



Oguda v Home Afrika Limited (Employment and Labour Relations Cause E476 of 2021) [2023] KEELRC 3275 (KLR) (7 December 2023) (Judgment)

Neutral citation: [2023] KEELRC 3275 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE E476 OF 2021**

**BOM MANANI, J
DECEMBER 7, 2023**

BETWEEN

BRUNO OBODHA OGUDA CLAIMANT

AND

HOME AFRIKA LIMITED RESPONDENT

JUDGMENT

1. The parties to this action had an employment relation which lasted until February 8, 2021 when it was terminated. According to the evidence on record, the Claimant was engaged as the Respondent's Group Commercial Manager, a position that he held from November 1, 2019 to February 8, 2021. Prior to this, he had served in the position of Commercial Manager, 3rd Party Property Sales since November 1, 2016.
2. The evidence shows that on February 8, 2021, the Respondent issued the Claimant with a notice terminating his contract of service with immediate effect. According to the notice, the reason for the Respondent's decision was the economic meltdown that had been occasioned by the Covid 19 pandemic.
3. The Respondent indicates that the meltdown had adversely affected its business making it difficult for it (the Respondent) to retain its entire workforce. Consequently, it (the Respondent) had to declare some positions, including the Claimant's, redundant.
4. The Claimant states that the Respondent did not issue him with notice of intended redundancy as required by law. Further, he contends that the Respondent did not disclose the selection procedure that it applied to pick on him (the Claimant) for release from employment on account of redundancy.
5. On its part, the Respondent avers that following the economic challenges that came with the Covid 19 pandemic, it was forced to take austerity measures in order to remain afloat. The Respondent contends that it begun by effecting staff salary cuts but was eventually forced to lay off some of its employees.



6. The Respondent contends that it consulted its employees on the matter during the entire of the process. It (the Respondent) states that it held several staff meetings in which the matter was discussed. The Respondent avers that the Claimant, being part of its management, attended all the meetings.
7. It is the Respondent's case that it followed the law in processing the Claimant's release. It is contended that prior to his release, the Claimant was paid his redundancy dues.
8. The Respondent further states that after it rendered its decision, the Claimant was notified of his right to seek review of the decision in line with the existing internal dispute resolution mechanisms. However, he did not. Instead, the Claimant elected to prematurely approach the court through the instant case.

Issues for Determination

9. After evaluating the pleadings and evidence on record, the following are the issues that I consider important to determine in the cause:-
 - a. Whether the Claimant failed to exhaust internal dispute resolution procedures before he approached the court with the case.
 - b. Whether the Claimant's contract of service was lawfully terminated.
 - c. Whether the parties are entitled to the reliefs that they seek through their respective pleadings.

Analysis

10. The Respondent has asserted that the Claimant's action offends the doctrine of exhaustion of alternative dispute resolution procedures. It is the Respondent's contention that the Claimant did not exhaust the available administrative processes before he approached the court.
11. If I understand the Respondent well, its argument is that the Claimant did not challenge the decision to terminate his contract through an appeal to the Respondent. Therefore, his decision to approach the court was premature.
12. The Respondent relies on a comment in its letter dated February 8, 2021 to advance this argument. The relevant portion of the letter reads as follows:-

“If you have a complaint or query about your selection or the methods and criteria used or you wish to appeal against your selection, you may do so by writing to HR Office within 14 days setting out your reasons. The organization's grievance procedure will be implemented and your complaint/appeal will be considered, you will be advised in writing thereafter of the organization's decision.”
13. This excerpt does not suggest that the Claimant was bound to submit to the Respondent's internal appeal process after the decision to terminate his contract was rendered. The Respondent did not tender in evidence its Human Resource Manual to enable the court evaluate it and determine whether it obligates the parties to submit to alternative dispute resolution mechanisms to resolve their disputes before approaching the court.
14. Absent, this evidence, the court cannot proceed on assumptions to return a finding that the Claimant failed to invoke the Respondent's internal dispute resolution procedures. The fact that the Claimant admitted in evidence that he did not appeal the Respondent's decision does not mean that he was bound to appeal the decision to the Respondent.



15. Second, clause 19.1 of the Claimant's letter of appointment evidently recognizes the parties' right to submit to the court's jurisdiction to adjudicate disputes that may arise from their contract. In the court's view, the instant dispute is one such dispute.
16. The second question for consideration is whether the decision to terminate the Claimant's contract was lawful. Both parties agree that the Respondent invoked redundancy as the justification for terminating the Claimant's contract. However, they disagree on whether the right procedure was followed.
17. The law on redundancy in Kenya is now fairly well settled. Before declaring a redundancy, the employer is required to serve the affected employee and or his trade union with a notice of the intended redundancy. This notice must be for a minimum period of one month.
18. The notice must indicate the reason for the proposed redundancy. In addition, it (the notice) should speak to the extent of the redundancy.
19. Further, the employer must serve the redundancy notice on the local labour office. Just like the notice to the employee and or the trade union, this latter notice must be for a minimum period of one month and must speak to the reason and extent of the proposed redundancy.
20. Once these notices have issued, the employer is required to undertake an open selection process for the employees who are to be released. All factors remaining constant, the employer must adopt the first in last out formula to select the employees to be released. However, he (the employer) may, for cogent and verifiable reasons, apply other parameters in undertaking the selection exercise including the skill, reliability and ability of the employees to be retained and or released.
21. At the same time, the employer is required to engage the employees in consultations to see if it is possible to obviate the looming redundancy by finding alternatives to laying off the employees. This may include deploying the employees to other areas.
22. Once the employer has identified the employees who are to be released through a transparent process, he must then pay those who have been isolated for release their terminal dues. Details of what is to be paid are specified under section 40 of the [Employment Act](#).
23. An analysis of the evidence on record does not convince me that the Respondent followed the above procedure in terminating the Claimant's contract. There is no evidence that the Claimant was issued with the requisite redundancy notice as required under section 40 (1) (a) and (b) of the [Employment Act](#). Similarly, there is no evidence that the Respondent served the local labour office with the redundancy notice.
24. The only notice that the Claimant was issued with was the dismissal letter dated February 8, 2021. According to the letter, the Claimant's services were terminated with immediate effect. Certainly, this was not a redundancy notice that is contemplated under section 40 (1) (a) and (b) of the [Employment Act](#).
25. The Respondent confirms that the redundancy exercise did not affect the Claimant alone. According to the Respondent, several other employees were affected by the process. Yet, it (the Respondent) offers no evidence on how it selected the employees (including the Claimant) to be released from employment.
26. As has been observed in a number of judicial pronouncements, failure by the employer to follow the procedure of declaring redundancy as prescribed under section 40 of the [Employment Act](#) renders the entire process invalid ([Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3](#)



others [2014] eKLR). Consequently, I declare the redundancy declaration in respect of the Claimant's position irregular and therefore unlawful.

27. The next question for determination relates to the reliefs that are to be granted to the parties. Having lost his employment through an irregular process, the Claimant is entitled to compensation for unfair termination of his employment contract.
28. Having regard to all circumstances, I consider that an award of compensation that is equivalent to the Claimant's gross salary for four (4) months is adequate compensation for the loss that he suffered. In this regard and in terms of section 49 of the *Employment Act*, I have considered the duration that the Claimant had served the Respondent. At the point of their separation, the parties had worked together for approximately four (4) years, a considerably long time. Further, I have considered the fact that the Claimant's conduct did not contribute to the decision to terminate his contract.
29. I have also taken into account the fact that the Claimant lost his job due to the economic challenges that were presented by the Covid Pandemic. Employers did not wish the effects of the pandemic on employees.
30. The court takes judicial notice of the grave effects that the pandemic had on the ability of most employers to retain staff. As they grappled with how to react to this new reality, some employers ended up taking action that was contra the law. But the court must not lose sight of the fact that some of the measure that employers resorted to were in reaction to the desperate moments that they were faced with.
31. Before I pen off, it is perhaps necessary to point out that the evidence on record shows that the Claimant's salary in April 2020 had been reviewed upwards to Ksh. 474,344.00. Although the Respondent suggests that the salary may have been reduced owing to the Covid pandemic, there was no evidence that this was with the Claimant's involvement. In terms of section 10 (5) of the Employment Act, variation to the Claimant's contract could not have been effected without his involvement.
32. The other matter that requires examination regards the payments that the Respondent made to the Claimant after his exit from employment. The Respondent has produced cheque leaves and bank statements to demonstrate that it made the following payments to the Claimant:-
 - a. 9th March 2021 Ksh. 225,846.00
 - b. 18th April 2021 Ksh. 225,846.00
 - c. 26th May 2021 Ksh. 400,000.00
 - d. 28th May 2021 Ksh. 208,033.00
 - e. 9th July 2021 Ksh. 200,000.00
 - f. 23rd July 2021 Ksh. 200,000.00
 - g. 12th August 2021 Ksh. 149,400.00
 - h. 1st September 2021 Ksh. 131,000.00Total Ksh. 1,740,125.00
33. In the letter of termination of the Claimant's contract dated 8th February 2021, the Respondent confirms owing him (the Claimant) the following amounts even before factoring in the severance dues and notice pay that are payable under section 40 of the Employment Act:-



- a. Salary for eight (8) days worked in February Ksh. 84,506.00
- b. Accrued leave dues Ksh. 264,082.00
- c. Pending entertainment allowance Ksh. 60,000.00
- d. Pending salary Ksh. 1,016,000.00
- e. Pending commissions Ksh. 312,509.00
- f. Other commission Ksh. 46,595.00

Total Ksh. 1,828,692.00

34. In effect, the sum of Ksh. 1,740,125.00 that was paid to the Claimant was in part settlement of the Respondent's indebtedness to him as shown in paragraph 33 above and as confirmed by the Respondent. Therefore, the Respondent cannot rely on these payments to assert that it settled the Claimant's severance and notice pay under section 40 of the Employment Act.
35. If anything, the payments in paragraph 32 above did not fully discharge the Respondent's outstanding obligations to the Claimant as shown in the Respondent's letter of 8th February 2021. As indicated by the Claimant during his oral testimony, the payments settled his salary arrears. Thus, he abandoned the claim for salary arrears.

Determination

36. After evaluation of the evidence on record, I arrive at the conclusion that the redundancy declaration in respect of the Claimant's position was irregular.
37. Consequently, I declare that the Claimant's contract of service was unlawfully terminated.
38. I award the Claimant compensation for unfair termination that is equivalent to his salary for four (4) months, that is to say Ksh. 474,344.00 x 4 = Ksh. 1,897,376.00
39. I also award the Claimant salary in lieu of notice to terminate his contract of service that is equivalent to his salary for one (1) month in terms of clause 12 of his contract of service, that is to say Ksh. 474,344.00.
40. The Claimant is awarded interest on the above amount at court rates from the date of this judgment.
41. The award is subject to the applicable statutory deductions.
42. The Claimant is awarded costs of the case.
43. Any other relief that has not been granted is deemed as having been declined.

DATED, SIGNED AND DELIVERED ON THE 7TH DAY OF DECEMBER, 2023

B. O. M. MANANI

JUDGE

Order

In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.



B. O. M MANANI

