



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT MOMBASA
CAUSE NO 435 OF 2016

JAMES KINENE MURAGURI.....CLAIMANT

VS

RAFFIA BAGS (EAST AFRICA) LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. This is an employment dispute between James Kinene Muraguri and Raffia Bags (East Africa) Limited. By his Statement of Claim dated 17th May 2016 and filed in court on 7th June 2016, the Claimant seeks several prayers including damages, compensation and terminal dues.
2. The Respondent filed a Statement of Response on 20th July 2016 but did not attend the trial in spite of due notice. Both parties filed final submissions.

The Claimant’s Case

3. The Claimant states that in 2012, Raffia Bags (EA) Limited acquired the business then known as Raffia Bags (Kenya) Limited where the Claimant worked in the position of Shift Manager from 2010 to 2012.
4. Upon the acquisition, Raffia Bags (Kenya) Limited declared the Claimant redundant and paid him his dues on the subsisting contract of employment as follows:

- a) 2 months’ salary *ex gratia* payment.....Kshs. 197,942
- b) Severance pay for 3 years @ 20 days per year.....228,394
- c) One month earned leave (basic).....86,061
- d) 3 months’ salary in lieu of notice.....258,183

5. On 16th March 2012, immediately after the Claimant’s disengagement with Raffia Bags (Kenya) Limited, the Respondent engaged the Claimant as a Shift Manager, but did not issue him with a contract of service.
6. On 3rd February 2016, the Respondent issued a notice dated 1st February 2016, declaring the Claimant’s position redundant effective 29th February 2016.
7. The Claimant contends that the termination of his employment on account of redundancy was wrongful and unfair, as he was not accorded a hearing before service of the redundancy notice dated 3rd February 2016. He adds that when he protested, his employer offered to retain him on the payroll over the three-month notice period.
8. The Claimant cites the following as particulars of breach:

- a) The Claimant was not given a contract of service on 16th March 2012;

- b) The Claimant was not subjected to a fair selection process before being declared redundant;
- c) As the sole Night Shift Manager, Production the Claimant's work and night shift assignment remained intact, without a Shift Manager;
- d) The employer orally offered to retain the Claimant as a Night Shift Manager, Production even after expiry of the redundancy notice period on 29th February 2016;
- e) There were no grounds for declaring the position of Night Shift Manager, Production redundant and none were given to the Claimant;
- f) The Labour Officer was not involved in the redundancy selection process, if any;
- g) The Claimant was not afforded a hearing before being served with the redundancy notice;
- h) The Claimant's position was declared redundant after the Claimant insisted that the Respondent should employ another Night Shift Manager to relieve him following elevation of the other Shift Manager to Factory Manager;
- i) The Respondent did not offer to pay severance on the same terms as Raffia Bags (K) Limited yet the Respondent had assimilated the employee on the terms he enjoyed on 15th February 2012;
- j) The night shift operational requirement of the Respondent dictated that there be at the very least 2 Night Shift Managers as the factory ran for 24 hours, 7 days a week;
- k) The selection of only the Claimant for redundancy was not justifiable in all the circumstances of the case.

9. The Claimant maintains that declaration of redundancy in respect of the Night Shift Manager's position was discriminatory and in contravention of Articles 27 and 41 of the Constitution of Kenya, 2010. He gives the following particulars in this regard:

- a) The Respondent's decision to declare the position of Night Shift Manager redundant was prompted by the Claimant's demand for reasonable working conditions;
- b) The Respondent's decision to declare the position of Night Shift Manager redundant was reached without adherence to the natural justice principle- *audi alteram partem*;
- c) The Respondent's selection and singling out of the Claimant for redundancy after he demanded the employment of another Night Shift Manager to relieve him, was unfair and not justifiable in the circumstances of the Respondent's factory;
- d) The terms and conditions of service were never reviewed upwards for the entire period the Claimant worked in the Respondent Company;
- e) The Claimant was subjected to unfair working conditions as he was required to manage night shift production alone for over 2 years without a reliever;
- f) For over 2 years, the Claimant did not spend a single night in his matrimonial residence on a working day as he continuously worked night shift, save for his off day on Thursday of every week;
- g) The Claimant worked a minimum of 10 hours a night for 5 days and on the 6th day, he put in a minimum of 8 hours between 3.00 pm and 11.00 pm;
- h) The Respondent never paid the Claimant overtime for the extra night hours worked between 2012 and 2016;
- i) The Claimant was, in these circumstances forced to ask his employer to improve his working conditions to save his marriage and family;
- j) For trying to get reasonable working conditions, the employer declared the Claimant's position redundant;
- k) To the Claimant's knowledge, no new Night Shift Manager had been retained.

10. The Claimant therefore contends that the declaration of redundancy was wrongful, unreasonable, unfair and in breach of his fundamental rights. He now claims the following:

- a) Severance pay for 5 years.....Kshs. 380,657
- b) Earned leave (basic).....86,061

- c) 3 months' pay in lieu of notice.....258,183
- d) Fuel allowance for Dec 2015; Jan-Feb 2016.....15,000
- e) *Ex gratia* payment (2 months gross pay).....197,942
- f) Overtime (8 hours per week for 192 weeks).....1,032,732
- g) 12 months' pay in compensation.....1,187,652
- h) General and exemplary damages for discrimination and breach of the Claimant's fundamental rights guaranteed under the Constitution, 2010 to be assessed by the Court
- i) Costs of the claim

The Respondent's Case

11. In its Statement of Response dated 19th July 2016 and filed in court on 20th July 2016, the Respondent admits having engaged the Claimant on 16th March 2012, after the Respondent acquiring the Plant from Raffia Bags Kenya Limited.

12. The Respondent states that it was not privy to the Claimant's previous contract with Raffia Bags Kenya Limited nor the terms of severance negotiated and settled between the Claimant and his former employer at the time of acquisition.

13. The Respondent further states that as a new entity, it employed the Claimant as a Shift Manager on 16th March 2012 on new terms, following independent negotiations between the Claimant and the Respondent's Human Resources Manager, who was only privy to the Claimant's last pay slip to confirm his last remuneration.

14. The Respondent admits not issuing a contract of service to the Claimant but avers that it was implied in the oral employment contractual arrangement between the Claimant and the Respondent's Human Resources Manager that the terms and conditions of employment would adhere to and be governed by the Employment Act.

15. The Respondent denies the Claimant's averment that the parties agreed to retain, incorporate and/or assimilate the Claimant's terms and conditions of employment with the Claimant's previous employer in his new employment and avers that if at all, which is denied, the parties agreed to retain such terms, the Claimant's former employment contract annexed to the Statement of Claim does not correspond with the enumeration under paragraph 4 of the Statement of Claim.

16. The Respondent admits issuing a notice of redundancy to the Claimant and avers that the notice was issued in consonance with the provisions of Section 40 of the Employment Act in regard to the procedural guidelines and terms of settlement.

17. The Respondent denies that the termination of the Claimant's employment on account of redundancy was wrongful or unfair and avers that there had been several discussions between the Claimant and the Human Resources Manager on the prevailing economic conditions the Company was operating in with respect to financial and operational challenges.

18. The Respondent adds that the prospect of the Claimant being declared redundant was known to the Claimant and reasonably anticipated prior to the issuing of the termination notice on account of redundancy.

19. The Respondent further denies that the Claimant ever challenged the employer on the redundancy and avers that it is the Claimant who insisted that he ought to work for two more months or be paid for an additional two months as per his initial terms of service with Raffia Bags Kenya, which supposition the Respondent neither implied to the Claimant nor agreed to.

20. In denial of the particulars of breach enumerated at paragraph 7 of the Statement of Claim the Respondent avers as follows:

- a) The Claimant was not issued with a contract of service but the parties agreed to be bound to the terms and conditions of employment as stipulated under the Employment Act;
- b) The Claimant's position was the only position affected by the redundancy at the time, and as such since the Claimant was the only employee in that position, he was the only subject of redundancy at the time;
- c) Initially the Respondent had two Night Shift Managers but one left when the Company scaled down operational output, meaning that there was no need for regular production, hence the retention of the Claimant as the only Shift Manager;
- d) The Claimant's insistence on an additional two months' notice was denied and his employment was effectively terminated on 29th February 2016;
- e) The grounds for termination of the Claimant's employment on account of redundancy were well articulated in his letter of termination as *'restructuring and workforce reorganization due to increased overhead, operational cost and the inability to sustain*

the workforce due to increased cost of production.'

- f) The Labour Officer was notified of the redundancy and a copy of the termination letter on account of redundancy sent to the Labour Officer in compliance with the provisions of Section 40(1)(b) of the Employment Act;
- g) The Claimant never asked for the employment of another Shift Manager to relieve him. The former Shift Manager was never elevated and in fact resigned from employment on his own volition after securing a job elsewhere;
- h) The Respondent never offered to incorporate and/or assimilate the Claimant's terms of severance with his previous employer either during the Claimant's employment with the Respondent or in the period leading to termination on grounds of redundancy;
- i) The operational requirement alleged by the Claimant for two Night Shift Managers for 24 hours, 7 days a week did not exist, the Company could operate for 24 hours without a Night Shift Manager, the presence or absence of a Night Shift Manager did not directly or indirectly affect operations;
- j) The termination of the Claimant's employment on account of redundancy was justified as his position was no longer an operational requirement.

21. The Respondent also denies the particulars of discrimination and contravention of Articles 27 and 41 of the Constitution enumerated in paragraph 8 of the Statement of Claim.

22. The Respondent reiterates that the termination of the Claimant's employment on account of redundancy was executed in accordance with the provisions of the Employment Act.

23. The Respondent avers that the Claimant's final dues were prepared in accordance with the terms and conditions of employment stipulated under the Employment Act as hereunder:

- a) 4 years' severance pay (16.03.12 to 29.02.16).....Kshs. 228,394.61
- b) 3 days accrued leave.....12,371.37
- c) Fuel allowance (12/2015,01/2016,02/2016).....15,000.00
- Total final dues before tax.....**255,765.98**

24. The Respondent states that the Claimant declined to receive his final dues.

Findings and Determination

25. There are two (2) issues for determination in this case:

- a) Whether the termination of the Claimant's employment was lawful and fair;
- b) Whether the Claimant is entitled to the remedies sought.

The Termination

26. On 1st February 2016, the Respondent wrote to the Claimant as follows:

"Dear Mr. Muraguri,

RE: TERMINATION OF EMPLOYMENT ON ACCOUNT OF

REDUNDANCY

The above subject refers

We would like to inform you that the management has embarked on restructuring and reorganisation of its workforce due to increase (sic) overhead/operating cost and the inability to sustain the same increased cost of production.

*In view of the foregoing we therefore regret to notify you that your employment with us shall be terminated effective **29th February, 2016** as result of your position being declared redundant.*

You will be entitled to severance pay as provided for in section 40 of the Employment Act 2007 Laws of Kenya.

The management recognizes and appreciates the services that you have rendered to the company and therefore wishes you all the best in your future endeavours.

Yours faithfully

Raffia Bags (EA) LTD

(Signed)

V. Ouma

Human Resources Manager

CC: County Labour Officer Mombasa County”

27. The reason given for termination of the Claimant’s employment is redundancy. Section 2 of the Employment Act, 2007 and the corresponding section in the Labour Relations Act, 2007 define redundancy 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 services of an employee are superfluous and the practices commonly known as abolition of office, job or occupation and loss of employment.”

28. As held in *Jane I Khalechi v Oxford University Press E.A. Ltd [2013] eKLR*) redundancy is defined by two significant factors; first, it is undertaken at the instance of the employer and second, the conduct of the employee is not in issue.

29. Because of the unique nature of this mode of separation, the law places a heavy responsibility on the employer not only to secure the rights of the affected employee but also to ensure that the redundancy exercise is undertaken fairly and objectively.

30. Towards this end, Section 40 of the Employment Act provides as follows:

40. (1) An employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions –

(a) where the employee 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 reasons for, and the extent of, the intended redundancy not less than a month prior to the date of the intended date of termination on account of redundancy;

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

(c) the employer has, in the selection of employees to be declared redundant had due regard to seniority in time and the skill, ability and reliability of each employee of the particular class of employees 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 where leave is due to an employee who is declared redundant, paid off the leave in cash;

(f) 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

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

31. The first two conditions under Section 40 of the Employment Act have to do with notice to the affected employee, their trade union (where one exists) and the local Labour Officer.

32. The third condition deals with the selection criteria, including seniority in time, skill ability and reliability of each employee within the affected establishment.

33. The last four conditions set out the statutory benefits to be paid to an employee declared redundant.

34. Regarding the factor of notice, the Court of Appeal in *Thomas De La Rue v David Opondo Omutelelma [2013] eKLR* and *Kenya Airways Limited v Aviation & Allied Workers Union of Kenya & 3 others [2014] eKLR* decisively determined that in every redundancy situation, two separate and distinct notices, of not less than a month each, are required.

35. The first notice is a general one to employees within the targeted establishment, the relevant trade union and the local Labour Officer. By definition, this notice should set out the reasons and extent of the intended redundancy. The second notice is a termination notice addressed to each affected employee individually.

36. The only notice availed to the Court in this case is the termination letter dated 1st February 2016, addressed to the Claimant and copied to the Mombasa County Labour Officer.

37. In the *Kenya Airways Case* (supra) **Maraga JA** (as he then was) stated the following:

“The notices under this provision are not merely for information. The purpose of the notice under Section 40(1) (a) and (b) of the Employment Act, as is also provided for in...ILO Convention No. 158 Termination of Employment Convention, 1982, is to give the parties an opportunity to consider ‘measures to be taken to avert or to minimize 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.”

38. The substance of the finding by the learned Judge of Appeal, with which I fully associate myself is that the notices under Section 40 (1) of the Employment Act carry an imperative for consultation. Regarding the notice to the Labour Office, the intention is to elicit advice to the employer in addition to providing a safeguard against abuse of redundancy processes and procedures (See *Bernard Misawo Obora v Coca-Cola Juices Kenya Limited [2015] eKLR* and *Fredrick Mulwa Mutiso v Kenya Commercial Bank Limited [2017] eKLR*).

39. The Claimant told the Court that he had no prior notice of the redundancy. In its Response and final submissions, the Respondent made a general statement that there were some discussions on the redundancy, between the Claimant and its Human Resources Manager. This statement, which did not carry any particulars, was however not supported by any evidence and the Court attached nil probative value to it.

40. On the selection criteria for the redundancy, the Respondent states that only the Claimant’s position was affected and this condition did not therefore apply. This may well have been the case but because the Claimant had all along maintained that there was no genuine case of redundancy, the Respondent ought to have dispelled this serious accusation by tangible evidence.

41. It was not lost on the Court that the Claimant was the only Night Shift Manager, Production and the Respondent ought to have answered the lingering question as to what had happened to the functions of this position. It was not enough to simply state that the ‘*management had embarked on restructuring and reorganisation of its workforce due to increase in overhead/operating cost and the inability to sustain the same*’.

42. The Respondent should have given further explanation especially in view of the Claimant’s assertion that the termination was a punishment to him for demanding better working conditions. According to the Certificate of Service issued to the Claimant on 29th February 2016, the Claimant was ‘*hardworking, obedient, and reliable*.’ To lose such an employee, there ought to have been a good reason, which the Respondent did not share with the Court.

43. As held by my brother **Radido J** in *Stephen Karisa Jefwa v Elsek & Elsek (K) [2014] eKLR* an employer who wishes to invoke redundancy as a ground for termination of employment must prove that the reasons for redundancy are valid and fair.

44. As demonstrated in the foregoing parts of this judgment, the Respondent not only failed to issue the statutory redundancy notice but more importantly did not convince the Court that the redundancy was not coloured. For these reasons, I find and hold that the termination of the Claimant’s employment was substantively and procedurally unfair and he is entitled to compensation.

Remedies

45. I therefore award the Claimant eight (8) months’ salary in compensation. In arriving at this award I have taken into account the Claimant’s length of service coupled with the Respondent’s conduct in executing the redundancy.

46. The Claimant also lays a claim for redundancy benefits based on his exit terms from Raffia (Kenya) Limited. It is common ground that upon engaging the Claimant, the Respondent did not issue him with a written contract of service. The only thing to do in such a situation is to adopt the terms and conditions set out in the Employment Act.

47. Based on this, the Claimant is entitled to severance pay at the rate of fifteen (15) days’ pay for every completed year of service. No basis was established for the claim for *ex gratia* payment.

48. According to the termination letter, the Claimant was given a month’s notice as provided in the Employment Act. The claim for three months’ pay in lieu of notice is therefore without basis and is dismissed.

49. The claim for overtime compensation was not proved and no basis was established for the claims for general and exemplary damages. These claims therefore also fail and are disallowed.

50. The claims for leave pay and fuel allowance are admitted and are payable.

51. In the end, I enter judgment in favour of the Claimant as follows:

a) 8 months' salary in compensation.....	Kshs. 791,768.00
b) 4 years' severance pay (16.03.12 to 29.02.16).....	228,394.61
c) 3 days accrued leave.....	12,371.37
d) Fuel allowance (12/2015,01/2016,02/2016).....	<u>15,000.00</u>
Total.....	1,047,533.98

52. This amount will attract interest at court rates from the date of judgment until payment in full.

53. The Claimant will have the costs of the case.

54. Orders accordingly.

DATED SIGNED AND DELIVERED AT MACHAKOS THIS 7TH DAY OF MAY 2020

LINNET NDOLO

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, this judgment has been delivered to the parties electronically, with their consent. The parties 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, the Court is guided by Article 159(2)(d) of the Constitution of Kenya which commands the Court to render substantive justice without undue regard to technicalities, Article 40 of the Constitution which guarantees access to justice, and Section 18 of the Civil Procedure Act which imposes a duty to employ suitable technology to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

LINNET NDOLO

JUDGE

Appearance:

Mr. S.M. Kimani for the Claimant

Mr. Mathare for the Respondent