REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

ELRC CAUSE E023OF 2022

KUDHEHIA WORKERS……CLAIMANT

VS

NYALI GOLF AND COUNTRY CLUB LIMITED……RESPONDENT

JUDGMENT

Background

1. The Claimant, acting for Jairus Oloko Munala [the grievant], through an Amended Memorandum of Claim dated 7th March 2023, sued the Respondent, seeking declaratory and compensatory remedies against them.

2. The Respondent opposed the claim through an Amended Statement of Response dated 8thNovember 2022. The Respondent denied that the Grievant had a cause of action against them. Further, he was entitled to the reliefs sought.

3. At the hearing, the Grievant testified in support of his case, while the Respondent called one witness to testify on its behalf. The parties adopted their witness statements filed herein as their respective evidence in chief, and adopted the documents filed under their lists of documents as their documentary evidence.

Claimant's case

4. It was the Claimant's case that at all material times the Grievant was an employee of the Respondent, having been employed on 1 August 2010 in the position of an Indian Chef. His starting monthly salary was KShs. 19,500.
5. In 2019, the Executive Chef, Mr Mohammed Nassoro, left the employment of the Respondent. Following this, his duties were handed over to the Grievant to continue performing them. The taking over of the Executive Chef's responsibilities was carried out at the instructions of the Manager, Eunice Musila.
6. It was contended that the Grievant performed his duties diligently and with dedication until 1stOctober 2021, when the Respondent unfairly terminated his employment, alleging that his position had become redundant. In the letter

terminating his employment, allegedly on account of redundancy, the Respondent stated that they had employed a new executive chef. The termination of his employment due to redundancy was unjustified.

7. From 2019 to the time of termination of his employment in 2021, the Grievant was performing the duties of an executive chef at the Respondent's.
8. The Grievant worked for the Respondent for a total of 10 years.
9. The Grievant contended that the termination of his employment was a retaliatory action following his participation and signing of affidavits in another case, which had been initiated by the Claimant union against the Respondent, Cause No. E008 of 2021. He signed the affidavits in his capacity as a Shop Steward.
10. The Court delivered a ruling in the above-mentioned matter on 20th May 2021. Subsequently, the Respondent asked him to take his leave in June 2021. Indeed, he did take it. In July 2021, the Respondent unjustifiably extended his leave until the time he was terminated on 1st October 2021. He stated that this could not be a coincidence.
11. Participation in activities of a trade union does not constitute fair reasons for termination of an employee's employment.
12. The termination of the Grievant's employment was procedurally unfair and substantively unjustified. It failed to meet the requirements for both aspects.
13. It was contended that by reason of the premises, the Grievant is entitled to;

I. Five [5] months' pay in lieu of notice……. KShs. 263,620.00
II. Severance pay for 10 years…… KShs. 527,240.
III. Compensation for Public Holidays worked for 7 years……KShs. 246,045.00IV. Compensation for overtime worked……KShs. 188, 819.64.
V. Gratuity pay for 10 years worked……KShs. 421,792.00
VI. Long service award

a) Completion of 5 years…… KShs. 3,150.00
b) Completion of 10 years…… KShs. 3,650.00

VII. Acting allowance for period November 2019-September 2021……. KShs. 282,348.00 VIII. Compensation for unfair termination ……KShs. 632,688.00.

Respondent's case

14. It was the Respondent's case at all material times, the Grievant was its employee and a member of the Claimant union. He was first employed on 1st August 2010 on a seasonal contract for a period of six months, which contract terminated on 31st January 2011. On 1st December 2011, the Grievant was again employed as a seasonal contractor on a one-year contract terminating on 31st December 2012, earning a monthly salary of KShs. 19,500.
15. The grievant was again employed by the Respondent on 12th November 2014 as an assistant head cook, a position he held until the termination of his employment on 1st October 2021.

16. Contrary to the Grievant's assertion, he only retained continuous employment for seven [7] years, from 2014 to 2021. Not ten [10] years.
17. The Grievant was issued with a redundancy notice as required by the Employment Act because of the restructuring of the Respondent's operations, and the selection of the Grievant for redundancy was based on his performance.
18. Contrary to the Claimant's assertions, the Grievant was not a diligent and satisfactory performing employee. He had been issued show-cause and warning letters on various occasions for his poor, unsatisfactory performance.
19. On 1st September 2021, the Grievant was served through the Claimant with a thirty [30] days' notice of intended redundancy in accordance with the stipulations of Section 40[1][c] of the Employment Act. After the lapse of the 30 days' notice the Grievant was lawfully and procedurally terminated through a letter dated 1st October 2021.
20. Subsequently, the Grievant was informed of his terminal dues vide a letter dated 1st October2021, which he refused to collect.
21. It was further contended that as the Grievant was only continuously employed by the Respondent for seven [7] years, he is not entitled to five [5] months' notice pay but three [3] months', KShs. 158, 172.00.
22. The Claim for severance pay is admitted safe that it should be computed on seven [7] years, and not ten [10] years as sought by the Claimant. Thus KShs. 369, 068.00.
23. The Grievant was often compensated for public holidays worked. His claim for compensation under the head is without merit. At the time of separation, there were no overtime compensation dues outstanding in his favour.
24. Under Clauses 17 and 19 of the Collective Bargaining Agreement between the Respondent and the Claimant Union, the Grievant was and is not entitled to Gratuity. A long service award cannot be granted to him since he did not work continuously as contemplated by the Collective Bargaining Agreement to qualify for the benefit.
25. The Respondent is willing to issue the Grievant a Certificate of Servicer as required by law.

Analysis and Determination

26. I have carefully considered the parties' pleadings, evidence, and the respective submissions by their Counsel, and the following issues emerge for determination: -

a) Whether the termination of the Grievant's employment on account of redundancy was fair.
b) Whether the Claimant is entitled to the reliefs sought.

27. It is not in contestation that the Grievant's employment was terminated on 1st October 2021, on account of redundancy. The Respondent contended that the termination was substantively justified and procedurally fair, while the Claimant suggested that it was camouflaged, without substantive justification and procedurally unfair.

28. In cause No. ELRC 1332 of 2018 Showkat Hussein Badat v Oshwal Education M Relief Board, this Court stated:
“50. The defining characteristic of termination due to redundancy is the absence of fault on the part of the employee. It is a species of “no-fault termination. One cannot be off mark to state that it is for this reason that the Employment Act places particular obligations on the employer, most of which are directed towards ensuring that those employees to be dismissed are treated fairly”.
29. Both section 2 of the Employment Act 2007 and section 2 of the Labour Relations Act define 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 employer's initiative where services of an employee are superfluous and practices commonly known as abolition of office, job or occupation and loss of employment”.
30. The locus classicus on redundancy under Kenyan law is Kenya Airways Limited versus Aviation and Allied Workers Union and 3 others (2014) eKLR, where the Court of Appeal stated: “There are two broad aspects of this definition. The first one is that the loss of employment in redundancy cases has to be by involuntary means and at the initiative of the employer; it should not be a contrived situation. It has to be non-volitional. I understand this to refer to a situation, in most cases, an economic downturn, brought about by factors beyond the control of the employer, which leaves the employer with no option but to take an initiative, the consequences of which will be inevitable loss of employment……”
31. A redundancy situation may arise if significant changes to the mode of production, programmes, or activities of an employer entity are likely to cause, or have caused, a reduction in the necessary labour force, along with a surplus of labour.
32. While the law does not recognise an inherent right to lifelong employment, the social equilibrium established within a constitutional framework, in which the right to fair labour practices is recognised as a fundamental right, affords employees protection against unfair dismissal. At the same time, it allows employers to terminate an employee for a justifiable reason, provided they adhere to appropriate procedural standards.
33. The employer bears the onus of demonstrating to the court that a legitimate redundancy situation existed, thereby justifying a fair and valid rationale for terminating the employee's employment. Throughout his case, the Claimant maintained that the Respondent terminated his employment without any genuine basis. Essentially, the Claimant contended that the events constituted an unfair termination disguised as redundancy.
34. Due to the opposing positions taken by the parties regarding the alleged redundancy, it is this court's responsibility to determine whether there was a genuine redundancy. The Respondent’s Counsel argued that the Respondent had demonstrated a genuine redundancy; accordingly, the termination of the Claimant’s employment was based on a fair and valid reason. These submissions are unpersuasive for the reasons that will emerge shortly.

35. In my view, it is insufficient for an employer merely to state that the organisation or entity underwent restructuring, resulting in the redundancy of certain positions. Employers are expected to provide reasonable details, and this expectation intensifies when the employee disputes the redundancy, perceiving it as obfuscated. I have not lost sight of the fact that the Respondent asserted that the redundancy followed a restructure of its operations.
36. The process of restructuring and declaring redundancy is not a single event; rather, it constitutes a series of actions. In circumstances such as those presented in the current case, it is reasonable to anticipate evidence from the employer regarding: when the concept of restructuring was first conceived; the rationale behind this concept; the dates when discussions about the idea occurred; the specific date when a decision was made regarding the restructuring; and the considerations regarding the steps necessary to facilitate the restructuring process, culminating in the exit of those affected.
37. I have carefully examined the Respondent's pleadings and the evidence provided by their witness, and I do not hesitate to conclude that the evidence lacks the requisite specificity and is overly general. The pleadings and the evidence regarding the restructuring are ambiguous.
38. The letter dated 1st September 2021, captioned "Notice of Intended Redundancy -Jairus Munala, in my view, and the termination letter do not accurately reflect the existence of a redundancy situation. The Respondent explicitly stated in the letter that it had recruited a new Executive Chef, thereby rendering the Grievant redundant.
39. This Court observes that the Respondent did not challenge the evidence presented by the Grievant, who testified that there previously existed an Executive Chef position while he was serving as an Assistant Head Chef. The Grievant was only requested to serve temporarily, in an acting capacity, as the Executive Chef. Moreover, the Respondent has neither argued nor demonstrated that the Assistant Chef position was ever filled by another individual or that it was abolished on the basis of redundancy. In my opinion, the appointment of the newly recruited Chef was not intended to
replace the Grievant, but rather to fill a longstanding vacancy. It is for this reason that I am persuaded that the termination of the Grievant's employment on account of redundancy was an unfair termination camouflaged as a redundancy termination.
40. In light of the premises articulated above, this court encounters no difficulty in asserting that the termination of the Claimant's employment on the grounds of alleged redundancy lacked substantive justification.
41. Assuming I am wrong on this, for the reasons hereinafter, this court will still find the termination unfair due to a lack of procedural fairness. Section 40 of the Employment Act elaborately outlines the steps an employer must take when terminating an employee's employment on the grounds of redundancy. The section provides:
"An employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions – 5 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 out 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.''. 42 A. No doubt, the Grievant was issued with a letter dated 1st September 2021, captioned as set out above. The inquiry that this court is tasked with addressing is whether the letter possessed the characteristics of the notice(s) contemplated by section 40(1) of the Employment Act, and whether it was sufficiently formulated to fulfil the objectives for which the provisions under that section are designed.

42. In the German School Society v Helga Ohany as Consolidated with Civil, 342 of 2018 Helga Ohany v The German School Society [2023] KECA 894[KLR], Court of Appeal stated;
"Having regard to the legislative intention of the provision of section 40 of the Employment Act, and International Law and decided cases, we find that consultation on an intended redundancy between the employer and the employee is implied by section 40[1][a]and [b] of the Employment Act. Moreover, consultation is also specifically required by Article 47 of the Constitution and the Fair Administrative Action Act. Article 47 and section 4[3] of the Fair Administrative Action Act provide that where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give notice to the person affected by the decision. [See.
Cargill Kenya Limited v Mwaka & Others, para 35-37]."

43. The correspondence delivered to the Grievant resembles a termination letter significantly. It cannot be interpreted otherwise. No redundancy notice was issued or served.
44. A redundancy notice, which I have concluded was neither issued nor served in the current matter, gives rise to the event of consultation prior to the declaration of redundancy. In accordance with our legal framework, consultation is imperative. The significance of consultation in a redundancy process cannot be understated. This necessity was aptly articulated by Maraga JJA (as he then was) in the Kenya Airways case (supra). The Respondent failed to present any evidence indicating that consultations occurred prior to the termination. No evidence was presented to demonstrate that consultations did not take place.
45. Pursuant to section 40 of the Employment Act, an employer claiming that an employee's termination was based on redundancy bears the obligation to demonstrate that an objective selection criterion was employed for those to be affected. The Grievant was the sole employee selected from the Respondent's kitchen department. The Respondent merely stated that they considered the Grievant's performance and decided that he was the one to be dismissed. The vital issue, which the Respondent's evidence did not address, is how the performance was weighted and against whom.
46. In the upshot, I find that the termination was procedurally unfair.
47. I now turn to consider whether the reliefs sought by the Claimant can be availed to the Grievant. This Court notes that the Respondent admits that the Grievant is entitled to notice pay, but only to the extent of three months' salary under the Collective Bargaining Agreement, since he worked for only seven [7] continuous years. Clause 19 [f] of the CBA does not anchor the extent of severance pay on "continuous years worked" but on "each completed year of service". In my computation, the Grievant's cumulative years of service were 10. The formula the Respondent seeks to apply is off the mark.
48. Clause 20[d] of the Collective Bargaining Agreement provided;

"If an employee's services are terminated before attaining the appropriate retirement age, he shall be entitled to gratuity equal to 24 days' pay for each completed year of service, provided that he/she has worked for 5 years and above as provided for in paragraphs [b] and [c] of this Clause. Gratuity shall also be paid in cases of resignation. Provided that an employee who is terminated or resigns after completion of 15 years of service will be entitled to thirty [30] days' pay for each completed year of service. An employee who resigns and has worked for less than 15 years will be entitled to 24 days' pay for each completed year.

49. In light of this explicit stipulation of the CBA, I am not able to fathom what informs the Respondent's assertion that the Grievant is not entitled to Gratuity. I hold he is entitled.
50. During his cross-examination, the Grievant indicated that on all occasions when he worked during public holidays, the Respondent would grant him a day off in compensation for the work performed on the public holiday. Consequently, he is not entitled to the compensation sought for work done during public holidays.

51. Claiming compensation for overtime, the Claimant merely threw figures at the court without any supporting evidence from the Grievant. Consequently, I am compelled to hold that the claim was not proved.
52. Having found, as I have set out above, that the Grievant worked for a cumulative period of ten years, I hold that he is entitled to a Long Service award as sought in the Amended Statement of Claim.
53. Section 49[1][c] of the Employment Act bestows authority on this Court to grant compensatory relief for an employee for unfair termination of their employment. However, it is pertinent to note that the exercise of the authority is discretionary. It is exercised on a case-by-case basis.
54. I have carefully considered the circumstances under which the Grievant's employment was terminated, including the fact that the termination was camouflaged as a redundancy termination, an act on the part of the Respondent that easily passes for an unfair labour practice, and the length of his service, and hold that he is entitled to the compensatory relief, to an extent of six months' gross salary.
55. In the upshot, Judgment is hereby entered for the Grievant in the following terms;

I. A declaration that the termination of his employment on account of redundancy was procedurally and substantively unfair.
II. Notice pay…… KShs. 158, 172.00.
III. Severance Pay……KShs. 527, 240,00.
IV. Gratuity…… KShs. 425, 792.00.
V. Long Service award……KShs. 6,800.00
VI. Compensation pursuant to the provisions of Section 49[1][c] of the Employment

Act,……KShs. 316, 344.00

VII. The Respondent shall issue him a certificate of service within 30 days of this Judgment.
VIII. Costs of this suit.

READ, SIGNED AND DELIVERED THIS 16TH DAY OF APRIL 2026.

OCHARO KEBIRA
JUDGE