



REPUBLIC OF KENYA



**Inyambukho v Orchid Furnitures Ltd (Cause 788 of 2018)
[2023] KEELRC 757 (KLR) (24 March 2023) (Judgment)**

Neutral citation: [2023] KEELRC 757 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 788 OF 2018
AN MWAURE, J
MARCH 24, 2023**

BETWEEN

JOSEPH AMBETSA INYAMBUKHO CLAIMANT

AND

ORCHID FURNITURES LTD RESPONDENT

JUDGMENT

1. The claimant filed a memorandum of claim dated May 22, 2018.
2. He avers that he was employed by the respondent in 2013 as a machine operator and he issued him a contract of employment. He was being paid kshs 17,000/-. He says his salary was increased to kshs 18,500/- inclusive house allowance.
3. He states that on March 22, 2018 the respondent's Human Resource Manager informed him they were to reduce their workforce and claimant was one of those to be terminated in that regard.
4. He says respondent did not follow the right procedure in terminating him and he prays for damages as per paragraphs 11 (1) a-c the statement of claim. The total claimed by the claimant is Kshs 373,230/- plus costs and interest and certificate of service.

Respondent's case

5. The respondent filed a statement of response dated July 11, 2018. He denies the averments of the claimant in his memorandum of claim. He however states that as per the collective bargaining agreement signed by shoppers Sacco Limited on behalf of the respondent and the employees the respondent was mandated to pay all dues to the Sacco employees for dispatch to the relevant employees. He affirms he paid all dues to the claimant and he signed and accepted the payment and appended a thumb print.



6. He says the claimant's statement of claim is therefore baseless and scandalous and vexatious and he applies it be struck off in its entirety.

Claimant's evidence in court

7. The claimant in his evidence stated that on March 22, 2018 the respondent Human Resource Manager summoned and informed him the employer had decided to reduce the number of employees and he was one of those to be terminated. He says he was given notice why he would be terminated and he signed the letter.

Respondent's evidence

8. The respondent's witness is Michael Rotich and he says he was part of trade union that served claimant with termination letter and the right procedure was followed to terminate him. He says claimant worked for the respondent for five years and had no disciplinary issues. He was terminated because the respondent's client's base reduced.

Claimant's submissions.

9. The claimant says the respondent did not explain the reasons for terminating the claimant from employment and no reasons were given for declaring claimant redundant. He says that according to *David Gichana Omuya v Mombasa Maize Millers Ltd* [2014] eKLR the court held that section 43 of the *Employment Act* has placed a statutory obligation upon the employer to prove the reasons for terminating the services of an employee. Section 45 of the *Act* on the other hand requires the employer to prove that the reason for terminating are valid and fair reasons. The claimant submits the termination herein was substantially unfair.
10. The claimant also states the procedure followed to declare claimant redundant was flawed and not in keeping with section 40 of the *Employment Act*. The claimant relied on the case of Bernard A. Kagasi v For You Chinese Restaurant [2014] eKLR where court laid down the conditions to be met before terminating an employee from employment on account of redundancy and this is as laid down in section 40 of *Employment Act*.
11. The claimant states the process was not followed and so was procedurally unfair.
12. The claimant prays for 12 months compensation as the other prayers of one month salary in lieu of notice, March 2018 salary and severance pay were paid. He also prays for costs of the suit.

Respondent's submissions.

13. The respondent avers that the claimant claims he was unlawfully terminated and yet the respondent says the claimant was informed the reason for termination was redundancy. As for procedural fairness the respondent says claimant was a member of Shoppers Sacco Society Limited and all payments were channelled for onward transmission to the claimant.
14. The respondent also says that according to section 43 of *Employment Act* provides that the reason behind the termination of an employee is valid if an employer believed such a reason to genuinely exist and in this case it was based on operational requirement of the employer as in section 45(2) (b)(1) of *Employment Act*.
15. The respondent says they complied with procedural fairness requirement as the Shoppers Sacco Society Limited was informed of claimant's redundancy. He therefore avers the procedural requirements were met.



16. Respondent says the claimant was paid his terminal dues and is not entitled to the 12 months compensation.
17. The respondent also says claimant failed to discharge the onerous of burden of proof and so prays his claim be dismissed and costs and interest be awarded to the respondent.

Analysis and determination

18. The claimant was served with a termination letter dated March 28, 2018 and was informed that his services were declared redundant. The issues for determination was whether he was unfairly and unprocedurally declared redundant and whether he is entitled to the dues prayed.
19. The law that sets out termination on basis of redundancy are section 40 1(a-h) of the [Employment Act](#) which states as follows.
 - (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.
20. The court from the evidence on record does not find any iota of evidence that the respondent complied with the provisions in section 40 of the [Employment Act](#). There is no evidence of notice of the intended redundancy to the union and to the labour officer where claimant operated from. There is no notice also to the claimant. Ideally the notice to the union and the labour officer should be one month before the intended redundancy. The letter to Shoppers Sacco Society Limited is merely forwarding the payment to the said Sacco. There is no way a Sacco can be equated to a Union unless a certificate of registration of the union is provided to prove such a union exists.
21. The respondent did not inform the claimant the criteria of declaring his position redundant based on length of years worked and skills. In fact there is no evidence that there was a conversation pertaining to the criteria between the claimant and the respondent before the termination.



22. The claimant in his submissions admitted he was paid severance pay and salary in lieu of notice and unpaid salary even though the claimant says he was paid after filing suit and so claims he is entitled to costs.
23. The conditions precedent to declaring an employee redundant under section 40 of the [Employment Act](#) are mandatory and not to be left to the choice of the employer.
24. The respondent must comply with the procedural mandate provided in section 41(1) of the [Employment Act](#) as well in declaring the employee redundant. In the case of [Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 Others](#) [2014] e KRL the court stated: -

“As a whole for any termination of employment under redundancy to be lawful it must be both substantially justified and procedurally fair.”
25. Also the case of [Jane Khalechi v Oxford University Press EA Limited](#) [2013] eKLR the court held:

“Section 40 of the [Employment Act](#) 2007 gives the conditions precedent before one is declared redundant. These conditions outlined in the law are mandatory and not left to the choice of the employer.
26. The present case the respondent failed to give valid justification for declaring the redundancy and as well failed to follow the mandated process for declaring an employee redundant. The court therefore holds the claimant was unfairly and un procedurally terminated.
27. Having found judgment in favour of the claimant and the claimant having admitted in his submissions that he was paid his dues, the court will award the claimant damages for unfair termination. He is awarded 5 (five) months’ salary equivalent as general damages. The same is totalling kshs 113,100/- plus costs are awarded to the claimant and interest at court rates from date of judgment till full payment. Claimant also to be availed certificate of service within 14 days herein.
28. Orders accordingly.

Dated, Signed and Delivered virtually in Nairobi this 24th day of March 2023.

ANNA NGIBUINI MWAURE

JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of the Constitution which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

ANNA NGIBUINI MWAURE



JUDGE

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