



**Idow v Sifa Investments Limited (Cause 366 of 2018)
[2022] KEELRC 104 (KLR) (17 June 2022) (Judgment)**

Neutral citation: [2022] KEELRC 104 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 366 OF 2018
B ONGAYA, J
JUNE 17, 2022
(BEFORE HON. JUSTICE BYRAM ONGAYA ON FRIDAY 17TH JUNE, 2022)**

BETWEEN

ALI ABDULLAHI IDOW CLAIMANT

AND

SIFA INVESTMENTS LIMITED RESPONDENT

JUDGMENT

1. The claimant filed the memorandum of claim on 04.06.2018 through Otieno Asewe & Company Advocates. The claimant's case is that the respondent employed him as a night security guard on 26.06.2014 at a monthly salary of Kshs. 16, 585.00 as at termination on 24.04.2018. On 24.04.2019 the claimant received a letter being notification of redundancy. The letter notified the claimant that within 30 days his services would be rendered redundant. Further, that the claimant had been with the respondent for 10 months only and since the employment the business in the transport sector had been on declining trends and the business had become bad so that trucks were parked due to stiff and unfair competition – necessitating cut down on administrative costs. The letter stated that since the claimant had served the shortest period, the decision to render him redundant had been taken as part of the respondent's reorganization. He was to complete the clearance form the same 24.04.2019 and hand it to the HR office. The letter further stated that the claimant had a balance of 11 leave days to be taken from 25.04.2018 to 08.05.2018. It concluded,

“If you adhere to procedures in good faith all your legal dues will be paid before mid-May 2018.”

2. The claimant's case is that he was not given a notice of his impending redundancy and he felt the redundancy was in bad faith. He urged that the termination was in breach of sections 40, 43, 45 and 49 of the *Employment Act*, 2007. He claimed as follows:



- a. One month pay in lieu of notice Kshs. 16, 585.00.
 - b. Pro-rate annual leave for 2017/2018 being 10 days making Kshs. 11, 147.50.
 - c. Severance pay for 10-months Kshs.7, 962.00.
 - d. Compensation for unfair termination Kshs.16, 585 x 12 months = Kshs.199, 020.00.
 - e. Total claim Kshs. 234, 715.00.
3. He prayed for judgment against the respondent for:
- a. Payment of Kshs.234, 715.00 as prayed for.
 - b. The termination was unfair and unlawful under sections 40, 43, 45 and 49 of the [Employment Act](#).
 - c. Costs and interest at Court rates.
 - d. Any other relief that the Honourable Court may deem just and fit to grant.
4. The respondent filed on 30.08.2018 the response to memorandum of claim through Moses Mwakisha & Company Advocates. The respondent pleaded that the claimant was employed as a standby casual from 26.06.2014 and subsequently absorbed as a full time employee on 01.07.2014. The respondent admitted that the contract of service was terminated on account of redundancy per the letter dated 24.04.2018. Further, after termination the claimant was paid 30-days' in lieu of notice as he was not required to work during that period - the claimant acknowledged the payment and his claims were unfounded. The respondent prayed that the claimant's claim be dismissed with costs. The respondent has exhibited the letter dated 08.05.2018 addressed to the claimant on final dues and particularised as follows:
- a. Salary April 2018 Kshs.16, 585.00.
 - b. Wages in May while on 8 days' leave Kshs.4, 423.00.
 - c. One-month salary in lieu of the notice Kshs. 16, 585.00.
 - d. Severance pay for 10 months 12.5 days Kshs. 6, 910.00.
 - e. Total Kshs. 44, 503.00.
5. After deduction of NSSF, NHIF, PAYE, advance taken in April and outstanding loan taken in March 2018, the net due to the claimant was Kshs.16, 818.00. The respondent has also exhibited the certificate of payment of the final dues of Kshs. 16, 818.00 signed by the claimant and confirming that he had no further claims against the respondent in future.
6. The claimant testified to support his case and the respondent's witness(RW) was Nashon Mutuku Timona, the respondent's Human Resource Manager. The final submissions were filed for the claimant but not the respondent. The Court has considered all material on record and returns as follows.
7. To answer the 1st issue, the parties were in a contract of service. The respondent employed the claimant as a security guard and the last monthly payment was Kshs.16, 585.00. The employment was initially upon casual basis from sometimes on 26.06.2014 until termination by the letter dated 24.04.2018 on notification of redundancy and effective around 24.05.2018.



8. To answer the 2nd issue for determination the Court returns that the termination was unfair as the respondent failed to comply with section 40 of the Employment Act, 2007. While purporting to give the claimant a 30-days' notice per section 40 of the Act, the respondent failed to pay the claimant up to 24.05.2018 and instead only paid for the 8 days of leave days taken and enjoyed in May 2018. By that computation, the respondent has confirmed that it was pretentious in purporting to give the claimant a 30-days termination notice. The Court finds that it was unfair. Further, the respondent has not provided evidence to establish that the claimant had been the least senior guard and the selection criteria in section 40 (1) (c) with due regard to seniority in time, skills, ability and reliability of all affected guards has not been shown to have been complied with. The respondent did not serve the area labour officer the requisite 30-days' notice on the reasons for and the extent of the redundancy. The Court finds that the procedure was unfair and the provisions of section 40 of the Act were breached in all those identified respects.
9. The Court has considered the factors in section 49 of the Act on award of compensation for unfair termination. The Court considers that since 26.06.2014 the respondent had retained the claimant on casual basis. The claimant had a clean record of service and he desired to continue in employment. The termination was without due process per section 40 of the Act and the same was flagrantly unlawful. The claimant had served for 10 months on permanent basis. To balance justice for the parties he is awarded Kshs. 16, 585.00 x 10 months thus Kshs. 165, 850.00 in compensation.
10. While making a finding of unfair termination on account of redundancy, the Court has considered the opening submissions by counsel for the respondent at the hearing that the claimant had served for only 10-months and he was not entitled to allege unfair termination. Counsel appears to have been alluding to section 45(3) of the Employment Act, 2007 which states,

(3) "An employee who has been continuously employed by his employer for a period not less than thirteen months immediately before the date of termination shall have the right to complain that he has been unfairly terminated."

The Court finds that the section is in plain English and it is permissive and not prescriptive or prohibitory in its terms. It plainly says that those who have been in continuous employment for not less than 13 months have a right to complain of unfair termination and, it does not prohibit those who have not been in such continuous employment not to complain. The Court considers that the section being permissive rather than prescriptive and prohibitory, it does not take away the right of an employee who has worked for any tenure or holding a concluded prospective contract of service which is terminated from complaining of unfair termination as may be appropriately urged on the basis of such relevant constitutional, statutory, contractual and lawful practices applicable on case to case basis. The Court further considers that to the extent that the section is permissive and not prescriptive and prohibitory, the same is not concise on the mischief it sets out to curb. The Court further considers that the section asserts a right for employees to complain about unfair termination while mentioning the instances of a tenure of not less than 13 months of continuous service but, without excluding other tenures of service – particularly, not excluding actually served tenures of less than 13 months or even futuristic tenures where a concluded contract of service is terminated prior to the employee reporting to embark on its performance. The section appears to amount to a content incoherency or incompleteness in legislative drafting and whose consequence appears to render the section dispensable for all practical purposes in its application to cases of alleged unfair termination. It is a vestigial statutory provision.

11. Further, section 35 (4) (a) of the Act provides that service of termination notice or payment in lieu of termination notice (in any case despite the tenure of the contract of service in issue) does not affect



the right of an employee whose services have been terminated to dispute the lawfulness or fairness of the termination in accordance with section 46 of the Act; which lists the reasons for termination that do not amount to fair reasons for dismissal or imposition of other disciplinary penalty. The Court returns that by that provision, the design of the *Employment Act*, 2007 is such that there is no statutory provision or principle in *the Act* that based on the actual tenure served under a contract of service, an employee may be automatically disqualified from urging a case of unfair termination. Section 35(4) (b) also provides that giving of termination notice or pay in lieu of notice shall not affect the right of an employer or an employee to terminate a contract of employment without notice for any cause recognised by law. The Court therefore considers that the design of section 35(4) (a) and (b) of *the Act* is such that the fairness or unfairness of the reasons for termination is the primary test in initiation of a claim for unfair termination - and not the actual tenure of the contract of service or such of the persisting tenure actually served.

12. In any event, in the instant case the respondent admitted to have retained the claimant effective 26.06.2014 as a standby casual whose status in terms of continuity of service prior to permanent emplacement on 01.07.2014 was not attested to. The Court finds that such material considerations would not be ignored towards making an adverse finding against the claimant. Again, the Court's view is that the respondent by itself invoked redundancy as the mode of terminating the claimant's employment and it cannot be allowed to probate and abrogate by suggesting it is nevertheless not bound by section 40 and other relevant provisions of *the Act* governing redundancy.
13. The respondent offered no evidence to show that the reason for termination or initiating redundancy as stated in the letter of the notice of redundancy actually existed and as required in sections 43 and 45 of *the Act*. In absence of proper notices to the claimant and the area labour officer per section 40 1(a) and (b), it is difficult for the Court to return that as at termination, the respondent has discharged the burden of justifying the reasons for termination per section 47(5) of *the Act*.
14. The 3rd issue is whether the claimant is entitled to the other remedies as prayed for. The Court finds as follows:
 - a) The Court finds that the claimant is entitled to one month pay in lieu of notice Kshs. 16, 585.00. The Court has found that the respondent pretended to give the claimant a 30-days' notice when it computed pay for only 8 days of leave in May 2018. The 30-days' notice was to lapse on or about 24.05.2019. The Court reckons that the one-month's salary in respondent's computation covers for the mandatory 30-days' notice in section 40(1) (a) as read with (b) thereof – a notice period of 30-days the respondent was to serve and prepare the claimant for the looming redundancy effective about 24.05.2018. Section 40 (1) (f) then required the respondent to pay the claimant not less than one-months' notice or one-month's wages in lieu of notice – and the Court returns that particular payment has not been shown to have been computed and paid and is now awarded as claimed.
 - b) The claimant prayed for pro-rate annual leave for 2017/2018 being 10 days making Kshs. 11, 147.50. The claimant appears to have been granted that leave per the letter of notice of redundancy at and having rested and with due pay the claim is declined as superfluous and unjust.
 - c) The claimant prayed for severance pay for 10-months Kshs.7, 962.00 but the same appears to have been computed and paid. The claim is declined.
15. In conclusion judgment is hereby entered for the claimant against the respondent for:



1. The declaration that termination was unfair and unlawful under sections 40, 43, 45 and 49 of the *Employment Act*.
2. The respondent to pay the claimant a sum of Kshs. 182, 435.00 (less PAYE) by 01.08.2022 failing interest to be payable thereon at Court rates from the date of this judgment till full payment.
3. The claimant has succeeded in his claim and he is awarded costs of the suit.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 17TH JUNE, 2022.

BYRAM ONGAYA

JUDGE

