



Van Kappel Kenya Limited v Ndungu (Employment and Labour Relations Appeal E016 of 2023) [2024] KEELRC 13562 (KLR) (19 December 2024) (Judgment)

Neutral citation: [2024] KEELRC 13562 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
EMPLOYMENT AND LABOUR RELATIONS APPEAL E016 OF 2023
ON MAKAU, J
DECEMBER 19, 2024**

BETWEEN

VAN KAPPEL KENYA LIMITED APPELLANT

AND

PHILIP MWAURA NDUNGU RESPONDENT

(Being an appeal from the Judgment of the Honourable Mr.B.Mararo (SPM) delivered on 3rd October 2023 in Nanyuki CMELRC Cause NO. E017 of 2021)

JUDGMENT

Introduction

1. By a Memorandum of Appeal dated 13th October 2023, the appellant seeks the following reliefs: -
 - a. The appeal be allowed.
 - b. The Judgment dated 3rd October 2023 be set aside and the claimant's suit be dismissed with costs.
 - c. The Appellant be awarded the costs of this Appeal.
2. The appeal stands on twelve grounds which were compressed during submissions into the following: -
 - a. The trial court erred by failing to grant the appellant an opportunity to be heard on its defence.
 - b. The trial court erred by awarding the respondent notice pay and severance pay yet they were not pleaded specifically.
 - c. The trial court erred by awarding the respondent notice pay of Kshs.107,502 yet his monthly salary was Kshs.46,365, and contrary to glaring evidence that the respondent had been paid the same.



- d. The trial court erred by considering extraneous matters and awarding severance pay which was not pleaded in the body of his pleadings.
- e. The trial court erred by awarding the maximum compensation of 12 months salary without giving any justification.
- f. The trial court erred by failing to order for statutory deductions from the damages awarded.

Background

3. The respondent was employed by the appellant as a mechanic on 5th June 2017 for a monthly net salary of Kshs.35,000. By a letter dated 31st January 2019, his services were terminated through retrenchment with effect from the same day. According to the respondent, the retrenchment was unfair and unlawful because the reason was not genuine because it employed other persons in the same position. Besides the procedure followed was unfair.
4. Before the said retrenchment, the appellant had guaranteed a loan he had taken from Stanbic Bank on the strength of his payslip as such the decision terminate his services unlawfully has caused him to suffer mental anguish and stress. Therefore, he prayed for the following reliefs:
 - a. That a declaration is hereby issued that retrenchment procedure by the Respondent was unprocedural and unlawful.
 - b. That a declaration is hereby issued that the claimant's termination by the Respondent was unfair, unprocedural and unlawful.
 - c. Terminal dues and benefits, salary, in lieu of notice and general damages for unlawful termination.
 - d. Any other relief that the court deems fit to grant.
 - e. Costs and interest at court rate.
5. The appellant filed Memorandum of Reply dated 2nd July 2021 denying the alleged unlawful termination. It averred that the respondent was informed of the reason for the termination and therefore he was not entitled to the reliefs sought. It further denied that another person was hired to replace him.
6. During the hearing, the respondent testified as PW1 and basically adopted his written statement dated 24th August 2021 and produced a bundle of documents as exhibits. In brief, the statement reiterated the facts set out in his pleadings. He contended that the employer's conduct of retrenching him without any explanation to him and the Labour Officer offended the principles of natural justice and equity, and occasioned on him mental anguish.
7. The appellant never attended the hearing and therefore did not tender any evidence in defence. After considering the evidence on record, the trial court (Hon.Mararo SPM) delivered his judgment on 3rd October 2023 in which he found that the respondent had proved his case of constructive dismissal and granted the following reliefs: -
 - a. That a declaration is hereby issued that retrenchment procedure by the Respondent was unprocedural and unlawful.
 - b. That a declaration is hereby issued that the claimant's termination by the Respondent was unfair, unprocedural and unlawful.



- c. Notice pay awarded at Kshs.107,502
- d. Payment of Kshs.645,012 as general damages for unfair and unlawful termination of services together with interests from date of this Judgment till payment in full.
- e. Severance pay at Kshs.53,751.
- f. That the claimant is entitled to the costs of the claim together with interests.

Submissions in this appeal

8. It was submitted for the appellant that the trial court failed to grant him an opportunity to be heard in his defence against the respondent's case. It was argued that the appellant was denied chance to participate in the court proceedings from 28th March 2023 to 3rd October 2023 when the judgment was delivered. It was further that although the court fixed the date for hearing, no affidavit of service was placed on record to confirm that service on the appellant. Consequently, despite having filed witness statement and documentary evidence, he was denied opportunity to prosecute its defence.
9. It was further submitted that the respondent never pleaded notice pay and severance pay specifically as required of a claim for special damages. Consequently, it was submitted that the trial court erred by granting the same. For emphasis, reliance was placed on Socfinaf Company Limited T/A Tatu Estate v Julius Ouma Okoth (2010) eKLR and Nanyuki Water & Sewerage Company Limited v Benson Mwiti Ntiritu (2018) eKLR where the court dismissed claim for special damages for failure to specifically plead and prove the same.
10. It was further submitted that the respondent's monthly salary was Kshs.46,365 and therefore awarding him Kshs.107,502 was an error which must be corrected. Citing section 35 (1) (c) and 36 of the [Employment Act](#), it was submitted that the respondent was only entitled to 28 days salary in lieu of notice and not the two months' salary.
11. It was further submitted that the award of the salary in lieu of notice was contrary to glaring evidence confirming that the respondent had been paid the same together with his salary for January 2019. Reference was made to the respondent's payslip on page 13 of the Record of Appeal.
12. It was further submitted that the trial court considered allegation that one Naftali Kinya was employed to replace the respondent after the redundancy yet that was not allegation in his pleadings or witness statement. Further that, the award of severance pay was an error since it was not pleaded in the body of the statement of claim or as relief. To fortify the above, reliance was placed on Computer Revolution Africa Ltd v Anthony Mwai Munyi (2020) eKLR where the Court of Appeal held that parties are bound by their pleadings.
13. It was submitted that the award of 12 months' salary compensation for unfair termination was an error without giving any justification as required under section 49(4) of the [Employment Act](#). It was submitted that the trial court ought to have considered the employee's length of service, and the opportunities available to the employee to secure comparable or suitable employment elsewhere. For emphasis, reliance was placed on Kenya Broadcasting Corporation v Geoffrey Wakio (2019) eKLR where the Court of Appeal held that an award of maximum 12 months' pay must be based on sound judicial principles to justify or explain the same.
14. Finally, it was submitted that the trial court ought to have ordered that the decreed sum be subjected to statutory deductions as provided under section 49 (2) of the [Employment Act](#), 2007. It was urged that the said provision is mandatory and ought to be complied with. For emphasis, reliance was placed



- on the holding of the Court of Appeal in *Direct Line Assurance Company Ltd v Jeremiah Wachira Ichaura* (2016) eKLR that lumpsum payment for terminal dues subject to statutory deductions.
15. On the other hand, it was submitted for the respondent the appellant has not disputed the fact that it employed the respondent for a monthly salary of Kshs.53,751; that it terminated his services on account of redundancy without following the correct procedure; and that the termination was unfair and unlawful.
 16. It was further submitted that the appellant was not denied an opportunity to be heard on its defence as its Advocates were served with hearing notice dated 5th April 2023 vide an email sent on the same date. It was submitted that an Affidavit of Service was filed and it is on record. It further submitted that on the 13th June 2023 when the suit was scheduled for hearing, the appellant's counsel wrote to the respondent's counsel requesting for an adjournment but the request was declined. It was therefore submitted that the failure by the appellant to attend the hearing on the material date was deliberate.
 17. As regards the award of severance pay and salary in lieu of notice, it was submitted that section 40 (1) (g) of the *Employment Act* provides for payment of severance pay to an employee who is laid off at the rate of 15 days' pay for each year of service. Further, it was submitted that section 49 of the *Employment Act* provides for payment of salary in lieu of notice.
 18. It was further submitted that the respondent pleaded and prayed for the said reliefs and his salary as Kshs.53,751. Consequently, it was urged that the trial court was right in awarding the severance pay and salary in lieu of notice based on the pleaded salary.
 19. It was further submitted that awarding severance pay plus notice pay and compensation for unfair termination was right because the latter is discretionary while the former was a matter of law. To fortify the foregoing, reliance was placed on *Kenfreight (E.A) Limited v Benson K.Nguti* (2016) eKLR.
 20. It was argued that the court should not interfere with the award of damages since the trial court was right in his decision. For emphasis, reliance was placed on *Mbogo v Shah* (1968) EA page 93, and *Gicheru v Morton & Another* (2005) 2KLR 333 where court stated the threshold upon which decision of the inferior court can be interfered with on appeal.
 21. As regards the award of maximum 12 months' salary compensation, it was submitted that the court was right because the respondent was laid off unlawfully. Further that, the award was discretionary under section 49 of the *Employment Act* and it should not be interfered with on appeal. For emphasis, reliance was placed on *Kemfro Africa Limited T/A Meru Express Services (1976) & Another v Lubai & another No.2* (1987) KLR 30 and *Catholic Diocese of Kisumu v Sophia Achieng Tete* (2004) 2 KLR 55 where the court held that for appellate court to interfere with an award of general damages, the trial court must have applied wrong principles to arrive at the award.
 22. As regards the failure to subject the award of damages to statutory deductions, it was submitted that under section 49 (2) of the *Employment Act* any payment made under section 49 of the Act is automatically subject to statutory deductions with or without a court order. Consequently, the court was urged to dismiss the appeal with costs because the appellant did not present an arguable case.

Determination

23. This being a first appeal, my duty is to re-evaluate the evidence on record and make my own conclusions on the disputed issues, and then determine whether or not the impugned decision should stand. I



gather support from *Selle v Associated Motor Boat Company Ltd* (1968) EA 123 where the court held thus: -

“The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the court must consider the evidence, evaluate itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, the court is not bound necessarily to follow the trial Judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”

24. In this case, the following issues fall for determination: -
- a. Whether appellant was denied the right to be heard on its defence.
 - b. Whether the retrenchment of the respondent amounted to unlawful termination.
 - c. Whether the award of damages by the trial court should be interfered with.

Right to hearing

25. The appellant contended that the hearing date of the suit was fixed in its absence but there is no denial that a hearing notice was served on its counsel. All what is submitted in paragraph 10-12 is that despite having filed witness statement and documents, it was excluded from participating in the proceeding from 28th March 2023 to 3rd October 2023 when the judgment was delivered. It further contends that it was not served with notice for submissions, or the respondent’s submissions, which could have enabled it to apply for recalling of the respondent for cross examination.
26. I have carefully gone through the record of appeal and I am satisfied that there is evidence on record that the appellant was served with a hearing notice and an Affidavit of Service was filed. The affidavit of service was not included in the Record of Appeal but I was able to get it from the lower court file.
27. The affidavit of service was sworn by Mr. Moses Kamau on 5th April 2023 and filed in court on 6th April 2023. Consequently, I find and hold that the appellant was made aware of the hearing date and failed to attend court to prosecute his defence.

Unlawful termination

28. Section 45 (1&2) of the *Employment Act* provides that: -
- “(1) No employer shall terminate the employment of an employee unfairly.
- (2) A termination of employment by an employer is unfair if the employer fails to prove:
- (a) that the reason for the termination is valid;
 - (b) that the reason for the termination is a fair reason-
 - i. related to the employee’s conduct, capacity or compatibility; or



- ii. based on the operational requirements of the employer; and
- (c) that the employment was terminated in accordance with fair procedure.”

29. Retrenchment is termination of the employment on account 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 practice commonly known as abolition of office, job or occupation and loss of employment”.

30. The retrenchment letter dated 31st January 2018 stated that: -

“Re: Retrenchment Due To Downturn Of Business

We refer to the above matter.

It is with deep regret that we will no longer require your services. Due to a drastic downturn in business, the company is downscaling operations and had to invoke a retrenchment scheme. We, therefore have to terminate your employment effective 31st January 2019.

As per your contract, we will pay one month’s wages in lieu of the 30-day notice period.

Kindly sign the attached letter to receive your dues. We have also attached a letter of recommendation herewith and wish you all the success in your future endeavours.

Yours sincerely

.....”

31. The question that arises is whether the said retrenchment was in accordance with the mandatory procedure for redundancy under section 40 of the [Employment Act](#), 2007 which states that: -

- “(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 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."

32. The retrenchment was done without any prior notice contrary to section 40 above, which provide for not less than one-month notice. Further, the area Labour Officer was not served with one-month notice. Without me labouring the point, I find that the retrenchment was not done in accordance with mandatory procedure laid down by section 40 of the *Employment Act* and its therefore unlawful and unfair within the meaning of section 45 of the *Employment Act, 2007*.

Quantum of damages

33. The trial court awarded the respondent salary in lieu of notice, severance pay and maximum compensation of 12 months salary for unlawful termination. The respondent pleaded his monthly salary of Kshs.35,000 and the termination letter offered to pay him one-month salary in lieu of notice. He was therefore entitled to the said Kshs.35,000 as one-month salary in lieu of notice and not the award of Kshs107,751 which was not supported by evidence and pleadings.
34. The award of severance pay of Kshs.53,751 was also not supported by the pleadings and evidence. For an employee to get the said benefit under section 40 (1) (g) of the *Employment Act*, he/she must have served for full years. In this case, the respondent served for only one complete year and based on the foregoing provision, the respondent was entitled to 15-days' pay for each complete year of service. It follows that the award of severance pay of Kshs.53,751 was excessive and it must be reduced to Kshs. 17,500 which equals to a half of his monthly salary of kshs.35,000.
35. The respondent was also awarded 12 months' salary as compensation for unfair termination. No reasons were given by the trial court to justify the maximum award. I agree with the appellant that the trial court erred by failing to take into account relevant factors set out under section 49 (4) of the *Employment Act*.
36. In this case, the relevant factors to consider included the length of his period of service to the company, whether he contributed to the termination through misconduct and the chances of him securing alternative job elsewhere. The failure by the trial court to take into account the said relevant factors resulted to an erroneous judgment and a manifestly high award that must be interfered with.
37. Since the termination was on account of redundancy, the respondent did not contribute to the same through misconduct. However, he served for one and a half years, and in my view, being a mechanic, the respondent had good chances of securing alternative employment including self-employment within a reasonable time.



38. Taking into consideration the above factors, I reduce the maximum award to four months gross salary for the unfair termination equalling to Kshs.140,000. In interfering with the said award of damages, I am guided by *Mbogo v Shah* (1968) EA page 93 where the Court of Appeal held that:

“I think it is well settled that this court will not interfere with the exercise of discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong...”

39. Again, in *Butt v Khan* (1981) KLR 349, the Court of Appeal held that: -

“An appellate court will not disturb an award of damages unless it is so inordinately high or low so as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low.”

40. I have already made a finding that the award of damages was either contrary to express provision of the law, or evidence and pleadings. Hence the interference with the same as highlighted above.

41. The issue of statutory deduction is not contested and is expressly provided for under section 49 (2) of the *Employment Act*. The trial court erred in law by failing to direct that the award of damages was subject to statutory deductions. (See *Kenfreight (E.A) Limited v Benson K.Nguti* (2016) eKLR.

Conclusion and disposition

42. I have found that the appellant was denied the right to prosecute its defence. I have also found that the retrenchment of the respondent was procedurally unfair and for that reason it amounted to unfair termination of his employment. Finally, I have found that the award of damages was not supported by the pleadings, evidence and relevant factors were not taken into account and as such it was erroneous and excessive. Consequently, I allow the appeal set aside the impugned judgment and substitute it with the following orders: -

- a. A declaration is hereby issued that retrenchment of the respondent by the appellant was unprocedural and unlawful.
- b. The appellant is ordered to pay the respondent: -
 - i. One-month salary in lieu of notice.....Kshs.35,000.00
 - ii. Compensation of 4 months gross pay.....Kshs.140,000.00
 - iii. Severance payKshs. 17,500.00Total Kshs.192,500.00
- iv. Interest at court rate from date of filing the suit in the lower court.
- c. The above award is subject to statutory deductions.
- d. The respondent will have costs of the suit in the lower court plus interest at court rate from date of filing this suit.
- e. Each party to bear own costs of the appeal since it only succeeded partially.



DATED, SIGNED AND DELIVERED AT NYERI THIS 19TH DECEMBER, 2024.

ONESMUS N MAKAU

JUDGE

Order

This judgment has been delivered to the parties via Teams video conferencing with their consent, having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N MAKAU

JUDGE

