



REPUBLIC OF KENYA



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Ogworu v West Kenya Sugar Company Limited (Employment and Labour Relations Cause E002 of 2024) [2025] KEELRC 101 (KLR) (22 January 2025) (Judgment)

Neutral citation: [2025] KEELRC 101 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KAKAMEGA
EMPLOYMENT AND LABOUR RELATIONS CAUSE E002 OF 2024**

**JW KELI, J
JANUARY 22, 2025**

BETWEEN

DOUGLAS NDARERA OGWORI CLAIMANT

AND

WEST KENYA SUGAR COMPANY LIMITED RESPONDENT

JUDGMENT

1. The Claimant instituted suit vide a Statement of Claim dated 15th January, 2024 and filed on 14th February, 2024 seeking the following reliefs:-
 - a. A declaration that the Respondent's action and or inaction of dismissing the Claimant on account of alleged redundancy was illegal or otherwise amounted to unlawful termination, based on the circumstances thereof;
 - b. Damages for unfair and or unlawful termination, being an equivalent of twelve (12) months' salary
 - c. Unpaid salary for the month of August, 2023
 - d. Unpaid overtime for the entire period of employment
 - e. Certificate of Service
 - f. Costs of the suit plus interest at court rates.
2. The Claimant's Statement of Claim was filed alongside the Verifying Affidavit sworn by the Claimant on 15th January 2024; the Claimant's Witness Statement dated 15th January 2024; and the Claimant's List of Documents dated 15th February 2024 and a 2nd Bundle of documents dated 27th May 2024 filed on 28th May 2024.



3. The Respondent entered an appearance in the matter through the law firm of O & M LLP Advocates and filed a Response to the Statement of Claim dated 15th April 2024. They also filed a List of Witnesses dated 15th April 2024, and the Respondent's Witness Statement of one Julius Lunani dated 15th April 2024.
4. Following the directions of the Court issued on 14th October, 2024 after the oral hearing that parties file their respective submissions, the Claimant filed submissions dated 31st October 2024 filed on 4th November 2024, while the Respondent filed submissions dated 25th October 2024, and filed on 29th October 2024.

Hearing

The Claimant's case

5. The Claimant's case was heard on 22nd July 2024, when the Claimant testified under oath. He adopted his written witness statement dated 15th January 2024, and produced the documents listed in his List of Documents dated 15th February 2024 and 27th May 2024, as the Claimant's exhibits 1-11. He was cross-examined by the Respondent's Counsel, Mr. Otieno.
6. During the hearing of the case, the Claimant (CW1) testified that he was employed by the Respondent, and the employment was terminated through a dismissal letter dated 2nd August 2023 on the grounds of redundancy. During his employment, he had faced disciplinary processes. The last show cause letter was dated 1st July 2023 (Page 17 of the Respondent's documents)
7. The Claimant further testified that he had incidences of absconding duty and consequently got a warning letter.
8. It was the Claimant's testimony that he was in the Engineering department and after he left, another individual Dilo Bilah was employed by the Respondent in the same Claimant's position. The Claimant further stated that he had been working in the position for seven (7) years.
9. On cross-examination, the Claimant stated that he was employed on 23rd September 2015, and at the time his salary was Kshs. 63,250/= . He had no evidence of the payment in Court. The Claimant asserted that his immediate Supervisor was the General Manager.
10. It was stated that during his tenure, the Claimant faced two disciplinary issues and was subjected to one disciplinary hearing which culminated in a warning letter and returning of money. The Claimant stated that the Respondent did not communicate to the Claimant on the redundancy and downsizing.
11. The Claimant stated that the Dismissal letter also communicated the dues he was entitled to and claimed that he was not paid his terminal dues and was not issued with a certificate of service by the Respondent. The Claimant testified that he was discriminated by the Respondent as he was the only one dismissed and declared redundant.
12. On re-examination, the Claimant testified that his dismissal letter did not capture his disciplinary issues. He further stated that he was informed by the Human Resources Manager, Julius Lunani, that Dilo was there to replace him. He further enquired via chat with Dilo confirming that Dilo was performing the same duties previously held by him.



The Respondent's case

13. The Respondent's case was heard on 18th September, 2024, when its witness Julius Maikuva Lunani (RW1) testified under oath, and was cross-examined by the Claimant's counsel Ms. Ogala holding brief for Mr. Otieno. He adopted his Witness Statement dated 15th April, 2024 as his evidence in chief and produced the documents attached to the Respondent's list of documents dated 17th April, 2024 as Respondent's exhibits 1-2D.
14. RW1 testified that he knew the Claimant as one of the office employees and was a Surveyor. RW1 stated in the course of his employment, the Claimant had disciplinary proceedings and some were sorted. The witness testified that the Claimant was dismissed on account of redundancy and that the redundancy also affected other employees as well.
15. On cross-examination, RW1 stated that the Claimant was employed in the year 2015 and was confirmed as a permanent employee in the year 2017 and earned a salary in the sum of Kshs. 68,750/= . At the time of the Claimant's dismissal, RW1 stated that the Claimant was earning around Kshs. 83,000/=.
16. RW1 further stated that under normal circumstances, there has to be a reason for the redundancy which has to be communicated, consultation has to be done with the labour office and a memo drafted to the affected employees. RW1 testified that a notice was issued to the Claimant dated 7th July, 2023 (RW Exhibit 13) with the heading "Notice of Closure meeting" and "Notice of suspension of Operation" (Page 22 of the Respondent's documents). It was further stated that the said notice did not indicate the issue of redundancy and the Claimant was declared redundant based on government documentation.
17. Further, RW1 asserted the criteria used by the Respondent to declare the Claimant redundant was the last in first out. The redundancy affected around 200 employees. It was stated that the Claimant was fully paid and a copy of the Cheque for the payment(at page 25 of RW documents) evidences the same.
18. On re-examination, the RW1 stated that the Claimant was issued with a Cheque on 3rd October, 2023 which he signed his final dues. Upon clearance, the RW1 issued the Claimant with a Certificate of Service and Dino Bilal did not replace the Claimant.

Determination

Issues for determination

19. The Claimant in written submissions raised the following two(2) issues for determination namely: whether the Respondent followed the laid down legal procedures when terminating the Claimant's employment on account of the alleged redundancy ; and whether the Claimant is deserving of the prayers sought.
20. On the other hand, the Respondent in written submissions raised the following three(3) issues for determination namely: whether the redundancy was justified; whether the redundancy exercise was conducted in accordance with the law and whether the Claimant is entitled to the reliefs sought.
21. The court having heard the case and considered the issues raised by the parties was of the considered opinion that the issues for determination in the suit were as follows:-
 - a. Whether the termination on basis of redundancy was lawful and fair.
 - b. Whether the Claimant was entitled to reliefs sought.



Whether the termination on basis of redundancy was lawful and fair.

The claimant's case

22. The Claimant (CW1) testified that he was employed by the Respondent. That his contract was terminated through a dismissal letter dated 2nd August 2023 on the grounds of redundancy. He had earlier been served with a Show Cause letter and disciplinary hearing on Pages 8-20 of the Respondent's documents. The Claimant further testified that he had incidences of absconding duty and consequently got a warning letter.
23. It was the Claimant's testimony that he was in the Engineering Department of the Respondent and after he left, another individual Dilo Bilah, was employed by the Respondent in the same Claimant's position. The Claimant further stated that he had been working in the position for seven (7) years.
24. During cross-examination, the Claimant stated that he was employed on 23rd September 2015, and at the time his salary was Kshs. 63,250/= . He had no evidence of the payment in Court. The Claimant asserted that his immediate Supervisor was the General Manager.
25. The Claimant stated that the Respondent did not communicate to the Claimant on the redundancy and downsizing. The Claimant stated that the dismissal letter also communicated the dues he was entitled to and claimed that he was not paid his terminal dues and was not issued with a certificate of service by the Respondent.
26. The Claimant testified that he was discriminated by the Respondent as he was the only one dismissed and declared redundant. He testified that his dismissal letter did not capture the disciplinary issues. He further stated that he was informed by the Human Resources Manager Julius Lunani, that Dilo was there to replace him. He further enquired via chat with Dilo confirming that Dilo was performing the same duties previously held by him

Response

27. On cross-examination, RW1 stated that the Claimant was employed in the year 2015 and was confirmed as a permanent employee in the year 2017 and earned a salary in the sum of Kshs. 68,750/= . At the time of the Claimant's dismissal, RW1 stated that the Claimant was earning Kshs. 83,000/=.
28. RW1 stated that under normal circumstances, there has to be a reason for the redundancy which has to be communicated, consultation has to be done with the labour office and a memo drafted to the affected employees.
29. RW1 testified that a notice was issued to the Claimant dated 7th July, 2023 (RW Exhibit 13) with a heading "Notice of Closure meeting" and "Notice of suspension of Operation" (Page 22 of the Respondent's documents). It was further stated that the said notice did not indicate the issue of redundancy and the Claimant was declared redundant based on government documentation. The witness did not explain what he meant by government documentation.
30. Further, RW1 asserted the criteria used by the Respondent to declare the Claimant redundant was the last in first out. The redundancy affected around 200 employees. That the Claimant was fully paid and a copy of the Cheque for the payment (page 25 of the respondent's documents evidences the same).
31. On re-examination, the RW1 stated that the Claimant was issued with a Cheque on 3rd October 2023 which he signed his final dues. Upon clearance, RW1 issued the Claimant with a Certificate of Service and Dino Bilal did not replace the Claimant.



Decision

32. The claimant was issued with a letter dated 2nd August 2023 titled, "Dismissal letter". It stated that the company was downsizing due to out of crop period. That the management had resolved to clear him on redundancy. He was to be paid among others for days worked upto 31st July 2023, accrued leave days but not taken, one month salary in lieu of notice pay, severance pay of 15 days for every full year completed.
33. Redundancy is a faultless recognized method of separation between employer and employee under the *Employment Act* which defines the same as follows:- "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 practices commonly known as abolition of office, job or occupation and loss of employment;"
34. The respondent to justify the redundancy stated that it was out of crop and was thus downsizing as per the dismissal letter. RW1 stated that under normal circumstances, there has to be a reason for the redundancy which has to be communicated, consultation has to be done with the labour office and a memo drafted to the affected employees.
35. An employer who wishes to invoke redundancy as a method of separation from employee is obliged to comply with the provisions of section 40 of the *Employment Act* which states:- '40. 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.”

36. On the procedure followed to declare the claimant's employment redundant, RW1 testified that a notice was issued to the Claimant dated 7th July, 2023 (RW Exhibit 13) with the heading “Notice of Closure meeting” and “Notice of suspension of Operation” (Page 22 of the Respondent's documents). RW1 told the court that the said notice did not indicate the issue of redundancy and the Claimant's employment was declared redundant based on government documentation. Further, RW1 asserted the criteria used by the Respondent to declare the Claimant redundant was the last in first out. The redundancy affected around 200 employees. There was no evidence before the court of other employees who were issued with dismissal letters on account of redundancy. The alleged government documentation was not explained.
37. From the evidence placed before the court by the respondent, the court finds there was no compliance with a notice to the claimant and the labour officer in charge of the area where the claimant was 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;(section 40(a) and(b) of the Employment Act) The issue of redundancy was only mentioned in the dismissal letter dated 2nd August 2023 which the court finds applied retrospectively as the claimant was to be paid salary for days worked upto 31st July 2023.
38. The respondent in submissions while admitting to the non-compliance attempted to justify the action on account of the notices issues of suspension of operation of 7th July 2023(page 22 of the Respondent's documents). RW1 admitted that the said notices never mentioned redundancy. The Court holds that those notices were not intended for compliance with section 40 of the Employment Act. The claimant was not notified that the respondent intended to terminate his employment on account of redundancy a month before nor was he consulted on the same and why he was targeted. Indeed he had been issued with a notice to show cause for negligence in work dated 1st July 2023(page 17 of the Respondent's documents). Redundancy is a faultless termination of employment. The employee is not at fault.
39. The oral testimony by RW1 of having applied last in first out criteria was not stated in the dismissal letter. No evidence was placed before the court of persons working in the Engineering Department of the Claimant and the selection criteria. The claimant led evidence and he was replaced immediately by another officer called Dino Bilal Juma who he met when doing clearance on the 2nd August 2023 (C-exh 4 and 5 being evidence of reporting to work for clearance) The claimant further produced evidence of conversation with the said Dilo who confirmed to be his replacement (C-exh 8). The respondent denied the replacement and stated that Dilo was engaged as a quantity surveyor and not Survey engineer and produced his degree (Rexh 19). RW1 told the Court the said Dilo was employed on 1st August 2023 and the claimant issued with dismissal letter on the 2nd August 2023. On a balance of probabilities, the court finds that it was more likely than not, that Dilo was employed to replace the Claimant. The court holds that the reasons for the dismissal were thus not valid.
40. Redundancy is a special procedure as the employment is terminated on no fault of the employee. It is an option available to the employer but restricted as held in the Court of Appeal in Kenya Airways



Limited v Aviation & Allied Workers Union Kenya & 3 others (2014) e KLR where (Githinji JA held: “Redundancy is a legitimate ground for terminating a contract of employment provided there is a valid and fair reason based on operational requirements of the employer and the termination is in accordance with a fair procedure.” The employer, with valid reasons related to the business operational requirements, must thus comply with the redundancy process under section 40 of the *Employment Act*. This was not the case in the dismissal of the claimant from employment. The court was persuaded by the decision of Justice Rika *Wekesa v Mount Kenya University (Petition 138 of 2016)* [2024] KEELRC 538 (KLR) (8 March 2024) (Judgment) where he observed on the compliance: “in Section 40 of the *Employment Act* employed the term ‘intended redundancy’ and ‘intended date of termination on account of redundancy.’ The use of those terms was deliberate. Fair redundancy procedure must have notices of intended redundancy, and intended termination. Those notices issued, before there was a decision to terminate on account of redundancy. The notices paved way for consultations. There was no notice issued to the petitioner by the respondent, advising him that the respondent intended to declare any position redundant or that it intended to terminate his contract on account of redundancy. Such notices ought to have issued at least a month, before the intended date of termination.

6. Consultations were integral to fulfilment of the procedural rights under section 40(1)(c) to (g) of the *Employment Act*. It was only through consultations that the selection criteria; the obligations under the CBA or individual contract; leave entitlement; notice; and severance pay could be agreed upon. Consultations were important because fairness of procedure and substance, was premised on the employer complying with all the conditions prescribed by the law, under section 40(1) of the *Employment Act*.”

41. The court having analysed the evidence and the applicable procedure on redundancy (section 40 of the *Employment Act*) holds that the claimant’s dismissal on account of redundancy was unlawful and unfair.

Whether the Claimant was entitled to reliefs sought.

42. The court established that the claimant was paid dues under the dismissal letter as a cheque was issued in his name and he signed a final dues clearance letter on the 3rd October 2023 which indicated the amount under the cheque. He did not deny having signed the discharge.

Claim for unpaid salary for August 2023

43. Salary was sought for days worked in August 2023. The respondent submits there was no proof the claimant worked. The court finds that the claimant is deemed to have worked upto and including the date of the dismissal letter. The dismissal letter was dated 2nd August 2023. The Court holds that the claimant is owed salary for 2 days in August 2023 which is granted thus 2/31x83000 for total sum of Kshs. 1,660/-

Compensation for unlawful and unfair termination

44. The court held that the dismissal was unlawful and unfair. The claimant had worked for 7 years and was a survey engineer, he was paid notice in lieu and accrued leave, and severance pay. Applying the criteria under section 49 of the *Employment Act*, the court finds that subsequently the claimant secured a job, had incidents of absconding duty though not basis of termination, and taking into account the length of service of 7 years and paid dues, holds that a compensation for the unlawful and unfair dismissal of the equivalent of 10 months’ salary was adequate. RW 1 told the court the claimant was earning gross



salary of Ksh. 83,000 at dismissal thus is awarded total sum of Kshs. 830,000 as compensation for the unlawful and unfair termination.

Overtime claim

45. This claim in the form of special damages was not proved. Further, the claimant signed a discharge form as related to any payments under the contract upto 31st July 2023. The only issue was the 2 days not paid in August. The prayer is disallowed.

Conclusion

46. The claim dated 15th January 2024 is held as merited and Judgment is entered for the claimant against the respondent as follows:-

- a. The dismissal of the Claimant from employment on account of redundancy is declared as unlawful and unfair.
- b. Compensation for the unlawful and unfair dismissal is awarded equivalent of 10 months' gross salary at Kshs. 83,000 per month total sum Kshs. 830,000/-
- c. Award of unpaid salary for 2 days in month of August 2023 for the sum of Kshs. 1,660/-
- d. Awards (b and c) above payable less statutory deductions(PAYE) with interest at court rates from judgment date till payment in full.
- e. Costs of the suit.

47. Stay of 30 days is granted.

48. It is so Ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 22ND DAY OF JANUARY, 2025.

JEMIMAH KELI,

JUDGE.

In the presence of:

Court Assistant: Otieno

Claimant : - Ogola

Respondent:- Chitala h/b Otieno

