



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1021 OF 2015

(Before Hon. Justice Hellen S. Wasilwa on 25th April, 2019)

DEREK WANGAKI OKOVA.....CLAIMANT

VERSUS

TOTAL KENYA LIMITED.....RESPONDENT

JUDGEMENT

1. The Claimant filed the instant Claim vide an Amended Memorandum of Claim filed on his behalf by the firm of Onyony and Company Advocates on 15th February, 2018 seeking the following prayers:-

a) A declaration that the Respondent is in breach of the provisions of the Employment Act No. 11 of 2007 and the law in the following respect:-

- i. By discriminating against the Claimant contrary to the provisions of Section 5 of the Employment Act No. 11 of 2007.***
- ii. By failing to notify the Claimant personally or the Labour Officer the reasons for and the extent of the intended redundancy of the Claimant at least one month prior to the date of intended date of termination on account of redundancy contrary to Section 40 (1) (a) and (b) of the Employment Act No. 11 of 2007.***
- iii. By failing to issue, a termination notice as per the Claimant's contract of employment.***
- iv. By failing to take into account, in the selection of the Claimant as an employee to be declared redundant, due regard to seniority in time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy contrary to Section 40 (1) (c) of the Employment Act No. 11 of 2007.***
- v. By unfairly, unlawfully and summarily terminating the employment of the Claimant contrary to Section 45 (1) of the Employment Act. No. 11 of 2007.***

b) A declaration that the Respondent is in breach of the contract of service in the following respect:-

- i. By discriminating against the Claimant in the mode of selection of employees to be declared redundant contrary to the Respondent's separation Procedures dated November 2014.***
- ii. By terminating the Contract of Service without any just or lawful cause.***

c) An Order for a permanent injunction prohibiting the Respondent, whether by itself, its servants and or agents or otherwise howsoever from repossessing the Claimant's Motor Vehicle Registration Number KBZ 061B.

d) An Order compelling the Respondent to hand in the Log Book and execute the necessary transfer document of the motor vehicle registration number KBZ 061B.

e) An Order for damages against a permanent injunction prohibiting the Respondent, for unlawfully, unfairly and wrongfully whether by itself, its servants and or agents or otherwise howsoever from declaring the Claimant redundant.

f) An Order for compensation at the rate of 12 months of the Claimant's salary Kshs. 5,743,332/-.

g) Costs and interest on costs of the suit.

h) Any other or further relief that the Honourable Court may deem fit to grant.

Facts of the matter

2. The Claimant was employed as a Technical & Engineering Manager within the Respondent's Operations Department with effect from 15th June, 2013 at a monthly salary of Kshs 420,000.00 per month. He carried out his duties diligently and dutifully from the date of employment and this was evidenced by the salary increments he received with the last increment as at May 2015 earning a basic salary of Kshs. 478,611.00 per month.
3. The Claimant further states that on or about 4th June 2015 with insufficient notice and improper consultation the Respondent served him with a Notification of Redundancy, which was to take effect on 30th June, 2015.
4. The Claimant gave his evidence on 4th December, 2018, reiterated the averments in the Amended Memorandum of Claim. The Claimant sought and was allowed to adopt his witness statement dated and filed in Court on 15/6/2015 adopted as his evidence in chief.
5. The Claimant further stated that the Respondent declared him redundant unfairly as evidenced by the notice of redundancy dated 4/6/2015, which was effective as from 30/6/2015. It was CW1's further evidence that the role he was handling while under the Respondent's employment still exists to date.
6. CW1 averred that the Respondent hired several people including one Alex Ndalila who was having similar qualifications as those of CW1. The Respondent however, directed that he remains in employment in compliance with the Court Order.
7. CW1 further averred that the Respondent was in good financial management as evidenced by the profit of 1.3 billion in 2013 and a further profit of Kshs 1.4 billion in the year 2014. It was CW1 further evidence that the Respondent had no reason to declare him redundant.
8. CW1 contended that his performance while under the Respondent's employment was above par as evidenced by the appraisal conducted by the Respondent in the year 2015 in which CW1 scored 81% cumulatively but scored 90% as an individual.
9. CW1 testified that on 15/7/2015 he was sent on compulsory leave, which was indefinite and was also kicked out of the system which meant that he would not be eligible for allowances. CW1 further testified that he had a car loan with the Respondent, which he confirmed having fully paid however, he stated that the Respondent was yet to hand over the Logbook for the said Motor Vehicle despite the fact that he had cleared the loan.
10. CW1 contended that he was negatively affected by the redundancy and urged the Court to allow his Claim as prayed.
11. The Respondent has filed an Amended Memorandum of Response Amended on 19th April 2018 and filed in Court on 20th April, 2018 through the firm of Mohammed Muigai Advocates where they admit having engaged the Claimant herein. However, current employment is denied.
12. The Respondent further admitted that the Claimant on or about 12th June 2014 took a car loan of Kshs. 4,070,208.00 under the Respondent's Car Scheme Procedures.
13. The Respondent avers that due to increased market competition coupled with the global fall in oil prices resulting in reduced market share, the Group undertook a cost saving and business realignment initiative in March 2014 in order to enhance its competitiveness globally. Further, the Respondent avers that its Managing Director communicated changes and planned reorganization to other members of staff on 15th September, 2014 including the Claimant herein whose role was impacted by the re-organisation.
14. The Respondent further avers having held meeting on 27th May, 2015 between its representatives and the Claimant herein whom they informed of the reorganisation and he was informed of the terms of separation.
15. The Respondent contends that the Claimant sought to be employed by KETRACO while still under the Respondent's employment a fact which was brought to the Respondent's knowledge when KETRACO wrote to Respondent prompting the Respondent's action to terminate the Claimant's services summarily.
16. The Respondent urged the Court to dismiss the Claim with Costs to the Respondent.
17. RW1, Mbithe Semo, the Talent Development Manager, testified on behalf of the Respondent herein on 12th February, 2019. She reiterated the averments in the Amended Memorandum of Response. RW1 sought and was allowed to adopt her witness statement dated and filed in Court on 11/02/2019 adopted as her evidence in chief.
18. In her statement, RW1 confirmed that the Claimant was indeed an employee of the Respondent herein working in the position of Technical Engineering Manager within Operations Department of the Respondent as evidenced by his Appointment letter dated 6th May, 2013 annexed to the Claimant's bundle of documents.

19. RW1 further confirmed that the Claimant applied for a car loan, which was granted and was to be governed by the Car Scheme Procedures. She further averred that the Claimant is yet to fully settle the outstanding loan balance prompting the Respondent to repossess the said Motor Vehicle Registration Number KBZ 061B.

20. RW1 contended that the Claimant was declared redundant following due process as set out in the Employment Act, 2007. The Claimant however approached the Court through a Notice of Motion Application in which he inter alia sought temporary injunctive relief preventing the Respondent from declaring him redundant, which orders were issued and a ruling delivered on 14th December, 2015 thus the Respondent was unable to declare the Claimant redundant.

21. RW1 further contended that it was in the course of the Claimant's employment that he sought and gained employment at KETRACO and that the Claimant worked simultaneously for both the Respondent herein and KETRACO for a period of five (5) months as evidenced by the correspondence annexed to the Respondent's supplementary list and bundle of documents as documents no. 2, 3 and 4 respectively.

22. RW1 averred that by getting gainful employment at KETRACO the Claimant breached his terms of the employment contract prompting his dismissal.

23. In evidence, RW1 averred that the Claimant left the Respondent's employment through redundancy, which affected 6 other employees.

24. RW1 further averred that during the subsistence of the employment relationship the Claimant was advanced a car loan, which was outstanding at Kshs. 42,000/- at the time of termination of exit.

25. On cross-examination, RW1 stated that the main reason for redundancy was economic. She further stated that all commercial projects were moved to marketing as well as part of the work done by the Claimant herein was also moved to marketing.

26. RW1 further stated that the decision to declare some positions redundant was a management decision and that there was no position within the Respondent Company that could be filled by the Claimant herein. She added that following the Claimant's separation from the Respondent's employment no engineer was engaged by the Respondent to fill the position held by the Claimant.

27. On further cross-examination RW1 stated that it was following his notification of the process of redundancy that the Claimant moved to Court seeking to stop it. Further, it was RW1's evidence that indeed the Claimant was away on leave. However, she admitted that the date to report back to work was not indicated in the leave form as there was no work since all the work was moved to the marketing department.

28. RW further averred that the car loan was to be repaid in years while the Claimant has only been engaged by the Respondent for a period of 3 years leaving an outstanding balance of Kshs. 42,000/-.

29. RW1 urged the Court to dismiss the Memorandum of Claim as drawn.

30. Parties thereafter filed and exchanged written submissions.

Claimant's Submissions

31. The Claimant filed his submissions on 12th December, 2018 and filed supplementary written submissions on 21st February, 2019.

32. The Claimant has submitted that the notice for redundancy was not procedural and as such was unlawful and unfair. The Claimant argued that the said notice was issued less than 1 month from the date of intended redundancy in complete violation to the provisions of Section 40 of the Employment Act. For emphasis the Claimant cited the Authority of **Thomas De La Rue (K) Ltd Vs David Opondo Omutelema (2013) eKLR** where the Court of Appeal held that:-

"It is quite clear to us that Sections 40(a) and 40(b) provide for two different kinds of redundancy notifications depending on whether the employee is or is not a member of a trade union. Where the employee is a member of a union, the notification is to the union and the labour officer atleast one month before effective redundancy date. Where the employee is not a member of the union, the notification must be in writing and to the employee and the labour officer. Section 40 (b) does not stipulate the notice period as in the case of 40 (a), but in our view, a purposive reading and interpretation of the statute would mean the same notice period is required in both situations. We do not see any rational reason why the employee who is not a member of a union should be entitled to a shorter notice."

33. The Claimant further submitted that the redundancy was not justified and that it was not in conformity with the provisions of Section 43 of the Employment Act, 2007. The Claimant further submitted that the Respondent neither conducted any job evaluation nor deployed him to another department but it terminated his services despite the fact that it did hire new staff under the pretext of cost cutting.

34. It is further submitted that no attempt was made by the Respondent to prove the validity and fairness in the process of redundancy. To fortify his argument the Claimant cited the case of **Kombo Kai Mtoro Vs Patel Freighters Ltd (2013) eKLR** for emphasis.

35. It is the Claimant's further submission that the Respondent has given varied reasons for the redundancy proving that the redundancy was fake and conjured up. For emphasis the Claimant relied on the Authority of **Kenya Airways Limited Vs Aviation & Allied Workers Union Kenya & 3 Others (2014) eKLR**.

36. The Claimant contended that the Respondent defied the Court Orders issued on 15th June, 2015 by sending him on forced leave pending

hearing and determination of the instant claim. Further, the Respondent even stopped remitting the Claimant's NSSF payments during the said period he was on leave in complete disregard of the Court Orders of 15th June 2015.

37. The Claimant submitted that the Court takes note of this blatant disregard for the Court and the law. To fortify his submission the Claimant sought to rely on the case of **Sam Nyamweya & 3 Others Vs Kenya Premier League Limited & 2 Others (2015) eKLR** for emphasis.

38. The Claimant further submitted that he was deserving possession of the Motor Vehicle Registration Number KBZ 061B as the Respondent is holding the same on account of an outstanding debt of Kshs. 42,000/- yet it did not provide any accounts for scrutiny to demonstrate the amount that is due if any. In the alternative, the Claimant submitted that should there be a debt then the Respondent cannot repossess the motor vehicle before the end of 60 months as agreed.

39. In conclusion, the Claimant submitted that the redundancy was not genuine as the Respondent went on to hire staff following the Claimant's separation from the Respondent's employment. For emphasis the Claimant relied on the **Authority of Jane I Khalechi Vs Oxford University Press E.A Ltd (2013) eKLR**. The Claimant urged the Court to allow his Claim as prayed.

Respondent's Submissions

40. It is submitted by the Respondent that the Claimant herein was not declared redundant following the intervention of this Honourable Court and subsequent Orders not to declare the Claimant redundant pending hearing and determination of this Claim. The Respondent further submitted that the elements of redundancy as provided under Section 21 of the Employment Act, 2007 have been satisfied in this Claim.

41. The Respondent further submitted that it did comply with the Court Order not to declare the Claimant redundant as evidenced by there being no contempt of court proceedings filed against it for failure to comply with court orders. It is submitted that the Claimant voluntarily left the Respondent's employment following the discovery of his simultaneous employment at KETRACO.

42. The Respondent further submitted that it is entitled to sell the car as prescribed by the car scheme procedures that provides that a vehicle is to be sold if the Claimant "is unable to clear the outstanding loan balance at the time of separation from the Company."

43. It is the Respondent's further submission that the Claimant acknowledged the outstanding car loan balance as evidenced by the emails between the Claimant and the Respondent annexed to the Respondent's Amended Memorandum of Response and that the debt is yet to be settled.

44. In conclusion, the Respondent submitted that the Claimant's Claim ought to be dismissed with costs to the Respondent.

45. I have examined all the evidence and submissions of all the Parties. The issues for determination by this Court are as follows:-

1. Whether the decision to declare the Claimant redundant was lawful and justified.

2. Whether the Claimant is entitled to the remedies sought.

46. On the 1st issue, the Claimant was served with a redundancy notice letter on 4/6/2015 indicating that the redundancy was to take effect on 30th June 2015. The Claimant has submitted that this notice was illegal and therefore null and void as the notice period was below the required notice as provided under Section 40 of Employment Act.

47. Section 40 of Employment Act states as follows:-

(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 the 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 to 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”.

48. Indeed, under Section 5(f) the notice period should be 1 month but in case of the Claimant, he was given less than 1 months' notice and therefore there was a clear breach of the law.

49. Following this notice, the Claimant approached Court on 15/6/2015 under Certificate of Urgency and was given orders stopping the taking effect of the redundancy thus translating him to work. He also got orders, which stopped the Respondent from repossessing motor vehicle registration No. KBZ 061 B, which he had bought through a loan given to him by the Respondent. These orders were confirmed pending the hearing and determination of this claim.

50. The Claimant has also submitted that the reason for his redundancy were not factual because the position he was occupying still exists todate but had been moved to a new department and several people were hired after this who had similar qualifications to his.

51. He also indicated that the Respondent was in a good financial standing as per the company accounts and therefore there was no reason for the retrenchment.

52. Given that this Court stopped the Claimant's intended redundancy, there was no redundancy effected upon the Claimant and he remained an employee of the Respondent till he left employment. There was therefore no redundancy in place that was to be adjudicated upon by this Court.

53. The Claimant has also averred that he was sent on compulsory leave on 15th July 2015 after the Court stopped the redundancy. He contends that this was an unlawful redundancy.

54. A redundancy cannot be equited to a compulsory leave and therefore the contention that the Respondent declared him redundant by sending him on compulsory leave cannot be far from the truth.

55. Having declared as above that there was no redundancy effected against the Claimant as the process was stopped by Court, I will not delve into any issues surrounding a redundancy situation, which does not exist.

56. The only issue that remains therefore surrounds motor vehicle KBZ 061 B which the Claimant wants the Respondent compelled to hand in the log book and execute the necessary transfer documents to him.

57. The Claimant has averred that he paid for this vehicle fully. The Respondent on their part aver that the Claimant failed to pay 42,000/=. The Respondent did not produce documents detailing how they arrived at the 42,000/= unpaid loan which the Claimant avers was fully paid.

58. At page 18 of his documents the Claimant demonstrated that he had fully paid for this loan which payment was acknowledged by Standard Chartered Bank on 13.10.2017.

59. Having found that the Claimant fully paid for this loan, the Respondent cannot continue holding onto the log book of motor vehicle KBZ 061 B. I therefore allow Claimant's prayer and direct that the Respondent forthwith release the log book of motor vehicle KBZ 061 B to the Claimant and proceed to sign the transfer to him accordingly within 30 days of this judgement.

60. As to other prayers sought, they revolve around a redundancy, which in this case stopped at a redundancy notice. I will therefore not make any orders as prayed.

61. In terms of costs, the Respondent will pay costs of this suit accordingly.

Dated and delivered in open Court this 25th day of April, 2019.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Miss Nyambane holding brief Mr. Cyprian Onyony for Claimant

Onyango holding brief Wetang'ula for Respondent