



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1425 OF 2011

(Before Hon. Lady Justice Hellen S. Wasilwa on 19th December, 2018)

REGINALD ASIBWA.....1ST CLAIMANT

BERNARD WANJARE ODERO.....2ND CLAIMANT

-VERSUS-

KENYA AIRWAYS LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. The Claimants herein filed their Memorandum of Claim on 23rd August 2011 alleging that they were unfairly terminated on account of redundancy. The Claimants seek the following reliefs:

- 1. Damages for wrongful dismissal and unfair termination of employment as per Sections 49 and 50 of the Employment Act, Act No. 11 of 2007; Kshs. 2,679,484.***
- 2. Amounts the Claimants could have earned if they could not have been terminated unfairly; Kshs. 38,852,529.***
- 3. 66 accumulated leaves days; Kshs. 99,000.***
- 4. Punitive damages proposed at Kshs. 150,000.***
- 5. Any other remedy that this honourable Court may deem it to grant.***
- 6. Costs of the cause.***

2. The Respondent filed its Memorandum of Claim on 22nd June 2012 in which it avers that all its staff in the Flight and Operations Engineering (FLOE) Section were notified of the re-structure of the section.

3. When the matter came up for hearing Bernard Wanjare Odero, the 2nd Claimant herein, and acting in person, testified on his own behalf and on behalf of his co-claimant.

Claimants' Case

4. The 1st Claimant was first employed by the Respondent as an Auxillary Staff from 6th June 1992 to October 2002. He was thereafter deployed as mailing clerk and eventually promoted to work as a Route Navigation Officer between 200 to June 2011. The 2nd Claimant was first employed as an Auxiliary Staff (Grade 1) on 1st July 1996. He then served as a Route Navigation Officer (Grade 7) from 2001 to 2009 and upgraded to H10 in January 2009.

5. The Claimants aver that the Respondent undertook a restructuring of the Company but this was done without any proper consultation with all stakeholders. It is the Claimants' case that the Respondent did not consider job requirements in its selection of staff and that the

Respondent purported to promote the Claimants by changing their titles merely by name but their roles remained the same. Further, that the Respondent declared the Claimants redundant without following the laid down rules or procedure as required under the labour law.

6. The 2nd Claimant testified that in 2011 more staff were recruited and a week later the Respondent decided that old staff were to go. The management in its Memo dated 3rd August 2011 refuted the redundancy theory. The Chief Executive Officer had in his Memo dated 10th August 2011 stated that he had noticed the unethical behaviour of persons handling recruitment processes.

7. He testified that on 23rd August 2010, the then Head of Human Resource Sophie Njagi in her letter indicated that duty allowance was payable to unionisable employees. This is the extra hours they are demanding from January 2009 to July 2010, which amounts to Kshs. 3,800,000 each for 19 months.

8. In cross-examination the 2nd Claimant testified that their positions were being graded out and that they were not interviewed for the position of Assistant Flight Operations Engineer –Navigation as this was a junior position as stated. He testified that he signed the Release and Discharge Form under duress. This Form indicated they had no liability against the Respondent. He further testified that they were paid some dues as per the termination letter and was also paid his pension.

Respondent's case

9. The Respondent avers that the Claimants were elevated to Grade H10 following a re-evaluation of their roles but not on promotion as alleged by the Claimants. The staff in the FLOE Section were notified of the re-structure and through a meeting between the staff and the Respondent's Acting Group Human Resources Director of Flight Operations and Chief Pilot, all the affected staff were being given an opportunity to apply for the roles in the new structure and the interview process undertaken to assess each staff members suitability. The restructure was necessitated by systems and processes changes to improve efficiency resulting in the job role of Assistant FLOE Navigation being created and the role of Aeronautical Information Service Officer (ASIO), which the Claimants held being done away with.

10. The Respondent further avers that the full and final payment was made to the Claimants who signed a release and discharge form on 1st July 2011.

11. RW1 David Rimberia, the Respondent's Head of Employee Relations testified that at the time of redundancy a new software was introduced thus the role held by the Claimants fell off.

12. RW1 testified that the Claimants had not had exemplary services. The 1st Claimant had been cautioned in a letter dated 20th April 2009 for failure to adopt some manual and on 20th May 2009 a complaint was raised by the Transport section accusing the Claimant of using foul language. While the 2nd Claimant was on 26th June 2009 issued with a show cause letter. He testified that as the time of termination there was some outstanding leave for the 1st Claimant being 20.17 days but there were no pending leave days for the 2nd Claimant. In respect of the extra hours worked RW1 testified that the Claimant had been informed they would be paid extra duty. They were not entitled to overtime as they were in management.

Claimants' Submissions

13. The Claimants submitted that their final dues did not include payment for the extra hours. The duty allowance was specifically for employees who worked on shift yet the Claimants never worked on shift from January 2009 to July 2010. Further, no evidence had been tendered by the Respondent to prove that they were not entitled to leave.

14. The Claimants submitted that in declaring them redundant the Respondent did not take into account the provisions of Section 40 (1) of the Employment Act. Therefore, their termination was unfair under Section 45 of the Employment Act.

Respondent's Submissions

15. The Respondent submitted that as provided under Section 2 of the Employment Act, redundancy involved the termination of employment at the initiate of the employer where an employee's services are superfluous. It stated that pursuant to the provisions of Section 40 (1) of the Employment Act the Court ought to take a two-fold approach comprising of substantive justification and fair process in determining the lawfulness of termination through redundancy.

16. The Respondent further submitted that it had furnished the Court with cogent reasons for the Claimants' termination being the restructuring process that resulted in the downsizing of the staff in the Respondent's FLOE Section. In support of this, the Respondent relied on the case of **Kenya Plantation and Agricultural Workers Union v James Finlay (K) Limited [2013] eKLR.**

17. The Respondent submitted that on the procedural formalities dictated under Section 40 (1) of the Employment act, it had formally notified the Claimants of the ongoing restructuring and undertook consultation through interviews for other positions but the Claimants were not successful in the interviews.

18. On the extra hours worked the Respondent submitted that the Claimants in their submissions referred to prayers which were not pleaded for in the Memorandum of Claim dated 22nd August 2011. The Respondent relied on the case of **Nairobi City Council v Thabati Enterprises Ltd [1995-1998] 2 EA 231** where the Court held that the only way to raise issues for determination is through pleadings. In addition, the Claimant's had received duty allowance and that the Respondent's witness testified that the Claimants were not entitled to productivity allowance.

19. The Respondent submitted that the award for damages for wrongful dismissal and unfair termination be dismissed since the Respondent had established that there was no wrongful/unfair termination. In addition, it stated that should the Court be inclined to find that the Claimants' termination was unfair, the Court should be guided by Section 49 (1) as read with Section 50 of the Employment Act, Section 49 (4) of the Employment Act and in **Standard Group Limited v Jenny Luesby [2018] eKLR**.

20. The Respondent submitted that the claim for the amount which would have been earned if the Claimants weren't terminated should be dismissed as it lacks legal basis. In addition, the accumulated leave days for the 1st Claimant weren't payable since he had signed his discharge and release on 1st July 2011 as having accepted the terminal dues as full and final settlement. According to the Respondent the claim for punitive damages is misconceived as held in **Abraham Gumba v Kenya Medical Supplies Authority [2014] eKLR**.

21. The Claimants filed their further submissions in which they submitted that the discharge voucher signed for benefits received is not a bar to file a claim for the unsettled claims. Further, in the absence of a notice to the labour officer on the intended redundancy the entire process was untenable in law.

22. I have examined all the evidence and submissions of the Parties herein. This is a case of redundancy where the Claimants aver that they were unfairly declared redundant.

23. The Claimants were notified of their redundancy on 6.6.2011 and informed that the redundancy would be effected on 9.6.2011. They were then immediately asked to leave and were paid 3 months' salary in lieu of notice and other benefits as enumerated in their termination letter.

24. Section 40(1) 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.

25. Under (f) above one of the key requirements in declaring a redundancy is to issue notice to the Claimants.

26. The Respondents in essence informed the Claimants of the redundancy and asked them to leave employment but paid them 3 months' salary in lieu of notice.

27. The essence of a notice period has been expanded in the case of **CA No. 46 of 2013 Kenya Airways Limited vs Aviation and Allied Workers Union Kenya and 3 Others (2014) eKLR** 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 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”.

28. The notice as explained above allows the parties to consult over the redundancy situation and reach an understanding that that was the only way out of the parties. It also gives the employee a soft landing space as he seeks for an alternative avenue on how to absorb the situation. Payment of salary in lieu of notice does not cushion the employee as the law anticipates consultation.

29. In the case of the Claimants, they were not given the opportunity to consult on the redundancy and no notice was given to them. I therefore find the redundancy was unfair and I therefore award them each compensation equivalent to 6 months’ salary for the unfair redundancy. This translates as follows for each Claimant =

= 6 x 111,645.20 = 669,871.2

30. The Respondent will also pay costs of the suit.

Dated and delivered in open Court this 19th day of December, 2018.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Miss Omondi for Respondent – Present

Claimant – Present