



REPUBLIC OF KENYA



KENYA LAW
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Mulyanga v Zitron Limited (Cause 876 of 2018)
[2023] KEELRC 2400 (KLR) (9 October 2023) (Judgment)

Neutral citation: [2023] KEELRC 2400 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 876 OF 2018
JK GAKERI, J
OCTOBER 9, 2023

BETWEEN

BENJAMIN ERIC MULYANGA CLAIMANT

AND

ZITRON LIMITED RESPONDENT

JUDGMENT

1. The Claimant commenced this suit by a Memorandum of Claim filed on 6th June, 2018 alleging unfair/unlawful termination of services and unfair labour practices.
2. The Claimant avers that he was employed by the Respondent on 5th September, 2011 as a Security Officer at a gross salary of Kshs.22,279/= and owing to his diligence, was promoted to Security Supervisor in December 2012 at a salary of Kshs.25,000/= and to Head of Security at Captain Club Casino & Terrance Restaurant in December 2017 at a salary of Kshs.30,000/=.
3. That on 26th February, 2018, the Security Manager called and instructed him to report to the Human Resource Manager's Office the following day, when the Human Resource Manager explained to him that the company was restructuring its operations and his employment had been terminated with immediate effect.
4. The Claimant prays for;
 - a. A declaration that termination of the Claimant's employment was unfair/unlawful.
 - b. Order to the Respondent to pay Kshs.570,000/= as Claimant's terminal dues comprising;
 - i. 3 months' notice Kshs.90,000/=
 - ii. 16 days leave Kshs.16,000/=
 - iii. Paternity leave 2014 Kshs.4,000/=



- iv. Severance pay Kshs.90,000/=
- v. Compensation 12 months salary Kshs.360,000/=.
- c. Respondent to pay exemplary damages of Kshs.1,000,000/= for subjecting the Claimant to unnecessary suffering due to abrupt loss of income.
- d. Costs and interest on (b) and (c) from date of judgement till payment in full.

Respondent's case

5. The Respondent neither filed a response nor participated in the proceedings and the suit proceeded as undefended.

Claimant's evidence

6. The Claimant adopted the written statement which rehearses the contents of the statement of claim. He testified that he suffered immensely as he had to defer his studies for a year, his son was sent home for non-payment of school fees, his wife suffered a heart-attack and died in 2019 and he had to relocate to the village.
7. He confirmed that he was a member of the National Social Security Fund and National Health Insurance Fund.

Claimant's submissions

8. Counsel isolated two issues for determination;
 - i. Whether termination of the Claimant's employment was unfair.
 - ii. Whether the Claimant is entitled to the reliefs sought.
9. On termination, counsel submitted since the Claimant's employment by letter dated 27th February, 2018 was on account of redundancy and due process was not followed, it was a disguised dismissal from employment and thus unfair.
10. Reliance was made on the provisions of Section 40 of the *Employment Act* as well as the sentiments of the court in *Kenya Airways Ltd V Aviation & Allied Workers Union of Kenya & 3 others* (2014) eKLR to urge that the Respondent did not explain to the Claimant the reason for the restructuring or comply with the provisions of Section 40 of the *Employment Act*.
11. The decisions in *Daniel Mburu Muriu V Hygrotech East Africa Ltd* (2021) eKLR and *Margaret Mumbi Mwago V Intrahealth International* (2017) eKLR among others were also relied upon to buttress the submission on compliance with the provisions of the *Employment Act* in a redundancy.
12. Counsel urged that termination of the Claimant's employment was unfair for want of substantive and procedural fairness and invited the court to find as such.
13. As regards the reliefs sought, counsel urged that since the termination was unfair and the Respondent did not defend the suit, the court should grant the reliefs as prayed.
14. The Respondent did not file submissions.

Findings and determination

15. The issues for determination are;



- i. Whether termination of the Claimant's employment was unfair; and
 - ii. Whether the Claimant is entitled to the reliefs sought.
16. Before delving into the above-mentioned issues, it is essential to determine whether the Claimant has proved that there was an employment relationship between him and the Respondent as held in *Monica Kanini Mutua V Al- Arafat Shopping Centre and another* (2018) eKLR cited by Maureen Onyango J. in *Humphrey Munyithia Mutemi V Soluxe International Group of Hotels and Lodges Ltd* (2020) eKLR as follows;

“ . . . in an undefended claim, it is trite that the Claimant establishes all the facts of the claim and must establish the existence of an employment relationship with the Respondent as a preliminary issue before establishing the alleged unfair termination of the employment.”
 17. Abuodha J. expressed similar sentiments in *Nicholus Kipkemoi Korir V Hatari Security Guards Ltd* (2016) eKLR.
 18. In the instant case, the Claimant has attached a letter of appointment dated 5th September, 2011 duly executed by the parties on even date and the letter of termination of employment dated 27th February, 2018 duly signed by the Human Resource Department and stamped by the Respondent.
 19. In the court's view, there is abundant evidence to show that the Claimant was indeed an employee of the Respondent as alleged in the statement of claim.
 20. On termination of employment, there is no dispute that the Respondent terminated the Claimant's employment on 27th February, 2018 on account of redundancy as it was grounded on the “ongoing restructuring in the Security Department” as the Respondent had decided to do away with the position of Security Supervisor held by the Claimant
 21. The opening paragraph of the letter is to all intents and purposes a redundancy statement as it is clear that the Claimant's position had been abolished, one of the elements captured by the statutory definition of redundancy under Section 2 of the *Employment Act*, 2007 as follows;

“Redundancy means 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 practice commonly known as abolition of office, job or occupation and loss of employment.”
 22. There is sufficient judicial authority for the proposition that redundancy is a legitimate consequence of business processes at the instance of the employer and within its operational requirements and has variously been described as re-organization, restructuring or reconstitution, right-sizing and many others. (See *Kenya Airways Ltd V Aviation & Allied Workers Union Kenya & 3 others* (Supra), *Jane Khalachi V Oxford University Press (EA) Ltd*).
 23. Needless to emphasize, since redundancies are recognized by law, they must be conducted in consonance with the provisions of the *Employment Act*, 2007 and must pass the fairness test encapsulated in Section 45 of the Act.
 24. For a redundancy to pass muster, it must be conducted in accordance with the provisions of Section 40(1) of the *Employment Act*, 2007. This section is couched in mandatory terms and compliance with its provisions is imperative.



25. An employer is obligated to comply with the seven (7) conditions prescribed therein. Consultations with the affected employees and/or the union, where the employees affected by the redundancy are members of the union is mandatory.
26. Other requirements include notice to the union or the employee(s), if not members of a union, at least one month before the effective date. The notice must provide the reasons for and extent of the redundancy so as to fulfil the substantive justification test under Section 45 of the *Employment Act*. Others include selection criteria, ensuring fairness where there is a Collective Bargaining Agreement, payment of any leave due in cash, notice or pay in lieu of notice and severance pay for the duration served.
27. The Court of Appeal paraphrased these conditions in *Freight In Time Ltd V Rosebell Wambui Munene* (2018) eKLR.
28. In *Barclays Bank of Kenya Ltd & another V Gladys Muthoni & 20 others* (2018) eKLR the Court of Appeal underscored the essence of fairness in redundancies as follows;

“The rationale is that any termination of employment must be based on genuine valid and fair reasons. Such reasons must be proved by the employer, otherwise, the termination is unfair. Where such reasons do not exist, the termination by whatever reasons stated by the employer without proof, this amounts to unfair termination of employment in terms of Section 45 of the *Employment Act* . . .

There must be a justification. The employer must demonstrate that there exists a genuine reason that requires the business to re-organize, reduce staff or restructure its business to viability, the same must be found as valid and fair . . .”
29. In the instant case, the Respondent did not demonstrate that it had a genuine, valid and fair reason for the alleged restructuring or what it was intended to achieve.
30. Relatedly, from the evidence on record, it is clear that the Respondent did not comply with the provisions of Section 40(1) of the *Employment Act*, 2007.
31. In the absence of credible evidence of a justification for the alleged redundancy coupled with the non-compliance with the provisions of the *Employment Act*, 2007, it is the finding of the court that there was neither a redundancy nor a fair termination of the Claimant’s employment.
32. Put in the alternative, there was an unfair termination of the Claimant’s employment within the meaning of Section 45 of the *Employment Act* as neither the substantive nor the procedural precepts were complied with.

Reliefs

Declaration

33. Having found that termination of the Claimant’s employment on account of redundancy was unfair, a declaration to that effect is merited.

Three months in lieu of notice

34. Clause 10 of the Appointment Letter provides that the contract was terminable by either party giving the other three (3) months notice.



35. In the absence of evidence to show that the Respondent gave the Claimant the requisite notice or payment in lieu, the Claimant is entitled to notice pay.

Pro rata leave for 16 days

36. The Respondent adduced no evidence to prove that the Claimant had taken all leave days by the date of termination and the Claimant's evidence is uncontroverted. The Claimant is awarded pay for the number of outstanding leave days.

Paternity leave in August 2014, Kshs.14,000/=

37. The Claimant tendered no credible evidence of entitlement to paternity leave in 2014. Moreover, the claim for payment is statute barred, having been filed after 3 years as ordained by the provisions of Section 90 of the *Employment Act*, 2007.

The prayer is dismissed.

Severance pay

38. The Claimant testified that he was a member of the National Social Security Fund (NSSF). The prayer for severance pay is unsustainable by dint of the provisions of Section 35(6)(d) of the *Employment Act*, 2007 and it is accordingly dismissed.

12 months compensation

39. Having found that termination of the Claimant's employment was unfair, the Claimant is entitled to the relief under Section 49(1)(c) of the *Employment Act*, 2007.

40. In determining the quantum of compensation, the court has taken into consideration the fact that;
- i. The Claimant was an employee of the Respondent for about 6 years.
 - ii. The Claimant did not contribute to the termination of employment.
 - iii. The Claimant did not appeal the decision of the Respondent or express his wishes to continue as an employee of the Respondent.

41. In the circumstances, the court is satisfied that the equivalent of 3 months salary is fair.

Damages for suffering Kshs.1,000,000/=

42. The Claimant availed no evidence to justify entitlement to damages for the alleged unnecessary suffering. Similarly, the provisions of the *Employment Act*, 2007 do not recognise such remedy.

The prayer is dismissed.

43. In conclusion, judgement is entered for the Claimant against the Respondent in the following terms;
- a. Declaration that termination of the Claimant's employment was unfair.
 - b. One (1) month's salary in lieu of notice.
 - c. 16 days pro rata leave.
 - d. Equivalent of 3 months' salary compensation.
 - e. Costs of this suit.



f. Interest at court rates from date of judgement till payment in full.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 9TH DAY OF OCTOBER 2023

DR. JACOB GAKERI

JUDGE

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 has 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.

DR. JACOB GAKERI

JUDGE

