



REPUBLIC OF KENYA



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**Tialal & 2 others v Jubilee Party (Petition E180 & E177 of 2021 & E063 of 2022
(Consolidated)) [2023] KEELRC 1483 (KLR) (8 June 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1483 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E180 & E177 OF 2021 & E063 OF 2022 (CONSOLIDATED)**

MN NDUMA, J

JUNE 8, 2023

BETWEEN

WILSON SAMBA TIALAL PETITIONER

AND

JUBILEE PARTY RESPONDENT

AS CONSOLIDATED WITH

PETITION E063 OF 2022

BETWEEN

STEPHEN OYONGO OMBASA PETITIONER

AND

JUBILEE PARTY RESPONDENT

AS CONSOLIDATED WITH

PETITION E177 OF 2021

BETWEEN

RUTH NTHENYA MWINZI PETITIONER

AND

JUBILEE PARTY RESPONDENT



JUDGMENT

1. The petitioner filed different petitions which have since been consolidated due to commonality of issues. Wilson Samba Tialal; Stephen Oyongo Ombasa and Ruth Nthenya Mwinzi all worked for Jubilee in different capacities and were employed on different dates. The petitioners' employment was terminated by a letter dated October 8, 2021 on grounds of redundancy.
2. Wilson worked as a membership Development Officer; Ombasa was employed as a Legal Officer while Ruth worked as a Records Officer.
3. The notice of redundancy dated October 8, 2021 received on the said date read as follows:

“ This is to inform you that the National Management Committee in its meeting held on 30th September, 2021 resolved to undertake a re-organisation of the structure of the party. The exercise has necessitated the removal of certain job positions including yours and as a result your services as ahave been rendered redundant.

Your services are therefore, contractually terminated with effect from October 8, 2021. The letter continued to offer the petitioner one month salary in lieu of notice and service pay calculated at fifteen days salary for each completed year of service.”
4. The petitioners state that the intended redundancy notice did not comply with section 40(1) of the Employment Act in that the petitioners were targeted solely for their Ethnic origin. That employees from one community were not touched by the exercise. That the exercise violated articles 27, 41 and 47 of the Constitution as it amounted to discrimination, unfair labour practices and unfair administrative action.
5. That the Ministry of Labour was not given not less than a months' notice of termination. That the employees were not personally notified of intended termination on grounds of redundancy until the last day when they received letters of termination
6. That section 5(7) of the Employment Act, 2007 was also violated since selection was based on ethnic discrimination.
7. That leave days due were not paid in lieu.
8. That the termination of the petitioners was therefore unlawful and unfair and the petitioners be granted the reliefs sought including:-
 - (a) declaration that the terminations were unlawful and unfair;
 - (b) declaration that the termination violated article 27, 41 and 37 of the Constitution;
 - (c) That termination violated section 5, 20, 31 and 40 of the Employment Act and that the petitioners be paid terminal benefits set out including payment in lieu of one month notice; in lieu of leave days not taken; payment of 15% house allowance in the period worked and compensation equivalent to 12 months' salary for the unlawful and unfair termination of employment; costs and interest.
9. That no criteria was provided for the selection and so the facts speak for themselves. That regard to seniority and skill was not adhered to. That the petitioners be provided the reliefs sought.



Replying Affidavit

10. The respondent filed a replying affidavit of Wambui Gichuru, the Executive Director of the respondent who deposes that the respondent issued a notice to the petitioners in terms of section 40(1) of the *Employment Act*, 2007.
11. That restructuring was due to the ongoing elections and all staff were consulted and notified. That individuals whose positions were affected received letters of termination and they were paid terminal dues in terms of section 40(1) of the Act.
12. That the respondent did not violate any provision of *the Constitution* as alleged or at all in the conduct of the redundancy exercise.
13. That the petition do not disclose any tangible violation or threat of rights of the petitioners as alleged or at all.
14. That the petitions do not meet the threshold set out in Anarita Karimi case and should be dismissed for failure to disclose any cause of action against the respondent.

Further Affidavit

15. The respondent filed a further affidavit by Wambui Gichuru, stating that the respondent fully complied with the provisions of section 40 of the *Employment Act*. That in Petition No. E063 of 2022, Ombasa was paid Kshs.500,000 including one month salary in lieu of notice; salary for days worked and severance pay. That in Petition No. E177 Ruth was paid Kshs.125,000 in same respect while Wilson in Petition E180 was paid Kshs.150,000 in similar respect.
16. That the consolidated petition lack merit and it be dismissed with costs.

Determination

17. The parties filed written submissions which the court has carefully considered together with the deposition by the parties and the following issues fall to be determined.
 - a. Whether the petitioners have established any threat and or violation of petitioner's rights set out in the petition.
 - b. Whether the respondents have established valid reason to terminate the employment of the petitioners following a fair proceedings.
 - c. Whether the petitioners are entitled to the reliefs sought.
18. In *David Mathu Kimingi -vs- SMEC International PTY Limited* [2021] eKLR it was held thus:-

The main issue for determination in the application before me is whether the petition raises any issues on violation of *the Constitution* to meet the threshold of a constitutional petition. In the Petition while the petitioner has cited article 41(1) of *the Constitution* as having been allegedly contravened, he has failed to specify the said provision and further give particulars of the said contravention within the body of the Petition. The petitioner further alleges violation of his constitutional right under article 23(3) in the orders he seeks in the petition yet the same is not averred with specificity and particulars given on how the respondent violated the said right. It is my considered opinion that the Petitioner has failed to satisfy the threshold of specificity as espoused in the celebrated cases of Anarita Karimi Njeru



v Republic (No. 1) (1979) 1KLR154 and Mumo Matemu v Trusted Society of Human Rights Alliance, Civil Appeal No. 290 of 2012 (2013) eKLR.”

19. The court has also considered the decision in *Bernard Ouma Omondi and Another* [2021] eKLR in seeking to find out if this suit has met the threshold required in a Constitutional petition.
20. The court finds that this is an ordinary termination on grounds of redundancy which ought to have been brought by way of a statement of claim so as to allow the claimants and respondent to adduce evidence on the substantive and procedural appropriateness of the exercise conducted by the respondent leading to termination of employment of the petitioner.
21. The petitioners in the consolidated petition have cited violation of articles 27, 41, and 47 of *the Constitution* by the respondent without providing in specific details particulars of such violations. There is no evidence before Court that the petitioners were selected for retrenchment on the basis of their ethnic origin as barely stated by the petitioners. There is no evidence that the re-organisation that took place amounted to unfair labour practice targeting the petitioners to the exclusion of other employees. There is no details at all of any violation of article 47 of *the Constitution* for the court to conclude that the retrenchment exercise amounted to unfair administrative action.
22. There is no reason whatsoever provided why a simple claim for unlawful and unfair termination of employment was not instituted by way of a memorandum of claim as provided under *Employment and Labour Relations Court (procedure) Rules*, 2016.
23. The real issue raised in these consolidated suits is whether the respondent complied with the provisions of Section 40(1) of the *Employment Act* in terminating the Employment of the petitioners on grounds of redundancy. In the case of *Thomas De la Rue (K) Limited -vs- David Opondo Omutelema* [2013] eKLR, the Court of Appeal elaborated the requirements of section 40(1) of the *Employment Act*. The court stated that notices come in three fold. To the union where the employees are unionized; to the employee, if not unionized and to the Labour Office. The court stated that all these notices should be in writing and of not less than one month before the date of the intended termination on grounds of redundancy.
24. The respondent did not provide any written notice to the petitioners of the intended redundancy. The petitioners were only served with letters of termination on October 8, 2021, the day the termination took effect. The respondent failed the procedural test for fairness in this respect. The respondent also failed to provide a written criteria for the selection of the petitioners. The respondent did not adduce any evidence to demonstrate that the selection criteria was fair.
25. The respondent also failed to demonstrate that it had established leave days due in respect of each claimant as at the date of termination and paid salaries in lieu of leave days not taken. The respondent therefore did not satisfy the requirements of section 40(1) (e) of the Act.
26. The court finds that though the respondent may have been entitled to re-organise the party and reduce its staff, the respondent completely failed the procedural test.
27. The termination therefore violated sections 36, 40, 41, 43 and 45 of the *Employment Act*, 2007 and the termination was therefore unlawful and unfair.
28. The petitioners are entitled to compensation in terms of Section 49(1) (c) of the *Employment Act*, 2007.
29. In this respect, the petitioners lost their jobs unfairly for no reason of their own. The petitioners did not contribute to the termination. The petitioners were unfairly selected for termination since no reasons for the selection was provided by the respondent. The petitioners were not compensated for



the job loss and they suffered loss and damage. No adverse records of the petitioners were adduced by the respondent. The court relies on the case of *Fanice Owela Amino Ndengu –vs- Trident Plumbers Limited* [2022] eKLR and *Brian Kimani Ngichiri and Serville Investment Limited* [2021] eKLR to find that the Wilson, who had served the respondent from 2013, a period of about 8 years; Ombasa who had served the respondent from 2017, a period of about 4 years and Ruth who had served from 2017, a period of about 4 years are granted compensation for unlawful and unfair termination of their employment as follows:-

- a. Wilson is granted the equivalent of six (6) months' salary in compensation for the unlawful and unfair termination of employment in the sum of Kshs.(60,000 x 6) = 360,000.
 - b. Ombasa is granted the equivalent of three (3) months' salary in compensation in the sum of Kshs.(200,000 x 3) = 600,000.
 - c. Ruth is granted the equivalent of three (3) months' salary in compensation in the sum of Kshs. (50x3) = Kshs.150,000.
 - d. All the petitioners to be granted a Certificate of Service within 30 days of this judgment.
 - e. Interest at Court rates in respect of (a) (b) and (c) above from date of judgment till payment in full.
 - f. Costs of the suit.
30. For the avoidance of doubt, all the other claims set out in the consolidated petition are dismissed for lack of merit.

DATED AND DELIVERED AT NAIROBI (VIRTUALLY) THIS 8TH DAY OF JUNE, 2023.

MATHEWS N. NDUMA

JUDGE

Appearance

Mr. Baabu for petitioners

Mr. Njomo for Respondent

Ekale: Court Assistant

