



**Longhorn Publishers Kenya also known as Longhorn Kenya Limited v Njuguna  
(Civil Appeal E413 of 2020) [2023] KECA 316 (KLR) (17 March 2023) (Judgment)**

Neutral citation: [2023] KECA 316 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL E413 OF 2020  
F SICHALE, LA ACHODE & PM GACHOKA, JJA  
MARCH 17, 2023**

**BETWEEN**

**LONGHORN PUBLISHERS KENYA ALSO KNOWN AS LONGHORN KENYA  
LIMITED ..... APPELLANT**

**AND**

**KAREN KARAGANIA NJUGUNA ..... RESPONDENT**

*(Being an appeal against the judgment and orders of the Employment  
and Labour Relations Court at Nairobi (Wasilwa J.) delivered on  
16th September 2020) in Nairobi ELRC Cause No. 490 of 2016)*

**JUDGMENT**

1. This is an appeal by the appellant, Longhorn Publishers Kenya, also known as Longhorn Kenya Limited, against the judgment and orders of the Employment and Labor Relations Court (ELRC) (Wasilwa, J.) delivered on September 16, 2020, which was in favor of the respondent, Karen Karagania Njuguna.
2. The respondent had sued the appellant, her former employer, contending that her position had been unlawfully and un-procedurally declared redundant and therefore, she was unlawfully terminated from her position as a Personnel and Administration Manager, on April 3, 2013. The respondent alleged that immediately after her termination, the appellant renamed her position as Chief Human Resource Officer and recruited her replacement less than a month later, with a similar job description. She also asserts that the redundancy was not as a result of the appellant's financial decline, because it only affected her and one other person and the appellant went on to recruit 23 new employees. Further that, her previous position was not merged with the human resource function as alleged by the appellant.
3. In her claim, the respondent therefore sought reinstatement, compensation and general damages.



4. In response, the appellant filed a memorandum of defence and maintained that the respondent's redundancy was procedural and necessary. The appellant stated that the respondent's position was terminated due to abolition of the position of Personnel and Administration Manager on May 4, 2013 as the company was restructuring and that subsequently, the human resource aspect of the position was appended to the Finance Manager, creating a Finance and Administration Manager position. The appellant denied that the new position created was similar to the one the respondent previously held and asserted that the termination was in accordance with the provisions of Section 40 of the [Employment Act](#).
5. In the impugned judgment, the court found that there was no redundancy situation that warranted the appellant to declare the respondent redundant and therefore, the respondent's termination was unjustified. The learned judge accepted the respondent's claim that her previous position and the new position of Chief Human Resource Officer were one and the same, as some of the responsibilities she held were transferred to the new position. The learned judge pointed out that the appellant had terminated the respondent and appointed someone else to merely fill in the same position, with a different job title but bearing the exact same job description.
6. The Court arrived at the conclusion that although the appellant followed the provisions of Section 40 of the [Employment Act](#), the respondent was still entitled to compensation due to unfair termination and awarded the respondent compensation of four million four hundred and one thousand five hundred and ninety-five shillings (Kshs. 4,401,595/=) less statutory deductions.
7. That is the judgment that provoked the appeal now before us. The appellant alleges that the learned judge erred in law and fact on many fronts as evinced in her finding that the redundancy was unjustified; in failing to consider that the new position of Chief Human Resource and Administration Officer created new roles completely different from what was there before and was a lower job grade than that of the Personnel and Administration Manager; in failing to consider that the appellant had paid the respondent a severance pay of kshs. 1,300,775.90, and lastly in awarding the respondent 9 months' compensation as damages and going further to tabulate it at kshs. 4,401,595/=.
8. This appeal was canvassed by way of written submissions. In his submissions Mohamed Muigai LLP, Counsel for the appellant cites the case of [Kenya Airways Limited v. Aviation & Allied Workers Union Kenya & 3 Others](#) (2014) eKLR and contend that the [Employment Act](#) allows redundancy as a way of terminating an employee's contract if there is a valid reason to do so and the same should be done fairly and procedurally. Counsel asserts that the appellant has demonstrated that the respondent's redundancy was necessary by producing into evidence, the notice declaring the respondent's position redundant and explaining the reasons for the decision.
9. Making reference to the case of [Kenya Union of Commercial Food & Allied Workers v. Aseco \(k\) Ltd](#) (2002) eKLR, Counsel argues that the respondent's termination on the basis of redundancy met the standards set in law because the merging of the positions was with the aim of increasing efficiency and mitigating losses caused by decrease in demand of the appellant's products. Further, that the respondent's role had become superfluous because the position of Personnel and Administration Manager had been abolished and its functions merged with those of the Finance and Administration Manager and those of the Chief Human Resource and Administration Officer.
10. Counsel contends that the Key duties of the Chief Human Resource and administration Officer being oversight over required changes in the company structure, dispute and grievance resolution, budgeting and budgetary allocations, communication, monitoring between employees and service providers and development and updating job descriptions, they were not the same as the duties that were carried out by the Personnel and Administration Manager. He further, relies on the case of Kenya Airways Limited



(supra), to urge that the redundancy was necessary because the appellant was experiencing economic difficulty, brought on by a decline in demand for its products.

11. Counsel also contends that the Superior court wrongly exercised its discretion under Section 49 of the *Employment Act* and misdirected itself on matters it should not have acted on, while failing to take into consideration important details. Citing the cases of *Coffee Board of Kenya v. Thika Coffee Mills Limited & 2 Others* (2014) eKLR, *Ol Pejeta Ranching Ltd v. David Wanjau Muboro* (2017) eKLR, and *Julimatt Enterprise Limited v. Vincent Mugadia Kitazi* (2018) eKLR, Counsel submits that the court did not elaborate why it awarded compensation of nine (9) months and failed to take into account, the kshs.1,300,775.90/= already paid to the respondent upon termination.
12. Counsel asserts that under Section 49(h) and (m) of the *Employment Act*, the court should have given due consideration to the payments made by the employer and received by the employee in the form of severance pay and any compensation including ex gratia payment, in respect of termination of employment. In that regard, Counsel proposes one (1) month compensation as fair award in case of a finding of liability and asserts in conclusion, that the respondent's termination of employment was justifiable.
13. In response, Man'gerere & Bosire Associates, Counsel for the respondent submitted that the respondent's termination was unjustified because the appellant's organizational structure shows that the position of Personnel and Administration Manager was retained under a different title. That the new title of Chief Human Resource and Administration Officer, performs similar key responsibilities to those previously performed by the respondent. Counsel argues that the responsibilities of the new office were only expanded from those the respondent was already performing and that the new recruit reports to the Managing Director just like she did. He asserts that the trial judge correctly found that the redundancy was unjustified in line with the definition of redundancy in Section 2 *Employment Act*.
14. Regarding the compensatory award, Counsel urges that there was a typographical error as the total award amount should read 9#377,955 = ##b# 3,401,595/=. He concludes by asserting that the redundancy was a sham, unjustified and without genuine and/or valid reason. That it was in contravention of Article 41 of *the Constitution* and was actuated by malice and bad faith and urges this Court to uphold the findings of the trial court.
15. This being the first appeal, under Section 17 of the *Employment and Labour Relations Court Act* as read with Article 164 (3) of *the Constitution*, we shall reevaluate the evidence on record to reach our own conclusion on the evidence and applicable law in accordance with Rule 29(1)(a) of the Court of Appeal Rules. This rule was expounded in the case of *Arthi Highway Developers Limited v. West End Butchery Limited and 6 others* (2015) eKLR citing the decision in *Selle & another v Associated Motorboat Co Ltd of Kenya & others* [1968] EA 123 as follows:

“An appeal to this court from a trial by the High Court is by way of a re-trial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally”.



16. On that basis we have carefully considered the record of appeal and the grounds on which it is founded, the written submissions of the respective counsel and the law. We are of the considered view that the main issues for consideration are:
- i. Whether the declaration of redundancy in the position held by the respondent was justified.
  - ii. Whether the appellant complied with procedural requirements under the Act, and
  - iii. Whether the compensation of 9 months was excessive.
17. To answer the question whether the declaration of redundancy was justified, the starting point is to define the term redundancy. Section 2 of the [Employment Act](#) defines redundancy as;

“redundancy means the loss of employment, occupation, job or career by involuntary means through no fault of an employee, involving termination of employment at the initiative of the employer, where the services of an employee are superfluous and the practice is commonly known as abolition of office, job or occupation and loss of employment;”

We have considered all the three issues together.

18. This Court in [Tobias Ongaya Auma & 5 Others v. Kenya Airways](#) (2007) eKLR, specified that an employer has the right to declare redundancy and that redundancy is a legitimate ground for terminating a contract of employment. There is however a rider, that there must be a valid and fair reason based on the operation requirements of the employer for the redundancy to be declared and the termination should also be procedurally fair.
19. The [Employment Act](#) therefore, allows employers to terminate employment on the basis of redundancy, but requires that the declaration of redundancy to be fair and justified. The burden is placed on an employee to prove that the termination was unfair while the employer shoulders the burden of showing that the declaration of redundancy was justified.
20. Section 40 of the [Employment Act](#), the procedure provides for termination of employment on account of redundancy as follows:

Termination on account of redundancy.

1. An employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions;
  - A. where the employee is a member of a trade union, the employer notifies the union to which the employee is a member and the labour officer in charge of the area where the employee is employed of the reasons for, and the extent of, the intended redundancy not less than a month prior to the date of the intended date of termination on account of redundancy;
  - B. where an employee is not a member of a trade union, the employer notifies the employee personally in writing and the labour officer;
  - C. the employer has, in the selection of employees to be declared redundant, had due regard to seniority in time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy;



- D. where there is in existence a collective agreement between an employer and a trade union setting out terminal benefits payable upon redundancy, the employer has not placed the employee at a disadvantage for being or not being a member of the trade union;
- E. the employer has where leave is due to an employee who is declared redundant, paid off the leave in cash;
- F. the employer has paid an employee declared redundant not less than one month's notice or one month's wages in lieu of notice; and
- G. the employer has paid to an employee declared redundant severance pay at the rate of not less than fifteen days' pay for each completed year of service."

21. The section quoted above should be read together with Sections 43, 45 and 47 (a) of the *Act* to give context. A reading of these four provisions of the Law indicates that termination in the case of redundancy is fair or justified if the following four components are demonstrated to exist; the first is that there must be a reason for termination, the second is that the reason must be valid, the third is that the termination must be based on operational requirements of the employer, and the last is that the employment must be terminated in a procedurally fair manner. (See *PrideInn Hotels & Investment Limited v. Hamisi Madzungu* (2015) eKLR.
22. As aforementioned, the question that arises is with regard to whether the redundancy was necessary. The Superior court found that the appellant had failed to demonstrate the existence of a redundancy situation, because it declared the respondent redundant but later employed someone else to fill the same post.
23. Upon perusing the record of appeal, we note that in a letter dated April 3, 2013 annexed to the record, the Managing Director of the appellant one Musyoki Muli, informed the respondent that the board of directors was in the process of restructuring the company with the aim of increasing efficiency gains and mitigating against the falling demand for the appellant's products and services. Mr. Muli further informed the respondent that the position of Personnel & Administration Manager had been abolished and its human resource function merged with finance.
24. In another letter dated July 30, 2013, Mr. Muli appointed one Emma Kerubo Maina to the position of Chief Human Resource and Administration Officer. All the key responsibilities for this new position according to the letter were also new, save for four responsibilities being;
- I. Assessing the training needs of all employees and facilitating present and future training or development requirements
  - II. Preparing and presenting departmental reports for decision making
  - III. Ensuring compliance with statutory requirements relating to National Hospital Insurance Fund (NHIF), National Social Security Fund (NSSF), Higher Education Loans Board (HELB), Directorate of Industrial Training (DIT), the Pension Scheme and Health and Safety Standards, among others.
  - IV. Managing administrative controls of procurement and issuance of office supplies and services to facilitate company operations



25. We have considered it fit to establish at this juncture, whether the four (4) roles set out above and demarcated to the Chief Human Resource and Administration Officer are indicative of a mere replacement of the respondent. According to the letter of appointment dated July 30, 2013, the Chief Human Resource and Administration Manager has a total of twenty-five(25) key responsibilities. We have therefore, carefully considered the remaining twenty-one (21) roles attributed to the new position in comparison to those carried out by the respondent and in our opinion, the roles are significantly different. This is to say that the role of the position of Chief Human Resource and Administration Manager created points to a necessity, or a need to achieve objectives other than the four similar roles of the two positions.
26. The respondent has advanced the argument that the role was basically the same because both she and the new employee reported to the Managing Director. Looking at the company structure, provided in the record of appeal, it is clear that several other employees of the company are answerable directly to the Managing Director save for the board of directors. In our opinion therefore, the fact that both offices reported to the Managing Director is not indicative of the interchangeability/similarity of positions. We therefore disagree with the Learned Judge and make a finding that the two positions are separate and distinct, with each having its own key responsibilities, save for a minority that were transferred.
27. The respondent also points out that the appellant did not in fact, follow through and absorb her role into the finance department as previously indicated. This, she alleges, is because the company wrongfully terminated her services and replaced her with another person under the guise of redundancy. To this end, during cross examination, Kezia Njoki Waiganjo the Human Resource Business Partner in-charge of employee relations testified that the respondent's role did not in fact, get merged with that of the finance office as indicated in her termination letter. The appellant failed to explain why the respondent's role was not merged with the finance office, only alluding through the witness statement by the Human Resource Business Partner-Employee Relations that after some time there was need to conduct further restructuring, to create a new position.
28. It is therefore not clear who performs the ten other roles the respondent performed prior to her termination. What is certain however, is that those roles do not form part of the roles of the Chief Human Resource and Administration Officer. As noted earlier the onus falls on the respondent to prove that her termination was unfair. Whether another person was hired to replace her in performing the remaining 10 duties, the respondent did not put forth any evidence to support such a conclusion. In our considered opinion therefore, the respondent has not shown that she was unfairly terminated, and her position declared redundant.
29. Having so found, it is imperative that we investigate whether the appellant was justified in terminating the respondent's employment. Section 43 of the *Employment Act* requires the employer to prove the reasons for termination. The test of what is justifiable is subjective and whether termination is based on operational requirements of the employer should be construed in the context of the statutory definition of redundancy. This means that the employer must demonstrate that the employee's termination is due to redundancy. (See Kenya Airways Limited v. Aviation & Allied Workers Union). The appellant claims that the termination was necessary because the respondent's roles were merged with the finance office leading to abolition of the respondent's position in the company.
30. The appellant argues that the company's restructuring was necessary to increase efficiency gains and mitigate against the falling demand for the appellant's products and services. Evidence on record indicates that the appellant's earnings fluctuated through the years, with 2011 being the year when the appellant saw the highest earnings and thereafter in 2012 faced a sharp decline, which slightly improved in 2013. This, according to the appellant, necessitated the restructuring of the company. In the case



of Kenya Airways Limited (supra), this Court in pronouncing the appropriate test for justification of redundancy noted as follows;

“As long as the employer genuinely believed that there was a redundancy situation, any termination was justified and it was not for the court to substitute its business decision of what was reasonable. The Court has no supervisory role.”

31. The respondent has advanced counter arguments to the justification of redundancy alleging that the company’s reasons are untenable considering that they hired 23 new members of staff in subsequent months. It is our opinion that redundancy in this case must be investigated based on the circumstances prevailing at the time in which the decision was made and not subsequent months and the conditions following. Therefore, the fact that the appellant went on to further restructure and create new positions months later does not take away from the need to restructure and abolish some offices at the time of declaration of redundancy.
32. Based on the financial statements of the appellant and their bearing on the relevance of the declaration of redundancy, it is our considered view that there was a valid and fair reason, based on the operational requirements of the appellant for termination of the respondent’s services through the declaration of redundancy.
33. We have made a finding that the redundancy declared by the appellant was justified. We also note that following the declaration of redundancy, the appellant complied with the requirements of Section 40 of the *Employment Act* and this was acknowledged by the Superior Court. The appellant offered the respondent severance pay of kshs. 1,300,775.90/= plus all other dues that had accrued and this is not disputed by the respondent. For the foregoing reasons, we hold that the remedy of compensation of salary for 9 months being 9,377,955= 4,401,595/= less statutory deductions awarded by the Superior Court to the respondent in these circumstances was not explained and is unjustifiable.
34. We accordingly allow this appeal and set aside the Judgment of the Employment and Labour Relations Court.

We make no order as to costs.

**DATED AND DELIVERED IN NAIROBI THIS 17<sup>TH</sup> DAY OF MARCH, 2023.**

**F. SICHALE**

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**JUDGE OF APPEAL**

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**L . ACHODE**

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**JUDGE OF APPEAL**

**M. GACHOKA, CIArb, FCIArb**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original

Signed



DEPUTY REGISTRAR

