



**Shula v Blue Waves Enterprises Limited (Formerly Crown Sea Enterprises Limited)
(Cause 1814 of 2017) [2023] KEELRC 2087 (KLR) (27 July 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2087 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1814 OF 2017**

**K OCHARO, J
JULY 27, 2023**

BETWEEN

CHARLES NYILISI SHULA CLAIMANT

AND

**BLUE WAVES ENTERPRISES LIMITED (FORMERLY CROWN SEA
ENTERPRISES LIMITED) RESPONDENT**

JUDGMENT

1. Through a Memorandum of Claim dated the 7th of September 2017, the Claimant instituted a Claim against the Respondent seeking the following reliefs;
 - a. A declaration that the Claimant had suffered unfair and wrongful redundancy.
 - b. Damages for wrongful redundancy.
 - c. Issuance of certificate of service.
 - d. Payment of all the terminal dues set out in paragraph 7 of the statement of claim.
 - e. 12 months' gross salary compensation.
 - f. Cost of the suit and interest thereon.
2. The statement of the Claim was filed contemporaneously with the Claimant's witness statement dated 7th September 2017 and the list of documents of the even date.
3. Upon being served with the summons to enter appearance, the Respondent did file a Memorandum of Appearance on the 1st of December 2017 and subsequently filed a Replying Memorandum on the 15th



of March 2018. The Memorandum was filed side by side with its witness statement. The Respondent denied the Claimant's claim in toto.

4. At the hearing hereof, the Claimant adopted the contents of the aforesaid witness statement as his evidence in chief and had the documents admitted as his documentary evidence. He briefly testified in chief, clarifying points that needed to be on the statement and documents.
5. The Respondent closed its case without calling a single witness to testify in support of its defence against the Claimant's claim.

The Claimant's case

6. The Claimant's case was that the Respondent herein was initially trading as Crown Sea Enterprises Limited. Crown Sea Enterprises Limited first employed him in January 2004 in the position of Sales Person at its display shop at China Centre, Ngong Road at a salary of Kshs. 6000. The employment was not under any written contract.
7. On or about February 2005, the General Manager Mr. Liu Wei Quin transferred him to the above-mentioned Company's factory which was situated along Likoni Road in Industrial Area, to work as a delivery person. In the year 2009, he was again transferred to the Company's shop in Eastleigh, Nairobi as a salesperson, where he worked till December 2016.
8. He stated that around the year 2012, he noticed that the delivery notes that he was handling had changed in title from Crown Sea Enterprises Limited to Blue Waves Enterprises Limited. He had no information as regards what occasioned the change.
9. On or about 26th April 2006, the Respondent then trading under the name Crown Sea Enterprises Limited introduced its employees including him to the National Security Fund, through a letter by the above-mentioned General Manager.
10. The Claimant contended that the Respondent's allegation that he was not at any time its employee is quite untrue. The NSSF statement clearly shows that at all material times, the Respondent was in the records of the Fund indicated as Blue Waves Enterprises Limited.
11. The Claimant stated that from April 2006 until June 2014, his NSSF dues were being remitted dutifully, however thereafter, the Respondent without any reason ceased making the remittances.
12. It was his testimony that throughout the time he worked for the Respondent, he was never allowed to take his annual leave. He worked 7 days a week without any off days. During public holidays he would still work but with no compensation. He only had one off day in a year, 1st of January.
13. On 31st December 2016, the Respondent unlawfully terminated his employment on account that it was unable to continue doing business. He contended that therefore the termination was by him being declared redundant. The termination was not preceded by any notice as required by law. The termination was verbal by the General manager who told him that there was no more work for him.
14. The Respondent failed to pay him his terminal dues. His efforts to pursue the payment didn't bear any fruit hence this suit.
15. It was his testimony that at the time he was exiting employment, his salary was Kshs. 12,000. The Respondent never used to issue them with payslips. The salary was paid in cash through the Respondent's shop Manager.



16. In his evidence under cross-examination, the Claimant stated that the delivery note that he tendered as evidence before this Court is a testament that his employer, Crown Sea Enterprises Limited, changed its name and started operating under the name Blue Waves Enterprises Limited.
17. He admitted that according to the certificate that was filed by the Respondent in court, the year of its incorporation appears as 2011. Further that the certificate from NSSF indicates that the respondent was registered with the fund in the year 2013.
18. He told the Court that his initial employer was making the NSSF remittance where his name obtains thereon. The first remittance was in 2006 April. When the name was changed, Blue Waves continued to remit the same.
19. It was his testimony that the list that the Respondent had exhibited only indicated the workers who were working within the factory. He was guarding their shops.
20. He further testified that he knew Anthony Njogu. Anthony was a manager at their shop. Contrary to what the Respondent alleged he was not an employee of Anthony. He did not have any shop as purported.
21. On re-exam, he told the Court that he was initially employed by Crown Sea Enterprises and when the name changed, the Respondent continued to remit his NSSF contributions.

The Claimant's submissions.

22. The Claimant filed his submissions on 31st October 2022 distilling two issues for determination thus:
 - i. Whether the Claimant was an employee of the Respondent.
 - ii. Whether the Claimant's redundancy was unfair.
23. On the first issue the Claimant's counsel submitted that there can be no doubt that there existed an employer-employee relationship between the Claimant and the Respondent. The documents placed before this Court shows that the Respondent for a period was making statutory NSSF remittances. Counsel argued that the remittances were so being made in fulfilment of a statutory duty by an employer under section 20[1] of the NSSF Act. The section 20(1) provides:
 - “(1) From the commencement date and subject to the provisions of sub-section (3) and section 21, an employer shall pay to the Pension Fund in respect of each employee in his or her employment—
 - (a) the employer's contribution at six per centum of the employee's monthly pensionable earnings; and
 - (b) the employee's contribution at six per centum of the employee's pensionable earnings deducted from the employee's earnings.”
24. On the second issue it was submitted that the Claimant was declared redundant by the Respondent in December 2016, on the reason that the Respondent was unable to continue with business. As much as the employer has a right to terminate an employee's employment on a ground such as was in this matter the termination must accord the provisions of section 40 of the *Employment Act*. The Respondent was obliged to inform the Claimant by issuing the requisite notices, of the fact that it was intended that his employment be terminated on account of redundancy.



25. That is clear that there weren't any consultations between the Respondent and the Claimant regarding the redundancy issue.
26. It was also submitted that there was no evidence that the Labour Officer was informed of the intended redundancy. This was a clear procedural lapse denoting procedural unfairness. There is no material that was tendered by the Respondent before the Court from which it can be discerned how the Respondent arrived at the Claimant as one of those to be affected by the redundancy.
27. The Respondent did not place any evidence before this Court to demonstrate that indeed it was not able to continue with business, hence the reason for the termination of the Claimant's employment.
28. Lastly it was submitted that the Claimant's evidence remained uncontroverted since the Respondent opted not to call any witness during trial which indicates that the purported redundancy of the Claimant was both substantively and procedurally unfair, thus entitled to the reliefs sought.
29. The Claimant placed reliance on a number of cases to buttress his submissions thus; Kenya Airways vs Kenya Aviation Workers Union (K) (2014) eKLR, Jerusha Nyambura Maingi vs Sen-Tech Ltd (2013) eKLR and lastly the case of Francis Kiragu vs Rivers Cross Technologies Ltd (2013) eKLR.
30. On 18th January 2023, this Court gave direction that the Respondent file and serve its written submissions but the direction was not complied with, consequently, I will proceed to render myself on the claim herein absence of its submissions notwithstanding.

Analysis and Determination

31. The Parties herein filed a statement of agreed issues for determination dated 9th September 2020. In the statement the following issues were identified for determination;
 - I. Whether the Claimant was unlawfully and orally declared redundant?
 - II. Whether the Respondent unlawfully kept the Claimant in employment without any Contract of employment for the period 2004 to 2016.
 - III. Whether the Claimant was granted his statutory off days, public holidays, and payments as required by law.
 - IV. Whether the Claimant's overtime payments were ever made to him.
 - V. Whether the Claimant was issued with a Certificate of Service upon his termination.
 - VI. What appropriate remedies are awardable to the Claimant?
 - VII. Who is to bear the costs of the suit?
32. With due respect these issues are over split and others duplicate, I will ignore them. In my view the following issues present themselves for determination in this matter, thus;
 - i. Whether there existed an employer-employee relationship between the Claimant and the Respondent.
 - ii. If the answer to [i] above is in the affirmative, how did the separation in employment between the two occur?



- iii. If the termination occurred at the initiation of the Respondent, was the termination fair?
- iv. Whether the Claimant is entitled to the reliefs sought.
- v. Who should bear the costs of this suit?

Whether there existed employer-employee relationship

33. It is the Claimant's position that he was employed by the Respondent initially trading as Crown Sea Enterprise Limited as a salesperson before the Respondent changed its name to Blue Waves Enterprises Limited sometime in 2012. His employment was without any written contract. At this point, it becomes imperative to state that an employment contract may be express or implied and if express it may be oral or in writing. Offer and acceptance are, nonetheless, basic for the formation of a valid contract of employment.
34. It is apparent that there is not any contest on the fact that the Claimant was first employed in the year 2004, by an entity that went by the name Crown Sea Enterprises Limited, but what became a subject of contention as can be garnered from the pleadings by the parties is the question whether the Respondent herein was that initial entity which metamorphosized to be what it is, Blue Waves Enterprises Limited, and therefore the employer to the Claimant.
35. The Claimant tendered as evidence a letter dated 26th April 2006 by the General Manager Crown Enterprise Limited, addressed to NSSF, that introduced him and other employees for registration as members. In a letter dated 7th June 2017, by the Federation of Kenya Employers written on behalf of the Respondent, it was stated in part;

“..... Our instructions are that your client has no contractual relationship with ours whatsoever, save that upon the dissolution of M/s Crown Sea Enterprises, his erstwhile employer.....”
36. No doubt the contents of these two documents point to the fact that indeed the Claimant was at a certain point an employee of Crown Sea Enterprise Limited. Further from the second document, the letter dated 7th June 2017, it is clear that in a way the entity Crown Sea Enterprises ceased to operate as such. As to whether it changed the name to Blue Waves Enterprises Limited, I shall shortly hereinafter determine.
37. The Claimant tendered as evidence NSSF statements to fortify his position that Crown Sea Enterprises only changed its name but continued to do the business it used to. He urged the Court not to lose sight of the fact that the statement clearly has on it Blue Waves Enterprises as his employer. The statement has a Number 02334127 which I consider the membership number for the employer. This same number appears on the letter dated 14th August 2013 captioned “notification of the employer's registration number”.
38. The letter hereinabove mentioned by the Federation of Kenya Employers makes an admission that indeed the Respondent, Blue Waves continued to make remittances to NSSF after the alleged ‘dissolution’ of Crown Sea Enterprises Limited. One is left to wonder whether the Respondent could continue making the remittances if it did not have any relationship with Crown Sea and the Claimant. The burden under section 20 of the NSSF Act is a burden cast on an employer. The Respondent could not make the remittances if he was not the Claimant's employer.



39. By reason of the premises, coupled with the fact that the Respondent didn't put forth any evidence to discount the Claimant's, I am persuaded by the latter that in the course of his employment, Crown Sea changed its name to operate under the new name Blue Waves Enterprises Limited. Even under the changed name, he continued to be an employee as initially employed.
40. In the upshot, I hold that there existed an employer and employee relationship between the Respondent and the Claimant.

How did the separation in employment between the Claimant and the Respondent Occur?

41. Having determined that there existed an employer-employee relationship between the Respondent and the Claimant, I now turn to consider and determine how the separation between them occurred. The Claimant asserted that his employment was brought to an end by the General Manager of the Respondent, on account that the Respondent is unable to continue trading. Effectively, he was declared redundant. This evidence was not challenged at all.
42. Section 2 of the [Employment Act](#) 2007 and section 2 of the [Labour Relations Act](#) defines redundancy as:
- “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 are commonly known as the abolition of office, job or occupation and loss of employment.”
43. The locus classicus on redundancy under the Kenyan Law is Kenya Airways Limited vs Kenya Aviation & Allied Workers Union (2014) eKLR relied on by the counsel for the Claimant herein where the Court of Appeal stated:
- “There are two broad aspects of this definition. The first one is that the loss of employment in redundancy cases has to be by involuntary means and at the initiative of the employer. It should not be a contrived situation. It has to be non-volitional. I understand this to refer to a situation, in most cases an economic downturn, brought about by factors beyond the control of the employer, which leaves the employer with no option but to take an initiative the consequence of which will be an inevitable loss of employment.”
44. By reason of the foregoing premises, I hold that the circumstances under which the separation occurred point to the fact that the termination of his employment was

Whether the termination was fair.

45. The law recognizes no right to employment for life, however, the social balance struck in the context of a constitutional regime in which the right to fair labour practices, is a fundamental right not to be dismissed unfairly.
46. The employer (Respondent) is burdened with the onus of satisfying the Court that there was a genuine redundancy situation, and therefore a fair and valid reason for the termination of an employee's (Claimant's) employment. Indeed, this is what section 43 and 45 of the [Employment Act](#) requires of the Employer. Again, and again, this Court has held that a burden of proof imposed on a party by a statute is only dischargeable by proffering sufficient evidence on the matters that he has to prove thereof unless there is an admission thereof. The Respondent opted not to present any evidence to testify on its behalf. It didn't not, therefore, discharge the burden of proof under sections 43 and 45 of the [Employment Act](#), the reason for the termination, and that the same was fair and valid, respectively.



47. Section 40 of the *Employment Act* provides the procedure to be followed before declaring an employee redundant. The said section provides:

“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.”

48. Considering the evidence by the Claimant and the fact that his evidence remained unchallenged, I conclude that the relevant notices contemplated under section 40 of the *Employment Act* were not issued to both the Claimant and the Labour officer. Further that there were no consultations between the Respondent and the Claimant on the redundancy that the former alleged to be the basis for the termination. The termination was procedurally flawed, therefore.

49. By reason of the premises, I conclude that the termination of the Claimant's employment was both procedurally and substantively unfair.

Of the reliefs grantable

i. Payment in lieu of leave days for 12 years.

50. The *Employment Act* enjoined the Respondent to allow the Claimant to proceed for leave with pay or compensation in lieu of untaken leave days. The Claimant contended that the Respondent didn't at any time allow him to pick his annual leave during the currency of his employment. Annual leave is a statutory right that cannot



be out contracted or denied. The Respondent did not have a witness to testify, to either demonstrate that the Claimant throughout his tenure, was allowed to enjoy this statutory right as and when it was due for enjoyment and or that whenever for one reason or the other the Claimant didn't utilize his leave days, he was compensated.

51. By reason of the foregoing premise, I find that the Claimant is entitled to an award under this head. However, it is imperative to state that the Court notes that the prayer under this head has been made in ignorance of the stipulations of section 90 of the [Employment Act](#). The section provides for a limitation of causes of action in respect of matters flowing out of contracts of service and or the Act. The section provides for a limitation period of three years. Consequently, this court is not prepared to grant compensation for the entire twelve years as sought but for three years immediately before the filing of this suit. Therefore, January 2015-December 2016, Kshs. 16,800.

ii. Payment of the off days and public holidays.

52. The claim under this head, is one that this Court holds, has just been thrown to it. From the material placed before this Court, one is not able to discern which public holidays are the subject matter here, considering that in a year there are several Public Holidays and the Court takes judicial notice of the fact that all years do not have equal number of Public Holidays. I am not persuaded to grant this relief as the same is generalized and without any proof of the same.

iii. Overtime for hours worked

53. The Claimant urged this court to award him overtime for the extra hours worked. In the case of Rogoli Ole Manadiengi vs General Cargo Services Ltd (2016) eKLR the Court held as follows:

“The Employee, in claiming overtime pay however, is not deemed to establish the claim for overtime pay by default of the Employer bringing to Court such employment records. The burden of establishing hours or days served in excess of the legal maximum, rests with the Employee.”

54. The Claimant did not place before this Court evidence to prove that he worked overtime. Without evidence, there isn't a basis upon which this Court can make an award in favour of the Claimant.

iv. Service pay for the 12 years worked.

55. Section 40 (g) of the [Employment Act](#) enjoins the employer to pay severance pay to the employee declared redundant for each year of service. The same provides:

“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.”

56. Considering the evidence on record in its totality I come to an inescapable conclusion that the Claimant first came into the employment of the Respondent in the year 2004 and served up until 2016, therefore a period of 12 years. Having found that the Claimant was terminated on account of redundancy he is entitled to severance pay. Therefore; (12,000 X15/30 x 12 Completed years) = Ksh. 72,000.



v. 12 months compensation

57. The Claimant invited this Court to award him Kshs. 144,000 as compensation for the unfair termination. I am alive of the fact that the 12 months' gross salary is the maximum awardable compensation provided for under section 49 (1) (c) of the Employment Act. A grant of compensatory relief under the section is discretionary, the extent too. It depends on the circumstances peculiar to each case. I have carefully considered the manner in which the Claimant's employment was terminated which in my view was in total ignorance of the stipulations of the law, the length of time that he served the Respondent, and the fact that he didn't contribute in any manner to the termination, and arrive at the conclusion that he is entitled to the compensatory relief and to an extent of ten [10] months' gross salary, KShs. 120,000.

vi. **Certificate of service.**

58. The Claimant contended that he was not issued a certificate of service at the termination of his employment. Section 51 of the Employment Act places an obligation upon the employer to issue a certificate of service to an employee with whom he or she has separated. It matters not how the separation occurred. The certificate is a statutory entitlement to a terminated employee. The Respondent herein is hereby directed to issue the certificate to the Claimant.

59. In the upshot, judgment is hereby entered in favour of the Claimant in the following terms;

- I. Compensation for unutilized leave days, KShs. 16,800.
- II. Severance pay, Kshs. 72000.
- III. Certificate of service be issued to him within 30 days of this Judgement.
- IV. Compensation pursuant to the provisions of section 49[1][c] of the Employment Act, KShs. 120,000.
- V. Interest on the sums awarded above at court rates from the date of this judgment till full payment.
- VI. Costs of the suit.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 27TH DAY OF JULY, 2023.

.....
OCHARO KEBIRA

JUDGE

