



Mengesa & another v Standard Chartered Bank Kenya Limited & another (Employment and Labour Relations Cause 805 & 804 of 2019 (Consolidated)) [2024] KEELRC 1681 (KLR) (2 July 2024) (Judgment)

Neutral citation: [2024] KEELRC 1681 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

EMPLOYMENT AND LABOUR RELATIONS CAUSE 805 & 804 OF 2019 (CONSOLIDATED)

MN NDUMA, J

JULY 2, 2024

BETWEEN

JOHN BWOYI MENGESA CLAIMANT

AND

STANDARD CHARTERED BANK KENYA LIMITED RESPONDENT

AS CONSOLIDATED WITH

EMPLOYMENT AND LABOUR RELATIONS CAUSE 804 OF 2019

BETWEEN

ISAAC MWANGI NGARA CLAIMANT

AND

STANDARD CHARTERED BANK KENYA LIMITED RESPONDENT

JUDGMENT

1. Isaac Mwangi Ngara and John Bwoyi Nyongesa, sued their employer Standard Chartered Bank Kenya Limited in the consolidated suit. John Bwoyi Nyongesa testified as CW1 whereas Isaac Mwangi Ngara testified as CW2.
2. CW1 adopted a witness statement dated 1/11/2019 as his evidence in chief whereas CW2, adopted a witness statement dated the even date as his evidence in chief. CW1 stated that he was employed by the respondent on 28/5/2007 in the capacity of sales representative and rose through the ranks to the position of customer service manager/banking business. CW1 served diligently and faithfully until



14/8/2019 a period of about twelve (12) years when his employment was terminated on grounds of redundancy.

3. Before the termination the respondent invited CW1 for interviews for the same position and was advised he was not successful.
4. That the termination was not for a valid reason and the respondent violated section 4 of the Employment Act, 2007 as it was done in bad faith.
5. The respondent did not follow the principle of first in last out since the bank retained colleagues of CW1 who had joined the bank much later as seen from the employment numbers.

CW1's employment number was 1277625 whereas those left behind were:

- i. Rael Atieno Opondo 1294248
 - ii. Karungi Mackline 1436836
 - iii. Gladys Chelule Chepkoech 1448436 and
 - iv. Nyamai Ann Muthoka 1471907
6. That in the period 2012 to 2016, CW1 worked as relationship manager (Business Banking) during which period CW1 was paid Kshs 67,000/= monthly while the least paid relationship manager earned Kshs 110,000/=. That CW1 was underpaid by Kshs 43,000/= per month.
 7. That between the year 2016 and 14th August 2019, CW1 was paid Kshs 132,800.67 per month as against expected salary of Kshs 300,000/= due to the spiral effect of the underpayment suffered by CW1 for the year 2012. That CW1 was being underpaid to the tune of Kshs 167,199.33 per month during this period.

CW1 seeks the following reliefs:

- i. Equivalent of 12 months' salary in compensation
 - ii. Under payments for 2012 to 2016 @43,000/= per month x 48 months Kshs 2,004,000/=
 - iii. Underpayment between 2016 to 14/8/2019 at Kshs 167,191.33 x 44 months Kshs 7,356,770.52.
 - iv. Grant of certificate of service
7. The respondent varied the interest rate of CW1's loan with the bank of about 1 million from the staff rate of 6.46% per annum to commercial rates upon termination to the loss and detriment of CW1.
 8. That CW1 was forced to accept the changes so as to be paid his terminal benefits. That despite demand, the respondent has not made good the claim. CW1 prays to be awarded as prayed.
 9. CW2 stated that he was employed by the respondent on 19/9/2008 in the capacity of sales representative and rose through the ranks to the position of Business Banking Acquirer and his employment number was 1321695.
 10. That the claimant worked diligently and faithfully until 14/8/2019 when his employment was terminated on grounds of redundancy. That prior to the termination the respondent invited CW2 for interview for the same position and was deemed unsuccessful.



11. That the declaration of redundancy was not for a valid reason and the respondent did not follow the last in first out principle as per section 40(1)(c) of the Employment Act, 2007. That employees that were retained were employed after CW2 and they included: -
 1. Rose Kuria 1487117
 2. Purity Mwangi 1448387
 3. Martin Guchu 1504930
 4. Seraphine Ndinda 1404791
 5. Emerald Mutahi 1435135
12. Their staff numbers indicate that they were employed after CW2.
13. That the termination was unlawful and unfair. The claimant prays for:
 - a. General damages equivalent to 12 months' salary @Kshs 157,739.40 per month and
 - b. Provision of certificate of service.
14. That the respondent upon terminating employment of CW2 varied the interest on a loan of 1.7 million from the staff rate of 6.46% to commercial rates to the loss and detriment of CW2. CW2 refused to sign a new contract to that effect. That despite demand, the respondent has not made good the loss.
15. CW1 and CW2 insisted on their facts despite concerted cross-examination by Mr. Rabut advocate for the respondent and CW2 stated that the respondent did not notify the labour office of the intended redundancy since their letters of termination were not copied to the Ministry of Labour. CW1 and CW2 said there was notice of redundancy but their final dues were paid after they had left. That in any event that notice was not sent to labour office. The claimants admitted having been notified vide a letter dated 10/10/2021 which spoke of merged functions upon introduction of digital platforms. That this was said to be the reason for the intended declaration of redundancies. CW1 and CW2 said they do not contest the reason for the intended redundancy but are aggrieved by the manner it was implemented. Business Banking was not mentioned in that letter CW1 stated. CW1 and CW2 insisted they were interviewed on the same positions they held but they also applied for other positions but were not successful. CW1 said he applied for two positions. That 30 positions were to be abolished across departments.
16. CW1 said he was told to sign letter dated 14/8/2019 so as to be paid his final dues. CW1 said he did not sign the same willingly. CW1 and CW2 said they were paid 1-month salary in lieu of notice; ½ month salary for each completed year of service; and for leave days not taken. That the outstanding loans were discounted by 25% and the loans were to remain at staff rates for a period of six (6) months from date of termination.
17. CW1 said he signed because he was desperate. CW2 said he did not sign. CW1 said he had no pay slips for the staff he says were paid more than him. CW1 said he had raised the matter of underpayment in a letter dated 26/8/2019. That at the time he had received notice of redundancy dated 30/7/2019. That he raised the issue since he wanted it to be addressed together with the redundancy settlement. CW1 said he understood the reply on the underpayment by the bank hence he came to court.
18. CW1 said the loan was currently non-performing. CW1 said the loan was discounted and he paid 5 months effective from date of termination. CW2 said he trained all the staff who came after him and were retained. CW2 admitted that the letter dated 12/7/2019 was addressed to the Ministry of



Labour. CW2 said he did not receive it. CW2 said the benefits in the letter dated 14/8/2019 were paid to him but he did not sign the letter since he disagreed with its content. CW2 said the letter he received explained the reason for intended declaration of redundancy. That 30 staff members were to be retrenched. That people in the same department attended interviews for the same positions. CW1 and CW2 said they do not know how much they scored.

Defence

19. RW1 Morris Mandere adopted witness statement dated 7/10/2021 as his evidence in chief and produced exhibits '1' to '9' dated 27/4/2020 and separate bundle dated 8/10/2021 with exhibits '10' to '12'. RW1 said redundancy notice dated 12/7/2019 was written to the Commissioner of Labour and copied by email to Labour Office, Nairobi though it was not stamped by the office.
20. RW1 said there were consultative meetings on redundancy on 19/6/2019 as evidenced by emails before court however labour officers were not invited to those meetings.
21. RW1 said CW1 earned a monthly salary of Kshs 132,800/= at the time of termination. That the respondent had introduced a new operating model in retail banking segment by creating value centers including, priority and premium value centers, credit card and personal loans value Centre, referral analytics and clients experience, and process and governance. The changes were aimed at embedding strategy and adopt a respective structure. As a result of the new operating model, excess capacity occurred impacting 40 managerial staff including the 1st and 2nd claimants.
22. CW2, the second claimant earned Kshs 157,739/= as at the time of termination and his position was impacted in the same manner and through the same process as that of CW1. The evidence by RW1 is similar in all material respects with regard to the position by CW2 and were paid similar terminal benefits upon declaration of redundancy.
23. Subsequently on 12/7/2019 the respondent wrote to the Commissioner of Labour notifying of the impending redundancy. The respondent further aimed at minimizing any negative impact to staff through deployment to other parts of its business and released only those who could not find positions in the bank.
24. Further, those declared redundant were to be paid redundancy packages subject to statutory deductions on any money owing to the respondent at the end of their service as follows: -
 - i. One-month salary in lieu of notice
 - ii. Severance pay at the rate of 1.5 months' salary for each completed year of service and
 - iii. Encashment of any leave not taken at the time of termination.
25. On 26th June 2019, all impacted staff were subjected to a competitive selection process which the claimants took part in. The respondent then picked top five scorers in the order of ranking from the interview and the claimants were not successful.
26. By a letter dated 15/7/2019, the claimants were notified that their roles were no longer required as a result of excess capacity created by standard digitization and alignment to the value centres operating model and as such claimants' positions were declared redundant.
27. The respondent further advised that it would work with the claimants to find suitable alternative roles to avoid redundancy situation. However, in the absence of any alternative roles, the claimants were declared redundant.



28. By letters dated 14/8/2019 the claimants' positions were terminated on account of redundancy with effect from 14/8/2019. In addition to the aforesaid terminal benefits, the claimants got a net discount of 25% on outstanding loans and 6 months usage of the staff bank account on staff rates from the date of separation.
28. The claimants were also issued with certificates of service.
29. RW1 was subjected to very close cross-examination by advocate Kabue for the claimant and RW1 reiterated same evidence as adduced in chief with regard to the notice sent to the Commissioner of Labour dated 12/7/2019 and copied to Nairobi Labour Office and that consultation meeting, took place with the claimants in addition to interviews done with respect to all affected staff with a view to minimize the impact of retrenchment. That after the interviews, the top five (5) scorers were retained. RW1 said seniority, skills and ability were considered in the selection process. That the two claimants' employment was terminated upon the respondent making effort to get them alternative employment but it was not possible due to reduced capacity after restructuring. That the suit lacks merit and it be dismissed with costs.

Determination

30. The parties filed written submissions which the court considered together with the evidence adduced by CW1, CW2 and RW1. The issues for determination are:
- i. Whether the termination of CW1 and CW2 was for a valid reason following a fair procedure.
 - ii. Whether the claimants are entitled to the reliefs sought.
31. The *Employment Act*, 2007 defines redundancy at section 2 as follows: -

“redundancy” means 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.”

Section 40 of the Act, provides for substantive and procedural requirements for a lawful and fair declaration of redundancy 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.

32. Courts have pronounced themselves on these statutory requirements for an employer to terminate employees on grounds of redundancy in the case of *Kenya Airways Limited v Aviation and Allied Workers Union of Kenya & 3 others* [2014] eKLR where the Court of Appeal stated: -

Thus, redundancy is a legitimate ground for terminating a contract of employment provided there is a valid and fair reason based on operational requirements of the employer and the termination is in accordance with a fair procedure. As section 43(2) provides the test of what is fair reason is subjective, the phrase “based on operational requirements of the employer” must be construed in the context of the statutory definition of redundancy.

What the phrase means, in my view, is that while there may be underlying causes leading to a time redundancy situation such as reorganization, the employer must nevertheless show that the termination is attributable to redundancy – that is that the services of the employee have been rendered superfluous or the redundancy has resulted in abolition of office, job or loss of employment.”

33. On the procedural requirement, the Court of Appeal in the said *Kenya Airways Case* stated as follows:

“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;

Where an employee is not a member of a trade union, the employer notifies the employee personally in writing and the labour officer”

34. Furthermore, on the issue of selection criteria this court interpreted the requirements of section 40(1) (c) in the case of *Kenya Union of Domestic Hotels Educational Institutions Hospitals and allied Workers (KUDHEIHA) v Nairobi Hospital* [2022] eKLR as follows: -

As earlier observed selection should be based on seniority in time, skill, reliability and ability of each employee of the particular class of employees affected by redundancy. Seniority in time is often characterized as Last In First Out (LIFO) principle.



35. The same is a guideline not mandatory but in any event the criteria used to declare the redundancy should be well documented. The employer should not merely cite reorganization without basis to identify or to single out an employee for termination. Out of their members declared redundant how many were considered and how many were in that department, what criteria was applied?”
36. In the present case, the court is satisfied from the evidence adduced by CW1, CW2 and that by RW1 and the documents before court that the respondent had a valid reason to declare the claimants’ redundant upon restructuring the bank.
37. The court is also satisfied that the respondent adhered to all the procedural and substantive requirements under section 40(1)(a) to (g) of the *Employment Act* 2007 by notifying the labour office and the claimants of the intended redundancy at least one month before the date of termination. In addition, the respondent paid one-month salary in lieu of notice to both claimants; severance pay equivalent to 1.5 times months’ salary for each completed year of service and also paid in lieu of leave days not taken.
37. Furthermore, the respondent granted a rebate on the interest on outstanding loan of 25% of the outstanding amount and also allowed repayment of the outstanding loan at staff rates for a period of six (6) months from the date of termination.
38. It is however the court’s considered finding that since the termination of employment of the claimants was for no fault at all on their part but for operational reasons to suit the circumstance of the respondent, the staff loans initially granted at favourable staff rates of 6.46% should not be altered to commercial rates to their loss and detriment.
39. The court is also satisfied that the respondent granted the claimants certificates of service.
40. In the final analysis, the court finds that the suit by the claimants lack merit except in respect of the prayer to declare outstanding loans payable by the claimants be repaid on staff rates of 6.46% from the date the interest rates were altered till payment in full and the court declares accordingly.
41. The respondent to pay half the costs of the suit.

DATED AT NAIROBI THIS 2ND DAY OF JULY, 2024.

MATHEWS NDERI NDUMA

JUDGE

Appearance:

Mr. Kabue for the claimant

Mr. Rabut for respondent

Mr. Kemboi, Court Assistant

