



Nyongesa v Rwandair Limited (Employment and Labour Relations Cause E966 of 2021) [2024] KEELRC 2697 (KLR) (25 October 2024) (Judgment)

Neutral citation: [2024] KEELRC 2697 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE E966 OF 2021
AN MWAURE, J
OCTOBER 25, 2024**

BETWEEN
WILLIAM WILBERFORCE OMONDI NYONGESA CLAIMANT
AND
RWANDAIR LIMITED RESPONDENT

JUDGMENT

Introduction

1. The Claimant filed a statement of claim dated 19th November, 2021.

Claimant's case

2. The Claimant avers that on or about 1st December 2015 he was employed by the Respondent as a Sales Executive in its Nairobi offices.
3. The Claimant avers that he worked diligently for over 5 years as a Sales Executive when his employment was unfairly terminated by the Respondent.
4. The Claimant avers that the Respondent served him with a letter on or about 21st December 2020 by giving a notice terminating his employment on account of redundancy.
5. The Claimant avers that in the said letter, it stated that the redundancy process was still at a consultant stage and the parties would use the upcoming 30 days to explore alternative approaches to the intended redundancy. The notice was with effect on 15th December 2020 and at the end of the said period, the Respondent will communicate its outcome.
6. The Claimant avers that on 5th January 2020, he wrote a letter to the Respondent making inquiries regarding the intended process and requested for a meeting to give his views which the Respondent replied to and addressed the wrong date but did not address issues raised by the claimant.



7. The Claimant avers that he was invited for a meeting by the Respondent and was given a letter which had the Respondent's decision as well as a guide on the clearance process.
8. The Claimant avers that the termination process was ultimately carried out without due process.
9. On or about 1 February 2020, the Claimant avers that he was given a letter dated 14 January 2020 purporting to terminate his employment with effect from 15th January 2020, and the respondent paid him Kshs.584,112/= as his final dues. Despite the inquiries, the respondent did not explain how the said figures were arrived at.
10. The Claimant avers that he was not fully compensated or even provided him with an itemized pay statement in accordance with section 20 of the Employment Act.
11. The Claimant avers that he is seeking compensation of Kshs. 2,330,888.00 being terminal dues and damages.
12. The Claimant further avers that the respondent's actions were unlawful and amounted to unfair practice contrary to Article 41 of the Constitution, sections 20,28, 40, 41, 45 and 92 of the Employment Act.
13. The Claimant prays for the following:
 - a. A sum of Kshs.2,330,888.00 itemised as follows:Salary until last day = Kshs.110,000.00Severance pay = Kshs.412,500.00Unpaid leave days = Kshs.247,500.00Pay in lieu of one month'sNotice = Kshs.165,000.0012 months pay as damagesfor unfair termination = Kshs.1,980,000.00Total = Kshs.2,330,888.00
 - b. Exemplary and punitive damages against the claimant for unfair labour practice and acting with impunity
 - c. Any further or other orders that the court may deem just and appropriate
 - d. Costs of this suit
 - e. Interest on the above sums from date of the unfair termination of his employment

Respondent's case

14. In opposition to the claim, the respondent filed its memorandum of response dated 16th December 2021.
15. The Respondent denies the allegations made by the claimant and avers it followed due process in declaring the Claimant redundant and was paid all his dues.
16. The Respondent also denies that the claimant is entitled to any relief sought.

Claimant's evidence

17. The Claimant adopted his witness statement dated 4th November 2021 as his evidence in chief together with the list of documents dated 19th November 2021 as exhibits 1 to 10 respectively.
18. He stated that he was declared redundant together with other 3 employees from the Sales departments.
19. He stated that he joined the respondent in 2019 and he was amongst the last to be recruited by the respondent.



Respondent's evidence

20. The respondent's witness is Ms Betty Ingabize who said she was the respondent's Country Manager in Kenya. She adopted her witness statement as her evidence in chief together with the list of documents dated 16th December 2021 as exhibits 1 to 3 and a further list of documents dated as exhibits 4 to 12.
21. She stated that the claimant did not perform his duties diligently as there was a conflict of interest but he apologised vide a letter dated 27th September 2018.
22. She stated that the claimant was notified of his redundancy vide a letter dated 21st December 2020 as the meeting took place on 18th December 2020.
23. She stated that the claimant was the last person to join the respondent's company as he was employed in 2015 while Lilian was employed in 2008.

Claimant's submissions

24. The claimant came up with two issues for determination including:
 - i. Was the claimant's employment unfairly and unlawfully terminated?
 - ii. What reliefs, if any, is the claimant entitled to
25. On the first issue, the claimant cited the case of Kenya Airways Limited V Aviation and Allied Workers Union and 3 others (2014) eKLR where the Court of Appeal stated as follows:

“Thus, redundancy is a legitimate ground for terminating a contract of employment provided there is a valid and fair reason based on operational requirements of the employer and the termination is in accordance with a fair procedure. As section 43(2) provides, the test of what is a fair reason is subjective. The phrase “based on operational requirements of the employer” must be construed in the context of the statutory definition of redundancy. What the phrase means, in my view, is that while there may be underlying causes leading to a true redundancy situation, such as reorganization, the employer must nevertheless show that the termination is attributable to the redundancy – that is that the services of the employee has been rendered superfluous or that redundancy has resulted in abolition of office, job or loss of employment.”

26. The claimant submitted that the respondent's redundancy process was a sham and the reason for terminating him was poor performance. The claimant further submitted the respondent failed to provide evidence to support the alleged reason for redundancy and the process was improperly conducted.
27. The claimant submitted that the respondent failed to comply with Section 40 of the *Employment Act* during the redundancy process, including issuing proper notices, considering seniority, paying severance pay, paying for unutilized leave days and failing to provide a statement of pay.
28. On the second issue, the claimant submitted that he is entitled to the reliefs sought with costs and interest of the suit.

Respondent's submissions

29. The respondent came up with two issues of determination as follows:



- i. Whether the respondent in declaring the claimant redundant followed the laid down legal procedure.
 - ii. Whether the claimant is entitled to the prayers he is seeking
30. On the first issue, the respondent submitted that section 2 of the *Employment Act* defines redundancy 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;
31. In *Jane Khalechi V Oxford University Press EA Ltd* [2013] eKLR the court stated that employers have the prerogative to determine the structure of their business and therefore make positions redundant. The court further stated that the terms redundancy reorganization and restructuring are related, but can be separable. There are other terms used in different jurisdictions to denote this form of employment termination. These include downsizing, laying off and rightsizing and therefore the employer has the right to determine the structure of its business.
32. The respondent relied on Section 40 of the *Employment Act* stating that the respondent followed the laid procedure by notifying the claimant about the intended redundancy vide a letter dated 15th December 2020 and having a meeting with him. The respondent submitted that the notice to the Labour office was not adequate notified but it complied with the requirements of notifying the claimant.
33. The respondent submitted that the reasons for redundancy were due to the Covid-19 pandemic which led to travel restrictions and the closure of businesses that affected the transport industry.
34. The respondent argued that the claimant was the last person hired and that his performance contributed to his redundancy. Furthermore, the claimant did not provide sufficient evidence to support his claim. The respondent maintained that it followed the proper procedures when declaring the claimant redundant.
35. The respondent submitted that the claimant denies not being paid his terminal dues but the respondent availed evidence to prove that it did pay the said terminal dues.
36. The respondent submitted that it has proven that the reliefs were paid less the statutory deduction which totalled Kshs.243,510/= . The respondent also submitted that the claimant was not terminated as alleged but was declared redundant thus the respondent prays that the claimant's suit be dismissed with costs.

Analysis and determination

37. Having considered the pleadings, and submissions of the parties, the main issues for determination were as follows:
 - a. Whether the respondent followed the process in declaring the claimant's job redundant
 - b. Whether the claimant is entitled to the reliefs sought
 - c. Who should bear the costs of the suit.



Whether the Respondent followed the process in declaring the Claimant's job redundant

38. Section 40(1) of the [Employment Act](#) sets out conditions which the employer must comply with before declaring an employee redundant. These are:
- 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; the employer has not placed the employee at a disadvantage for being or not being a member of the trade union;
 - e. the employer has where leave is due to an employee who is declared redundant, paid off the leave in cash;
 - f. 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.
39. In this instant case, the respondent was issued with the notice of intended redundancy dated 18th December 2020 with effect from 15th December 2020 that was to run for 30 days in compliance with section 40 of the [Employment Act](#).
40. The Respondent issued a letter for redundancy on 21st December 2020 and the reasons for the restructuring exercise was due to the Covid-19 pandemic. The claimant argued that the notice was on short notice and that the reason for terminating was due to his poor performance. The claimant also argued that he was not the last to join the respondent in accordance with section 40(1)(c) of the [Employment Act](#).
41. In *Thomas De La Rue (K) Ltd V David Opondo Omutelema* [2013] KECA 492 (KLR) the Court of Appeal stated that:

“It is quite clear to us that Sections 40 (a) and 40 (b) provide for two different kinds of redundancy notifications depending on whether the employee is or is not a member of a trade union. Where the employee is a member of a union, the notification is to the union and the local labour officer at least one month before the effective redundancy date. Where the employee is not a member of the union, the notification must be in writing and to the employee and the local labour officer. Section 40 (b) does not stipulate the notice period as is the case in 40 (a), but in our view, a purposive reading and interpretation of the statute would mean the same notice period is required in both situations. We do not see any rational



reason why the employee who is not a member of a union should be entitled to a shorter notice.”

42. In *Cargill Kenya Limited V Mwaka & 3 Others* [2021] KECA 115 (KLR) addressed redundancy as follows:

“It is thus our finding that the above interpretative factors discount a construction that a notice of termination is required by subsection (1) (f), or within the timelines held by the learned judge of the trial court. While such a notice may eventually require to be given in a termination on account of redundancy, it is definitely not one of the conditions to be met under Section 40 subsection 1(f) of the *Employment Act* before the redundancy. In our view, the learned judge in the trial court appears to have conflated the payment in lieu of notice under section 40 subsection (1) (f), with the final declaration of termination by redundancy, and erred in finding that there is a requirement to issue a notice of termination before the redundancy under section 40(1)(f) of the *Employment Act*.”

The trial judge also held that the termination was unlawful for reasons that the Appellant used the notices of intended redundancy as notices of termination under Section 40(1)(f). This finding was in error for two reasons. Firstly, as we have found, no notice of termination is required to be given before redundancy under Section 40(1)(f) of the *Employment Act*. Secondly, an examination of the letters issued by the appellant lead us to a conclusion that they indeed were notices of intended redundancy required by Section 40(1) (a) of the *Employment Act*.”

43. The notices issued to the labour office are important because it open to the consultative process with key stakeholders. In *Kenya Airways Limited V Aviation & Allied Workers Union Kenya, Minister for Transport, Minister for Labour & Human Resource Development & Attorney General* [2014] KECA 404 (KLR) the Court of Appeal held:

- a. Consultation is implicit in the *Employment Act* under the principle of fair play;
- b. Consultation gives an opportunity for other avenues to be considered to avert or to minimize the adverse effects of terminations;
- c. Consultations are meant for the parties to put their heads together and are imperative under Kenyan law;
- d. Consultations have to be a reality, not a charade;
- e. Opportunity must be given for the stakeholders to consider;
- f. Stakeholders must have and keep an open mind to listen to suggestions, consider them properly and then only then decide what is to be done; and
- g. Consultation must not be cosmetic.

44. The respondent admitted that it did not involve the labour office which is a key stakeholder when it comes to the redundancy process thus the court finds and holds that the respondent issued the notices as a termination notice and not a redundancy process as set out in Section 40(1)(b) of the *Employment Act*.

45. Infact the respondent failed to follow the mandatory process provided in Section 40 of the *Employment Act*. None of the requirements provided thereto were followed.



On 15th December 2020 the respondent gave the claimant a notice of intended redundancy and stated this would take 30 days to consult and decipher if there was any other alternative to redundancy. They were to discuss further.

46. There is no evidence of any other consultation as on 14th January 2021 the claimant was served with a termination notice and was not even given any other notice. He was to leave the following day that is on the 15th January 2021. The court is puzzled as to why this urgency and yet this was termination through redundancy and not summary dismissal.

47. The respondent did not give the required notice to the labour officer of that area and not even to the claimant.

In the case of Thomas De (k) Ltd -vs- David Opondo (supra). The court provided that adequate notice must be given to the labour office and to the employee. The respondent failed to give required notice.

48. There was also no consultation with the claimant and no indication as to what selection criteria was applied to decide the claimant was the one to be declared redundant.

49. The court has considered the pleadings and submission and precedents and finds the respondent did not comply with the mandatory requirements of termination due to redundancy. The claimant was therefore unlawfully and unprocedurally terminated from his employment.

Whether the claimant is entitled to the reliefs sought

50. Since the claimant was unfairly terminated, the court will award the claimant as follows:

- a. Salary pleaded was until last working day Kshs.110,000/= This is not specified and is not clear how it is arrived at and so is declined.
 - b. Severance pay for five (5) years pay is awarded at Kshs.412,500/=
 - c. Unpaid leave is not proved as well and there is no evidence that the claimant applied for leave during the time worked for the respondent and was declined so this prayer is declined.
 - d. Pay in lieu of one month's notice awarded at Kshs.165,000/=
 - e. Claimant was unfairly, wrongfully and illegally dismissed from employment. According to section 49(1)(c) of the Employment Act guideline the court will award the claimant five (5) months as general compensation considering he worked for the respondent from 2015 to 2020 and so he is to be compensated: Kshs.165,000 X 5= Kshs.825,000/=
- Total award is Kshs.1,402,500/= less the Kshs.412,590/= already paid as terminal benefits.
Balance = Kshs.989,910/=
- f. Costs are awarded to the claimants plus interest at court rates at 14% from the date of judgment till full payment.

51. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 25TH DAY OF OCTOBER, 2024.

ANNA NGIBUINI MWAURE

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 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.

A signed copy will be availed to each party upon payment of Court fees.

ANNA NGIBUINI MWAURE

JUDGE

