



REPUBLIC OF KENYA



**KENYA LAW**  
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**Oyugi v Surechill Africa Limited (Cause E528 of 2023)  
[2025] KEELRC 789 (KLR) (13 March 2025) (Judgment)**

Neutral citation: [2025] KEELRC 789 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E528 OF 2023  
CN BAARI, J  
MARCH 13, 2025**

**BETWEEN**

**JACOB OMONDI OYUGI ..... CLAIMANT**

**AND**

**SURECHILL AFRICA LIMITED ..... RESPONDENT**

**JUDGMENT**

**Introduction**

1. The Claimant lodged this claim against the Respondent vide a Statement of Claim dated 4<sup>th</sup> July, 2023, seeking the following remedies: -
  - i. One months' salary in lieu of notice
  - ii. One month's salary in lieu of redundancy
  - iii. 12 months' salary compensation for unfair termination
2. The Respondent filed a Response, wherein, it argues that the Claimant was lawfully declared redundant.
3. The matter proceeded for hearing on 13<sup>th</sup> November, 2024, when the Claimant testified in support of his case. The Respondent presented the evidence of Emilien Digermaro, the Group Chief Executive Officer to support its case. Both witnesses adopted their witness statements and produced documents filed in the case in support of their respective positions.
4. Submissions were subsequently filed for both parties.



## The Claimant's Case

5. It is the Claimant's case that he was given an employment offer by the Respondent on 6<sup>th</sup> April, 2021 and issued with an employment contract on 8<sup>th</sup> April, 2021 and was designated as the Business Development and Key Account Manager. He states the contract of employment commenced on 3<sup>rd</sup> May, 2021 and the probation period therefore was supposed to end on 3<sup>rd</sup> August, 2021 as per the said contract.
6. That the Respondent terminated the contract of employment of the Claimant on account of redundancy on 13<sup>th</sup> June, 2022 where the Claimant was earning a salary of Kshs.350,000/=.
7. The Claimant further states that at the time of joining the Respondent as a Business Development and Key Account Manager, he was interviewed by the Managing Director - Africa and Commercial Director Africa as the only officers of the Respondent.
8. The Claimant further states that, on 5<sup>th</sup> May, 2022, at around 10:00 am, when the Africa Team of the Respondent domiciled in Nairobi was holding its routine meeting, the Global Chief Executive Officer Mr. Emillien Di Gennaro logged into the tele-conferencing network virtually from their UK offices, and it is in that meeting, that the Claimant, who was heading Business Development and Key Account and Pauline Njeri, heading Marketing were declared and/or rendered redundant on the spot.
9. That this decision was communicated to them from the UK Head Office by the said Global Chief Executive Officer, who asked them if they could be permitted and excused from the running meeting, so they could go home and digest that communication.
10. The Claimant avers that thereafter, the duo were excluded from any further meetings of the Africa Team, even though they were still in the employment of the Respondent. The Claimant states that he complained to the management of the Respondent on why he was being excluded from the meetings, but, no explanation was given.
11. The Claimant states that the notice of intention to render him redundant was never issued to him as required by law. That the information passed by the CEO when he gate crashed the Africa Team meeting became the notice of intention to render them redundant, and at the same time a notice of redundancy.
12. The Claimant reiterates that processes undertaken by the Respondent towards his termination is corroborated by a series of events which demonstrates that the Respondent did not make the decision based on valid reasons and good faith, demonstrated firstly by the fact that the redundancy was notified to him verbally, in the meeting of 5<sup>th</sup> May, 2022; that the Claimant received a letter dated 6<sup>th</sup> May, 2022, giving intention to render him redundant, only one day after the pronouncement by the CEO; that on 10<sup>th</sup> May, 2022, the Respondent convened a meeting in which the Claimant attended, aimed at ratifying and/or to rectify a decision which had already been made contrary to the law governing redundancy and termination of contract of employment and finally that on 11<sup>th</sup> May, 2022, the Respondent issued two conflicting notices touching on the notice of intention to declare redundancy.
13. The Claimant contends that even though there were economic challenges which could have imposed financial constraints in the operations of the Respondents, it was not true that the relieving and or rendering him redundant could have resolved that financial constraints.
14. The Claimant states that to further demonstrates that the Respondent did not terminate his services in good faith, on 11<sup>th</sup> June, 2022, the Respondent developed a proposal for a mutual separation and settlement, in which a mutual bar was imposed against him pursuing any liability from any forum.



15. The Claimant contends that his termination was not based on any valid reasons, because, a part from himself and Pauline Njeri, the then head of marketing, there was no restructuring or reorganization which was undertaken by the Respondent.
16. The Claimant contends that he was not given sufficient notice, instead his notice period was computed from the general notice issued to all employees on 11<sup>th</sup> May, 2022.
17. He avers that the Respondent failed to engage him to consider pay cuts if that was the issue, but opted instead, to retain the officers who were supposed to report to him and to terminate him.
18. The Claimant further states that the Respondent violated his rights by engaging in unfair labour practices, when it utilized the expertise, experience and skills of the Claimant to set up its business, and later to terminate his contract of employment on none valid reasons.
19. It is his case that the Respondent varied his contract of employment when it entered a fresh KPIs for 2022/2023, and therefore interfered with a fixed contract and hence the Claimant is entitled to payment for the remaining contract period.
20. The Claimant states that the Respondent mounted the process of termination without complying with substantive and procedural law governing redundancy.
21. The Claimant finally states that his claim is for payment of his terminal dues comprising of pay in lieu of notice, one-month salary in lieu of redundancy and compensation for the unfair termination.
22. On cross-examination, the Claimant confirmed that he received a formal redundancy notice dated 6<sup>th</sup> May, 2022, but delivered to him on 9<sup>th</sup> May, 2022.
23. The Claimant confirmed that he received a request for formal separation which he declined. He further told court that he was called to a meeting to discuss the redundancy, which he attended and aired his concerns where he posed the question of why he was being dismissed after he had been declared redundant.
24. The Claimant further told court on cross-exam, that he received a redundancy package and that his medical cover was allowed to run for up to one year after the redundancy. He states that he signed the redundancy package on a no prejudice basis.
25. On re-examination, the Claimant told court that he is not claiming the amounts already paid, but that he was only claiming compensation for the unfair termination. He states further that there was no meeting to discuss the redundancy and neither was there a criteria for the redundancy provided.
26. The Claimant prays that his claim be allowed.

### **The Respondent's Case**

27. It is the Respondent's case that it employed the Claimant as a Business Development and Key Account Manager from 6<sup>th</sup> April 2021, earning a salary of Ksh.350,000 per month.
28. The Respondent states that the Claimant's employment was terminated on account of redundancy on 13<sup>th</sup> June 2022, and evidenced by a letter of redundancy of the same date signed and acknowledged by the Claimant.
29. The Respondent states that it declared redundancy due to poor business performance and avers that in the period between October 2021 and May 2022, it had only sold ten (10) refrigerators out of a targeted one thousand two hundred (1,200) refrigerator units.



30. That arising from the poor performance, and as part of a continuous organizational review in line with its business requirements, the Respondent undertook a comprehensive review of its organizational structure and decided to change its market approach by adopting a new business strategy aimed at focusing on a few large business partners. That the new business strategy mandated the Respondent to reduce its management-level employees and introduce more "on the ground" employees to assist in implementing the new strategy.
31. It is the Respondent's case that upon the implementation of the new business strategy, the Respondent's organizational structure was restructured to include only 2 management-level employees- the CEO and the Commercial Operations Director and 5 junior level employees.
32. It is the Respondent's position that the CEO attended the Africa team meeting held on 5<sup>th</sup> May 2022 to inform the employees of the intended restructuring, and as part of the consultation meetings required before a formal notification. It states further that the CEO did not terminate the Claimant's position at that meeting as alleged.
33. The Respondent states that following the meeting held on 5<sup>th</sup> May 2022, the Respondent prepared the notice of intention to declare redundancies and explaining to all the employees that the Respondent was considering adopting a new operational structure and that the said structure was likely to lead to some roles being declared redundant.
34. The Respondent states that in a meeting held on 10<sup>th</sup> May, 2022, the CEO explained that there were logistical challenges in getting all the notices ready by Friday 5<sup>th</sup> May 2022, hence they were issued the next working day on 9<sup>th</sup> May 2022.
35. It is the Respondent's case that it sent to the County Labour Office the requisite notice of intention to declare redundancies as required by law. That under this letter, the Respondent indicated to the Labour Office the reason necessitating the redundancies, the positions that were likely to be affected by the redundancy and the consultations that the Respondent had so far held with the employees.
36. The Respondent further states that it offered the Claimant an alternative to the redundancy process in the form of a Mutual Separation Agreement sent on 11<sup>th</sup> June 2022 which offered the Claimant Ksh.1,408,035, an additional amount of Ksh.403,613 over what the Claimant would have received if they had continued with the redundancy process. In addition, the Respondent states that it invited the Claimant to apply for the role of the Business Development Officer, but unfortunately, he did not take up the opportunity.
37. The Respondent avers that the Claimant's termination was due to his position being declared redundant and that the redundancy was procedurally done. It further avers that the Claimant was issued with sufficient notice before termination.
38. It states that the notice of intended redundancy was issued on 11<sup>th</sup> May 2022 while the termination letter was issued on 13<sup>th</sup> June 2022. That the resultant time between these two dates shows that the Claimant received the mandatory one-month notice.
39. On cross-examination, RW1 stated that the Respondent's Board resolved to declare redundancies on 7<sup>th</sup> April, 2022 and that he attended a regular meeting and made the announcement verbally to management.
40. RW1 further confirmed that he told the Claimant that he could leave the Respondent and serve the notice period from home. RW1 confirmed that the Claimant was paid his dues including allowing the medical cover to continue for one year.



41. The Respondent prays that the Claimant's claim be dismissed with costs.

### **The Claimant's Submissions**

42. It is the Claimant's submission that the redundancy process followed by the Respondent was procedurally flawed, beginning with the oral notification of redundancy on 5<sup>th</sup> May 2022 during an official forum. He submits that this was in direct violation of Section 40(1)(a) of the *Employment Act*, 2007, which mandates that redundancy be communicated in writing at least one month before the intended termination.
43. The Claimant submits that the reasons provided by the Respondent for the termination of his employment, specifically the claim of economic challenges leading to redundancy, are both unsubstantiated and not grounded in the reality of the Respondent's financial situation. That while the Respondent cites economic constraints as the reason for the redundancy, the Claimant contends that the termination of his role could not have been a solution to the company's financial difficulties. He placed reliance in the case of *Kenya Airways Limited v Aviation & Allied Workers Union Kenya, Minister For Transport, Minister For Labour & Human Resource Development & Attorney General [2014] KECA 403 (KLR)* to support this assertion.
44. In further support of his case, the Claimant submits that his department was not abolished, and the positions of his colleagues remained intact, reinforcing the argument that the redundancy was not truly necessitated by the company's financial difficulties.
45. Additionally, the Claimant maintains that his termination was not based on valid reasons, as there was no restructuring or reorganization of the business that would have justified the redundancy.
46. The Claimant submits that the selection process for redundancy was unfair, arbitrary, and lacked the transparency required by law. That the Respondent has failed to provide any clear evidence of how the employees selected for redundancy, including the Claimant, were chosen. He sought to rely in the case of *Kenya Airways limited (supra)* for the holding that:-
- “Last in First Out [LIFO] is a mandatory requirement under the Kenyan Law. Section 40 refers to consideration of seniority in time which is basically about LIFO. Although Shivo appeared to down play the importance of LIFO, it is part of the Kenyan law and parties cannot contract out of the requirement....”
47. The Claimant further submits that the consultation process conducted by the Respondent in relation to his redundancy was both inadequate and contrary to the requirements set out in Kenyan employment law. That Section 40 of the *Employment Act*, 2007 clearly mandates that an employer must engage in meaningful consultations with employees who are affected by redundancy.
48. The Claimant submits that he is entitled to one month's salary in lieu of notice due to the Respondent's failure to provide the required notice as stipulated under Section 35 of the *Employment Act*, 2007.
49. The Claimant finally submits that the termination of his employment by the Respondent was unlawful, as it failed to adhere to both the procedural and substantive requirements outlined in the *Employment Act*, 2007.



## **The Respondent's Submissions**

50. The Respondent contends that the redundancy was valid and justified as the restructuring strategy solely focused on improving the Respondent's financial performance, and pray that the Court finds that the reasons for the termination of the Claimant's employment was fair and valid.
51. It is the Respondent's submission that it followed due procedure as required by the Act for employment terminations necessitated by redundancy. That it followed all the steps and paid out all the terminal dues that the Claimant was entitled to receive by law. It submits further that it went out of its way to offer the Claimant both an alternative position in the company and invite the Claimant to take up the offer on the mutual termination.
52. The Respondent maintains that it satisfactorily met all the requirements outlined in the Kenya Airways Limited vs. Aviation Workers Union Kenya case (supra) concerning termination based on redundancy. It contends that the redundancy was fair and valid as it genuinely believed that there was the existence of a redundancy situation and it strictly followed due procedure in terminating the services of the Claimant.
53. It is its submission that once the Respondent paid the Claimant one month in lieu of notice, the claim for damages for the unexpired period of the contract became mute. It placed reliance in the case of Robert Kennedy Moi v Attorney General and Another [2014] eKLR where the court held that:-
- “Payment for Salaries for the unexpired period of contract are not due as the Jaw does not provide for anticipatory income. Section 49(4)(e) requires that employees mitigate their losses. Being able bodied , the Claimant was expected to move on with his life after the termination of his employment. This was the decision of Rika J. in D.K. Njagi Marete V Teachers Service Commission {2013} eKLR, High Court Civil Case No. 1139 of 2002 Menqinya Salim Murqani V Kenya Revenue Authority and Industrial Court Cause No 87 of 2011 O/qha Auma Adede V New Kenya Cooperative Creameries Ltd. The Claim for payment of salary for the unexpired period of the contract is therefore without merit and is dismissed.”
54. It is the Respondent's final submission that the Claimant is not entitled to the reliefs sought.

## **Analysis and Determination**

55. Having considered the pleadings, the witnesses' oral testimonies and the rival submissions, the issues that arise for determination are:-
- i. Whether the Claimant was unfairly terminated.
  - ii. Whether the Claimant is entitled to the remedies sought.
  - iii. Who bears the costs.

## **Whether the Claimant was unfairly terminated.**

56. It is not disputed that the Claimant was terminated on the ground of redundancy. Redundancy is defined in Section 2 of the Employment Act as well as the Labour Relations Act, as the loss of employment, occupation, job or career by involuntary means through no fault of the employee, involving termination of employment at the initiative of the employer.



57. The general principle is that redundancy is a legitimate ground for terminating a contract of employment, provided that the employer can prove that actual redundancy was the reason for the dismissal.
58. In determining the legality of a redundancy, the court examines the bona fides and integrity of the redundancy process.
59. The question is whether the Respondent adhered to the 7 steps outlined in Section 40(1) of the [Employment Act](#), 2007, in declaring the Claimant redundant. Section 40(1) provides thus:-
- “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.
60. On the issue of the redundancy procedure, the Respondent issued notice of intention to declare redundancies to all staff on 11<sup>th</sup> May, 2022. It is also on the same date that a notice of the redundancy was issued to the County Labour Officer-Nairobi County. Yet another notice of redundancy issued to all staff earlier on 6<sup>th</sup> May, 2022 is also before court.
61. The Claimant faulted the selection process as being unfair, arbitrary, and lacking in transparency on the premise that the Respondent failed to provide clear evidence of how the employees selected for the redundancy were chosen.
62. The law presumes that at the initial meeting where a decision is reached to declare redundancies, it is not yet known which employees will be affected by the redundancy. That it is from the discussions and the criteria developed for the redundancy that positions will be identified for the redundancy.



63. The consultation process principally aims at adopting proper criteria for selection for redundancy, and exploration of alternatives to redundancy.
64. An employer is ideally required to identify a pool of employees from which those to be made redundant are selected in the interest of fair play and in accordance with the provisions of Article 41 of *the Constitution*. In *Joseph Macharia Warutere & 3 Others v. Saab Kenya Ltd (2017) eKLR*, the court held that the selection criteria must be objective and where questioned, the employer should be able to show that there was a criterion in place.
65. Further in case of *Kenya Airways Limited v Aviation & Allied Workers Union Kenya, Minister for Transport, Minister for Labour & Human Resource Development & Attorney General [2014] KECA 403 (KLR)* the court opined thus on selection criteria for redundancy:-
 

“Last in First Out [LIFO] is a mandatory requirement under the Kenyan Law. Section 40 refers to consideration of seniority in time which is basically about LIFO. Although Shivo appeared to down play the importance of LIFO, it is part of the Kenyan law and parties cannot contract out of the requirement...”
66. At no point in this case did the Respondent address the question of the selection criteria for the redundancy. The Court therefore safely concludes that the Respondent never had regard to seniority in time and to the skill, ability and reliability of the employee affected by the redundancy.
67. The Respondent’s CEO attended what was said to be a regular meeting, and announced the intention to declare redundancies complete with the positions and the names of the employees that were to be affected. This for me, lies the irregularity- the redundancy was already decided and/or predetermined even before the discussions were held contrary to the provisions of Section 40 of the *Employment Act, 2007*.
68. It is also obvious that the Respondent’s CEO realised later that it put the cart before the horse in as far the redundancy process was concerned, and tried to work the same backward as shown by the notices issued in quick succession on 5<sup>th</sup>, 6<sup>th</sup> and 11<sup>th</sup> May, 2022 to employees and to the Labour offices.
69. In my view, the Respondent did not adhere to the tenets of procedural fairness in effecting the redundancy, which renders the termination procedurally unfair, and so I hold.
70. On the substantive fairness of the redundancy, the question is whether the Respondent had fair and justified ground for the redundancy.
71. The Respondent’s position is that it declared redundancy due to poor business performance as it had only sold ten (10) refrigerators out of a targeted one thousand two hundred (1,200) refrigeration units in the period between October 2021 and May 2022.
72. That arising from the poor performance, and as part of a continuous organizational review in line with its business requirements, it undertook a comprehensive review of its organizational structure and decided to change its market approach by adopting a new business strategy aimed at focusing on a few large business partners. That the new business strategy mandated the Respondent to reduce its management-level employees and introduce more “on the ground” employees to assist in implementing the new strategy.
73. The Claimant in his pleadings admitted that there were economic challenges which could have imposed financial constraints in the operations of the Respondents, and further asserting that the redundancy was not the way out of the company’s financial situation.



74. In the Kenya Airways Limited vs. Aviation Workers Union Kenya case (supra) the court had this to say on substantive justification for a redundancy: -

“.....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. As section 43(2) provides, the test of what is a 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 may be underlying causes leading to a true redundancy situation, such as reorganization, the employer must nevertheless show that the termination is attributable to the 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- ”.

75. By the Claimant’s own admission, the Respondent’s business was facing financial difficulties, and which in my view confirms the existence of a redundancy situation which justified the decision to declare redundancies.

76. In whole, I find and hold that though the Respondent has proved fair reason for the redundancy, the redundancy process was seriously flawed, which renders the Claimant’s termination on account of redundancy procedurally unfair and unlawful.

#### **Whether the Claimant is entitled to the remedies sought**

77. The Claimant’s statement of claim, indicates that he seeks payment of one month salary in lieu of notice, one month salary for redundancy notice and 12 months; salary as compensation for the unfair termination. The record clearly shows that the Claimant was paid one-month salary in lieu of notice as well as severance pay.

78. He confirmed during his oral testimony that he does not claim the money already paid, but only seeks compensation for the unfair termination. I will therefore on this account, only deal with the issue of compensation.

79. In the case of Alphonse Maghanga Mwachanya v Operation 680 Limited [2013] eKLR the Court held that in determining an award of compensation, the court is to consider the 13 factors set out under Section 49 (4) of the *Employment Act*. Further in Elizabeth Wakanyi Kibe v Telkom Kenya Ltd [2014] eKLR where the Court cited the case of D.K. Marete v Teachers Service Commission Cause No. 379 of 2009 for the holding that remedies are not aimed at facilitating the unjust enrichment of aggrieved employees, but are meant to redress economic injuries in a proportionate way.

80. The Claimant in his pleadings admitted that there were economic challenges which could have imposed financial constraints in the operations of the Respondents. Further, the Respondent’s assertion that it offered the Claimant an alternative to the redundancy process in the form of a Mutual Separation Agreement sent on 11<sup>th</sup> June 2022, and that it further invited the Claimant to apply for the role of the Business Development Officer was not controverted.

81. The Claimant also confirmed that the Respondent allowed his medical cover to continue for one year after the termination.

82. Taking the foregoing into consideration, I deem an award of 6 months’ salary sufficient compensations for the unfair termination.



83. In the final analysis, I grant the following reliefs: -

- a. A declaration that the Claimant was unfairly terminated from the service of the Respondent
- b. An order that the Respondent pays the Claimant 6 months salary as compensation for the unfair termination at Kshs. 2,100,000/-
- c. The Respondent shall bear the costs of the suit.

84. It is so ordered.

**DATED, SIGNED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS  
13<sup>TH</sup> DAY OF MARCH, 2025.**

**C. N. BAARI**

**JUDGE**

Appearance:

Ms. Kimani h/b for Mr. Nyabena for the Claimant

Ms. Wekesa h/b for Ms. Mugenyu for the Respondent

Ms. Esther S- C/A

