



**Chogo v Kamongo Waste Paper (Kenya) Ltd (Employment and Labour Relations
Petition E103 of 2023) [2024] KEELRC 2494 (KLR) (11 October 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2494 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS PETITION E103 OF 2023
AN MWAURE, J
OCTOBER 11, 2024**

BETWEEN

JOHNSTONE MAGILI CHOGO PETITIONER

AND

KAMONGO WASTE PAPER (KENYA) LTD RESPONDENT

JUDGMENT

Introduction

1. The Petitioner filed a Petition dated 19th June 2023.

Petitioner's Case

2. The Petitioner avers that he was employed by the Respondent in 1992 on contract terms later converted to permanent and pensionable terms. He was later promoted to a supervisor in the department of operations responsible for white sales collections quality control vide a letter dated 3122018.
3. The Petitioner avers that on 2352023, he was summoned to the office of the Chief Executive Officer (CEO) and served with a termination letter on account of redundancy.
4. The Petitioner avers that the prior to the letter, the Respondent had not shared it was undergoing economic hardships. That this was a device employed to unconstitutionally and unlawfully terminate his employment.
5. The Petitioner avers that he did not accept the termination letter instead he asked the Respondent to allow him to absorb the shock which the Respondent agreed verbally.
6. The Petitioner avers that in his knowledge, the Respondent was afloat and there are no indicators of any inability that would give rise to declaration of redundancy. Further, his duties were assigned to another person.



7. The Petitioner avers that the Respondent's actions was in violation of Article 27 and 28 of the *Constitution* as he was the only one picked for victimization under the guise of redundancy. This was discriminatory and in violation of his human rights and dignity.
8. The Petitioner avers that in contravention to Article 41 of the *Constitution* and Section 40 of the *Employment Act*, he was never informed of the criteria used by the Respondent to isolate him for redundancy and he was not given any notice in advance of the termination.
9. It is the Petitioner's case that he served the Respondent for 32 years and was earning a monthly salary of Kshs 85,750 at the date of the impugned declaration of redundancy. This was not taken to account as his terminal benefits was limited to the period beginning October 2018.
10. The Petitioner avers that he could not access his initial letter of appointment which has been misplaced but the Respondent's records shall confirm he was employed in 1992.

Respondent's Case

11. In opposition to the Petition, the Respondent filed a replying affidavit dated 17th November 2023.
12. The Respondent avers that it employed the Petitioner vide an employment letter dated 3122018 effective 1102018.
13. The Respondent avers that due to the covid-19 pandemic in March 2019, it started experiencing a decline in revenue and this continued even after covid-19.
14. The Respondent avers that due to the decline in revenue, it opted to restructure including but not limited to alignment of jobs within its needs, early retirement and declaration of redundancy of roles which had ceased to be viable.
15. The Respondent avers that it sent a notice of impending redundancy of 20 employees to the Labour Office on 24112022. On the same day, the Respondent had a meeting with all its staff informing them of the planned staff reorganization and how changes will affect them. This was followed by a memo dated 25112022 reiterating the content of the meeting and advising employees of the impending redundancy.
16. The Respondent avers that it subsequently engaged in an analysis of its operation requirements for over 5 months and by march 2023 it was apparent it would retain 5 of the employees in the affected departments while 15 were to be declared redundant.
17. The Respondent avers that the Petitioner's department was not receiving any materials in February, March and April 2023 and the staff had nothing to do.
18. The Respondent avers that on 2032023, it sent a revised letter to the Labour Office notifying them of the redundancy exercise. It subsequently held a meeting with the Petitioner notifying him of its intention to declare him redundant considering he was not doing any work. It was mutually agreed had he be paid one month notice in lieu of the redundancy notice.
19. The Respondent avers that it issued the Petitioner with a termination letter on grounds of redundancy on 2352023 which enumerated all benefits to be paid including 2 months salary in lieu of notice.
20. The Respondent avers that the Respondent declined to collect his dues despite being sent a letter dated 1462023 requesting him to avail himself and collect his dues.
21. It's the Respondent's case that it complied with the relevant legislation governing the redundancy process including service of notices to the employees together with relevant institutions and thereafter



holding consultations with the employees in addition to keeping them informed of the criteria, process and justification.

22. The Respondent asserts that the Petitioner was not subjected to any victimization and neither did the Respondent infringe any of his constitutional rights.

Petitioner's Submissions

23. The Petitioner submitted that the Respondent totally disregarded Section 40 of the *Employment* which provides the procedure for termination on account of redundancy. The Respondent further violated Article 47 of the *Constitution* and Section 4(3 and 4) of the *Fair Administrative Action Act*.

Analysis and Determination

24. The main issue for the Court's determination is whether the termination of the Petitioner's employment on account of redundancy was unlawful and unfair.

25. Termination on account of redundancy is clearly provided for under Section 40 of the *Employment Act* 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.



- 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.”
26. In the instant petition, it is to be noted that the Respondent filed its notification of redundancy process dated 20/3/2023 which was received by the Ministry of Labour and Social Protection on 22/3/2023. Subsequently, it issued the Petitioner with a termination notice dated 23/5/2023 effective same date.
27. Maraga JA (as he then was) in *Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others* Nairobi Civil Appeal No. 46 of 2013 (2014) eKLR opined
- “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, and I will shortly show that consultation is imperative, on the justifiability of that intention and the mode of its implementation where it is found justifiable. At that initial stage, the employer would not have identified the employee(s) who will be affected. So that notice cannot have the names of the employees as Mr. Mwenesi contended. It does not have to be a calendar months' notice as Mr Mwenesi contended. The Act requires one month's notice. The period runs from the date of service of that notice. It is after the conclusions of the consultations on all issues of the matter that notices will be issued to the affected employees of the decision to declare them redundant.”
28. The Court of Appeal in *Cargill Kenya Limited v Mwaka & 3 others* (Civil Appeal 54 of 2019) [2021] KECA 115 (KLR) (22 October 2021) (Judgment), held as follows: -
- “While the requirement of consultation is not expressly provided 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. In this respect we wholly adopt the reasoning of Maraga J.A. (as he then was) in *Kenya Airways limited and Aviation & Allied Workers Union Kenya & 3 others* (supra), where the learned judge held as follows:
- “...Section 40(1) of our *Employment Act* does not expressly state the purpose of the notice. Although it also does not expressly provide for consultation between the employer and the employees or their trade unions before the final decision on redundancy is made, on my part I find the requirement of consultation provided for in our law and implicit in the *Employment Act* itself.
- By dint of article 2(6) of the *Constitution*, the treaties and conventions ratified by Kenya are now part of the law of Kenya. The Kenya Constitution, 2010 was promulgated on 27th August, 2010. Before then Kenya was a dualist state, which, like other dualist states, domesticated the treaties or conventions it ratified by legislation. By virtue of the provisions of this Article, however, the treaties or



conventions which Kenya had ratified before that date, whether domesticated or not, automatically became part of the law of Kenya. The process of ratification of the treaties Kenya has entered and those it enters into after the enactment and entry into force of the Ratification of Treaties Act, 2012 is now through legislation.

29. Kenya is a State party to the International Labour Organization (ILO), which it joined in 1964 and is bound by the ILO conventions. Article 13 of [*Recommendation No. 166 of the ILO Convention No. 158-Termination of Employment Convention, 1982*](#) requires consultation between the employers on the one hand and the employees or their representatives on the other before termination of employment under redundancy. It reads:

- “ 1. When the employer contemplates terminations for reasons of an economic, technological, structural or similar nature, the employer shall:
 - a. provide the workers' representatives concerned in good time with relevant information including the reasons for the terminations contemplated, the number and categories of workers likely to be affected and the period over which the terminations are intended to be carried out;
 - b. give, in accordance with national law and practice, the workers' representatives concerned, as early as possible, an opportunity for consultation on measures to be taken to avert or to minimise the terminations and measures to mitigate the adverse effects of any terminations on the workers concerned such as finding alternative employment.”

30. We can only add that in interpreting statutes, the courts have the function of filling in the textual detail by implication, which arises either because it is directly suggested by the words expressed, or because they are indirectly suggested by rules or principles of law which are not excluded by the express wording of a statute. See in this regard the text by F. Bennion: [*Bennion on Statutory Interpretation*](#), 5th Edition, at sections 172 to 174. Having regard to the legislative intention of the provisions of section 40 of the *Employment Act*, the international law and decided cases, it is our finding that consultations on an intended redundancy between the employer and the relevant unions, labour officials and employees is implied by section 40(1)(a) and (b) of the *Employment Act*.

31. Furthermore, consultation is also now specifically required by article 47 of the *Constitution* and the *Fair Administrative Action Act*. Article 47 and section 4(3) of the *Fair Administrative Action Act* provide that where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-

- (a) prior and adequate notice of the nature and reasons for the proposed administrative action;
- (b) an opportunity to be heard and to make representations in that regard;
- (c) notice of a right to a review or internal appeal against an administrative decision, where applicable;
- (d) a statement of reasons pursuant to section 6;
- (e) notice of the right to legal representation, where applicable;



- (f) notice of the right to cross-examine or where applicable; or
- (g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.

32. An administrative action is defined under the Act to include any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates. Employers fall within the category of persons whose action, omission or decision affects the legal rights or interests of employees, and more so the redundancy by the Appellant in the present appeal is not contested. The Appellant was therefore also bound by the provisions on consultation required by Article 47 and section 4(3) of the *Fair Administrative Action Act*.

The nature and content of the consultations required to be undertaken in a redundancy process was explained by Maraga JA in *Kenya Airways limited and Aviation & Allied Workers Union Kenya & 3 others* (supra):

“The purpose of the notice under section 40(1) (a) and (b) of the *Employment Act*, as is also provided for in the said ILO Convention No. 158-Termination of Employment Convention, 1982, is to give the parties an opportunity to consider “measures to be taken to avert or to minimise the terminations and measures to mitigate the adverse effects of any terminations on the workers concerned such as finding alternative employment.” The consultations are therefore 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. This means that if parties put their heads together, chances are that they could avert or at least minimize the terminations resulting from the employer’s proposed redundancy. If redundancy is inevitable, measures should be taken to ensure that as little hardship as possible is caused to the affected employees”

33. In view of the foregoing, the termination of the Claimant’s employment on account of redundancy was unlawful and unfair as it fell short of the procedure laid down in Section 40 of the *Employment Act*.

34. The Respondent failed to prove that it held consultation with its employees including the Petitioner in respect to the alleged financial struggles it was undergoing and the intended redundancy process. There is no proof of engagement with the Petitioner in person about the intended redundancy.

In fact Section 40 of the *Employment Act* provide in mandatory terms that the trade union in which the employee belongs to must be served notice of not less than one month of the intended redundancy. There is also need to give the employee a notice preferably of at least one month of the intended redundancy. This is not shown was served in this particular case.

35. In any event the employer is mandated to pay the employee a month salary if they fail to give him notice. The court has found no evidence from the Respondent that he paid Petitioner the one month salary in lieu of notice.

36. Going by a good number of authorities on redundancy like *Kenya Airways Limited -VS- Aviation & Allied Workers Union Kenya & 3 Others* (Supra) and *Cargill Kenya Limited -VS- Mwaka & 3 Others* (Supra) the court finds the respondent did not follow the mandatory procedure as relates to redundancy. The Petitioner was not given notice and was ambushed with a redundancy letter and was to leave the same day. He had served the Respondent for a long time. Yet the court was not shown how the Respondent used the selection criteria with the expected criteria of the “last one in would be the first out.”



37. Looking at the evidence and the submissions in this case the court is not satisfied the Respondent complied with the law that clearly provides how the redundancy process should be carried out.
38. The court finds the Petitioner has proved he was unlawfully terminated from employment on the guise of redundancy.
39. The court therefore holds the Petitioner is entitled to the following declarations
- (1) The Respondent action of declaring the Petitioner redundant and terminating his employment was in violation of article 40 of the *Employment Act* and even though the court will not reinstate him to his former employment he will be compensated by being awarded
- a. One month's salary in lieu of noticeKShs 84,759=
 - b. 10 months equivalent of his salary as compensation for unlawful terminationKShs 847,590=
 - c. The other prayers in the petition are not proved and are not deserved. However Petitioner is awarded costs and interest at 14% per annum from the date of Judgment until full payment.....Kshs. 932,349=

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 11TH DAY OF OCTOBER, 2024.

ANNA NGIBUINI MWAURE

JUDGE

Order

In view of the declaration of measures restricting Court operations due to the Covid-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of the *Constitution* which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the *Constitution* and the provisions of Section 1B of the 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.

ANNA NGIBUINI MWAURE

JUDGE

