



REPUBLIC OF KENYA



KENYA LAW
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**Lugose v Tom Mboya Labour College (Appeal E059 of 2023)
[2024] KEELRC 730 (KLR) (20 March 2024) (Judgment)**

Neutral citation: [2024] KEELRC 730 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
APPEAL E059 OF 2023
S RADIDO, J
MARCH 20, 2024**

BETWEEN

NELSON LUGOSE APPELLANT

AND

TOM MBOYA LABOUR COLLEGE RESPONDENT

*(Being an Appeal from the judgment of Hon M.I. Shimenga given at Kisumu
on the 19th October 2023 in Kisumu CMELRC No. 239 of 2022)*

JUDGMENT

1. Nelson Lugose (the Appellant) sued Tom Mboya Labour College (the Respondent) before the Senior Resident Magistrates Court on 9 November 2022, alleging unfair termination of employment and breach of contract.
2. In a judgment delivered on 19 October 2023, the Senior Resident Magistrate dismissed the Cause, and this prompted the Appellant to lodge a Memorandum of Appeal with this Court on 2 November 2023, contending that:
 - i. The Learned trial Magistrate erred in Law and fact and misdirected herself by failing to exercise judicial authority on known legal principles and rendering an unjust judgment.
 - ii. That the Learned trial Magistrate erred in law and fact in failing to appreciate the provisions of Section 40 of the *Employment Act* which is explicit in terms and mandatory in tone thereby arriving at an erroneous decision based on extraneous facts not forming part of the proceedings.
 - iii. That the Learned trial Magistrate erred in fact and law in addressing the main issue of redundancy in a narrow manner that consultation with employees is not mandatory during the process preceding redundancy while relying in an authority that has already been overturned by the Court of Appeal.



- iv. The Learned trial Magistrate erred in fact and in law in holding that the Appellant was reasonably compensated during termination whereas the redundancy was unfair and unlawful hence not justified in the circumstances.
 - v. The Learned trial Magistrate erred in fact and in law in making an inference that the claim was time barred whereas the suit was filed before the lapse of 3 years from the time the cause of action arose.
 - vi. The Learned trial Magistrate erred in fact and in law in failing to find that the Respondent did not follow the laid down procedure as stipulated in Section 40 of the [Employment Act](#).
 - vii. The Learned trial Magistrate erred in fact and in law in failing to award the Appellant house allowance and gratuity despite there being overwhelming evidence in support of the same.
 - viii. The Learned trial Magistrate erred in law and fact in making the findings which were a total misdirection and legal deviations from the express provisions of the law and known legal principles.
 - ix. The Learned trial Magistrate erred in law and fact in failing to find that the evidence Appellant was uncontroverted by the Respondent having failed to call any witness to testify thus the pleadings remained unsubstantiated.
3. The Appellant filed the Record of Appeal on 9 February 2024 and the Court gave directions on 15 February 2024. The Appellant filed his submissions on 12 March 2024 (should have been filed and served before 1 March 2024), and the Respondent on 11 March 2024.
 4. The Court has considered the Record of Appeal and submissions.

Role of the Court on first Appeal

5. In *Abok James Odera t/a A. J. Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates* (2013) eKLR, the Court of Appeal stated as follows regarding the duty of a first appellate Court:-

This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess, and reanalyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.
6. This Court will keep the interdict in mind.

Limitation

7. The Appellant was informed of the termination of his employment through a letter dated 23 September 2020. The effective date of termination was given as 1 October 2020.
8. The Appellant instituted the proceedings against the Respondent to challenge the fairness of the decision on 9 November 2022, well within the 3 years contemplated by section 90 of the [Employment Act](#), 2007.

Unfair termination of employment

9. While finding that the Respondent had justifiable and valid reasons to terminate the Appellant's employment on account of redundancy, the Senior Resident Magistrate cited and relied on the dicta in the minority judgment of the Court of Appeal in *Kenya Airways Ltd v Aviation & Allied Workers Union of Kenya & 3 Ors* (2014) eKLR.



10. The Court of Appeal has settled the question of consultations. In the authority relied on by the Senior Resident Magistrate, the majority stated that:

I agree with Mr. Mwenesi that both the notices themselves and their duration of 30 days under this provision are mandatory. Section 40(1) of our *Employment Act* does not expressly state the purpose of the notice. Although it also does not expressly provide for consultation between the employer and the employees or their trade unions before the final decision on redundancy is made, on my part I find the requirement of consultation provided for in our law and implicit in the *Employment Act* itself.

.....

the requirement of consultation is implicit in the principle of fair play under Section 40(1) of the *Employment Act* itself and our other labour laws. The notices under this provision are not merely for information. Read together with Part VIII of the *Labour Relations Act*, 2007 which provides for reference to the Minister for Labour of trade disputes, including those related to redundancy (see Section 62(4)) for conciliation, I am of the firm view that the requirement of consultations implicit in these provisions. 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 avert or 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 minimize the terminations resulting from the employer’s proposed redundancy. If redundancy is inevitable, measures should to be taken to ensure that as little hardship as possible is caused to the affected employees. In the circumstances, I agree with counsel for the 1st respondent that consultation is an imperative requirement under our law.

11. The Court of Appeal affirmed the above cited legal position in *Barclays Bank of Kenya Ltd & Ar v Gladys Muthoni & 20 Ors* (2018) eKLR where it stated:

The trial court was emphatic that the requirement for consultations before issuance of a redundancy notice was imperative, otherwise it would result in unfair termination of employment. The appellants argue that they had a right to organize and run their business operations as they saw fit and there was no obligation for an employer to have consultations before declaring redundancy. They cited the dicta of Githinji, JA in the *Kenya Airways* case (supra), that in Kenya there was no 'pre-redundancy consultation but only post redundancy dispute resolution'. On the other hand, the respondents rely on the dicta of Maraga and Murgor, JJ.A in the same case.

We have carefully examined that case which, unlike this case, involved unionizable employees, a collective bargaining agreement and oral evidence tested in cross examination. In the end, we are persuaded that the dicta of Maraga and Murgor, JJ.A regarding consultations prior to declaration of redundancy resonate with our Constitution and international laws which have been domesticated by dint of Article 2 (6) of *the Constitution*.

12. The Court will now turn its attention to the other prerequisites for redundancy.
13. The Respondent issued a letter dated 23 September 2020 informing the Appellant of the termination of his employment.
14. The reasons given were conduct of the Appellant and the obtaining economic situation brought about by the COVID-19 pandemic.



15. In so far as one of the reasons for the termination of the Appellant's employment was based on his conduct, it was incumbent upon the Respondent to comply with the procedural fairness requirements set out in section 41 of the [Employment Act](#), 2007.
16. Section 41 of the [Employment Act](#), 2007 demands that before terminating an employment contract on the grounds of misconduct, performance or physical incapacity, the employer should grant the employee an opportunity to make representations, either in the presence of a colleague or representative of a trade union if he is a member of one.
17. The Record does not show that the Respondent allowed the Appellant an opportunity to make representations in the company of a colleague of his choice or representatives of his trade union, if any, before the decision to terminate the contract was made.
18. With respect to the economic situation then obtaining, this was beyond the control of the parties and because it was involuntary on the part of the Appellant, it was a redundancy.
19. Section 40 of the [Employment Act](#), 2007 provides the guidelines on termination of an employment contract on the ground of redundancy, and these include written notification to the Local Labour Officer at least one month in advance, and payment of severance pay.
20. The Respondent did not call any evidence to demonstrate that the written notice was given to the Labour Officer. The failure tainted the fairness of the termination.
21. Further, the notice was dated 23 September 2020 and it gave the effective date of termination as 1 October 2020. The notice period fell short of the statutory one month set out in section 40(1) of the [Employment Act](#), 2007.
22. The Court has also perused the termination letter and schedule of dues paid to the Appellant.
23. The letter indicated that the Appellant would be paid gratuity.
24. Gratuity and severance pay are distinct, and the Respondent did not place any record before the Senior Resident Magistrate to show that by gratuity it meant the severance pay contemplated by section 40(1) (g) of the [Employment Act](#), 2007.
25. However, the Court will assume that the gratuity was a mislabelling of severance pay.
26. The Court has concluded that the Respondent did not comply with all the requirements of section 40(1) of the [Employment Act](#), 2007, and therefore finds that the Senior Resident Magistrate erred in law and fact in dismissing the Cause.
27. Since the Appellant served the Respondent for about 11 years, and in consideration of the length of service, and that he was paid some dues, this Court is of the view that the equivalent of 9 months' gross salary as compensation for unfair termination of employment would be appropriate (gross wages was Kshs 16,900/-).

House allowance

28. Despite pleading that he was not paid housing allowance, the Appellant did not lay an evidential basis for this head of the claim either in the written witness statement which was adopted as part of the evidence.
29. The Respondent produced copies of the Appellant's appointment, confirmation letters and payslip which indicate that he was getting 15% of the basic salary as house allowance.



Conclusion and Orders

30. The Court has re-evaluated the pleadings and evidence placed before the Senior Resident Magistrate and finds that the Senior Resident Magistrate fell into an error of law and fact in dismissing the Cause.
31. The judgment is set aside and substituted with a judgment finding that the Respondent unfairly terminated the Appellant's employment.
32. The Appellant is awarded:
 - (i) Compensation Kshs 152,100/-.
33. The Appellant is denied costs of the Appeal for late filing of submissions without any explanation. The Appellant however is granted costs before the Senior Resident Magistrate.

DELIVERED VIRTUALLY, DATED AND SIGNED IN KISUMU ON THIS 20TH DAY OF MARCH 2024.

Radido Stephen, MCI Arb

Judge

Appearances

For Appellant Omondi Abande & Co. Advocates

For Respondent Isaac Mbingi Okello, Advocate

Court Assistant Chemwolo

3| 14 Page Kisumu Appeal No. E059 of 2023

