



**Ndiege v M.J Awale and Crown Bus Services Ltd (Cause 322 of 2017)
[2022] KEELRC 1606 (KLR) (29 July 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1606 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 322 OF 2017**

SC RUTTO, J

JULY 29, 2022

BETWEEN

ZACHARY OMBATI NDIEGE CLAIMANT

AND

M.J AWALE AND CROWN BUS SERVICES LTD RESPONDENT

JUDGMENT

1. The claimant avers that he was employed by the respondent as a security officer sometimes in 2012 and at the time of his termination, was earning a monthly salary of Kshs 19,000/=. According to him, he served diligently and faithfully until he was wrongfully and unlawfully retrenched. He contends that the respondent was not undergoing financial problems at the time, as it had embarked on a massive expansion of their fleet of buses that involved a phenomenal outlay of capital. It is for this reason that the claimant seeks against the respondent the sum of Kshs 312, 233.00 being 18 days balance of notice pay, 25 days annual leave, salary for January, 2017, 60 days severance pay and compensatory damages.
2. The respondent opposed the claim and avers that the retrenchment was done lawfully and within the meaning of section 40 of the *Employment Act*. The respondent further states that it was undergoing financial difficulties and denied embarking on a massive expansion of its fleet of buses. The respondent termed the assertions by the claimant, as baseless, vexatious and brought in bad faith, hence urged the Court to dismiss the suit with costs.
3. The matter proceeded for part hearing on 30th November, 2021 and was finalized on 7th March, 2022. Both sides presented oral evidence.

Claimant's case

4. The claimant adopted his witness statement and documents filed together with the claim, to constitute his evidence in chief. He also produced the said documents as exhibits before court. It was the claimant's testimony that he was employed by the respondent sometimes in June, 2012, to serve as a



security officer. That on 19th January, 2017, he received a letter declaring him redundant. That during the period he worked for the respondent, he never received a warning letter except in October, 2016 when he had assisted a stranded customer.

5. The claimant further told Court that in mid-December, 2016, the respondent had bought four new buses and that at the time, business was good as it was during the high season. That as such, the company was not experiencing financial difficulties. He further stated in his testimony that at the time, more than 10 employees of the respondent company were declared redundant. That he was the only employee in the security department who was laid off. In summing up his testimony in chief, the claimant stated that he was not paid severance pay as well as other terminal benefits he was entitled to. He asked the Court to allow his claim as prayed.

Respondent's case

6. The respondent tendered its testimony through Mr. Abdullahi Hassan, who testified as RW1. He identified himself as the Operations Manager of the respondent. RW1 also adopted his witness statement and the respondent's bundle of documents to constitute his evidence in chief. He also produced the documents filed on behalf of the respondent as exhibits before court.
7. RW1 testified that the respondent is involved in public transport. That the respondent's business had in the recent past been on a decline due to financial challenges. He attributed the same to the general state of economy in the country, high operational costs and the obstruction of access to its head office. That it was on this account that the respondent embarked on a retrenchment exercise with a view to cut its recurrent expenses and operational costs. That as such, over 10 employees were retrenched.
8. It was RW1's further testimony that upon the claimant receiving the retrenchment notice, he absconded duty and kept away from the respondent's workplace. That thereafter, he wrote to the respondent demanding his terminal dues and compensation for unlawful retrenchment. That the respondent was willing to pay the claimant his terminal dues but he had refused to collect the same.

Submissions

9. Both parties filed written submissions upon close of the trial. The claimant submitted that the notice of redundancy issued to him was malicious as it did not meet the legal requirements under the *Employment Act*. That further, the requirements in regards to seniority were not adhered to as he was roughly 43 years in age at the time.
10. In further submission, the claimant stated that the respondent did not highlight the mode of selection of employees' in accordance of section 40 of the *Employment Act*. That further, the respondent was on a purchasing spree of new buses hence the financial challenges, were self-inflicted. The claimant urged the Court to be guided by the determination in *Aviation & Allied Workers Union v Kenya Airways Limited & 3 others* (2012) eKLR.
11. On its part, the respondent submitted that redundancy is a legitimate ground for terminating an employment relationship. It placed reliance on the case of *Kenya Airways Limited v Aviation & Allied Workers Union of Kenya & 3 others* (2014) eKLR. That the claimant was the only employee in his department hence his reliance on the provisions of section 40 (1) (c) of the *Employment Act*, was impractical. That in 2016/2017, there was need for change of the respondent's organisation structure and this affected the claimant's position as it was no longer renting the office where it was stationed at the time.



12. It was further submitted on behalf of the respondent that there was real and genuine need for the redundancy exercise. In support of this argument, the respondent cited the case of *Monarch Insurance Co. Ltd v Industrial Court & another* [2015] eKLR.

Analysis and Determination

13. Having considered the pleadings, the evidence submitted before court and the rival submissions, the Court is being called to resolve the following questions: -
- i. Whether there was substantive reason for the claimant's termination on account of redundancy?
 - ii. Whether the termination of the claimant was lawful and procedural?
 - iii. Is the claimant is entitled to the reliefs sought?

Justifiable reason for redundancy?

14. According to the respondent, the reason for the claimant's redundancy was occasioned by the financial difficulties it was experiencing at the time. The claimant has disputed this assertion and maintains that the respondent was doing well financially, at the time.
15. Termination on account of redundancy falls under termination based on an employer's operational requirements as provided for under Section 45(2) (b) (ii) of the *Employment Act*, which reads as follows: -

“ A termination of employment by an employer is unfair if the employer fails to prove-

- (a) that the reason for the termination is valid;
- (b) that the reason for the termination is a fair reason-
 - (i); or
 - (ii) based on the operational requirements of the employer; and...”

16. The Court of Appeal (Githinji JA, as he then was) in *Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others* (2014) eKLR, established the parameters necessary to pass the fairness test in instances of termination on account of redundancy, thus: -

“Section 40(1) of the *EA* is merely procedural by its tenor. It has to be read together with sections 43, 45 and section 47(5) of *EA*. It is implicit from the four sections that to establish a valid defence to a claim for unfair termination based on redundancy, an employer has to prove: -

- (I) the reason or reasons for termination.
- (II) that reason for termination is valid and that
- (III) the reason for termination is fair reason based on the operational requirements of the employer and
- (IV) that the employment was terminated in accordance with fair procedure.



17. In light of the position espoused in the above authority, it follows that for termination on account of redundancy to pass the fairness test, an employer must prove the requirements under sections 43, 45 and 47(5) of the Employment Act.

18. The learned Judge further observed in the Kenya Airways case (supra) as follows: -

“Thus, redundancy is a legitimate ground for terminating a contract of employment provided there is a valid and fair reason based on operational requirements of the employer and the termination is in accordance with a fair procedure. As section 43(2) provides, the test of what is a fair reason is subjective. The phrase “based on operational requirements of the employer” must be construed in the context of the statutory definition of redundancy.”

19. In the instant case, the reason given by the respondent for the claimant’s termination was “due to financial reasons”.

20. Further, in its letter to the county labour office, the respondent cited financial challenges due to the general state of the economy of the country, poor sales, high VAT on the prices of the buses, high cost of rent and high fuel costs.

21. In support of its case, the respondent exhibited a letter dated 4th November, 2016 addressed to Lloyd Masika Limited, couched as follows: -

“Re: Notice To Vacate (sic) Premises L.r. No. 209/655 A.p.d.k. House Lagos Road

The above refers. We write to inform you that our Company wishes to vacate the above stated premises from 31st December, 2016.

The reason for this is due to slow down of business and loss of customers mainly caused by blockage of the main road in front of our premises by public transport shuttles. Because of this, our buses have been unable access our parking area in time and our customers have been unable to access our premises with their luggage. Our company will not be able to cover costs of rent from 31st December, 2016.

Kindly prepare our deposit.

We appreciate your good service and wish to continue with our good relationship in future...” Underlined for emphasis

22. In a further letter dated 20th January, 2017, the respondent addressed the Director Lloyd Masika Limited, as follows: -

“Re: A.P.D.K. House Rentals

We are writing regarding the above mentioned matter. We now set out below the reasons for our wish to vacate the premises and cease tenancy. Our operations have been greatly hindered by Starbus and Latema Sacco vehicles which block our entrance and block the whole of Lagos road starting from the fire station through to River Road making it difficult for our buses to reach our parking on time as scheduled. Consequently, our buses end up being held up in the traffic for more than 2 hours for a mere 300M approximately, something that delays our operations and causes dissatisfaction to our customers.

Furthermore, our customers and suppliers find it difficult to access our offices for purposes of offloading and loading their respective luggage. Hence, our sales have decreased and we have lost most of our customers due to the delay.



Moreover, the cost of rentals is relatively high compared to those of surrounding buildings which are charged 100-130/- p.sq.ft, as opposed to what we pay (288/- p.sq.ft). In addition, the cost of our rental is escalating and thus increasing our obligations further.

We wish to request that the rentals be reduced. Should the request not be possible we shall have no other recourse than to surrender the space.

Kindly take our request into consideration.” Underlined for emphasis

23. The respondent further exhibited a letter dated 26th September, 2016 addressed to the Traffic 1 Nairobi area. The letter which is referenced “Obstruction Of Public Road (Lagos Road) reads as follows: -

“The above refers.

We request your assistance to stop Latema Sacco (Starbus) vehicles from using the public road outside our business premises (Lagos road) as a bus stop.

The Sacco’s ignorance of traffic laws has affected our business in the following ways: -

1. Our buses cannot access our parking from any side of the road, delaying arrival and departure times by hours.
2. Loading and offloading our buses in almost impossible as the main entrance is always blocked.
3. Our business is no longer visible and accessible to our customers; which has resulted in severe loss of income

All attempts to resolve the matter amicably have proved futile.

We kindly request and look forward to your assistance.” Underlined for Emphasis

24. The thread running through the letters reproduced above, is that the respondent’s business had been severely affected on account of its location, hence loss of customers and subsequently, loss of income. Further, the respondent had cited high cost of rent in its letter to Loyd Masika and as such, had issued notice to vacate the premises it was occupying at the time.
25. In light of the foregoing, it is evident that the respondent was experiencing financial challenges at the time it declared the claimant redundant. This fact can be confirmed through the correspondence to Loyd Masika. Over and above, the claimant admitted that 10 of his coworkers were also declared redundant at the time.
26. As to the claimant’s argument that the respondent was in the process of acquiring new buses, the same was not substantiated by any evidence.
27. On this score, I will follow the determination by Justice Githinji JA (as he then was) in the [*Kenya Airways case \(supra\)*](#) where the learned Judge pronounced himself as follows: -

“As long as the employer genuinely believed that there was a redundancy situation, any termination was justified and it was not for the court to substitute its business decision of what was reasonable. The Court has no supervisory role.” The fact that the Airline was expanding and that the Airline had given an assurance an year before, that it was not contemplating redundancies do not solely render the rationalization exercise unreasonable. The expansion programme is a ten-year plan. The reasonableness of the Airline’s decision



has to be judged by the circumstances prevailing at the time the decision was made. It is lawful even in apparently successful enterprises to reduce staff as a cost saving measure.

In the circumstances of this case, there was a valid and fair reason based on the Airline's commercial operational requirements and the termination of services on account of redundancy was justified."

28. Therefore, and in following with the holding in the above authority, the reason advanced by the respondent as being the reason for the redundancy, is one that is fair and valid in light of the financial situation it was in, at the time the claimant was declared redundant. I also reiterate that it is not for the Court to substitute its economic reasoning with that of an employer.
29. The total sum of the foregoing is that the respondent has discharged its burden under the law by proving that the reasons for which the claimant was declared redundant were valid, fair and was in respect of its operational requirements at the time.

Fair procedure?

30. As regards procedural fairness in cases of redundancy, the same is provided for in an elaborate fashion under section 40(1) of the Act. Under the said provision, the following conditions must precede a redundancy: -
 - 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 date of 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 employees to be declared redundant had due regard 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 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 notice or one month's wages 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.
31. From the evidence on record, the claimant was issued with a one months' notice of redundancy. It is also notable that the respondent notified the county labour office of its intention to retrench some of its employees. The notice is dated 6th January, 2017 and was to take effect after one month.
32. It is therefore apparent that the respondent complied with the provisions of clause (b) of section 40(1) of the Act.
33. The claimant has submitted that the notice issued was not in compliance with the legal requirements set out under the Act.



34. It is clear from the notice of redundancy issued by the respondent that the same was for 30 days starting 6th January, 2017. It did not have to start on the first day of the month, so long as the period of 30 days was not reduced. Over and above, the claimant was to be paid one month's salary in lieu of notice as per the tabulation exhibited by the respondent.
35. In this regard, I wish to echo the determination of Githinji JA (as he then was) in the *Kenya Airways (supra)* where the learned Judge reckoned that: -
- “There was substantial compliance with the requirement of notice. Any defect in the notice is tempered by the legal requirement in Section 40(1) (f) that the employer has to pay not less than one month salary or wages in lieu of notice in all redundancy situations.”
36. The respondent also exhibited a tabulation of the claimant's dues containing notice pay, salary for January for the days worked, and severance pay. This was in compliance with clauses (f) and (g) of section 40(1) of the Act.
37. It bears to note that clause (e) is only applicable where the leave is due. In this case, the claimant admitted that he had proceeded on leave in December, 2015, just before he was declared redundant. In the circumstances, there was no evidence that he had outstanding leave days.
38. In view of the foregoing, I am satisfied that the respondent complied with the requirements of section 40 (1) of the *Act* and I see no reason to hold otherwise.
39. In total sum, the respondent has proved that it had a justifiable reason to terminate the claimant's employment on account of redundancy and having found that it complied with the procedural requirements under section 40 (1) of the *Act* the ensuing termination was substantively and procedurally fair.
40. The upshot of the foregoing is that the Court finds and hold that the termination of the claimant was fair and lawful.

Reliefs

41. Having found that the claimant's termination was fair and lawful, he is not entitled to any of the reliefs sought, besides what was tabulated by the respondent and which he is at liberty to collect.

Orders

42. In conclusion, I find that the claimant's termination was neither unfair nor unlawful hence the claim is dismissed in its entirety.
43. Each party shall bear its own costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 29TH DAY OF JULY, 2022.

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STELLA RUTTO

JUDGE

Appearance:

For the Claimant Mr. Muga Apondi

For the Respondent Mr. Otinga



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 had 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 *Civil 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.

STELLA RUTTO

JUDGE

