Fursys Kenya Limited v Oyare (Appeal E046 of 2021)
[2023] KEELRC 2846 (KLR) (31 October 2023) (Judgment)

Neutral citation: [2023] KEELRC 2846 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

APPEAL E046 OF 2021

K OCHARO, J

OCTOBER 31, 2023

BETWEEN

FURSYS KENYA LIMITED ..... APPELLANT

AND

SAMUEL OYARE ..... RESPONDENT

(Being an Appeal against the Judgment and Decree of Honourable David Obonyo Mbeja S.R.M in the Chief Magistrate's Court at Milimani Commercial Courts delivered on 1st April 2021 in CMEL Cause No. 1413 of 2019)

JUDGMENT

Introduction

1. The appeal herein which has been initiated vide a Memorandum of Appeal on 29th April 2021 assails the Judgment of the Honorable Senior Resident Magistrate in the above-mentioned cause, putting forth principal grounds that he erred in law and fact;

    a. In finding that the Claimant was wrongfully, unlawfully and unfairly terminated;

    b. In finding that the Claimant was rendered both redundant and unfairly terminated – two diametrically opposed findings;

    c. In awarding excessive compensation of 12 months' salary;

    d. In awarding interests at court rates on the awarded damages/compensation from the date of filing suit;

    e. In ignoring authorities by superior courts on the issue of redundancy;

    f. In failing to indicate the reason or reasons to justify why he reached the decision to make a maximum award;

h. In exercising judicial discretion capriciously and whimsically in the award of compensation hence arriving at an erroneous decision factually and legally.

2. On the above grounds, the Appellant prayed for orders that: -

1. This Appeal be allowed and judgment entered in favour of The Appellant in the following terms:

a. The judgment of the Chief Magistrates Court [Hon. Mr. David Obonyo Mbeja (SRM)] dated 1st April 2021 in CMEL Cause No. 1413 of 2019 be set aside.

b. CMEL Cause No. 1413 of 2019 be dismissed with costs to the Appellant.

2. Costs of this appeal be awarded to the Appellant.

3. The Appellant filed a Record of Appeal dated 13th June 2022 and a Supplementary Record of Appeal dated 4th July 2022.

4. When the matter came up for direction on the appeal on 29th July 2022, this Court ordered that the appeal be canvassed by way of written submissions, and gave timelines for the parties to file their respective submissions.

5. The Appellant filed Submissions dated 14th January 2023, and the Respondent filed his dated 15th September 2022.

The Case Before The Trial Court

6. Through a Memorandum of Claim dated 14th August 2019 filed by the Respondent herein before the Trial Court the Respondent contended that he first came into the employment as a technician on 1st June 2007, but the said employment was unlawfully terminated on 7th August 2019 on grounds of redundancy.

7. On its part, the Appellant herein resisted the Respondent's claim by way of a Memorandum in Response dated 29th June 2020. It denied the allegations contained in the Respondent's Memorandum of Claim in toto. Further, denying the Appellant's entitlement to the reliefs that he had sought in his pleadings.

8. In his evidence before the Learned Trial magistrate, the Respondent took issue with the procedure leading up to the termination on the alleged account of redundancy. He categorically stated prior to the termination he was not issued with any formal notice indicating the Appellant's intention to terminate his employment on account of redundancy. Further, if indeed the Appellant had a justification to terminate the employment of his employees on account of redundancy then the same was without any specific criteria of selection of those to who were to be affected. The Appellant failed to give regard to seniority in time, skill, ability and reliability of each employee.

9. The Respondent alleged before the Trial Magistrate that upon terminating his employment, the Appellant failed to pay him his terminal dues.

10. The Respondent summed up his case before the Trial Court by stating that the Appellant's actions were un-procedural and unlawful as there was non-adherence with the provisions of the *Employment Act* 2007. The Respondent claimed an order for reinstatement to his place of work; 1 month's salary in lieu of notice and 12 months' gross salary compensation for unlawful termination.

11. The Appellant asserted that before terminating the Appellant's employment on account of redundancy, it gave the Respondent and the Labour Office the requisite notice of the intended redundancy in compliance with the provisions of Section 40 (1) (b) of the *Employment Act* 2007. After the termination, it requested all the employees declared redundant, including the Respondent, to visit the finance department to be paid for their terminal dues i.e. all untaken leave days, one month's salary in lieu of notice, and severance pay.

12. On the issue of the criteria for the selection of employees to be declared redundant, the Appellant stated that it checked the abilities and skills of the employees and uniformly applied the same criteria to all the employees. The Respondent was selected as he had been given warning letters for absconding work and was not efficient at work.

13. The Appellant asserted that the termination of the Respondent's and the other employee's employment was a result of its poor financial status, which called for right sizing of its human capital. Redundancy is a legitimate ground for termination of an employment contract. The termination was both procedurally and substantively fair.

14. The learned Trial Magistrate heard both the Respondent and the Appellant's witness on their respective cases. He thereafter rendered himself on the matter on 1st April 2021. In his judgment, the Learned Magistrate analyzed the law on redundancy in detail and concluded that the Appellant hadn't demonstrated that the termination was in strict adherence to the provisions of section 40 of the *Employment Act*. The notices contemplated thereunder were not issued by the Appellant. In particular, the trial court held that the Respondent [employee] and the labour office had not been issued with the requisite notice of the intended redundancy. It found that the letters produced by the Appellant were simply termination notices, rather than notices of intended redundancy. The fact that the words "redundancy" and "notification" were included in the body of the letters, didn't change their character. The mandatory one-month notice was not given.

15. Having found that the Appellant failed to issue the Respondent herein and the Labour Officer with the mandatory 30 days' notice per Section 40 (1) (b)of the Act, the trial Court held that the termination of the Respondent's on account of redundancy was unfair.

16. Regarding the selection criteria, the learned Trial Magistrate concluded that there was no evidence before him that could suggest that the selection process of those who were to be affected was fair. The Appellant didn't present before him the evaluation material alleging that the same was confidential. In his view, section 40 [1] was not complied with.

17. On the terminal dues payable to the Respondent, the trial Court held that the Appellant had failed to comply with Sections 40 (1) (f) and (g) of the *Employment Act* 2007 by paying the Respondent one month's wages in lieu of notice and severance pay at the rate of not less than 15 days pay for every year of service. In particular, the Appellant had only produced evidence of payment of severance pay for only 5 years of service, rather than the 12 years that the Respondent served.

18. Having found that the termination on account of redundancy was not demonstrated to have been in adherence with the prescripts of the law, the learned Trial Magistrate awarded the Respondent 12 months' gross salary pursuant to section 49[1][c] of the *Employment Act*.

19. The trial Court found that the Claimant was entitled to severance, but the sum of Kshs. 113,424.66 that the Appellant paid the Respondent was an underpayment. The amount was not out of a computation done in accordance with the stipulations of section 40 of the Act.

The Appeal.

20. The Appellant, being aggrieved by the decision of the Trial Court, filed the present Appeal, on the grounds set out hereinabove.

Appellant's Submissions

21. In its submissions dated 14th January 2023, the Appellant urges this Court to reconsider the evidence, reevaluate the same and draw its own conclusions without necessarily being bound by the findings of the Trial Court as held in Selle & Another vs Associated Motor Boat Co. Ltd & Others (1968) EA 123.

22. It is the Appellant's submission that it followed the strict procedure contained in Section 40 of the *Employment Act* 2007, by issuing the Respondent and the Labour Office with a formal written notice of the intended redundancy. The Appellant directs this Court to letters dated 7th August 2019 and 22nd August 2019 to the Respondent and the Labour Officer, respectively.

23. It is further submitted that the redundancy was effected after consultations had been held between the Appellant and its employee, in accordance with Article 13 of Recommendation No. 166 of the ILO Convention No. 158 – Termination of Employment Convention 1982, which by dint of Article 2 (6) of *the Constitution* of Kenya 2010 is part of the laws of Kenya.

24. The Appellant cited the Court of Appeal case of Cargill Kenya Limited vs Mwaka & 3 Others Civil Appeal 54 of 2019 [2021] KECA 115 to buttress its position that issuance of a notice of termination before declaring a redundancy is not a requirement or condition under Section 40 (1) (f) of the *Employment Act* 2007.

25. On the issue of the compensation for unfair termination awarded by the trial Court, the Appellant submits that compensation equivalent to 12 months' gross salary was excessive in the circumstances of the case. Further, in arriving at the award, the trial Court did not take into account the factors set out in Section 49 of the *Employment Act* 2007.

26. The Appellant submitted further that the trial Court failed to take into consideration the reasons for the redundancy and the measures which the Appellant took to settle terminal benefits inclusive of severance pay to the Respondent. In essence, the Trial Magistrate did not give reasons justifying the maximum award of 12 months' gross salary. On the requisite duty to do so, the Appellant placed reliance on Civil Appeal No. 180 Of 2017 Kiambaa Dairy Farmers Co-Operative Society Limited v Rhoda Njeri & 3 others [2018] eKLR (Kiambaa Case) and Ol Pejeta Ranching Limited vs David Wanjau Muhoro [2017] eKLR.

27. The Appellant submits that compensation equivalent to 4 months' gross salary as awarded in Cargill Kenya Limited v Mwaka, or 2 months' gross salary as awarded in Judy Gakii Njeru v Wananchi Group (K) Limited [2021] eKLR would have been sufficient for unlawful redundancy.

28. Buoyed by the belief that it followed due procedure while declaring the Respondent redundant by issuing both him and the labour office with the requisite notice, submitted that the compensation awarded by the trial court was unjustified and/or excessive, if not completely wrong.

29. Finally, the Appellant submits that the trial court ignored the decisions of the Superior Courts presented to it by the Respondent on the issue of redundancy. The Appellant relies on the cases of Dodhia v National & Grindlays Bank Limited and

Another [1970] EA 195 and Jasbir Singh Rai & 3 others to buttress its submission that Courts are bound to adhere to judicial precedent.

Respondent's Submissions

30. The Respondent submitted that this Court being the first Appellate Court over this matter, is enjoined in interrogating this appeal to re-assess and re-evaluate the evidence. To support this point, he cited the case of Mark Ourui Mose vs R [2013] eklr. Further, this Court can only interfere with the findings of the Trial Court if the same appears to have been reached in the exercise of discretion in a wrong manner. To bolster the submission reliance was on the case of Mbogo & Another vs Shah [1968] EA 93 cited with approval in Farah Awad Gullet vs CMC Group Motors Limited [2018] eKLR.

31. The Respondent submits that the Appellant failed to meet the six (6) conditions required by Section 40 of the *Employment Act* 2007 as the bare minimum conditions for effecting redundancy, as has been stressed in Hesbon Ngaruiya Waigi vs Equitorial Commercial Bank Limited [2013] eKLR cited in Liu Ching Liang vs Webwave Electric Manufacturing (K) Company Limited & 2 Others [2017] eKLR.

32. It is submitted that termination on account of redundancy must be procedurally fair and substantively justifiable under Sections 43 and 45 of the *Employment Act* 2007 as stated in Ancent Mumo Kalani vs Nairobi Business Ventures Limited [2018] eklr and confirmed in Julie Topirian Njeru vs Kenya Tourist Board Industrial. That fairness in the redundancy process involves engaging the employee in adequate consultations which precede termination. The Respondent states that the Appellant's redundancy process was unprocedural, not substantive, and did not follow the law.

33. While the Respondent admits that redundancy is a legitimate ground for terminating a contract of employment, there should be a valid and fair reason based on operational requirements of the employer, and the termination should be according to fair procedure. The Respondent relied on Kenya Airways Limited and Aviation & Allied Workers Union of Kenya & 3 others [2014] eKLR to buttress his submissions.

34. Lastly, the Appellant failed to produce any evidence from which the selection criteria for those that were to be affected by the redundancy could be deduced.

Analysis and Determination

35. Firstly, this being a first Appeal, this Court is obliged to reconsider and re-evaluate the evidence and material that was placed before the trial Court and come to its own independent findings and conclusions. This position as was set out elaborately in the case of Selle -vs- Associated Motor Boat Co. [1968] EA 123); see also (Abdul Hameed Saif vs. Ali Mohamed Sholan [1955] 22 E. A. C. A. 270) where the Court held: -

> " An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif v Ali Mohamed Sholan (1955), 22 E.A.C.A. 270)".

36. In the context of redundancy, the above position was reiterated in the case of The German School Society & another v Ohany & another (Civil Appeal 325 & 342 of 2018 (Consolidated)) [2023] KECA 894 (KLR) (24 July 2023) (Judgment) where, in paragraph 28, the Court of Appeal held as follows: -

> " We have considered the records for the two appeals, the parties' submissions and the law. This being a first appeal, we are cognizant that our primary role is to re-evaluate the evidence before the ELRC and draw our own conclusions. A first appeal is a valuable right of the parties and unless restricted by law, the whole case is open for reconsideration both on questions of fact and law. The judgment of the appellate court must reflect this court's conscious application of its mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of this Court. The first appellate court has jurisdiction to reverse or affirm the findings of the trial court. While reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. A first appellate court is the final court of fact ordinarily and therefore a litigant is entitled to a full, fair, and independent consideration of the evidence at the appellate stage. In addition, we bear in mind that we, unlike the ELRC, we did not have the benefit of seeing the witnesses testify. (See Kenya Ports Authority v Kuston (Kenya) Limited (2009) 2EA 212)."

37. Cognizant of this role, this Court has analyzed the Appellant's Record of Appeal and more particularly pages 38 and 39 thereof, where copies of the Letter of Termination to the Respondent dated 7th August 2019, and Letter to the Labour Office dated 22nd August 2019, obtain. The Letter of Termination dated 7th August 2019 titled: "Termination of Employment" reads in part:

> " As per the conditions of our employment contract, please allow this letter to serve as termination of contract, effective 07.08.2019.
>
> Unfortunately, the economic conditions in the industry have resulted in slow sales in the year 2018 and 2019 which negatively impacted on our cash flows. In view of the above, the company, through its restructuring process to ensure a lean team has made your position redundant. The Company therefore regrettably informs you of its decision to terminate your services.
>
> Your dues and payments in lieu of notice have been prepared and you can liaise with the finance department for clearance.
>
> We wish you the best in your future challenges."

38. The letter is signed by one B.M. KIM and copied to the Labour Office.

39. The letter to the Labour Office is captioned "Notification of Termination of Employment – Samuel Oyare Okal". In sum, the letter forwards to the labour office the Termination letter dated 7th August 2019.

40. The law relating to redundancy is now well settled in the Kenyan situation. The primary law on redundancy is Section 40 of the *Employment Act* 2007 which provides: -

> " 40. Termination on account of redundancy

(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.

(2) Subsection (1) shall not apply where an employee's services are terminated on account of insolvency as defined in Part VIII in which case that Part shall be applicable.

(3) The Cabinet Secretary may make rules requiring an employer employing a certain minimum number of employees or any group of employers to insure their employees against the risk of redundancy through an unemployment insurance scheme operated either under an established national insurance scheme

established under written law or by any firm underwriting insurance business to be approved by the Cabinet Secretary."

41. There is no doubt in my mind that Section 40[1][a] provides for the issuance of notices where the employee[s] to be affected by the intended termination of employment on account of redundancy, is a member[s] of a trade union. A notice signifying the employer's intention must be served upon the trade union and the Labour Officer. The notices must be issued at least 30 days prior to the date appointed for the termination. Section 40[1][b] contemplates a scenario where the employee[s] to be affected by an intended termination of his or her employment is not a member of a trade union. In such a situation the notice must be issued in writing to the employee and the Labour Officer. Too, the notice must be of not less than thirty days. See, The German School Society & another v Ohany & another (Supra).

42. In my view, the central issue in this appeal is whether the Appellant did issue notices contemplated under Section 40 (1) (b) of the Act. A cursory perusal of the Termination Letter dated 7th August 2019 reveals that the same terminated the Respondent's employment With Immediate Effect. It wasn't a thirty days' notice. The notice contemplated in the provision is not supposed to be a termination notice but a notification of an intended redundancy. Similarly, the letter to the Labour Office must be one notifying of an intended termination of employment. It cannot be a post-termination notification. The letter dated 22nd August 2019 to the Labour Office was issued after the Respondent's employment had been terminated. It simply informed them of the termination. It did not give 30-days' notice.

43. By reason of the foregoing. I am persuaded by the Respondent that the Learned trial Magistrate didn't err in finding that the termination of his employment was without adherence to the provisions section 40[1][b] of the Act and that consequently, the termination was unfair.

44. The Appellant placed reliance on the Cargill Kenya Limited case (Supra) in its submissions. With great respect, the submissions reflect how far off the mark the Appellant was in appreciating the point of discussion that was in the matter as regards section 40[1][a] and [b] of the Act, and the Court's holding thereon. The point of discussion was whether, under section 40, the employer is enjoined to issue two notices i.e. a notice signifying the employer's intention to terminate his employee[s] employment on account of redundancy and subsequently a termination notice. The Court expressed the view that it is only a notice of intended redundancy contemplated under the provision.

45. In fact, one will safely conclude that section 40[1][f] provides for payment of wages in lieu of notice following an appreciation that issuance of a termination notice is not contemplated thereunder.

46. The justification for the notice of intended redundancy is to birth consultations between the employer and the employee and this was aptly captured in The German Society School (Supra). The Court of Appeal held at paragraphs 56, 57 and 60:-

> " 56. A notice to the employee/trade union/labour officer opens up the door for a consultative process with the key stakeholders. The Court of Appeal in Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 Others (2014) eKLR held:
>
> a) Consultation is implicit in the *Employment Act* under the principle of fair play;
>
> b) Consultation gives an opportunity for other avenues to be considered to avert or to minimize the adverse effects of terminations;

c) Consultations are meant for the parties to put their heads together and is imperative under Kenyan law;

d) Consultations have to be a reality not a charade;

e) Opportunity must be given for the stakeholders to consider;

f) Stakeholders must have and keep an open mind to listen to suggestions, consider them properly and then only then decide what is to be done; and

g) Consultation must not be cosmetic.

57. In essence, consultation is an essential part of the redundancy process and ensures that there is substantive fairness. The employer should ensure that it carries out the process as fair as possible and that all mitigating factors are taken into consideration. A reading of the record shows that the respondent was served with a redundancy notice and asked to proceed for a one month's leave. The trial court found that the redundancy was unfair and irregular for failure to give adequate notice and thereby not giving consultation a chance.

60. However, on the question whether the notice gave consultations and dialogue a chance, we find that while the requirement for consultation is not expressly provided for in section 40 of the *Employment Act*, this requirement is implied, as the main reason and rationale for giving the notices in section 40(1) (a) and (b) to the unions and employees of an impending redundancy where applicable."

47. No doubt, the Letter of Termination dated 7th August 2019 issued to the Respondent herein did not allow for consultations as required by the law.

48. The Appellant takes issue with the trial Court's finding that the Respondent was unfairly declared redundant and unfairly terminated, findings which it considers to be diametrically opposite.

49. On this issue, I return that the two positions are in no way contradictory. The Court in Kenya Airways Ltd and Aviation & Allied Workers Union of Kenya & 3 Others Civil Appeal No. 46 of 2013 held as follows: -

> " Thus, redundancy is a legitimate ground for terminating a contract of employment provided there is a valid and fair reason based on operational requirements of the employer and the termination is in accordance with a fair procedure. As section 43(2) provides, the test of what is a fair reason is subjective. The phrase "based on operational requirements of the employer" must be construed in the context of the statutory definition of redundancy. What the phrase means, in my view, is that while there may be underlying causes leading to a true redundancy situation, such as reorganization, the employer must nevertheless show that the termination is attributable to the redundancy - that is that the services of the employee has been rendered superfluous or that redundancy has resulted in abolition of office, job or loss of employment—".

50. In my view, the Trial Magistrate's statement was referring to procedural fairness in the process that led to the termination of the Respondent's employment and the effect [the unfair termination] This

he rightly so. Section 45 (2) of the Act which speaks to procedural and substantive fairness, is wholly applicable to terminations as a result of redundancy.

51. I now turn to the issue of the compensation for unfair termination. Undeniably, the award was made under the provisions section 49[1][c] of the Act. The learned Trial Magistrate had the discretion to make the award and fix the amounts for compensation, however after taking into account the factors enumerated in section 49 (4) namely:-

> "(a) wishes of the employee;
>
> (b) the circumstances in which the termination took place, including the extent, if any, to which the employee caused or contributed to the termination; and
>
> (c) the practicability of recommending reinstatement or re-engagement;
>
> (d) the common law principle that there should be no order for specific performance in a contract for service except in very exceptional circumstances;
>
> (e) the employee's length of service with the employer;
>
> (f) the reasonable expectation of the employee as to the length of time for which his employment with that employer might have continued but for the termination;
>
> (g) the opportunities available to the employee for securing comparable or suitable employment with another employer;
>
> (h) the value of any severance payable by law;
>
> (i) the right to press claims or any unpaid wages, expenses or other claims owing to the employee;
>
> (j) any expenses reasonable incurred by the employee as a consequence of the termination;
>
> (k) any conduct of the employee which to any extent caused or contributed to the termination;
>
> (l) any failure by the employee to reasonably mitigate the losses attributable to the unjustified termination; and
>
> (m) any compensation, including ex-gratia payment, in respect of termination of employment paid by the employer and received by the employee".

52. On this issue, there can be no doubt that the trial court gave reasons for the award. The reasons are elaborately set out on page 12 of the judgment. In my view, the reasons suggest that he was aware of the factors considerable under the provision above stated and that he did consider them. The Learned Magistrate did err in awarding the compensation.

53. Cognizant of the parameters set out in the case Mbogo & Another -v- Shah [1968] EA 93, I see no sufficient reason that has been advanced that will prompt this Court to disturb the award by the trial Court upon an exercise of judicial discretion. It was not sufficiently argued that the Learned Magistrate misdirected himself, acted on matters he should not have acted on, failed to take into consideration matters that he should have and/or arrived at the wrong conclusion.

54. In the upshot, I hereby dismiss the Appeal herein with costs to the Respondent.

READ, DELIVERED AND SIGNED THIS 31ST DAY OF OCTOBER 2023.

.....

OCHARO, KEBIRA.

JUDGE

In the presence of:

Mr. Ayugi for the Claimant

No Appearance for the Respondent