

Receivership) & another [2016] eKLR where the court held that the appointment of Receivers/Managers discharges the employment contract and any continuation thereof is at the option of the receiver/Manager.

5. In view of the foregoing, the respondent denied the alleged unlawful termination and contended that the claimant is not entitled to the reliefs sought. It submitted that the claimant did not prove that he was earning a salary of Kshs. 650,000 per month at the time of the separation. Finally, the respondent submitted that the claimant has not proved the claim for bonus and prayed for the suit to be dismissed with costs.

Issues for determination

6. There is no dispute that the Claimant was employed by the Respondent from 24.11.2008 to 9.4.2015 when his employment contract was terminated on account of redundancy. The main issues for determination revolve around the fairness or otherwise of the said termination. It is now trite law that for termination of an employee's contract of service to pass test of fairness, it must be grounded on a valid and fair reason, and a fair procedure must be followed. Consequently, the issue for determination are as follows:

- (a) Whether the termination was justified by a valid reason;
- (b) Whether the procedure followed was fair;
- (c) Whether the claimant's constitutional rights were violated;
- (d) Whether the Claimant is entitled to the reliefs sought in their suit.

JUSTIFICATION

7. Redundancy has been defended under section 2 of the Employment Act as:

“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”.

8. From the foregoing definition, it is clear that when it comes to termination on account of redundancy, the reason for the termination cannot be blamed on the employee. The reason must relate to an involuntary happening or cause that is beyond the employer's control or which is inevitable in relation the employer's operational requirements.

9. The termination letter dated 9.4.2021 was issued by the Receiver & Manager of the respondent and it stated as follows:

“I would like to inform you that Mr. Samuel Onyango and I were appointed Joint Receivers and Managers of the company by the Bank of Africa Kenya Limited on 13 march 2015, and I&M Bank Limited and Kenya Commercial Bank Limited on 20 March 2015.

As you are aware the company has been experiencing cash flow problems and most of its on-going projects have nearly stalled and for this reason it has become necessary to rationalize the operations of the company and terminate the services of the employees. I therefore regret to inform you that your services are terminated with effect from April 2015.

Any claim you have against the company will be dealt with in accordance with the provisions of the Companies Act (Cap 486)...

Your certificate of service is in the course of preparation and you will be advised when to collect it.

The Receivers and managers act as agents of the company without personal liability. ...”

10. Having considered the contents of the foregoing letter, I find that the respondent had a valid reason to justify terminating the services of the claimant. The reason was financial constraints which forced the creditors of the respondent company to place it under Receivers and Managers. Under section 45(2) (b) of the Employment Act, operational requirements of the employer is a valid and fair reason for terminating the services of an employee.

PROCEDURE

11. Section 40(1) of the Employment Act provides for a mandatory procedure for redundancy. First, it provides for at least one month prior notice in writing to the employee or his trade union, and the area Labour Officer. Second, it provides for a fair selection process of the person to be laid off including a consideration of seniority in time and skill. Third, there should be no unfair treatment on the basis of union membership. Fourth, employer must pay accrued leave. Fifth, employer must pay at least one month salary in lieu of notice, plus severance pay of not less than 15 days' pay for each completed year of service.

12. In this case the Respondent has not produced any written notice of the said redundancy served on the Claimants and the area Labour Office at least one month before the effective date of the redundancy. The only letter produced was the one dated 9.4.2015, which terminated the claimant's services with effect from the same day. As a result of the failure to serve the notice before the intended

redundancy, there were no consultations with the claimant and the labour officer to try and avert the redundancy or to mitigate the adverse effects of the redundancy.

13. The jurisprudence emerging from our Courts is that redundancies and their extreme effects can be averted or minimized through the use of consultations between employers and their employees, either directly or through their representatives. In **Kenya Airways Limited v. Aviation & Allied Workers Kenya & 3 Others [2014] eKLR** the Court of Appeal stated as follows:

“The purpose of the notice under section 40 (1) (a) and (b) of the Employment Act, as is also provided for in the said ILO Convention No. 158 – Termination of Employment Convention, 1982, is to give the parties an opportunity to consider “measures to be taken to minimise the terminations and measures to mitigate the adverse effects of any terminations on the workers concerned such as finding alternative employment.” The consultations are therefore meant to cause the parties to discuss and negotiate a way out of the intended redundancy, if possible, or the best way of implementing it if it is unavoidable. This means that if parties put their heads together, chances are that they could avert or at least minimise the terminations resulting from the employer’s proposed redundancy. If redundancy is inevitable, measures should be taken to ensure as little hardship as possible is caused to the affected employees.” [Emphasis added]

14. Having found that the notice of the redundancy was never served on the claimants and the local labour officer, and that no formal consultations were held to try and avert or minimise the redundancies or effects of the redundancy, I see no need of considering whether a fair selection was conducted.

15. Further, the respondent did not comply with the other procedural requirements set out under section 40 of the Employment Act including the computation and payment Salary in lieu of notice, accrued leave and severance pay before the effective day of the redundancy. In this case the respondent informed the claimant that his claims will be dealt with under the Companies Act. Finally, the respondent did not issue certificate of service to the claimant but it promised to prepare and call him to collect. Having considered the foregoing procedural lapses, I find and hold that the termination of claimant’s contract of service was not odne in accordance with a fair procedure set out under section 40 of the Employment Act.

Violation of the claimant’s constitutional rights

16. The claim that the claimant’s constitutional rights were violated does not meet the competence threshold and as such I decline to entertain the same. The competency threshold was set out by the High Court of Kenya in **Anarita Karimi Njeru –v-Republic [1979] eKLR** where it was held that:

“we would, however, again stress that if a person is seeking redress from the high Court on a matter which involves a reference to the constitution, it is important (if to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provision said to be infringed, and the manner in which they are alleged to be infringed.”

RELIEFS

17. Having found that the termination of the claimants’ employment on account of redundancy was done without following the mandatory procedure set out by section 40 of the Employment Act, I make a declaration that the termination was unfair and unlawful.

18. Flowing from the foregoing, the claimant is entitled to one month salary in lieu of notice for being laid off without prior notice. He is also awarded 6 months’ salary as compensation for the unfair termination considering his long service of 8 years and the fact that he did not cause the termination through misconduct. The foregoing award will be based on a gross salary of Kshs. 650,000 per month which he pleaded despite the pay slips produced as exhibits showing a higher salary.

19. The claimant is also entitled to salary for the nine days worked in April 2015 before the separation.

20. The claim for service pay fails because the said pay slips show that he was a contributing member of the NSSF and as such under section 35(6) of the Employment Act, he was disqualified from claiming service pay.

21. The claim for damages for constitutional violations is declined because the claim did not meet the competence threshold. Likewise, the claim for Bonus for the years of service is declined for lack of particulars and evidence to substantiate.

22. However the claim for certificate of service is granted by dint of section 51 of the Act.

Conclusion and disposition

23. I have found that the termination of the claimant’s employment contract on account of redundancy was unfair and unlawful. I have further found that the claimant is entitled to some of the reliefs sought. Consequently, I enter judgement for him against the respondent as follows:

Notice	Kshs. 650,000
Compensation	Kshs.3, 900,000

Salary for 9 days Kshs. 195,000

Total Kshs. 4,745,000

24. The above award will be paid subject to statutory deductions but in addition to costs and interest at court rates from the date hereof.

DATED, SIGNED AND DELIVERED IN NAKURU THIS 15TH DAY OF OCTOBER, 2021.

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 15th April 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