

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT
NAIROBI
CAUSE NO. 100 OF 2019

DAVID WACHIRA NGANGA.....
CLAIMANT

VERSUS

KENYA KAZI SERVICES
LTD.....RESPONDENT

JUDGMENT

1. Through an Amended Statement of Claim dated 16th October 2024, the Claimant avers that prior to his dismissal from employment, he had been recruited by the Respondent from 5th June 2006 as a Security Manager in charge of corporate clients in Mombasa, a position he held for three years until 2009.
2. He further avers that he thereafter served as Operations Manager in an acting capacity until 10th May 2010, when he was substantively confirmed. Subsequently, he was transferred to Nakuru as the Area Branch Manager before being assigned to the position of Project Manager – East Africa Breweries. He avers that his last position was that of Key Accounts Manager – Nairobi, which he held from January 2016 until 20th March 2017.

3. It is the Claimant's case that on 20th March 2017, he received a letter from the Respondent indicating that it was undertaking reorganisation and restructuring, and that his position was likely to be affected. He states that he was thereafter assigned to what was described as a newly created position of Division Manager, Nairobi North, in which he continued to discharge his duties without clear direction. He further avers that on 14th May 2018, he was informed that his position had not been declared redundant and that, during the redundancy process, he had been placed in the said role of Division Manager, Nairobi North.
4. In the circumstances, the Claimant seeks from the Respondent the sum of **Kshs. 7,093,642.40**, together with a declaration that he is entitled to compensation equivalent to his salary, final dues, and bonuses for the period he would have remained in employment but for the alleged redundancy and unfair termination. He further prays for damages for breach of his rights, together with interest.
5. In response to the Amended Statement of Claim, the Respondent admits that the Claimant was notified on 20th March 2017 of an intended redundancy likely to affect the position of Key Accounts Holder, but contends that the Claimant was encouraged to engage in consultations with a view to being assigned a different role.

6. The Respondent avers that it offered the Claimant the position of Division Manager, which he accepted, and his supervisors confirmed that he settled into the role and discharged his duties effectively. To this end, the Respondent denies that there was any uncertainty regarding the position of Division Manager.
7. It is the Respondent's case that the Claimant was not declared redundant, noting that the redundancy process ran for 12 months, from February 2017 to February 2018, after which it was concluded. According to the Respondent, the Claimant cannot attribute his resignation to a redundancy exercise that had already ended.
8. On the basis of the foregoing, the Respondent prays that the Amended Statement of Claim be dismissed with costs.
9. The matter came up for hearing on 5th March 2025 and 29th May 2025, during which both parties adduced oral evidence.

Claimant's Case

10. The Claimant testified in support of his case as CW1. For starters, he adopted his witness statement as his evidence in chief and produced the list and bundle of

documents filed with the Amended Memorandum of Claim as his exhibits before the Court.

11. The Claimant testified that on 20th March 2017, he was moved to what was described as a newly created office of Division Manager – Nairobi North, with assurances from the then Senior Operations Manager, one Edward Meaby, that negotiations and confirmation to the role would follow.

12. He stated that he served in this capacity for one year, but contended that the position was a mere decoy, as he was in fact deployed to work with experts along the Nairobi–Mombasa Expressway. This prompted him to make repeated reminders to management that he was serving in an unconfirmed position.

13. The Claimant averred that these reminders turned into frustrations at a time when significant changes were taking place within the Respondent, including employees being released on redundancy, some retiring, and some positions being advertised while their substantive holders were still in office.

14. Owing to growing frustration and anxiety from working under hazardous conditions without formal recognition or confirmation, the Claimant stated that

he requested separation on redundancy grounds by his letter dated 12th April 2018.

15.To his surprise, his request was declined on the basis that the redundancy exercise had already lapsed. However, the Managing Director, Mr. Chris Manning, confirmed that redundancies were still ongoing and that more would follow in May and June 2018.

16.The Claimant maintained that he had in effect, been deceitfully rendered redundant and that this was possibly engineered to lead to his dismissal. He averred that, acting under duress and for the sake of his mental peace, he included the word 'resignation' in his request for separation.

17.He further testified that from April 2017, he was orally instructed to take up the position of Division Manager – Nairobi North. He accepted the role on the strength of promises that he would be confirmed, which were never honoured.

18.The Claimant stated that following the issuance of his separation notice, the Respondent, by an email of the same date, indicated that the redundancy notice had expired and that, having served as Division Manager – Nairobi North for

over three months, he had effectively been confirmed to that position. The Claimant stated that this was never communicated to him despite his repeated requests for clarification.

19. The Claimant regarded this as a premeditated scheme to deny him his rightful earnings and force him into resignation.

20. He added that during the period he was allegedly serving as Division Manager – Nairobi North, he was in fact working along the Nairobi–Mombasa Expressway with the Respondent’s client, Bechtel, undertaking hazardous assignments such as guiding, interpreting, navigating, liaising, and providing security to geologists, surveyors, and engineers, while being exposed to dangerous animals, insects, reptiles, and the elements.

21. According to the Claimant, he served one month’s notice pursuant to the redundancy letter of 20th March 2017 and another one month’s notice as indicated in his separation request of 12th April 2018, making a total of two months as required under his initial letter of appointment dated 24th May 2006. Nevertheless, the Respondent deducted from his final dues an amount equivalent to one month’s salary, alleging that he had not served notice.

22.The Claimant further testified that in computing his final dues, the Respondent unlawfully withheld his bonus for the year 2017, notwithstanding that he had fully worked during the period.

23.He further stated that his pension scheme commenced upon his confirmation as per his appointment letter dated 24th May 2006, but that six years of contributions were omitted from the Respondent's calculations.

24.In closing, the Claimant urged the Court to allow his Amended Statement of Claim as prayed.

Respondent's Case

25.The Respondent called oral evidence through **Norine Silwe** (RW1), who introduced herself as the Respondent's Human Resource Officer. Similarly, she adopted her witness statement, together with the list and bundle of documents filed on behalf of the Respondent, as her evidence in chief.

26.RW1 testified that in February 2017, the Respondent undertook a rationalisation, reorganisation, and restructuring exercise aimed at reviewing its financial position in relation to revenue and costs, which included a redundancy process. This decision was communicated to all employees.

27. She stated that on 20th March 2017, the Claimant was informed that his position of Key Accounts Manager was likely to be affected, and he was issued with one month's notice. He was encouraged to consult with his head of department to explore ways of avoiding redundancy and to consider alternative roles in which he could be retained.

28. During the restructuring, the Respondent identified the position of Division Manager as suitable for the Claimant, given his expertise and skill set. The Claimant accepted the role, was confirmed in it, and his email signature and correspondence were updated to reflect the new position.

29. RW1 testified that the Claimant served in the position of Division Manager for over three months, and his supervisors commended his performance. She clarified that the transition did not result in a salary increment.

30. RW1 explained that the redundancy process lasted twelve months, from February 2017 to February 2018, after which it was concluded.

31. She stated that on 12th April 2018, the Claimant sought separation on the basis of redundancy, but the Respondent informed him that the redundancy exercise had expired, noting further that he had already been confirmed as Division Manager

and was advised that if he wished to exit employment, he was required to do so in accordance with the Employment Act 2007.

32. RW1 further averred that by his email of 15th May 2018, the Claimant indicated his intention to resign, which the Respondent accepted. Following his resignation, the Claimant was paid all his final dues, including accrued leave.

33. It was RW1's view that the Claimant was not entitled to the reliefs sought since he was neither declared redundant nor denied any contractual benefits. She was categorical that bonus payments were not part of the Claimant's contract, that his salary remained as agreed, and that he had not demonstrated any breach of his employment rights.

34. According to RW1, the Claimant's case disclosed no reasonable cause of action, and consequently, she urged the Court to dismiss the Amended Statement of Claim with costs.

Submissions

35. The Claimant submitted that the position of Key Accounts Manager was never declared redundant and argued that the Respondent failed to demonstrate that it was substantially justified in declaring it so. In support of this position, the

Claimant relied on the case of **Kenya Airways Limited v Aviation & Allied Workers Union Kenya & Others [2014] KECA 403 (KLR)**.

36. He further urged the Court to find that he was unfairly terminated, on the basis that the Respondent had not produced any documentary evidence to prove that a restructuring exercise had in fact taken place.

37. Citing the case of **Patrick Kariuki v Mustek East Africa Limited [2021] eKLR**, the Claimant contended that he was constructively dismissed, as the Respondent initiated a redundancy process, failed to follow the statutory procedure, and unilaterally altered his position without consultation. To reinforce this argument, he placed reliance on **James Ang'awa Atanda & 10 Others v Judicial Service Commission [2017] eKLR**.

38. In conclusion, the Claimant urged the Court to find that he had proved his case on a balance of probabilities, having established that his termination was unfair, unlawful, and amounted to constructive dismissal arising from the Respondent's conduct.

39. On the other hand, the Respondent submitted that the Claimant voluntarily resigned from employment by his email dated 15th May 2018, without assigning any reasons for doing so.
40. In the same vein, the Respondent posited that since the Claimant resigned of his own volition, Section 43 of the Employment Act on substantive justification for termination was inapplicable.
41. The Respondent further submitted that the position of Key Accounts Manager was among those considered during the redundancy process. That the said position remained vacant throughout the exercise, and after due deliberation, the Respondent resolved to retain it.
42. Relying on the decisions in **Edwin Beiti Kipchumba v National Bank of Kenya Limited [2018] eKLR** and **Ayonga v Falcon Signs Limited [2023] KEELRC 300 (KLR)**, the Respondent argued that the validity of a resignation does not depend on any action by the employer.

43. The Respondent further argued that the Claimant failed to follow the proper procedure by not issuing the requisite two months' notice. Nonetheless, his resignation was accepted and final dues were paid.

44. The Respondent further submitted that the Claimant improperly introduced new allegations in his submissions namely, that another person was hired as Key Accounts Manager during the restructuring, and that beyond his pleaded claim of unfair termination on account of redundancy, he was also advancing a fresh and distinct cause of action of constructive dismissal which had neither been pleaded nor canvassed at the hearing.

45. On these grounds, the Respondent urged the Court to decline the invitation to consider causes of action not pleaded. To buttress this argument, the Respondent invited the Court to consider the decisions in **Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others (2014) eKLR**, **Erastus Wade Opande v Kenya Revenue Authority & another Kisumu HCCA No. 46 of 2007** and **Daniel Torioch Arap Moi v Mwangi Stephen Muriithi & another (2014) eKLR**.

Analysis and Determination

46. The Court has considered the pleadings, the evidence on record, and the parties' respective submissions, and has identified the following issues for determination:

- i. Whether the Claimant's employment was terminated by way of redundancy;*
- ii. Depending on (i) whether the termination of the Claimant's employment was fair and lawful; and*
- iii. Whether the Claimant is entitled to the reliefs sought.*

Whether the Claimant's employment was terminated by way of redundancy

47. Before delving into the substantive issues, the Court finds it necessary to address the question of constructive dismissal. At the outset, it must be observed that this issue was not pleaded by the Claimant but was only raised for the first time in his submissions, wherein he invited the Court to determine that he had been constructively dismissed.

48. The Court concurs with the decision in **Rem Ogodo Ogana v Kenya Sugar Board [2016] eKLR**, that a claim for constructive dismissal must be specifically pleaded, setting out the precise particulars which the employee believes compelled him or her to leave employment involuntarily, notwithstanding that the employer had not expressly terminated the employment relationship.

49. In the present case, the Claimant did not plead constructive dismissal in his Statement of Claim, nor did he seek reliefs ordinarily associated with such a claim. By law, he was required to specifically plead constructive dismissal and set out the particulars thereof, which he failed to do.

50. If indeed the Claimant considered himself constructively dismissed on account of the Respondent's failure to issue him with a written confirmation or job description for the role of Division Manager, Nairobi North, he ought to have expressly pleaded as much in his Statement of Claim.

51. It is trite that submissions do not constitute evidence. On this issue, I gather support from the decision of the Court of Appeal in **Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & Another [2014] eKLR**, where it was held as follows: -

“We have already found that the 1st respondent failed to discharge his burden of proof of the existence of facts claimed of the companies, what they owned and whether property sales indeed took place, followed by transfers. So what we conclude is that the learned trial judge simply lifted the figure of sh.80,161,720/= from the 1st respondent's submissions and

awarded it against the appellant. This was wholly in error. Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties' "marketing language", each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed there are many cases decided without hearing submissions but based only on evidence presented. Underlined for emphasis

52. Accordingly, the Court finds that since constructive dismissal was not pleaded, it does not arise for determination in this matter.

53. With that being said, I now turn to the substantive issue, namely, whether the Claimant's employment was terminated by way of redundancy.

54. It is not in dispute that by a letter dated 20th March 2017, the Respondent notified the Claimant that the position of Key Accounts Manager, which he then held, was among those likely to be affected by an intended redundancy.

55. Both parties exhibited a copy of the said letter, which in part stated: -

“The position of Key Accounts Manager (being the position you hold) is one of the positions that is likely to be affected. Therefore, in line with Section 40(1)(b) of the Employment Act... we hereby give you one (1) month’s notice of the intended redundancy. The company will now engage in a consultation process with a view to assessing whether and to what extent redundancy could be avoided and, if not possible, to also discuss any comments or suggestions you may have on the proposed redundancies which will take place over the course of the next thirty days. In addition, the HR Manager will provide a full list of any open vacancies on request. If the proposed redundancy does take place, the envisaged termination date will be 20th April 2017...”

56. From the foregoing, it is apparent that the redundancy of the Claimant’s position was not final or certain. Indeed, the letter expressly provided that if the redundancy materialized, the effective date of termination would be 20th April 2017.

57. The record, however, bears that 20th April 2017 came and went, yet the Claimant’s employment continued uninterrupted. Indeed, under cross-

examination, the Claimant confirmed that his employment was not terminated on that date.

58. Nearly a year later, by an email dated 12th April 2018, the Claimant sought clarification from the Respondent regarding the redundancy process, stating that he had waited anxiously for communication without any response. In the same email, the Claimant expressed his wish to separate from the Respondent under the redundancy terms, proposing to commence the process on 15th April 2018 and conclude on 15th May 2018.

59. In reply, the Respondent advised the Claimant vide an email dated 27th April 2018, that the redundancy notice had long expired and could not be invoked after a year. The Respondent further informed him that he had been serving as Division Manager for over three months, which effectively confirmed him in that position.

60. In an email dated 9th May 2018, the Claimant maintained that the redundancy was still ongoing since the Respondent had not conclusively addressed the matter, and to this end, cited confirmation from Chris Manning. The Claimant further reiterated his intention to separate from the Respondent, giving 15th May 2018 as his final working day.

61. In response, the Respondent, through a letter dated 14th May 2018, informed the Claimant that he had been identified and confirmed in the position of Division Manager, Northern. He was also advised that more than 12 months had passed since the redundancy exercise, which had therefore been concluded.

62. Through the same letter, the Claimant was further notified that the position of Key Accounts Manager still existed and had not been declared redundant. He was also reminded that he had performed the role of Division Manager for more than three months and had been confirmed in the position, as reflected in his email signature and correspondence. The Respondent further advised the Claimant to comply with the provisions of the Employment Act and his contract, should he wish to terminate his services.

63. Following the Respondent's letter of 14th May 2018, the Claimant, by an email dated 15th May 2018, referred to his earlier correspondence of 12th April and 9th May 2018 and expressly asked that the term "**redundancy**" be substituted with "**resignation**," while retaining all other terms. In the same communication, he confirmed that his last working day would be 15th May 2018. Consequently, the Claimant's resignation was accepted by the Respondent.

64. In light of the Claimant's email of 15th May 2018, it is evident that he exited employment by way of resignation and not through redundancy.

65. Accordingly, the Court finds that the redundancy process initiated by the Respondent on 20th March 2017 did not result in the termination of the Claimant's employment. Instead, the employment relationship came to an end when the Claimant voluntarily chose to resign, with effect from 15th May 2018.

66. In light of the foregoing finding, the second issue for determination is rendered moot.

Reliefs

67. The Claimant sought payment of salary for 15 months in respect of the position of Division Manager. However, he did not place before the Court any evidence to demonstrate that the position of Division Manager attracted a salary different from that of Key Accounts Manager, nor did he establish that the salary claimed was indeed attached to the role of Division Manager. In the absence of such proof, this claim cannot succeed.

68. The Claimant also prayed for severance pay amounting to **Kshs. 2,281,718/=**.

Having found that the Claimant was not declared redundant, the Court holds that this relief is unavailable.

69. The claim for salary in lieu of notice equally fails. Here is why. The Claimant exited employment through resignation, having served one month's notice. His contract of employment required that he issue two months' notice prior to termination. In the circumstances, and given that the Claimant only served one month, his claim for one month's salary in lieu of notice is unsustainable.

70. The Claimant further sought payment of **Kshs. 517,500/=** for the period 2006 to 2012 and **Kshs. 60,632/=** for the period 2012 to 2017. He asserted that although he joined the pension scheme upon confirmation, six years of contributions were omitted from the Respondent's calculations. In support of his position, he produced a Member Benefits Statement from the Kenya Kazi Limited Staff Pension Scheme, which reflected his date of employment and scheme entry as 1st January 2012.

71. It is therefore apparent that the Respondent did not account for the period between 1st September 2006, being the date of the Claimant's confirmation in employment, and 31st December 2011. Accordingly, the Court directs the

Respondent to reconcile the Claimant's pension contributions for the said period within thirty (30) days of this Judgment, failing which judgment shall be entered against it in the sum of **Kshs. 517,500/=**.

72. The Claimant also sought payment of **Kshs. 121,264/=** being bonus for 2017/2018. To this end, he relied on an email dated 16th April 2018 from the Respondent's Chris Manning addressed to Helgah and others, which stated in part:

“All please note that these bonuses will depend on the audited financial results for 2018 FY and are not to be communicated to the admin and management team further, as they may not materialize depending on the audited accounts... tomorrow through the day we agree the recommended bonuses as per the template and submit tomorrow night.”

73. It is clear from this communication that the payment of bonuses was conditional upon the audited financial results for the 2018 financial year. No evidence of such audited results was produced to justify the Claimant's entitlement to bonus. Moreover, the Claimant did not establish that his counterparts received bonuses while he was excluded. Accordingly, the Court is not persuaded that this claim is merited.

Orders

74. Save for the residual issue relating to pension, the Claimant's suit founded on unfair termination of employment is hereby dismissed, with an order that each party shall bear its own costs.

DATED, SIGNED and DELIVERED at NAIROBI this 3rd day of October 2025.

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STELLA RUTTO

JUDGE

In the presence of:

For the Claimant

Mr. Owino

For the Respondent

Mr. Otieno instructed by Mr. Anzala

Court Assistant

Millicent

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 had been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B** of the **Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

STELLA RUTTO

JUDGE