



**Onduso v Tata Chemicals Magadi Limited (Cause 597 of 2021)
[2023] KEELRC 3117 (KLR) (22 November 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3117 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 597 OF 2021
DKN MARETE, J
NOVEMBER 22, 2023**

BETWEEN

RICHARD MAISIBA ONDUSO CLAIMANT

AND

TATA CHEMICALS MAGADI LIMITED RESPONDENT

(as consolidated with ELRC Cause NO. E598 of 2021 and E604 of 2021.)

JUDGMENT

1. This matter was commenced through a statement of claim dated 19th July, 2021. The issue in dispute is herein cited as;

Unfair and unlawful termination/redundancy of the claimant; richard maisiba onduso and refusal to pay him his full terminal dues.
2. The Respondent in a Memorandum of Defence dated 9th September, 2021 denies the claim and prays that it be dismissed with costs.
3. The Respondent in a Memorandum of defence dated 9th September 2021 denies the claim and prays that it be dismissed with costs.
4. The Claimant crowns this by Reply to the Respondent's Memorandum of defence dated 13th January, 2021 in which he reiterates and reinforces his claim.
5. The claimant's case is that on or about 1st May 2015 he entered into a written employment agreement with the Respondent whereby he was offered employment as Regional Sales Executive at a basic salary of Kshs.1,548,000.00 per annum payable monthly in arrears.
6. The Claimant's further case is that at the time of termination, he worked as a Technical Sales Executive at Nyeri at a salary of Kshs.204,542.00 per month. He worked a diligently and faithfully until on or



- about 12th July, 2019 when his services were terminated on allegations of fundamentally breaching his terms of contract.
7. The Claimant's other is that he appealed against the said termination from his employment by a letter dated 19th July, 2019 whereby he sought to be given an opportunity to continue with his employment. The Claimant was bereaved having lost his father and was busy with the burial arrangements at the time and therefore it could not be possible for him to attend the disciplinary hearing as he was away at his rural home where the burial took place on 14th July, 2019.
 8. It is his further case that the Respondent never accorded the Claimant a fair hearing after declaring him redundant which is contrary to the mandatory provisions of section 40 of the Employment Act, 2007.
 9. The Claimant avers that by a letter dated 28th June, 2019, he responded to the allegations of poor performance and stated that he did not agree with the ratings as they were different from what he had rated himself and that of the line managers. Besides, the Respondent never issued the Claimant with the mandatory one month's notice of intention to declare him redundant as is required by law and particularly section 40 and 41 of the Employment Act, 2007.
 10. He claims thus;
 - i. A declaration that the Claimant's termination/redundancy from his employment was unfair and unlawful.
 - ii. The Claimant be paid his terminal benefits as set out in paragraph 8 hereinabove totalling to Kshs.3,702,984.35/=.
 - iii. The Honourable court do issue such orders and give such directions as it may deem fit to meet the ends of justice.
 - iv. The Respondent be ordered to issue the Claimant with a certificate of service as required by the provisions of section 51 of the Employment Act, 2007.
 - v. The Respondent to pay the costs of this claim.
 - vi. Interest on the above at court rates.
 11. He prays as follows;
 - i. A declaration that the Claimant's termination/redundancy from his employment was unfair and unlawful.
 - ii. The claimant be paid his terminal benefits as set out in paragraph 8 hereinabove totalling to kshs.3,702,984.35/=
 - iii. The Honourable court do issue such orders and give such directions as it may deem fit to meet the ends of justice.
 - iv. The Respondent be ordered to issue the Claimant with a certificate of service as required by the provisions of Section 51 of the Employment Act, 2007.
 - v. The Respondent to pay the costs of this claim
 - vi. Interest on the above at court rates.
 12. The Respondent's case is a denial of the claim. It is her case that the Claimant's employment contract was not unfairly or unlawfully terminated as alleged. Further the claim has no basis and should be dismissed on grounds as follows;



- i. The claims relating to the termination of his employment contract on 12th July, 2019, were mutually settled following his appeal against the termination.
 - ii. He was fully paid his dues in accordance with the settlement reached at the time and he is bound by the terms thereof. He is estopped from challenging the termination of his employment in the circumstances.
 - iii. In the settlement, the Claimant discharged all claims he had against the Respondent with respect to his employment and the termination thereof.
 - iv. The claimant should not be allowed to approbate and reprobate. His claim is false, an afterthought and made in bad faith.
 - v. The amounts claimed have been fully and finally paid to the Claimant by the Respondent save for compensation for unfair termination which is denied on the terms set out in this Defence.
13. The Respondent further case is that the Claimant was at all times during the pendency of employment expected and had agreed to be bound by the terms if his employment contract and the Respondent's rules and procedures as formulated and published from time to time. This was a term of his employment contract.
 14. Her further case is that the Claimant's employment contract was terminated on 12th July 2019 on grounds of poor performance. The claimant attained poor performance ratings for two consecutive years and failed to show any improvement despite being afforded the necessary opportunities to do so. This prompted the issuance of a show cause letter to which he responded. He was invited to a disciplinary meeting where his case was heard in his presence and decision to terminate employment was reached.
 15. The Respondent's other case is that the Claimant's appeal against the decision to terminate his service and this was also heard with a decision to uphold the termination of employment. Thereafter, the parties through mutual and amicable discussions issued the Claimant with an exit package whereby his exit was computed on basis of a redundancy. This was instead of termination.
 16. The Respondent avers that the Claimant accepted this package on 29th August 2019 and by a letter dated 30th September instant, this was effected. It is the Respondent's case that this was a mutual stop gap measure fomented to settle the matter and cannot now be used as a basis for a claim on redundancy.
 17. The issues for determination therefore are;
 1. Whether there was indeed a termination of the employments of the Claimant on ground of redundancy.
 2. Whether the termination of employment of the Claimant by the Respondent was wrongful, unfair and unlawful
 3. Whether the Claimant is entitled to the relief sought.
 4. Who bears the costs of this cause.
 18. The 1st issue for determination is whether there was indeed a termination of the employments of the Claimant on ground of redundancy. The Claimant in his written submission dated 10th July, 2023 submits a case of termination and on account of redundancy that was unfair. This is based on the grounds that the Respondent arm twisted the Claimant to the redundancy package in disregard of section 40 of *Employment Act*, 2007.



19. The Respondent on the other hand denies this and elaborately submits that the redundancy package was a stop gap measure and a peace overture agreed onto by the parties. It was not and never was a redundancy package in the strict sense of section 40. The Claimant agreed to this redundancy package in lieu of termination.
20. Further, the Respondent submits thus;
- i. The Claimant was paid and confirmed receipt of his notice pay, accrued leave pay, leave travelling allowance and baggage allowance as part of the separation package. The same claims being made herein are false and have no basis in the circumstances. (see the redundancy letter of 30th September 2019 at page 28). The claimant has no further outstanding payments and is put to strict proof of his claims to the contrary.
 - ii. The claimant was paid and duly acknowledged receipt of severance pay of Kshs. 1,062,526.17 which was computed at the rate of 28.75 days for every year worked.
 - iii. The claimant was paid his salary up to the date of termination of his contract on 12th July 2019. He did not discharge any duties for the Respondent after the termination of his contract and is therefore not entitled to any further payments as alleged or at all. The claimant is put to strict proof of the contrary.
 - iv. The claimant was paid his outstanding personal account TMS (travel management system) of Kshs.119,508.00. The claimant has no further outstanding payments and is put to strict proof of his claims to the contrary.
 - v. The claimant is not entitled to any payments with respect to his alleged unpaid bonus and/or any further payments from the respondents. The claimant acknowledged the sums paid to him by the respondent as his final dues and further declared that he had no further claims against the Respondent with respect to the separation package. There is no legal or factual basis for the claims herein and any claims for payment made subsequently are false, an afterthought and in bad faith.
 - vi. The claimant is not entitled to compensation for unfair termination as alleged or at all. His separation was mutual and negotiated culminating in an agreement which superseded the initial termination of his employment by the Respondent. He is bound by the terms thereof and is estopped from challenging the same having benefitted from payment on the terms thereof. The claimant is put to strict proof of the contrary.
 - vii. There is no dispute on the claimant's certificate of service. He was issued with a certificate of service dated 8th August 2019.
21. The Respondent further submits a case of fair and lawful termination of employment as follows;
- 2.1. The Claimants were employed as Regional Sales Executives on varying dates in 2015. Their contracts were terminated on 12th July 2019 on grounds of poor performance. The Claimants attained poor performance ratings for 2 consecutive years and failed to show any improvement despite being afforded the necessary opportunities to do so.
 - 2.2. Prior to the termination of their contracts, the Respondent invited the Claimants to disciplinary hearings giving them an opportunity to provide justifiable reasons for their poor performance. The reasons provided were not satisfactory, hence culminating in the termination of their contracts. The Claimants also exercised their right to appeal following which their termination was upheld.



- 2.3. Following the termination of the Claimants' contracts, the Claimants and the Respondent entered into mutual and amicable discussions wherein the Claimants were offered and accepted separation packages. The agreed packages provided for the settlement to be computed on the basis of the Respondent's redundancy package as these terms were favourable. The Claimants accepted these terms and subsequently, in reliance of the terms thereof, were issued redundancy letters on the same date.
- 2.4. The Respondent maintains that the Claimants' contracts were not terminated on grounds of redundancy as alleged. Their respective termination letters clearly set out that each Claimant was terminated for underperformance. The discussions on the settlement packages on redundancy terms took place AFTER the terminations had been effected and appeal concluded. There was no misunderstanding on the grounds that culminated in the termination of the Claimants' employment contract.
22. A scrutiny of the entire matter leaves one doubtless on the merits of the case. The Respondent's case overwhelms that of the Claimant on a preponderance of evidence. The Respondent has ably established his case of termination of employment on grounds of non performance. This was done procedurally and lawfully by taking the Claimant through the due process of termination of employment as envisaged by the [Employment Act, 2007](#).
23. The Claimant cannot be heard to sideline the mutual agreement on redundancy induced as a stop gap measure and exit package inter partes. He cannot now change tune and purport to claim redundancy proper through this scheme. I therefore find a case of no termination on grounds of redundancy and also a case of lawful termination of employment in the circumstances. This answers the 1st and 2nd issue for determination.
24. The 2nd issue for determination whether the claimant is entitled to the relief sought. He is not. Having lost a case of unlawful termination of employment, he becomes disentitled to the relief sought.
25. I am therefore inclined to dismiss the claim with orders that each party bears their costs of the same.

DELIVERED, DATED AND SIGNED THIS 22ND DAY OF NOVEMBER 2023.

D. K. NJAGI MARETE

JUDGE

Appearances:

1. Mr Nyabena instructed by Nyabena Alfred & Co. Advocates for the Claimant.
2. Mr. Nyango instructed by Kaplan & Stration Advocates for the Respondent

