



**Obidi v Alpha Fine Foods Limited (Cause 98 of 2018)
[2022] KEELRC 4145 (KLR) (29 July 2022) (Judgment)**

Neutral citation: [2022] KEELRC 4145 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 98 OF 2018**

**M MBARŪ, J
JULY 29, 2022**

BETWEEN

DOUGLAS OBIDI CLAIMANT

AND

ALPHA FINE FOODS LIMITED RESPONDENT

JUDGMENT

1. On February 1, 2018 the claimant filed his memorandum of claim and served the respondent with summons on February 13, 2018. The respondent did not enter appearance or file a response.
2. On May 15, 2018 the parties attended for mention in court and the respondent was represented by Masese Advocate for Federation of Kenya Employers (FKE) and was allowed 14 days to file responses and in default the claimant was allowed to proceed undefended. The respondent did not comply as directed.
3. The claimant issued notice to take a hearing date to the respondent. There was no attendance.
4. In a letter dated June 4, 2018 the respondent's officer Amir Parjapia wrote to the claimant indicating that the notices sent to them should be placed with the Federation of Kenya Employers (FKE) who were attending to this matter of their behalf.

Claim

5. The claimant was employed by the respondent as a truck cleaner in February 2009 earning a salary of kshs 15, 800. During the course of the employment the claimant was allocated different duties with his last duty being a truck driver assistant (turn-boy).
6. On the August 15, 2017 the claimant reported to work but was verbally informed of his termination without and told this was due to reduction in work and the financial woes facing Nakumatt Supermarkets which was one of the respondent's main clients.



7. The claimant being aggrieved by the termination lodged his complaint at the sub county labour office on the 25th August 2017 and copied addressed to the respondent's director the claimant's demands were indicated as being notice pay, leave pay, days worked in August 2017 and certificate of service amounting to kshs 60,404.00 which amount ought to have been paid within seven days.
8. The respondent only made payment of kshs 6, 320.00 being pay for the 12 days worked in August 2017.
9. Despite his service of over eight years employment was unfairly terminated under a redundancy for the following reasons that there was no notice required under section 40(1) (b) of the *Employment Act* notifying the claimant personally in writing and the labour officer of the local area of the redundancy reasons and the extent of the intended redundancy. It is evident that the respondent was not aware of the employees that would be declared redundant. An employer can only issue the required notice upon knowing who will be rendered redundant. The verbal communication fell short of the written notice expected under the act. There was no criterion given for the selection of the claimant or consultation between the claimant and the respondent to establish whether he could serve in any other capacity within the respondent or whether redundancy could be avoided.
10. The claim is also that despite the respondent being required to make the claimant's statutory National Social Security Fund (NSSF) contributions the respondent did not remit the funds for 20 months in the years 2009, 2010 and 2011.
11. The claimant avers that it was not a fair or valid reason to declare him redundant in order to reduce costs yet the respondent continued to outsource transport for the rest of its clients.
12. Severance pay is due under section 40(1) (g) of the *Employment Act*, 2007 at the rate of not less than 15 days for each completed year of service. The claimant's services pay is made out as follows: kshs 15,800/2 x 8 years = kshs 72,923.08
13. Compensation for unfair termination of 12 Months' gross pay equivalent to kshs 189,600.

The claimant prays for the following remedies:

- a. A declaration that the claimant's termination from the respondent's employment on account of redundancy was substantively unjustified and unprocedural, unfair, unlawful and unconstitutional.
- b. A declaration that the terminal dues listed by the labour officer in the two letters were insufficient of the dues prescribed under section 40 of the Employment.
- c. An order does issue that the respondent remits the twenty (20) months claimant's NSSF deductions to the Fund.
- d. The claimant prays for remedies for wrongful dismissal and unfair termination as follows:
 - i. One month's salary in lieu of notice Ksh.15,800;
 - ii. severance pay Ksh.72,923;
 - iii. compensation for unfair termination Ksh.189,600;
 - iv. unpaid leave for 8 years.



14. The claimant testified that he joined the respondent in 2009 as a truck cleaner earning a salary of Kshs 250 per day and over the years reviewed as provided under The Regulation Of Wages (General) (Amendment) Order.
15. After sometime he would be assigned duties of a driver assistant/ turn boy and was expected to assist in the delivery of the respondent's products to its clients.
16. On the August 15, 2017 he reported to work as usual but around 2:00 pm he was called to the office by the Manager Productions Mr Amit and the Marketing & Transport Manager Mr Yasin who informed him that his employment was terminated from employment as a result of the reduction in work which was attributable to the financial crisis that Nakumatt Supermarkets had been facing. During the said meeting the claimant was informed that the respondent had sold its trucks.
17. No notice had issued or payment of terminal dues save The respondent only made payment for the 12 days worked in the month of August amounting to kshs 6,320.00. the claims made should be awarded as prayed.
18. At the end of the hearing, the claimant filed his written submissions.
19. The claimant submitted that whereas the provisions of section 40 of the *Employment Act*, 2007 allow the respondent to terminate its employees through the process of redundancy in the event of reduction of work, the respondent is bound to strictly follow the provisions therein and no derogation thereof is permissible. Additionally, an employer is not allowed to abuse the redundancy provisions under the law as an easier way of getting rid of employees. That section 45 of the Act must be followed and an employer must show that there was indeed a genuine and fair case of redundancy. The claimant further submitted that the respondent's actions of terminating his employment amounted to a redundancy process as envisioned in section 2 of the *Employment Act* but it failed to comply with the mandatory requirements of carrying out such a process under section 40. That the respondent also failed to exercise the right to structural alignment of its affairs by failing to properly justify the reasons of the redundancy as required in section 43 of the *Employment Act*.
20. In the case of *Gladys Agayo v Somak Travel Ltd* [2015] eKLR, the court faced with similar facts opined that what the respondent had done to the claimant upon realizing there was downturn in business was not what is legally acceptable in the template of a redundancy set out under section 40 of the *Employment Act*.
21. In the case of *Onesmus Kinyua Magoiya v Prudential Life Assurance Kenya* [2022] eKLR, the court held that the redundancy process was unfair and unlawful stated it not enough for the employer to say that they relied on this or that reason provided for in the Act to terminate the employee's service and that validity of the reason, justice and equity as prescribed by statute must be demonstrated.
22. The claimant further submitted that the respondent should have further shown attempts to redeploy the affected employees to other departments but notably, it has to date not stopped its operations. In the case of *Mary Nyawira Karimi v Pure Circle (K) Limited* [2018] eKLR, the court borrowed its wisdom from the decision in *Agnes Ongadi vs Kenya Electricity Transmission Company Limited* [2016] eKLR where it was held that in restructuring or abolition of office, all efforts must be shown to have been made to retain or redeploy such officers, and that recruiting persons with similar skills without consideration internally is abusing the essence of a restructuring and purpose of abolition of office.
23. The claimant submitted that since the termination on account of redundancy failed to comply with the mandatory provisions of the *Employment Act*, the same ought to be declared unfair and unprocedural. That apart from justifying its reasons for the redundancy, the respondent failed to prove compliance



with issuance of mandatory notices to the area Labour Officer, to all employees and to the affected employees, as under section 40(1) (b) of the Act. In the case of *Kenya Airways Limited v Aviation & Allied Workers & others* [2014] eKLR in upholding that the redundancy process carried out was unfair, the court held that there was need to conclude consultations on all issues of the matter before notices could be issued to the affected employee of the decision to declare them redundant.

24. The claimant submitted that he deserves maximum compensation taking into account the manner in which his services were abruptly terminated. That he had worked for the respondent for eight (8) years without disciplinary issues and had demonstrated impeccable service which attracted salary increase over the years. He urges Your Ladyship to consider the foregoing circumstances in granting him maximum compensation and to be guided by the factors stated under section 49(4) of the *Employment Act* i.e. his length of service with the respondent and legitimate expectation to work until retirement age. In the case of *Rael Mwiya Mutinda v Kenya Commercial Bank Limited* [2019] eKLR, the court held that the claimant was entitled to 12 months' salary as maximum compensation for unfair termination after considering the manner in which her services were terminated, the benefits paid to her, the length of service and the respondent's own contribution to the circumstances that led to the termination of her employment.
25. The claimant further submitted that he is therefore entitled to payment in lieu of notice since the respondent did not issue him with a notice of intended redundancy. That he is entitled to severance pay upon the redundancy at the rate of not less than fifteen days' pay for each completed year of service as provided under section 40 (1) (g) of the *Employment Act*. That he is also entitled to service pay since the respondent did not remit his NSSF contributions as required by section 20 of the National Social Security Fund Act and despite making the claimant's salary deductions. That his claim for Housing Allowance as provided for under section 31(1) of the *Act* is uncontroverted and that this court should thus award the same as pleaded. He submitted that despite the FKE directing the respondent to issue him with the Certificate of Service, it declined and this court should convert the fine of kshs 100,000.00 into damages. He prays for costs he has incurred in this suit as per section 12(4) of the Employment and Labour Relations court Act.

Determination

26. As outlined above, the respondent did not file any response. The claim is not opposed.
27. On the facts and the law, an employer is allowed to terminate employment for operational reasons and where there is reduced work. However, the employer must adhere to the provisions of section 40 of the *Employment Act*, 2007 by issuing a general notice and individual notice on the intended action and to the subject employee respectively.
28. On August 15, 2017 the respondent summoned the claimant and verbally informed him that employment was terminated due to reduced work. There were no prior notices issued pursuant to section 40 of the *Employment Act*, 2007. See *Thomas De La Rue (K) Ltd v David Opondo Omutelema* [2013] eKLR under section 40 (a) and (b) of the Act, an employee is entitled to a general notice of the redundancy and an individual notice to the affected employee. This position is reiterated in the case of *Barclays Bank of Kenya Ltd & another v Gladys Muthoni & 20 others* [2018] eKLR that redundancy notices are not mechanical so as to satisfy the motions of the law, and that fair labour practice requires the employer to act in good faith.
29. In this case, the claimant was denied the due process of section 40 of the *Employment Act*, 2007. Such resulted in unfair termination of employment that lacked substantive justice and procedural fairness. Notice pay is due at one month gross pay all at ksh.15, 800.



30. Compensation is due pursuant to section 45 and 49 of the *Employment Act*, 2007 for the unfair termination of employment. section 45(2) directs that;
- (2) 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) related to the employee’s conduct, capacity or compatibility; or
- (ii) based on the operational requirements of the employer; and
31. In the case of *Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others* [2014] eKLR the court held that;
- section 45(1) of *EA* prohibits an employer from terminating the employment unfairly and section 45(2) stipulates what is unfair termination. It provides:
- "(2) 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) related to the employee’s conduct, capacity or compatibility; or
- (ii) based on the operational requirements of the employer; and
- (c) that the employment was terminated in accordance with fair procedure.
32. For this violation, compensation is due. The claimant was last earning Ksh 15, 800 per month. 6 months compensation is hereby found appropriate all at ksh 94, 800.
33. Severance pay is also due in a redundancy. The claim for pay for 8 years worked is not contested and is hereby awarded at Ksh 72, 923.
- The claim for leave for 8 years is not defended. No work records have been filed.
34. A driver assistant in the year 2017 was earning a basic wage of ksh 13,960.80 Under the Regulation of Wages (General) (Amendment) Order, 2017. For the 8 years, such last basic wage is applicable all being ksh 111, 680.
35. On the non-remittance of NSSF dues as required under the law, the claimant shall report to the Labour Officer and who shall address and sanction the respondent accordingly. The claim due for non-remittance was service pay which is not pleaded.
36. The claim is found with merit and good foundation and the claimant is entitled to cot.
37. Accordingly, judgement is hereby entered for the claimant against the respondent in the following terms;
- a. a declaration that employment terminated unfairly;
- b. compensation Ksh 94,800;
- c. severance pay ksh 72,923;
- d. notice pay Ksh 15,800;



- e. leave pay ksh 11,680;
- f. the Labour Officer shall address the non-payment of statutory dues accordingly;
- g. costs of the suit.

DELIVERED IN COURT AT NAIROBI THIS 29TH DAY OF JULY, 2022.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant:

..... and

