Tamarindi Management Limited v Gatheru (Employment and Labour Relations Appeal E021 of 2023) [2025] KEELRC 2110 (KLR) (18 July 2025) (Judgment)

Neutral citation: [2025] KEELRC 2110 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI

EMPLOYMENT AND LABOUR RELATIONS APPEAL E021 OF 2023

ON MAKAU, J

JULY 18, 2025

BETWEEN

TAMARINDI MANAGEMENT LIMITED ..... APPELLANT

AND

ELIJAH GICHUKI GATHERU ..... RESPONDENT

(Being an appeal against the Judgment of Hon. A.G.Kibiru (MR) Chief Magistrate delivered on 22nd November, 2023 in Nyeri MCELRC No.E014 of 2021)

JUDGMENT

Introduction

1. The main issue in this appeal is whether the respondent's employment contract was terminated on account of frustration. The appellant employed the respondent for 20 years until 4th June 2020 when it terminated the contract with a notice of one month citing frustration occasioned by the Covid-19 Pandemic. The respondent filed suit alleging unlawful termination on account of redundancy.

2. The trial court agreed with the respondent that the termination was unlawful because the right procedure for redundancy was not followed. The court then awarded the following reliefs.

    a. Damages for unfair termination.....Kshs.138,600

    b. Severance pay.....Kshs.242,550

    c. Unpaid house allowance.....Kshs.324,000

    d. One-month salary in lieu of notice.....Kshs.23,100

    e. Certificate of service

    f. Costs and interests

3. The appellant impugned the judgment vide Memorandum of Appeal dated 27th November 2023 citing the following 11 grounds of appeal: -

   a. That the learned Trial Magistrate erred in law and fact in finding that the Appellant was required to follow the procedure prescribed under section 40 of the *Employment Act*, 2007 in terminating the Respondent's services despite the Respondent's contract having been frustrated.

   b. That the learned Trial Magistrate erred in law and in fact in failing to find that the doctrine of frustration applied to discharge the Appellant from performance of its contractual obligations.

   c. That the learned Trial Magistrate erred in law and fact in awarding the Respondent house allowance for the period between 2015 up to June 2020 yet the said claim is time barred under section 90 of the *Employment Act*, 2007.

   d. That the learned Trial Magistrate erred in law and in fact in awarding the Respondent house allowance for the period between 2015 up to June 2020 yet the Respondent was being paid a consolidated salary.

   e. That the learned Trial Magistrate erred in law and in fact in awarding the Respondent house allowance yet the Respondent had failed to specifically plead and prove the same.

   f. That the learned Trial Magistrate erred in law and in fact by ignoring and failing to consider binding authorities cited and provided by the Appellant in their written submission dated 13th October 2023.

   g. That the learned Trial Magistrate erred in law and in fact in finding that the Respondent's termination was done unfairly and unjustly.

   h. That the learned Trial Magistrate erred in law and in fact in misinterpreting the evidence tendered by the parties herein.

   i. That the learned Trial Magistrate erred in law and in fact in awarding the Respondent 6 months' salary as compensation which award was unjustified and or excessive in the circumstance.

   j. That the learned Trial Magistrate erred in law and in fact in the construction of evidence tendered before court which led to an erroneous finding and decision.

   k. That the learned Trial Magistrate erred in law and in fact in making a decision against the weight of evidence before the court.

4. The appeal seeks the following orders: -

   a. This appeal be allowed with costs to the Appellant both in this Honourable Court and in the Chief Magistrate Court at Nyeri Court.

   b. The Judgment and orders of the Honourable A.G.Kibiru delivered on 22nd November 2023 in Chief Magistrate Employment and Labour Relations Case No.E14 of 2021 be set aside and the Respondent's suit in the Chief Magistrate Court at Nyeri Court be dismissed.

Before the trial court

5. The respondent's case was that he was employed by the appellant on 1st October 1999 and worked diligently until 30th June 2020 when his employment was unfairly terminated. He prayed for;

a. Compensation of unfair termination.....Kshs.292,836

b. Severance pay.....Kshs.244,030

c. House allowance of Kshs.5,400 from

1.1.2014 -30.6.2020.....Kshs.324,000

d. Two months salary in lieu of notice.....Kshs.46,200

6. He contended that the respondent never gave a hearing or followed the correct redundancy procedure. He further contended that his trade union was not involved before the termination. He was just served with a notice of termination and a termination letter on 4th June 2020 and he signed to acknowledge receipt. He was a member of Pension Scheme but the HR Department never issued him with a letter to enable him access his pension.

7. He confirmed that he was a kitchen steward and his salary was Kshs.23,100. He further confirmed that the appellant was a hotel and due to Covid-19 Pandemic austerity measures were introduced including reduction of salary. He denied knowledge whether the hotel was closed down.

8. His appeal to the employer was dismissed and he referred the matter to the Labour Office for conciliation. He admitted that his two payslips dated 31st December 2018 and 31st January 2019 indicated Basic salary and consolidated salary respectively.

9. The appellant's case was that the respondent's contract was frustrated due to Covid-19 which led to closure of the hospitality business. It contended that it was not possible to declare a redundancy due to uncertainty of the pandemic as the Government had ordered all the eateries to be closed. It contended that the respondent's salary was consolidated and admitted that the same had been reduced with consent of the respondent. It was argued that the payslip indicating the salary as basic was erroneous.

10. The appellant contended that it had 800 employees but due to Covid-19 it reduced the number to 50. It was appellant's case that the termination was not redundancy since the hotel merely closed down due to restrictions imposed by the Government. That although the Government allowed employees to work from home the respondent's role could not work in the manner. It further averred that, granting the respondent a hearing was not possible in the circumstances.

11. The appellant admitted that the respondent worked for over 20 years and he was served with termination letter on 4th June 2020. He was not issued with certificate of service. The claim for house allowance arrears was denied.

Submissions in the appeal

12. The appellant argued ground 1 and 2 together by submitting the trial court erred by finding that the procedure provided for redundancy under section 40 of the *Employment Act* was not followed yet the termination was based on frustration. Further that the trial court erred by failing to hold that the doctrine of frustration discharged the parties from their respective obligations.

13. It was submitted that employment contract is a contract like any other and as such principles of common law including frustration, applies. Accordingly, the restrictions imposed by Government due to Covid-19 led to the business closure and not redundancy under section 40 of the *Employment Act*. Reliance was placed on the definition of frustration in Halsbury Laws of England (3rd Edition) Volume 8 page 185 to fortify the above submission that the respondent's role had not fallen off and therefore

the compensation for failure to comply with the procedure under section 40 of the *Employment Act* was not justified.

14. Grounds 3, 4 and 5 were argued together that the trial court failed to consider evidence which showed that the respondent was drawing a consolidated salary and only relied on a letter of recommendation from a conciliator. It was argued that the respondent's payslip dated 31st January 2019 was prove that his salary was consolidated and that the claim of house allowance as a continuing injury did not arise. Further that, even if house allowance was owing, the same ought to be calculated at 15 percent which would mean Kshs.3,465 and not Kshs.5,400. Therefore, the court was urged to re-evaluate the evidence and draw its own conclusions.

15. Ground 6,7 and 9 were argued together to reinforce the submission that the termination of the contract herein was on the premise of frustration and not redundancy.

16. Finally, ground 8,10 and 11 were argued together that the trial court erred in awarding severance and salary in lieu of notice. It was submitted that a redundancy situation was not proved to warrant compliance with section 40 of the *Employment Act*. It was further submitted that the award of one-month salary in lieu of notice was wrong because the respondent admitted in evidence that he received termination notice dated 28th May 2020 on 4th June 2020. It was argued that even if the notice was shorter than one month, then the award should have been for the days less a full month's notice.

17. On the other hand, it was submitted for the respondent that the *Employment Act* is a self-contained statute on matters of *Employment Act* and therefore it ousts the application of English Law of contract and the common law doctrine of frustration in Kenya. That part VI of the Act, particularly provides for the basic minimum rights of an employee with respect to termination or dismissal from employment, and the term frustration of contract does not appear anywhere in the Act. Consequently, it was submitted that the trial court was right in failing to find that the doctrine of frustration applied to discharge the appellant from performance of its contractual obligations.

18. As regards the award of house allowance, it was submitted that a dispute had been referred for conciliation by the respondent's trade union for the period 2015-June 2018 vide a letter dated 14th December 2018, (Page 21 and 22 of the Record) and the conciliator found that the appellant was paying its employees, house allowance of Kshs.5,400 but discontinued on 1st January 2014 without consultation. The conciliator then recommended for immediate reinstatement of the house allowance and pay the arrears since the payslips then showed that the employees were being paid basic salaries.

19. It was further submitted that the unpaid house allowance amounted to continuing injury and the claim was filed within 12 months and hence not time barred under section 90 of the *Employment Act*. It was submitted that his employment ended on 30th June 2020 and he filed the suit on 21st April 2021.

20. It was also submitted that as long as the claim for house allowance arrears is filed within three (3) years from the date of termination of employment the claim was not time barred. For emphasis, reliance was placed on the Court of Appeal decision in G4S Security Services (K) Limited v Joseph Kamau & 468 others (2018) eKLR.

21. As regards the merit of the award of the house allowance, it was submitted that the respondent's contract of employment provided for payment of house allowance. Further that, Regulation 4 of the Regulation of Wages and Condition of Employment provides for payment of house allowance at 15 percent of the basic salary. The claim was properly pleaded and provided as noted in page 8 and 9 of the impugned judgment and therefore it was submitted that the court was right in awarding the Kshs.324,000 as house allowance.

22. It was further submitted that the trial court was right in finding that the termination of the respondent's employment was done unfairly and unlawfully. It was observed that the defence witness admitted in evidence that the respondent was never given any hearing before the termination and no termination notice of one month was given before the termination.

23. It was further submitted that the trial court analysed the evidence in answer to the issues framed for determination and proceeded to award six-month salary (Kshs.138,600) as compensation for the unlawful termination. It was argued that the award was fair and reasonable considering the long service by the respondent. Consequently, the court was urged to find that the respondent pleaded and proved his case on a balance of probabilities and uphold the impugned judgment because it is solid and backed by evidence and the law. The court was further urged to dismiss the appeal with costs.

24. This being a first appeal, my mandate is to re-evaluate the evidence on record and make my own conclusions but bearing in mind that I did not see the witnesses giving evidence. I gather support from Selle v Associated Motor Boat Company Ltd (1968) EA 123 where the court held thus: -

> " The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the court must consider the evidence, evaluate itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, the court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."

Issues for determination

25. Having considered the pleadings, evidence and submissions tendered during the trial and the rival submissions filed herein, the following issues arose for determination: -

    a. Whether the separation between the parties herein was through redundancy or frustration of the contract.

    b. If, the answer to (a) above is redundancy, whether it was unlawfully done.

    c. Whether the awards by the trial court should stand.

    d. Who pays the costs of the appeal?

Frustration v Redundancy

26. Redundancy is defined under section 2 of the *Employment Act* as: -

> " 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."

27. Frustration is not defined in the Kenya law but according to Halsbury Laws of England (3rd Edition) Volume 8 page 185: -

> " Frustration occurs whenever the law recognises that without the default of either party a contractual obligation has become incapable of being performed because, the circumstances in which the performance is called for would render it a thing radically different from that which was undertaken by the contract..."

28. In view of the statutory definition above it is clear that redundancy arises from a deliberate managerial decision made with a view to keeping the business afloat or move profitable and the employee is not at any fault. On the other hand, frustration is a spontaneous occurrence without fault of either the employer or the employee that automatically renders performance of the contract impossible. Frustration is very rare in employment matters and may occur in instances like death of the employee or permanent incapacitation or failure to secure necessary entry or work permits in a foreign Country.

29. The counsel for the two sides have differed over whether the doctrine of frustration applies in Kenya. There is no doubt that principles of English common law applied in Kenya and especially to fill the Lacuna left by *the Constitution* and the statute law of the land. (See *Judicature Act*). As correctly observed by the respondent, our *Employment Act* has not recognised frustration as a means of termination of employment.

30. Accordingly, the doctrine ought to apply to fill the gap left by the statute. Indeed, English common law principle are applicable in Kenya including constructive dismissal that has been applied widely in Kenya yet it is not in our statute. Just like the doctrine of constructive termination, frustration needs to meet certain threshold otherwise it may end up being redundancy.

31. In the instant case, the Government of Kenya declared presence of Covid -19 cases in the Country and advised on measures to contain spread of the infection. There is no doubt that the pandemic affected businesses in the Country and abroad. However, there was no complete lock down. Restaurants and eateries were allowed to operate but on take-away basis.

32. In order to cushion the business for the economic impact caused by the pandemic the appellant put in place austerity measures including temporary reduction of salaries of which the respondent agreed to on 4th June 2020 when he signed letter by the employer dated to 24th March 2020. This was a managerial decision to ensure that the business remain afloat.

33. Surprisingly, however, the appellant served the respondent on the same date (4th June 2020) with a termination letter back dated to 28th May 2020 indicating that it was not possible for the employment relationship to continue due to travel restrictions internationally and various measures imposed by the Government including operations of hotels and restaurants. The letter stated as follows: -

> " Elijah Gatheru
>
> 39100
>
> Tamambo Karen Blixen Coffee Garden
>
> Tamarind Management Limited
>
> Nairobi.
>
> Dear Elijah
>
> R.E: Termination Of Service

As you are aware, COVID-19 is now a global pandemic which has caused significant changes in the business environment through the world and has had an adverse effect on this business. In addition, travel restrictions have been put in place internationally while locally the government has put in place various measures in order to protect public health one of which is restrictions on the operations of restaurants and hotels, and this has had the unfortunate effect of forcing the company to cease operations completely and indefinitely.

It is not possible under these circumstances for the employment relationship with the company to proceed. This is not a situation that could have been contemplated and it is one that is difficult to accept for us.

Your contract therefore stands frustrated automatically and the same shall terminate with effect from 1st July 2020 with your last working day being 30 June 2020.

You will be paid up to and including 30 June 2020 in accordance with your terms and conditions of service.

Please hand over all the company property in your possession by completing the staff exit form obtainable from the HR Office before you leave.

We take this opportunity to thank you for the excellent and dedicated service you have rendered to the Tamarind Group and wish you success in your future endeavors.

Yours sincerely

Gerson Misumi

Chairman- Tamarind Management Limited

Cc: Group HR Manager

General Manager, Nairobi Area"

34. Having carefully considered the above letter and the other one dated 24th March 2020, I take the view that the decision to terminate the employment contract was a deliberate managerial prerogative which cannot meet the threshold of frustration. The restrictions on international travel and the public health measures imposed by the Government were not permanent and they did cancel operation permits for the appellant.

35. In the circumstances, the court finds that the appellant exercised its managerial judgment on its business survival in the pandemic situation and decided to suspend operations. The court further finds that the contract did not end automatically due to the covid-19 pandemic since the appellant was allowed to continue with the business and the respondent was willing to fit in the austerity measures introduced by the employer including salary cuts.

36. Accordingly, this court finds that the decision to reduce salary and then terminate the contract of employment was due to redundancy situation caused by reduced business as opposed to frustration due to Covid-19 pandemic. The court should lean more towards a finding of redundancy than frustration if failure to perform a contract of service is due to mere reduction or stoppage of businesses to avoid losses. Upholding a defence of frustration without due consideration would aid an employer, who is running away from future losses to deny the employee the benefits accruing from the contract.

Whether the redundancy was unlawful

37. The procedure of terminating employment on account of redundancy is provided under section 40 of the *Employment Act* as follows: -

> "(1) 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 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."

38. In this case, the appellant admitted that the above procedure was not followed contending that the contract terminated automatically under the doctrine of frustration. I have already made a finding that the termination was on account of redundancy and as such the appellant had a legal obligation to act fairly before terminating the services of the respondent. It did not do so and therefore I agree with the trial court that the appellant terminated the respondent's employment unlawfully without following the procedure under section 40 of the *Employment Act*.

39. I seek support from the Kenya Airways Ltd v Aviation & Allied Workers Union of Kenya & 3 others where the Court of Appeal held that: -

> "The purpose of the notice under section 40 (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 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 minimise the terminations resulting from the employer's proposed redundancy. If redundancy is inevitable, measures should be taken to ensure as little hardship as possible is caused to the affected employees."

40. Also, in the case of De La Rue (K) Ltd v David Opondo Omutelema (2013) eKLR the Court of Appeal held that: -

> " It is quite clear to us that sections 40 (a) and 40 (b) provide for two different kinds of redundancy notifications depending on whether the employee is or is not a member of a trade union. Where the employee is a member of a union, the notification is to the union and the local labour officer at least one month before the effective redundancy date. Where the employee is not a member of the union, the notification must be in writing and to the employee and the local labour officer. Section 40 (b) does not stipulate the notice period as is the case in 40 (a), but in our view, a purposive reading and interpretation of the statute would mean the same notice period is required in both situations. We do not see any rational reason why the employee who is not a member of a union should be entitled to a shorter notice."

Awards by the trial court

41. The awards given by the trial court include one-month salary in lieu of notice, compensation for unfair termination, severance pay and house allowance. The Court of Appeal in Butt v Khan (1978) eKLR (Law JA) held: -

> " An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material aspect, and so arrived at a figure which was either inordinately high or low."

42. The trial court having made a finding that the termination was on account of redundancy, it was justified to award severance pay as provided under section 40 of the *Employment Act*. The court used 15 days basic pay of Kshs.23,100 to assess the severance for 21 years. The award of Kshs.242,550 was therefore well founded on the law and evidence.

43. The award of house allowance was granted on the basis of recommendation by conciliator in a trade dispute lodged in 2018. The letter is dated 14th December 2018 and it observed that the employees were receiving house allowance of Kshs.5,400 until 1st January 2014 when it was discontinued without consultation and hence forth the payslips did not indicate the house allowance. The conciliator then recommended that the house allowance be reinstated.

44. Section 31 of the *Employment Act* requires an employer to provide reasonable housing to the employee or pay house allowance. In this case, the claimant was not provided with house allowance. His letter of appointment dated 1st October 1999 expressly provided for a specific amount of housing allowance being Kshs.2,600. It has not been denied that before discontinuation on 1st January 2014, the allowance was Kshs.5,400.

45. Under section 10 (7) of the *Employment Act*, the employer has the burden of disproving any verbal allegation of a term of contract of employment. In this case the appellant did not produce any documentary evidence to prove to the conciliator or this trial court that it changed the mode of payment to consolidated pay. It also did not prove that it consulted the claimant or his trade union before changing the mode of payment. In the circumstances, I find no reason to fault the trial court for assessing and awarding the arrears of housing allowance for 2015-June 2020 being Kshs.5,400 x 66 months =Kshs.356,600.

46. In my own view, the trial court under assessed the sum payable because it never considered the period from 1st January- December 2014 which is a whole twelve months. But since there is no cross appeal, I will not interfere with the award.

47. The appellant alleged that the claim for house allowance was filed out of time but as correctly argued by the respondent the omission to pay the house allowance amounted to continuing breach of the contract which was challenged in court within 12 months of ceasation. The breach ceased on 30th June 2020 and the suit was filed on 21st April 2021, about ten (10) months after the ceasation of the continuing breach and therefore properly before the court within the meaning of section 90 of the *Employment Act*.

48. As regards compensation under section 49 of the *Employment Act*, I agree with the trial court that upon making a finding that the unlawful redundancy was unfair termination, the award was mandated by the law. This award is intended to cushion an employee while looking for alternative source of livelihood. However, my view remains that, severance pay and compensation under section 49 serve the same purpose of cushioning employee while settling down after dismissal for no fault on his part.

49. In view of the foregoing, I am of considered opinion that awarding both compensation and severance pay amounts to double benefits on the part of the employee and double jeopardy to the employer. In the circumstances, the two should not be awarded together like it happened in this case. A court faced with a dilemma as which relief to award between the two reliefs, should lean towards what is more favourable to the employee and leave the less beneficial. In this case the respondent was awarded severance pay of Kshs.242,550 and compensation of Kshs.138,600 for unfair termination. The former is more favourable to the employee and therefore I set aside the award of compensation and leave out the award of severance to cushion the respondent while absorbing the shock of losing employment for no fault on his part.

50. The award of one-month salary in lieu of notice was challenged on ground that the claimant was given one-month notice vide the letter dated 28th May 2020. The letter was acknowledged by the respondent on 4th June 2020. However, in my view, the said notice was defective and did not meet the threshold of a notice under section 40 (1) (a) of the *Employment Act*.

51. The appellant knew that the respondent was a member of a trade union and it failed to serve it with the notice. It also failed to serve the area Labour officer with the notice. The notice did not also fit the threshold under section 40(1) (b) which required that a notice of intention to declare redundancy be served on the employee (if not a member of union) and area labour officer.

52. The notices contemplated in section 40 (a) and (b) are just declaration of intention to undertake redundancy. It is then followed by a selection process which identifies the affected staff. The affected staff are then entitled to a termination letter giving notice of termination on account of redundancy which may allow the employee to serve the notice period or be paid salary in lieu of notice and exit. (See Kenya Airways Case, supra).

53. Having found that the alleged notice was defective and unlawful, the award of one-month salary in lieu of notice under section 40(1) (f) of the *Employment Act* must stand.

Conclusion

54. I have found that the termination of the respondent's employment was not on account of frustration but redundancy. I have found further that the redundancy was done without following the mandatory procedure prescribed by section 40(1) of the *Employment Act* and as such it amounted to unlawful termination. I have also found that the respondent was entitled to the reliefs awarded by the trial court save for the award of compensation for unfair termination which serves the same purpose as the severance pay. Consequently, I allow the appeal to the extent highlighted above and vary the impugned judgment by setting aside the award of compensation for unfair termination. The rest of the awards by the lower court are not disturbed. Each party shall bear own costs of the appeal since it has only succeeded partially.

DATED, SIGNED AND DELIVERED AT NYERI THIS 18TH DAY OF JULY, 2025.

ONESMUS N MAKAU

JUDGE

Order

This judgment has been delivered to the parties via Teams video conferencing with their consent, having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.