Ndungu v Robert Bosch East Africa Ltd (Cause 656 of 2019)
[2024] KEELRC 786 (KLR) (16 April 2024) (Judgment)

Neutral citation: [2024] KEELRC 786 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 656 OF 2019

JK GAKERI, J

APRIL 16, 2024

BETWEEN

JOHN NGINYA NDUNGU ..... CLAIMANT

AND

ROBERT BOSCH EAST AFRICA LTD ..... RESPONDENT

JUDGMENT

1. The Claimant commenced the instant suit by a Statement of Claim filed on 6th August, 2019 alleging unfair/unlawful termination of employment by the Respondent.
2. It is the Claimant's case that he was employed by the Respondent under a written contract of service effective 1st May, 2014 as the Business Developer in East Africa on permanent terms until attaining the age of 60 years.
3. That the Respondent unilaterally purported to make a Mutual Agreement for termination of employment dated 13th June, 2019 when his salary had risen to Kshs.414,815.63.
4. It is the Claimant's case that he was not privy to the mutual separation agreement and an unsigned second letter entitled Retrenchment Agreement dated 14th June, 2019 was forwarded to him.
5. The Claimant avers that his employment was terminated on 30th June, 2019 by way of Termination of Employment form.
6. According to the Claimant, the mutual separation agreement was null and void as his employment was permanent and he was not guilty to any misconduct.
7. The Claimant prays for;
    i. A declaration that his dismissal from employment by the Respondent was unfair, illegal, unconstitutional, null and void.

ii. Payment of salaries for the remaining period of the contract 16 years x 12 x 414,815.63 = Kshs.79,644,600.96.

iii. 12 months compensation for wrongful dismissal.

iv. General damages for psychological stress, anguish/suffering.

v. Costs of the suit.

vi. Any other/further relief that the Honourable Court may deem fit/just to grant.

Respondent's case

8. In its statement of defence filed on 18th September, 2019, the Respondent admits that the Claimant was its employee as alleged but avers that the employment contract had an exit clause. It admits having issued two similar contracts of employment.

9. The Respondent avers that the mutual separation agreement had been agreed upon during a meeting held on 3rd June, 2019 which was the Claimant's notice of termination of his employment on account of redundancy.

10. That when the agreement was reduced into writing by the Respondent, the Claimant declined to sign and suggested changes which were effected but he still refused to sign contesting clause 10.5 of the agreement on restraint but the Respondent was adamant.

11. That the Claimant requested for a clearance form on 26th June, 2019 and promised to consult an advocate.

12. It is the Respondent's case that termination of the Claimant's employment on account of redundancy was substantively just and procedurally fair as due process was adhered to.

13. The Respondent prays for dismissal of the Claimant's case with costs.

Claimant's evidence

14. On cross-examination, the Claimant confirmed that there was no fallout between him and the Respondent and he was not mistreated by the employer.

15. Strangely, the Claimant denied having been aware of the mutual separation agreement dated 13th June, 2019. That there were no discussions and he was being informed about it as evidenced by email communication.

16. It was the Claimant's evidence that there was no notice of termination of employment and the company was doing very well then.

17. On re-examination, the Claimant testified that he declined to sign the mutual separation agreement as they could not agree on certain terms.

18. It was his testimony that he was not summoned for misconduct or performance and no notice of termination on account of redundancy was given.

Respondent's evidence

19. RWI, Mr. Joseph Kariuki confirmed that he joined the Respondent on 19th September, 2022. It was his testimony that a meeting was held on 3rd June, 2019 and the Claimant was present but refused to sign the separation agreement.

20. RWI testified that the Claimant was notified of the termination on account of redundancy on 3rd June, 2019 as confirmed by the email dated 14th June, 2019 and employment would end on 28th June, 2019.

21. The witness admitted that the notice was not sufficient, if it was given.

Claimant's submissions

22. Counsel submitted on whether termination of the Claimant's employment was illegal or unfair or unconstitutional, entitlement to the reliefs sought and costs.

23. On termination, counsel submitted that no reason was given by the Respondent as the alleged financial difficulties of the Respondent were not proved and cited the provisions of Section 43 and 45(2) of the *Employment Act*, 2007 as well as the decisions in Mary Chemweno Kiptui V Kenya Pipeline Co. Ltd (2014) eKLR, Walter Ogal Anuro V Teachers Service Commission (2013) eKLR among others to urge that a redundancy must be substantively justifiable and procedurally fair.

24. As regards procedure, counsel relied on the provisions of Section 41 of the *Employment Act*, 2017 to urge that the termination was not procedurally fair.

25. Reliance was also made on the provisions of Section 40 of the Act on redundancy to urge that the provisions were not complied with and the purported redundancy was unprocedural.

26. On reliefs, counsel submitted that the Claimant was entitled to the reliefs sought and costs of the suit.

Respondent's submissions

27. On termination, counsel submitted that contrary to the Claimant's assertion, his employment was terminated on account of redundancy as evidenced by copies of emails on record.

28. Reliance was made on the provisions Section 40(1) of the *Employment Act*, 2007.

29. Counsel urged that consultation begun on 3rd June, 2019 but the Claimant did not sign the agreement.

30. Counsel cited the Court of Appeal decision in Cargill Kenya Ltd V Mwaka & 3 others (2021) KECA 115 on notice.

31. Counsel further submitted that the Claimant did not dispute having received severance pay and one month's salary.

32. On the reliefs sought, counsel submitted that the Claimant had failed to discharge the burden of proof that his employment was terminated on the ground of misconduct as it was a redundancy.

33. Counsel urged that the Respondent had complied with the law as applied by Githinji JA in Kenya Airways Ltd V Aviation & Allied Workers Union Kenya & 3 others, as the Claimant was consulted.

34. Counsel prayed for dismissal of the Claimant's suit with costs.

Findings and determination

35. It is common ground that the Claimant was an employee of the Respondent from 1st May, 2014 to June 2019 about 5 years and served diligently until early June 2019 when the Claimant attended a meeting attended by Mr. Vandan, Frank, Zamokuhle and the Head of Human Resource, Irene Njoki Mutegi when the issue of terminating the Claimant's employment on account of redundancy was discussed as evidenced by the Claimant's email dated 6th June, 2019 at 9.42 pm as the Claimant was expecting a formal notification as promised.

36. From the email exchanges, it is discernible that the Respondent did not issue the anticipated letter but prepared a separation agreement whose terms the parties could not agree and it was not executed by any of them.

37. The discussions between the parties as captured by the emails on record make it clear that the Claimant had accepted the fact that the impending separation was on account of redundancy and suggested a rephrasing of the agreement.

38. It is unmistakable that the deal breakers were the Non-Solicitation and Restraint of Trade and intellectual property rights, and discussions hit a deadlock on 26th June, 2019.

39. In a nutshell, the parties separated after the discussions on email and meetings failed and the Claimant was paid leave and severance pay, Kshs.1,073,122.95 on 25th July, 2019 and salary for June 2019 and a bonus of Kshs.145,185.47, total Kshs.383,444.51 on even date.

40. The issues for determination are;

    i. Whether termination of the Claimant's employment on account of redundancy was unfair.

    ii. Whether the Claimant is entitled to the reliefs sought.

41. From the evidence before the court and the Claimant's statement of claim, it is perceivable that the Claimant was aware that the impending termination of his employment was on account of redundancy as opposed to an ordinary termination where the employer is required to evidentiary establish the employee's culpability.

42. Both the provisions of the *Employment Act*, 2007 and case law are consistent that redundancy is one of the legitimate methods of separation at the instigation of the employer on account of economic challenges, re-organization, restructuring or technological changes among others.

43. Analogous to termination of employment or summary dismissal, a redundancy must be justifiable and procedurally fair and the employer bears the heavy burden of proof.

44. For a redundancy to pass muster, the employer is required to observe the provisions of Section 40(1) of the *Employment Act*, 2007.

45. The essence of Section 40(1) was underscored by the Court of Appeal in Freight In Time Ltd V Rosebell Wambui Munene (2018) eKLR as follows;

> "In addition, Section 40(1) of the *Employment Act* prohibits in mandatory tone, the termination of a contract of service on account of redundancy unless the employer complies with the following seven conditions, namely; . . .

46. The court had expressed similar sentiments in Barclays Bank of Kenya & another V Gladys Muthoni & 20 others (2018) eKLR.

47. The conditions include, notice to the trade union and labour officer, or if the employee is not a member of a union to the employer and the Labour Officer, selection criteria, fairness whether an employee is a member of the union or not, payment of leave in cash, one month's notice or pay in lieu of notice and severance pay at the rate of not less than 15 days for each completed year of service.

48. As regards notice of the intended redundancy, since the Claimant was not a member of a trade union, Section 40(1)(b) of the *Employment Act*, 2007 was applicable under which the Respondent was obligated to send a written notice to the Claimant and the labour officer.

49. RWI testified that no written notice was given as the Claimant was notified of the redundancy during a meeting on 3rd June, 2019,

50. Equally, the Respondent did not furnish evidence to prove that any letter was sent to the labour officer.

51. Closely related to the foregoing are the contents of the notice.

52. Under Section 40(1)(a) of the *Employment Act*, 2007, the redundancy notice must set out the "reasons for and the extent of the intended redundancy."

53. Without a notice, the Respondent did not demonstrate that the purported redundancy of the Claimant was justifiable as no reason was given.

54. The allegation by RWI that the Respondent was grappling with financial challenges was not borne by facts or any evidence.

55. Finally, Section 40(1)(a) provides that the notice must be given at least one month before the effective date of the redundancy.

56. See Cargill Kenya Ltd V Mwaka & 3 others (Supra).

57. Even if the notice in this case was given on 3rd June, 2019, it would not have met the threshold of Section 40(1)(a) and (b) of the Act and RWI confirmed as much on cross-examination.

58. In sum, the Respondent did not comply with the requirements of the *Employment Act*, 2007 on notice and the same was ineffectual.

59. As regards consultations, email communication on record reveal that there were significant engagement between the Claimant and the Respondent on the redundancy and the Claimant had the opportunity to negotiate the terms of separation though he appear to have laid more emphasis on the clauses of the separation agreement.

60. Consistent with the holding in Barclays Bank of Kenya & another V Gladys Muthoni & 20 others (Supra) on the essence of consultations in a redundancy, the court is satisfied that there were consultations.

61. On selection criteria, it is common ground that there was none.

62. It is unclear to the court how the Respondent made the decision to declare the Claimant redundant.

63. Significantly, the Respondent paid the Claimant one month's salary, a bonus, leave days and severance pay which the Claimant has not contested.

64. From the foregoing, it is decipherable that the Respondent has failed to demonstrate on a preponderance of probabilities that termination of the Claimant's employment on account of redundancy was substantively justifiable or procedurally fair and thus the redundancy transitioned to an unfair and unlawful termination of the Claimant's employment.

Whether the Claimant is entitled to the reliefs sought

a. Declaration

65. Having found that the termination of the Claimant's employment on account of redundancy was unfair for non-compliance with the provisions of the *Employment Act*, 2007, a declaration to that effect is merited.

b. Payment of salaries for the remaining period of the contract

66. The Claimant adduced no evidence to prove entitlement to the salary payable till retirement as correctly submitted by the Respondent's counsel. While it is true that the employment contract had no specific duration of service, it had an exit clause and either party could terminate the same by one month's notice which suggests that there was no guarantee that the Claimant would remain an employee of the Respondent until he attained the age of 60.

67. More significantly, the Court of Appeal has consistently held that employees are required to move on after termination of employment and not await anticipatory earnings and are not supposed to "replicate employment wrongs and multiply remedies."

68. (See Elizabeth Wakanyi Kibe V Telkom Kenya Ltd (2014) eKLR, D.K. Njagi Marete V Teachers Service Commission (2020) eKLR and National Social Security Fund V Grace Kazungu & another (2018) eKLR among others).

69. In D K Njagi Marete V Teachers Service Commission, the court was unambiguous that the claim for anticipatory benefits till retirement had no legal anchorage.

70. In the instant case, the Claimant has cited no law to justify the prayer.

    It is declined.

c. Maximum compensation

71. Having found that the termination of the Claimant's employment by the Respondent was unfair, the Claimant is entitled to compensation in accordance with the provisions of Section 49(1)(c) of the *Employment Act*, 2007 having regard to the relevant parameters under Section 49(4) of the Act.

72. In determining the quantum of compensation, the court has taken into consideration the fact that;

    i. The Claimant was an employee of the Respondent for about 5 years and 2 months which is not long and had served diligently.

    ii. The Claimant had no recorded warning or cases of misconduct.

    iii. The Claimant did not contribute to the termination of his employment.

    iv. The Claimant did not express his wish to remain in the Respondent's employment or appeal the decision.

    v. The Claimant envisaged remaining an employee of the Respondent until retirement at the age of 60.

    vi. The Claimant was paid severance pay of Kshs.1,073,039.10.

73. In the circumstances, the court is satisfied that the equivalent of 2 months gross salary is fair.

d. General damages for psychological stress, anguish/suffering

74. The Claimant adduced no evidence of the stress, anguish or suffering alleged or demonstrate that the Respondent was responsible for any stress he had to endure.

The claim is dismissed.

75. In the upshot, judgment is entered in favour of the Claimant against the Respondent in the following terms;

    a. Declaration that termination of the Claimant's employment was unfair.

    b. Equivalent of 2 months' salary Kshs.829,631.26.

    c. Costs of the suit.

    d. Interest at court rates from date hereof till payment in full.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 16TH DAY OF APRIL 2024

DR. JACOB GAKERI

JUDGE

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 *Civil 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.

DR. JACOB GAKERI

JUDGE