



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 271 OF 2017

(Before Hon. Justice Ocharo Kebira on 22nd March 2022)

PAUL NZUKI GEORGE

CLAIMANT

VERSUS

POLLMAN'S TOURS & SAFARIS

RESPONDENT

JUDGMENT

The Claimant filed his claim vide a Memorandum of claim dated 31st January 2017 in which he prays for the following remedies.

I. A declaration that he was wrongfully and unfairly declared redundant

II. Notice period of One (1) month Kshs 32,354.00/=

III. Outstanding dues Kshs 16,117.00/=

IV. 12 months' salary as compensation for wrongful and unfair termination Kshs 32,354 x 12 = Kshs 388,248

V. Punitive and aggravated damages for breach of the Claimants constitutional Rights.

VI. Costs incidental to the suit

In response to the memorandum of claim the Respondents filed a memorandum of defence dated 30th June 2017.

On the 4th November 2021, when this matter came up for hearing, neither the Respondent's witness nor the Respondent's counsel were in attendance of Court. Noting that the date had been taken by consent, and at the instance of the Claimant, the court allowed the matter to proceed their presence notwithstanding.

The Claimant urged the Court to adopt his witness statement that he filed herein on the 13th February 2017, as his evidence in chief, and those documents that were filed under the list of documents dated 31st January 2017, as his documentary evidenced. The court so adopted. He testified briefly in clarification of some aspects of the statement and the documents, that he thought needed clarification.

The Claimant stated that he was employed by the Respondent on the 1st of July 2010. That he was later on the 22nd February, 2011 confirmed to the position of a Service representative with a salary of Kshs 32, 354 per month. Further that on the 17th June 2015 the Respondent terminated his employment on account of redundancy.

He stated in his oral testimony that the decision to terminate his employment on the account hereinabove stated was expressed through the Respondent's letter dated 20th May 2015. According to the letter, his employment was to come to an end a month after the date of the letter.

He contended that prior to this letter, there had not been any notice to him. There were no consultations over the redundancy. The affected employees were not given the criteria that the Respondent used to identify the to be affected employees.

The Claimant states that in that month when his employment was terminated he had worked for 15 days but the Respondent failed to pay him for these days worked. He further stated that the Respondent did not pay him his dues that it was expected to under law.

He asserted that the termination was unlawful and unfair, entitling him to the reliefs that he has sought in his pleadings. He further contended that he protested the termination, however this did not attract any positive action by the Respondent.

Respondent's Case.

As stated hereinabove, the Respondent filed a statement of Response but did not present any evidence to support the same. It is now trite that pleadings which have not been supported by evidence will just remain mere statements in the eyes of the court and shall be treated as such. Nothing therefore turns on the Respondent's statement of Response.

Determination.

From the material before me, the following issues emerge for determination;

- *Whether the termination of the Claimant's employment was procedurally fair,*
- *Whether the termination was substantively fair,*
- *Whether the Claimant is entitled to the reliefs sought,*
- *Who should bear the costs of this suit.*

Whether the termination of the Claimant's employment was procedurally fair.

This court has said before that the defining characteristic of termination on account of redundancy is lack of fault on the part of the employee. It is a species of "no fault" termination. I am of a firm view that this provides the reason why the Employment Act 2007, places particular obligations on an employer, most of which are directed towards ensuring that those employees whose employment is to be terminated are treated fairly.

Section 40[1] of the Employment Act, Provides: -

"An employer shall not terminate a contract of service on an account of redundancy unless the employer complies with the following obligations: -

[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 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 the employees to be rendered redundant had due regard to the seniority in time and to the skill, ability and reliability of each employee of a 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 wages in lieu of notice; and

[g]. The employer has paid an employee declared redundant severance pay at the rate of not less than fifteen days' pay for each completed year of service."

I now turn to consider whether the procedure contemplated under the provision above stated was complied with by the Respondent. Under the section an employer contemplating to terminate an employee's employment on account of redundancy must give the employee a notice of intention. This notice is expected to stir consultations, and after consultations a second notice is issued to the employee of the decision to declare him or her redundant. This is what the Court of Appeal held in the classical case of **Kenya Airways Limited v Aviation & Allied Workers & Others [2014]eKLR** thus;

"my understanding of this provision is that when an employer contemplates redundancy, he should first give a general notice of the intention to the employees likely to be affected or their union. It is that notice that will illicit consultations between the parties..... The Act requires one month's notice. The period runs from the date of service of the notice. It is after the conclusion of the consultation on all issues of the matter that notice will be issued to the affected employee of the decision to declare them redundant."

From the evidence of the Claimant I gather his contention to be that he was only served with one notice, instead of the two contemplated in the provision. The duty to prove that the procedure provided for in section 40[1] of the Employment Act, which procedure is mandatory lay upon the Respondent pursuant to the Provisions of section 45. The evidence by the Claimant that the procedure was not adhered to was not challenged in any manner. Consequently, I hold that the Respondent did not establish that the termination was procedurally fair. Non-compliance of the provisions of section 40[1] renders a termination unfair pursuant to the provisions of section 45[2].

The Claimant contended that he was not engaged in any form of consultations with the Respondent over the alleged redundancy situation prior to the termination. The Respondent did not bring forth any evidence to discount this contention. The Claimant's evidence remained un rebutted.

Imperative to state that consultation is a key component in the process where an employer alleges being of a redundancy situation and consequently intends to terminate an employee's or employees' employment on an account of redundancy. The Court of Appeal in the case of **Barclays Bank of Kenya Ltd & Another v Gladys Muthoni & 20 others [2016]eKLR**, expressed itself on the importance of consultations, and I agree, Viz;

“37. We have carefully examined that case which unlike this case, involved unionisable employees of a collective bargaining agreement and oral evidence tested in cross examination. In the end, we are persuaded that the dicta of Maraga and Murgor JJA regarding consultation prior to the declaration of redundancy resonate with our constitution and international laws which have been domesticated by dint of Article 2[6] of the Constitution.”

By reason of these premises, I hold that the termination was procedurally unfair.

Whether the termination was substantively fair.

The Claimant asserted that the termination was without any valid reason. Under section 43 of the Employment Act, the employer is charged with the burden of proving in a dispute as is herein that the termination was with a valid and fair reason. In **John William Strauss & Another vs Plessey[PTY]Limited [2002] & BLLR 755[CC]** the South Africa Labour Court, held that the employer has a right to dismiss an employee for fair reason. Further in **Super Group Supply Chain Partners V- Arthur Dlamini & Another [JA 77/10]**, the Labour Court of South Africa held *“It is trite that an employer is permitted to dismiss an employee for its operational requirements. However, for the employer to do successfully it is obliged to have a bona fide economic rationale for the dismissal.”*

I am persuaded by the holding.

The Respondent did not place any evidence before the Court. By reason of this premise it did not demonstrate that it had a genuine economic reason for the alleged redundancy. Consequently, it failed to discharge the twin burden that the law placed upon it under the provisions of sections 43 and 45 of the Employment Act, prove of the reason for dismissal, and that the reason was fair and valid, respectively.

In the upshot, I find that the termination was substantively unfair.

What Reliefs is the Claimant entitled to if any?

Having found that the termination the Claimant's employment was both procedurally and substantively unfair, I now turn to the reliefs sought by the Claimant. He sought for one month's salary in lieu of notice, Kshs. 32,354. Considering that there was no evidence from the Respondent to rebut his claim, and that the same is an entitlement under section 40 of the Act, I award him this amount.

The Claimant further sought for 15 days' pay asserting that he was not paid for the days for which he worked in the month of June 2015. The evidence on this was not controverted, he is consequently awarded, Kshs.16,177.00 under this head.

Owing to the fact that the termination was procedurally unfair, and substantively unjustified, the Claimant sought for a compensatory relief pursuant to the provisions of section 49[1][c] of the Employment Act. I am alive to the fact that an award of the compensation is discretionary, dependent on the peculiar circumstances of this matter. By reason of the extent that the Respondent deviated from what the law required of it, the length of time that the Claimant worked for it and the fact that the Claimant did not in any way to the termination, I am persuaded that the Claimant is entitled to a grant of the relief, and to the extent of 4 months' gross salary, Kshs. 129,416.

The Claimant has sought for aggravated damages for an alleged breach of Constitutional rights. The Claimant did not plead with particularity the constitutional right that the Respondent breached. He did not supply any contents in his pleadings that can help the Court or anybody discern how any of his rights if at all were violated. His evidence too is too insufficient on this. The Court can make no award on bald assertions as is the case here.

It is imperative to state that aggravated damages being in character what they are, intended for punishment and deterrence, unlike general damages that are for compensation, can only be awarded if a claim meets a specific threshold. In this I find support in the holding of the Court of Appeal in **Godfrey Julius Ndumba Mbogoria & Another v Nairobi City County [2018]eKLR**, thus;

“Exemplary damages are essentially different from ordinary damages. The object of damages in the usual sense of the term is to compensate. The object of exemplary damages is to punish and deter. We are guided by the case of Rooks v Benard [1964] AC 1129 where Lord Devlin set out the categories of cases in which exemplary damages may be awarded which are, [i] in cases of oppressive, arbitrary or unconstitutional action by the servants of the Government, [ii] cases in which the defendant's conduct has been calculated to make profit for himself which may well exceed the compensation payable to the plaintiff and [iii] where exemplary damages are expressly authorised by statute.”

I have no doubt in my mind that the Claimant's case *herein* doesn't meet the threshold. I decline to award the damages sought.

In the upshot I enter Judgement for the Claimant in the following terms;

1. A declaration that the termination of his employment was both procedurally and substantively unfair.
2. One Month's Salary in lieu of notice, Kshs. 32,354.00.
3. Unpaid salary, Kshs. 16,177.00
4. Compensation pursuant to Section 49[1][c] of the Employment Act, Kshs. 129,416.00.
5. Interest on [2] [3] and [4] at court rates from the date of filing this suit till full payment.
6. Costs of the Suit.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 22ND DAY OF MARCH, 2022.

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OCHARO KEBIRA

JUDGE

Delivered in presence of;

Mr. Waiganjo for the Claimant.

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