Covenant Guest House v Karani (Employment and Labour Relations Appeal E019 of 2022) [2023] KEELRC 2977 (KLR) (17 November 2023) (Judgment)

Neutral citation: [2023] KEELRC 2977 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

EMPLOYMENT AND LABOUR RELATIONS APPEAL E019 OF 2022

AN MWAURE, J

NOVEMBER 17, 2023

BETWEEN

COVENANT GUEST HOUSE ..... APPELLANT

AND

JULIUS OMUABA KARANI ..... RESPONDENT

(Being an Appeal from the Judgment and Order of the Honourable S.A Opande delivered on 20th January 2022 in MCELRC Cause No. 2013 of 2019 – Julius Omuaba Karani V Covenant Guest House)

JUDGMENT

1. The Appellant filed this appeal vide a Memorandum of Appeal dated 18th February 2022 which appellant being dissatisfied with the judgment of the Hon. S. A Opande delivered on 20th January 2022 on grounds that: -

    a. the learned magistrate erred in fact and law in finding that the Claimant was unfairly, unprocedurally and unlawfully terminated hence entitled to the relief of general damages totalling 6 months pay to the tune of Kshs 60,000/-.

    b. the learned magistrate erred in fact and law in finding that the Claimant had been terminated by the Respondent by dint of redundancy and the termination was fair and lawful.

    c. the learned magistrate erred in fact and law in finding that the Claimant was entitled to payment in lieu of notice to the tune of Kshs 10,000 whilst evidence tendered by the Appellant shows that the Claimant's employment had been properly terminated and the Claimant paid his terminal dues.

d. the learned magistrate erred in fact and law in finding that the Claimant was entitled to house allowance to the tune of Kshs 45,000 whilst the Appellant tendered evidence that the Claimant's gross monthly pay was consolidated to include house allowance.

e. The learned magistrate erred and misdirected himself in awarding the Claimant unpaid overtime to the tune of Kshs 28,886 despite the Claimant failing to tender any evidence in support of the claim for the overtime hours worked.

f. the learned magistrate erred in fact and law in finding in awarding the Claimant interest on the reliefs granted from the date of filing of the suit.

g. the learned magistrate misdirected himself on the facts and the law and based his findings on wrong and irrelevant considerations.

h. the learned magistrate erred in fact and law in finding that in the circumstances of the case, the finding of the learned magistrate is totally insupportable in law.

i. the learned magistrate erred in fact and law in finding that in all the circumstances of the case, the learned magistrate failed to do justice before the Appellant.

2. The Appellant prayed for orders that: -

a. The appeal herein be allowed.

b. The judgment delivered on 20th January 2022 and subsequent orders be set aside and be substituted with an order dismissing the suit with costs.

c. The costs of this Appeal be borne by the Respondent.

Appellant's Submissions

3. The Appellant submitted that the Respondent resigned following the Appellant's operational reorganization involving the outsourcing of security services hence it amounts to redundancy and relied on the Court of Appeal case of *Kenya Airways Ltd –v- Aviation & Allied Workers Union of Kenya & 3 Other*s Civil Appeal No. 46 of 2013.

4. The Appellant submitted that it issued the Respondent with a transition notice dated 30th May 2019 explaining the reasons for the transition of its security services to Olosho Security Services and further informed the Respondent to get in touch with Olosho Security Services to fast track his interview process to facilitate the absorption of the Respondent into the new company. However, the Respondent opted to resign upon being issued with the transition notice.

5. The Appellant submits that the Respondent's termination was fair and lawful as it was within section 45 of the *Employment Act* due to reorganisation of the Appellant's business model which required it to outsource security services from Olosho Security Services.

6. The Appellant submitted that the Respondent claimed in his witness statement and examination in chief that he did not know if he signed an agreement. However, the Appellant produced a copy of the signed letter of appointment which explicitly explained that the Respondent's salary would be consolidated.

7. The Appellant submitted that the Respondent in his witness statement and examination in chief claimed that he did not have any leave days and never took leave, however, during cross- examination the Respondent stated he took 4 leave days every month amounting to 48 days a year which is well above the statutory leave requirements.

8. The Appellant submitted that by signing the Employee Payment Indemnity dated 30th May 2019 the Respondent indemnified the Appellant from all future claims with respect to dues owed to him and the Respondent did not plead that he signed the document under coercion, mistake, fraud, misrepresentation or undue influence. The Appellant relied on *Coastal Bottlers Limited V Kimathi Mithika* [2018] eKLR.

9. The Appellant submitted that it has demonstrated hereinabove that the Respondent resigned from his employment and therefore prays that this Court dismisses the general damages awarded by the learned magistrate amounting to Kshs. 60,000/= and in the event this Honourable Court finds that the Respondent's termination was unfair, the Appellant prays this court only issue the Respondent damages equivalent to his notice period.

10. The Appellant submitted that the transition notice issued to the Respondent was not intended to terminate the Respondent but he voluntarily resigned therefore cannot claim that he is owed payment in lieu of notice.

11. The Appellant submitted that the learned magistrate erred in awarding the Respondent house allowance as it was included in his salary because he was drawing a consolidated salary which was corroborated by the Respondent's payslips produced as an exhibit by the Respondent which showed that the sum paid as basic pay was also described as gross pay.

12. The Appellant submitted that the learned magistrate erred in awarding the Respondent overtime and/or Public Holiday as the Respondent did not lead any evidence to demonstrate that he had worked overtime and/or Public Holiday contrary to section 107 of the *Evidence Act*.

13. Lastly, the Appellant submitted that the learned magistrate erred in awarding interest on the reliefs from the date of filing the suit as the general principal according to authorities is that damages should be paid from the date of assessment which is at the date of judgment which is the earliest day that the Appellant's liability could have arisen.

Respondent's Submissions

14. The Respondent submitted that section 43 of the *Employment Act* provides that an employer is required to give one month notice before termination on account of redundancy and the Appellant failed to give notice in writing to the Respondent or the labour officer as required by law and no evidence was presented before court to the contrary.

15. The Respondent further submitted that the Respondent never received the transition notice from the Appellant and there was no proof of acknowledgment of receipt of the said notice by the Respondent.

16. The Respondent submitted that the validity of the said notice is in question as it was neither witnessed by the author nor stamped to authenticate the notice. Further, the notice was presented in evidence by the Appellant and is dated 30th May 2019 and was effective on 1st June 2019 therefore did not provide the Respondent sufficient time as required by law and cannot be deemed as proper or valid. Thereby there was no compliance with provisions of redundancy.

17. The Respondent submitted that he never wrote any resignation letter to the Appellant and no evidence was adduced as such the allegations are baseless and made in bad faith.

18. It was submitted for the Respondent that in his testimony the Respondent stated that he neither received an Employee Payment Indemnity nor executed it. Further, the Appellant's witness alleged in his testimony that the Respondent last stepped at the Appellant's place of work on 30th May 2019

yet the discharge note is dated 31st May 2019. Therefore, it is the Respondent's submissions that the Employee Payment Indemnity was falsified and as such holds no legal weight or validity.

19. The Respondent submits that the Indemnity does not form a valid contract as such is void ab initio.

20. The Respondent submitted that the general award by the trail court was rightful as the Respondent worked diligently without any bad record for 3 years and the dismissal was blatant without regard of fair labour practices.

21. The Respondent submitted that he was terminated without a fair hearing and the Appellant never gave reasons for the termination or gave notice for termination upon the Respondent as required by law hence the trial court's award to the Respondent for one month's pay in lieu of notice was rightful.

22. The Respondent submitted that the Appellant has not produced any evidence to show that the Respondent's salary was a consolidated figure, hence he is entitled to the unpaid house allowance.

23. The Respondent submitted that he is entitled to overtime pay as he worked for the Respondent from 6am to 6pm from Monday to Sunday and public holidays unpaid and that the Appellant did not produce any evidence in court to contradict the Respondent's position and affirm how many days a week the Respondent worked in a week.

Analysis and Determination

24. The first issue before this court is whether the trial court erred in fact and law in failing to find that the Claimant/ Respondent had been terminated by the Appellant by dint of redundancy and the termination was fair and lawful.

25. The trial court pronounced itself as follows on this issue:

> " The issue of redundancy arose by dint of the respondent reorganizing their security services and giving the claimant away to another firm. The Respondent however failed to observe the provision of section 40 of the *Employment Act* as no evidence has been rendered that the Labour officer within the area of employment of the claimant was notified. I therefore find that the claimant was never declared redundant as per the law."

26. Section 40 (1) of the *Employment Act* addresses termination on account of redundancy thus: -

> " 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."

27. In *Amalgamated Union of Kenya Metal Workers v Kenya Coach Industries* [2021] eKLR the court stated:-

> " As was stated by the Court of Appeal in Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others [2014] eKLR –
>
> Kenya is a State party to the International Labour Organization (ILO), which it joined in 1964 and is bound by the ILO conventions. Article 13 of Recommendation No. 166 of the ILO Convention No. 158-Termination of Employment Convention, 1982 requires consultation between the employers on the one hand and the employees or their representatives on the other before termination of employment under redundancy. It reads:
>
> > " 1. When the employer contemplates terminations for reasons of an economic, technological, structural or similar nature, the employer shall:
> >
> > (a) provide the workers' representatives concerned in good time with relevant information including the reasons for the terminations contemplated, the number and categories of workers likely to be affected and the period over which the terminations are intended to be carried out;

(b) give, in accordance with national law and practice, the workers' representatives concerned, as early as possible, an opportunity for consultation on measures to be taken to avert or to minimise the terminations and measures to mitigate the adverse effects of any terminations on the workers concerned such as finding alternative employment."

28. The Court further observed:

Section 40(1) of the *Employment Act* requires employers contemplating redundancy to give the employees or their trade union notice of at least one month. In addition to providing the parties with an opportunity to try and avert or minimize terminations resulting from redundancy and mitigate the adverse effects of such terminations, the other objective of a reasonable notice, as was stated in the English case of Williams v. Compare Maxam Ltd 11 is:

" to enable the union and employees who may be affected to take early steps to inform themselves of the relevant facts, consider possible alternative solutions and, if necessary, find alternative employment in the undertaking or elsewhere."

Unless the circumstances are such that it would be an utterly futile exercise to hold any meaningful negotiations, consultation has to be real and not cosmetic. The New Zealand Chief Judge succinctly expressed this point in the case of Cammish v. Parliamentary Service 12:

" Consultation has to be a reality, not a charade. The party to be consulted must be told what is proposed and must be given sufficiently precise information to allow a reasonable opportunity to respond. A reasonable time in which to do so must be permitted. The person doing the consulting must keep an open mind and listen to suggestions, consider them properly, and then (and only then) decide what is to be done."

29. In this case it is clear that there was no notification of intended redundancy as required under Section 40(1)(a) and (b) of the Act. What the Respondent gave was termination notice under Section 40(1)(f).

It is further clear that the Respondent did not give the Claimant an opportunity to question the validity of the reasons given for redundancy or the criteria for selection that are set out in Section 40(1)(c) and (d). The Claimant has also raised pertinent issues that ought to be cleared before the Respondent can declares the employees redundant.

30. Redundancy is a right of an employer. However, the law recognises that it is done by the employer at no fault of an employee and has set safeguards to ensure it is not used as an excuse to relieve employees of their employment for reasons other than those stated by the employer. As was stated by the Court of Appeal in the Kenya Airways case when it stated: -

... the notice envisaged by Section 40(1)(a) of the *Employment Act* ... My understanding of this provision is that when an employer contemplates redundancy, he should first give a general notice of that intention to the employees likely to be affected or their union. It is that notice that will elicit consultation between the parties, and I will shortly show that consultation is imperative, on the justifiability of that intention and the mode of its implementation where it is found justifiable. At that initial stage, the employer would not

have identified the employee(s) who will be affected. So that notice cannot have the names of the employees ... It does not have to be a calendar month's notice ... The Act requires one month's notice. The period runs from the date of service of that notice. It is after the conclusions of the consultations on all issues of the matter that notices will be issued to the affected employees of the decision to declare them redundant."

It is for these reasons that I must declare the notice issued by the Respondent irregular for not being in compliance with the law."

31. Further, in the Court of Appeal case of *Cargill Kenya Limited vs Mwaka & 3 others* (Civil Appeal 54 of 2019) [2021] KECA 115 (KLR) the learned judges held:-

> " Having regard to the legislative intention of the provisions of section 40 of the *Employment Act*, the international law and decided cases, it is our finding that consultations on an intended redundancy between the employer and the relevant unions, labour officials and employees is implied by section 40(1)(a) and (b) of the *Employment Act*.

Furthermore, consultation is also now specifically required by article 47 of *the Constitution* and the Fair Administrative of Action Act. Article 47 of *the Constitution* and section 4(3) of the Fair Administrative of Action Act provide that where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-

(a) prior and adequate notice of the nature and reasons for the proposed administrative action;

b. an opportunity to be heard and to make representations in that regard;

(c) notice of a right to a review or internal appeal against an administrative decision, where applicable;

(d) a statement of reasons pursuant to section 6;

e. notice of the right to legal representation, where applicable;

(f) notice of the right to cross-examine or where applicable; or

(g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.

32. An administrative action is defined under the Act to include any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates. Employers fall within the category of persons whose action, omission or decision affects the legal rights or interests of employees, and more so the redundancy by the Appellant in the present appeal is not contested. The Appellant was therefore also bound by the provisions on consultation required by Article 47 and section 4(3) of the *Fair Administrative Action Act*.

33. The nature and content of the consultations required to be undertaken in a redundancy process was explained by Maraga JA in Kenya Airways limited and Aviation & Allied Workers Union Kenya & 3 others (supra):

> We are likewise persuaded by the decision of the Employment Appeals Tribunal in Williams vs Compare Maxam Ltd (1982) IRLR 83 as follows:
>
> " There is a generally accepted view in industrial relations that, in cases where the employees are represented by an independent union recognised by the employer, reasonable employers will seek to act in accordance with the following principles:
>
> 1. The employer will seek to give as much warning as possible of impending redundancies so as to enable the union and employees who may be affected to take early steps to inform themselves of the relevant facts, consider possible alternative solutions and, if necessary, find alternative employment in the undertaking or elsewhere.
>
> 2. The employer will consult the union as to the best means by which the desired management result can be achieved fairly and with as little hardship to the employees as possible. In particular, the employer will seek to agree with the union the criteria to be applied in selecting the employees to be made redundant. When a selection has been made, the employer will consider with the union whether the selection has been made in accordance with those criteria.
>
> 3. Whether or not an agreement as to the criteria to be adopted has been agreed with the union, the employer will seek to establish criteria for selection which so far as possible do not depend solely upon the opinion of the person making the selection but can be objectively checked against such things as attendance record, efficiency at the job, experience, or length of service.
>
> 4. The employer will seek to ensure that the selection is made fairly in accordance with these criteria and will consider any representations the union may make as to such selection.
>
> 5. The employer will seek to see whether instead of dismissing an employee he could offer him alternative employment."

A perusal of the record of appeal shows that there was no evidence on record or presented to the trial judge of any consultations undertaken in the manner stated hereinabove. We therefore find no fault in the finding by the trial judge that the termination of the respondents was unfair for want of the consultations envisaged by section 40 of the *Employment Act*."

34. In *Daniel Mburu Muriu v Hygrotech East Africa Ltd* [2021] eKLR the court held:-

> " Clearly, declaration of redundancy is a process and not an event. Further, even when an employee is to be terminated on redundancy such an employee should still be afforded a hearing on whatever it is that they would wish to say about the termination on redundancy. Further, Section 43 of the Act on proof of reason for termination by the employer, and Section 45 on unfair termination apply to termination on redundancy just as they apply on

other terminations. Hence both substantive and procedural fairness apply on redundancy and an employer who fails either test stands to be held liable for unfair, or wrongful, and unlawful termination.

For avoidance of doubts, redundancy is a form of termination and therefore Sections 43, 45, 47 and 49 of the Act apply in cases of redundancy just like in other forms of termination. Therefore, Section 40 provides for an ideal situation where the reason for termination on redundancy is based on a valid and lawful reason. Once an employer has a valid and lawful reason(s) for termination on redundancy, such an employer must apply and comply with Section 40 of the Act."

35. The court has considered the pleadings and submissions and in view of the foregoing, this court agrees with the trial court that the Respondent's termination was wrong and unlawful as the Appellant failed to notify the Respondent of its intention to terminate his employment on grounds of redundancy and failed to properly follow the procedure set out in section 40 of the *Employment Act*. Furthermore, there was no consultation as provided in Article 47 of *the Constitution* and section 4(3) of the *Fair Administrative Action Act*.

36. Against this background, this court upholds the trial court's judgement to the Respondent as follows considering further that section 40 (e), (f) and (g) of the *Employment Act* provides that an employer terminating an employee on account of redundancy must comply with the following conditions: -

"(a) the employer has where leave is due to an employee who is declared redundant, paid off the leave in cash;

(b) 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

b. 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."

So the award is revised for the following reason as follows:

1. General damages will reduce to 4 months from 6 months considering respondent worked for respondent for 30 months – Kshs 50,000/-
2. Pay in lieu of notice is justified kshs 10,000/-
3. House allowance is justified as respondent never produced proof of payment of house allowance kshs 45,000/-
4. Overtime is hard to prove and is declined.

37. This appeal is hereby dismissed on account of the fact that the appellant did not tender evidence that the respondent was lawfully terminated under redundancy. However, the award by the trial magistrate has been replaced by this court's award at a total of kshs 105,000/-.

38. Interest will be from date of this judgment till full payment.

39. The costs of this appeal will be awarded to the respondent based on this revised award and costs of the trial court case will also be based on the revised award and was already awarded to the respondent.

40. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 17TH DAY OF NOVEMBER, 2023.

ANNA NGIBUINI MWAURE

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 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.

A signed copy will be availed to each party upon payment of Court fees.

ANNA NGIBUINI MWAURE

JUDGE