Case Number:	Cause 2509 of 2016
Date Delivered:	04 Jan 2022
Case Class:	Civil
Court:	Employment and Labour Relations Court at Nairobi
Case Action:	Judgment
Judge:	Jacob Kariuki Gakeri
Citation:	Martin Mwangi v Protocol Solutions Limited [2022] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Employment and Labour Relations
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	-
Case Outcome:	Judgment entered for the Claimant
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 2509 OF 2016

(Before Hon. Justice Dr. Jacob Gakeri)

MARTIN MWANGI.....CLAIMANT

VERSUS

PROTOCOL SOLUTIONS LIMITED.....RESPONDENT

JUDGMENT

1. By a statement of claim dated 1st December 2016, the Claimant instituted proceedings against the Respondent alleging that the Respondent had filed refused and/or neglected to pay his terminal dues after having declared him redundant on 29th February 2016. That the failure to pay was a breach of the provisions of the Employment Act and the contract of employment between the parties.

2. The Claimant prays for –

(a) Unpaid salary for 3 months Kshs.420,000

(b) One month's salary in lieu of notice Kshs.140,000

(c) Severance pay 15 days for three years completed Kshs.210,000

(d) Leave days earned but not paid (30) Kshs.140,000

(e) Per diem for travel to Angola (13th July 2021 to 28th September 2013 and 20th October 2013 to 6th December 2013 Kshs.280,600

(f) 12 months' salary as compensation for unfair termination Kshs.1,680,000

(g) Costs of this claim.

(h) Interest on (g) above

3. The Respondent filed a reply to the statement of claim on 28th April 2017 praying for dismissal of the claim with costs.

Claimant's Case

4. The Claimant avers that he was employed by the Respondent on 1st October 2013 as Network Engineer at a monthly salary of Kshs.140,000 and served the Respondent until 29th February 2016 when the Respondent terminated the employment contract on the ground of redundancy by a letter dated 4th February 2016. The Claimant tabulated his entitlements as follows: –

a) One month's salary in lieu of notice;

b) Severance pay of 15 days salary for each completed year of serve

c) Earned but unpaid salary for 3 months leading to termination

d) Earned but unpaid leave days 30 days

e) Earned but unpaid per diem for travelling to Angola (USD 2,886) from 13th July to 21st September 2013 and 30th November 2013 to 6th December 2013.

5. It is averred that the Respondent failed, refused and/or neglected to remit any sum of terminal dues and has not done so to date. That the failure or refusal to pay was without any justification or explanation notwithstanding several requests and attempts to resolve the matter. That demand for payment was made by the Claimant's Counsel but to no avail.

6. It is further alleged that the Respondent's notice dated 4th February 2016 was defective since it fell short of the contractually agreed one month's notice.

7. That the failure to pay terminal dues after promising to do so, was a breach of the Employment Act and a violation of employee rights as guaranteed by the Constitution.

Respondent's Case

8. The Respondent submits that the Claimant was its employee until his services were lawfully terminated on 4th day of February 2016.

9. It also admits that the Claimant was employed on 1st October 2016 at a monthly salary of Kshs.140,000 subject to statutory deductions.

10. It avers that the Claimant was notified of the termination effective the 4th February 2016 to the 29th February 2016 and the notification was legal. That the Claimant demonstrated empathy to the Respondent since the business was recording losses.

11. It is further averred that the Respondent settled the Claimant's one month's salary in lieu of notice and severance pay was not available to the Claimant and no salary was outstanding at the time and had no leave entitlement.

12. The Respondent contends that the appointment letter was clear that an employee could work in such other place of business of the Company as the Company may from time to time require the employee to work from. Thus, the Claimant was not entitled to per diem.

13. That the Claimant had received all his dues.

Evidence

14. The Claimant adopted the written statement and testified that he was claiming the 12 months' salary as compensation because he had been promised payment but none came through yet he had financial commitments to meet.

15. That the three months' pay relates to salary for the months of December 2015, January and February 2016. The last payment was in November 2015 thus the final dues had not been paid.

16. The documents on record show that the Claimant was hired on 1st October 2013 as a Network Engineer at the Respondent's Technical Department effective 7th November 2012 at Kshs.140,000/= per month. The contract provided for a three months' probationary period. The Claimant's dues were enumerated in paragraph 3.1 of the contract and the hours of business were 8.00

and 5.00 pm, Monday to Friday. The place of work was Nairobi, Kenya and/or such other place of business of the business Company as the Company determined from time to time.

17. The Respondent tendered no evidence since the matter proceeded as undefended owing to the withdrawal of the Respondent's Counsel after non appearances on 28th September 2020 and on 26th July 2021. On 10th August 2021, the Respondent's Advocate was not in Court but Miss Nyaseme who held his brief told the Court that the Advocate had an emergency at home and sought an adjournment of the hearing and the Plaintiff's Counsel indulged him.

18. On 22nd September 2021, Miss Nyaseme told the Court that Counsel for the Respondent had as early as 2018 filed chamber summons seeking to cease acting for the Respondent since he no longer had instructions from the Client and sought an adjournment which the Claimant's Counsel objected to vehemently discounting the chamber summons dated 26th February 2018. The Claimant reluctantly accepted Witness and Advocates' costs of Kshs.4,300/= and the hearing was adjourned to 25th October 2021.

19. After hearing the Respondent's Counsel, the Court granted the prayer to cease acting for want of instructions by the Client. The Claimant's Counsel applied to have the matter proceed to formal proof since he was ready to proceed and the Court acceded to the request on the ground that the Respondent had not filed any supportive documentation, service notwithstanding and had contributed to the delay of the hearing since 2020 and the suit was filed in 2016.

Claimant's Submissions

20. The Claimant's Counsel identified one issue for determination namely whether the Claimant is entitled to the relief sought. Counsel submits that redundancy is one of the ways of termination of employment contracts and relies on Section 2 of the Employment Act for the definition of term redundancy. Further reliance is made on the word of Maraga JA (as he then was) in **Kenya Airways Limited v Aviation and Allied Workers Union Kenya & 3 Others [2014] eKLR** to underscore the fact that redundancy was an involuntary loss of employment at the instigation of the employer and attributes no fault on the employer.

21. Section 40 of the Employment Act, 2007 is citied to demonstrate the conditions to be complied with by the employer for redundancy to pass the fairness test.

22. Counsel further relies on Article 41(1) of the Constitution of Kenya 2010 to underline the right to fair labour practices.

23. On consultations and discussions preceding a redundancy as required by law, reliance is made on the decision in **Kenya Airways Limited v Aviation and Allied Workers Union Kenya & 3 Others (supra)** where Maraga JA stated that –

"In the circumstances, I agree with Counsel for the 1st Respondent that consultation is an imperative requirement under our law."

24. It is submitted that by its letter dated 4th February 2016, the Respondent committed itself to pay the Claimant's terminal dues by instalments from 29th February 2016 to 30th September 2016, a promise it did not honour thereby occasioning the Claimant undue hardship and thus violating his constitutional rights germane to fair labour practices.

25. The Claimant empathises the submissions by relying on the equitable doctrine of *promissory estoppel* as explained by Lord Denman CJ in **Pickard v Sears [1837] 6 A.&.E 469.**

26. The Court of Appeal decision in **Serah Njeri Mwobi v John Kiman Njoroge [2013] eKLR** is also relied upon to reinforce the submission on estoppel by the Respondent's conduct. It is submitted that the Respondent be estopped from going against its promise to pay the Claimant's dues by instalments.

27. The Respondent did not file submissions.

Determination

28. From the pleadings, evidence on record and submissions by the Claimant, the issues for determination are: -

a) Whether the Claimant was terminated on account of redundancy;

b) Whether the Claimant is entitled to the reliefs sought.

29. Termination of employment contracts on account of redundancy is elaborately provided for by the provisions of the Employment Act 2007. Section 2 of the Act provides that -

"redundancy" **means 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;**

30. Section 40 of the Act sets out the operative framework on redundancy as a form of termination. An employer who proposes to terminate a contract of employment on the ground of redundancy is required to conduct it in consonance with the provisions of Section 40 of the Employment Act. A redundancy conducted in violation of Section 40 of the Act is an unfair termination under Section 45(1) of the Act which provides that:-

"No employer shall terminate the employment of an employee unfairly."

31. Section 40(1) of the Employment Act provides that –

(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.

32. The Court of Appeal has underscored the essence of compliance with the provisions of Section 40(1) of the Employment Act.

In **Freight In Time Limited v Rosebell Wambui Munene [2018] eKLR** the Court stated that –

"In addition, Section 40(1) of the Employment Act prohibits, in mandatory tone, the termination of a contract of service on account of redundancy unless the employer complies with the following seven conditions …"

33. In the instant case, the Claimant's termination letter dated 4th February 2016 under the reference ***"Termination of employment by reason of redundancy"*** states that –

"The purpose of this letter is to confirm the outcome of a recent review by Protocol Solutions Limited of its operational requirements and what this means to you.

As a result of the recent financial realities and structural realignment focusing on sustainability and efficiency of the company and its workforce, your services will no longer be required.

Regrettably this means your employment will terminate. This decision is not a reflection on your performance.

Based on your consultancy agreement, your notice period is one month. The notice period is effective starting the date of this letter. Your last working day will be 29th February 2016 after which you will be required to follow the laid down clearance procedure.

Your final dues will be paid as below

· 1 month salary in lieu of notice effective date being 4th February, 2016

· Redundancy entitlement of 15 days' pay for each completed year of service

· Outstanding pay up to and including your last day of employment

· Accrued entitlements of leave days

· Any other dues owed to you.

Less

· 10 days not worked from 26th November 2015 to 9th December 2016.

Kindly note that due to the current financial difficulties in the organization your dues will be paid in instalments between February 29th, 2016 and September 30th, 2016.

We thank you for your valuable contribution during your employment with us.

Yours Sincerely

SIGNED

Job Ndege

Managing Director"

34. Instructively, the Respondent's letter has no particulars of the specific amounts due to the Claimant. The omission

notwithstanding, the Claimant appears to have accepted the terms of payment but contends that the Respondent did not honour its promise and as a consequence subjected him to financial embarrassment.

35. The Respondent's letter of 24th February 2016 was unambiguous that the Claimant was terminated on account of redundancy following a review of the Respondent's operational requirements consequent to which the Claimant's services became superfluous.

36. This case turns on whether the Respondent complied with the mandatory provisions of Section 40(1) of the Employment Act.

37. From the documents on record, it is evident that the Respondent did not comply with the requirements of Section 40(1) of the Employment Act for the following reasons –

a) First, the Respondent's notice to the Claimant dated 4th February 2016 did not accord the Claimant at least one month before the date of redundancy. The notice was 25 days and is thus invalid.

b) Second, the notice dated 4th February 2016 does not set out the reasons and the extent of the redundancy. Reference to review of the Respondent's *"operational requirements", "financial realities and structural realignments"* is insufficient. The notice does not explain how many persons were affected and wow they were identified as provided by Section 40(1)(c) of the Act. There is no evidence on record to demonstrate that the Respondent was restructuring the Nairobi Office.

c) Third, the Respondent has provided no evidence of any discussions and or consultations on the proposed redundancy. The Court is guided by the words of Maraga JA (as he then was) in **Kenya Airways Limited v Aviation and Allied Workers Union Kenya & 3 Others (supra)** as follows: -

"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 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 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, 1*** *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."*

d) Fourth, there is no evidence on record that the Labour Officer was notified of the intended redundancy of the Claimant at least one month prior to 4th February 2016.

e) Finally, the Respondent led no evidence and/or attached no documentary evidence that it in fact honoured its promise to the Claimant. This implicates the doctrine of promissory estoppel. The Court is in agreement with the Claimant's submissions that the Respondent is estopped from asserting any rights inconsistent with its promise to pay the Claimant's dues as explained by Lord Denman CJ in **Pickard v Sears (supra)** as follows –

"The rule of law is clear that where one, by his words or conduct, wilfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is precluded from averring against the latter a different state of things as existing at the time."

38. The principle of promissory estoppel was elaborated by Lord Denning L.J. in **Combe v Combe [1951] 2KB 215**.

39. In the instant case, the Respondent made a promise to pay the Claimant's dues by instalments and the Claimant in reliance upon the promise made financial commitments which he was unable to honour because the Respondent did not keep its promise, to the detriment of the Claimant. The Respondent is estopped asserting otherwise and is bound to honour its promises.

40. In sum, the Respondent purported to terminate the Claimant's employment on account of redundancy without compliance with the mandatory provisions of the Employment Act.

41. It was incumbent upon the Respondent to prove the redundancy as provided by Section 47(5) of the Employment Act.

42. The inescapable conclusion is that this was an unlawful redundancy. It is the finding of the Court that Respondent's termination of the Claimant's contract of employment on account of redundancy was unfair for noncompliance with the provisions of the Employment Act on the procedural requirements and failure to justify and establish the fact of redundancy.

43. The Court is persuaded that this was an unfair termination as was the case in **Hesbon Ngaruiya Waigii v Equatorial Commercial Bank Limited [2013] eKLR**.

Reliefs

44. The Claimant prays for the following –

(a) Unpaid salary for 3 months

45. The Claimant's written statement makes no reference to unpaid salary for November and December 2015 and January 2016 nor is the outstanding salary mentioned in the statement of claim. In the absence of any proof, the claim is **declined.**

(b) One month's salary in lieu of notice

46. The notice given by the Respondent was less than one month as thus ineffective. The Claimant is awarded the one month's salary in lieu of notice, **Kshs.140,000.00.**

(c) Severance pay, 15 years for three completed years

47. Having found that the purported redundancy was unlawful, the severance payable under Section 40(1)(g) is unavailable. In addition, the Claimant was a member of the NSSF which renders him ineligible for service pay as provided by Section 35(6) of the Employment Act. See **Hassanath Wanjiku v Vanela House of Coffees [2018] eKLR**. The claim is **declined.**

(d) Leave days earned but unpaid

48. The Claimant led no evidence to establish the 30 days leave claimed. Neither the statement of claim nor the written statement make reference to leave or furnish the particulars of when it accrued. The claim is **declined.**

(e) Per diem for travel to Angola in 2013

49. The Claimant adduced no evidence to establish this claim. The Claimant provided no evidence of having travelled to Angola in 2013 or at any other time and why the per diem had been outstanding since then. The claim is **disallowed.**

(f) 12 months' salary compensation for unlawful termination of employment

50. Having found that the purported redundancy was unlawful and unfair, the Claimant become eligible for the relief provided by Section 49(1)(c) of the Employment Act subject to the guidance provided by Section 49(4) of the Act. The Court has considered the following –

i) The Claimant worked for the Respondent for about three years and three months and wished to continue.

ii) The Respondent ambushed the Claimant with a redundancy without previous engagement or consultation as mandated by law.

iii) The Claimant did not contribute to his termination as evidenced by the last paragraph of the termination letter which states that "*We thank you for your contribution during your employment with us.*"

51. In the circumstances the equivalent of three months' salary is fair, **Kshs.420,000/=.**

52. **In conclusion, judgment is entered for the Claimant for the sum of Kshs.560,000/- with costs.**

53. Interest at Court rates from the date of judgment till payment in full.

54. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 4TH DAY OF JANUARY 2022

DR. JACOB GAKERI

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 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They 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, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B** of the **Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE