



**Mavyuva v Wealth Creator Security Limited (Cause 2067 of 2017)
[2023] KEELRC 838 (KLR) (12 April 2023) (Judgment)**

Neutral citation: [2023] KEELRC 838 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 2067 OF 2017
JK GAKERI, J
APRIL 12, 2023**

BETWEEN

BENSON NZIOKA MAVYUVA CLAIMANT

AND

WEALTH CREATOR SECURITY LIMITED RESPONDENT

JUDGMENT

1. The claimant commenced this suit by a Memorandum of Claim filed on October 16, 2017 alleging unlawful and unfair termination on account of redundancy and non-payment of terminal dues and benefits.
2. The claimant avers that he was employed by the respondent on October 15, 2012 as a Supervisor and remained in the same position until termination of employment and his basic salary was Kshs.15,000/= per month. That he served the respondent for over 5 years.
3. It is the claimant's case that he was neither given a notice of termination nor paid terminal dues.
4. The claimant prays for;
 - a. A declaration that termination of employment was unlawful and an order that the Claimant be paid dues and benefits of Kshs.326,538/= comprising;
 - i. One month's salary in lieu of notice Kshs.15,000/=.
 - ii. Salary for April Kshs.15,000/=.
 - iii. 7 days worked in May Kshs.4,038/=.
 - iv. 24 leave days (5 years) Kshs.69,231/=.
 - v. Severance pay (15x5 years) Kshs.43,269/=.



- vi. 12 months compensation Kshs.180,000/=.
- Total Kshs.326,538/=.

Respondent's case

- 5. Evidence on record show that the claimant's advocate on record caused the service of summons and the Memorandum of Claim on the respondent through one Mr. Francis Kiumbi (Captain) who visited the court Process Server's Office on April 11, 2018 but declined to stamp and sign a copy.
- 6. However, the respondent neither entered appearance nor filed a response to the claim and on May 2, 2019, the court directed that the case proceeds for hearing as an undefended claim and hearing took place on January 23, 2023.

Claimant's evidence

- 7. The claimant adopted his written statement testifying that he was employed on November 15, 2015 and was declared redundant on May 7, 2017 and had no advance notice. That the director called them to inform them that there was no more work for them.
- 8. The claimant provided a statement from the National Social Security Fund dated May 25, 2017 showing that he was an employee of Wealth Creator Security Ltd, the respondent and NSSF Contributions had been made up to March 2017.

Claimant's submissions

- 9. The claimant's counsel identified two issues for determination, namely;
 - i. Whether termination of the claimant's employment was unlawful.
 - ii. Whether the claimant is entitled to the reliefs sought.
- 10. As regards termination of employment, counsel relied on the provisions of section 2 and 40 of the *Employment Act*, 2007 to urge that the purported redundancy was not conducted in accordance with the law as the Labour Officer was not notified of the intended redundancy, and there were no consultations, or section criteria.
- 11. Decisions in *Luke Kinyua Kamunti v Amigos Nuts and Commodities Ltd* (2019) eKLR and *Dennis Leak Ojuok v Population Services Kenya* (2022) eKLR were relied upon to urge that the redundancy was unfair.
- 12. As regards the reliefs sought, counsel for the claimant urged that the claimant was entitled to all the prayers sought as he was terminated from employment unfairly.
- 13. Counsel urged that the claimant had established his case on a balance of probabilities.
- 14. The respondent did not file submissions.

Determination

- 15. The issues for determination are;
 - i. Whether termination of the claimant's employment was unfair and
 - ii. Whether the claimant is entitled to the reliefs sought.



16. Before delving into the issues in detail, it is elemental to determine whether the claimant was indeed an employee of the respondent.
17. In this regard, the court is guided by the sentiments of Onyango J. in Humphrey *Munyithya Mutemi v Soluxe International Group of Hotels and Lodges Ltd* (2020) eKLR as follows;

“In the case of *Monica Karimi Mutua v Al Arafat Shopping Centre & another* (2018) eKLR, the court held that in an undefended claim, it is trite that the claimant establishes all the facts of the claim and must establish the existence of an employment relationship with the respondent as a preliminary issue before establishing the alleged unfair termination of the employment.”
18. Similarly, in *Nicholus Kipkemoi Korir v Hatari Security Guards Ltd* (2016) eKLR, Abuodha J. stated as follows;

“This burden does not become any less on the employee simply because the employer has not defended the claim or absent at trial. The claimant must still prove his or her case. It is therefore not enough for the employee to simply make allegations on oath or in the pleadings, which are not backed by any evidence and expect the court to find in his or her favour.”
19. In the instant case, the claimant provided a witness statement, NSSF statement dated May 25, 2017, a copy of National Identity Card, postal address of the respondent and a copy of demand letter dated September 9, 2017.
20. A part from the NSSF statement which identifies the respondent as the claimant’s employer for the duration 2013 to 2017, no other evidence connects the claimant with the respondent.
21. The claimant adduced no evidence to demonstrate that he was employed on 15th October, 2012 or November 15, 2012 as the Memorandum of Claim and witness statement state respectively.
22. Similarly, the claimant adduced no evidence to demonstrate how the respondent paid salaries, nature of the respondent’s business, location or his specific duties.
23. However, since the claimant’s averments and evidence on record is uncontroverted, the court is satisfied and finds that the claimant was an employee of the respondent from July 2013 to early 2017.
24. In the absence of evidence to the contrary, the date of employment will be taken as July 2017 as per the NSSF statement.
25. As regards termination, the claimant avers that he was declared redundant on May 7, 2017 but alleges that the provisions of *Employment Act*, 2007 relating to redundancy were not complied with.
26. Whereas section 2 of the *Employment Act* defines the term redundancy, section 40 of the Act prescribe the seven (7) conditions to be complied with for a redundancy process to pass muster. The provision is couched in mandatory terms and employers are bound to observe all the requirements failing which the redundancy transitions to an unlawful termination of employment.
27. The seven conditions were highlighted by the Court of Appeal in *Freight In Time Ltd v Rosebell Wambui Munene* (2018) eKLR and include notice to the union if the employee is a member, or to the employee if he/she is not a member, notice to the Local Labour Office, selection criteria based on seniority in time, skill, ability and reliability of employee, payment of leave due in cash, one month’s notice or pay in lieu and severance pay.



28. In addition to the requirements, there must be meaningful consultations before the redundancy is effected. (See *Barclays Bank of Kenya Ltd & another v Gladys Muthoni & 20 others* (2018) eKLR, *Thomas De La Rue (K) Ltd v David Opondo Omutelema* (2013) eKLR and *Kenya Airways Ltd v Aviation & Allied Workers Union Kenya & 3 others* (2014) eKLR).
29. As held in *Barclays Bank of Kenya Ltd v Gladys Muthoni & 20 others* (*supra*), it is the duty of the employer to justify the redundancy and the notice under section 40(1)(a) of the *Employment Act*, 2007 must set out the reasons and extent of the redundancy.
30. In the instant case, it is evident that the respondent did not comply with the provisions of the *Employment Act* relating to redundancy. It is thus clear to the court that there was no redundancy on May 7, 2017 but a termination of employment.
31. As provided by various provisions of the *Employment Act*, for a termination of employment to pass muster, it must be substantively justifiable and procedurally fair as aptly captured by Ndolo J. in *Walter Ogal Anuro v Teachers Service Commission* (2013) eKLR as follows;
- “However, for a termination to pass the fairness test, it must be shown that there was not only substantive justification for the termination but also procedural fairness.”
32. While the provisions of section 43, 45(2) and 47(5) of the *Employment Act* prescribe the requirements essentials of substantive justification of termination of employment, Section 45(2)(c) and 41 of the Act provide for procedural fairness.
33. Significantly, the procedural tenets prescribed by section 41 of the *Employment Act* are mandatory as held in *Pius Machafu Isindu v Lavington Security Guards Ltd* (2017) eKLR.
34. In this case, there is no evidence of a fair termination of employment. None of the prescriptions of the *Employment Act* appear to have been complied with.
35. For the foregoing reasons, it is the finding of the court that the claimant has on a balance of probabilities proved that termination of his employment by the respondent on May 7, 2017 was unfair.

Reliefs

- a. Having found that termination of the claimant’s employment was unfair for want of substantive justification and procedural fairness, a declaration to that effect is hereby issued.
- b. Dues and benefits

i. One month’s salary in lieu of notice

36. The claimant testified that on May 7, 2017, he was notified by word of mouth by the director that he had been declared redundant. If the claimant’s evidence is to be believed and in the absence of evidence to the contrary, it is clear that no notice was given.

The prayer is awarded.

ii. Salary for the month of April 2017 and 7 days worked in May 2017

37. The claimant tendered no shred of evidence that his salary for April 2017 and the 7 days worked in May 2017 had not been paid as at the date of termination of employment.

The prayers are declined.



iii. Leave (24 days for 5 years)

38. The claimant adduced no evidence of any pending leave days. Neither the written statement nor the oral evidence adduced in court make reference to outstanding leave days.

The prayer is declined.

iv. Severance pay 5 years

39. Since the provisions of the Employment Act, 2007 relating to redundancy were not complied with, the purported redundancy transitioned to an unfair termination of employment for which the claimant is entitled to the relief provided by section 49(1)(c) of the Employment Act. The prayer for severance pay under section 40(1)(g) is unsustainable and is declined.

v. 12 Months compensation for unfair loss of employment

40. Having found that termination of the Claimant's employment was unfair, the Claimant is entitled to the relief provided by Section 49(1)(c) of the Employment Act, 2007.

41. In arriving at the quantum of compensation, the court has taken into consideration the following;

- i. The claimant was an employee of the respondent for about 5 years.
- ii. The claimant did not contribute to the termination of employment.
- iii. The claimant did not appeal the director's decision or demonstrate his wish to continue in the respondent's employment.

In the circumstances, the court is satisfied that the equivalent of three (3) months salary is fair.

c. Certificate of service

42. The claimant is entitled to a certificate of service by dint of section 51 of the Employment Act.

43. In conclusion, 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. Equivalent of 3 months salary.
- d. Certificate of service.
- e. Costs of this suit.
- f. Interest at court rates from the date of judgement till payment in full.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 12TH DAY OF APRIL 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 March 15, 2020 and subsequent directions



of April 21, 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.

