



**Ooga v Academy (Cause 1817 of 2017)**  
**[2022] KEELRC 3894 (KLR) (16 September 2022) (Judgment)**

Neutral citation: [2022] KEELRC 3894 (KLR)

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**  
**CAUSE 1817 OF 2017**  
**SC RUTTO, J**  
**SEPTEMBER 16, 2022**

**BETWEEN**

**LYDIA NYABOKE OOGA ..... CLAIMANT**

**AND**

**JEREMIC ADVENTIST ACADEMY ..... RESPONDENT**

**JUDGMENT**

1. The claimant avers *vide* a memorandum of claim filed on September 11, 2017, that she was employed by the respondent on February 18, 2014 as a teacher. That she served with loyalty and diligence until April 6, 2017, when the respondent wrongfully and unlawfully terminated her services. On this account, she claims one month's salary in lieu of notice, salary arrears, accrued annual leave and compensatory damages.
2. The respondent neither entered appearance nor filed a response in answer to the memorandum of claim. The claim was therefore undefended. The claimant produced an affidavit of service sworn by one Peter Sema Mutunga on February 5, 2018, wherein he deponed that he effected service of the memorandum of claim and summons to enter appearance upon the respondent. To this end, he annexed copies of the summons and memorandum of claim to the affidavit, both of which contained the receiving stamp of the respondent.
3. It is against this background, that the matter proceeded as undefended on May 23, 2022.

**Claimant's case**

4. It was the claimant's testimony that she was employed by the respondent as a secondary school teacher. That on April 6, 2017, the respondent informed her that the school had been suspended on account of low enrollment. That the communication which was verbal, was made by one Pastor Ogola of Kibera SDA church. That following this communication, she was told to go home together with her colleagues and await payment of their salary arrears. That from then, she had been following up for the payment



of her salary arrears from the respondent, but her attempts had yielded no fruit. She further averred that she was not given any notice prior to being terminated.

### Submissions

5. The claimant submitted that the respondent had no valid reasons to terminate her employment. That she was neither issued with a notice to show cause why her services should not be terminated nor was she called for any disciplinary hearing, contrary to section 41 of the *Employment Act*. In support of her submissions, the claimant cited the case of *Walter Ogal Anuro v Teachers Service Commission* (2013) eKLR.

### Analysis and Determination

6. From the pleadings on record and the evidence submitted before court, it is apparent that the following issues stand out for determination: -
  - i. Whether the claimant's termination was unfair and unlawful
  - ii. Whether the claimant is entitled to the reliefs sought

### Unfair and unlawful termination?

7. From the testimony of the claimant, she was informed by the respondent that her termination was on account of low enrollment at the school where she was serving as a teacher. It would thus seem that her termination was on grounds of redundancy and was related to the respondent's operational requirements. 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...”

8. Section 2 of the *Employment Act* defines the term “redundancy” 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”.
9. Taking into account the provisions of section 45(2) (b) (ii) of the *Employment Act*, as well as the statutory definition of the term redundancy, an employer is bound to prove that an employee's redundancy 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.
10. 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”.



11. In light of the foregoing statutory provisions and the aforesaid authority, the respondent was required to prove the reasons that led to the claimant's termination. Consequently, it was bound to prove the fact that the school, where the claimant was stationed, had low enrollment and had been suspended.
12. As stated herein, the respondent failed to file a defence nor tender any evidence in whatever form or manner, to prove the reasons for the claimant's termination. Subsequently, the respondent did not discharge its evidential burden under sections 43(1) and 45(2) (a) and (b) of the *Employment Act*.
13. Evidently, under section 40(1) of the *Employment Act*, an employer has the right to declare a redundancy situation. Nonetheless, the same should be undertaken in consonance with the law.
14. The respondent having failed to prove the reasons for the claimant's termination, I cannot help but find that the same was unfair.
15. As stated herein, it is apparent that the claimant was terminated on grounds of redundancy. Subsequently, the respondent was required to apply the procedure stipulated 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.
16. As stated herein, the respondent did not tender any defence hence there was no proof that it complied with any of the aforesaid requirements. I therefore take it that there was no compliance at all and I am led to conclude that the termination was unlawful.
17. The net effect of the foregoing, is that the claimant was unfairly and unlawfully terminated from employment and I so find and hold.
18. I now turn to consider the reliefs available to the claimant?



### **Appropriate Reliefs**

19. The claimant is awarded compensatory damages equivalent to six (6) months gross salary as I have found that her termination was both unfair and unlawful. This award has considered the length of the employment relationship, the fact that the respondent failed to prove the reasons for the claimant's termination as well as compliance with the requirements of procedural fairness.
20. The claimant is also awarded one (1) month's salary in lieu of notice.
21. The court also awards the claimant salary arrears from June to December, 2015 and February, March and April, 2017 as it is evident that the respondent failed to pay the same despite the claimant's correspondence to that effect.

### **Orders**

22. In the end, the claim succeeds and judgment is entered in favour of the claimant against the respondent and she is awarded: -
  - a. Compensatory damages in the sum of Kshs 90,000.00 which sum is equivalent to six (6) months of his gross salary.
  - b. One month's salary in lieu of notice being Kshs 15,000.00.
  - c. Salary arrears for 10 months being the sum of Kshs 150,000.00.
  - d. The total award is Kshs 255,000.00.
  - e. Interest on the amount in (d) at court rates from the date of judgement till payment in full.
23. The respondent shall bear the costs of the suit.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 16<sup>TH</sup> DAY OF SEPTEMBER, 2022.**

.....

**STELLA RUTTO**

**JUDGE**

**Appearance:**

For the Claimant In person

For the Respondent No appearance

Court Assistant Abdimalik Hussein

### **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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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**

