



**Figio v Crown Petroleum Ltd (Appeal E049 of 2021)
[2022] KEELRC 1490 (KLR) (26 May 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1490 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E049 OF 2021**

**AK NZEI, J
MAY 26, 2022**

BETWEEN

ALI FIGO APPELLANT

AND

CROWN PETROLEUM LTD RESPONDENT

(Being an appeal against the judgment of the Principal Magistrate Hon. Lesootia Saitabau delivered on 14th July 2021 at Mombasa in the Employment Case No. 1061 of 2019)

JUDGMENT

1. The appellant herein was the claimant in Mombasa Chief Magistrate's Court ELRC Suit No 1061 of 2019, whereas the respondent was the defendant. *Vide* a memorandum of claim dated December 5, 2019 and filed in the said court on December 6, 2019, the appellant pleaded:-
 - a) That he was engaged by the respondent on December 11, 2009 in the position of Service Station Pump Attendant and earned Kshs 16,200 per month at the time of termination of his employment on November 6, 2019.
 - b) That the appellant was engaged verbally by the respondent and during the period of his employment with the respondent, he was never served with any warning.
 - c) That during the period of employment, the appellant earned wages which were below the then statutory minimum General Wages Order, and his efforts to have the same adjusted never yielded any positive fruit.
 - d) That in 2018, the respondent transferred the appellant from its Mikindani branch to its Jomvu Head Office where the appellant used to report at 8.00am and to leave by 8.00pm on daily basis, and there was no conversation as to overtime.
 - e) That after 2018, the appellant was transferred back to Mikindani.



- f) That on August 25, 2019, the respondent transferred the appellant again, verbally, from Mikindani to its branch in Kongowea within Nyali Constituency, with the same terms and conditions of employment.
 - g) That on November 6, 2019, the respondent terminated the appellant's employment on account of redundancy without according him any hearing and/or following the rightful procedure of redundancy, which was unfair and unlawful.
 - h) That on terminating the appellant's employment, the respondent paid the appellant one month salary being notice, leave days not taken, severance pay and issued him with a certificate of service without considering other entitlements based on the criteria adopted by the appellant.
 - i) That when transferring the appellant to Kongowea branch on August 25, 2019, the respondent was fully aware of her intention to close the Kongowea branch.
 - j) That there was no hearing between the appellant and the respondent before termination, and the principle of first in last out was not adopted.
2. The appellant sought the following reliefs:-
- a) A declaration that the claimant's (appellant's) termination on account of redundancy was unprocedural and unfair.
 - b) That the respondent be compelled to pay the claimant (appellant) as follows:-
 - i) Underpayment on the gross wage (Basic Salary + House Allowance) as per the statutory minimum *General Wages Order 2017* effective from 1/5/2017 to 30/10/2019 (30 months).....ksh.91,003.90
 - ii) Overtime worked on week days at Jomvu in 2018 (78 hours) 78x150.10x1.5.....ksh.17,561.70
 - iii) Days worked on Sundays and Gazette Public Holidays effective from January 1, 2017 to October 31, 2019 (53 days) Kshs 42,715.35.
 - c) Maximum compensation for unfair termination.....Kshs 230,802.
- Total Kshs 382,082.95
3. The appellant also filed his recorded witness statement and a list of documents dated the same date, both of which accompanied the memorandum of claim. Document listed on the appellant's said list of documents included the *Regulations of Wages (General) (Amendment) Order, 2017*, bundles of attendance time in and out, the appellant's certificate of service dated November 6, 2019 and a demand letter dated November 14, 2019.
4. The respondent entered appearance on December 17, 2019 and subsequently filed a statement of response on January 20, 2020.
5. The respondent:-
- a) Admitted having transferred the appellant after 2018 back to Mikindani and to having transferred him on August 25, 2019 from Mikindani to its Kongowea branch, but with no intention of closing the branch.



- b) Admitted having terminated the appellant's employment on November 6, 2019 on account of redundancy, but denied having done so unprocedurally or unfairly.
 - c) Pleaded that it served the appellant with a notice dated November 6, 2019 informing him of the respondent's decision to lay him off on ground of redundancy.
 - d) Pleaded that another notice was served on County Labour Officer on September 13, 2019, and that the appellant was paid all his dues being one month salary in lieu of notice, leave days, severance pay and a certificate of service was issued.
6. The respondent filed two recorded witness statements of Hassan Said and Faiz Salim Omar, dated January 28, 2020 and September 3, 2020 respectively, and a list of documents dated January 28, 2020. Documents listed on the said list of documents were a payslip for October 2019, a petty cash voucher dated October 22, 2019 (on payment of the appellant's terminal dues), the termination letter on account of redundancy dated November 6, 2019, a certificate of service and a letter dated September 13, 2019 addressed to the County Labour Office, Mombasa.
 7. On May 18, 2020, the respondent filed a supplementary list of witnesses and a recorded witness statement by Mohammed Abubakar. The respondent also filed a notice to produce documents, requiring production by the appellant of the original copies of bundles of attendance time in and out listed on the appellant's list of documents.
 8. On his part, the appellant filed a notice to produce on June 10, 2020 requiring production by the respondent of the appellant's written contract of service, attendance sheet/register indicating time in and time out and copies of payslips/vouchers acknowledged by the appellant.
 9. When the trial opened on September 8, 2020, the appellant adopted his recorded statement as his testimony and produced his listed documents as exhibits. The appellant's recorded statement basically replicated the averments made in the memorandum of claim. The appellant further testified:-
 - a) That he earned Kshs 16,200, which was paid via M-pesa.
 - b) That he was transferred from Mikindani to Kongowea, where he worked for three months before termination on November 6, 2019 without notice.
 - c) That he was not issued with redundancy notice.
 - d) That he worked overtime, from 8am-8pm and worked on public holidays without pay.
 10. Cross-examined, the appellant testified that he was issued with a redundancy letter but not a termination letter, and was paid a total of Kshs 101, 066 being notice pay, payment for leave days and severance pay. That the appellant did not receive payslips (as exhibited by the respondent) and that there were new employees whom the respondent retained.
 11. Re-examined, the appellant stated that he earned Kshs 16,200 but not the amount shown on the payslip exhibited by the respondent, and that the appellant did not receive payslips.
 12. Defence case opened on February 3, 2021, and the respondent called two witnesses, Mohammed Abubakar (RW-1) and Faiz Salim Omar (RW-2). RW1 adopted his recorded and filed witness statement as his testimony, referred to the respondent's filed documents and further testified:-
 - a) That the appellant was deployed at Kongowea which was closed down and the appellant was declared redundant along with others.



- b) That the appellant was paid all his terminal dues, and that the Respondent had a petty cash voucher showing payments.
 - c) That the claimant earned Kshs 19,000 before deductions, and that the salary was inclusive of house allowance.
 - d) That the appellant took off days once a week, and that such off days could fall on days other than Sundays, depending on the schedule.
 - e) That the attendance register produced by the appellant did not originate from the respondent.
13. RW-2 adopted his recorded and filed witness statement as his testimony in chief, and told the court that he was a Supervisor and Salesman with the respondent, and that the appellant worked in either morning or evening shifts, and worked six days in a week and eight hours in a day. That the appellant did not work overtime, and the respondent disputed the attendance register filed by the appellant.
14. Cross examined, RW-2 testified that the respondent did not have a register of shifts.
15. The trial court delivered its judgment on July 14, 2021 and rendered itself as follows:-

“As to whether the claimant is entitled to reliefs sought, the claimant claims that he was paid monthly salary of Kshs 16,200, he submits that he was entitled to a monthly salary of Kshs 19,200 inclusive of house allowance. The respondent produced a payslip for the month of October 2019 showing that the claimant was paid Kshs 19,233. The claimant has not tendered evidence that he was paid Kshs 16,200 and I have no reason to doubt credibility of the payslip that the respondent produced. Without evidence that the claimant was paid Kshs 16,200, I have no reason to doubt the payslip produced on record. The same confirms that the claimant’s salary was within the statutory minimum wage and I hold as such.

....further the respondent (*sic*) did not specify the public days he allegedly worked without pay. For the reason the prayer for overtime, public holidays and Sundays allegedly worked must fail.

In a nutshell, the court finds that the claimant has failed to establish his case on the balance of probabilities, the suit stands dismissed with orders that each party bears its own costs.”

16. Aggrieved by the foregoing decision of the lower court, the appellant filed the present appeal on July 27, 2021 and set forth nine grounds of appeal; which, put together, amount to four grounds of appeal which I will deal with together. These are:
- a) That the learned trial magistrate erred in law and in fact by failing to find that the respondent had not followed a lawful and fair procedure in terminating the Appellant’s employment on account of redundancy.
 - b) That the Learned trial magistrate erred in law and in fact by disregarding the respondent’s own petty cash voucher signed by both the appellant and the respondent indicating that the appellant was paid Kshs 16,000 as notice pay of one month salary, and instead maintained that the appellant’s salary was Kshs 19,233.
 - c) That the learned trial magistrate erred in law and in fact by validating a single fabricated copy of a payslip filed by the respondent which was not signed by the appellant and was in dispute instead of validating the petty cash voucher which was signed by both parties indicating that the appellant was paid Ksh 16,000 as one month salary in lieu of notice.



- d) That the learned trial magistrate erred in law by dismissing the appellant's prayers for underpayments, overtime, days worked on Sundays and gazetted public holidays, maximum compensation, costs and interest.
17. This is a first appeal. As stated by the Court of Appeal in the case of *Jacob Oriando Ochanda v Kenya Hospital Association T/A Nairobi Hospital* [2019] eKLR, it is this court's primary duty to re-evaluate the evidence on record and to come to its own independent conclusion on the evidence and the law. See also *Abok James Odera T/A JA Odera & Associates v John Patrick Machira T/a Machira & Co Advocates*, Court of Appeal Civil Appeal No 61 of 1999.
18. Having considered the pleading filed and evidence presented in the lower court by both parties, issues that emerge for determination, in my view, are as follows:-
- a) Whether termination of the appellant's employment on account of redundancy was unfair.
- b) Whether the claimant is entitled to the reliefs sought in the lower court.
19. On the first issue, section 40 (1) of the *Employment Act* provides that an employer shall not terminate a contract of service on account of redundancy unless the employer complies with the conditions set out in that section. That is:-
- a) Where the employee is a member of a trade union, the employer shall notify 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 redundancy not less than a month prior to the date of the intended termination on account of redundancy.
- b) Where the employee is not a member of a trade union, the employer shall notify the employee personally in writing and the labour officer.
- c) In selecting the employees to be declared redundant, due regard has been had to seniority in time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy.
- d) Where there 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 notice or one month's wage in lieu of notice; and
- g) The employer has paid to an employee declared redundant severance pay at the rate of not less than fifteen days' pay for each completed year of service.
20. Although the respondent demonstrated, and the appellant admitted having been paid one month salary in lieu of notice (Kshs 16,000), leave days due and severance pay for years of service, the respondent did not demonstrate having issued any written notice to the appellant's union (if the appellant was unionized) and to the area labour officer, or to the appellant and the labour officer if the appellant was not unionized, not less than a month prior to the date of redundancy in compliance with section 40(1)(a) of the *Employment Act, 2007*. This rendered the entire process unprocedural and therefore unfair.



21. Further, the respondent did not demonstrate what method it used in identifying the employees to be terminated on account of redundancy; and did not state which class of its employees were being declared redundant. It was not enough for the respondent to state that it terminated the appellant's employment on account of redundancy upon closure of its Kongowea branch.
22. The appellant testified that the respondent had other branches, including Jomvu and Mikindani branches where the appellant had previously worked, and that new employees were retained by the respondent. This evidence was neither rebutted nor controverted by the respondent. The respondent did not comply with the provisions of section 40(1)(c) of the *Employment Act, 2007*, and this rendered the entire process unprocedural and therefore unfair.
23. Section 40(1) of the *Employment Act* is couched in mandatory terms, and the provisions thereof must be adhered to by every employer undertaking a redundancy process.
24. In the present case, the respondent terminated the appellant's employment on account of redundancy vide a letter dated November 6, 2019. The letter stated that the redundancy would take effect on the date of the letter (November 6, 2019). This letter was produced in evidence by both parties. The respondent further produced in evidence a letter dated September 13, 2019 addressed to the County Labour Officer, Mombasa, informing him that some six employees (including the appellant) would be terminated on redundancy effective October 31, 2019 due to closure of the respondent's petrol station. The said letter was not shown to have been served and/or delivered to either the appellant or the other listed employees. As already stated in this judgment, failure to serve personal notice on the appellant was unprocedural and unfair.
25. It is my finding that termination of the appellant's employment by the respondent on November 6, 2019 on account of redundancy was unprocedural and therefore unfair, and amounted to unfair termination of employment.
26. The appellant cited the case of *Mukbutsi Obayo v DVS Air and Sea Limited* [2018] eKLR, where the court stated as follows:-

“This notification of intention under section 40(1) (a) and (b) is different from the notice of termination under section 40(1) (f).

In the present case, the claimant was not notified of the intention to carry out the redundancy. What the respondent did was to issue notice of termination under section 40(1) (f).

This is evident from the fact that the claimant received only one letter dated September 4, 2017 which is appropriately entitled “termination of service on account of redundancy”. The letter does not mention the notification period which should have come a month earlier.”
27. The foregoing situation is similar to the case in the present appeal. The appellant did not receive a personal notification of the intended redundancy. He only received the letter terminating his employment on account of redundancy on November 6, 2019.
28. In the case of *Plantation and Agricultural Workers Union v Harvest Limited* [2014] eKLR, the Industrial Court stated as follows:-

“Section 40(1) (c) of the *Act* clearly provides that on selecting employees for redundancy, the employer shall have regard to seniority in time and to skill, ability and reliability of



each employee of the particular class of employees affected by the redundancy. The court holds that the idea of last in first out satisfied the seniority criterion. As far as skill, ability and reliability are concerned, it is the opinion of the court that an employer must have, prior to the redundancy exercise, instituted objective qualifications for skill, ability and reliability attached to the office held by the workers against which the skill, ability and reliability possessed by the individual workers targeted in the redundancy will be scored or measured against. The employer, in the court's opinion, must demonstrate the objective score sheet and the ranking of the targeted employees against that score sheet with respect to the selection factors set out in section 40(1) (c) of the *Act*, failing which it is difficult to establish compliance with the section. The court holds that the selection parameters in section 40(1) (c) are not in alternative so that in a redundancy process, the employer must establish that all the parameters have been taken into account and in objective manner....”

29. As already stated in paragraph 22 of this judgment, the respondent did not demonstrate compliance with section 40(1)(c); hence rendering the entire redundancy process substantively unprocedural and unfair.
30. Before determining the second issue, it is important to look into the issue of the appellant's salary during the period of employment. The appellant pleaded and testified that he earned Kshs 16,200 per month, which amount was below the then statutory minimum *General Wages Order, 2017*. The appellant testified that he used to be paid by M-pesa and under cross examination, he testified that he never received payslips.
31. On its part, the respondent pleaded (at paragraph 5 of its statement of response) that the appellant was earning a net salary of Kshs 17,600. At the trial, the respondent (RW1) testified that the appellant earned Kshs 19,000 before deductions, and that the amount was inclusive of house allowance. Among the documents produced in evidence by the respondent
 - a) is a petty cash voucher dated October 22, 2019 signed by both the appellant and the respondent, vide which the appellant was paid his dues upon termination of employment.
 - b) an alleged payslip for October 2019 stating the appellant's basic salary as Kshs 19,233 (before deductions) and the net (after deductions) as Kshs 17,600. The payslip does not have any indication of house allowance.
32. The aforesaid petty cash voucher shows that the appellant was paid Kshs 16,000 as notice pay. The question which arises here is why the respondent would pay Kshs 16,000 as notice pay if really the appellant's basic salary was Kshs 19,233 and his net pay was Kshs 17,600. The respondent did not explain this discrepancy in its evidence, and the matter was left rather grey.
33. The other question which arises regarding the petty cash voucher (respondent's exhibit No 2) is why parties would sign a petty cash voucher upon payment of a substantial sum of Kshs 101,066 in settlement of the appellant's terminal dues instead of the respondent issuing a payslip/pay statement to the appellant if at all the respondent ordinarily issued payslips to the appellant. It cannot escape the court's attention that the petty cash voucher bears a date that was before institution of the lower court suit.
34. Then, enter the lower court suit, and among the documents filed by the respondent was a payslip for the month of October 2019, bearing figures that contradicted both the respondent's pleadings and evidence. Interestingly, only that one payslip was filed by the respondent, yet the appellant had been in its employment since the year 2009. The respondent, who was the custodian of all employment



records regarding the appellant, did not produce in court any other payslip, or better still, the contract of employment with the appellant. section 10(7) of the *Employment Act* provides:-

“if in any legal proceedings an employer fails to produce a written contract or the written particulars as prescribed in subsection (1), the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer.”

35. It is my finding, on a balance of probability, that the appellant’s monthly salary at the time of termination was Kshs 16,200.
36. On the second issue, and having made a finding that termination of the appellant’s employment was unfair, and taking into account the circumstances in which the appellant’s employment was terminated, I award the appellant ten months’ salary being compensation for unfair termination of employment. That is Kshs 16,200x10 = 162,000.
37. The claim for underpayment on the gross wage (basic salary and house allowance) as per statutory minimum *General Wages Order of 2017* was pleaded appropriately and proved by the appellant in the lower court, and the same is allowed in the sum of Kshs 91,003.90 as pleaded and proved. The appellant produced in evidence the *Regulation of Wages (General) (Amendment) Order, 2017* as his exhibit no. 1, and demonstrated the underpayment by the respondent.
38. The claims for overtime and sundays and gazetted holidays worked were not proved, and the same are declined. Such claims must be proved by giving particulars of dates and extra hours worked, and sundays and holidays on which a claimant alleges to have worked. Evidence that a claimant actually worked for such hours or on such dates must be tendered by the person alleged to have worked.
39. Ultimately, and having considered written submissions filed by counsel for both parties, the appeal herein partly succeeds. The lower court’s judgment dated July 14, 2021 is hereby set aside and is substituted with a judgment in favour of the appellant as follows:-
 - a) Compensation for unfair termination of employment (16,200x10)
.....ksh. 162,000
 - b) Underpayment on gross wage (basic salary and house allowance) as per General Wages Order, 2017 Kshs 91,003.90Total Ksh 253,003.90
40. The claimant is awarded costs of this appeal and interest, and costs of proceedings in the court below.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 26TH DAY OF MAY 2022.

AGNES KITIKU NZEI

JUDGE

ORDER

In view of restrictions on physical Court operations occasioned by the COVID-19 Pandemic, this judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:



Miss Kieti for appellant.

Miss Nafula for respondent.

