



**Nyamao v Nestle Equatorial African Region Limited (Cause  
328 of 2015) [2024] KEELRC 65 (KLR) (25 January 2024) (Judgment)**

Neutral citation: [2024] KEELRC 65 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 328 OF 2015  
MA ONYANGO, J  
JANUARY 25, 2024**

**BETWEEN**

**DOUGHLAS ANDAI NYAMAO ..... CLAIMANT**

**AND**

**NESTLE EQUATORIAL AFRICAN REGION LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The Claimant was employed by the Respondent in October 2008 as a Service Desk Analyst reporting to the Globe/IS/IT Manager. By letter dated 16<sup>th</sup> February, 2009 the Claimant was confirmed as Help Desk Analyst. The Claimant was thereafter promoted to Customer Care-Lead on 1<sup>st</sup> June, 2011.
2. By letter dated 15<sup>th</sup> February 2015 the Claimant was notified of the intention to declare him redundant. Prior to issuing the Claimant with the redundancy notification, the Respondent held a meeting dubbed “Tuongee” which was attended by all staff including the Claimant during which the Respondent informed the employees of the intended redundancy.
3. By letter dated 8<sup>th</sup> January, 2015 the Respondent notified the Provincial Labour Officer Nairobi of the intended redundancy of 23 employees in which it set out the termination benefits to be paid to the employees declared redundant as follows:-
  1. Redundancy notice of one month with effect from date of notice, i.e 15<sup>th</sup> January, 2015.
  2. One month salary in lieu of notice
  3. Applicable salary as at the last date of work
  4. Accrued leave days to-date
  5. 1.5 months’ severance pay for each completed year of service with effect from date of employment



6. Pro-rated 13<sup>th</sup> Month's pay
  7. Pension contributions as per the Retirement Benefits Authority Regulations
  8. Any payments that may have been accrued as at the last date of work
4. The reasons given in both the notification to the Claimant and the Ministry of Labour was that the Respondent was restructuring due to deteriorating profitability.
  5. The Claimant was by email communication dated Friday 16<sup>th</sup> January, 2015 invited to attend consultative meeting on Monday or Tuesday with the compensation to discuss ways of mitigating the impact of his redundancy.
  6. By letter dated 19<sup>th</sup> January, 2015 the Claimant was given a breakdown of the terminal benefits due to him to include:-
    1. Redundancy notice of one month with effect from date of notice, i.e 15<sup>th</sup> January, 2015.
    2. One month salary in lieu of notice
    3. Applicable salary as at the last date of work
    4. Accrued leave days to-date
    5. 1.5 months' severance pay for each completed year of service with effect from date of employment
    6. Pro-rated 13<sup>th</sup> Month's pay
    7. Medical Benefits continuation up until April 30, 2015
    8. Job search and transition support
    9. Pension contributions as per the Retirement Benefits Authority Regulations
    10. Any payments that may have been accrued as at the last date of work
  7. Via email communication on 3<sup>rd</sup> February, 2015 the Claimant requested that the redundancy package be enhanced as follows:
    1. 4 months for every year worked (from day of hiring, I have worked a total of 6 years 3 months) medical cover till end of 2015
    2. Medical cover till end of 2015
    3. Full loan cover (as Nestle EAR limited acted as guarantor)
    4. 1-year life cover
    5. Payment of bonus for year ending 2014
    6. 6 months' severance pay
    7. 1 month's salary paid in lieu
    8. Pension contributions as per the retirement benefits authority regulations
    9. Nestle should settle statutory taxes on the final package



8. The Respondents replied to the Claimant's email on the same date informing the Claimant that following extensive deliberations it had been confirmed that there would be no change to the severance package.
9. By letter dated 16<sup>th</sup> February, 2015 the Claimant was informed of Confirmation of his redundancy. The letter referred to discussions held on 16<sup>th</sup> January and a meeting held on 16<sup>th</sup> February, 2015.
10. In this Statement of Claim dated 3<sup>rd</sup> March 2016 the Claimant avers that the redundancy was unprocedural and without notice and/or justification. He further avers that the redundancy was effected maliciously and gives the particulars of malice as follows:-  
 paragraph a-f of paragraph 6 of the claim.
  - a. Purporting to declare the Claimant redundant without following the requirements of Section 40 of the *Employment Act*.
  - b. Maliciously putting up a notice in the media print about the Claimant's exit from its (Respondent's) organization when they knew or ought to have known that the facts contained therein were totally baseless, out of context and unjustified and intended to malign his name and reputation.
  - c. By the aforesaid Act, causing or bringing the Claimant's reputation to ridicule and/or embarrassment in the eyes of the public.
  - d. Failing to pay the Claimant his lawful dues relating to the days he worked in February, 2015.
  - e. Failing to make any reference to the Claimant.
  - f. Notifying the Claimant's bankers of his redundancy with ulterior motives without consulting him.
11. The Claimant avers that he suffered loss as a consequence of the unprocedural redundancy and sets out the particulars of loss as follows:-
  - i. Salary for the period worked in  
February 2015 (16 days)..... Kshs. 168,879.00
  - ii. 12 months' salary as compensation  
@ Kshs. 276,429/= per month.....Kshs.3 293 148.00
  - iii. Accrued Interest on the Pension Funds for the Period 2009-2015 as per the new scheme in force (Details to be supplied at the hearing hereof) and the Claimant claims damages
12. The Claimant prays for the following remedies:-
  - a. Reinstatement to his previous position/job without any loss of benefits.
  - b. Salary arrears for the entire period the Claimant has been out of employment.
  - c. In the alternative, an order for payment of the Claimant's lawful terminal dues as set out above at paragraph 7.
  - d. Maximum compensation of twelve months salary.
  - e. Costs of this suit with interest thereon.



13. The Respondent filed a Memorandum of Defence dated 15<sup>th</sup> July, 2015 in which it denies the averments in the Statement of Claim and states that the decision to declare redundancies was as a result of the overall deterioration in growth and profitability of its business in the various countries served by the Regional Office which necessitated restructuring to a leaner and more sustainable model.
14. The Respondent avers that the Customer Care Lead role occupied by the Claimant was declared redundant due to the full integration of new software that reduced the volume of tickets raised leading to his position becoming superfluous.
15. The Respondent avers that in an attempt to minimize the effect of the redundancy the Claimant together with the other employees impacted by the redundancy was advised to apply for vacancies within the Respondent's organization which arose as a result of merger of some roles. That the Claimant applied for 2 positions: Customer Facing Supply Chain Executive and Internal Auditor, but later withdrew his applications. That the positions were filled by other employees who had been declared redundant with the Claimant.
16. It is the Respondent's position that the Claimant's final dues were paid in accordance with section 40(1) of the *Employment Act*. The Claimant was paid 1.5 months' severance pay for each completed year, one-month's salary in lieu of notice, accrued leave days and pro-rated 13<sup>th</sup> Month's pay. It is the Respondent's averment that its severance package was substantively higher than the statutory minimum of 15 days' salary for every year worked.
17. The Respondent denies the allegations of malice and defamation and state that it went to great lengths to aid all impacted employees including offering counselling services by engaging Coach Development Institute of Africa who are professional career coaches to assist in preparing the employees for exit from the company.
18. The Respondent avers that the Claimant's allegations that it failed to conclusively communicate the reasons for redundancy is misleading as the Claimant was notified and was aware that his position was declared redundant as is evident from correspondence annexed to the Memorandum of Reply.
19. The Respondent denies that the Claimant was not paid for some days worked in February 2015 and states that the Claimant was paid in full up to 15<sup>th</sup> February, 2015 and is not entitled to any further payments.
20. The Respondent denies that the redundancy was unfair, unlawful or illegal and states that the same was lawfully carried out. It states that the pension benefits prayed for by the Claimant are directed at the wrong party as the Respondent did not administer the pension scheme.
21. The Respondent prays that the Claim be dismissed with cost.

### **Evidence**

22. At the hearing of the Claim on 23<sup>rd</sup> February and 13<sup>th</sup> June, 2022 both parties called witnesses who adopted their respective witness statements and were cross-examined. Parties thereafter filed and exchanged written submission.

### **Claimant's submissions**

23. In his submissions the Claimant sets out the issues for determination as follows:-
  - a. Whether the Respondent had valid reasons for declaring the Claimant redundant and whether it followed the right selection criteria enforcing the redundancy procedure.



- b. Whether Respondent followed the right procedure in declaring Claimant redundant.
  - c. Whether the Claimant is entitled to the prayers he is seeking Statement of Claim.
24. On the first issue the Claimant submits that he was ambushed with a letter dated 15<sup>th</sup> January, 2015 after which he was locked out of the company until 16<sup>th</sup> February, 2015 when he was issued with the letter of redundancy. It is submitted that the Respondent did not produce any notice, memo or minutes of redundancy meetings that was held with its employees or with the Claimant to discuss the redundancy. It is further submitted that the Respondent did not table before the court any evidence of restructuring or criteria for identification of staff to be declared redundant. That the Respondent filed to satisfy the legal basis for declaring the Claimant's position redundant.
25. On the 2<sup>nd</sup> issue, the Claimant again reiterated that he was ambushed by the letter dated 15<sup>th</sup> January, 2015 and was thereafter locked out of the office premises until 16<sup>th</sup> February, 2015 when he was issued with the letter of redundancy.
26. For emphasis the Claimant relied on the decisions on the:-
- A. CASE : Kenya Airways v Kenya Aviation Workers Union (K)  
C.A. No. 46 of 2013 -eKLR 2014  
  
The Honourable Court held that the Employer did not apply a fair selection procedure set out at Section 40(1) (c) of the *Employment Act* and consequently unlawfully terminated the Employment of the 447 employees. 6 months salary was awarded as compensation in addition to the terminal dues payable to the affected employees.
  - B. CASE Jerusha Nyambura Maingi v Sen-tech Ltd  
ELRC Cause No. 1710 of 2013  
  
The Claimant who was declared redundant unprocedurally was awarded compensation by the Court after it established that the Employer did not consider the principle of seniority before declaring the Employee redundant. The Court further held that the Employer had failed to follow the requirement of Section 40 of the *Employment Act* and as such the redundancy was unlawful and amounted to unfair termination.  
  
6 months compensation was awarded.
  - C. CASE Francis Kiragu v River cross Technologies Ltd  
ELRC Cause No. 1681 of 2013  
  
The Honourable Court found and held that an employee who loses his/her employment thru' redundancy was entitled to compensation when the notice to the labour office was neither issued or specified which employees were affected by the redundancy process.  
  
The notice to the Labour office is meant to ensure proper preparation for the affected employees as well as acting as a control measure in curbing unlawful termination clothed as redundancy.  
  
The Court found in favour of the Claimant and awarded him 4 months compensation in addition to the severance pay for the years worked.
27. The Claimant urged the court to award maximum compensation him as prayed.



28. Respondents submission for the Respondent the issues extracted for determination are whether the redundancy undertaken was lawful and justifies and whether the Claimant is entitled to the order sought.
29. Replying on the Court of Appeal decision in Kenya Airways limited v Aviation & Allied workers union Kenya & 3 others. The Respondent submitted that the redundancy was lawful and justified as it was “non-volitional” and “at no fault of the employee”. The Respondent submitted that it had demonstrated from its supplementary Bundle of documents which included the Respondent’s audited reports that it had experienced overall deterioration in growth and profitability in its business in various counties which had not improved after implementation of cost cutting measures such as freezing business travel market spend and non- essential expenditure, suspending all training, renegotiation contracts with suppliers and revisiting payment terms with suppliers.
30. It was submitted that the situation is confirmed by the fact that the Respondent has since ceased operations and commenced voluntary liquidation proceedings as is evident from documents at pages 1 to 3 of the Respondents’ further list and bundle of documents.
31. It was the Respondent’s submission that it held consultations with all its employees on 15<sup>th</sup> January, 2015 where they were informed of the intended redundancy and that on the same date the Claimant was issued with the letter of intention to declare him redundant.
32. The Respondent submitted that the Claimant’s allegations of ambush were not approved as the Claimant admitted at the to hearing that he received the notice of intended redundancy. For emphasis the Respondent relied on the decision of the court of Appeal in Barclays Bank of Kenya Ltd v Evans Ondusa Onzere and the Court of Appeal decisions in East Africa Portland Cement Company Ltd v Ismael Otieno Ondingo.
33. On the justification and procedural fairness of the redundancy the Respondent submitted that it had bona-fide reasons to effect the redundancy relying on the decision in Carol Atieno Osweta v Kenya Yungheng Plate Mkaig Ltd where the Court held that “the practicability of recommending reinstatement or re-engagement and the common law principle that there should be no order for specific performance in a contract for service except in very exceptional circumstance.”
34. It further relied on the decision in Kenya Airways Limited v Aviation & Allied workers Union Kenya & 30 Others where the court stated.

“The decision to declare redundancy has to be that of the employer. In the above News Zealand case of G.N. Hale & Son Ltd, it was held that so long as the employer genuinely believed that there was a redundancy situation, then any dismissal was justified, and it was not for the court, or the union, to substitute their business judgment with that of the employer.”
35. The Respondent submitted that it had demonstrated that it issued 2 redundancy notices to the Claimant on 15<sup>th</sup> January and 16<sup>th</sup> February, 2015 in which it stated the reasons for the redundancy of his position. That the selection criteria was also explained to the Claimant during the consultation period. The Respondent relied on the decision in Diana Wambui Irungu & 2 Others v Nettle Kenya Limited.
36. The Respondent submitted that it notified the Labour Office of the intended redundancies and further took steps to support the Claimant by helping him search for alternative positions both within and outside the organization. That the Claimant was fully paid his terminal dues. The Respondent urged



the Court to be guided by the decision in *George Buoro v Kinindia Assurance Company* when the court stated:

“...Under section 45 (2) (b) the reasons for termination is fair if it is based on the operational requirements of the employer....Considering the redundancy notices served on both the claimant and the labour officer, I am satisfied that the reasons for the redundancy herein was valid and fair in relation to the operational requirement of the respondent. The employer has demonstrated that the redundancy resulted from re-organization of the company in order to remain competitive in the market. The court cannot assume the role of an investigator to prove wrong what the business managers consider to be the best decision for their business to remain competitive.” (Emphasis added).

37. On the prayers sought, the Respondent submitted that the Claimant is not entitled to 12 months salary as compensation for unlawful termination as he had not proved that his employment was unlawfully terminated.
38. The Respondent further submitted that the Claimant was paid salary for all days worked and is not entitled to the prayer of 16 days worked in February, 2015.
39. The Claimant further submitted that the prayer for accrued interest in Pension Funds, apart from not having been proved, has been directed at the wrong person as the same can only be made against the administrator of the Pension Fund.
40. On the prayer for reinstatement the Respondent submitted that the same is not available to the Claimant by virtue of Section 12(3) of the *Employment and Labour Relations Court Act*. The Respondent relied on the decision in *Nyoturu v Telkom Kenya Limited*.
41. The Respondent further stated that it is under liquidation and cannot recruit any employees.
42. On the prayer for salary arrears for the entire period the Claimant has been out of employment the Respondent submitted that there is no basis in law for award of the same, relying on the decision in *Fardosa Mohamed Elmi v British Broadcasting Corporation*, ELRC Cause No. 615 of 2019.

### **Analysis and determination**

43. Having considered the pleadings, evidence and submission by the parties including the authorities cited, the issues arising for determination are whether the redundancy was lawful and if the Claimant is entitled to the orders sought.

44. Redundancy is provided under section 40(1) of the *Employment Act* as follows:-

40 Termination on account of redundancy

1. 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.
2. Subsection (1) shall not apply where an employee's services are terminated on account of insolvency as defined in Part VIII in which case that Part shall be applicable.
  3. The Minister may make rules requiring an employer employing a certain minimum number of employees or any group of employers to insure their employees against the risk of redundancy through an unemployment insurance scheme operated either under an established national insurance scheme established under written law or by any firm underwriting insurance business to be approved by the Minister.
45. It is not contested that the Respondent issued notice of the intended redundancy to Labour Office by letter dated 8<sup>th</sup> January, 2015. In the letter the Respondent specified the reasons for redundancy being that "Current deterioration of the profitability of the company has led management to rethink its operational model and to proceed with restricting exercise. The aim is to improve competitiveness and generate better growth and ensure sustainable profitability. The Company will therefore adopt a leaner structure, which will result in laying off the certain employees." Refer to Appendix 3 of Respondent's bundle of document at page 5 thereof.
46. The Respondent specified in the letter that it was declaring 23 positions redundant and attached a list of the positions. No. 13 in the list is the position of "CS Lead" which is the Claimant's position.
47. The Respondent thereafter called all employees for a meeting on 15<sup>th</sup> January, 2015 which the Claimant admitted that he attended. At the meeting the Respondent informed the employees of the intended redundancies. Immediately after the meeting the Respondent issued a letter of intended redundancy to the Claimant dated 15<sup>th</sup> January, 2015 titled "Re: Notice of Intended Redundancy on Account of Restructuring.
48. On the same day the Respondent issued to the Claimant a second letter titled "Management Representatives" which also advised the Claimant of the intended redundancy and explained the reasons for the same. The letter is reproduced below-

Nestle Equatorial African Region Ltd.

January 15, 2015

Douglas Nyamao

Nairobi



#### Management representatives

We wish to advise you that we are undertaking a restructuring study of the region in order to ensure that we have the optimal model in place to meet the needs of the marketplace. The implementation of a revised model or structure may result in the redundancy of positions within the EAR Regional Office. Impact may result in the redundancy of your position. You will receive today, notice of Intended redundancy as required by Kenyan Law. This is a start of a consultation process with you and we will have further consultations in the coming weeks. We have committed to on-going consultations with the potentially impacted employees as the study progresses. This is your chance to ask or state any question/comment or clarification.

We recognise that this period of uncertainty creates all kinds of anxieties for you and we wish to assist you in any way possible during this difficult time.

#### Employee's Questions/comments Or Clarification

Name: Signed

Name: Signed

Employee

Name Douglas Nyamo Signed

49. It is on record that the Claimant made a counter offer to the Respondent by email on 3<sup>rd</sup> February, 2015 after receiving the notice of redundancy but the same was not accepted.
50. It is also on record that the Claimant was informed of alternative positions available in the company and indeed applied for 2 positions, that of Customer Facing Supply Chain Executive and Internal auditor but later withdrew the applications. The Claimant was thereafter issued with a letter dated 16<sup>th</sup> February, 2015 titled confirmation of Redundancy which referred to a meeting of the same day and informed him that his redundancy was effective from 16<sup>th</sup> February, 2015. He was further informed of his gross package of Ksh.2,444,384.77 representing:
  - a. One month salary in lieu of notice
  - b. Accrued leave days to-date
  - c. 1.5 months' severance pay for each completed year of service with effect from date of employment
  - d. Pro-rated 13<sup>th</sup> Month's pay
  - e. Medical Benefits continuation up until April 30, 2015
  - f. Any payments that may have been accrued as at the last date of work.
51. The letter informed the Claimant that his pension contributions will be paid as per Retirement Benefits Authority Regulations and would be done under separate cover. The Claimant was also informed that bonus pay-out of 2014 which he was eligible for and would be made together with salary for February 2015.
52. The Claimant thereafter completed the clearance form which was signed by relevant offices. It is noteworthy that the clearance form and redundancy letter dated 16<sup>th</sup> February, 2015 are not signed by the Claimant. The earlier 2 letters of 15<sup>th</sup> January, 2015 are both signed by the Claimant in acknowledgment of receipt.



53. Evidence of payment of the terminal benefits to the Claimant are at pages 27,28,29 and 30 of the Respondent's bundle.
54. Redundancy is a prerogative of the employer. The only conditions that the Respondent must fulfil are those set out in section 40 of the [Employment Act](#) in respect of notification of intention to declare redundancy, indicating the extent and reasons thereof, and the payment of the terminal dues set out in the Act or in the terms of employment if more favourable.
55. It is my finding that the Respondent complied with the law and the redundancy was therefore lawful.

**Is the Claimant entitled to the prayers sought?**

56. The Claimant prayed for salary for February, 2015. This was paid as is evident from the payslip at page 28 and remittance advise at page 27 of the Respondent's bundle. It is therefore not payable, having already been paid.
57. The Client prayed for 12 months' salary as compensation. Having found that the redundancy was lawful, the Claimant is not entitled to compensation which is only payable to an employee who has been unfairly terminated.
58. The Claimant further prayed for reinstatement. This prayer was abandoned as it is not mentioned in the written submissions. All the same it is worth clarifying that the same would not be due for the fact that the redundancy was lawful and also due to the fact that the Respondent is under liquidation. It would further not be available to the Claimant due to the fact that the orders can only be granted within 3 years from the date of termination, which in this case, was on 16<sup>th</sup> February, 2015 almost 9 years ago.

**Conclusion**

59. In the end, I find that the Claimant has failed to prove his claim against the Respondent with the result that the same fails and is dismissed.
60. Each party shall bear its cost.

**DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 25<sup>TH</sup> DAY OF JANUARY 2024**

**MAUREEN ONYANGO**

**JUDGE**

