Anyona v BS Mohindra and (K) Limited (Cause 714 of 2015)
[2025] KEELRC 2622 (KLR) (18 September 2025) (Judgment)

Neutral citation: [2025] KEELRC 2622 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 714 OF 2015

K OCHARO, J

SEPTEMBER 18, 2025

BETWEEN

JORIM MOGERE ANYONA ..... CLAIMANT

AND

BS MOHINDRA AND (K) LIMITED ..... RESPONDENT

JUDGMENT

1. The suit herein was initiated against the Respondent by three Claimants, Jorim Mogere Anyona, Zablon Magero Omwansu, and Elly Opiyo Ondigo, through a Memorandum of Claim dated 28th April 2015, seeking both declaratory and compensatory reliefs against the latter.

2. On 15th December 2016, the parties filed a letter of consent dated 29th November 2016, which read in part;

> " Kindly record the following partial consent judgment.
>
> I.
>
> a] That the claim by Zablon Magero Omwansu having been settled at Kshs.461,449 on 21st July 2016,
>
> b] The claim by Elly Opiyo having been settled on 22nd December, 2015 at Kshs.624,180
>
> II. This claim, as relates to the above two claimants, is hereby withdrawn with no orders as to costs.
>
> III. That Jorim Mogere Anyona be at liberty to proceed with his claim independently.

IV. The respondent to respond to the substantive claim of [3] above within 21 days from filing of this consent."

3. Following the consent, the Memorandum of Claim was amended on 20th May 2019, retaining Jorim Mogere Anyona as the sole Claimant.

4. The Respondent resisted his claim through their Amended Memorandum of Response dated 27th May 2022. They denied his cause of action against them and entitlement to the reliefs sought.

5. At the hearing of this suit, the parties adopted their witness statements as their evidence in chief and had admitted the documents filed herein as their documentary evidence.

6. After hearing their respective cases, this Court directed them to file written submissions. The submissions were subsequently filed.

The Claimant's Case

7. It was the Claimant's case that he was first employed by the Respondent around 1994 in its Production Depart-ment Export Division.

8. He was at all material times a fully paid-up member of the Kenya Union of Commercial, Food and Allied Workers, and he was also the Chief Shop Steward representing all unionisable employees of the Respondent at the shop floor level.

9. At the material time, the Union and the Respondent had a Collective Bargaining Agreement, which came into effect in April 2013, for a two-year duration and was deemed to be in force until renewed.

10. The aforementioned Collective Bargaining Agreement encompasses provisions regarding the termination of employment—Clause 10, redundancy—Clause 11, and gratuity—Clause 20.

11. The Claimant further stated that at the time of separation, he had been employed by the Respondent for a duration of twenty (20) years. During this period, he held various positions, including Supervisor (in charge), within the Production Department of the Export Division, as well as roles such as Quality Controller and Dyer/Designer.

12. In September 2014, there were indications that the Respondent intended to terminate the employment of several employees from the Export Section. Several names were proposed, including: Elly Opiyo, Mutiboka Magdalene, James Muthukya, and Wambugu Judy. His name was not in the initial list.

13. On 1st October 2014, the Respondent served the Ministry of Labour and the Union with a notice to declare redundancies. In the notice, the Respondent stated that the redundancy resulted from the closure of their export department and that the extent of the redundancy would not affect more than 8% of their staff members.

14. The Respondent stopped exporting carvings through the company in January 2014.

15. On 16th October 2014, the Union corresponded with the Respondent in response to the notice dated 1st October 2014. The Union sought to understand the reasons behind the extent of the intended redundancy, the criteria used to identify employees to be affected, and the available options to prevent the redundancy.

16. The parties met on 24th October 2014 regarding the intended redundancy, where the Union asked the Respondent to prepare a plan to retain all targeted employees. If this was not possible, they requested

that two of the targeted employees, who were least ready to leave employment so suddenly, be retained. The second option was based on the fact that one of those targeted would have exited, albeit with little notice.

17. The Respondent did not accept either of the two proposals made on 24th October 2014. They informed the Union that jobs in the import department were not comparable to those in the export department and that there were no vacancies suitable for the skills of those facing redundancy. They also raised their issue regarding their 'current salary demands' and stated that they would only retain a cleaner and a storeman.

18. On October 23rd, 2015, the Respondent informed the union that they planned to declare four of the five employees redundant, citing a lack of available jobs in the imports department.

19. On 9th January 2015 and 6th March 2015, the Respondent identified the four employees targeted for redundancy: Elly Opiyo Ondigo, James Muthukya Muthangya, Jorim Mogere Anyona, and Zablon Magero Omwansu.

20. On 11th February 2015, the union wrote to the Respondent regarding their letter dated 23rd January 2015 and clearly stated that the four (4) employees targeted for redundancy had already been absorbed in different sections within the import department. The union further proposed to the Respondent to implement an early retirement package for those of advanced age who were willing to exit.

21. On 1st March 2015, the Respondent issued redundancy notices to four (4) employees and advised them that their payments would be made in accordance with the law and the collective bargaining agreement.

22. The Respondent later withdrew the intention to declare Mr. James Muthukya Muthangya redundant, leaving three (3) employees, including the Claimant.

23. He stated further that in the years 1999 and 2008, the Respondent had declared redundancies. They paid those declared redundant both severance pay and gratuity.

24. The Collective Bargaining Agreement between expired on 31st March 2015 and was due for review. The union had already submitted its proposals for review of the agreement. He believes that the Respondent targeted him in an attempt to undermine the review.

25. He asserted that in the premises, he is entitled to the following reliefs;

    a. Severance Pay calculated at the rate of,

       25 days x 29,097 x 21 years = Kes. 599,651.01/=

    b. Gratuity Pay calculated at the rate of 28 days x (29,697 x 21 years)/26 = Kes.671,609.08/=

    c. Unpaid Annual Leave for the period 2011-2014 at the rate of 28 days x (29,697 x 4 years)/26 = Kes. 127,925.54/=

    d. Unpaid Leave Allowance for the period 2011-2014 at Kes. 19,400/=

    e. Relocation Allowance at Kes. 8,000/=

    f. Notice Pay (3 months) at Kes. 89,091/=

    g. Underpayment/Responsibility Pay for carrying out floor supervision and design work from 1998-2015 (17 years) calculated at the rate of,

       i. Supervising `Kshs.30,000 x 12 months x 17 years = Kes.6,120,000/=`

ii. Designing `Kshs.4,000 x 12 months x 17 years = Kes. 816,000/=`

h. General damages for unlawful termination and discrimination calculated as Kshs.29,697 x 12 months = Kes. 356,364/=

i. Costs of the suit and interest until full payment thereof.

26. Cross-examined by Counsel for the Respondent, the Claimant testified that at the material time, he was a member of the Kenya Union of Commercial Food and Allied Workers Union.

27. When he initially joined the Respondent's workforce, he did so as a Dyer/Designer. At the time of his departure, he was working in the Respondent's Export Department, handling deliveries within the Department.

28. Though he stated in his witness statement that, at some point in September 2017, the Respondent indicated the intention to declare some employees redundant, the statement does not list the names of those earmarked for redundancy.

29. By virtue of his position as a workers' representative within the Respondent organisation, he knew that his name was not on the list and that it was added later.

30. The Respondent ceased exporting carvings in January 2014.

31. In addition, the Claimant further testified that the Respondent served his Union and the Labour Officer with notice of its intention to declare redundancy. The notification came after 10 months of the export cessation.

32. Over the course of 10 months, he was transferred to the Respondent's Import Department. However, he has no documents to prove this transfer.

33. On 9th January 2015, and 6th March 2015, a year after it had ceased exporting carvings, the Respondent identified those who were to be affected by the redundancy. He was one of them.

34. The Claimant further testified that there had been earlier redundancies, but he was not fully aware of their details.

35. He reiterated that he had not received his terminal dues. He refused the Respondent's offer to pay him, as it was too minimal.

The Respondent's Case

36. The Respondent presented David Gakuru, one of its employees, to testify on its behalf.

37. The witness stated that claims by Zablon Magero Omwansu and Elly Opiyo Ondigo, who initially filed this suit together with the Claimant herein, were settled amicably through a consent filed in court on 16 December 2016 in full and final settlement of their claims, with the involvement of the Union.

38. The Claimant was uncompromising and, having disagreed with the Union that holds a Recognition Agreement with the Respondent, he hired a private lawyer to pursue his claim in Court, which forms the basis of this statement.

39. The Claimant was employed by the Respondent as a dyer/Designer from 1st January 1994 to 30th April 2015. He was earning a basic salary of Kshs.24,497 and a house allowance of Kshs.5,200 per month.

40. The Claimant was a member of the Kenya Union of Commercial Food and Allied Workers, and his terms of service were governed by the terms of the negotiated Collective Bargaining Agreement between the Respondent and the Union (KUCFAW).

41. In early 2014, the Respondent faced stiff competition from other businesses/competitors in the export of wood curving, soap stones, sculptures and other ornamental items attributed to an influx of individuals and companies. The Respondent was consequently adversely affected by the said stiff competition in the export market.

42. As a result of this, and loss of work, in January, 2014 the Respondent stopped exporting carvings and other ornamental articles to foreign markets and transferred all the employees in the export department, where the Claimant was stationed to the import department as a temporary measure pending consultations with the Union.

43. The import department could not manage the huge wage bill occasioned by the additional staff and consequently the Respondent was constrained to lay off some of its employees after exhausting all available resources to absorb the affected staff into other sections.

44. On the 1st October, 2014, the Respondent in compliance with the provisions of Section 40 of the *Employment Act* and the provisions of the CBA issued a 30 days Notice of intention to declare 3 employees (including the Claimant herein) redundant to the Union (KUCFAW) and copied to the District Labour Officer Industrial Area. The redundancy was to take effect on the 1st November, 2014.

45. The Respondent engaged the Union (KUCFAW) over the same issue for more than six (6) months at great costs to no avail. The Union resisted the redundancy. The Respondent's action on declaring redundancies and choice of employees was not actuated by malice, ill-will nor did the Respondent exercise any form of discrimination was alluded to by the Union.

46. Out of a total workforce of 6 employees that served in the export department, three employees were absorbed into other sectors however it became uneconomical to absorb and accommodate the remaining three, including the Claimant herein.

47. The Claimant was terminated on account of redundancy and was offered payment of all his terminal dues in accordance with the agreement entered into between the Respondent and his Union and in accordance with the CBA. The Claimant refused to take the dues.

48. He asserted that the Claimant cannot be availed the prayers set out in the Claim document as he refused to receive his terminal benefits despite being invited to collect the same by the Respondent and his Union. His colleagues Zablon Magero Omwansu and Elly Opiyo Ondigo received their payments.

49. It is not true that it was the norm and practice of the Respondent to pay severance pay and gratuity. The terms were negotiated and agreed upon by the Claimant's Union and the Respondent under Clause II of the CBA in so far as payment of the redundancy package is concerned.

50. He further stated that the material redundancy the subject matter of the instant suit was different from the redundancy scenarios of 1999 and 2008 as the circumstances were not akin to the instant case i.e. there was no competition in the industry, the economy and general financial position of the country and the Respondent respectively could then sustain settlement of a redundancy package outside what was there in the law and the prevailing CBA.

51. Consequently, the redundancy instances of 1999 and 2008 cannot qualify to be a tradition and practice of the Respondent in settling dues for redundant employees.

52. He asserted that in so far as the Claimant refused to accept the negotiated package by his Union, he is not entitled to the compensatory relief sought. The redundancy was lawfully carried out in accordance with the provisions of Section 40 of the *Employment Act* and the provisions of the CBA. Indeed, the Respondent settled all outstanding claims of the workers affected by the Redundancy, save for the Claimant, who refused, failed, and neglected to receive payment of his terminal dues as per the terms of the CBA.

The Claimant's Submissions

53. The Claimant's Counsel identified the following issues for determination;

    a. Whether the Respondent's termination of the Claimant was in line with fair procedure in line with Section 40(1)(c) of the *Employment Act*.

    b. Whether the Claimant is entitled to the reliefs sought

    c. Who should bear the costs of the suit?

54. On the first issue, Counsel submitted that as stated in the case of Ahamed Mwarumba Mwavita v Kocos Kenya Limited [2021] eKLR, Section 40 of the *Employment Act*, elaborately sets out the procedure and principles that must be adhered to by the employer who wishes to declare a redundancy. Thus;

    a. To issue notice of the anticipated redundancy to his employees. This is a general notice issued at least 30 days before the actual termination on account of redundancy. It is addressed to the employees and local labour office where the employees are not members of a Trade Union. Where the employees are in a union, the notice goes to the Trade Union and the local labour office.

    b. The notice should indicate the grounds for the proposed redundancy. It must also indicate the extent of the redundancy in the context of how many employees will be affected and from which departments.

    c. The employer must then embark on a selection process of the employees to be terminated while having regard for the seniority in time of the employees, their reliability, ability and skills. The general principle is that, all factors remaining constant, the employer should implement the first-in, last-out rule. That is to say, employees who were last to join the organisation should be the first to leave it. However, the law permits the employer to depart from the rule on justifiable grounds in order to enable them to retain the employees whom they believe are critical to their organisation.

    d. The employer must then pay the employees identified for release: severance pay, leave dues, and a month's salary in lieu of notice.

55. There is no evidence that the decision to settle for the Claimant as the suitable candidate for release was arrived at using a fair selection process. It is not clear whether the Respondent implemented the first-in-last-out principle or if it departed from it on some acceptable ground in law.

56. On the first-in-last-out selection criteria, Counsel placed reliance on the case of Emmanuel Liano Chang'oka v Plan International Kenya [2023] eKLR, where the Court opined as follows:

> " The Claimant's evidence was that at the time of the purported redundancies, he was working with other employees who were his juniors in the same department. It was the Claimant's evidence that he was terminated but these junior colleagues who had been hired after him

were retained by the Respondent. This evidence was not challenged by the Respondent. All that the Respondent said in answer to the assertion was that the restructuring process was not guided by the first in last out principle alone. In other words, the Respondent was by this simply admitting that the selection procedure was not solely guided by the first in last out principle.

If this be the case, then it was critical that the Claimant demonstrates the basis of its selection of the 44 and ultimately 11 members of staff out of its workforce of 300 individuals. As I have indicated above, this evidence was not provided to the court. So to speak, the process was executed in a manner that remains opaque. This is unlike in the Thomas De La Rue (K) Ltd v David Opondo OmuteLema where evidence was tendered demonstrating the criteria used in identifying the employees who were released.

The fact that the selection process was executed in an opaque manner renders it invalid. The consequence is to fail to demonstrate that the procedure for declaring the redundancy was fair. Discussing this matter, the Court of Appeal in Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others [2014] eKLR said that the employer must ensure that the selection procedure is not opaque. It must be open and verifiable. For the reasons advanced above, I hold that though the termination may have been well intentioned, it nonetheless failed to comply with the requisites of the law on declaring a valid redundancy. From the evidence provided, the Respondent has failed to provide evidence on a balance of preponderance to demonstrate that the reason for termination was valid. Further, there is evidence that the procedure adopted in processing the redundancy had significant lapses. Accordingly, the Respondent's action to terminate the Claimant is declared unfair."

57. The Claimant's overwhelming 20-year experience spent working with the Respondent, and his ability to wear different hats at various times and periods of his employment made the Claimant a reliable and beneficial resource. The Respondent had no justifiable and/or realistic reason for declaring the Claimant redundant apart from his association with the workers' union.

58. On the reliefs sought, Counsel submitted that severance and gratuity pay were provided for under the Collective Bargaining Agreement, under Clause 11 on redundancy. Furthermore, the Respondent had previously declared redundancies in 1999 and 2008. On those two occasions, those declared redundant were paid both severance pay and gratuity pay. As such, the Claimant therefore had a legitimate expectation that the Respondent would accord him the same. To support this submission, the case of Josephine Mwende v University of Nairobi [2021] eKLR was cited.

59. On unpaid annual leave and leave allowance, Counsel submitted that this is a relief that the Claimant is entitled to. The Collective Bargaining Agreement, under Clause 12, provides that an employee declared redundant has the right to seek any outstanding payments that have yet to be made to them as of the time they were declared redundant. The Claimant took his annual leave in the years 2011-2014 but was not paid during this time and now claims the same, being the sum of Kshs. 127,925.54/=.Additionally, he was not well remunerated during his other leave days, such as sick leaves and now demands the due payment of Kshs. 19,400/=.

60. On relocation allowance [KShs. 8000], it was submitted that it is a benefit that was provided for in the CBA for the inconvenience of having to move his place of residence following the declaration of redundancy.

61. Notice pay is a legal entitlement under Section 40 of the *Employment Act*. There cannot be a reason, therefore, why the Claimant can be deprived of the same.

62. On Underpayment/Responsibility pay for carrying out floor supervision and design work from 1998-2015 (17 years), Counsel submitted that Claimant's evidence was that he was tasked with extra responsibilities of floor supervision and design work from the year 1998 to 2015, a period of 17 years, and that the Respondent's witness admitted this fact in his evidence. Despite the extra responsibilities, the Claimant's salary was not adjusted upwards. He should be compensated in the manner sought in his pleadings.

63. It was further submitted that the termination of the Claimant's employment was both unlawful and discriminatory. He should be awarded general damages.

64. Costs follow the event. Having established his case, the same should succeed with costs.

The Respondent's Submissions

65. In early 2014, the Respondent faced stiff competition from other businesses/competitors in the export of wood carving, soap stones, sculptures and other ornamental items attributed to an influx of individuals and companies. The Respondent was, as a result, adversely affected by the said stiff competition in the export market.

66. As a result of the above, and loss of work, in January 2014, the Respondent stopped exporting carvings and other ornamental articles to foreign markets and transferred all the employees in the export department, where the Claimant was stationed, to the import department as a temporary measure pending consultations with the Union.

67. The above was not contested. The Claimant similarly agreed that the export section was closed and that everybody had been transferred therefrom.

68. The import department could not manage the huge wage bill occasioned by the additional staff. Consequently, the Respondent was constrained to lay off some of its employees after exhausting all available resources to absorb the affected staff into other sections.

69. All the above was subject to discussion with the Union in terms of the prevailing CBA as well as within the context of section 40 of the *Employment Act*.

70. On the 1st October, 2014, the Respondent in compliance with the provisions of Section 40 of the *Employment Act* and the provisions of the CBA issued a 30 days Notice of intention to declare three employees (including the Claimant herein) redundant to the Union (KUCFAW) and copied to the District Labour Officer Industrial Area The redundancy was to take effect by the end of October, 2014, more particularly on the 1st November, 2014.

71. The Respondent engaged the Union (KUCFAW) over the same issue for more than six (6) months at great costs to the Respondent to no avail. The Union apparently resisted the redundancy. The Respondent's action on declaring redundancies and choice of employees was not actuated by malice, ill-will, nor did the Respondent exercise any form of discrimination as alluded to by the Union.

72. Out of a total workforce of 6 employees that served in the export department, three employees were absorbed into other sectors; however, it became uneconomical to absorb and accommodate the remaining three, including the Claimant herein.

73. The Claimant cannot be entitled to payment of both severance pay and gratuity. The Respondent notified the Claimant's union of intended redundancies as provided in law and thereafter negotiated redundancy terms, which the Respondent tabulated and made payments.

74. The Claimant failed to demonstrate that it was the norm and practice of the Respondent to pay severance pay and gratuity. The terms were negotiated and agreed upon by the Claimant's Union and the Respondent under Clause II of the CBA insofar as payment of the redundancy package is concerned.

75. Similarly, the Claimant could not demonstrate that the material redundancy, the subject matter of the instant suit, was the same as the redundancy scenarios of 1999 and 2008, as the circumstances were not akin to the instant case.

76. In so far as the Claimant refused to accept the negotiated package by his Union, he is not entitled to maximum compensation. The redundancy was lawfully carried out in accordance with the provisions of Section 40 of the *Employment Act* and the provisions of the CBA. Indeed, the Respondent settled all outstanding claims of the workers affected by the Redundancy, save for the Claimant, who refused, failed, and neglected to receive payment of his terminal dues as per the terms of the CBA.

77. The Claimant's claim is devoid of merit, and the same should be dismissed with costs. Furthermore, should this Court determine that some amount should be paid to the Claimant, it should not attract interest due to his failure to accept the money at the material time.

Analysis and determination

78. I have carefully considered the pleadings and evidence by the parties herein, the respective submissions by their Counsel, 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.

79. There is no dispute that at all material times, the Claimant was an employee of the Respondent and his employment was terminated on account of redundancy. It bears repeating that a lack of fault on the part of the employee is the defining characteristic of termination of an employee's employment due to operational requirements of the employer. In my view, for this reason, the *Employment Act*, 2007, provides a detailed codification of the procedure to be adopted and the principles that must be adhered to in such terminations, as outlined in Section 40 thereof.

80. Particular obligations are imposed on the employer in considering the termination of employees' employment due to redundancy. This aims to ensure that those affected by redundancy are treated fairly.

81. Although it was neither raised nor submitted by any of the parties, this Court considers this a crucial question that must be addressed: Does the outcome of redundancy negotiations between a trade union and the employer bind the union's members? In my view, the general principle is that whenever a trade union enters into negotiations or agreements with an employer on redundancy or any other employment matter, the results are generally binding on the union's members. Union members cannot renege on negotiated outcomes.

82. This overarching principle is initially founded on the agency and representativity principle. Trade unions possess apparent authority to negotiate and bind their members concerning employment issues. Furthermore, permitting members to deviate from outcomes negotiated by their union would undermine collective bargaining and could lead to disruptions in industrial peace and predictability in labour relations.

83. However, I must point out that where the redundancy agreements reached between the Union and the employer undermine statutory protections and rights, such as notice, severance pay, or fairness requirements, and/or are unconstitutional, they cannot bind the members.

79. Undeniably, there were consultations between the Respondent and the Claimant's trade Union. The consultation, regarding a redundancy situation that was to affect employees within the Respondent's Export Department, including the Claimant. Following the consultations, a redundancy package was agreed upon. Other employees accepted payment of the terminal dues per the agreement. The Claimant declined the offer, holding that the dues were insufficient.

80. The Claimant does not deny that there were consultations with the abovementioned outcome. He has not demonstrated that what was being offered by the Respondent was less than the minimum provided for under the law, or that the agreement was unconstitutional.

81. In fact, at paragraph 14 of the Respondent's Amended Response, the Respondent clearly states what it has offered and remains willing to pay the Claimant as a redundancy package. Essentially, the offer includes the dues the Claimant has sought in his pleadings, except for the compensatory relief under section 49[1][c] of the *Employment Act*, general damages for discrimination, and gratuity, which, for the reasons that will shortly come out here below, this court refuses to grant.

82. In light of this Court's finding hereinabove that the outcome of the negotiations/consultations between his Union and Respondent bound him, I conclude that he did not have a cause of action against the Respondent for a claim for unfair termination and concerning the redundancy package. And for this reason, he cannot be entitled to the compensatory remedy, the general damages, and the gratuity sought.

83. In conclusion, the Claimant's case fails. It is hereby dismissed. For clarity of record, he is only entitled to the redundancy package that the Respondent offered, and as admitted and outlined under paragraph 14 of the Respondent's Amended Memorandum of Response.

84. Orders accordingly.

READ, SIGNED AND DELIVERED THIS 18TH DAY OF SEPTEMBER 2025

OCHARO KEBIRA

JUDGE

In the presence of:

Claimant: .....

Respondent: .....