



**Aponga v Athi River Mining Cement PLC (Cause 787 of 2017)
[2022] KEELRC 13028 (KLR) (1 November 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13028 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 787 OF 2017
JK GAKERI, J
NOVEMBER 1, 2022**

BETWEEN

BONFACE SUMBA APONGA CLAIMANT

AND

ATHI RIVER MINING CEMENT PLC RESPONDENT

JUDGMENT

1. The Claimant initiated this suit by a Memorandum of Claim filed on 27th April, 2017 claiming that he had been unlawfully, wrongfully and unfairly terminated from employment by the Respondent.
2. The claimant avers that he was employed by the Respondent on 16th February, 2016 as a general worker but had no written contract of employment and his duties included moving bags of fertilizers from the machine to the designated storage place at Kshs.3000/= per week paid through the Bank. That he discharged his duties diligently.
3. It is the Claimant's case that on 8th February, 2017, one Bonface Wanga, his cousin and colleague at the workplace informed him that he was on the list of those identified for termination and did not report to work until 10th February, 2017 and confirmed the information that he was due for termination on 16th February, 2017.
4. It is the Claimant's case that the termination letter dated 16th February, 2017 identified restructuring as the reason for termination of employment.
5. The Claimant further avers that the termination was not conducted in accordance with the law and that the Respondent was not issuing payslips to its employees.
6. He averred that throughout the period of employment, he was neither housed by the Respondent nor paid housing allowance.
7. The Claimant prays for:



- i. A declaration that the dismissal of the Claimant is unlawful, wrongful and unfair.
- ii. Days worked Kshs.7,384.62
- iii. In lieu of leave Kshs.9,692.31
- iv. Severance pay Kshs.6,923.08
- v. Service pay Kshs.6,923.08
- vi. House allowance Kshs.21,600.00
- vii. Compensation Kshs.144,000.00
- viii. Costs of this suit
- ix. Interest on (ii) – (vii).

Respondent's case

8. Despite notice of service of the suit on 25th July, 2017, the Respondent did not file any response to the suit but entered appearance on 9th June, 2017.
9. Notice of the hearing slated for 13th October, 2021 was served through email but the Respondent did not attend. Hearing was adjourned to 26th May, 2022 on which date the suit certified as undefended and formal proof hearing slated for 21st June, 2022 when formal proof took place. Mention to confirm filing of submissions was scheduled for 27th July 2022 and notice was served on 1st July, 2022.
10. The Respondent's counsel on record did not honour any of the notices served and did not file submissions.

Claimant's evidence

11. The Claimant adopted the written statement which is a replication of the Memorandum of Claim.

Claimant's submissions

12. The Claimant identifies three issues for determination namely; whether the Claimant was an employee of the Respondent, whether termination of the Claimant's was fair and lawful and whether the Claimant is entitled to the reliefs sought.
13. As to whether the Claimant was an employee of the Respondent, reliance is made on the provisions of section 10 (7) of the *Employment Act* to urge that it is the duty of the employer to cause a contract of service to be written failing which it is his/her duty to prove or disapprove an alleged term of the contract and in the instant case the employer had not disproved the terms alleged by the Claimant.
14. The NSSF statement on record is also relied upon as evidence that the Claimant was an employee of the Respondent as is the written termination letter dated 16th February, 2017.
15. On whether termination of the Claimant's employment was fair, it is submitted although the termination letter purported to give the Claimant a one month notice, the termination was unlawful as the reason cited was restructuring and the provisions of Section 40 of the *Employment Act* were not complied with as regards notice to the Claimant and Labour Officer, selection criteria and other requirements.



16. Similarly, Section 43(1) of the [Employment Act](#) is relied upon to urge that it is the duty of the employer to prove the reason or reasons for termination of employment and the Respondent did not do so as it did not participate in the proceedings.
17. It is urged that there was no genuine reason for redundancy.
18. The decisions in [Jane I. Khalechi v Oxford University Press E.A Ltd](#) (2013) eKLR and [Kenya Airways Ltd V Aviation & Allied Workers Union Kenya & 3 others](#) (2014) eKLR and others are relied upon to underscore the mandatory nature of the conditions to be complied with to actualize the redundancy of an employee.
19. Finally, the decision in [Hesbon Ngaruiya Waigi V Equatorial Commercial Bank Ltd](#) (2013) eKLR is relied upon to urge that if the provisions of Section 40 of the [Employment Act](#) are not complied with, the purported redundancy is deemed unprocedural and unfair termination of employment.
20. As regards the reliefs sought, it is urged that the Claimant is entitled to the 16 days worked in February 2017. Section 18 (4) of the [Employment Act](#) is relied upon in support of the submission.
21. It is further urged that the Claimant had not taken leave for the duration served, was not paid severance pay as provided by Section 40(1) (g) of the [Employment Act](#) as well as house allowance as provided by Section 31 of the Act.
22. It is submitted that the Claimant is entitled to compensation for the unlawful termination of employment and a certificate of service in accordance with Section 51 of the [Employment Act](#).
23. The Respondent did not file submissions service of notice of mention to confirm filing of submissions notwithstanding.

Determination

24. The issues that commend themselves for determination are;
 - i. Whether the Claimant was an employee of the Respondent.
 - ii. Whether the Claimant was declared redundant or his employment contract was unfairly terminated.
 - iii. Whether the Claimant is entitled to the reliefs sought.
25. As to whether the Claimant was an employee of the Respondent, the starting point are the sentiments of Onyango J. in [Humphrey Munyithya Mutemi v Soluxe International Group of Hotels & Lodge Ltd](#) (2020) eKLR where the learned judge stated:

“In the case of *Monica Kanini Mutua v Al-Arafat Shopping Centre and another* (2018) eKLR, the court held that in an undefended claim, it is trite that the Claimant establishes all the facts of the claim and must establish the existence of an employment relationship with the Respondent as a preliminary issue before establishing the alleged unfair termination of the employment.”
26. Abuodha J. expressed similar sentiments in [Nicholas Kipkemoi Korir V Hatari Security Guards Ltd](#) (2016) eKLR.
27. Guided by these sentiments, I will now proceed to determine whether there was an employment relationship between the Claimant and the Respondent.



28. The Claimant relied on two documents in urging his case namely, the termination letter dated 16th February, 2017 which has his name as Bonface Sumba Aponga, ID card number xxxx, designated as General Worker and the workplace ARM – Athi River Factory. A second document is the NSSF statement dated 5th April 2017 which has his name as Aponga Sumba Bonface, NSSF No. xxxx, ID card number xxxx and employers name, the Respondent. The statement shows that NSSF contributions were made from March, 2016 to January 2017. The foregoing is consistent with the Claimant’s written statement on record

The two documents provide sufficient evidence and the court is satisfied and finds that the claimant was an employee of the Respondent on the terms alleged in the Memorandum of Claim.

29. As to whether there was a redundancy or the Claimant’s employment was unfairly terminated, the starting point is the law on redundancy.

30. Section 2 of *Employment Act* defines redundancy 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 practice commonly known as abolition of office, job or occupation and loss of employment.”

31. There is sufficient judicial authority for the proposition that in a redundancy, the employee is innocent. The process is initiated by the employer based on its circumstances and is a commercial decision. Because of its unique nature, as a separation mechanism, the law prescribes a distinct process to be complied with by the employer; if the redundancy is to pass muster.

32. Section 40(1) of the *Employment Act* prescribes the seven conditions to be complied with in a redundancy. The Court of Appeal explained the conditions in *Freight In Time Ltd v Rosebell Wambui Munene* (2018) eKLR and a summary was also provided in *Jane I. Khalechi v Oxford University Press E.A Ltd* (2013) eKLR as follows;

1. Give notice to the union and the Labour Officer at least one month before the process commences;
2. For those not unionized, personal letters copied to the Labour Officer;
3. Use a criteria of seniority, abilities and reliability of each employee;
4. Where there is a CBA, the same should not disadvantage any employee;
5. Leave days should be paid in cash;
6. One month notice or pay in lieu of notice and
7. Severance pay not less than 15 days for each year of service.

33. As explained in *Freight In Time Ltd V Rosebell Wambui Munene* (Supra), compliance with the provisions of Section 40 (1) of the *Employment Act* is mandatory. A redundancy cannot be carried through otherwise.

34. The law places a heavy burden on the employer to justify any termination of employment including redundancy. Section 40 (1) (a) of the Act requires the employer to notify the union or the employee(s) and the Labour Officer the reasons for and extent of the redundancy and the process must be fair as ordained by the provisions of Section 45 of the *Employment Act*.



35. Evidently, as a form of termination of employment, redundancy must pass the substantive justification and procedural fairness test. (See *Kenya Airways Ltd V Aviation & Allied Workers Union Kenya & 3 others* (Supra).
36. In the instant case, although the letter of termination is referenced as ‘Termination of Employment on the basis of restructuring’, there is no indication that it was intended to be a redundancy notice.
37. The letter is explicit that;
- “The purpose of this letter is to confirm the outcome of a recent review done by Management and Human Resource team on operational requirements.
- As a result, the company reviewed the structure of Mavuno Department in line with the new Human Resource requirements. Regrettably, your position is now not necessary in the new organisational structure. Therefore, the company hereby issues this letter as notice of termination of your services as per your contract letter . . .”
38. The letter directs the Finance Department to process the Claimant’s dues as at the date of the letter.
39. The Claimant led no evidence of what transpired thereafter as regards payment of terminal dues. Clearly, the Respondent considered the letter dated 16th February, 2017 a notice of termination of employment in accordance with the terms of the contract between the parties.
40. No attempt was made to comply with the provisions of the *Employment Act* on redundancy.
41. In *Hesbon Ngaruiya Waigi V Equitorial Commercial Bank Ltd* (supra), the court stated as follows;
- “Where redundancy is declared by an employer, the procedure to follow is a set out under the provisions of Section 40 of the *Employment Act* and where not followed, any termination as a result will be deemed unprocedural and unfair. Any termination of an employee following a declaration of redundancy must be based on the law otherwise the same becomes wrong and if the grounds used to identify the affected employee are not as per the law, the same becomes unfair.”
42. It requires no gainsaying that in this case the Respondent did not comply with the provisions of Section 40 (1) of the *Employment Act*, 2007. The letter to the Claimant was not copied to the local Labour Officer, nor is there a defined selection criteria or consultations. The Claimant was faced with a fiat accompli.
43. Finally, the letter does not set out the reasons for and extent of the redundancy.
44. Finally, the Respondent did not provide evidence of any restructuring or reorganization of the Respondent.
45. Guided by the foregoing decisions, the court is satisfied and finds that the purported redundancy transitioned to an unfair termination of the Claimant’s employment for which the Claimant is entitled to reliefs.



46. As to entitlement of the Claimant to the reliefs sought, the sentiments of Abuodha J. in *Nicholus Kipkemoi Korir V Hatari Security Guards Ltd (Supra)* are instructive. The learned Judge stated as follows;

“The settled rule in all civil claims is that a party who intends a court to find or decide any matter in his or her favour must prove the allegations to the required standard of proof in civil claims which is on a balance of probability . . . This burden of proof does not become any less on the employee simply because the employer has not defended the claim or absent at the trial. The Claimant must still prove his or her case. It is therefore not enough for the employee to simply make allegations on oath or on the pleadings, which are not backed by any evidence and expect the court to find in his or her favour.”

47. The court is guided by these sentiments.

48. The court proceeds as follows;

- i. Having found that the Respondent did not comply with the provisions of Section 40(1) of the *Employment Act* on redundancy, a declaration is hereby issued that termination of the Claimant’s employment was unlawful.
- ii. Days worked Kshs.7,384.62
- iii. In lieu of leave Kshs.9,692.31

49. The Claimant adduced no evidence to establish these prayers. Neither the written statement on record nor the oral testimony makes reference to unpaid days or outstanding leave days. Indeed, neither the memorandum of claim nor the written statement provide the particulars such as the number of days.

The prayers are declined.

iv. Severance pay

50. Although severance is payable under the provisions of Section 40(1) (g) of the *Employment Act*, it is not available in the instant case since the Respondent did not carry out a redundancy as envisioned by the Act, it terminated the Claimant’s employment contract unfairly and severance pay is not due.

The prayer is declined.

v. Service pay

51. Evidence on record shows that the Claimant was a member of the NSSF and the Respondent remitted contributions to the fund. Service pay is unavailable to persons who are members of the NSSF as ordained by Section 35 (6) (d) of the *Employment Act*.

The prayer is declined.

vi. House Allowance

52. The Claimant testified that he was neither housed by the employer nor paid a housing allowance and his salary was not consolidated as required by the provisions of Section 31 of the *Employment Act*.

53. As submitted by the Claimant, housing is a statutory right of an employee and an employer must provide housing or pay an allowance or pay a consolidated salary. In this case, the Claimant’s evidence is uncontroverted. The Claimant is awarded a housing allowance of up to 15% of the salary of Kshs.12,000/= per month for the 12 months served Kshs.21,600/=.



- vii. Compensation
54. Having found that termination of the Claimant's employment was unfair, the Claimant is entitled to the discretionary relief provided by Section 49(1)(c) of the *Employment Act*.
55. In ascertaining the level of compensation, the court has taken into consideration the fact that;
- i. The Claimant was in the employment of the Respondent for 12 months only which is a fairly short time.
 - ii. The Claimant had no record of misconduct or wrong doing.
 - iii. The Claimant did not appeal the Respondent's decision.
 - iv. The Claimant did not contribute to the termination of employment.
56. In the circumstances, the court is satisfied that the equivalent of two (2) months salary is fair, Kshs.24,000/=.
- viii. The Claimant is entitled to a certificate of service by dint of Section 51 of the *Employment Act*.
57. In conclusion, judgement is entered for the Claimant against the Respondent in the following terms:
- a. Housing allowance Kshs.21,600
 - b. Equivalent of 2 months compensation Kshs.24,000
Total Kshs.45,600
 - c. Certificate of service.
 - d. Costs of this suit.
 - e. Interest at court rates from the date hereof till payment in full.
58. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 1ST DAY OF NOVEMBER 2022

DR. JACOB GAKERI

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 has 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.



DR. JACOB GAKERI
JUDGE

