REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 19 OF 2014

(Before Hon. Lady Justice Hellen S. Wasilwa on 20th December, 2018)

ANCENT MUMO KALANI.....CLAIMANT

-VERSUS-

NAIROBI BUSINESS VENTURES LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant filed suit on 22nd January, 2014, seeking damages for unlawful termination through the firm of Enonda, Makoloo, Makori & Company.

2. He avers that he was employed by the Respondent on 31st July, 2012, as a Shop Manager where he worked diligently and attended his assigned duties promptly and with loyalty until 5th June, 2013, when the Respondent issued the Claimant with a letter of termination in which they cited breach of clause 16 and 17 of the employment letter.

3. He further avers that the termination was unfounded, unwarranted, unfair and false accusations were made against him. That he was not paid his terminal dues upon termination. At the point of termination, he was earning a salary of Kshs. 41,250.00. He further contends that on 25th October, 2011, he was issued with calculated final dues which were incorrect. He urges the Court to declare his termination unfair, null and void, reinstatement without loss of benefits and payment of all his outstanding dues.

4. The Respondent filed a Statement of Defence wherein they admit the employment relationship and state that he earned a gross salary of Kshs. 34,375 and would receive 1% of the total sales generated every month by the retail shop exclusive of VAT.

5. That the Claimant worked of the Respondent until 5th June, 2013, when the Respondent served him with a letter of termination which termination was due to closure for 6 months of the Village Market Mall for renovation purposes.

6. They aver that with that closure, the Respondent would not be able to effect payment of salaries of employees and therefore had to reduce work force through layoffs in order to cut down on costs. Further that the termination was in line with clause 16 and 17 of the letter of employment. That they paid the Claimant one month's salary in lieu of notice and aver that the termination was on account of redundancy and was not in any way unwarranted or unfair.

Evidence

7. In addition to what is contained in the Memorandum of Claim the Claimant in evidence stated he was issued with a letter of termination on 5th June, 2013, prior to which he had not been given a chance to present his side of the story and due process was not followed in effecting the termination. That the Respondent did not produce any evidence in support of the circumstances that led to his termination.

8. That as at the time of termination the Claimant had entered into financial commitments with the knowledge that he had secured a good employment back up at the Respondents. That he had proved himself a good employee hence the salary increment to Kshs. 41,250/=. That the final dues paid to him did not reflect the actual benefits due to him. He urged the Court to allow the claim with costs.

9. The Respondent put up one witness one Aboula Venka Tathya Narayana, the director thereof. He stated that the Village Market shop was completely demolished and the renovations took 1 year and 3 months to be completed. That the Respondent as a result had to let some employees go. That the loss of employment of the Claimant was due to redundancy.

Submissions

10. On behalf of the Claimant it is submitted that the provisions of Section 41, 45(1), (2), (4) and (5) of the Employment Act were not followed for the reason that the manner, timing and reasons for termination of the Claimant's employment are totally unfair. Further that dismissal of an employee by reason of redundancy, although a potentially fair reason for dismissal may be found to be unfair if the reasons behind, or procedures followed during the redundancies are unfair.

11. That the law on redundancy is contained in Section 40 of the Employment Act, 2007 wherein the Respondent was required to serve the Claimant with notice to pave way for negotiations and thereafter a notice of termination. No notice was issued to the Claimant.

12. It is the Claimant's submission that his position did not become redundant but the actions of the Respondent of purporting to close the shop was in effect a redundancy. They cite **Julie Topirian Njeru versus Kenya Tourist Board Industrial Cause No. 886 of 2010,** it was held that termination of employment through redundancy being an involuntary termination must be procedurally fair and substantively justifiable and must follow the law on unfair termination in particular under section 43 and 45 of the Employment Act, 2007. Fairness of the redundancy process includes engagement of the employee by the employer in adequate consultations which should precede any decision on termination.

13. They also rely In Civil Appeal No. 46 of 2013 **Kenya Airways Limited vs Aviation & Allied Workers Union Kenya & 3 Others** where Mr. Justice David Maraga (as he then was) stated as follow:-

> ***"There are two broad aspects of this definition. The first one is that the loss of employment in redundancy cases has to be by involuntary means and at the initiative of the employer. It should not be a contrived situation. It has to be non-volitional. I understand this to refer to a situation, in most cases an economic downturn, brought about by factors beyond the control of the employer, which leaves the employer with no option but to take an initiative the consequences of which will be inevitable loss of employment.***
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> ***The second aspect is that the loss of employment in redundancy has to be at no fault of the employee and the termination of employment arises "where the services of an employee are superfluous" through "the practices commonly known as abolition of office, job or occupation and loss of employment. " In this case, what I understand as required to be determined in this aspect of the definition of redundancy is whether the appellant abolished the offices, jobs or occupations of the affected employees resulting in their services being superfluous hence their loss of employment. Corollary to that that is the justification for that abolition, if the appellant indeed abolished their offices. Determination of these two aspects will, determine the first issue of whether or not the redundancy in this case was necessary".***

14. Other than stating that the Premises was being closed for repairs, it is submitted that the Respondent did not tender any evidence to indicate this claim against them by Claimant was procedurally handled either through a redundancy process or a fair termination and hence his termination was tainted by malice. In this instance, it is submitted on behalf of the Claimant that it is the employer who is the one with the burden of proving the reason(s) for the termination and failure to prove these reason(s) would imply that the termination of contract was unfair. It is submitted that the Respondent has failed to prove that any issues warranting termination existed at the time of termination of the contract. As a result of the unlawful termination the Claimant's Counsel prays for the suit to be allowed with costs.

15. On behalf of the Respondent it is submitted that Section 2 of the Employment Act, 2007 defines 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 the services of an employee are superfluous and the practices commonly known as abolition of office, job or occupation and loss of employment."***

16. They submit that the Claimant's employment was terminated at the instance of the employer and in this matter amounts to a redundancy. They rely on the Court of Appeal Case of **Kenya Airways Ltd and Aviation & Allied Workers Union of Kenya & 3 Others** Civil Appeal No. 46 of 2013:-

> ***"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 a 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 the 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—"***

17. That the Respondent herein has shown that there was a valid and fair reason for termination, in this instance based on operational requirements. Furthermore, that the Claimant herein was offered one month's pay in lieu of notice which he declined to accept.

18. The Respondent's Counsel admits that the Respondent herein failed to issue a letter to the labour officer as required under Section 40 of the Act but that the Respondent should not receive a penalty of more than 1 month's salary for the same. This is due to the fact that the Respondent's witness on stand indicated that he did not know what the proper process for redundancy was and the error was thus not malicious in any way. They cite the case of **Charles Nyangi Nyamohanga vs Action Aid International (2015) Eklr**, where the Court granted 3 months' salary compensation to the employee due to the fact that notice had not been given to the labour officer. The court in that matter took into consideration the amount of time the employee had worked with the employer which was 1 year.

19. As to the remedies the Claimant seeks it is submitted that reinstatement without loss of benefits is not a viable remedy for the reason that Section 49 of the Employment Act provides that an order for re-instatement should be granted in exceptional circumstances.

20. It is submitted that no exceptional circumstances were pleaded or shown in this instance. They cite the case of **Kenya Power & Lighting Company Limited -Versus- Aggrey Lukorito Wasike [2017] eKLR** (Waki, Karanja & Kiage JJ.A) where in holding that matters in Section 49(4) (a) to (m) must be seriously considered before granting the remedy of reinstatement, the Court stated, "A striking feature of the learned Judge's award of reinstatement is that it is not preceded, accompanied or followed by any indication that the foregoing matters were given serious or any consideration as they were required to be. We consider that to be a serious error of law because, as set out in (d), the order of specific performance in a contract for personal services, which an order of reinstatement amounts to, is not to be made except in very exceptional circumstances. At the very least a Judge ought to set out factors that mark out a particular case as possessed of exceptional circumstances before reinstatement can be ordered. This provision, properly understood, ought to render orders of reinstatement rarities, not common place and routine pronouncements as appear to come from certain sections of the Employment and Labour Relations Court. This calls for a strict adherence to the law as carefully and mandatorily set out in the controlling statute."

21. As to the monetary remedies sought by the Claimant counsel cites the decision in **D.K Njagi Marete v Teachers Service Commission [379[N] of 2009,** where the Court emphasized the need for proportionality and fairness in evaluating the suitability of employment remedies. The demands of social justice must be weighed carefully against the needs of economic development. Ultimately, the purpose of compensatory awards is not to punish errant employer, however, egregious their decisions against their employees be; the objective is to ensure economic injury suffered by the employee is adequately addressed. They urge the Court to be so guided.

22. I have examined all evidence and submissions of the parties. The Respondent's position is that the Claimant was terminated on account of redundancy as they had to close shop due to renovations that were being done at the Village Market where the shop where the Claimant was working was situated.

23. The issue then this Court has to determine is whether the redundancy was procedurally fair as provided for under Section 40 of Employment Act 2007 which provides 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;***
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> ***(b) Where an employee is not a member of a trade union, the employer notifies the employee personally in writing and the labour officer;***
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> ***(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;***
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> ***(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".***

24. From the evidence of the Claimant, the Claimant was served with a letter dated 5/6/2013 terminating his contract on the same day. No notice was issued to him as envisaged under Section 40(1)(f) of Employment Act above.

25. The Respondent paid the Claimant 1 month salary in lieu of notice but that does not cover the aspect of consultation as envisaged before redundancy as held in **CA No. 46 of 2013 Kenya Airways Limited vs Aviation and Allied Workers Union Kenya and 3 Others (2014) eKLR** where Maraga JA (as he then was) considered the position of consultation before redundancy and rendered himself thus:-

> ***"51. Kenya is a State party to the International Labour Organization (ILO), which it joined in 1964 and is bound by the ILO conventions. Article 13 of Recommendation No. 166 of the ILO Convention No. 158-Termination of Employment Convention, 1982-requires consultation between the employers on the one hand and the employees or their representatives on the other before termination of employment under redundancy. It reads:-***
>
> ***"1. When the employer contemplates terminations for reasons of an economic, technological, structural or similar nature, the employer shall:-***
>
> ***(a)provide the workers' representatives concerned in good time with relevant information including the reasons for the***

terminations contemplated, the number and categories of workers likely to be affected and the period over which the terminations are intended to be carried out;

(b) give, in accordance with national law and practice, the workers' representatives concerned, as early as possible, an opportunity for consultation on measures to be taken to avert or to minimise the terminations and measures to mitigate the adverse effects of any terminations on the workers concerned such as finding alternative employment."

52. As I have said, besides this Convention, the requirement of consultation is implicit in the principle of fair play under Section 40(1) of the Employment Act itself and our other labour laws. The notices under this provision are not merely for information. Read together with Part VIII of the Labour Relations Act, 2007 which provides for reference to the Minister for Labour of trade disputes, including those related to redundancy (see Section 62(4)) for conciliation, I am of the firm view that the requirement of consultations implicit in these provisions. 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 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. This means that if parties put their heads together, chances are that they could avert or at least minimize the terminations resulting from the employer's proposed redundancy. If redundancy is inevitable, measures should to be taken to ensure that as little hardship as possible is caused to the affected employees. In the circumstances, I agree with counsel for the 1st respondent that consultation is an imperative requirement under our law. Mr. Oraro's criticism of the learned trial Judge's reliance on the UK Employment Appeals Tribunal's decision in Mugford v. Midland Bank, UK Employment Appeal Tribunal, 10 and the treatise by Rycroft and Jordan, - "A guide to the South Africa Labour Law" both of which dealt with the requirement of consultation, was therefore unfair. Those were authorities on comparative jurisprudence which the learned Judge was perfectly entitled to make reference to and where appropriate rely on".

26. In the circumstances, I find the termination of the Claimant unfair and I award the Claimant:-

1. 1 month salary in lieu of notice = 41,250/=.

2. 6 months' salary as compensation for unfair termination = 6 x 41,250 = 247,500/=

3. Prorata leave for the year = 17,160/=

TOTAL = 305,910/=

4. The Respondent will also pay costs of this suit plus interest at Court rates with effect from the date of this judgement.

Dated and delivered in open Court this 20th day of December, 2018.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Mwamuye holding brief Enonda for Claimant – Present

Mutai holding brief Maina for Respondent – Present