



**IN THE COURT OF APPEAL**

**AT MOMBASA**

**(CORAM: OKWENGU, MAKHANDIA & SICHALE, J.J.A.)**

**CIVIL APPEAL NO.47 OF 2014**

**BETWEEN**

**RIFT VALLEY RAILWAYS (K) LIMITED ..... APPELLANT**

**AND**

**KIYA KALAKHE BORU ..... RESPONDENT**

*(Being an appeal from the judgment and decree of the High Court of Kenya at Mombasa (Makau, J.) dated 29<sup>th</sup> August, 2014*

*in*

*Mombasa ICC Claim No.246 of 2013)*

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**JUDGMENT OF THE COURT**

The appeal before Court can be traced to a written contract of employment signed between the appellant and the respondent wherein the respondent was employed by the appellant and designated as an Assistant Station Master with effect from 1st November, 2006. In the course of his duties, a wagon mishap occurred leading to disciplinary proceedings by the appellant against him. During the pendency of the proceedings however, he was rendered redundant by the appellant. The proceedings in the end vindicated him and concluded that he was not responsible for the mishap. This was a month after his severance from the appellant's employment. The respondent subsequently made a claim before the Industrial Court at Mombasa, his contention being that prior to severance of his employment, he had worked on night-shift for 79 months and was therefore entitled to an amount of Kshs.625,6980/- as night shift duty allowances. He further contended that his severance was as a result of the disciplinary proceedings and that the redundancy was due to extraneous considerations and not as per the Employment Act and the policies of the appellant. He therefore prayed for a declaration that the severance was irregular, unlawful, unfair and wrongful, payment of 12 months' salary as damages for wrongful termination of employment, Kshs.625,680/- being night shift duty allowance, costs and interest.

The appellant filed a response to the claim which in summary it claimed that the retrenchment was justified and lawful as his services had been rendered surplus to the appellant's requirements. That he had been duly paid severance package in accordance with the Kenya concession assessment, his letter of employment and the Employment Act. That the disciplinary proceedings were never instituted maliciously or in bad faith and were in any case irrelevant to the suit.

In its judgment the Industrial Court (Makau, J.) found that the retrenchment was unlawful and unfair, awarded the respondent Kshs.600,000/- as compensation plus cost and interest. Being aggrieved by the decision of the Industrial Court, the appellant filed 16 grounds of appeal to this Court and at the end prayed that: the appeal be allowed, the judgment of **Makau, J.** be set aside with an alternative prayer for the respondent to refund the retrenchment amount of Kshs.758,214.37/-, costs of the appeal and costs in the court aquo. (sic)

In summary the grounds of appeal were that:

- *The Honourable Court erred in law and fact by determining undisputed issues as opposed to The issues for determination as per the parties' consent thereby depriving the Appellant an opportunity to be heard contrary to **Articles 27 and 50 (1)** of the Constitution on the rights to equal protection of the law and fair hearing respectively.*
- *The Honourable Court failed to consider the evidence before it hence manifesting bias in respect of The Appellant's evidence contrary to the principles of natural justice as per **Article 159** of the Constitution.*
- *The Honourable Court interrogated and made a determination on the procedure for rendering an employee redundant whilst it was not in dispute and finding that the procedure under **Section 40** of the Employment Act was not adhered to, subsequently the retrenchment was unfair in conformity to the meaning prescribed under **Section 45** of the Employment Act.*
- *The Honourable Court erred in law and fact by making a finding that the pending disciplinary case before The Appellant's Disciplinary Committee was a mere fabrication and that The Respondent's retrenchment was based solely on this.*
- *The Honourable Court erred in law and fact in finding that The Respondent was entitled to night-shift allowance and further that he was the sole Railway Operator in the Country and hence he may not get a similar job in a long time.*
- *The Honourable Court erred in law and fact in awarding the Respondent the maximum gross salary of 12 months being Kshs.600,000/- without considering the factors under **Section 49** of the Employment Act and by passing the retrenchment package and other benefits accorded to the Respondent by the Appellant.*
- *The Honourable Court erred in law and fact by making an order for costs and interest in light of the aforementioned.*

On being served with the Record of Appeal, the respondent in turn filed a two ground Notice of cross-appeal stating that in declining to award him the night-shift allowance, the learned Judge failed to appreciate and apply the provisions of **Section 74** of the Employment Act. Secondly by failing to make the award, the learned Judge erred in not applying the relevant law to the respondent's uncontroverted evidence. He prayed therefore for the cross-appeal to be allowed and the judgment of **Makau, J.** varied and set-aside to the extent of the refusal to grant an award for night-shift allowance and the same be substituted with such an award in favour of the respondent for Kshs.625,698/- or such sum as the Court will find just and appropriate in addition to the sum of Kshs.600,000/- awarded as damages. That he be awarded costs of the Cross- Appeal and the costs in the High Court.

At the hearing of the appeal, the appellant through **Mr. Abidha**, learned counsel condensed the grounds of appeal into 4 broad issues. The first and second issues were captured in grounds 1,2,3 & 5 of appeal to wit; that the Honourable court departed from the pleadings and made a determination on undisputed issues thereby disregarding the issues that the parties had agreed to canvass. The bone of contention being that the Honourable court interrogated the process of redundancy that led to the termination of the respondent's employment whilst it was not an issue in dispute. Further, the court made it the basis for the finding that the termination was unfair. The parties did not tender evidence in that regard as they were

never invited to address the court in respect of that determination. Referring to **Section 40** of the Employment Act, it was the view of the appellant that, that was a question of fact which required the leading of evidence. Consequently, the appellant was denied a right to fair hearing as envisaged by **Articles 159 and 27 (1) & (2)** of the Constitution. He relied upon the Malawian Court of Appeal case of *Malawi Railways Ltd v Nyasulu (1998) MWSC 3* for all these sub missions.

The third issue was captured in ground 10; that the court purported to rewrite the Contract of Employment when it held that the respondent was entitled to night shift allowance as per the contract of service, Collective Bargaining Agreement (CBA) and the appellant's Human Resource manual. The contract provided for night-shift and overtime allowances. However, the appellant could not have been a beneficiary. The Court departed from the terms of the contract when it held otherwise. For this proposition the appellant relied upon the finding of this Court differently constituted in the case of *National Bank of Kenya Ltd v Pipe Plastic Samkolit (K) Limited & Anor. (2002)2 E.A 503* in which it was held that a court of law cannot rewrite a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved.

The last issue is the subject of grounds 5,6,7,8,& 9 of appeal. Basically that the judgment was not premised on law at all. In reaching the finding and awarding the respondent 12 months compensation the trial court gravely erred since the appellant had complied with **Section 40** of the Employment Act. Finally, the trial court failed to consider **Sections 43, 45 & 49** of the said Act thereby misdirecting himself.

The respondent was represented by **Mr. Onyango**, learned counsel who opposed the appeal submitting that the Honourable court did not depart from the issues as framed. Redundancy was an issue that was framed and it was at the heart of the Statement of Claim by the respondent and therefore it was an issue for determination. He concurred with the findings in the Malawi case but distinguished it stating that the facts of this case did not match the said decision. The respondent urged further that as the Industrial Court is not a mechanical court, it is empowered under **Section 3**, the overriding objective, to execute fairness and it is given wide discretion. It therefore did not err by referring to issues that arose in the proceedings. He in addition argued that seniority in the order of redundancy had to be considered by the court. That the court not only considered the procedure but the fairness factor as well. He refuted the appellant's submission that the court rewrote the contract and distinguished the *National Bank Case (Supra)* stating that though he agreed with its findings, it was nonetheless distinguishable on the facts. Counsel instead referred to the respondents letter of employment and the appellant's Human Resource Manual and submitted that the Human Resource Manual in reference to 'shift' and 'overtime allowance', the word 'and' had been used which is the key word and reiterated his submission in the High Court. He submitted further that the decision of the court was not contrary to the law and that **Section 40** was inapplicable and only applied where termination is lawful, fair and unchallenged but as it was challenged in this case, then the remedies under **Section 49** applied.

On the cross-appeal counsel submitted that the employer was duty bound to produce documents in respect of the employment and that the trial court declined to award the respondent the night-shift allowance on the basis that there were no supporting documents. He relied upon **Section 74** of the Employment Act. He contended that when the court allowed an adjournment to enable parties to avail the documents, the appellant did not do so. Hence, the respondent produced what was in his possession and that as per **Section 43** it was the onus of the appellant to disprove the respondent's claim. Therefore adverse reference had to be drawn as per **Section 119** of the Evidence Act. He relied on *Sakar's Law of Evidence, 14th Edition at pages 1502-1504* for this proposition.

In reply **Mr. Abidha** stated that the only contract between the appellant and respondent was that of employment which remained unvaried, that though compensation can be up to 12 months, the court could still have awarded a 1 month pay as the respondent had received severance pay which the court ought to have considered and that this money ought to be refunded if the appeal is allowed. On the cross-appeal he pointed out that it is settled law that he who alleges must prove and that the respondent never proved he was entitled to night-shift allowance hence the cross-appeal ought to be dismissed.

The established principle on a first appeal is that this court ought to reconsider and re-evaluate the evidence afresh and reach its own conclusions. See *Selle & Another v Associated Motor Boat Company Ltd & Others* [1968] EA 123. However in doing so we must bear allegiance to the provisions of **rule 17** of the Industrial Court Rules which restrict our jurisdiction to matters of law only in appeals from Industrial Court. It would appear that the respective parties to this appeal were not aware of this requirement going by some of their submissions.

The parties during trial agreed on the following: the existence of the employment relationship between the parties, admission of all their documents as exhibits and that the procedure and facts of the redundancy were not in dispute. The parties then narrowed down the issues for determination by court into three; whether termination of the respondent's employment on account of redundancy amounted to unfair termination, whether the respondent was entitled to night shift allowance and whether the respondent was entitled to Kshs.625,860/- as accrued night shift allowance and compensation for unfair termination.

The issues which this Court must determine are: whether the High Court made a determination on undisputed facts, whether the redundancy was unfair and wrongful coupled with the awarding of a 12 months compensation and the place for the night-shift allowance. To us all these appear to be matters of law as most of them turn on the interpretation of the Employment Act, the appellant's letter of employment as well as appellant's Human Resource manual.

We propose to commence with the least controversial of the issues, this being the night-shift allowance. As per the appellant's Contract of Employment the respondent's working hours would not exceed 52 in a week. His regular working hours were to be Monday to Friday from 8.00 am to 1.00 pm and from 2.00p.m to 5.00 pm. and when required to work beyond office hours, he was entitled to overtime or shift allowance . The overtime was not to exceed 12 hours per week. As per the Human Resource Policies and Procedures manual, the night-shift commenced from 10.00p.m to 6.00a.m. and the rate for its allowance was 10% of the basic salary. It is also clear from the contract that the intention of the parties was to create both overtime and shift allowances as separate entities. The High Court did not rewrite the contract as alluded to by the appellant. A quick perusal of the Statement of Claim reveals that the respondent at the Industrial Court specified that he had worked for 79 months on night-shift. This would roughly translate to 6.583 years. He was employed on 1st November, 2006 and dismissed on 5th May, 2013 which is an estimated 79 months. However at the trial he indicated that he did not work on night-shift throughout his tenure. The time-sheets produced reflecting night-shift duty were for June & July, 2008, September, 2008, July & August, 2009 and July, 2010 totaling to only 32 days. The basic pay during that period is not indicated and this Court would be second guessing if it attempts to calculate the same. The High Court did not, contrary to the appellant's ground 10 of the appeal, make a finding that the respondent was entitled to night-shift allowance. It simply made an observation that, "*The court has perused the said time sheets and agrees that the claimant worked during night-shift and for long hours...*" The Court then made the conclusion that "... *The claim before the court is not particularized and lacks material details both in the pleadings and evidence. Consequently the court is not able to understand how the figure of Kshs.625,680/- was arrived at. The prayer is therefore not granted for the foregoing reasons.*" We concur with this finding and re-emphasize that an attempt to work out the night-shift allowance in the absence of evidence and specific particulars such as the basic pay for the claimed period would be shooting in the dark.

The respondent pointed out that as per **Section 74** of the Employment Act, it was the onus of the appellant to produce the documents to disprove his claim. Whereas **Section 74** lays a burden upon an employer to keep records of his employee, which should contain certain particulars including working hours, it does not provide that it is the employer's onus to produce them in court. There is an avenue for this at the point of discovery proceedings. At this stage a party may be compelled by the court to produce such documents. The proceedings are silent about any attempts by the respondent to make such an application. It is trite law that he who alleges must prove and this burden only shifts after such 'proving'. Hence the respondent's evidence though uncontroverted was insufficient to support the claim. The cross-appeal must on that score fail as well.

Coming to the issue as to whether the redundancy was unfair and wrongful, part of the exhibits consists of a letter addressed to the respondent dated 30th April, 2013 informing him that the appellant had found his services to “*be in excess to company requirements*”. The respondent's contention was that the retrenchment was unfair as it occurred whilst the disciplinary proceedings against him were pending. In addition, out of 12 station masters only 2, including himself, were retrenched. He stated further that he was not the youngest of the group and that the office he held was never abolished. As per the issues framed however, the respondent was not questioning the process of rendering him redundant but the reasons thereof.

The trial court in determining the fairness or otherwise of the retrenchment did however, interrogate the process of rendering the respondent redundant even addressing, *inter alia*, the period of giving notice and found that “*the procedure was in breach of Section 40 of the Employment Act and therefore unfair within Section 45 of the said Act.*” The parties had during the trial not addressed the court on the undisputed issues, one of which was the process leading to redundancy. The trial court therefore ought not to have interrogated the process and made a conclusion since at the point of crafting the judgment the parties had no opportunity to ventilate their positions. This Court has stated before in *Malindi C.A No. 26 of 2013 Kalume Karisa Mbithe & Another v Bromine Investment Ltd (UR)* that:

*“Where no issues are agreed or identified by the parties or framed by the court before the hearing, and issues are identified by the court at the time of writing the judgments as happened in this case, there is a danger of the issues identified at that late stage not having been fully canvassed by the parties during trial.”*

To this extent therefore, we are of the view that the trial court erred in canvassing and determining on the procedure adopted by the appellant in rendering the respondent redundant when it was not an issue for determination.

Moving on to the fairness or otherwise of the retrenchment, let us consider the definition of Redundancy. As per **Section 2** of Employment Act it is;

*“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.”*

**Section 40(1)** of the Employment Act provides that:

**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.**

The respondent conceded that he was notified of the retrenchment and his only contention was that he was retrenched whilst the disciplinary proceedings were taking place and seniority was not considered. At the trial, the appellant's testimony was that the disciplinary case that was pending against him was investigating his skill and competence in relation to the accident. The appellant's witness was part of the disciplinary committee and was therefore prone to reaching a biased decision. To our mind however, the relevant part of **Section 40** of the Employment Act that would have come into play in the circumstances would have been **subsection (1) paragraph (c)**. We are therefore unable to agree with reasons given by the High Court in making its finding as to why the retrenchment was to be considered unfair. Since, firstly, the parties were not querying the procedure and neither the speed with which the procedure was concluded, which the court perceived to be too quick in the circumstances. Nor was the opinion of the respondent to be the guiding factor as the law is clear on the considerations to be kept in mind before making a conclusion as regards one's redundancy.

We do however agree with the court's assertion that, *"... the court has jurisdiction to enforce fairness during such retrenchments and to ensure that they are done according to the law. In the present case the court is satisfied that the claimant was put to a disadvantage during the selection for retrenchment by the pending disciplinary case. The said case was investigating the claimant's competence, which was one of the reasons for retrenchment according to evaluation document produced by the defence as RVR 8. Otherwise the respondent did not prove what other reason she (sic) retrenched the claimant and left his colleagues."*

The appellant's exhibit RVR-9 is the Internal Memo dated 15th November, 2012 alerting all staff members about the impending restructuring of the appellant Company that would entail retrenchment. That memo was never challenged at trial. Redundancy although is a proper and valid ground for termination of employment, it must always be fashioned along the requirements of **Section 40** of the Employment Act. Any departure therefrom would attract the wrath of **Section 45** with the consequence that the retrenchment would be christened *"unfair"* and the invocation of **Section 49** for appropriate remedies. However, as the appellant's witness clearly indicated that at the disciplinary proceedings the respondent's competence was being evaluated, the retrenchment would only have been deemed fair had it been done after the conclusion of the proceedings, whatever their outcome. Similarly, the requirement to have regard to seniority in time and skill, ability and reliability was thrown through the window.

In adjudging the unfairness of the respondent's retrenchment, the court granted him Kshs.600,000/- as compensation being 12 months gross salary at the rate of Kshs.50,000/- per month. This was within the remedies contemplated under **Section 49**. The appellant is of the view that the High Court ought to have considered that severance pay had already been paid to the respondent before granting this amount. However a simple answer to this submission is that as per **Section 40**, severance pay is a mandatory part of the redundancy package. Further, the appellant challenged the number of months considered in computing the award. First it must be pointed out that under **Section 49(1)(c)** of the Act, the amount awarded ought to be **"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."** The same is couched in a manner giving the court discretion as to the number of months it would consider justifiable. Accordingly, the trial court was not duty bound to give exactly 12 months of wages or salary. There is a long list of past decided cases that clearly root for the appellate court not to intervene or interfere with the exercise of discretion by the trial court in awarding damages unless the same was done injudiciously and where the trial court considered extraneous circumstances or left out relevant facts or if on the whole it applied the *wrong principles* and arrived at an unjust decision or the award is manifestly

high or inordinately low. see ***Kemfro Africa Ltd & Anor v Lubia, (1987) KLR 30.*** In the present case, the trial court held that the appellant was the sole railway operator in the country and as such the respondent may not get a similar job in a long time. Hence the award of 12 months' salary or wages cannot be faulted. The respondent also testified that out of the 12 station masters, only two, himself included, were retrenched. All these were relevant considerations. We do not therefore discern injudicious exercise of discretion nor consideration of extraneous factors. In which event then, the amount awarded was fair. This is of course subject to the statutory deductions that were to apply as at the time of the award. **Section 49(2)** Employment Act provides that “**Any payments made by the employer under this section shall be subject to statutory deductions**”

Though this Court has taken a different path from that of the High Court on some issues and partly departed from its findings, it nevertheless finds that, for the reasons that the appeal was premised on the interrogation of the process of determining redundancy, the purported nightshifts allowance, the damages awarded and a further prayer to refund the retrenchment fund, it cannot stand. On the other hand the gist of cross-appeal was a refusal by the High Court to grant night-shift allowance. It cannot be gainsaid that this issue was never proved at trial hence it finds no further support at this juncture.

It is for these reasons that, the appeal and cross-appeal must all fail. They are all dismissed with each party bearing their own costs.

**Dated and delivered at Malindi this 26<sup>th</sup> day of February, 2015.**

**H. M. OKWENGU**

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**JUDGE OF APPEAL**

**ASIKE-MAKHANDIA**

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**JUDGE OF APPEAL**

**F. SICHALE**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**