



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR COURT OF KENYA

AT NAIROBI

ELRC CAUSE NUMBER 562 OF 2018

ANDREW ONDIEK.....CLAIMANT

VERSUS

DHL SUPPLY CHAIN LIMITED.....RESPONDENT

(BEFORE HON. JUSTICE DAVID NDERITU)

JUDGMENT

I. INTRODUCTION

1. In a Statement of Claim dated 11th April, 2018 and filed in court on 11th April, 2018 the claimant prays for: -

- a) **Reinstatement to his previous position/job without any loss of benefits.**
- b) **Salary arrears for the entire period the claimant has been out of employment.**
- c) **Damages for wrongful and or unlawful termination, dismissal or unlawful termination disguised as redundancy.**
- d) **Maximum 12 months compensation for unlawful redundancy.**
- e) **Costs of this suit and interest thereon.**

2. Together with the statement of claim was filed a statement by the claimant and a bundle of documents in support of the claim.

3. On 9th March, 2020 the Respondent filed a memorandum of response dated 26th February, 2020 and on the 11th March, 2020 the Claimant filed a reply to memorandum of response dated 10th March 2020. In their memorandum of response, the Respondent prays as that the Claimant's cause be dismissed with costs for want of merits.

4. Although the Respondent had originally indicated that they did not have any documents to file or witness to call they with the leave of court filed two documents on payment of dues and called one witness.

5. This cause proceeded for hearing before this court on 28th July, 2021 and 6th August, 2021 when the claimant (CW1) and RW1 testified for the claimant and the Respondent, respectively.

II. CLAIMANT'S CASE

6. During the hearing the claimant adopted his witness statement and stated that he was first engaged by the Respondent in 2004 as a Network Transport Analyst; that he held various other positions and rose through the ranks to the position of Warehouse Operations and Transport Lead BAT/Business Unit Manager BAT by 2015.

7. The Claimant further stated that on 9th October, 2017 he received an email inviting him to a meeting to be held on 11th October, 2017 on "Restructuring" of the business of the Respondent. The Claimant further stated that he attended the said meeting wherein he met with the

human resource managers, finance director, operations director, and the managing director.

8. The Claimant testified that during the said meeting he was informed of restructuring of the business of the Respondent and that the position that he held was to be abolished. He was informed that the restructuring was immediate with no notice or handover procedure.

9. The Claimant stated that he was issued with a redundancy letter during the meeting which he signed and returned on 11th October 2017. He stated that as at the time of the termination he had served the Respondent for 14 years.

10. The Claimant stated that he was not given an opportunity to respond to the redundancy process and that within three months of his termination the Respondent advertised the same position, hence demonstrating bad faith and malice on the part of the Respondent as pleaded in Paragraph 9 of the statement of claim.

11. The Claimant stated that his last gross pay was Kshs.361,320/= and reiterated his prayers as per the statement of claim adding that he was terminated at 43 years of age yet he was ready and willing to serve the Respondent till the retirement age of 60.

12. In cross-examination the claimant admitted that he was paid terminal dues as tabulated by the Respondent in Respondent's exhibits 1 and 2 but he stated that the Respondent was dishonest in the tabulation and that what he is seeking in this cause is compensation for unfair termination. He stated that he had not waived his legal rights when he received the terminal dues as worked out by the Respondent.

III. RESPONDENT'S CASE

13. The Respondent's case is that in or about October 2017 they were experiencing difficult financial times after losing some major clients and that to navigate through the hard times they decided to restructure the company which included declaring the Claimant redundant.

14. The only witness called by the Respondent (RW1) produced exhibits 1 and 2 showing the tabulation and payments of terminal dues to the Claimant in the sum of Kshs.3,841,354.86 which amount the Claimant admitted receiving in his testimony.

15. The Respondent's case is that the Claimant was paid his terminal dues and as such this cause serves no purpose and should thus be dismissed with costs.

IV. ISSUES FOR DETERMINATION

16. This court has thrashed through the pleadings filed by both parties, the oral and documentary evidence adduced, and the written submissions filed by both parties. On 7th August, 2020 Advocates for the Claimant filed a "statement of agreed issues" dated 6th August, 2020 which they had executed on their part. However, Advocates for the Respondent did not execute their part and as such the statement cannot be taken to be of the agreed issues.

17. This court frames the issues for determination as follows: -

- a) Was the claimant's termination by the Respondent on account of redundancy valid and lawful?
- b) If the said termination was lawful, is the Claimant entitled to the reliefs sought against the Respondent?
- c) What is the status of the dues already paid to the claimant by the Respondent?
- d) Who meets the costs of this litigation?

V. TERMINATION

18. It is not disputed that the Claimant was allegedly terminated on redundancy during a meeting held on 10th October, 2017 between the claimant and top management of the Respondent.

19. The unchallenged evidence from the Claimant is that he had not been informed of the impending redundancy prior to that meeting and that he had not even the slightest knowledge when coming for the meeting that he was to be declared redundant and be served with a termination letter during that meeting. The Claimant stated that no discussions had taken place between the management of the Respondent and the Claimant or indeed any other employee who was to be affected by the said redundancy.

20. The Claimant further testified that no reason(s) was given to him for the redundancy and as such he alleges that the termination on account of redundancy was malicious and targeted at him personally. Besides, the Claimant testified that the position that he held was advertised by the Respondent barely three months after his termination. In his view this advertisement of the same position by the Respondent in February, 2018 was in furtherance of the malice. The Claimant concluded that his termination on account of redundancy was without any factual or legal basis or justification.

21. On the other hand, the Respondent in their pleadings, including the filed written submissions, but without any supporting oral or documentary evidence, allege that they informed the Claimant and other employees of the impending declaration of redundancy due to tough financial times. However, no oral or documentary evidence was adduced to support that allegation.

22. Section 2 of the Employment Act No. 11 of 2007 (the Act) defines redundancy as meaning

“the loss of employment, occupation, job or career by involuntary means through no faults 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.”

23. The above definition of redundancy gives an employer a leeway to terminate employees for no fault on the part of the employee and if the same is not properly checked it can easily be abused by employers who would engage workers during a given season when they need their services only to terminate them on redundancy when that season ends notwithstanding that such employees are on contract or permanent and pensionable terms is for this very reason, *inter alia*, that the legislature enacted Section 40 of the Act to guard against abuse of redundancy and to specify conditions and terms that an employer shall meet before declaring an employee redundant.

24. Section 40(1) of the Act provides as follows:

“An employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions-

(a) Where the employer 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 intended date of the termination on account of redundancy;

(b) where an employee is not a member of the trade union, the employer notifies the employee personally in writing and the labour officer;

(c) the employer has, in the selection by 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 employee 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 paid an employee declared redundant not less than one month's notice or one month's wages in lieu of notice; and

(f) the employer has paid to the employee declared redundant severance pay at the rate of not less than fifteen days' pay for each completed year of service.”

25. For avoidance of doubts, redundancy is a form of termination and therefore Sections 43, 45, 47 and 49 of the Act apply in cases of redundancy just like in other forms of termination. Therefore, Section 40 provides for an ideal situation, where the reason for termination or redundancy is based on a valid and lawful reason. Once an employer has a valid and lawful reason(s) for termination on redundancy, such an employer must then comply with Section 40 of the Act.

26. The starting point in this matter therefore is to first critically examine the reason given by the Respondent for terminating the Claimant on account of redundancy before examining if the Respondent indeed complied with the provisions of Section 40 of the Act in terminating the Claimant.

27. The reason for declaring the Claimant redundant is found in the notice of redundancy dated 10th October, 2017 addressed to the Claimant by the Respondent, and which the Claimant produced as **exhibit 41**. In the said notice the Respondent posits that they had a difficult year and that they had decided to re-organize their operational structure by abolishing several positions within the company including the position then held by the Claimant of the Business Unit Manager –BAT.

28. During the hearing no evidence was tendered to prove or demonstrate that the Respondent was indeed experiencing a difficult financial period at the material time. There is no evidence on what major clients the Respondent had allegedly lost at the material time or indeed any other evidence whatsoever to illustrate that those alleged circumstances prevailed at the material time.

29. Under Section 43 of the Act, the Respondent as the employer is under obligation to prove the reason(s) for termination and that the same was lawful and valid under Section 45 of the Act. As stated above, there is no evidence adduced at all by the Respondent to prove that they were experiencing difficult financial circumstances at the material time which would have caused them to terminate the Claimant on redundancy. What criteria then can this court use to determine if the termination of the Claimant on account of redundancy was valid, fair, just and equitable? In the glaring lack of evidence as demonstrated above this court finds that the termination of the Claimant by the Respondent on account of redundancy was malicious, unfair, unjust, and unlawful.

30. In the circumstances, this court concludes, finds, and holds that the Respondent had no valid and lawful reason(s) to terminate the Claimant on account of redundancy and therefore in terms of substance of the termination the court finds in favour of the Claimant.

31. In terms of the procedure to be adopted and declaring and terminating on redundancy, Section 40 of the Act has been reproduced verbatim above to emphasize and drive the point home on the need of procedural fairness. A plethora of court decisions is now available on substantive and procedural fairness in terminating on redundancy. In **Kenya Airways Limited -V- Aviation and Allied Workers Union of**

Kenya and 3 Others (2014) eKLR, the Court of Appeal had this to say: -

“Thus, redundancy is a legitimate ground for terminating a contract of employment provided there is a valid and fair reason based on operational requirements of the employer and the termination is in accordance with a fair procedure. As Section 43(2) provides, the test of what is fair reason is subjective. The phrase “based on operational requirements of the employer” must be construed in the context of the statutory definition of redundancy. What the phrase means, in my view, is that while there may be underlying causes leading to a true redundancy situation, such as reorganization, the employer must nevertheless show that the termination is attributable to redundancy – that is that the services of the employee has been rendered superfluous or that redundancy has resulted in abolition of office, job or loss of employment.”

32. The Respondent has not demonstrated that a notice of not less than a month was issued to the claimant and the area labour officer prior to the termination. There is no evidence on the criteria that the Respondent applied in selecting the Claimant for termination, and there is no evidence of payment of pending leave days in cash prior to the termination.

33. The court finds that the Respondent acted in blatant disregard of Section 40 of the Act in declaring and terminating the Claimant on account of redundancy both in substance and the procedure applied. The evidence on record, and which was not rebutted is that the Claimant was not invited for a hearing or to make any presentations and or dispositions that he may have wished to present during the meeting of 10th October, 2017 in which he was terminated. The Claimant was hence denied due process as enshrined in Article 47 of the Constitution, Section 4 of the Fair Administrative Actions Act and Section 45 of the Employment Act. The Respondent was not fair, just, and equitable in deciding to and actually terminating the Claimant.

34. By now it is clear and the court has said enough in demonstrating that the substance and the procedure adopted by the Respondent in terminating the Claimant on account of alleged redundancy was unfair and unjust and the court shall now consider the reliefs sought.

VI. RELIEFS

35. The Claimant was terminated on 10th October 2017. During the hearing the Claimant did not express his wishes or desire to be reinstated to his position or to be re-engaged by the Respondent. In any event, a period of close to four years has lapsed since the termination and the lawfulness and practicability of reinstatement or re-engagement is at odds with such orders being issued. The Claimant was paid severance pay and other dues under the heads in exhibit 1 and 2 of the Respondent and as such it would not be appropriate to order reinstatement or re-engagement; see the holding of the Court of Appeal in **Kenya Power and Lighting Company Limited –v- Aggrey Lukorito Wafuke (2017) eKLR** that reinstatement may only be issued under very special circumstances as it is an order of specific performance in a contract of personal services.

36. In the circumstances, this court finds and holds that reinstatement is not an appropriate remedy to issue in this cause.

37. Having concluded and found that re-instatement is not an appropriate remedy in the circumstances of this cause, the claim for salary arrears also fails as the same is pegged on an order of re-reinstatement.

38. On damages for wrongful and unlawful termination disguised as redundancy this court finds that the damage that is occasioned to an employee on wrongful dismissal or unlawful termination is mainly in the loss of the wages or salary that the employee would have earned were it not for the wrongful dismissal or unlawful termination. Any other damage would have to be specifically pleaded and proved. The Claimant has not pleaded any specifics of the alleged damages and no evidence was tendered in support of the same – see the holding in **Dominic Nderee Mbori and Another –Vs- Nairobi City Council (2018) eKLR**. In the circumstances, this claim is also denied.

39. On compensation for unlawful redundancy, the Claimant has sought for the maximum 12 months gross salary. However, before dealing with the issue of compensation this court shall deal with the status of the dues already paid to the Claimant by the Respondent after termination and their relevance to and impact on any award that may be made under this head.

40. The Claimant does not deny receiving a sum of Kshs.3,841,354.86 from the Respondent, which amount was credited into Claimant’s bank account. As per the Respondent’s exhibits I and 2 the said amount is made up as follows:

a) Notice period pay as per the Contract (3 months)	- Kshs.1,383,095.00
b) One month’s salary in lieu of notice	- Kshs. 461,032.00
c) Redundancy pay (14 years)	- Kshs.5,054,448.00
d) Leave days balance (49.8)	- <u>Kshs.826,636.79</u>
TOTAL	- <u>Kshs.7,725,214.79</u>

It is this amount less lawful deductions that left the balance of Kshs.3,841,354.86 that the Claimant signed for and received from the Respondent as his final dues.

41. It is evidently clear that there is no payment in compensation for unlawful termination and the reason is not difficult to discern. The

termination had not been declared unlawful and as such compensation for the same was not an issue as at that point in time. In the circumstances, the court finds that as far as the items listed above are concerned the Claimant was satisfied with the tabulation and the amounts paid for each item and he undertook not to file any other or further claims under the same heads. The court finds that as far as the items listed above are concerned the Claimant is estopped from making other or further claims on the same.

42. **Section 120 of the Evidence Act (Cap 80)** provides as follows:

“When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such other person or his representative, to deny the truth of that thing.”

This court takes the view that the Claimant, by signing for, accepting, and receiving the aforesaid sum of money, undertook not to file or ask for any other or further claims in respect of the specific items for which he accepted the settlement. There is no deceit, fraudulent misrepresentation, or duress that has been alleged, pleaded, and proved by either party. The settlement is binding between the parties with the force of a contract.

43. However, and this is the point of departure between the two parties, the Claimant neither undertook nor promised not to pursue any other or further claims under any other head(s). In other words, the Claimant did not forego his other lawful and legitimate claims relating to his termination. From the pleadings and the evidence adduced, the Claimant does not dispute the settlement of the items enumerated above and he has no other or further claims under those heads, which he correctly knew and understands were settled with finality in the aforesaid settlement.

44. However, the issue of the lawfulness and fairness of the termination had not been litigated upon and settled as at that point and as such the Claimant is not estopped under Section 120 of the Evidence Act (Cap 80) from pursuing that claim to logical end.

45. In evaluating what would be reasonable and fair compensation to the Claimant, a number of factors come into play as provided for under Section 49(4) of the Act. As stated elsewhere in this judgment, the Claimant has not expressed an intention of going back to work with the Respondent. It is clear from the written submissions filed and the oral testimony that the Claimant has moved on, although he stated that he was as at the time of the hearing hereof still unemployed. However, in his oral testimony the Claimant lamented that he was terminated at an early age of 43 years yet he was ready and willing to work for the Respondent to the retirement age of 60 years.

46. Clearly, the Claimant did not in any way contribute to his termination. The Claimant had served the Respondent for a period of over 15 years. In a small economy like ours where jobs are not easy to come by, it is certainly not likely for the Claimant to secure comparable or suitable employment with another employer, and no wonder the Claimant testified that he is still unemployed.

47. However, the court notes that notwithstanding that the termination was unlawful, and the court has found so, the Respondent paid some dues to the Claimant as enumerated above. This gesture must have cushioned the Claimant from serious financial embarrassment. The Claimant has returned the favour by not pressing any claims that the parties had mutually settled.

48. Section 49(1) (c) Caps the maximum award payable under this head at 12 months gross salary. Court have also held that only under special circumstances may the maximum award of 12 months gross salary be awarded. This court notes that the Respondent made payment for a total of four months' pay; for notice as per the contract they paid three months' salary and one month's salary in lieu of notice. The Respondent also paid redundancy or severance pay for 14 years worked and completed.

49. Considering all the issues and factors above the court finds that an award of ten (10) months gross salary under this head would be fair and just. The court reiterates that the Claimant was at no fault at all, he was ready and willing to continue working for the Respondent till the retirement age of 60 years, yet the Respondent blatantly denied the Claimant substantive and procedural fairness.

50. The court also notes that barely three months after unlawfully terminating the Claimant, the Respondent advertised the same, comparable, or similar position to be filled internally. If the Respondent was acting in good faith and without malice, they would have contacted the Claimant for purposes of filling that advertised position either as a form of re-engagement or reinstatement.

51. In the circumstances, and doing the best that this court can do, under this head the Claimant is therefore awarded as hereunder:

Kshs.361,032 X 10 = 3,610,320

52. The claim for car allowance of Kshs.100,000/= per month is denied for the reason that the same was being paid to the Claimant to facilitate him while on duty working of the Respondent. Upon termination, albeit unlawfully, the Claimant no longer travelled on duty for the Respondent and as such, it would be unfair and punitive to order the Respondent to continue paying the same yet the Claimant was no longer running errands for them.

53. The Claimant is awarded costs of this litigation and the same may be agreed or taxed.

IV. DISPOSAL

54. In final disposal of this cause, this court issues the following orders: -

a) A declaration be and is hereby issued that the termination of the Claimant by the Respondent on account of redundancy

was unfair and unlawful.

b) The Claimant is awarded a sum of Kshs.3,610,320/= being compensation for unlawful and unfair termination.

c) Costs to the Claimant.

DATED, DELIVERED VIRTUALLY, AND SIGNED AT NAIROBI

THIS 24TH DAY OF SEPTEMBER 2021

DAVID NDERITU

JUDGE