Ombese v Skanem Interlabels Nairobi Limited (Cause E715 of 2020)
[2024] KEELRC 13178 (KLR) (21 November 2024) (Judgment)

Neutral citation: [2024] KEELRC 13178 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE E715 OF 2020

L NDOLO, J

NOVEMBER 21, 2024

BETWEEN

NAHASHON OMBESE ..... CLAIMANT

AND

SKANEM INTERLABELS NAIROBI LIMITED ..... RESPONDENT

JUDGMENT

Introduction

1. By a Memorandum of Claim dated 4th November 2020 and amended on 9th May 2022, the Claimant proceeds against the Respondent, alleging unlawful termination of his employment. The Respondent defends itself by a Memorandum of Response dated 19th November 2020 and amended on 24th May 2022.

2. The matter went to full trial, with the Claimant testifying on his own behalf and the Respondent calling two witnesses; Rajesh Kumar and Alice Nguyo. Thereafter, the parties filed written submissions.

The Claimant's Case

3. The Claimant was employed by the Respondent on 29th August 2008, in the position of Sales Team Leader, earning an initial monthly salary of Kshs. 200,000, which was later increased to Kshs. 270,000.

4. In addition, the Claimant claims to have been entitled to commission on achievement of a monthly target of Kshs. 5,000,000, payable upon settlement by clients on agreed credit terms. The Claimant states that he exceeded his targets.

5. Further, the Claimant claims to have been entitled to bonus, Kshs. 40,000 for fuel, family medical cover at Kshs. 40,000 per annum and Kshs. 5,000 as monthly mobile phone allowance.

6. The Claimant worked for the Respondent until 15th July 2020, when his employment was terminated on account of redundancy. He asserts that the Respondent did not observe the law on declaration of redundancy, thus rendering the termination unlawful and unfair. The Claimant therefore claims the following:

    a. Severance pay.....Kshs. 2,150,335.40

    b. 12 months' salary in compensation.....3,241,752.00

    c. Outstanding commission.....3,960,000.00

    d. Costs plus interest

The Respondent's Case

7. In its Memorandum of Response as amended on 24th May 2022, the Respondent admits having employed the Claimant but denies the allegation that the employment was unlawfully and unfairly terminated.

8. The Respondent's case is that the Claimant's employment was lawfully terminated on account of redundancy, upon which he was paid all his terminal dues. The Respondent avers that it fully complied with the provisions of Section 40 of the *Employment Act*.

9. The Respondent states that the Claimant was paid all his commissions from 2008 to 2020. In this regard, the Respondent claims having issued cheque number 012086 dated 30th November 2016 for Kshs. 830,939 after reconciling accounts and mutually agreeing with the Claimant on the commission payable up to the year 2015.

10. With respect to the commission for period between 2016 and the termination date, the Respondent avers that it made payment to the Claimant who signed an acknowledgment on 11th September 2020, in full settlement of his commissions.

Findings and Determination

11. There are two (2) issues for determination in this case:

    a. Whether the termination of the Claimant's employment was lawful and fair;

    b. Whether the Claimant is entitled to the remedies sought.

The Termination

12. The Respondent produced a letter dated 15th July 2020, addressed to the Claimant as follows:

> " Dear Nahashon,
>
> Re: Termination of Employment
>
> This is a recap of our meeting this morning in regards to the above matter. As mentioned to you, this has been occasioned by the tough economic situation as a result of COVID 19 which has forced us to cut down on cost as the workflow has reduced. Unfortunately, this means loss of employment.
>
> We regret to notify you officially that your employment with Skanem Interlabels Nairobi Limited will come to an end immediately.

You will be paid your final dues inclusive of a one month's salary in lieu of notice. The finance department will work on your dues and a tabulation of the same will be given to you.

You will also receive a certificate of service when collecting your final dues upon clearance from the Human Resources office.

We take this opportunity to thank you for the services you have rendered to the company during your employment tenure and wish you success in all your future endeavours.

Yours faithfully,

Skanem Interlabels Nairobi Ltd.

(signed)

Sachen Gudka

C.E.O"

13. According to this letter, the Claimant's employment with the Respondent came to an end as a result of redundancy. 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."

14. While the law recognises redundancy as a legitimate mode of termination of employment, it sets stringent conditions to be satisfied by an employer declaring redundancy. These conditions are codified in Section 40 of the *Employment Act* as follows:

40.

(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 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 declaredBredundant had due regard to seniority in time and 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.

15. The first 2 conditions under Section 40 require every employer declaring redundancy to issue a one-month notice of intention to the affected employee, their union (where applicable) and the local Labour Officer. By definition, this notice, should set out the reasons for and the extent of the intended redundancy.

16. It is now settled that the redundancy notice is separate and distinct from the termination notice provided under Section 40(1)(f).

17. In Thomas De La Rue (K) Ltd v David Opondo Omutelema [2013] eKLR the Court of Appeal stated as follows:

> "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."

18. In the subsequent decision in Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others [2014] eKLR Maraga JA (as he then was) stated the following:

> "The purpose of the notice under Section 40(1) (a) and (b) of the *Employment Act*, as is also provided for in....ILO Convention No. 158-Termination of Employment Convention, 1982, is 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 are therefore 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 is unavoidable."

19. In the more recent decision in The Germany School Society & another v Ohany & another [2023] KECA 894 (KLR) the Court of Appeal held that the requirement for consultation is implied in Section 40 of the *Employment Act*, stating that:

> "In essence, consultation is an essential part of the redundancy process and ensures that there is substantive fairness. The employer should ensure that it carries out the process as fair as possible and that all mitigating factors are taken into consideration."

20. Going by the termination letter dated 15th July 2020, the Claimant was informed about the loss of his employment in a meeting held on the same day on which he was issued with the termination letter. There was therefore no prior redundancy notice. In addition, the selection criteria was not disclosed, and the Claimant's claim that he was unfairly targeted was not dislodged.

21. From the foregoing, it is clear that in terminating the Claimant's employment the Respondent did not observe the law on declaration of redundancy, and the resultant termination was therefore unlawful and unfair.

22. Before addressing the remedies sought by the Claimant, I need to dispense with the collateral issue of the discharge vouchers signed by the Claimant. In its final submissions, the Respondent suggests that these documents completely discharged it from any liability arising from the termination of the Claimant's employment.

23. I will say two things on this issue; first, the Claimant signed the discharge vouchers on a 'without prejudice' basis meaning that he retained his right to raise further claims and second, the discharge vouchers were limited to the payment items listed. They could therefore not be used to insulate the Respondent from a claim of unlawful and unfair termination of employment.

Remedies

24. Pursuant to the foregoing, I award the Claimant twelve (12) months' salary in compensation. In making this award, I have taken into account the Claimant's long service and the fact that he did not in any way contribute to the termination. I have further considered the Respondent's failure to issue a redundancy notice to the Claimant.

25. On the claim for severance pay, the Respondent states that the item listed as gratuity was in fact severance pay. The Court found this explanation reasonable as the Claimant did not establish any basis for payment of gratuity as a distinct item. The claim for severance pay is therefore declined.

26. The Claimant did not adduce any evidence to support his claim for balance of commission, which therefore fails and is dismissed.

27. Finally, I enter judgment in favour of the Claimant in the sum of Kshs. 3,727,248 being 12 months' salary in compensation for unlawful and unfair termination of employment.

28. This amount will be subject to statutory deductions and will attract interest at court rates from the date of judgment until payment in full.

29. The Claimant will have the costs of the case.

30. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 21ST DAY OF NOVEMBER 2024

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JUDGE

Appearance:

Mr. Nyakiangana for the Claimant

Mr. Wandati for the Respondent

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