



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MALINDI

CAUSE NO. E007 OF 2021

EMMANUEL LIMO CHANG'OKA.....CLAIMANT

VERSUS

PLAN INTERNATIONAL KENYA.....RESPONDENT

JUDGMENT

1. By this action, the Claimant seeks compensation from the Respondent for alleged wrongful termination. The claim is opposed by the Respondent.

2. It is the Claimant's case that he was employed by the Respondent on 14th September 2015 on a three year contract in the capacity of a Sponsorship Officer. That the contract was renewed over time with the last renewal taking place in September 2020. That the last contract was to run up to 30th June 2023.

3. The Claimant asserts that his duties entailed community outreach to the children under the care of the Respondent's program. That because of the nature of this engagement, the Claimant was required to make constant journeys from his office to the field to meet these children. The Claimant asserts that the Respondent had provided him with a motor cycle for this purpose.

4. It is the Claimant's case that over time, he developed complications of the back associated with the long use of the motor cycle. That this was confirmed by his doctors.

5. It is the Claimant's case that when he informed the Respondent's management about his medical condition, they did not take the matter positively. Rather than find alternative ways of ensuring that the Claimant was able to execute his work safely, the management embarked on alleged witch hand in a bid to get rid of him.

6. As a result of the matters aforesaid, the Claimant says that the Respondent devised a scheme to terminate his employment under the guise of redundancy. The Claimant asserts that on 27th November 2020 he was served with a notice terminating his employment allegedly on grounds of redundancy. Yet, in his view, the Respondent did not have grounds to terminate the contract for reasons of redundancy. Neither did the Respondent follow the laid down procedure in terminating him.

7. The Claimant has thus filed the case to seek, inter alia, a declaratory order that his termination was unlawful. He also seeks to be issued with a Certificate of Service and to be awarded damages as more specifically set out in the statement of claim.

8. The Respondent has disputed the claim. According to the Respondent, the Claimant was lawfully terminated on grounds of redundancy.

9. It is the Respondent's case that the organization begun experiencing financial constraints when its income was outstripped with the cost of running its programmes. This forced the Respondent to undertake an audit of its structures and finances. According to the Respondent, this evaluation confirmed that the organization was overstaffed and underfunded thereby straining delivery of its core mandate.

10. As it states, the Respondent had to therefore undergo some form of restructuring. This process inevitably meant that some members of its staff would be laid off and some positions within the job structure of the Respondent scrapped.

11. The Respondent states that with this realization, it immediately notified all employees who were affected by the process. These included the Claimant. That the staff numbering about forty four (44) were asked to apply for new positions in the organization.

12. Meanwhile, the Respondent states that the affected members of staff were informed that should they not be taken on board in the new positions they were applying for, they will have to be let go. According to the Respondent, all these members of staff were issued with the relevant notices. Eleven (11) of them were eventually terminated and paid their terminal dues in line with the law.

13. With respect to the Claimant, the Respondent states that it issued him with a notice of intention to terminate him on grounds of redundancy on 19th October 2020. The notice indicated that the Claimant will be served with another termination notice at the close of November 2020 just in case he was not re-absorbed into the organization.

14. According to the Respondent, the Ministry of Labour was also notified of the impending redundancy. And finally, the Claimant was released at the close of December 2020 and paid all his redundancy dues.

15. The Respondent indicates that it consulted the Claimant throughout the process. And that the Claimant was kept in the know of the developments.

16. It is the Respondent's case that the Claimant's case is therefore an abuse of the court process. It is just an attempt by a greedy employee to reap where he has not sowed. The Respondent asks that the case be dismissed with costs.

17. The parties gave evidence. They relied both on their written statements and oral evidence. The evidence reiterates their case as set out in their pleadings.

18. At the close of the case, the parties undertook to file written submissions. In this judgment. I have considered all that was on record at the time of writing the judgment.

19. The issues for determination in this case in my view are as follows: -

a) Whether the Claimant was lawfully terminated on account of redundancy.

b) Whether the Claimant is entitled to the reliefs sought in the case.

20. I would like to begin by setting out the law on redundancy in Kenya as I understand it. The relevant legislations in this respect are: sections 40, 43 and 45 of the Employment Act and article 41 of the Constitution 2010. Although the Respondent has in its submissions referred to ILO Convention no. 158 of 1982 on termination of employment, it is perhaps necessary to mention that this Convention is yet to be ratified by Kenya. Despite its non-ratification by the country, I note that a couple of judicial pronouncements have been made based on the provisions of the Convention. On my part, I make no reference to it as the Convention still has no force of law in Kenya.

21. The Employment Act defines redundancy as the involuntary loss of employment by an employee without his fault. As pointed out by the Respondent in its written submissions, redundancy is what comprises loss of employment for operational reasons at the work place at the instance of the employer. The grounds justifying declaration of redundancy are a myriad. However, the primary consideration is that whatever the ground, it must have the effect of rendering the affected employee's position obsolete or no longer required by the employer.
22. As pointed out by the Respondent, redundancy is an organizational tool that is at the disposal of the employer to reorganize its enterprise for optimum performance. It is a power that is within the discretion of the employer to invoke to bring to closure the employer-employee relation which courts should as a general rule not interfere with. However, courts will intervene where the employer is unable to demonstrate that it has valid grounds to declare a redundancy or that it has failed to follow the procedure prescribed by law for declaring the redundancy.
23. Section 40 of the Employment Act lays down the procedure to be followed in declaring a redundancy. First, the employer must issue notice to his workforce notifying them of the impending redundancy. This notice must be for a period of not less than one month. The law requires that the notice addresses two critical things: the reason for and extent of the proposed redundancy.
24. The notice should be served on the employee in person if he is not a member of a trade union. However, where he belongs to a trade union, the notice is to be addressed to the trade union. In addition, the notice must be addressed to the labour officer within the local limits of the place the employee works.
25. The employer is then required to undertake the selection process which will identify the employees to be released. The rule of the thumb is that the policy of first in last out be adopted as a guide in the process. However, in recognition of the fact that the redundancy tool is really a device to enable the employer reorganize his enterprise, the law permits a departure from this principle on grounds that are objectively identifiable and verifiable. Consequently, using other tools such as the reliability, ability and skill of employees, the employer is permitted to pick employees that are most suitable for his enterprise and retain them even though they may be latter recruits into his organization.
26. The employer must then pay the employees identified for release salary of one month in lieu of notice, severance pay as worked out under the law, accrued leave days, salary for days worked and any other benefits agreed upon under a collective bargaining agreement or individually where applicable.
27. All these requirements are key ingredients in protecting the right to fair labour practice under article 41 of the Constitution. Failure to comply with any one of them will provide a basis for a declaration that this right has been violated.
28. Under section 43 and 45 of the Employment Act, the burden of proving that there are valid grounds to terminate an employee and that fair procedure has been followed in releasing him lies with the employer. This includes instances where an employee is terminated for operational reasons.
29. The reason for termination in this case is redundancy. As indicated above, by this the Respondent was simply saying that the Claimant's position had either become obsolete or was no longer required within its establishment. And by virtue of sections 43 and 45 of the Employment Act, the burden lies with the Respondent to justify this position.
30. From the evidence provided the Respondent states that it began experiencing a measure of financial constraints in managing its core programmes towards the close of the year 2020. As a result, it resolved to take measures to mitigate this situation. The measures included downsizing of its bloated staff and closing some positions within its job structure.
31. These are, on their face, valid grounds for declaring a redundancy. But did the Respondent discharge the burden of justifying these reasons for termination? I am afraid it did not.
32. There was no evidence of the alleged financial constraints the Respondent was facing presented to court to justify the decision to cut back on its staff. One would have expected production of audited accounts for the period under consideration or some other financial statement that provided the basis for the decision by the Respondent. Better still, the Respondent would have provided the report of the audit it conducted on its activities that showed a mismatch between its income and expenditure and on the basis of which the decision to restructure was taken.

33. Unfortunately, this evidence was either withheld or was simply unavailable. All that the Respondent's witness did and which the Respondent submits should be taken as proof of the assertion was to lead oral evidence, unsupported by figures that it had to take the unprecedented steps due to the financial constraints occasioned by among other factors, its bloated staff.

34. Also critical was the indication that the organization was restructured with the consequence that some positions became superfluous. As this was the reason for the redundancy, the Respondent would have been expected to provide evidence of this restructuring in terms of sections 43 and 45 of the Employment Act.

35. At least, evidence of the organogram of the Respondent before and after restructuring was necessary in this respect. For instance, the Respondent asserts that the position of Sponsorship Officer was done away with. Yet, it has not filed any evidence of how many Sponsorship Officers it had within its ranks prior to the restructuring and further evidence that all of them were terminated. There is no evidence that the new organogram of the Respondent did not have this position. This evidence was not provided.

36. In the absence of this evidence, it is difficult to rely on the Respondent's mere oral assertions unsupported by documents that the Respondent had experienced financial strain due to the mismatch between its workforce and its finances. It is also difficult to hold that the structure of the Respondent was indeed altered and some positions scrapped. This is particularly so in the face of the Respondent's witness's concession during cross examination that there are officers in the organization that are still doing the very same work that the Claimant had been doing before he was laid off. If these officers were integrated into a new structure of the Respondent, it was for the Respondent to provide evidence on this new structure.

37. In the face of these deficiencies in evidence by the Respondent, I find that the Respondent did not justify the reason for termination on grounds of operational requirements of the employer as required under sections 43 and 45 of the Employment Act. As was held in *Ahamed Mwarumba Mwavita v Kocos Kenya Limited [2021] eKLR*, it is for the employer to prove the reasons for redundancy in terms of the law.

38. As to the procedure adopted, it is clear from the evidence provided that the Respondent issued some notices in an effort to comply with the requirements of section 40 of the Employment Act. However, a number of the notices do not meet the minimum requirements of the law. For instance, whilst the first notice to the Claimant dated 19th October 2020 indicates the reason for the proposed redundancy it does not indicate the extent of the redundancy. It does not disclose the number of members of staff who were likely to be affected in the process. This is unlike in the *Thomas De La Rue (K) Ltd v David Opondo Omutelema [2013] eKLR* where the redundancy notice specifically indicated that the number of staff likely to be affected was 35.

39. It is noteworthy that the Respondent issued two notices of intended redundancy: one to the Claimant and the other to the Ministry of Labour. Whilst the notice to the Ministry of Labour indicates the reasons and extent of the intended redundancy declaration, that to the Claimant is silent on the extent of the redundancy. In terms of section 40 of the Employment Act, the two notices ought to express themselves on these two ingredients. Therefore, the fact that the notice to the Ministry of Labour is compliant in this regard does not cure the deficiencies in the notice to the Claimant.

40. As for the notice to the labour office, it is noteworthy that while the law directs the employer to serve the notice on the labour officer within the local limits of where the employee works, the Respondent addressed its notice to the Director of Labour, Ministry of Labour, Nairobi. This is despite the fact that the Claimant was at the time engaged at the Respondent's Kilifi office where the Ministry of Labour has a local labour officer.

41. In the *Thomas De La Rue (K) Ltd v David Opondo Omutelema* case, the court alludes to the need for the notice to go to the local labour office in the following manner:

“It is quite clear to us that sections 40 (a) and 40 (b) provide for two different kinds of redundancy notifications depending on whether the employee is or is not a member of a trade union. Where the employee is a member of a union, the notification is to the union and the local labour officer at least one month before the effective redundancy date. Where the employee is not a member of the union, the notification must be in writing and to the employee and the local labour officer.”

42. The requirement that notice of a proposed redundancy be served on a labour officer within the local limits of where the affected employee works must have been intended for administrative convenience. It is not lost to us that the government is a large entity and correspondence on a matter could go unattended if not directed to the office with the immediate mandate to address the issue at hand. In respect of section 40 of the Employment Act, it appears reasonable to think that the labour officer within the local limits of an employer who is declaring redundancies is best suited to address the issues raised by such employer as compared to the Ministry of Labour's central office in Nairobi. The law gives such officer the immediate mandate over the redundancy.

43. I also think that the selection process was poorly handled. The Respondent states that at the time of declaring the redundancies, it had a workforce of about three hundred (300) staff. And that only forty four (44) of them were identified for possible redundancy. Of these forty four (44), eleven (11) were finally released. Yet, there was no evidence how the Respondent picked these forty four (44) and ultimately the eleven (11) from the pool of three hundred (300) employees.

44. The Claimant's evidence was that at the time of the purported redundancies, he was working with other employees who were his juniors in the same department. It was the Claimant's evidence that he was terminated but these junior colleagues who had been hired after him were retained by the Respondent. This evidence was not challenged by the Respondent. All that the Respondent said in answer to the assertion was that the restructuring process was not guided by the first in last out principle alone. In other words, the Respondent was by this simply admitting that the selection procedure was not solely guided by the first in last out principle.

45. If this be the case, then it was critical that the Claimant demonstrates the basis of its selection of the 44 and ultimately 11 members of staff out of its workforce of 300 individuals. As I have indicated above, this evidence was not provided to the court. So to speak, the process was executed in a manner that remains opaque. This is unlike in the *Thomas De La Rue (K) Ltd v David Opondo Omutelema* where evidence was tendered demonstrating the criteria used in identifying the employees who were released.

46. The fact that the selection process was executed in an opaque manner renders it invalid. The consequence is to fail to demonstrate that the procedure for declaring the redundancy was fair. Discussing this matter, the Court of Appeal in *Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others [2014] eKLR* said that the employer must ensure that the selection procedure is not opaque. It must be open and verifiable.

47. For the reasons advanced above, I hold that though the termination may have been well intentioned, it nonetheless failed to comply with the requisites of the law on declaring a valid redundancy. From the evidence provided, the Respondent has failed to provide evidence on a balance of preponderance to demonstrate that the reason for termination was valid. Further, there is evidence that the procedure adopted in processing the redundancy had significant lapses. Accordingly, the Respondent's action to terminate the Claimant is declared unfair.

48. Having so found, the next issue is whether the Claimant is entitled to the reliefs he seeks in the statement of claim. According to the Claimant, he had just concluded a fresh contract with the Respondent before he was terminated. At the time, he was earning a monthly salary of Ksh. 130,664/=. This fact is not disputed by the Respondent. In any event, the Claimant produced his July 2020 pay slip establishing this fact.

49. I note that the Respondent paid the Claimant some Ksh 490,039/=. However, there was no voucher executed by the parties to indicate that this payment comprised a pretrial settlement between the parties.

50. Having regard to the guidelines under section 49 of the Employment Act, I am minded to award the Claimant compensation equivalent to his gross salary for seven (6) months. I have considered that the Claimant's conduct did not contribute to the loss of his job. I have also considered the fact that he has not been able to secure new employment after he was terminated and that he had served the Respondent for long without blemish. The award works out to Ksh. 783,984/=.

51. However, as the Respondent had already paid the Claimant some Ksh 490,039/=:, this amount shall be discounted from the sum now awarded leaving the Respondent with the obligation to settle the balance of Ksh. 293,945/=. This amount is subject to the applicable statutory deductions under section 49 of the Employment Act.

52. I also award the Claimant interest on the amount aforesaid at court rates from the date of institution of the case till payment in full.

53. I award the Claimant costs of this case.

54. The Respondent is also ordered to provide the Claimant with a Certificate of Service.

Dated, signed and delivered on the 28th day of April, 2021

B. O. M. MANANI

JUDGE

In the presence of:

No appearance for the Claimant

No appearance 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