Prideinn Hotels & Investment Limited v Madzungu (Civil Appeal 88 of 2017) [2022] KECA 764 (KLR) (24 June 2022) (Judgment)

Neutral citation: [2022] KECA 764 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPEAL 88 OF 2017

SG KAIRU, P NYAMWEYA & JW LESSIT, JJA

JUNE 24, 2022

BETWEEN

PRIDEINN HOTELS & INVESTMENT LIMITED .... APPELLANT

AND

HAMISI MADZUNGU .... RESPONDENT

(An appeal against the judgment and decree of the Employment and Labour Relations Court at Mombasa (Rika, J) delivered on 27th June, 2017 in Industrial Cause No. 457 of 2015)

JUDGMENT

1. This is a first appeal arising from the judgment and decree of the Employment and Labour Relations Court (ELRC) delivered on 27th June 2017.The appellant was aggrieved by the award on compensation for unfair termination and other orders in the judgment of the ELRC.

2. The brief background of the case is that the respondent was employed as a cleaner in the appellant hotel on 1st July 2003, on a monthly salary of Kshs.10,598/-. This figure will be explained later in this judgment. The dispute between the parties arose when the appellant issued the respondent a 30 day notice of termination of employment, dated 1st May 2015. The reason advanced for termination in the notice was the appellant's inability to sustain all staff in its payroll due to hard economic times. The respondent felt that the termination was unfair and consequently instituted the claim against the appellant for compensation for unfair termination, severance pay, one month pay in lieu of notice, paternity leave pay, for a declaration that the terms of the termination were unfair and costs.

3. The appellant denied the respondent's claim. It maintained that the requisite notice of termination on account of redundancy was issued to the respondent and the Labour office, and that the due process followed as required by the law. The appellant insisted that the respondent was paid all his dues.

4. The claim was heard by the ELRC which found that the respondent was not issued with a notice of intended redundancy under Section 40(1) (b) of the *Employment Act*, 2007(the Act); that the appellant was instead given a direct notice of termination; that the appellant paid the respondent Kshs. 30,000/- much later as service pay, rather than severance pay; that no notice of intended redundancy stating the reasons for, and extent of the intended redundancy was issued to the respondent and the Local Labour Office as required under the Act. That instead, the notice of termination of employment was copied to the Labour Officer. That there was no consultation between the appellant, the respondent and the Labour Office, and that the termination letter dated 1st May 2015, merely communicated a decision already made by the appellant, to terminate its relationship with the respondent.

5. In the end, the ELRC found that the respondent was entitled, and therefore granted, the equivalent of twelve months' salary in compensation for unfair termination; one month's salary in lieu of notice; and severance pay based on 15 days' salary for each complete year of service worked. The Court also ordered the appellant to issue to the respondent Certificate of Service, and awarded costs to the respondent, and interest at 14% per annum from the date of judgment till payment is made in full.

6. Being aggrieved with the decision of the ELRC, the appellant filed this appeal and raised several grounds. The appellant faulted the ELRC firstly for finding that the appellant did not follow the law in terminating the respondent on account of redundancy and secondly, for awarding the respondent terminal dues, yet the same were already paid; thirdly, for awarding salary in lieu of notice yet notice was given; fourthly, for awarding the respondent severance pay in disregard of the evidence; fifthly, for awarding damages on a salary of Kshs 12,248/- yet the respondent's salary was Kshs 10,708/-; and lastly, that the award was manifestly excessive and unfair . It was sought that judgment of the ELRC Court be set aside and substituted with an order dismissing the respondent's claim.

7. The appeal was heard virtually on the 23rd February 2022. Mr. Muriuki learned counsel holding brief for Mr. Morara learned counsel for the appellant was present. Mr. Kimani Njenga learned counsel for the respondent was absent despite service with the hearing notice. However, the respondent's written submissions dated 21st April 2021 are on record. Mr. Muriuki on his part relied entirely on the appellant's written submissions dated 18th March 2021.

8. We have considered the appeal, the submissions of counsel as filed, together with the record of appeal. This being a first appeal, it behooves upon this Court to re-evaluate, re-assess and reanalyze the evidence on record and then determine whether the conclusions reached by the learned trial Judge should hold. In the case of *Kenya Ports Authority vs. Kuston (Kenya) Limited* (2009) 2EA 212 this Court espoused that mandate or duty as follows:-

> " On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence."

9. Morara Apiemi & Ngangito advocates, learned counsel for the appellant in their written submissions faulted the learned Judge for failing to consider the hard economic times faced by the Hotel Industry as a result of which the industry is forced to declare redundancy and terminate employment. Counsel relied on the case of *Gerrishom Mukhutsi Obayo v DSV Air and Sea Limited* (2018) eKLR, and argued that it followed Section 40(1) of the Act by giving the respondent one month notice and explaining the reasons for his termination; that the respondent did not belong to any trade union therefore no notice was issued to the trade union. The appellant urged that by dint of Sections 35(5), 36 and 40(1)(e), (f) (g)

and 51 of the Act, the respondent was entitled to remuneration for work done before termination, leave pay, notice pay, severance pay and a certificate of service; and that all the monies due to the respondent were paid to him. The learned judge was faulted for awarding the respondent severance pay in disregard of the evidence that he was paid Kshs 30,203/-; and, that the respondent was not entitled to service pay as per Section 35(6) of the *Employment Act* for he was a member of a registered pension scheme.

10. Mr. Mwangi Njenga counsel for the respondent opposed the appeal. Counsel urged that the learned judge made the correct findings on the footing of Section 40(1) of the Act that the respondent's termination on grounds of redundancy was unfair; that the failure to issue a redundancy notice to the Labour Officer was procedural unfairness. For that proposition counsel relied on the case of *Kenya Airways Limited vs. Aviation & Allied Workers Union Kenya & 3 Others* (2014) eKLR. Counsel urged that the damages awarded by the court do not warrant interference as there was no indication that the same are manifestly high; and for that proposition relied on the case of *Rift Valley Railways (K) Limited vs. Kiva Kalakhe Boru* (2015) eKLR.

11. In view of the material placed before the Court, the issues for determination are whether a valid redundancy notice was issued; whether the appellant complied with procedural requirements under the Act; whether the respondent was entitled to severance pay; whether the compensation of the equivalent of ten months pay was excessive; and, whether the appeal should succeed and to what extent..

12. There is no dispute that the appellant issued a notice to the respondent giving him 30 days' notice before his services were terminated. The issue is whether the letter was a valid notice of termination on account of redundancy as the appellant contends, or a termination of employment as the respondent contends and as the court found. We must first define redundancy. Under Section 2 of the Act, redundancy is defined as:

> " redundancy means the loss of employment, occupation, job or career by involuntary means through no fault of an 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;"

13. In *Tobias Ongaya Auma & 5 others vs. Kenya Airways* (2007) eKLR, the court underscores that an employer has a right to declare redundancy. That redundancy is a legitimate ground for terminating a contract of employment provided there is a valid and fair reason based on operational requirements of the employer and the termination is in accordance with a fair procedure.

14. Indeed, the Act makes provision for redundancy as a means of terminating employment. It is a mandatory requirement that for redundancy to be lawful it must be both substantially justified and procedurally fair. The Act prohibits unreasonable and unjustified termination of employment. The employee has the burden to prove the termination was unfair, however the employer has the burden of prove to justify the termination.

15. Section 40 of the Act provides for termination of employment on account of redundancy and provides:

> " 40. Termination on account of redundancy
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> 1. An employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions
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>   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."

16. Section 40 of the Act is merely procedural. It must be read together with Sections 43, 45 and 47(a) of the Act. From these four sections, to establish a valid defence to a claim of unfair termination based on redundancy an employer has to prove; one, that there is a reason for termination; two, that the reason for termination is valid; three, the reason for termination is fair reason based on the operational requirements of the employer; and four, the employment was terminated in accordance with fair procedure.

17. The ELRC found that the respondent was issued a 30 day notice of termination of employment vide the letter dated 1st May 2015, and was told that the appellant was not able to retain all staff due to hard economic times. The ELRC found that the appellant did not follow the law on termination of employment on the ground of redundancy under Section 40 as read with Section 45 of the Act. The Judge of the ELRC then set out the reasons why he arrived at that finding. The learned Judge observed that the respondent was not issued with a notice of intended redundancy under Section 40(1) (b) of the Act; and that instead he was given a direct notice of termination. He also noted that the appellant later paid the respondent 30,000/-which was explained to represent service, rather than severance pay. He noted that no notice of intended redundancy stating the reasons for, extent of the intended redundancy, issued to the Labour Office, that there was no consultation in any form involving

the respondent, the appellant and the Labour Office; neither did the appellant show what measures it applied in selecting the respondent, from the entire workforce, among them 13 cleaners.

18. The letter dated 1st May 2015 is at page 19 of the record of appeal. It is addressed to the respondent, on the appellant's letterheads. It is titled and provides as follows:

> " Re: Service Termination Notice"
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> " The management hereby informs you of decision made in regards to your contract and the intention to terminate your services with Prideinn Hotels…Hence the need to give you 30 days notice effective today…The management will pay you 30 days full notice at end of the month of May 2015 less any deductions…"(sic).

19. Did this letter meet the requirements of Section 40 of the Act? Section 40(1) of the Act sets down conditions an employer must satisfy before it can terminate an employee on account of redundancy. We have set this section herein above. The appellant in its evidence stated that the respondent was not a member of a trade union, which was not contested. Section 40 (1) (a) applies where the employee was a member of a trade union. In addition to sub-section (1) (a), sub-section 40 (1) (b) applies where the employee is not a member of a trade union. Both sub-section (a) & (b) apply to an employee who is not a member of any union because the second part of the sub-section (a) details the nature and content of the notice required to be served, which is missing under sub-section (b). So that for the latter sub-section to be complete, it should be read together with the former. Under (b) the appellant was required to serve a notice to the respondent personally, and the Labour Officer.

20. The letter of 1st May 2015 does not anywhere in the title or body of it make reference to 'redundancy'. It clearly shows the intention of the maker is to terminate the employee in question within 30 days of the date of the letter. It states a reason for the termination, that it had become necessary to terminate the respondent's employment due to hard economic times.

21. The appellant needed to show that it served the notice on the Labour Office, 30 days before the redundancy, setting out the reasons and the extent of the redundancy. No such letter was displayed. The appellant instead testified that it copied the notice served upon the respondent to the Labour office and sent it there. There was no evidence of the involvement of the Labour Office at the stage contemplated under the Act, which is before the notice took effect. As this court held in Kenya Airways Limited v. Aviation & Allied Works Union Kenya & 3 Others (2014) eKLR the failure to issue a redundancy notice to the Labour Officer and a separate notice to the affected employees amounted to procedural unfairness.

22. Quite apart from the service of the notice of redundancy, the appellant was required under Section 40 (1) (c) to show that in the selection of employee to be declared redundant, it 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. In other words, the appellant was required to outline the selection process followed in selecting the respondent for redundancy.

23. The appellant's submission was that it demonstrated that it acted in compliance with section 40(1) of the Act since the respondent was the only gardener in that particular class of employees, and consideration of seniority or number of years worked did not arise. The respondent's submission was that the respondent was terminated unfairly and the process of selecting him was not shown. The respondent in his evidence stated that he had worked for 12 year as a gardener cum cleaner, and had acquired skills. That there were many other cleaners in the establishment. The ELRC found that there were 13 cleaners working for the appellant at the time. In addition, the respondent testified that the appellant had five other similar establishments where it could have considered transferring him.

That upon termination, the appellant employed another person to perform the same job he had been performing before termination. These facts were not contested.

24. We have considered the evidence and find no demonstration of any criteria having been adopted and applied in selecting the respondent for termination. The section requires that there be a process used to identify the employee for termination on account of redundancy. We believe that even if he was the only person in the office affected, the reason for selecting him should still be shown. Section 2 identifies redundancy where the services of an employee are superfluous by reason of abolition of office or job. So that the appellant's excuse that the respondent was the only person in his category of job cannot be accepted as an excuse to flout the mandatory requirement of Section 40 (1) (c) of the Act.

25. Turning now to the issue whether the termination was fair, Sections 43 and 45 of the Act apply. Section 43 requires an employer to prove that the reason for termination was fair, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of Section 45. While Section 45 defines what constitutes unfair termination.

Section 45of the Act provides that

> " 45. Unfair termination
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> 1. No employer shall terminate the employment of an employee unfairly.
> 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."

26. As we stated earlier in this judgment, the burden to justify the termination and prove that the reason for termination was valid, was a fair reason and was based on the operational requirements of the employer; and that the respondent was terminated in accordance with fair procedure as set out under the Act lies with the appellant. The appellant's evidence was that due to hard economic times it could no longer sustain all its employees in its payroll. The reason of hard economic times given has to be considered along with the procedure adopted. Whereas the appellant may have had a good reason, it failed in the procedure used in terminating the respondent. Failure to give the notice contemplated under Section 40 (1), failure to show that there was a selection process followed in identifying the respondent, and the failure to involve the Labour Office before the termination are proof that the appellant failed to follow due process of the law, both substantially and procedurally.

27. We shall consider the other issues together, which are; whether the respondent was entitled to severance pay; whether the compensation of the equivalent of 12 (twelve) months' pay was excessive; and, whether the appeal should succeed and to what extent.

28. The appellant challenges the manner in which the ELRC exercised its discretion in arriving at the awards made under the various heads. This Court in *Mulemi v Angweye & another* (Civil Appeal 170 of 2016) [2021] KECA 214 (KLR) considered the appellate court's power to interfere with discretion of High Court and lower courts and held as follows;

> " In Mbogo & Another vs. Shah [1968] E.A 93; at page 94, paragraph H - 1 Sir Clement De Lestang V.-P: had this to say:
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> "I think it is well settled that this Court will not interfere with the exercise of discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."
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> See also Sir Charles Newbold, P., in the same decision at page 96 paragraph G - H where he expressed himself as follows:
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> "For myself, I like to put it in the words that a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice."

(See also *Rift Valley Railways (K) Limited v. Kiya Kalakhe Boru* (2015) eKLR)

29. The appellant contends that by dint of Sections 35(5), 36 and 40(1)(e), (f) (g) and 51 of the Act, the respondent was entitled to remuneration for work done before termination, leave pay, notice pay, severance pay and a certificate of service; and that all the monies due to the respondent were paid to him. The learned judge was faulted for awarding the respondent severance pay in disregard of the evidence that he was paid Kshs 30,203/-; and, that the respondent was not entitled to service pay as per Section 35(6) of the *Employment Act* for he was a member of a registered pension scheme. The respondent on his part supported the finding of the ELRC urging that no terminal benefits were paid to the respondent.

30. The ELRC entered judgment in the respondent's favour and awarded him the equivalent of 12 (twelve) months' salary in compensation for unfair termination at Kshs. 134,976/-; one month salary in lieu of notice at Kshs. 12,248/-; and severance pay based on 15 days' salary for each complete year of service worked at Kshs. 84,793/-. The Court also ordered the appellant to issue to the respondent with a Certificate of Service, and awarded costs to the respondent, and interest at 14% per annum from the date of judgment till payment is made in full.

31. As this Court held in Mulemi v Angweye & another, (supra) we cannot interfere with the exercise of discretion by the ELRC unless we are satisfied that the court misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have or that the decision is clearly wrong.

32. Section 40 of the Act requires an employer not to terminate an employee declared redundant unless it has paid off the leave in cash where leave is due to such employee; has paid not less than one month's notice or one month's wages in lieu of notice; has paid severance pay at the rate of not less than fifteen days' pay for each completed year of service.

33. The appellant urged that under Sections 35(5), 36 and 40(1)(e), (f) (g) and 51 of the Act, the respondent was only entitled to remuneration for work done before termination, leave pay, notice pay and severance pay. It then urged that the payment of Kshs. 30, 203/- met the requirements under those heads. We find that except for compensation for unfair termination, which the appellant insists was paid in full, the appellant does not challenge the ELRC's finding that what was payable to the respondent was severance pay, notice pay and pay for work done. It is how the amount is calculated which is in issue. Under the three heads, the appellant's calculation brings the total amount payable to 30, 203/-.

34. Having considered the evidence before the ELRC, we are satisfied that the appellant had not paid the respondent's dues as prescribed under Section 40 of the Act. It claimed that the amount it paid of Kshs. 30, 203/- was severance pay and notice pay. Considering the provisions of Section 40 (g) of the Act which provides that severance pay should not be less than 15 (fifteen) days pay for each completed year of service, clearly the amount of Kshs. 30, 000/- does not meet the requirement of the Act., taking into account that the respondent had worked for 12 years. However since the ELRC noted that this amount was paid to the respondent, albeit late, this amount will be presumed to have been paid to the respondent as his salary for the month of May 2015, which was due to him. The amount above the 30, 000/- will be deducted from the final award.

35. The appellant urged that the termination of the respondent's employment was subject to Sections 35(5), 35, 40 (1) (e), (f), (g) and 51 of the Act. Sections 35 and 36 of the Act apply to termination notice but not to termination on account of redundancy and does not apply. Section 40 (1) of the Act deals with payments due to an employee who has been declared redundant, and it applies to this claim. Section 51 of the Act does not deal with payments.

36. The law is clear as to how payment under each head should be calculated.

    Before we come to that we note that there was a conflict in regard to how much the respondent's salary was before termination. The appellant submitted that the respondent's salary was Kshs. 10, 708/-. From the evidence of the respondent before the ELRC, he was earning Kshs. I1, 248/- at the time of termination. It is not clear where the figure of Kshs 12, 248/- arrived at by the court came from. In light of the appellant's exhibit at page 81 of the record, which is the payroll for all staff for May 2015, which is the month the respondent's employment was terminated, his salary was Kshs.10, 548/-. This is the amount the ELRC should have taken into consideration, and upon which the award made in this claim should have been pegged.

37. The ELRC gave the maximum months allowed as compensation under Section 49 (1) (c) of the Act , which provides that an employee whose employment has been terminated unfairly or is unlawfully dismissed may be paid the equivalent of a number of months wages or salary not exceeding twelve months based on the gross monthly wage or salary. (Emphasis ours). As the ELRC has not given any reasoning to justify or explain the exercise of discretion to grant maximum number of months allowable under the Act, we find the award excessive. We are supported by this Court's decision in Ol Pejeta Ranching Limited v. David Wanjau Muhoro (2017) eKLR where the Court concluded that it was inclined to find that the judge took into account irrelevant considerations, or failed to take into account relevant considerations when considering the award, on grounds that failure to explain why the court found the respondent was entitled to the maximum awardable compensation of 12 months' pay, made the Court's intervention necessary,

38. The respondent had worked for 12 years. He had a clean record. This was a case of redundancy, thus he did not play any role in the termination. We think that 6 (six) month's pay as compensation for unfair termination is reasonable.

39. In conclusion we find that the learned ELRC Judge misdirected himself on the correct amount of salary the respondent was earning at the point of termination. He also gave an excessive award on compensation for unfair termination for the reason we have explained in this judgment. We order as follows:

1]. We set aside the award for the equivalent of twelve months' salary in compensation for unfair termination, and in its place award the equivalent of six months' pay at the rate of Kshs. 10, 548/- bringing the total to Kshs. 63, 288/-;

2]. We vary the award of one month's salary in lieu of notice at the rate of Kshs. 12,248/- and substitute the same with one months' salary in lieu of notice at the rate of Kshs. 10, 598/-; and,

3]. We vary the award of severance pay based on 15 days' salary for each complete year of service worked using the monthly salary of Kshs. 10, 598/- bringing the total amount to Kshs. 63, 5688/-.

4]. We order that the amount payable to the respondent be reduced by Kshs. 19, 605/-, being the amount paid to him by the appellant upon termination.

5]. This award will be subject to statutory deductions. 6]. The order on interest is not disturbed.

40. Since the appeal has succeeded in part, it is ordered that each party will bear its own costs of the appeal.

DATED AND DELIVERED AT MOMBASA THIS 24TH DAY OF JUNE, 2022.

S. GATEMBU KAIRU (FCI Arb)

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

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

Signed

Deputy Registrar