ISL Kenya Limited v Owino (Employment and Labour Relations Appeal 4 of 2020) [2024] KEELRC 1448 (KLR) (6 June 2024) (Judgment)

Neutral citation: [2024] KEELRC 1448 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MACHAKOS

EMPLOYMENT AND LABOUR RELATIONS APPEAL 4 OF 2020

MA ONYANGO, J

JUNE 6, 2024

BETWEEN

ISL KENYA LIMITED ..... APPELLANT

AND

ALLOYCE OTIENO OWINO ..... RESPONDENT

(Being an appeal from the judgment of the Chief Magistrates Court at Mavoko by Hon. B. Kasavuli, Principal Magistrate delivered on the 16th November, 2020 in ELRC No. 15 of 2019 Alloyce Otieno Owino v ISL Kenya Limited)

JUDGMENT

1. The Appellant herein was sued by the Respondent in the trial court vide Memorandum of Claim dated 10th January 2019 in which the Claimant, now the Respondent, sought compensation for alleged unlawful and unfair dismissal by the Appellant. In the judgement delivered on 16th November, 2020 the court found in favour of the Respondent herein and awarded him pay in lieu of notice Kshs 14,534, unpaid leave Kshs 20,348, 12 months' salary as compensation for unfair termination Kshs 174,408 and costs.

2. The Appellant, being aggrieved by the said decision, has appealed to this court against the entire judgement and decree on the following grounds as raised in its Memorandum of Appeal:

    1. That the Honourable Magistrate erred in law and fact when he held that the Appellant had terminated the Respondent's employment unfairly;

    2. That the Honourable Magistrate erred in law and fact when he held and found that the Respondent had not been informed or notified of the closure of the Appellant's factory;

3. That the Honourable Magistrate erred in law and fact when he held that the Appellant had not led evidence to prove that the workers had elected Mr. Evans Ochego as their representative in meeting held on 5/4/2017;

4. That the Honourable Magistrate erred in law and fact when he held that the Respondent had not given reasons why the Area Labour Officer did not attend the meeting held on 5/04/2017;

5. That the Honourable Magistrate erred in law and fact when he held that the Respondent had failed to establish the basis for all-inclusive sum of Kshs 10,000 only paid to the Respondent;

6. That the Honourable Magistrate erred in law and fact when he held that the Appellant had not proved that the Respondent used to attend work based on the availability of production materials;

7. That the Honourable Magistrate erred in law and fact when he failed to appreciate and hold that the employment relationship had been terminated with the consent of both the Appellant and the Respondent;

8. That the Honourable Magistrate erred in law and fact when he failed to appreciate and hold that when the Respondent signed the payment sheet, the Respondent and the Appellant had agreed that the Respondent had received full and final settlement of dues outstanding;

9. That the Honourable Magistrate erred in law and fact when he failed to hold that the payment sheet was a contract to terminate the employment relationship between the Appellant and the Respondent;

10. That the Honourable Magistrate erred in law and in fact when he failed to consider the appellant's submissions

11. That the Honourable Magistrate erred in law and fact when he failed to appreciate the principles- which govern the termination of employment relationships between employers and employees; and

12. That the Honourable Magistrate erred in law and fact in ordering the Appellant to pay the Respondents terminal benefits as follows:

    i. 1 Month's salary in lieu of notice of Kshs 14,534/=

    ii. Unpaid/untaken leave for 2 years of Kshs 20,348/= only.

    iii. Damages for unfair termination of Kshs 174,408/= only.

3. The Appellant seeks the following orders: -

    i. That this appeal be allowed;

    ii. That the judgment delivered by Honourable Bernard Kasavuli, PM on 17/11/2020 (sic) and issued in Mavoko MC ELRC Cause 15 of 2019 – Alloyce Otieno Owino v ISL Kenya Limited be set aside;

    iii. That the Respondent be directed to pay for the costs of this appeal and Mavoko MC ELRC Cause 15 of 2019.

Background of the case

4. The Respondent herein was an employee of the Appellant. According to his Memorandum of Claim, the Respondent was employed by the Appellant in February, 2015 as a loader. His salary was Kshs 559 per day translating to Kshs 14,534 per month. On 31st March 2017 he reported to work as usual but was denied entry by the security guards at the gate on the Appellant's instructions. On or about 5th April, 2017 the Appellant paid him Kshs 10,000 purporting the same to be in full and final settlement of his terminal dues. It was the Respondent's position that the termination of his employment was unlawful/unfair, unprocedural and offended the express provisions of the *Constitution* of Kenya and the *Employment Act*, that he had done absolutely nothing wrong, was not given a hearing before the termination which in his opinion was a dismissal, he was not given a plausible reason before the decision to dismiss him was reached and the process was undertaken in haste, was harsh, inhumane and unjustified.

5. The Respondent prayed for a declaration that the termination was unlawful and unfair, a declaration that the tabulation of his terminal benefits was inaccurate, an order that the Appellant pays his terminal benefits as tabulated at paragraph 8 of his Memorandum of Claim, payment of compensatory damages, costs and interest.

6. At the hearing the Respondent reiterated the averments in his Claim. In cross examination he stated that he signed for the money offered by the Appellant because he had financial difficulties.

7. The Appellant filed a Statement of Defence Dated 2nd April 2019 in which it stated that it engaged the Respondent as a casual labourer working as a machine attendant at its factory. That the Respondent was paid a daily wage of Kshs 559 per day paid at the end of the week based on the number of days worked. It was the Appellants case that during the months of February to April, 2017 it experienced financial constraints owing to the ban of twisted steel bars in favour of ribbed steel bars for reinforcement of concrete. That as a result the Appellant was forced to lay off all workers, among them the Respondent herein.

8. The Appellant averred that it notified all workers including the Respondent. That it also informed the area Labour Officer of its intention. That on 5th April, 2017 it convened a meeting which was attended by its General Manager, Human Resources Manager, Managing Director and the worker's representative. That it was resolved that each worker be paid Kshs 10,000 in full and final settlement of their dues. That the Appellant thereafter convened a meeting with all the employees including the Respondent and informed them of the resolution to close the business and pay each of them Kshs 10,000 and that the employees had a choice to accept or reject the offer. That the Respondent received and acknowledged payment on 31st March 2017 thereby terminating the employment by mutual consent. It was the averment of the Appellant that the Respondent was estopped from claiming any further payment from the Appellant.

9. At the hearing the Appellant called John Frederick Okello, its Human Resources Manager who reiterated the averments in the Statement of Defence.

The Appeal

10. The appeal herein was disposed of by way of written submissions. Both parties filed submissions which I have carefully considered. Although the Appellant filed 12 grounds of appeal, in the submissions it merged them into two issues for determination namely-

i. Whether the Honourable Magistrate erred in law and in fact by entering the judgment that he did in Mavoko MC ELRC Cause No 15 of 2019;

ii. Whether the Honourable Magistrate erred in law and in fact in granting costs and interest to the claim to the Respondent.

11. On the first issue the Appellant submitted that in employment contracts like other contracts, parties have the option to mutually terminate the same at any time provided notice is given as provided in section 35 of the *Employment Act*. That the right is guaranteed to the employer. That it is this right that was exercised by the Appellant in terminating its relationship with the Respondent which the Respondent accepted and which the Honourable Magistrate failed to appreciate.

12. It is submitted for the Appellant that the Honourable Magistrate erred in holding that the notice dated 31st March 2017 to the Sub-County and County Labour Offices in Athi River and Machakos on the intention to close down the whole of the operations of the company due to the legal directive and harsh political climate did not suffice. That the notice was placed at open areas within the company premises so that all employees could see it because there were many employees affected. That the Honourable Magistrate erred in holding that the notice was not addressed to the Respondent. That the only time a general notice and a specific notice is required is during a redundancy as was held in *Geoffrey Nyabuti Onguko v Blow Plant Limited* 2015 eKLR.

13. The Appellant submitted that in *National Bank of Kenya Limited v Hamida Bana & 103 others* the Court of Appeal cited the case of *William Barasa Obutiti v Mumias Sugar Company Limited* [2006] eKLR the court held that an employer and employee have the right to terminate an employment contract at any time during the life of the contract and the court should not re-write terms of the contract for them but help in realizing them.

14. It is submitted that there was an uproar among employees who demanded a meeting that was held on 5th April, 2017 in the presence of the area Member of Parliament. That the Labour Officer who had been notified was unavailable due to other pressing engagements. That the workers elected one of them Mr. Evans Ochengo who represented them at the meeting. That at the meeting it was agreed that all employees would be paid Kshs 10,000 in full and final settlement which the Respondent testified he accepted without being forced to do so.

15. The Appellant relied on the decision in *Thomas De La Rue (K) Limited v David Opondo Omutelema* where the Court of Appeal held that where a discharge voucher is used, in making a determination the court should investigate whether it was freely signed with all parties having full knowledge and information, without duress, mistake and/or undue influence, which it was the burden of the Respondent to prove. The Appellant further relied on the decision in *Coastal Bottlers Limited v Kimani Mithika* in Mombasa CACA No 21 of 2017 (2018) eKLR.

16. On the award of compensation, the Appellant submitted 12 months should be the maximum and a court has the discretion to award less in a claim like this one where the termination was mutual. It relied on the decision in *Josphat Mukuna Amasa v Solutions Insurance Brokers Limited* [2021] eKLR.

17. The Respondent crystallised the issues for determination as follows-

a. What was the date of employment of the Respondent by the Appellant.

b. Whether or not the Respondent's employment was continuous/whether the Respondent attended work based on the availability of production materials?

c. Whether the termination from employment was fair/by consent of parties or whether it was unfair/termination?

d. Whether the 'Payment sheet of Kshs 10,000 in full and final settlement can preclude this court from inquiring into the fairness of the termination and calculation of dues?

e. Whether the Respondent is entitled to the relies awarded?

18. It was submitted for the Respondent that he worked for the Respondent continuously for more than 3 months and was not a casual employee. The Respondent relied on sections 8, 9(1) and (2), 10(3) and (7) and 74(1) on the employer's responsibility to keep employment records and the decision in *Meshack Kiio Ikulume v Prime Fuels Kenya Limited* [2013] and *Josephine M. Akinyi v Farhiyo Mohamed* [2016] eKLR of the *Employment Act*.

19. On whether the termination was fair the Respondent submitted that the Appellant did not comply with section 45(2) of the *Employment Act* and the termination was therefore unfair.

20. On the final settlement of Kshs 10,000 the Respondent submitted that he had testified that he disputed the same but signed for the money because he had financial difficulties. For emphasis the Respondent relied on the decision in Simon Muguku Gichingi v Taifa Sacco Society Limited and Muthaiga Country Club v Simon Wachira Muhoro where the courts held that the employer cannot circumvent the law by producing a discharge voucher signed by the employee.

21. It was further submitted for the Respondent that no employment records were produced by the Appellant to prove that the Respondent went on annual leave or was paid in lieu, relying on the decision in *Lawi Wekesa Wasike v Mattan Contractors Limited* [2016] eKLR.

Analysis and Determination

22. As the first appellate court I am under a duty to reconsider and evaluate the evidence afresh with a view to reaching my own decision in the matter. I must however exercise caution since I do not have the advantage of having seen and heard the witnesses. See *Selle & another v Associated Motor Boat Co. Ltd & others* [1968] EA 123.

23. I have carefully reconsidered and evaluated the evidence on record. I have also considered the written submissions by the rival parties in this appeal. In my view, the issues for determination are whether the Respondent proved her claim against the Appellant and if the award by the Honourable Magistrate was excessive or based on wrong or irrelevant considerations as to require interference by this court.

24. It is not disputed that the Respondent's employment was terminated on 31st March 2017 and that on 5th April 2017 he was paid Kshs 10,000 like all other employees of the Appellant whose employment was terminated together with him.

25. The reason given by the Appellant for the termination as stated at paragraph 10 of the Statement of Defence was that during the months of February to April 2017 the Appellant was in financial trouble owing to the fact that the government had banned the manufacturer of twisted steel bars in favour of ribbed steel bars for reinforcement of concrete and that it was forced to lay off all its workers.

26. A lay off of workers in circumstances when the employer is unable to sustain their employment in situation such as those that the Appellant described would constitute redundancy under section 40 of the *Employment Act*.

27. Redundancy is defined in section 2 of the Act 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 an employee are superfluous and the practices commonly known as abolition of office, job or occupation and loss of employment".

28. Section 40(1) of the Act sets out the mandatory procedure for redundancy as follows:

> 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;
>
> (e) the employer has not placed the employee at a disadvantage for being or not being a member of the trade union;
>
> (f) the employer has where leave is due to an employee who is declared redundant, paid off the leave in cash; 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.

29. In the instant case the Appellant appears to have appreciated the need to notify the labour office of the intention to lay off the workers but failed to follow through on all the other mandatory provisions under section 40. The termination of the Respondent's employment therefore amounted to an unfair and unlawful redundancy.

30. Even if we were to consider the termination under section 35 which provides for termination with notice, the Appellant did not give notice to the Respondent in the manner specified in section 40(1)(b) which provides that "...the employer notifies the employee personally in writing ..." of the intended redundancy. The averments by the Appellant that it convened a meeting at which an employee elected by the workers was present and that there was another meeting at which the employees were informed of the resolution, apart from not being compliant with the law, were not proved. Placing notices in the compound as averred by the Appellant is not a notification in the manner specified by the Act.

31. Termination of employment under section 35 as submitted by the Appellant would still not meet the provisions of the Act. Section 43 of the Act provides that an employer must prove the reasons for termination. The section provides:

> 43. Proof of reason for termination
>
> (1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.
>
> (2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.

32. The evidence adduced by the Appellant did not clarify if the termination was for all employees or just "casual employees". In any event, the Respondent having worked for the period he did, was not and could not have been a casual employee. His terms were not those of a casual employee as defined in the Act being "a person the terms of whose engagement provide for his payment at the end of each day and who is not engaged for a longer period than twenty-four hours at a time".

33. Further, the Appellant did not demonstrate that it complied with section 35 on giving of notice or pay in lieu thereof.

34. Whichever way the termination is considered, whether as a redundancy or normal termination, it did not meet the provisions of the Act. The termination was therefore unfair.

35. On the remedies the Appellant was of the view that 12 months compensation awarded to the Respondent was an improper exercise of the discretion of the Honourable Magistrate. Under the circumstances in which the Respondent's employment was terminated, he was entitled to severance pay as provided in section 40(g) of the Act.

36. The terms set out in the *Employment Act* are the mandatory minimum standard as provided in section 26 of the Act which provides:

> 26. Basic minimum conditions of employment
>
> (1) The provisions of this Part and Part VI shall constitute basic minimum terms and conditions of contract of service.
>
> (2) Where the terms and conditions of a contract of service are regulated by any regulations, as agreed in any collective agreement or contract between the parties or enacted by any other written law, decreed by any judgment award or order of the Industrial Court are more favourable to an employee than the terms provided in this Part and Part VI, then such favourable terms and conditions of service shall apply.

37. The Respondent having not filed a cross appeal this court will not go into the tabulation of what he would have been entitled to which would be in excess of what the Honourable Magistrates awarded. Suffice to state that he would have been entitled to pay in lieu of notice, severance pay and compensation. He would further have been entitled to service pay as there was no evidence adduced by the Appellant to prove that the Respondent was a member of NSSF or any other pension or provident fund or gratuity scheme which the Appellant contributed to as provided in section 35(5) as read with section 35(6) of the Act. What was awarded to the Respondent was thus far less than what he is statutorily entitled to under the Act.

38. For the foregoing reasons I find no merit in the Appeal. The upshot is that appeal is dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 6TH DAY OF JUNE, 2024

MAUREEN ONYANGO

JUDGE