



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MALINDI

CAUSE NO. 46 OF 2017

DAVIES MUTUNGA MUSANGO.....CLAIMANT

VERSUS

ORGANIC GROWERS & PACKERS LTD.....RESPONDENT

JUDGMENT

1. The cause of action in this suit is premised on alleged unfair termination of the Claimant by the Respondent. The Claimant, who was an employee of the Respondent, claims to have been unfairly terminated on 23rd August 2017 when the Respondent laid him off allegedly on account of redundancy.

2. The Claim was instituted vide a Memorandum of Claim dated 12th October 2017 and filed on 16th October 2017. In the said statement of claim, the Claimant avers that on 1st March 2014, he was employed by the Respondent in the position of an electrical engineer. That his monthly salary was Kenya Shillings One Hundred Thousand (Ksh. 100,000/=). That the Claimant served in this position until 23rd August 2017 when he was handed a letter by the Respondent's management terminating his contract of service. That the termination was without justification in law.

3. In the Claimant's view, the termination was callous as it violated all regulations in the rulebook on fair termination. Besides the failure to issue notice to terminate to him, the Claimant avers that the Respondent, who asserts to have terminated the contract on account of redundancy failed to observe all the redundancy procedures under the law. For instance, it is asserted that: the 'First in Last out' principle was disregarded; the Claimant was terminated yet his position remains within the Respondent's job structure; no staff appraisals were done prior to the impugned termination; and no consultations with staff were done prior to the terminations.

4. It is the Claimant's case that the termination be declared illegal and unfair. The Claimant prays for an award of damages in addition to praying for a Certificate of Service. He also prays for costs of the action and interest on any sum that may be awarded to him by the court.

5. The Respondent has denied liability. It filed a Response to the Memorandum of Claim dated 6th November 2017. In addition, it also filed a list of documents introducing a series of documents that are connected to the dispute.

6. In its response, the Respondent admits the employer-employee relation between the parties. The Respondent avers that its business experienced financial strain around the time the Claimant was terminated forcing it to go into losses. That this development forced the Respondent to take austerity measures in a bid to remain afloat. That it is as a consequence of this that a decision was taken to lay off some of the Respondent's employees, an exercise that saw the Claimant and other employees being declared redundant.

7. It is the Respondent's case that it observed all the legal procedures regulating declarations of redundancies in handling the Claimant's case. That: a notice of the proposed redundancy was served on the labour office within the local limits of the area the Respondent operates; and the Claimant was paid his redundancy dues worked out as provided for in law. That the Claimant executed a release voucher absolving the Respondent from liability in respect of future and or further claims arising from the separation of the parties. In the Respondent's view therefore, the termination of the Claimant was lawfully executed and the present case is not merited.

8. After the institution of this action, it would appear that the Respondent went into liquidation on 7th September 2020. Evidence of this development is contained in Gazette Notice No. 7487 in the Kenya Gazette issued on 25th September 2020. Consequently, the Claimant applied for and was granted leave to continue with this cause against the Respondent while in liquidation.

9. In addition to the pleadings, the parties filed their respective witness statements. The Claimant filed a bare list of documents. However, an identical set of documents were filed by the Respondent and which were produced as exhibits.

10. At the trial, only the Claimant and his witness gave oral testimony. The Respondent's witnesses did not testify. Instead, Counsel for the Respondent sought to rely on their filed documents.

11. The evidence adduced by the Claimant basically reiterates his case as captured in the pleadings. In cross examination, the Claimant confirmed that he received his final dues from the Respondent as set out in document number 4 on the Claimant's list of documents and which appears as document number 16 on the Respondent's list. The Claimant indicated that the document discharged the "company" (Respondent) from further claims.

12. The Claimant indicated that he was not given a recommendation letter by the Respondent. That he was aware that the Respondent has since closed down.

13. The Claimant denied knowledge of the Respondent having given a redundancy notice to the Ministry of Labour as the notice filed by the Respondent was not copied to the Claimant. He also stated that he was not served with a redundancy notice as required by law.

14. It was the Claimant's case that in his department, other staff had been hired after he was employed by the Respondent. However, at the time of his termination, those members of staff were retained. This, according to him, violated the first in last out principle in processing redundancies.

15. The Claimant called RW2. This witness reiterated the evidence as presented by the Claimant.

16. At the close of the case, both parties filed their written submissions. I have considered the pleadings, evidence and submissions as filed in reaching my decision on the matter.

17. The law on declarations of redundancies at the workplace in Kenya is now fairly settled. It can be discerned not just from the text of the statute but case law as well. Section 40 of the Employment Act requires that the following be observed in declaring a redundancy: -

a. The employer must issue a redundancy notice to the affected employees setting out the reasons and extent of the proposed redundancy. This notice ought to be for a period of not less than one month prior to the termination of the affected employees. Where the affected employees are members of a Trade Union, the notice should be lodged with the Trade Union. However, where there is no Trade Union involved, the notice is to be served on the employees individually.

b. The notice aforesaid must also be delivered to the local labour officer where the employer operates from.

c. The employer is then required to undertake a selection process which will isolate the employees to finally be released. During this exercise, the employer should have regard for the principles of seniority in time of engagement of the affected employees, their skills, abilities and reliability. It is at this point that the first in last out principle applies. It is perhaps important to point out that this principle is not inflexible. The employer may depart from in a bid to retain junior staff that he/she thinks he/she must retain for the efficient running of the enterprise. However, this decision can only be arrived at on grounds that can be objectively tested.

d. The employer must then process and pay severance pay to the affected staff, pay any leave days not utilized and as well pay salary earned but not paid. In addition, the employer must pay the affected employees salary in lieu of one month notice.

18. It has been observed that although the law in Kenya does not expressly require parties to consult during the redundancy process, this is nevertheless a requirement of the International Labour Organization's Convention No 158 which Kenya has ratified. The requirement is also implicit in the statutory dictate under the Employment Act that the employer must issue notice of the intended redundancy to the employees. This notice is intended to open avenues for consultation between the parties. Accordingly, parties must consult in an effort to determine whether there is a chance to avoid the redundancy declaration. Indeed, this is an ingredient of what goes into the right to fair labour practice as conceived under article 41 of the Constitution (for this, see the decision of Maraga J in *Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others* [2014] eKLR).

19. I have considered the evidence on record. It does appear to me that the Respondent did not strictly adhere to the legal requirements stipulated above in declaring the Claimant redundant. There is no evidence that the Respondent issued the Claimant with the mandatory one month's notice as set out under section 40 (1) (a) and (b) of the Employment Act. Instead, the Respondent only issued the Claimant with a letter of termination dated 23rd August 2017. The letter appearing as document number 15 on the Respondent's list of documents was said to terminate the Claimant's contract of service on account of redundancy "with immediate effect."

20. The letter does not indicate the reason for the redundancy. And neither does it state the extent of the redundancy. Although the Respondent's letter dated 3rd July 2017 (document 14) on the Respondent's list of documents) would have served as the redundancy notice under section 40 of the Employment Act, it is to be noted that it was not copied to the Claimant.

21. It is also noteworthy that no evidence was placed before the court to demonstrate that the selection procedure set out under the law was followed in this case. Even though the Respondent suggests that the Claimant was the only person in the department, the Claimant's evidence suggests that there were other individuals working with him in the same section who were hired after him. That these individuals were retained even as the Claimant was released.

22. The Respondent did not provide any evidence to rebut this contention by the Claimant. No evidence of the Respondent's staff profile was provided. No evidence of the Respondent's organogram was presented. Section 45 of the Employment Act which places the burden of justifying the validity of a termination on the employer requires the employer to, inter alia, provide evidence to demonstrate that all

terminations including those based on the operational requirements of the employer have been undertaken for valid reasons and using the right procedure.

23. Further, there was no evidence that the Respondent involved the Claimant in any consultations prior to terminating him. As is clear from the evidence on record, the redundancy notice that would have triggered these consultations was never issued. This failure to initiate consultations with the Claimant and other affected employees violated the obligation on the Respondent to ensure fair labour practice in the process.

24. In the premises, I find that the Respondent did not follow the procedure stipulated in the law in declaring the purported redundancy that is the subject of this case. Accordingly, I declare the process unlawful and the resultant termination unfair.

25. The termination of the Claimant having been unfair, the next issue for consideration is whether he is entitled to the other reliefs sought. The Claimant has prayed for damages in addition to other reliefs.

26. Absent other factors, the Claimant would be entitled to an award of damages in terms of section 49 of the Employment Act. However, I note from the pleadings filed by the defense that it is the defense case that the Claimant was in any event paid some compensation under a pre-trial settlement. This assertion appears at paragraphs 3 and 9 of the defense.

27. The defense did not call any witnesses. It nevertheless introduced evidence through cross-examination of the Claimant and his witness. During this process, the Claimant acceded to the defense position that he was paid his final dues. He was shown and recognized as the discharge voucher that he signed document number 4 on his list of documents. He confirmed that he understood the document as discharging the Respondent from any further claims by the Claimant.

28. There is no insinuation on the part of the Claimant that he was coerced into the pretrial settlement through which he abandoned his right to further claims against the Respondent. Applying the reasoning in *Thomas Otieno Oluoko v Uzuri Foods Limited (Golden Harvest Mills) [2021] eKLR* and *Christine Juma Were v Kenafric Industries Ltd [2021] eKLR*, I find that the discharge voucher constitutes a binding agreement between the parties from which the court cannot depart save as it would in the case of an impugned contract.

29. I therefore award no compensation to the Claimant. However, I order that the Respondent grants the Claimant a Certificate of Service in terms of section 51 of the Employment Act.

30. I order that each party bears its/his own costs.

Summary of Award

31. The Court issues a declaration that:

- a. The Claimant's termination was unlawful.**
- b. However, the court does not award the Claimant any compensation in view of the fact that there was a pre-trial settlement of damages between the parties.**
- c. The Court orders the Respondent to issue the Claimant with a Certificate of Service.**
- d. Each party to bear his/its own costs.**

DATED, SIGNED AND DELIVERED ON THE 24TH DAY OF MARCH, 2022

B. O. M. MANANI

JUDGE

In the presence of:

Mogaka for the Claimant

Metto for the Respondent

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 April 2020, this judgment 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

JUDGE