



**Omwayo v Empso Sacco Society Limited (Cause 1885 of 2017)
[2022] KEELRC 12912 (KLR) (14 October 2022) (Judgment)**

Neutral citation: [2022] KEELRC 12912 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1885 OF 2017
SC RUTTO, J
OCTOBER 14, 2022**

BETWEEN

BRIAN OMUKA OMWAYO CLAIMANT

AND

EMPSO SACCO SOCIETY LIMITED RESPONDENT

JUDGMENT

1. The claimant avers vide a Statement of Claim filed on 21st September, 2017, that he was employed by the respondent as a human resource manager between 18th January, 2017 and 11th August, 2017. That barely a week after his confirmation on 3rd August, 2017, he was issued with a letter of termination on grounds that his office had been scrapped. The claimant reads malice into his termination as he avers that the respondent told him that his political affiliations could not be trusted.
2. Subsequently, the claimant has cited the respondent for malice and breach of the provisions of the *Employment Act*. On this account, he seeks against the respondent general damages on grounds of discrimination, damages for loss of career advancement and development, costs of the suit and interest.
3. The respondent opposed the claim and denied the claimant's averments stating that he was terminated at the end of his probation. The respondent further avers that at no point in time was the claimant's alleged political affiliation, a reason for his termination and/or discontentment. The respondent further avers that the claimant was terminated on account of being involved in a suspicious activity involving loss of a cash bail receipt which was in his custody. In addition, the respondent states that the claimant was given an opportunity to show cause and that it complied with all the necessary procedures.
4. Prior to the hearing on 14th June, 2022, the firm of advocates that was erstwhile on record for the respondent successfully sought to cease acting for it, citing loss of instructions. Subsequently, the respondent was unrepresented at the hearing.



5. Despite being served with the day's hearing notice, the respondent failed to appear in Court hence pursuant to the provisions of Rule 22(1) (b) of the Employment and Labour Relations Court (Procedure) Rules, 2016, the matter proceeded, its absence notwithstanding.

Claimant's case

6. The claimant testified in support of his claim and to start with, he adopted his witness statement and the bundle of documents filed together with his claim, to constitute his evidence in chief. He also produced the said documents as his exhibits before Court.
7. According to the claimant, he was terminated on grounds of redundancy and that he was not issued with a redundancy notice as required under the law. That he was later issued with another letter of termination with a different accusation on a matter he had no idea. It was the claimant's testimony that his termination was malicious in that immediately after the voting exercise in the General Elections, he was informed by the respondent that it could not trust his political affiliations and thus his allegiance to its directors, particularly the chief executive officer, who comes from the central region, due to divergent political inclination.
8. The claimant stated that immediately after the results of the presidential elections were announced, he was called on 11th August, 2017 to collect a letter, which unknown to him, was his letter of termination. He contends that he was a target of political and tribal intolerance by the respondent, its agents and promoters. That the decision to terminate him was based on discriminatory reasons other than those espoused under the law.

Respondent's case

9. As stated herein, the respondent did not attend Court to present oral evidence, hence its case remained as per its statement of defence.

Submissions

10. The claimant submitted that the process applied by the respondent falls short of what is expected from a lawful redundancy, hence his termination was unfair and unlawful. He further argued that the respondent failed to discharge its burden under section 47(5) of the *Employment Act*. In support of its submissions, the claimant placed reliance on several authorities including *Fatma Ali Dabaso vs First Community Bank Limited* (2018) eKLR, *Hesbon Ngaruiya Waigi vs Equatorial Commercial Bank Limited* (2013) eKLR and *Francis Maina Kamau vs Lee Construction* (2014) eKLR.
11. No submissions were presented by the respondent.

Analysis and Determination

12. From the pleadings on record, the evidence submitted before Court and the opposing submissions, the Court singles out the following issues 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?

13. From the record, the reason advanced for the claimant's termination was financial constraints the respondent was facing, thus resulting in the elimination of his position. The claimant's letter of termination reads in part: -

“We regret to inform you that your employment with Empso Sacco Society Limited is hereby terminated due to the financial constraints that (sic) organisation is facing. This has necessitated the Board of Directors to reduce the costs of labour where unfortunately your position (Human Resource Officer) was eliminated amongst others. Therefore, under the terms of employment, the company is giving you one months' notice in lieu as per your letter's provisions...”

14. It is therefore apparent that the claimant was terminated on grounds of redundancy. Termination on account of redundancy falls within the ambit of Section 45(2) (b) (ii) of the *Employment Act*, which is couched 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...”

15. The above provision is conjoined with, and indeed has to be considered in the context of the definition of the term redundancy which is defined under section 2 of the *Employment Act* 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”.

16. Taking into account 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 an employee's redundancy was effected on valid and fair reasons, that were based on its operational requirements. Such reasons ought to fall within the statutory definition of the term redundancy. In terms of section 43(1), 45 (2) and 47(5) of the *Employment Act*, the burden of proof lies with the employer.

17. In *Kenya Airways Limited vs 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”.

18. Revisiting the reasons given for the claimant's termination, the respondent bore the burden of proving that it had financial constraints resulting in the elimination of the position of human resource officer, which was held by the claimant at the material time. Put differently, it had the onus to prove that the reason for the claimant's termination was fair, valid and related to its operational requirements. This is in essence, substantive justification.



19. In this case, the respondent did not lead any evidence to prove that it had justified reasons for the claimant's termination. There was no proof of the respondent's alleged financial constraints or an organogram to indeed prove that the claimant's position was no longer in existence. If anything, the respondent in its defence, appeared to depart from the reason advanced in the claimant's letter of termination.
20. In this regard, the respondent stated in its defence that the claimant's termination was on due to the fact that he was directly involved in suspicious activity relating to loss of a cash bail receipt which was in his custody. Even if it were so, it failed to advance evidence to prove the said assertion. The respondent's failure to participate in the trial did not help matters either. As such, the reason for the claimant's termination on account of redundancy remained unjustified.
21. No doubt, under Section 40(1) of the *Employment Act*, an employer has the prerogative to declare a redundancy situation. Nonetheless, the same should not be taken as a license by an employer 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 to provide safeguards for employees.
22. As was admirably, expressed by Githinji JA (as he then was) in *Kenya Airways Limited vs Aviation & Allied Workers Union Kenya & 3 Others* (supra): -

“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.”
23. I wholly align myself to the determination in the above authority and it is my finding that 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*.
24. I now move to determine whether the respondent adhered to the procedural requirements in terminating the claimant's employment on account of redundancy.

Procedural compliance?

25. The requirement of procedural fairness in cases of redundancy, is stipulated under section 40(1) of the *Employment Act* as follows: -
 - 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.
26. The claimant has averred that the respondent did not comply with the provisions of section 40 of the [Employment Act](#).
27. As regards the requirement of notice, the claimant was notified in the letter of termination that he would serve one months' notice. Therefore, it is apparent that this provision was not fully complied with, seeing that the claimant was instructed not to report to work with effect from 17th August, 2017. It can thus be construed that his notice was cut short. It is also notable that the notice was not issued to the labour office as required.
28. The significance of the notice contemplated under section 40 (1) (b) of the [Employment Act](#) is that, it is the means through which an employer communicates an intended redundancy to an employee and the labour office. Having failed to prove that the claimant was given adequate notice and that the labour office was notified as much, I am lead to conclude that the respondent fell short of the provisions of section 40(1)(b) and (f) of the [Employment Act](#).
29. 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. In the instant case, the respondent did not provide the selection criteria it applied in declaring the claimant redundant. It remains unclear how the respondent determined that the claimant's position was the one earmarked for elimination. In absence of proof of a selection criterion envisaged under Section 40 (1) (c) of the [Employment Act](#), it is apparent that the respondent is at fault for noncompliance.
30. It bears to note that the respondent was excused from compliance with the provisions of section 40(1) (g) of the [Employment Act](#), which is in regards to severance pay, as it is evident that the claimant had not completed one year in the respondent's employment.
31. The total sum of my consideration is that the respondent failed to prove that it complied with the procedural requirements stipulated under section 40 (1) of the [Employment Act](#) hence it is at fault.
32. The net effect of the foregoing is that the claimant's termination was substantively and procedurally unfair, and I so find and hold.



Appropriate Reliefs

33. As the Court has found that the claimant's termination was substantively and procedurally unfair, he is awarded compensatory damages equivalent to four (4) months of his gross salary. This award has considered the length of the employment relationship.
34. The claim for general damages on account of discrimination fails as there was no evidence from the claimant's end, to prove the same.
35. As the employment relationship is admitted, the claimant is entitled to a certificate of service pursuant to section 51(1) of the Employment Act.

Orders

36. In the end, judgment is entered in favour of the claimant against the respondent and he is awarded compensatory damages in the um of Kshs 116,616.00. Interest shall apply on the award at court rates from the date of Judgement until payment in full.
37. The respondent shall bear the costs of the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 14TH DAY OF OCTOBER, 2022.

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STELLA RUTTO

JUDGE

Appearance:

For the Claimant Mr. Malinzi

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 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

