



**Mutua v Reef Hotels (Management) Company Limited (Cause E025 of 2024) [2024] KEELRC 2470 (KLR) (11 October 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2470 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
CAUSE E025 OF 2024  
M MBARŪ, J  
OCTOBER 11, 2024**

**BETWEEN**

**ANNASTACIA MBENYA MUTUA ..... CLAIMANT**

**AND**

**REEF HOTELS (MANAGEMENT) COMPANY LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The respondent employed the claimant as a human resources manager on a renewable contract from 1<sup>st</sup> April 2022 to 31<sup>st</sup> March 2023 as a salary of Ksh.100, 000 per month. Upon the expiry of the contract, it was renewed from 1<sup>st</sup> April 2023 to 31<sup>st</sup> March 2024.
2. The claim is that the claimant would proceed on her annual leave at the end of the year but on 9 November 2023 she received an email from the respondent directing her to proceed for annual leave from 10 November 2023. The claimant was put under pressure to sign the leave forms which started on 14 November 2023 for 15 days and reported back to work on 1<sup>st</sup> December 2023 when she was issued with a notice of redundancy through a notice dated 1<sup>st</sup> December 2023 on the basis that the respondent outsourced the function.
3. The claim is that the respondent failed to adhere to the provisions of Section 40 of the *Employment Act*. The due process of notice and reasons thereof were not shared or payment of terminal dues. The claimant is seeking the following;
  - a. Service pay ksh.50,000;
  - b. Ex gratia Ksh.50,000;
  - c. Notice pay Ksh.100,000;
  - d. Leave travel allowance Ksh.10,000;



- e. Salary arrears Ksh.20,000;
  - f. Annual leave Ksh.110,000;
  - g. Payment for balance of contract of 4 months Ksh.400,000;
  - h. House allowance for 7 months at 15% Ksh.68,250;
  - i. House allowance for the last 5 months Ksh.60,000;
  - j. House allowance for the second year of 8 months Ksh.120,000;
  - k. 12 months compensation Ksh.1,200,000;
  - l. Certificate of service;
  - m. Costs of the suit.
4. The claimant testified that her case was a demotion and unfair termination of employment to through a purported redundancy to circumvent the law. Under her term contract, the claimant had a legitimate expectation to complete the contract hence the claim for payment of the full contract balance.
  5. The claimant testified that in September 2023 she was called to a meeting and informed by the respondent that there would be a restructuring but her position was not affected. However, on 1<sup>st</sup> November 2023, the respondent wrote to the Labour office on the redundancy process without a copy to the claimant because she had a term contract. However, on 7 November 2023, she was directed to take her annual leave but ordinarily, she would proceed on annual leave at the end of each year. She was put under pressure and took 15 days leave from 14 November 2023 and when she resumed duty on 1<sup>st</sup> December 2023, she was served with notice terminating employment on account of redundancy.
  6. Upon cross-examination, the claimant testified that as the human resources manager, part of her duties was to print all employees' contracts. Her contract was issued in WORD format so she could print and add her name to it. The respondents alleged that she changed some terms without evidence. She was not invited to address any misconduct that she had changed the draft contract.
  7. The claimant testified that she only learned of the redundancy a day after returning from her annual leave in December 2023. There was no question of indiscipline addressed at the time.
  8. The claimant admitted that in July 2023 she was suspended for 2 weeks. On 8 November 2023, she was directed to take annual leave but only did so a week later on the basis that she was being pressured to do so. Her employment was terminated through a notice dated 1<sup>st</sup> December 2023 on account of redundancy. Her terminal dues were noted and payment was conditional that there be clearance.
  9. The claimant admitted that she was paid per the notice issued and made to sign a discharge voucher and was allowed to make remarks. She noted that she had further claims based on what had been paid. She had a contract with the respondent which was not completed. Under the discharge voucher, she was paid Ksh.233,000 only and the claims made should be paid in full since there was no redundancy notice issued and the letter dated 1<sup>st</sup> December 2023 served both as the termination and notice letter. Service, leave, and compensation were not paid.
  10. The claimant testified that in negotiating the renewal of her contract she had asked to be paid a house allowance like other employees but this was not factored hence her claims to be paid. It was not necessary to terminate her employment because the same office was replaced immediately after she left meaning the redundancy was not justified.



11. In response, the respondent admitted that the claimant was employed on contract from 1<sup>st</sup> April 2023 to 31<sup>st</sup> March 2024. The initial employment from 14 April 2022 was on a probationary contract.
12. The claimant was not a diligent employee and was on several occasions cautioned on account of dishonesty and failure to carry out her duties. The claimant went on leave based on operational reasons.
13. On 8 November 2023, the claimant had a meeting with the general manager, Halake Jarso and discussed the claimant's annual leave. She declined to proceed on leave and only did so after the management through Hamid Sheikh wrote to her indicating this was tantamount to insubordination. On 14 November 2023, the claimant proceeds on leave earning 1<sup>st</sup> December 2023.
14. The response is that the respondent hired a company to address its human resource function and through a notice dated 1<sup>st</sup> December 2023 notified the claimant of her termination on account of redundancy since her office had been abolished. The notice was discussed with the claimant and it was agreed that she would sign a discharge voucher and be paid her terminal dues which she did on 2 December 2023.
15. The claims made are not justified and should be dismissed. Service pay is not due as this is already paid. There was one month's notice paid and acknowledged. Travel allowance was not in the contract and alleged salary arrears are without evidence. The term contract ended lawfully due to redundancy and house allowance was not due and the salary paid was consolidated.
16. In evidence, the respondent called Jarso Halake the general manager who testified that he worked with the claimant who was the human resources manager and was on fixed term contract. He was involved with the termination of employment when he held a meeting with the claimant in September 2023 and informed her about a restructuring of the human resources department. The other departments affected were the food and beverages manager, the chef and the human resources who were later terminated. The process is ongoing to date.

The office of human resources was placed with a consultant.

17. After September 2023, a notice was issued to the Labour Office and the claimant remained aware of these notices. On 8 November 2023, he advised the claimant to proceed on annual leave but she declined. He escalated the matter to Hamid who wrote to the claimant since she had protested and asked to be paid instead of taking her annual leave.
18. On 1<sup>st</sup> December 2023, the claimant was issued with a termination notice and paid her full dues at ksh.233, 940 and she signed the discharge voucher voluntarily and was also allowed to make comments on it. A certificate of service was issued, she had noted misconduct and had been earlier suspended from duty and reprimanded. The practice of the respondent was to follow due process which was one with the restructuring process and the claims made should be dismissed with costs.

Both parties attended and filed written submissions.

19. The pleadings, the evidence and submissions are analyzed and the issues which emerge for determination are whether there was unfair termination of employment and whether the remedies sought should be awarded.
20. In this case, the employment relationship terminated following notice dated 1<sup>st</sup> December 2023. The respondent notified the claimant that the position of human resources manager had been declared redundant with effect from 1<sup>st</sup> December 2023 and hence, under Section 40 of the *Employment Act* her employment would be terminated with effect on the same date.

The respondent offered to pay the claimant the following dues;



- a. Gross consolidated salary including 1<sup>st</sup> December 2023;
  - b. One month's notice;
  - c. Leave days earned and not taken by 1<sup>st</sup> December 2023;
  - d. Severance pay of 15 days for one year completed;
  - e. Leave travelling allowances for 2023;
  - f. Salary difference as a result of April 2023, paid in arrears;
- Less statutory deductions
- Less Reef Sacco.
24. The claimant testified that there was an unfair termination of employment covered under an alleged redundancy. She had not been served with prior notice until she resumed her annual leave on 1<sup>st</sup> December 2023 when she was served with the termination notice.
  25. Termination of employment following a redundancy is lawful and allowed under Section 40 of the *Employment Act*. In the case of *Thomas De La Rue (K) Ltd v David Opondo Omutelema* [2013] eKLR, the court held that under the provisions of Section 40(1) of the *Employment Act*, the employer is under a legal duty to issue notice on the intention to render the positions affected by redundancy one month before the intended date of termination. This position is reiterated in the case of *Barclays Bank of Kenya, Barclays Africa Group (SA) Ltd v Gladys Muthoni & 2 Others* [2018] eKLR that the notice issued may be written or oral subject to the employee being made aware of the restructuring process.
  26. In *Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others* [2014] eKLR, the court held that 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 following a fair procedure. There must be an underlying reason leading to a true redundancy situation, such as reorganization. The employer must nevertheless show that the termination is attributable to the redundancy. The services of the employee have been rendered superfluous or that redundancy has resulted in the abolition of office, job or loss of employment.
  27. In this case, the claimant admitted that in September she was called to a meeting and told there would be a restructuring. Indeed, the respondent sent notice to the Labour officer on 1<sup>st</sup> November 2023.
  28. The record of the respondent of the meeting held with the claimant is not challenged in any material way. She was made aware of the general provision that there was an intended restructuring.
  29. The evidence that the redundancy was used as a camouflage for unfair termination of employment is left bare.
  30. The claimant's work record is not particularly rosy. She had noted misconduct which resulted in a suspension for two weeks in July 2023 through notice dated 8 July 2023. She was invited to a disciplinary hearing on 2<sup>nd</sup> August 2023 and reprimanded. It was noted that in previous hearings of misconduct, the claimant was not remorseful over her misconduct.
  31. The respondent had occasion to dismiss the claimant summarily but opted for a reprimand. To urge a case that the redundancy was meant to circumvent unfair termination of employment is without justification.



32. The rationale is that in redundancy, it is not the conduct of the employee that is an issue but the phasing out of the position. The office held by the claimant was abolished and a consultant agreement was issued instead.
33. In this case, redundancy was declared and the claimant was issued with notice. The Labour officer was notified.
34. On the claims made, the claim for service pay is on the basis that the claimant should be paid for years worked. Under the redundancy, the payment due under Section 40(1) is severance pay which was tabulated and paid following the notice dated 1<sup>st</sup> December 2023.
35. There is no legal basis demonstrated for the claim for ex gratia pay. This is not a term in the contract of employment or under the law regulating redundancy. Ex gratia payment is purely gratuitous at the discretion of the employer.
36. In the termination notice, the claimant was allocated a one-month notice pay. Under Section 40(1) of the *Employment Act*, the law contemplates two forms of notices under a redundancy, one the general notice on the intention to declare a redundancy and the other, personal notice to the employee as held in the case of *Ignas Karingo Mghona & 4 others v Star Hope International Foundation* [2016] e-KLR. Where the employee is not a member of the Union, notice of intention to declare redundancy issues to the employee, as well as to the local Labour Office. In this case, the meeting held with the claimant in September 2023 served this purpose and a notice was served upon the Labour officer.
37. In the case of *Cargill Kenya Limited v Mwaka & 3 others (Civil Appeal 54 of 2019)* [2021] KECA, the Court of Appeal went to length to address a claim of notice pay in redundancy and held that;

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 a notice. It is also notable that the legislative intention from the arrangement and content of the enactments in section 40 subsection (1) (d) to (g) was the provision of payments to be made to affected employees in a redundancy, and section 1(f) can only thus be construed within this context, as was done by Maraga JA in *Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others Nairobi Civil Appeal No. 46 of 2013* (supra) as illustrated in the foregoing, and in *Africa Nazarene University v David Mutevu & 103 others* (2017) eKLR where this Court held as follows:

“As stated earlier, the trial court was of the view that after the issuance of the notice under sub-section (b), the employer was obligated to issue a second notice under subsection (f). With respect, we differ with that construction and concur with the appellant that the section relates to payment in lieu of notice. Admittedly, the subsection is inelegantly drafted as it talks about “payment of one months notice” or “payment of one month’s wages in lieu”. It is all about payment. If it was about a second notice, it should surely have said so in so many words.”

38. In this respect, the payment in lieu of notice is in tandem with Section 40(1) (f) of the *Employment Act*. The respondent paid the claimant in lieu of notice and hence complied with the law. The two notices due are lawfully addressed.
39. Leave travelling allowance, salary arrears and annual leave were addressed in the notice terminating employment. The further claim is not given any basis in law or under the employment contract.



40. Employment terminated lawfully due to no fault of either party but following the declared redundancy. The term contract was terminated through due process.
41. The claim for house allowance was on the basis that this is an item the claimant had agitated during her employment and was not addressed. Other employees were paid a house allowance but she was treated differently. However, the claimant failed to address this differential treatment with any evidence whereas under her employment contract, the salary was consolidated as allowed under Section 31 (2) (a) of the *Employment Act*;
- (2) This section shall not apply to an employee whose contract of service—
- (a) contains a provision which consolidates as part of the basic wage or salary of the employee, an element intended to be used by the employee as rent or which is otherwise intended to enable the employee to provide himself with housing accommodation; or
42. In any case, the claimant had her salary under the term contract and the salary paid is not a regulated wage under the Wage Orders that attract a 15% house allowance.
43. A Certificate of Service has since been issued and dated 2 December 2023.
44. On costs, the claim is without merit. The claimant was paid all her terminal dues immediately upon termination of employment which included a generous tabulation amounting to Ksh.233, 940. In this regard, costs are awarded to the respondent.
45. Accordingly, the claim herein is dismissed with costs to the respondent.

**DELIVERED IN OPEN COURT AT MOMBASA ON THIS 11 DAY OF OCTOBER 2024.**

**M. MBARŪ**

**JUDGE**

