



REPUBLIC OF KENYA



**Kanyugo v Guru Nanak Ramgarhia Sikh Hospital (Cause E535 of 2022)
[2024] KEELRC 154 (KLR) (8 February 2024) (Judgment)**

Neutral citation: [2024] KEELRC 154 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E535 OF 2022
L NDOLO, J
FEBRUARY 8, 2024**

BETWEEN

ERIC NDERITU KANYUGO CLAIMANT

AND

GURU NANAK RAMGARHIA SIKH HOSPITAL RESPONDENT

JUDGMENT

Introduction

1. By his Memorandum of Claim dated 25th July 2022, the Claimant sued the Respondent for unlawful termination of employment. The Respondent filed a Statement of Defence dated 27th September 2022, to which the Claimant responded on 25th November 2022.
2. At the trial, the Claimant testified on his own behalf and the Respondent called its Administrator, Ravinder Singh. The parties also filed written submissions.

The Claimant's Case

3. The Claimant states that he was employed by the Respondent as an Internal Auditor, on a two-year contract, effective 1st September 2020. He earned a monthly salary of Kshs. 250,000.
4. The Claimant further states that on 26th August 2021, he received an email notifying him of a meeting with the Chief Operations Officer and the Senior Human Resource Officer, to be held on 27th August 2021 at 3.00 pm. The agenda of the meeting was not provided.
5. The Claimant avers that on 27th August 2021, the Chief Operations Officer, the Senior Human Resource Officer and the Human Resource Consultant informed him that the Respondent was declaring redundancies owing to the effect of the COVID-19 pandemic. The Claimant was issued with a termination letter giving him three months' notice effective 1st September 2021.



6. The Claimant faults the action taken by the Respondent on the following grounds:
 - a. The Claimant and the Labour Officer were not notified in writing of the intended redundancy;
 - b. The Claimant was not paid a one month's notice;
 - c. The Claimant was not paid severance pay;
 - d. There was no due regard to seniority in time, skill, ability and reliability of the Claimant who was affected by the redundancy;
 - e. Due process was thrown out of the window in the haste to dismiss the Claimant;
 - f. The Claimant was not afforded any opportunity to make representations.
7. The Claimant tabulates his claim as follows:
 - a. One month's salary in lieu of notice.....Kshs. 250,000
 - b. Leave pay for one year.....175,000
 - c. Service pay for one year.....125,000
 - d. 12 months' salary in compensation.....3,000,000
 - e. Costs plus interest

The Respondent's Case

8. In its Statement of Defence dated 27th September 2022, the Respondent admits having employed the Claimant as pleaded in the Memorandum of Claim. The Respondent further admits having issued the Claimant with a termination letter.
9. The Respondent avers that the Claimant was paid all his terminal dues amounting to Kshs. 255,526.65.
10. According to the Respondent, the Claimant did not have any pending leave days as he proceeded on leave from 10th November 2021 thus utilising all his leave days.
11. The Respondent maintains that the Claimant was paid severance pay as indicated on his payslip for the month of November.
12. The Respondent claims to have met all the conditions for termination under redundancy. In this regard, the Respondent states that a notice was issued to the County Labour Office on 25th August 2021, which was duly acknowledged. In addition, the Claimant was issued with a three months' notice on 27th August 2021.
13. Further, the Respondent avers that the Claimant was invited to a meeting where he was given an explanation as to how the decision was arrived at. According to the Respondent, the Claimant was given an opportunity to express his dissatisfaction, which was duly noted.
14. The Respondent states that the Claimant was the only employee in the Internal Audit Department and the rule on seniority in time stipulated under Section 40(1)(c) of the [Employment Act](#) was complied with.
15. The Respondent adds that the Internal Audit Department where the Claimant was working became redundant following a decision by the Board to engage external auditors on need basis.
16. The Respondent denies the Claimant's entire claim and asks the Court to dismiss it.



Findings and Determination

17. There are two (2) issues for determination in this case:
- a. Whether the termination of the Claimant's employment was lawful and fair;
 - b. Whether the Claimant is entitled to the remedies sought.

The Termination

18. On 27th August 2021, the Respondent wrote to the Claimant as follows:

“Dear Mr. Kanyugo,

Re: Termination of Employment on Account of Redundancy

In reference to above, the company is regretting to inform you that it's ending your employment contract due to redundancy of your job position. The company is contracting the services to external consultant and its operations and this would affect your current position as an Internal Auditor. Due to that change, the company has been compelled to declare your position redundant.

Kindly note that we have attempted to find alternative positions to fit you but we have been unable as other positions require skills, knowledge and experience not related to your position. In reference to your appointment letter and the employment law, the Hospital hereby gives you three months' notice effective 1st September 2021. Your Last working day will be 30th November 2021. You shall be paid your final dues as per the [Employment Act](#) at the end of your notice period as follows;

1. 15 Days for every completed year of service
2. Any accumulated unutilised leave days
3. Any other pay stipulated in your employment contract
4. Certificate of service under law Section (51) as per the contractual obligation upon clearance

In case of any clarification, you can reach out to the Human Resource Department. Finally, we take this opportunity to thank you for your good service to the Hospital and we wish you well in your future endeavours.

Yours faithfully,

Guru Nanak Ramgarhia Sikh Hospital

(signed)

Mr. Uthamkumar Menon

Chief Operating Officer”

19. From the foregoing, it is evident that the Claimant's employment was terminated on account of redundancy.



20. Section 2 of the *Employment Act* and the corresponding Section in the *Labour Relations Act* define redundancy as:

“the loss of employment, occupation, job or career by involuntary means through no fault of an 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.”

21. The law recognises redundancy as a legitimate mode of termination of employment but sets out a mandatory procedure to be observed by every employer declaring redundancy. This procedure is codified by Section 40 of the *Employment Act* as follows:

40.

(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 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 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;
 - e. 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
- f. 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.

22. The first 2 conditions under Section 40 require every employer declaring redundancy to issue a one-month notice of intention to the affected employee, their union (where applicable) and the local Labour Officer. By definition, this notice should set out the reasons for and the extent of the intended redundancy.

23. Established jurisprudence is to the effect that the redundancy notice under Section 40(1)(a) & (b) is separate and distinct from the termination notice provided under Section 40(1)(f) which may be paid off in cash.



24. In *Thomas De La Rue (K) Ltd v David Opondo Omutelema* [2013] eKLR the Court of Appeal stated as follows:

“It is quite clear to us that sections 40 (a) and 40 (b) provide for two different kinds of redundancy notifications depending on whether the employee is or is not a member of a trade union. Where the employee is a member of a union, the notification is to the union and the local labour officer at least one month before the effective redundancy date. Where the employee is not a member of the union, the notification must be in writing and to the employee and the local labour officer. Section 40 (b) does not stipulate the notice period as is the case in 40 (a), but in our view, a purposive reading and interpretation of the statute would mean the same notice period is required in both situations. We do not see any rational reason why the employee who is not a member of a union should be entitled to a shorter notice.”

25. In the subsequent decision in *Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others* [2014] eKLR Maraga JA (as he then was) rendered himself thus:

“The purpose of the notice under Section 40(1) (a) and (b) of the *Employment Act*, as is also provided for in....ILO Convention No. 158-Termination of Employment Convention, 1982, is to give the parties an opportunity to consider ‘measures to be taken to avert or to minimize the terminations and measures to mitigate the adverse effects of any terminations on the workers concerned such as finding alternative employment.’ The consultations are therefore meant to cause the parties to discuss and negotiate a way out of the intended redundancy, if possible, or the best way of implementing it if it is unavoidable.”

“In essence, consultation is an essential part of the redundancy process and ensures that there is substantive fairness. The employer should ensure that it carries out the process as fair as possible and that all mitigating factors are taken into consideration.”

26. The need for consultation as embedded in the redundancy notification process has been affirmed in subsequent decisions of the Court of Appeal. In *The German School Society v Helga Obany* (Civil Appeal No Nai 325 of 2018 consolidated with No 342 of 2018) it was held that:

“In essence, consultation is an essential part of the redundancy process and ensures that there is substantive fairness. The employer should ensure that it carries out the process as fair as possible and that all mitigating factors are taken into consideration.”

27. In the present case, the only notice issued to the Claimant was a termination notice. Additionally, the notice to the Labour Office was issued two days prior to the termination notice. It is therefore evident that the redundancy notice required under Section 40(1)(a) & (b) was not issued.

28. Regarding the selection criteria, the Respondent’s case is that the Internal Audit Department where the Claimant worked was phased out with its functions being outsourced from an external consultant. The Court found no reason to fault the Respondent on this account. There is also evidence that the Claimant was paid all his dues.

29. However, for a redundancy to pass the lawfulness and fairness test, all the conditions under Section 40(1) of the *Employment Act* must be satisfied. The Respondent missed the mark by failing to issue proper redundancy notices to the Claimant and the Labour Officer. For this reason, the resultant termination was unfair within the meaning of Section 45 of the *Act*.



Remedies

30. I therefore award the Claimant three (3) months' salary in compensation for unlawful and unfair termination of employment. In arriving at this award, I have considered the Claimant's length of service moderated by the fact that the Respondent complied with some of the conditions set by Section 40(1) of the *Employment Act*.
31. The claims for notice pay, leave pay and service pay were abandoned in the course of the trial.
32. Finally, I enter judgment in favour of the Claimant in the sum of Kshs. 750,000 in compensation for unlawful and unfair termination of employment.
33. This amount will attract interest at court rates from the date of judgment until payment in full.
34. The Claimant will have the costs of the case.
35. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 8TH DAY OF FEBRUARY 2024

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JUDGE

Appearance:

Mr. Kaburu for the Claimant

Mr. Kanyuira for the Respondent

