



Karachi v Rugu (Sued as the Legal Administrator of the Estate of Paul Rogo Itotia - Deceased) & 3 others (Employment and Labour Relations Cause E060 of 2021) [2025] KEMC 150 (KLR) (1 July 2025) (Judgment)

Neutral citation: [2025] KEMC 150 (KLR)

**REPUBLIC OF KENYA
IN THE NAKURU LAW COURTS
EMPLOYMENT AND LABOUR RELATIONS CAUSE E060 OF 2021**

PA NDEGE, SPM

JULY 1, 2025

BETWEEN

LUKA OMUCHIRO KARACHI ALIAS LUKE MANOA CLAIMANT

AND

PETER ITOTIA RUGU (SUED AS THE LEGAL ADMINISTRATOR OF THE ESTATE OF PAUL ROGO ITOTIA - DECEASED) 1ST RESPONDENT

LILIAN IRIGO RUGU (SUED AS THE LEGAL ADMINISTRATOR OF THE ESTATE OF PAUL ROGO ITOTIA - DECEASED) 2ND RESPONDENT

NEWTON RUGU 3RD RESPONDENT

ISAAC RUGU 4TH RESPONDENT

JUDGMENT

1. By Memorandum of Claim dated January 18, 2021, the claimant avers that he was an employed by Peter Itotia Mwangi T/a Westpoint Commercial Stores (deceased) on the 31st day of December, 1990 as a sales person earning a salary of Kshs 9500.00/= until the demise of the said Peter Itotia Mwangi T/a Westpoint Commercial Stores (deceased) on the 20th January, 2018 (hereinafter referred to as the first period). Upon the demise of the first employer on 20th January, 2018 the claimant and all other employees were locked out of the premises by all the respondents herein on the 1st of February 2018 on the allegations that there was a dispute regarding the running of the business among the family.
2. The lock out continued till 1st August, 2018 when, upon intervention of the county labor offices in Nakuru county, the claimant together with all other employees were told to be re-engaged by the 3rd and 4th respondents back to their employment with better negotiated terms of service culminating in salary increment whereof the claimant was now earning Kshs 25,000/= (hereinafter referred to as the 2nd period).



3. The claimant further claims that he wholeheartedly served the respondent until the 20th of March 2020 when the claimant together with all other employees were told to proceed home as the 3rd and 4th respondents were closing business due to the adverse effects of COVID-19 pandemic. He claims that all subsequent efforts to get in touch with the 3rd and 4th respondents for purposes of establishing the status of his employment were futile as he stated that the respondents later reopened the business and hired new staff.
4. He was initially retained at the monthly salary of Kshs 1,500/= which he continued earning up to the 31st of December 2013 when the same was increased to 3,000 and by the year 2020 he was earning a monthly salary of Kshs 25,000/=. While he was working for the respondent he would start his day at 8:00 am and end his day at work at 6:00 pm in the evening constituting a 10-hour working day and would work on 6 days of the week without benefit of rest days or overtime payments. He further states that he was never paid any house allowance for the entire period of time that he worked for the respondent neither was he housed by the respondents, that he was never allowed to go for his annual leave for the entire period of time of employment as statutorily required and neither was he given any payments in lieu of leave as statutorily required. Furthermore, he states that the respondents neglected to issue him with a certificate of service, severance pay which is in line with section 40 of the Employment Act 2007 for the entire period of time served to the point of termination. Further, the respondents neglected to make periodic payments to N.S.S.F on behalf of the claimant and further to operate with any other retirement benefits scheme and that the respondents owe him monies in respect of one month's salary in lieu of notice being the last monthly salary at the time of termination of employment.
5. The claimant prays for remedies as follows
 - i. A declaration be made to the effect that the claimant's termination in the first and the second periods was unfair,
 - ii. Respondents to pay the claimant compensation for unfair termination for both first and the second period; the First period total claim summing to Kshs 300,000 while the second period are Kshs 327,498.84,
 - iii. Payment of the one month in lieu of notice for both the first and second periods. First period total sum amounting to Kshs 25,000 while the second period amounts to Kshs 27,291.57.
 - iv. Payment of all monies emanating from underpayments for both the first and the second period. First period total summing up to Kshs 1,186,701.09 while the second period totals Kshs 60,029.40
 - v. Payment of all monies emanating from normal overtime dues for both period of employment. The total for the first period being Kshs 1,054,086.09 and the second period being Kshs 184,615.38.
 - vi. Payment of all monies emanating from off days worked and rest days worked during both the first period and the second period of employment. The total claims for the first period being Kshs 120,542.40 and the second period being Kshs 205,128.21.
 - vii. Payment of all monies emanating from unpaid annual leave for both the first and the second periods. The total claims for the first period summing up to Kshs 568,571.79 while the second period summing up to Kshs 37,963.23.



- viii. Payment of holiday for both the first and the second periods. Total claims for the first period summing up to Kshs 120,542.40 while for the second period being Kshs 205,128.21.
 - ix. Payment of severance pay for both the first and the second periods. Total claims for the first period summing up to Kshs 213,350.67 and the second period summing up to Kshs 35,897.44
 - x. Payment of service pay to the claimant or in the alternative an order for payment of all unpaid N.S.S.F dues to the relevant body for both the first and the second periods. Total claims for the first period summing up to Kshs 404,873.04 and for the second period to be Kshs 31,490.27
 - xi. The respondent to issue a certificate of service for both the periods of service
 - xii. The respondents to pay costs and interests on all the claims listed.
 - xiii. The court to grant any other orders that may deem necessary to grant.
6. The claimant filed documents in support of the claim which are annexed to the memorandum of claim which included
- i. Copy of claimants' national identification card.
 - ii. Demand letter dated 5th November, 2020
 - iii. Demand letter dated 20th August, 2020.
 - iv. Certificate of posting.
 - v. Copy of grant letters of administration intestate dated 9th march, 2020
 - vi. Copy of letter to the deputy registrar succession & family court registry dated 10th August, 2020
 - vii. Letter from Nancy Njoroge & Co Advocates dated the 12th August, 2020.
 - viii. Letter from Nancy Njoroge & Co Advocates dated the 12th August, 2020.
 - ix. Any other document to be produced at the hearing of the cause.
7. The respondents filed a response to the memorandum of claim dated 10th September 2021 in which they admitted that the claimant was employed by them. However, they averred that,
- i. The claimant was employed as a sales person and that he was employed from 31st December, 1990.
 - ii. That they did hire new staff after the reopening of the business after the covid pandemic.
 - iii. That the claimant absconded duty leaving no option to the respondent but to terminate the claimant's employment.
 - iv. That the claimant was employed on a retainer salary of Kshs 1,500 which was later increased to Kshs 3,000 on 31st of December 1990.
 - v. That all their employees worked overtime, worked during the holidays and that they were not entitled to statutory rest days
 - vi. That they did not pay all statutory deductions as mandated by law.
8. The respondents further denied and contested all the tabulation of the claims as enumerated and prayed for in the memorandum of claim. The respondents did not however submit any list



of documents to reply to the memorandum of claim filed. The claimant however testified and produced the documents filed herein. The 3rd Respondent was the only witness who testified for the Respondents.

Submissions

9. The claimant filed his written submissions dated 30th May 2025. In support of the averment in the memorandum of claim and witness statement, the claimant submitted briefly that the conditions set out in section 40 of the [Employment act](#) 2007 must be followed, failure to which, the termination on account of redundancy becomes unfair within the meaning of section 45 of the Act. That from the evidence that was provided by the respondents' witness, the termination of employment of the claimant in both first and second periods of employments was as a result of redundancy: the first time being after the death of the proprietor and the second being due to the covid 19 pandemic. That however, sections 40, 43 and 45 give the obligations that are to be followed before declaring an employee redundant. That it was evident that the redundancy process that was undertaken did not follow the procedural conditions provided by statutes.
10. The claimant cited several decisions, however a notable one was that of Kenya Airways Limited Vs Aviation & Allied Workers Union of Kenya & 3 Others (2014) e KLR where the court held the following;

Thus, redundancy is a legitimate ground for terminating a contract of employment provided there is a valid reason based on the operational requirements of the employer and the termination is in accordance with fair procedure. As section 43 (2) provides the test of what is fair reason is subjective. The phrase "based on operational requirements of the employer" must be construed in the context of the statutory definition of redundancy.

What the phrase means, in my view is that while there be underlying causes leading to a time redundancy situation such as reorganization, the employer must never the less show that the termination is attributable to redundancy that is that the services of the employee has been rendered superfluous or that redundancy has resulted in abolition of office, job or loss of employment.

11. The respondents did not provide any submissions.

Determination

12. There is no dispute that the claimant was declared redundant and therefore the remaining issues in dispute for my determination are whether the redundancy was in accordance with the law and if the redundancy process that the respondent undertook fully met the criterion set under the [Employment Act](#) 2007. Redundancy is provided for under section 40 of the [Employment Act](#) that gives out the conditions to be met by an employer before declaring an employee to be redundant whereby the employer has to notify the employee and the labor officer in writing at least one month prior, pay severance pay at least 15 days for each completed year of service, following a fair selection criterion and consider other alternative for the employee.
13. Section 40 sets out the procedure for redundancy. The claimant was not provided a prior notice for the termination of her contract of employment both in the first instance on 1st February 2018 and also during the Covid 19 pandemic when they were released off duties on 20th March 2020. In Phoebe Kwamboka Mafoya Verses Simba and Simba Advocates 2019 KEELRC 168 (KLR), the Court invalidated a termination where only one month's salary was paid without proper show cause process or mandatory notice.



14. Moreover, the claimant did not receive severance pay as required by the *Employment Act*. The respondent admits to the fact that he did not make any payments to the claimant after declaring his redundant. This principle was held by A.K Murgor J. of the Court of Appeal in the case of Kenya Airways Versus Aviation and Allied Workers Union, supra, where it was held that every employee is entitled to a 15-day severance pay of every completed year of service. The court also emphasized that even where the redundancy is lawful, failure to pay severance pay violates the law. The respondent failed to demonstrate that the redundancy process that he undertook was a fair process. The respondent further admits to hiring of new staff after reopening after the Covid 19 pandemic was over.
15. The claimant was neither consulted nor given a chance for a hearing when the redundancy decision was being made. This was a violation of section 41(2) of the *Employment Act* 2007 that guarantees every employee a right for a hearing or a representation before such a decision is made by the employer. This principle was also upheld in the case of Mary Chemuweno Kiptum v Kenya Pipeline Company Limited, 2014 KEELRC 905 (KLR), where the court observed that section 41 of the *Employment Act* is couched in mandatory terms. Where an employer fails to follow these mandatory provisions, whatever the outcome of the process, it is bound to be unfair as the affected employee has not been accorded a fair hearing in the presence of their union representative or in the presence of a fellow employee of their own choice.
16. The claimant was not given a certificate of service as required by section 51 of the *Employment Act* 2007. The respondent admits to the fact that he did not issue certificates of service to the claimant. Certificate of service is not a favor but a statutory right as its denial prejudices an employee's future employment prospects.
17. Sections 10 and 94 of the *Employment Act* require employers to keep written contracts and maintain records of employees particulars, wages and payment details, working hours, leave entitlements and social security contributions. The respondents admits that records were missing herein and that the claimant was paid in cash without even pay slips or a written contract. This then violates statutory obligation and shifts in the burden of proof to the employer under section 10 (7) which states:

If in any legal proceeding an employer fails to produce a written contract or written particulars, the burden of proof to the employer proving or disproving an alleged term of employment shall be on the employer. The respondent's failure to keep proper records of the claimant's employment including: No written contract thus violating section 9 of the *Employment Act*, no records of overtime, leave or house allowance thus violating section 27 and 28 of the *Employment Act* and No proof of NSSF contribution which was not presented in court thus violation of Section 36 of the NSSF Act. The lack of records in this case prejudices the respondent's defense and supports the claimant's assertion regarding unfair treatment and unpaid dues. In *Cosmus Nyokundi Nyaberi versus Mwakaikai Agencies Limited*, Justice Ndolo observed that this court is fully aware that it is the responsibility of an employer to document the employment relationship and in certain respects, the burden of proving or disproving a term of employment shifts to the employer. This doesn't however, release the claimant from the burden of proving their case. Even where an employment contract is oral in nature, the claimant must still adduce some evidence whether documentary or viva voce to corroborate their word. Lastly in *Edwin Kabogo Munene Verses Equity Bank Limited Industrial 1132 of 2012* whereby the employer was obligated to produce records under section 74 of the *Employment Act* failed which an adverse inference can be drawn that the claimants' assertions on the point are true.



18. On these facts alone, the only conclusion that may be drawn is that the redundancy did not comply with the provisions of section 40 and amounts to an unfair termination. I need not dwell further into the particulars of the redundancy process and will now proceed to consider the reliefs sought by the claimant.

A Declaration that the termination in both periods of employment was unfair

19. Taking into account the facts provided by the claimant, he was unfairly terminated out of his employment. The *Employment Act* 2007 provides that the burden of proof shifts to the employer to prove that the termination followed all due process as set out by the Act. Following the fact that the employer has failed to prove that he followed all due process in the termination of the claimant I hereby declare that the termination process undertaken by the respondent to be unfair and unlawful.

Compensation for the unlawful termination for both the first and second employment periods

20. Following that finding that the claimant was unlawfully terminated from his work, I hereby find that the claimant is entitled to Kshs 300,000 for the first period and the second period to be Kshs 327,498.84 being 12 months compensation for unfair termination.

Payment in lieu of notice

21. Taking into account that the claimant was entitled to both the one month's notice of intention to terminate and a month's notice for termination, I find that the claimant is entitled to one month's notice and assess the same at Kshs 25,000 for the first period and the second period Kshs 27,291.57 which are calculated in line with the relevant Minimum Wages Order as pleaded in the Memorandum of Claim.

Underpayments for both the first and the second periods

22. After taking considerations of the matters before me, it is evident that the claimant was being underpaid by the respondents. He did not receive a house allowance neither was the respondents housing her. I hereby award the claimant the total sum of money calculated that was supposed to be paid to him in both the first and the second period of employment, first period total summing up to Kshs 1,186,701.09 and the second period Kshs 60,029.40.

Unpaid leaves, Off days and Rest days, Overtime and Days worked during holidays

23. The facts provided by the claimant confirm that he was not paid annual leaves, off days and rest days, overtime and days worked during holidays. The respondents failed to provide records showing that the claimant only worked during the stipulated time by statute. There was however no evidence from the claimant of whatever nature, oral or documentary, that he applied for annual leave and was denied. I thus do hereby dismiss the claim for annual leave. I however find no records presented to controvert his other claims under the other heads herein and I do therefore find that he worked during public holidays for both the first and the second period. The total for the first period being Kshs 1,172,179.09 and the second period being Kshs 205,128.21 from overtime worked, and first period summing to Kshs 213,350.67 and for the second period being Kshs 35,897.44 for days worked during the holidays and finally Kshs 1,172,179.09 for the first period and Kshs 205,128.21 for days worked during off days and rest days.



Severance pay for both the first and second periods

24. Section 40 (1) (g) of the *Employment Act* stipulates the requirement for an employee to pay the employer a severance pay of at least 15 of each completed year of service. The facts provided proves that the respondents failed to pay the employee a severance pay as mandated by the *Employment Act* 2007. I thus hereby award the claimant a severance pay of Kshs 404,873.04 for the first period of service and the second period summing to Kshs 31,490.27.

Issuance of Certificate of Service

25. Section 50 (1) of the *Employment Act* mandates the employer to give an employee a certificate of service after termination of contract. The respondent affirms that he failed to give the claimant a certificate of service. I hereby order the respondents to issue a certificate of service to the claimant as mandated by the Act.

Conclusion

26. In conclusion, an order of declaration be and is hereby made declaring that the decision by the Respondents to terminate the Claimant's services on 1st of February 2018 and on the 20th of March 2020 on account of redundancy was unlawful and unfair and Judgment is entered in favor of the claimant against the respondent as follows;

- a. Compensation for unlawful termination in both the first and second period both totaling to Kshs 627,498.84.
 - b. Payment of monies owed in lieu of notice in both the first and the second period totaling to Kshs 52,291.57.
 - c. Payment of all monies emanating from underpayment for both the first and the second period totaling to Kshs 1,246,730.49.
 - d. Payment of all monies emanating from unpaid overtime and days worked during the holidays for both the first and the second period time of service which total to Kshs 2,865,256.55
 - e. Payment of a severance pay of Kshs 436,363.32 for both the two time periods of time served.
 - f. Certificate of service
 - g. Cost of the suit to be paid by the respondents.
27. For avoidance of doubt, an initial amount had been paid by the respondents to the claimant and the same shall be subtracted from the total amount awarded by the court herein as follows: Kshs 5,834,675.79 – 660,940.00 = 5,173,735.79. Thus the net amount payable herein is Kshs. 5,173,735.79, costs and interest.

**DATED, SIGNED AND DELIVERED AT NAKURU ON THIS...01ST DAY OF...JULY.....
2025**

ALOYCE-PETER-NDEGE

SENIOR PRINCIPAL MAGISTRATE

In the presence of;

Claimant's Counsel: Mburu



Claimant: n/a

1st Respondent: n/a

2nd Respondent: n/a

3rd Respondent: n/a

4th Respondent: n/a

