



**Ndolo v Umma University (Appeal E097 of 2022)  
[2024] KEELRC 1393 (KLR) (13 June 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1393 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
APPEAL E097 OF 2022  
NZIOKI WA MAKAU, J  
JUNE 13, 2024**

**BETWEEN**

**FRANCIS WAMBUA NDOLO ..... APPELLANT**

**AND**

**UMMA UNIVERSITY ..... RESPONDENT**

*(Being an appeal against the whole judgment, orders and decree of Hon. Mrs. Gicheha Chief Magistrate delivered at Kajiado on 9th June 2022 in Kajiado CMEL No. 3 of 2020)*

**JUDGMENT**

1. Being dissatisfied with the orders and decree of the Hon. Mrs. Gicheha (Chief Magistrate) in Kajiado CMEL No. 3 of 2020 delivered on 9<sup>th</sup> June 2022, the Appellant filed a Memorandum of Appeal dated 8<sup>th</sup> July 2022 appealing against the whole of the said Judgment on the grounds:
  - a. That the learned Hon. Trial Magistrate erred in law and fact in arriving at findings and a judgment not supported by any evidence on record and entirely against the Claimant's weighty evidence on record.
  - b. The Hon. Trial Magistrate erred in law and fact in arriving at a finding that the termination of the Claimant's employment on the basis of alleged redundancy was procedural.
  - c. The Hon. Trial Magistrate erred in law and fact in failing to make awards as pleaded by the Claimant when the same are lawfully provided for and the Respondent had provided no evidence to rebut the validity of the claims and instead shifted the legal burden due to the Respondent back to the Claimant.
2. The Appellant prays that the Appeal be allowed and that Orders do issue: that the Judgment of the Honourable Magistrate be set aside; that the Court do re-evaluate the evidence and the prayers



this being a first appeal and proceed to award in favour of the Appellant as had been pleaded in the Memorandum of Claim with interest; and the costs of the lower court be awarded to the Appellant.

3. The matter was disposed of by way of written submissions.

### **Appellant's Submissions**

4. The Appellant asserted that his case is that the termination of his employment was unlawful whereas the Respondent maintains that it was a lawful redundancy. He noted that the Trial Magistrate held in summary that termination of the Claimant/Appellant's employment was based on a lawful redundancy process and that save for severance pay, he was neither entitled to any other terminal dues nor to costs. The Appellant asked the Court to re-analyse all the evidence as the first appellate Court. As regards the question of redundancy, the Appellant submitted that section 40(1)(a) and (b) of the *Employment Act* requires that for a redundancy to be justified, notice of not less than a month must be given to the employee, union and labour office. That where there is no union, it is mandatory for the notice to be issued to the employee and that the said notice must specify the reason for the redundancy and the extent of such redundancy. That most importantly, the employer must proceed to pay outstanding terminal benefits including a severance package. The Appellant noted that no notice was issued to the affected employees as required by law and that the Notice issued to the Labour Office did not meet the 30 days' threshold and was not copied to the employees declared redundant and who were thus caught flat footed on the termination date. It was the Appellant's submission that the trial Magistrate was therefore wrong in finding that the Claimant/Appellant was issued with an appropriate notice when none was shown and produced before the Court. He argued that it is trite law that failure to follow and adhere to laid down legal procedures renders the whole process unlawful and entitles the affected employee to compensatory damages, in this case, for the unlawful termination by way of redundancy.
5. For the other terminal benefits, the Appellant submitted that having found that he was never given any notice of the intended redundancy, he is entitled to notice pay. He noted that the trial Magistrate, in declining the claim for overtime, stated that the Claimants were compensated with off-days for the overtime but a perusal of the register referred to (at pages 22 to 151) does not show any entry as compensatory off days for overtime. That the trial Court did not consider that the affected employees put in 45 hours of work i.e. 8 hours from Monday to Friday and 5 hours on Saturday or on equivalent day and were entitled to 1½ off days in a week. That given the limitation of labour claims to 5 years, the Claimants would be entitled to overtime claim only for the last 5 years of service. The Appellant further submitted that in the absence of any record showing he took leave, he is entitled to leave untaken and that such leave records are to be provided by the employer. He affirmed the award of the claim for severance payment, confirmed that they abandoned the other claims and contended that there was no justification for failure to award costs to the Claimant/Appellant.

### **Respondent's Submissions**

6. The Respondent noted that the Appellant never cleared with the Employer and never surrendered the signing staff register, which has records and information on days worked and days the Appellant went for off. It submitted that the letter dated 20<sup>th</sup> December 2017 is explicit that the said letter served as notice of redundancy effective from 20<sup>th</sup> December 2017. That the evidence from the Claimant/Appellant's documents was that his last working day was 20<sup>th</sup> January 2018 and that the witness also confirmed that there were consultative meetings in which the University management engaged them. It was the Respondent's submission that the trial Court looked at the evidence tendered and witness confirmation of the redundancy procedure before it declared the process as lawful. The Respondent



further submitted that in *Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others* [2014] eKLR, Maraga JA (as he then was) sitting at the Court of Appeal cited with approval a decision from New Zealand in the case of *G.N. Itale & Son Ltd v Wellington Caretakers IUW* (1990) 3 NZELC 97,696; (1991) 4 NZELC 95,310; [1991] 1 NZLR 151(CA) where it was held that the court has no jurisdiction to prevent an employer from restructuring or adopting modern technology so long as it observes all relevant regulations. It maintained that the redundancy was justified as the Claimant's work of a particular kind and at a particular place in employ of the Respondent ceased due to outsourcing of security guard services. That procedural fairness was observed and that it needs to be noted that the employees were not unionisable and therefore the only requirement was to notify the staff and the labour officer, which it did.

7. It was the Respondent's submission that the law is very particular on benefits payable upon termination on grounds of redundancy as provided for under section 40 of the *Employment Act*. That in brief, the employee declared redundant is required to be paid: any leave due to be paid in cash; one month's notice or one month's wages in lieu of notice; and severance pay at the rate of not less than fifteen days' pay for each completed year of service. It submitted that that since the Appellant was served with a requisite notice for the redundancy, he is not entitled to any payment pursuant to section 40(1) (f) of the *Employment Act*. Furthermore, that the nature of operations of the security guards means they were accorded off days, that is more than the one off-day entitled to an employee per week making a total of 4 off days per month. In lieu the Claimants and other security guards in Employment of the Respondent went for off days more than 4 off days in a month. It was the Respondent's further submission that the University Council of the Respondent has never determined and/or approved any 'Leave Travelling Allowance' for any of its staff and that the same is thus not payable. It asked the Court to order the Appellant to pay costs of this suit as it is trite law that costs follow the event, as was reiterated in *Cecilia Karuru Ngayu v Barclays Bank of Kenya & another* [2016] eKLR.
8. This being a first appeal, the Court has to reconsider the evidence and law cited before coming to its own conclusion while warning itself that it neither saw nor heard the witnesses for either side. The Appellant was the Claimant in the matter below. He asserts the Respondent declared a redundancy without following the law. It is argued that the Respondent did not issue a notice as required under section 40 of the *Employment Act*. In the termination that ensued on account of redundancy, the Respondent issued a notice on 8<sup>th</sup> December 2017. The Appellant was listed as the fourth member of staff on the list. During trial before the Learned Chief Magistrate, evidence was tendered that there was consultation and that the Respondent's management engaged the employees prior to the redundancy being effected. The Appellant was entitled to receive terminal dues but declined to clear with the Respondent. As at the time of the trial, the Appellant still held original documents from the Respondent, to wit, the original work register.
9. The Appellant earned Kshs. 14,450/- and was accordingly awarded Kshs. 32,512.50. The Appellant's contract of service was terminated after the Respondent outsourced the provision of security services. The Appellant was involved in discussions surrounding this termination and as such the Appellant had no valid claim other than the severance pay he was entitled to as well as pay for leave earned and not taken. The Appellant did not prove he was entitled to any other sum before the Learned Chief Magistrate. I do not find any reason to upset the decision made by the court below. I accordingly dismiss the appeal as unmerited. However, I do not award any costs with the result the Appellant is to collect the sum awarded by the Chief Magistrate in her Judgment of 9<sup>th</sup> June 2022.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 13TH DAY OF JUNE 2024**



**NZIOKI WA MAKAU**  
**JUDGE**

