



**Ngure v Board of Management of Sigona Golf Club (Cause E286 of 2021) [2024] KEELRC 1821 (KLR) (12 July 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1821 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E286 OF 2021**

**SC RUTTO, J**

**JULY 12, 2024**

**BETWEEN**

**EUNICE NJOKI NGURE ..... CLAIMANT**

**AND**

**THE BOARD OF MANAGEMENT OF SIGONA GOLF CLUB .... RESPONDENT**

**JUDGMENT**

1. The Claimant avers that she was employed by the Respondent for 25 years before her employment was unfairly terminated on account of redundancy by a letter dated 12<sup>th</sup> November 2020. The Claimant further avers that she was first employed as an Accounts Clerk in the year 1995 and in 2018, she was transferred from the Accounts Department to the Accommodations Department to take up the position of the Head Receptionist who was going on maternity leave.
2. According to the Claimant, the redundancy letter came as a surprise to her as she had worked for the Respondent for 25 years and the principle of last in first out was not considered. She termed the redundancy unfair, predetermined, and a scheme to terminate her services without any rightful justification and in complete disregard of the rules of natural justice.
3. Against this background, the Claimant has sought the following reliefs against the Respondent:
  - a. Unpaid salary;
  - b. Unpaid medical refund of Kshs 65,128.00;
  - c. 12 months compensation for unfair, unlawful and wrongful termination of employment on account of redundancy;
  - d. Service charge for December 2020;
  - e. Certificate of Service; and



- f. Costs and interests.
4. Through its Reply filed on 27<sup>th</sup> June 2023, the Respondent has denied that the Claimant was its employee and contends that she was actually an employee of Sigona Golf Club (Club). The Respondent further denies that the Claimant's employment was illegally or unlawfully terminated.
5. According to the Respondent, the Claimant's termination was not only fair but justifiable and observed the tenets of the law to the letter. Consequently, the Respondent has asked the Court to dismiss the Claim in its entirety.
6. During the hearing which proceeded on 8<sup>th</sup> February 2024, both parties called oral evidence.

### **Claimant's Case**

7. The Claimant testified in support of her case as CW1 and for starters, she sought to rely on her witness statement to constitute her evidence in chief. She further produced the list and bundle of documents filed alongside the Statement of Claim as exhibits before Court.
8. It was the Claimant's evidence that she was a member of the Kenya Union of Domestic Hotels Educational Institutions Hospitals and Allied Workers (KUDHEIHA Workers), having joined in August 2015 and a beneficiary of all the Collective Bargaining Agreements (CBAs) that were in place.
9. In this regard, she contends that the Union provided for basic minimum wages as well as wage increments in its Memorandum of Agreement with the Respondent.
10. That despite being a beneficiary of the Memorandum of Agreement dated 26<sup>th</sup> April 2017 between KUDHEIHA and the Respondent, her pay for the period effective 1<sup>st</sup> January 2018 where she was entitled to 9% of the basic pay, was never effected.
11. It was her contention that she did not receive any salary increment as provided for in the union Agreement and claims the amount of Kshs 3,283/= for a period of 3 years from January 2018 until November 2020 when her services were terminated due to redundancy.
12. The Claimant further averred that on 22<sup>nd</sup> June 2018 while on her way home, she injured her right leg and was treated at the Aga Khan University Hospital Kikuyu where she paid the hospital bill and was to be refunded the amount spent on treatment by the Respondent.
13. Upon recovering in 2018, she lodged a claim of Kshs.65,128/= being the amount spent at Aga Khan Hospital Kikuyu but the Respondent has never paid the same to date.
14. She further stated that on 6<sup>th</sup> May 2020, she received a letter from the Respondent informing her of the Employment Contract variation reducing her gross salary as of May 2020. That she would get 70% of her gross salary and in the month of June she would get 60% of her gross salary.
15. That she agreed to the contract of variation for the months of May and June and the Respondent indicated that the contract will be reviewed by 15<sup>th</sup> June 2020. The Respondent continued deducting July, August and September 2020 salaries unilaterally without her authority. She claims the unpaid salary for July, August and September 2020.
16. That the contract was to be reviewed by 15<sup>th</sup> June 2020 which the club management never reviewed and continued paying 70% of the gross pay unilaterally without any consultation until 12<sup>th</sup> November 2020 when she was served with a notice to declare her redundant.



17. She protested the Redundancy Notice stating that the redundancy was unfair and did not consider the CBA in place by the Union that provided that the principle to be adopted in declaring an employee redundant is “last in first out”.
18. According to the Claimant, she had served the Respondent diligently and with dedication until the Respondent proclaimed her services redundant.
19. It was the Claimant’s contention that the letter of redundancy did not give a justifiable reason for the redundancy and she was not given a fair chance to defend herself against the redundancy.

### **Respondent’s Case**

20. The Respondent called oral evidence through its former General Manager, Mr. Samuel Gachoka who testified as RW1. Equally, RW1 adopted his witness statement to constitute his evidence in chief. He proceeded to produce the documents filed on behalf of the Respondent as exhibits before Court.
21. It was RW1’s testimony that the Club issued a Notice titled Unionized Staff Salary Harmonization wherein the Club confirmed that in cases where unionized staff earned more than the minimum wage as per the 2017/2018 CBA, the salaries would be stagnated until they equal the minimum wage as other unionized employees.
22. It was his evidence that the Claimant was therefore not entitled to a 9% salary increment at the time, since her salary was Kshs.36,480.00, which was higher than the minimum wage as per the 2017/2018 CBA.
23. RW1 further stated that vide a notice dated 4<sup>th</sup> November 2019, the Club in line with the Memorandum of Agreement with the Union, reviewed the Claimant’s salary who received a wage increase of 3% and an increment in her house allowance from Ksh. 5,800.00 to Ksh. 6,000.00. As such, the Claimant’s claim for Ksh. 3,283.00 from January 2018 to November 2018 is unfounded.
24. That the Claimant was well aware of the provisions of the CBA as regards medical treatment, which strictly provided for employees to be treated at public hospitals. That in this regard, the Claimant was treated at the Aga Khan University Hospital, which does not fall under the category of public hospitals.
25. He further stated that the Claimant did not spend any of her monies on the said treatment and cannot purport to demand a refund of these sums.
26. RW1 further stated that sometime in March 2020, the Respondent being part of the hotel and recreational club industry, was adversely affected by the COVID-19 global pandemic causing its business to experience very low sales.
27. Due to the pandemic and the directives shutting down most if not all recreational centers which included the Club, the Club’s funding was substantially reduced, and it became imperative for it to reduce its costs and to ensure operational efficiency.
28. Consequently, as part of a continuous organizational review and in line with the business requirements, the Club undertook a comprehensive review of its organizational structure to ensure that it adapted to the current business environment and requirements which necessitated the impending redundancies after its attempts at cushioning its employees from the effects of the pandemic failed.
29. That on or about 15<sup>th</sup> April 2020, the Club held a consultative meeting with the Union with the agenda of the meeting being to discuss the effects of the COVID-19 pandemic on the Club and its employees.



30. The meeting was attended by the Union officials where it was ascertained that the Club had been adversely affected by the pandemic and some of the problems being experienced by the Club were inter alia that the club patronage had reduced to about 10%. The management of the Club reported to the Union that following the closure of most of the work stations, majority of employees had no jobs in their regular stations.
31. After discussions, the Club together with the Union came up with certain proposals which included, inter alia, that all the Club's employees would be retained during the period from 1<sup>st</sup> April 2020 to 31<sup>st</sup> August 2020.
32. On the issue of salaries, it was agreed that due to a decrease in Club income and in an effort to retain all the employees, monthly gross salaries for all employees would be cut by 50% and that all allowances, save for house allowance, would be discontinued for the period.
33. The Union officials also agreed that employees whose work stations were closed would be deployed to work anywhere else during the intervening period.
34. In light of this agreement with the Union, the Club held individual meetings with all the employees on 6<sup>th</sup> May 2020, where they were advised that most of the income generating activities had been closed due to the pandemic and that this frustration had rendered it near impossible for the Club to meet some contractual obligations such as those embodied in their employment contracts.
35. The Club thereafter issued the Claimant with a letter dated 6<sup>th</sup> May 2020 advising her that her gross monthly salary would be adjusted and effective 1<sup>st</sup> May 2020, she would receive 70% of her gross salary and effective 1<sup>st</sup> June 2020, she would receive 60% of her gross salary. This agreement was thereafter reviewed on 15<sup>th</sup> June 2020. The Claimant duly acknowledged receipt of this letter.
36. The Club, being in the entertainment industry, continued to be adversely affected by the ongoing COVID-19 pandemic causing it to continue experiencing very low sales which had a negative impact on its business. This necessitated the redundancies after its attempts at cushioning its employees from the effects of the pandemic failed.
37. It was RW1's evidence that the Club held consultative meetings with the Claimant, in the presence of the Union officials, on 5<sup>th</sup> October 2020 and on 19<sup>th</sup> October 2020 with respect to the restructuring programme.
38. The Club advised the Claimant of the actions proposed and allowed her to ventilate their views on the redundancy exercise. As such, she was well aware of the restructuring programme, and cannot claim to have been surprised at the outcome.
39. According to RW1, the Club informed all its employees of the outcome of the restructuring exercise and specifically wrote to all the employees, including the Claimant, whose jobs were being affected by the restructuring, advising them of the impending changes and further advising them that they would be paid their final dues.
40. On 12<sup>th</sup> November 2020, the Club went ahead to issue the Claimant with a Redundancy Notice. The Notice was also shared with the Federation of Kenya Employers and the Union advising them that the Claimant had been declared redundant as a result of its restructuring programme. RW1 further averred that to date, there has been no response, enquiry, complaint or action by the Union, which only goes to show the validity of the process.



41. The Claimant was advised of the terms of disengagement on the Redundancy Notice and that she was entitled to two (2) months' notice period as stated in her employment contract. This Notice was duly received and acknowledged by the Claimant.
42. At the end of the restructuring exercise, all the staff employed by the Club in the Accommodation Suites Department were affected, and all the affected employees were advised of this. As such, and contrary to the Claimant's averments on discrimination, several positions were indeed abolished or downsized, while others remained to create efficient structures.
43. In RW1's view, the Club carried out a transparent and corrupt free exercise, involved all its employees, and further ensured that its decisions were fair, just and in accordance with the provisions of the *Employment Act*.
44. He added that the exercise was not a simple redundancy process, but a realignment exercise meant to streamline the Club's operations with respect to particular departments and programmes.
45. That as such, the simple "last in first out" principle for declaration of redundancy was not the only factor to be considered.
46. According to RW1, the Club relied on both the *Employment Act* and the CBA which provides for other grounds for redundancy, such as skill, merit, ability and reliability all being equal to the principle of "last in, first out".
47. It was RW1's further assertion that even if the "last in first out" principle was to be adopted by the Respondent, she would still have been declared redundant as she was the last person/staff member recruited into the Accommodations Department.
48. RW1 further contended that any claims of discrimination, unfairness or specific targeting during the restructuring exercise are not only preposterous but also absurd and an unfortunate attempt by the Claimant to unduly sensationalize a rather legitimate process.
49. In his view, all the employees including the Claimant who were affected by the said restructuring programme were paid handsome redundancy packages, way above the provisions of the *Employment Act*, and as such, the suit by the Claimant is an attempt to get more than she deserves.

### **Submissions**

50. On her part, the Claimant submitted that the criteria invoked by the Respondent before issuing her with a redundancy letter was unclear. In support of her submissions, the Claimant cited the case of Kenya Airways Limited vs Aviation & Allied Workers Union Kenya & 3 others (2014) eKLR. It was the Claimant's further position that the "last in first out" principle is aimed at protecting long-serving employees and as such, would have seen new employees terminated and not her as she had served the Respondent faithfully for 25 years. On this issue, the Claimant further placed reliance on the case of Tobias Ongaya Auma & 5 others vs Kenya Airways (2007) eKLR.
51. The Claimant further submitted that she was wholly dependent on her job for her livelihood and the unjustified ejection from employment by the Respondent was targeted and calligraphed to hoard (sic) her out of employment contrary to law.
52. On the other hand, the Respondent submitted that due to the ravaging and worldwide effects of the pandemic, the Club experienced loss of business income and sales in the Club, which led to the Claimant being terminated on grounds of redundancy.



53. Placing reliance on the case of *Jane I Khalechi vs Oxford University Press EA Limited* [2013] eKLR, the Respondent submitted that the redundancy exercise was justified based on its operational needs. That in fact, the Claimant was redeployed to the golf course during the period of six months with the hope that business would be revived.
54. According to the Respondent, all these actions were in a bid to ensure that the Claimant would not lose her job but six months later, the Club was still undergoing stress thereby leaving no choice but to declare a redundancy on various positions including the Claimant's position.
55. In further support of the Respondent's case, the case of *Kenya Airways Limited vs Aviation & Allied Workers Union of Kenya & 3 Others* (supra) was cited.
56. The Respondent further submitted that the Club fully complied with the requirement on notification by issuing a notice to the Claimant, KUDHEIHA Workers and the Labour Office.
57. With respect to the selection criteria, the Respondent posited that the Claimant's employment position was affected and entirely abolished. Therefore, the criteria was inapplicable. According to the Respondent, the redundancy exercise was substantively and procedurally fair and sound. It urged the Court to frown upon any claims to the contrary.
58. The Respondent further submitted that in conducting the redundancy, the Club engaged the Claimant and notified her of the intention to declare the redundancy and allowed her to address any concerns with both the Club and the Union.
59. The Respondent stated in further submission that it was wrongly enjoined in this matter for the reasons that the Club was at all times the employer of the Claimant and that it does not have the capacity to sue or be sued in its own personal capacity. To this end, the case of *Lochab Brothers vs Kenya Furfural Co Ltd* [1983] eKLR was cited.

### **Analysis and Determination**

60. Arising from the pleadings, the evidence on record as well as the rival submissions, the following issues stand out for consideration by the Court:
  - i. Whether the Respondent is a proper party to this suit;
  - ii. Whether the Claimant's termination by way of redundancy was fair and lawful;
  - iii. Whether the Claimant is entitled to the reliefs sought.

### **Whether the Respondent is a proper party to this suit**

61. It is the Respondent's contention that it has been wrongly enjoined in the instant suit as the Claimant was an employee of the Club and that it has no capacity to be sued.
62. The question that begs to be answered is whether the Respondent is a proper party to this suit. The answer to this question lies in Section 2 of the *Employment Act*, 2007 which defines the term "Employer" to mean any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual and includes the agent, foreman, manager or factor of such person, public body, firm, corporation or company.
63. In its Memorandum of Response, the Respondent stated that it is the Board of Management of the Club. Therefore, applying the above definition, it is apparent that the Respondent is not completely distinct from the Club.



64. It is also evident that the term “Employer” has been interpreted liberally in the *Employment Act* to incorporate other parties who are not strictly parties to the contract of service.
65. This position was amplified by the Court in the case of Daniel Mutisya Masesi vs Romy Madan & another [2013] eKLR, where it was determined as follows:-
- “The *Employment Act* defines the term ‘employer’ expansively, and does not suggest anywhere that directors cannot be joined with their corporate business vehicles in redressing employment wrongs. The Court looks at the whole economic enterprise, not the legal and business reincarnations behind the enterprise. The objection by Romy Madan, alias Rajy Madan, to being added as a Co-Respondent in the claim is rejected.”
66. Applying the above determination to the instant case and bearing in mind the definition of the term “Employer” under the *Employment Act*, I return that the Respondent being the Board of Management of the Club, is a proper party to this suit.

### **Whether the Claimant’s termination by way of redundancy was fair and lawful**

67. It is trite that any termination of employment on account of redundancy ought to be both substantially justified and procedurally fair. Such was the holding by the Court of Appeal in the case of Kenya Airways Limited vs Aviation & Allied Workers Union Kenya & 3 Others (2014) eKLR.
68. Whereas substantive justification relates to the reasons ascribed for the redundancy, procedural fairness has to do with the procedure applied in effecting the redundancy. I will consider the two elements under separate heads.

#### **i. Substantive justification**

69. As can be discerned from the letter dated 5<sup>th</sup> November 2020, the main reason advanced by the Respondent for the Claimant’s termination on account of redundancy, is loss of business and economic constraints due to the COVID-19 pandemic.
70. It is a matter of public notoriety that the outbreak of the COVID-19 global pandemic occasioned massive disruptions in business operations not only in Kenya but in most parts of the world.
71. Further, it is common knowledge that following the outbreak of the COVID-19 pandemic, the Government adopted drastic response measures to contain the spread of the pandemic. Some of these measures included but not limited to restriction of movement and social distancing.
72. From the record, it is discernible that the Respondent operates in the recreation and hospitality industry. It thus follows that following the outbreak of the COVID-19 pandemic and in the period that followed, the Respondent’s operations were hampered.
73. Indeed, this Court takes judicial notice of the effect of the COVID-19 pandemic on many sectors of the economy including the recreation and hospitality industry.
74. To this end, I don’t have any doubt in my mind that the Respondent’s operations were adversely affected by the COVID-19 pandemic due to the measures imposed by the Government specifically with respect to social distancing.
75. As such, the Court returns that the reason given by the Respondent to declare a redundancy was fair, valid, and based on its operational requirements hence was in consonance with the requirements of Section 45(2) (b) (ii) of the *Employment Act*.



76. Therefore, the Court is persuaded that the Claimant's termination by way of redundancy was substantively justified.

## ii. Procedural fairness

77. Turning to the procedural aspect of the redundancy process, Section 40(1) of the Employment Act stipulates the following conditions that an employer must comply with prior to an employee's termination on account of redundancy:

- 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.

78. The first requirement relates to Notification of the redundancy. The record herein bears that the Claimant's Union (KUDHEIHA Workers) was notified of the intention to declare her redundant in a meeting held on 5<sup>th</sup> October 2020. Subsequently, the Respondent issued the Union and the County Labour Office with a Notice dated 5<sup>th</sup> October 2020. In view of this, it is apparent that Respondent acted in compliance with the Notice requirement stipulated under Section 40(1) (a) of the Employment Act.

79. The other requirement stipulated under Section 40 (1) (c) of the Employment Act is with respect to the selection criteria to be applied by the employer in selecting employees to be declared redundant. In this regard, the employer is required to prove that in the selection of employees to be declared redundant, it has paid 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.

80. According to the Respondent, the Claimant's position was affected and entirely abolished hence the selection criteria was inapplicable. Having asserted as much, one would have expected that the Respondent would lead evidence in the form of its organizational structure to indeed prove that the position of the Head Receptionist was completely abolished.



81. Having failed to prove as much, the Respondent has failed to persuade the Court that the requirement to apply the selection criteria under the *Employment Act* was not applicable.
82. In light of the foregoing, the Court returns that the Respondent failed the test under Section 40(1) (c) of the *Employment Act*.
83. On the requirement for consultations, it is evident from the record that the Respondent engaged the Union on 5<sup>th</sup> October 2020 on the issue of the Claimant's redundancy. The record further reveals that the Claimant was invited to the meeting and informed of the intended redundancy. She was also given an opportunity to ask any questions or give a comment with respect to the redundancy.
84. In this regard, it is apparent that the Respondent complied with the requirement for pre-redundancy consultations as decreed under Article 13, Convention No. 158 - Recommendation No. 166 of the International Labour Organisation (ILO) convention.
85. With respect to the requirement for payments under Section 40(1) (e)(f) and (g) of the *Employment Act*, it is notable that the Claimant was advised through the letter of termination dated 5<sup>th</sup> November 2020 that she would be paid notice pay for two months and severance pay at the rate of 20 days wage for each completed year of service. To that end, the Respondent complied with respect to the payments due to the Claimant following a redundancy.
86. The upshot of the foregoing is that the Respondent did not substantially comply with the provisions of Section 40 (1) of the *Employment Act* as it failed to prove that the selection criteria was not applicable. To that extent, the Claimant's termination by way redundancy was not procedurally fair within the meaning of Section 40(1) of the Act.

### **Reliefs?**

#### **Compensatory damages**

87. As the Court has found that the Respondent did not substantially comply with the procedural requirements under Section 40(1) (c) of the *Employment Act* in selecting the Claimant for the redundancy, she is awarded compensatory damages equivalent to three (3) months of her last gross salary. This award takes into account the fact that the Respondent has proved that it had a valid and fair reason to declare the Claimant redundant thus the damages are nominal.

#### **Unpaid salary**

88. The Claimant avers that the Respondent deducted her salary without authority in the months of July, August and September 2020.
89. From the record, the Claimant executed an agreement with the Respondent and consented to salary reduction in the months of May and June 2020. As per the agreement, a review was to be undertaken on 15<sup>th</sup> June 2020. There is no evidence that this was done. Therefore, further deductions from the Claimant's salary beyond the month of June 2020 was unauthorized and was without her consent. The salary reduction was therefore irregular and the Claimant is entitled to a refund.

#### **Refund of medical expenses**

90. The Claimant has further sought a medical refund of the sum of Kshs 65,128.00. The record reveals that the Claimant's medical costs were settled by CIC Insurance hence she did not pay any money from her pocket. Indeed, the Claimant admitted as much during cross-examination. This being the case, the claim to this extent is declined.



### **Service charge**

91. The claim for service charge for December 2020, is declined as the Claimant had exited the Respondent's employment by then. In any event, the Claimant has not made any justification for the payment.

### **Orders**

92. In the end, the Claim succeeds and Judgment is entered in favour of the Claimant against the Respondent in the following manner: -

- a. The Claimant is awarded compensatory damages equivalent to three (3) months of her last salary being the sum of Kshs. 132,912.00.
- b. The Claimant is awarded the sum of Kshs 39,874.00 being unpaid salary for the months of July to September 2020.
- c. The total award is Kshs 172,786.00.
- d. Interest on the amount in (c) at court rates from the date of Judgment until payment in full.

93. The Claimant is further entitled to a Certificate of Service in accordance with Section 51(1) of the Employment Act. This shall issue within 30 days from the date of this Judgment.

94. Each party shall bear their own costs as the Court has found that the Respondent had a valid and fair reason to declare the redundancy.

**DATED, SIGNED and DELIVERED at NAIROBI this 12<sup>th</sup> day of July 2024.**

.....  
**STELLA RUTTO**

**JUDGE**

In the presence of:

For the Claimant Ms. Makori

For the Respondent Ms. Wamuyu

Court assistant Millicent Kibet

### **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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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 had 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.

**STELLA RUTTO**



**JUDGE**

