



**Olwende v P & G Distribution East Africa Ltd (Cause 27 of 2020)
[2023] KEELRC 262 (KLR) (1 February 2023) (Judgment)**

Neutral citation: [2023] KEELRC 262 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE 27 OF 2020
S RADIDO, J
FEBRUARY 1, 2023**

BETWEEN

WILFRED MUSANDA OLWENDE CLAIMANT

AND

P & G DISTRIBUTION EAST AFRICA LTD RESPONDENT

JUDGMENT

1. This Cause was heard on 6 October 2022, when Wilfred Musanda Olwende (the Claimant) testified and on 28 November 2022, when the Human Resource Director with P & G Distribution East Africa Ltd (the Respondent) testified.
2. The Claimant filed his submissions on 13 December 2022 and the Respondent on 10 January 2023.
3. The Claimant set out 2 Issues in his submissions:
 - (i) Whether the Claimant's termination on 27th March 2020 on the grounds of redundancy was unlawful?
 - (ii) Whether the Claimant is entitled to the remedies sought in the Amended Memorandum of Claim?
4. The Respondent listed the Issues in dispute as:
 - (i) Whether the Respondent's termination of the Claimant's employment because of redundancy was in accordance with the law?
 - (ii) Whether the Claimant is entitled to the reliefs sought in the Memorandum of Claim?
 - (iii) Who is entitled to the costs of the suit?



5. The Court has considered the pleadings, evidence and submissions and will adopt the Issues as outlined in the submissions.

Unfair redundancy

6. On 16 January 2020, the Respondent issued a notice of potential termination of employment to the Claimant. The reason given for the notice was operational constraints (consolidation and centralisation of business from Dubai).
7. The notice informed the Claimant that consultations would be held over the next 30 days to assess suitable alternatives.
8. The notice further informed the Claimant that:

In the event that your employment is terminated on account of redundancy, the termination of your employment will be effective from 30th June 2020 or an earlier date agreed to by the company and the employee. In such event, you will be required to enter into a separation agreement with the company within 40 days of the date of this letter and an official termination will be delivered to you at least one month prior to the effective date of termination of your employment.
9. In the interlude, the Claimant and Respondent engaged in consultations to separate earlier than the set out date and the Respondent offered the Claimant a Voluntary Separation Agreement.
10. The parties did not agree on the terms of the Voluntary Separation Agreement and the Respondent wrote to the Claimant again 28 February 2020, giving him notice that his position had become redundant and that his last day of work would be 27 March 2020.
11. According to the Claimant, the Respondent's decision to bring the relationship to an end was unilateral as the Respondent had created a legitimate expectation that unless there was mutual agreement, the contract would come to an end on 30 June 2020.
12. The unilateral change of the date of the redundancy, the Claimant urged, was premature and unfair, within the meaning of section 45 of the *Employment Act*, 2007.
13. The Respondent, however, asserted that it carried out the redundancy process within the law, and that it held consultations with all the affected employees including the Claimant and that as part of the consultations, it offered the employees (including the Claimant) a more favourable voluntary separation agreement.
14. Despite the offer, the Respondent contended that the Claimant declined to accept the offer within the set timelines, and thus it was compelled to issue the termination notice(s) of 28 February 2020.
15. The Respondent issued the notice contemplated by section 40(1)(b) of the *Employment Act*, 2007 on 16 January 2020. It also held consultations with the Claimant.
16. In terms of the notice, the separation was to become effective on 30 June 2020, unless there was a mutual agreement to separate at an earlier date.
17. There was no mutual agreement which was a sine qua non for an earlier separation through a voluntary mutual separation, and the Court finds that the contractual effective date of 30 June 2020 remained.
18. The Court is of that view because of the promise made by the Respondent that:



In the event that your employment is terminated on account of redundancy, the termination of your employment will be effective from 30th June 2020 or an earlier date agreed to by the company and the employee.

19. In the case of the Claimant, there was no mutual agreement on separation before 30 June 2020..
20. By bringing the Claimant's contract to an early end without mutual agreement, the Respondent was in breach of its own contractual promise. It was estopped by the written promise from taking such decision.
21. The Court, therefore, finds that the Respondent breached the contract after creating a legitimate expectation that it could only terminate the contract earlier than 30 June 2020 through or after mutual agreement.

Appropriate remedies

Damages for unlawful termination of contract

22. The Claimant prayed for Kshs 1,809,752/- being the equivalent of 12 months' gross wages as compensation.
23. The Respondent had complied with the requirements of section 40 of the *Employment Act*, 2007. However, in addition it made a promise to the Claimant on the effective date of separation. It backtracked on the promise.
24. Had the Respondent not backtracked, the contract would have terminated on 30 June 2020, as outlined in the notice of 16 January 2020.
25. Because of the Respondent's decision, the Claimant lost the wages he would have earned in April, May and June 2020.
26. The Court is, therefore, of the view that the equivalent of 3 months wages the Claimant would have earned over the period would be appropriate and fair compensation.
27. The Court awards Kshs 452,436/- (gross monthly wage was Kshs 150,812/-).

Severance pay

28. The Respondent's evidence that the Claimant was offered severance pay at the rate of 2 weeks' pay for each year of service was not displaced.
29. In the circumstances, the Court has no other legal or contractual foundation to award the further severance pay of Kshs 218,921/- sought by the Claimant.
30. If the Respondent did not pay the severance it offered the Claimant, it should make the payment.

Certificate of Service

31. A Certificate of Service is a statutory entitlement and if the Respondent did not issue one, it should.

Conclusion and Orders

32. From the foregoing, the Court finds that the Respondent was in breach of contract and the Claimant's legitimate expectation on separation date and awards him:
 - (i) Damages Kshs 452,436/-



33. The Respondent to issue a Certificate of Service within 21 days, if one was not issued.
34. The Claimant to have interest on decretal sum from date of judgment together with costs.

DELIVERED VIRTUALLY, DATED AND SIGNED IN KISUMU ON THIS 1ST DAY OF FEBRUARY 2023.

RADIDO STEPHEN, MCI Arb

JUDGE

Appearances

For Claimant Bruce Odeny & Co. Advocates

For Respondent Coulson Harney LLP Advocates

Court Assistant Chrispo Aura

