



**Emmanuel v AVC Mangement Co Ltd t/a Mnarani Club (Appeal  
E006 of 2023) [2024] KEELRC 13638 (KLR) (23 May 2024) (Judgment)**

Neutral citation: [2024] KEELRC 13638 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
APPEAL E006 OF 2023**

**AK NZEI, J  
MAY 23, 2024**

**BETWEEN**

**JILANI MWAMUYE EMMANUEL ..... APPELLANT**

**AND**

**AVC MANGEMENT CO LTD T/A MNARANI CLUB ..... RESPONDENT**

*(Being an appeal from the judgment of the SPM's Court Kilifi - Hon. J. B. Kituku  
delivered on 17th March 2023 in Kilifi CM-ELR Cause No. E008 of 2022)*

**JUDGMENT**

1. The Appellant was the Claimant in Kilifi Principal Magistrate's Court Employment Cause No. E007 of 2020 whereby he had sued the Respondent herein seeking the following reliefs:-
  - a. A declaration that termination of the Appellant's employment was unfair, unjust and wrongful.
  - b. Four(4) months' pay in lieu of notice.....kshs. 121,332
  - c. Severance pay.....kshs. 218,398
  - d. Travelling allowance.....kshs. 5,600
  - e. Unpaid salary balance of kshs. 75% for April-July 2020 (kshs. 30,333x75% x4 months) .....kshs. 90,999
  - f. Unpaid salary for August -October 2020 (kshs. 30,333x3 months).....kshs. 90,999
  - g. Salary arrears for January-October 2020 (7%x30,333x12 months).....kshs. 29,119.68
  - h. Compensation for unfair termination of employment (kshs. 30,333x12 months).....kshs. 362,996



- i. Costs of the suit and interest at Court rates.
  - j. Any other relief that the Court may deem just and fit to grant.
2. The Appellant had pleaded that he was employed by the Respondent as a Barman from 2/5/2010, earning kshs. 30,333 per month at the time of termination, and that he was declared redundant on 7/10/2020. That the Appellant was not given any notice of or appraisal of the selection criteria used in declaring him redundant.
3. The Appellant had further pleaded:-
  - a. that the Respondent had failed or neglected to issue requisite notices for the intended redundancies as contemplated under Section 40(1)(a) and Section 40(1)(f) of the [Employment Act](#) 2007.
  - b. that the Respondent failed to inform the Appellant of the selection criteria adopted to declare him redundant, and that there was no regard to seniority in time, skill, ability and reliability of the Appellant as contemplated under Section 40(1)(c) of the [Employment Act](#).
  - c. that the Respondent failed to pay the Appellant all his contractual and terminal dues prior to termination on account of redundancy contrary to the provisions of Section 40(1)(d)(e)(f) and (g) of the [Employment Act](#).
  - d. that the Respondent had no genuine reason to declare the Appellant redundant. That the Respondent, through her senior officers, had been calling the Appellant to return to work and offer his services on short term contracts, meaning that the Respondent's business was still running and the Respondent was using Covid-19 Pandemic situation to engage in unfair labour practices.
  - e. that the Appellant was unfairly and unjustifiably declared redundant by the Respondent without following due process as per the law, and without payment of terminal and contractual dues.
4. Documents filed by the Appellant alongside the memorandum of claim dated 27/10/2020 and filed in Court on 28/10/2020 included the Appellant's written witness statement dated 27/10/2020 and an evenly dated list of documents, listing 6 documents. The listed documents included copies of the Appellant's identity card, certificate of service, computation of final dues by the Respondent, termination letter, copy of a payslip and the Appellant's contract of employment.
5. The Respondent filed response to the Appellant's claim on 27/11/2020, admitting having employed the Appellant but denying his claim. The Claimant denied having unfairly declared the Appellant redundant and pleaded that the declared redundancy was fair, just and procedurally sound in that:-
  - a. the Respondent was guided by the Collective Bargaining Agreement and provisions of the [Employment Act](#).
  - b. that the Appellant was issued with the necessary redundancy notice.
  - c. that the Appellant was notified of the redundancy, and that the Respondent computed and paid the Appellant's terminal and contractual dues to him.
  - d. that the Respondent closed doors for a while and was forced to reduce staff due to the new normal brought by Covid-19 pandemic.



- e. that the Appellant was given reasons for redundancy termination, and that the decision to declare him redundant was fair, lawful and justifiable.
  - f. that the Appellant was not entitled to the reliefs sought.
6. Documents filed by the Respondent alongside the response to the Appellant’s claim included a written witness statement by Hendrick Venter (the Respondent’s Resort Manager), and a bundle of copies of documents, among them some hand-written documents, and documents/lists of names regarding payment of the Respondent’s employees’ salaries for November 2020. Also included in the bundle of copies of documents was a copy of an application for funds transfer dated 5/11/2020 indicating an amount of five million Kenya Shillings and the purpose as “staff final dues phase I”. Names and particulars of the intended beneficiaries of the said final dues were not presented in evidence. It is to be noted that the Appellant’s employment had been terminated on 7/10/2020. Other documents included the Appellant’s termination letter dated 7/10/2020, among others.
  7. At the trial, the Appellant adopted his filed witness statement as his testimony and produced in evidence the documents referred to in paragraph 4 of this judgment. In his adopted witness statement, the Appellant had stated, inter alia, as follows:-

“The Respondent has offered to pay me a total of kshs.345,330 as contained in the final dues payslip. I find this offer unsatisfactory....”
  8. Cross examined, the Appellant testified that he was not aware that the tabulated money had been paid into his account. I have not seen any demonstration by evidence that any payment was made to the Appellant after termination of his employment on 7/10/2020 on account of redundancy. The primary suit was filed on 28/10/2020, less than a month after the said termination.
  9. The Respondent called one witness, Handrick Venter (DW-1), who adopted his filed witness statement as his testimony and produced in evidence the Respondent’s filed documents. DW-1 further testified that the Respondent communicated the issue of redundancy to the staff, and that the matter was discussed in January 2020. That after Covid-19 broke out, the Respondent send its staff on paid leave in March and April, and subsequently put them on 25% pay during the months of May to July 2020, and unpaid leave from August 2020. That in paying terminal dues, the Respondent was guided by the Collective Bargaining Agreement (CBA); and that all payments had been made.
  10. Cross-examined, DW-1 testified that the Appellant was terminated on account of redundancy, and that the Labour Office was not involved in the redundancy process. That the Appellant’s employment terminated in October 2020 and that he was paid.
  11. Although DW-1 stated on being re-examined by his Counsel, that a letter had been copied to the Labour Office, he did not tell the Court what letter he was referring to, when it was dated, and when it was served on the Labour Officer. He did not specify which labour office he was referring to, and no proof of service of any letter or redundancy notice on the area Labour Officer was produced in evidence.
  12. The trial Court delivered its judgment on 17/3/2023, dismissing the Appellant’s suit with costs. Aggrieved by the said judgment, the Appellant preferred the present appeal and set out the following grounds of appeal:
    - a. that the learned magistrate erred in law and fact by disregarding the Appellant’s evidence that there were no consultations done with his involvement before his termination on account of redundancy.



- b. that the learned magistrate erred in law and fact by finding that the Respondent had complied with Section 40 of the [Employment Act](#), thus dismissing the Appellant's suit.
  - c. that the learned magistrate erred in law and fact by dismissing the Appellant's prayers by stating that he was paid, thus estopped from claiming the same despite the evidence of the alleged payment being controverted by the Appellant.
13. The Appellant sought the following reliefs on appeal:-
  - a. that the appeal be allowed, and the judgment delivered on 17/3/2023 by the trial Court be set aside in its entirety.
  - b. that the Court awards the Appellant the prayers sought in his claim.
  - c. that costs of the appeal be awarded to the Appellant.
14. This is a first appeal, and the evidence presented before the trial Court is before me for re-evaluation and fresh consideration. This Court, however, takes cognizance of the fact that it did not see or hear the witnesses testify first hand.
15. Having considered the evidence presented by both parties before the trial Court, issues that fall for determination, in my view, are as follows:-
  - a. whether termination of the Appellant's employment by the Respondent was unfair.
  - b. whether the reliefs sought by the Appellant in the trial Court are deserved.
16. On the first issue, it was a common ground that the Appellant was employed by the Respondent and remained in employment upto 7/10/2020 when his employment was terminated by the Respondent on account of redundancy. The period of the Appellant's service was not in dispute, and his monthly salary at the time of termination was also not in dispute. It was further a common ground that the Appellant was unionized, and that there existed a valid Collective Bargaining Agreement (CBA) between the Respondent and the Trade Union of which the Appellant was a member, KUDHEIHA. Turning to the law governing termination of employment by employers on account of redundancy, Section 40(1) of the [Employment Act](#) provides, in mandatory terms, 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.

17. The Court of Appeal stated as follows in the case of Thomas De La Rue [K] LTD v David Opondo Omutelema [2013] eKLR:

“It is clear to us that Section 40(1)(a) and 40(1)(b) provides 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 trade 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 a union, the notification must be in writing to the employee and the local Labour Officer...”

18. It was stated as follows in the case of Francis Maina Kamau v Lee Construction [2014] eKLR:-

“Where an employer declares redundancy, the conditions set out in Section 40 of the Employment Act must be observed, and where the employer fails to do so, the termination becomes unfair termination within the meaning of Section 45 of the Employment Act.”

19. The Appellant's letter of termination of employment on account of redundancy states in part:-

“Re: Termination Of Employment On Account Of Redundancy

The purpose of this letter is to confirm the outcome of a recent review by AVC Management Company Limited – Trading as Mnarani Club, of its operational requirements, and what this means for you.

As a result of the economic downturn due to the current Covid-19 Pandemic, and the change in operational requirements of Mnarani Club, your position of cleaner has been made redundant.

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

Your employment ended on 30<sup>th</sup> September 2020. Based on your length of service, your notice period is 4 months. Instead of working the notice, you will be paid kshs. 121,332 plus the redundancy entitlement set out below.

...you will be paid redundancy pay of kshs. 218,398 in accordance with the Collective Bargaining Agreement 2019.

This amount of kshs. 345,330 represents 4 months pay which is based on your 10.4 years of service as well as travel allowance. See attached calculation of final dues.



Due to the current Covid-19 Pandemic, we propose that your final dues to be paid in 3 equal installments as discussed with the Works Committee and Union representatives....”

20. Whereas it was a common ground that the Appellant worked until 7/10/2020, with the said date being his last working day, his termination letter stated that “his employment ended on 30/9/2020”. It is clear from the Appellant’s termination letter that the Appellant did not serve any notice period. Indeed, as stated in this judgment, the Respondent admitted at the trial that the area labour officer had not been notified of the intended redundancy pursuant to Section 40(1) (a) of the *Employment Act*, which is couched in mandatory terms. No evidence was presented by the Respondent to demonstrate service of the mandatory statutory notice on the area Labour Officer.
21. My understanding of Section 40(1) (a), (b) and (c) is that the criteria used by the employer in selecting the employees to be declared redundant ought to be set out in the notice contemplated in Sections 40(1) (a) and (b), which must be served on the local Labour Officer.
22. I have looked at the Respondent’s letter to KUDHEIHA (the Union) dated 31/8/2020 and the same simply lists the names of employees earmarked for redundancy, their status of employment (whether permanent or on contract) and the departments in which they worked. Employees due for retirement were also listed in that letter. The criteria used in selecting the employees earmarked for redundancy was not stated in that letter, and the employees’ seniority in time, skill or reliability is not given/shown. No notice was shown to have been send to or served on the area Labour Officer.
23. Section 40(1) is couched in such a way that an employer terminating an employee’s employment on account of redundancy must comply with all the requirements set out in the subsection, the only availed option being service of a redundancy notice either on the employee where the employee is not unionized or on the trade union where the employee is unionized.
24. Regarding payment of dues referred to in Section 40(1) (e) (f) and (g), the provisions are specific that payment must be made at the point of termination on account of redundancy or before the actual termination. That is why the term used therein is “the employer has paid to the employee”. In the present case, the employer terminated the Appellant’s employment on account of redundancy, and in the letter of termination made a proposal to settle payable terminal dues by 3 instalments. This was both unfair and illegal. It is no wonder that the primary suit herein was filed less than a month after the date of the letter of termination (on 28/10/2020). At the trial, the Appellant denied having been paid his tabulated terminal dues.
25. It is my finding that termination of the Appellant’s employment on account of redundancy was unfair on account of the Respondent’s failure to comply with the mandatory provisions of Section 40(1) of the *Employment Act* 2007, and I so hold and declare.
26. On the second issue, and having made a finding that termination of the Appellant’s employment was unfair, and taking into account the fact that the Appellant’s employment was terminated without payment of terminal dues and that he was send away empty handed, and having taken judicial notice of the Covid-19 Pandemic which was then plaquing the whole world, I award the Appellant the equivalent of six (6) months’ salary as compensation for unfair termination of employment. I also award terminal dues as tabulated by the Respondent based on the applicable CBA; at kshs. 345,330. The Appellant did not fault the tabulation. He only denied having received payment.
27. The Respondent did not demonstrate payment of the tabulated dues to the Appellant.



- 28. Having stated that, and having considered the submissions filed, the appeal herein is allowed, the trial Court’s judgment delivered on 17/3/2023 is hereby set aside, and judgment is entered for the Appellant against the Respondent as follows:-
  - a. Terminal dues.....kshs.345,330
  - b. Compensation for unfair termination of employment (kshs. 30,333x60.....kshs. 181,998

Total kshs. 527,328
- 29. The awarded sum shall be subject to statutory deductions pursuant to Section 49(2) of the Employment Act.
- 30. The Appellant is awarded costs of the appeal and of proceedings in the Court below.
- 31. The Appellant is also awarded interest on the awarded sum, to be calculated at Court rates from the date of the trial Court’s judgment.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 23<sup>RD</sup> MAY 2024**

**AGNES KITIKU NZEI**

**JUDGE**

**ORDER**

This Judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of the applicable Court fees.

**AGNES KITIKU NZEI**

**JUDGE**

Appearance:

.....Appellant

.....Respondent

