



Kenya Union of Commercial Food and Allied Workers Union v Yemken Trading Company Limited (Cause E810 of 2022) [2024] KEELRC 1100 (KLR) (16 May 2024) (Judgment)

Neutral citation: [2024] KEELRC 1100 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E810 OF 2022**

L NDOLO, J

MAY 16, 2024

BETWEEN

KENYA UNION OF COMMERCIAL FOOD AND ALLIED WORKERS UNION CLAIMANT

AND

YEMKEN TRADING COMPANY LIMITED RESPONDENT

JUDGMENT

1. The issues in dispute as listed by the Claimant in its Statement of Claim dated 7th November 2022 are; intention to declare unlawful redundancy and unlawful and un-procedural redundancy of Kevin Ooko Obare. The Respondent’s defence is contained in a Response dated 11th July 2023.
2. The matter went to full trial with the Grievant, Kevin Ooko Obare testifying for the Claimant. The Respondent called its Human Resource Officer, Asha Juma. The parties thereafter filed written submissions.

The Claimant’s Case

3. The Claimant states that the Grievant was the Chief Shop Steward of the Respondent’s unionisable employees. On 24th October 2022, the Respondent wrote to the Claimant giving notification of a declaration of redundancy.
4. The Claimant wrote back to the Respondent on 28th October 2022, objecting to the intended redundancy. The Claimant also proposed a meeting with the Respondent but the Respondent declined. On 4th November 2022, the Grievant’s employment was terminated on account of redundancy.



5. The Claimant accuses the Respondent of violating due procedure in the redundancy. In particular, the Claimant states that the Respondent did not issue the requisite redundancy notice. In addition, the Respondent failed to inform the Claimant the extent of the redundancy.
6. According to the Claimant, the Grievant was targeted for redundancy and placed at a disadvantage based on his trade union activities and membership.
7. The Claimant avers that the main aim of the redundancy was to terminate the employment of the Claimant's members and replace them with outsourced labour.
8. The Claimant seeks the following remedies:
 - a. A declaration that the Respondent's actions were unlawful and unfair;
 - b. A declaration that the redundancy notice dated 24th October 2022 was null and void;
 - c. A declaration that the termination of the Grievant's employment on account of redundancy was unlawful and procedurally unfair;
 - d. An order directing the Respondent to unconditionally reinstate the Grievant, without loss of benefits or in the alternative, pay the following benefits to him:
 - i. 12 months' salary in compensation;
 - ii. 18 days' severance pay for every year worked;
 - iii. 2 months' pay in lieu of notice;
 - iv. Any pending leave;
 - v. 4 days' salary for the month of November 2022;
 - vi. Certificate of service;
 - vii. Costs.

The Respondent's Case

9. In its Response dated 11th July 2023, the Respondent states that the Claimant has no legal mandate to represent the interests of the Respondent's employees.
10. The Respondent further states that it has been experiencing serious financial challenges due to a harsh economic environment, which led it to declare redundancies.
11. The Respondent asserts that it complied with the law in executing the redundancies. Specifically, the Respondent avers that it issued the requisite notices to the Claimant Union and respective employees.
12. The Respondent denies that the Grievant was placed at a disadvantage based on his trade union activities or membership. The Respondent further denies the allegation that it was replacing the Claimant's members with outsourced labour.

Findings and Determination

13. There are two issues for determination in this case:
 - a. Whether the termination of the Grievant's employment was lawful and fair;
 - b. Whether the Grievant is entitled to the remedies sought.



The Termination

14. On 4th November 2022, the Respondent wrote to the Grievant as follows:

“Dear Kevin,

Re: REDUNDANCY

For the past period of 5 months the company has been conducting an extensive audit of its operations mainly focussing on achieving optimum machine operation capacity as well as maximum utilization of its manpower. Being custodians of new brands in a very competitive market, there has equally been consideration on our sales volumes viewed against our production capacity. In order to guarantee sustainability of our nascent business, we have considered various factors with the above concerns greatly influencing our objectives and actions.

During this period, we have been reviewing your skills against your work responsibilities. Your skills are deemed insufficient to realize the performance levels expected of the position you are holding. As a result of the above, we regret that your position has been declared redundant under Sec 40 of the [Employment Act](#) 2007.

Thus the following will apply;

You shall be paid severance pay equivalent to 18 days pay for every year worked You shall be paid one month salary in lieu of notice You shall be paid for all leave days un-utilized Any other monies due You shall be given a certificate of service

Your redundancy shall take effect as from 4th November 2022 and your dues shall be paid instant. We thank you for your services and wish you well in your future endeavors.

For: Yemken Trading Company Ltd.

(signed)

HR Manager”

15. The evidence on record indicates that the Grievant’s employment with the Respondent came to an end as a result of redundancy.

16. 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.”

17. While the law recognises redundancy as a legitimate mode of termination of employment, it sets stringent conditions to be satisfied by the 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.

18. The first 2 conditions under Section 40 require every employer declaring redundancy to issue a one-month notice of intention to the affected employee, 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.
19. It is now settled law that the redundancy notices under Section 40(1) (a) and (b) are separate and distinct from the termination notice provided under Section 40(1)(f), which may be paid off in cash.
20. 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.”

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.”

21. In the more recent decision in *The German School Society v Helga Ohany* (Civil Appeal No Nai 325 of 2018 consolidated with No 342 of 2018) the Court of Appeal held that the requirement for consultation is implied in Section 40 of the *Employment Act* and stated 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.”

22. By its own admission, the Respondent did not issue a redundancy notice as defined in law, ostensibly because it was weary of sabotage by the employees. The Grievant, who occupied the position of Chief Shop Steward, told the Court that he came to learn of the redundancy when he was issued with a termination letter. Whatever fears the Respondent may have had, there was no justification for it to violate the law on issuance of redundancy notice.

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

24. According to the Claimant, the Grievant was targeted for redundancy because of his union activities. The only way the Respondent would have debunked this allegation was to lay before the Court some clear selection criteria, which it failed to do.

25. For the foregoing reasons, I find and hold that the termination of the Grievant’s employment was unlawful and unfair.

Remedies

26. I therefore award the Grievant six (6) months’ salary in compensation. In arriving at this award, I have taken into account his length of service and the Respondent’s failure to comply with the law on declaration and execution of redundancy.

27. There is evidence that the Grievant was paid all his terminal dues and the claims thereon are therefore without basis and are disallowed.

28. In the end, I enter judgment in favour of the Grievant in the sum of Kshs. 150,000 being six (6) months’ salary in compensation for unlawful and unfair termination of employment.

29. This amount will attract interest at court rates from the date of judgment until payment in full.

30. I award the Claimant disbursement costs assessed at Kshs. 20,000.

31. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 16TH DAY OF MAY 2024

LINNET NDOLO



JUDGE

Appearance:

Mr. Nyumba (Union Representative) for the Claimant

Mr. Okoth for the Respondent

