National Oil Corporation of Kenya v Cheruiyot & 37 others (Civil Appeal 283 of 2020) [2025] KECA 148 (KLR) (7 February 2025) (Judgment)

Neutral citation: [2025] KECA 148 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 283 OF 2020

F SICHALE, F TUIYOTT & FA OCHIENG, JJA

FEBRUARY 7, 2025

BETWEEN

NATIONAL OIL CORPORATION OF KENYA ..... APPELLANT

AND

LUKE CHERUIYOT & 37 OTHERS & 37 OTHERS & 37 OTHERS & 37 OTHERS & 37 OTHERS ..... RESPONDENT

(Being an Appeal from the Judgment and Decree of the Employment and Labour Relations Court at Nairobi (Wasilwa J) dated 20th December 2018) in Nairobi ELRC Cause No. 493 OF 2016)

JUDGMENT

1. National Oil Corporation of Kenya (the appellant herein), has preferred this appeal against the judgment and orders of Wasilwa, J dated 20th December 2018, in Nairobi ELRC Cause No. 493 of 2016, in which the learned judge inter alia awarded the 1st, 2nd, 3rd, 4th, 6th, 7th, 9th, 10th, 14th, 15th, 16th, 18th, 23rd 28th, 30th, 31st and 36th respondents 12 months' salary for each year worked being compensation for unfair redundancy.

2. A brief litigation history is necessary to contextualize the facts in this appeal: vide a plaint dated 17th September 2001, filed in the High Court at Nairobi, the respondents filed suit seeking damages for unlawful redundancy due to alleged blatant disregard of the *Employment Act* CAP 226 of the Laws of Kenya (now repealed).

3. The respondents' case was that they had been employed by the appellant at different times in various capacities and their employment contract was terminated by the appellant on or about the years 2000 and 2001 on account of redundancy.

4. They further contended their redundancy was wrongful on the grounds inter alia that the exercise and the decision was made without the mandate and authority of the board of the appellant and that the

appellant failed to seek any authority from the Ministry of Energy, the Head of Civil Service or the Directorate of Personnel Management before declaring them redundant.

5. In a judgment delivered on 20th December 2018, Wasilwa, J found that the appellant had breached Section 16 (A) of the repealed *Employment Act*, CAP 226 of the Laws of Kenya as the evidence before the court showed that the claimants received letters terminating them without any notice. As stated above, she awarded each one of them 12 months' salary for each year worked being compensation for unfair redundancy.

6. The appellant was aggrieved by the aforesaid judgment thus provoking the instant appeal. In an undated Memorandum of Appeal, the appellant raised 6 grounds of appeal as follows:

> "a. That the learned Honourable Judge erred in fact and law by awarding the claimants a blanket compensatory damages of 12 months' salary for each year worked contrary to the Collective Bargaining Agreement between the respondent and the appellant.
>
> b. That the learned Honourable Judge erred in fact and in law by awarding the claimants a blanket compensatory damages of 12 months' salary for each year worked contrary to the repealed *Employment Act* CAP 226.
>
> c. That the learned Honourable Judge erred in fact and in law by awarding the claimants a blanket compensatory damages of 12 months' salary for each year worked contrary to Internal Code of Regulations.
>
> d. That the learned judge erred in fact and in law by awarding damages to a deceased person who did not give authority to prosecute.
>
> e. That the learned judge erred in fact and in law by holding that the defendants did not follow due procedure in effecting the redundancy exercise according to the Collective Bargaining Agreement.
>
> f. That the learned Honourable judge erred in fact and in law by admitting a claim of 25 claimants whereas only six (6) had their witness statements on record."

7. When the matter came up for plenary hearing on 17th September 2024, Mr. Kegogo learned counsel holding brief for Mr. Saende appeared for the appellant whereas Mr. Teddy Ochieng appeared for the respondents. Both parties wholly relied on their written submissions dated 1st April 2021 and 12th September 2024 respectively without oral highlights.

8. The appellant in its written submissions consolidated its grounds of appeal into 2 main grounds of appeal as follows:

> "i. Whether the learned judge erred in law and in fact by holding that the redundancy process was unprocedural and unlawful.
>
> ii. Whether the learned judge erred by awarding compensation for unlawful termination when the applicable law did not provide for such remedy."

9. Turning to the first issue and as to whether the learned judge erred in law and in fact by holding that the redundancy process was unprocedural and unlawful, it was submitted that the respondents were notified about the redundancy exercise through various notices; that RW1 proved through the

various minutes on record that the claimants were represented in the redundancy meetings which was sufficient proof that there was notice to that effect and that the appellant had provided evidence of letters notifying the parent ministry of the intended redundancy exercise contrary to the assertions by the respondents.

10. It was further submitted that the issue of engaging all stakeholders in a redundancy exercise was discussed by this Court in the case of Kenya Airways vs. Aviation and Allied Workers Union of Kenya & 3 Others [2014]; that strict adherence to the provisions of Section 16A would lead to injustice and prejudice on the part of the employer and that in any event, the same could easily be remedied by damages in lieu of notice to the affected claimants.

11. It was thus submitted that since the Union and the workers were represented in the redundancy meetings and the notices served, their purpose effectively rendered the respondents claims nugatory.

12. It was further submitted that the respondents had contended that the redundancy exercise did not follow the correct procedure as laid out in Section 16A of the repealed *Employment Act* and the Collective Bargaining Agreement (CBA) and that the learned judge erred in fact by not considering the evidence by the appellant to the effect that they served a notice that detailed the criteria used in the redundancy process.

13. Lastly, it was submitted that the learned judge erred in awarding compensation for unlawful termination when the applicable law did not provide for such a remedy and that the award of 12 months' salary for unlawful termination was unknown in law.

14. It was further submitted that the learned judge cast a blind eye on the express provisions of clause 26.10 (e) of the CBA on the computation of redundancy pay and that a blanket pay of 12 months for years worked was not only alien in law, but tantamount to rewriting the contract between the employer and the employees.

15. It was thus submitted that the redundancy dues were properly computed and paid to the employees as per the CBA and that in any case, should there have been a dispute with regards the redundancy, and the CBA should have guided the learned judge to make an award.

16. It was further submitted that the damages awarded to the respondents were unreasonably high and unknown in law and that if anything, the respondents were entitled to severance pay at the rate of fifteen days' pay for each completed year of service.

17. Consequently, we were urged to review the evidence on record and find that there were sufficient notices served upon the respondents in respect to the redundancy exercise.

18. On the other hand, it was submitted for the respondents that nowhere in the impugned judgment did the superior court award any of the claimants' compensation of 12 months' salary for each year worked as the judgment was express that to the effect that the respondents were awarded 12 months' compensation for unlawful termination.

19. As to whether the superior court erred in holding that the redundancy procedure followed by the appellant did not comply with the law, it was submitted that the decision of the court that the redundancy process was not proper was two-pronged because firstly, there was no proper notice to the respondents prior to their termination on redundancy and secondly the procedure that had been laid out under Section 16A of the repealed *Employment Act* to wit inter alia, the appellant having due regard to the seniority in time and to the skill, ability and reliability of each employee was not taken into consideration as the oldest employees were the ones declared redundant.

20. We have carefully considered the record, the grounds of appeal, the rival submissions by the parties, the cited authorities and the law. This being a first appeal, our duty as stipulated under rule 31 of the rules of this Court is to re-evaluate and consider afresh the evidence tendered before the trial court and come to our own conclusion one way or another.

21. This duty was reiterated in Abok James Odera t/a A.J Odera & Associates V John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR where this Court pronounced itself as follows: -

> " This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way. See the case of Kenya Ports Authority vs Kustron (Kenya) Limited 2000 2EA 212."

22. Having carefully perused the record and the rival pleadings by the parties, we have framed the following two main issues for our determination:

1. Whether the learned judge erred in law and in fact by holding that the redundancy process was unprocedural and unfair.

2. Whether the learned judge erred by awarding compensation for unlawful termination when the applicable law did not provide for such remedy.

23. Turning to the first issue, it is common ground that the at all material times relating to this suit the respondents had been employed by the appellant in different capacities. It is also not in dispute that sometimes in the year 2000 and 2001, the respondents were declared redundant by the appellant.

24. Section 16A of the *Employment Act* Cap 226 (now repealed) which dealt with redundancy provided as follows:

> " A contract of service shall not be terminated on account of redundancy unless the following conditions have been complied with –
>
> (a) The union of which the employee is a member and the Labour Officer in charge of the area where the employee is employed shall be notified of the reasons for, and the extent of, the intended redundancy;
>
> b. The employer shall have 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;
>
> c. No employee shall be placed at a disadvantage for being or not being a member of the trade union;
>
> d. Any leave due to any employee who is declared redundant shall be paid off in cash;
>
> e. An employee declared redundant shall be entitled to one month's notice or one month's wages in lieu of notice;
>
> f. An employee declared redundant shall be entitled to severance pay at the rate of not less than 15 days' pay for each completed year of service as severance pay."

25. The respondents faulted the redundancy process on two fronts namely want of proper notice and failure to comply with the procedure laid out under Section 16A (1) of the repealed *Employment Act*.

26. We have anxiously gone through the record and contrary to the finding by the learned judge and the respondent's assertions, several notices were issued to the respondents as we shall demonstrate shortly.

27. Firstly, vide an Internal Memo from the Managing Director of the appellant to all members of staff of the appellant dated 25th October 2000, the respondents were issued with a notice of declaration of redundancy which further indicated the purpose of the redundancy to be:

> "In an effort to bring down costs and achieve a leaner corporation so as to succeed in the existing competitive marketing environment, the corporation has been forced to take certain steps which though drastic are necessary for the survival and well-being of the company."

28. The memo further outlined the steps to be followed in the declaration of the redundancy and further outlined the intended objectives of the redundancy.

29. Similarly, vide a letter dated 19th October 2000, from the Managing Director of the appellant to all the unionaisable members of staff of the appellant, they were informed of an intended voluntary redundancy programme following a notice of redundancy dated 7th July 2000, given to their Union where they were further required to indicate whether they wished to be included in the programme as per clause 26.10 of the CBA between the appellant and the respondents.

30. Additionally, there were minutes on record between Kenya Petroleum Workers Union and the management of the appellant dated 8th and 15th August 2000, respectively where inter alia the issue of redundancy was discussed culminating in issuance of redundancy letters dated 1st November 2000 to the respondents.

31. From the circumstances of this case and for the reasons which we have stated above we are satisfied that indeed the respondents were issued with requisite notices prior to the redundancy contrary to the findings by the learned judge starting with the memo dated 25th October 2000 culminating to the issuance of the redundancy notices dated 1st November 2000.

32. Faced with a similar situation in the case of Kenya Airways Limited v Aviation & Allied Workers Union of Kenya & 3 others [2014] eKLR, Maraga JA (as he then was) stated thus:

> "My understanding of this provision is that when an employer contemplates redundancy, he should first give a general notice of that intention to the employees likely to be affected or their union. It is that notice that will elicit consultation between the parties, and I will shortly show that consultation is imperative, on the justifiability of that intention and the mode of its implementation where it is found justifiable. At that initial stage, the employer would not have identified the employee(s) who will be affected. So that notice cannot have the names of the employees as Mr. Mwenesi contended. It does not have to be a calendar months' notice as Mr Mwenesi contended.
>
> The Act requires one month's notice. The period runs from the date of service of that notice. It is after the conclusions of the consultations on all issues of the matter that notices will be issued to the affected employees of the decision to declare them redundant." (Emphasis Ours).

33. We fully agree with the position taken by Maraga JA (as he then was) and hold and find that the respondents were issued with the requisite notices before they were declared redundant.

34. The respondents further faulted the appellant for failing to follow the procedure laid out under Section 16A of the repealed *Employment Act* by inter alia not having due regard to the seniority in time, skill, ability and reliability of each employee as the oldest employees were the ones who were declared redundant.

35. First of all, there is nothing on the record to show that indeed the oldest employees were the ones that were declared redundant as contended by the respondents. Secondly, we note that from the redundancy letters dated 1st November 2000, the criterion that was used to declare the respondents redundant was not indicated.

36. Be that as it may, vide a letter dated 5th July 2000, by the appellant's Managing Director to the Permanent Secretary, Directorate of Personnel Management through the Permanent Secretary in the Ministry of Energy, the appellant's Managing Director informed the Permanent Secretary that the appellant intended to begin a staff rationalization and rightsizing process and requested for guidance in developing suitable packages and assistance for staff intending to retire and further sought assistance to develop government approved modalities of identifying individual staff to leave , having in mind the revenue generation capacity of the appellant.

37. As we have alluded to earlier, whereas it is indeed evident inter alia that seniority in time, skill, ability and reliability of each employee appears not to have been taken strictly into consideration in declaring the respondents redundant, by the aforesaid letter dated 5th July 2000, the appellant sought guidelines from the parent ministry in developing suitable packages for the departing employees and modalities of identifying individual staff to exit.

38. Consequently, we are of the considered opinion that failure to strictly follow this procedure did not render the declaration of the respondents' redundancy illegal.

39. Our view in this regard is further fortified by the Kenya Airways decision (supra) where again the Court while confronted with a similar situation stated thus:

> I do not agree with the learned Judge that the "last-in-first-out" principle in section 40(1) (c) must always be employed. The employer can use all or any of the criteria in that paragraph. In the present technological age, if the "last-in-first-out" principle is held to be mandatory, it may defeat the employer's objective of employing modern technology to carry out his business because it may be that the last employees to be employed, who according to this principle should be the first to exit, are the ones with the technological know- how that the employer requires. All this notwithstanding, however, in a nutshell, I find that the appellant employed an opaque criteria in the selection of the retrenched employees that did not meet the statutory threshold."

40. We fully agree and reiterate the position taken by the court in the above decision. In light of the above, and the appellant having gone an extra mile to even seek guidance from the parent ministry on "developing suitable packages and assistance for the retiring staff and modalities of identifying individual staff to exit", nothing more could have been expected of the appellant.

41. Accordingly, we are of the considered opinion that the appellant substantially complied with provisions of Section 16A of the *Employment Act* (supra), and that the declaration of the respondents' redundancy was procedural and lawful. Consequently, nothing turns on this point.

42. Lastly, the learned judge was faulted for awarding compensation for unlawful termination when the applicable law did not provide for such a remedy. It was the appellant's submission that the award of 12 months' salary for unlawful termination was unknown in law.

43. On the other hand, it was contended by the respondents that nowhere in the impugned judgment did the learned judge award the claimants compensation of 12 months' salary for each year worked.

44. We have looked at the judgment and specifically paragraph 44 thereof where the learned judge stated:

> In terms of remedies, I therefore find for the claimants herein and award them compensation for the unfair redundancy at 12 months' salary for each year worked." (Emphasis Ours).

45. It is evident from the above excerpt of the judgment of the learned judge that the contention by the respondents that "nowhere in the judgment as delivered on the 20th December 2018 did the superior court award any of the claimants compensation of twelve months' salary for each year worked" is far from the truth as the learned judge indeed awarded the respondents compensation for the unfair redundancy at 12 months' salary for each year worked.

46. Section 16A subsections (d), (e) and (f) of the *Employment Act* (supra), that was then in force at the time that the respondents were being declared redundant provided for the remedies that an employee declared redundant was entitled to. The same provided:

> "(d) Any leave due to any employee who is declared redundant shall be paid off in cash;
>
> e. An employee declared redundant shall be entitled to one month's notice or one month's wages in lieu of notice;
>
> f. An employee declared redundant shall be entitled to severance pay at the rate of not less than 15 days' pay for each completed year of service as severance pay."

47. It is therefore evident that the award made by the learned judge namely: compensation for the unfair redundancy at 12 months' salary for each year worked was not one of the remedies contemplated by the Act for an employee declared redundant and the same is therefore alien to law and cannot be allowed to stand.

48. We also hasten to add that even if we had found the redundancy to be unlawful, S.15 of the Trade Disputes Act (then in existence but repealed by the *Labour Relations Act* No. 4 of 2007) did not provide or contemplate for compensation of 12 months' salary for each year worked.

49. We think we have said enough to demonstrate why this appeal is for allowing. Accordingly, we find merit in the appellant's appeal and set aside all the consequential orders issued by Wasilwa, J on 20th December 2018 in its entirety.

50. In light of the chequered litigation history in this matter, the order that commends itself to us as regards costs is that each party shall bear his/its own costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 7TH DAY OF FEBRUARY, 2025.

F. SICHALE

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JUDGE OF APPEAL

F. TUIYOTT

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JUDGE OF APPEAL

F. OCHIENG

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR.