



**Mwanje v A to Z Transporters Ltd (Cause 70 of 2018)
[2023] KEELRC 1990 (KLR) (27 July 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1990 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 70 OF 2018**

**AK NZEI, J
JULY 27, 2023**

BETWEEN

JAMES ANDANJE MWANJE CLAIMANT

AND

A TO Z TRANSPORTERS LTD RESPONDENT

JUDGMENT

1. The suit herein was instituted by the Claimant on 13/2/2018 vide an evenly dated memorandum of claim. The Claimant pleaded that he was employed by the Respondent on 1/5/2005 as a mechanic earning ksh. 26,676 per month, and retained continuous uninterrupted employment until December 17, 2016 when his employment was terminated. It was the Claimant's pleading that he reported to work on December 17, 2016 but was terminated without being issued with any termination letter, without plausible reasons, and without being afforded an opportunity to defend himself, and that the Claimant's attempt to engage the Respondent's representatives with a view to reconciling the parties herein failed as the Respondent refused to consider such attempts.
2. The Claimant further pleaded that the Respondent's actions violated Sections 18(1) & (5), 40, 49 and 50 of the *Employment Act*, and *International Labour Organization Convention* (ILO) No. 158 (Termination of Employment Convention) ratified by Kenya and enshrined in Kenyan law (vide Article 2(6) of *the Constitution*).
3. The Claimant set out his claim against the Respondent as follows:-
 - a. one month salary in lieu of notice.....ksh 26,676
 - b. service pay.....ksh. 26,676
 - c. maximum compensation for unfair termination of employment at the rate of the Claimant's annual salary ..ksh. 320,112



(less ksh. 30,748 paid)

- d. Certificate of Service.
 - e. costs of the suit.
4. Other documents filed by the Claimant together with the memorandum of claim included the Claimant's affidavit in verification of the claim, the Claimant's written witness statement dated 13/2/2018 and an evenly dated list of documents listing three documents. The listed documents included the Claimant's letter of appointment dated 1/5/2005, a demand letter dated 1/12/2018 and the Respondent's letter dated November 17, 2017 responding to the demand letter.
 5. The Respondent entered appearance on 22/3/2018 and filed response to the claim on 23/3/2018; and admitted having employed the Claimant as pleaded and at the pleaded monthly salary. The Respondent however denied having terminated the Claimant's employment unlawfully, and pleaded that the termination was on account of redundancy, that the Respondent complied with the procedures laid down in law and that the Claimant is not entitled to terminal dues as he had been paid ksh. 30,748 as compensation for termination on account of redundancy.
 6. The Respondent further pleaded that the Claimant was not entitled to compensation for wrongful termination as his termination was fair, lawful and procedural as Section 40 of the *Employment Act* was complied with in that:-
 - a. notice was given to the Claimant's Union (Kenya Long Distance Truck Drivers & Allied Workers Union) and Mombasa County Labour Officer more than a month prior to the date of termination.
 - b. the Claimant was notified of the intended termination on account of redundancy.
 - c. reasons for, and extent of the termination on account of redundancy were sufficiently given.
 - d. dues outlined at Section 40 of the *Employment Act* (leave pay, salary in lieu of notice and severance pay, totaling to ksh. 30,748) were duly paid to the Claimant.
 7. It was the Respondent's further pleading that there existed another suit, being Mombasa ELRC Cause No. 336 of 2017 (K.L.D.T.D.A.W.U. -VS- A-Z Transporters Limited – Formerly Nairobi ELRC Cause No. 2615 of 2016) that was pending hearing and final determination having been filed by the Claimant's Union pursuant to the same cause of action; and that proceedings in the suit herein ought to be stayed pending hearing and final determination of the said other suit.
 8. Further, the Respondent filed a written witness statement of one Lewis Mwadime, a former Human Resource Officer of the Respondent (dated 11/5/2018) and an evenly dated list of documents, listing seven documents. The listed documents included a letter of appointment dated 1/5/2005, the Respondent's letter dated 18/11/2016 addressed to the County Labour Officer and the Secretary General of K.L.D.T.D.A.W.U, a Strike Notice by Kenya Long Distance Truck Drivers and Allied Workers Union to the Respondent dated 19/12/2016, a Court order dated 23/12/2016 (in Nairobi ELRC Cause No. 2615 of 2016), a termination letter dated 17/12/2016 addressed to the Claimant, confirmation of payment letter dated 3/2/2017 and documents on payment of NSSF regarding the Claimant.
 9. The Claimant filed Reply to the Respondent's Response on 29/10/2018 and joined issued with the Respondent. On 8/2/2019, the Respondent filed a second witness statement by its Managing Director, Kavel Ramesh Purshotam Patel, dated 5/2/2019. On 19/3/2020, the Respondent filed a



- supplementary list of documents dated 17/3/2020, listing a petty cash voucher dated 17/12/2016 and a letter from the Cooperative Bank dated 3/2/2017.
10. Record shows that trial opened on 28/1/2019 before L. Ndolo, J. The Claimant adopted his witness statement dated 13/2/2018 as his testimony. He further produced in evidence his listed documents referred to in paragraph 4 of this judgment.
 11. Cross-examined and re-examined, the Claimant further testified:-
 - a. that he was a member of the Long-Distance Truck Drivers & Allied Workers Union and that the said Union was aware that the Claimant had been terminated.
 - b. that the Claimant was not aware of any redundancy notice from the Respondent to the Union, and had not been given any redundancy notice prior to his termination.
 - c. that the Claimant was paid his salary for December 2016.
 - d. that the strike notice produced by the Respondent was dated 19/12/2016, after the Claimant had been terminated.
 - e. that the Claimant was aware that the Respondent went to Court to stop the strike, and that the Court order produced by the Respondent was dated 23/12/2016, after the Claimant's termination. That the Claimant did not go back to work after his termination.
 - f. that the Respondent did not pay the Claimant anything else apart from his salary.
 12. The Respondent's case opened on 25/1/2023 before me. The Respondent called one witness, Kavel Ramesh Patel (RW1) who told the Court that he was a former Managing Director of the Respondent company which he said had closed down in December 2017. RW-1 adopted his filed witness statement dated 5/2/2019 as his testimony, and produced in evidence the Respondent's listed documents referred to in paragraph 8 of this judgment. The Respondent stated, both in his adopted witness statement and orally in Court:-
 - a. that the Claimant was employed by the Respondent on 1/5/2005 in the position of a Mechanic and served the company until 17/12/2016 when he was declared redundant together with 9 other employees, but they declined to sign their clearance documents, including certificates of service, citing lack of due process in declaring them redundant. That the Claimant's Union declined to witness its members' clearance citing the same reason, and thereupon issued a strike notice.
 - b. that the Respondent moved to Court and obtained an order staying the strike vide Cause no. 336 of 2017.
 - c. that prior to the redundancy, the Respondent had notified the Claimant's Union and the County Labour Office of the intention to declare redundancies vide a letter dated 18/11/2016; that the redundancy was effected on 17/12/2016 and that the Respondent outlined (in the termination letter) what was to be paid to the Claimant.
 - d. that the termination was done in strict adherence to the law governing redundancy.
 - e. that the Claimant was paid his dues amounting to ksh. 30,748, which payment the Respondent's bank confirmed vide a letter dated 3/2/2017.
 13. Cross-examined and re-examined, the Respondent (RW-1) testified:-



- a. that although he (RW-1) had testified that the Respondent company was closed on 21/12/2017, he had filed a witness statement dated 5/2/2019 indicating that he was the Respondent's Managing Director, and that he did not have any documents to show that the Respondent company had closed.
 - b. that the Claimant had worked for the Respondent company for 11 years and had seniority in skill and time.
 - c. that the Respondent's letter dated 18/11/2016 was the redundancy notice, and that there was no acknowledgement of receipt of the same by the Claimant. That the letter indicated that the effective date of redundancy was 17/12/2016.
 - d. that there was no evidence to show that the Claimant had refused to receive/to sign the letter dated 18/11/2016.
 - e. that the Claimant was entitled to December 2016 salary, to one month salary in lieu of notice, to severance pay for eleven years and to leave pay.
 - f. that the calculation done by the Respondent amounted to ksh. 169,322, but the Claimant was paid ksh. 30,798 after deducting PAYE (ksh. 44,660), NSSF (200), NHIF (1,700), Sacco deposit (ksh. 1,000) and Sacco loan (ksh. 90,955).
 - g. that the Respondent had no records of the loan that was deducted, and that the Sacco to which the Claimant belonged had nothing to do with the management of the Respondent company.
 - h. that the Respondent had no evidence to show that the Claimant's job post of Mechanic had been abolished in the Respondent company.
 - i. that the Claimant had 15 pending leave days, whereupon the Respondent computed ksh. 10,838, and notice pay at ksh. 21,627.
14. Having considered the pleadings filed and the evidence presented by both parties herein, issues that fall for determination, in my view, are as follows:-
 - a. whether termination of the Claimant's employment was unfair.
 - b. whether the Claimant is entitled to the reliefs sought.
 15. On the first issue, the Claimant is not shown to have been issued with any employment termination notice pursuant to Section 35(1) (c) of the *Employment Act*, he was not issued with any statement of charges of misconduct against himself/notice to show cause, was not called upon to show cause over any allegations of wrong doing against himself, and was not given an opportunity to be heard prior to termination of his employment pursuant to Section 41 of the *Employment Act*.
 16. The Respondent pleaded and testified that termination of the Claimant's employment was on account of redundancy; that the Respondent issued a redundancy notice on 18/11/2016 regarding the Claimant and nine other employees and served the same on the County Labour Office and the Claimant's Union before effecting the Claimant's redundancy vide a termination letter dated 17/12/2016, receipt whereof the Claimant refused to acknowledge. The Respondent produced in evidence copies of the said redundancy notice dated 18/11/2016 and a termination letter dated 17/12/2016.



17. The said redundancy notice, addressed to the County Labour Officer, Mombasa and the Secretary General of KLDTU&AWU, reads in part:-

“RE: Notice of Intention to terminate 10 employees on account of redundancy

.....

The above captioned matter refers;

Pursuant to the *Employment Act* 2007 Clause 40(1) (a), we hereby take this opportunity to notify you that we intend to declare the above stated number of employees redundant.

This move has been necessitated by the fact that the company cannot sustain the current wage bill which stands at around 7.5 million per month due to the following reasons.....”

18. The foregoing notice did not name, and did not identify the ten employees targeted for redundancy, the posts and ranks they held in the Respondent company, and the criteria used by the Respondent in picking them out for redundancy. The said purported redundancy notice is shown to have been served on the Kenya Long Distance Truck Drivers & Allied Workers Union on 21/11/2016, and is not shown to have been served on the County Labour Officer, Mombasa. Further, no evidence was tendered by the Respondent to demonstrate that the Claimant was ever made aware of or even consulted over the impending redundancy.
19. It is further to be noted that the said purported redundancy notice was served on the Claimant’s Union on 21/11/2016 while the intended redundancy was to take effect on 17/12/2016. This falls short of the mandatory one month notice period provided for under Section 40 of the *Employment Act*.
20. It is no wonder, therefore, that the Claimant and his Union refused to sign any documents after his termination, stating that the right procedure had not been adhered to. The Respondent (RW-1) testified as much. Section 40(1) of the *Employment Act* provides as follows:-
- (1) An employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions—
 - (a) where the employee is a member of a trade Union, the employer notifies the Union to which the employee is a member and the labour officer in charge of the area where the employee is employed of the reasons for, and the extent of, the intended redundancy not less than a month prior to the date of the intended date of termination on account of redundancy;
 - (b) where an employee is not a member of a trade Union, the employer notifies the employee personally in writing and the labour officer;
 - (c) the employer has, in the selection of employees to be declared redundant, had due regard to seniority in time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy;
 - (d) where there is in existence a collective agreement between an employer and a trade Union setting out terminal benefits payable upon redundancy; the employer has not placed the employee at a disadvantage for being or not being a member of the trade Union;
 - (e) the employer has, where leave is due to an employee who is declared redundant, paid off the leave in cash;



- (f) the employer has paid an employee declared redundant not less than one month's notice or one month's wages in lieu of notice; and
 - (g) the employer has paid to an employee declared redundant severance pay at the rate of not less than fifteen days pay for each completed year of service.
21. The Respondent did not demonstrate compliance with the foregoing procedure in terminating the Claimant's employment. The entire process of terminating the Claimant's employment on purported account of redundancy was procedurally unfair. Further, the Respondent did not demonstrate validity of the alleged reason for termination. The Respondent did not produce in evidence its audited statements of account to demonstrate inability to foot its wage bill.
 22. I find and hold that termination of the Claimant's employment was procedurally and substantively unfair. It was held as follows in the case of *Walter Ogal Anuor-vs- Teachers Service Commission*[2013] eKLR:-

“...for a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer in effecting the termination.”
 23. The Claimant referred the Court to several decided cases which included *Julie Topirian Njeruvs- Kenya Tourist Board-Industrial Court Cause No. 886 of2010* where the Court (Rika J) stated that termination of employment through redundancy, being an involuntary termination, must be procedurally fair and substantively justifiable; and must follow the law on unfair termination, in particular Sections 43 and 45 of the *Employment Act* 2007. That fairness of the redundancy process includes engagement of the employee by the employer in adequate consultations which should precede any decision on termination.
 24. Also cited was the case of *Irene Naserian Kabolo -v-s Kenya Aids NGOs Consortium – Industrial Court Cause No. 1937 of 2011 [2013] eKLR* where the Court stated that a crucial element in redundancies is the act of abolishing the office that the employee affected is holding or acting in. That the employer must show that the office has been manifestly and effectively abolished. In the present case, the Respondent (RW1) testified that he had nothing to show that the post held by the Claimant before termination had been abolished.
 25. On the second issue, and having made a finding that termination of the Claimant's employment was unfair, I award the Claimant the equivalent of eight months salary being compensation for unfair termination of employment. It was a common ground that the Claimant was earning ksh. 26,676 at the time of his termination. The equivalent of eight months' salary is ksh. 213,408, which I award the Claimant. I also award the Claimant ksh. 26,676 being payment in lieu of notice.
 26. Although the Respondent (RW-1) admitted in evidence that the Claimant was entitled to service pay, I disallow that claim on the basis of the Claimant's admission in evidence that he was an NSSF contributor. Section 35 of the *Employment Act* disqualifies him from making the claim.
 27. The claim for issuance of a certificate of service is allowed pursuant to Section 51(1) of the *Employment Act*.
 28. The Claimant testified that what was paid to him upon termination was his salary for December 2016. The Respondent (RW-1) testified that the Claimant was entitled to the December salary and had been paid.



29. consequently, and having considered written submissions filed by Counsel for both parties herein, judgment is hereby entered for the Claimant against the Respondent for:-
- a. One month salary in lieu of noticeksh. 26,676
 - b. Compensation for unfair termination of employment.....ksh. 213,408
ksh. 240,084
30. The Claimant is awarded costs of the suit and interest at Court rates.
31. The Respondent shall issue the Claimant with a certificate of service within thirty days of this judgment.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 27TH JULY 2023

AGNES KITIKU NZEI

JUDGE

Order

This Judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of the applicable Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

Mr. Ngonze for Claimant

N/A for Respondent

