



**Mini Bakeries (Mombasa) Limited v Ndirangu (Appeal E128 of 2023)
[2024] KEELRC 947 (KLR) (11 April 2024) (Judgment)**

Neutral citation: [2024] KEELRC 947 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E128 OF 2023**

**M MBARÚ, J
APRIL 11, 2024**

BETWEEN

MINI BAKERIES (MOMBASA) LIMITED APPELLANT

AND

PETER MAINA NDIRANGU RESPONDENT

*(Being an appeal from the judgment of Hon. Nabibya (SRM) delivered
on 26 October 2023 in Mombasa CMELRC No. E007 of 2021)*

JUDGMENT

1. The appeal arises from the judgment in Mombasa CMELRC No.E007 of 202 delivered on 26 October 2023. The appellant is seeking that the judgment and decree thereof be set aside and substituted with an order dismissing the suit with costs.
2. The appellant has lodged three (3) grounds of appeal;
 1. The learned magistrate erred in law and fact in finding that there was no evidence of consultation nor communication of the criteria used prior to redundancy.
 2. The learned magistrate erred in law and fact in awarding severance pay for 20 years in any event.
 3. The learned magistrate erred in law and fact in awarding compensation for supposed unutilised leave days from the years 2017 and 2019.
3. The background of the appeal is a claim filed by the respondent against the appellant in Mombasa CMELRC No. E007 of 2021 on the grounds that he was employed in January 1999 as a bakery-packer at a wage of ksh.15, 768 per month. On 24 July 2020, the appellant served him with a 2-month termination notice on account of redundancy. There was no consultation or indication of a selection criteria resulting in unfair termination of employment. He claimed payment of the following dues;



- A. General damages for unfair termination at 12 months ksh.189,216;
 - B. Severance pay for 20 years Ksh.157,680;
 - C. Compensation for annual leave for 20 years Ksh.315,360;
 - D. Compensation for public holidays for 20 years Ksh.23,264;
 - E. Compensation for off days Ksh.1,119,360;
 - F. Compensation for overtime for 3 hours for 20 years Ksh.719,415;
 - G. Costs.
4. In response, the appellant's case was that it issued a notice of intended redundancy on 1st April 2020 to the Bakery Confectionary, Manufacturing & Allied Works Union to which the respondent was a member. Upon consultations with the union on 8 April 2020, 6 June 2020 and 19 June 2020 it was agreed that through an agreement dated 2 July 2020 that a total of 589 employees be declared redundant. Employees in the packing division were declared redundant. The selection factors alleged by the respondent were not applicable. All terminal dues were paid on 19 October 2020 and the respondent voluntarily signed the discharge voucher hence he is estopped from making further claims. The appellant further responded that it had been paying house allowance above the minimum statutory provision. It operates an 8-hour shift system, therefore not possible for overtime. It was possible to work on off days or public holidays but each such day was paid off at month's end together with the wage due. It was not humanly possible to work for 20 years without a break.
 5. The appellant also filed various work records.
 6. In judgment, the trial court was short and brief. The finding was that the respondent was entitled to severance pay as claimed for 20 years. the claim for annual leave was allowed, save based on the evidence of leave taken in the year 2018 for 26 days, 2019 had a balance of 18 days hence cumulatively, the respondent had 525 days all assessed at ksh.25,200.
 7. Both parties attended and agreed to address the appeal by way of written submissions.
 8. The appellant submitted that following a redundancy declared in April 2020, notice was issued to the union under section 40(1) of the *Employment Act*, 2007 (the Act). The claimant was unionised and that applied to him together with the consultations undertaken. The redundancy arose due to the impact of the Covid-19 pandemic forcing the appellant to close some departments and in this case, the entire packaging department was affected. It was not a case of a selection criteria over 500 employees were effected and the union was involved in addressing the matter. At the end of employment, the respondent was paid all his terminal dues and he voluntarily signed the agreement which is binding as held in *Universal Education Trust Fund v Monica Chopara* [2012] eKLR. There were consultations with the union and the terminal dues payable agreed upon. In the case of *Kenya Union of Commercial Food and Allied Workers v Tusker Mattresses Limited* [2021] eKLR the court held that where a whole department is affected, the issue of selection criteria does not apply.
 9. The appellant submitted that the award of severance pay for 20 years was in error. The redundancy was established to be lawful and hence the award does not arise. Section 49(1) of the Act only permits the court to award as outlined and not beyond the maximum of 12 years. Upon declaring a redundancy, the respondent paid severance pay for the years 2011 to 2020 and to order payment for 20 years is double payment. There was evidence that the respondent was employed from the year 1999 but was only issued with an employment contract on 17 October 2011. In the case of *Kenya Union of Employees*



of Voluntary and Charitable Organisations (KUEVACO) v St Joseph Catholic Church, Jericho Parish [2018] eKLR the court held that any claims that arose before the written contract were not lawful.

10. The appellant submitted that the award for annual leave for the years 2017 and 2019 failed to factor in that these were time-barred claims. The award arose out of an arithmetic error.
11. The respondent submitted that he was in the continuous service and employment of the appellant for 20 years and the trial court properly assessed his claims. He worked from January 1999 to 24 July 2020 when his employment was terminated on account of redundancy. The appellant failed to follow due process leading to unfair termination of employment. He is entitled to enjoy the fruits of his judgment. In the case of Daniel Mburu Muriu v Hygrotech East Africa Ltd [2021] eKLR the court granted severance pay for 8 years of completed service.
12. The respondent submitted that the trial court assessed the due annual leave days for the years 2017 and 2019. The provisions of Section 40(1) (e) provide that an employer who terminates employment on account of redundancy should pay all the leave days owed in cash. The issue of time limitation does not arise in this case and the appeal should be dismissed with costs.

Determination

13. This is a first appeal. the primary duty of the court is to re-evaluate, re-assess and analyse the entire record and determine whether the conclusions by the trial court should stand or not and to give reasons either way as held in the case of Abok James Odera t/a Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR.
14. The main issue for determination in this appeal is the finding that there was no communication or consultations during the redundancy process and hence the criteria applied was unprocedural leading to an error in tabulation of severance pay. The assessment of annual leave pay for the years 2017 and 2019 is also faulted.
15. As outlined above, the appellant employed the respondent from January 1999 until 24 July 2020 when his employment was terminated on account of a declared redundancy. Before the trial court, the respondent testified that he was a shop steward while in the employment of the appellant. His payment statement as submitted by the appellant confirms this fact.
16. In evidence, the appellant called Ms Nancy Gacheru who testified that the respondent started work as a casual employee. This was converted and issued with a letter of appointment on November 1, 2011. This evidence was not challenged in any material way.
17. Under the Act, an employer who employs a casual employee is allowed to convert such employment under a written agreement, letter, and contract or as the case may allow. Such an employee ceases being a casual employee under the provisions of Section 10 of the Act. The employee enjoys the rights and benefits under the Act due to the written contract. Any claims accruing under the previous regime of employment, in this case, casual employment form a separate and different term of employment. A claim for leave or severance pay thereof is subject to the provisions of Section 90 of the Act.
18. In this regard, the respondent was employed under a written contract as of November 1, 2011. Any claims going back to this written contract as of 13 January 2021 when he filed his Memorandum of Claim before the lower court are time-barred.
19. In assessing the claims made, the trial court should and ought to have factored in this legal position.



20. On the redundancy, once declared by the employer, this is a lawful and justified reason for termination of employment. It does not relate to the discipline or capacity of the employer. The employer cannot sustain employment hence the redundancy.
21. Section 40(1) of the Act requires the employer who enjoys recognition with a trade union to issue notice to the union for and on behalf of its members in its employment. The respondent as a shop steward was unionised. He made his union dues payments monthly. His union was issued with the redundancy notice and engaged by the appellant from 1st April 2020. The appellant filed a notice dated 1st April 2020 to Bakery Confectionary, Manufacturing & Allied Works Union to which the respondent was a member.
22. There is evidence of various consultations through invitation letters to the union dated 8 April 2020, 6 June 2020 and 19 June 2020. There were meetings held leading to an agreement dated 2 July 2020 that a total of 589 employees in one department would be laid off. The respondent was one of the affected employees and hence a personal termination notice was issued to him.
23. As held in the case of *Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others* Nairobi Civil Appeal No. 46 of 2013 (2014) eKLR, the employer must justify a redundancy and issue a general notice to the employee. Where the employees are unionised, notice must be issued to the union and copied to the Labour Officer. For the affected employee(s), personal/individual notice must be issued. This position is affirmed in the case of
24. In this case *Cargill Kenya Limited v Mwaka & 3 others* (Civil Appeal 54 of 2019) [2021] KECA 115 (KLR) (22 October 2021) (Judgment) the court held that;
- 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;
25. The court, cited above, in addressing the notices to be issued held that;
- ...The threshold required to be met under section 40(1) (a) and (b) of the *Employment Act* in this regard is notification 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”
26. Therefore, upon the required notice having been issued to the union where the respondent was a member and shop steward on the shop floor, consultations led to an agreement dated 2nd July 2020 and 589 employees in the packaging department were affected. these consultations are lawful and recognised by the court as held in the case of *Barclays Bank of Kenya, Barclays Africa Group (SA) Ltd vs Gladys Muthoni & 2 others*, Nairobi Civil Appeals No 296 & 301 of 2016 (2018) eKLR.
27. Consultation with the trade union on the reasons for, and the extent of, the intended redundancy was the core issue highlighted in the case of *Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others* Nairobi Civil Appeal No. 46 of 2013 (2014) eKLR. This is in tandem with Article 13 of Recommendation No. 166 of the *ILO Convention* No. 158 on Termination of Employment Convention, 1982 which requires consultation between the employers on the one hand and the employees or their representatives on the other before termination of employment under redundancy.



28. The appellant, in consultation with the union, reached an agreement. This affected the department where the respondent was placed. It was also agreed that payment of terminal dues would include service pay for full years worked and other benefits including leave days earned.
29. On 19 October 2020, the respondent was paid the following dues;
- Pay up to 30 September 2020 Ksh.18, 606;
 - Leave pay ksh.617.59;
 - Leave allowance Ksh.3, 300;
 - Other allowances ksh.227.04;
 - Severance pay Ksh.82, 478.77.
30. The tabulation of these dues was based on employment from 1st November 2011 to 30 September 2020. This was nine (9) full years of service. At a wage of Ksh.18,606 per month, a multiplier of 15 days for every year amounts to $Ksh.18,606 \div 30 \times 15 \times 9 = Ksh.83,727$.
31. The appellant paid Ksh. 82, 978.77 less Ksh.749. This is a tabulation error and the sum is lawfully due to the respondent.
32. With regard to leave pay, under a redundancy, Section 40(1) (e);
- (e) The employer has where leave is due to an employee who is declared redundant, paid off the leave in cash;
33. These provisions must be read in whole and not in part. Taking annual leave is regulated under Section 28 of the Act. Where such annual leave is due, the employer should ensure that this is taken. However, the employee who enjoys such benefit is not allowed to accumulate such annual leave for more than 18 months unless with approval from the employer as required under Section 28(4) of the Act.
34. The leave pay in issue is for the years 2019 and 2017. Employment terminated on 24 July 2020. The appellant tabulated the owed leave days and the attendant allowances. Accrued leave could only be claimed up until the year 2018.
35. The records filed confirm that in the year 2018, the respondent took 26 annual leave days from 1st to 31 October 2018. From 1st to 22 October 2019 he took 18 leave days. Within this year he had 8 *special off days* for personal reasons.
36. The payments for annual leave under the redundancy dues well compensated the respondent for his time. An award going back to the year 2019 and 2017 is not justified.
37. Accordingly, the appeal is with merit and is hereby allowed. Save, the severance pay is under-calculated by ksh.749 which is due to the respondent. Each party is to bear its costs.

DELIVERED IN OPEN COURT AT MOMBASA THIS 11 DAY OF APRIL 2024.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet

..... and

