

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE NO. E6579 OF 2020
CONSOLIDATED WITH CAUSE NO. E6582 OF 2020

JOHN MWAKOMA KISOMBE.....1ST CLAIMANT

THOMAS MBOYA ABANDA.....2ND CLAIMANT

-VS-

INCHCAPE KENYA LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. This judgment determines Causes No E6579 of 2020 and E6582 of 2020 consolidated on 12th March 2024, by consent of the parties.
2. The matter proceeded to full trial with both the 1st Claimant, John Mwakoma Kisombe and the 2nd Claimant, Thomas Mboya testifying. Stella Wairimu Kimemia testified on behalf of the Respondent. The parties also filed written submissions.

The Claimants' Case

3. In his Statement of Claim dated 22nd December 2020, the 1st Claimant, John Mwakoma Kisombe states that he worked for the Respondent as a Service Advisor at Simba Colt Motors Ltd, from 1st December 2017 until 28th February 2019. Previous to this stint, the Claimant had worked as a Technician from 2nd May 2013 until 30th November 2017.

4. In his Statement of Claim of even date the 2nd Claimant, Thomas Mboya Abanda states that he worked as a Logistics Officer at RMA Motors Ltd from 1st April 2015 until 23rd July 2018, when the Respondent, upon taking over Jaguar Land Rover, a major franchise client, offered Mboya a similar position.
5. On 9th July 2020, the Claimants and four other colleagues were summoned to a meeting at the Respondent's Headquarters in Westlands, Nairobi where they were handed termination letters, citing redundancy as the reason for termination.
6. The Claimants state that no prior notice had been issued to them and they had no information as to why they had been summoned to the Headquarters. They add that no redundancy notice was issued to the Labour Office.
7. The Claimants accuse the Respondent of targeting them for redundancy unfairly. They lay a claim of unlawful termination of employment and therefore claim reinstatement without loss of benefits or in the alternative:

1st Claimant: John Mwakoma Kisombe

- a) Kshs. 950,000 being compensation for loss of future service of 20 years;
- b) Kshs. 1,140,000 being 12 months' salary in compensation.

2nd Claimant: Thomas Mboya Abanda

- a) Kshs. 1,689,500 being compensation for loss of future service of 20 years;

b) Kshs. 2,027,400 being 12 months' salary in compensation.

8. The Claimants also seek general damages, costs plus interest.

The Respondents' Case

9. In its Memorandum of Response dated 5th March 2021, the Respondent admits having employed the Claimants, but deny that the termination of their employment was unlawful or unfair.

10. The Respondent states that in March 2020, the country went into a lockdown in a bid to mitigate the spread of the COVID-19 pandemic.

11. The Respondent claims to have experienced low uptake of its services due to increase in taxes and reduced demand for products in the transport sector. The Respondent was therefore forced to scale down its operations due to reduced business.

12. The Respondent states that it explored all available options and arrived at the difficult decision to merge some roles and declare redundancies due to multiplicity of several roles which could no longer be supported.

13. By an internal memo dated 1st June 2020, issued by the Respondent's Human Resources Manager, staff were informed that due to the adverse effects of the COVID-19 pandemic, it was forced to declare some positions redundant.

14. The Respondent refers to a subsequent consultative meeting said to have been held in early July 2020, to discuss the intended redundancy.

15. The Respondent claims to have deployed the last in first out criteria to select the Claimants for redundancy.
16. By respective letters dated 9th July 2020, the Claimants were informed that their positions had been declared redundant. The terminal dues payable to the Claimants were duly set out.
17. The Respondent defends the redundancy as justifiable and fair and denies the Claimants' entire claims.

Findings and Determination

18. The following two (2) issues fall for determination in the consolidated actions:
- a) Whether the termination of the Claimants' employment was lawful and fair;
 - b) Whether the Claimants are entitled to the remedies sought.

The Termination

19. The termination of the Claimants' employment was communicated by identical letters dated 9th July 2020, addressed to the Claimants as follows:

"Re: Termination of Employment Contract on account of redundancy

As you very well know, we are facing challenges on our business performance mainly driven by changes in the legislation that has brought an increase in tax and low demand of our products in the market.

Coupled with this, the impact of COVID 19 has now paralyzed many businesses and ours is no exception.

As a result, we are forced to restructure the organization and take stringent measures to enable us to bring the business to profitability and guarantee business continuity. It is with great mixed feelings that we notify you that your role as Service Advisor/Logistics Officer is now redundant in the organization effective from July 09, 2020.

We understand this brings termination of your employment contract with our company and we thank you for serving the business for the last one/five years plus.

We would also like to advise you that closure of your existing employment contract will be handled as follows:

- You will be entitled to a severance payment in line with the Employment Act 2007 which is 15 days for each completed year of service.*
- You will be paid salary for the 9 days worked in the month of July 2020*
- You will be paid all the accrued leave days as at 9th July 2020*
- You will receive a one-month salary in lieu of notice as per the provisions of the Employment Act.*
- You will receive an additional one month's salary as an ex gratia allowance*

- *Please verify with Finance Department for any unsettled personal account balance and the above-mentioned amount doesn't consider that.*
- *Please make sure to hand over all the key information and documents related to your role and at your disposal to the appropriate person in discussion with your line manager.*
- *In accordance with your employment contract, you have the responsibility to keep confidential all company related key information, documents and business plans at your disposal.*
- *Please make sure to hand over all ICK company property that you may have at your disposal due to your current responsibility. Along with this your e-mail, account access will be terminated too and make sure you do all the needful before your departure date.*

We wish you the very best of luck in your future endeavors.

With warm regards.

(signed)

Hussein Ibrahim

Managing Director, Inchcape Kenya"

20. According to this letter, the Claimants' employment was terminated on account of redundancy.

21. Section 2 of the Employment Act and the corresponding provision in the Labour Relations Act, 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 the services of an employee are superfluous and the practices commonly known as abolition of office, job or occupation and loss of employment.”

22. It is not a matter for debate that the law recognises redundancy as a legitimate mode of termination of employment. However, the same law sets stringent conditions to be satisfied by any employer declaring redundancy. These conditions are codified in Section 40 of the Employment Act 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.

23. The first 2 conditions under Section 40 require every employer declaring redundancy to issue a one-month notice of intention to the affected employee(s), their union (where applicable) and the local Labour Officer. By definition, this notice should set out the reasons for and the extent of the intended redundancy.

24. It is now settled that the redundancy notice is separate and distinct from the termination notice provided under Section 40(1)(f).

25. In ***Thomas De La Rue (K) Ltd v David Opondo Omutelema [2013] eKLR*** the Court of Appeal stated as follows:

“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 local labour officer at least one month before the 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 local labour officer. Section 40 (b) does not stipulate the notice period as is the case in 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.”

26. In the subsequent decision in ***Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others*** [2014] eKLR Maraga JA (as he then was) rendered himself as follows:

“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.”

27. In yet another subsequent decision in ***The German School Society and another v Ohany and another*** [2023] KECA 894 (KLR) the Court of Appeal held that the requirement for consultation is implied in Section 40 of the Employment Act, stating that:

“In essence, consultation is an essential part of the redundancy process and ensures that there is substantive fairness. The employer should ensure that it carries out the process as fair as possible and that all mitigating factors are taken into consideration.”

28. According to the Claimants, they were summoned to the Respondent's Headquarters on 9th July 2020, where they were handed termination letters. They state that they had no prior notice of any impending redundancy.

29. On its part, the Respondent claims to have issued an internal memo dated 1st June 2020 communicating to all employees about the intended redundancy. According to the Respondent, this memo was posted on all its notice boards. The Respondent adds that the memo was followed by a consultative meeting sometime in early July 2020.

30. There was however no evidence that the Claimants received or even saw the memo dated 1st June 2020. Further, the alleged consultative meeting held in July 2020, significantly in the middle of COVID 19 restrictions, was not documented.

31. Moreover, the notice issued to the Labour Office on 17th June 2020 did not set out the extent of the redundancy as required by Section 40(a) and (b) of the Employment Act.

32. On the whole, the Respondent failed to prove issuance of a redundancy notice as required by law.

33. Under Section 40(1)(c) the employer is required to follow an objective selection criterion for redundancy, which takes into account seniority in time, skill, ability and reliability of each employee affected by the redundancy.

34. Although the Respondent claims to have followed the last in first out selection criterion, no evidence was led to support this assertion. In addition, the skill, ability and reliability considerations seem not to have been taken into account.

35. For the foregoing reasons, I find and hold that the termination of the Claimants' employment was unlawful and unfair.

36. The Claimants seek reinstatement as a primary remedy. However, in light of the time lapse post separation, coupled with the reason assigned to the termination being redundancy, I find that reinstatement would not be an appropriate remedy in this case.

37. Instead, I award each Claimant four (4) months' salary in compensation. In arriving at this award, I have taken into account the Claimants' length of service and the Respondent's failure to fully comply with the conditions set out under Section 40 of the Employment Act.

38. No basis was established for the claims for compensation for loss of future service and general damages, which therefore fail and are dismissed.

39. Finally, I enter judgment in favour of the Claimants as follows:

a) 1st Claimant: John Mwakoma Kisombe- Kshs. 380,000

b) 2nd Claimant: Thomas Mboya Abanda - Kshs. 675,800

40. These amounts will attract interest at court rates from the date of judgment until payment in full.

41.The Claimants will have the costs of the case.

DELIVERED VIRTUALLY AT NAIROBI THIS 22ND DAY OF MAY 2025

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JUDGE

Appearance:

Mr. O'Makalwala for the Claimant

Mr. Angwenyi for the Respondent