Chirima v DL Group of Companies Limited (Cause 23 of 2019) [2023] KEELRC 2552 (KLR) (19 October 2023) (Judgment)

Neutral citation: [2023] KEELRC 2552 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE 23 OF 2019

M MBARŨ, J

OCTOBER 19, 2023

BETWEEN

PHILIP CHIRIMA .... CLAIMANT

AND

DL GROUP OF COMPANIES LIMITED .... RESPONDENT

JUDGMENT

1. The respondent employed the claimant from January 1, 2012 as Group Human Resource and Administrative Manager earning a salary of Ksh.179,5000 per month.

2. The claim is that on 26 October 2018 the respondent terminated the claimant's employment after receiving a letter from the Group Chairman stating that his position was redundant and his last working day would be 15 October 2018. His claim is that as the Group Human Resource Manager, the claimant was not aware of any redundancy because around the same time, the respondent had employed a Human Resource Director who took over the claimant's duties. The claimant was not invited to apply for this position despite working and undertaking the same duties.

3. The claim is that employment terminated unfairly and contrary to the law and the claimant is seeking the following dues;

   a. 96 unpaid leave days Kshs. 574,399;

   b. Unpaid car maintenance Ksh30,000 x 7 years = Kshs. 2,520,000;

   c. Manages for unlawful termination Kshs. 2,154,000;

   d. Baggage allowance Kshs. 179,500; and

   e. Costs of the suit.

4. The claimant testified in support of his case that upon employment by the respondent he worked diligently and in March 2017 he was moved to the Eldoret Office but on 12 October 2018, Epimach Maritim then consulting for the respondent informed the claimant that his position had been declared redundant as a result of restructuring and that each business unit would have its own Human Resource Manager in a centralised manner. On 26 October 208 the claimant was issued with letter of redundancy dated 23 October 2018 taking effect on 15 October 2018.

5. The claimant engaged the respondent regarding the company car he had been allocated and asked for refund of car running allowances but there was no response. Also, upon his exit, the respondent engaged a Human Resource Director, the position he was previously holding without offering him a chance to apply for this position leading to unfair termination of his employment.

6. In response, the respondent's case is that termination of employment on the grounds of redundancy was lawful and justified. The redundancy process was carried out procedurally and the claimant is not entitled to compensation as claimed. All terminal dues were paid in accordance with the contract and the law and the claimant acknowledged receipt of his terminal dues.

7. The claimant was employed form January 1, 2012 and deployed at Mombasa Office which had about 400 employees. In the year 2017 the respondent underwent restructuring and created the new position and roles and abolished various other positions. It was evident that there was need to recruit an individual that was conversant with human resource practices and labour laws within the East Africa region so as to take over the group Human Resource and Administrative Director position. this rendered the position held by the claimant redundant.

8. The claimant was issued with notice, he was engaged in consultations and through letter dated 23 October 2018, notice to terminate employment issued.

9. The claimant did not have the qualifications and experience to serve in the new position of Group Human Resource Director. At the time, the claimant had 17.5 leave days and he received payment in lieu thereof. The car maintenance claim is not due and has no factual basis and the contract of employment indicated that he was responsible for the car maintenance. The claim for baggage allowance is not lawful or contractual.

10. In evidence, the respondent called Eliaz Kiptoo the accountant who testified that he tabulated the claimant's terminal dues after the Human Resource Manager directions attend of employment and part of the final agreement terms. The dues included;

    a. Two months' notice pay;

    b. Severance pay for 15 days for 6 full years worked;

    c. 5 days worked;

    d. 17.5 leave days;

    Less statutory deductions

    Total paid Kshs. 722,196.50

11. The claimant signed the settlement agreement on the terminal dues.

12. Mr Kiptoo testified that he was not aware of the circumstances leading to the termination of the claimant's employment. He was only called to tabulate his terminal dues. He was guided by the human resource to do so and the claimant singed the separation agreement.

13. At the close of the hearing, parties filed written submissions which are analysed.

Determination

14. The respondent has relied on the separation agreement to urge a response that it precluded the claimant from instituting suit as herein done and as such, the suit is bad in law and should be dismissed.

15. In employment and labour relations claim, the applicable law is the *Employment Act*, 2007 (the Act) read together with the Employment and *Labour Relations Act*, 2011. One has to do with rights in employment and the other relates to the reliefs and remedies one can seek.

16. Whether an employee has signed a separation agreement or not, whether there is a discharge voucher or not or any matter that direct the employee not to file any suit upon exit from employment, such matter must be addressed within the context of the applicable law. An employee cannot wish away his rights in employment and labour relations outside the law. A discharge voucher per se does not absolve an employer from its statutory obligation(s) and cannot stop the court from enquiring into the fairness of a termination of employment once suit is filed. A claimant is given the right to seek redress with regard to his employment rights as held in *Thomas De La Rue v David Opondo Omutelema* [2013] eKLR.

17. Section 35(4) of *the Act* allow an employee to claim any lawful dues arising out of his employment.

> (4) Nothing in this section affects the right—
>
> (a) of an employee whose services have been terminated to dispute the lawfulness or fairness of the termination in accordance with the provisions of section 46; or
>
> (b) of an employer or an employee to terminate a contract of employment without notice for any cause recognised by law.

18. Unlike commercial contracts regulated under the law of contract, in employment and labour relations, where an employee enjoys a right in employment, upon a claim such as herein, the court must assess and award accordingly. A discharge voucher cannot apply to negate a legal right which is set out in the law.

19. Through a settlement agreement dated 25 January 2019, parties agreed that the claimant should be paid Kshs. 722,196 as final dues at the end of his employment following a redundancy. The dues were to include;

> … all dues owing to me as regards to include public holidays and off days worked during this period, leave days earned and not taken during the period of my contract. I also confirm that I have no further claims whatsoever against the Company ….

20. The claimant's case is that there was a redundancy that was unlawful and leading to unfair termination of his employment.

21. Redundancy is regulated under Section 40 of *the Act* and the terminal dues payable upon a lawful redundancy process is addressed under Section 40(1) of *the Act* and where there is an unfair redundancy, this is addressed under Section 45(2) of *the Act*. Within the legal protections, the claimant is justified to state his case and which should be assessed by the court with regard to allegations that termination of employment was unlawful and unfair.

22. Through notice dated 23 October 2018, the respondent terminated the claimant's employment on the grounds that, your position will become redundant at the end of this notice period. This notice takes effect on 15 October 2018.

23. A redundancy is defined under Section 2 of *the Act* to mean loss of employment due to no fault of the employee. The position held is abolished leading to termination of employment

24. Under Section 40(1) of *the Act*, a notice of intended redundancy must issue to the employees of the business. Where such intention is actualised and leading to specific positions being abolished, then individual notices must issue to the affected employees.

25. Fundamentally, the notice of redundancy must issue to the employee and to the Labour Officer responsible for the area of the employer operations.

26. Whereas an employer is allowed to reorganize its business, a redundancy must be given context. The need for, reasons of and for the declaration of redundancy. Pursuant to Section 40(1) of the *Employment Act*, 2007 (the Act), the employer has a legal duty to give reasons for, and the extent of, the intended redundancy.

27. In the case of *Cargill Kenya Limited v Mwaka & 3 others* (Civil Appeal 54 of 2019) [2021] KECA, the Court of Appeal held that a redundancy is invalid where the employer fails to give valid reasons leading to loss of employment;

> 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."

28. It is therefore not sufficient that the respondent wanted to reorganise its business and this led to the abolition of the position held by the claimant. That notwithstanding, there is a legal duty to give reasons for, and the extent of the intended redundancy.

29. A redundancy cannot affect a single employee. It would defeat the very purpose of reorganisation to only remove a single employee and replace him with a similar officer. Mr Kiptoo testified for the respondent that he was instructed by the Human Resource Manager to tabulate claimant's terminal dues forming part of the settlement agreement. Where indeed the claimant had been the Group Human Resource Manager from the year 2012 until October 2018, to employ another person holding a position allegedly removed following a redundancy was just but a sham.

30. Under Section 45(2) of *the Act*, employment must terminate procedurally even where such relates to a redundancy or other operational matter;

> (2) A termination of employment by an employer is unfair if the employer fails to prove—
>
> (a) that the reason for the termination is valid;

(b) that the reason for the termination is a fair reason—

(i) related to the employee's conduct, capacity or compatibility; or
(ii) based on the operational requirements of the employer; and

31. Hence, the notice that issued to the claimant on 23 October 2018 was deficient of various legal requirements particularly, the notice was backdated to take effect from 15 October 2018 which is contrary to Section 40(1) of *the Act*, no notice issued to the Labour Officer, and the claimant was singled out in the entire enterprise for termination of his employment. This was unlawful and unfair contrary to Section 40 read together with Section 45 of *the Act*.

32. The import of Section 40 of *the Act* is given emphasis by the Court of Appeal in the case of in *Thomas De La Rue (K) Ltd v David Opondo Omutelema* [2013] eKLR, the Court held that;

> It is quite clear to us that sections 40 (a) and 40 (b) provide for two different kinds of redundancy notifications depending on whether the employee is or is not a member of a trade union. Where the employee is a member of a union, the notification is to the union and the local labour officer at least one month before the effective redundancy date. Where the employee is not a member of the union, the notification must be in writing and to the employee and the local labour officer. Section 40 (b) does not stipulate the notice period as is the case in 40 (a), but in our view, a purposive reading and interpretation of the statute would mean the same notice period is required in both situations. We do not see any rational reason why the employee who is not a member of a union should be entitled to a shorter notice.

33. On the findings above, the claimant is entitled to compensation following unlawful and unfair termination of his employment by the respondent.

34. At the end of his employment, the claimant admitted that his was paid Kshs. 722,196.50. this related to;

    a. 2 months' notice pay at Kshs. 359,100;

    b. Severance pay for 6 full years Kshs. 538,650;

    c. 5 days worked Kshs. 29,925;

    d. 17.5 leave days Kshs. 104,737.50

    Total Kshs. 1,032,412.50

    Less statutory deductions

    Total paid Kshs. 722,196.50.

35. The claimant was last earning Kshs. 179,550 per month.

36. The two months' notice pay at Kshs. 359,100 is a correct tabulation.

37. From January 1, 2012 to 15 October 2018, the claimant had 6 complete years. a severance pay for 15 days for each year is Kshs. 98,775 x 6 = 538,650 a correct tabulation.

38. The employer is the legal custodian of work records. The claim for 96 days outside the 17.5 days allocated is not justified.

39. On the claim for unpaid car maintenance for 7 years, under clause 3 of the employment contract dated 5 December 2011, the claimant had the benefit of the company will provide you with a motor vehicle,

which it considers suitable for the purpose of your duties, all reasonable costs of running the vehicle will be borne by the company. You will be responsible for the maintaining the vehicle in good order.

40. Any costs for maintaining the vehicle in it nature comprise special damages. These requires evidence in form of receipts and invoices which are lacking in this case. The claimant cannot be found to have kept use of the company vehicle with expenses running to over 2 million without approval by the respondent. Such claim must fail.

41. Baggage allowance is not contractual or lawful or under any agreement or private treaty.

42. On the finding that there was unlawful and unfair termination of employment, the claimant having worked diligently for over 6 years, there is no poor work record or matter submitted in terms of Section 45(5) of *the Act*, an award of compensation for 3 months' gross salary is hereby found appropriate ward. On the salary of Kshs. 179,550 per month, compensation due is Kshs. 592,650.

43. Accordingly, judgment is hereby entered for the claimant against the respondent with a ward of Kshs. 592,650 together with 50% of his costs.

DELIVERED IN OPEN COURT AT MOMBASA THIS 19TH DAY OF OCTOBER 2023.

M. MBARŨ

JUDGE