he cited the case of Gerrishom Mukhutsi Obayo v DSV Air and Sea Limited [2018] eKLR, where the Court held that notices to the employee and Labour Officer is not a mere formality but a vital procedural safeguard that allows time for verification, consultation, and settlement before termination takes effect. And lastly, he cited the case of Margaret Mumbi Mwango v Intrahealth International [2017] eKLR, where the Court clarified that redundancy notices under section 40(a) and (b) must be issued simultaneously to the employee or union and the Labour Officer, and that a separate termination notice under the contract should follow thereafter.

9. The Appellant further submitted that the Respondent also failed to engage in consultation with him or other employees as required under Article 13 of the ILO Recommendation No. 166 and Convention No. 158 (Termination of Employment Convention, 1982), both of which require employers contemplating redundancy to provide adequate information and to consult with workers or their representatives to mitigate the effects of termination. He cited the cases of Williams v Compare Maxam Ltd [1982] ICR 156 and Cammish v Parliamentary Service [1996] 1 ERNZ 404, which underscore that consultation must be real and not a mere formality. The Appellant submitted that the Respondent neither disclosed the selection criteria used to identify him for redundancy nor produce any report by the Labour Officer to confirm compliance with statutory procedure. Reliance was again placed on the decision in Gerrishom Mukhutsi Obayo v DSV Air and Sea Limited (supra) and Hesbon Ngaruiya Waigi v Equatorial Commercial Bank Limited [2013] eKLR, where it was held that redundancy must be a transparent and participatory process. The Appellant also referred to Article 15 of the ILO Recommendation No. 119 (Termination of Employment Recommendation, 1963), which provides that the selection of workers for redundancy should be based on objective and fair criteria such as skill, ability, length of service, and family circumstances. For the foregoing reasons the Appellant submitted that the Respondent's redundancy exercise neither met the substantive threshold nor satisfied the procedural safeguards required under section 40 of the *Employment Act* and the relevant international labour standards, and was thus unlawful.

10. Finally, he urged that having proved unlawful termination, he was entitled to the costs of the suit, submitting that costs follow the event and should therefore be borne by the Respondent as the author of the impugned termination.

Respondent's Submissions

11. In opposition, the Respondent identified two issues for determination:

    a. whether the redundancy of the Appellant was valid, and

b. whether the Appellant was entitled to the reliefs sought.

12. On the first issue the Respondent maintained that the redundancy complied with section 40 of the *Employment Act*. It asserted that the decision to declare the Appellant redundant was both substantively justified and procedurally fair. It drew attention to the memo dated 28th May 2020 (REXH 6) in which staff were informed of the intention to commence redundancy proceedings due to the adverse economic impact of the Covid-19 pandemic and the sinking of MV Ringiti, which had reduced revenue by fifty percent. The Respondent further highlighted that on the same date, the Appellant was placed on compulsory paid leave at fifty percent salary as a temporary measure to mitigate financial constraints. Subsequently, by a letter dated 1st July 2020 addressed to the County Labour Officer, Kisumu County, the Respondent communicated its continued operational difficulties and notified the Labour Office of its decision to declare six employees redundant effective 1st August 2020. It was therefore the Respondent's submission that both the Labour Officer and the affected employees were duly notified in accordance with the law. Moreover, it added that during cross-examination, the Appellant admitted having been informed via the said memo of the company's financial difficulties and the possibility of staff layoffs. It submitted that in view of section 40 of the *Employment Act*, it was permitted to terminate employment contracts on account of redundancy arising from economic, technological, structural, or similar reasons.

13. On the second issue regarding entitlement to reliefs, the Respondent submitted that the Appellant had failed to prove any of the claims sought. Regarding the claim for "loss of monies outstanding and other allowances," the Respondent asserted that it was inchoate and incomprehensible, and unsupported by law or evidence. In respect of the claim for Kshs. 1,692.31/- in accrued allowances the Respondent submitted that it was unfounded as, the Appellant had been paid all allowances for every year worked, as demonstrated by his payslips and the Respondent's crew rotation memo dated 28th October 2019. With respect to the claim for Kshs. 28,012/- terminal dues the Respondent contended that there is no legal basis for the argument that terminal dues must be paid before the issuance of a termination letter. Concernining the claim for Kshs. 191,296/- allegedly as accrued leave, the Respondent submitted that the Appellant had utilized all his leave days, hence he was not entitled to any payment under this head. It drew attention to his payslip for June 2020 and his compulsory paid leave letter dated 29th May 2020, which indicated that he had utilized all his leave days.

14. Regarding compensation for salvage of MV Ringiti on 2nd May 2020, the Respondent submitted that the claim was baseless and contradicted the evidence on record. It drew attention to the testimonies of RW1 and RW2, who confirmed that the Appellant was on a ten-day sick-off from 4th to 14th May 2020, and that the salvage occurred on 12th May 2020, not 2nd May 2020 as alleged. The Respondent added that even if the Appellant had participated, the act would have been within the scope of his duties as crew member, and it would be unreasonable to seek payment for assisting in a rescue operation intended to save human life. The Respondent further submitted that the Appellant's pleadings were inconsistent with the evidence regarding the date of the salvage operation. It highlighted that the Appellant erroneously pleaded that the salvage mission took place on 2nd May 2020 yet it took place on 12th May 2020 and that therefore anything under that head was not awardable. It asserted that parties are bound by their pleadings and cited the Supreme Court of Nigeria in the case of Adetoun Oladeji (Nig.) Ltd v Nigeria Breweries Plc SC 91/2002, where it was held that any evidence led which does not support the averments in the pleadings must be disregarded. The Respondent also relied on the decision in Eastern Produce (K) Ltd v John Lumumba Mukosero [2008] eKLR, where the Court held that the mere filing of a suit does not in itself establish a prima facie case and that the burden of proof always rests upon the claimant to establish liability on a balance of probabilities. Further reliance was placed on the decision in the case of David Getare Nyangau v Houseman General Contractors Ltd

[2013] eKLR, where the Court reiterated that a party seeking relief must prove entitlement to the same and that the burden of proving unfair termination lies with the employee, while the employer bears the burden of justifying the grounds for termination. In conclusion, the Respondent urged the Court to find that the redundancy was lawful and that the Appellant had failed to prove his case. It therefore prayed that the appeal be dismissed with costs.

Disposition

15. This being a first appeal, this Court is enjoined to evaluate and examine the record before the Magistrates' Court and the evidence presented before it in order to arrive at its own conclusion. This principle of law was settled in the celebrated case of Selle v Associated Motor Boat Co. Ltd [1968] EA 123 where the Court of Appeal outlined the duties of a first appellate court as follows:

> ...is not bound necessarily to accept the findings of fact by the court below. An appeal to this 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...
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> [Emphasis supplied]

16. Having properly warned myself that I neither saw nor heard the Appellant and the Respondent testify, I come to the following determination having evaluated the evidence they presented in the Trial Court and which evidence and documents in support thereof are before this Court.

17. The issue that was before the trial court was a dismissal of the Appellant. In his pleadings he did not claim termination on account of redundancy. The statement of claim did not articulate the manner of termination only seeking various reliefs such as the withheld terminal allowances and dues. The Learned Magistrate did not find for the Appellant and this Court is handicapped by the claim as pleaded. The fact that it is now asserted there ought to have been various considerations of the parameters attendant to a termination on account of redundancy, there is no relief the Appellant can obtain as on appeal the case cannot be retried or reheard. The Appellant would have been entitled to relief had he articulated a claim for redundancy as the sums paid fell short of the dues he would have been entitled to such as severance pay, notice, leave dues and salary for the month of July 2020.

18. For avoidance of doubt, by way of obiter, covid 19 was an act of God that affected enterprises to the point where some closed shop and others retrenched. I do not agree that the Covid-19 pandemic did not constitute an act of God capable of frustrating an employment contract. It would be absurd to hold otherwise as we all are aware people were unable to travel to their places of work and many a contract was thereby frustrated.

19. In sum I disallow the appeal for the reasons outlined above on the pleadings and evidence laid before the Learned Magistrate. I would dismiss this appeal and order each party to bear their own costs for the claim before the Learned Magistrate and on this Appeal.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF NOVEMBER 2025

NZIOKI WA MAKAU, MCIArb.

JUDGE