



Owuor v Saab Kenya Limited (Employment and Labour Relations Cause 983 of 2018) [2024] KEELRC 2450 (KLR) (26 September 2024) (Judgment)

Neutral citation: [2024] KEELRC 2450 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 983 OF 2018
K OCHARO, J
SEPTEMBER 26, 2024**

BETWEEN

GORDON OTIENO OWUOR CLAIMANT

AND

SAAB KENYA LIMITED RESPONDENT

JUDGMENT

Introduction

1. By a Memorandum of Claim dated 14th June 2018, the Claimant sued the Respondent herein seeking the following reliefs and orders: -
 - a. A declaration that the Claimant’s termination on account of redundancy was substantively unjustified and unprocedural, unfair and unlawful.
 - b. Damages for unfair and unlawful termination.
 - c. Interest on (a) and (b) above, at court rates.
 - d. Costs of the suit and interest thereon.
 - e. Any other relief that this Honourable Court shall deem fit and just to grant in the circumstances.
2. In response to the claim, the Respondent filed a Memorandum of Defence dated 20th February 2019, denying the allegation that the termination of the Claimant’s employment was unfair, and his entitlement to the reliefs sought.
3. In line with the directions of this Court issued on 25th April 2023 that parties file their respective submissions, the Claimant filed written submissions dated 16th May 2023, and the Respondent filed theirs dated 6th December 2023.



Claimant's case

4. At the hearing the Claimant adopted his witness statement filed herein as part of his evidence in chief. He stated that through a contract of employment dated 28th April 2016, the Respondent employed him as a Technical Support Staff/Driver on a fixed term of two (2) years, effective 10th May 2016.
5. At all material times, he worked diligently, dedicatedly and impressively. The Respondent appraised him positively. As a result, his salary was reviewed upwards to KShs. 115,000/-. At the time of separation, he was earning a gross remuneration of this amount.
6. He stated that on the 20th of June, 2017 he received a call from the Respondent informing him to pick up a redundancy notice from their offices. The notice indicated that he was being declared redundant due to changes in operational requirements. He asserted that he was hearing this for the first time.
7. In the letter, he was directed to work until 12 July 2017, when he was to return to the Nairobi Office to complete the Company's exit procedure. According to him, he was prematurely declared redundant on 12 July 2017, a period shorter than the prescribed 30-day statutory notice period.
8. He further contended that the termination of his employment was illegal and unlawful as it was not undertaken per the procedure set out in Section 40 of the Act. There were no consultations between his employer and him on the alleged redundancy situation. Further, he wasn't informed of the criteria used to identify him for termination.
9. The Claimant contended that the Respondent didn't have any reasonable and sufficient grounds for the termination of his employment. It was only actuated by malice on the part of the Respondent.
10. Cross-examined by Counsel for the Respondent, the Claimant testified that he was appointed as a driver to offer services specifically to the UN Support Office in Somalia. His employment contract was therefore based on the operational requirements of the Office. Upon the operational requirements ceasing, he could no longer be required as a driver by the UN Support Office.
11. He further testified that the redundancy notice dated 20th June 2017, expressly indicated that his last day of work was to be 19th Of July 2017. Though the letter was dated 20th June 2017, it was not served on him on the same date.
12. According to the letter, was to remain in the Mogadishu office till 12th July 2017. However, it didn't state that he was not required to report to work after the 12th of July 2017.
13. He further testified that he received all the sums of money that were set out in the redundancy notice save for the notice pay for the period 20th June- 19th July 2018.
14. In his evidence under re-examination, he stated that he was employed as an employee of the Respondent. His contract of employment did provide that his employment was tied to the operational requirements of the UN Support Office Somalia.
15. He reiterated that according to the redundancy notice, he was to exit employment on the 12th of July 2017. The interview form prepared by the Respondent indicated the termination date as 12th July 2017.
16. The Claimant further testified that he actually received the letter on 6th July 2018, when he returned to the Mogadishu base. On 20th June 2017, he was in Nairobi, on leave. Before the 20th of June 2017, he hadn't received any notice from the Respondent concerning a redundancy situation.



Respondent's case

17. The Respondent presented one witness Russel Thuma, its Human Resources Manager to testify on its behalf. At the hearing, he adopted his witness statement dated 20th February 2019 as his evidence in chief. The witness stated that the Claimant was employed by the Respondent but seconded to the United Nations Support Office in Somalia (UNSOS) under an agreement between the Respondent and UNSOS for the provision of various personnel including drivers.
18. In April 2017, UNSOS informed the Respondent that it was considering terminating the agreement as it no longer required drivers. Considering the impact that the termination of the agreement was to have on the Respondent's drivers, inclusive of the Claimant, the witness decided to inform the Claimant of the impending redundancy and upon such disclosure, the Claimant applied for a job with the United Nations Peace Keeping Operation. On 6th June 2017, when the Human Resources Officer of the United Nations Peace Keeping Operations, sought information on the Claimant's suitability, the witness gave a glowing recommendation in favour of the Claimant.
19. The witness stated that on 12th June 2017, the Respondent received a termination notice of the agreement between the United Nations Support Office Somalia and itself.
20. It was further stated that the effect of the termination of the agreement was that with effect from 12th July 2017, the Claimant's services would no longer be required by both UNSOS and the Respondent. As a result, and in conformity with the law, the Respondent, issued a one-month redundancy notice to the Claimant vide a letter dated 20th June 2017, which informed him that his last day of work could be 19th July 2017.
21. The notice informed the Claimant that he was required to work in Mogadishu as a driver until 12th June 2017, which was the effective date of termination of the agreement between UNSOS and the Respondent. The notice also informed the Claimant of the reason for redundancy and his entitlements which included his salary for the notice period and an extra one month's salary. The Claimant picked a cheque for the amount, and voluntarily, unconditionally, and unequivocally executed a declaration signifying that he had no other or further claim against the Respondent.
22. The witness asserted that the Respondent had the prerogative of determining whether or not the employee will work during the notice period, the Respondent can decide to put the employee on compulsory leave during the notice period and the only thing that matters is that the employee is either paid a salary for working during the notice period or salary in lieu of the notice if he/she is not required to work. The Claimant cannot fault the Respondent for cutting the notice short yet he was paid not just one month's salary, but an extra month's salary.
23. As the three drivers engaged under the agreement between UNSOS were declared redundant, as a result of the termination of the agreement, the issue of the selection criteria cannot be an issue in this matter.
24. Cross-examined by Counsel for the Claimant, the witness stated that under the redundancy law, the employer is required to issue a redundancy notice to the affected employee [if not a member of a trade union], a trade union [if the employee is a member of a trade union], and the Labour Officer.
25. The witness stated that the letter dated 20th June 2017, was not a notice of intention to declare redundancy. It communicated a decision that had been made and the redundancy period.
26. The witness admitted that in a redundancy situation, there has to be a notice for the intention to declare redundancy, to open a way for consultations between the employer and the affected employee[s].



Further, the Respondent didn't have any document to demonstrate that there were consultations between it and the Claimant.

27. The letter to the Labour Officer was dated 1st June 2017. It predated the letter by UNSOS, terminating the agreement. He went ahead to state that there had been a series of correspondences between UNSOS and the Respondent before the 12th Of June 2017.
28. The witness testified that the Claimant's employment contract didn't provide that his contract was tied to that of the Respondent and its client.
29. He further testified that the last day of work for the Claimant was 19th July 2017. He worked between 12th July 2017 to 19th July 2017.

Analysis and Determination

30. I have carefully considered the pleadings, oral and documentary evidence, and submissions filed, by both parties and the following issues emerge for determination: -
 - a. Whether the termination of the Claimant's employment was fair.
 - b. Whether the Claimant is entitled to the reliefs sought.

a. Whether the termination of the Claimant's employment was fair.

31. There is no dispute that the Claimant's employment was terminated on the grounds of redundancy. However, there is a great controversy as to whether it was both procedurally and substantively fair.
32. Redundancy is defined in Section 2 of the Employment Act and the Labour Relations Act, 2007 as:

“The loss of employment, occupation, job or career by involuntarily means through no fault of the 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.”
33. Termination on redundancy falls under the category of no-fault terminations. It is normally at the employer's initiation, without being influenced by any fault or action on the part of the employee. In my view, this informs why the legislature deemed it imperative to have provided, a section in the Employment Act, 2007, providing for a detailed procedure and conditions that the employer contemplating, and effecting the termination must conform with. The stipulations of the section relate to events, pre-declaration and post-declaration, of the redundancy. The provision is intended to ensure absolute fairness in the termination on grounds of redundancy.
34. The Claimant's Counsel submitted that Section 40 of the Employment Act, dictates that any employer desirous of engaging in the redundancy process must issue the requisite notices, namely;
 - I. The redundancy notice- which has to subsist for one month; and
 - II. The Termination Notice- which succeeds the redundancy notice and also subsists for a minimum period of one [1] month.
35. According to Counsel for the Claimant, the first notice, namely the Redundancy Notice, is to be issued;
 - I. To the trade union [if the employee is a member of a trade union] and the Labour Officer simultaneously; or



- II. Where an employee is not a member of a trade union, to the employee personally in writing and the Labour Office simultaneously
36. After a lapse of one month, the second notice is issued, [the termination notice] to the employee personally. According to the Claimant's Counsel, the notice dated 20th June 2017, issued by the Respondent was a termination notice. Therefore, the notices contemplated under the provision were not issued, rendering the termination unfair. To support these submissions, the Counsel cited the decisions in *Margret Mumbi Mwago vs Intrahealth International* [2017] eKLR, and *Gerrisom Mukhutusi Obayo v DSV Air and Sea Ltd* [2018] eKLR.
37. Counsel for the Respondent sees it differently, under Section 40 of the Act only one notice is contemplated as issuable. There is no requirement for a second notice. In the instant case, the Redundancy notice was a thirty-day notice of the Respondent's intention to declare the Claimant redundant. Where a thirty [30] days' notice is issued and is accompanied by payment of one month's wages, as was in the present case, an additional notice is needless. To support this submission Counsel for the Respondent placed reliance on the case of *Cargill Kenya Limited v Mwaka & 3 Others* [Civil Appeal No. 54 of 2019] [2021] KECA[KLR] [22nd October 2021].
38. At this point it becomes imperative to state that the Section provides;
- “40. Termination on account of redundancy
- (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.

(2) Subsection (1) shall not apply where an employee's services are terminated on account of insolvency as defined in Part VIII in which case that Part shall be applicable.

(3) The Cabinet Secretary may make rules requiring an employer employing a certain minimum number of employees or any group of employers to insure their employees against the risk of redundancy through an unemployment insurance scheme operated either under an established national insurance scheme established under written law or by any firm underwriting insurance business to be approved by the Cabinet Secretary.”

39. A clear reading of the provision will certainly reveal that issuance of notice is provided for under subsection (1) (a) and (b). Whether issuable under sub-section [1] [a] or sub-section[b], depends on the circumstances of each case, that is whether the affected employee is a member of a trade union or not. Between sub-sections [c] – [f], there is no provision for issuance of any other notice besides the 30-day notice contemplated under sub-sections 1[a] and [b]. There isn't any room available for an inference that there is a requirement for issuance of a second notice.

40. I am cognizant of the fact that in practice there has been confusion as regards whether the section contemplates issuance of two different notices at different intervals, and indeed there have been decisions suggesting that the contemplation of the provision is to the effect. The Claimant's Counsel thinks so.

41. In my view, the confusion has since been settled. The law on the requisite notices issued under Section 40 of the Act is now trite. In the case of *Cargill Kenya Limited v Mwaka & 3 others* [supra] cited by Counsel for the Respondent, the Court of Appeal held;

“In this respect, it is notable that a plain and contextual reading of subsection 1[f] shows that its express objective and purpose is the payment required to be made to employees affected by redundancy, and not the issuance of notice. It is also notable that the legislative intention from the arrangement and content of the enactments in Section 40 sub-section [1][d] to [g] was the provision of payments to be made to affected employees in redundancy, and section 1[f] can only be continued in that context.

Lastly, it would be illogical to give a literal meaning to the sub-section of payment of one month's notice, and it would also be straining it too far to give it a meaning of one month's notice of termination before redundancy, in trying to resolve any grammatical ambiguity in the subsection.

It is our finding that the above interpretive factors discount a construction that a termination notice is required by subsection [1][f], or within the timelines held by the trial Judge. While such notice may eventually require to be given in a termination on account of redundancy, it is definitely not one of those conditions to be met under section 40 subsection [1][f], before the redundancy.....”

42. Equally, in the case of *The German School Society & another v Ohany & another* (Civil Appeal 325 & 342 of 2018 (Consolidated) [2023] KECA 894 (KLR) (24 July 2023) (Judgment), the Court of Appeal emphasized that Section 40 of the Employment Act contemplates one notice. Consequently,



I am, convinced by the Respondent's Counsel's submissions as regards the number of notices issuable under the sated provision.

43. The Respondent argues that it issued a redundancy notice under its letter dated 20th June 2017. There isn't any doubt that indeed the letter was issued to the Claimant. The question that springs up, is whether it was truly in the character of a notice contemplated under subsection [1][b] mentioned above. The letter read in part:

“We regret to inform you that due to changes of operational requirements within the United Nations Support office in Somalia and Saab Kenya Limited, the organization is unable to retain you in employment and a decision has been made to make your position redundant. This letter therefore serves as a formal notification effective 20th June 2017, your last days of work will therefore be 19th July 2017.”

44. I have carefully read the letter, and what it was communicating. In my view, it communicated two things;

- a. That a decision had been made to declare the Claimant redundant as the Respondent was no longer able to retain him.
- b. His last day of work was to be 19th July 2017.

Clearly, the letter didn't communicate an intention to carry out a redundancy process, but a decision that had been made to terminate his employment on grounds of redundancy. I take a clear view that the letter dated 20th June 2017 was not a notice of an intended redundancy but a termination notice.

45. This Court hasn't lost sight of the fact that prior to issuing the Claimant with the notice dated 20th June 2017, the Respondent had issued the Labour Office with a Notice through its letter dated 1st June 2017. The letter read:

“This letter serves as a written follow-up to the meeting you had with the Human Resources Officer for Saab Kenya Limited. As you are aware, Saab Kenya Limited is undergoing a series of departmental reorganization which may lead to some declarations of redundancies.

The reasons for this reorganization are as follows:

1. Changes of operational requirements within the United Nations Support office in Somalia.
2. Forced closure of the UN Technical Support Staff/Driver department by the UN requirements.
3. Reorganization of our internal systems to meet the UN and Clients requirements.

The company anticipates that this reorganization will affect to reduce all the three (3) of our Drivers working to support the UNSOS Contract in Somalia in our organization as a whole due to the fact that the need for the same number of staff to carry out their roles has since stopped.

Enclosed herein see justification letter from UNSOS Reference No. PS/L/17/0139/MW.

This letter serves as a notice of the intended action. All legally (sic) provisions shall be followed to the full extent as provided in accordance with the provisions of the Employment Act 2007.”



This sounded like a true redundancy notice contemplated under section 40[1], only that it wasn't copied to the Claimant.

46. A true redundancy notice should be that which births a consultative process on the intended redundancy, between the employer and the employee[s] to be affected. No doubt, the purported notice dated 20th June 2017, did not allow space for any consultations. In its tone, it didn't set the stage for consultation which is a vital component of a fair redundancy process. On the nature of a redundancy notice as a stage setter for consultations; that consultation in a redundancy process is a legal imperative in Kenya; and the purpose of consultation, the Court of Appeal held in *The German Society School (Supra)*, thus;

“ 56. A notice to the employee/trade union/labour officer opens up the door for a consultative process with the key stakeholders. The Court of Appeal in *Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 Others (2014) eKLR* held:

- a) Consultation is implicit in the Employment Act under the principle of fair play;
- b) Consultation gives an opportunity for other avenues to be considered to avert or to minimize the adverse effects of terminations;
- c) Consultations are meant for the parties to put their heads together and is imperative under Kenyan law;
- d) Consultations have to be a reality not a charade;
- e) Opportunity must be given for the stakeholders to consider;
- f) Stakeholders must have and keep an open mind to listen to suggestions, consider them properly and then only then decide what is to be done; and
- g) Consultation must not be cosmetic.

57. In essence, consultation is an essential part of the redundancy process and ensures that there is substantive fairness. The employer should ensure that it carries out the process as fair as possible and that all mitigating factors are taken into consideration. A reading of the record shows that the respondent was served with a redundancy notice and asked to proceed for a one month's leave. The trial court found that the redundancy was unfair and irregular for failure to give adequate notice and thereby not giving consultation a chance.

60. However, on the question whether the notice gave consultations and dialogue a chance, we find that while the requirement for consultation is not expressly provided for in section 40 of the Employment Act, this requirement is implied, as the main reason and rationale for giving the notices in section 40(1) (a) and (b) to the unions and employees of an impending redundancy where applicable.”



47. In his evidence, the Respondent's witness admitted that there isn't any material that has been placed for by the Respondent from which a conclusion can be made that there were consultations before the termination.
48. By reason of the foregoing premises, I come to an inescapable conclusion that the termination of the Claimant's employment was procedurally unfair, as the letter dated 20th June 2017 was a termination notice, not a notice of redundancy contemplated under section 40[1][b] of the Employment Act.
49. I now turn to consider whether the termination was substantively fair. The Court in Kenya Airways Ltd and Aviation & Allied Workers Union of Kenya & 3 Others Civil Appeal No. 46 of 2013 held that even in instances of termination of employment on account of redundancy, the employer must have a valid and fair reason and follow fair procedure in line with Section 45 of the Act. The Court 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 a 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 true redundancy situation, such as reorganization, the employer must nevertheless show that the termination is attributable to the redundancy - that is that the services of the employee has been rendered superfluous or that redundancy has resulted in the abolition of office, job or loss of employment—”.
50. The holding above implies that all those provisions of the Employment Act that speak to substantive fairness in the termination of an employee's employment apply even in situations where the termination is on the grounds of redundancy, thus; Section 43[prove of the reason[s] for termination]; Section 45[2] [demonstration that the reason for the termination was valid and fair] and Section 47[5] that the termination was lawful and justified].
51. In the present case, the Respondent asserted that the redundancy situation was caused by operational requirements that led to the Claimant's employment being superfluous. The Claimant was specifically recruited to serve the Respondent's Client, UNSOP in Somalia. On or about 12th June 2017, the client terminated the contract between it and the Respondent. The Claimant in his evidence under cross-examination admitted that, indeed, in his understanding of the relationship between him and the Respondent, his employment was dependent on the remaining in existence, that contract between the Respondent and its stated client.
52. The Respondent produced a letter dated 12th June 2017 Reference: PS/L/17/0139/MW Subject: Termination Fo Services Of Three (3) Drivers In Mogadishu Under Contract UNSOS/CON/016/04 addressed to one Alex Cavalli Bjorman. The letter notified the Respondent that the United Nations Support Office in Somalia no longer required the services of the three drivers in Mogadishu. Besides just pleading that the termination was not on any valid ground and that it was prompted by malice, the Claimant didn't lead any sound evidence to discount the Respondent's that the redundancy situation was ignited by this letter, and or establish the malice.
53. I agree with the Respondent, therefore, that there was a true redundancy situation, and that there was a valid reason for the termination of the Claimant's employment. The termination was therefore substantively fair.



(b) Whether the Claimant is entitled to the reliefs sought.

54. Having held that the Claimant's employment was unfairly dismissed I now turn to consider the matter of the reliefs sought.
55. The Claimant only seeks damages for unfair termination, and submits that an award of twelve (12) month's gross salary as compensation would be sufficient.
56. The Respondent submits that the Claimant is not deserving of an award of compensation equivalent to 12 months' gross salary as the termination of his employment was substantively and procedurally fair, and he was capable of securing alternative employment.
57. Under Section 49 (1) (c) of the Employment Act 2007, this Court is bestowed with the power to award an employee who has successfully assailed the decision by his or her employer to terminate his or her employment, a compensatory relief for unfair termination. However, it is pertinent to state that the power is exercised discretionarily depending on the circumstances of each case.
58. I have carefully considered the manner in which the Claimant's employment was terminated and to be specific in ignorance of the dictates of procedural fairness in matters, termination of employment on grounds of redundancy, therefore ignorance of the fact that as the termination was under the category of no-fault terminations absolute fairness was required; the length of period that was remaining on the Claimant's contract, approximately nine months, the length of his service being approximately 1 year 1 month; and that the termination was not a result of his fault, and hold that he is entitled to the compensatory relief, three (3) months' gross salary.
59. In the upshot, judgment is hereby entered for the Claimant in the following terms: -
- a. A declaration that the termination of the Claimant's employment on account of redundancy was procedurally unfair.
 - b. The Claimant be paid compensation for unfair termination amounting to Kshs. 345,000/-.
 - c. Interest on (b) above at Court rates from the date of Judgment until payment in full.
 - d. The Respondent shall bear the costs of this suit.

READ, DELIVERED AND SIGNED THIS 26th DAY OF SEPTEMBER, 2024.

OCHARO KEBIRA

JUDGE

In the presence of:

Mr. Karuuti for the Claimant

Mr. Onyango for the Respondent

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 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.

A signed copy will be availed to each party upon payment of Court fees.

OCHARO KEBIRA

JUDGE

