



**Abdulrahman v Transafrika Motors Limited (Cause E059 of 2022)
[2023] KEELRC 1237 (KLR) (25 May 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1237 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE E059 OF 2022**

M MBARŪ, J

MAY 25, 2023

BETWEEN

SWALEH BAAKEER ABDULRAHMAN CLAIMANT

AND

TRANSAFRICA MOTORS LIMITED RESPONDENT

JUDGMENT

1. On July 10, 2014 the respondent employed the claimant as the accountant at a salary of Ksh. 40,000 per month and the last salary earned was Ksh. 57,817 per month. He was issued with a contract of employment with terms and conditions of employment with duties of management of accounts, tabulating taxes, analysing business operations and reporting to management on the company finances. The claimant had access to the financial records of the respondent and the returns were good.
2. On March 11, 2022 the claimant was issued with notice and summoned to the administration management office where he was served with a letter and notice of intention to terminate his employment on the grounds of redundancy. He was served with another letter dated April 11, 2022 terminating his employment on the same grounds.
3. The claimant questioned the rationale of the intended redundancy and the respondent admitted that he had a clean record but there was need for a redundancy.
4. The claim is that the claimant was victimised and targeted for redundancy for doing his work well, the company financial returns were good and showed huge profits and there was no reason to lay him off and this contravened section 5(3) of the *Employment Act*, 2007 (the Act) and article 27(4) of the *Constitution* which prohibits discrimination on the grounds of ethnicity, health status and colour.
5. The claimant is seeking a declaration that termination of employment was unfair, compensation for 12 months, general damages for discriminatory treatment and payment for 22 years expected to work until retirement at 60 years.



6. The claimant testified in support of his case and noted that upon employment he took charge of the respondent's financial department and was aware of all operations and tax returns and there were huge profits being generated. He noted concerns with tax returns and reported to his supervisor in operations but was told to do his work. These reports were not taken well and without prior notice or any need to lay him off, the claimant was served with a redundancy notice. The respondent said that due to COVID pandemic it could not pay salaries but this was not true since the company was doing well financially. On January 31, 2022 the human resource officer called the claimant and sent him on compulsory leave from 1st to March 10, 2022 and upon resuming duty he was directed to hand over his duties and he complied. He was then issued with notices of redundancy leading to unfair termination of employment.
7. In response, the respondent's case is that following the downturn of the company occasioned by Covid-19 pandemic the business reduced and there arose need to reduce the workforce in order to remain afloat. The respondent had a total of 19 employees including the claimant whose position was declared redundant. From the accounts department, 7 employees were laid off to reduce the number from 30 to 23 and the claimant was not the only one affected.
8. On February 11, 2022 the respondent wrote to the Minister giving notice of the intended redundancy and the claimant was informed on March 11, 2022 and his employment terminated through notice dated April 11, 2022. There are no new employees recruited to replace the claimant as alleged and the claimant did not have a clean record of service because he had been issued with several warning letters with regard to his conduct on February 18, 2019 where the respondent paid heavy fines to tax officials due to shortfalls occasioned by the claimant.
9. The decision by management to include the claimant on the redundancy list was due to his previous work record and he was not a good performer. The claim on the grounds of discrimination is not correct as this was a case of redundancy and he was paid his terminal dues;
 - a. Pay for days worked;
 - b. Pay for pending leave days;
 - c. One-month notice
 - d. Severance payTotal dues Ksh. 262,286.47
10. Termination of employment was for a lawful reason due to redundancy and at the prerogative of the employer and the claims made should be dismissed with costs.
No evidence was called by the respondent.
11. At the close of the hearing parties were directed to file written submissions. Only the claimant complied and the issues which emerge for determination are;
 - Whether there are constitutional violation and discrimination;
 - Whether employment terminated unfairly; and
 - Whether the claims made are justified.
12. On 11th April, 2022 the respondent issued the claimant with notice terminating his employment on account of redundancy and that due to business downturn and the current operations which do not



meet up with the expenditure of the company, we are forced to lay off some staff members as one of the remedial ways to arrest this situation.

13. On 11th March, the respondent issued the claimant with notice of intended redundancy.
Both notices are directed at the claimant.
14. At paragraph 5 and 10 of the Memorandum of Response, the respondent's case is that the claimant was part of the 7 employees laid off to reduce the number of employees from 30 to 23 and that the claimant was identified because he did not have a clean work record, he had previously been issued with several warning letters regarding late coming behaviour performance or duties especially the second warning letter dated February 18, 2019 where the company paid heavy fines to tax officials due to shortfalls on the claimant's part.
15. Whereas termination of employment on account of redundancy is lawful and allowed in terms of Section 40 of the Act, the employer is not allowed to abuse such provisions to cover up other reasons leading to termination of employment so as to address alleged misconduct or gross misconduct. A redundancy is well defined under section 2 of the Act to include;

The loss of employment, occupation, job or career by involuntary means through no fault of an 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.
16. A redundancy is therefore not about the conduct of the employee but due to an operational requirement leading to a situation that the office held by the subject employee is abolished or it is no longer required. The Act hence appreciates the parameters of Section 40 of the Act as separate and distinct with those of section 41 which relates to misconduct, poor performance and incapacity of the employee and further where there is gross misconduct, that this is addressed under the provisions of section 44 of the Act. To then interplay redundancy in a case that should otherwise be of alleged misconduct, this is to engage in unfair labour practices.
17. Part of the considerations required to be taken into account under section 40 of the Act when selecting employees affected in a redundancy, misconduct or gross misconduct is not part of them. Had this been the case, the drafters of the law should have applied the provisions of section 41 directly under section 40 of the Act which is not the case.
18. This in my humble view is deliberate. This is to allow an employer who genuinely finds an operational requirement the latitude to lay off some employees for good cause is not tied and is able to proceed and do so within the law. To fail to address any form of misconduct and then couch a redundancy as a solution, is unlawful in view of the due process requirements under section 41 of the Act.
19. The respondent's case is also that there were in total 7 employees affected in the process. The notice to the Minister only covers the claimant. No other employee is addressed.
20. A redundancy cannot be called and applied against a single employee. To do so is both discriminatory and unfair labour practice. Upon the claimant pleading that he was discriminated against, the burden of proof shifted to the respondent to prove that there was no such matter. No evidence was called to disprove the same as required under section 5(7) of the Act that;
 - (7) In any proceedings where a contravention of this section is alleged, the employer shall bear the burden of proving that the discrimination did not take place as alleged, and that the discriminatory act or omission is not based on any of the grounds specified in this section.



21. Upon an employee's claim that there was discrimination against him by the employer, the burden of proof shifts to the employer to demonstrate that there was none in view of the prohibited grounds under the Act. without any call of evidence, such burden is not discharged.
22. Discrimination at the workplace is outlawed. Such practices negate the very essence of legal protections at the shop floor in terms of section 5(7) (c) of the Act which directs that;

An employment policy or practice includes any policy or practice relating to recruitment procedures, advertising and selection criteria, appointment, and the appointment process, job classification and grading, remuneration, employment, job assignments, the working environment and facilities, training and development, performance evaluation systems, termination of employment and disciplinary measures.
23. The employer should have in place a policy that ensures that there is no discriminatory treatment at the workplace and where the employee experiences such practice, he must find a procedure to address and address his complaint.
24. The court in *Magare Gikenyi J. Benjamin v County Government of Nakuru & 4 others* [2020] eKLR held that;

... Discrimination at the workplace is outlawed under section 5 of the *Employment Act*, 2007 and a serious human rights violation under the Bill of Rights pursuant to article 27 of the *Constitution*, 2010.

A claim that there is discrimination against any person must be given its due weight with sufficient evidence. Failure to prove has potential to create a serious dent in employment and labour relations. It is not sufficient to allege there is discrimination against an employee at the workplace. Such an allegation must be proved.
25. The court finds the respondent discriminated against the claimant for no good cause and by picking him out of other employees to lay him off under the guise of a redundancy, such was unlawful and damages are due.
26. The claimant was last earning Ksh. 57,817 per month. He had worked for the respondent for over 7 years. Damages at 3 months' gross salary is hereby found appropriate all at Ksh. 173,451.
27. The claim is also for pay for days worked, notice pay and severance pay. In the letter and notice terminating employment dated April 11, 2022 the respondent offered to pay the claimant these dues.
28. The claimant has attached a tabulation of his terminal dues and therein are the following payments;
 - a. Pay for 11 days worked Ksh. 21,199.57;
 - b. 6 pending leave days Ksh. 11,563.40;
 - c. Notice pay Ksh. 57,817;
 - d. Service pay for 7 years Ksh. 171,706.50.
29. These dues having been settled less statutory deductions is lawful and to claim the same is not justified.
30. Accordingly, judgment is hereby entered for the claimant against the respondent in the following terms;
 - a. A declaration that the claimant was discriminated against by the respondent;



b. Damages awarded at Ksh. 173,451;

c. Each party shall bear own costs.

DELIVERED IN OPEN COURT AT MOMBASA THIS 25TH DAY OF MAY, 2023.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet Muthaine

..... and

