



REPUBLIC OF KENYA



KENYA LAW
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**Sagoo v Thika Cloth Mills Limited (Cause 372 of 2019)
[2023] KEELRC 2697 (KLR) (27 October 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2697 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 372 OF 2019
SC RUTTO, J
OCTOBER 27, 2023**

BETWEEN

SURINDER SAGOO CLAIMANT

AND

THIKA CLOTH MILLS LIMITED RESPONDENT

JUDGMENT

1. The claimant avers that she was employed by the Respondent with effect from 7th December 2015, as an Administrative Manager. According to the claimant, she served the Respondent diligently. It is the claimant's case that vide a letter dated 5th March 2019, the Respondent informed her of its intention to terminate her employment maliciously or reasons of alleged redundancy. The claimant was subsequently terminated from employment through a letter dated 3rd June 2019. The claimant has termed her termination unlawful, unprocedural and illegal hence seeks reinstatement and in the alternative, payment of Kshs 6,375,600/= being three months' salary in lieu of notice, leave pay, severance pay and compensatory damages. The claimant has further sought to be awarded the costs of the suit.
2. Opposing the claim, the Respondent avers that the claimant was employed due to her vast experience in marketing and sales to boost its (Respondent) performance. That the Respondent had expectations that the claimant would improve their turnover. However, contrary to the Respondent's expectations, it experienced low turnover. The Respondent attributed this fact to the claimant's conduct, general attitude and behaviour towards other employees. According to the Respondent, the notice of termination was in no way made out of malice. It contends that the claimant's employment was lawfully terminated as she was accorded a three months' notice period. It is on account of the foregoing that the Respondent has asked the Court to dismiss the claimant's suit with costs.
3. The matter proceeded for hearing on diverse dates during which both sides called oral evidence.



claimant's Case

4. The claimant testified in support of her case and to start with, she adopted her witness statement to constitute her evidence in chief. She further produced the list and bundle of documents filed on her behalf as exhibits before Court.
5. It was the claimant's evidence that she worked for the Respondent devotedly with a clean record for three and a half years.
6. According to the claimant, she has no idea why she was terminated from the Respondent's employment.
7. She further testified that prior to her termination from employment, she was not accorded a fair hearing. That her termination was abrupt and that she was just given the letter of termination. She further stated that there was no cause for her termination.
8. She further denied being a racist and maintained that the Respondent was happy with her work. That her salary was even increased due to her good work.
9. Concluding her testimony in chief, the claimant asked the Court to allow her claim as prayed.

Respondent's case

10. The Respondent called three witnesses to testify in support of its case. Ms. Tejal Dodhia who testified as RW1 was the first to go. She identified herself as the Respondent's Director. She adopted her witness statement to constitute her evidence in chief and proceeded to produce the initial list and bundle of documents as well as the list and supplementary bundle of documents filed on behalf of the Respondent as exhibits before Court.
11. It was RW1's evidence that during the claimant's tenure in office, she received numerous complaints both verbal and written from staff about her attitude and general behavior towards them. The employees complained about the claimant's rudeness and abusive language, especially the junior employees. That in some instances, she was racist and suggested that she should not share bathroom facilities with Africans.
12. RW1 testified that at first, she did not take much action but when the complaints kept increasing, she gave the claimant a verbal warning to change her attitude and conduct towards other employees.
13. According to RW1, the Respondent Company also received complaints from the customers about the claimant's general attitude towards them. That a few of the Respondent's Customers resorted not to go to its offices and others may have resolved to stop dealing with the company entirely.
14. She (RW1) spoke to the claimant on several occasions and verbally warned her about a change in her attitude and her conduct but she did not reform.
15. RW1 further stated that matters went from bad to worse and two of the Respondent's long serving staff members resigned while citing frustration, abusive language, mistreatment and even threats from the claimant as the reason for their resignation.
16. It was RW1's further testimony that the claimant's attitude and behavior had an overall negative effect on her employees. That there was a total lack of morale and zeal for work. The reduced morale impacted negatively on the overall sales of the company for the years the claimant was with the Respondent.



17. RW1 further averred that due to the low turnover recorded during the claimant's tenure as the Sales Manager, the company could only manage to give its employees a minimal increment in their salaries.
18. When the Respondent conducted appraisals for the staff in the marketing department and informed them of the proposed increment, the claimant was the only person who complained about her salary increment knowing very well that the sales for the Company were not improving yet it was her duty to ensure that the sales picked up.
19. Her attitude and conduct with regard to the increment was unbecoming. Being the head of sales, the claimant was aware of the Company's performance and limitations in relation to finances. Further, the claimant was amongst the highest paid employees in the Company.
20. RW1 termed the claimant's overall performance as unsatisfactory. That further, her conduct and attitude affected staff morale and customers shied away from dealing with the Company. It was RW1's evidence that for those reasons, the Respondent decided to terminate the claimant's employment to protect the business interests of the company due to the adverse effects of her conduct and general attitude on the overall performance of the company.
21. RW1 further stated that the claimant's performance was the reason behind her termination. That the Company was not planning to terminate other employees but her position had to be terminated due to her poor performance. Over the years, even with the Company's hardship, the Respondent has increased the overall number of employees.
22. The claimant was issued with a three (3) months' notice for termination vide the letter dated 5th March 2019, which she acknowledged by accepting and signing.
23. RW1 further stated that there was no communication from the claimant regarding reconsideration. The only communication was her lawyer's letter. As far as RW1 understood, the claimant had accepted the termination.
24. Upon expiry of the notice period, the Respondent issued the claimant with a letter dated 3rd June 2019, wherein they included a statement of all her terminal dues including payment for leave days not taken.
25. In RW1's view, there are no amounts owing to the claimant.
26. Ms. Mary Wangari Mwaura, who testified as RW2, identified herself as a former employee of the Respondent. Similarly, she adopted her witness statement to constitute her evidence in chief.
27. It was RW2's evidence that she had been an employee in the Respondent company for over forty (40) years working in various capacities since 1979.
28. According to RW2, ever since the claimant joined the Respondent Company, she became accustomed to uttering discriminatory statements against employees of African descent. She (RW2) reported the matter to the Directors and the claimant was verbally warned.
29. RW2 further testified that the Company lost goods due to the claimant's negligence. That on two particular occasions, the claimant released and dispatched goods without first confirming with her (RW2) whether payment had cleared in the Company's account. The claimant dispatched goods to a customer who had not paid and despite reporting the incidences to the Directorate of Criminal Investigation, the Respondent was unable to recover the money. The Respondent also lost out on the consignment.
30. RW2 further stated that she witnessed the claimant in many instances disrespecting her junior staff by hurling abusive words at them and throwing papers in their faces in the presence of the customers.



- Matters got out of hand when the claimant told a junior staff member who has a visual impairment that they were making mistakes because of their blind eye. According to RW2, this was highly discriminatory.
31. It was RW2's further evidence that the claimant failed to deliver on her duties. That when she joined the Company, the claimant was tasked with bringing government orders. However, during her tenure, no orders ever came in until management requested her (RW2) to take over that role.
 32. Mr. Arthur Macheche Ngao who testified as RW3, identified himself as an employee of the Respondent Company. RW3 also adopted his witness statement to constitute his evidence in chief.
 33. RW3 testified that he has been an employee of the Respondent Company for twenty nine (29) years, acting in various capacities. He was already in the Respondent's employment when the claimant was employed in 2015. His work engagement with the claimant was not swift. In most instances, she was rude to customers and even turned away customers for no valid reason.
 34. RW3 cited an incident when a customer who was scheduled to travel to South Africa the next day went to the Respondent Company for an inquiry a few minutes before 5:00 p.m. According to RW3, the claimant stood at the door, denied the customer entry and told them to go back the following day since it was past business hours. The following day when the customer went back, the claimant told the Director that he (RW3) was the one who had turned away the customer and denied them entry to the office. When the Director confirmed from the customer, she was told that the claimant was the one who denied them entry to the office.
 35. On yet another incident, a customer went to make their purchases from the Company and he (RW3) took the customer for lunch as a courtesy extended for their purchase. The claimant reprimanded him together with the customer and told him (RW3) that he is not allowed to buy customers lunch. Since then, the said customer swore to never buy anything from the Respondent Company and has never returned despite his (RW3) numerous apologies.
 36. In another incident, the Respondent was required to submit a tender for National Youth Service (NYS) and they needed to have everything ready before close of business to be submitted by 10:00 a.m. The claimant went in late and delayed in filling the prices for the tender and as a result of the late submission of the Respondent's bid, they were disqualified.
 37. It was RW3's evidence that on another occasion, a client from Kisumu was to purchase goods from the Respondent but she delayed as she was traveling at night and the bus broke down. She arrived at the office at 3:00 pm but the claimant sent her back. The customer tried to explain to her but the claimant refused to listen. The customer called him (RW3) to convince the claimant to allow her entry but to no avail. The customer has never returned to the Respondent's office.
 38. According to RW3, the Respondent Company lost valuable customers due to the claimant's rudeness and lack of courtesy.
 39. RW3 further stated that the claimant mistreated and hurled insults at the employees in the office to the extent that some employees resigned.

Submissions

40. It was submitted on behalf of the claimant that the process of her termination was contrary to Section 41 of the *Employment Act*. That she was not granted any hearing or any notice of termination. Citing the case of Walter Ogal Anuro vs Teachers Service Commission (2013) eKLR, it was her further submission that the Respondent did not follow the laws and rules of natural justice in dismissing her.



It was the claimant's further submission that she was employed on a contract which was later converted to permanent and pensionable, clearly showing that she was a very good and valuable employee.

41. The Respondent on the other hand submitted that the claimant has failed to satiate her burden of proof as required and has not demonstrated the unfair nature or any element of unfairness in the termination of her employment. Placing reliance on the case of Kenya Revenue Authority vs Reuwel Waithaka Gitahi and two others (2019) eKLR, the Respondent submitted that it arrived at the decision to terminate the claimant's employment based on reasons it genuinely believed to exist at the time. As such, the claimant's termination was fair in the circumstances.
42. It was the Respondent's further submission that it complied with the requirements of Section 47(5) of the [Employment Act](#) and justified its reasons for the termination of the claimant's employment.
43. It was further submitted by the Respondent that it has sufficiently demonstrated that it had just reasons to terminate the claimant's employment, informed her of the termination and followed the requisite procedure.
44. The Respondent further posited that it lawfully exercised its contractual right to terminate the claimant's employment after giving her notice. The Respondent contended that parties are bound by the terms of their contract which was not at any point vitiated by mistake, fraud, coercion or undue influence. In support of this position, the Respondent placed reliance on the cases of National Bank of Kenya Ltd vs Pipelastic Samkolit (K) Ltd and another (2002) EA 503 and Manuel Anidos vs Kinangop Wind Par Limited (in receivership) (2019) eKLR.
45. The Respondent further submitted that upon signing the termination agreement on 5th March 2019, a binding contract between itself and the claimant came into force, signifying an agreement separate from employment and she cannot allege the termination was unfair.

Analysis and determination

46. Flowing from the pleadings on record, the evidentiary material placed before me as well as the opposing submissions, it is apparent that the Court is being called to resolve the following questions: -
 - i. Whether the termination of the claimant's employment was unfair and unlawful;
 - ii. Is the claimant entitled to the reliefs sought?

Unfair and unlawful termination?

47. For an employee's termination from employment to meet the legal threshold, an employer must justify that there was reason to terminate the services of the employee and that such termination was in line with fair procedure. This is aptly captured under Sections 41, 43 and 45 of the [Employment Act](#) (Act).
48. In the instant case, the record bears that the claimant was issued with a notice of termination dated 5th March 2019, which was to take effect on 5th June 2019. The letter is couched in part:

“ Re: Notice of Termination

Dear Miss Sagoo,

Over the last two financial years (2017 and 2018), Thika Cloth Mills Limited has not performed too well and unfortunately, our efforts have not resulted in increased sales and work.



After reviewing our options, we have no choice but to reduce our overhead costs. As we do this, I have no choice but to terminate your employment with a three months written notice.

Therefore, your last day of employment will be 5th June 2019.

I wish to thank you for all the support you have given the sales office of Thika Cloth Mills Ltd from December 2015 to date...”

49. What can be deduced from the claimant’s notice of termination is that the reasons for which she was being disengaged were on account of the Respondent’s operational requirements. In this regard, the Respondent cited lack of increased sales and work hence the need to reduce its overhead costs.
50. Pursuant to section 45(2)(b)(ii) of the Act, an employer is allowed to terminate an employee’s contract of service on account of its operational requirements. This is what is commonly known as redundancy. For context purposes, the term “redundancy” is defined under section 2 of the Employment Act to mean “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 commonly known as abolition of office, job or occupation and loss of employment”.
51. To put it succinctly, termination by way of redundancy is effected at the initiative of the employer and the employee is at no fault.
52. In terms of section 45 (2) (a) and (b) of the Act, for termination to be fair, an employer ought to prove that the reason for the termination is valid, fair, and related to the employee’s conduct, capacity or compatibility; or based on its operational requirements.
53. Applying the aforesaid statutory provision to the case herein, it follows that the Respondent was bound to prove that indeed, the claimant’s termination was occasioned by its operational requirements.
54. Interestingly, the Respondent through its pleadings and the testimony of its three witnesses, appears to have departed from the reasons advanced in the claimant’s notice of termination. I say so because the Respondent’s defence in Court was centred on the claimant’s general conduct and attitude towards her colleagues. With respect to this, RW1 testified as to how she received complaints regarding the claimant’s rudeness and abusive language. RW1 further testified that the claimant’s junior colleagues complained that she was racist and had even suggested that she could not share bathroom facilities with them. RW1 further attributed the resignation of two of the Respondent’s long serving employees to the claimant’s behaviour.
55. RW1 further cited the complaints from the Respondent’s clients regarding the claimant’s general attitude. According to her, the claimant’s attitude and conduct affected the morale of her employees so much that the Respondent experienced negative sales.
56. RW1 was also categorical that the claimant’s performance was the reason behind her termination from employment.
57. RW2 stated that the claimant was accustomed to uttering discriminatory statements against employees of African descent. She further alleged that the claimant had been negligent in her work thus occasioning loss to the Respondent company.
58. On his part, RW3, cited about three incidents in which he witnessed the claimant’s rudeness towards the Respondent’s clients. According to RW3, the Respondent lost the said clients due to the claimant’s rudeness and behaviour towards them.



59. What manifests from the evidence of the Respondent's witnesses is that in actual sense, the claimant's termination had nothing to do with its operational requirements, but rather was more related to her conduct, performance and compatibility.
60. Therefore, I am led to conclude that the Respondent cited its operational requirements as a way to let go off the claimant and was a ruse to justify her termination.
61. As stated herein, termination on account of the employer's operational requirements falls within the realm of redundancy. Therefore, it is undertaken on the basis that the employee is not at fault. This does not seem to be the case herein as it is clear from the Respondent's evidence that the claimant's termination had everything to do with her alleged conduct and performance as opposed to the company's performance.
62. In this regard, I am led to question why the Respondent did not state as much in the claimant's notice of termination. Why did it make an about-turn in Court and cite poor performance and conduct as the reason for the termination whereas the claimant's notice of termination is very explicit that she was being let go due to the Respondent's own operational requirements?
63. Indeed, in the event the claimant's general conduct, performance and compatibility were truly wanting, nothing stopped the Respondent from stating as much in her notice of termination. In any event, termination under those grounds was to be preceded by a fair process as required under section 45(2) (c) of the Act.
64. Needless to say, the Respondent did not satisfy the requirements under Section 45(2) (a) and (b) of the Act by proving that it had a valid and fair reason to warrant termination of the claimant's employment on account of its operational requirements. Ultimately, the claimant's termination was substantively unfair.
65. That said, I now turn to consider the question of procedural fairness. As stated herein, the claimant was terminated on account of the Respondent's operational requirements or to put it better, redundancy. Contrary to the Respondent's arguments before Court, there was no mention of the claimant's conduct or performance in the notice of termination. Therefore, the applicable procedure for termination in this case is Section 40(1) of the Act as opposed to Section 41.
66. In this regard, the aforesaid section 40(1) sets the following conditions that must precede a redundancy;
- 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.
67. It is noteworthy that all the conditions stipulated above are mandatory and the employer cannot cherry-pick and selectively apply the same.
68. From the record, the Respondent did not comply substantively with the aforementioned conditions save for the issuance of the three months' notice and encashment of leave days. I say so because there is no evidence that a notice of the intended redundancy was issued to the labour office. There is further no evidence of the selection criteria applied by the Respondent in earmarking the claimant for redundancy. If anything, it is clear that the claimant was the only employee who was let go. As a matter of fact, it was RW1's testimony that the Respondent was not planning to terminate other employees but the claimant's position had to be terminated. What this manifests is that the claimant was unfairly selected for termination under the guise of redundancy.
69. Further to the foregoing, there is no evidence that the claimant was paid one month's salary in lieu of notice in line with section 40(1) (f) of the Act. At this juncture, I need to point out that issuance of notice under Section 40(1) (a) and (b) of the Act is quite distinct from the requirement to pay one month's salary in lieu of notice under section 40(1) (f).
70. On this score, I gather support from the determination by the Court of Appeal in the case of *Cargill Kenya Limited vs Mwaka & 3 others* (Civil Appeal 54 of 2019) [2021] KECA 115 (KLR) where it was held as follows:
- “In this respect, it is notable that a plain and contextual reading of subsection 1(f) shows that its express objective and purpose is the payment required to be made to employees affected by redundancy, and not the issuance of a notice. It is also notable that the legislative intention from the arrangement and content of the enactments in section 40 subsection (1) (d) to (g) was the provision of payments to be made to affected employees in a redundancy, and section 1(f) can only thus be construed within this context, as was done by Maraga JA in *Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others* Nairobi Civil Appeal No. 46 of 2013 (supra)...”
71. Therefore, it was not sufficient for the Respondent to issue three months' notice of termination to the claimant. It was required to pay her in terms clause (f). As there is no evidence of payment, it follows that the Respondent did not comply with the provisions of Section 40(1) (f) of the Act.
72. Still on the requirements under Section 40(1), the Respondent did not lead evidence to prove that it paid the claimant severance pay under Section 40(1) (g). To that extent, it is at fault.
73. The total sum of my consideration is that the Respondent substantially failed to comply with the provisions of Section 40 (1) of the Act hence it is at fault. In the circumstances, I cannot help but find that the claimant's termination on account of redundancy was unprocedural hence unlawful.



74. Having elected to terminate the claimant on account of its operational requirements hence declaring her redundant, the Respondent was bound to comply with all the procedural requirements under section 40(1) of the Act.
75. All in all, the claimant's termination from employment was unfair and unlawful within the meaning of sections 40, 43 and 45 of the Act.
76. Before I pen off on this issue, I find it worth mentioning that the Respondent's argument that it exercised its contractual right to terminate the claimant, does not hold. Its further argument that the separation was mutual has no basis. I say so because section 45(2) of the Act mandates an employer to not only prove the reasons for termination but also prove that it subjected the employee to a fair process prior to the termination. These are mandatory provisions of the law and regardless of the fact that the claimant's contract of employment provided for a three months' notice period prior to termination, the aforesaid statutory provisions still applied and remained binding on the Respondent.
77. With respect to the argument on mutual separation, it is notable that the tone of the notice of termination does not in any way suggest as much. If anything, it is clear that the termination was at the behest of the Respondent and all the claimant did was to accept the letter by signing. Indeed, there is no indication that the parties mutually agreed to the terms of the separation. In any event, if that was the case, then the same would have been discernible from the notice of termination.
78. That said, I now proceed to consider the reliefs available to the claimant.

Reliefs?

79. As the Court has found that the claimant's termination was both unfair in substance and procedure, she is awarded compensatory damages equivalent to five (5) months of her gross salary. This award takes into consideration the length of the employment relationship as well as the circumstances attendant to the claimant's termination.
80. The claimant is further awarded one (1) month's salary in terms of section 40(1) (f) of the Act.
81. As the Court has found that the claimant's termination was on account of redundancy, she is entitled to severance pay at the rate of fifteen days' pay for each completed year of service, which in this case I find to be three (3) years.
82. The claim with regards to leave is declined as it is evident that the claimant was compensated for unutilized leave days and the same was paid together with her terminal dues. As a matter of fact, the claimant did not dispute receiving the payment.

Orders

83. Against this background, I enter Judgment in favour of the claimant against the Respondent and she is awarded: -
 - a. One (1) month's salary in lieu of notice being the sum of Kshs 252,000.00.
 - b. Compensatory damages in the sum of Kshs 1,260,000.00 being equivalent to five (5) months of his gross salary.
 - c. Severance pay for three (3) completed years of service being the sum of Kshs 378,000.00.
 - d. The total award is Kshs 1,890,000.00.
 - e. Interest on the amount in (d) at court rates from the date of Judgment until payment in full.



f. The claimant shall also have the costs of the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 27TH DAY OF OCTOBER, 2023.

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STELLA RUTTO

JUDGE

Appearance:

For the claimant Mr. Katunga Mbuvi

For the Respondent Ms. Ndungu

Court Assistant Abdimalik Hussein

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

STELLA RUTTO

JUDGE

