THERE IS NO LEGAL REQUIREMENT TO ISSUE A SECOND NOTICE BEFORE REDUNDANCY

Cargill Kenya Limited v Mwaka & 3 others [2021] KECA 115 (KLR)

1. Background

1.1. The Appellant, Cargill Kenya Limited, employed the 1st Respondent as a Human Resource Assistant on 15 May 2009. Her employment was terminated on 28 February 2015 on account of redundancy.

1.2. The 2nd and 3rd respondents were also employed by the appellant in clerical roles between 1989 and 1993. Their employment was also terminated by the appellant on account of redundancy on 5th January 2015.

1.3. The Respondents challenged the redundancy, on the basis that the Appellant had not complied with the procedure set out in section 40 of the Employment Act of 2007. The trial court held that section 40 of the Employment Act, contemplates the issuance of two notices before termination on account of redundancy. Specifically, the first notice is intended to open the door for a three-way dialogue involving parties in whose name the notice is issued and addressed, while the second notice assumes the processes under the first notice have been undertaken and finalized.

1.4. On its parts, the Appellant contended that:

- a plain reading of section 40 (1) (f) requires an employer to pay a month's salary in lieu of notice as a condition before termination on account of redundancy and does not provide for issuance of a notice of termination.
- the Appellant complied with section 40 of the Employment Act. In particular, the 1st Respondent (who was not a member of a union) was issued with a notice of redundancy in person, while notice of intention to declare redundancy in respect of the 2nd-4th Respondents was contained in a letter issued to the County Labour Office and the Kenya Shipping Clearing and Warehousing Workers Union. Further, the Respondents were issued with termination letters after the expiry of the notice to intention to declare redundancy.

1.5. The trial court held that section 40 of the Employment Act 2007, requires an Employer to issue two forms of notices before redundancy, The first, under section40 (1) [a] and (b) is an expression of intention to declare redundancy and is issued to the Trade Union and the Labour Office. Where an employee is not a member of a Union, the notice of intention to declare redundancy is issued to the Employee, as well as to the local Labour Office.

1.6. The trial court found that the notices issued by the Respondent to the Employees and their Union, communicating intention to declare redundancy were in effect, notices of termination under section 40 (1) (f_. They did not communicate an intention to declare redundancy; rather, they simply informed the Employees that the Respondent had decided to terminate their contracts on account of redundancy and were therefore, in effect notices of termination under section 40 (1) (f).

2. Court of Appeal's Determination

The Court held as follows:

2.1. Section 40 (1)(f) of the Employment Act, 2007, provides that an employer shall not terminate a contract of service on account of redundancy, unless the employer has paid an employee declared redundant not less than one month's notice or one month's wages in lieu of notice.

2.2. A plain and contextual reading of section 40 (1) (f) shows that its express and objective purpose is the payment required to be made to employees affected by redundancy and not the issuance of a notice. It is also notable that the legislative intention from the arrangement and content of the enactments in section 40 (1) (d) to (g), was to provide for payments to be made and effected to employees in a redundancy. Section 40 (1) (f) can only be construed within this context. Section 40 (1) (f) is all about payment. If it was about a second notice, it should surely have said so in so many words.

2.3. It would be an illogical result to give a literal meaning to s. 40 (1) (f), and it would also be straining the provision too far to interpret it as requiring one month's notice of termination before redundancy in an attempt to resolve any grammatical ambiguity in the subsection.

2.4. In effect, no notice of termination is required to be given before redundancy under section 40 (1) (f) of the Employment Act.

2.5. The letters issued by the Appellant were indeed notices of intended redundancy as required under section 40 (1) of the Employment Act. The threshold under section 40 (1) (a) and (b) of the Employment Act is that the notification should include the reasons for, and the extent of, the intended redundancy and should be issued not less than a month prior to the intended date of termination on account of redundancy.

Key Contacts

Anne Muema
Advocate / Managing Partner

Email: amutheu@mutieadvocates.com

Maureen Kubai
Associate

Email: mkubai@mutieadvocates.com

About Mutie Advocates
Mutie Advocates is a Nairobi-based law firm with a strong focus on legal compliance, data protection and privacy law, complemented by a broad range of legal services. Built on a foundation of legal excellence, the firm provides expert support in corporate and commercial law, employment and labour relations, intellectual property, litigation, dispute resolution and regulatory compliance. Known for its practical and client-centered approach, Mutie Advocates helps organizations navigate complex legal and regulatory landscapes through data audits, policy development and strategic legal advisory. The firm serves a diverse clientele, including individuals, corporates, non-governmental organizations and public institutions, delivering timely, effective and solution- oriented legal services.

Website: www.mutie-advocate.com
Phone: +254 768 042 180
E-mail: info@mutieadvocates.com
Address: Assi Centre, School Lane, Westlands
P O Box 211-00621, Nairobi

Disclaimer:
The views expressed in this article are for general guidance and should not be interpreted as legal advice. Mutie Advocates shall not be held liable for any reliance placed on this information without formal legal consultation. Always seek professional advice tailored to your situation.