Ouma v Cempack Solutions Ltd & another (Cause 46 of 2015)
[2022] KEELRC 12846 (KLR) (13 October 2022) (Judgment)

Neutral citation: [2022] KEELRC 12846 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 46 OF 2015

AN MWAURE, J

OCTOBER 13, 2022

BETWEEN

ALFRED OYARE OUMA ..... CLAIMANT

AND

CEMPACK SOLUTIONS LTD ..... 1ST RESPONDENT

EAST AFRICA FOUNDRY LTD ..... 2ND RESPONDENT

JUDGMENT

Claimant's Case

1. By memorandum of claim filed on the 19th January 2015, the Claimant alleges that he was first employed verbally by the 2nd Respondent as a moulding machine operator on 8th May 1995 all the way up to 15th January 2010 when a sister company namely Tantalite holdings ltd served the Claimant with appointment letter on the 15/1/2010.

2. The said Company Tantalite Holdings Ltd was working alongside the East Africa Foundry, the 2nd Respondent herein. The Claimant says that another sister company still working alongside 1st Respondent transferred the Claimant's services to the 1st Respondent on 1st April 2015.

3. The Claimant avers that on 2/11/2015, the 1st Respondent served the Claimant with a termination letter dated on the same date on account that the Company's operations were low and that it could not afford to retain the Claimant at work. The Claimant avers that he worked for the Companies for 25 years working in the same place and during the time he was terminated he was working at the gate due to his long illness which developed as a result of long working hours. He says attempts to have the Respondents pay his redundancy benefits failed.

4. The Claimant prays for the following remedies as a result;

a. The 1st Respondent to pay the Claimant his full and final redundancy benefits a sum of ksh 390,834.20.

b. The 2nd Respondent herein to pay the Claimant his redundancy benefits a sum of ksh 3,563,265.

c. The Respondent to pay the costs of this claim.

Respondent's Case

5. The 1st Respondent filed a notice of appointment of advocates through the firm of Grace W. Kamuyu & Co. Advocates to act for it. It then filed a memorandum of response on the 16th February 2016. The 1st Respondent admits to have employed the Claimant effective 1st April 2015 as a continuous service. The 1st Respondent also admits terminating the Claimant's services effectively from 1st December 2015.

6. The 1st Respondent avers that all the outstanding dues for the Claimant were calculated and paid to him. The Respondent says upon payment of the final dues they wrote a letter to the Claimant's bank notifying them of the termination and informing them to terminate any obligations which the Claimant may not have cleared with the bank. The 1st Respondent prayed that the claim be dismissed with costs.

7. The 2nd Respondent denied that it never employed the Claimant as moulding machine operator and prayed that the claim against it be dismissed with costs.

8. The claim was disposed through written submissions. The Court has gone through the submissions and shall accordingly consider the said submissions as is necessary in the judgment.

Claimant's Submissions

9. The Claimant in his submission states he was employed by the 2nd Respondent in 1995 and his services were terminated illegally through transfer to a sister company contrary to sections 17,18,20,31,35,36,45 and 51 of the *employment act* 2007. He says the deed of partition field by the 2nd Respondent just shows how all companies decided to go their separate ways in 2015. He says they misguided themselves however on how to handle their employees.

10. He avers that the 2nd Respondent did not file a witness statement to rebut the fact that he was an employer of the Claimant. He only tendered oral denials. He submits that the claimant has demonstrated he was an employee of the Respondents and they should therefore pay his terminal dues.

11. The claimant submits that the 1st Respondent was his last employer and he terminated his services on the guise of redundancy. He says he was a watchman in a sizeable company and there was no way the Respondents could have been unable to pay his salary.

12. He also says the responds did not follow the procedure stipulated in section 40 of *employment act* on terminating a contract on the grounds of redundancy. The Claimant relied on the case of *Mercy Wangari Muchiri vs Total Kenya Ltd* (2020) eKLR where decision of *Gerishon Mukhutsi Obako vs DSV Air & Sea Limited* 2018 eKLR was cited and the Court held as follows:

> "In both sections the provision is that the notice is given to the employee and the labour officer, or the union and the labour officer. It means that in each case, the labour officer must be entitled at least to one month's notice before the redundancy is effected, and the employee or union must also be notified at least one month before the redundancy is affected. The word used is notification. This period of one month is intended for the person receiving the

notice to confirm that the preconditions of redundancy have been complied with. These preconditions as set out under section 40(1) include the communication of reason for, and extent of, the redundancy, and the selection criteria. The period is necessary for any disputes over these issues to be settled before the redundancy is effected. The period also allows for consultations and any negotiations to take place before the redundancy is carried out, and for the labour officer to ensure that the redundancy will be carried out in accordance with the Act. For a redundancy to be valid, the employer must prove that both the labour officer and the employee or the employee union, where there is one, have been notified at least one month before the redundancy takes place."

13. The claimant says the Respondent did not demonstrate the issuance of notice to the labour officer or to the union as required by law rendering the termination therefore unlawful. The Claimant prays his claim be allowed.

14. The Respondents despite pleading for opportunity to file their submissions the Court did not get the benefits of their submissions.

Issues for Decision

15.

a. Whether there was redundancy/unfair termination

b. Whether the Claimant is entitled to the reliefs sought.

The 1st Respondent maintains that it employed the Claimant as from the year 2015. There is no disagreement between the 1st and the 2nd Respondent as to who employed the Claimant. There is a letter of appointment dated 15th January 2010 by Tantalite Holdings Limited and is signed by both the Respondent's representative and the Claimant. The contract was transferred to Cempack Ltd on 15th May 2015 presumably by Tantalite Holdings Ltd. The terms of employment remained the same.

16. On 2nd November 2015 the client was served with a termination notice by Cempack Solutions Ltd. The reason given was that the operations were low. The notice was effective from 1/12/2015.

17. The Claimant's employment was terminated on the grounds of low operations. That would be on the ambit of redundancy. Redundancy is defined in Section 2 of the *Employment Act* 2007 as follows:

> " redundancy" means 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;

18. Further Section 40 of the *Employment Act* 2007 provide that: (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.

19. The 1st Respondent did not follow the law in terminating the Claimant under redundancy. In *Kenya Airways Limited vs Aviation & Allied Workers Union Kenya & 3 Others* [2014] eKLR the Court of Appeal held that Section 40 (1) (a) stipulates, 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 termination. The learned Judge of the High Court in the *Kenya Union of Commercial Food and Allied Workers vs British American Tobacco* Cause No. 143 2008 outlined the manner in which redundancy consultations should be conducted when he stated:

> " The legal obligation on the parties to consult on the matter is designed to enable the parties to explore ways and means of minimizing the social and economic impact of the loss of jobs. The obligation is primarily imposed on the employer. The union's duty is to make reasonable counter proposals to the employer's proposals with a view to giving the affected employees a "soft landing ground".
>
> In our view such consultations must be meaningful and held within the true spirit of collective bargaining. The employer ought to give the union an opportunity to influence its decision. There must be a genuine attempt to resolve the matter through objective consideration of the proposals generated by the parties to mitigate the harsh impact of redundancy.

20. The Respondent did indicate through the letter dated the 2nd November 2015 that it was facing financial difficulties and was obliged to terminate the Claimant. This is evidence that it was declaring redundancy. From the letter, it is clear that the Respondent never complied with the requirement of notice to the labour union or labour officer as the notice merely communicates to the Claimant a decision that had already been taken to terminate rather than the intention to do so. Nor has evidence been adduced that there was consultation as contemplated under the law. The Court finds that the termination did not comply with the law as regards redundancy.

21. The Court finds therefore that the 1st Respondent failed to comply with the law related to redundancy and therefore rules the Claimant was unlawfully terminated by the 1st Respondent. Judgment is entered in favour of the Claimant as against the 1st Respondent.

22. As pertains to the 2nd Respondent the Claimant claims he worked for East Africa Foundry Ltd from 8th May 1995 up to 15th January 2010. It is quite unbelievable that an employee who worked in an organisation for that long and yet had no documentation even a record from NSSF or from mpesa to show there was an employer and employee relationship. It would be irresponsible for a Court to rely only on the word of a party without any documents whatsoever to show there was an employer and employee relationship. The photograph produced in Court does not show any proof of such a relationship either. I am persuaded to find the 2nd Respondent is a stranger to the Claimant as per his claim in his statement of response dated 18th February 2016.

    The Claimant has prayed for one month notice against "East Africa Foundry 6,000/- and accrued house allowance 3,402,000/- and leave arrears of Kshs 72,765/- and 12 months equivalent of salary and Kshs 82,800/-. The same are declined in total and the suit against the 2nd respondent is dismissed with no orders as to costs.

23. Against Campack Solutions Ltd the following remedies are

    awarded:-

    a. Days worked in December 2015 he was apparently terminated effective 1st December I will award him one month salary in lieu of notice Kshs 12,224/80.

    b. Severance pay for 5 years is awarded as there are no records from NSSF to prove remittance therein so is awarded Kshs 13,488/-

    c. Redundancy for 5 years @1/2 x 12,224.80 = 30,562/-

    d. Pending leave Kshs 61,124/- in the absence of any records to prove leave taken provided by respondent.

    Costs are awarded to the Claimant and interest at Court rates from date of judgment till full payment.

    Total awarded is Kshs. 117,398.80/-.

    Orders accordingly.

DELIVERED, DATED AND SIGNED IN NAIROBI THIS 13TH

OCTOBER, 2022.

ANNA NGIBUINI MWAURE

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 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.

ANNA NGIBUINI MWAURE

JUDGE