



Meshack v Hipora Business Solutions (EA) Limited (Cause 322 of 2016) [2022] KEELRC 1266 (KLR) (6 July 2022) (Judgment)

Neutral citation: [2022] KEELRC 1266 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 322 OF 2016
MA ONYANGO, J
JULY 6, 2022**

BETWEEN

IMO CHRISPINES MESHACK CLAIMANT

AND

HIPORA BUSINESS SOLUTIONS (EA) LIMITED RESPONDENT

JUDGMENT

1. Vide a memorandum of claim dated 15th December 2015 and filed on 2nd March 2016, the Claimant avers that his employment was unfairly and unlawfully terminated by the Respondent and seeks the following reliefs:

- (a) A declaration that the Claimant dismissal from employment was unlawful
- (b) A declaration that the Claimant is entitled to payment for his terminal dues and compensatory damages as pleaded.
- (c) An order for Respondent to pay the Claimant for his terminal dues as tabulated below:

- (i) One month salary in lieu of notice Kshs.20,000.00
- ii. Uniform (refund for money deducted) Kshs.2,000.00
- iii. Severance pay

$$\frac{15}{30} \times \frac{10}{12} \times 20,000 \text{ Kshs.}8,33.30$$

- iv. Off duty worked not paid 8 November 2014, 15 September 41 days



$$\frac{20,000}{26} \times 41 \text{ Kshs.} 31,538.50$$

v. 12 months' salary as compensation for unfair dismissal at Kshs.20,000/-
Kshs.240,000.00

vi. Overtime (working 11 hours a day) 3 hours Overtime at @ 3 hours daily

$$\text{Hourly pay (K)} = 96.15$$

8 No. of hours worked =

$$3 \times 30 \text{ days} \times 10 \text{ months} = 900 \text{ hours}$$

$$\text{Overtime} = 900 \times 96.15 \text{ Kshs.} 86,535.00$$

vii. Accrued leave $21 \times \frac{10}{12} \times \frac{20,000}{26} =$
17.5 x 769 Kshs.13,461.50

vii. Holidays worked but not paid 8/11/2014 -15/9/2015 = 8 days

$$\left(\frac{20,000}{26} \times 8 \right) \text{ Kshs.} 6,153.80$$

vii. House Allowance

$$\frac{15}{100} \times 20,000 \times 10 \text{ Kshs.} 30,000.00$$

vii. Withheld September 2015 earnings being 17,474 – 13,000 Kshs.4,747

d. Costs of this suit plus interest thereon.

2. The Respondent filed a statement of reply on 15th April 2016 in which it avers that the termination of the Claimant's employment was lawful and justified. That the Respondent believes in fair labour practices and is not known to muzzle the rights of its employees.
3. It is not in dispute that the Claimant was employed by the Respondent on 8th November 2014 vide a letter of offer dated 7th November 2014 as a loss control officer to double check product entry at retail store's front end when deliveries of stock were made. His first posting was at Tuskys T-Mall, the Respondent's client.
4. On 13th June 2015, the Claimant was transferred to Tuskys OTC Branch with the Central Business District of Nairobi.
5. The Claimant worked without any negative incidents until 13th September 2015. On that date when he was off duty, the Claimant was called by the Respondent's Area Manager, Mr. Dan Kiaga and summoned to go to the Respondent's Head Office at Panari Hotel on the morning of 14th September 2015.



6. It is the Claimant's case that prior to the 14th September 2015, he had not been notified of any intended redundancy. That indeed on 11th September 2015 new employees were recruited by to perform the same duties that he was performing.
7. In the witness affidavit of Edward Ntonyiri, the Respondent's Human Resource Manager, sworn on 30th April 2022, he deposes that the Claimant's contract with the Respondent was terminated following the termination of the Respondent's contract with Tuskys on 25th August 2015 when Tuskys directed that the Respondent removes all its employees from Tuskys stores immediately as the receiving area was under review.
8. It is the averment of Mr. Ntonyiri that the Respondent did not have another station to relocate the staff removed from Tuskys and was left with no option but to lay them off due to lack of work. That the Respondent settled all the Claimant's terminal dues as is evidenced by a copy of the Claimant's acknowledgment of payment annexed to the witness affidavit as annexure EN5.

Submissions of the Claimant

9. It is the Claimant's submission that the Respondent did not comply with the procedure for redundancy as set out in Section 40 of the *Employment Act*. Further, that there is no evidence that there was any redundancy, relying on the decision in *Catherine Kamau v Freight In Time Limited* [2022] eKLR and *Mary Nyawira Karimi v Pure Circle (K) Limited* [2018] eKLR where the Courts held that the Respondents failed to prove that there was redundancy or that fair procedure was followed.
10. The Claimant further submits that even if there was redundancy, the Respondent was still bound to comply with Sections 43, 45(2) and 47(2) of the *Employment Act* to prove the reason for termination and demonstrate that the procedure followed was fair based on the Respondent's operational requirements.
11. The Claimant submits that the Respondent supplied nothing to the Court to prove that there was valid termination of the Claimant's employment or that other employees besides, the Claimant were laid off. That there is further no evidence that the contract that the Claimant was working on was cancelled.

Respondent's Submissions.

12. It is submitted for the Respondent that the circumstances that led to the termination of the Claimant's employment were beyond the control of the Respondent and was unforeseeable. That the termination was a redundancy which is a legitimate ground of termination as was acknowledged by the Court of Appeal in *Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others* [2014] eKLR.
13. The Respondent submits that the Claimant having worked for the Respondent for ten months was entitled to payment of only one month's salary in lieu of notice, accrued leave and certificate of service which it complied with.

Determination.

14. I have considered the pleadings and submissions of the parties. I have also considered the authorities cited. The parties are in agreement that the Claimant was declared redundant. The only issues for determination are therefore whether the Respondent complied with the procedure for redundancy and whether the Claimant is entitled to the prayers sought.



15. Section 40(1) of the *Employment Act* provides for the procedure and benefits payable for redundancy as follows
- (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.
16. In the instant case, the Claimant was not notified of the intention to declare him redundant. There was a notification to the Labour Officer at least one month prior to the intended redundancy.
17. In the case of *Thomas De La Rue (K) Ltd v David Opondo Omutelema* [2013] eKLR, the Court held that where an employee is not a member of the union, then the notice anticipated under Section 40(1)(a) and (b) is to be given to the employee and the Labour Officer at least one month before the redundancy.
18. The redundancy of the Claimant was therefore unlawful for reason of noncompliance with the requirements for notification of both the employee and the local Labour Officer of the intended redundancy at least a month before the redundancy is effected. The redundancy therefore amounted to an unfair termination for failure to comply with the statutory procedure.

Remedies

19. The Claimant prayed for a plethora of remedies which I consider below –
- (a) One month's salary in lieu of notice
20. The Claimant has acknowledged in the submissions that the Respondent paid the Claimant in lieu of notice as is evident from the Final Dues Payment Advise submitted to Court by the Respondent.



- (b) Uniform refund
21. It is the Claimant's case that the Claimant was not refunded the money deducted for uniform. The Respondent admits that the Claimant is entitled to the same and is willing to reimburse the same. The Claimant is thus awarded Kshs.2,000/-.
- (c) Severance Pay
22. The Claimant admits that he is not entitled to severance pay as he did not complete one year's service in the employment of the Respondent.
- (d) Off duty worked but not paid
23. The Claimant submits that he worked for off days for which he was never paid. He claims 41 off days. The Claimant submits that the Respondent was bound to produce the records of the off duty days worked and which days were not paid for as provided in Section 16 and 74 of the Employment Act.
24. The Respondent on the other hand submits that the Claimant was given one day off every week and has not proved that he worked on any day when he was off duty.
25. I am inclined to agree with the Respondent. The Claimant's contract was specific that he would work for 66 hours every week for six days and would be entitled to one off day every week.
26. The Claimant did not specify which days he worked on his off day. This being special damages claim, he was bound to plead and prove the same. I find no proof of work on off days that was not paid for.
- (e) 12 months' salary for unfair dismissal
27. Having found that the redundancy of the Claimant amounted to an unfair dismissal for want of compliance with the statutory procedure at Section 40(1) of the Act, and considering the circumstances of this case and the relevant factors under Section 49(4) of the Act it is my view that compensation of five months is reasonable. I accordingly award the Claimant Kshs.100,000/- being the equivalent of five (5) months' salary as compensation.
- (f) Overtime
28. The Claimant's contract provided for a standing overtime which was paid with his salary. Specifically, paragraph 2 headed "SALARY" in the contract provided:
- "Salary
- You will be paid a Gross salary of KSH 20,000.00 Comprising of basic salary of KSH 13,363.03 Housing allowance KSH 2,004.45 Overtime KSH 4,632.52 per month effective 1st March, 2015 payable in arrears on the last day of the month and subject to all statutory deductions in accordance with the relevant laws inter alia including PAYE, NSSF and NHIF. You will also be provided with a summarized job description."
- (g) Accrued Leave
29. The Claimant was paid Kshs.1,1540/- for 17.5 days leave. He worked from 8th November 2014 to 15th September 2015, a total of 11 months. His contract did not provide for annual leave so he would be entitled to 21 working days leave or 1.75 days per month as provided in Section 28 of the Employment Act. At 1.75 days a month, he was entitled to 19.25 days which would amount to Kshs.14,808/-. The Claimant is entitled to the difference between what was paid and what he was entitled to being Kshs.3,268/- which I award her.



- (h) Holidays worked and not paid
30. The Claimant prayed for Kshs.12,304/- under this head. The Claimant specifically prayed for eight public holidays between 8th November 2014 and 15th September 2015. No evidence was adduced by the Respondent to prove that the Claimant was paid for the public holidays worked. It was duty of the Respondent to rebut the Claimant's averment by proof of payment as provided in Section 10(3) (a) and 74(1)(b) of the Act.
31. In the absence of rebuttal, I award the Claimant the sum of Kshs.12,304/- as prayed.
- (i) House allowance
32. The Claimant's contract quoted above specifically provided that part of his salary constituted house allowance. He is therefore not entitled to any further payment under this had. The prayer is dismissed.
- (j) Withheld September 2015 salary
33. The Claimant was paid salary up to 30th September 2015. A deduction was made of 19 hours not worked at Kshs.1,720.21 which was not explained. The same is awarded to the Claimant.
- (k) Costs and Interest
34. Having found that the Claimant's employment was unfair, he is entitled to costs of the suit which I award him, together with interest on decretal sum at Court's rates from date of judgment to the date of payment in full.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 6TH DAY OF JULY 2022

MAUREEN ONYANGO

JUDGE

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 has 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.

MAUREEN ONYANGO

JUDGE

