



**Njihia & 2 others v Kenya Road Hauliers Limited (Cause
E318 of 2023) [2024] KEELRC 1260 (KLR) (16 May 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1260 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E318 OF 2023**

JK GAKERI, J

MAY 16, 2024

BETWEEN

GEORGE NJUGI NJIHIA 1ST CLAIMANT

BENARD NJACI NJOROGE 2ND CLAIMANT

PETER KARUME MACHARIA 3RD CLAIMANT

AND

KENYA ROAD HAULIERS LIMITED RESPONDENT

JUDGMENT

1. The Claimants commenced this suit by a Statement of Claim filed on 18th April, 2023.
2. It is the Claimants case that they were employed by the Respondent as drivers in April 2002, November 2017 and 2015 respectively and thus served diligently for 22 years, 5 years and 7 years respectively.
3. The Claimants aver that they were unlawfully terminated on 15th December, 2022 on account of redundancy for non-compliance with the law, principally want of consultation.
4. That the Claimants were earning Kshs.46,460/= as at the date of termination.
5. The Claimants claim that they are entitled to accrued leave days, two months' salary in lieu of notice and severance pay.
6. The Claimants pray for;
 - i. A declaration that termination of their employment on account of redundancy was unlawful and unfair.
 - ii. Terminal dues in the sum of Kshs.659,375/=, 285,000/= and 330,581/= respectively.



- iii. 12 months compensation for unlawful termination of Kshs.557,520/= per person.
- iv. Costs of the suit.
- v. Interest on (ii) from date of filing.
- vi. Any other relief the court may deem fit to grant.

Response

7. By its response dated 18th May, 2023, the Respondent admits that the Claimants were employed as drivers earning Kshs.35,482.65 per month.
8. It is the Respondent's case that the notice of closure of business dated 15th December, 2022 sent to the union and all staff was issued against the backdrop of tough economic conditions.
9. That a notice of intended redundancy dated 31st December, 2022 was sent to the union and the Claimants and informed them that the Respondent was ready to discuss the payment plan and the notice was running by the time the Claimants sent a demand letter dated 11th January, 2023.
10. The Respondent avers that the Claimants were fully paid salaries for December 2022.
11. The Claimants filed a response to the Respondent's Response dated 30th May, 2023 denying that notices were served on them, union or the labour officer before termination of employment and denied knowledge of the notices.
12. They also denied that any discussions took place.
13. Similarly, the Respondent filed a response to the Claimants response but raised no new issue.
14. The Respondent prays for dismissal of the Claimant's case with costs.

Claimant's evidence

15. Pursuant to an authority dated 17th April, 2023, the 2nd and 3rd Claimant authorised the 1st Claimant, Mr. George Njugi Njihia to act and plead on their behalf.
16. The witness cited his national identity card number as 12522209 and testified that he was employed in 2002 and the Respondent was Kenya Road Transporters Ltd but changed its name in 2011.
17. Although the 1st Claimant confirmed that he had filed a contract of service signed in 2011 and filed in January, 2023, his list of documents make no reference to the alleged contract and none is on record.
18. The witness confirmed that he received a notice of closure of the company and the union was also notified and received the letter but he was not given the computation of final dues.
19. The witness, however admitted that he received the letter on payment of dues and was paid in December 2022 and January 2023 and the other Claimants were also paid.
20. CWI testified that he was not paid service pay and his salary was Kshs.42,960/= and a net of Kshs.36,960/= and they were paid upto February 2023. Copies of the payslips on record had a figure of Kshs.46,960/= as gross salary.
21. In contradiction of earlier evidence, the witness confirmed that they had no written contracts of service.
22. That the action is for severance pay.



23. On re-examination, the witness testified that he worked for the Respondent for 20 years and was not given a contract of service and all employees were notified of closure of the Respondent Company and they received two notices.
24. The witness prays for severance pay as the only claim.

Respondent's evidence

25. RWI, the Respondent's Managing Director confirmed that he was aware of the fact that he was required to keep records including the contracts of employment but did not file them.
26. It was his evidence that the Respondent company came into existence in 2011 and could not testify on what has transpired hitherto.
27. That the 1st Claimant's National Social Security Fund statement showed the date of employment as 1998 and the employer was Kenya Road Hauliers Ltd.
28. That Bernard Njoroge was employed on 1st April, 1996 and the 3rd Claimant on 1st May, 2011 and their gross salary was Kshs.42,960.00.
29. The witness confirmed that the Respondent issued a redundancy notice on 31st December, 2022 and the same was sent to the union vide email dated 15th December, 2022 but the copy sent to the union had no endorsement by the union or the Labour officer.
30. The witness confirmed that the letters sent to the Claimants had no individual acknowledgement.
31. That the 1st Claimant's dues were first computed at Kshs.325,191/= and consultations involved the employees, union and the labour officer but no evidence was filed.
32. The witness testified that Mr. George Njugi was paid in February 2023.
33. That the Respondent did not owe the Claimants severance pay or leave days.
34. On re-examination, the witness testified that the CBA had no service pay.

Claimant's submissions

35. On the date of employment of the 1st Claimant, counsel submits that the Claimants' evidence showed that he started working in 2002 not 2011 as alleged by the Respondent and the Respondent had not provided evidence of incorporation of the company.
36. Reliance was made on the provisions of Section 10(7) of the *Employment Act*, 2007 and Section 107 of the *Evidence Act* as were the decisions in Meshack Kii Ikulume v Prime Fuels Kenya Ltd (2013) eKLR and Phillemon Oseni Kidavi V Brinks Security Ltd (2018) eKLR on keeping of records.
37. As regards termination of employment on account of redundancy, counsel urges that termination of the Claimants employment was unjustified and did not meet the legal requirements.
38. Reliance was made on the sentiments of Maraga JA (as he then was) in Kenya Airways Ltd V Aviation & Allied Workers Union Kenya & 3 others (2014) eKLR to urge that the Respondent did not give proper notices of redundancy and the notices given were not served on the trade union and the labour officer as no evidence of service was provided and the Claimants were not accorded a fair hearing.
39. Sentiments of the court in Thomas De La Rue (K) Ltd V David Opondo Omutelema (2013) eKLR and Gerrishom Mukhutsi Obayo V DSV Air and Sea Ltd (2018) eKLR were cited to reinforce the



submission that the Respondent did not issue the notices envisioned by Section 40 of the [Employment Act](#), 2007.

40. Concerning the reliefs sought, counsel submitted that the Claimants were entitled to outstanding leave, severance pay, notice pay, compensation for unfair termination and certificate of service.

Respondent's submissions

41. On termination on account of redundancy, counsel submitted that the Claimants were employed as follows;
- 1st Claimant 1/01/2012
- 2nd Claimant 22/12/2017
- 3rd Claimant 23/03/2015, their net salary was Kshs.35,482.65 and the termination of employment was legal and justified as the law provided for re-organization of businesses. (See James Ngunia Kinyua V Oserian Development Co. Ltd (2017) eKLR.
42. Counsel further submitted that the Respondent duly informed the Claimants and the union of the intended cessation of business on 15th December, 2022 and the notice was shared with the union and was followed by individual notices to the Claimants on 31st December, 2022.
43. Counsel urged that the notice laid it bare that the Respondent was experiencing economic hardships.
44. According to counsel, two different notices are necessary for redundancy and the termination of employment by the Respondent was conducted in accordance with the law.
45. On the reliefs sought, counsel submitted that the Claimants were not entitled to 2 months' notice and accrued leave days as they were paid in lieu of notice and CWI confirmed that leave days were paid.
46. That since the termination of employment was not unfair, the prayer for compensation did not arise and were only entitled to severance pay as tabulated by the Respondent, namely; Kshs.325,248/=, Kshs.147,840/= and Kshs.206,976/= respectively.

Analysis and determination

47. It is common ground that the Claimants were employees of the Respondent engaged on different dates as drivers on similar terms and conditions of service.
48. Their gross salary stood at Kshs.42,960.00 and a net of Kshs.35,482.65, a fact the Claimants admitted on cross-examination.
49. Having considered the pleadings, evidence and submissions by counsel, the issues that commend themselves for determination are;
- i. When the Claimants were employed by the Respondent.
 - ii. Whether termination of the Claimants employment on account of redundancy was unfair.
 - iii. Whether the Claimants are entitled to the reliefs sought.
50. On the date of employment of the Claimants, the Respondent admitted that Mr. Bernard Njoroge had been an employee for 5 years and Mr. Peter K. Macharia 7 years which would suggest that they were employed sometime in 2017 and 2015 respectively.



51. Strangely, none of the Claimants availed evidence on the actual date of employment. In fact, the evidence adduced in court make no reference to the date of employment. The witness statement on record provides the number of years served.
52. RWI admitted that the 2nd and 3rd Claimants were employed as alleged in 2017 and 2015 respectively but was non-committal on the 1st Claimant who allegedly served the Respondent for 20 years but had no evidence to prove the same.
53. Although the 1st Claimant confirmed that he was employed by Kenya Road Hauliers Ltd in 2002, he availed no evidence of the contract of engagement and the NSSF statement on record reveal that he was not at work in 2002 and if he was, no deductions were remitted and he has not filed a claim for a refund of the deductions.
54. As correctly submitted by the Claimants' counsel, the law requires the employer to keep employment records, it behooves the Claimants to demonstrate when they were employed by the Respondent. The date of securing employment is memorable and is typically etched in the mind of the employee.
55. However, as the Respondent did not avail controverting evidence, the Claimant's claim that he served for 20 years remains unchallenged.
56. As regards termination on account of redundancy, it is common ground that by a notice dated 15th December, 2022, the Respondent notified all its employees that it was ceasing operations and that it was in the process of selling its fleet owing to the tough economic environment in the past 5 years. Among the challenges cited included losses, delayed payments by clients, fuel costs, negligent drivers and mechanical breakdowns.
57. The notice promised payment of terminal dues and outstanding salaries and all employees would proceed on leave from 24th December, 2022.
58. The Respondent availed copies of notices addressed to the Claimants dated 31st December, 2022 informing them of the intended redundancy.
59. The letters in question had no acknowledgement by the Claimants or evidence of service. Copies of termination notices dated 31st January, 2023 were also availed but none had been acknowledged by the Claimants.
60. Similarly, copies of deposit of monies into the Claimants' accounts for the sum of Kshs.35,483.00 were also availed.
61. It is common ground that the Respondent's notice of closure of operations dated 15th December, 2022 was a redundancy statement as it put the Claimants on notice that their employment by the Respondent was coming to an abrupt end.
62. Redundancy is one of the legally recognized approaches of terminating the employment relationship and may be occasioned by various circumstances including restructuring, re-organization, technological changes and cost-cutting among others.
63. Redundancies are exclusively available to employers and the provisions of the [Employment Act](#) not only defines the term redundancy but also prescribes the precepts of a fair redundancy process.
64. Section 40(1) of the [Employment Act](#), 2007 underscores the requirements of a fair redundancy process.



65. In *Freight In Time Ltd V Rosebell Wambui Munene* (2018) eKLR, the Court of Appeal expressed itself as follows;
- “In addition, Section 40(1) of the *Employment Act* prohibits in mandatory tone, the termination of a contract of service on account of redundancy unless the employer complies with the following seven conditions, namely; . . .
66. See also *Thomas De La Rue (K) Ltd V David Opondo Omutelema* (Supra).
67. These conditions include notice to the union and the labour officer or notice to the employee and labour office at least one month before the effective date of redundancy, selection criteria, equity where an employee is or is not a member of a union, payment of leave days in cash, one month’s notice or salary in lieu of notice and severance pay.
68. Courts have in addition held that consultations are an integral part of the redundancy process as clearly held in *Kenya Airways Ltd V Aviation & Allied Workers Union Kenya* (Supra) and *Cargill Kenya Ltd V Mwaka & 3 others* (2021) eKLR.
69. I will now proceed to determine whether the process employed by the Respondent met the statutory threshold bearing in mind that the law places a heavy burden on the employer to justify termination of a contract of service.
70. First, as regards the notice of redundancy, Section 40(1)(a) and (b) of the *Employment Act*, 2007 require notices to the union and the labour officer, if an employee(s) is a member of the union and a written notice to the employee and the labour officer where the employee(s) affected is not a member of a union not less than one month prior to the date of redundancy.
71. In this case, since the Claimants were members of the union, the Respondent was obligated to send the notice to the union and the local labour officer only according to Section 40(1)(a) of the *Employment Act*, 2007.
72. Although RWI testified that a letter was sent to the union, he adduced no evidence of service of the letter or acknowledgment by the union.
73. The fact that the notice of redundancy dated 15th December, 2022 and the letters addressed to the Claimants are copied to the Transport Workers Union-Kenya does not show that the letter was sent to the union and had no response or it was delivered at all.
74. This would be atypical for a union.
75. Based on the evidence on record, there is no indication as to when and by whom the redundancy notice was sent and/or acknowledged by the union, a central prayer in the process.
76. Equally, the Respondent provided no evidence to demonstrate that the redundancy notice was sent to the local labour office.
77. Second, under Section 40(1)(a) of the Act, the notice must state the “reasons for and extent of the intended redundancy.”
78. Assuming that the notice of closure of operations was the redundancy notice, the notice merely mentioned the tough economic downfall without showing how the company had been impacted upon. Challenges of delayed payments by clients, negligent drivers, breakdowns and losses among others are not uncommon in transport business.



79. There is no evidence to show that the company was struggling to pay its employees or that its profits had plummeted in the last 5 years of tough economic downfall.
80. The requirement of the reason or reasons for the redundancy reinforces the requirements of Section 43 and 45(2) of the *Employment Act*, 2007 as far as the reason(s) for termination of employment is concerned.
81. In the court's view, however, the notice was sufficient to the extent as it affected all employees of the company.
82. Having found that the Respondent did not comply with the provisions of Section 40(1)(a) of the *Employment Act* on notification of the union and the local labour office, the alleged notice of redundancy was ineffectual.
83. As far as the number of notices required under Section 40(1) of the *Employment Act*, 2007 is concerned, in the Kenya Airways Ltd case (Supra), the Court of Appeal made no specific finding on a second notice being required.
84. Similarly, in African Nazarene University V David Motevu & 103 others (2017) eKLR and Cargill Kenya Ltd V Caroline Mwaka & others (Supra), the Court of Appeal held that the provisions of Section 40(1)(f) of the *Employment Act*, 2007 do not expressly provide for a notice as its focus is payment.
85. Third, although RWI alleged that there were consultations and discussions between the Respondent, union, Claimants and the labour officer, he provided no scintilla of evidence of the alleged discussions or consultations or when they took place and where.
86. In Kenya Airways Ltd V Aviation & Allied Workers Union Kenya (Supra), Murgor JA held as follows;
- “ . . . So that, where Section 40(1)(a) of the Act, only contemplates notification, it is clear from the ILO Convention, which is applicable to Kenyan law by virtue of Article 2(6) of *the Constitution*, that in addition to the requirement to notify the union, in this case, the Respondent and the competent authorities, that being the Ministry of Labour, there is also the requirement for the employer to hold consultations with the trade union representatives.
- Conversely, neither Section 40(1)(a) of the Act, nor the ILO Convention makes it a requirement for the employer to consult with the employee . . .
- I might add that, consultations in redundancies are two-way discussions between the employer and the union to be conducted with candor, reasonableness and commitment towards addressing the concerns of both management and the employees and focused on reaching solutions.”
87. Maraga JA (as he then was) expressed similar sentiments on the requirement and significance of consultations.
88. In Cargill Kenya Ltd V Mwaka & others (Supra), the Court of Appeal stated that;
- “Having regard to the legislative intention of the provisions of Section 40 of the *Employment Act*, the international law and decided cases, it is our finding that consultations on an intended redundancy between the employer and the relevant unions, labour officials and the employees is implied by Section 40(1)(a) and (b) of the *Employment Act*.”
89. The court is guided accordingly.



90. In the instant case, the Respondent tendered no documentary evidence of any consultations with the union or the labour office.
91. Fourth, the Respondent availed no evidence of the impact of the Collective Bargaining, if any, on the dues payable to the Claimants and the requirement of equity under Section 40(1)(d) of the Employment Act, 2007 is of no moment.
92. Fifth, the Claimants were paid some monies but were not paid severance pay.
93. Having found that the Respondent's redundancy process did not meet the threshold prescribed by Section 40(1) of the Employment Act, 2007, the purported redundancy transitioned to an unfair termination of the Claimant's employment which entitles them to the reliefs provided for by the Employment Act, 2007.

Whether the Claimants are entitled to the reliefs sought

94. Having found that the termination of the Claimants employment on account of redundancy was unfair, I will now proceed to determine the reliefs available to the Claimants.
 - a. Declaration
95. Flowing from the foregoing finding, it is clear that the termination of the Claimants employment was unfair and a declaration to that effect is merited.
 - b. Two months' salary in lieu of notice
96. CWI availed no evidence of the basis of this claim as no Collective Bargaining Agreement (CBA) was availed to justify the prayer.
97. More importantly, CWI confirmed on cross-examination that the Claimants were paid for the months of December, January and February.
98. Equally, on re-examination, CWI testified that they were paid one month's salary as notice.
99. Finally, as adverted to elsewhere in this judgement, the provisions of Section 40(1) of the Employment Act, 2007 do not expressly require two notices and courts have not found that a second notice is implied by law.
100. The claim for two month's salary in lieu of notice is unmerited and is declined.
 - c. Accrued annual leave
101. Neither the Claimants' written statement nor the oral evidence adduced in court make reference to any outstanding leave days for any of the Claimants or how many they were or when they accrued.
102. Relatedly, CWI confirmed on cross-examination that he was in court for severance pay.
103. In the absence of relevant particulars and supportive evidence, the prayer for accrued leave days is unsustainable and is declined.
 - d. Severance pay
104. Having found that termination of the Claimants employment on account of redundancy was unfair, the claim for severance pay is unsustainable as the termination transitioned to an unlawful termination of employment under the provisions of Section 45 of the Employment Act, 2007.

The prayer is declined.



- e. 12 months compensation
105. Having found that termination of the Claimants employment was unfair, the provisions of Section 49(1)(c) of the *Employment Act*, 2007 kick in and the Claimants are entitled to compensation upto a maximum of 12 months' salary subject to the provisions of Section 49(4) of the Act.
106. In determining the quantum of compensation, the court has taken into consideration the fact that;
- i. The Claimants were employees of the Respondent as follows;
1st Claimant 20 years
2nd Claimant 5 years
3rd Claimant 7 years.
- In the circumstances of this case, where the Claimants were not blameworthy for the termination, the duration served is an important consideration in determining the level of compensation.
- ii. The Claimants did not contribute to the termination of employment.
- iii. The Claimants had no recorded warnings or misconduct.
- iv. The Claimants tendered no evidence as to whether they applied for employment in the company that acquired the Respondent's assets or how they mitigated their loss.
107. In the circumstances, the court is satisfied that the Claimants should be compensated as follows;
- 1st Claimant 8 months salary Kshs.343,680/=
- 2nd Claimant 5 months salary Kshs.214,800/=
- 3rd Claimant 6 months salary Kshs.257,760/=
- Total Kshs.816,240/=**
108. In conclusion, judgment is entered in favour of the Claimants against the Respondent as follows;
- **a. Declaration that termination of the Claimants employment on account of redundancy was unfair and unlawful.**
- **b. Equivalent of 8 months, 5 months and 6 months' salary for the 1st, 2nd and 3rd Claimant respectively.**
- **c. 50% costs of this suit.**

Orders accordingly.

CONCLUSIOINS

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 16TH DAY OF MAY 2024

DR. JACOB GAKERI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have



waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of **Section 1B** of the *Civil Procedure Act (Chapter 21 of the Laws of Kenya)* which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE

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