Mueni & 5 others v Ponders Limited (Appeal E063 of 2023)
[2025] KEELRC 525 (KLR) (24 February 2025) (Judgment)

Neutral citation: [2025] KEELRC 525 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

APPEAL E063 OF 2023

NJ ABUODHA, J

FEBRUARY 24, 2025

BETWEEN

EUNICE MBITHE MUENI ..... 1ST APPELLANT

TINA MBITHI ..... 2ND APPELLANT

JULIANA NYOKABI MUCHIRI ..... 3RD APPELLANT

MWENDE MULWA ..... 4TH APPELLANT

VICTORIA MBITHE MUTISYA ..... 5TH APPELLANT

BONFACE MUTUA MATHEKA ..... 6TH APPELLANT

AND

PONDERS LIMITED ..... RESPONDENT

(Being an appeal arising from the Judgment and Orders of Honourable M.W Murage(SRM) delivered in Milimani Chief Magistrates Court, MC.ELRC No. E1874 of 2021 on 14th April,2023.)

JUDGMENT

1. Through the Memorandum of Appeal dated 8th May, 2024, the Appellant appeals against the whole of the Judgment of Honourable M.W Murage delivered on 14th April, 2023.

2. The Appeal was based on the grounds that:

    i. The Learned Magistrate erred in law and in fact in failing to find that the Appellants termination vide the letters dated 2nd August,2021 by the Respondent on grounds of change of some of its operations and organizational structure amounted to a declaration of redundancy as defined under section 2 of the *Employment Act* cap 226.

ii. The Learned Magistrate erred in law and in fact in failing to find that the Appellants termination vide letters dated 2nd August,2021 by the Respondent amounted to abolition of the Appellants job position and further failed to appreciate that it is not the heading of this letter that matters but the effect thereof.

iii. The Learned Magistrate erred in law and in fact in failing to find that the Respondent did not comply with the mandatory provisions set out in section 40 of the *Employment Act*,2017 while terminating the Appellants employment.

iv. The Learned Magistrate erred in law and in fact in failing to find that the Respondent did not prove that there was an actual "change of some of its operations and organizational structure" by the Respondent that necessitated the Appellants being declared redundant.

v. The Learned Magistrate erred in law and in fact in failing to find that the alleged "change of some of its operations and organizational structure" was a mere gimmick since the Appellants' termination, the Respondent employed other merchandizers.

vi. The Learned Magistrate erred in law and in fact in find that it was not open for the Respondent to terminate the Appellant's employment "at will" by notice for any reason or for no reason at all since the current constitutional and statutory design on employment law in Kenya renders redundant the "at will" doctrine that the Respondent utilized to terminate the Appellants.

vii. The Learned Magistrate erred in law and in fact in finding that the Appellants suit was uncontroverted and unchallenged since the Respondent never called any witnesses or even filed any documents in support of their case.

viii. The Learned Magistrate erred in law and in fact in failing to properly analyse the evidence laid before her by the Appellants.

ix. The Learned Magistrate erred in law and in fact in totally disregarding the Appellant's pleadings and submissions.

3. The Appellants prayed that the Appeal be allowed with costs and the Judgment and orders delivered on 14th April,2023 by the honourable court be set aside and substituted with an order allowing the suit together with costs and interests.

4. The Appeal was disposed of by written submissions.

APPELLANT'S SUBMISSIONS

5. The Appellant's advocate Njuru & Company Advocates filed written submissions dated 13th November, 2024. Counsel submitted on the role of the first Appellate court while relying on the case of Selle & Another v Associated Motor Boat Co. Ltd & Others (1968) EA 123.

6. On the issue of whether the Appellants were terminated on account of redundancy counsel relied on section 43 of the *Employment Act* on the burden of employer to prove termination was fair. Counsel relied on the case of Kenfreight(E.A) Limited V Benson K. Nguti (2016) eKLR on this assertion. Counsel relied on section 2 of the Act and Halsburys Laws of England vol 16 at page 460 and the case of Kenya Pilots Association v Kenya Airways Limited cause 94 of 1993 on the definition of redundancy.

7. Counsel submitted that the trial court misdirected herself when she stated that the letter needs to state the words redundancy for an argument of termination on account of redundancy to arise. That the letter was clear that the termination was due to Management decision to change "some of its operations

and organizational structure". That the reasons fell squarely within the meaning of redundancy. That the Respondent spelt out the reason for termination and could not turn back and place reliance on the employment contract. That the same ought to be read as merely intended to defeat the provisions of sections 40,41,43,45 and 49 of the *Employment Act*.

8. Counsel submitted that the Respondent did not discharge the burden of proof as they did not lead evidence to justify the grounds for termination hence the Appellants claim remained uncontroverted. Counsel relied on the case of Kenya Airways Limited versus Aviation & Allied Workers Union Kenya & 3 others (2014) eKLR on what the employer needs to prove in cases redundancy for it to be valid. That the trial court erred in making a finding that the Appellants had not established their case and urged the court to be guided by the decision of the Court of Appeal in Muthaiga Country Club v Kudheiha Workers (2017) eKLR.

9. Counsel urged the court to find that the Appellants were terminated on account of redundancy and the trial court erred when it held that the Respondent could terminate the Appellants at will in terms of clause 11 of the contracts for no reason whatsoever. That the current jurisprudence in law of employment leans towards good cause doctrine which frowns upon arbitrary termination of employees' service. An employer should terminate an employee for good cause. Counsel relied on among other cases the case of Kabenge Mugo vs Syngenta East Africa Limited Industrial Cause Number 1476 of 2011.

10. On the issue of whether the termination was procedurally fair counsel relied on among others the case of Onesmus Kinyua Magoiya v Prudential Life Assurance Kenya (2022) eKLR and section 40 of the Act on the required procedure during redundancy. That the Respondent was bound to adhere to fair procedures provided under section 40(1) of the Act. That the Respondent failed to notify the labour officer of the reasons for the redundancy and the extent of redundancy at least 28 days prior to the intended date of termination. That the Respondent did not demonstrate the selection criteria of the employees to be declared redundant as per section 40(1) (c) of the Act.

11. Counsel further submitted that the Respondent did not comply with section 40(1) (e) and (g) on payment of the Appellants outstanding leave days and severance pay. That section 40 of the Act was mandatory before employees are declared redundant and not left to the choice of the Respondent. That the Appellants termination was unfair and unprocedural while placing reliance on the case of Titus Muriuki Ndirangu v Beverly School of Kenya Limited (2022) eKLR.

12. On the issue of whether the Appellants were entitled to reliefs sought, counsel submitted that the Appellants were entitled to compensation for unfair termination as they did not contribute to the termination but due to the Management decision to change operations and organizational structure. That jobs were hard to come by in Kenya and the right to work ought not to be easily trampled with while protecting article 41 of *the Constitution*. Counsel urged the court to award 12 months compensation while relying on the case of Nicholas Otinyu Muruka v Equity Bank Limited (2013) eKLR.

13. On the relief of unpaid leave days counsel submitted that the Appellants were entitled to the same as per section 28 of the Act as prayed in the claim. That the Respondent owed the Appellants leave for 2020 and 2021 and as the custodian of employment records under section 10 and 74 of the Act they did not produce any document showing the Appellants went on leave or were paid. That without any evidence by the Respondent to the contrary the court ought to believe the Appellant. Counsel relied on the case of Ashiruga Mjengo v Roy Collins Kamau (2019) eKLR.

14. On the relief of severance pay counsel submitted that the same was an entitlement under section 40 (g) of the Act and the Respondent was supposed to pay the Appellants 15 days salary for each year of

service. That the severance ought to be paid as particularized in the claim as there was no evidence by the Respondent that the same was paid to the Appellants. That judgment should be entered in favour of the Appellants for the sum of Kshs 2,701,000/= as prayed in the claim with costs of the lower court and this Appeal.

RESPONDENT'S SUBMISSIONS

15. The Respondent's Advocates Akolo Wanyanga & Company Advocates filed written submissions dated 29th March, 2024. On the issue of whether the Appellants were lawfully terminated counsel submitted that contracts between parties that do fulfil all the four elements of a contract are treated as binding if parties read and understood the contents of the contract they were entering in to wilfully unless factors like coercion, bribery and other fallacies were employed while signing the contract. Counsel relied on the case of National Bank of Kenya Ltd vs Pipeplastic Samkolit (K) Ltd & Another (2001) eKLR that a court cannot rewrite parties contract.

16. Counsel submitted that the Appellants willingly entered into employment contract and were bound by all terms of their contract and the clause on termination was not exempted. That the Respondent abided by clause 11 of their contract while terminating their employment. That the contract applied both ways and if the Appellants wanted to cease being employees they could as well give their notice as specified in the contract and it would be binding. That their termination was therefore legal and within their contract as the Respondent gave them one month's notice.

17. On the issue of whether the Appellants termination was as a result of redundancy counsel submitted that the Appellants got their services terminated lawfully in accordance with their employment contract with the Respondent and they were not declared redundant. That their services were terminated after the management noted that there was a need to change some of its operations and organization structure but at no point did they state redundancy as the reason. The allegations by the Appellants that they were replaced were null and void and could not be proved.

18. Counsel submitted that while terminating the appellant's service they gave them one month's notice in accordance with the contract entered into between the parties herein and also in accordance with section 35 of the *Employment Act*. That the notice under section 35 of the act was mandatory as stated in the case of Ahamed Mwarumba Mwavita vs Kocos Kenya Ltd (2021) eKLR. That the Appellants had their contract terminated as per contract they signed with the Respondent and thus there was no liability to be borne by the Respondent. That the judgment of the lower court should be upheld with costs.

DETERMINATION

19. The court has considered the Record of Appeal and submissions filed by the both parties and notes that the duty of the Court as the first appellate court was to re-evaluate the evidence in the subordinate court both on points of law and facts and come up with its own findings and conclusions as held in Court of Appeal for East Africa in Peters –vs- Sunday Post Limited [1958] EA 424. The appropriate standard of review established in cases of appeal can be stated in three complementary principles:

    i. First, on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;

    ii. In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and

iii. It is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.

20. In this case, the Judgment of the trial court was that the Claimants' claim was dismissed with costs to the Respondent while holding that the court could not rewrite parties contract and the Claimants had not established their case. The Appellants appealed the whole of the Judgment. The court is of the opinion that the issues placed by the parties for determination in the appeal are with regard to whether the trial court was right when it held that parties were bound by the contract and that the appellants did not prove their case and the Court were to hold contrary to the trial, whether the appellant was entitled to reliefs sought.

21. This court has therefore come up with two main issues;

i. Whether the trial court erred by finding that Appellants' termination of employment was not unfair and unlawful

ii. WHEHWWwWhetherWhetherWhe Whether the Appellants were entitled to reliefs sought at the trial court.

Whether the trial court erred by finding that Appellants' termination of employment was not unfair and unlawful

22. It is not in dispute that the Appellants were employees of the Respondent who got terminated by being given a one-month notice effective 1st September,2021. The Respondent averred that by dint of clause 11 of the employment contract they were entitled to terminate the services of the Appellants by giving them one month's notice. That the decision was arrived at after the management decided to change its operations and organization structure.

23. The Appellants on the other hand argued that the said change of operations and organization structure amounted to a declaration of redundancy of their services in as much as their letters never mentioned redundancy. That they were replaced upon termination. The trial court found that the Respondent, as per the employment contract, could give the Appellants one month's notice which they acknowledged they were given hence the termination was lawful as per terms of the contract.

24. The court therefore concerns itself with the question whether change of operations and organization structure amounted to redundancy as per the law and whether the clause of giving the Appellants one month's notice was binding and legal.

25. Section 41 read together with section 43 of the *Employment Act* requires that in any termination case, an employer obliged to give reason for such termination and before it is effected, the employee concerned is heard. This is a statutory obligation which cannot be overridden by any contractual obligation. In the case of Kenfreight (E.A.) Limited v Benson K.Nguti [2016] eKLR the Court of Appeal held as follows which decisions was upheld by the Supreme Court:_

> The *Employment Act*, for example, introduced and prescribed minimum terms which the parties must consider as they contract. It established the concept of fair hearing and placed a duty on an employer to give reasons before dismissing or terminating the services of an employee. These developments are a stark departure from the traditional power of the employer to terminate or dismiss at will as demonstrated in the earlier decisions of the courts.... So that, although there is freedom to contract, under the present regime, the terms

of the contract must be in consonance with the irreducible minimum terms and conditions in the Act.

26. This therefore means, the Respondent could not just terminate the services of the Appellants at will without giving valid reasons for termination. A closer look at their termination letters states that it was due to management decision to change operations and organization's structure. The court therefore interrogates if it this a valid reason and did not amount to redundancy as contended by the respondent.

27. Redundancy has been defined under section 2 of the *Employment Act* as;

> " 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.

28. The court notes that the reason given by the respondent for terminating the appellant's service, fall within the meaning of redundancy under section 2 of the Act. The courts have stated severally that even in cases of redundancy the reason ought to be valid as provided for under section 43 of the *Employment Act* and the employee given a right to be heard under section 41 of the *Employment Act*. The termination of service will be deemed unfair under section 45 of the Act if an employer fails to prove as valid, reason for termination and the employee is not heard.

29. In Kenya Airways Limited VS. Aviation and Allied Workers Union of Kenya and 3 Others (2014) eKLR, the Court of Appeal pronounced itself as follows:

> " Thus, 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. As Section 43(2) provides, the test of what is fair reason is subjective. 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 be underlying causes leading to a time redundancy situation such as reorganization, the employer must nevertheless show that the termination is attributable to 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."

30. The Respondent concentrated on alleging that they adhered to the contract in terminating the Appellant's service but did not prove the reasons of termination beyond the allegation of the change of operations and organization structure. The Respondent neither proved if at all there was any operational changes nor rebut the Appellants assertions that they were replaced. The reason for termination was therefore invalid.

31. Regarding the process undertaken by the Respondent in separating with the appellant, it is trite law that even in redundancy the procedure under section 41 of the *Employment Act* ought to be followed. The court notes that the Respondent did not follow the right procedure in declaring the Appellants redundant. The Appellants were given notice of termination but not redundancy notice. This, in the Court's was done to avoid complying with the requirements of the Act on redundancy.

32. Section 40 of the *Employment Act* is the guiding law on the process of redundancy which provides as follows: -

(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 The *Employment Act*, 2007 47 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.

33. From the above provision it is clear that the Respondent did not notify the labour officer in a month's time as required, no selection criteria was given, the Appellants were never paid severance pay and unpaid leave and they were not given the notice for redundancy. The Respondent did not follow the procedure provided for under section 40 of the Act hence the termination on account of redundancy was unfair. This trial court therefore erred in finding that the respondent could terminate the appellant's service as per the contract of employment which was in clear breach of the *Employment Act*.

Whether the Appellants were entitled to reliefs sought at the trial court.

34. This court having found that the Appellants were unfairly terminated proceeds to find that they were entitled to damages for the same as provided for under section 49 of the Act. The Appellant was entitled to compensation for unfair termination. This court notes the period the Appellants worked for the Respondent was some from 2015 and others 2017 to 2021 which is tentatively 4-6 years. The Court also considers the nature of the termination and awards the Appellants six months' salary as compensation for unfair termination.

35. On the prayer for accrued leave, section 28 of the *Employment Act* gives every employee a right to take annual leave. The employer has the duty to ensure every employee has taken annual leave as and when due. The Respondent who is the custodian of employment records under section 74 of the Act did not rebut this assertion to show that the Appellants took leave as claimed. The same has been treated by courts as a continuing injury under section 90 of the *Employment Act*. The claim has to be filled within 12 months after cessation thereof. In this case the Appellants were terminated in August,2021

and filed their claim in November,2021 which was within the limitation period. The claim is therefore allowed as prayed.

36. On the prayer for severance pay, this is due as under section 40(g) of the Act in a case for redundancy. This prayer succeeds since the redundancy was unfair as claimed in the claim and no evidence was tendered if the Respondent paid the Appellants the same.

37. In conclusion the Court sets aside the order of the trial court dismissing the appellant's claim for unfair termination and substituting therefore with an order entering judgment against the respondent in favour of the appellants and as prayed in their statement of claim as follows:

    i. Eunice Mbithe Mueni .....Kshs 250,000/=

    ii. Tina Mbithi..... Kshs 255,000/=

    iii. Juliana Nyokabi Muchiri.....Kshs 289,000/=

    iv. Mwende Mulwa.....Kshs 249,000/=

    v. Victoria Mbithe Mutisya.....Kshs 289,000/=

    vi. Bonface Mutua Matheka .....Kshs 289,000/=

    vii. The appellants will have costs of the suit in the trial court and this Appeal.

    Total .....KSHS 1,621,000/=

38. It is so ordered.

DATED AT NAIROBI THIS 24TH DAY OF FEBRUARY, 2025

DELIVERED VIRTUALLY THIS 24TH DAY OF FEBRUARY, 2025

ABUODHA NELSON JORUM

PRESIDING JUDGE-APPEALS DIVISION