



Shamala v Starehe Boys' Centre & School (Employment and Labour Relations Cause E426 of 2021) [2024] KEELRC 2713 (KLR) (25 October 2024) (Judgment)

Neutral citation: [2024] KEELRC 2713 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE E426 OF 2021
AN MWAURE, J
OCTOBER 25, 2024**

BETWEEN

OSCAR SHAMALA CLAIMANT

AND

STAREHE BOYS' CENTRE & SCHOOL RESPONDENT

JUDGMENT

Introduction

1. The Claimant instituted this claim by way of a Statement of Claims dated 30th April 2021 and filed in court on 25th May 2021.

Claimant's Case

2. The Claimant avers that on or about 8th September 2003, he was employed as an artisan/decorator in job group "E" by entering into a contract of service with the Respondent.
3. The Claimant avers that, in a letter dated 6th August 2012, the Respondent referred to a circular issued by the Permanent Secretary of the Ministry of State for Public Service regarding the re-alignment of the salary structure. As a result, the Respondent converted the Claimant's salary to Kshs.17,527 per month, along with a house allowance of Kshs.10,000/=.
4. The Claimant avers that he performed his duties diligently and with reasonable care without any fail, until the respondent terminated his employment vide a letter dated 21st July 2020 without according him a fair hearing as required by the law. This termination, he avers, violated Articles 28, 41(1), 47, 48, and 50(1) of *the Constitution* of Kenya, as well as section 42 of the *Employment Act*, resulting in him incurring substantial losses.
5. The Claimant avers that he is 45 years old and has been unable to secure another job hence he should be paid anticipatory salaries and allowances for 15 years.



6. The Claimant avers that the respondent acted unfairly and maliciously, causing him substantial financial loss and seeks payment of general damages to compensate him, aggravated damages and exemplary damages.
7. The Claimant is praying for
 - a. A declaration that his employment was unlawfully and wrongfully terminated by the respondent in violation of Articles 28, 41(1), 47, 48, and 50(1) of the Constitution of Kenya, as well as section 42 of the Employment Act.
 - b. An award of damages for breach of contract and unlawful and wrongful termination of employment as follows:
 - i. Damages for unlawful termination (12 months' salary) - Kshs.330,324
 - ii. One month's salary in lieu of notice - Kshs.27,527
 - iii. Severance pay -Kshs.233,979.50
 - iv. Unpaid salary for July and August -Kshs.55,054
 - v. Anticipatory salaries and Allowance (13 years) -Kshs. 4,294,212Total Kshs.4,941,096.50
 - c. An award for aggravated and exemplary damages
 - d. Interest on (b), (c), and (d) above at court rates until payment in full
 - e. Certificate of service
 - f. Costs of this suit plus interest at court rates until payment in full
 - g. Any other relief that the court may deem fit to grant

Respondent's Case

8. In opposition to the Claim, the Respondent filed a reply to the statement of claim dated 26th August 2022.
9. The respondent admitted to terminating the claimant vide a letter dated 21st July 2020, which was justified given the serious and urgent circumstances created by the Covid-19 pandemic.
10. The respondent denies the claimant's claim regarding his age, spousal employment and unfair termination.
11. The respondent avers that it paid all terminal dues to the claimant and the claimant is not entitled to any of the prayers sought in the statement of claim.

Claimant's evidence in court

12. The Claimant (CW1) adopted his undated witness statement attached to the statement of claim dated 30th April 2021 as his evidence in chief.
13. He testified that he was terminated from his employment as a painter and decorator. He stated that he was a casual employee for 10 years.



14. He testified that vide a letter dated 8th September 2003 his employment was changed from casual to temporary employment.
15. He testified that he was terminated on 21st July 2020 and wrote a demand letter dated 11th January 2021.
16. During cross-examination, CW1 stated that he was not aware of any meeting held by the Respondent as the school was closed due to the Covid-19 pandemic. He stated that on that day he was at home.
17. CW1 stated that he was called to collect a letter which he came to realize was a termination letter dated 21st July 2020.

Respondent's evidence in court

18. The respondent's witness (RW1), Joseph Leonard, adopted his witness statement dated 26.8.2022 and his further witness statement dated 7.11.2022 together with the list of documents and further list of documents as exhibits 1 to 10 as his evidence in chief.
19. During cross-examination, RW1 stated that CW1 was paid his salary vide Mpesa as there is a message to confirm that but he did not attach the statement to show that money was sent.
20. RW1 confirmed that CW1 was terminated vide a letter dated 21st July 2020 and there was a meeting which was held as a hybrid meeting as it was physical and virtual at the same time.
21. RW1 stated that CW1 was a member of KUDHEIHA union and the union was notified about terminating the claimant which was communicated vide a letter dated 19th July 2020 and was delivered on 22nd July 2020.

Claimants' Submission

22. The claimant came up with three issues for determination as follows:
 - i. Whether the claimant was lawfully terminated
 - ii. Whether the claimant is entitled to the reliefs sought
 - iii. Who bears the costs of the claim?
23. On the first issue, the claimant submitted that the law permits an employer to terminate an employee which is regulated under sections 40, 43 and 45 of the *Employment Act*.
24. The claimant submitted that section 40 of the *Employment Act* provides for a laid down procedure that an employer needs to meet before declaring an employee redundant which includes:
 - 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.
25. The claimant submitted that the respondent did not comply with the legal requirement for terminating his employment due to redundancy. The respondent admitted that the claimant was a member of COTU and KUDHEIHA trade union thus two unions were to be notified as required by the law.
26. The claimant submitted that the respondent did not issue proper notice, provide a hearing or pay pending leave and stated that the termination was dismissal disguised as redundancy.
27. In *Daniel Mburu Muriu V Hygrotech East Africa Ltd* [2021] eKLR the Court held that the respondent acted in blatant disregard to section 40 of the *Employment Act* in declaring and terminating the claimant on account of redundancy both in subsistence and the procedure applied.
28. The Claimant submitted that he is entitled to the relief sought.

Respondent's Submissions

29. The respondent submitted that the respondent is a charitable institution that depended on donations which was affected by the Covid- 19 pandemic. The respondent submitted that it implemented austerity measures after consulting with staff and other stakeholders, ultimately leading to the claimant's termination.
30. The respondent urged the court to dismiss the relief sought and prayed that the claimant's claim be dismissed.

Analysis and Determination

31. After considering the pleadings and the evidence adduced as well as the submissions the court considers the following issues for determination:
- a. Whether the claimant was unfairly terminated
 - b. Whether the claimant is entitled to the reliefs sought
 - c. Who should bear the costs.

Whether the claimant was unfairly terminated

32. 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.
33. In this instant case, the respondent admitted that the claimant was a member of COTU and KUDHEIHA. The respondent was required to notify the two trade unions about the claimant's redundancy in accordance with section 40(1)(a) of the *Employment Act* which it did not do so. It was only the Labour office that was notified. 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.”
34. The respondent also did not accord the claimant audience to hear the reasons for his termination and procedure was not followed as laid down in sections 41 and 43 of the *Employment Act*. In *Walter Ogal Anuro v Teachers Service Commission (2013) eKLR* the Court held that:
- “.... For a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer to effect the termination.”
35. After due consideration of the pleadings, submissions and precedents the court finds the respondent fell a foul to the mandatory procedure prescribed under Section 40 of the *Employment Act* in terminating an employee due to redundancy.



The respondent did not give a notice to the local labour officer of the intended redundancy and neither was the claimant given notice. He was just given a termination letter and was advised his notice month was that August 2020. He was not informed of his terminal dues including severance pay and any other pending dues.

He was not advised on the criteria used to select him as one of those who were declared redundant.

36. In the case of DANIEL MBURI MURII -VS- HIGROTECT EAST AFRICA LTD ELRC 26 OF 2020 the court held: -

“Essentially the act allows an employer to terminate an employee. However, the said right on the part of the employee is regulated by Sections 40, 43 and 45 of the Act. Section 40 specifically places obligation and conditions that an employer ought to meet before declaring an employee redundant.”

37. Having considered the pleadings and submissions alongside authorities the court finds the respondent did not terminate the claimant fairly and procedurally and therefore enters judgment in favour of the claimant.

Whether the claimant is entitled to the reliefs sought

38. Having held that the claimant was unfairly terminated, the Court awards the claimant the following reliefs: -

- a. Damages for unlawful termination (12 months' salary). Section 49 of the *Employment Act* provides for compensation for 12 months. The court is of the view that compensation of 12 months is excessive thus compensation for 10 months will be adequate therefore the claimant is awarded Kshs.165,162 which is calculated as follows: $27,527 \times 10 = \text{Kshs.}275,270/=$
- b. One month's salary in lieu of notice is awarded in accordance to Section 36 of the *Employment Act* amounting to Kshs.27,527/=
- c. For severance pay, the claimant is entitled to the same since he was declared redundant and thus awarding him Kshs.233,979.50/=
- d. Unpaid salary for July and August 2020 is awarded at Kshs. 55,054/=
- e. Anticipatory salaries and allowance are also declined as well as is not proved and are not legally supported.
- f. The total award is Kshs.591,830/50
- g. Costs are awarded to the claimants plus interest at court rates of 14% per annum from the date of judgment till full payment.

39. 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

