Sembe v IBM East Africa Limited (Cause 605 of 2018) [2025] KEELRC 2406 (KLR) (17 July 2025) (Judgment)

Neutral citation: [2025] KEELRC 2406 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 605 OF 2018

K OCHARO, J

JULY 17, 2025

BETWEEN

FRANCIS OMENDA SEMBE .... CLAIMANT

AND

IBM EAST AFRICA LIMITED .... RESPONDENT

JUDGMENT

Background

1. At all material times, the Claimant was an employee of the Respondent as a Security Specialist until 30th April 2018, when his employment was terminated at the Respondent's initiative. Claiming that the termination was unfair and unlawful, he filed a suit against the Respondent seeking the relief:

    i. An order of injunction against the Respondent, whether by themselves, agents, servants and or representatives, restraining them from effecting the notice dated 1st March 2018 of terminating by declaring the Claimant redundant or in any manner relinquishing the employment services of the Claimant effective 30th April 2018.

    ii. A declaration that the Respondent is in contempt of the orders of the 27th of April,2018.

    iii. An order directing that the Director of the Respondent be imprisoned for 6 Months or pay a fine of KShs. 200,000 for being in contempt of Court.

    iv. An order directing the Respondent to disclose the detailed criteria and mechanism used to select and identify the Claimant as eligible for redundancy and to disclose all documents, correspondences and information, internal or otherwise generated or obtained in the process of declaration of redundancy of the Claimant.

    v. An order directing the Respondent to, with immediate effect, reinstate the Claimant to employment and put the Claimant in the status he was before.

vi. In the alternative, 12 months' Compensation for KShs. 3,835,000.00.

vii. Costs of this suit.

viii. Certificate of service.

2. The Respondent challenged the Claimant's claim via the Amended Statement of Defence dated 23rd August 2019 which denied the Claimant's cause of action and entitlement to the reliefs sought.

3. After hearing the parties on their respective cases, this Court directed them to file written submissions. They obliged. The submissions are on record.

The Claimant's case.

4. The Claimant adopted her witness statement herein filed as part of her evidence in chief, and produced the documents filed under various lists of documents as his documentary evidence.

5. He stated that he was employed by the Respondent on 15th April 2014, as a Security Specialist for the Respondent's East Africa Region, which comprised Kenya, Tanzania, Uganda, Ethiopia, Mauritius, Seychelles, Rwanda, Burundi, Madagascar, South Sudan, Djibouti, and Eritrea, at a monthly salary of KShs. 319,395.

6. He was initially reporting to Lucky Kambale, the then Senior Security Professional in charge of the Central, East, and West Africa region, who left the Respondent's employment on 31st March 2016. Thereafter, he started reporting directly to the Security Manager for IBM Africa-Jaco Brand based in South Africa.

7. At all material times, he dedicatedly, with a clean record, worked for the Respondent. To his dismay, on March 1, 2018, the Respondent issued him a letter indicating that it had decided to terminate his employment due to redundancy.

8. He argued that the Respondent's action was discriminatory because it only singled him out. There was no reasonable criterion used to determine him as the employee to be dismissed. The procedure prescribed by law for redundancy termination was not followed.

9. Answering the matters raised in the Respondent's statement of Defence, he asserted that at no time was he directly involved in implementing the Small Country Model or working directly with clients.

10. After Lucky Kambale left his position, it was never advertised, and therefore, no competitive process was conducted to select a Security Manager for East Africa.

11. Contrary to the Respondent's assertion, no consultative meeting took place on 26th March 2018 involving him, the HR team, and his Manager. In fact, he only discovered that Jacob Brand was travelling to Kenya on this date in the evening when Mr. Brand sent him a text message.

12. He was issued the termination letter on the morning of March 27, 2018, when he was abruptly summoned to a meeting room at the IBM Centre, where his manager, Jaco Brand, and Priscilla Gichuki from HR were present. Virtually attending was Mayokun Aduwo, the HR leader for East and West Africa. During the meeting, his manager casually informed him that a decision had been made to declare him redundant and that he would be required to serve until 30th April 2018. He was not given a chance to make any representation on the Respondent's surprise move.

13. He argued that the termination was motivated by malice. It resulted from his expression of dissatisfaction with how a court order issued by the Children's Court, against him, was managed when it was served on the Respondent. According to him, it was handled in a way that violated his privacy.

14. He did not hand over the laptop, work materials, access badges, or any item to Barnard Oganga on 30th April 2018, as alleged by the Respondent. He left them in the office intending to return on 2nd May 2018, and was surprised to be informed that he had handed them over to Barnard Oganga.

15. He stated that he made frantic efforts to resolve the matter internally, but they did not yield any results. He was forced to seek legal redress. He obtained a restraining order against the Respondent, but despite this, the Respondent defied the order and proceeded with the termination of his employment.

16. He further asserted that the Security Manager [Banard Oganga] had only slightly over two years' experience in corporate security, having been sourced directly from the Kenya Defence Forces in September 2015, compared to him, who had over 17 years' experience as a security professional, having served in different capacities in three corporate organisations: IBM, Safaricom, Nation Media, and the Directorate of Criminal Investigations.

The Respondent's Case.

17. The Respondent presented two witnesses to testify on its behalf, Jacob Brand [RW1] and Mayokun Aduwo [RW2].

18. RW1 adopted his witness statement dated 21st April 2022 as his evidence in chief. He stated that he is the Respondent's Senior Security Manager, based in South Africa.

19. He stated that the Claimant's security role as operations manager was limited to Kenya, Tanzania, and Mauritius, where the Respondent had physical offices. Countries which had clients but no physical offices were Madagascar, Uganda, and the Seychelles. The Respondent outsourced security in these countries where it did not have a physical presence and received regular security updates from its consultants. Whilst the updates would be sent to the Claimant, they were also sent directly to the Respondent's Senior Security Manager.

20. Benard Oganga, who was the Country Security Manager at the material time, was the Claimant's superior. The Claimant reported to Benard and required his approval for most tasks. Benard replaced Lucky Kasmbale, to whom the Claimant previously reported. The Claimant and Benard Oganga were not peers, as the Claimant stated. The Claimant only reported to him [RW2] briefly when Lucky Kambale, the former Country Manager, had left the Respondent's employment.

21. He asserted that the reporting structure presented in evidence by the Respondent under his list of documents dated 18th June 2018, is not a factual or accurate representation of the Respondent's reporting structure. The document was electronically generated by the Respondent's HR system, which does not clearly delineate hierarchy from both a practical and factual perspective.

22. The employees affected by the redundancy were issued with counselling services as well as job placement services at the Respondent's expense.

23. The concerns pertaining to the child maintenance case and the existing court orders against the Claimant were addressed privately within the Human Resources department and remained confidential. Neither he [Rw1] nor Mr. Benard Oganga was aware of the personal matter faced by the Claimant. It was not included in the redundancy review. The redundancy itself was not conducted with malicious intent, considering the circumstances.

24. On 30th April 2018, the Claimant handed over his laptop and iPad to Bernard, as well as other work-related items earlier. The handing over of the items was a testament to the Claimant's compliance with the redundancy notice. Having cleared with the Respondent, the role no longer existed. The injunctive order, which was served on the Respondent after 4 p.m., had in the circumstances been overtaken by events.

25. The Claimant's position was primarily responsible for security guidance and support to the Respondent's assignee population. When the number reduced significantly, there simply was not enough work. After the change of the Respondent's business model, the Claimant's services were superfluous as the Country Security Manager was capable of managing the Claimant's administrative tasks.

26. He asserted that the position the Claimant held no longer exists in the Company structure. As such, the prayer for reinstatement by the Claimant cannot be effected and enforced.

27. RW2, the Respondent's Human Resources Leader for North, East and West Africa, stated that the Claimant was employed under a contract of employment dated 10th April 2014 by IBM East Africa to serve as a Security Specialist. He carried out his duties in this role until his employment was terminated on 30th April 2018, due to redundancy.

28. The reasons for the Claimant's termination on the grounds of redundancy were fair and valid. The Respondent Company sells high-end IT products in East Africa. Its business model as regards sales was a combination of direct Sales activity carried out by the Respondent's direct sales team and the Respondent's reseller business partners. These business partners are independent distributors of the Respondent's products. The Respondent's sales model evolved over time, with business partners making and finalising majority of the product sales. The direct sellers, whom IBM employed, did most of the marketing, pre-sales, and sales activities.

29. In February 2018, the Respondent made the decision to change the business model so that the Business Partners would exclusively be responsible for marketing, pre-sales and selling activities, supported by a much smaller IBM team that enables and manages those Business partners. The new model, referred to as the Small Country Model, had the following advantages:

    a. Operational costs were lower as the Respondent required fewer direct sales staff;

    b. It streamlined the business and sales process as there was no longer a duplication of roles between the direct sales team and the business partners.

    c. The business partners had more contact with their clients and control of the sales, and in the circumstances, understood how best to reach out and market the Respondent's products to their clients.

30. The small country model's implementation led to the elimination of many direct sales roles, with only a small number of employees kept on to support the business partners technically.

31. The witness further stated that the Respondent carried out an evaluation of its operational requirements in its offices, and it was noted that the support services which had been essential to the larger employee base now needed to be reviewed due to the reduced workforce.

32. The Respondent's security office is one of the support roles which is required to ensure the safety of the Respondent's staff and assets. The Respondent had two security officers, including the Claimant, working in its office. These senior officials had previously served 300 employees. The employee base had now been reduced to only 180 employees. Consequently, the Respondent did not require two

senior security officials working in the Kenyan office. The IBM South Africa office has one security manager responsible for over 1,000 employees spread across six locations.

33. He further asserted that Claimant's role was largely to provide administrative support to the Country Security Manager, who was his superior. The Country Security Manager is responsible for managing the Respondent's security department and all crisis management exercises. Consequently, a decision was made to retain the Country Security Manager and abolish the Claimant's position. The two positions were not on the same level.

34. It is against this background that Pricilla, the Associate Human Resource Partner reporting to him, along with the Country Security Manager, Bernard Oganga, held a consultative meeting with the Claimant on 26th March 2018 to discuss the company's restructuring and the fact that his position would no longer be needed. The Claimant was encouraged and invited to apply for other opportunities within IBM. Unfortunately, the Claimant did not identify any suitable role. He stated that he understood the reasons for the redundancy as explained to him, and was offered additional time to consider the terms, but he accepted them immediately.

35. It was further stated that the redundancy did not only affect the Claimant's role. There were other positions: -

    a. Hybrid Cloud/Software Sales – 5 positions

    b. Hybrid Cloud/Software Operations – 1 position

    c. Airtel Account-Client Management – 2 positions

    d. Airtel Account-IT Specialist – 4 positions

    e. Marketing & Communication (portfolio Marketing) – 1 position

    f. Marketing & Communication (Corporate Citizenship) – 1 position

    g. Systems-Sales – 1 position

    h. Sales and Distribution – 3 positions

36. The Claimant was issued with a termination letter dated 1st March 2018 and was paid his terminal dues on 30th April 2018, which were computed as follows:

    a. Severance pay (one month's pay for every year of service) Kshs. 1,292.389.

    b. 3 months' pay in lieu of notice, Kshs. 958,785

    c. Pay for 9 days' accrued leave, Kshs. 132,734.43

    d. Salary for the month of April, Kshs. 319,595

37. The Claimant handed over his laptop, work material and his access codes and cards at around 11 am on 30th April 2018, and the Claimant's position ceased to exist on the same date. No suitable alternative position was available for him. The Claimant's services were superfluous as the Country Security Manager was capable of managing the Claimant's administrative tasks. The Claimant's position does not exist.

38. The witness further stated that the Claimant obtained an ex parte court order issued by the Employment and Labour Relations Court on 27th March 2018, which, among other things, restrained the Respondent from declaring him redundant, effective 30th April 2018. However, the said order was served on the Respondent Company on 30th March 2018 at 4.15 p.m. The Claimant had, however,

completed handing over in the morning. Having cleared with the Respondent, his role no longer existed. Events had overtaken the injunctive order.

39. The Claimant is not entitled to the orders sought, and the suit ought to be dismissed.

Analysis and Determination.

40. There is no dispute that at all material times, the Claimant was an employee of the Respondent; furthermore, her employment was terminated at the Respondent's initiative due to redundancy. The Claimant charged that the termination was not procedurally and substantively fair.

41. I have carefully considered the pleadings, witness statements [turned part of evidence in chief], the oral testimony and documentary evidence, and submissions by the parties, and distil the following two issues for determination:

    i. Whether the termination of the Claimant's employment was fair.

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

a. Whether the termination of the Claimant's employment was fair.

42. Undoubtedly, the Claimant's employment was ended due to redundancy. However, there is significant debate over whether it was both procedurally and substantively fair.

43. Redundancy is defined in Section 2 of the *Employment Act* and the *Labour Relations Act*, 2007, 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, where the services of an employee are superfluous, and the practices commonly known as abolition of office, job or occupation and loss of employment."

44. Termination due to redundancy falls under no-fault terminations. The employer typically initiates it without any fault or action on the part of the employee. In my view, this explains why the legislature considered it essential to include a section in the *Employment Act*, 2007, that provides detailed procedures and conditions the employer must follow and consider when contemplating and executing such a termination. Also see, Kenya Airways Limited v Aviation &Allied Workers Union Kenya & 3 Others [2014] eKLR, and Jane Khalechi v Oxford University Press EA Limited [2013] eKLR.

45. The Claimant's Counsel submitted that the termination of the Claimant's employment was unfair and pre-determined. The Respondent was expected under Section 40 of the *Employment Act* to demonstrate an objective criterion they used to arrive at the decision that he was the one to be let go on account of redundancy. They failed to. To support this submission on the duty that lay on the Respondent, Counsel placed reliance on the case of Kenya Airways Ltd [Supra], where Murgor JA, stated;

> "When evidence is considered, it is doubted whether the Appellant's outlined selection process was followed. I say this because, where an employer adopts a selection criterion, they must be able to show that the criteria was applied systematically and uniformly across board, and where the numbers involved are large, it must be structured and comparatively based.......... On whether LIFO was the sole criteria, I do not agree with the Industrial Court that LIFO is the sole mandatory criteria to be applied in redundancies. It is evident that section 40[1][c] requires the employers to apply all the selection criteria specified, with due regard to seniority in time, in time, skill, ability, and reliability of each employee. A sole

application of LIFO would no doubt be detrimental to any employer, as continuity and succession planning within the organization could be Jeopardized. As a consequence, I find that the appellant did not apply a fair selection procedure as required by section 40[1] of the Act, and in so doing unfairly terminated the contracts of 447 affected employees."

46. I have carefully considered the Respondent's Counsel's submissions and note that they do not sufficiently address the issue of selection criteria, upon which the Claimant solely bases his submission that the termination was procedurally unfair.

47. This Court has not lost sight of the fact that during the hearing, it emerged from the evidence presented by the Respondent's witnesses that at the relevant time, the Respondent employed two senior Security Officers in Kenya: the Claimant, a Security Specialist, and Bernard Oganga, who allegedly replaced Lucky Kambale, the Country Security Manager. It was further indicated that the Claimant was selected for termination due to redundancy, while Bernard Oganga was retained to perform the duties previously carried out by the Claimant.

48. It was not in dispute that both the Claimant and Barnard Oganga were the only security professionals who were based in Kenya, and that one of them was dismissed on an alleged redundancy basis. However, the following crucial questions remained highly contentious: Was Mr. Barnard Oganga ever appointed to replace Lucky Kambale as a Country Security Manager? Was Barnard, at that material time, a peer of the Claimant or his supervisor?

49. The Respondent argued that initially Barnard was not a supervisor of the Claimant; however, he became one when he was appointed to replace Lucky. This, the Claimant strongly denied. Given that the selection criterion was heavily contested, the Respondent needed to present sufficient and convincing evidence that Barnard was indeed appointed to that role. Inexplicably, although it was the easiest thing for an employer to do in the circumstances of the content station, the Respondent didn't provide evidence, including an appointment letter and even oral evidence with specifics regarding when the appointment occurred. I am persuaded that, as the Claimant contended, at the material times, Barnard was a security professional like the Claimant, serving in another department of the Respondent company, and as such, a peer of the Claimant.

50. The Respondent selected one of the two for termination due to redundancy. It had the obligation to demonstrate that this decision was based on an objective selection criterion, considering the factors outlined in section 40 of the *Employment Act*. All that, RW2 did was only make a bare assertion that the Respondent decided Barnard would handle the tasks the Claimant was handling, without venturing into details regarding the selection criteria and the factors considered.

51. It should be acknowledged that, according to the Claimant's evidence regarding his length of service with the Respondent, in comparison to that of Barnard, the principles of LIFO (last In, First Out), and his cumulative experience, could have influenced the outcome in his favour. This heightened the essence of a detailed explanation on the criteria, but which the Respondent didn't give.

52. The Claimant claimed that after his efforts to persuade the Respondent to abandon their plan to effect the redundancy notice—because he considered the process to be improperly initiated—failed, he was forced to seek redress in court. Awaiting the hearing and the determination of an application he filed, the Court issued an injunctive order restraining the implementation of the notice. The Respondent does not contest that the order was issued and that it was injunctive. However, they argued strongly that although the Claimant served the order on his last day of work, it was served on the Respondent at around 4:15 pm. By that time, the Claimant had already cleared with the Respondent in the morning and was therefore no longer their employee. Events had overtaken the order.

53. That, in the circumstances, the order could not serve any useful purpose, the Respondent's Counsel placed reliance on the case of Habiba Ali Mursal & 4 Others v Mariam Noor Abdi [2018] eKLR.

54. The Claimant contended that, contrary to the Respondent's assertion, he didn't clear with them on the 30th April 2018. He didn't hand over any of the properties of the Respondent, including the laptop and the iPad, to Barnard Oganga. With the order in his possession, he left the item in his office, looking forward to continuing work on May 2, 2018.

55. However, in his evidence under cross-examination, RW2 explicitly admitted that, according to the alleged handover notes, Barnard received the assets from Francis, who handed them over on behalf of the Claimant. With this grave positional contradiction, I can only reasonably conclude that the Respondent was not candid on the matter of handing over. The Claimant's position persuades me.

56. Though the working hours for the Respondent's employees were between 9.00 am and 5:00 PM, per RW2's evidence, the Claimant was logged off at 11:30 am. The Respondent didn't present any evidence extracted from the system to demonstrate that the Claimant was logged off at that time or at any time on 30 April 2018.

57. The order having been served within the working hours of the last day, it was not open for the Respondent to just decide that the same had been overtaken by events. Any reasonable employer in the circumstances would move to court with an application for discharge of the temporary injunctive order and or for further directions. They didn't. They deliberately made conclusions on their own, which only the court that issued the order could make. It is because of this that I conclude that the implementation of the redundancy notice was illegal and unfair.

58. For the foregoing premises, I find that the termination of the Claimant's employment on account of redundancy was substantively unfair.

(b) Whether the Claimant is entitled to the reliefs sought.

59. Having held that the Claimant's employment was unfairly terminated, I now turn to consider the matter of the reliefs sought.

60. The Claimant only seeks damages for unfair termination, and submits that an award of twelve (12) months' gross salary as compensation would be sufficient.

61. The Respondent submits that the Claimant is not entitled to an award of compensation equivalent to 12 months' gross salary as the termination of his employment was both substantively and procedurally fair.

62. Under Section 49 (1) (c) of the *Employment Act* 2007, this Court is granted the authority to award compensatory relief to an employee who has successfully challenged the employer's decision to terminate their employment on the ground that it was unfair. However, it is important to note that the exercise of this power is discretionary and depends on the circumstances of each case.

63. I have carefully considered how the Claimant's employment was terminated and to be specific with non-conformity with the dictates of procedural and substantive fairness in matters, termination of employment on grounds of redundancy, therefore ignorance of the fact that as the termination was under the category of no-fault terminations absolute fairness was required; the length of his service; and that the termination was not a result of his fault, and hold that he is entitled to the compensatory relief, six (6) months' gross salary.

64. The Claimant sought that this Court find and declare that the Respondents were in contempt of the Court order. No doubt, this Court is not the proper forum to handle the contempt matter, considering the manner in which it has been presented and the timing.

65. Civil contempt proceedings possess a distinct procedural framework. These are generally commenced through a Notice of Motion application. Upon the contempt being established, the proceedings may conclude with the respondent's commitment to civil detention and/or the imposition of a fine, subsequent to the opportunity granted to the contemnor(s) to provide a response.

66. Since I am unable to fathom how the Claimant thought the above-mentioned process could be infused into the main claim herein for a contemporaneous determination, I decline to grant the declaratory order and the allied order of damages sought.

67. In the upshot, Judgment is hereby entered for the Claimant in the following terms;

    a. A declaration that the termination of the Claimant's employment on account of redundancy was unfair.

    b. Compensation for unfair termination pursuant to Section 49[1][c] of the *Employment Act*, KShs, 1,917,570.

    c. Interest on (b) above at court rates from the date of this Judgment until payment in full.

    d. The Respondent shall bear the costs of this suit.

READ, SIGNED, AND DELIVERED VIRTUALLY IN MOMBASA ON 17TH JULY, 2025.

OCHARO KEBIRA

JUDGE