



**Kangethe v Kenya Clay Products Limited (Cause E865 of 2023)
[2024] KEELRC 1230 (KLR) (6 May 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1230 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E865 OF 2023
NZIOKI WA MAKAU, J
MAY 6, 2024**

BETWEEN

MONICAH WANGUI KANGETHE CLAIMANT

AND

KENYA CLAY PRODUCTS LIMITED RESPONDENT

JUDGMENT

1. The Claimant filed this suit against the Respondent through a Statement of Claim dated 26th October 2023, wherein she averred that the Respondent employed her as an Administration Assistant/Secretary effectively from 1st November 2010 through a Letter of Appointment dated 29th October 2010. That at the time of her employment, her monthly salary was Kshs. 47,800/- and she enjoyed salary increments with her excellent performance and that her last salary as at 31st July 2023 was Kshs. 85,000/-.
2. The Claimant's case was that on 31st July 2023, she received a letter dated 28th July 2023 in which the Respondent maliciously, irregularly and without just cause and/or excuse whatsoever, unlawfully, wrongfully and unprocedurally declared her redundant effectively terminating her employment with the Company. That upon the said termination, the Respondent failed and/or refused to pay her terminal dues including severance pay and subjected her to untold emotional and psychological torture and anguish. That moreover, the Respondent had maliciously refused and/or failed to release instructions to the manager of its Staff Retirement Scheme - Zamara Actuaries, Administrators & Consultants Limited under their scheme - Zamara Fanaka Retirement Plan (Provident) ENKE Management, to process her pension thus causing her untold suffering. It was the Claimant's averment that she was on permanent terms of employment and entitled to work with the Respondent until her retirement age at 65 years and/or beyond but lost 10 working years because of the Respondent's unlawful action. That the Respondent acted maliciously, which particulars include terminating her employment without notice and due process, failing to accord her a hearing before declaring her redundant and causing her financial embarrassment, mental anguish and torture. The Claimant



thus prays for Judgment against the Respondent for a declaration that the termination through the declaration of redundancy was unlawful, wrongful, unfair, irregular, unprocedural, and in breach of the law and tenets of natural justice. She also seeks 12 months' salary as compensation for wrongful termination of her employment, costs and interest, and a Certificate of Service.

3. In her Witness Statement, the Claimant further asserted that the reason given for the redundancy in the letter issued to her was 'downturn in business and a challenging economic environment'. She contended that the same came as a great shock to me as neither was there was indication from the Respondent that it would carry out any redundancies nor did it notify her of the intended redundancy. Furthermore, that the Respondent did not consult or prepare her in any way for her to be equipped to face a job loss notwithstanding that she had faithfully and diligently served it for 13 years. She maintained that the Respondent did not issue the requisite notices to both her and the Labour Office. The Claimant stated that the Respondent had offered to pay her one (1) month's salary in lieu of notice and one-way transport for 1+3 family members as her terminal dues only on condition that she signs a clearance form confirming she had no other claim against the Respondent. That therefore when she declined to sign the said form, the Respondent refused to make the said payment. She argued that pursuant to a CBA dated 27th April 2023 between the Respondent and the Kenya Building Construction, Timber & Furniture Industries Employees Union, she is entitled to severance pay at the rate of 26 days for each completed year of service and one-way transport for 1+3 family members at the rate of Kshs. 7,200/- per person.
4. Respondent's Case
In its Statement of Defence dated 24th January 2024, the Respondent admitted to have employed the Claimant and to her last salary as pleaded in her Statement of Claim. It averred that it has in the recent past experienced reduced sales and low revenue collection caused by the economic downturn, which has affected its ability to meet its financial obligations. That it therefore embarked on cost cutting measures including employment costs, all aimed at reducing the operation costs and enabling it run a sustainable business and that eventually, the Claimant's position and several other positions were declared redundant. The Respondent's case is that it followed a fair and just procedure in selecting the employees affected by the declaration of the redundancy by duly issuing notices to the said employees and the Labour Office and paying severance pay and notice pay. That the Claimant's terminal dues were processed and paid to her and were in the form of a redundancy package made up of one month's notice pay, one-way transport for 1+3 family members, severance pay for 12 completed years, less 5 days advance leave and statutory deductions, all totaling to Kshs. 834,737/-.
5. The Respondent further averred that the Claimant's termination letter from the Respondent is sufficient for her to approach the Staff Retirement and Benefit Scheme for purposes of notifying the Scheme about the separation of employment. That it had indeed issued Instructions to the Pension Fund alerting it about the Claimant's exit and that it has also executed and submitted the Exit Forms to the Pension Fund Trustees. The Respondent denied the particulars of malice and unfair termination of employment as pleaded in the Statement of Claim and maintained that there was fair selection and consultation prior to termination of employment on account of the redundancy and that all the employees were notified about the impending termination. The Respondent fronted that the claim for compensation for unlawful termination is not payable as the termination process was procedurally fair and just and that general damages is not payable under the employment law and contract. That in short, the Claim is not merited and should be dismissed with costs.
6. The Respondent also filed a Witness Statement made by Mr. Gilbert Kisiah, who asserted that during the period of employment, the Respondent promoted the Claimant from the position of Administration Assistant/Secretary to the position of Secretary/Receptionist. He maintained that



the Respondent experienced low sales and low revenue collection with the advent of the Covid-19 Pandemic and that the economic downturn continues to date. He asserted that both a notice of intention to declare redundancy and termination notices were issued to affected employees including the Claimant and that the termination process was therefore procedurally fair.

7. The Claimant's rejoinder in her Reply to Defence dated 26th January 2024 was that the Respondent made payment on 17th January 2024 in part settlement of this suit. She averred that though the Staff Retirement Benefit Scheme is independently run, the Respondent was required to fill, sign and provide the Notification of Exit Form to her to enable the processing of her pension by the scheme provider. She confirmed that the Respondent finally executed and submitted the Notification of Exit Forms to the Scheme provider on 7th November 2023 in part settlement of this suit. The Claimant prays that the Respondent's Statement of Defence be dismissed and judgement entered for her as prayed in her Statement of Claim.

8. Evidence

The Claimant testified before Court on 19th March 2024 that she was as at then still unemployed and that being 55 years, she felt it would be impossible to secure some other employment. She denied having received any letter or correspondence regarding the redundancy or there being any meeting about the redundancy. She confirmed that the Respondent had settled payment for one month's salary in lieu of notice and one-way transport at Kshs. 14,000/- and that severance pay was paid after she filed suit. The Claimant further testified that the Respondent did not have any justification for the redundancy because the Company was doing very well and sales were skyrocketing every other day. She thus asked the Court to help her get compensation for the wrong dismissal and for costs. Under cross-examination, the Claimant confirmed that she was not the only one declared redundant and that while four (4) employees lost employment, the others were from HR and Factory departments. She also confirmed that among the two secretaries and one receptionist, whom they used to relieve, she was the last to join the Company. She however reiterated that the Respondent did not inform her of the criteria or procedure it used to select her for the redundancy. When referred to the Notice issued to the Labour Office, the Claimant stated that the notice date and rubber stamp of the Labour Office were not clear.

9. The Respondent's witness and HR Manager, Mr. Gilbert Kisiah, testified that the four employees affected by the redundancy were from the HR, Factory, Drier/Kiln and Secretary Departments. He stated that the Claimant was assigned to the GM – Evans Kiragu whose position was scrapped upon his retirement in August/September 2022. He confirmed that they used the criteria of last in first out (LIFO) in selecting the Claimant from the pool of secretaries and receptionist they had and went on to justify why and how the other three were declared redundant. He further testified that a general notice was issued to the employees placed at the Main Gate and that the notice was concurrently issued to the Labour Office. He asserted that the Claimant being a secretary, she was the one who typed the Notice and that the Respondent having given all employees one-month notice, it was incumbent to again pay those affected one month's notice of termination. He further stated that the Claimant was uncooperative as she was not available for the consultative meeting that was set on 24th July 2023.

10. Under cross-examination, he admitted that they had not produced any documents to show the financial status of the Respondent and that there is no signature from the Claimant showing receipt of the general notice to all employees. He also admitted that the notice issued to the Labour Office did not indicate the extent of the redundancy or particularise the same and confirmed that the annexed List of Employees Affected by Redundancy did not accompany the letter to the Labour Office. He also confirmed that they did not avail to Court any memo showing that the Claimant was invited to the alleged meeting of 24th July 2023, which did not take place and was not rescheduled. He was



adamant that though they had not filed any policy document on the redundancy, he had explained how they arrived at the criteria used. He asserted that even though severance pay was not captured in the Retrenchment Letter and Clearance Certificate, the same was paid on 17th January 2024. He clarified in re-examination that when the general notice was issued, the decision on who was to be declared redundant had not been made.

11. Claimant's Submissions

It was the Claimant's submission that issues for determination are whether the declaration of redundancy was unlawful, wrongful, unfair, irregular, unprocedural and in breach of the law and tenets of natural justice and whether the Claimant is entitled to compensatory damages. The Claimant submitted that the evidence shows that the termination of her employment was irregular and unfair for want of substantive justification and procedural fairness. That in the case of *Daniel Mburu Muriu v Hygrotech East Africa Ltd* [2021] eKLR, the Court stated that both substantive and procedural fairness apply on redundancy and an employer who fails either test stands to be held liable for unfair, or wrongful and unlawful termination. The Claimant argued that the Respondent contravened the provisions of section 43 of the [Employment Act](#) as it did not have any justifiable reasons to terminate her employment on account of redundancy. That essentially, the Respondent did not attempt to adduce any evidence as to its sales or financial status to justify declaration of redundancy because of low sales/ financial difficulties. That the Court in the case of *Daniel Mburu Muriu v Hygrotech East Africa Ltd* (supra) observed that the respondent should have confirmed it was experiencing financial difficulties by producing audited financial statements. The said Court then found that it was therefore satisfied there was no good, lawful, or reasonable basis for the respondent to declare the claimant redundant. It was the Claimant's submission that this Court should thus find that the Respondent in the instant case failed to discharge its duty to prove the basis for declaring her redundant.

12. On procedural fairness, the Claimant submitted that the Respondent failed to follow the laid down mandatory procedure elaborated in section 40(1) of the Act in declaring her redundant. Firstly, it did not give personal notice to her while the notice to the labour officer did not indicate the extent of the intended redundancy, as envisaged under section 40(1)(a) and (b). That the general notice the Respondent claims to have issued to all employees thus falls short of the notice envisaged under the Act. In this regard, the Claimant relied on the case of *Abigael Jepkosgei Yator & another v China Hanan International Co. Ltd* [2018] eKLR in which the Court affirmed that in a redundancy, the notice to an employee, trade union (where the employee is unionised) and the labour officer should set out the reasons for and the extent of the intended redundancy. The Claimant noted that secondly, the Respondent admitted in evidence that it did not consult and involve her in any way before a decision to terminate her on account of redundancy was reached, despite having faithfully served it for 13 years. That in the case of *Daniel Mburu Muriu v Hygrotech East Africa Ltd* (supra), the Court stated that even when an employee is to be terminated on account of redundancy, such employee should still be afforded a hearing on whatever it is they would wish to say about the termination. She also relied on the analysis of the Court of Appeal in [Cargill Kenya Limited v Mwaka & 3 others \(Civil Appeal 54 of 2019\)](#) [2021] KECA 115 (KLR) (22 October 2021) (Judgment) on the requirement of consultation under section 40 of the Act. The Claimant's third note was that the Respondent did not provide any proof of the criteria it used in the selection of employees to be declared redundant, which criteria was opaque contrary to the provisions of section 40(1)(c) of the Act. Lastly, it was the Claimant's submission that the Respondent failed to pay her severance pay following the redundancy as provided under section 40(1)(f) and that it only paid the same after she had filed the instant suit.

13. The Claimant submitted that consequently, she is entitled to compensation for unlawful termination of employment and urged the Court to consider the Respondent's unfair conduct towards her in



assessing the damages. She further asked the Court to be guided by the provisions of section 49(4) of the *Employment Act* in considering the length of her service and her age in awarding her 12 months' salary as compensation for unlawful termination of employment. It was the Claimant's submission that since costs follow the event, the Court ought to award her costs and interest.

14. Respondent's Submissions

According to the Respondent, the award of compensation is discretionary and guided by many factors enumerated in section 49(4) of the *Employment Act*. It noted that it held meetings with the affected employees and duly informed them of the unfortunate situation the Company had found itself. It argued that compensation ought not to be granted in the instant suit because firstly, parties agreed on the undisputable claims long before the Claim was set down for hearing. Secondly, that there was substantial compliance on its part through issuance of requisite notices to the employees and the Labour Office long before it issued the termination letters. Thirdly, that the redundancy affected all departments of the Respondent and therefore there was no discrimination in the selection of the affected employees. Lastly, that the redundancy procedure also meets the requirement of section 45(2)(b)(ii) of the *Employment Act* since the termination based on the operational requirements of the employer and the exercise of the commercial judgment should not attract a penalty. It was the Respondent's submission that it is settled law that the purpose of the compensatory award is to make good the employee's loss and not to punish the employer per Industrial Court Cause No. 379[N] of 2009, D.K. Njagi Marete v Teachers Service Commission [2013] eKLR. It argued that in the circumstances of this case, the employee's economic injury has been compensated by way of dues from the Pension Scheme and Severance Pay for 12 years and an award of compensation would thus amount to punishing an employer who has settled all the applicable terminal dues payable to the Claimant under the law of the redundancy. Further, that the claim for 12 months' compensatory award also fails to appreciate the value of severance pay for 12 years paid to the Claimant as required in section 49(4)(h) of the *Employment Act*. The Respondent relied on the case of Robert Kithinji Kiugu v AAA Growers Limited [2019] eKLR wherein the Court held that an employee whose contract is fairly terminated is not entitled to any reliefs. Still on the issue of compensation, the Respondent submitted that the evidence given by both parties on the selection criteria used for the redundancy confirms that it was not a targeted redundancy as four employees from different departments were affected. Moreover, that the Claimant's position had become superfluous following the retirement of the GM and abolishment of the said office from the Respondent's Company. That it was also demonstrated to the Court that the employer applied the criteria of Last in First Out (LIFO) and the Claimant was last to join the pool of secretaries. It was the Respondent's submission that in the end, the evidence in Court demonstrates there was substantial compliance of the redundancy procedure and substantive fairness by the Respondent. That it was justified to reorganise and restructure its business and to declare the affected positions redundant and that section 45(2) contemplates 'reorganization' as a fair termination reason as held in the case of Jane I Khalechi v Oxford University Press E.A. Ltd [2013] eKLR.

15. In addition, the Respondent maintained that the redundancy procedure met the requirements under section 40 of the *Employment Act*. It submitted that its interpretation of section 40(1)(f) of the *Employment Act* was that it was mandatory that the employee should serve notice period. That it was in this regard that the Claimant's Retrenchment Letter indicated that, "since the Company should have given you one-month notice to serve, it has waived and will pay you one month's salary in lieu of notice." The Respondent argued that this communication was not an admission that there was no notice of intention to declare redundancy as alleged in the Claimant's Submissions. It further submitted that consultation is addressed in the last paragraph of the General Notices issued to employees and the labour office, which invited representation from both employees and labour office but which representation was never received. It further argued that the Notice of Intention to Declare



a Redundancy could not have had names of the employees because at that initial stage, the employer would not have identified the employee(s) likely to be affected by the redundancy. The Respondent relied on the case of *Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others* [2014] eKLR (Nairobi Civil Appeal No. 46 of 2013) quoted with approval in *Cargill Kenya Limited v Mwaka & 3 others (Civil Appeal 54 of 2019)* [2021] KECA 115 (KLR), in which Maraga JA (as he then was) stated as follows:

“46. I disagree with Mr. Mwenesi that the appellant's letter of 1st August 2012 did not constitute the notice envisaged by section 40(1)(a) of the *Employment Act* as it did not have the names of the affected staff and there was no notice addressed to the appellant's individual employees. My understanding of this provision is that when an employer contemplates redundancy, he should first give a general notice of that intention to the employees likely to be affected or their union.... At that initial stage, the employer would not have identified the employee(s) who will be affected. So that notice cannot have the names of the employees as Mr. Mwenesi contended...”

16. The Respondent further submitted that this is a case where each party should meet its own costs because parties engaged and settled all undisputed claims on their own volition. It urged the Court to be persuaded by the decision in the case of *Thomas Sila Nzivo v Bamburi Cement Limited* [2014] eKLR wherein Rika J held that the Industrial Court is guided by section 12(4) of the Industrial Court Act and Rule 28 of the Industrial Court [Procedure] Rules 2010 in considering an order for costs and is not regulated by the *Civil Procedure Act*. The said Court went on to observe that the Industrial Court has wide latitude and costs do not follow the event as frequently stated in the Civil Courts. It was the submission of the Respondent that considering the nature of employment cases as discussed in the foregoing case and the fact that it has paid the Claimant notice and severance, this Court should order each party to bear their own costs.
17. Here is an employee who was terminated on grounds of redundancy. The Respondent asserts it applied the principle of last in first out. It is asserted a notice was issued. The notice was a general notice plastered on one of the noticeboards of the Respondent. No personal notice was issued to the Claimant. There is no doubt that when economic downturns hit, a company may be compelled to declare some positions redundant. As a matter of fact, section 40(1) of the *Employment Act* recognises the leeway an employer has in organising its business. It provides in *parre materia* 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) ...; (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) ...; (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 law envisages that the employee will be notified personally. This was not done in the case of the Claimant. *Ipsa facto* the redundancy did not conform to the law. At the point the employer decides who to take out, there must be rationale for the decision. That is why the law provides for a consideration of skills/expertise, longevity in service etc generally and the last in first out principle –



LIFO. The Claimant herein was not subjected to the primary consideration – notification prior to the declaration of redundancy communicated to her in the termination letter. As such, the dismissal being patently unlawful must be deprecated. She sought 12 months salary as compensation. Under section 49 of the *Employment Act*, when a court is considering the reliefs to award a successful litigant, the court must take into account the payments made at the point of termination so as not to unjustly enrich another. In this case, other than the egregious manner of termination, the Respondent paid all the required benefits. As such, the court finds that a sum of 4 month’s salary compensation would more than suffice for the Claimant. As she was terminated unlawfully, she will also have costs of the suit. All the other prayers in her claim are unmerited and accordingly dismissed. That should have an effect on the total sum she can recover in costs as the only item that was justiciable was the manner of termination not the entire claim before court. In the final analysis, I enter judgment for the Claimant against the Respondent for:-

- a. 4 month’s salary as compensation – Kshs. 340,000/-.
- b. Costs of the suit.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 6TH DAY OF MAY 2024

NZIOKI WA MAKAU

JUDGE

