Kenya Union of Domestic Hotels Educational Institutions, Hospitals and Allied Workers (KUDHEIHA) v Ugenya Diploma Primary Teachers Training College (Cause E052 of 2024) [2025] KEELRC 1209 (KLR) (30 April 2025) (Judgment)

Neutral citation: [2025] KEELRC 1209 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE E052 OF 2024

JK GAKERI, J

APRIL 30, 2025

BETWEEN

KENYA UNION OF DOMESTIC HOTELS EDUCATIONAL INSTITUTIONS, HOSPITALS AND ALLIED WORKERS (KUDHEIHA ..... CLAIMANT

AND

UGENYA DIPLOMA PRIMARY TEACHERS TRAINING COLLEGE ..... RESPONDENT

JUDGMENT

1. The claimant filed the instant suit on 4th July, 2024 vide a Memorandum of Claim alleging unlawful termination of 10 members on account redundancy.

2. Those named as grievants are Michael Ochieng Omondi, Wilfred Owuor Onyango, Charles Oduor Odhiambo, Mary Adhiambo Atieno, Pascalia Awino Odhiambo, Meshack Omondi Osuru, Benard Odongo Manjul, Hernest Onyango Otieno, Winnie Akinyi Odongo and Florence Auma Opondo.

3. The claimant's case is that it has a Recognition Agreement with the respondent and concluded a Collective Bargaining Agreement with the assistance of a conciliator but the respondent refused to sign it.

4. The claimant avers that the grievants were employed by the respondent on diverse dates as per their letters of appointment and their employment was terminated vide letters dated 13th June, 2023 on account of redundancy.

5. That the grievants were victimized for union activities as workers representatives and conciliation failed notwithstanding the conciliators Report.

   The claimant prays for:

i. A declaration that termination of the grievants employment by the respondent was unfair and unlawful.

ii. Unconditional reinstatement without loss of benefits or in the alternative pay the grievants salary in lieu of notice, one months salary as notice, severance pay at 15 days for 9 years and 12 months compensation computed as follows.

10/1/2015	Michael Ochieng (8.5)	Kshs.285,214.00
01/05/2015	Wilfred Onyango (8)	Kshs.337,384.50
4/4/2018	Charles Oduor (5.2)	Kshs.285,214.00
10/1/2015	Mary Adhiambo (8.5)	Kshs.285,214.00
4/4/2018	Pascalia Awino (5.2)	Kshs.344,178.00
10/1/2015	Meshack Omondi (8.5)	Kshs.303,529.00
10/1/2015	Benard Odongo (8.5)	Kshs.285,214.00
10/1/2015	Hernest Onyango (8.5)	Kshs.285,214.00
01/4/2015	Winnie Akinyi (8.5)	Kshs.337,384.50
10/1/2015	Florence Auma (8.5)	Kshs.285,214.00
TOTAL		Kshs.3,033,931.50

iii. Costs and interest at court rates.

iv. Any other order the court may deem just.

v. Respondent be compelled to sign the Collective Bargaining Agreement (CBA) negotiated under the chairmanship of the County Labour Officer.

Respondent's Case

6. By a response filed on 29th January, 2025, the respondent avers that the grievants were employees of the Board of Management and states that discussions on the CBA are pending conclusion and due process was followed in the redundancy process and the decision was consultative.

7. It is the respondent's case that it was experiencing financial challenges owing to reduced capitation and paid the grievants their dues.

8. According to the respondent, the claimant had no cause of action against the respondent and the instant suit should be dismissed with costs.

Claimant's evidence

9. In his written statement dated 4th March, 2025, Mr. Michael Ochieng testifying on behalf of the grievants stated that the grievants were victimized because of union application by incessantly asking the respondent to sign the CBA.

10. On cross-examination CWI confirmed that some of his colleagues were still employees of the respondent when he left employment. He admitted having received payment in his bank account the sum of Kshs.222,010.00 as per the respondent letter of redundancy and could not recall whether the union was involved.

11. The witness admitted that the claimant union and the respondent were negotiating a CBA.

12. On re-examination, the witness testified that the suit related to claims other than those paid for by the respondent.

Respondent's evidence

13. RWI, Mr. Fredrick Nyawanda confirmed, on cross-examination that he was aware of the Recognition Agreement between the parties and did not notify the union the fact of redundancy but informed the employees and the reason was declining enrolment of students and other dynamics including reduction in government grant.

    He denied that the respondent had refused to sign the CBA.

14. It was his testimony that all employees declared redundant were paid their dues in full, including salary for the month of June and in lieu of notice, but paid by instalments owing the lack of resources.

15. On re-examination RWI testified that the respondent had availed evidence of payment, had no income generating activities on account of its small size, a BOM Committee met non-teaching staff on 12th June, 2023 and were thus engaged and could be re-engaged if things improved and the respondent had employees who were members of the union.

    Claimant's submissions

16. The claimant's submissions were untraceable on the CTS despite several attempts to retrieve the same.

17. In addition, a document filed sometime in mid April 2025 failed to load and was thus unavailable.

Respondent's submissions

18. As to whether termination of the grievants employment was fair and lawful, counsel submitted that the grievants were declared redundant occasioned by financial hardships due to reduced capitation and low intake and consequent rationalization of non-teaching staff establishment as evidenced by the Ministry of Educations request for data vide Circular dated 11th August, 2021 and subsequent meetings and communication to the Labour Officer, Kisumu.

19. Counsel submitted that the respondent engaged the claimant prior to the retrenchment as evidenced by minutes of the BOM Committee and the grievants were heard and the separation was peaceful and in good faith and were issued with good recommendation letters.

20. Counsel further submitted that the respondent was guided by the provisions of Section 40(1) of the *Employment Act*.

21. As regards the reliefs sought counsel submitted that salaries due to the grievants up to June 2023 were paid despite their having worked for 12 days only.

That the grievants were also paid gratuity and severance pay.

22. That the relief with respect to the Collective Bargaining Agreement was prematurely before the court and reinstatement of the grievants was untenable and impracticable owing to the respondent's acute financial hardships and in any case, it is not automatic.

The respondent prayed for dismissal of the claimant's suit.

Analysis and determination

23. The facts of the case are largely uncontested.

24. It is common ground that the grievants were employees of the respondent, were members of the claimant union as evidenced by copies of their pay slips on record, and were declared redundant by the respondent vide letters, dated 13th July, 2023, and were paid one month's salary in lieu of notice, salary up to July 2023 gratuity and salary arrears from October 2022 to June 2023.

25. It is also undisputed that the claimant and the respondent had a Recognition Agreement and had been negotiating a CBA.

26. RWI confirmed that the claimant union was not consulted or notified of the intended redundancy but testified that the employees were notified and were consulted. However, CWI testified that they were not accorded a notice.

27. Finally, while the claimant union alleges that the agrievants were terminated from employment unfairly and unlawfully, the respondent maintains that the employees were declared redundant and due process was followed.

28. This case turns on whether the provisions of Section 40(1) of the *Employment Act* were complied with in declaring the grievants redundant.

29. It requires no belabouring that redundancy is one of the legitimate methods of bringing an employment relationship to an end at the instigation of the employer and may be occasioned by multifarious factors; including technological changes, restructuring or re-organization occasioned by the business or commercial environment and cost-cutting among others.

30. Section 2 of the *Employment Act* defines the term redundancy and Section 40 of the Act prescribes the precepts of a fair redundancy process.

31. In Freight In time Ltd V Rosebell Wambui Munene [2018] eKLR, the Court of Appeal expressed itself as follows:

> "In addition, Section 40(1) of the *Employment Act* prohibits in mandatory tone, the termination of a contract of service on account of redundancy unless the employer complies with the following seven conditions namely..."

32. See also Thomas De La Rue (K) Ltd V David Opondo Omutetema [2013] eKLR and Barclays Bank of Kenya Ltd & Another V Gladys Muthoni and 20 Others [2018] eKLR.

33. These conditions include notice to the union where the employee(s) are members of the union and the Labour Officer or the employee, if not a member of the union and the Labour Officer at least one month before the effective date of the redundancy, the notice must state the reasons for and extent of

the intended redundancy, selection criteria, equity whether an employee is a member of a union or not where dues are set out in a CBA, payment of leave in cash, one month's notice and severance pay.

34. Courts have, in addition held that consultation is integral part of the redundancy process. See Kenya Airways Ltd V Aviation and Allied Workers Union Kenya & 3 Others [2014] eKLR and Cargill Kenya Ltd V Mwaka & 3 Others (2014) eKLR.

35. I will now proceed to determine whether the respondent complied with the provisions of Section 40(1) of the *Employment Act*.

36. First, as regards the notice of redundancy, the provisions of Section 40(1)(a) of the *Employment Act* require the notice to be given to the union and the Labour Officer at least one month prior to the effective date of the redundancy.

37. In this case, since the grievants were members of the claimant union, a fact the respondent acknowledged in evidence, a notice ought to have been given to the claimant union for its participation in the process. The respondent's witness admitted that no notice was given to the union and availed no evidence to prove that a notice had been forwarded to the local labour officer.

38. Clearly, the provisions of Section 40(1)(a) on the notice of redundancy was not complied with.

39. The respondent witness's retort that employees were notified cannot avail the respondent. The law required a notice to the claimant union and the local labour officer.

40. Second, the notice required by Section 40(1)(a) of the Employment must state the reasons for and extend of the intended redundancy.

41. Although RWI tried to explain the causes or reasons for the redundancy, his efforts were of little evidential value as he had no letter setting out in concise terms which occasioned the redundancy other than or in addition to the alleged declining enrolment.

42. However, it is discernible that the issue of declining enrolment and reduction of grant by the Ministry of Education had been discussed by the Board of Management.

43. On the issue of notice and reasons and extent of the redundancy, the court returns that the respondent was non-compliant.

44. Third, on selection criteria, the respondent's witness testified that it had 27 non-teaching staff members by June 2023 and 10 were declared redundant. Asked by the court how the number 10 was arrived at, RWI could not tell whether the respondent had a selection criteria as guided by the provisions of Section 40(1)(c) of the *Employment Act*, such as seniority in time, skill, ability and reliability of each employee of the employees affected by the redundancy.

45. Fourth, the requirement of consultations in redundancies was adverted to by Murgor JA and Maraga JA (as he then was) in Kenya Airways Ltd V Aviation & Allied Workers Union Kenya & 3 Others (Supra).

46. Similarly, in Cargill Kenya Ltd V Caroline Mutana Mwaka & 3 Others (Supra), the Court of Appeal held:

> " Having regard to legislative intention of the provisions of Section 40 of the *Employment Act*, the international law and decided cases, it is our finding that consultations on an intended redundancy between the employer and the relevant unions labour officers and employees is implied by Section 40(1)(a) and (b) of the *Employment Act*".

47. In the instant case, since the respondent did not notify the union, no consultations took place.

48. The respondent's testimony that it consulted the employees is equally unpersuasive as the BOM Committee met the employees the day before the letters were dispatched to inform them of their decision not to consult them on a way forward.

49. Clearly, no consultations took place as envisioned by the provisions of the *Employment Act*.

50. Finally, the redundancy notices made no reference to leave days and severance pay. However, the respondent paid gratuity for the period served by the grievants ranging between Kshs.62,280.00 as the lowest and Kshs.118,260.00 as the highest.

51. The payment of gratuity, in the absence on an express contractual requirement, was undoubtedly, a good gesture by the employer.

52. A panoramic view of the redundancy process undertaken by the respondent reveals that the provisions of Section 40(1) of the *Employment Act* were not complied with and as a consequence, the purported redundancy transitioned to an unfair and unlawful termination of the employment of the grievants which entitles them to reliefs under the *Employment Act* as follows:

    i. Declaration

    Having found that termination of the grievant's employment in a purported redundancy transitioned to an unfair termination of their employment, the declaration sought is merited.

    ii. Reinstatement

    Although the claimant's suit falls within the duration prescribed under Section 12(3)(vii) of the *Employment and Labour Relations Court Act*, the claimant tendered no evidence to demonstrate that the positions are still available or that circumstances had changed rendering reinstatement of the grievants tenable and practicable.

    Similarly, it requires no gainsaying that the remedy of reinstatement is discretionary as held in the Kenya Airways Ltd Case (Supra) and the court is enjoined to exercise its discretion on the basis of the parameters set out under Section 49(1)(c) of the *Employment Act*. The grievants did not appeal the decision to terminate their employment, and have neither demonstrated its practicability in this instance. From the foregoing, the court is not inclined to exercise its discretion in favour of reinstatement of the grievants.

    iii. The alternative remedies are:

    Salary in lieu of notice

    The redundancy letters on record promised payment of one month's salary in lieu of notice and salary for the month of June and July 2023 and CWI did not testify that payment was not made as promised.

    The prayer for salary in lieu of notice is devoid of merit and is dismissed.

    iv. One month's salary for notification period.

    It is unclear to the court as to what this prayer entails.

    It is trite law that the provisions of Section 40(1) of the *Employment Act* provide for one (1) notice only not two, which must be given or salary paid in lieu of notice and in this case salary was paid in lieu of notice.

The prayer lacks supportive evidence and it is declined.

v. Severance pay at 15 days for each completed year of service

Having held that the termination of the grievants employment transitioned to an unlawful and unfair termination, and having further found that the respondent paid each grievant gratuity for the duration served, the claim for severance pay unsustainable and it is declined.

vi. 12 months salary compensation

Having found that termination of the grievant's employment by the respondent was unlawful for non-compliance with the provisions of Section 40(1) of the *Employment act* and thus unfair within the meaning of Section 45 of the Act, the grievants are entitled to compensation under Section 49(1)(c) of the *Employment Act*.

In determining the quantum of compensation, the court has taken the following into consideration. The grievants did not appeal the decision of the respondents and did not contribute to the termination of their employment. The court has further considered that the grievants served the respondent for between 5 and 8 years and were paid gratuity for the duration served.

In the circumstances the equivalent of two (2) months gross salary is fair.

vii. Respondent be compelled to sign the CBA

It is trite law that a Collective Bargaining Agreement (CBA) is an agreement as the name encapsulates.

Both the provisions of the *Employment Act* and the *Labour Relations Act* state that:

> "Collective Agreement" means a registered agreement concerning any terms and conditions of employment made in writing between a trade union and an employer, group of employers or employers' organization.
>
> The foregoing definition contemplates no role of this court in the negotiation and/or conclusion of a CBA.
>
> In fact, the only role donated to the court by the *Labour Relations Act* is registration of the collective agreement pursuant to the provisions of Section 60 of the Act.
>
> The Court of Appeal has laid it bare that it is for the parties involved to negotiate and conclude the terms of the CBA as envisioned by law.
>
> In Teachers Service Commission V Kenya National Union of Teachers & 3 Others [2015] eKLR the Court of Appeal held:
>
> > "The very essence of a collective agreement is that the terms and conditions thereon contained are voluntarily agreed upon between the employer and the union...
> >
> > If the labour court fixes basic salary in a collective agreement as the labour court did in this case, the collective agreement ceases to be a collective agreement as envisaged by the law".

In the words of Odek JA,

> "It is my considered view that, collective bargaining is neither compulsory nor automatic. It is source of voluntarily negotiated terms and conditions of service for employees.
>
> Collective bargaining is a platform upon which trade unions can build to provide more advantageous terms and conditions of service to their members...
>
> The right is grounded on the concept of social dialogue, freedom of contract and autonomy of parties in collective bargaining...
>
> The Article emphasize the ability of the employer and trade unions to operate as partners not adversaries... the constitutional recognition of the right to collective bargaining is not a right to black mail a party into collective bargaining".
>
> The court is bound by the foregoing sentiments and is in agreement with them.
>
> Under the theory of freedom of contract, parties are free to into into contracts with the persons or parties of their choice and there cannot be a legally enforceable agreement unless the parties entered into it freely and voluntarily. It is not the domain of courts of law to force parties to agree or impose an agreement on them. A court Order compelling parties to agree on terms of a draft agreement would negate the principle of freedom of contract and the basic common law principles upon which contracts are based.
>
> The prayer is declined.

53. In the upshot, Judgment is entered in favour of the claimant against the respondent as follows:

    a. Declaration that termination of employment by the respondent was unfair and unlawful.

    b. Equivalent of two (2) month's gross salary compensation

    c. Respondent shall reimburse the claimants costs assessed at Kshs.30,000.00

    d. Interest on the compensation from date of Judgment till payment in full.

    Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU ON THIS 30TH DAY OF APRIL, 2025.

DR. JACOB GAKERI

JUDGE

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 has 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.

DR. JACOB GAKERI

JUDGE