Highlands Mineral Water Company Limited v Shaeen (Civil Appeal 183 of 2018) [2023] KECA 1133 (KLR) (22 September 2023) (Judgment)

Neutral citation: [2023] KECA 1133 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 183 OF 2018

HM OKWENGU, JM MATIVO & GWN MACHARIA, JJA

SEPTEMBER 22, 2023

BETWEEN

HIGHLANDS MINERAL WATER COMPANY LIMITED ..... APPELLANT

AND

FARIDA SHAEEN ..... RESPONDENT

(Being an appeal from the judgment and order of the Employment and Labour Relations Court, Nairobi (Ndolo, J.) dated 29th October, 2014 in Industrial Cause No. 925 of 2013)

JUDGMENT

1. By a memorandum of claim dated June 18, 2013 filed at the Industrial Court at Nairobi, Farida Shareen (the respondent) sued her employer, Highland Mineral Water Co. Ltd (the appellant), seeking the reliefs listed in paragraph 3 below. The gravamen of her case was that on or about 6th December 2012, without any lawful justification or excuse, the appellant terminated her services alleging that it was closing its Nairobi depot on 31st December 2012. She claimed that as at the time she was terminated, she was earning a monthly salary of Kshs. 145,000/=.

2. She claimed that she had worked for the appellant for a period of 2 years, that the respondent did not pay her as stipulated in the employment contract, but it instead summarily dismissed her to avoid paying her terminal dues. As a consequent, the respondent claimed that she lost her dues as follows:

    a. 3 months' salary in lieu of notice Kshs.

        435,000/=

    b. Service/gratuity pay (21 days for each year of service)....Kshs. 203,000/=

    c. 21 days leave pay (2012) Kshs.

        101,500/=

d. December 2012 salary... Kshs.

145,000/=

Total Kshs.884,500/=

3. The respondent averred that the appellant's actions were unfair, unlawful, and irregular, in violation of her contract of service, *the Constitution* and the *Employment Act*, 2007 (herein after referred to as the Act). As a result, she prayed for: (a) general damages; (b) a declaration that the termination of her services was irregular and unlawful and an order that she be paid Kshs. 884,500/= being her dues plus costs of the suit and interests.

4. In opposition to the claim, the appellant filed an amended response and a counter-claim dated 28th February 2014. In a nutshell, its case was that it employed the respondent as its accounts manager from 3rd January 2011 to 31st December 2012 on the following terms:

i. she was to serve a probation period of 3 months;

ii. either party could terminate the contract by giving a one months' notice or payment in lieu of notice; and

iii. the respondent could be summarily dismissed if there were sufficient grounds to suspect her of having committed a criminal offence against the appellant or to the substantial detriment of the appellant's property;

5. It was the appellant's case that at the time of her suspension, the respondent was earning a gross salary of Kshs. 142,800/=. Further, an independent audit at its Nairobi Depot unearthed a loss of Kshs. 6,779,726/= in both stock and cash which loss was attributed to the respondent and her co-worker, a loss which influenced its decision to close the depot.

6. The appellant averred that it served the respondent with a one- month notice prior to the termination in accordance with the contract. It denied the respondent's claim and maintained that the respondent failed to clear with the company prior to collecting her dues and did not prepare a handover report, which was a requirement. It stated that it issued her with a one-month notice stating the reason for the termination. Further, the respondent declined to undergo the hand over procedure or defend herself against the audit report. In addition, her employment was terminated in accordance with section 44 (4) (g) of the Act and her contract of service. Lastly, the appellant counter-claimed Kshs. 6,779,726/= against the respondent plus interests and costs.

7. In her reply to the counter-claim, the respondent stated that she handed over on 31st December 2012, (the same day the termination took effect as per the termination letter dated 6th December 2012) and she was notified that her dues would be processed. Further, the only reason given for her termination was that the Nairobi depot was to be closed, but not the alleged financial malpractice nor was she ever invited for a meeting over the alleged malpractice and therefore the said report is an oversight.

8. After hearing the parties, Ndolo, J in the impugned decision dated 29th October 2014 replicated the provisions of section 43 of the Act and the contents of the termination letter dated 6th December 2012 and proceeded to state as follows:

> " 15. From the evidence placed before the Court, it would appear that soon after the termination of the claimant's employment the respondent discovered through a forensic audit that the company had lost Kshs. 6,779,729/= in unbanked cash

and missing stock which the respondent attributed to the claimant. On this basis, the respondent withheld the claimant's dues.

16. In support of its position on the alleged loss and the claimant's culpability, the respondent produced an e-mail dated 19th July 2012 from the Chief Finance Officer, Paul Chege to the claimant and another one dated 14th August 2012 from the Chief Accountant, Nicholas Malei to Paul. From this correspondence, it is apparent that the issue of reconciliation of the Nairobi Depot accounts had caught the attention of management as early as July 2012.

17. Yet, the respondent appears not to have taken any action until after the claimant's departure from the company. In fact, there was no mention of any loss in the termination letter issued to the claimant on 6th December 2012. Indeed, from this letter, the only reason the claimant was required to get in touch with accounts was for paymemt of her dues.

18. The respondent made reference to the case of Saleh Kiplangat Chebii vs. Centre for African Family Studies (CAFS) [2014] eKLR in which Rika J sought to make a distinction between handover and clearance stating that while handover is a mere transfer of tools of trade from one employee to another in the interim, clearance is undertaken with finality at termination of employment.

16. While I fully associate myself with the holding of my brother judge in the CAFS Case (supra), I do not think it is open to an employer who issues a termination letter with no mention of any pending disciplinary issue against an employee to require the employee to answer charges that were not put to them either during or at the end of the employment. Once an employee leaves the employment of an employer the environment within which a disciplinary inquiry can take place melts away. This does not however bar an employer from pursuing recourse through the criminal or civil justice systems.

17. The claimant maintains that by the last day of her employment with the respondent she had fully handed over. First, she periodically made weekly returns to the Chief Accountant through the Chief Executive Officer in Nyeri. Second, she did a final handover to the respondent's Sales Director, one Mr. Clyde on the instructions of the Chief Executive Officer.

18. The respondent on the other hand takes the position that the claimant has not handed over to date and for that reason, her terminal dues continue to be withheld. To buttress its position, the respondent produced an audit report prepared by Delyde Association dated 25th January 2013.

19. In expressing their view, the consultants stated as follows:

"Our view is that due to weak controls and ineffective monitoring of stocks at the Nairobi depot, the company has suffered high losses totaling to Kshs. 6,779,726/= over the review period."

16. My reading of this conclusion is that the loss incurred by the respondent arose both from systematic weaknesses and human intervention and it was therefore not possible to assign any particular portion of the loss solely to the

claimant. Moreover, there was no evidence that the claimant was ever involved in the investigations leading to the audit report to enable her to respond to any adverse findings against her. The veracity of the findings were thus not tested and could not be used as a basis to deny the claimant her terminal dues."(Emphasis added)

9. Regarding the termination, the learned judge observed as follows: "24...The termination letter is clear and the respondent confirms that the termination of the claimant's employment had nothing to do with the Kshs. 6,779,726/= loss or any form of misconduct on the claimant's part. Indeed, my reading of the letter is that the termination was driven by what is commonly known as redundancy."

10. The learned judge held that where an employer declares a redundancy, the conditions set out in section 40 of the Act must be complied with and where the employer fails to do so, the termination becomes unfair within the meaning of section 45 of the Act. In a nutshell, the learned judge found in favour of the respondent and awarded her the following sums:

    a. 6 months' salary being compensation for unfair termination... Kshs.

       870,000/=

    b. 1 month's salary in lieu of notice Kshs.

       145,000/=

    c) Leave 145,000/30x26.5 Kshs.

       128,083/=

    d) Salary for December 2012 Kshs.

       145,000/=

       Total.....Kshs. 1,288,083/=

       The learned judge also ordered the appellant to bear the costs of the suit and interests on the above sums from date of the award until payment in full.

11. The learned judge dismissed the appellant's counter-claim on grounds that the respondent did not involve the respondent in the investigations leading to the adverse findings against her in the independent audit report and for not being supported by tested evidence.

12. Aggrieved by the verdict, the appellant seeks to set it aside citing a whopping 13 grounds, which can safely be summed up as follows;

    (a) whether the reason disclosed in the termination letter dated 6th December 2012 amounted to redundancy as was held by the learned judge. (b) Whether the termination was procedurally fair and in accordance with the law. (c) Whether the counter-claim was merited. (d) Whether the compensation awarded by the trial court was merited.

13. The gravamen of the appellant's case was that the issue of redundancy was not pleaded nor was it urged before the trial court.

    For this reason, counsel faulted the learned judge for raising and determining an unpleaded issue which was not canvassed before the Court. Maintaining that the termination was lawful, counsel cited section 45 (2) of the Act which provides a termination of employment by an employer is unfair if the employer fails to prove——

(a) that the reason for the termination is valid; (b) that the reason for the termination is a fair reason—— (i) related to the employees conduct, capacity or compatibility; or (ii) based on the operational requirements of the employer; and (c) that the employment was terminated in accordance with fair procedure.

14. Counsel also cited section 43 of the Act which provides

> 43.
>
> (1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.
>
> (2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.

15. The appellant's counsel referred to clause 7 of the letter of appointment which provided that at any time after satisfactory completion of the probation, the appellant could terminate the agreement by giving one month's notice in writing or pay one month's salary in lieu of notice. The clause further provided that the said provision was without prejudice to the appellant's right to summarily terminate the employment for lawful cause. The provision also provided that the respondent could terminate the employment by giving a three months' notice in writing or three months' pay in lieu of notice.

16. Buttressed by the above clause, the appellant's counsel submitted that in conformity with section 35 of the Act, the one-month' notice dated 6th December 2012 sufficed. Further, as per an oral notice, the termination notice was effective from 30th November 2012. Reacting to the respondent's contestation that the reason for the termination was stated in the termination letter, counsel sought refuge in the amended response and counter-claim, which he argued, stated the basis for the termination.

17. Asserting the argument that the respondent never cleared with the employer, counsel cited *Saleh Kiplagat Chebii vs. Centre for African Family Studies (CAFS)*[2014] eKLR in support of the proposition that it is during clearance when an employer advises the employee his or her dues, the contractual and statutory obligations to be satisfied and issue the certificate of service.

18. Disputing that the termination was not on grounds of redundancy as was held by the learned judge, the appellant's counsel referred the court to the definition of redundancy in section 2 of the Act and section 40 of the Act, which provides for termination on account of redundancy. Counsel relied on *Thomas De la Rue (K) Ltd vs. David Opondo Omutelema,* [2013] eKLR which held, inter alia, that section 40 (a) and (c) of the Act provides for two different kinds of redundancy notifications depending on whether or not an employee is a member of a trade union.

19. Further, counsel relied on Barclays Bank of *Kenya Africa Group (SA) Ltd v Gladys Muthoni & 20 others* [2018] e KLR which involved notices issues by a third party and the court held that the notices were not redundancy but termination notices. In addition, the appellant's counsel relied on *Cargill Kenya Limited v Mwaka & 3 others* [2021] KECA 115 (KLR) which underscored the need to give a statutory provision a purposive interpretation that gives effect to the legislative intention. Counsel faulted the trial judge for holding that section 40 applied to the facts of this case and relied on *Jane Khalechi v Oxford University Press EA Ltd* [2013] e KLR which set out considerations for redundancy and maintained that no redundancy was declared by the respondent.

20. In opposition to the appeal, the respondent's counsel submitted that it was clear that the respondent lost her job because the Nairobi depot was closed rendering her redundant. Counsel argued that the trial Court faulted the appellant for not making a general declaration of redundancy and for failing to issue a proper one months' notice but instead issued a notice dated 6th December 2012 to take effect on 31st December 2012.

21. The respondent's counsel also submitted that whereas at paragraph 10 of its amended response and counter-claim, the appellant claimed that it terminated the respondent's services under section 44 (4) of the Act, it was a clear departure from the reasons stated in its termination letter dated 6th December 2012. Lastly, counsel dismissed the decisions cited by the appellant's counsel as contradictory.

22. We have considered the record of appeal, the parties' submissions and the law. We are cognizant that our primary role as a first appellate Court is to re-evaluate the evidence before the ELRC and draw our own conclusions. A first appeal is a valuable right of the parties and unless restricted by law, the whole case is open for reconsideration both on questions of fact and law. A first appellate court is the final Court of fact ordinarily and therefore a litigant is entitled to a full, fair, and independent consideration of the evidence. In addition, we bear in mind that we, unlike the trial Court, did not have the benefit of seeing the witnesses testify. (See *Kenya Ports Authority v Kuston (Kenya) Limited* [2009] 2EA 212).

23. The appellant deployed a lot of energy faulting the trial judge for determining an issue that was not pleaded or canvassed by the parties during the trial. The nub of the appellant's contestation is that the trial court concluded that the reason provided in the termination letter dated 6th December 2022 was that dismissal was necessitated by the closure of the appellant's Nairobi depot which amounts to dismissal on grounds of redundancy.

24. The argument that the learned judge determined an unpleaded issue is attractive. However, that is how far it goes. This is because redundancy is a matter of law. Undeniably, a court of law may, or even must, raise on its own motion a point of law not relied upon by the parties provided it must not exceed the limits of the case as defined by the claims of the parties, who remain `masters of the litigation.' (dominus litis). There is no suggestion before us, even in the slightest manner that the said issue did not arise from the pleadings or the arguments before the court or that the issue exceeded the limits of the case before the trial Court as defined by the claims before the trial Court. The foregoing position of the law sufficiently extinguishes the appellant's contestation that the trial Court digressed and addressed an unpleaded issue.

25. The question now narrows to whether the reason provided by the appellant, namely, the termination was necessitated by the closure of its Nairobi Depot, constituted redundancy as defined by the law. Redundancy is defined in the Act and the *Labour Relations Act*, 2007 as follows:-

> The loss of employment, occupation, job or career by involuntarily means through no fault of the employee involving termination of employment at the initiative of the employer, where the services of an employee are superfluous, and the practices commonly known as abolition of office, job or occupation and loss of employment.

26. The term 'redundancy' appears to be the most common term used to describe dismissals based on the operational requirements of the employer. In *Hlongwane & Another v Plastix (Pty) Ltd* [1990] 11 ILJ 171 (IC) 173 at par E- F98, the Labour Court of South Africa held that redundancy means that an employee becomes redundant as a result of, for instance, the introduction of new machinery or technology or the restructuring of the business. In this instance, the employment of the employee is lost permanently.

27. The Act provides that an employer may fairly terminate an employee's employment solely based on the operational requirements of the employer. It is an employer's prerogative to elect to make its employees redundant if there is a justifiable business reason for doing so. Section 40 (1) of the Act provides for termination on account of redundancy as follows:-

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

    a. Where the employee is a member of a trade union, the employer notifies the union to which the employee is a member and the labour officer in charge of the area where the employee is employed of the reasons for, and the extent of, the intended redundancy not less than a month prior to the date of the intended date of termination on account of redundancy.

    b. Where an employee is not a member of a trade union, the employer notifies the employee personally in writing and the labour officer;

    c. The employer has, in the selection of employees to be declared redundant had due regard to seniority in time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy;

    d. Where there is in existence a collective agreement between an employer and a trade union setting out terminal benefits payable upon redundancy; the employer has not placed the employee at a disadvantage for being or not being a member of the trade union;

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

    f. The employer has paid an employee declared redundant not less than one month's notice or one month's wages in lieu of notice; and

    g. The employer has paid to an employee declared redundant severance pay at the rate of not less than fifteen days' pay for each completed year of service.

28. In *Thomas De La Rue (K) Ltd vs. David Opondo Omutelema* [2013] e KLR, this Court stated:-

> "It is quite clear to us that sections 40 (a) and 40 (b) provide for two different kinds of redundancy notifications depending on whether the employee is or is not a member of a trade union. Where the employee is a member of a union, the notification is to the union and the local labour officer at least one month before the effective redundancy date. Where the employee is not a member of the union, the notification must be in writing and to the employee and the local labour officer. Section 40 (b) does not stipulate the notice period as is the case in 40 (a), but in our view, a purposive reading and interpretation of the statute would mean the same notice period is required in both situations. We do not see any rational reason why the employee who is not a member of a union should be entitled to a shorter notice."

29. This Court in *Cargill Kenya Limited vs. Mwaka & 3 others* [2021] KECA 115 (KLR) addressed redundancy as follows:-

> "It is thus our finding that the above interpretative factors discount a construction that a notice of termination is required by subsection (1) (f), or within the timelines held by the learned judge of the trial court. While such a notice may eventually require to be given in a termination on account of redundancy, it is definitely not one of the conditions to be met under section 40 subsection 1(f) of the *Employment Act* before the redundancy. In our view, the learned judge in
>
> the trial court appears to have conflated the payment in lieu of notice under section 40 subsection (1)(f), with the final declaration of termination by redundancy, and erred in finding that there is a requirement to issue a notice of termination before the redundancy under section 40(1)(f) of the *Employment Act*."
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> The trial judge also held that the termination was unlawful for reasons that the Appellant used the notices of intended redundancy as notices of termination under section 40(1)(f). This finding was in error for two reasons. Firstly, as we have found, no notice of termination is required to be given before redundancy under section 40(1)(f) of the *Employment Act*. Secondly, an examination of the letters issued by the appellant lead us to a conclusion that they indeed were notices of intended redundancy required by section 40(1) (a) of the *Employment Act*."

30. A reading of the record and the termination letter shows that the reasons offered for the termination disclose termination on grounds of redundancy. Accordingly, we find and hold that the trial court correctly found that the termination was on grounds of redundancy.

31. The next question is whether the termination was unfair. Unfair dismissal is the termination of employment without good cause or a fair procedure or both. Fairness provides a wider scope of factors to consider in making decisions – such as procedural fairness and substantive fairness.

32. Termination of employment through redundancy is also subject to the substantive justification envisaged by sections 43 and 45 of the Act, which provides for proof of reason for termination and for unfair

termination respectively. In order for termination to be fair in the eyes of the law, it has to be both substantively and procedurally fair. Apart from a valid reason of termination, the employer must follow fair procedures for termination in accordance with the Act. In any form of termination, the employer is required to prove the reasons for the termination otherwise, it will be termed as unfair. Every employee has the right not to be unfairly dismissed. Section 45 (1) of the Act provides that no employer shall terminate the employment of an employee unfairly. Section 45

(2) provides as follows:

> (2) A termination of employment by an employer is unfair if the employer fails to prove— (a) that the reason for the termination is valid; (b) that the reason for the termination is a fair reason— (i) related to the employees conduct, capacity or compatibility; or (ii) based on the operational requirements of the employer; and (c) that the employment was terminated in accordance with fair procedure.

33. From the facts and circumstances of this case, we entirely agree with the trial court that the process of termination was unfair and irregular for failure to accord with the clear provisions of sections 40 (1), 43 and 45 of the Act. We therefore find no reason to fault the finding by the trial judge that the termination was unfair.

34. Next, we will address the validity of the notice of termination dated 6th December 2012. The employment contract expressly provided for one month's written notice or payment of one month's salary in lieu of notice. The appellant's notice dated 6th December 2012 was to lapse on 31st December 2012, which was less than the one month required under the contract. The notice period was less than one month contrary to the employment contract. The appellant's counsel alluded to an oral notice, which he argued was to take effect from 30th November 2012. There is no evidence in support of this oral notice nor was the Court informed why or whether the parties ever varied the written notice orally as was submitted. No reasons were provided to demonstrate why an oral notice should prevail over a written document.

35. We take the view that termination on notice involves two distinct elements: the notification of termination and the giving of notice. The notification of termination is a unilateral act permitted by the contract – either inherently or specifically. In this case, Clause 7 of the Contract provided for termination and a notice period of one month. The failure to give proper notice is a breach of contract. In this case, the appellant erred by purporting to give a notice period shorter than the one month which was expressly provided under the contract.

36. We now turn to the appellant's counter claim premised on an alleged loss allegedly discovered after an audit report. First, the alleged loss is not the reason for termination provided in the termination letter. There is nothing to show that the respondent was accorded an opportunity to reply to the alleged loss of funds or the alleged report. There is nothing to show that the respondent was interviewed by the person(s) who under took the alleged audit. The termination letter did not mention the alleged inquiry or the alleged loss. An employer cannot be permitted terminate an employee's services citing the ground(s) for the termination and subsequently purport to introduce other allegations which were not part of the reasons for the termination. In the instant case, the additional reasons for termination were introduced in an amended response to a statement of claim and a counter-claim. In our view, the trial court was correct in finding that the respondent was not afforded an opportunity to reply to such serious allegations nor was she interviewed prior to, during or after the report was made.

37. The appellant introduced a counter-claim purported to have arisen from a loss discovered after terminating the employee's services. As the learned judge correctly observed, the appellant had the option of pursuing the claim through either civil proceedings or criminal proceedings. We therefore uphold the trial court's findings on this issue. Even if we were to hold otherwise (which we are unable), and examine the counter-claim on merit, the evidence in its support is wanting and its mere production is not proof of the alleged loss. Much more was needed to surmount the standard of proof in civil cases. Notably, the report itself concluded that the alleged loss could have been due to process failures.

38. Regarding the award made by the trial court to the respondent, there was no argument before us to suggest that the award was excessive or unmerited. In fact, the reason proffered was that the respondent was required to clear and hand over before her dues were paid. Section 50 of the *Employment Act*

obliges courts to apply the factors in section 49 of the Act in determining a complaint or suit involving wrongful dismissal or unfair termination. Section 49(1) provides as follows:

a. the wages which the employee would have earned had the employee been given the period of notice to which he was entitled under this Act or his contract of service;

b. where dismissal terminates the contract before the completion of any service upon which the employee's wages became due, the proportion of the wage due for the period of time for which the employee has worked; and any other loss consequent upon the dismissal and arising between the date of dismissal and the date of expiry of the period of notice referred to in paragraph (a) which the employee would have been entitled to by virtue of the contract; or

c. the equivalent of a number of months' wages or salary not exceeding twelve months based on the gross monthly wage or salary of the employee at the time of dismissal.

39. In determining the award, the approach is that the court has discretion, to be exercised judicially upon a consideration of all facts, and in essence, it is a matter of fairness to both parties. We find nothing to suggest that the trial judge improperly exercised her discretion in arriving at the award. Further, there is nothing before us to suggest that the amounts awarded are excessive or unreasonably high to merit this court's intervention. In conclusion, we find and hold that this appeal lacks merit. Accordingly, we dismiss it with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF SEPTEMBER, 2023

HANNAH OKWENGU

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JUDGE OF APPEAL

J. M. MATIVO

.....

JUDGE OF APPEAL

G.W. NGENYE-MACHARIA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR