Kenya Uinion of Commercial Food and Allied Workers v Bowip Agencies Limited (Cause E016 of 2025) [2025] KEELRC 2243 (KLR) (29 July 2025) (Judgment)

Neutral citation: [2025] KEELRC 2243 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE E016 OF 2025

JK GAKERI, J

JULY 29, 2025

BETWEEN

KENYA UINION OF COMMERCIAL FOOD AND ALLIED WORKERS ..... CLAIMANT

AND

BOWIP AGENCIES LIMITED ..... RESPONDENT

JUDGMENT

1. The Claimant union commenced this suit vide a Memorandum of claim dated 19th March, 2025 filed on 21st March, 2025 alleging that the respondent declared the grievant redundant in contravention of the provisions of the *Employment Act*.

2. The Claimant's case is that the grievant was employed by the respondent on 1st July 2013 on a 6 months fixed term contract at Kshs.23,000 per month, confirmed on 5th January 2015 as a Van Assistant at Kshs.25,000 per month, received new terms of employment on 26th March 2018 at Kshs.33,544 per month.

3. The Claimant avers that vide letter dated 27th July, 2024, the respondent declared the grievant redundant, the dispute was reported to the Minister, a conciliator appointed who invited the parties for meetings, prepared a report and field a certificate of unresolved dispute.

   The Claimant pays for:

   i. Finding that the respondent's action was unlawful and unprocedural.

   ii. Reinstatement or in the alternative

   iii. Salary for July 2024 Kshs. 35,000

   iv. Notice pay Kshs. 35,000

v. Leave earned but not taken Kshs. 105,000

vi. Severance pay Kshs. 262,500

Total: Kshs.437,500

vii. Unrefunded parking fee Kshs.2,560

viii. Certificate of service.

ix. Quantified costs to the Claimant.

x. Any other relief the court may teem fit and just to grant.

Respondents case

4. The Respondent admitted that the grievant was its employee but denied his union membership as neither the Claimant not the union disclosed the membership and the Claimant was not notified of the redundancy.

5. It is the respondent's case that the grievant was given the reasons for being declared redundant and the failure to pay the grievant's terminal dues was un account of the grievant's failure to complete the clearance process and did not collect his dues.

6. According to the respondent, the redundancy was occasioned by inflation and disruption of the supply chain and the requisite process were complied with and there was no suitable alternative for the grievant. Finally, the respondent averred that the salary for July 2024 was part of the grievant's terminal dues amounting to Kshs.116,020.00 which was ready for collection by the grievant upon clearance.

Claimant's evidence

7. The grievant confirmed on cross-examination that he was declared redundant by the respondent but was unaware of the challenges the respondent was facing and in any case it had another client.

8. On union membership, the grievant testified that he was a private member since early 2024 but had not notified the respondent. It was his testimony that he only cleared with the line manager and neither completed the clearance form nor collect his cheque.

9. The witness confirmed that the termination letter had an entry on untaken leave days.

10. On re-examination, the grievant testified that he was unaware of the cheque and contradicted himself by testifying that he cleared and was not paid having already confirmed that he did not complete the clearance form and return it.

11. He admitted having received the redundancy letter but had not received notice of the redundancy.

Respondents evidence

12. Mr. Benjamin Omole, confirmed on cross-examination, that the respondent issued a notice of redundancy in July or June 2024 and another letter one (1) month thereafter.

13. It was his testimony that the grievant refused to sign the clearance form but the respondent computed his dues and prepared a cheque and the grievant was requested to complete the clearance process but kept off. Strangely, the witness was unable to confirm the grievants basic salary but admitted that the payslip for June 2024 showed that the grievant salary was Kshs.35,000.000.

14. The witness confirmed that the grievant was entitled to about 22 leave days per year and had completed several leave request forms.

15. On re-examination, the witness testified that the leave forms covered the leave days taken at a given time and the claimant had a balance of 30 leave days and terminal dues were computed up to 27th July 2024.

Claimant's submissions

16. The claimant union submitted the grievant had the right to join a trade union as ordained by law, including the *Constitution* of Kenya and he paid union dues privately, the absence of a recognition agreement notwithstanding.

17. The claimant further submitted that the respondent did not observe the provisions of Section 40 of the *Employment Act* as there was no redundancy notice, no proof of service and the letters availed were an afterthought.

18. On the clearance form, the claimant submitted that the absence of clearance ought not be the respondent's excuse for non-payment of the grievants terminal benefits and the cheque was dated 16th December, 2024 yet the grievant left in July, 2024 left and in any case the grievant signed the clearance form and had handed over and was never called to do so.

19. The claimant urged that the grievant had only proceeded on leave for 8.5 days from 2022 to 2024 and had 38 days pending.

Respondent's submissions

20. On standing of the union, counsel submitted that the respondent was unaware of the union and the claimant had not shown that the grievant was paying union dues and the card was not sufficient evidence of union membership.

21. Reliance was placed on Stephen Obure Onkanga V Njuca Consolidated Ltd [2013] KECA 475 (KLR), to submit that the claimant had no locus standi to file the suit and it ought to be struck out.

22. On redundancy, counsel submitted that the grievant's position was abolished due to financial challenges and it had lost a client and the issue had not been challenged, and the requisite notices were issued. Counsel submitted that redundancy was the only viable option.

23. On reliefs, counsel submitted that since the redundancy was substantively and procedurally fair, the reliefs sought were unavailable.

24. That reinstatement was impracticable in the sense explained in Kenya Airways Ltd V Aviation and Allied Workers Union Kenya & 3 Others [2014] eKLR as the department was scrapped.

25. On notice pay and salary for July 2024 counsel submitted that since the amount claimed was Kshs.35,000, it could not be Kshs.35,221 claimed in the submissions as parties were bound by their pleadings as held in I.E.&B.C. & another V Stephen Mutinda Mule & 3 Others [2014] eKLR.

26. Moreover, the grievant worked up to 27th July, 2024 and the sum was part of his terminal dues.

27. On untaken leave days, counsel submitted that the grievant had a balance of 30 days, which was part of his terminal dues, that severance pay stood at Kshs.175,000.00 not Kshs.262,500.00 as claimed.

28. On unrefunded parking fees, counsel urged that who alleges must prove and the claimant adduced no evidence in support of the claim.

Analysis and determination

29. It is common ground that the respondent employed the grievant as a Direct Sales Representative effective 2nd July 2013 under a six-month fixed term contract at Kshs.22,000 and a lunch allowance of Kshs.100.

30. Puzzlingly, the grievant did not sign his copy of the contract of employment. Equally not in contest, by letter dated 5th January 2015, the respondent employed the grievant as a Sales Representative subject to a 3 months probationary period at a consolidated salary of Kshs.33,544 per month and an overnight allowance of Kshs.1500, as necessary.

31. Finally, the contract of employment was modified vide letter dated 26th March 2018.

32. On the locus standi of the union challenged by the respondent, it is trite law that a union derives its standing to represent grievants by virtue of their membership to the union. Union membership is a question of fact.

33. Relatedly, and as submitted by the claimant union, unionisable employees have a constitutional right to join trade unions of their choice and the right is individual not corporate.

34. The allegation that the respondent was unaware of the existence of a union having participated in reconciliation proceedings and attended meetings is intriguing, more so because it never raised the issue as a preliminary point for the court's determination to, inter alia obviate injudicious use of judicial time.

35. More significantly, the respondent did not avail verifiable evidence or any evidence to controvert the grievants union membership card on record.

36. The claimant union, in the court's view, established a prima facie case that the grievant was its member and had to requisite standing to institute the instant suit.

37. It is also not in dispute that the respondent declared the grievant redundant vide letter dated 27th July 2024 entitled termination notice by reason of redundancy. The letter made no reference to any other letter or notice and RW1 confirmed on cross examination that the notice of redundancy was dated July or June.

38. Although the RW1 alleged that there was another notice one (1) later, he did not avail a copy of the letter and in the same vein confirmed that the grievant's terminal dues were computed on 27th July 2024 which would suggest that there may have been a prior redundancy notice. Among the documents the respondent availed in support of its case was an internal memo by the Director Mr. Benjamin Omole dated 20th May 2024, signed on his behalf informing all employees of an intended redundancy. Significantly, the memo promised consultations and ensuring that all employees need were met and employees were free to contact him for any clarifications.

39. A redundancy notice dated 25th June 2024 was also sent to the grievant ID No. xxx Cell. No. 0729xxx, which was followed by a notice of termination of employment on account of redundancy.

40. As confirmed by the grievant during cross examination, the notice of redundancy stated the reasons for redundancy as economic challenges, including inflation, supply chain disruption and decrease in consumer spending leading to a decline in revenue.

41. The letter was emphatic that there was staff reduction to cut costs for sustainability of the business and catalogued the benefits due to the claimant including unutilized leave days, severance pay and salary up to 27th July 2025. The letter requested the grievant to hand over company property in his possession.

42. Finally, the respondent availed a copy of a cheque No. xxx of Kshs.116,020 dated 6th December 2024 in the grievant's name.

43. The Claimant contended that the respondent's actions were unlawful and unprocedural.

The issues for determination are: -

i. Whether termination of the grievant's employment on account of redundancy was unfair.

ii. Whether the claimant is entitled to the reliefs sought.

44. It is trite law that redundancy is one of the legitimate ways of separation between an employer and employee and the principles that govern redundancy are fairly well settled.

45. See Kenya Airways Ltd V Aviation & Allied Workers union Kenya & Others (2014) eKLR.

46. Analogous to other approaches to the termination of employment, for a redundancy to pass muster, it must have been substantively justifiable and procedurally fair. Thus, the provisions of Section 45 and 47 (5) of the *Employment Act* apply to redundancies.

47. It is exclusively at the instance of the employer and the employee is not at fault and may be occasioned by restructuring, re-organization right-sizing or technological changes.

48. As held in Grace Team Accounting Limited V Blake (2014) U2CA 54T, the commercial rationale for a redundancy must be established including evidence of the facts of the process being achievable for a redundancy to be deem justifiable.

Put in alternative terms the redundancy must be proved.

49. Whereas Section 2 of the *Employment Act* defines the term redundancy, Section 40 (1) sets out the requirements an employer must comply with for a redundancy to pass as fair.

50. The requirements of Section 40 (1) of the *Employment Act* must be complied with.

51. In Freight in Time Ltd V Rosebell Wambui Munene (2018) eKLR the Court of Appeal laid it bare that: -

> "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:
>
> a. if the employee to be declared redundant is a member of a union, the employer must notify the union and the local labour officer the reasons for and extent of redundancy at least one month before the date when the redundancy is to take effect;
>
> b. if the employee is not a member of the union, the employer must notify the employee personally in writing together with the Labour Officer;
>
> c. in determining the employees to be declared redundant, the employer must consider seniority in time, skill, ability, reliability of the employees;

d. where the terminal benefits payable upon redundancy are set under a collective agreement, the employer shall not place an employee at a disadvantage on account of the employee being or not being a member of a trade union;

e. the employer must pay the employee any leave due in cash;

f. the employer must pay the employee at least one month's notice or one month's wage in the lieu of notice; and

g. the employer must pay the employee severance pay at the rate of not less than 15 days for each completed year of service".

52. See also Gladys Muthoni & 20 Others V Barclays Bank of Kenya Ltd & Another (2018) eKLR.

53. In addition, the Court of Appeal has held that consultations, though not expressly provided for constitute part of the matrix of lawful redundancy process.

54. It is trite that the employer shoulders the burden to prove that it had a justifiable basis for the redundancy and the process was fair. In the instant case, it is evident that the employer notified its employees of an impending redundancy.

55. The letter dated 20th May 2025 merely warned the employees of the redundancy and the possible causes in very general terms. While this is creditable, the respondent ought to have availed detailed information as to when the company started experiencing challenges including loss of the alleged distributorship and the impact they had had on the respondent's bottom line, albeit generally, to show the trend.

56. The respondent's letter made no reference to the departments likely to be affected and how. No organogram was provided to show the status of the respondent and where the proposed redundancy would take the employer.

57. Such evidence or information would have embellished the respondent's case.

58. In a similar vein, the notice of redundancy dated 27th July 2024 lacked sufficient details as it was inter alia silent on the total workforce, how may employees would be affected, the alleged decline in revenue and the optimal workforce for sustainability of the company.

59. Clearly, the contents of paragraphs 3 and 4 of the notice of termination of account of redundancy lacked the necessary supportive and verifiable evidence to enable the respondent establish that it had a justification for the redundancy. Thus, in the court's view, the reasons for and extent of the redundancy were not substantiated.

60. Relatedly, the respondent did not adduce evidence to demonstrate that notice of the redundancy setting out the reasons for and extent of the redundancy was sent to the local labour office in consonance with the provisions of Section 40 (1) (b) of the *Employment Act*.

61. A notice of redundancy issued under Section 40 (1) (b) of the *Employment Act* is deemed ineffectual if it is not sent to the employee and the local labour officer at least one (1) month prior to the date of redundancy or it is not sent to either of them or it does not set out the reasons for and extent of the redundancy.

The law does not insist on two (2) notice of redundancy.

62. In this case, the notice was ineffectual in that the respondent did not avail a copy of the notice it forwarded to the local labour officer and receipt thereof by that office and provided no verifiable evidence of the reasons for and extent of the redundancy.

See Thomas Del Rue (K) Ltd. V David Opondo Omutelema (2013) eKLR.

63. Concerning the selection criteria, it is discernible that the respondent had none and if it had one, no evidence was availed. Why for instance was the claimant declared redundant and others in sales were left? What considerations were at play?

64. Section 40 (1) (c) of the *Employment Act* prescribes a selection criterial based on seniority in time skill, ability and reliability of each employee. The respondent ought to demonstrate how the grievant performed, compared to others in the department.

65. The respondent provided no documentary evidence of the criteria it employed in the process.

66. As regards terminal dues and Collective Bargaining Agreement, the claimant tendered no evidence that it had a Collective Bargaining Agreement with the respondent.

67. As regards consultations, although the respondent's letter expressly stated that there would be consultations, the respondent provided no evidence of any consultations between it and the employees. Indeed, RW1 adduced no shred of evidence of there having been consultations between the respondent and its employees.

68. In Barclays Bank of Kenya Ltd & another V Gladys Muthoni & 20 others (supra) the Court of Appeal held:

> " Furthermore, consultation was necessary before the redundancy notices were issued. Article 13 of Recommendation No. 166 of the ILO Convention No. 158. Termination of Employment Convention 1982 provides.

69. ... This law is applicable in this country. The purpose of the provision as Maraga JA emphasized... The learned Judge further emphasized that the consultation must be real not cosmetic citing with approval the New Zeland case of Cammish V. Parliamentary Service (1996) IERNZ 104 stating thus...

Murgor JA, in the same case, stated as much adding...

> " We respectively agree with views expressed by the two learned Judges. the *Constitution* in Article 41 is fairly loud on the rights to fair labour practices and we think it accords with the *Constitution* and international best practice that meaningful consultation be held pre-redundancy. We agree with the trial court that redundancy notices are not mechanical so as to satisfy the motions of the law..."

70. The court finds that the respondent has failed to prove that there was any meaningful consultations before the redundancy on 27th July 2024.

71. The court expressed similar sentiments in Cargill Kenya Ltd V Mwaka & 3 others (2021) DECA 115 (KIR) thus:

> " Having regard to the 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 official, and employees is implied by Section 40 (1) (a) and (b) of the *Employment Act*"

72. Thus, although the respondent had promised to pay one (1) months salary in lieu of notice, untaken annual leave and severance pay at 15 days for each completed years of service, the ineffectual notice, inadequate justification for the redundancy, absence of a selection criteria and lack of consultations

culminate in the finding that the respondent has failed to prove that it had a justification for the redundancy and conducted it fairly.

73. In a nutshell, the purported redundancy transitioned to an unfair and unlawful termination of the grievant's employment within the meaning of section 45 of the *Employment Act*, for which the claimant is entitled to compensation under section 49 (1)(c) of the *Employment Act*.

Appropriate relief

74. Prayer (i) is not a relief but a finding and the court has already found as much, elsewhere in the Judgment.

On reinstatement, the court proceeds as follows:

This is one of the remedies provided for by Section 12 (3) (Vii) of the *Employment and Labour Relations Court Act* read with Section 49 (3) (a) of the *Employment Act*.

However, as held by the Court of Appeal in Kenya Airways Ltd V. Aviation & Allied Workers Union Kenya and 3 Others (supra), the relief is discretional and the court's discretion must be exercised Judicially in light of the relevant factors, set out under Section 49 (4) of the *Employment Act*, and Section 12 (3) (vii) of the *Employment and Labour Relations Court Act* such as length of service, circumstances in which termination of employment took place, value of severance pay, wishes of the employee and practicability of reinstatement among others.

In this case, the claimant had worked for the respondent and had no recorded incidence of misconduct, did not contribute to the termination of employment, wished to continue in the respondent's employment but did not appeal the redundancy nor prove that the position was still part of the respondent's organogram and vacant.

75. In this case the court is not persuaded that the claimant has demonstrated any exceptional or unique circumstances sufficient to qualify the common law principle that there should be no specific performance in contracts of personal service.

The relief of reinstatement is unmerited and it is declined.

76. Although the respondent's notice of termination on account of redundancy identified the items to be paid for, it did not disclose how the sum of Kshs.116,200 was arrived at including the debts the claimant may have owed the respondent.

77. Whereas the amount payable as salary for July 2024 and notice pay is certain, neither the Claimant nor the respondent appeared aware of the outstanding leave days.

78. Strangely, the Claimant's claim was grounded on the assumption that the claimant did not proceed on leave at all and the leave forms availed by the respondent did not make the case any easier on account that the leave days requested for and allegedly taken differed significantly. Whose record or evidence is credible? In the court's view none of the parties appeared truthful on leave days.

79. Based on the contradictory evidence adduced, the claimant is awarded payment for 30 untaken leave days.

80. On severance pay, the claimant used 13 years in place of 11, which translates to Kshs.192,000.00.

81. Finally, as adverted to elsewhere, the grievant is entitled to compensation for the unlawful and unfair termination of his employment by the respondent.

82. In determining the quantum of compensation the court has taken into consideration the fact that the grievant served the respondent for about 11 years, wished to continue working for the respondent, was free from blame, had no recorded misconduct, did not appeal the decision of the respondent, practicability of reinstatement and the common law principle that specific performance is generally unavailable in contracts of personal service.

83. For the foregoing reasons the court is satisfied that the equivalent of four (4) months gross salary is fair compensation, Kshs.140,000.00

84. The grievant is entitled to a certificate of service by dint of Section 51 of the *Employment Act*.

85. The upshot of the foregoing is that Judgment is entered in favour of the Claimant against the Respondent in the following terms:

    a. Salary for up to 27th July 2024, Kshs.31,500.00

    b. Salary in lieu of notice Kshs.35,000.00

    c. Untaken leave days Kshs.35,000.00

    d. Severance pay Kshs.192,000.00

    e. Equivalent of 4 months salary Kshs.140,000.00

    Total Kshs.433,500.00

    f. Certificate of service.

    g. Reimbursement of the claimant's costs of Kshs.20,000.00.

ATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU ON THIS 29TH DAY OF JULY, 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