



REPUBLIC OF KENYA



**Muragami v Roben Aberdare (K) Limited (Cause E037 of 2021)
[2022] KEELRC 13260 (KLR) (23 November 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13260 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
CAUSE E037 OF 2021
ON MAKAU, J
NOVEMBER 23, 2022**

BETWEEN

MICHAEL WACHIRA MURAGAMI CLAIMANT

AND

ROBEN ABERDARE (K) LIMITED RESPONDENT

JUDGMENT

Introduction

1. The claimant brought this suit on July 7, 2021 seeking the following reliefs;-
 - a. A declaration that termination of his employment was illegal, unlawful, unfair and inhumane and that the claimant is entitled to payment of his terminal dues in full.
 - b. Compensation for unfair and illegal termination.
 - c. An order for the respondent to pay him terminal dues amounting to *Kshs* 2,209,500.00 as tabulated under paragraph 11 of the claim.
 - d. An order for the respondent to issue him with a certificate of service.
 - e. Costs of the claim plus interest thereon.
2. The basis upon which the said reliefs are sought is that his employment of over 8 years was unlawfully and unfairly terminated by the respondent on account of redundancy. He averred that the termination was in breach of mandatory provisions of section 40 and 45 of the *Employment Act*.
3. The respondent filed its defence on March 18, 2022 denying that it unlawfully terminated the claimant's services. It averred that the claimant was duly consulted in several meetings between him and the company before the termination. It further averred that the decision to lay off the claimant



was arrived at within the law. Finally it averred that the claimant is not entitled to reliefs sought and prayed for the suit to be dismissed with costs.

4. The suit never went to hearing as the parties agreed to adopt their written statements and documents as their evidence. They then filed written submissions to urge their respective cases.

Evidence

5. The claimant's written statement is dated July 5, 2021 and he states that he joined the respondent on June 19, 2012 as a surveyor. He produced appointment letter as proof of the said employment. His salary was Kshs 90,000.00 per month.
6. He further stated that on December 31, 2020 the respondent issued him with a letter terminating his services on account of redundancy. He contended that the termination was unlawful and unfair because the proper procedure was not followed and there was no justification for the same. He contended that there was no consultation, no restructuring, reorganization or abolition of his position. Further, the labour officer was never notified of the intended redundancy. Therefore he prayed for the reliefs sought since the termination was unfair after his long service of 8 years.
7. The respondent relied on the statement written by its General Manager Mr Ambrose Kinyua dated March 15, 2022 where he stated that claimant's services were terminated by the respondent after several meetings where everything was explained to him. He further stated that the claimant was paid one month salary in lieu of notice and he raised no complaint.
8. He further stated that the claimant was 62 years at the time of the termination and as such there was no point of serving notice to the labour office. He contended that the claim for damages for unfair termination is baseless because he had reached retirement age.
9. He also contended that the claim for leave days is misplaced since the claimant used to take his leave. Finally, he stated that the claim for severance pay is without merits because the company used to pay for the claimant NHIF and NSSF dues. He produced internal memos to support the defence case that the suit be dismissed with costs.

Submissions

10. The claimant reiterated that the provisions of section 40 and 45 of the *Employment Act* were never complied with and that rendered the redundancy unlawful and unfair. He also reiterated the facts set out in his pleadings and fortified them with court decisions in the case of *Angela Sbiukuru Ilondanga v Airtel Networks Kenya Ltd [2018] eKLR*, *Thomas De La Rue v David Opondo Omutelema [2013] eKLR* and *Kenya Airways Ltd v Aviation & Allied Workers Union of Kenya & 3 others [2014] eKLR* where the court discussed the mandatory procedure provided under section 40 of the *Employment Act* before terminating employment on account of redundancy.
11. According to the claimant, the termination of his employment on ground of redundancy cannot stand the test of fairness and is unlawful. Therefore he submitted that he is entitled to the reliefs sought in the suit.
12. The respondent responded to the claimant's submissions on October 18, 2022 reiterating that the redundancy was justified and procedurally lawful. It contended that termination was based on the employer's operational requirement, and the claimant's underperformance in the competitive and technology-oriented field. Further, the claimant being 62 years old, his age, ability, skill and reliability in survey field was considered before the termination.



13. The respondent further submitted that the claimant was orally informed of the intended redundancy prior to the issuance of the termination letter and there were consultations held with him. He contended that consultation is mandatory to all employees and fortified his assertion by the Court of Appeal decision in the Kenya Airways *case* aforesaid. In the end he urged the court to dismiss the suit with costs.

Analysis and Determination

14. Section 45 of the *Employment Act* makes the following provisions regarding termination of an employment contract –

- “(1) No employer shall terminate the employment of an employee unfairly.
- (2) 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) related to the employee’s conduct, capacity or compatibility; or
 - (ii) based on the operational requirements of the employer; and
 - (c) that the employment was terminated in accordance with fair procedure.”

15. I have carefully considered the pleadings, evidence and the rival submissions. The facts are straight forward. The claimant was employed by the respondent until his services were terminated *vide* the letter dated December 31, 2021 citing redundancy as the reason for the termination. The issues for determination are;

- a. Whether the termination was justified by valid and fair reason.
- b. Whether termination violated the mandatory procedure set out by section 40 of the *Employment Act*.
- c. Whether the claimant is entitled to the reliefs sought.

Reason for the termination

16. Paragraph two of the termination letter captured the reason for the termination as follows: -

“As earlier discussed with the general manager and myself in the month of May, the work of a surveyor has become very competitive and technology oriented. Following our recent award of new construction contracts and based on your performance on one of the contracts we are of the opinion that you don’t meet the needs of this demanding and diverse role at this point in time. We regret to inform you that your position has been declared redundant effective February 1, 2021, and we hereby give you one month’s notice.”

17. The reason for the layoff according to the above letter is that the nature of work in the sector has become competitive and technology oriented, and the claimant was no longer competent in the industry. The



said lack capacity was exacerbated by the fact that the claimant was already 62 years which according to the respondent was beyond the mandatory retirement age.

18. The claimant has not denied that he was 62 years when he was laid off. He also did not dispute that he lacked technological competencies that are now said to be necessary to remain competitive as a surveyor in the industry. The aforesaid circumstances reveals a redundancy situation which justified the termination. Consequently, I find that the respondent has proved that the reason for terminating the services of the claimant was valid and fair as it related to the employer's operational requirements.
19. I seek support from case of *Kenya Airways Ltd v Aviation Workers Union Kenya [2014] eKLR* where the Court of Appeal held that:

“As long as the employer genuinely believed that there was existence of a redundancy situation, any termination was justified and it is not for the court to substitute its decision of what was reasonable. The court has no supervisory role.”

Procedure followed

20. Section 40 of the *Employment Act* provides a mandatory procedure that must be followed before terminating employee's services on account of redundancy. The said procedure includes service of at least one month notice to the employee or his trade union if a member of a union, and the area Labour Officer, thereafter consultations and selection of the affected staff, payment of salary in lieu of notice, accrued leave and severance pay.
21. In the case of *Thomas De La Rue v David Opondo Omutelema [2013] eKLR*, and *Kenya Airways Ltd v Aviation Workers Union Kenya [2014] eKLR* the Court of Appeal held that notice of at least one month provided under section 40 of the *act* is mandatory. It follows that failure to serve the minimum required notice on the employee and Labour officer renders the process unfair and unlawful contrary to section 45 of the *act*. Matters were made even worse by respondent's failure to pay the claimant severance pay and his accrued leave days as required by section 40 of the *act*.

Reliefs

22. In view of the foregoing finding that the redundancy was done without complying with the mandatory procedure outlined by section 40 of the *Employment Act*, I make declaration that the termination of the claimant's employment was unfair and unlawful within the meaning of section 45 of the *act*.
23. The claimant did nothing wrong to earn the layoff, he had served 8 years six months, and at the age of 62 years he may not secure another employment. Consequently, I award him 6 months' salary gross salary being Kshs 540,000.00 as compensation for unfair termination pursuant to section 49(1) of the *act*.
24. The claim for leave is also granted because going by the internal memos produced as leave records, the claimant used to go for one week leave during the christmas holidays. The claimant was entitled to leave of 21 days. It means that he did not utilize 14 days of his annual leave every years which translates to 14 days x 8 years plus 10.5 days equaling to 122.5 accrued leave days. Calculated using a salary of Kshs 90,000.00 the leave is assessed at Kshs 367,500.00.
25. The claim for rest days has not been established by evidence and it is dismissed. Likewise, the claim for severance pay is declined because the unfair termination has adequately been compensated under section 49 of the *act* above.
26. In the end I enter judgment for the claimant against the respondent in the following terms:
Compensation Kshs 540,000



Accrued leave Kshs 367,500

Total Kshs 907,500

The award is subject to statutory deductions but in addition to costs and interest at court rates from the date hereof. He will also have a certificate of service.

DATED, SIGNED AND DELIVERED AT NYERI THIS 23RD DAY OF NOVEMBER, 2022.

ONESMUS N MAKAU

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 April 15, 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with rule 28(3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N MAKAU

JUDGE

