



**Omondi v Scripture Union of Kenya (Cause E343 of 2020)
[2023] KEELRC 1840 (KLR) (6 July 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1840 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E343 OF 2020
BOM MANANI, J
JULY 6, 2023**

BETWEEN

TIMOTHY OCHUKA OMONDI CLAIMANT

AND

SCRIPTURE UNION OF KENYA RESPONDENT

JUDGMENT

1. This action by the Claimant challenges the restructuring process that the Respondent undertook in the year 2017 resulting in the Claimant being terminated from employment on July 20, 2017 on account of redundancy. The Claimant's case is that the process was irregular and he was denied the chance to be absorbed in the revised structure of the Respondent when his application for a new position was not considered. Consequently, the Claimant prays for the various reliefs that are set out in the Statement of Claim.
2. The Respondent does not admit liability for the claim. According to the Respondent, the restructuring process was executed in accordance with the law and members of staff given a fair chance to be considered for retention. The Respondent avers that the Claimant lost the opportunity when he failed to act within the timelines that had been set.

Claimant's Case

3. The Claimant avers that he was employed by the Respondent on October 16, 2006 in the position of Sales Assistant. He worked for the Respondent in various capacities and stations until July 20, 2017 when he was issued with a letter terminating his services. At the time of exit, the Claimant states that his gross monthly salary was Ksh 38,115.00.
4. Just before termination of his contract, the Claimant indicates that the Respondent issued him with a letter dated June 13, 2017 indicating that it had commenced the process of restructuring its bookshop business. The letter indicated that the restructuring had been necessitated by low business in the



- Respondent's bookshop department. Further, the letter communicated the fact that the Respondent's management would keep the Claimant informed about the process.
5. The Claimant indicates that shortly thereafter, he received yet another letter from the Respondent dated June 28, 2017 informing him of the new structure of and positions within the Respondent's bookshop department. The letter asked the Claimant to apply for any two of the positions if he wished to be retained.
 6. According to the letter of June 28, 2017, the Claimant had up to the evening of July 5, 2017 to tender his application for the position that he wished to be considered for. The application was to be accompanied by the Claimant's curriculum vitae and testimonials.
 7. It is the Claimant's case that this deadline was extended to July 13, 2017 at 5.00 pm. As a matter of fact, there is an email on record confirming this fact.
 8. The Claimant states that he applied for the position of Logistics Assistant. The application is dated July 13, 2017 and is said to have been delivered through email.
 9. Despite the application, the Claimant states that he was not called for an interview for the new position. Instead, the Respondent issued him with a letter dated July 20, 2017 terminating his contract of service.
 10. The Claimant further states that his appeal against the decision to terminate his contract was not considered. And neither was he paid his full terminal dues as more particularly set out in the Statement of Claim.
 11. The Claimant states that the decision to end his contract was carried out in a manner that flouted section 45(1) and 45 (2) (c) of the *Employment Act*. In his view, the termination of his contract was unlawful.

Respondent's Case

12. On its part, the Respondent maintains that after experiencing low business in its bookshop department over a long period of time, the management opted to find a lasting solution to the problem. This election resulted in a resolution on June 12, 2017 to restructure the department.
13. According to the Respondent, the restructuring process was to see closure of a number of its bookshop outlets around the country. Further, some staff designations were going to change. Inevitably, this process was going to result in some job losses.
14. The Respondent states that it wrote to members of staff notifying them of this development. The Respondent asked members of staff to apply for the new positions that had been established within its structure. Nevertheless, those who were not keen to be retained were given the option of voluntary retirement.
15. The Respondent's case is that it set conditions for those who wished to apply for new positions. The interested employees were to submit their curriculum vitae and testimonials. Further, the applications had to be lodged by close of business on July 13, 2017. Anybody whose application did not meet these minimum requirements was considered as having not applied for the new positions.
16. It is the Respondent's case that when he lodged his application on July 13, 2017, the Claimant failed to adhere to the above conditions. The application was incomplete for want of the Claimant's curriculum vitae and testimonials. Consequently, it was not considered.



Issues for Determination

17. The issues for determination in the cause in my view are as follows:-
 - a. Whether the Respondent followed the prescribed procedure in handling the redundancy exercise.
 - b. Whether the Claimant's contract of service was fairly terminated.
 - c. Whether the parties are entitled to the reliefs that they have set out in their pleadings.

Analysis

18. This case is a good example of the challenges that a court faces when asked to adjudicate on a matter that involves an unrepresented litigant. The pleadings as formulated by the Claimant are in a less than desirable state. Although the case is typically concerned with the process of redundancy, one has to significantly struggle to appreciate this fact. Yet, I have to somehow analyze the pleadings, make sense of the dispute and render a decision.
19. Helpfully, both parties are in agreement that the dispute revolves around the decision by the Respondent to restructure its bookshop business and the fact that it resulted in some job losses. Further, the Claimant helpfully navigates the challenges of pleading his case by averring that the process as undertaken by the Respondent did not accord with the requirements of sections 45(1) and 45(2)(c) of the [Employment Act](#). The aforesaid provisions state as follows:-

"No employer shall terminate the employment of an employee unfairly."

"A termination of employment by an employer is unfair if the employer fails to prove that the employment was terminated in accordance with fair procedure."
20. The import of the above provision is that for a decision by the employer to terminate an employment contract to be considered as fair, the employer must demonstrate that he acted in accordance with fair procedure. This requirement applies to all instances where the employer unilaterally opts to terminate employment including where the decision is informed by the operational requirements of the enterprise (see section 45 (2) (b) (ii) of the [Employment Act](#)).
21. The procedure for terminating an employment relation for operational reasons is provided for under section 40 of the [Employment Act](#). The law requires the employer to issue a notice of his intention to declare redundancy to the affected employees or their trade unions. The notice should be for a minimum period of one calendar month. The notice must indicate the reasons for and extent of the proposed redundancy.
22. Second, the employer is required to select members of staff who will be required to exit the enterprise. The accepted practice is to make the selection based on the seniority of the affected employees. Thus, the employees who were first to be hired by the enterprise will be the last to exit.
23. Notwithstanding the aforesaid general principle, the employer may be permitted to overlook the aspect of seniority and make his selection of the employees to exit based on their skill, reliability and ability. However, such departure from the seniority principle must be justified on objectively verifiable grounds.
24. Once the employer has identified the employees to be released, he must then pay them their redundancy dues, leave dues and salary for one month in lieu of notice to terminate. If the employees have other



- benefits guaranteed under their contracts of service or collective bargaining agreements, these must be settled.
25. The Respondent contends that it followed the law in processing the restructuring process and the resultant realignment of the affected employees. In support of this argument, the Respondent relies on the fact that after the restructuring, it asked all its employees to apply for the new positions within a fixed timeframe. Those who did were considered with some being re-absorbed. Those who did not meet the timelines and other attendant conditions like the Claimant lost their jobs. They were however, paid their terminal dues.
 26. The critical question is whether what the Respondent did satisfies the requirements of section 40 as read with section 45 of the *Employment Act*. Whilst the Respondent contends that it does, the Claimant contests this fact.
 27. I have looked at the evidence on record. Although the Respondent asserts that it involved the Ministry of Labour in the process, there is no evidence that this was the case. Section 40 (1) (a) of the *Employment Act* requires the employer to issue the redundancy notice to the labour officer within the local limits of the enterprise. There was no evidence that such notice issued. None was produced in evidence.
 28. The other matter relates to whether the notice that was served on the Claimant meets the minimums of section 40 (1) (a) of the *Employment Act*. A look at the notice does not demonstrate that it indicated the extent of the proposed redundancy. To meet this requirement, the Respondent was required to provide information on the number of employees likely to be affected by the restructuring process. The notice to the Claimant is silent on this.
 29. The Respondent does not disclose why it elected to utilize the tool of interviews to undertake the selection process for the employees to be retained instead of the default principle of seniority. As pointed out earlier in this decision, whilst the employer is entitled to overlook seniority and undertake the selection of employees to be released based on reliability, skill and ability, he must provide a justification for this departure which should be capable of being objectively verified. Apart from the Respondent stating that it selected employees to be retained through interviews and re-hiring, it is not self evident from the record why the Respondent settled for this approach.
 30. The importance of ensuring that the employer justifies departure from seniority as the mechanism for selection of employees to exit the organization is to minimize the possibility of using redundancy as a smokescreen for victimizing employees that the employer wishes to get rid of for ulterior reasons. Indeed, this is the reason why the Court of Appeal stated in *Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others* [2014] eKLR that the selection process must not be opaque.
 31. In view of the foregoing, I agree with the Claimant that the Respondent did not uphold the requirements of sections 45 as read with section 40 of the *Employment Act* in processing the redundancy and restructuring of its bookshop department. Consequently, I declare the process procedurally irregular.
 32. The Claimant has prayed for a plethora of reliefs including salary for 36 months from July 2017 to July 2020. However, section 49 of the *Employment Act* only permits the court to grant compensation for unfair termination of a contract of service that is equivalent to a maximum of the aggrieved employee's twelve months gross salary. Even then, such award should only be made for cogent reasons (*Postal Corporation of Kenya v Andrew K Tanui* [2019] eKLR).
 33. I note that prior to his release from employment, the Claimant had served the Respondent for approximately 11 years, a fairly long period of time. Further, there is no evidence that the Claimant's conduct contributed to the closure of the employment relation between the parties. In the premises,



I am minded to award the Claimant compensation that is equivalent to his salary for six months that is to say, Ksh 38,115.00 x 6 = Ksh 228,690.00.

34. I note that on his release, the Claimant was paid Ksh 94,834.00. This amount shall be discounted from the sum awarded above leaving the sum of Ksh 133,856.00 that is due to him.
35. I award the Claimant interest on the aforesaid sum of Ksh 133,856.00 at court rates from the date of this decision.
36. The above award is subject to the applicable statutory deductions.
37. Since the Claimant acted in person, he is entitled to recover only the disbursements incurred in prosecuting this action as can be supported by receipts.
38. The Respondent is ordered to issue the Claimant with a Certificate of Service.
39. For the avoidance of doubt, any other relief that the Claimant prayed for but which has not been expressly granted is deemed denied. The court has taken this approach appreciating its duty to avoid making multiple awards arising from the same cause of action and appreciating that the decision on which reliefs to grant under section 49 of the Employment Act is discretionary.

Summary of Award

40. Termination of the Claimant's contract of service is declared procedurally unfair.
41. The Claimant is awarded Ksh 228,690.00 less the amount of Ksh 94,834.00 already paid to him leaving a balance of Ksh 133,856.00.
42. The Claimant is awarded interest at court rates on the amount awarded from the date of this judgment.
43. The sum awarded is subject to the applicable statutory deductions.
44. The Claimant is allowed to recover only the disbursements incurred in mounting this action that are supported by receipts.
45. The Respondent is ordered to issue the Claimant with a Certificate of Service.
46. For the avoidance of doubt, any other relief that the Claimant prayed for but which has not been expressly granted is deemed denied. The court has taken this approach appreciating its duty to avoid making multiple awards arising from the same cause of action and appreciating that the decision on which reliefs to grant under section 49 of the Employment Act is discretionary.

DATED, SIGNED AND DELIVERED ON THE 6TH DAY OF JULY, 2023

B. O. M. MANANI

JUDGE

In the presence of:

..... **the Claimant**

.....**for the Respondent**

ORDER

In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent,



the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

B. O. M MANANI

