United Millers Limited v Okusimba (Appeal E076 of 2024)
[2025] KEELRC 1860 (KLR) (27 June 2025) (Judgment)

Neutral citation: [2025] KEELRC 1860 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

APPEAL E076 OF 2024

J RIKA, J

JUNE 27, 2025

BETWEEN

UNITED MILLERS LIMITED ..... APPELLANT

AND

DANIEL SHIRAKU OKUSIMBA ..... RESPONDENT

(An Appeal from the Judgment of the Hon. Chief Magistrate Priscah Nyotah Wamucii dated 6th November 2024, in Nakuru C.M.E & L.R.C Cause E 289 of 2023, between the Parties herein)

JUDGMENT

1. The Respondent filed the Claim at the Trial Court against his former Employer, the Appellant herein, for unfair and unlawful redundancy.

2. He prayed for compensation, redundancy benefits, costs and interest.

3. In its Judgment delivered on 6th November 2024, the Trial Court found that the Appellant complied with Section 40[1] of the *Employment Act*, save for Section 40 [1] [c]. Termination was declared to have been unfair, and the Respondent awarded equivalent of 6 months' salary, in compensation for unfair termination.

4. The Appellant filed its Memorandum of Appeal dated 19th November 2024. The Grounds of Appeal are that the Trial Court misapprehended the facts and wrongly interpreted and applied Section 40 [1] [c] of the *Employment Act*.

5. It is proposed by the Appellant that the Appeal is allowed, and the Judgment of the Trial Court is substituted with an Order, dismissing the Claim with costs of the Trial and the Appeal, to the Appellant.

6. Parties agreed that the Appeal is considered and determined on the strength of the Record of Appeal and Submissions. They confirmed filing and exchange of the Submissions at the last mention before the Court, on 30th April 2024.

7. The Appellant submits that it scaled down its operations, as a result of Covid-19 outbreak. The Respondent was working as a machine attendant.

8. The Appellant was compelled to shut down its plant at Nakuru, and did not have obligation under Section 40[1] [c] of the *Employment Act*, to establish the selection criteria, in declaring the Respondent's position redundant.

9. Relying on the E&LRC decision in Geoffery Mang'eea Abere v. Mini Bakeries Nairobi Limited [2024] KEELRC 2207 [KLR], Appellant submits that it shut down its plant where the Respondent worked, and Section 40[1][c] requiring an Employer to select Employees to exit on redundancy based on seniority, skill, ability and reliability, was inapplicable. The entire plant shut down, affecting all Employees.

10. The Respondent counters that the Appellant's reliance on the Abere decision above is misplaced. The decision involved a single Employee within a unique department. The Respondent herein was 1 among 120 Employees, whose positions were declared redundant.

11. The Respondent submits that in any event, Section 40 [1] [c] of the *Employment Act* does not exempt business closures. Decisions of the Court of Appeal, Kenya Airways Limited v. Aviation and Allied Workers Union & Others [2014] e-KLR and Cargill Kenya Limited v. Mwaka & 3 Others [2021] KECA 115 [KLR], established the critical role of procedural fairness in redundancy processes, with selection criteria being an integral aspect of fair procedure.

12. The Respondent submits that the Appellant set off with a scaling down of operations, sending Employees home for 60 days, before informing them about redundancy at the end of the 60 days. It is submitted that the Appellant ought to have applied the selection criteria from the outset.

13. The Respondent submits that the Trial Court correctly evaluated the facts and rightly applied Section 40 [1] of the *Employment Act*.

14. The Respondent proposes that the Appeal is rejected with costs to the Respondent.

The Court Finds : -

15. The evidence on record does not support the position that the Appellant closed down its plant at Nakuru, therefore rendering selection criteria under Section 40 [1][c] of the *Employment Act*, inapplicable.

16. The redundancy process had its origin in the Memo dated 3rd August 2021 issued to all Employees by the Appellant.

17. The Employees were advised that due to unavoidable circumstances [Covid-19], the Appellant was scaling down operations. Scaling down was limited to a period of 60 days, effective from 3rd August 2021.

18. The Appellant advised that it would retain a skeleton manpower, and that normal operations could resume after the 60 days or earlier. The Employees were told that they would appraised, and were assured that they had not been dismissed.

19. At the end of the 60 days, the Appellant issued a second Memo to all Employees, dated 6th October 2021. The Memo is referenced 'reduced operations- Nakuru Refinery Division.'

20. The Appellant did not refer to closure of its plant. It referred to 'reduced operations' and 'restructuring' which is not the same thing, as closure of business.

21. The Trial Court correctly found, at paragraph 8 of the Judgment, that the refinery was not closed down. It was probable that some machines were left running. At the time scaling down of operations started on 3rd August 2021, the Appellant retained what was characterized as a skeleton manpower.

22. This skeleton manpower was not shown to have been removed in October 2021, when the Appellant informed the Respondent about redundancy for the first time.

23. Section 40 [1] [c] of the *Employment Act* ought therefore, to have been taken into account by the Appellant. The refinery was not shut down.

24. The Appellant on the whole, appears not to have consulted the Employees, in accordance with the principle of redundancy consultation, underscored by the Court of Appeal in the case of The German School Society & Another v. Ohany & Another [2023] KECA 894 [KLR].

25. The Appellant sent its Employees home in a scaling down of operations exercise; the exercise was to last a maximum of 60 days; at the end of the scaling down exercise, the Employees were issued with notices of redundancy; there was no consultation; and it was not known how the Respondent was selected for redundancy, while the refinery where he worked as a machine attendant, remained operational.

26. In between August and October 2021, there was evidence that in the absence of consultations, the Employees became restive and engaged in some form of industrial action, which the Appellant sought to address through the Chief's Act.

27. Redundancy was a process with its origin in August 2021, rather than an event that took place in October 2021, which called on the Appellant to consult the Employees at every turn. The Appellant made unilateral decisions, communicated to the Respondent as notices and internal memos. There was no consultation.

28. The Appellant has not demonstrated that the Trial Court misapprehended the evidence before it, or misapplied the law, to warrant this Court's interference with the Judgment of the Trial Court.

It is ordered : -

a. The Appeal is declined.

b. Costs of the Appeal to the Respondent.

DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY, AT NAKURU, THIS 27TH DAY OF JUNE 2025.

JAMES RIKA

JUDGE