



Kiguta v Trustees, Edelvale Trust - Jamaa Home & Mission Hospital (Cause 1073 of 2018) [2023] KEELRC 1157 (KLR) (15 May 2023) (Judgment)

Neutral citation: [2023] KEELRC 1157 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1073 OF 2018
JK GAKERI, J
MAY 15, 2023**

BETWEEN

JAMES ANTHONY NJERU KIGUTA CLAIMANT

AND

**THE TRUSTEES, EDELVALE TRUST - JAMAA HOME & MISSION
HOSPITAL RESPONDENT**

JUDGMENT

1. The Claimant initiated this suit by a Statement of Claim alleging unprocedural termination of employment on account of redundancy.
2. The Claimant avers that he was employed by the Respondent as a Senior Accountant on 1st May, 1995 and confirmed on 31st December, 1997 and was subsequently appointed the Administrative Officer in April 2002.
3. It is the Claimant's case that his employment was terminated by letter dated 30th June, 2015 ostensibly in changes "to streamline hospital activities by merging and reorganizing non-core activities of the hospital."
4. The Claimant avers that his termination from employment was unprocedural.
5. The Claimant prays for;
 - i. ksh 2,254,560/= together with interest thereon at commercial rates from date of filing suit until payment in full.
 - ii. Costs of this suit and interest thereon.
 - iii. Any other or further relief that the court may deem fit and just to grant.



Respondent's case

6. The Respondent filed its Statement of Reply on 14th August, 2018.
7. The Respondent denies that the Claimant was employed as a Senior Accountant but an Accountant.
8. It is the Respondent's case that the Claimant was not promoted to Senior Accountant but was demoted due to unsatisfactory performance and dismissed but re-employed on a lower position after he petitioned the employer.
9. That either party could terminate the contract by one (1) month's notice and the Claimant was paid one month's salary and signed a discharge statement and was paid his pension of ksh 1,742,827.55.
10. The Respondent avers that termination of the Claimant's employment was procedural and all dues were paid and prays for dismissal of the suit with costs.

Claimant's evidence

11. The Claimant testified that he worked for the Respondent for 20 years without any break. He admitted having received the sum of ksh 85,762/= as notice pay and ksh 1,742,927.55 from the contributory pension scheme.
12. He testified that he was paid severance pay.
13. It was his testimony that he received the termination letter on 30th June, 2015 and was unaware whether the Labour Officer was notified and was claiming;
 - i. Severance pay ksh 1,024,800.00.
 - ii. 12 months compensation ksh 1,229,760.00
 - iii. Certificate of service.
 - iv. Costs.

Respondent's evidence

14. RWI, Mr Victor Nemasi testified that the Claimant was employed on 1st January, 1998. That the Claimant's employment was terminated but he appealed the decision and was allowed back at a lower scale and was dismissed on June 30th 2015 pursuant to a restructuring.
15. On cross-examination, the witness confirmed that he knew the Claimant. He confirmed that the Claimant was employed on 1st May, 1995.
16. That there was discontinuation of the Claimant's employment in April 2002 but had no documentary evidence on interruption of employment.
17. That the Claimant was affected by the re-organization of the Respondent.
18. It was his testimony that the termination letter did not attribute fault on the part of the Claimant.
19. The witness insisted that the Claimant was not declared redundant but his employment was terminated.



Claimant's submissions

20. The Claimant's counsel addressed a singular issue, whether termination of the Claimant's employment on account of redundancy was in compliance with the provisions of the *Employment Act*, 2007.
21. Counsel submitted that from the contents of the termination letter, it was clear that the Claimant's employment was terminated on account of redundancy as defined in Section 2 of the *Employment Act*, 2007.
22. Apart from reliance on the provisions of Section 40 of the *Employment Act*, to underscore the requirements of termination of employment on account of redundancy, counsel also relied on the decisions of the Court of Appeal on the issue such as *Thomas De La Rue (K) Ltd v David Opondo Omutelema* (2013) eKLR and *Kenya Airways Ltd v Aviation and Allied Workers Union Kenya & 3 others* (2014) eKLR on the requirements such as notice and consultations before declaration of redundancy.
23. Counsel urged that the Respondent did not avail a notice of redundancy or evidence of consultations.
24. The decision in *Barclays Bank of Kenya Ltd & another v Gladys Muthoni & 20 others* (2018) eKLR was relied upon to urge that the Respondent did not provide a valid and fair reason for declaring the Claimant redundant and as a consequence, the termination of employment was unfair.

Respondent's submissions

25. The Respondent's counsel submitted on two issues, namely;
 - i. Whether the Claimant's employment was terminated on account of redundancy and
 - ii. Whether the Claimant was entitled to termination notice and service pay.
26. As regards termination of the Claimant's employment, counsel urged that the Respondent had the prerogative to restructure its business. The decision in *Josphat Cosmas Onyango v Tribe Hotel Ltd* (2017) eKLR was relied upon to reinforce the submission.
27. As regards service pay and notice, counsel submitted that the Claimant was not given notice of intention to declare him redundant or severance pay as he was a member of the NSSF as well as a contributory pension scheme as provided by Section 35(6) of the *Employment Act*, 2007.
28. Reliance was made on the decision in *Anthony Yamo Ihito v Basco Products (Kenya) Ltd* (2022) eKLR to urge that Section 36 of the *Employment Act* exempted employees covered by NSSF from payment of service pay.

Findings and determination

29. The issues for determination are;
 - i. Whether termination of the Claimant's employment was fair.
 - ii. Whether the Claimant waived his rights to pursue further claims against the Respondent.
 - iii. Depending on the answer to (ii) above, whether the Claimant is entitled to the reliefs sought.
30. As regards termination, it is common ground that the Claimant's employment was terminated on account of redundancy and as correctly submitted by the Claimant's counsel, the termination



letter dated 30th June, 2015 was unambiguous that the Claimant's employment was on account of redundancy, a submission the Respondent's counsel did not contest.

31. The termination letter dated 30th June, 2015 stated *inter alia*;

Re: Termination Of Employment As An Office Administrator

We wish to inform you that the Edelvale Board of Trustees has decided to terminate your services with effect from 1st July, 2015.

The effective changes are meant to streamline hospital activities by merging and re-organizing non-core activities of the hospital . . .”

Yours faithfully

Signed

Sister Racheal Njagi.

32. As correctly submitted by the Respondent's counsel and as courts have held in legions of decisions, employers have the prerogative to determine the structures of their business through what is variously described as re-organizations, restructuring or reconstitution as a business imperative. (See [Kenya Airways Ltd v Aviation and Allied Workers Union Kenya & 3 others \(Supra\)](#), [Jane Khalachi v Oxford University Press \(EA\) Ltd](#)).
33. However, such processes must be conducted in accordance with the law.
34. No doubt the Claimant's letter dated 30th June, 2015 was a redundancy statement and the Respondent was required to comply with the provisions of Section 40(1) of the [Employment Act, 2007](#).
35. As defined in Section 2 of the [Employment Act, 2007](#), redundancy entails the loss of employment at the instance of the employer and the employee is neither at fault or a contributor to the termination.
36. Section 40(1) of the [Employment Act](#) sets out the seven conditions an employer must comply with for a redundancy to pass muster.
37. Section 40(1) is couched in mandatory terms and compliance with its provisions is an imperative.
38. The seven conditions were summarised by the Court of Appeal in [Freight in Times Ltd v Rosebell Wambui Munene](#) (2018) eKLR as;
- a. At least one month's notice to the trade union and the Local Labour Officer where an employee is a member of a trade union. The notice must provide the reasons for and extent of the redundancy;
 - b. At least one month's notice to the employee and the Local Labour Officer, if the employee is not a member of a trade union;
 - c. Selection criteria of the employees to be declared redundant, regard being to seniority in time and skill, ability and reliability of each employee of those affected by the redundancy;
 - d. If there is a Collective Bargaining Agreement, between the employer and a trade union membership or non-member of the union should not disadvantage an employee in relation to the terminal benefits payable;
 - e. Leave due be paid in cash;
 - f. At least one month's notice or one month's wage in lieu of notice; and



- g. Severance pay at the rate of not less than fifteen days for each completed year of service.”
39. It is common ground that the foregoing provisions were complied with other than notice pay.
40. As the Court of Appeal underscored in *Barclays Bank of Kenya Ltd & another v Gladys Muthoni & 20 others* (*Supra*), the law places a heavy burden on the employer to justify that a termination of employment was fair.
41. Similarly, the provisions of Section 47(5) of the *Employment Act*, 2007 are categorical that the “burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.”
42. In the *Barclays Bank of Kenya Ltd & another* case (*Supra*), the Court of Appeal held as follows;
- “The rationale is that any termination of employment must be based on genuine valid and fair reasons. Such reasons must be proved by the employer, otherwise, the termination is unfair. Where such reasons do not exist, the termination, by whatever reason(s) stated by the employer without proof, this amounts to unfair termination of employment in terms of Section 45 of the *Employment Act*. Specifically, where an employer relies on the provisions of Section 40 so as to terminate employment without justifying the redundancy, it does not matter that the employee was consulted, the same amounts to unfair termination of employment. It is therefore not sufficient for an employer to state that there is a business re-organization. . . There must be a justification. The employer must demonstrate that there exists a genuine reason that requires the business to reorganize, reduce staff or restructure the business to viability, the same must be found as valid and fair . . .”
43. In the instant case, the Respondent has not demonstrated that it had a genuine, valid and fair reason for the alleged merging and re-organization of the non-core activities. It is unclear what the re-organization was intended to achieve and what departments and employees were affected.
44. In the absence of credible evidence of the justification and structure of the alleged re-organization, the court is satisfied and finds that the Respondent had no valid and fair reason to terminate the Claimant’s employment.
45. RWI admitted on cross-examination that the letter of termination was silent on the reason for termination.
46. RWI’S evidence that this was a normal termination in that the Respondent paid a one month’s salary in lieu of notice cannot avail the Respondent as the provisions of Section 45(2) of the *Employment Act* are emphatic that the employer must prove that it had a valid and fair reason to terminate the Claimant’s employment.
47. From the material before the court, it is evident that there was neither a normal termination of the Claimant’s employment nor a redundancy. There was an unfair termination of the Claimant’s employment as neither the substantive nor the procedural precepts were complied with.
48. As to whether the discharge statement barred the Claimant from making further claims against the Respondent, it is common ground that the Claimant executed a discharge statement dated 22nd July, 2015 which he neither vitiated nor contested.
49. The principles governing discharge vouchers and/or settlement agreements or certificates is now well settled.



50. Firstly, the employer-employee relationship is ultimately a contractual relationship governed by the principles of common law and equity, *Employment Act* and other relevant statutes (See *Krystalline Salt Ltd v Kwekwe Mwakele & 67 others* (2017) eKLR).

51. In *Thomas De La Rue (K) Ltd v David Opondo Omutelema* (*Supra*), the Court of Appeal held as follows;

“We would agree with the trial court that a discharge voucher per se cannot absolve an employer from statutory obligation and that it cannot preclude the Industrial Court from enquiring into the fairness of a termination. That is however, as far as we are prepared to go. The court has, in each and every case to make a determination, if the issue is raised, whether the discharge voucher was freely and willingly executed, when the employee was seized of all the relevant information and knowledge.”

52. As regards the role of the court in such cases, in *Coastal Bottlers Co. Ltd v Kimathi Mitbika* (2018) eKLR, the Court of Appeal held thus;

“Whether or not, a settlement agreement or a discharge voucher bars a party thereto from making further claims depends on the circumstances of each case. A court faced with such an issue, in our view, should address its mind firstly, on the import of such a discharge/agreement; and secondly, whether the same was voluntarily executed by the concerned parties.”

53. In the instant case, the Respondent provided documentary evidence that the sum of ksh 85,762.00 paid to the Claimant whose receipt he acknowledged comprised;

Salary in lieu of noticeksh 109,239/=

Travelling Allowanceksh 3,000/=

Medical Scheme 2013ksh 8,524/=

Medical Scheme 2014ksh 1,957/=

Medical Scheme 2015ksh 19,910/=

Totalksh 85,762/=

54. The Discharge Statement dated 22nd July, 2015 stated as follows;

“I James A. K. Njeru of P.O. Box hereby acknowledge receipt of ksh 85,762/= in full and final settlement and discharge of all sums due (By hand Cheque no 013973).

I also acknowledge and agree that I have no further claim whatsoever against E.T Jamaa Home & Mission Hospital including that for reinstatement into the job or to any further compensation arising out of termination of my contract of service/resignation/dismissal.”

Signature: Signed

ID no: 9947239

Date: 22/07/2015

Witness: signed



55. In the court's view, the Claimant and the Respondent had agreed that payment of the sum of ksh 85,762/= would effectively discharge the Respondent from liability under the contract of employment between the parties and the termination of employment and as adverted to elsewhere in this judgement, the Claimant did not deny having signed the agreement or its enforceability.
56. In *Coastal Bottlers Ltd v Kimathi Mitbika* (*Supra*), the Court of Appeal stated as follows;
- Further, from the record, we do not discern any misrepresentation on the import of the said agreement or incapacity on the Respondent's part at the time he executed the same. It did not matter that the amount thereunder would be deemed as inadequate. As it stood, the agreement was a binding contract between the parties . . .”
57. The Court of Appeal expressed similar sentiments in *Trinity Prime Investments Ltd v Lion of Kenya Insurance Company Ltd* (2015) eKLR emphasizing that even if the amount paid is less than the total loss, as long as the same is executed and the transaction was free from misrepresentation, fraud or other vitiating elements, the employer is fully discharged from liability.
58. The foregoing applies on all fours to the facts of the instant case.
59. For the foregoing reasons, the court is satisfied and finds that Claimant waived his right to pursue further claims on the Respondent.
60. As regards the reliefs sought, the Claimant prays for severance pay and 12 months compensation for unfair termination.
61. It requires no belabouring that the prayer for severance pay is unsustainable as the purported redundancy was an unfair termination of employment in terms of Section 45 of the *Employment Act, 2007* which does not attract severance pay as a relief.
62. As regards the prayer for 12 months salary compensation, the relief is available under Section 49(1) (c) of the *Employment Act, 2007* and having found that termination of the Claimant's employment was unfair for want of substantive justification and procedural fairness, the Claimant would have been entitled to compensation but for the waiver he voluntarily and willingly executed on 2nd July, 2015.
63. In the upshot, the Claimant's suit against the Respondent is dismissed.
64. Parties to bear own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 15TH DAY OF MAY 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

