



D' Silva v Lordship Africa Fund Management Limited (Employment and Labour Relations Cause E567 of 2020) [2024] KEELRC 2706 (KLR) (4 November 2024) (Judgment)

Neutral citation: [2024] KEELRC 2706 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE E567 OF 2020
MN NDUMA, J
NOVEMBER 4, 2024**

BETWEEN

GLORIA D' SILVA CLAIMANT

AND

LORDSHIP AFRICA FUND MANAGEMENT LIMITED RESPONDENT

JUDGMENT

1. The suit was filed on the 23 /9/ 2020 by the claimant seeking the following reliefs;
 - a. A declaration that the Respondent breached the principles of natural justice in the process of terminating the claimant's employment
 - b. A declaration that the dismissal of the claimant by the respondent's was unfair and/unlawful
 - c. Payment of all outstanding dues including:
 - i. Leave days, severance pay and unpaid salary for January 2020 Ksh 976,863
 - ii. Medical for herself and one dependant ksh 250,000
 - iii. Bonus for 2019 Ksh 492,138
 - iv. Bonus for 2020 ksh 526,588
 - v. Payment until end of contract October 2020 ksh 5,265,588 (All staff were given an increment of minimum 7% effective January 2020)
 - vi. 12 months compensation for loss of employment ksh 6,319,056
 - vii. Damages for loss of employment/ breach of legitimate compensation and loss of livelihood in respect of the unexpired term of the contract of employment ksh 1,500,000



Total Ksh 15,330,233

- d. General Damages for unfair and/ or unlawful termination
 - e. Costs of this claim
 - f. Certificate of Service
 - g. Interest on (c) (d) and (e) above at court rates.
 - h. Recommendation letter
2. The claimant (CW1) adopted witness statement dated 14/9/2020 as her evidence in chief and produced exhibits '1' to '12' in support of the evidence adduced before court.

Facts of the Claim

3. CW1 testified that she was employed as operations manager. She testified that she was employed on 15/10/2018 on a 2year contract and worked until 17/01/20. That she served for a period of 1 year and 2 months. That at the time of leaving the Respondent's employment the claimant was told the position was being restructured and there was no more work. She met with the employer on 15/11/19 and on 19/11/19 when she discussed issue of mutual separation initiated by the respondent. That the issue of redundancy was not discussed. That she was offered an exit package of 2 months' in lieu of notice, salary for 17 days worked in January 2020,15 days severance pay for 1 year, and payment in lieu of leave days not taken. The claimant did not agree with the package and exit which she considered unfair and discriminatory.
4. RW 1 Jilna Sunil Patel adduced sworn testimony and adopted the witness statement dated 1/2/23 as her evidence in chief. She also produced the documents as contained in the list dated the 5/2/2021 as exhibits 1 to 4. She testified that she knew the claimant who was the Respondent's operations manager for projects from 15/10/2015 when she started work until she left on the 18/1/2020. The position was declared redundant as the company restructured the projects department. That the respondent wrote to the labour office notifying them of the intended decision and the claimant. That the respondent had tried to find a different position for the claimant but it was not possible. The witness said that the respondent offered claimant exit package aforesaid but she did not collect the cheque which was ready from 4/2/2020. That the respondent did a fresh cheque which was not picked again.
5. On cross examination Rw1 said the notice was issued in November 2019 and the letter was sent to claimant via email. Rw1 further stated the emails of the claimant were deactivated on 17/1/2020 and the last day for the claimant at work was on the 18/1/2020. That basic targets for the respondent had been met and the claimant's position was no longer required. That the respondent sent the notice to the labour office through post but the labour office did not confirm receipt of the notice. The respondent had no evidence of postage. Rw1 stated restructuring was done in good faith and the respondent tried its best to take good care of the claimant. The notice of redundancy was given on the 19/11/2019.
6. The parties filed written submissions which the court has considered together with the evidence adduced by the parties.

Determination

7. The following issues arise for determination: -
- a. Whether there were valid grounds for termination of the claimant's employment on the basis of redundancy



- b. If the answer to (a) is in the affirmative, whether the Respondent followed due procedure in declaring the claimant redundant.
 - c. The remedies, if any, the claimant is entitled to.
8. Redundancy as defined under section 2 of the *Employment Act* 2007 means 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;
 9. The import of section 2 of the Act is that the circumstances or reasons leading to an employee being declared redundant must have been involuntary, that is, the employee is at no fault, rather it is the initiative of the employer. The Services of the employee must in addition be rendered superfluous.
 10. The employer in declaring redundancy must also comply with the procedural requirement under section 40 of the *Employment Act* 2007 which provides that;
 - a. 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;
 - g. and 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
 11. The Court of Appeal held in Civil Appeal No 46 of 2013 Kenya Airways Limited versus Aviation & Allied Workers Union Kenya and 3 others 2014 eklr as follows: -

‘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’

12. The claimant contends that the redundancy of the claimant was not a genuine organizational necessity but rather was a well-orchestrated scheme designed to force her out of employment with the company and it was only her role within the entire organization that was declared redundant, raising significant concerns about the legitimacy of the process.
13. From the evidence tendered by the Claimant in court, two key questions in the view of this Court were not satisfactorily addressed by the respondent. This is whether the claimant’s position remained after she had left the respondent’s employment and whether the roles previously handled by the claimant were devolved to another position or were taken over by a new employee. The respondent was unable to explain what tangible steps were taken by the respondent to absorb the claimant in another position. The claimant explained in her testimony in chief that she appealed to the respondent to consider giving her another position in addition to her existing duties given her level of expertise in different fields the organization is involved in. That the respondent instead proceeded to put an advertisement for a position of financial controller after she was informed, they were not hiring any new persons. She sent an email to request that she be assigned the duties of one Harkiran Jandu who had resigned but this request was ignored, and the respondent went ahead and hired someone else. The Claimant stated that part of the work done by the said Harkiran Jandu were roles that she was initially hired to do. The claimant emphasised that it was only the claimant who was terminated on account of redundancy.
14. The respondent did not sufficiently rebut this credible evidence adduced by the claimant.
15. As regards procedural fairness, the Court of Appeal had the following to say in *Thomas De La Rue (K) Ltd versus David Opondo Omutelema 2013 Eklr* that;

‘It is quite clear to us those 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’

16. There is a dispute as to whether valid notices were issued as required. The respondent has exhibited copy of notice of redundancy dated the 16/11/2019 allegedly issued to the Labour office, and an email communication dated the 19/11/2019 to the claimant. The claimant disputes that the required notice was issued and has exhibited the letter dated 12/6/2023 where the labour office disputes having received the said notice. The respondent was unable to demonstrate that indeed labour office was notified on the intended redundancy at least one month before it happened.
17. The court returns that there was no valid reason proved by the respondent for the alleged termination nor was there strict compliance with procedural requirements of the law. The Court finds the termination of the claimant was unlawful and unfair and in violation of sections 2, 40, 41, and 45 of the *Employment Act* 2007.
18. Section 49 (4) provides that the court shall, in deciding whether to implement the remedies specified in subsections (1) and (3), to take into account any or all of the following



- a. the wishes of the employee;
 - b. the circumstances in which the termination took place, including the extent, if any, to which the employee caused or contributed to the termination; and
 - c. the practicability of recommending reinstatement or reengagement.
 - d. the common law principle that there should be no order for specific performance in a contract for service except in very exceptional circumstances;
 - e. the employee's length of service with the employer;
 - f. the reasonable expectation of the employee as to the length of time for which his employment with that employer might have continued but for the termination; The *Employment Act*, 2007
 - g. the opportunities available to the employee for securing comparable or suitable employment with another employer;
 - h. the value of any severance payable by law;
 - i. the right to press claims or any unpaid wages, expenses or other claims owing to the employee;
 - j. any expenses reasonably incurred by the employee as a consequence of the termination;
 - k. any conduct of the employee which to any extent caused or contributed to the termination;
 - l. any failure by the employee to reasonably mitigate the losses attributable to the unjustified termination; and
 - m. any compensation, including ex gratia payment, in respect of termination of employment paid by the employer and received by the employee
19. The claimant's contract of employment was with effect from 15/10/2018 to 14th October 2020. The contract of employment was to elapse in 9 months' time which the claimant did not serve by fact of the termination. The claimant did not contribute to the termination and suffered loss of means of support unlawfully. The claimant was not compensated for the loss and had not obtained alternative employment as at the time of the hearing. The claimant was not given certificate of service to assist her obtain new employment quickly. The Court having taken into account the factors listed above under section 49(4) awards the claimant the equivalent of 2 months' salary in compensation for the unlawful and unfair termination in the sum of Ksh (492,138 x 2) ksh. 984,276.
20. The claimant adduced uncontroverted evidence that on the 14th December 2019 she visited hospital for treatment but was unable to use her medical insurance card. She was informed that her medical cover had expired and was not renewed by her employer. That on the 18th December, she needed to undergo a medical procedure but was still unable to use her medical insurance card. Rw1 confirmed that the medical cover for the claimant had expired and was not renewed. The refusal to renew the insurance cover of the claimant breached her contractual terms and conditions of employment. The court finds that the claimant has proved the claim for payment of medical insurance cover in the sum of ksh 250,000 and awards the claimant accordingly.
21. The claimant also gave evidence which has not been controverted that in the year 2019 the Respondent gave bonuses equivalent to one month's salary to all employees including one Harkin Jandu who had resigned but she was left out. She had no performance issues at the time of the termination. The court awards bonus for the year 2019 totalling ksh 492,138 to the claimant accordingly. No bonus was payable for the year 2020 since the claimant served for only 17 days in the new year.



22. The claimant had a leave balance of ksh 341,918. This is not disputed by the Respondent who in earlier proposal to settle exhibited in court also acknowledged the pending leave balance. The claimant is awarded ksh 341,918.73 in lieu of leave days not taken
23. The claim for unpaid salary for 17 days for January 2020 is not disputed and is acknowledged in the proposed package. The claimant is awarded ksh 317, 508.39 being unpaid salary for 20 days worked in January 2020 as offered in the exit package.
24. The claimant was also paid severance pay calculated at 15 days salary for one year but has not yet received the amount. The same is duly awarded to the claimant in the sum of Ksh. 307,255.91.
25. For the avoidance of doubt all amounts contained in the settlement package and the cheque that was not received are not in contention and the respondent to simply re – issue the cheque that was not collected by the claimant in addition to the awards made in this judgment.
26. In the final analysis, judgment is entered in favour of the claimant as against the respondent as follows;
 - a. A declaration is issued that the termination of the claimant by the respondent was unfair and unlawful.
 - b. 2 months' salary in compensation for unlawful and unfair termination in the sum of ksh. 984,276.
 - c. Bonus for the year 2019 in the sum of ksh. 492, 138.
 - d. Unpaid medical cover for the claimant and one dependent in the sum of ksh 250,000.
 - e. Unpaid salary for Jan 2020 ksh 317, 508.39 as per exit package.
 - f. Leave balance ksh 341,918.73 as per exit package.
 - g. Severance pay in the sum of Ksh. 307,255.91 as per exit package.
 - h. Two months salary in lieu of notice as per the exit package Ksh. 984,276 as per exit package
 - i. Certificate of service to be granted forthwith.

TOTAL ksh 3,677,373.03

Interest at court rates from date of judgment till payment in full for items b, c, d and costs awarded to the claimant for the suit.

DATED AT NAIROBI THIS 4TH DAY OF NOVEMBER 2024

MATHEWS NDERI NDUMA

JUDGE

Appearances

Mr. Cohen for the Claimant

M/s. Guserwa for the Respondent

Court Assistant; Kemboi

