



**Githuku & another (Suing as the Legal Representative of the Estate of the Late Henry Mbugua) v Foton East Africa Ltd (Cause 316 of 2015) [2022] KEELRC 1306 (KLR) (14 July 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1306 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU**

**CAUSE 316 OF 2015**

**HS WASILWA, J**

**JULY 14, 2022**

**BETWEEN**

**ROSE NYOKABI GITHUKU & SAMUEL MBUGUA (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF THE LATE HENRY MBUGUA) ..... CLAIMANT**

**AND**

**FOTON EAST AFRICA LTD ..... RESPONDENT**

**JUDGMENT**

1. By a memorandum of claim dated October 22, 2015, Henry Mbugua sued the Respondent, his employer, for unfair termination and sought for compensation for the unfair termination.
2. Before this cause was heard and determined the Claimant passed away on the December 4, 2018 and was substituted by Rose Nyokabi and Samuel Mbugua, his widow and son respectively. An Amended claim dated January 28, 2021 was filed on the February 1, 2021 seeking the following Orders; -
  - a) A declaration that the termination of the Claimant's employment was unfair and unlawful
  - b) Kshs. 23,262.40 being unpaid one-month salary in lieu of Notice.
  - c) Kshs. 23, 262.40 being unpaid salary for the month of June, 2015.
  - d) Kshs. 90, 692 being salary underpayment for 14 months (April 2014 to May, 2015).
  - e) Kshs. 47,480.22 being unpaid house allowance for the month of April, 2014 to May 2015.
  - f) Kshs. 20,995.80 being annual leave earned but not taken.
  - g) Kshs. 3,919.30 being pro rata leave.



- h) Kshs 16,797 being severance pay.
  - i) Compensation for wrongful and unfair termination of the contract of employment in terms of section 49(1)(c) of the Employment Act at the rate of 12 months gross salary.
  - j) Costs of the suit to be borne by the Respondent.
  - k) Interest on (a)-(j) above.
  - l) A certificate of service under section 51 of the Employment Act.
  - m) Any other or further relief that this Court may deem fit and just to grant in the peculiar circumstances of this case.
3. The background of this case is that the Claimant was employed by the Respondent sometimes on the April 7, 2014 as heavy commercial vehicles driver earning a salary of Kshs. 14,470 which money was below the statutory limits. He nevertheless performed his duties till June 15, 2015 when his services were terminated on the basis that his position had been declared redundant when their offices in Nakuru were shut down.
  4. The Claimant avers that the Respondent failed to follow the procedure provided for under section 40 of the Employment Act with regard to redundancy, as he was never issued with Redundancy Notice, was not given the criteria used in declaring the Claimant redundant, the labour officer was never notified and that he was not paid severance pay upon the alleged redundancy.
  5. The Claimant avers that he was not housed by Respondent neither was he paid house allowance as provided for under the law. It was also stated that the Claimant never took his annual leave neither was he paid for the same.
  6. The firm of Ataka Kimori & Okoth entered appearance for the Respondent and filed a defence dated November 6, 2015 on even date.
  7. According to the Respondent, the Claimant was employed on the April 7, 2014 on probation of three months which lapsed on the July 7, 2014 and on the July 8, 2014 the Claimant was offered a contract as a driver for a salary of Kshs.14,470/= which salary according to the Respondent was in accordance with the regulation in place at the time.
  8. The Respondent avers that under the employment contract, clause 11 was to the effect that any party could terminate the contract by either giving one-month notice or pay in lieu, and that no reason was required before the said termination. Accordingly, the Respondent terminated the Claimant services and paid the Claimant one-month salary in lieu of Notice.
  9. It is stated that on the said termination the Claimant was paid one month's salary in lieu of notice, 15 days worked in June, 2015, severance pay and 9 leave days earned and not taken. In addition, that since the employment was contractual, the Respondent did not need to follow the redundancy process.
  10. The Respondent maintain that the Claimant served it for less than 12 months and was duly paid his dues as such not entitled to the reliefs sought in the claim.
  11. The Claimant filed a response to defence on the December 11, 2015 and reiterated the content of his claim and in addition stated that he was underpaid as per Legal Notice 197 of 2013 and Legal notice 116 of 2015 which prescribed the minimum wage for driver of commercial duty vehicle to be Kshs. 20,770 and Kshs. 23, 262.40 respectively. He denied receiving any money including his June salary from the Respondent upon his termination.



12. The firm of Ataka, Kimori and Okoth filed an application to cease acting for the Respondent in the Notice of Motion dated April 25, 2015. This application was heard and allowed on the October 7, 2021. The Respondent did not participate in the hearing of this case despite service.

#### **Claimant's case.**

13. Samuel Mbugua, the son of the deceased and the administrator of the estate of Henry Mbugua testified as CW-1 and sought to adopt his father's statement dated October 22, 2015 together with the document filed on the same date. He stated that they amended the claim on November 28, 2021 to reflect the changes pursuant to the demise of his father and urge this Court to allow the claim as prayed.

#### **Submissions.**

14. It was submitted for the Claimant that the burden of proof is provided for under section 47(5) of the Employment Act where the Claimant is tasked with proving the unfair termination while the Respondent is mandated to give the reason for the said termination. It was argued that since the Respondent did not participate in hearing its case cannot be considered and the Claimant's case remains uncontroverted. To support this argument the Claimant relied on the case of *Job Onyinkwa v Expressions Flora Limited* [2015] eKLR where the Court held that;

“According to the Claimant, the dismissal was unfair. In its Response, the Respondent made general denials of the facts set out by the Claimant and put him to strict proof. In a complaint of unfair termination of employment, bare denials and putting the employee Claimant to strict proof will not do. This type of pleading is inadequate and does not meet the statutory standard. I say so because section 43 of the Employment Act, 2007 expressly places a burden upon the employer to prove the reasons for a dismissal while section 45 of the Act requires the employer to prove the reasons as valid and fair. Further section 10(3) and (7) of the Act places an obligation upon an employer to meet a certain statutory burden in as far as assertions by an employee are concerned. The Respondent did not meet the standards expected through its pleadings. It did not call any witnesses. But an employee also has a low threshold standard of proof to meet. That requirement is located in section 47(5) of the Employment Act, 2007. Although the Claimant's case was poorly prosecuted, it is not in doubt that a hearing as contemplated by section 41 of the Employment Act, 2007 was not held. Similarly, there is nothing to suggest that a written notice of termination of employment as required by section 35 of the Act was issued. The Respondent by failing to call its witnesses did not justify the reasons for the separation or tender evidence in support of the facts outlined in its pleadings why it did not issue a notice or why summary dismissal was warranted. The Court therefore reaches the conclusion that the dismissal was both procedurally and substantively unfair.”

15. On whether the termination was unfair, it was submitted that the Respondent abruptly without notice, closed its Nakuru Branch as such terminating the services of the Claimant without Notice or reason thereof. It was argued further that the Respondent alleged that the termination was based on redundancy and failed to follow due procedure provided for under section 40 of the Employment Act as such the termination was unfair. In this they relied on the case of *Kenya Union of Domestic Hotel Educational Institutions and Hospital Workers (KUDHEIHA) v Agha Khan University Hospital*



Nairobi[2015] eKLR and the case of Gerrishom Mukhutsi Obayo v DSV Air and Sea Limited [2018] eKLR where the Court held that;-

“The Respondent’s argument that the order in which the notice to the employee and the Labour Officer is given is inconsequential is in my opinion, a misapprehension of the requirements of both Section 40(a) and (b). In both sections the provision is that the notice is given to the employee and the Labour Officer, or the union and the Labour Officer. It means that in each case, the Labour Officer must be entitled at least one month’s notice before the redundancy is effected, and the employee or union must also be notified at least one month before the redundancy is effected. The word used is notification. This period of one month is intended for the person receiving the notice to confirm that the preconditions of redundancy have been complied with. These preconditions as set out under Section 40(1) include the communication of reason for, and extent of, the redundancy, and the selection criteria. The period is necessary for any disputes over these issues to be settled before the redundancy is effected. The period also allows for consultations and any negotiations to take place before the redundancy is carried out, and for the Labour Officer to ensure that the redundancy will be carried out in accordance with the Act. For a redundancy to be valid, the employer must prove that both the Labour Officer and the employee or the employee’s union, where there is one, have been notified at least one month before the redundancy takes place.”

16. It was submitted in conclusion that the Claimant has demonstrated a case of unfair termination and are deserving of the reliefs sought as such they urged this Court to allow the claim as prayed in the amended claim of January 18, 2021.
17. I have examined the evidence and submissions filed before me. This case proceeded ex parte as the Respondents though served failed to attend Court for hearing.
18. From the letter of recommendation issued to Claimant Henry Mbugua, he was terminated because the branch where he was working closed down.
19. This in my case is a clear case of redundancy which is defined under Section 2 of the Employment Act 2007 as follows;-

“redundancy” means 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 or occupation and loss of employment”.

20. The Claimant had worked for Respondent since April 4, 2014 to June 15, 2015 as a driver and the fact of closing the Nakuru Branch of the Respondent was not act perpetrated by the Claimant and so it was a redundancy situation and therefore the Respondents were obligated to follow the law as provided under Section 40 of the Employment Act which states as follows;

“40. Termination on account of redundancy

- (1) An employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions —
  - (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.

(2) Subsection (1) shall not apply where an employee's services are terminated on account of insolvency as defined in Part VIII in which case that Part shall be applicable.

(3) The Cabinet Secretary may make rules requiring an employer employing a certain minimum number of employees or any group of employers to insure their employees against the risk of redundancy through an unemployment insurance scheme operated either under an established national insurance scheme established under written law or by any firm underwriting insurance business to be approved by the Cabinet Secretary”.

21. There is no evidence that this was followed by the Respondents and so the Respondents terminated the Claimants unfairly.

22. I find the Claimant has established his case against the Respondents which case remains uncontroverted.

23. I find for the Claimant and I award him as follows;-

- 1. 1 month salary in lieu of notice = 23,262.40/=
- 2. Unpaid salary for the month of June 2015  
= 23,262.40/=
- 3. Underpayments of salary as pleaded  
= 90,692.40/=
- 4. House allowance not paid as pleaded = 47,480.22
- 5. Annual leave earned and not taken as pleaded  
= 20,993.80/=
- 6. Severance pay equivalent to 15 days for each year served =  $\frac{1}{2} \times 23,262.40 = 11,631.20/=$



7. Compensation equivalent to 10 month's salary for unfair redundancy =  $10 \times 23,262.40 = 232,624/=$   
Total Awarded = 449,946/=  
Less statutory deductions
8. The Respondents will pay costs of this suit plus interest at Court rates with effect from the date of this Judgment.

**DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 14<sup>TH</sup> DAY OF JULY, 2022.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Ekesa for Claimant – present

Respondents – absent

Court Assistant - Fred

