



**Kinyua v Focus Publishers Ltd (Cause 623 of 2016)
[2022] KEELRC 12885 (KLR) (6 October 2022) (Judgment)**

Neutral citation: [2022] KEELRC 12885 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 623 OF 2016
AN MWAURE, J
OCTOBER 6, 2022**

BETWEEN

GEMMA KAIMURI KINYUA CLAIMANT

AND

FOCUS PUBLISHERS LTD RESPONDENT

JUDGMENT

Introduction

Claimant's case

1. The claimant filed his claim dated March 29, 2016. The claimant states in her claim that she worked for the respondent from March 1, 2014 until January 1, 2017 in the position of assistant editor.
2. She says that sometime in the course of her employment she enrolled for a masters and respondent accepted to restructure her work hours to accommodate her tasks. She says she worked competently and there was no laxity in her work at all.
3. She says that however on August 11, 2015 she received warning letter denoting poor performance of her tasks. She says the said warning letter was later withdrawn after she complained that the same lacked merit. She avers she continued working without any problems until January 2, 2016 when she got another warning letter citing poor work ethics. She was accused of having taken 63 days leave and was sked to propose how to reimburse the respondent.
4. She says she tendered a letter dated January 11, 2016 asking to be allowed to work overtime. The offer was not accepted because apparently the respondent's work policy was to work till 5 pm. The respondent did not provide alternative time frame to compensate for any leave taken and so the claimant's hands were tied. She furthermore claims she was entitled to 28 days annual leave and also



she was entitled to reasonable study leave. She claims she never went on leave and so was entitled to 63 days of leave.

5. The claimant says that the allegation by the respondent that she is owed 63 days leave was a misrepresentation.
6. The claimant proceeds to say that on January 11, 2016 she was given a letter declaring the position of assistant editor redundant due to company restructuring exercise. She was also asked to compensate respondent Kshs 9,337/- for 63 days leave.
7. The claimant says her gross salary was Kshs 40,000/-. The claimant avers she was not given prior notice before she was declared redundant.
8. She further prays for compensation under section 49 of the employment Act as follows for unfair and wrongful determination:-

49.

- (1) Where in the opinion of a labour officer summary dismissal or termination of a contract of an employee is unjustified, the labour officer may recommend to the employer to pay to the employee any or all of the following –
 - a. the wages which the employee would have earned had the employee been given the period of notice to which he was entitled under this act or his contract of service;
 - b. where dismissal terminates the contract before the completion of any service upon which the employee's wages became due, the proportion of the wage due for the period of time for which the employee has worked; and any other loss consequent upon the dismissal and arising between the date of dismissal and the date of expiry of the period of notice referred to in paragraph (a) which the employee would have been entitled to by virtue of the contract; or
 - c. the equivalent of a number of months wages or salary not exceeding twelve months based on the gross monthly wage or salary of the employee at the time of dismissal.
- (2) Any payments made by the employer under this section shall be subject to statutory deductions.
- (3) Where in the opinion of a labour officer an employee's summary dismissal or termination of employment was unfair, the labour officer may recommend to the employer to –
 - (a) reinstate the employee and treat the employee in all respects as if the employee's employment had not been terminated; or
 - (b) re-engage the employee in work comparable to that in which the employee was employed prior to his dismissal, or other reasonably suitable work, at the same wage .



- (4) A labour officer shall, in deciding whether to recommend the remedies specified in subsections (1) and (3), take into account any or all of the following –
- (a) the wishes of the employee;
 - (b) the circumstances in which the termination took place, including the extent, if any, to which the employee caused or contributed to the termination; and
 - (c) the practicability of recommending reinstatement or re - engagement.
 - (d) the common law principle that there should be no order for specific performance in a contract for service except in very exceptional circumstances;
 - (e) the employee’s length of service with the employer;
 - (f) the reasonable expectation of the employee as to the length of time for which his employment with that employer might have continued but for the termination;
 - (g) the opportunities available to the employee for securing comparable or suitable employment with another employer;
 - (h) the value of any severance payable by law; (i) the right to press claims or any unpaid wages, expenses or other claims owing to the employee;
 - (j) any expenses reasonable incurred by the employee as a consequence of the termination;
 - (k) any conduct of the employee which to any extent caused or contributed to the termination;
 - (l) any failure by the employee to reasonably mitigate the losses attributable to the unjustified termination; and
 - (m) any compensation, including ex-gratia payment, in respect of termination of employment paid by the employer and received by the employee.

9. She also prays for general damages for violation of claimant’s rights on fair labour practices under article 41 of the Constitution. She prays for costs also and interest.

respondents case

10. The respondent admits the claimant was employed as its assistant editor from March 1, 2014. She was required to promote the interests of the respondents at all times.
11. The respondent says that the claimant registered for masters program in the course of her employment and she undertook to put extra working hours to cover for the time she would attend to her studies.



12. The respondent says to their shock the claimant was callous and not keen on her work. In particular he says she usually reported late to work and spent time doing her personal matters even in her car. He says despite sending her warning letters and verbal discussions the claimant did not improve her ways.
13. He says in response to a warning letter dated January 7, 2016 the claimant responded on January 11, 2016 and said she could not work extra hours as the office was closed after 5 pm.
14. The respondent says they decided claimant was a surplus requirement and her work had always to be redone by someone else and so was declared redundant in line with section 40(1)(c) of the [Employment Act](#).

claimant's submissions

15. The claimant in her submissions avers she was terminated under redundancy as per section 40 of the [Employment Act](#). She however submits that the redundancy conducted by the respondent was in violation of section 40 of the [Employment Act](#) and as such renders the said Act of redundancy by the respondent unfair termination.
16. The claimant therefore submits that since her termination was unfair and was in contravention of section 40 of [Employment Act](#), section 45 and article 41 of the [Constitution](#) she is therefore entitled to compensation as per her prayers vide her claim.
17. The respondent in their submissions however claim that the termination of claimant's redundancy was lawful under section 40 of the [Employment Act 2007](#) as they paid her one month salary in lieu of notice. It is the respondent's averment therefore that the claimant's termination under redundancy was justified in law and so prays her claim be dismissed with costs to the respondent.

Decision

18. Termination of employment on gross misconduct is well provided in mandatory terms under provisions of section 41 and 45 of the [Employment Act 2007](#). But as per redundancy the provisions to be followed as provided in section 41 of the [Employment Act 2007](#).
19. The respondent claims the claimant was callous in performing her duties. They gave her two warning letters on August 14, 2015 which was later withdrawn even though the court did not see the withdrawal letter. Then there was another warning letter dated January 7, 2016 whereby she purportedly responded by her letter of January 11, 2016 Whereby she explained that she could not work extra hours since the office used to close by 5 pm.
20. In any event the respondent did not terminate the claimant from employment because of gross misconduct. She was terminated under redundancy. The respondent's letter dated January 11, 2016 to the claimant explained that the position of assistant editor has been scrapped and that she was declared redundant. She was further advised that her contract with the respondent had ceased with effect from January 12, 2016.
21. To terminate employment under redundancy is defined under section 2 of the [Employment Act](#). Under section 2 of [Employment Act 2007](#) redundancy is defined as the loss of employment occupation, job or career by involuntary means through no fault of an employment the initiative of the employer where the services of the employee are superfluous and the practice commonly known as abolition of office, job or occupation and loss of employment.
22. To terminate employment under the provision of section 40(1) of [Employment Act 2007](#) the Law must be strictly followed. Section 40(1) of [Employment Act](#) provides as follows:-



1. The employer shall not terminate the 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 labor 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 labor 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.
23. The respondent did not follow the above provision of the law or at all. They did not notify the claimant that they intended to declare her position redundant.
24. They as well did not give her one month notice of their intentions to declare the position redundant and they did not consult her. In fact the employer is supposed to justify the restructuring process before they undertake the same and justify the criteria used to declare the position redundant. In several authorities among them *Kenya Airways Limited Allied Workers Union Kenya & 3 others* [2014] eKLR the respondent failed to notify the Union of his intentions to terminate claimants employment and also failed to give employee opportunity to make suggestions to avert redundancy as the above consultation would have given employee a chance to mitigate on the adverse effects of the redundancy.
25. In the case of *Jane Khalechi vs Oxford University Press Ltd EA Limited* [2013] eKLR provided the conditions precedent before one is declared redundant and these conditions outlined in the law are mandatory and not left to the choice of an employer. Redundancies affect workers livelihoods and where this must be done by an employer the same must put that into consideration.
26. The court therefore rules that conditions outlined in section 41 of the *Employment Act* must be adhered to and as observed in the above case of Jane *Khalechi v Oxford Press EA Limited (supra)* the same is mandatory and not left to the decision of the employer.
27. In this case the respondent hereby gave the claimant a termination letter dated January 11, 2016 informing her of the decision to terminate her employment. She was to leave the following day on January 12, 2016.



28. Clearly the respondent failed to comply with the provisions of section 40 of the *Employment Act* and therefore the court must find that the termination of the claimant was unfair and was wrongful. In the premises judgment is entered in favour of the claimant. She is awarded the following remedies on the basis of unfair and unlawful and wrongful termination.

- a. General damages for unlawful termination of 3 months equivalent being Kshs 120,000/-. This is general damages not special damages for this.
- b. Payment of one month *in lieu* of notice Kshs 40,000/-
- c. Salary for 11 days worked in January 2016 Kshs 14,663/-
- d. Payment in lieu of leave not awarded as employer was willing to repay the days she took leave to go to her studies and so this is declined.
- e. Gratuity is not provided and is not proved and so is declined.
- f. Costs are awarded to the claimant and interest on the above award at court rates from date of judgment till full payment.

Total award herein is Kshs 174,663/-

Orders accordingly.

DELIVERED, DATED AND SIGNED IN NAIROBI THIS 6TH 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

