Wachenje v Standard Chartered Bank Kenya Limited (Cause 664 of 2020) [2022] KEELRC 1520 (KLR) (17 June 2022) (Judgment)

Neutral citation: [2022] KEELRC 1520 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE 664 OF 2020

B ONGAYA, J

JUNE 17, 2022

BETWEEN

BIGVAI MWAILEMI WACHENJE ..... CLAIMANT

AND

STANDARD CHARTERED BANK KENYA LIMITED ..... RESPONDENT

JUDGMENT

1. The claimant filed a plaint in the memorandum of claim on 23.12.2020 through Wachenje Mariga & Company Advocates. The respondent employed the claimant as a New Business Executive on 21.06.2011 on commission and later on a consolidated monthly salary of Kshs. 42, 000.00 rising to Kshs. 100, 000.00 as at 2018. The respondent renewed the contracts of service being two year fixed contracts in 2014 to 2016; 2016 t0 2018 and the last of such contracts was for 2018 to 2020 but which the respondent terminated on 20.01.2019 allegedly on account of redundancy. It is pleaded that terms of the contract included:

    a. The claimant to receive a fixed monthly income of Kshs. 42, 000.00/= (latter Kshs. 100, 000.00/=) together with a variable pay based on actual sales achieved in the month.

    b. Upon termination, the claimant be entitled to commission on the sale of products accepted by respondent's customers after the termination if sale was attributable to the claimant.

    c. The claimant be supplied with a statement of all commissions due each month.

    d. Payment of gratuity at the end of the contract.

2. It was pleaded that the respondent had failed to to settle the commissions owed to the claimant and had further failed to supply a statement of the commissions due for each month the claimant worked.

3. It was claimed that the respondent had refused per the 2018 contract to pay the claimant's terminal dues contrary to the *Employment Act*, 2007 and general rules of termination of employment under

the *International Labour Organisation* – Termination of Employment Instruments prescribing such payment.

4. Further, the respondent summarily dismissed the claimant on grounds of redundancy on 20.01.2019 without adhering to the procedure, failing to furnish him with justifiable reasons for such declaration and failing to pay terminal dues prescribed in law. Further the position held by the claimant has continued in existence and the reason for termination was not genuine. The claimant claimed and prayed for:

    a. A declaration that the redundancy was unprocedural, unfair and failed to uphold the tenets of transparency and the *employment act* fair labour practices.

    b. Damages for unfair termination (12 months) at Kshs. 1, 200, 000.00.

    c. Retainer in lieu of notice Kshs.42, 000.00.

    d. Unutilised 33-leave days at Kshs.106, 000.00.

    e. Gratuity at Kshs. 200, 000.00.

    f. Payment for remainder of contract Kshs. 1, 200, 000.00.

    g. Sales pay-outs or bonuses at Kshs. 70, 000.00.

    h. Total claim of Kshs. 2, 876.000.00.

    i. Certificate of service.

5. The respondent filed the memorandum of reply on 12.03.2021 through Cotoow & Associates Advocates. The respondent admitted employing the claimant on fixed term two years' rolling contracts in 2014, 2016 and 2018 and admitted terminating the claimant's contract of service on 20.01.2019 on account of redundancy. It was pleaded that the termination was in compliance with section 40 of the *Employment Act*, 2007 and the claimant was paid one-month in lieu of notice; one and half months' salary for each completed year of service, offer to net off 25% discount on the claimant's outstanding loans with the respondent as per the redundancy letter dated 20.01.2019. The respondent's case was that the respondent having computed damage and loss as a result of redundancy at the rate of one and a half year for every completed year of service, the claimant was not entitled to gratuity as the same would amount to double compensation or unjust enrichment.

6. The respondent further pleaded that the claimant was only entitled to commission on sale of products accepted by the Bank's customers only if the sale was mainly attributable to the direct claimant's efforts during the period covered by the agreement and only if the sales were presented to the respondent and accepted by the respondent prior to the termination of the agreement. Further in the instant case the claimant failed to to present the alleged sales prior to his termination for acceptance by the bank and therefore the claimant's claim is in breach of the contract of employment between the claimant and the respondent.

7. The respondent prayed that the suit be dismissed with costs.

    The claimant testified to support his case and the respondent's witness (RW) was the respondent's legal officer, Lorraine Adoli Oyombe. Final submissions were filed for the parties. The Court has considered all the material on record and returns as follows.

8. To answer the 1st issue for determination the Court returns that parties were in a contract of service as admitted between them in their pleadings. The claimant as at termination was serving the last of

the two year fixed term contract and his last monthly payment was Kshs. 100, 000.00. RW in cross-examination testified and confirmed thus, "His contract was renewed 2014-2016; 2016 – 2018; 2018 – 2020. No dispute the contract he has not exhibited was concluded. It was like previous ones." By that testimony the Court finds that the terms and conditions in the contract exhibited by the claimant made by the parties on 22.01.2014 commencing on 01.02.2014 as extended by the letter of extension of contract dated 22.01.2016 for the period 01.02.2016 to 31.01.2018 constitute the operative terms and conditions for the last contract not exhibited but which was renewed to run for two years from 01.02.2018 to 31.01.2020. The Court returns accordingly on the existence of the last two-year fixed term contract of service.

9. To answer the 2nd issue for determination the Court returns that the claimant's employment was terminated by the redundancy letter dated 20.01.2019 taking effect on the same date.

10. To answer the 3rd issue for determination, the Court returns that the termination was unfair as it did not comply with provisions of section 40 of the *Employment Act*, 2007 as read with sections 43, 45, and 47(5) of the Act.

11. The respondent did not serve upon the claimant the 30 days' notice prescribed in section 40 (b) of the Act. As submitted for the respondent there was no evidence that such notice had been served and the Court follows the holding in T*homas De la Rue (K) Ltd –Versus- David Opondo Omutelema* [2013]eKLR by the Court of Appeal (Karanja, Kiage and M'Inoti JJ.A) thus, "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. Section 40(b) does not stipulate the notice period as is the case in 40(a), but in our view, a purposive reading and interpretation of the statute would mean the same notice period is required in both situations. We do not see any rational reason why the employee who is not a member of a union should be entitled to a shorter notice." In the claimant's case there is no doubt that the redundancy took effect immediately. That was unfair and without due preparation as stipulated under the section.

20. RW's evidence on the issue of notice was thus, "The claimant was issued with letter of redundancy on or about 21.12.2018. The letter is not exhibited. He refused to sign it. It is not filed." The Court has considered that evidence and returns that in absence of the letter the claimant allegedly refused to sign for being exhibited, the testimony by RW simply confirms that no such notice was issued. The Court has also considered the letter dated 19.12.2018 addressed to the Commissioner of Labour and received on 20.12.2018. Section 40 (1) required the respondent to notify 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 termination on account of redundancy. The letter to the Commissioner of Labour is obviously not to the area labour officer contemplated in the section and the Court finds that it fell short of the notice prescribed in the section. To confirm the respondent's recklessness in purporting to issue the notice to the area labour officer and the failure to actually do so as found by the Court, RW testified in a contradictory manner as follows on the place of deployment of the claimant, "I do not know the branch the claimant was serving. I do not know if his branch was affected. I say branch was not affected. I say am not sure. I say all bank branches were affected. I do not know if his branch was closed. Letter to labour officer did not say his position would be affected but his role." By that evidence it should be clear that the respondent failed to take due diligence towards complying with section 40 (1) (a) and (b) of the relevant notices to the claimant and the area labour officer.

21. The Court further finds that the respondent failed to comply with the criteria for selection of employees for redundancy. The Act defines redundancy as the loss of employment, occupation, job or career by involuntary means through no fault of an employee, involving termination of employment at the initiative of the employer, where the services of an employee are superfluous and the practices commonly known as abolition of office, job, occupation and loss of employment. RW testified that the claimant was selected for redundancy because while performing satisfactorily, his performance was not one of the best but that the claimant's score card which had not been exhibited showed he had 70% so that he was at the bottom of the list. She confirmed that the claimant had never been emplaced on a performance improvement program (PIP) and he had no adverse performance issues. In re-examination RW testified, "Criteria in selecting claimant for redundancy was ranking in his job family. Looking at year 2017 and quarter 1 and 2 and 3 in his family. He was ranked bottom ten (10). So he was selected. That is not exhibited in Court." By that evidence the Court finds that despite satisfactory performance, the claimant's selection for redundancy was being attributed to his performance and which was inconsistent with the definition of redundancy in the Act, that the reason is not attributable to the employee. Further the Court finds that the respondent in selecting the claimant for the redundancy failed to comply with the clear selection criteria in section 40 of the Act and which does not include the performance ranking criteria that the respondent purported to invoke.

While making that finding the Court follows its opinion on the requisite selection criteria in *Kenya Plantation and Agricultural Workers Union –Versus- Harvest Limited* [2014]eKLR, thus,

> "Section 40(1) (c) of the Act clearly provides that in 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 satisfies the seniority criterion. As far as skill, ability and reliability are concerned, it is the opinion of the court that the 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 skills, 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 also 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 an objective manner. It is the opinion of the court that the employer enjoys the discretion to place given weights on each of the parameters but none can be applied in exclusion of the others." The Court returns that the selection criteria as invoked by the respondent in the instant case was strange and outside the one prescribed in section 40 of the Act. To confirm that finding, RW at the end of the cross-examination stated, "On redundancy procedure I say FILO was not used. A different principle was used."

22. Turning to the reason for termination, was it fair and genuine? The letter dated 19.12.2008 to the Commissioner for Labour was to the effect that the respondent had introduced digitization platforms for better efficiency and economy over the previous 2 years with the overall effect being increased usage of alternate channels by the clients and excess capacity within certain job families. The letter stated that the impact of the changes would result in reduction of roles affecting a total of 40 employees in the Retail Banking, Wealth Management, Commercial Banking and Information Technology. RW's evidence was that the claimant's job family was one of those to be affected but the letter to the

Commissioner for Labour did not state that his position would be affected, but his role would be so affected. In further cross-examination she stated, "He was not a team leader at time of redundancy. His position was not of a team leader. Contracts do not show he was team leader. If he was a team leader he'd be affected. His job family was affected. It had excess capacity hence redundancy." RW testified in re-examination thus, "We were reducing staff in staff families. He used to go out to sale. We invested in digital technology. Customers could do a lot on-line. So we were reducing the numbers..."

24. The contract made on 22.01.2014 for a term of 2 years ending on 31.01.2016 states that the claimant was employed as a New Business Officer initially working in Consumer Banking and reporting to the New Business Manager and deployed at Kenyatta Avenue Branch. By letter dated 22.01.2016 the contract was extended from 01.02.2016 to 31.01.2018 and the terms and conditions of the original contract issued to the claimant remained unchanged. The respondent addressed to the claimant the letter dated 20.08.2016 titled "Employee Banking Reorganization Structure". The letter conveyed to the claimant that following the employee banking reorganization and his demonstrated consistent good performance, he was being advised that he had been appointed to the position of Participating Team Leader, Employee Banking effective 01.09.2016 as per attached job description and scorecard for the role. He was to report to Relationship Manager, Employee Banking and his new grade was Senior Participating Team Leader at Kshs. 1, 200, 000.00 per year effective 01.09.2016 while other terms and conditions of service remained unchanged. In absence of any other material on record, the Court finds that the claimant held the position as conveyed in that letter as at the time of redundancy. Now, the job families listed in the letter to the Commissioner for Labour and to be affected in the redundancy included Retail Banking, Wealth Management, Commercial Banking and Information Technology. While testifying that the claimant's position fell within the listed job families, RW offered no nexus to establish that assertion. The Court finds that as at redundancy time the claimant was to report to Relationship Manager, Employee Banking in his new grade as Senior Participating Team Leader. In absence of any other material, the Court returns that his job family was Employee Banking and it was not one of the job families listed in the notification to the Commissioner of Labour which RW and therefore the respondent relied upon in justifying the redundancy. The Court returns that the respondent has therefore failed to show that the reason for termination existed and was genuine and valid as at the time of the termination of the claimant's contract of service on purported grounds of redundancy and as envisaged in section 43 of the Act. The reason was unfair as it did not relate to the respondent's operational requirement as per section 45 of the Act. The respondent has failed to establish the grounds justifying the termination on account of redundancy per section 47(5) of the Act.

25. Thus the Court finds that the termination was unfair both in procedure and in substance.

The 4th issue is whether the claimant is entitled to the remedies as prayed for. The Court returns as follows:

a. The claimant has established award of the declaration that the redundancy was unprocedural, unfair and failed to uphold the tenets of transparency and the *employment act* fair labour practices.

b. The claimant has prayed for damages for unfair termination (12 months) at Kshs. 1, 200, 000.00. The Court has considered the factors in section 49 of the Act. The claimant desired to continue in employment. He had 12 months to serve in the running two years' fixed term contract. The mitigating factor in favour of the respondent was that the claimant was given 25% net discount on his outstanding loans with the respondent. The further mitigating factor in favour of the respondent was the payment of severance pay at enhanced rate of one and a half month's salary in severance pay and not the statutory rate of a half month for each completed year of service. The aggravating factor is that the termination was abrupt without notice and

despite the claimant's clean record of service that was satisfactory. In view of the highlighted prevailing factors the Court awards the claimant Kshs. 1, 000, 000.00 in compensation for unfair termination under section 49 of the Act and being ten (10) months' gross salaries.

c. The claimant prays for retainer in lieu of notice Kshs.42, 000.00. The basis of this prayer was not plead and strictly proved. The claimant's testimony and witness statement do not offer an explanation for the claim. The same will fail.

d. The claimant prays for unutilised 33-leave days at Kshs.106, 000.00. In completing the exit pack the claimant's line manager signed that as at 30.01.2019 the claimant had 28 plus 5 days carried over making 33 days. The payment details exhibited for the respondent on leave days earned but not taken as at 20.01.2019 being the last date of service states "refer to final pay slip" and the payment due is not stated. No submissions have been urged for the claimant to support the claim and prayer. For the respondent it was submitted that the claimant's submissions abandoning the claim by not making submissions be deemed to show the same was duly satisfied. The Court agrees and the claim and prayer is deemed abandoned.

e. The claimant prayed for Gratuity at Kshs. 200, 000.00. The payment details as computed for the respondent does not show computation of gratuity. RW suggested that the claim was covered in the one and a half month's salary for each completed year of service effective 21.06.2011 fixed at Kshs. 1, 000, 000.00 in the payment details. However, the Court finds that the Kshs. 1, 000, 000.00 was clearly severance pay as contemplated under section 40 of the *Employment Act*, 2007 and the payment was not only statutory but also did not substitute the contractual gratuity. The mutual testimony by RW and the claimant was that the claimant was entitled to gratuity at the end of the term service. In re-examination the claimant testified thus, "I say gratuity was provided for. Gratuity claimed part was paid. I do not even know whatever was paid. An amount was paid. It was Kshs.125, 000.00. It should have been 206, 000.00 before tax." By that evidence the Court finds that on a balance of probability gratuity was paid and the prayer will collapse.

f. The claimant has prayed for payment for remainder of contract Kshs. 1, 200, 000.00. While it is true that the claimant did not serve for the period claimed, that period has been taken into account in awarding the claimant 10 months' salaries under section 49 of the Act in compensation for the unfair termination. As urged for the respondent the Court follows *David Mwangi Gioko & 51 Others – Versus- Nairobi City Water & Sewarage Company Limited* [2013]eKLR where Rika J held, "... In Industrial Court Cause Number 611[N] of 2009 betweennMaria Kagai Ligaga v. Coca Cola East and Central Africa Limited, this Court gave the view that the purpose of any employment compensation is not to unjustly make rich aggrieved employees, but to redress their economic injuries in a proportionate way. The Court went on to say that, ''courts, even in advanced economies hardly award compensation based on the remainder years of service. Compensation must be reasonable and not appear to punish the employer. The law of unfair termination requires that the Court observes the principle of a fair go all round.'' Employees are paid salaries for contributing their labour. When there is no contribution, there is no compensation.A fair go all round is based on an employment relationship of equal and reciprocal responsibility. The Claimants did not voluntarily with-hold their labour; they were denied the opportunity to continue working for 5 years. It is not their fault, but should they be paid for the entire duration when they have not contributed any labour? Some other young Turks were recruited by the Respondent, have been rendering labour and getting compensated at the end of every month. To ask the Respondent to pay the Claimants for the entire 5 years would clearly be burdensome,

and inhibit the Respondent's ability to render public service to the residents of Nairobi." In this case, the Court considers that it is sufficient that the unexpired period the claimant was unfairly denied from serving had been taken into account in awarding the compensation for unfair termination. As submitted for the respondent, in *Minnie Mbue –Versus- Jamii Bora Bank Limited* [2017]eKLR (Musinga, Gatembu, and Murgor, JJ. A) the Court awarded payment for unexpired term of service on account of clause 20.1 of the letter of appointment which provided for the employer to pay for the unexpired contractual period – and therefore distinguishable from the instant case where no clause to pay for unexpired term was agreed upon.

g. The claimant prayed for sales pay-outs or bonuses at Kshs. 70, 000.00. The claimant testified that bonuses were earned when mortgages for clients were approved in 2018 and disbursement done. In cross-examination he testified thus, "1 claim bonuses. They were payable upon approval by the respondent. I rely on terms of contract on bonuses. I have not filed evidence of approval of bonuses. Any relevant document is in the respondent's possession." RW on her part testified thus, "He closed mortgages for over 20 million and bonuses not paid is not known to me. Am not aware of such mortgages he closed. Bonuses were discretionary. He has to show he closed the mortgages and is not enough to simply allege as done." The claimant filed on 16.12.2021 and served a notice to produce documents and the alleged mortgages he may have closed together with related material are not part of the documents he asked the respondent to produce. The claimant did not also plead the particulars of the transactions such as the specific details of the mortgages he may have closed. In the circumstances there was no sufficient pleading and evidence to support the claim. The Court also considers that there is no reason to doubt the case as urged for the respondent that the payment of bonuses was discretionary. The prayer will therefore fail.

h. The exhibited certificate of service does not show that the claimant worked from 2011 to 2014. The Court finds that the claimant is entitled to a certificate of service showing he worked for the respondent from 21.06.2011 to 20.01.2019.

i. As the claimant has succeeded substantially in his claims, the respondent will pay his costs of the suit.

In conclusion judgment is hereby entered for the claimant against the respondent for:

1. The declaration that the redundancy was unprocedural, unfair and failed to uphold the tenets of transparency and the *employment act* fair labour practices.

2. The respondent to deliver (within 30-days from the date of this judgment) to the claimant the certificate of service per section 51 of the Act and showing that the claimant worked for the respondent from 21.06.2011 to 20.01.2019.

3. The respondent to pay the claimant a sum of Kshs.1, 000, 000.00 (less PAYE) by 01.08.2022 failing interest to be payable thereon from the date of this judgment till full payment.

4. The respondent to pay claimant's costs of the suit.

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

BYRAM ONGAYA, JUDGE