



**Shah v Alloy Castings Limited (Cause E019 of 2023)  
[2024] KEELRC 2114 (KLR) (26 July 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2114 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E019 OF 2023**

**SC RUTTO, J  
JULY 26, 2024**

**BETWEEN**

**KOMAL SHAH ..... CLAIMANT**

**AND**

**ALLOY CASTINGS LIMITED ..... RESPONDENT**

**JUDGMENT**

1. It is common cause that the Claimant was employed by the Respondent as the Head of its Marketing department with effect from 6<sup>th</sup> January 2021. The employment relationship was short-lived seeing that the Claimant's contract of employment was terminated on 23<sup>rd</sup> February 2022. According to the Claimant, her termination was unlawful, unfair and unprocedural. Consequently, she claims the following reliefs against the Respondent:
  - a. A declaration that the termination of the Claimant's employment on account of redundancy was unlawful, unfair and unprocedural.
  - b. Kshs. 6,600,000 being compensation for unlawful, unfair and unprocedural termination of the Claimant's employment calculated as Kshs. 550,000 per month x 12 months.
  - c. Kshs. 343,750 being severance pay @ 15 days' pay for every year worked - 2021, and 2022 (prorated).
  - d. Kshs. 77,916.67 being payment for five point two five (4.25) accrued leave days earned but not utilized.
  - e. Kshs. 48,214.29 being amount unlawfully deducted from the Claimant's March 2022 salary.
  - f. Interests in (ii), (ii), (iv) and (v) above.



- g. An order compelling the Respondent to remit all the tax deductions made from the Claimant's gross pay during the term of her employment to the Kenya Revenue Authority.
  - h. An order compelling the Respondent to issue the Claimant with a Certificate of Service.
  - i. Punitive damages for the Respondent's malicious and disparaging conduct in the manner in which it terminated the Claimant's employment together with the failure to issue the Claimant with any written terms of employment and payslips for the months of January 2021 to April 2021.
  - j. Costs of the suit and interest thereon.
  - k. Such other and further relief that this Honourable Court deems fit to grant.
2. The Claim did not go unopposed. Putting the Claimant to strict proof, the Respondent has denied the Claimant's assertions that her termination from employment was unlawful, unfair and unprocedural. Accordingly, the Respondent has asked the Court to dismiss the Claimant's claim with costs.
3. During the hearing which proceeded on 3<sup>rd</sup> April 2024, both parties called oral evidence.

### **Claimant's Case**

- 4. The Claimant testified in support of her case and for starters, she sought to rely on her witness statement as well as her list and bundle of documents to constitute her evidence in chief.
- 5. It was the Claimant's evidence that the Respondent failed to provide her with a Contract of Service detailing her terms of engagement despite numerous requests.
- 6. She averred that she served the Respondent diligently, competently and with utmost dedication, consistently delivering the performance expected of her role. That despite her exceptional performance and without any lawful reason or following proper procedure, the Respondent terminated her employment by a letter dated 23<sup>rd</sup> February 2022, on the alleged ground of redundancy.
- 7. The Claimant termed the reason for her termination from employment flimsy and unjustifiable.
- 8. The Claimant averred that she was not aware nor had she been notified that there was a restructuring exercise being undertaken within the Respondent's company.
- 9. In her view, since the Respondent stated in the termination letter that the restructuring exercise was particularly in her section, she ought to have been informed of the restructuring exercise and/or even called upon to give a report on the progress of the department.
- 10. It was her contention that this was a clear demonstration that the alleged restructuring program was simply a false excuse cited by the Respondent to appear to have a valid reason for her termination while its actual intention was to achieve her exit from the company.
- 11. The Claimant further asserted that the Respondent failed to issue her with a Notice of Intended redundancy and never notified the Labour Officer of its intention to terminate her employment on grounds of redundancy.
- 12. That further, the Respondent failed to engage her in any consultative discussions prior to her termination or grant her a chance to be heard on any queries that she may have had in a legitimate redundancy exercise.



13. It was her further evidence that the Respondent never provided her with any explanation or demonstrated the criteria used in arriving at the decision to declare her position redundant.

### **Respondents' Case**

14. The Respondent called oral evidence through its Chief Executive Officer, Mr. Navraj Sagoo who testified as RW1. Equally, RW1 adopted his witness statement as well as the list and bundle of documents filed on behalf of the Respondent to constitute his evidence in chief.
15. It was RW1's testimony that prior to the appointment of the Claimant, the Sales and Marketing Departments of the Respondent were joined as one Department, headed by one individual, Mr. Pravin Tandel.
16. With a view to improving the sales and marketing returns of the Respondent, it implemented a Transformational Plan, designed by Stanford Seed, which recommended the departmental split of the Sales and Marketing Departments. Pursuant to this, the Claimant was employed as the Head of Department- Marketing while Mr. Pravin Tandel was designated Head of Department-Sales.
17. The targeted monthly sales, following the implementation of the Transformational Plan, was Kshs. 36,000,000. Unfortunately, from May 2021 until the Claimant's termination on account of redundancy, that monthly target was never achieved.
18. It was RW1's evidence that it became apparent that the Respondent's sales were not adequate enough to justify the sales and marketing departmental split with two separate heads of department.
19. That the Respondent's Management therefore took the decision to merge back the Sales and Marketing Departments under one unified head (holding the position of Head of Sales and Marketing), thereby rendering redundant the Claimant's position of Head of Marketing as well as the position of Head of Sales.
20. According to RW1, in selecting which of the two employees, between the Claimant (Head of Marketing) and the Head of Sales, Mr. Pravin Tandel, would be terminated on account of redundancy, the Respondent was guided by the principle of "last-in-first-out" (LIFO).
21. That as Mr. Tandel had been with the Company longer than the Claimant and had previously held the unified position of Head of Sales and Marketing, the Claimant was selected for termination on account of redundancy.
22. That the Respondent, vide the one-month Notice of intention to terminate the Claimant on account of redundancy, dated 23<sup>rd</sup> February 2022, notified the Claimant of the termination of her employment contract with a copy to the County Labour Officer and the National Employment Authority.
23. The Claimant acknowledged the said Notice and accepted the Respondent's decision on redundancy vide her letter dated 7<sup>th</sup> March 2022.
24. In full compliance with the *Employment Act*, the Respondent paid the Claimant's terminal dues as per the pay slip issued in March 2022 and was duly issued her Certificate of Service dated 5<sup>th</sup> April 2022.
25. According to RW1, the termination of the Claimant's employment on account of redundancy was in full compliance with the requisite provisions of *the Constitution*, the *Employment Act*, and its Employment Contract with the Claimant.
26. He further averred that in breach of the Employment Contract and the provisions of law, the Claimant absented herself from duty on 11<sup>th</sup> February 2022 and 28<sup>th</sup> March 2022 without approved leave, which



amounted to gross misconduct. In consequence thereof, the two days were deducted as absent from her pay.

### **Submissions**

27. It was the Claimant's submission that the Respondent ignored, failed and/or refused to issue her with a contract of employment and in the circumstances, violated Section 9(2) of the *Employment Act* as read together with the Employment (General) Regulations, 2014. In support of this position, the Claimant sought to rely on the case of Eddie Mutegi Njora v Mega Microfinance Co. Ltd (2015) eKLR.
28. Citing the case of Cargill Kenya Limited v Mwaka & 3 others (2021) KECA 115 (KLR) 22 and Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others (2014) eKLR, the Claimant submitted that she was not invited and/or involved in any consultative meetings with the Respondent in respect to the intended redundancy. That in the circumstances, she was not able to make representations for consideration by the Respondent with respect to her qualifications, experience and work achievements in an attempt to avert the intended redundancy. According to the Claimant, she was blind-sided and only informed, in final terms, that her employment had been terminated on account of redundancy.
29. It was the Claimant's further position that the application of the LIFO principle as a basis for redundancy does not satisfy the parameters and standards relating to the selection criteria prescribed under Section 40 (1) (c) of the *Employment Act*.
30. In her view, the Respondent's decision to consider the LIFO principle as a single factor for terminating her employment constituted an opaque criterion in her selection as a candidate for redundancy. According to her, this was simply unlawful. The Court was urged to find as much.
31. On the other hand, the Respondent submitted that the redundancy was justified. The Respondent further posited that in a redundancy situation, once an employer makes the commercial decision that a redundancy is necessary, a Court of Law should not substitute such a decision with its own decision. To buttress this position, the Respondent placed reliance on the case of Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others (supra).
32. Referencing the case of Barclays Bank of Kenya Ltd & another v Gladys Muthoni & 20 others (2018) eKLR, the Respondent submitted that the Claimant's employment was terminated after expiry of more than one month Notice of Intention to Declare Redundancy from 23<sup>rd</sup> February to 31<sup>st</sup> March 2022.
33. The Respondent further submitted that there was consultation with the Claimant and in view of her acknowledgment in her letter dated 7<sup>th</sup> March 2022, she is estopped from alleging that the redundancy was unjustified or unlawful.

### **Analysis and Determination**

34. Arising from the pleadings, the evidence on record as well as the rival submissions, the following issues arise for consideration by the Court:
  - i. Whether the Claimant's termination was unfair and unlawful;
  - ii. Whether the Claimant is entitled to the reliefs sought.



## **Whether the Claimant's termination was unfair and unlawful**

35. As can be discerned from the letter dated 23<sup>rd</sup> February 2022, the Claimant's contract of employment was terminated on grounds of redundancy. In the letter of termination, the Respondent notified the Claimant that it was undergoing a restructuring hence it was unable to sustain her in employment.
36. It is now settled that any termination of employment under 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 v Aviation & Allied Workers Union Kenya & 3 Others (2014) eKLR.
37. 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 start by considering substantive justification.
38. According to RW1, the Respondent implemented a transformational model which recommended a split of the Sales and Marketing Departments hence the Claimant was recruited to head the Marketing Department while Mr. Pravin Tandel was designated to head the Sales Department.
39. The Respondent averred that it did not achieve the targeted monthly sales to justify the departmental split of the Sales and Marketing Department with two separate heads of department. That it therefore took the decision to merge back the Sales and Marketing Departments under one unified head.
40. In view of the Respondent's assertions, one would have reasonably expected that it would adduce evidence in the form of its organizational structure after the merger of the two departments to prove that indeed, the positions of the Head of Sales and Marketing Departments had now been merged and placed under one person.
41. In this case, the Respondent only exhibited the organizational structure following the transformational plan which indicates that the two departments aforesaid were under two distinct heads. In this regard, the Marketing Department is shown to be within the Respondent's organizational structure headed by the Claimant.
42. The bottom line is that there was new no organizational structure flowing from the alleged restructure to prove that the departments of Sales and Marketing had been merged and that the department of marketing which was being headed by the Claimant had ceased to exist within the Respondent's structure.
43. As was held in the case of Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others [supra], while there may be underlying causes leading to a true redundancy situation, such as reorganization, the employer must nevertheless show that the termination is attributable to the redundancy and that the services of the employee have been rendered superfluous or that the redundancy has resulted in the abolition of office, job or loss of employment.
44. In further analyzing the definition of the term redundancy, the Court reckoned as follows:

“There are two broad aspects of this definition...The second aspect is that the loss of employment in redundancy has to be at no fault of the employee and the termination of employment arises “where the services of an employee are superfluous” through “the practices commonly known as abolition of office, job or occupation and loss of employment.” In this case, what I understand as required to be determined in this aspect of the definition of redundancy is whether the appellant abolished the offices, jobs or occupations of the affected employees resulting in their services being superfluous hence



their loss of employment. Corollary to that is the justification for that abolition, if the appellant indeed abolished their offices. Determination of these two aspects will, determine the first issue of whether or not the redundancy in this case was necessary.” Underlined for emphasis

45. Applying the above determination to this case, I return that the Respondent has failed to prove that the Claimant’s position was abolished from its organizational structure.
46. This being the case, I cannot help but find that the Respondent has not proved to the requisite standard that there was substantive justification for the termination of the Claimant’s employment on account of redundancy.
47. I must point out that whereas Section 40 of the Act appears to allow an employer to declare a redundancy, the same ought to be justified. Therefore, this right notwithstanding, the Respondent was duty-bound to prove that the Claimant’s redundancy was attributable to the reorganization hence was substantively justified.
48. As to the procedural aspect of the redundancy process, Section 40(1) 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.
49. With respect to the notice requirement under Section 40(1) (b), the record bears that the Claimant was issued with a Notice of Termination dated 23<sup>rd</sup> February 2022. Notably, this was the same Notice that communicated the Respondent’s decision to terminate the Claimant’s employment on account of redundancy.
50. It is this Court’s view that the notice contemplated under Section 40 (1) (b) is an “intention to declare a redundancy”. It is issued before the redundancy takes effect. In this case, the said notice was issued to the Claimant after her position had already been declared redundant. It was a notice declaring the



Claimant redundant as opposed to an “intention” to declare a redundancy as contemplated under Section 40 (1) (b) of the *Employment Act*. Differently expressed, the Respondent had already made the decision to declare the Claimant redundant.

51. In *Kenya Airways v Aviation & Allied Workers Union Kenya & 3 Others* (supra) Maraga JA, (as he then was) addressed this issue as follows: -

“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. It is that notice that will elicit consultation between the parties, ....”
52. Applying the above determination to the case herein, it becomes apparent that the Respondent did not substantially comply with the statutory requirement under Section 40 (1) (b) of the Act and to that extent, is at fault.
53. The other requirement is in respect of the selection criteria stipulated under Section 40 (1) (c) of the Act. With respect to this, 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.
54. In this case, the Respondent stated that it applied the “last in first out” principle in selecting the Claimant for redundancy. What this means is that the Respondent only applied one criterion in earmarking the Claimant for redundancy. As such, I cannot help but question whether the Respondent considered the Claimant’s skill, ability and reliability. As this is not apparent from the record, I am led to conclude that the Respondent did not comply substantially with the provisions of Section 40(1) (c) of the Act in selecting the Claimant for redundancy.
55. This therefore leaves room for doubt as to whether such selection, if any, was undertaken objectively. To that extent, the Respondent failed the test under Section 40(1) (c) of the Act.
56. Turning to the requirement for consultations, RW1 testified during the hearing that there were verbal consultations between the Human Resource Manager and the Claimant. Therefore, there is no concrete evidence to confirm that such consultations were undertaken in accordance with Article 13, Convention No. 158 - Recommendation No. 166 of the International Labour Organisation (ILO) convention.
57. In *Kenya Airways v Aviation & Allied Workers Union Kenya & 3 Others* (supra), it was held that consultations are meant to cause the parties to discuss and negotiate a way out of the intended redundancy, if possible, or the best way of implementing it if it is unavoidable. That is to say, consultations should not be cosmetic but rather meaningful and should be geared towards mitigating the adverse effects of the redundancy.
58. As I have found that there was no evidence that the parties undertook pre-redundancy consultations, I return that the Respondent is at fault to that extent.
59. As to the payments under Section 40(1) (e) (f) and (g) of the Act, it is notable that the letter of termination did not itemize the terminal dues payable to the Claimant.
60. With respect to leave, the Claimant, has sought to be compensated for 4.25 accrued leave days. The Respondent on the other hand has averred that the Claimant took 22 leave days and the excess days of 2.75 days were recovered from her salary.



61. In support of its case, the Respondent exhibited the Claimant's leave records which reveal that she took a total of 22 leave days in the year 2021. Under Section 28(1) (a) of the Act, an employee is entitled to a minimum of twenty one (21) working days per year as annual leave.
62. In this case, it is notable that the leave form dated 9<sup>th</sup> February 2022, indicates that the Claimant had "0" leave balance in respect of 2021. Notably, the Respondent has not made any mention of the Claimant's leave days for the year 2022. This is noting that the Claimant was terminated from employment with effect from 31<sup>st</sup> March 2022, hence she is entitled to the unutilized leave days with respect to 2022, on a prorated basis.
63. As I note that the Claimant has not sought to be paid one (1) month's salary in lieu of notice, I presume that the same was paid out to her in line with Section 40(1) (f) of the Act after termination.
64. With respect to the severance pay, the Respondent has submitted that the Claimant is not entitled to the same as she was confirmed to her position in May 2021 and was terminated in March 2022. That therefore, she had not worked for a full year in her confirmed position.
65. In terms of Section 40(1) (g) of the Act, an employee is entitled to severance pay upon being declared redundant, at the rate of not less than fifteen (15) days' pay for each completed year of service.
66. My understanding of the foregoing provision is that the employee earns severance pay for every completed year of service. In my view, an employee's service commences when he or she is first employed as opposed to when they are confirmed.
67. In this case, the Claimant was employed in January 2021, hence she completed one (1) year of service at the end of January 2022. Therefore, she was entitled to severance pay for one (1) completed year of service. In my respectful view, it is inaccurate for the Respondent to argue that the Claimant had not completed one year of service hence is not entitled to severance pay.
68. In total sum, it is evident that the Respondent did not act in compliance with the provision of Section 40(1) (g) of the Act.
69. All in all, the Respondent did not substantially comply with the provisions of Section 40 (1) of the Act hence the Claimant's termination by way of redundancy cannot be said to have been procedurally fair.

### **Reliefs?**

#### **Compensatory damages**

70. As the Court has found that the Respondent failed to prove that the Claimant's termination by way of redundancy was substantively and procedurally fair, she is awarded compensatory damages equivalent to three (3) months of her salary. This award takes into account the length of the employment relationship which was relatively short.

#### **Severance pay**

71. As the Court has determined elsewhere in this Judgment that the Claimant was in the Respondent's service for one (1) complete year, she is entitled to severance pay for one (1) year being January 2021 to January 2022.

#### **Accrued leave days**

72. For the reasons, set out herein the claim for accrued leave pay succeeds and to this end, the Claimant is entitled to prorated leave days for the year 2022.



## Salary deductions

73. The Claimant has sought to be paid the sum of Kshs 48,214.29 being salary deductions effected from her pay in the month of March 2022.
74. It is noteworthy that during cross-examination, the Claimant testified that she had requested for leave on 1<sup>st</sup> February 2022 but the same had not been approved by the Respondent's CEO. She further testified that on 28<sup>th</sup> March 2022, she was unwell and had notified the human resource office of the same. She admitted that she had not presented a medical sheet as none was demanded from her.
75. Pursuant to Section 30 (1) of the Act, an employee is entitled to sick leave of at least seven days with full pay and thereafter, to sick leave of seven days with half pay, subject to production of the requisite certificate of incapacity to work signed by a duly qualified medical practitioner.
76. Worthy to note is that under Section 30 (2), an employee becomes entitled to sick leave with full pay subject to him or her notifying the employer as soon as is reasonably practicable of his absence and the reasons for it.
77. In this case, the Claimant's assertions that she was unwell were not supported by any evidence. Besides, there is no evidence that she brought the issue of her illness to the Respondent's attention and forwarded a copy of a medical report to that effect.
78. In light of the foregoing, it is evident that the Claimant's absence from work on the occasions indicated herein was without approval of the Respondent. Therefore, the Respondent was entitled to recover any salary paid out to her during the said period.
79. The claim for punitive damages is declined.
80. As the employment relationship has been admitted, the Claimant is entitled to a Certificate of Service in line with Section 51(1) of the Act.

## Orders

81. In the final analysis, the Claim is allowed and Judgment is entered in favour of the Claimant against the Respondent in the following manner: -
  - a. A declaration that the termination of the Claimant from employment was unfair and unlawful.
  - b. The Claimant is awarded the sum of Kshs. 1,650,000.00 being compensatory damages for unfair termination.
  - c. The Claimant is entitled to the sum of Kshs 275,000.00 being severance pay for one (1) completed year of service.
  - d. The Claimant is awarded unpaid leave (4.25 days) in the sum of Kshs. 77,916.67.
  - e. The total award is Kshs. 2,002,916.67.
  - f. Interest on the amount in (e) at court rates from the date of Judgment until payment in full.
  - g. The Claimant shall have the costs of the suit.
  - h. The Respondent shall release to the Claimant her Certificate of Service within 14 days from the date of this Judgment if not already issued to her.



**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 26<sup>th</sup> DAY OF JULY 2024**

**STELLA RUTTO**

**JUDGE**

In the presence of:

For the Claimant Ms. Wangare

For the Respondent Mr. Omino

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**

