



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Sudi v Isinya Feeds Limited FTA Sigma Supplies Limited (Appeal
E115 of 2021) [2023] KEELRC 395 (KLR) (16 February 2023) (Judgment)**

Neutral citation: [2023] KEELRC 395 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL E115 OF 2021
B ONGAYA, J
FEBRUARY 16, 2023**

BETWEEN

MESHACK DOUGLAS SUDI APPELLANT

AND

ISINYA FEEDS LIMITED FTA SIGMA SUPPLIES LIMITED RESPONDENT

(An appeal from the Judgment and decree of the Hon. Irene Macia Kabuya (Mrs), Principal Magistrate delivered on 22.09.2021 in Kajiado Employment Cause No. E007 of 2021)

JUDGMENT

1. The appellant filed the memorandum of appeal on October 7, 2021 through Ngigi Njuguna & Company Advocates. The appellant's grounds of appeal are that the learned trial Principal Magistrate erred in law and fact as follows:
 - a. By taking into account irrelevant issues and arriving at a wrong conclusion.
 - b. By canvassing issues not before the Court and arriving at wrong conclusion.
 - c. By failing to consider all the pleadings on record.
 - d. By applying the standards of a civil case.
 - e. By failing to take into account all the relevant factors in awarding reliefs and therefore arrived at a wrong figure.
 - f. By failing to take into account and apply the principles of employment law and procedure.
 - g. By failing to take into account the appellant's submissions.
2. The appellant prayed for orders:



- a. That the entire judgment and decree of the Chief Magistrate’s Court at Kajiado written and delivered by Hon Irene Marcia Kahuya delivered on September 22, 2021 in Kajiado Employment Cause No E007 of 2021 Meshack Douglas Sudi –Versus- Isinya Feeds Limited FTA Sigma Supplies Limited against the appellant be discharged and set aside.
 - b. The Honourable Court makes an appropriate judgment on unfair redundancy and reliefs and determine the suit finally.
 - c. The appeal be allowed with costs to the appellant.
3. The appellant had filed a statement of claim before the trial Court on January 27, 2021 through Ngigi Njuguna & Company Advocates. He pleaded as follows. He was employed by the respondent from January 1, 2021 as a Feed-mill Attendant at Kshs 7,000.00 per month increasing to Kshs 24,000.00 per month and he received seasonal contracts. He worked for 6 days per week from 6.00am to 6.00pm effective January 1, 2012 to January 1, 2015 when he moved to night shift working from 6.00pm to 6.00am but was not paid overtime. He worked on public holidays without due pay. He worked for the respondent for 8 years and 5 months without being issued a warning letter or disciplinary action. He took annual leave on April 6, 2020 and resumed duty on May 4, 2020 when he was informed that his employment had already been terminated on account of redundancy by a notice dated April 30, 2020 and which notice had not been communicated to him. He was not informed the criteria used to select him for redundancy yet he was long serving and productive employee. His case was that the redundancy was unlawful and unfair for want of fair selection criteria per section 40(c) of the *Employment Act* and he was not paid terminal dues. He prayed for orders including that the redundancy was unlawful and unfair; Kshs 24, 000.00 pay in lieu of termination notice; Kshs 1, 983, 208.00 pay for overtime worked; Kshs 139, 902 unpaid public holidays; Kshs 288, 000.00 compensation for wrongful dismissal at 12 months’ salaries per section 49(1) (c) of the Act and costs.
 4. The respondent opposed the suit by filing the memorandum of reply dated May 26, 2021 through Malonza & Company Advocates. The respondent admitted employing the claimant (appellant) as pleaded for the claimant. He was employed as a Feed-mill Attendant at Kshs 7, 000.00 increasing to Kshs 24, 000.00 per month. He worked overtime as alleged but was duly paid per petty cash vouchers. Further the respondent denied that the appellant worked on public holidays as alleged. He worked for 8 years 5 months with a clean record and he took leave from April 6, 2020 to May 4, 2020. The respondent’s further case was as follows. That it issued a redundancy notice dated April 30, 2020 due to the Covid-19 pandemic which adversely affected the respondent’s enterprise. Thus, it is pleaded that the respondent was forced to reduce the workforce to mitigate effects of the workforce. Further, overtime and final dues were paid. Moreover, when the situation stabilized the claimant and other affected employees were recalled to resume duty and in the process the suit was filed. The respondent negotiated for the appellant to withdraw the suit and at that point the appellant absconded duty. Thus, he was rehired upon known terms but deserted duty without due notice. The termination was not wrongful per section 45(2) of the Act and section 40(1) of the Act had been complied with. The respondent pleaded that the provisions of law had been complied with so that there were not justifications to grant the reliefs sought. The respondent prayed that the memorandum of claim be dismissed with costs.
 5. The respondent filed the submissions on the appeal and the appellant failed to do so.
 6. This being a first appeal the Court will re-examine the facts and arrive at its own conclusions bearing in mind that it did not by itself take the evidence as was done by the trial Court.



7. In finding that the procedure for redundancy under section 40 of the Act had not been complied with, the learned Principal Magistrate stated thus, "... From the evidence adduced, it is clear that no meeting was held prior to the redundancy procedure that took place hence the criteria used for the exercise was unknown to the claimant. We only became aware of this criteria during cross examination evidence; that the same targeted employees in the night shift first. The respondent provided a list of the affected staff including the claimant herein but it is not clear whether they were all night shift employees as per their private policy. Furthermore, no evidence in terms of lost revenue before, during and after the Covid – 19 Pandemic was furnished to show the need for the said redundancy exercise. From where I sit, it would appear that the claimant was ambushed with bad news upon resuming from his annual leave hence no notice had been given to him prior to the official communication of 30/4/2020. In as much as the letter provides channels for the claimant to address any concerns that he had, it was in my view mandatory that he be informed of the respondent's intention to declare some staff redundant based on a clear criterion after which he be served with one month's notice that would eventually take effect after the expiry period. I therefore find that the claimant has established that the respondent did not comply with the selection criteria as set out in the Act." The Court has revisited all material on record and returns that the findings by the trial Court on the pertinent facts and law were correct as quoted. The appellant has not established any material respects in which the trial Court may have erred in finding that the termination on account of redundancy had not complied with the provisions of section 40 of the Act. Perusal of the respondent's submissions on the appeal do not show attack of that finding by the trial Court.
8. The trial Court found that final dues must have been paid as no claim of severance pay had been claimed. Further, it was found that overtime and work on public holidays must have been paid because the bundle of petty cash vouchers produced by the respondent was sufficient proof that the appellant's allegations had not been true. The Court has perused the record and there is no established basis to disturb that finding by the trial Court.
9. In declining the award of notice payment, the trial Court stated that the claimant had not been notified about the redundancy prior to issuance of the notice but the 30 days' notice had anyway been issued prior to the termination. Was that finding valid? The notice to the Kajiado County Labour Officer was dated 30.04.2020 and received by the Labour Officer on May 14, 2020. The claimant's name is listed as number 32. The letter states that the redundancy was to take effect upon expiry of 30 days from April 30, 2020. The claimant resumed work from annual leave on May 4, 2020 and was informed that his employment had been terminated by the notice dated April 30, 2020 - but which had not been communicated to him previously. The Court finds that indeed it cannot be said that a month's notice had been served upon the County Labour Officer and the claimant (appellant) as is provided in section 40(1) of the Act. The Court therefore finds that the trial Court erred in law and fact in finding that the notice was not invalid in the circumstances as to constitute unfair termination of employment under section 45(2) of the Act - and as had been submitted for the appellant before the trial Court. The trial Court further erred in stating that although the claimant was not notified of the intended redundancy prior to issuance of the redundancy notice, the same was still issued 30 days prior to his termination. Respectively, the Court finds that the trial Court misdirected itself in that regard because as already shown by evidence, both the claimant and the County Labour Officer never received the one-month notice as prescribed in section 40 (1) of the Act. The claimant did not receive the notice and was entitled to the one month's pay Kshs 24, 000.00 now awarded.
10. The Court further finds that the trial Court further misdirected itself by concluding, "In conclusion I find that Claimant's case succeeds to the extent of a declaration that the redundancy exercise was unfair only to the extent that he had not been taken through the process prior to the notice being served upon



him. This can be remedied by compensation which I award the claimant one month's salary....” The trial Court had already found the termination unfair because the respondent had failed to show it had complied with the statutory criteria for the selection of the claimant for redundancy, and, had as well failed to establish, by evidence, the extent to which the business had been affected by the Covid-19 Pandemic. Further the trial Court had failed to consider the factors in section 49 of the Act in justifying the award of one-month compensation. The appeal would succeed to that extent.

11. Looking at the factors in section 49 of the Act, the Court considers as follows. First, while the respondent had not established by evidence the loss of revenues attributable to the effects of the Covid-19 Pandemic on the business, the Court would take such judicial notice that enterprises suffered serious constraints during the pandemic – and that was a mitigating factor in favour of the respondent. A further mitigating factor is that after the termination by redundancy and progression to stability, the respondent re-employed the appellant but who opted to desert duty. The Court has considered the aggravating circumstances against the respondent as well being failure to comply with the law on service of the due notices under section 40(1) of the Act and breach of statutory selection criteria. Thus the one-month salary in compensation would be varied to two months making Kshs 24, 000.00 x 2 = Kshs 48, 000.00.
12. The appellant failed to comply with the Court's directions on filing of submissions and each party to bear own costs of the appeal.

In conclusion, the appeal herein is determined with orders:

1. The declaration that the termination of the appellant's employment by way of redundancy was unfair and unlawful.
2. The respondent to pay the appellant a sum of Kshs 72, 000.00 (less PAYE) by April 1, 2023 failing interest to be payable thereon at court rates from the date of this judgment till full payment.
3. The respondent to pay the appellant costs of the suit before the trial Court.
4. Each party to bear own costs of the appeal.
5. The judgment by the trial Court herein and the decree flowing therefrom is varied accordingly.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS THURSDAY 16TH FEBRUARY, 2023

BYRAM ONGAYA

PRINCIPAL JUDGE

