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Bash Hauliers Limited v Kimani (Civil Appeal E038 of 2021) [2023] KECA 1276 (KLR) (27 October 2023) (Judgment)

Neutral citation: [2023] KECA 1276 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MALINDI

CIVIL APPEAL E038 OF 2021

P NYAMWEYA, JW LESSIT & GV ODUNGA, JJA

OCTOBER 27, 2023

BETWEEN

BASH HAULIERS LIMITED .... APPELLANT

AND

SAMWEL NJOROGE KIMANI .... RESPONDENT

(An appeal against the judgment and decree and the ruling of the Employment and Labour Relations Court at Mombasa by Hon. Justice James Rika delivered on 15th December, 2020 in ELRC Cause No. 60 of 2019)

JUDGMENT

1. This is a first appeal arising from the judgment and decree of the Employment and Labour Relation Court at Mombasa in the Employment and Labour Relations Court in ELRC Cause No. 60 of 2019. The appeal emanates from a claim by Samwel Njoroge Kimani, the respondent on 12th September 2013 against Bash Hauliers Limited, the appellant for unlawful termination of employment.

2. The facts in brief are that the respondent was employed by the appellant as a forklift driver as of on 26th January 2011; that his contract was terminated by the appellant on 10th June 2019, on the ground of redundancy; that by that time his last gross monthly salary was Kshs. 82,765.00; that the claim reason for redundancy was a ploy to terminate his employment unfairly; that he was singled out for redundancy since his juniors were untouched and the entire process was shrouded in mystery; and that after his employment was terminated the appellant employed other people to take up his position. As a result, the respondent prayed for compensation for unfair termination equivalent of his 12 months' gross salary, at Kshs. 993,180 together costs and interest of the suit.

3. The appellant's case, on the other hand was that it employed the respondent as a forklift driver on a monthly salary of Kshs. 82,765.00; that the appellant terminated the respondent's contract, on redundancy; that the process was fair and in accordance with the law since the respondent received a

notice dated 10th June 2019 advising him that he had been discontinued, on redundancy; and that the claim for unfair termination of contract was brought in bad faith.

4. By a consent order recorded on 12th September 2020, the trial court allowed the parties to have the claim considered and determined based on the pleadings, documents, witness statements and submissions.

5. In his judgement, the learned trial Judge (Rika, J) found that at the time the appellant terminated the respondent's contract, the respondent the respondent's last salary was Kshs. 82,765.00; that there was no evidence that a downsizing exercise took place, or that there was justification for such an exercise; and that no documents were exhibited before the Court showing the reason and extent of redundancy or the number of affected employees.

6. The learned Judge further found that that the appellant contravened the provisions of section 40 (a) and (b) of the *Employment Act*, 2007 (hereafter, the *Act*) on the strength that there was no notice issued under demonstrating any form of consultation between the parties; that the Labour Office was never involved the notice of termination having issued on 10th June 2019, to take effect 8 days later, on 18th June 2019; that the respondent was not advised on selection criteria; that the respondent's his juniors were retained and new employees were recruited to discharge the respondent's roles; and that what took place was not a redundancy process as prescribed under Section 40 of the said Act, but termination at the will of the appellant.

7. In the result, the learned Judge concluded that the manner of the respondent's termination having been contrary to sections 40 and 45 of the Act, the termination was therefore unfair. He proceeded to award the respondent compensation, equivalent to the respondent's 8 months gross salary at Kshs. 662, 120/- together with interest at the rate of 16% per annum. In arriving at the said figure, the learned Judge observed that:

> "There is nothing on record to suggest that his performance was wanting, or that he had disciplinary problems. He was paid terminal benefits, which mitigated the effect of losing his job. His contract was open-ended."

8. Aggrieved, the appellant preferred this appeal against the judgment of the Hon. Justice Rika, J delivered on 15th December 2020 based on 17 grounds outlined in the memorandum of appeal dated 12 January 2021 that faulted the trial judge in law and fact for allowing the respondent's claim; failing to consider the documentary evidence tendered by both parties proving the fact that other employees were as well affected by the redundancy process carried out by the appellant; in holding that the Labour Office was not involved when there was documentary evidence placed in court proving the same; for failing to take into account a letter dated 10th June 2019 addressed to the County Labour Office forming part of the documentary evidence; in failing to appreciate the fact that other employees were as well rendered redundant; in holding that the respondent was the only employee affected despite the documentary evidence proving the contrary; in holding that the respondent did not issue a notice under section 40(a) or 40(b) of the Act despite the existence of such notices forming part of the appellant's list of documents; and in placing too much reliance on the statements by the respondent, while failing to place reliance on the facts, substance and weight of the evidence adduced.

9. The trial judge was further faulted for erring in law and fact for; relying blindly on the respondent's claim that the respondent's juniors were retained and new employees were recruited to despite his roles without evidence to support the claim; that relying on the respondent's assumption without any form of evidence led the trial court to make an erroneous conclusion; that the trial court failed to take into account extraneous factors in allowing the respondent's claim; that documentary evidence produced by the appellant was never taken into account; that the holding that the termination of the respondent's

employment on account of redundancy was unfair was flawed since the respondent was notified of the impeding termination and was also paid all his dues applicable; that the trial judge erred in law and fact by expanding the conditions provided under section 40 of the Act; that in finding that termination on account of redundancy it must be proved that either the performance of an affected employee was wanting or that he had disciplinary concerns, the trial court erred in law and fact by taking into account extraneous factors not provided for under the law thereby reaching an unjust and unfair conclusion and further that the award of interest at 16% was unreasonable and unjustifiable in the circumstances.

10. We heard this appeal on the Court's virtual platform on 13th June 2023 during which learned counsel, Ms Nafula, appeared for the appellant while Mr Chamwada appeared for the Respondent. Both counsel relied on their written submissions in their entirety.

11. To support its submissions, the appellant cited the case of *Pamela Nelima Lutta v. Mumias Sugar Co. Ltd* (2017) eKLR on what constitutes fair termination - fair procedure and valid reason. The appellant submitted that section 45 of the Act provides that termination of an employee's contract of service is unfair if the employer fails to prove that the termination was grounded on valid and fair reasons relating to the employee's conduct, capacity and compatibility or based on the employer's operational requirements; that a fair procedure was followed; that where an employee is not a member of a trade union, the employer notifies the labour officer and the employee personally in writing; that in this case, the appellant did issue a notice to the respondent informing him of their decision to terminate him on account of redundancy vide a letter dated 10th June 2019; that though the appellant failed to issue notice to the respondent a month before his termination, payment was made for one month; that the trial judge erred in finding that the labour officer was not involved in the process despite the existence of a letter to the said office; that although section 40(1) (b) does not specify the length of time the notice ought to have been issued, the respondent was paid one month salary in lieu of notice in compliance with section 40(1) (f) of the *Act.* The case of *Africa Nazarene University v. David Mutevu and 103 Others* (2017) eKLR was cited to support the submission that notice to the employee or the labour office was considered a fair labour practice. The appellant further submitted that it complied with the subsections (e) and (g) of section 40 of the *Act* since the respondent was paid leave balance, severance pay along with the terminal dues.

12. To demonstrate that the termination on account of redundancy was undertaken with sound reason, the appellant submitted that its letter to the County Labour Office stated that the appellant would be downsizing the number of staff to strengthen operations and would therefore be terminating 15 staff hence it was not correct for the respondent to claim that he was the only one singled out for termination; and that it was not obliged to prove that downsizing was genuine or necessary and referred to section 43(2) of the *Act* for the position that the reasons for termination of a contract are matters that the employer at the time of the termination of the contract genuinely believed to exist and which caused the employer to terminate the services of the employee. The case of *Kenya Airways Limted v. Aviation & Allied Workers Union & Others* [2014] eKLR was cited to submit that as long as the employer genuinely believed that there was a redundancy situation, any termination was justified and it was not for the court to substitute its decision of what was reasonable.

13. The appellant therefore submitted that the trial judge erred in holding that the termination was unfair by virtue of this and the consequent misapprehension of the law impacted the court's judgment in awarding the claimant 8 months compensation for unfair termination; that there was no evidence to basis the finding made by the trial court that junior staff were retained as the respondent's replacement; that the respondent had a valid reason to terminate the respondent's employment; that the respondent's termination was lawful and fair; that he was compensated for termination as per

section 40 of the *Employment Act*; and that the respondent is therefore not entitled to the prayers sought. Hence the appellant prayed that the appeal should be allowed with costs.

14. On behalf of the respondent, it was submitted that there was no evidence to support the generalized allegation of "downsizing to meet operational requirement" by the appellant; and that there was no valid reason by the appellant to justify termination as the procedure went against section 40 and 45 of the *Employment Act*, 2007; that the reason for downsizing the number of the appellant's staff in the present circumstances due to operational requirement did not warrant the redundancy situation. The case of Freight In *Time Limited v. Rosebell Wambui Munene* (2018) eKLR was cited to demonstrate that the termination did not show the extent of the redundancy situation.

15. To demonstrate that the termination procedure was flawed, the respondent submitted that notice of termination was not issued a months prior to the date when the termination was to take effect; that the respondent was not taken through a selection criteria of the termination process in ensuring that his right against discrimination under Article 41(1) of *the Constitution* of Kenya, 2010 were not violated; and that the trial judge exercised his discretion judiciously and within the provisions of the Act hence the respondent urged that the appeal is dismissed with costs..

16. In the respondent's submissions, the facts of this case are distinguishable from those in the Kenya Airways Case, supra, since in that case, it was evident that the appellant in that case had made substantial losses over the years hence had applied countrywide measures to cut costs by staff rationalism where some services were abolished and inevitably the number of its staff was reduced.

Analysis and Determination

17. We have considered the evidence on record, the written and oral submissions by and on behalf of the parties to this appeal and the authorities cited.

18. This being the first appeal, we are mindful that the duty of this Court as set out in the decision of *Selle & Another vs Associated Motor Boat Co. Ltd & Others* [1968] EA 123 is to reconsider the evidence, evaluate it and draw our own conclusion of facts and law, and we will only depart from the findings by the trial Court if they were not based on evidence on record; where the said Court is shown to have acted on wrong principles of law as was held in *Jabane v Olenja* [1968] KLR 661, or where its discretion was exercised injudiciously as held in Mbogo & Another v Shah [1968] EA 93.

19. In our view the issues that fall for determination in this appeal are whether the court has the power to interrogate the reasons given by the employer for declaring redundancy; and secondly, whether the appellant's actions amounted to unfair termination.

20. Section 2 of *Employment Act* defines redundancy as:

> " 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."

21. Section 40 of the *Act* deals with termination of employment on account of redundancy and provides:

> "(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 an employee declared redundant severance pay at the rate of not less than fifteen days pay for each completed year of service."

22. Section 43(1) of the *Act* provides that in any claim arising out of termination of a contract, the employer shall be required to prove the reasons or reasons for termination and where he fails to do so, the termination shall be deemed to be unfair termination within the meaning of sections 45. Section 43(2) provides:

" 43.

(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."

23. Section 45(1) of the Act prohibits an employer from terminating the employment unfairly and Section 45(2) stipulates what is unfair termination. It provides:

" (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 employee's 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.

24. Section 46 of the Act sets out the reasons which do not constitute fair reason for termination or discipline.

25. Section 47(5) of the Act provides that for a complaint of unfair termination of employment or dismissal, the burden of proving unfair termination or wrongful dismissal rests on the employee while the burden of justifying the grounds of termination or dismissal rests with the employer.

26. In this case, the respondent adduced evidence that in terminating his employment, the appellant did not give proper reasons save for a generalised one without any particulars. The letter conveying the redundancy stated that:

> " we are in the process of downsizing the number of staff to strengthen our operations…it is unfortunate to notify you that the operations department has been affected, and you are one of those to be laid off."

27. There was no evidence that the appellant had, 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. Maybe this evidence might have come out had the matter been conducted by way of viva voce evidence. Whereas the law permits cases of this nature to be conducted by way of statements and documentary evidence, one must always be wary of the incapacitation that that kind of a procedure may subject the parties to. In this absence of this crucial evidence, which evidence ought to have come from the appellant, we have no basis for faulting the learned judge in his finding that the termination of the employment of the respondent was unfair and contrary to the provisions of the *Employment Act* and therefore substantially infirm. Based on the evidence as presented before the court, the appellant failed to show that there existed valid grounds to declare the respondent redundant.

28. In our view the genuine belief that there exist reasons for termination of a contract, for the purposes of section 43(2) of the Act must be based on facts and those facts, being uniquely in the knowledge of the employer, can only be disclosed by the employer. In order for this court to make a finding as to whether there was a basis for forming that belief, evidence ought to be presented before the court which, though may not necessarily lead to the conclusion that the employer had no option but to terminate the employment, but those which satisfies the criteria that any reasonable person in the place of the employer would have arrived at the same conclusion, even if later the conclusion may turn out to have been erroneous. No such basis was laid before us.

29. As regards procedural impropriety, the respondent's position was, and this was admitted by the appellant, that the respondent was not given one month's notice. It is true that whereas in cases where an employee is a member of a trade union the law prescribes that the notice to the trade union be not less than one month. It is also true that where the employee is not a member of a trade union the law is silent as to the length of the period required. It therefore follows that the period of the notice ought to be a reasonable one. In our view, since the consequences of redundancy to an employee is the same whether or not one is a union member, we do not see any reason why the period of notice to a non-unionisable employee ought to be any different from that of a unionisable employee. We therefore hold

that just as in the case of a unionisable employee, the reasonable period of notice in cases of redundancy for a non-unionisable employee ought to be one month.

30. It is clear that the appellant did not comply with the requirement for issuance of a reasonable notice.

31. Maraga, JA (as he then was) in *Kenya Airways* Case, *supra* expressed himself on the duration of the notice:

> "I agree with Mr. Mwenesi that both the notices themselves and their duration of 30 days under this provision are mandatory. 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."

32. The learned Judge further pronounced himself on the procedure 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 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."

33. The learned Judge concluded that:

> "As I have said, besides this Convention, the requirement of consultation is implicit in the principle of fair play under Section 40(1) of the *Employment Act* itself and our other labour laws. The notices under this provision are not merely for information. Read together with Part VIII of the *Labour Relations Act*, 2007 which provides for reference to the Minister for Labour of trade disputes, including those related to redundancy (see Section 62(4)) for conciliation, I am of the firm view that the requirement of consultations implicit in these provisions. The purpose of the notice under Section 40(1) (a) and (b) of the *Employment Act*, as is also provided for in the said *ILO Convention* No. 158-Termination of Employment Convention, 1982, is to give the parties an opportunity to consider "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 consultations are therefore meant to cause the parties to discuss and negotiate a way out of the intended redundancy, if possible, or the best way of implementing it if it is unavoidable. This means that if parties put their heads together, chances are that they could avert or at least minimize the terminations resulting from the employer's proposed redundancy. If redundancy is inevitable, measures should to be taken to ensure that as little hardship as possible is caused to the affected employees. In the circumstances, I agree with counsel for the 1st respondent that consultation is an imperative requirement under our law."

34. Therefore, whether one looks at it from the point of substantive infirmity or procedural impropriety, the termination of the respondent from the appellant's employment on grounds of redundancy cannot be justified. We have no reason to fault the learned trial judge in this regard.

35. The memorandum of appeal did not question the award apart from the rate of interest of 16%. We agree with the appellant that there was no basis for imposing that rate of interest. Accordingly, while we dismiss the appeal, we direct that the rate of interest imposed be 14% which, according to this Court's decision in *Highway Furniture Mart Limited v Permanent Secretary Office of the President & another* [2006] eKLR, is the court interest rate. We award half the costs of this appeal to the respondent.

36. Judgement accordingly.

DATED AND DELIVERED AT MOMBASA THIS 27TH DAY OF OCTOBER, 2023.

P. NYAMWEYA

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

G. V. ODUNGA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR