Standard Group Limited v Rugami & another (Appeal E106 of 2021)
[2025] KEELRC 219 (KLR) (29 January 2025) (Judgment)

Neutral citation: [2025] KEELRC 219 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

APPEAL E106 OF 2021

DKN MARETE, J

JANUARY 29, 2025

BETWEEN

THE STANDARD GROUP LIMITED ..... APPELLANT

AND

IRENE WAIRIMU RUGAMI ..... 1ST RESPONDENT

MARGARET WANGUI MWANGI ..... 2ND RESPONDENT

JUDGMENT

1. This matter was originated by way of a Memorandum of Appeal dated 13th September, 2021. It come out thus;

    1. The learned trial Magistrate erred in law and fact in failing to dismiss and/or strike out the Respondents' suit with costs.

    2. The learned trial magistrate erred in law and fact in failing to analyse the issues that arose at the hearing and raised in the submissions as filed by the Appellant and make a determination on the same.

    3. The learned trial magistrate erred in law and in fact by holding that the Respondents were unfairly terminated.

    4. The Learned Magistrate erred in law and in fact in finding that the Respondent had proved their case on a balance of probability contrary to the evidence on record.

    5. That on a without prejudice basis, the learned trial magistrate erred in law and fact by awarding damages for unfair termination which are excessive in the circumstance and in view of the fact that the Appellant had made payments due to the Respondents as at the time of their termination of employment.

2. The Appellant also latter issues and files a Supplementary Record of Appeal dated 6th February, 2024 in which she buttresses her case for the appeal.

3. This is matter is consolidated with Appeal No. E025 of 2022. This is suo moto and based on the commonality of the issues raised in the two appeals and also that the parties had submitted that these two be handled together.

4. The Appellant in her written submission dated 19th March 2024 posits a case of lawful termination of the employment of the Respondents and therefore this appeal. On this she relies on the authority of *Sammy C Akifuma v Shell Development (K) Ltd* which referenced the definition of redundancy as outlined in the Halsbury Laws of England, 4th ed..,16(1992) at paragraph 412 where the court held thus;

> "An employee who is dismissed I taken to be dismissed by reason of redundancy if the dismissal is attributable wholly or mainly to:
>
> a. The fact that his employer has ceased, or intends to cease, to carry on the business for the purposes of which the employee was employed by him, or has ceased, or intends to cease, to carry on that business in the place where the employee was so employed; or
>
> b. The fact that the requirement of that business for employees to carry out work of a particular kind, or for employees to carry out work of a particular kind in the place where he was so employed, have ceased or dismissed or are expected to cease or diminish.

5. It is the Appellant's case that the redundancies were declared and relevant notices issued to the Respondents in accordance with the law.

6. The Appellant however fails to demonstrate and satisfy the provisions of Section 40 of the *Employment Act*, 2007 which provides for the streamlined legal procedure in cases of redundancy. The learned trial magistrate observed this candid deficiency in procedure and therefore her findings of unfair termination of the employment of the Respondents.

7. Again, and notably, the learned magistrate further observed that the Respondent handed over their duties to new employees, a situation that is frowned upon and contradicts the essence and principles of redundancy.

8. The Respondent submits a case of unfairness in the process of termination of her employment. This is as follows;

> The process of redundancy is consultative under Section 40 of the *Employment Act*. This is the object of the Notice under Section 40(1) (b) aforementioned. This also accords and flows from the Constitutional Right to fair administrative action under Article 47 and also the provisions of the Fair Administrative Action Act. We are here fortified by the Court of Appeal in Mombasa Court of Appeal Civil Appeal No. 54 of 2019 Cargill Kenya Limited v Mwaka & 3 others (Civil Appeal of 2019) [2021] KECA 115 (KLR) (22 October 2021) (Judgment) Neutral citation: [2021] KECA 115 (KLR).

9. We can only add that in interpreting statutes, the courts have the function of filling in the textual detail by implication, which arises either because it is directly suggested by the words expressed, or because they are indirectly suggested by rules or principles of law which are not excluded by the express wording

of a statute. See in this regard the text by F. Bennion: Bennion on Statutory Interpretation, 5th Edition, at sections 172 to 174. Having regard to the legislative intention of the provisions of section 40 of the Employment Act, the international law and decided cases, it is our finnding that consultations on an intended redundancy between the employer and the relevant unions, labour officials and employees is implied by section 40(1)(a) and (b) of the Employment Act.

10. Furthermore, consultation is also now specifically required by article47 of the Constitution and the Fair Administrative Action Act. Article 47 and section 4(3) of the Fair Administrative Action Act provide that where an administrative action is likely to adversely a ect the rights or fundamental freedoms of any person, the administrator shall give the person a ected by the decision-

    a. prior and adequate notice of the nature and reasons for the proposed administrative action;

    b. an opportunity to be heard and to make representations in that regard;

    (c) notice of a right to a review or internal appeal against an administrative decision, where applicable;

    d. a statement of reasons pursuant to section 6;

    e. notice of the right to legal representation, where applicable;

    f. notice of the right to cross-examine or where applicable; or

    g. information, materials and evidence to be relied upon in making the decision or taking the administrative action.

11. An administrative action is defined under the Act to include any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates. Employers fall within the category of persons whose action, omission or decision affects the legal rights or interests of employees, and more so the redundancy by the Appellant in the present appeal is not contested. The Appellant was therefore also bound by the provisions on consultation required by Article 47 and section 4(3) of the Fair Administrative Action Act

12. The nature and content of the consultations required to be undertaken in a redundancy process was explained by Maraga JA in Kenya Airways limited and Aviation & Allied Workers Union Kenya & 3 others (supra):

> " 52. The purpose of the notice under section40(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" We are likewise persuaded by the decision of the Employment Appeals Tribunal in Williams vs Compare Maxam Ltd (1982) IRLR 83 as follows:

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

1. The employer will seek to give as much warning as possible of impending redundancies so as to enable the union and employees who may be affected to take early steps to inform themselves of the relevant facts, consider possible alternative solutions and, if necessary, find alternative employment in the undertaking or elsewhere.

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

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

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

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

13. A perusal of the record of appeal shows that there was no evidence on record or presented to the trial court of any consultations undertaken in the manner stated hereinabove. We therefore find no fault in the finding that the termination of the respondents was unfair for want of the consultations envisaged by section 40 of the Employment Act. This is as follows;

> No opportunity whatsoever was made to in furtherance of consultation with the Respondents.

14. They were given letters on the same day they were asked to hand over and vacate their positions, Further the Respondents were asked to hand over to their replacements who had been hired a few days earlier. In that regard we submit that the lower Court was right in deeming the same as unfair termination.

15. It is the Respondent's conclusive submission is that redundancy is a legitimate ground for terminating a contract of employment provided that there is valid reason based on operational requirements of the employer and the termination is in accordance with fair procedure. As is intended by Section 43(2) of the Employment Act, 2007, the test of what is a fair reason is subjective.

Further,

> The phrase "based on operational requirements of the employer" must be construed in the context of the statutory definition of redundancy. What the phrase means, in my view, is that while there may be underlying causes leading to a true redundancy situation, such as reorganization, the employer must nevertheless show that the termination is attributable to the redundancy – that is that the services of the employee has been rendered superfluous or that redundancy has resulted in abolition of office, job or loss of employment." From the above provisions and decisions, the requirements in fulling the threshold set by section 40(1)(c) of the Employment Act can therefore be surmised Filed on: 2024-10-01 10:12:06+03 - BY: D. K. Githinji & Company - Reference: E3L3W9JM - KSH. 75.00 as follows. First, an employer should include the factors set out in section 40(1)(c) of the Employment Act in the criteria for evaluating and selecting the employees to be declared redundant. Second, the employer is required to prove that the criteria was objectively, uniformly and fairly applied. The Appellant has in this respect relied on a report titled 'Job Evaluation Report' dated November 2014 undertaken by its consultants, who also gave evidence in the trial Court. The Appellant argues that the said report stated the criteria for selection for redundancy...

16. In the circumstances of the absence of observation of the requirement of the redundancy per section 40 of the Employment Act, 2007, I find that the learned magistrate was prudent in finding for the Respondent. A case of unfair termination of the employment of the Respondent was explicit and obvious.

17. I am therefore inclined to dismiss the appeal and allow the Cross Appeal on the following terms;

    (i) The Appellant be and is hereby ordered to meet and pay the Respondent's salary for January, 2018 as follows;

        (a) 1st Appellant Kshs.53,396.63

        (b) 2nd Appellant Kshs.53,375.00

    (ii) Accrued leave for 30 days for the year 2017.....Kshs66,745.80

    Total of award.....Kshs.120,041.63

DELIVERED, DATED AND SIGNED THIS 29TH DAY OF JANUARY 2025.

D. K. NJAGI MARETE

JUDGE

Appearances:

1. Mr. Okring instructed by TripleOK Law Advocates for the Appellant.

2. Mr. Githinji instructed by A. K. Githinji & Company Advocates for the Respondent.