Musikohe v Radar Limited (Employment and Labour Relations Cause 1787 of 2017) [2024] KEELRC 187 (KLR) (9 February 2024) (Judgment)

Neutral citation: [2024] KEELRC 187 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

EMPLOYMENT AND LABOUR RELATIONS CAUSE 1787 OF 2017

K OCHARO, J

FEBRUARY 9, 2024

BETWEEN

TIMOTHY IRAKO MUSIKOHE ..... CLAIMANT

AND

RADAR LIMITED ..... RESPONDENT

JUDGMENT

Introduction

1. At all material times the Claimant was an employee of Respondent, whose employment was terminated on or about the 23rd November 2016. Contending that the termination was unfair and unlawful, he initiated this suit vide a Memorandum of Claim dated 30th August 2017 seeking: -

    a. A declaration that the Respondent's action to terminate the Claimant's employment was illegal, unlawful, unfair and harsh and that the Claimant is entitled to payment of his due terminal benefits as pleaded in paragraph 6 of the statement of claim.

    b. A declaration that the Claimant is entitled to payment of compensatory damages as pleaded in paragraph 7.

    c. An order for the Respondent to pay to the Claimant the total sum of Kshs 1,160,449/-.

    d. Interest on (c) above from the date of filing suit until payment in full.

    e. Costs of the suit.

2. In response to the said Memorandum of Claim, the Respondent filed a Memorandum of Reply dated 16th October 2017, denying the Claimant's claim, and the fact that he is entitled to the reliefs sought.

3. At the close of the parties' respective cases, this Court directed them to file written submissions. The Claimant filed submissions dated 7th November 2022, while the Respondent filed submissions dated 18th December 2022.

Claimant's case

4. At the hearing, the Claimant adopted the contents of his witness statement herein filed as his evidence in chief and moved the Court to admit the documents that he filed under the list of documents dated 30th August 2017 as his documentary evidence.

5. The Claimant's case is that he was employed by the Respondent on 3rd October 2012 as a Security Guard and rose through the ranks over the years to the position of Rider Supervisor, for a salary of Kshs 20,747/- per month. Despite working diligently for the Respondent, his employment was terminated on 23rd November 2016 vide a letter dated 22nd November 2016 issued by the Respondent's Human Resource Manager, James Mwanzia. The reason for the termination of employment was that his services were no longer required due to low business.

6. The Claimant asserted that the allegation that the Respondent was doing poorly businesswise was not genuine. At the material time, the Respondent's business was thriving. Other employees continued to work uninterrupted, and the Respondent continued to recruit Rider Supervisors.

7. He further contended that he had not conducted himself in any manner that could attract the Respondent's action of terminating his employment. Further, the Respondent didn't issue any notification to him of its intention to terminate his employment on account of low business, before the decision to end his employment.

8. The Claimant further contended that the termination was preceded by total non-adherence with due process. Due to this, coupled with foregoing premises, the termination of his employment should be found unlawful, unfair and contrary to the provisions of the *Employment Act* 2007.

9. The Claimant asserts that in the circumstances of this matter, he is entitled to the reliefs he has sought in his pleadings. Further, he should be availed of the compensatory remedy of 12 months' gross salary, being Kshs 20,747/- x 12 months (Kshs 248,964/- on account of the fact that as a result of the unfair termination, he suffered abrupt loss of income and an inability to meet his continuing obligations.

10. Cross-examined by Counsel for the Respondent, the Claimant testified that the termination letter expressed the reason for the termination of his employment as diminished business on the part of the Respondent.

11. He further testified that he was a supervisor of all the Respondent's assignments, and a link between the Respondent, its clients and workers.

12. The termination letter was copied to the Labour Officer. Further, at termination, the Respondent paid him salary in lieu of notice. True as the pay slips reflect, the Respondent used to pay him for overtime worked.

Respondent's case

13. The Respondent presented Albert Moruri Mogaka, to testify on its behalf. By consent of both Counsels, the witness adopted the contents of the witness statement of Rinah Talu Ondego as his evidence in chief. The witness stated that the Claimant was employed on 3rd November 2012 for a

monthly salary of Kshs 20,747/-, and that his employment was terminated on 22nd November 2016 on account of redundancy.

14. In his oral testimony in court, the witness stated that there was no redundancy notice issued. Further, the redundancy situation affected not only the Claimant but also other employees.

15. The witness stated further that at separation, the Respondent issued the Claimant with a certificate of service. According to him, the Claimant's claim lacks any reasonable basis. The Respondent duly followed the law in terminating his employment.

16. Cross-examined by Counsel for the Claimant, the witness stated that he was not certain whether the Respondent Company underwent a redundancy situation at the material time.

17. He testified that the Claimant was given notice as required by law before his employment was terminated. He refuted the suggestion by Counsel that after terminating the Claimant's Court, the Respondent continued recruiting new employees.

18. The witness asserted further that prior to the termination of the Claimant on the account of redundancy, there were consultations, and the Respondent's minutes are a testament.

19. At termination, the Claimant was paid severance pay. Further, he had no unutilized leave days.

Claimant's Submissions

20. In his submissions dated 7th November 2023, the Claimant submitted that the termination of the Claimant's employment on the alleged account of redundancy was not in compliance with the statutory requirements set out in Section 40 (1) (b) of the *Employment Act* 2007. In particular, they did not notify the Claimant personally in writing of the impending arrangement to declare him redundant and the reasons thereof. The Respondent's witness indeed did admit that there was no notification.

21. The Claimant argued that the Respondent's assertion that it experienced diminished business resulting to the termination of his employment is incapable of belief as after the termination of his employment the latter continued to recruit Rider Supervisors. The allegation of redundancy was only intended to cover up an unlawful termination.

22. The Respondent did not prove that there existed a valid reason for the termination of the Claimant's employment. It was not able to demonstrate that it was in a situation of business downturn. This Court should conclude that the termination was unfair, therefore. To support this point, the Claimant placed reliance on the decision in *Paul Ngeno v Pyrethrum Board of Kenya Ltd* [2013] eKLR

Respondent's Submissions

23. In their submissions dated 18th December 2022, the Respondent submits that Section 40 of the *Employment Act* 2007 sets out the procedure to be complied with by an employer who intends to terminate an employee's employment on account of redundancy.

24. That redundancy is a legitimate ground for terminating a contract of employment provided there is a valid and fair reason based on the operational requirement of the employer and the termination is in accordance with a fair procedure. In support of this point, the Respondent placed reliance on the Court of Appeal case of *Kenya Airways Limited v Aviation and Allied Workers Union of Kenya & 3 Others* [2014] eKLR.

25. The Respondent further submitted that it duly followed the procedure set out under Section 40 of the *Employment Act*. A written notice was issued to the Claimant, seniority and ability were considered, one month's wages in lieu of notice was given and his severance pay.

Issues for Determination

26. I have carefully considered the pleadings, evidence, and submissions filed by both parties. The following issues emerge for determination:

    a. Whether the termination of the Claimant's employment was fair.

    b. Whether the Claimant is entitled to the reliefs sought in his Memorandum of Claim.

a Whether the termination of the Claimant's employment was fair.

27. The defining characteristic of termination on account of redundancy is the lack of fault on the part of the employee. It is a species of "no fault" termination. One cannot be off mark to state that it is for this reason that the *Employment Act*,2007, places particular obligations on the employer, most of which are directed towards ensuring that those employees whose employment is to be terminated are treated fairly. See this Court's decision in *Onesmus Kinyua v Prudential Assurance Kenya.* [2022] eKLR.

28. The Respondent posited that the Claimant's employment was terminated on account of redundancy following a business downturn on its part. There can be no doubt that redundancy is a legitimate ground for termination of an employee's employment as long as the termination is fueled by genuine operational requirements of the employer and effected in adherence to the cannons of procedural fairness. Addressing this, the Court of Appeal in the case of *Kenya Airways Ltd* [*supra*], cited by Counsel for the Respondent stated;

> " 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 a 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 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 have been rendered superfluous or that redundancy has resulted in abolition of office, job or loss of employment....."

29. Section 40 of the *Employment Act* 2007 which provides: -

> " 40. Termination on account of redundancy
>
> (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.

(2) Subsection (1) shall not apply where an employee's services are terminated on account of insolvency as defined in Part VIII in which case that Part shall be applicable.

(3) The Cabinet Secretary may make rules requiring an employer employing a certain minimum number of employees or any group of employers to insure their employees against the risk of redundancy through an unemployment insurance scheme operated either under an established national insurance scheme established under written law or by any firm underwriting insurance business to be approved by the Cabinet Secretary."

30. There is no doubt that Section 40 (1) (a) provides for the issuance of notices where the employee[s] to be affected by the intended termination on account of redundancy, is a member [s] of a trade union. A notice signifying the employer's intention must be served upon the trade union and Labour Officer. The notices must be issued at least 30 days prior to the date appointed for termination. Section 40[1] [b] contemplates a scenario where the employee[s] to be affected by the intended termination is not a member of a trade union. In such a situation the notice must be issued in writing to the employee and the Labour Officer. Too, the notice must be of not less than 30 days. See, *The German School Society*

& another v Ohany & another (Civil Appeal 325 & 342 of 2018 (Consolidated)) [2023] KECA 894 (KLR) (24 July 2023) (Judgment).

31. The question then that comes up at this point is, did the Respondent comply with Section 40 (1) (b) by issuing a 30 days' notice of Intended Redundancy to the Claimant? I have carefully gone through the documents presented by the parties and note that the only document that speaks to the termination of the Claimant's employment and the reason for the termination is that captioned "Termination from Employment" and dated 22nd November 2016. It was not preceded by any other letter or correspondence on the matter. The Respondent didn't bring forth any evidence demonstrating that there was any.

32. The letter reads in part;

> " We refer to the above matter and regret to inform you that your employment with the company has been terminated with effect from the 22nd November 2016. This is due to the fact that we no longer require your services due to low business.
>
> We value the service you rendered to the company during the course of your employment and we will consider you in the future where need arises....."

33. In my view, the characteristics of the notice contemplated under Section 40[1][b] of the Act, are totally absent in the above-stated letter. It is a termination letter not a notice of intended redundancy. The letter did not give 30 days before the termination took effect.

34. As a result, this Court concludes that contrary to the Respondent's assertion, it didn't issue the notices contemplated under Section 40[1] of the *Employment Act*.

35. The Claimant contended that the termination of his employment was not preceded by any consultations as required by law. It is trite law now that though the *Employment Act*, of 2007 does not provide expressly that consultations must be undertaken, Section 40[1] thereof implicitly does. Further, *ILO Convention 158* provides that there must be consultations before termination of an employee's employment on account of redundancy. Though Kenya has not ratified the Convention, this Court is inspired by the Convention as it is aligned with our statutory provisions aimed at employee protection from arbitrary terminations of their employment.

36. The issuance of the 30 days' notice provided for under Section 40, is intended to provoke consultations between the employer and the employee or between the employer and a trade union as the case may be. Emphasizing this, the Court of Appeal in the case of The German Society School (Supra), stated;

> " 56. A notice to the employee/trade union/labour officer opens up the door for a consultative process with the key stakeholders. The Court of Appeal in *Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 Others* (2014) eKLR held:
>
> a) Consultation is implicit in the *Employment Act* under the principle of fair play;
>
> b) Consultation gives an opportunity for other avenues to be considered to avert or to minimize the adverse effects of terminations;
>
> c) Consultations are meant for the parties to put their heads together and is imperative under Kenyan law;

d) Consultations have to be a reality, not a charade;

e) Opportunity must be given for the stakeholders to consider;

f) Stakeholders must have and keep an open mind to listen to suggestions, consider them properly and then only then decide what is to be done; and

g) Consultation must not be cosmetic.

57. In essence, consultation is an essential part of the redundancy process and ensures that there is substantive fairness. The employer should ensure that it carries out the process as fair as possible and that all mitigating factors are taken into consideration. A reading of the record shows that the respondent was served with a redundancy notice and asked to proceed for a one month's leave. The trial court found that the redundancy was unfair and irregular for failure to give adequate notice and thereby not giving consultation a chance.

60. However, on the question whether the notice gave consultations and dialogue a chance, we find that while the requirement for consultation is not expressly provided for in section 40 of the *Employment Act*, this requirement is implied, as the main reason and rationale for giving the notices in section 40(1) (a) and (b) to the unions and employees of an impending redundancy where applicable."

37. The Respondent asserted that consultations were undertaken before the termination. In my view, and with great respect, the assertion is just but a bald assertion. The Respondent didn't present any details regarding the alleged consultations or any document from which its being can be discerned. The Respondent's witness testified that there are minutes which speak to the consultations. I have seen none. Issuance of the 30 days' notice hereinabove mentioned births the phase of consultations, in the absence of the notice, the Respondent needed then to explain how the alleged consultations were initiated. As a result of the foregoing premises, I am not persuaded that there were any consultations.

38. I now turn to consider whether the termination was substantively fair. Both section 2 of the *Employment Act* and section 2 of the *Labour Relations Act* define redundancy 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 the employee are superfluous and the practice is commonly known as the abolition of the office, job or occupation and loss of employment."

39. No doubt, our law recognizes no right to employment for life, however, the social balance struck in the context of a constitutional regime in which the right to fair labour practices is a fundamental right is to afford an employee the right not to be unfairly dismissed and the employer the right to dismiss an employee for fair reason provided that a fair procedure is followed.

40. The Respondent was burdened with the onus of satisfying this Court that the termination of the Claimant's employment was effected for a valid and fair reason. In this matter not only did the Claimant allege that the termination was wanting in procedure and an affront of section 40 of the *Employment Act*,2007 but that it was simply an excuse employed by the Respondent to cover up an unfair termination.

41. Section 40 of *the Act* cannot be read in isolation from the provisions of sections 43 and 45. Besides, just asserting that the Claimant's employment was terminated as a result of low business, the Respondent didn't place any material before this Court from whence one can discern the alleged deep of its business. No doubt, accounts documents comparing two periods required to be produced.

42. For the employer to successfully dismiss an employee as a result of its operational requirements, he or she is obliged to have a bona fide economic reason. In my view, this would only be demonstrated by detailed and or cogent evidence, not unsupported assertions.

43. As a result of the foregoing premises, I hold that the Respondent failed to discharge her duty under section 45[2] of the Act- demonstrating that the reason for the termination was fair and valid. The termination was substantively unfair in the circumstances.

44. In the upshot, I conclude that the termination of the Claimant's employment was both procedurally and substantively unfair. In fact, one considering the provisions of section 44[1] of the *Employment Act*, and the factual matrix of this matter shall find no hesitation to conclude that what happened was an unjustified summary dismissal.

Whether the Claimant should be awarded the terminal dues contained in his Memorandum of Claim dated 30th August 2017.

45. Having held that the Claimant's employment was unfairly terminated as I have hereinabove, I now turn to consider whether the reliefs sought are available to him.

46. The Claimant seeks to be awarded *inter alia*, one month's salary *in lieu* of notice. The Respondent contended that it paid the Claimant all his terminal dues. Section 40[f] of the Act places an obligation on the employer to pay the employee whose employment he or she has terminated on account of redundancy to pay the employee not less than one month's salary in lieu of notice. In his evidence under cross-examination, the Claimant admitted that he was paid a salary in lieu of notice. In light of this, the relief sought under this head cannot be availed to him.

47. There is no dispute that the Claimant did work for the Respondent for 4 years. However, the fact to whether he did enjoy his right to annual leaves, is in contestation. Again, payment for any leave days outstanding at the time of separation on account of redundancy is a specific statutory obligation placed on the employer under section 40 of the Act. To an extent then, where payment of the same is disputed, the onus is on the employer to establish fulfilment of the obligation. I have carefully considered the material placed before me by the Respondent, and conclude that the same doesn't rebut the Claimant's assertion that he never proceeded for any annual leave during his tenure. Nothing could have been easier than the Respondent producing in evidence his employment records to counter the assertion, or to demonstrate that he was duly compensated for earned but unutilized leave days. The provisions of section 74 of the *Employment Act*, have not escaped this Court's mind. The employer is the keeper of employment records. Where without any justification he or she fails to produce the record in proceedings where they are relevant, an adverse inference may be made against him or her.

48. In the absence of records controverting the Claimant's allegation that he did not take leave for the entire period of employment, which should have been adduced by the Respondent as the keeper of records under Sections 10(3) and 74 of *the Act*, I am obliged to grant payment for leave days for the 3 years immediately preceding the termination of the Claimant's employment.

49. I now turn to the claim for overtime worked. A perusal of the copies of pay slips produced by the Claimant indicates that he was routinely paid Kshs 3,563.00 per month as overtime. cross-examined by Counsel for the Respondent, the Claimant admitted that he used to be paid for overtime work. As a

result, I have no reason to award him any overtime compensation, as doing so will amount to unjustly enriching him.

50. Despite claiming payment for public holidays worked but not paid for, the Claimant didn't give details of the public worked, because seldom do we have an equal number of public holidays each year. In so saying, this Court is cognizant of the fact that the relevant Cabinet Secretary has legal powers to declare public holidays from time to time, outside of those constitutionally and specifically provided for in law. In the case of *James Orwaru Nyaundi v Kilgoris Klassic Sacco Limited* [2022] eKLR, this very Court held that: -

> "78. The Claim for overtime and public holidays worked compensation has just been thrown to Court. This Court has incessantly urged that this practice must come to a stop. It is not enough for a Claimant to just give figures to court, asserting that he or she is entitled to them, cross her or his fingers hoping that the Respondent does not place before Court documents, and as a consequence of the failure say "behold the claim is proved, the employer has not tendered in evidence any documents." The Claimant must if she or he has to succeed in the Claim, be specific on the days when he worked overtime, the specific public holidays, when he worked and wasn't paid for."

51. In light of the foregoing premises, the claim for public holidays must also fail.

52. I finally turn to the issue of compensation for unfair termination. This Court's powers to make a compensatory award where it has been found that the termination of an employee's employment was unfair flows from the provisions of section 49[1][c] of the *Employment Act*. However, it should be pointed out here that the grant of the same is discretionary, and it depends on the circumstances of each case.

53. The Claimant prays for 12 months' gross salary as compensation. This Court hasn't lost sight of the fact that this is the maximum awardable compensation under the above-cited provision.

54. This Court has carefully considered how the Claimant's employment was terminated, the casual disregard of the provisions of Section 40 of the *Employment Act* by the Respondent, the fact that the Claimant did not contribute to or cause the termination, and his length of service, being four years, and conclude that he is entitled to 8 months gross salary as compensation for unfair termination.

55. In the upshot, judgment is hereby entered for the Claimant in the following terms: -

    a. A declaration that the Respondent's action to terminate the Claimant's employment was wrongful and unfair.

    b. The Claimant be paid terminal dues as follows: -

        i. Compensation for earned but unutilized leave days for 3 years (20747/30 x 21x3) ..... Kshs 43,568.70

        ii. Compensation for unfair termination (20,747x8) Kshs 165,976.00

        Total Kshs 209,544.00

    c. Interest on (b) above at Court rates from the date of this judgment until payment in full.

    d. The Respondent shall bear the costs of this suit.

READ, DELIVERED AND SIGNED THIS 9th DAY OF FEBRUARY, 2024.

OCHARO, KEBIRA

JUDGE

In the presence of:

Mr. Emmanuel for Namada for Claimant

Mr. Wachakana for Respondent

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of *the Constitution* which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

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OCHARO, KEBIRA

JUDGE