



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Juma v Ayuda Ninos De Africa Kenya (Appeal E027 of 2023)
[2025] KEELRC 74 (KLR) (23 January 2025) (Judgment)**

Neutral citation: [2025] KEELRC 74 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MALINDI
APPEAL E027 OF 2023
M MBARÚ, J
JANUARY 23, 2025**

BETWEEN

MESHACK LEMMY JUMA APPELLANT

AND

AYUDA NINOS DE AFRICA KENYA RESPONDENT

*(Being appeal from the judgement of Hon. James Ongondo
delivered on 7 November 2023 in Malindi MELRC No.25 of 2023)*

JUDGMENT

1. The appeal arises from the judgement delivered on 7 November 2023 in Malindi MCELRC No.25 of 2023. The appellant is seeking that the judgment be set aside with costs.
2. The appeal arises from the facts that the respondent employed the appellant under a contract dated 1 March 2022 as a basketball coach in Lamu. The agreed wage was Ksh.45, 000 per month. On 4 July 2022, the appellant was ordered to leave his place of work immediately without notice or reasons why his contract had been terminated prematurely. He claimed the following;
 - a. Unexpired term contract July 2022 to March 2023 Ksh.405,000;
 - b. Notice pay Ksh.45,000;
 - c. 12 months compensation Ksh.540,000;
 - d. Costs of the suit.
3. In response, the respondent admitted that the appellant's employment was terminated on 7 July 2022 due to the non-availability of funds since it is a non-governmental organization. the appellant was working in Lamu, but the respondent being a charitable organization and dependent on donor funds for its operations did not receive funds for its operations. There was no option but to terminate



employment. The purpose of the letter dated 4 July 2022 was to inform the appellant that he was not discharging his duties as required under the contract. There was no dismissal from employment as alleged, but there was an offer to convert employment from full-time to part-time, but the appellant declined. The termination of the contract was procedural and under the law, as well as the reasons for the non-availability of funds.

4. In his judgment, the learned magistrate held that termination of employment was procedural and fair. There was the payment of salary in lieu of notice and reasons given that there were financial challenges. The claim was dismissed, and each party was to bear its costs.
5. Aggrieved, the appellant filed the appeal on four (4) grounds;
 1. The learned magistrate erred in law and fact in his judgment in finding that the claimant's termination was fair in the circumstances.
 2. The learned magistrate erred in law and fact by holding that the claimant herein was fairly terminated because the respondent was experiencing financial difficulties yet the said termination was not pursuant to financial constraint but non-performance.
 3. The learned magistrate erred in law and fact in failing to determine the issue of changing the claimant's contract without consulting him.
 4. The learned magistrate erred in law and fact in finding that the respondent was unfairly terminated yet he was terminated pursuant to the termination clause in the contract and was paid all the terminal dues.
6. On these grounds, both parties agreed to address the appeal by way of written submissions.
7. The appellant submitted that through a notice dated 4 July 2022, his employment was terminated by the respondent by proposing that his employment terms be changed from full-time contract to part-time work. On 7 July 2022, another notice was issued indicating that employment was terminated due to the unavailability of funds. Termination of employment was flawed and not justified. The respondent did not adhere to Section 41 of the *Employment Act*. In the case of *Mary Chemweno Kiptui v Kenya Pipeline Company Limited* [2014] eKLR, the court held that under Section 41 of the *Employment Act*, there are mandatory provisions that an employer must adhere to. In this case, there was no due process.
8. The appellant submitted that the respondent proposed to change his employment contract without consultations contrary to Section 10(5) of the *Employment Act*. In *Kenya Airways Limited v Aviation & Allied Workers Union Kenya*, the court held that under Section 40 of the *Employment Act*, where the reason for termination of employment is redundancy, such should not be changed to the conversion of employment. Where a redundancy exists, notice must be issued under the law.
9. The reliefs sought should have been allowed within the unexpired term contract from July 2022 to March 2023. For the unlawful termination of employment compensation and notice pay should have been awarded with costs.
10. The respondent submitted that it is a charitable organization, and the major donor is Anidan Spain Office, dependent on well-wishers in Spain and Europe for funds. In 2022, the respondent received funds from donors, but due to the COVID-19 pandemic and the war in Ukraine, donations stopped. As a result of unavailable funds, through a notice dated 7 July 2022, the appellant's employment was terminated under section 40 of the *Employment Act*.



11. The respondent followed due process and substantive fairness. There were no funds to support employment. In the case of *Dennis Leak Ojuok v Population Services Kenya* [2022] eKLR the court held that redundancy is a justified ground for termination of employment. Where there is an economic downturn, the employer is justified to terminate employment.
12. In the case of *Walter Anuro Ogal v Teachers Service Commission* [2013] eKLR, the court held that where the employer follows the fairness test, termination of employment is justified and, hence, lawful. In this case, the respondent followed due process, issued notice, and noted that there were no funds. In *Barclays Bank of Kenya Ltd & another v Gladys Muthoni & 103 others* [2018] eKLR, the court held that where the employee is notified in writing about the reasons leading to termination of employment, such is sufficient under Section 40 of the *Employment Act*.
13. Employment is terminated lawfully, and the judgment of the trial court should be confirmed with costs.

Determination

14. This being a first appeal, the court's mandate is to reevaluate, reassess, and re-analyse the evidence before the trial court and draw its conclusions. However, remember that the trial court had the opportunity to take evidence.
15. The appellant's case is that his employment was terminated unfairly. The trial court erred in finding that the contract of employment was terminated due to financial constraints rather than alleged non-performance. He also contests that the trial court failed to determine the proposed conversion of his employment contract.
16. The respondent's case is that financial constraints led to notice to the appellant and termination of employment. There was due process and fairness.
17. The appellant filed a letter dated 4 July 2022. It was the termination of the contract of employment. The respondent noted that his employment would be terminated on 1 August 2022 because;

... this termination is done as long as you have NOT been working 48 hours as per the agreement (8 hours per day) from the beginning.

Therefore we are forced to take you as a part-time basketball coach for two hours only from 4.00 pm to 6 pm. And an allowance of Ksh.12, 000 like other part-time coaches/teachers. ...
18. The respondent filed a letter dated 7 July 2022.
19. It was a termination of your contract letter to the appellant. The respondent noted that;

... we regret to inform you that we will be ending your term of employment with us with immediate effect due to the unavailability of funds to keep you as a basketball part-time coach agreed earlier but we shall pay you one month's gross salary by the end of this month as compensation for the premature termination of the contract. ...
20. Two letters terminating employment.
21. The earlier letter issued notice of 26 days because the appellant was not attending work as per his contract/agreement. He was not working for 8 hours per day as agreed.
22. The other letter noted that employment would end immediately due to the unavailability of funds and that the contract would be converted to a part-time contract at Ksh. 12,000.



23. Section 41 of the *Employment Act* regulates termination of employment due to misconduct and failure to attend work. The employee should be issued with notice to attend, address the misconduct, and give an account as to why he was not attending work for 8 hours per day as required under his contract.
24. The Court of Appeal outlined the due process steps in the case of *Fredrick Oduor Lamba v Kenya Electricity Generating Company PLC*. [2023] KECA 118 (KLR) as follows;
- When we talk about a procedurally fair process, in our view the following 7 concepts must be manifest in the entire process.
- a. Fair Notice. An employer may not discipline an employee for violating a rule or standard whose nature and penalties have not been made known.
 - b. Prior Enforcement. An employee may not be penalized for violating a rule or standard that the employer has failed to enforce for a prolonged period.
 - c. Due Process. An employer must afford the employee a reasonable opportunity to rely to the allegations. Once assessed, punishment may not be increased.
 - d. Substantial Evidence. Charges must be proven by substantial and credible evidence.
 - e. Progressive Discipline. When responding to misconduct that is short of egregious (very serious), an employer must issue at least one level of punishment that allows the employee an opportunity to improve.
 - f. Mitigating and Extenuating Circumstances. The penalty must be proportional to the gravity of the offence, taking into account any mitigating, extenuating, or aggravating circumstances.
25. In this case, the core issue was addressed in the notice dated 4 July 2022 regarding the appellant not attending to his duties as required. He was notified of such a matter and that his employment would terminate with effect from 1 August 2022. However, the second notice introduced the issue of immediate termination of employment due to the unavailability of funds.
26. Although an employer is allowed under section 40 of the *Employment Act* to terminate employment for operational reasons leading to redundancy, due process requires the employee to be issued notice and the labour officer to be notified of the reasons for and extent of the redundancy.
28. In evidence, the respondent called Ali Omar, who testified that the labour office was informed through Annexure 7 of the response. The court reading of this letter does not demonstrate such a fact. It is not addressed to the labour office or copied to such an office.
29. The respondent well cites the case of *Barclays Bank of Kenya Ltd & another v Gladys Muthoni & 103 others* [2018] eKLR, where the court held that the procedures under Section 40 of the *Employment Act* require that the labour officer be notified of the extent of and the reasons for the termination of employment on account of redundancy. This position is reiterated in the case of *Cargill Kenya Limited v Mwaka & 3 others* [2021] KECA 115 (KLR) that the affected employees are entitled to a notice before termination of employment due to operational reasons and further, a notice pay where the employer does not intend to have the employee at the shop floor.
30. In any event, termination of employment on account of redundancy cannot affect a single employee as held in *Keen Kleeners Limited v Kenya Plantation and Agricultural Workers' Union* [2021] KECA



352 (KLR) and *Jane I Khalachi v Oxford University Press E. A. Ltd*, Cause No.924 of 2010 the court held that;

employers have the prerogative to determine the structures of their businesses and therefore make positions redundant. Positions and not employees, become redundant. When the position becomes redundant, the employee can be re-deployed, which means the employee is given another job, or the employee is retrenched, meaning the employee loses the job altogether.... Although not expressly defined under the *Employment Act* 2007, 'reorganization' is contemplated by section 45 [2] as a fair termination reason.

31. This is reiterated in *Agnes Ongadi v Kenya Electricity Transmission Company Limited* [2016] eKLR held that:

...A redundancy, restructuring or reorganization commenced with the sole purpose of laying off specific employees is a sham. Such is not justified and cannot be sanctioned by the court...

32. Ali Omar for the respondent admitted that the list of the affected employees in the redundancy and termination of employment was not filed. He did not indicate which other employees were affected by the alleged unavailability of funds. He could not justify why the appellant was the only employee whose contract of employment was terminated.

33. Whereas the notice dated 4 July 2022 gave 26 days' notice, the notice dated 7 July 2022 was to take effect immediately. The notices issued to the appellant do not meet the threshold of sections 41 and 40 of the *Employment Act*. The mandatory procedures under Section 41 were not adhered to. The procedural steps for termination of employment were not followed. The core issue for terminating employment due to the unavailability of funds was not addressed under the protections set out in Section 40 of the *Employment Act*.

34. The offer to convert employment from full-time to part-time is lost in the context that the respondent had no funds. In effect, such an offer should have been approved by the appellant in writing under Section 10(5) of the *Employment Act*. See *Muthui v Kenya Rural Roads Authority (KERRA)* [2023] KECA 331 (KLR).

35. The trial court erred in finding that there were fair reasons leading to the termination of employment. Without addressing the mandatory provisions of Sections 41 and 40 of the *Employment Act*, employment was terminated unlawfully and unfairly under Section 45 of the *Employment Act*.

36. The trial court should have addressed the claims made.

37. On notice pay, Ali Omar testified that the appellant was paid in lieu of notice. There is evidence of such payment under Annexure page 13 of the response. The July 2022 salary was paid in full. The payment in September 2022 addressed notice pay.

38. On the claim for the unexpired term contract ending in March 2023, the appellant had hoped to serve under his contract to the end. Were it not for the unfair termination of employment, he had 8 months to go. However, having been issued with notice and payment thereof, he was free to secure new employment or work part-time. For the unfair termination of the contract, a payment of 3 months gross salary is hereby found appropriate. This amounts to Ksh.135, 000.

39. On the claim for 12 months compensation, with the term contract addressed as above, the claim is taken into account.



40. The claim before the trial court had with good foundation and hence costs should have been awarded together with costs for the appeal.
41. Accordingly, the judgment in Malindi MELRC No.25 of 2022 is hereby set aside the following orders issued;
- a. Employment of the appellant terminated unfairly;
 - b. Compensation awarded at Ksh.135,000;
 - c. Costs of the proceedings before the lower court and for the appeal.

DELIVERED IN OPEN COURT AT MOMBASA THIS 23 DAY OF JANUARY 2025.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet

..... and

