Kisii University v Kenya University Staff Union (Civil Appeal E145 of 2022) [2024] KECA 656 (KLR) (7 June 2024) (Judgment)

Neutral citation: [2024] KECA 656 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CIVIL APPEAL E145 OF 2022

HM OKWENGU, HA OMONDI & JM NGUGI, JJA

JUNE 7, 2024

BETWEEN

KISII UNIVERSITY ..... APPELLANT

AND

KENYA UNIVERSITY STAFF UNION ..... RESPONDENT

(Being an appeal from the entire Judgment and Decree of the Employment and Labour Relations Court at Kisumu (S. Radido, J.) dated on 4th May 2022 in Cause No. E009 of 2020)

JUDGMENT

1. On 19th March 2010, the parties herein entered into a recognition agreement; and thereafter signed a Collective Bargaining Agreement. On 30th September 2020 the University sent a 1- month redundancy notice in respect of two hundred and four

   (204) employees. The next day, the respondent sent out redundancy notices to select employees.

2. The Union felt that the redundancy notice was unlawful and moved the court for a declaration that the said notices were unlawful, unfair and violated fundamental constitutional rights. It sought an order of injunction to stop the redundancies from being implemented.

3. The respondent Union asserted that the appellant got the procedure wrong as the Union was not consulted; the criteria set out in section 40(1) (c) of the *Employment Act* was not considered; the notice period was less than the legally envisaged 30 days; the local Labour Officer was not notified, the redundancy notices were signed by a person not authorized to practice as a Human Resource Officer by the *Human Resource Management Professionals Act*, 2012; and finally the University Council had not approved the declaration of redundancies.

4. The appellant on the other hand contended that it complied with due process; asserting that the council resolved to have management carry out redundancies through a resolution dated 26th August

2019, a copy of which was served on the local Labour Office, and that the university scheme of service allowed the

Registrar to sign the redundancy notices, despite not being a licenced human resource practitioner at the material time.

5. The appellant also blamed the respondent for frustrating consultations, by immediately rushing to court, instead of giving consultations a chance, which process could only be triggered upon service of notice. Further, that the selection criteria of last in first out was not the only determining factor in effecting redundancies; and that the enterprise resource planning system made the need for employees performing clerical duties superfluous.

6. Vide a judgment dated 4th May 2022, the trial court drawing from the decisions in Thomas De La Rue (K) Ltd v David Opondo Omutelema [2013] eKLR adopted a purposive reading, that section 40 (a) and (b) recognised two different kinds of redundancy notifications, depending on whether an employee was a member of a trade union or not, irrespective of whichever category an employee fell, adequate notification was necessary; and held that there would be no reason why one category should be subjected to a shorter notification period than the other; that an extract of a delivery book produced by the appellant showed that the redundancy notice(s) was served upon the Union and the local Labour officer on the same day; as to whether the Council as the employer gave its seal of approval, either in advance or after the redundancies, the learned Judge found that the Council met on 26th August 2019 and resolved that deliberate steps be taken to reduce the wage bill; thus the redundancy was based on a policy decision of the University Council but its implementation was left to the management of the university.

7. The learned judge also accepted the explanation by the appellant regarding the selection criteria, that the implementation of an enterprise resource planning system with a view to reducing expenditure had led to nearly all clerical jobs being superfluous; and considering this peculiar situation, the formula of last in first out was not the most appropriate or dominant consideration. The Court found that the University had valid and fair reasons for the declaration of redundancies. Further, that the practice status of the Registrar who signed the redundancy notice(s) should not have been determinative of the procedural fairness of the redundancies or the validity of the redundancies since the position of Registrar was entrenched in the university system.

8. On the issue regarding consultations, the trial court was satisfied that the University's decision, which was signaled through the notice of 30th September 2020 did not meet the threshold contemplated by section 40(1) of the *Employment Act*, 2007 on genuine consultations and was thus unlawful and unfair. This is what the learned judge stated:

> " The redundancy notice sent to the Union named the employees whose positions stood to be terminated on account of redundancy after the lapse of 30-days. The University was informing the Union of a fait accompli (decision). The decision by the University thus did not give an opportunity to the Union to engage with a view to minimising or mitigating the adverse effects of the redundancies. The notice(s) sent out by the University did not allow room for genuine and meaningful consultations since such genuine and meaningful consultations can only be carried out during the formative stages of the redundancy process. The consultations should be in the formative stages of the process because section 40(1) (a) talks of notification of intended redundancy. The notice(s) also fell short of what is envisaged under International Labour Organisation Convention No.158, Termination of Employment Convention...The University should have in the first instance engaged the

Union in consultations before making a decision that the contracts of specific employees would stand terminated".

9. Taking into consideration the respondent's allegation that the appellant had stopped paying the 204 employees the remuneration they were entitled to; coupled with the appellant's admission that due to the court order, the 204 persons were still in employment, the learned Judge was of the view that a declaration and an order that the 204 employees were entitled to, and be paid the entitlements up to the date of judgment would address the concerns.

10. The trial court thus found that the appellant unfairly, wrongfully, and unlawfully declared the positions of the 204 members of the union redundant; that the said 204 employees' contracts were sustained by the injunctive order issued by the court on 21st October 2020; and as such, they were entitled to benefits accruing under the respective contracts. The trial court awarded the equivalent of 7 months gross wages for each of the employees, calculated using the gross wages for September 2020; the appellant was directed to issue a certificate of service to each of the 204 employees within 21-days; the appellant was also directed to compute and file with the court within 30-days, a schedule of the terminal benefits due to each of the 204 employees, which dues were to be paid within 60 days; and the awards were to attract interest at court rates from the 7th June 2022 until payment in full.

11. Aggrieved by the decision of the trial court, the appellant filed its memorandum of appeal challenging the judgment of the Superior Court on 7 grounds of appeal that:

    i. Whether the learned trial judge erred by failing to find and to hold that based on the totality of the evidence presented by the parties' vis a vis the pleadings, the appellants were only entitled to benefits expressly provided for and protected under section 40 of the *Employment Act*, Cap 226 Laws of Kenya.

    ii. Whether the learned trial judge erred by finding that contracts of employees who had been declared redundant could be sustained by orders of the court which was a clear express negation of the right of the appellant to terminate its employees' contracts by means of redundancy for valid reasons.

    iii. Whether the learned trial Judge erred by failing to recognize that the requirement for consultations upon the issuance of a redundancy notice by the appellant was as binding on the respondent as it was on the appellant.

    iv. Whether the learned trial judge erred by holding that the appellant's employees had been unlawfully declared redundant and in the same breadth holding that the appellant has valid and fair reasons for terminating its employees by means of redundancy.

    v. Whether the learned trial Judge erred in law by awarding seven (7) months gross wages as compensation notwithstanding that the respondent had not pleaded for the award of compensatory damages in its claim.

    1. The appellant has broadly condensed these grounds of appeal under the following heads: Parties are bound by their pleadings, and the three substantive reliefs that the respondents had sought, did not give room for an award of damages; the declaration of redundancy was the prerogative of the employer (appellant); and a finding that such determination of redundancy was unlawful was untenable as it had the effect of keeping the affected employees in employment, yet they had already been awarded compensation of seven (7) months' pay for unlawful termination.

13. It is the appellant's contention that parties are bound by their pleadings, and that the union pleaded 3 substantive reliefs, none of which provided room for award of damages, and as such the trial court could not award what was not pleaded. The appellant also notes that despite finding that the appellant had a valid reason for declaring redundancies, the trial court nonetheless went ahead to award compensation equivalent to seven (7) months' salary. The appellant also laments that the trial court did not take into consideration the factors that forced the appellant to declare redundancies.

14. The appellant argues that the declaration of redundancy was the prerogative of the University, and that it was not proper for the court to order payment of salaries until 4th May 2022, as the affected employees stood terminated as 31st October 2021; and by ordering the payment of salaries until 4th May 2022, the trial court usurped the prerogative of the appellant by fixing the termination date; and as such, had no jurisdiction to order the retention of employees beyond the termination date.

15. The appellant submits that the action of the Union in rushing to court after the redundancy notice was served, within seven days of issue of said notice, stood in the way of any reasonable consultation with the university; as such the Union could not now turn around and say that the appellant did not invoke the mechanisms in the CBA to resolve disputes. The appellant further argues that the Union, on receipt of the notice should have made use of the dispute resolution mechanisms, and called for negotiations, as the dispute came into being after the issue of notice, not before; and that the Union has not shown that the university obstructed meaningful negotiations.

PARA 16.

The respondent in opposing the appeal argues that there were injunctive orders issued on the 21st of October 2020 whose purpose was to preserve the status quo pending the hearing and determination of the main suit; and by virtue of the said orders, the court sustained the contracts of the respondents' employees pending the disposal of the main suit; thus the respondent's employees were entitled to the payment of salaries up to and including the date of the delivery of the said judgment. That in any event, nothing on record demonstrates that the appellant moved the trial court to have the said orders discharged or varied, through an appeal or even a review; and the said orders remained in force from the date of its delivery to the date the judgment.

17. It is the respondent's contention that it is highly prejudicial to its cause, for the appellant to raise this issue on appeal despite there being orders in place that settled this matter conclusively, insisting that the appellant is hell bent on frustrating the realization of the judgment as awarded by the trial court; and unless something is done, the respondent will forever be left babysitting a barren decree. Drawing from the case of Kennedy Mokua Ongiri v John Nyasende Mosioma & Florence

    Nyamoita Nyasende [2022] eKLR, the respondent urges us not to allow a re-opening of this issue by way of an appeal, as this would be contrary to the principle of finality.

18. In relation to the aspect of consultation, the respondent contends that the trial judge was correct in concluding that the entire redundancy exercise was unlawful, because it was unilateral with no meaningful pre-redundancy consultations; and failed to meet the threshold contemplated by section 40(I) of the *Employment Act* on genuine consultations, as such the entire exercise was unlawful and unfair on this ground.

19. As to whether the learned trial judge erred in law by awarding seven (7) months gross wages as compensation notwithstanding that the respondent had not pleaded for the award of compensatory damages in its claim, the respondent argues that while addressing the issue on compensation, the trial court pointed out that one of the primary remedies where a court finds unfair termination of employment is an award of compensation; taking into account the factors outlined in section 49(4) of the *Employment Act* 2007.

PARA 20.

In reference to the argument that the compensation awarded was excessive, the respondent submits that the trial judge's reasoning in light of the circumstances was sound, and warranted an order for the award of compensation for an equivalent to 7 months' pay, to mitigate the negative ramifications of the redundancy exercise; and that the court also took into consideration the length of service for the employees who were declared redundant, as a key part of its analysis of the quantum of the compensation payable; that the compensation awarded by the trial Judge is the median compensation payable for wrongful and unfair termination, when compared with other jurisprudence from the labour courts. In support of this position, the appellant refers to the case of Transport Workers Union v Glory Driving School (2020) eKLR the Court awarded grievants who worked for the respondent for 1 to 3 years an award of 3 months' salary as compensation for unfair termination; awarding those who worked for the respondent between 4 and 6 years to equivalent of 5 months' salary; those who worked for 7 to 9 years an award of 8 months' compensation and those who worked for 10 to 18 years or more an award of 12 months' compensation for unlawful termination.

21. The respondent argues that from the record, it is apparent that only relevant factors were taken into consideration in the determination of the compensation payable; contending that the principles which guide an appellate court in this country in an appeal on an award of damages are now well settled, in the case of Peter M. Kariuki v Attorney General (2014) eKLR where the court identified the principles as follows:

> " The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either the judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that, short of this, the amount is so inordinately low or so inordinately high that it must be wholly erroneous estimate of the damage."

22. With respect to the appellant's argument, that the respondent was not entitled to compensation because the same was not specifically prayed for in the respondent's pleadings, the respondents urge us to draw from the case of Odd Jobs vs. Mubia (1970) EA 476 at 479 cited with approval in the case of National

> Social Security Fund v Grace K. Kazungu & Another [2018] eKLR, which held that:
>
> "a court may base its decision on an un-pleaded issue if it appears from the course followed at the trial that the issue has been left to the court for its decision".

23. On the issue of wrongful and unfair termination on account of redundancy, it is the respondent's argument that the evidence demonstrated that the appellant declared members of the respondent's union redundant without carrying out any consultations as prescribed under section 40 of the *Employment Act*; and the learned judge rightfully pointed out that the decision was a fait accompli, and the appellant did not tender any evidence to rebut this allegation, which thus remained uncontroverted.

24. This being a first appeal, and as has been reiterated in several decisions of this Court, our primary duty is to evaluate the evidence on the record in order to come to our own independent conclusion on the evidence and the law, as per Rule 31(1) (a) of the Court of Appeal Rules. This duty has been reiterated in Abok James Odera t/a A. J. Odera & Associates v John Patrick Machira t/a Machira & Company Advocates [2013] eKLR.

25. The main issues in this appeal are:

i. Whether the declared redundancy was lawful/justified? In this regard, section 40 of the *Employment Act* No. 11 of 2017 is instructive on this issue and provides that:

1. An employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions:

   SUBPARA 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;

   SUBPARA b.

   where an employee is not a member of a trade union, the employer notifies the employee personally in writing and the Labour Officer;

   SUBPARA 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;

   SUBPARA 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;

   SUBPARA e.

   the employer has where leave is due to an employee who is declared redundant, paid off the leave in cash;

   SUBPARA 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

   SUBPARA 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 Cabinet Secretary 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 Cabinet Secretary.

26. The appellant submits that it complied with the provisions of section 40 of the *Employment Act*, as the respondent Union and the affected employees were issued with the notices as provided under the

section 41(1) (a) and (b), which clearly communicated its intention to render the positions affected redundant one month before the intended date of termination. In this regard, the appellant relies on the case of Thomas De La Rue (K) Limited v

David (supra) to show that the notices sent to the Union sufficed for purposes of section 40 of the *Employment Act*.

27. The respondent on the other hand submits that the entire redundancy exercise was unlawful as there was no meaningful pre-redundancy consultations as the appellant failed to give the respondent union an opportunity to provide its view on the redundancy exercise, and that if fell on the appellant to initiate the consultations as the employer, and relies on Article 13 Recommendation No. 166 of the ILO Convention No. 158 - Termination of Employment Convention, 1982 which requires an employer to accord the workers' representative an opportunity for consultations on measures to mitigate the adverse effects of any termination.

28. From the evidence on record, it is clear that a notice was indeed issued to the respondent Union, dated 30th September 2020, which communicated an intention to declare redundancy and that the effective date of termination was 31st October 2020. Generally, for any termination of employment under redundancy to be lawful, it must be both substantially justified, and procedurally fair. In the present case, the substantive justification was that it was necessary for the appellant to undertake a process to rationalize various positions in their operations relating to outsourcing of non-core services which included catering, cleaning and security; and to declare the redundancy due to drastic reduction in revenue. This was due to the fact that inter alia fees from privately sponsored students had decreased by 70%. However, the question that remains is whether the manner in which it was conducted was procedurally fair. To answer this, we need to consider the next issue which is the process of consultation.

29. On the issue of consultation and dialogue, the respondent is of the view that no meaningful consultations were carried out as contemplated in a redundancy process. Maraga, JA, as he then was, in Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 Others Nairobi Civil Appeal No. 46 of 2013 (2014) eKLR held:

> " 49...Section 40(1) of our *Employment Act* does not expressly state the purpose of the notice. Although it also does not expressly provide for consultation between the employer and the employees or their trade unions
>
> before the final decision on redundancy is made, on my part I find the requirement of consultation provided for in our law and implicit in the *Employment Act* itself.

50. By dint of article 2(6) of *the Constitution*, the treaties and conventions ratified by Kenya are now part of the law of Kenya. The Kenya Constitution, 2010 was promulgated on 27th August, 2010. Before then Kenya was a dualist state, which, like other dualist states, domesticated the treaties or conventions it ratified by legislation. By virtue of the provisions of this Article, however, the treaties or conventions which Kenya had ratified before that date, whether domesticated or not, automatically became part of the law of Kenya. The process of ratification of the treaties Kenya has entered and those it enters into after the enactment and entry into force of the Ratification of Treaties Act, 2012 is now through legislation.

51. Kenya is a State party to the International Labour Organization (ILO), which it joined in 1964 and is bound by the ILO conventions. Article 13 of Recommendation No. 166 of the ILO Convention No. 158-Termination of

Employment Convention, 1982-requires consultation between the employers on the one hand and the employees or their representatives on the other before termination of employment under redundancy. It reads:

"1. When the employer contemplates terminations for reasons of an economic, technological, structural or similar nature, the employer shall:

a. provide the workers' representatives concerned in good time with relevant information including the reasons for the terminations contemplated, the number and categories of workers likely to be affected and the period over which the terminations are intended to be carried out;

b. give, in accordance with national law and practice, the workers' representatives concerned, as early as possible, an opportunity for consultation on measures to be taken to avert or to minimise the terminations and measures to mitigate the adverse effects of any terminations on the workers concerned such as finding alternative employment."

The decision of the United Kingdom Employment Appeals Tribunal in a labour related dispute involving the question of unfair dismissal the case of Williams v Compare Maxam Ltd (1982) IRLR 83 held that;

" There is a generally accepted view in industrial relations that, in cases where the employees are represented by an independent union recognised by the employer, reasonable employers will seek to act in accordance with the following principles:

1. The employer will seek to give as much warning as possible of impending redundancies so as to enable the union and employees who may be affected to take early steps to inform themselves of the relevant facts,

consider possible alternative solutions and, if necessary, find alternative employment in the undertaking or elsewhere.

2. The employer will consult the union as to the best means by which the desired management result can be achieved fairly and with as little hardship to the employees as possible. In particular, the employer will seek to agree with the union the criteria to be applied in selecting the employees to be made redundant. When a selection has been made, the employer will consider with the union whether the selection has been made in accordance with those criteria.

3. Whether or not an agreement as to the criteria to be adopted has been agreed with the union, the employer will seek to establish criteria for selection which so far as possible do not depend solely upon the opinion of the person making the selection but can be objectively checked against such things as attendance record, efficiency at the job, experience, or length of service.

4. The employer will seek to ensure that the selection is made fairly in accordance with these criteria and will consider any representations the union may make as to such selection.

5. The employer will seek to see whether instead of dismissing an employee he could offer him alternative employment."

We confirm from a perusal of the record, that the respondent Union vide pleadings dated 8th October 2020 rushed to court to contest the redundancy. The respondent maintains that this was a pre-emptive measure to enable negotiations to commence. It will be noted that the pleadings were within 7 days of

the notice, but we pause to ponder why the appellant university did not first engage in consultations with the respondent Union before issuing the notices; and subsequently dismissing the employees? Surely the Union would not be expected to commence the mechanisms to resolve disputes when its members were already at the edge of the cliff just about to tumble, at the lapse of 30 days, in what the learned judge so aptly termed a fait accompli; the scales were already lopsided! contested. Needless to say, we concur with the learned judge that the appellant was also bound by the requirements in article 47 of *the Constitution* and section 4(3) of the *Fair Administrative Action Act* to engage in consultations before issuing the notice. Certainly, for the Union, the most rational step in light of the developments, was to rush to court, as there was no room for genuine and meaningful consultation which could only have been carried out during the formative stages of the redundancy process. We thus agree with the trial court that the procedure adopted, thus, rendered the process of redundancy unlawful.

30. Was the respondent entitled to damages? In addressing the appropriate remedy, the learned Judge pointed out that an award of compensation is an available relief; and drawing from the factors outlined in section 49(4) of the *Employment Act*, 2007, he pointed out that the schedule of the employees whose positions were declared redundant indicated the length of service ranged from 1991 at the earliest to 2018. Section 50 of the *Employment Act* obliges the court to apply the factors in section 49 of the Act in determining a suit involving wrongful dismissal or unfair termination of employment of an employee; and that since the termination of the identified employees was practically accomplished then an equivalent of 7 months' gross wages for each employee, calculated using the gross wages for September 2020 was appropriate.

31. Redundancy in its very nature affects employees without any fault or wrongdoing on their part, and the employees need to be cushioned against said adverse effects. In Civil Appeal No. 46 of 2013 between Kenya Airways Ltd and Aviation & Allied Workers Union Kenya and 2 Others, Maraga, JA (as he then was) observed that:

> "... the traditional common law view has been that illegal termination of a contract of employment entitled the dismissed employee to damages; and that the measure of damages is salary in lieu equivalent to
>
> period of the notice provided for in the service contract. Where no reasonable notice is provided for in the service contract, the court will award reasonable damages having regard to the circumstances of each case..., in Kenya, reinstatement is one of the remedies provided for in Section 49(3) as read with Section 50 of the *Employment Act*... Reinstatement is, however, not an automatic right of an employee. It is discretionary and each case has to be considered on its own merits based on the spirit of fairness and justice in keeping with the objectives of industrial adjudication in this regard, there are fairly well settled principles to be applied. For instance the traditional common law position is that courts will not force parties in a personal relationship to continue in such relationship against the will of one of them that will engender friction, which is not healthy for businesses, unless the employment relationship is capable of withstanding friction like where the employer is a large organization in which personal contact between the affected employee and the officer who took action against him will be minimal.
>
> 69. Under the Kenyan *Employment Act*, the factors to be taken into account when considering reinstatement are enumerated in Section 49(4) of the *Employment Act* Those relevant to this appeal include the wishes and expectations of the employee; the common law principle that there should be no order for specific performance in a contract for service except in very exceptional circumstances; the practicability of reinstatement; any compensation paid by the employer;

and chances of the employee securing alternative employment I would like, in particular, say something about the practicability factor."

32. The appellant admits that it did not tabulate the terminal dues owing and leave earned and not taken; it nonetheless argues that

in any event, an award of one month's salary would suffice in damages; and not the 7 months' salary awarded by the trial court as there was no basis for such an award, as it was forced to declare redundancy by circumstances beyond its control.

33. We take note that the Act requires payment of not less than one month's salary in lieu of notice; so, what was the basis of the 7 months' salary award to the effect that the employees were entitled to payment of salaries upto and including the date of delivery of the judgment? Granted there were flaws relating to adherence to procedural safeguards but would that be the basis for awarding gross wages as compensation? And we say this fully aware that, indeed, damages were not specifically sought; the learned judge awarded the sum in lieu of reinstatement, it is apt to conclude that the court was justified in awarding some compensation under this head. We however acknowledge that the Act nonetheless requires not less than one month's salary in lieu of notice, and taking into consideration the impact of such declaration on the livelihood of the employees, and the non- reinstatement, and the fact that the employees will still get paid for redundancy, taking all the factors set out under section 49 of the Act into account, we consider that an award of damages of 7 months' salary was excessive, unjustified; and not awarded with due exercise of discretion. We, therefore, set aside the award of 7 months' salary; and substitute it with an award of 3 months' salary.

34. This upshot is that the appeal is allowed in regard to damages, limited to the extent of reducing the damages awarded to 3 months' salary. Each party shall bear its own costs of this appeal.

DATED AND DELIVERED AT KISUMU THIS 7TH DAY OF JUNE, 2024.

HANNAH OKWENGU

.....

JUDGE OF APPEAL

H. A. OMONDI

.....

JUDGE OF APPEAL

JOEL NGUGI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR