



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 1650 OF 2015

(Before Hon. Justice Ocharo Kebira on 24th March 2022)

KENYA BUILDING, CONSTRUCTION,

TIMBER & FURNITURE, INDUSTRIES EMPLOYEES UNION.....CLAIMANT

VERSUS

M/S SAGOO AND NYOTA LIMITED.....RESPONDENT

JUDGMENT

1. The Claim herein was initiated by the Claimant in its capacity as a union on behalf of 6[six] Grievants against the Respondent, through a Memorandum of Claim dated 18th September 2015 for the following reliefs and orders:

- a) *A declaration that the Respondent did not follow the laid down procedure in rendering the 6 Grievants redundant.*
- b) *Kshs. 1,836,048.00 being collective terminal dues for all the Grievants or account of their being rendered redundant.*
- c) *Issuance of a certificate of service to each Grievant.*
- d) *Cost of the claim.*

2. Upon being served with the summons to enter appearance the Respondent did and filed a memorandum of response.

3. As at the time this matter came up for hearing, only 3[three] Grievants prosecuted their claims. The claims by Dominic Maribe and James Okwaro were withdrawn for reasons that they had been compromised. Benson Enoka passed on before the matter would be heard.

The Claimant's case

4. The Claimant presented the three Grievants, Lazarus Ndenga, Stanley Anyerere and John Adeka, and William Kibiri – an official of the Claimant as its witnesses.

5. CW1, Stanley Anyerere gave a brief testimony in court. He urged the court to admit the contents of his witness statement dated 20/2/2020 as his evidence in chief. The witness stated that he came into the employment of the Respondent in May 2008, as plumber. He was however not issued with a letter of appointment. The witness further stated that at the time he was leaving the employment he was earning a total of Kshs. 13,000, inclusive of house allowance of Kshs. 3,000.

6. He stated that on the 5th January 2005, he and his colleagues reported to work as usual, when they were told that there was no more work for them. Those who were affected of this were six in number, him inclusive. His employment with the Respondent thereby came to an end.

7. The termination was without any letter of termination being issued to him. Subsequently he followed up payment of his dues but the effort did not realise any fruits. This prompted him to report the matter to his union. In turn the union referred the matter to the Ministry.

8. The witness asserted that a conciliator was appointed. At the conciliation meeting, the Counsel for the Respondent requested tabulation of redundancy dues that were payable to him. The same was given. Thereafter, there came no word from the Respondent.

9. Cross examined by Counsel for the Respondent the witness stated that he was employed as a plumber and that he was not given any letter of employment.
10. He asserted that his employment entailed him doing piping in houses, working on drainage systems and doing fittings at various construction sites.
11. He stated that he was earning Kshs. 14,200 per a month. Salary payment was being effected through the bank and petty cash.
12. In his further evidence under cross examination, the witness stated that according to the payment voucher dated 20th December 2014, which showed leave days, bonus and travel allowance, it was reflected that person paying was A.G. printing and publishers.
13. Questioned on the termination, the witness stated that he was terminated on 5th January 2015, however he had no document to demonstrate that he was terminated on account of redundancy.
14. In his evidence in re-examination, the witness stated that, AG Printers and Publishers was a sister company to the Respondent. He further stated that his salary was being paid by the Respondent. He was never paid by AG Printing company.
15. The witness stated further that it was not within his knowledge that AG Printing was remitting NSSF contributions for him. The witness asserted that there was no written contract of employment. It was the responsibility of the Respondent as the employer to issue one.
16. He stated that during the conciliation proceedings, A.G. printing was not involved.
17. The second witness who testified in support of the Claimant's claim was John Adeka. The witness urged court to adopt his witness statement as his evidence in chief. The witness stated that he was employed by the Respondent in or about January, 2007 as a plumber. His salary was Kshs. 12,500 plus a house allowance of Kshs. 2,500.
18. He contended that his employment was terminated on the 5th January, 2015 when he and 5 [five] others were informed that thenceforth there was no work for them. He alleged that at the termination he was not given any letter of termination or paid his terminal dues.
19. Despite his frantic push for payment of his terminal dues, the Respondent's management did make any payment.
20. The matter ended up in the hands of his union, and eventually at a conciliation table, conciliation that did bear any positive fruits.
21. Under cross examination by Counsel for the Respondent, the witness stated that he was employed as a plumber. He had no formal training in the area. The company, AG Printing and Publisher was based at Westlands owned by the owner of the Respondent.
22. The witness further stated that his salary payment was normally in cash. At being paid, he would acknowledge the payment by signing on a particular document. However, later the salary started being processed through the bank.
23. The reason given to him and his colleagues for the termination was that there was no more work for them.
24. In his evidence under re-examination by his Counsel, the witness stated that the bank statements show the Respondent as the person paying his salary into the account.
25. There were times when the witness and his colleagues would work for A.G. Printers. The two companies belonged to same person.
26. The Claimant's 3rd witness was William Kibiri, the Claimant's branch secretary – Kiambu Branch. He stated that he recruited the Grievants into the Claimant's membership in the month of October 2014.
27. He alleged that on the 5th January 2015, the Grievants reported to the union that they had been asked to leave the Respondent's premises for the reason that the Respondent had no work for them to handle.
28. When the Claimant approached the Respondent over the termination and terminal dues for the Grievants, the Respondent refused to engage them. The Claimant consequently lodged a dispute with the Ministry of Labour for possible conciliation.
29. The 1st conciliation meeting was convened on the 24th March 2015, the Respondent was represented by the law firm and M/S Magerere Bosire Advocates who sought for time so that parties are allowed more time to come to a settlement.
30. The conciliator agreed to grant the parties time to attempt an amicable settlement. It was agreed that:
 - (i) The Claimant was to forward a tabulation of the Claimant's demands.
 - (ii) That the parties were to meet in the chambers of the Respondent's Counsel on the 8th April 2015 for evaluation of the tabulated demands.

(iii) The parties were to attend another conciliation meeting that was slated for 15th April 2015 to check on the progress of the settlement negotiations.

31. He contended that the parties met on the 8th April 2015 as had been agreed, the Respondent's Counsel indicated that he would require more time to seek payment authorization from the Respondent's Managing Director who was then said to be out of the country.
32. Thereafter the union did not get any communication either from the Respondent or its Counsel. The Respondent failed to attend further conciliation meetings. The conciliation process being unsuccessful the conciliator issued a certificate to that effect.
33. Cross examined by Counsel for the Respondent, he stated that before a new member is admitted into the membership of the Claimant, he had to give his full names, National identity card and a description of his place of work.
34. The witness stated that as at the time the Grievants were being terminated their membership with the union, [Claimant] was only three months' old.
35. The witness contended that documents that help the union to determine who the employer for the person seeking membership of the union is, would include a letter of employment and NSSF statement. However, at 1st instance the documents are not insisted on.
36. Referred to the payment voucher presented to court by the Respondent, in respect of Stanley Anyerere, the witness stated that the same was by A.G. Printers. However, for Benson Enoda, the same was by SAGOO & Nyota Limited. For John Orita, voucher exhibited was by Graphics Printing and Publishing.
37. Referred to the NSSF statement for Stanley Anyerere, the witness stated that there on the employer is indicated as Graphics Printing and Publishing.
38. The witness stated that had he requested for details he would have known that the Grievants were employed by different people.
39. Under re-examination the witness stated that during the conciliation process, the issue regarding the employers being different was not raised by the Respondent. Referring to the bank statement of Stanley Anyerere, particularly the transactions for 1st May 2015 and 3rd July 2014, the witness stated that it is clearly reflected that the salary payment was channelled into the account by the Respondent.
40. He further stated that considering the statements, there can be seen many other entries for the same nature.
41. He contended that it is the employer who makes NSSF returns, and therefore if an employer decides to register a different name as the employer than known by the employees, this will by no means change the employer-employee relationship.
42. The last witness [CW-4] to testify in favour of the Claimant's case was Lazarus Ndenga. The witness asked the court to adopt and it did adopt, the contents of his witness statement dated 20th February 2005, as his evidence in chief. He was employed by the Respondent in June 2005. His salary was Kshs. 13,000, plus a house allowance of Kshs. 3,000 per a month. Employed as such as a mason.
43. The witness gave evidence on how the termination of his employment occurred, the report to the union, the attempted conciliation and its failure, evidence so similar to that of the other Grievants.
44. He asserted that his two colleagues accepted a settlement at Kshs. 20,000 [Twenty thousand], he on his part declined to pick the settlement sum.
45. Cross-examined by Counsel for the Respondent the witness confirmed that the termination was on an account that their work had diminished. That though he claimed for service pay, the NSSF statement shows that contributions were being remitted by the employer.
46. The witness testified that they would proceed for leave yearly from 18th December to 5th January of the succeeding year. Though sometimes they would proceed for their leave on 23rd December.
47. The witness asserted that he was using his own tools.

The Respondent's case

48. One Jaspal Nyotta testified on the Respondent's case. At his application the court adopted his witness statement dated 27th April 2021 as his evidence in chief, and admitted the documents that the Respondent filed as the Respondent's documentary evidence.
49. The witness testified that he is a director of the Respondent company, a company that deals with plumbing, supply and installation G.P. gas cookers. The Respondent employed Benson Enoda as a plumber in January, 2000 until 5th January, 2015, and Lazarus Ndenga in June 2005 as a mason, till same date, 5th January 2015.
50. He denied that Stanley Anyerere, John Andeka, Dominic Maribe and James Okwaro were employees of the Respondent.
51. He alleged that Benson Enoda and Lazarus Ndenga were terminated for a just cause, after undergoing a disciplinary hearing in accord

with the Respondent's Disciplinary Procedure. At all material times the two took their leave days and or got paid for the untaken days.

52. He asserted that at all material times the Respondent was willing to pay them a one month's salary in lieu of notice, payment which it did not make.
53. The Respondent through the witness did contend that at all material times or at all it did not have a recognition agreement with the Claimant union.
54. The witness testified that the NSSF statements that the Respondent has placed before the court, shows who the employer of the other 4 [four] employees were. It was not the Respondent.
55. The witness stated that true as reflected on the bank statement of Stanley Anyerere and John Andeka the salary was paid by the Respondent. The reason being that their employer and the Respondent operated under same roof, and whenever their employer did not have funds to pay salaries the Respondent would step in and pay them salaries to impede a situation where the employees would unnecessarily suffer.
56. The witness stated that his late father was in charge of the plumbing company. That on the 5th January 2015, upon realising that the Grievants had reported to work late, despite earlier warnings, he ordered them to get back home and wait for a call from him for resumption of work. They were not terminated on account of redundancy.
57. Surprisingly, the following day they received a letter from the Labour officer indicating that the Grievants had lodged a complaint with the officer through their union. The letter dated 23rd April 2015 indicates that they had been unlawfully terminated on account of misconduct. According to the witness, they never complained to the Labour officer therefore that the termination of their employment was on account of redundancy.
58. The witness contended that the payment voucher in respect of Stanley Anyerere, demonstrates that their company used at the end of the year to close for Christmas holidays. The company would then compute the untaken leave days and compensate the workers for the same. Additionally, they would give the employees travelling allowance.
59. The witness stated that they at all material times remitted NSSF contributions for their employees. The witness referred to paragraph 4 of his witness statement he confirmed that he had approached the employees for an out of court settlement but they refused. He maintains that they are entitled for one month's salary in lieu of notice, and is willing to have the amounts settled.
60. Cross examined by Ms. Chege for the Claimant the witness stated that all the companies had same directorship. Depending on the work load all the employees would be allocated work in either of the companies.
61. The witness stated that though they have employment records for the said companies, they placed none before this court. He stated that the Respondent paid the Grievants on behalf of A.G. Printers.
62. He asserted that through its letter dated 23rd April 2015, the Respondent informed the Labour Office that some of the Grievants were not is employees. The witness stated that the matter was referred for conciliation on 28th July 2015, the Respondent instructed an Advocate to represent it and sought out the issue.
63. The Respondent gave instructions to the Advocate and the union to work out the Grievants' entitlements.
64. The witness admitted that the letter dated 23rd April 2015 preceded the Respondent's dated even date. The said union's letter detailed the happenings in the matter up to that date.
65. The witness stated that the Advocate did not inform him that there had been an agreement on any figures. He stated that he had nothing to demonstrate that his late father terminated the employment of the Grievants on account of misconduct on their part. He had nothing to prove that fair procedure was adhered to in the termination.
66. The witness stated that he does not recall giving instructions to the Advocate during the conciliation process to compute the Grievants' entitlements. However, he had instructions to solve the matter.
67. In his evidence under re-examination, the witness stated that AG Printing does bulk printing where the Respondent company does plumbing works. He alleged that it was not possible for an employee of one company to work for another.

The Claimant's submissions

68. The Claimant's Counsel in her written submissions addressed the issue as to whether the Grievants were fairly terminated from their employment. She submitted that the memorandum of response herein filed by the Respondent contains mere denials.
69. It was argued that from the witness statement of the Respondent's witness, together with his *viva voce* evidence the Respondent's case appears to be anchored on two pivotal facts:

- a) That Lazarus Ndenga was an employee of the Respondent and was terminated on disciplinary grounds, lateness in reporting to

duty.

b) That Stanley Anyerere and John Andeka were not employees of the Respondent but employees of A.G. Printing Company Limited.

70. Counsel submitted that there was no prove by the Respondent that Lazarus Ndenga was taken through any disciplinary process prior to the alleged termination and that the termination of his employment was by reason of misconduct.

71. On the Respondent's contention that the NSSF statement showed that Stanley Anyerere and John Andeka were not employees of the Respondent, Counsel submitted that it is the employer who makes returns with NSSF. The employer, like the Respondent, with same directorship as that of a sister company, can for one reason or the other decide to make returns on certain employees under the sister company's name. This will not affect the employer-employee relationship between it and those employees. She argued further that working place intricacies of the employers' structure should not be visited on the employee. To buttress this, Counsel cited the holding of Justice Rika in **Industrial Cause No. 281 of 2014 [formerly Mombasa Civil Suit No. 187 of 2003], Philip Ateng Oguk & 27 others -vs- Westmont Power [Kenya] Limited and East African Power Management Limited.**

“Although the Respondent argues it was a separate legal entity, in a management and operations agreement with Westmost, there is adequate material to find such separateness were merely a facade aimed at placing barriers in the way of employees in realising their employment rights. The shared human resource division was just but an aspect of collectivity of very strong evidence, which would enable the court to disregard separateness in considering the employee's grievances.

Other pieces of evidence forming this conclusion include the following; Job identity cards issued variously in the names of the two companies; employees were assured by management that they were sister companies; salary review letters indicated E.A. Power Management Group as a member of investment; the companies shared Directors and staff; and the companies operated from the same work place”.

72. The matter was in all fours with the instant matter. Besides, the Grievants showed that their salary was being paid by the Respondent. Counsel further sought fortification in her submissions by putting reliance on the holding in **Elizabeth Waceke & 62 others -vs- Airtel Networks Kenya Limited & another [2013] eKLR** thus;

“That arrangements crafted by employees which tend to limit employees in actualization & employment rights, must not have the endorsement of the court.”

73. Further reliance was placed on the decision in **Industrial Cause No. 1011 of 2010 – Symon Wairobi Gituma -vs- East Africa Breweries Limited & 3 others**, thus;

“..... subsidiary or sister companies are often merely places of work for employees, and the courts should look at the business structure, not the legal structure adopted by the enterprise, in enforcing employee's rights. In this regard, courts must not hesitate separateness, and apportion liability to the center of decision making in the enterprise. There is a widespread use of triangular relationships by employers involving agencies subcontractors and facade companies, all aimed at evading labour regulations.”

74. Counsel urges this court to find that the termination of the Grievants' employment was unlawful.

75. She contended that the statement of claim carries a tabulation that was done between the Respondent's counsel and the union at the conciliation level. The court should enter judgment in terms of those figures.

Respondent's submissions

76. Counsel for the Respondent submitted that in order for the claimant to succeed in their claim herein, they had to prove on a balance of probabilities:

- (i) That the Grievants were employed by the Respondent.
- (ii) The Grievants' employment was terminated on account of redundancy; and
- (iii) The Grievants are entitled to the prayers sought.

77. On whether there existed an employment relationship between all the Grievants and the Respondent, counsel submitted that it was the Respondent's case that neither Stanley Anyerere nor John Andeka were employees of the Respondent. The NSSF and NHIF records showing statutory remittances in respect of the two that were tendered by the Respondent's witness were enough prove of the Respondent's position.

78. Counsel further submitted that, the fact that the salary for the two is reflected to have been paid into their bank accounts by the Respondent is not a prove that there existed an employment relationship between them and the Respondent. She argued that the Respondent's witness was able to explain the transactions as purely an internal arrangement between the Respondent and A.G. Printing and Publishers Company.

79. She further argued that the evidence by the Respondent's witness was sufficient in demonstration that the two companies were separate companies and none of them acted as an agent of the other. That the contracts and terms of employment were managed separately by the two companies and the Grievants worked in the premises of their separate companies.

80. As regards whether the Grievants' employment was terminated on account of redundancy, counsel submitted that section 2 of the employment Act, 2007 defines redundancy as the loss of employment, occupation, job or career by involuntary means through no fault of an employee. Further that section 40 of the Act stipulates elaborately, the procedure of terminating an employee's employment on account of redundancy.

81. That contrary to the Grievants' contention the Respondent's position was that the termination was a normal termination. counsel submitted that the redundancy claim was coined by the claimant who was never present when the Grievants were being terminated.

82. The burden was upon the claimant to prove that the termination was on account of redundancy.

83. On the reliefs sought by the claimant on behalf of the Grievants, it was argued that special damages must be specifically pleaded and proved. That the claimant sought a global sum of Kshs. 1,836,048 as terminal dues for all Grievants.

84. It was submitted that the allegation that the Grievants were under paid was unsubstantiated. The Grievants were ungraded artisans, who according to the relevant wage orders were entitled to earn Kshs. 302.60 per a day for 26 days a month. Therefore Kshs. 7,867.00. They were earning Kshs. 13,000, Kshs. 11,200 and Kshs. 12,500 respectively thus none of them can be said to have been underpaid.

85. The claim for unpaid stands on loose grounds. The vouchers that the Respondent produced shows that at the end of each year, any leave days not taken would be paid for together with travel allowance.

86. Lastly, counsel submitted that the claimant was not able to prove that which they had pleaded. The suit must fall consequently. In this submissions Counsel sought reliance on the Court of Appeal's holding in **Antony Francis Wareham t/a A.C. Wareham & 2 others -vs- Kenya post Office Savings Bank [2004] eKLR**, thus:

"Having done so we are impelled to state unequivocally that in our adversarial system of litigation, cases are tried and determined on the basis of the pleadings made and the issues of fact of law framed by the parties or the court on basis of those pleadings pursuant to order XIV of the Civil Procedure Rules. And the burden of proof is on the plaintiff and the degree thereof is on a balance of probabilities. In discharging that burden, the only evidence to be adduced is evidence of existence or nonexistence of facts in issue or facts relevant to the issue. It follows from those principles that only evidence of facts pleaded is to be admitted and if the evidence does not support the facts pleaded, the party with the burden of proof should fail. It follows that a court should not make any findings on unpleaded matters or grant any relief which is not sought by a party in the pleadings."

Analysis and Determination

87. The parties herein would not agree on the issues for determination for this matter, considering the material placed before me, I distil the following issues for determination;

- (i) *Whether all or any of the Grievants were employees of the Respondent.*
- (ii) *Whether the Grievants' employment was terminated on account of redundancy.*
- (iii) *Whether the Grievants are entitled to the reliefs sought or any of them.*
- (iv) *Who should shoulder the costs of this suit?*

Whether all or any of the Grievants were employees of the Respondent.

88. The Respondent in its memorandum of response totally denied the claimant's claim that the Grievants were its employees. However, when the Respondent's witness testified in court, he expressly admitted that one of the Grievants, Lazarus Ndenga [CW 4] was the Respondent's employee at all material times. This being so, then it is left of this court to determine whether or not the other two Grievants were the Respondent's employees.

89. From the onset it is imperative to state that there was no written contract of employment that was placed before me from which one can without difficulty ascertain who the Grievants' employer was. The claimant's witnesses contended that their employment was not courtesy of any letter or written contract of employment. The employer whom I shall hereinafter shortly point out failed in its statutory obligation under section 9 of the Employment Act, which provides: -

" 1. A contract of service-

[a]. For a period of or a number of working days where amount is aggregate to the equivalent of three months or more

[b]......

shall be in writing.

2. *An employer who is a party to a written contract of service to be responsible for causing the contract to be drawn up stating the particulars of employment and that the contract is consented to by the employee in accordance with sub-section 3.”*

90. Section 10 of the Act, stipulates the particulars that have to be in the written contract of employment contemplated in section 9 above stated. One of those particulars is the name of the employer – sub-section [2] [b].
91. Under sub-section 7, in any proceedings where an employer fails to produce a written contract or the written particulars the burden of proving or disapproving an alleged term of employment stipulated in the contract shall be on the employer.
92. By reason of the above premises, I do not agree with Counsel for the Respondent’s submissions that it was onus upon the claimant to prove who their employer was, in the circumstances of the matter as shall come out hereinafter shortly.
93. From the onset, it is important to state that I watched and listened to the Respondent’s witness testify, from his demeanour and language, the Court cannot be off mark to conclude that the purported separateness between the Respondent and its sister company that the Respondent wanted to establish didn’t come out.
94. The Respondent’s witness did testify that the Respondent and the other company – AG Printers and Publishers Limited had a common directorship, and business operation premises. Actually, the two companies can safely be stated to have been family businesses, from the tone of his stated testimony. The testimony is congruent with the evidence by the Grievants.
95. In a circumstance where, the witness was contending like he did here, that the Grievants were employees of the other company not the Respondent, the claimant had demonstrated on a balance of probabilities that the Respondent paid the Grievants salaries, the Claimant showed that they were a shared resource and that the businesses operated under one roof, it became incumbent upon the Respondent to disapprove the Grievants’ position.
96. At that juncture the evidential burden shifted to it [the Respondent]. It is worth stating that unlike the burden of proof which remains constant throughout a trial, the evidential burden shifts from one party to another as the trial progress according to the balance of the evidence given at any particular stage, the burden rests upon the party who should fail if no evidence at all or no further evidence, as the case may be, was adduced by either side – **Halsbury’s Laws of England, 4th Edition, volume 17, paragraph 13.**
97. The Respondent verily knew that the existence of the facts, payment of salaries by it, a shared directorship, business operation under same roof and the nature of the businesses, were proved and that it was expected of it reasonably to tender evidence in form of a record to demonstrate that notwithstanding the premises, the Grievants were not in its list of employees. In mind I have a document[s] like an employment register, or salary payment roll, and a record that could establish that indeed the two companies had the internal arrangement, where the Respondent would for one reason or other settle employees’ salaries on behalf of A.G. Printers, a document like a reimbursement cheque.
98. Upon the premise aforegoing, the court concludes that the Respondent failed to discharge the evidential burden, and the burden under section 10[7] of the Employment Act.
99. The Respondent’s witness explaining why it should not be considering that the Respondent was the employer of the two Grievants, notwithstanding the clear evidence that it paid salaries of the two into their respective accounts cited an internal arrangement between it and the other company. Its counsel submitted in favour of this. On this, one crucial question remains unanswered, what document is there to demonstrate this financial arrangement?
100. The unanswered question makes the Respondent’s witness’s testimony a bald allegation not enough to shake the claimant’s position that the Grievants were employees of the Respondent.
101. Further, the Respondent’s witness was categorical in his testimony in chief, that his late father was in charge of the plumbing company. The witness admitted that Lazarus Ndenga was an employee of the Respondent. Lazarus Ndenga was a plumber or working in same industry, like the other two Grievants. The Respondent did dispute this. The conclusion therefore should be that all the three Grievants were working under the same company, company under the headship of the witness’s late father. The totality of the evidence by the Respondent’s witness, coupled with the admission that the grievant, Lazarus Ndenga was the employee of the Respondent, leaves no doubt that the company that was being led by the witness’s late father was the Respondent company.
102. I am of the view that for deliberate reasons convenient to the Respondent, the witness decided not to specifically state which company out of the two was doing plumbing works and which was Publishing works.
103. The court is not in agreement with counsel for the Respondent’s submissions that the NSSF statements are all indicative that the Grievants were employees of the company. The statements cannot be considered in isolation from the other material placed before this court, hereinbefore referred to.
104. It is in situations like is in this matter that one should appreciate the jurisprudence in the decisions cited by counsel for the Claimant, namely, **Philip Ateng Oguk & 27 others -vs- Westmont Power [Kenya] Limited and East African Power Management Limited [281 of 2014], and Elizabeth Washeke and 62 others -vs- Airtel Networks Kenya Limited & another [2013] eKLR.**
105. By reason of the aforegoing premises I am Impelled to conclude that the Grievants were employees of the Respondent.

Whether the Grievants' employment was terminated on account of redundancy.

106. The Respondent admitted that Lazarus Ndenga was its employee. That it terminated his employment for a just cause after undergoing a disciplinary process in line with the company's disciplinary procedure. This is all that he said of the termination.

107. Where there is a dispute as regards termination of an employee's employment, section 43 of the Employment Act, requires an employer to prove the reason[s] for the termination. It is not enough for an employer to state that it dismissed an employee for a just cause. There are a galaxy of just causes that can attract a termination of a contract of employment, consequently an employer can only satisfy the duty bestowed upon it under the provision if only it is specific about the cause.

108. Having failed to demonstrate by evidence what the cause was, I am only left with one option, to conclude that the grievant was not terminated for any just cause as alleged, and that he was not taken through any disciplinary process. There was no iota of evidence tendered in support of the assertion that there was a disciplinary process.

109. The grievant and the others testified that they were released from their employment on an account that there was no more work for them to do. In essence, they were stating that their work had diminished according to their employer. There was no evidence that was placed before court to discount this fashion of evidence by the Grievants. The Respondent was blurred by the position it took in the matter to the effect that the two Grievants were not its employees.

110. The Grievants asserted that their termination was on account of the operational requirements of their employer, the Respondent. Both section 2 of the Employment Act and section 2 of the Labour Relations Act define redundancy as: -

"The loss of employment, occupation, job or career by involuntary means through no fault of an employee, involving termination of an employment at the initiative of the employer, where the services of an employee are superfluous and practices commonly known as abolition of office, job or occupation and loss of employment."

111. In the definition that are two pivotal aspects and relevant to this matter. The characteristic of the termination being one as a result of no fault or contribution on the part of the employee, second, superfluous, an indication that the employee[s]' work was unnecessary to the employer. Looking at the circumstances of the Grievants' termination, as expressed through their evidence, evidence which I agree with, I do not hesitate to find that the termination of their employment was on account of redundancy.

Whether the termination was procedurally fair.

112. Section 40 of the Employment Act, 2007, provides an elaborate procedure that an employer must follow before pronouncing a redundancy declaration on his or her employee[s]. The procedure contemplated in the provision entails issuance of specific notices to the employee personally where he is not a member of a union, or to a union if the employee[s] to be affected is its member, and to the labour office. Also, as a component in the procedure are consultations between the employer and the employee[s].

113. In the instant matter, there is no doubt that regard wasn't given to the statutory procedure, and by reason of this, I hold that the termination was procedurally unfair.

Of what reliefs are the claimant's entitled to if any?

114. With all due respect to the drafter of the claimant's pleadings, the same suffer from grave destituteness in specificity of the reliefs sought by the claimant on behalf of the Grievants. This courtesy of poor draftmanship. However, I get some comfort that they were not prepared by counsel.

115. The Court appreciates the submissions by Counsel for the Respondent that parties are bound by their pleadings. However, considering the fact that the Respondent's witness in his testimony indicated to court that he has all through been willing to pay the Grievants, the fact that the pleadings were done by a layman, I am constrained for the interest of justice and the principle that a wrong attracts a remedy, not to shut my eyes to the foregoing premises and award a nominal award to the claimants pursuant to the provisions of section 49 [1] [c] of the Employment Act, for the unfair termination.

116. In the upshot, I enter Judgment for the claimant in the following terms:

- a) A declaration that the termination of the Grievants' employment was by way of them being declared redundant.
- b) A declaration that the termination was both procedurally and substantively unfair.
- c) Compensation pursuant to the provisions of section 49 [1] [c] of the Employment act, 2007 at 4 [four] months' gross salary of each of the Grievants.
 - (i) Stanley Anyerere, Kshs. 50,780.
 - (ii) John Andeka, Kshs. 50,780.
 - (iii) Lazarus Ndenga, Kshs. 66,000.

- d) Interest on the awarded sum from the date of filing this suit till full payment, at court rates.
- e) The Respondents to issue certificates of service to the Grievants within one month of the date of this Judgment.
- f) Costs of this suit.

READ AND DELIVERED VIRTUALLY THIS 24TH DAY OF MARCH 2022.

OCHARO KEBIRA

JUDGE

IN PRESENCE OF;

MS. CHEGE FOR THE CLAIMANT.

MS. BHOKE 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 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.

OCHARO KEBIRA

JUDGE