



**Ong'era v SBM Bank (Kenya) Limited (Cause E090 of 2023)
[2025] KEELRC 816 (KLR) (26 February 2025) (Judgment)**

Neutral citation: [2025] KEELRC 816 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E090 OF 2023
DKN MARETE, J
FEBRUARY 26, 2025**

BETWEEN

VICTOR MATARA ONG'ERA CLAIMANT

AND

SBM BANK (KENYA) LIMITED RESPONDENT

JUDGMENT

1. This matter was originated by way of a Statement of Claim dated 9th February, 2023. The issues in dispute;
 - i. Unfair and unlawful termination of the employment services of victor Matara Ong 'era under the guise of redundancy;
 - ii. Violation of articles 22(1), 23(1), 27(5), 28, 41(1), and 47 of the constitution of Kenya, 2010;
 - iii. Violation of sections 40, 43 and 45 of the employment act no. 11 of 2007.
 - iv. Violation of section 4(2) of the fair administrative actions act no. 4 of 2015.
2. The Respondent in a Statement of Response and Counter Claim dated 13th June, 2023 denies the claim and prays that the same be dismissed with costs. She also prays that judgment be entered in the favour for the counter claim.
3. The Respondent in the main suit and Claimant in a Reply to Defence to the Counter Claim dated 16th November, 2023 denies the Defence and counter claim and avers as follows;
 - a. This Honourable Court is seized with the requisite jurisdiction to hear and determine the Respondent's counterclaim as it emanates from the employer-employee relationship between the Claimant and the Respondent.



- b. The Claimant in the main claim is attempting to use this Honorable Court to re-write the contract between the parties which act is frowned upon by courts
 - c. The Claimant in the main claim has a duty to honour his contractual obligations and it is in the interest of justice that the Claimant pays the outstanding loan amount.
4. Again, she prays that the Claimant's case be dismissed with costs and judgment be entered in favour of Plaintiff against the Defendant in the Counter Claim jointly and severally.
5. The claimant in a Claimant's Reply to the Respondent Statement of Response and Defence to Counter Claim dated 22nd August, 2023 denies that the Respondent is entitled to the remedies sought and that the Counter Claim should be dismissed with costs.
6. The Respondent in a Reply to Defence to the Counter Claim avers thus;
 - a. This Honourable Court is seized with the requisite jurisdiction to hear and determine the Respondent's counterclaim as it emanates from the employer-employee relationship between the Claimant and the Respondent.
 - b. The Claimant in the main claim is attempting to use this Honourable Court to re-write the contract between the parties which act is frowned upon by courts.
 - c. The claimant in the main claim has a duty to honour his contractual obligations and it is in the interest of justice that the claimant pays the outstanding loan amount.
7. She prays that the claimant's case be dismissed with costs and that Judgment be entered in favour of the Plaintiff against the Defendants in the counter claim jointly and severally.
8. The claimant's case is that on or about the year 2014 he was gainfully employed as an intern by the Respondents predecessor.
9. The claimant's further case is that he worked diligently for over 8 years rising through the ranks and becoming an Assistant Branch Manager (Service Delivery Manager) from which position his services were arbitrarily terminated in April 2022 under the guise of redundancy.
10. The claimant's other case is that throughout his employment, he demonstrated exceptional performance as evidenced by the various promotions by the Respondents whose nature of business requires high levels of trust and diligence for individuals holding managerial positions.
11. The Claimant further avers as follows; That on 21st November 2021, he got involved in a road accident whilst driving to work, which confined him to hospital for an extended period and rendered him incapable of resuming work until March 2022. That while he was hospitalized, the Respondent conducted a redundancy exercise on 6th December 2021 where all affected employees were informed of the declaration of redundancy by email and later by letters dated 7th December 2021. However, the Claimant was not among those affected and he did not receive any communication to that effect. It is his case that he later learnt that the Respondent designated someone to hold his position while he recuperated at the hospital. He is adamant that this speaks to the irrefutable importance and indispensability of the role he so diligently held and performed. That upon returning to work in March 2022, he was summoned to the Respondent's Human Resources Office based at their head office. In his habitual fashion of discipline and proactivity, he availed himself at the head office on 17th March 2022 where he was met with the shock of a letter dated 7th March 2022, purporting to declare him redundant. He also received a letter backdated to 6th December 2021 purporting to have been his Notice of Termination of Employment on Account of Redundancy, which notice had



conveniently emerged only after his resumption to work following months of hospitalization, He laments that the delay in communicating the notice of redundancy, even if legitimate, was prejudicial to his legitimate expectation that he was still in the employ of the Respondent. The notice was categorical that his role no longer existed in the Respondent's new fit-for-purpose structure. The Claimant takes issue with this false claim as he confirmed that the role had been taken up by another individual. He contends that not only did this occur long after the redundancy exercise had been concluded, but his position was also unaffected as it was retained by the individual promoted thereto while the claimant was hospitalized. He asserts that the backdated letter purported to be the notice of termination was only intended to hoodwink him out of the rights and benefits due and owing to him. In the premises, the Claimant has reasonable cause to believe, which he does, that his termination was in no way, shape, form or fashion a result of redundancy, and was in fact an intricate and crafty scheme to unfairly terminate his employment despite having dedicated his life, time and expertise to the Respondent. Based on the facts before this Court, the Claimant further wishes to state that the Respondent is incapable of and has indeed failed to explain, justify or prove that the position had become redundant or that the Claimant had become unable to perform the role. The Claimant further contends that the purported redundancy was due to his hospitalization as a result of the accident he suffered in November 2021. The purported redundancy was, therefore, discriminative in nature and not sanctioned by the law and recognized practice in regard to redundancy, the Claimant avers. The Claimant avers that at the time of termination of his employment, his gross salary was Kenya Shillings One Hundred and Sixty-Nine Thousand, Nine Hundred and Seventy-Five (Kshs. 169,975/=). Due to the iniquitous termination of his employment by the Respondent, the claimant laments that he has suffered serious financial embarrassments; which include listing with the Credit Reference Bureau (CRB) arising from his inability to service his loan with the Respondent and resulting in his inability to secure alternative employment. As a result of the foregoing, the Plaintiff avers that he has suffered and will continue to suffer great loss financially, psychologically and professionally unless this Honourable Court intervenes; for which reason he now claims against the Respondent.

12. The Claimant asks this court to note the following;
 - i. The Claimant at all times carried out his duties with loyalty and diligence.
 - ii. The Respondent did not provide any justification or reason for terminating the Claimant despite his position still being in existence and fundamental in the Respondent's operations
13. The illegality, unlawfulness and unfairness of the termination of employment may be further discerned from the following issues
 - i. Under Section 40 (1) of the *Employment Act*, the Respondent fundamentally breached the conditions for redundancy which require that in the selection of employees to be declared redundant, an employer has 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.
 - ii. Under Section 45 (2) of the *Employment Act* the reason for termination of the Claimant's employment must be shown to be a valid and a fair reason based on the operational requirements of the employer. The Respondent flouted this straightforward provision of the law
 - iii. That the Claimant has been an excellent and dedicated worker and has delivered outstanding results leading to several salary increments and promotions.
 - iv. The Claimant's notice of redundancy was an afterthought and has no factual or legal basis to justify the subsequent termination.



14. He prays thus;

Reasons Wineryong the Camas pray for judges spinst the Respondent for the following

- i. A Declaratios that the nation of the Claimant's employment by the Respondent was under and unlawful;
- ii. Ал Оюоки compelling the Respondent to pay the Claimantan oquivalent of 12 Months' salary being Kenya Shillings Two Million, Thirty-Nine Thoresand, Seven Hundred (Kalm. 2,039,700/-) as damages for fair termination.
- iii. An ORDER compelling the Respondent to pay General Damages for unfair terminations;
- iv. Costs;
- v. Interest on (ii), (iii) and (iv) above at court rates; and
- vi. Any other relief that his Honourable Court may deem fit and just to grant.

15. The Respondent's case is a denial of diligence service on the part of the claim and posits that;

- i. At the city centre branch, the Claimant was grossly negligent and guilty of misconduct.
- ii. Vide a letter dated 10th May, 2021, a show cause letter was issued to the Claimant following a series of irregular Mpesa transactions that were in contravention of the Respondent's Branch Operations Manual and the Code of Conduct Clause 24.25.5 as follows;
 - a. The Claimant approved irregularly batched individual transactions which were to be posted as single transactions;
 - b. The Claimant breached the security relating to matters affecting the employer's business and failed to adhere to the provisions of the Respondent's Branch Operations Manual and the Code of conduct in the manner provided in the letter dated 10th May 2021;
 - c. The Claimant authorized a teller to process their own Mpesa transactions using the Respondent's Mpesa till contrary to the provisions of the Respondent's Branch Operations Manual and the Code of Conduct.
 - d. The Claimant authorized a teller Mpesa transaction made by a teller on behalf of his wife using the Respondent's Mpesa till while she was not physically present; and
 - e. The Claimant made and/or signed a statement or entry in a document or official record which was to his knowledge false.

16. This misconduct and shortcomings were admitted vide a letter dated 17th May, 2021.

17. The Respondent's further case comes out thus;In compliance with the established employment laws, the Respondent invited the Claimant for a disciplinary hearing vide a letter dated 4th June, 2021.Following the disciplinary hearing on 17th June, 2021 and the admission and acknowledgement by the Claimant of wrong doing he was issued the 1st warning letter. In a letter dated 7th July, 2021.He was also removed from his roles as an Assistant Service Delivery Manager at the City Centre Branch.Vide a letter dated 14th July, 2021, the Claimant was transferred to the Machakos Branch and deployed to undertake duties of Senior Operations Officer.The Respondent did not comment the



redundancy exercise while the claimant was in hospital but way before he had been hospitalized. It is not true that since the Claimant did not receive any communication on 6th December, 2021 he was not affected by the redundancy. On the contrary, the true position SUBPARA a.

At the time of communicating the redundancy exercise, the Claimant was away on sick leave, and it was only humane for the Respondent to allow him to recuperate before communicating the redundancy to him.

SUBPARA b.

The Respondent decided on humanitarian grounds, to put on hold the Claimant's redundancy correspondences

18. The Respondent again denies paragraph 7 of the Statement of Claim for being misleading and avers that;
 - (a.) The Claimant's role was among the roles affected by the restructuring, as it was no longer in the new fit-for-purpose structure
 - (b) The Claimant's role was not taken up by somebody else.
 - c. Based on the established criteria used to evaluate the Respondent's employees for the available roles, the Claimant scored below 75% on the scoring matrix and was ultimately declared redundant.
 - d. All staff in the same role as the Claimant who scored below 75% were declared redundant
19. The Respondent moves on to narrate the events leading to the exercise of redundancy at paragraphs 13 to 25 of the Statement of Response and Counter Claim thereby bringing out a case of a genuine attempt to make business work even after acquiring employees of two defunct banks and subsequent closure of several branches between 2018 and 2021. All necessary legal prerequisites like notices to the labour officer were met.
20. Again, the Respondent denies contents of paragraphs 10,11,12,13,14,15, 16 and 17 of the Statement of Claim and avers that she did not issue the Claimant with a backdated letter. She further avers as follows;
 - a. The Claimant's role was among the roles affected by the restructuring. as it was no longer in the new fit-for-purpose structure
 - e. The Claimant's score was below the designated percentage based on the criteria used to declare redundancies
 - f. the Claimant was declared redundant after the process was concluded in October 2021 way before the Claimant was involved in a Road Traffic Accident on 21 November 2021,
 - g. It is not true that he was declared redundant because of his illness
 - h. The Respondent retained the Claimant in the payroll from the time he was declared redundant on 7th December 2021 to 16 April 2022 without any loss of income and all other benefits including medical cover yet during this period he was not on duty
 - i. The Respondent was very compassionate to the Claimant as it did not place him on half pay after exhausting the sick leave days entitlement on full pay in accordance with Clause 13 of his letter of offer.
21. The terms of the Claimant's redundancy letter were as follows:



- a. One-month Notice pay.
 - b. Salary earned up to the last working day, that is, 16th April 2022.
 - c. One and a half months salary (1.5) on his consolidated pay (basic pay plus all cash payments) for every completed year of service
 - d. Accrued annual leave days not taken as at the last date of working.
Continue due enjoying the Respondent's Medical Insurance Cover for self and eligible dependants until 16th April 2022.
 - e. Enjoy Respondent's Group Life Insurance Cover until 31 July 2022
 - f. Eligibility to enjoy 3 months moratorium on principal amount on loan repayments after your exit.
 - g. Continue servicing existing staff loans with the Respondent at the prevailing staff interest rates (5% & period of 5 years, as long as the loan respectively for a maximum remained performing
22. The Respondent at paragraph 32 of the Response narrates the origins of the Counter Claim thus;
- a. On 24 February 2020, the Claimant applied for a staff loan of KES 584,000.00 for purposes of purchasing a motor vehicle.
 - b. Further, on 27th April 2020, the Claimant applied for a Staff Personal Loan of KES 3,050,000.00 for personal development
 - c. The Claimant duly executed loan application forms which forms contained the terms and conditions of the loan
 - d. At the time of his exit from employment with the Respondent, the Claimant had an outstanding Personal Loan of KES 1,677,770.95 and a Car Loan of KES. 376,533.65 with the Respondent which he is well aware of and is required to service every month.
 - e. At the time of his exit from employment with the Respondent, the Claimant was issued with a "Full and Final Dues Settlement letter dated 15th April 2022 which listed the benefits payable and outstanding liabilities.
 - f. The Claimant was paid a total of KES. 1,076,443 being the redundancy package none of which the Claimant utilized to repay the outstanding loan.
 - g. The Claimant was further issued with a payslip for April 2022 which indicated the salary paid to him including all the terminal dues.
23. The Respondent in the penultimate prays as follows;
- a. the sum of KES. 1,705,739.95, being the outstanding Personal loan and Loan, together with interest thereon at the contractual rate from 19th April 2023 until payment in full.
 - b) Costs of the Suit and the Counterclaim.
 - c) Interest on (a) and (b) above at court rates from the date of filing this Statement of Response and Counterclaim until payment in full.
 - d) Any other relief the Honourable Court deems fit to grant.
24. The issues for determination therefore are;



1. Whether due process was pursued in declaring redundancy.
 2. Whether the Respondent is entitled to counter claim.
 3. Whether the Claimant is entitled to the relief sought.
25. The 1st issue for determination is whether due process was pursued in declaring redundancy. The Claimant in his written submission dated 1st March, 2024 seeks to rely on section 40(1) (b) (c) of *Employment Act*, 2007 which requires an employer to notify the trade union, or the employee personally including the labour officer. It also requires that the selection criteria for redundancy takes into account seniority and time, skill, ability and reliability of each employee in their cadre or class.
26. On this the Claimant sought to rely on authority of *KUDHEIHA v the Aga Khan University Hospital Nairobi*, Cause No. 815 of 2015 as cited in *Bernard Misawo Obora v Coca Cola Juices Kenya Limited* (2015) eKLR, the court emphasized the importance of the procedure under Section 40 of the *Employment Act*, 2007 where the court observed thus:
- “The notices envisaged under section 40 of the *Employment Act* are not mechanical or issued for the sake of going through a process. These processes affect employees and their jobs. Such notices should be carefully crafted prior to being issued. Such notices affect the employees behind the redundancy process. The procedures applicable in a redundancy are therefore set out in law and are mandatory... Such provisions being mandatory, an employer has to meet them and where not met, in their element, by an act of omission or commission, the resulting action that disadvantages the employees is inherently unprocedural and unfair.
27. It is the Claimant’s submission that the Respondent’s failure to adhere to redundancy procedure outlined in section 40(a) above rendered the redundancy process unfair and unlawful.
28. The Claimant further submitted to a default in substantive fairness by the Respondent for failure to issue reasons for termination or redundancy in accordance with section 43 of the *Employment Act*, 2007. This provides as follows;
- “(1) In any claim arising out of termination of a contract, the employ required to prove the reason or reasons for the termination, and employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.
- (2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.”
29. The Claimant submits that his office was not declared redundant and was retained with another person being put in his place. The redundancy was as result of his temporary disability and concurrency inability to work. This therefore adds to unfairness of the redundancy.
30. The Respondent on the other hand submits a case of substantive justification and procedural fairness in the redundancy process. Through and through, the Respondent gives an elaborate narration of the events leading to the redundancy process and the steps, including notices as applicable that were issued to the employees, the Claimant and the labour officer. This is even admitted by the Claimant. There was also a plethora of the correspondences inter partes during the entire redundancy process.



31. Again, the Respondent made the following considerations in assessing and grading the employees based on seniority in time, skill, ability and reliability
 - a. Job knowledge, skills and competencies-10%
 - b. Work experience (overall, management and specialized) -10%
 - c. Performance rating-20%
 - d. Disciplinary rating-10%
 - e. Academic qualifications-15%
 - f. Professional qualifications/Certifications and memberships - 10%
 - g. Reliability (attitude, behavior, culture fit, teamwork, potential) -15%
 - h. Attendance record (lateness and absence) -10%
- 23 ..., any employee who scored less than 75% was declared redundant It is imperative for this Honourable Court to note that the Claimant scored 70% with the least marks scored by the Claimant being 3% under disciplinary rating
32. The Respondent therefore submits a case of fair and lawful termination of the employment of the Claimant by the Respondent through a procedural and lawful redundancy process.
33. This is a long story well told. The Respondent eloquently and elaborately spells out a case of procedural redundancy culminating in a lawful termination of the employment of the Claimant. The Respondent's case is self-propelling on a preponderance of evidence. The Claimant has not succeeded in contravening such case. I therefore find a case of lawful and procedural termination of employment of the claimant on account of redundancy. This answers the 1st issue for determination.
34. The 2nd issue for determination is whether the Respondent is entitled to the counter claim. The Respondent's case is that at the time of exit from employment, the claimant had an outstanding personal Kshs. 1,677,770.95 and a car loan of Kshs.376,543.65 which facilities were within his knowledge and is requires to service every month.
35. It is the Respondent's further case that the claimant was paid a total of Kshs.1,076,443.00 being redundancy package and a further Kshs.7,057.993.00 by the insurance company for injuries suffered during the accident. None of these amount was utilized by the claimant to repay his loans with the Respondent. These form the counter claim and other claims by the Respondent.
36. The issue of the counter claim also raises issues of jurisdiction as raised by the Claimant. It is his case that this court lack jurisdiction to navigate issues of the counter claim, these being outside the realm of employment. The Respondent submits that this court has jurisdiction in that the issue constitute a dispute relating to or arising out of employment inter partes.
37. The issue is variously supported by the Respondent in evidence and analyses of his case. This court finds that the claimant is liable to the Respondent to the amount he willingly borrowed from the Respondent. In any event, he continues to enjoy the facilities and should redeem the same. I therefore find that the Respondent is entitled to the counter claim as prayed.
38. The 3rd issue for determination is whether the Claimant is entitled to the relief sought. He is not. Having failed on a case of unlawful termination of employment on account of redundancy, he becomes disentitled to the relief sought.



39. I am therefore inclined to dismiss the claim and allow the counter claim with orders that each party bears their costs of the claim and counter claim.
40. I further order relief on the counter claim as follows;
- i. The Claimant be and is hereby ordered to meet and pay the Respondent an amount of Kshs.2,181,360.45 as at 16th November, 2023.
 - ii. The counter claim shall continue to accrue interest at court rates till payment in full.

DELIVERED, DATED AND SIGNED THIS ^{26TH} DAY OF FEBRUARY 2025.

D. K. NJAGI MARETE

JUDGE

Appearances:

1. Mr. Magonda holding brief for Paulina instructed by Ombok & Owuor Advocates LLP for the Claimant.
2. Mr. Mutisya instructed by Walker Kontos Advocates for the Respondent.

