



**Kithunzi v Intra Africa Assurance Company Limited (Cause
869 of 2019) [2024] KEELRC 508 (KLR) (7 March 2024) (Judgment)**

Neutral citation: [2024] KEELRC 508 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 869 OF 2019
B ONGAYA, J
MARCH 7, 2024**

BETWEEN

THOMAS KITHUNZI CLAIMANT

AND

INTRA AFRICA ASSURANCE COMPANY LIMITED RESPONDENT

JUDGMENT

1. The claimant filed the statement of claim on 19.12.2019 through Kipgeno & Associates Advocates. The claimant prayed for judgment against the respondent for:
 - a. A declaration that the Respondent's termination of the claimant's employment on account of discrimination based on his ethnic or tribal origin was a violation of the claimant's rights as envisaged in section 5(3) of the *Employment Act*, 2007.
 - b. A declaration that the Respondent's termination of the claimant's employment on account of discrimination based on his ethnic or tribal origin was a violation of the claimant's constitutional rights as stipulated in Article 27(5) of *the Constitution* of Kenya.
 - c. A declaration that the Respondent's termination of the claimant's employment was in breach of the claimant's contract of employment.
 - d. A declaration that the claimant is entitled to be compensated for;
 - i. Violation of his constitutional rights as envisaged under Article 23(3) of *the Constitution*.
 - ii. Violation of his employment, legal and contractual rights.
 - e. A declaration that the termination of the claimant's employment was in violation of section 40 among other sections of the *Employment Act*, 2007 and was therefore unlawful and unfair.



- f. An order that the respondent do immediately pay the claimant his entitlements in the sum of Kshs. 18,523,962/= as particularized in paragraph 10 of the statement of claim.
 - g. Without prejudice to prayer (f) above and or in the alternative, the respondent be ordered to pay the claimant compensation equivalent to 12 month's gross earnings and benefits in sum of Kshs. 2,058,218/= on accordance with section 49(1)(c) of the Employment Act.
 - h. Punitive and exemplary damages for unlawful termination.
 - i. Costs of the suit
 - j. Interest on the amount to be awarded at court rates.
 - k. Any other relief or order the honourable court may deem fit and just to grant
2. The claimant's case was that the respondent employed him between 9th December 2013 and 25th May 2018. He was employed as an Assistant Business Development Manager and was later on 23rd February, 2013 deployed to work as a Branch Manager based at Lyric House in Central Business District (CBD) branch vide a letter dated 17th July, 2014.
 3. That on 25th April 2018, the Respondent gave a notice of purported intended redundancies resulting from purported restructuring without any justifiable cause or reason.
 4. That on the same day the claimant received a letter terminating his employment with immediate effect.
 5. That his termination was based on malice, bad faith and in breach of statutory duty which particulars he highlighted in his statement of claim.
 6. That another employee was recruited in a position similar to the one he held and others redeployed.
 7. That he was discriminated upon by the senior management staff whom he pointed out as Mr. Nims Chemaio Wekesa the Business Development Manager and Mr. Moses Murungi Kirima the Underwriting Manager and the Acting Principal Officer (who was also the respondent's witness).
 8. That the respondent company condoned the actions of the above employees to the detriment of the claimant.
 9. That the claimant has suffered loss and damage as follows:
 - a. Loss of earnings for 9 years totalling to Kshs. 9,525,600/=.
 - b. Loss of company's pension contribution for 9 years totalling to Kshs.857,412/=.
 - c. Loss of medical cover benefits for self and family for 9 years totalling to Kshs.7,290,00/=.
 - d. Loss of leave allowance benefit for 9 years totalling to Kshs. 595,350/=.
 - e. Loss of company's NSSF contributions for 9 years totalling to Kshs. 21,600/=.
 - f. Loss of communication/airtime allowance for 9 years totalling to Kshs.234,000/=.
 10. The claimant pleaded that he was wrongfully dismissed contrary to the Employment Act.
 11. The claimant filed his witness statement reiterating the issues in the statement of claim.
 12. In his statement, he gave a list of the members working for the respondent and insinuated that it constituted of a dominant ethnic community hence discriminatory.



13. The respondent filed its response to statement of claim dated 4th February 2022 and through Danlex Partners (Advocates and ADR).
14. In the response it confirmed that the claimant was its employee between 9th December 2013 and 25th May 2018.
15. Further, during the employment period, the claimant performed below the set target expectations and had several cases of indiscipline.
16. The respondent denied the allegations of malice, bad faith and breach of statutory duty as particularized by the claimant in the statement of claim in paragraph 7(a) – 7(e) namely failing to notify and give clear reasons or criterion and extent of the intended redundancy; failure to comply with statutory selection criteria of seniority in time, skills, ability, reliability in the class of affected employees; after redundancy continuing to employ further staff; abolishing only one position of the several positions of branch managers; and, recruiting one Frank Njenga to take up the claimant’s position.
17. The respondent pleaded that it terminated the claimant on account of redundancy and complied with all the conditions of section 40 of the [Employment Act](#) in the following manner;
 - i. The claimant was duly informed and made aware of the Respondent’s restructuring of its internal processes and design through email on 6th March 2018.
 - ii. The respondent issued a notice to the claimant personally, in writing of intended redundancy arising from the aforesaid restructuring through a letter dated 25th April, 2018.
 - iii. The respondent notified the labour officer in writing of the redundancy of the claimant through a letter dated 25th April 2018. Through a letter from the Ministry of East Africa, labour and Social Protection dated 7th May 2018 the labour commissioner acknowledged receipt of the notice.
 - iv. A letter of termination on account of the redundancy dated 25th May 2018 was thereafter duly issued to the claimant and he signed it on the same day.
 - v. The claimant was duly paid all his terminal dues through a cheque dated 25th May 2018 for Kshs. 275,855/= which he signed as a way of acknowledging receipt.
 - vi. The aforesaid terminal dues included severance pay at the rate of 15 days’ pay for each completed year of service, leave days accrued but not paid as at 25th May 2018 and one month’s salary in lieu of notice as stipulated under section 40 (b), (c) and (d) of the [Employment Act](#) 2007.
 - vii. The claimant signed a certificate of discharge acknowledging the aforesaid sum of Kshs. 275,855/= as full and final settlement of his terminal dues and declaring that he had no further claim against the Respondent in respect of his employment.
 - viii. The claimant was issued with a certificate of service dated 25th May 2018.
18. The respondent denied the claimant’s allegations of wrongful and unprocedural dismissal as unfounded and the claimant not entitled to any of the reliefs sought. The respondent prayed that the suit be dismissed with costs
19. The parties filed their respective submissions. The court has considered the parties’ respective cases and makes findings as follows.



20. To answer the 1st issue, there is no dispute that parties were in a contract of service which was terminated by the letter of termination on account of redundancy dated 25.05.2018.
21. To answer the 2nd issue for determination the Court returns that the respondent complied with the redundancy procedure in section 40 of the [Employment Act](#), 2007. The claimant received the redundancy notice dated 25.04.2018 by signing on the same date in acknowledgment of receipt. The letter invited consultations over the subsequent 30-days. The reason for the redundancy was staff rationalization exercise in line with the respondent's 2017 – 2021 strategic plan and the adoption of a new operating model approved by the Board of Directors. It was stated that the process would entail staff redeployment to alternative workstations, assignment to new roles, jobs falling away and the need to manage future talent. It was also to manage the respondent's operational environment for continued profitability and longevity. The letter was categorical that the claimant was one of the employees considered for redundancy and a consultation schedule would be provided for staff views to be obtained. The redundancy notice was attached to the letter dated 25.04.2018 addressed to the Cabinet Secretary for Labour said to be dated on the same 25.04.2018. By letter dated 07.05.2018 the Labour Commissioner acknowledged receipt of the letter. By that evidence the Court finds that the respondent substantially complied with the requirement of the 30 days' notices to the employee and labour officer per section 40 of the Act. The notices sufficiently explained the extent and reasons for the termination. The evidence is that during the service, the claimant had received concerns about his performance and failure to meet targets. In that consideration and further consideration that the claimant alleged there were other Branch Managers, he offered no particulars and evidence about such branches and the persons similarly employed as Branch Managers. It is therefore difficult to tell if his selection was unfair per selection criteria in section 40 of the Act. The Court has considered the termination letter, which the claimant signed. It stated in part, "Please signify your acceptance of these terms by signing and returning the duplicate copy of this letter to the office of the undersigned" The claimant signed the letter on 25.05.2018. The Court finds that he is bound as accepting the terms of the termination. The claimant appears not to have raised any serious objections or alternative views by way of consultations as were invited in the redundancy notice letter of 25.04.2018.
22. To answer the 4th issue, the Court finds that the redundancy was genuine in terms of section 43 of the [Employment Act](#). The claimant confirmed in his testimony that several other employees had around the same season left employment and while alleging they left voluntarily, he had no basis for such assertion. The redundancy notice was elaborate as to the reasons for the redundancy earlier enumerated in this judgment. After receiving the notice, the claimant by way of grievance or objection never questioned the reasons. On a balance of probability, there is no material for the Court to doubt the fairness and validity of the reasons as passing the tests per sections 45 and 43 of the Act accordingly.
23. The Court therefore returns that the termination by way of redundancy was not unfair in substance and procedure and respondent's submissions are upheld in that regard.
24. To answer the 4th issue, the Court returns that the claimant has failed to establish discrimination as alleged. The claimant says another person was employed in his place after the redundancy and the person was from a dominant ethnicity. In his testimony, he confirmed that other than his pleaded word, he had no written or other evidence of that allegation. He also pleaded that employees who lost employment were discrimately chosen as those from a dominant community were retained. In his cross-examination, he stated that he had not reported or expressed a grievance in that regard while in employment or even after he received the redundancy notice. The Court finds that the claimant did not plead particulars of ethnicity of himself and the respondent's employees he alleged were the dominant ethnicity and, he provided no evidence in that regard. Discrimination because of ethnicity must therefore fail as not established at all.



25. The 5th issue is on remedies. The claimant claimed payments with respect to 9-years of alleged unexpired tenure. The claimant established no basis for the claim. He was terminated on grounds of redundancy but he offered no good cause attributable to the respondent that may have barred him from gainfully engaging after the termination. His evidence was that as at the hearing of the suit on 02.11.2023 he rendered insurance services; clearly confirming he had gainfully moved on. The claims in that regard will fail. He has failed to show the termination was unfair and breach of rights and freedoms as alleged was not established at all. The alleged discrimination was not established at all. The suit is liable to dismissal with costs.

In conclusion judgment is hereby entered for the respondent against the claimant for dismissal of the suit with costs.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS THURSDAY 7TH MARCH 2024.

BYRAM ONGAYA

PRINCIPAL JUDGE

