



REPUBLIC OF KENYA



KENYA LAW
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Egasa v Filmaid Kenya (Cause 1425 of 2018)
[2024] KEELRC 13541 (KLR) (27 November 2024) (Judgment)

Neutral citation: [2024] KEELRC 13541 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1425 OF 2018
DKN MARETE, J
NOVEMBER 27, 2024

BETWEEN

LORIAN VINCENT EGASA CLAIMANT

AND

FILMAID KENYA RESPONDENT

JUDGMENT

1. This matter came about by way of a Memorandum of Claim dated 5th October, 2018. The issue in dispute is herein cited as;

Unlawful termination of employment.
2. The Respondent in a Statement of Response dated 18th April, 2019 denies the claim and prays that it be dismissed with costs.
3. The Claimant in a Reply to the statement of Response dated 24th September, 2019 answers the Response and reiterates his prayer for judgment in his favour.
4. The Claimant's case is that he was employed by the Respondent as Deputy County Director on a two (2) yea fixed term contract commencing 11th February 2017 to 10th September, 2019. He earned a consolidated salary of Kshs. 585,000.00. He performed his duties loyally, dutifully and diligently during his tenure of service.
5. The claimant's further case is that on 23rd August, 2018 he was called to a meeting by the Respondent and was notified of a decision to terminate his employment. On the same day he was served with a termination letter stating that his employment was terminated with effect from 23rd August, 2018 (the same day) on grounds of redundancy. He signed the letter under duress but on a without prejudice basis and was therein issued with a cheque for his terminal benefit.



6. The Claimant's further case is that the alleged redundancy and purported grounds for declaring redundancy were fictitious and non-existent. The Respondent feigned a redundancy situation as it did not face financial challenges at the time and is still operational to date. Further, the alleged restructuring exercise did not abolish his role as the Deputy County Director. No attempt were made to retain him in way other role in the organisation and further was targeted for constantly raising concerns and on challenged questionable decisions made by the Respondent.
7. The Claimant's other case is that the Respondent;
 - i. Failed to give the Claimant written notice of the intended redundancy prior to the date of the intended date of termination;
 - ii. Failed to notify to the Labour Office on the intended redundancy prior to the intended date of termination;
 - iii. Failed to consult and give reasons for the redundancy to the Claimant prior to the letter of termination;
 - iv. Failed to provide the criteria and mechanism used to short-list and identify the Claimant as being eligible for redundancy;
 - v. Issued the Claimant with a termination letter instead of a redundancy notice; and
 - vi. Attempted to justify the termination and imposed terms after the event.
8. The Claimant further avers that the redundancy process was flawed in substance and procedure. The unlawful termination on was also in breach of the Claimant's legitimate expectation to serve the full term of his contract. The Claimant had 13 months remaining to the contractual end date, i.e. 30th September 2019, before his contract was wrongfully terminated without cause. This was for;
 - i. Failing to formally notify the Claimant that the Respondent was considering terminating the Claimant's contract of employment.
 - ii. Failing to formally notify the Claimant of the reasons that the contract of employment was terminated.
 - iii. Failing to grant the Claimant an opportunity to be heard prior to the termination of the employment contract contrary to section 41 of the *Employment Act*.
9. The Claimants penultimate case is that his termination from employment was unlawful and unjustified and due process was overlooked in contracting Article 41 and 50 of *the constitution* of Kenya, 2010 as read with Section 40, 41, 43 and 45 of the *Employment Act*, 2007.
10. Further, the Claimant comes out as follows;
 - i. The Claimant served the Respondent diligently and did not breach any of his obligations as set out under his employment contract.
 - ii. The Claimant's termination was unlawful and unjustified and due process was not followed contrary to Articles 41 and 50 of *the Constitution* of Kenya 2010 as read together with sections 40, 41, 43 and 45 of the *Employment Act*.
 - iii. The Respondent violated the rules of natural justice, equity and fair play in failing to give the Claimant an opportunity to be heard before making a decision on his dismissal.
 - iv. The grounds giving rise to the Claimant's termination are false and an afterthought.



- v. In the circumstances, the Claimant seeks damages for the unlawful and unprocedural termination of his contract of employment by the Respondent as provided under Section 49 of the *Employment Act*.
11. He prays as follows;
- a. A declaration that the Claimant's termination of employment was unlawful, unprocedural and unjustified.
 - b. Damages for wrongful termination the equivalent of 12 month's salary @Kshs.585.000.00 per month totalling Kshs.7,020,000.
 - c. General damages for causing the Claimant embarrassment and emotional distress.
 - d. Costs of the suit.
 - e. Interest on (a) to (e) at court rates;
 - f. Any other remedy that this Honourable Court may deem fit to grant.
12. The Respondent denies the claim.
13. The Respondent's case is that it depends on donor funds to run its programmes and pay its administrative expenses including staff salaries and a substantial portion of these funds are given by Internews and Norwegian Refugee Council as donors.
14. The Respondent's further case is that it works as the implementing partner. This is as follows;
6. The Respondent also works as the implementing partner for all FilmAid International in respect of FilmAid International's programmes in Kenya whose funding comes through FilmAid International as the two organizations share a mission, a methodology, and a brand.
15. The Respondents further avers that out a funding for the USD 1,679,823.00 she received Kshs.1,400,000.00 and was advised to restructure by reducing costs on labour and thereby the restructuring that affected the position of Deputy County Director held by the Claimant.
16. A computation of the Claimant's terminal dues was done and presented to Claimant for verification. The Claimant verified the amount payable and voluntarily, unconditionally and unequivocally signed a declaration to the effect that he had received his terminal dues and that he had no further/other claim against the Respondent.
17. The Respondent denies claims of failing to comply with the redundancy process in substance or procedure. It also denies noncompliance with Section 40 of *Employment Act*, 2007 and further;
- a. Failing to give the Claimant written notice on the intended redundancy prior to the intended date of termination;
 - b. Failing to notify of the Labour office on the intended redundancy prior to the intended date of termination.
 - c. Failed to consult and give reasons for the redundancy to the claimant prior to the letter of termination
 - d. Failing to provide the criteria and mechanism used to shortlist and identify the claimant as being eligible for redundancy
 - e. Issuing the claimant with a termination letter instead of a redundancy notice and



- f. Attempting to justify the termination and imposed term after the event.
18. This matter came to court variously until the 26th September 2023 when it was heard inter parties.
19. The Issues for determination therefore are;-
1. Whether the termination of Claimant by the Respondent was wrongful, unfair and unlawful.
 2. Whether the Claimant is entitled to the relief sought.
 3. Who bears the costs of this cause.
20. The 1st issue for determination is whether the termination of Claimant by the Respondent was wrongful, unfair and unlawful. The Claimant in his written submission dated 8th March, 2021 submits that the redundancy was both unlawful and unjustified within the context set out in Section 2 of the *Employment Act*. In the case of *Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others* [2014] eKLR, the Court of Appeal analyzed the statutory definition of redundancy under two aspects. He expresses this case as follows;
- “that it has to be non-volitional, occasioned by an economic downturn brought about by factors beyond the control of the employer, which leaves the employer with no option but to take an initiative, the consequence of which will be the inevitable loss of employment.
- i. that it has to be at no fault of the employee and the termination arises where the employee’s services are superfluous through the common practices commonly known as abolition of office, job or occupation and loss of employment. Corollary to that is the justification for that abolition, if the appellant indeed abolished their office.
21. The Claimant’s further submission comes out thus;-
- The Respondent’s Country Director, Stella Suge (“DW1”) gave her testimony on 25th January 2024. She testified that the Respondent, as a non-profit organization, submitted yearly budget proposals for review by its donors. DW1 confirmed that this was a common practice. CW1, on the other hand, testified that the budget proposals were merely applications that would either be granted without changes or with revised budget sums. He equally confirmed that this was an ordinary practice in the non-profit sector. The Claimant thus submits that the issuance of budget proposals in and of themselves is not a basis for redundancy as alluded to by the Respondent. No evidence has been tendered by the Respondent for the Court to arrive at a contrary finding on the issue.
22. Again, the Claimant submits;
- Further, DW1 testified that the Respondent had presented the initial budget proposal and the revised budget issued to Internews for the year 2018-2019. See pages 7-29 and 46-64 of the Respondent’s Documents. She admitted that the Respondent had not availed the budget proposals and revised budgets for the previous years. The Respondent’s failure to present these documents demonstrates that it did not wish to provide a full picture of the common practice.



23. Further,

Following the issuance of the budget proposal, the donor wrote to the Respondent stating that it would provide funding of USD 1,400,000 as opposed to the initial USD 1,600,000. See page 42 of the Respondent's Documents. The Respondent's International office proposed measures to fit within the revised budget, including the reassessment of smaller administrative staff rules, i.e. housekeepers, interns, guards and office helpers. These roles were to be eliminated from the budget proposal and have their funding catered to from a 10% service charge administration fee that the Respondent received.

24. The Claimant further submits that the redundancy was not as consequence of any economic outturn and was indeed a device of the Respondent to rid off the Claimant.

25. The Claimant further submit that the redundancy was unprocedural for failing to the procedural fairness test. This is because from the onset the Respondent fails to notified the Claimant and the Labour Officer of intended redundancy one month prior to the intended termination date in contravention of section 40(1)(b) of the *Employment Act*, 2007. The documentary evidence presented before this court and the testimony of DW1 is to the extend that the decision to declare the Claimant position redundant took place in July, 2018. No notice was given to the Claimant or the Labour Officer as at July, 2018.

26. Further, DW1 admitted in her testimony that the first time the Respondent notified the Claimant of the redundancy of on 23rd August, 2018 and this is the same date the termination was effected. Shocking as it was, the Claimant was asked to clear from the office by 2pm. The letter of notice to the labour officer was served on 24th August, 2018 a day after the Claimant's contract had been terminated.

27. The Claimant further submit that the Respondent failed to engage in consultative meeting with the claimant one month prior to the effective termination date of the 23rd August, 2018. This was confirmed by the CW1 and DW1 in the evidence to court.

28. The Claimant seeks to rely on the authority of;

Cargill Kenya Limited v Mwaka & 3 others (Civil Appeal 54 of 2019) [2021] KECA 115 (KLR) (22 October 2021) (Judgment) where the court held thus;

“While the requirement of consultation was not expressly provided in section 40 of the *Employment Act*, that requirement was implied, as the main reason and rationable for giving the notices in section 40(1)(a) and (b) to the unions and employees of an impending redundancy...

...Consultations on an intended redundancy between the employer and the relevant unions, labour officials and employees was implied by section 40(1) (a) and (b) of *the Constitution* and Section 4(3) of the *Fair Administrative Action Act*... Employers fell within the category of persons whose action, omission or decision affected the legal rights or interests of employees. the appellant was therefore also bound by the provisions on consultation required by Article 47 and Section 4(3) of the *Fair Administrative Action Act*.

29. The purpose of the notice under section 40(1)(a) and (b) of the *Employment Act*, as was to give the parties an opportunity to consider measures to be taken to avert or to minimize the terminations and measures to mitigate the adverse effects of any terminations on the workers concerned such as finding alternative employment. The consultations were meant to cause the parties to discuss and



negotiate a way out of the intended redundancy, if possible, or the best way of implementing it if it was unavoidable. That meant that if parties put their heads together, chances were that they could avert or at least minimize the terminations resulting from the employer's proposed redundancy. If redundancy was inevitable, measures should have been taken to ensure that as little hardship as possible was caused to the affected employees.

30. The Respondent in her written submission dated 9th April, 2024 submits a case of lawful termination of employment.

31. She reiterates her case and submits that the redundancy exercise was attributable to reduced donor funding thus reducing employment by declaring the Claimant's position redundant. It is her case that this was purely for economic reasons and was not borne out of any ill will on her part.

32. The Courts have on numerous occasions acknowledged that redundancy is an ordinary human resource function and that employers can declare employees redundant for reasons of economic and structural nature. In making this submission we rely on the following authorities:-

a. *Rap vs. Unilever Kenya Limited (Cause 1568 of 2017) [2023] KEELRC 1342 (KLR) (18 May 2023) (Judgment)* where the Court held as follows:-

“A redundancy situation would arise where major changes in the mode of production, programmes or activities of an employer entity were likely to result or resulted in reduction of the needed Labour force and there was excess Labour.”

b. *Kenya Airways Limited vs. Aviation & Allied Workers Union Kenya & 3 others [2014] Eklr.* Where the court of appeal held as follows:-

“According to section 40 of the Act an employer is entitled to terminate the services of an employee on account of redundancy.

The ILO Convention also specifies that employers can terminate employment for reasons of economic, technological, structural or similar nature.

In the case of *Tobias Ongaya Auma & 5 Others Vs Kenya Airways [2007] eKLR* this court stated.

“further, it is not the role of any tribunal to prevent an employer from restructuring or adopting modern technology so long as it observes all relevant regulations”.

In *G.N Hale & Sons Limited Vs Wellington Cateres (supra)* the court of appeal took the view that a worker does not have the right to continue employment if the business can run more efficiently without him. As long as the employer genuinely believes that there was a redundancy situation, any dismissal was justified, and it was not for the court or the union to substitute their business judgment.”

(c) *Kenya Plantation & Agricultural Workers Union vs James Finlays (K) Limited [2013] Eklr.* Where the court held as follows;

“The court considers that the employer is entitled to undertake redundancy just like the other human resource functions like recruitment and selection, appointment and promotion training and development and termination of the contract of service including dismissal on disciplinary grounds. The general principle is that the court



shall not interfere in the employer's entitlement to undertake these functions and interference by the court shall be exercised very sparingly.”

33. The Respondent further submits compliance with section 40(1)(c) of the *Employment Act*, 2007 which provides for a selection of employees redundancy on due regard to seniority in time and to the skill, ability, and reliability of employee of a particular class of the employees affected by the redundancy.
34. As scrutiny of the respective cases of the party brings this out in favour of the claimant. His case has clearly demonstrated that redundancy process was without form. It did not comply with section 40 of the *Employment Act*, 2007 and therefore the Respondent's case must fail. I therefore find a case of unlawful termination of employment and hold as such.
35. The 2nd issue for determination is whether the Claimant is entitled to the relief sought. He is. Having won on a case of unlawful termination of employment, he becomes entitled to the relief sought.
36. I am therefore inclined to allow the claim and order relief as follows;
 - a. A declaration be and hereby issued that the termination of employment of the Claimant by the Respondent was unjustified, unprocedural, and I unlawful.
 - b. One(1) month salary in lieu of notice..... Kshs.585,000.00
 - c. Six(6) months salary as compensation for unlawful termination of employmentKshs.585,000.00 x 6..... .Kshs.3,510,00.00
Total of claimKshs.4,095,000.00
 - (d) Interest at court rate from today's date till payment in full.
 - (e) The costs of this cause shall be borne by the Respondent.

DELIVERED, DATED AND SIGNED THIS 27TH DAY OF NOVEMBER 2024.

D. K. NJAGI MARETE

JUDGE

Appearances:

Mr. Sheila Onyango instructed by Kaplan & Stratton Advocates for the Claimant.

Mr. Nyaburi instructed by Iseme, Kamau & Maema Advocates for the Respondent

