



Madodi v Wilfred Bungei t/a Tortoise House (Cause 129, 124, 125, 126, 128, 130, 131 & 132 of 2018 (Consolidated)) [2022] KEELRC 12907 (KLR) (14 October 2022) (Judgment)

Neutral citation: [2022] KEELRC 12907 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
CAUSE 129, 124, 125, 126, 128, 130, 131 & 132 OF 2018 (CONSOLIDATED)
NJ ABUODHA, J
OCTOBER 14, 2022

BETWEEN

MOSES OCHIENG MADODI CLAIMANT

AND

WILFRED BUNGEI T/A TORTOISE HOUSE RESPONDENT

JUDGMENT

1. When the Court became seized of this matter, it varied the direction by the previous judge in which the learned Judge (Marete J) had directed that oral hearing be dispensed with and parties do file submissions.
2. This Court was of different view and gave directions that parties file witness statements and witnesses be called to give oral evidence. The Court was further informed by Counsel that the dispute was over redundancy hence the evidence would be restricted to the process and compensation as provide under section 40 of the Employment.
3. The matter was subsequently adjourned severally when parties informed the Court that they were pursuing amicable settlement. This apparently never happened and parties returned to request the Court to dispense with oral hearing and take submissions on the issue of redundancy only.
4. It is important to note that this particular matter was selected as a test case on liability such that the decision of this court on this matter on liability would be replicated in the rest of the files in the series. That is to say cause numbers 123 – 128 and 130 – 132 of all 2018.
5. Section 40(1) of the *Employment Act* provides:
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.
6. The respondent herein in their pleadings and documents in support of the statement of response stated that the hotel business was closed and sold because it was not doing well and that the proprietor was intending to venture into elective politics. From the pleadings filed the claimants seem to acknowledge this when they state that they were terminated on the allegations that the work had gone down.
 7. None of them alleged that they were terminated on grounds of gross misconduct or breach of their contract of employment.
 8. Section 2 of the *Employment Act* defines redundancy to mean 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. Section 40(2) of the *Act* further provides that it shall not apply where an employee's services are terminated on account of insolvency as defined in part 1x(sic) in which case that part shall be applicable. The correct part referred to under section should be part VIII.
 10. Under part VIII, insolvency of an employer is dealt with. Section 66(1) provides
Where on an application made to him in writing by an employee or his representative the Minister is satisfied that-
 - (a) the employer of an employee has become insolvent,
 - (b) the employment of the employee has been terminated, and (c) on the appropriate date the employee was entitled to be paid the whole or part of any debt to which this Part applies, the Minister shall, subject to section 69, pay the employee out of the National Social Security Fund, the amount to which, in the opinion of the Minister, the employee is entitled in respect of the debt.



11. Further section 67 provides
An employer is insolvent for the purposes of this Part-
 - (a) if the employer is a person who—
 - i. has been adjudged bankrupt or has made a composition or arrangement with his creditors, or
 - ii. has died and his estate is to be administered in accordance with the *Law of Succession Act*;
 - (b) if the employer is a company—
 - i. a winding up order or an administration order has been made, or a resolution for voluntary winding up has been passed, with respect to the company; or
 - ii. a receiver or a manager of the company's undertaking has been duly appointed, or possession has been taken, by or on behalf of the holders of any debentures secured by a floating charge, of any property of the company comprised in or subject to the charge.
12. Although the respondent alleges that the business was down, no statements or account or any other evidence was availed to Court to support this. All the respondent alleged was that work had gone down and that he was in the process of selling the business to venture into politics. This neither fits in the description of redundancy under section 2 of the *Act* or insolvency under Part VIII of the *Act*. To this extent the Court takes the view that the termination of the claimants service was unfair within the meaning of section 45 of the *Employment Act*.
13. Regarding compensation, the claimants made a raft of claims these included overtime dues, leave dues, rest days and underpayment.
14. This matter however as noted earlier proceeded without the benefit of oral evidence because both counsel were of the view that the only issue in contention was redundancy. There was therefore no evidence or documents presented before the Court to support the above heads of claim. The Court therefore has no basis upon which to make a finding on them. The heads of claim therefore fail for lack of evidence.
15. The claimants were employed in 2013 and worked until August 2018 and worked until August 2018 when their services were unfairly terminated. This was approximately four and a half years. The claimants though worked in various positions including cooks, security and waiters, they did not exhibit any professional or vocational training for any special skills hence could be reasonably be deemed as general workers. To this extent the Court awards each of them as follows.
 - a) One month salary in lieu of notice.
 - b) Eight months' salary as compensation of unfair termination
 - c) Service pay at the rate of 15 days salary for each complete year of service (4 years)
 - d) Costs of the suit.
16. The parties to use the above criteria to calculate the amount payable to each claimant in each of the claims consolidated herein.
17. It is so ordered



DATED AND DELIVERED AT ELDORET THIS 14TH DAY OF OCTOBER, 2022

ABUODHA NELSON JORUM

JUDGE ELRC

