



REPUBLIC OF KENYA



KENYA LAW
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**Nyabuto v Radar Limited (Cause 1738 of 2017)
[2022] KEELRC 1445 (KLR) (5 August 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1445 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1738 OF 2017
SC RUTTO, J
AUGUST 5, 2022**

BETWEEN

WYCLIFFE MANYARA NYABUTO CLAIMANT

AND

RADAR LIMITED RESPONDENT

JUDGMENT

1. The claimant avers *vide* a statement of claim filed on 3 September 1, 2017, that he was employed by the respondent on April 15, 2013 as a security guard. That in the course of his employment, he worked diligently and to the satisfaction of his employer. That on November 23, 2016, he was handed a termination letter by the respondent's operations manager. That the reason given for his termination was low business. According to the claimant, his termination from employment was unlawful, unfair, and against the provisions of the *Employment Act*. As a result, he seeks against the respondent salary *in lieu* of notice, unpaid salary for the period worked in November, 2016, payment *in lieu* of untaken leave, compensatory damages and service gratuity.
2. From the record and subsequent pleadings filed by the parties, it is apparent that the respondent opposed the claim. Nonetheless, a copy of the response to the claim/defence statement was not on the physical record and was not traceable on the online portal. To this end, the court noted the same on its record on November 8, 2021 and followed up with an email of March 21, 2022 and a subsequent one on August 3, 2022, to the respondent's advocates on record. Be that as it may, the same was not availed.
3. The matter proceeded for hearing on March 21, 2022 and each side called oral evidence.

Claimant's case

4. The claimant adopted his witness statement and the bundle of documents filed together with the claim, to constitute his evidence in chief. He also produced the said documents as exhibits before court.



5. According to the claimant, the reason for his termination was fabricated as there was work for him to undertake. That he was not aware of any financial issues the respondent company was undergoing. He further testified that he was not served with any notice prior to his termination. The claimant admitted receiving the sum of Kshs 38,376/= but stated that he was not informed how the money was broken down. It was his further testimony that the money paid out to him was not sufficient. In further testimony, the claimant stated that he was not aware of the selection criteria applied by the respondent in declaring him redundant. He asked the court to allow his claim as prayed.

Respondent's case

6. The respondent presented oral evidence through Ms Consolata Karuri, who testified as RW1. She identified herself as the respondent's human resource assistant. RW1 adopted her witness statement and the respondent's bundle of documents to constitute her evidence in chief. She also produced the documents filed on behalf of the respondent as exhibits before court.
7. RW1 testified that the claimant's employment was terminated on November 22, 2016 on grounds of redundancy. That further, the respondent followed the law according to section 40 of the [Employment Act](#). That the claimant was given written notice and that it considered seniority and ability in effecting the redundancy. That further, the claimant was paid one month's salary *in lieu* of notice and severance pay upon his termination hence the amounts sought in the claim are doubtful and unwarranted.

Submissions

8. The claimant submitted that the respondent did not comply with the provisions of section 40 of the [Employment Act](#). That he was not issued with notice prior to termination nor was he informed of the criteria applied in selecting him for redundancy. That further, the respondent did not substantiate its claim that business was low. The following authorities were cited in support of the claimant's submissions; [Kenya Airways Limited v Aviation & Allied Workers Union](#) [2014] eKLR, [Hesbon Ngaruiya v Equatorial Commercial Bank Limited](#) [2013] eKLR, [Faiza Mayabi v First Community Bank Limited](#) [2019] eKLR and [Gerrishom Mukhutsi Obayo v Dsv Air and Sea Limited](#) [2018] eKLR.
9. On its part, the respondent submitted that the claimant was given sufficient notice at the time he was terminated. That further, the claimant had not discharged its burden under section 47(5) of the [Employment Act](#). That the reason for the claimant's termination was fair as it was based on its operational requirements. It placed reliance on the cases of [John Kisaka Masoni v Nzola Sugar Co Limited](#) (2016) eKLR and [John Kebaso Mose v Uchumi Supermarkets](#) (2017) eKLR.

Analysis and Determination

10. From the pleadings on record, the evidence submitted before court and the opposing submissions, it is apparent that the following issues stand out for determination: -
 - i. Whether there was a justifiable reason to terminate the claimant's employment on account of redundancy?
 - ii. Whether the respondent complied with the procedural requirements in effecting the claimant's redundancy?
 - iii. Whether the claimant is entitled to the reliefs sought?



Justifiable reason for redundancy?

11. According to the respondent, the reason for the claimant's termination was on account of low business hence his services were no longer required. The termination was therefore on account of redundancy. Redundancy falls within the ambit of section 45(2) (b) (ii) of the *Employment Act*, which provides 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...”
12. It is also imperative to consider the above statutory requirement in the context of the definition of redundancy under section 2 of the *Employment Act*. In this regard, the term “redundancy” is defined to mean “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”.
13. Bearing in mind the provisions of section 45(2) (b) (ii) of the *Employment Act* as well as the definition of the term redundancy, an employer is bound to prove that the redundancy situation was effected on valid and fair reasons that were based on its operational requirements. In terms of section 43(1), 45 (2) and 47(5) of the *Employment Act*, the burden of proof lies with the employer.
14. In *Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 Others* [2014]eKLR, the Court of Appeal held that: -

“For any termination of employment under redundancy to be lawful, it must be both substantially justified, and procedurally fair”.
15. Going back to the reasons given by the respondent, it had the burden to prove its assertion that it had low business at the time, hence the reason for the claimant's termination was fair, valid and related to its operational requirements. Simply put, it had to prove that the reason advanced was substantively justified.
16. In this case, the respondent did not produce any evidence in whatever form or manner, to support its assertion that business was low. There was nothing besides the testimony of RW1 to prove that its business was low, thus the reason for declaring redundancy.
17. Evidently, under section 40(1) of the *Employment Act*, an employer has the right to declare a redundancy situation. Nonetheless, the same should not be construed as a through pass to lay off employees without basis. It is for this very reason that the provisions of sections 43(1) and 45(2) (a) and (b) of the *Employment Act* come into play.
18. The respondent in this case did not discharge its burden of proof under sections 43(1) and 45(2) (a) and (b) of the *Employment Act*.



19. In concluding this issue, I will borrow the expression of Githinji JA (as he then was) in *Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 Others* (supra), thus: -

“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. What the phrase means, in my view, is that while there may be underlying causes leading to a true redundancy situation, such as reorganization, the employer must nevertheless show that the termination is attributable to the redundancy – that is that the services of the employee has been rendered superfluous or that redundancy has resulted in abolition of office, job or loss of employment.”

20. Against this background, I cannot help but find that the respondent has not proved that it had a justifiable reason to declare the claimant redundant.

Procedural compliance?

21. The requirements of procedural fairness in cases of redundancy, are to be found under under section 40(1) of the *Employment Act*. The provision is in the following manner: -

- 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.

22. It is noteworthy that the aforesaid conditions from (a) to (g) are mandatory and it is not open for the employer to cherry pick and apply the same selectively.

23. The first requirement is on issuance of notice. In this regard, the claimant avers that he was not given any notice prior to termination. The respondent disagrees and states that it paid the claimant one month’s salary *in lieu* of notice.



24. From the record, there is no notice to that effect. The letter of termination is dated November 22, 2016 and was to take effect immediately. The respondent states that it paid the claimant one month's salary *in lieu* of notice. While the claimant admitted to receiving the sum of Kshs 38,376.00, the respondent did not give a breakdown, particularizing what item was covered within the global figure. It is therefore not clear whether the amount paid constituted notice pay. I must add that the notice contemplated under section 40 (1) (b) of the *Employment Act* is significant in cases of redundancy, as it is the means through which an employer communicates an intended redundancy to an employee.
25. Without the written notice on record and breakdown of the payment to prove payment in lieu of notice, it is not possible to tell whether the respondent complied with the provisions of section 40(1) (b) and (f) of the *Employment Act*. This leads me to conclude that the respondent did not comply with the provisions of section 40(1)(b) and (f) of the *Employment Act*.
26. Section 40(1) (c) of the *Employment Act* requires an employer to have 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. This is basically the selection criteria that ought to be followed by an employer in effecting a redundancy process.
27. The claimant in this regard avers that he was not aware of the selection criteria applied in declaring him redundant. In its defense, the respondent did not produce before court the selection criteria if any, that it applied in effecting the redundancy process. Indeed, RW1 testified in cross examination, that the respondent did not apply any particular criteria during the redundancy exercise.
28. Without a selection criteria in place, one wonders how the respondent was able to identify the employees earmarked for redundancy. How did it determine who was to be retained and who was to be dismissed? In absence of a selection criteria, it is apparent that the respondent disregarded the provisions of section 40 (1) (c) of the *Employment Act*.
29. In regards to payment in lieu leave, the respondent stated that the claimant had no outstanding leave. The claimant on the other hand contends that he never proceeded on leave. To support its position, the respondent exhibited a leave application form indicating that the claimant had taken leave with effect from October 4, 2016 upto November 2, 2016. The claimant denied applying for leave in cross examination. His denial notwithstanding, it is notable that he did not rebut the respondent's assertion through a reply to the response to claim. Further, it did not challenge the authenticity of the leave form. I therefore take his testimony along those lines as a bare denial.
30. The last requirement is in regards to severance pay. Pursuant to section 40 (1) (g) of the *Employment Act*, an employer is required to pay an employee declared redundant, severance pay at the rate of not less than fifteen days' pay for each completed year of service. This is a contested issue as the claimant avers that he was not paid while the respondent maintains that it made the payment.
31. As stated herein, the amount paid to the claimant was not itemized and particularized. It is therefore not possible to determine whether the global sum paid constituted severance pay and whether such payment was accurate and in accordance with the statutory requirements under section 40 (1) (g) of the *Employment Act*.
32. The total sum of the foregoing is that the court finds that the respondent substantively failed to prove that it complied with the procedural requirements stipulated under section 40 (1) of the *Employment Act*.



33. As I have stated herein, compliance with the provisions of section 40 (1) of the *Employment Act* is mandatory and having found that the respondent failed to prove compliance, the claimant's termination was unfair and unlawful.

34. Such was the determination in *Hesbon Ngaruiya Waigi v Equitorial Commercial Bank Limited* [2013] eKLR where it was held that: -

“Where redundancy is declared by an employer, the procedure to follow is as set out under the provisions of section 40 of the *Employment Act* and where not followed, any termination as a result will be deemed unprocedural and unfair. Any termination of an employee following a declaration of redundancy must be based on the law otherwise the same becomes wrong and if the grounds used to identify the affected employees are not as per the law, the same becomes unfair.”

35. The net effect of the foregoing is that the claimant was unfairly and unlawfully terminated and I so find and hold.

36. What reliefs then avail the claimant?

Appropriate Reliefs

37. The claimant is awarded compensatory damages equivalent to four (4) months gross salary as I have found that his termination was both unfair and unlawful. This award has considered the length of the employment relationship.

38. The court also awards the claimant severance pay for three (3) years, being the period, he worked for the respondent.

39. The claimant is also awarded one (1) month's salary *in lieu* of notice as there is no proof that the same was paid.

40. The claim for salary for the days worked also succeeds as there is no evidence that the global sum paid by the respondent constituted the same.

41. The reliefs in regards to untaken leave days is denied for reasons stated herein.

42. The court takes note of the claimant's admission to the effect that he received the sum of Kshs 38,376.00 from the respondent. Subsequently, this amount will be reduced from his total award.

Orders

43. In the end, the claim succeeds in the following manner: -

- (a) A declaration that the claimant's termination was unfair and unlawful.
- (b) The claimant is awarded compensatory damages in the sum of Kshs 104,416.00 which sum is equivalent to four (4) months of his gross salary.
- (c) An award of one month's salary in lieu of notice being Kshs 26,104.00.
- (d) The claimant is also awarded the sum of Kshs 39,156.00 being severance pay for 3 years.
- (e) An award in the sum of Kshs 9,142.93 being salary for the days worked in November, 2016.
- (f) The total award is Kshs 188,818.93 less Kshs 38,376.00 hence the final award is Kshs 150,442.93.



- (g) Interest on the amount in (f) at court rates from the date of judgement till payment in full.
- (h) The respondent shall bear the costs of the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 5TH DAY OF AUGUST, 2022.

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STELLA RUTTO

JUDGE

Appearance:

For the Claimant Ms. Alividsa

For the Respondent Ms. Kageha

Court Assistant Abdimalik Hussein

ORDER

n 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

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