Mutiso v Cummins Car & General Ltd (Cause 427 of 2018) [2023] KEELRC 601 (KLR) (13 March 2023) (Judgment)

Neutral citation: [2023] KEELRC 601 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 427 OF 2018

JK GAKERI, J

MARCH 13, 2023

BETWEEN

SAMUEL MUTHOKA MUTISO .... CLAIMANT

AND

CUMMINS CAR & GENERAL LTD .... RESPONDENT

JUDGMENT

1. The claimant commenced this suit by a memorandum of claim filed on March 28, 2020 alleging unlawful termination on account of redundancy and unpaid dues.
2. The claimant avers that he was employed by Car and General (Trading) Ltd as an Assistant Import Manager on August 2, 2011 and served diligently to the satisfaction of the respondent.
3. That on or about March 16, 2017, Car and General Ltd transferred its business to Cummins Car and General Ltd, the respondent and the claimant was absorbed by the company, thus terminating the contract with Car & General Ltd and signed a new contract dated March 15, 2017.
4. The claimant avers that the President of the respondent was unequivocal that no employee of Car & General would loose his/her employment on account of the merger.
5. That his salary had by then risen from Kshs.80,000/= to Kshs.108,790/= per month.
6. It is the Claimant's case that while on leave in December 2017, the Respondent gave a 10% salary increment to staff effective January 2018 but when he resumed duty on January 19, 2018, he was issued with a redundancy letter that the respondent had outsourced the services the claimant was rendering for cost efficiency, effectiveness and customer satisfaction.
7. That his duties were given to his newly employed assistant and later to another person.
8. The claimant further avers that by the time he left, he had not received the salary increment.

9. That he was forced to proceed on leave in January 2018.

10. The claimant avers that the purported outsourcing of his services was not factual and was terminated from employment when on forced leave and his seniority skills and reliability were not considered and attendant dues were not paid in violation of the law.

11. The claimant prays for;

    i. A declaration that his termination on account of redundancy was unprocedural, unlawful and illegal.

    Compensation in terms of paragraph 15 (incorrectly cited as 14) as follows;

    ii. 12 months compensation Kshs.1,436,028.00

    iii. One month's salary in lieu Kshs.119,669.00

    iv. Service pay 15 days x 6 years Kshs.119,669.18

    v. 39 accumulated leave days.

        vi. Salary upto January 23, 2018 (23 days)

    vii. Total pension payable

    viii. Damages for unlawful termination.

    ix. Certificate of service.

    x. Costs of the claim.

    xi. Interest on (ii), (iii), (iv), (v) and (vi).

Respondent's case

12. The respondent admits the Claimant's employment history at Car & General Ltd in 2011 and the Claimant obtained a salary increment in January 2018.

13. It is the respondent's case that the redundancy was occasioned by the challenging business environment which called for cost cutting measures and the intention to declare redundancy was communicated prior to the declaration and the claimant signed the notice for purposes of payment of dues but had to clear with the Respondent prior to collection of dues but did not do so.

14. The respondent further avers that the claimant's services were outsourced to Intraspeed Arcpro (K) Ltd and Sea Freight.

15. The respondent denies that the claimant is entitled to damages as he had not cleared with the respondent and his position ceased to exist after redundancy was declared.

Counter-Claim

16. The respondent avers that the claimant took an I.O.U of Kshs.70,000/= which he did not settle and retained the respondent's laptop even after demand.

17. The respondent prays for;

    a. Kshs.45,000/= being the cost of the laptop the claimant retained.

    b. Kshs.70,000/= taken from the respondent.

c. Declaration that the claimant was duly and lawfully declared redundant.

d. Costs of the suit with interest.

Claimant's evidence

18. The claimant adopted the written statement.

19. On cross-examination, he confirmed that as at the date of termination of employment, his employer was the respondent.

20. That his duties included clearing and forwarding, dealing with international suppliers of the company from the United Kingdom, China and India and logistics.

21. That he was aware that the duties were outsourced in January 2018 and equally aware that DSV and Afro logistics cleared goods for the Respondent globally but were not doing it when he was employed in 2011.

22. That in December 2017, he was on leave for two (2) weeks and the leave was voluntary as he was taking university examinations contradicting his written statement which stated that he was forced to proceed on leave.

23. That he was not called for a meeting on January 18, 2018 and redundancy was not discussed and he did not speak thereat.

24. The claimant testified that he was forced to sign the document on redundancy on January 24, 2018 and had been called from home and completed the staff clearance on the same day which stated the reason for cessation of employment as redundancy.

25. That he did not register any misgivings about it.

26. The claimant denied knowledge of the I.O.U and stated that it was taken by his junior but admitted that he had the Respondent's laptop valued at Kshs.40,000/=.

27. That he visited the office for payment but was not paid and the dues remained outstanding.

28. The witness confirmed that as per the computation of dues form dated 7th August, 2018, his salary was Kshs.119,699/= and the letter of redundancy stated that payment of dues was subject to clearance and that he did not clear.

29. On re-examination, the claimant maintained that his office was not abolished. That there was no meeting on January 18, 2018, but an oral conversation and did not sign the minutes and had no opportunity to complain about the redundancy.

30. That he signed the letter of January 24, 2018 because payment had been promised and did not desert the place of work and was not given a letter of salary increment.

Respondent's evidence

31. RWI, Faith Wambui testified that she was the Supply Chain leader engaged in August, 2017. That the company was engaged in a cost saving exercise including outsourcing and there was no position for the claimant to be placed in and his position was thus rendered superfluous as outsourcing was more cost effective.

32. The witness testified that the letter to the Labour Office was dated January 19, 2018 and had no receipt stamp or acknowledgement.

33. That the claimant attended the meeting on January 18, 2018 and was informed of the redundancy and the letter would be ready on January 24, 2018.

34. It was RWI's testimony that the claimant's dues were processed and the cheque was due for collection on April 24, 2018 but the witness was unsure of who the claimant reported to in the office on that day.

35. It was her testimony that the claimant's position was not re-advertised as the document on record had neither source, nor date and the vacancy was in Car and General not the respondent.

36. The witness denied that the claimant's redundancy was a sham. That the respondent's computation of dues factored in the claimant's salary increment of 10% as all employees had benefited from it.

37. That Car and General and the respondent concluded the merger agreement in 2017 and outsourcing was an imperative.

38. On re-examination, the witness testified that one, Mr. Mbithi was also affected by the redundancy and was in the claimant's department.

Claimant's submissions

39. The claimant's counsel identified seven issues for determination, namely; unlawful termination of employment or redundancy, salary increment of 10%, compliance with Section 40 of the *Employment Act , 2007*, entitlement to compensation, severance pay, terminal dues and costs.

40. On the 1st issue, counsel contended that the claimant's duties were distributed to his assistant and he was the only one declared redundant as there was no evidence of anyone else and thus the claimant was discriminated and did not give the claimant the requisite notice.

41. That the claimant's employment was terminated when he was on leave and due process was not followed.

42. The decision in Walter Ogal Anuro v Teachers Service Commission (2013) eKLR was relied upon to underscore the essence of fairness in termination of employment.

43. It was urged that the claimant was ambushed by the Respondent.

44. As regards compliance with Section 40 of the *Employment Act*, counsel submitted that the Respondent had not provided a notice or memo of a redundancy meeting with the claimant or evidence of notice to the Labour Officer or evidence of the options it considered before declaring the Claimant redundant.

45. Counsel submitted that the termination of the claimant's employment was in violation of section 41 (2) of the *Employment Act*.

46. On the salary increment of 10%, counsel submitted that the claimant was entitled to the increment analogous to all other employees as discrimination at the work place was outlawed by section 5 (3) of the *Employment Act , 2007*.

47. On entitlement to the reliefs sought, counsel submitted that he was entitled to the reliefs outlined in paragraph 15 of the memorandum of claim including one month's salary in lieu of notice and maximum compensation as was the case in Alphonse Maghanga Mwachanya V Operation 680 Ltd (2013) eKLR.

48. Finally, counsel submitted that the Claimant was entitled to costs.

49. Reliance was also made on the decisions in Kenya Airways Ltd v Aviation & Allied Workers Union (K) (2014) eKLR, Jerusha Nyambura Maingi v Sen-tech Ltd, Francis Kiragu v River Cross Technologies among others.

Respondent's submissions

50. Counsel for the Respondent isolated three issues for determination, namely; whether the redundancy was justifiable, lawful and fair, entitlement of the Claimant to the prayers sought and costs.

51. On the 1st issue, counsel cited the decision in Agnes Ongadi V Kenya Electricity Transmission Co. Ltd (2016) eKLR to urge that declaration of redundancy was an employer's prerogative as long as there was a justifiable business reason and the law prescribed the procedure as held in Daniel Mburu Muriu V Hygrotech East Africa Ltd (2021) eKLR which involved notice of the intended redundancy to the union or employee affected and the labour officer. Reliance was also made on Mary Nyawira Karimi V Pure Circle (K) Ltd (2018) eKLR.

52. That the respondent served a notice to the labour officer but due to photocopying, the copy does not show the Labour Officer's stamp and the claimant did not seek leave for the Respondent to produce the original copy of the document.

53. The claimant had been invited for a meeting to discuss the redundancy before the letter was delivered a day later and the Respondent undertook to pay his dues.

54. The decision in Martin Mwangi V Protocal Solutions Ltd was relied upon to reinforce the submission.

55. That the claimant accepted the redundancy by signing the letter on January 24, 2018 and was thus bound as was held in Mercy Wangari Muchiri v Total Kenya Ltd (2020) eKLR.

56. Counsel submitted that the Claimant was informed of the impending redundancy on January 18, 2018 and received the letter dated January 19, 2018 and was promised payment of terminal dues subject to clearance which he did not until July 4, 2018 and did not collect the cheques drawn in his favour.

57. That the claimant's salary stood at Kshs.119,669/= in January, 2018.

58. Counsel further submitted that discrimination was neither pleaded nor testified about and was of no moment as there was no discrimination.

59. Counsel submitted that no other person was employed in the claimant's position as Intraspeed Arcpro Ltd and Sea Freight Ltd had been contracted to render services as admitted by the respondent's witness.

60. That the respondent explored other options for the claimant for alternative posting but there was none as RWI testified and the claimant did not provide documentation on his skills and qualifications beneficial to the company.

61. As regards entitlement to the prayers sought, reliance was made on the decision in Kenya Airways Corporation Ltd v Tobias Oganya Auma & 5 others (2007) eKLR on the employer's freedom to restructure or adopt new technology subject to observance of the law.

62. That the claimant had not proved that his employment was unfairly terminated.

63. Counsel submitted that the respondent employed the prescribed procedure.

64. Counsel urged that the claimant was not entitled to the reliefs sought.

65. On costs, counsel relied on the provisions of Section 12 (4) of the *Employment and Labour Relations Court Act , 2011* and Rule 29 of the Employment and Labour Relations Court (Procedure) Rules, 2016 to urge that costs should be awarded to the Respondent.

Determination

66. The issues for determination are;

    i. Whether the claimant was declared redundant or unlawfully terminated from employment.

    ii. Whether the claimant is entitled to the reliefs sought.

67. As to whether the claimant's employment was unlawfully terminated or he was declared redundant, parties have adopted opposing positions. Whereas the Respondent submitted that the redundancy was lawful and procedural, the claimant's counsel submitted that it was an unfair termination disguised as a redundancy for among other reasons, absence of a notice and consultations notice to the labour officer and selection criterion. The respondent's counsel submitted that the provisions of the *Employment Act* were complied with.

68. An opportune starting point is the concept of redundancy.

69. Section 2 of the *Employment Act , 2007* defines redundancy to mean;

> The loss of employment, occupation, job or career by involuntary means through no fault of the 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.

70. Redundancy may be a consequence of a corporate restructuring, re-organization, adoption of modern technologies, increased mechanization or adoption of a business model which impacts negatively on employees.

71. Needless to emphasize, business entities have the prerogative to re-organize or restructure their business for their benefits and the concomitant right to declare redundancies if satisfied that it is justifiable in the circumstances as was held in Tobia Ongaya Auma & 5 others v Kenya Airways (Supra) and G.N. Hale & Sons Ltd V Wellington Caterers (1990) 2 NZILR 1079 cited in Kenya Airways Ltd v Aviation & Allied Workers Union Kenya & 3 others (Supra) where Murgor JA stated as follows;

> " . . . There are diverse business concepts which when effected, can cost effectively, facilitate expansion and growth of a business, while reducing work force requirements. Outsourced services is one of such widely accepted business concepts which enables a company to focus on core business, reduce overheads, increase cost efficiency, savings and manage cyclical resource demands. It is not designed to deprive Kenyans of their jobs."

72. In sum, the decision of whether or not to declare redundancy, is that of the employer based on commercial consideration. However, for a redundancy to come to fruition, the process must be effected in accordance with the law.

73. Section 40 of the *Employment Act* sets out the procedural steps to be complied with in accomplishing a redundancy.

74. In Freight-In Time Ltd v Rosebell Wambui Munene (2018) eKLR, the Court of Appeal stated as follows;

> "In addition, section 40 (1) of the *Employment Act* prohibits, in mandatory tone, the termination of a contract of service on account of redundancy, unless the employer complies with the following seven conditions, namely;
>
> a. If the employee to be declared redundant is a member of a union, the employer must notify the union and the local labour officer of the reasons and the extent of the redundancy at least one month before the date when the redundancy is to take effect;
>
> b. If the employee is not a member of the union, the employer must notify the employee personally, in writing together with the Labour Officer;
>
> c. In determining the employees to be declared redundant, the employer must consider seniority in time, skill, ability, reliability of the employees;
>
> d. Where the terminal benefits payable upon redundancy are set under a collective agreement, the employer shall not place an employee at a disadvantage on account of the employee being or not being a member of a trade union;
>
> e. The employer must pay the employee any leave due in cash;
>
> f. The employer must pay the employee at least one month's notice or one month's wage in lieu of notice; and
>
> g. The employer must pay the employee severance pay at the rate of not less than 15 days for each completed year of service."

75. I will now proceed to apply the foregoing provisions of the law to the facts of the instant case.

76. As regards notice, documentary evidence on record show that the redundancy notice to the Claimant is dated January 19, 2018 and the effective date is January 24, 2018. The letter is unambiguous that "this has led to the termination of your employment effective the January 24, 2018."

77. The notice stated that the redundancy was occasioned by a management decision to outsource logistics and other activities relating to clearing and forwarding which the claimant was performing and the purpose was to imbue cost effectiveness, efficiency and customer satisfaction.

78. On cross-examination, the claimant confirmed that indeed the Respondent outsourced certain functions to some two companies. He described the functions as his job. This fact was confirmed by RWI on cross-examination. From the evidence on record, the redundancy notice would appear to pass the test on the reason and extent of the redundancy. Outsourcing is a generally accepted business approach to cost effectiveness and efficiency.

79. However, the notice did not meet the legal threshold prescribed by the provisions of section 40 (1) (a) of the *Employment Act* on account that the notice must be issued at least one month before the date when the redundancy is to take effect. The Respondent gave the claimant a notice of 4 days.

80. Contrary to the respondent's counsel's submission that the one-month notice pay cured the non-compliance with Section 40 (1) (a) of the *Employment Act*, this is not the case as Section 4 (1) (f) provide for a one month notice independent of Section 4 (1) (a) of the Act.

81. As regards notice to the Labour Officer, the copy on record is dated January 19, 2018. The letter makes no reference to the reasons for and extent of the redundancy as provided by section 40 (1) (a) of the *Employment Act*. It merely states that the claimant's services became "superfluous and the practices commonly known as abolition of office, job or occupation and thus leads to loss of employment" a replication of part of the definition of the term redundancy under Section 2 of the *Employment Act , 2007*.

82. In the court's view, section 40 (1) (a) of the *Employment Act* requires the employer to provide verifiable factual circumstances which culminated in the loss of the employee's employment. The court finds the letter to the Labour Officer inadequate in that respect.

83. Be that as it may, the more pertinent issue is whether the notice was served upon the Labour Officer, Nairobi South Region. When asked about the letter on cross-examination, RWI confirmed that the letter had no receipt stamp or other form of acknowledgment by the Labour Officer and did not provide an explanation.

84. Surprisingly, in his submissions, counsel for the respondent submitted that the receipt stamp was invisible on account that the document on record is a copy and the claimant did not file a notice to produce for the Respondent to avail the original copy. I disagree. A party's documentary evidence in court is taken as it is and no degree panel beating can alter or change a document or record. It speaks for itself. Moreover, it is trite that submissions are not evidence.

85. In Freight In Time v Rosebell Wambui Munene (Supra), the Court of Appeal held;

> " The requirement to issue a separate notice to the Labour Officer, simultaneously with the termination notice, is mandatory. Failure to issue renders the redundancy unlawful. On record there is no evidence to prove that a separate notice was issued to the Labour Officer."

86. Similarly, in Barclays Bank of Kenya Ltd & another v Gladys Muthoni & 20 others (2018) eKLR, the Court of Appeal was categorical that;

> " It is mandatory to serve the same notice on the Labour Officer."

87. In Francis Kiragu Waweru V Rivercross Technologies Ltd (2019) eKLR, Onyango J. held as follows;

> " In the absence of the notice to the Labour Officer, I find that the redundancy amounted to an unfair termination of employment. In Bernard Misawo Oboro v Coca Cola Juices Kenya Ltd (2015) eKLR, it was held that the notice to the Labour Officer is meant to elicit advice to the employer on the modalities to be employed on the redundancy process. This is an important process which not only ensures proper preparation for the affected employees but also acts as a control measure to curb against unlawful termination clothed as redundancy."

88. The court is guided accordingly.

89. In the absence of proof that the letter on record was actually served on the Labour Officer at least one month before the effective date and guided by the foregoing sentiments of the Court of Appeal and this court, the court is satisfied and finds that the Respondent has failed to proof on a balance of probabilities that it served a 30 days notice on the Labour Officer as by law required.

90. As regards consultation, it is trite that the same ought to take place before the declaration of redundancy.

91. This position finds support in Barclays Bank of Kenya Ltd & another v Aviation & Allied Workers Union Kenya & 30 others, the Court of Appeal held as follows;

> "In the end, we are persuaded that the dicta of Maraga and Murgor JJ.A regarding consultations prior to declaration of redundancy resonate with our constitution and international laws which have been domesticated by dint of Article 2 (6) of the *Constitution*. Furthermore, consultation was necessary before the redundancy notices were issued. Article 13 of Recommendation No. 166 of the ILO Convention No. 158 – Termination of Employment Convention 1982 that law is applicable in this country. The purpose of the provision as Maraga JA emphasized: "Is to give the parties an opportunity to consider measures to be taken to avert or to minimise the terminations and measures to mitigate the adverse effects of any terminations on workers concerned such as finding alternative employment." The consultations are therefore meant to cause the parties to discuss and negotiate a way out of the intended redundancy if possible or the best ways of implementing it if it is unavoidable.
>
> Murgor JA, in the same case stated as much adding: ". . . Consultations in redundancies are two-way discussions between the employer and the union to be conducted with candour, reasonableness and commitment towards addressing the concerns of both management and employees and focused on reaching solutions."

92. The foregoing sentiments are reinforced by the words of Mbaru J. in Agnes Ongadi v Kenya Electricity Transmission Co. Ltd (2016) eKLR as follows;

> "A restructuring or abolition of office are not matters that just happen. They require serious consideration by the employer and based on the positions held by various officers, all efforts must be shown to have been made to retain or redeploy such officers as to abolish office and then advertise for recruitment of persons with similar skills and abilities without giving a consideration internally would be to abuse the very essence of a restructuring and purpose of abolition of office . . ."

93. In this case, the respondent produced an email dated January 18, 2018 at 7.19 pm from one Carol Omajo to the Claimant copied to one Faith Wambui under the subject Minutes of meeting Held on January 18, 2018 under the heading

> "Below is a write-up of our meeting held today" and present were Faith Wambui, Carol Omanjo and the claimant and the Agenda discussed were redundancy and dues.

94. Although the claimant maintained that he did not speak at the meeting, he was present and the minutes suggest that he spoke on the issue of redundancy which is of no moment.

95. What is elemental is whether there were consultations before the claimant was declared redundant.

96. Although the email is sufficient evidence of the meeting which the claimant acknowledged having attended, it does not signify consultations as a decision had already been made about the outsourcing and the claimant's redundancy.

97. At most, it was a briefing session to bring the claimant on board before the letter was issued a few days later as the minute 2 promised.

98. The respondent appear to have kept the claimant out of its deliberations to outsource certain services and the impact it would have on the claimant as there was no evidence that any other person was involved.

99. Although on re-examination, RWI mentioned one Samuel Mutiso as having been affected, no cogent evidence was availed in support of the allegation.

100. The respondent tendered no evidence of any effort made to retain or redeploy the claimant. It did not assess his skills for redeployment.

101. In the end, it is the finding of the court that the respondent has not demonstrated that it consulted the claimant in the manner envisioned by law.

102. Closely related to the foregoing, the respondent adduced no evidence that it had a selection criteria or considered anything before declaring the claimant redundant. His seniority, skill, ability and reliability do not appear to have been considered as mandated by the provisions of Section 40 (1) (c) of the *Employment Act , 2007*.

103. Contrary to the respondent's counsel's submission that the claimant did not avail documentation or academic qualifications or experience, it was the duty of the respondent to engage him on that issue since it had his documentation. The fact that he was undertaking studies at the university to enhance his skills reinforces the position that the respondent should have considered a redeployment in other departments in any of its branches in or outside the country.

104. Having found that the respondent did not fulfil the requirement of consultations before declaring the claimant redundant, provided insufficient notice and did not serve the redundancy notice on the Labour Officer, it is the finding of the court that the non-compliance with the requirements of section 40 of the *Employment Act* rendered the purported redundancy an unfair termination of employment which entitles the Claimant to the remedies provided under Section 49 (1) of the *Employment Act , 2007*.

105. As regards entitlement to the reliefs sought, the court proceeds as follows;

a.Declaration

106. Having found that termination of the claimant's employment on account of redundancy was unfair, a declaration to that effect is hereby issued.

b.Compensation

107. From the contents of the redundancy letter dated January 19, 2018, and signed by the claimant on January 24, 2018, it is apparent that the parties had agreed on the amount due to the claimant and what was to be deducted and in particular the amount due in respect of the laptop which the claimant confirmed as Kshs.40,000/=.

108. Although on cross-examination, the claimant alleged that he was forced to sign the redundancy letter, he adduced no evidence on who coerced him, where and how? Furthermore, on re-examination, he testified that he signed the letter because he had been promised payment.

The alleged coercion was unproven.

109. Consequently, the Claimant is awarded;

    1. Salary upto and including January 23, 2018.

2. One month's salary in ***lieu*** of notice.

3. Severance pay at 15 days per year (6 years)

4. 39 days accumulated leave days.

5. Damages and compensation for unlawful termination.

6. Pension

110. This prayer is identical to the prayer for the sum of Kshs.1,436,028/= equivalent to 12 months salary under Section 49 (1) (c) of the *Employment Act* and was not proven.

111. Granted that the respondent had a contributory pension scheme and the claimant was a member, he is entitled to the amount due to him in accordance with the Agreement between the respondent and the Administrator of the Scheme.

112. The allegation of discrimination was not substantiated to attract any relief.

113. As regards compensation for the unlawful termination of employment, the court has taken into consideration the fact that the claimant served the Respondent for 6 years, did not contribute to the termination of employment and was a diligent employee. However, he neither expressed his wish to remain in the Respondent's employment nor appeal the decision by management.

In the circumstances, the equivalent of two (2) month's salary is fair.

7. Certificate of service

114. The claimant is entitled to a certificate of service by dint of Section 51 of the *Employment Act , 2007*.

Counter-Claim

115. The respondent's counter-claim had four prayers and the court proceeds as follows;

i. Declaration that the claimant's redundancy was lawful

116. Having found that the Respondent did not comply with the provisions of Section 40 of the *Employment Act , 2007*, the declaration sought is declined.

ii. Laptop Kshs.45,000/=

117. Although the evidence on record reveals that the laptop in question was not returned, demand notwithstanding, the value was contested. While the claimant testified on cross-examination that the exact value was Kshs.40,000/=, the respondent's witness did not avail evidence of the value of the laptop.

118. In the circumstances, the respondent is awarded Kshs.40,000/= being the value of the laptop.

iii. I.O.U Kshs.70,000/=

119. The respondent's witness tendered no direct oral evidence on the I.O.U but produced an approved petty cash request by the claimant dated November 10, 2017 which though not signed by him, bears his name as the requesting officer and was approved by Faith Wambui his supervisor, and one Eric Sangoro.

120. On cross-examination, the claimant confirmed that the I.O.U was requested by his juniors who were working under him. He could not, however, explain why the unnamed juniors used his name as the requester.

121. The court, in the circumstances is satisfied that the claimant made the request for Kshs.70,000/= and the same was not paid.

The Respondent is awarded Kshs.70,000/=.

122. As regards costs, both parties have prayed to be awarded costs.

123. It is trite that costs are a matter of discretion of the court.

124. According to Halsbury's Laws of England, 4th Edition (Re-issue) 2010 Vol. 10 Paragraph 16;

> " The court has discretion as to whether costs are payable by one party to another, the amount of those costs, and when they are to be paid. Where costs are in the discretion of the court, a party has no right to costs unless and until the court awards them to him and the court has an absolute and unfettered discretion to award or not to award them. This discretion must be exercised judicially; it must not be exercised arbitrarily but in accordance with reason and justice."

125. Similar sentiments were expressed by Kuloba J. (retired) in Judicial Hints on Civil Procedure, 2011 at page 94. See also Party of Independent Candidate of Kenya v Mutula Kilonzo & 2 others HCEP No. 6 of 2013.

126. Similarly, in Biashara Sacco Society Ltd & 82 others V Dickson Miricho Kihagi (2016) eKLR.

127. Mativo J. (as he then was) catalogued some of the salient factors a court must consider in determining the issue of costs, such as conduct of the parties, subject of litigation, circumstances that led to the proceedings, stage at which they were terminated, relationship between the parties, need to promote reconciliation among others.

128. The foregoing sentiments and holding have a statutory orientation under the provisions of the *Employment and Labour Relations Court Act , 2011* and attendant Regulations, 2016.

129. Section 12 (4) of the *Employment and Labour Relations Court Act , 2011* provides that;

In proceedings under this Act, the court may, subject to the rates make such orders as to costs as the court considers just.

130. Regulation 29 (1) of the Employment and Labour Relations Court (Procedure) Rules, 2016 provide that;

> The court shall be guided by Section 12 (4) of the *Employment and Labour Relations Court Act* and Advocates (Remuneration) Order in awarding costs.

131. Instructively, even after the claimant filed the instant suit, the respondent processed his dues, drew cheques in his favour and invited him to collect the cheques but he failed to do so and the cheques had to be cancelled.

132. Similarly, both parties are successful in their claims.

133. In the circumstances, the court is disinclined to award costs as both parties took the necessary steps to reinforce their claims.

134. In the end, judgement is entered for the claimant against the respondent in the following terms;

a. Declaration that termination of the claimant's employment was unfair.

b. One month's salary in lieu of notice.

c. Salary upto and including January 23, 2018.

d. Severance pay at 15 days per year for 6 years.

e. 39 days accumulated leave days.

f. Equivalent of 2 month's salary.

g. Interest on the total sum due under (b), (c), (d), (e) and (f) from date hereof till payment in full.

h. Certificate of service.

135. The respondent's counter-claim is successful to the extent the sum of Kshs.110,000/= is awarded to the respondent.

136. In the circumstances of this case, the court is satisfied that parties should bear own costs.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 13TH DAY OF MARCH 2023

DR. JACOB GAKERI

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 ***Civil 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.

DR. JACOB GAKERI

JUDGE

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