



**Wachira v Usafi Services Limited (Cause E008 of 2024)
[2025] KEELRC 405 (KLR) (14 February 2025) (Judgment)**

Neutral citation: [2025] KEELRC 405 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E008 OF 2024
SC RUTTO, J
FEBRUARY 14, 2025**

BETWEEN

KENNEDY WACHIRA CLAIMANT

AND

USAFI SERVICES LIMITED RESPONDENT

JUDGMENT

1. The Claimant avers that he was employed by the Respondent as a Senior Accountant with effect from 5th January 2015. According to the Claimant, he served the Respondent with loyalty and diligence for a period of 6.5 years until 21st June 2021, when the Respondent's Human Resource Manager summoned him to the office and informed him that the company required him to proceed on unpaid leave effective 1st July 2021 owing to financial constraints. Subsequently, he was issued with a letter dated 17th June 2021, which indicated that the reason he was required to proceed on unpaid leave was to allow the Respondent company reorganize, restructure, reengineer and reconstitute.
2. It is the Claimant's case that to date, he has not received any official communication with respect to his employment despite writing to the Respondent in the month of December 2021.
3. The Claimant contends that the Respondent's actions were unlawful, unfair and contrary to the basic tenets of fair labour practices.
4. On account of the foregoing, the Claimant has asked the Court to award him the sum of Kshs 3,088,000.00 being notice pay, salary arrears for May and June 2021, unpaid house allowance, severance pay and compensation for unfair termination.
5. Opposing the Claim, the Respondent avers that owing to financial constraints occasioned by the COVID-19 pandemic, it served the Claimant and the Ministry of Labour with a notice dated 1st August 2022 of an intended redundancy.



6. The Respondent further states that its other employees were put on leave as it (Respondent) made attempts at salvaging its dire financial situation with the aim of averting the termination of its employees but the situation was unsalvageable. As such, it served the Claimant with a further notice of termination dated 1st September 2022.
7. For the foregoing reasons, the Respondent has asked the Court to dismiss the Claimant's suit with costs.
8. During the hearing which proceeded on 11th November 2024, both parties called oral evidence.

Claimant's Case

9. The Claimant testified in support of his case and at the outset, he sought to rely on his Statement of Claim, witness statement as well as his list and bundle of documents to constitute his evidence in chief.
10. It was the Claimant's evidence that the Respondent did not comply with Section 40 of the [Employment Act](#), as it did not issue him with a letter copied to the labour officer informing him of the impending redundancy or the criteria used to single him out for redundancy as the company reorganized, restructured and reconstituted itself.
11. It was the Claimant's view that his termination from employment was un-procedural and unlawful.

Respondent's Case

12. On its part, the Respondent called oral evidence through its Operations Manager, Mr. Joseph Mwangi Chege who testified as RW1. Equally, RW1 adopted his witness statement as well as the list and bundle of documents filed on behalf of the Respondent to constitute his evidence in chief.
13. It was RW1's testimony that owing to the financial constraints occasioned upon the Respondent as a result of the COVID-19 pandemic, its operations were grounded as a result of which it was unable to generate revenue.
14. That upon consultations with its financial advisors, the Respondent was advised to place the Claimant and all its other employees on unpaid leave as attempts were made at restructuring its finances to mitigate the financial losses it had suffered.
15. RW1 further averred that the Claimant and the Respondents' other employees, were thus placed on unpaid leave with the eventual aim of recall once the Respondent's finances were stabilized.
16. The Respondent was unable to recover financially despite best efforts from its financial advisors as a result of which it was constrained to serve upon the Claimant and the Ministry of Labour a notice of intended redundancy dated 1st August 2022.
17. The Respondent thereafter served upon the Claimant a notice of termination dated 1st September in furtherance of the notice dated 1st August 2022.
18. According to RW1, the procedure for termination was not unfair as the Respondent followed the procedure set out in law.

Submissions

19. It was the Claimant's submission that the Respondent did not comply with any single requirement under Section 40 of the [Employment Act](#). In support of the Claimant's submissions, the Court was invited to consider the following decisions; *Gerrishom Mukhutsi Obayo v DSV Air and Sea Limited*



(20180 eKLR, Dennis Leak Ojuok v Population Services Kenya (2022) eKLR and Daniel Mburu Muriu v Hygrotech East Africa Ltd (2021) eKLR.

20. On the other hand, the Respondent denied that the Claimant's termination from employment was unlawful.

Analysis and Determination

21. Flowing from the pleadings by both parties, the evidence on record as well as the rival submissions, it is evident that the Court is being called to resolve the following issues:
- i. Whether termination of the Claimant's employment was unfair and unlawful;
 - ii. Whether the Claimant is entitled to the reliefs sought.

Unfair and unlawful termination?

22. As can be discerned from the record, the employment relationship came to an end on account of redundancy. As was rightly held in the case of Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 Others (2014) eKLR, termination of employment on account of redundancy ought to be both substantially justified and procedurally fair.
23. Whereas substantive justification relates to the reasons ascribed for the redundancy, procedural fairness has to do with the procedure applied in effecting the redundancy. I will consider the two elements under separate heads.

i. Substantive justification

24. From the Respondent's standpoint, it suffered financial constraints as a result of the COVID-19 pandemic as a result of which it placed its employees on unpaid leave. That consequently, it was unable to recover financially despite its best efforts hence it declared a redundancy.
25. It is a matter of public notoriety that the outbreak of the COVID-19 global pandemic occasioned massive disruptions in business operations not only in Kenya but in most parts of the world.
26. In addition, it is common knowledge that following the outbreak of the COVID-19 pandemic, the Government adopted drastic response measures to contain the spread of the pandemic. Some of these measures included but were not limited to restriction of movement.
27. In its letter dated 17th June 2021 to the Claimant, the Respondent observed that its operations touching on Production, Sales and Marketing, Human Resources and Finance had scaled down by over 80%. According to the Respondent, this was occasioned by little Product Sales/Movement and delay in overdue debt collection/liquidation since a sizable number of its customers countrywide had remained closed handling little commercial business activities due to economic downtime.
28. Owing to the restrictions on movement imposed by the Government as a response to the pandemic, it is more than probable that the Respondent's operations were adversely affected and that it was unable to move its products to its customers countrywide.
29. To this end, I don't have any doubt in my mind that the Respondent's operations were hampered to a great extent by the COVID-19 pandemic due to the measures imposed by the Government specifically with respect to movement.
30. As a matter of fact, the Claimant admitted during cross examination, that he was aware of the financial crisis the Respondent was facing.



31. In light of the foregoing, the Court returns that the reason advanced by the Respondent to declare a redundancy was fair, valid, and based on its operational requirements hence was in consonance with the requirements of Section 45(2) (b) (ii) of the *Employment Act*.
32. Therefore, the Court is persuaded that the Claimant's termination by way of redundancy was substantively justified.

i. Procedural fairness

33. Section 40(1) of the *Employment Act* stipulates the following conditions that an employer must comply with prior to an employee's termination on account of redundancy:
 - 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.
34. On the first requirement which relates to Notice, the record bears that the Respondent sent an email dated 5th September 2022 to the Claimant vide kenwacs@yahoo.com. Through the said email communication, the Claimant was notified of his termination on account of redundancy with effect from the date he was sent on unpaid leave. The email further made reference to a previous Notice dated 1st August 2022. Cross-examined, the Claimant confirmed that the email address (kenwacs@yahoo.com) through which the Notice was dispatched was his but denied receiving the letter of 1st August 2022.
35. What is striking about the Notice sent on 5th September 2022 vide the Claimant's email address is that the same served as communication of the Respondent's decision to terminate his employment on account of redundancy. It was not an intention to declare a redundancy.
36. My understanding of Section 40 (1) (a) and (b) aforementioned is that the employer is required to issue a Notice of an intention to declare a redundancy as opposed to a notice of termination. In this regard, the said Notice is issued at least 30 days prior to the redundancy taking effect.



37. In this case, the Notice of Termination issued to the Claimant on 5th September 2022 was not the Notice contemplated under Section 40(1) (a) and (b).
38. I say so bearing in mind that there is no evidence on record that the Claimant was served with the “Notice of Intended Redundancy” dated 1st August 2022 exhibited by the Respondent.
39. On this issue, I concur with the sentiments of the Court in the case of Kenya Airways v Aviation & Allied Workers Union Kenya & 3 Others (supra) that when an employer contemplates redundancy, he should first give a general notice of that intention to the employees likely to be affected or their union and that it is that notice that will elicit consultations between the parties.
40. Similarly, in the case of The German School Society & another vs Ohany & another [2023] KECA 894 (KLR), the Court of Appeal held that a notice to the employee/trade union/labour officer opens up the door for a consultative process with the key stakeholders.
41. In this case, as the Notice issued to the Claimant was final in nature, there was no room left for consultations.
42. I must also add that the fact that the Claimant was issued with a notice of one month prior to termination, did not supplant the Notice requirement under Section 40 (1) (a) and (b) of the [Employment Act](#).
43. In light of the foregoing, the Court arrives at the inescapable conclusion that the Respondent did not substantially comply with the statutory requirement with respect to Notice in terms of Section 40 (1) (a) and (b) of the Act, and to that extent, is at fault.
44. Turning to the requirement for consultations, there is no evidence from the Respondent’s end that the parties engaged in pre-redundancy consultations prior to the decision to terminate the Claimant’s employment on account of redundancy.
45. Whereas the [Employment Act](#) does not expressly provide for pre-redundancy consultations, Article 13, Convention No. 158 - Recommendation No. 166 of the International Labour Organization (ILO) convention does.
46. In the case of Kenya Airways v Aviation & Allied Workers Union Kenya & 3 Others (supra), it was held that pre-redundancy consultations are significant as they are meant to cause the parties to discuss and negotiate a way out of the intended redundancy, if possible, or the best way of implementing it if it is unavoidable.
47. Where the parties engage in pre-redundancy consultations, employees may agree to take a pay cut, suitable redeployment, or may even propose other cost-cutting measures, all with the aim of averting the redundancy in as much as possible or minimizing the number of terminations resulting from the redundancy exercise.
48. Accordingly, pre-redundancy consultations are useful if undertaken in good faith as they reduce the adverse effects and the extent of the intended redundancy.
49. As there were no pre-redundancy consultations in this case, I cannot help but find that the Respondent was at fault for want of compliance.
50. The Respondent was further at fault for want of compliance with Section 40(1) (e) (f) and (g) of the [Employment Act](#) which provides for the payments to be made by the employer to the employee following a redundancy exercise. It is noteworthy that in the email dated 5th September 2022, the Respondent was silent as to the payments due to the Claimant. As a matter of fact, there is no evidence



that the payments stipulated under Section 40(1) (e) (f) and (g) aforementioned were made to the Claimant by the Respondent.

51. Indeed, RW1 admitted during cross examination that the payments were not made.
52. What's more, in his emails of 21st December 2021 and 2nd February 2023, the Claimant requested the Respondent to pay him his dues as contemplated under Section 40(1) (e) (f) and (g) aforementioned. There is no evidence that the Respondent complied.
53. All in all, the Respondent did not comply with any of the provisions under Section 40 (1) of the Employment Act and consequently, the Claimant's termination from employment by way of redundancy was procedurally unfair.
54. In so finding, I am fortified by the holding in the case of *Hesbon Ngaruiya Waigi v Equitorial Commercial Bank Limited* (2013) eKLR, that where redundancy is declared by an employer, the procedure to follow is as set out under the provisions of Section 40 of the Employment Act and where not followed, any termination, as a result, will be deemed unprocedural and unfair.
55. That said, I now turn to consider the relief sought by the Claimant.

Reliefs?

56. As the Court has found that the Respondent failed to prove that the Claimant's termination from employment by way of redundancy was substantively and procedurally fair, he is awarded one (1) month's salary in lieu of notice and compensatory damages equivalent to six (6) months of his salary. This award has taken into account the length of the employment relationship, the grounds leading to the separation, and the fact that the Respondent did not comply with any of the procedural requirements prescribed under Section 40 (1) of the Employment Act.
57. The Claimant is further awarded salary arrears for the months of May and June 2021 as there is no evidence he was duly paid his salary as and when the same fell due. Indeed, RW1 admitted during cross examination that the Claimant was not paid his salary for the said period.
58. The Claimant is further awarded severance pay for six (6) years as provided for under Section 40(1) (g) of the Employment Act.
59. The claim for house allowance is declined as the Claimant's letter of appointment expressly provided for a consolidated salary. As such, it is presumed that the house allowance was subsumed in the said Claimant's gross salary.

Orders

60. In the final analysis, the Claim is allowed and Judgment is entered in favour of the Claimant against the Respondent as follows: -
 - a. A declaration that the termination of the Claimant from employment by way of redundancy was unfair.
 - b. The Claimant is awarded the sum of Kshs 104,000.00 being one month's salary in lieu of notice.
 - c. The Claimant is awarded the sum of Kshs. 624,000.00 being compensatory damages equivalent to six (6) months of his salary.



- d. The Claimant is awarded the sum of Kshs 208,000.00 being unpaid salary for May and June 2021.
- e. The Claimant is awarded the sum of Kshs 312,000.00 being severance pay for six (6) years.
- f. Total award is Kshs 1,248,000.00.
- g. Interest on the amount in (f) at court rates from the date of Judgment until payment in full.
- h. The Claimant shall have the costs of the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 14TH DAY OF FEBRUARY 2025.

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STELLA RUTTO

JUDGE

In the presence of:

For the Claimant Ms. Kariuki

For the Respondent Ms. Wanjiru

Court assistant Kemboi

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

