Kambo v Sagemcom Kenya Limited (Cause 196 of 2020)
[2022] KEELRC 14643 (KLR) (17 November 2022) (Judgment)

Neutral citation: [2022] KEELRC 14643 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 196 OF 2020

NZIOKI WA MAKAU, J

NOVEMBER 17, 2022

BETWEEN

WATSON WANJOHI KAMBO .... CLAIMANT

AND

SAGEMCOM KENYA LIMITED .... RESPONDENT

JUDGMENT

1. The Claimant instituted this suit vide a Statement of Claim dated 14th May 2020 against Sagemcom Kenya Limited for unlawful termination of employment on account of redundancy. He avers that the Respondent employed him as Head of Operations from 4th April 2017 for an initial three months' probation period. That his gross monthly salary was Kshs. 450,000/- and was entitled to 21 leave days with pay and one month notice or payment in lieu of notice on termination by either party. The Claimant avers that when he successfully completed his probationary period, the Respondent retained him on permanent employment and he since then diligently worked for the Respondent without receiving any warning letters or being subjected to any disciplinary proceedings. It is the Claimant's averment that vide a letter dated 17th April 2020, he was issued with a notice purporting to terminate his employment on grounds of redundancy with effect from 17th May 2020. That the said notice claimed there was a restructure in the company which rendered him redundant as had been discussed on 17th March 2020. He however avers that there had been no structural or operational changes in the company, whether in its French headquarters or in its African branches including Kenya and that had never been engaged in any discussions about structural changes in the company as alluded in the notice. The Claimant avers that after interacting with his colleagues, he realised he was the only employee served with the said notice and contends that he was therefore targeted. He avers that the said redundancy notice was engineered to get rid of him without valid reasons as it was issued shortly after he disagreed with the Respondent's Managing Director. Further, that no general notice was in fact issued by the Respondent to employees on the planned restructure and the particulars of the affected employees as envisaged by law and neither were there negotiations on the restructure.

2. The Claimant avers that in deciding that he was redundant, the Respondent did not regard his merit, skill, ability and reliability in the company or any other parameters enumerated under Section 40 of the *Employment Act*. That the Respondent's operations are still the same, his position at the company is still existent and his juniors are still at work. That the purported restructure and redundancy notices were contrived to unfairly terminate his employment and were thus discriminatory, illegal and unfair. He further avers that it was not the first time the Respondent was invoking redundancy to circumvent the law on the normal way of terminating employment as in 2017 it similarly issued a contrived redundancy notice to its then project manager before arbitrarily terminating his employment. The Claimant therefore prays that judgment be entered against the Respondent for declaratory orders that the Redundancy process it initiated was not substantially justified and was procedurally flawed while the Redundancy notice dated 17th April 2020 is discriminatory, illegal, null and void. He further prays for a declaration that the redundancy notice issued to him amounted to unfair termination of his contract of employment and that the Respondent be ordered to pay him damages for discrimination and compensation in the sum of Kshs. 5,400,000/- being 12 months' salary. He also seeks costs of the suit.

3. In reply, the Respondent filed an Answer to the Statement of Claim dated 28th May 2020 admitting that the Claimant was its employee from 8th May 2017. It avers that it declared the Claimant's position redundant after following due process and that the Claimant was fully aware of the redundancy plan having been issued with the notice of restructuring of the Company with the possibility of redundancy in a meeting on 16th March 2020 at 15:30 hours. The Respondent avers that the Claimant was additionally issued with the necessary notices during a one on one meeting with the Respondent's Managing Director on 17th March 2020 at 13:40 hours. That the Claimant's belated and baseless accusations coming after the notice to terminate his employment on redundancy are in bad faith, malicious and merely intended to injure and taint the reputation of its Managing Director. It is the Respondent's case that the Claimant's redundancy and termination on redundancy thereof was done following an evaluation process which was both procedurally and substantially fair and justified, was lawful and was within its right to restructure its functions to ensure efficacy.

4. The Respondent avers that in compliance with the law, it issued the Claimant with two notices with the first being notification of the intended redundancy and the second notice dated 17th April 2019 informing him that he had been declared redundant after the restructuring process. That in a letter dated 16th March 2020, it also issued a notice to the Labour Commissioner about the impending redundancy that was caused by lack of business. That the process affected five staff members under the Claimant's department whose contracts could not be renewed upon expiry from the month of December 2019 to March 2020 and who constituted 50% of the department. The Respondent avers that the Claimant refused to attend a follow-up meeting on 21st April 2020 which was to discuss his redundancy further and address any concerns he may have had and instead chose to rush to Court before engaging in consultations and the lapse of the redundancy notices.

5. It further avers that the Claimant had also always maintained the need to trim the Respondent's organization structure to the bare minimum due to lack of clientele as demonstrated in his emails dated 5th December 2019, 6th January 2020 and 9th January 2020 and cannot therefore claim unfair termination. The Respondent avers that there are no funds to pay the Claimant who was not the only employee terminated from employment and that rescission of the notice would irretrievably harm its business operations. It avers that the Claimant is not entitled to any of the remedies and prayers sought in the Statement of Claim and that his claim should be dismissed with costs to the Respondent.

Claimant's Submissions

6. The Claimant submits that redundancy is initiated by an employer when the role of an employee becomes superfluous and that the burden of proof thus rests on the employer to justify that the employee's services are no longer necessary to the organization. That this position is affirmed in the case of *Barclays Bank of Kenya Ltd & Another v Gladys Muthoni & 20 Others* [2018] eKLR where the Court of Appeal held that there is a heavy burden of proof placed upon the employer to justify any termination of employment and that the appellants ought to have given reasons and extent of the redundancy. He submits that whereas the Respondent in this case advanced several justifications to demonstrate that his role had become superfluous, it did not meet the threshold for substantive justification. The Claimant submits that the Respondent failed to lead evidence that the position of Head of Operations had become surplus and unnecessary to the organization or that the Claimant's roles as set out in his employment contract dated 4th April 2017 were superfluous. He submits that the Respondent had various projects and sites in the country that could be handled by the Claimant even after termination of his employment and he was for instance tasked with preparing budgets for Telkom, Safaricom and KENET when the Respondent temporarily reinstated him. Further, no evidence was adduced to show that his role in the region had also become superfluous while he led evidence that the Respondent was actively recruiting for its Kenyan, Ugandan and Tanzanian offices soon after the Respondent was declared redundant. It is the Claimant's submission that there was therefore no restructure and if any, it was not justified and that an entity that transferred funds and recruited could not have been cutting costs.

7. The Claimant cites the case of *Anne Njambi Ngugi v Mediamax Network Limited* [2020] eKLR where the Court in finding that the respondent did not discharge the burden of proving the existence of operational reasons to declare the claimant's position redundant, held that valid reasons must be demonstrated for redundancy and the employee informed as much. He submits that the reasons given in the instant case are untrue and similarly fall short of the threshold under Section 40(1) of the *Act* and that the Court should only conclude that the redundancy was not substantively justified. The Claimant submits that all of the employees who worked under him remained in employment after he had left and some of whom were even on temporary contracts. That this was contrary to Section 40(1)(c) of the *Employment Act* which expressly mandated the Respondent to consider "seniority in time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy". He further submits that his employment was for an unlimited term and therefore the completion of one contract by the Respondent did not terminate his employment as is the norm with short-term contracts.

8. On whether the redundancy process was procedurally fair, it is the submission of the Claimant that a notice must be issued under Section 40(1)(a) which the Respondent did grant but which notice falls short of the statutory requirement because he was not meaningfully engaged and the notice was also not served upon the Labour Officer. That in the case of *Luke Kinyua Kamunti v Amigos Nuts and Commodities Limited* [2019] eKLR, the Court while declaring the redundancy to be unprocedural and therefore unfair for want of notice to the labour officer, held that failure to issue a notice to the labour officer violated the provisions of Section 40 of the *Employment Act*.

9. On the issue of consultation, the Claimant cites the case of *Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 Others* [2014] eKLR where the Court of Appeal per Maraga JA (as he then was) found that the requirement of consultation is implicit in the principle of fair play under Section 40(1) of the *Employment Act* itself and that the notices under this provision are not merely for information but to allow parties an opportunity to consider measures of averting or minimising

the terminations. He submits that the Respondent in the instant case did not allow for consultations to explore options to redundancy such as a pay cut or redeployment to Uganda or Tanzania or to another department. It is the Claimant's submission that issuance of two notices cannot stand the test of Section 40(1) of the *Act* and that the Court of Appeal in the *Kenya Airways Limited case* (*supra*) expressed that consultations should be held after issuance of the first notice and not after termination letter as was experienced in the instant case. The Claimant submits that since the evidence he has led in the case lead to a conclusion that the redundancy was contrived and not founded on valid reasons, the prayers sought in the Statement of Claim are merited. That a termination is said to be unfair if the employer fails to prove that the employment was terminated in accordance with fair procedure, pursuant to Section 45(2) of the *Employment Act*. He submits that since the Respondent failed justify the substantive reason for redundancy and to adhere to the conditions set out in Section 40(1), the termination of his employment was therefore unfair within the meaning of Section 45(2). It is the Claimant's submission that he was also treated differently without justification in violation of his right to equal treatment under Article 27 of the *Constitution* of Kenya which has vertical and horizontal application and Section 5(3)(b) of the *Employment Act*. He urges this Court to thus award damages in the sum of Kshs. 7.5Million for the discrimination and that he relies on the Court of Appeal assessment of damages in *Ol Pejeta Ranching Limited v David Wanjau Muhoro* [2017] eKLR. The Claimant submits that his claim for compensation is also merited as the remedy for reinstatement is unavailable as was similarly affirmed by the Court of Appeal in *Kenya Broadcasting Corporation v Geoffrey Wakio* [2019] eKLR where the Court ordered the appellant to pay the respondent 12 months' salary as compensation for the unfair termination while considering the respondent's length of service and the failure to reinstate him. Finally, that since costs follow the event, he should be awarded the same.

Respondent's Submissions

10. The Respondent submits that there are two broad aspects to the definition of redundancy under Section 2 of both the *Employment Act* and the *Labour Relations Act*. First is that the loss of employment has to by involuntary means and at the initiative of the employer and second, the loss of employment should not be the fault of the employee and only arise where the services of the employee are superfluous. That employment laws recognise redundancy as a legitimate ground for termination of employment as was held by the Court of Appeal in the case of *Paul Wachiuri Ndonga v Keroche Breweries Limited* [2018] eKLR quoting the case of *Kenya Airways Limited v Aviation & Allied Workers Union Kenya & Others* [2013] eKLR. It is the submission of the Respondent that it had faced uncertainty in its Kenyan operations due to loss of bids, tenders and contracts and thus had no active projects to help it run smoothly and efficiently. That it was therefore its prerogative to redesign its organizational structures to suit the requirements of profit-making and it relies on the case of Nairobi Cause No. 1357 of 2010, *Samuel Gachomo Chege v Jesse Kangethe Karuma & Another* [2014] eKLR where the Court held that a finding of unfair termination would be unwarranted where termination is due to a substantive economic reason. Further, that it has demonstrated that it duly issued notices to the Claimant before terminating his employment on account of redundancy. It argues that Kenyan law does not provide for pre-redundancy consultation but only post-redundancy consultations which process it later on commenced and that this position was asserted in *Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 Others* [2014] eKLR. It further submits that the Claimant was well informed of the valid reasons leading to his position being declared redundant as he was aware of the Respondent's financial constraints caused by loss of contracts and lack of clientele. The Respondent submits that in the case of *Kenya Airways Corporation Ltd v Tobias Ogaya Auma & 5 Others* [2007] eKLR, the Court stated that one could not prevent an employer from declaring employees redundant where there are genuine reasons to do so. It is the Respondent's submission that in light of the foregoing, it has substantially justified the redundancy process it commenced.

11. The Respondent submits that it duly discharged its obligations under Section 40 of the *Employment Act* and therefore followed due procedure including issuing notices not less than a month prior to the date of redundancy to both the Claimant and the area Labour Officer. It submits that in the case of *Kavutha Ngonzi & 11 Others v Kapric Apparels (EPZ) Ltd* [2017] eKLR, the Court stated that the respondent properly used her managerial prerogative to lay off some staff and that such prerogative is permitted under Section 45(2)(b) of the *Employment Act* which provides that reason for terminating an employee's services relates to the operational requirements of the employer. It further submits that the Claimant was the only person holding the position of Head of Operations and in compliance with Section 40(1)(c) of the *Act*, it considered his seniority in time, skill, ability and reliability before declaring his position redundant. It submits that the Claimant's termination was therefore procedural and in accordance with Sections 40, 43 and 45 of the *Employment Act*.

12. As to whether the Claimant was subjected to discrimination, the Respondent submits that the Claimant has not adduced any evidence to show he was discriminated against while the Respondent's witness testified that the Claimant was not the only employee let go on account of redundancy. It relies on the case of *Wycliffe Lisalitsa v Chief Executive Officer Kenyatta National Hospital & 5 Others* [2014] eKLR where the Court held that for an employee to prove discrimination, the employee has to establish that two or more persons doing the same work were treated differently. The Respondent submits that in the case of *Reuben Wamukota Sikulu v the Director Human Resources Management Ministry of Devolution and Planning & 2 Others* [2020] eKLR, the Court held that in establishing a claim of discrimination, an employee is required to demonstrate a *prima facie* case through direct evidence or statistical proof that there was different treatment on any ground set out under Article 27(4) of the *Constitution*.

13. The Claimant herein was dismissed after what is stated to be a declaration of redundancy. Under Section 40 of the *Employment Act*, an employer can end the contract of an employee on grounds of redundancy. In this case, the Claimant who was employed as the Respondent's Head of Operations from 4th April 2017, received a letter of termination on account of redundancy on 17th April 2020. The letter informed him that he would be declared redundant effective 17th May 2020. It referenced a discussion held in March 2020, 17th March to be precise. The Claimant disavows such a meeting. He states that the meeting did not take place as alleged. He denies that there was any structural or operational changes in the company, whether in its French headquarters or in its African branches including Kenya. He said that he never engaged in any discussions about structural changes in the company as alluded in the notice served upon him. The Claimant asserts that after interaction with his colleagues, he realised he was the only employee served with the said notice. He as such contends that he was targeted and the redundancy notice was calculated to get rid of him without valid reasons. He asserts it was issued shortly after he disagreed with the Respondent's Managing Director. The Respondent on its part asserts it declared the Claimant's position redundant and that it followed due process. It insists that the Claimant was fully aware of the redundancy plan having been served with the notice of restructuring of the Company with the possibility of redundancy at a meeting on 16th March 2020. It proceeded to indicate the precise meeting times as well as the meeting the Claimant held with the Respondent's Managing Director on 17th March 2020. The Respondent asserts the Claimant was given the necessary notices during a one-on-one meeting with its MD on the said date at 13:40 hours. It thus states that the Claimant's accusations are in bad faith, malicious and merely intended to injure and taint the reputation of its Managing Director. It is the Respondent's case that the Claimant's redundancy and termination on account of redundancy were undertaken following an evaluation process which was both procedurally and substantially fair, lawful and justified. The Respondent is of the opinion that it was within its rights to restructure its functions to ensure efficacy.

14. The Claimant it would seem, was aware of the dire economic situation the Respondent faced. He signified such knowledge in his emails. He stated that there was need to trim the Respondent's organizational structure to the bare minimum due to lack of clientele. He wrote these emails on 5th December 2019 on the Kenet Contract, 6th January 2020 where the Claimant speaks of trimming the organisation to the bare minimum and the email of 9th January 2020 where he indicated that the plan is not to extend the contracts as they end and that if there is additional work that overwhelms the team they can hire per project and as needed. The Claimant cannot therefore claim he was unaware of the genesis of the redundancy. The Claimant also signed the letter that notified him of the intended redundancy. The letter dated 16th March 2020 was received by the Claimant on 17th March 2020. It was copied to the County Labour Office. He asserts there was a disagreement with the Managing Director of the Respondent and does not even attempt to give particulars or details. It would seem the Claimant opted to impugn the redundancy after it occurred and was fishing for a reason to pin the decision on. He did not demonstrate discrimination in the termination despite making averments to that effect. As held in the case of *Wycliffe Lisalitsa v Chief Executive Officer Kenyatta National Hospital & 5 Others* (*supra*), for an employee to prove discrimination, the employee has to establish that two or more persons doing the same work were treated differently. Further in the case of *Reuben Wamukota Sikulu v the Director Human Resources Management Ministry of Devolution and Planning & 2 Others* (*supra*), it was held that in order to establish discrimination, an employee is required to demonstrate a *prima facie* case through direct evidence or statistical proof that there was different treatment on any of the grounds set out under Article 27(4) of the *Constitution*. In this case other than merely allege it, the Claimant did not lead any evidence to establish this element. As such, his claim on discrimination also fails.

15. Suffice to say that from the foregoing, it is apparent the Claimant did not prove that his termination was contrary to the provisions of statute and in particular, that it offended the provisions of Section 40 of the *Employment Act* so as to bring it within the purview of Sections 43 and 45 of the *Employment Act*. As such, in my considered view, there was no basis for the assertions of targeting or the alleged illegality in the termination of the Claimant. This suit is ripe only for dismissal and thus suffers the fate befitting it – suit dismissed with costs to the Respondent as there was no basis for its initiation.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF NOVEMBER 2022

NZIOKI WA MAKAU

JUDGE