



**Kenya Private Universities Workers Union v Catholic University of Eastern Africa
(Cause 805 of 2017) [2024] KEELRC 956 (KLR) (25 April 2024) (Judgment)**

Neutral citation: [2024] KEELRC 956 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 805 OF 2017
MA ONYANGO, J
APRIL 25, 2024**

BETWEEN
KENYA PRIVATE UNIVERSITIES WORKERS UNION CLAIMANT
AND
CATHOLIC UNIVERSITY OF EASTERN AFRICA RESPONDENT

JUDGMENT

1. The Claimant is a trade union registered under the [Labour Relations Act](#) to represent non-teaching staff of private universities.
2. The Respondent is a private University whose unionisable employees the Claimant has recruited into its membership.
3. By a Memorandum of Claim dated 2nd May, 2017 as Amended on 22nd November 2018, the Claimant seeks the following orders on behalf of its members herein after referred to as the Grievants –
 4. 1 That, the Honourable court deem fit and find the action of the Respondent of refusal to allow the Claimant to either access her members or potential member to be null and void and order the Respondent to allow the Claimant to access her premises by meeting her embers and potential members as stipulated in our laws.
 4. 2 That the Respondent is ordered to comply with Section 48 of the Labour Relation Act, 2007 by way of deducting union dues and remitting the same in the Claimant’s gazette Accounts.
4. The issues in dispute as set out in the Amended Memorandum of Claim are:
 - a) Refusal by the Respondent to allow the Claimant herein to access both her members and potential members, to deduct and remit union dues and victimization of the Claimant members on account of Trade Union Affiliation/Activities.



- b) Victimization of Claimant Members vide unlawful termination of employment contracts of some of the Claimant Union Members vide unlawful unfair Unprocedural and unconstitutional Redundancy.
5. It is the Claimants case that following failure of the Respondent to allow the union access to its premises for purposes of recruitment of members and other union activities as requested in its numerous letters, the Claimant was compelled to report a trade dispute to the Cabinet Secretary responsible for Labour matters under Section 62 of the *Labour Relations Act*.
6. The Minister appointed a conciliator, Mr. G.A. Omondi, who was unable to reconcile the parties and issued a Certificate of Unresolved Dispute under section 67 of the Act. The certificate paved the way for filing of the instant suit.
7. The members of the Claimant on behalf of whom this suit is filed are:
1. Mary Mwendu Mutune
 2. Brigit Ochiche Obara
 3. Peter Muigai Wairigu
 4. Peter Mwangi Kariuki
 5. Janet Mongina Otoigo
 6. Antony Njoroge
 7. Mercy Wanjala Mwasi
 8. Loyce Karioko Njoka
 9. Lilian Achieng Osaso
 10. Martin Kinyaenje Kibe
 11. Ms. Florence Wakeya
 12. Mr. Peter Kadimo Ongwago
 13. Ms. Diana Dede
 14. Mr. George Wagaba Barasa
 15. Mr. Raphael Gugo Masitsa
 16. Pius Mayenga
8. The Claimant avers that the said members were irregularly declared redundant due to their union activities. That this is victimization. That the redundancy was unlawful and unprocedural.
9. It is the Claimants case that when it received the notification of redundancy dated 19th September, 2017 it wrote to the Respondent to furnish it with particulars. That the Respondent responded on 28th September, 2017 seeking more time to furnish the information requested.
10. The Claimant avers that although the Respondent asked for 7 days to supply the information no information was supplied to the Claimant. That instead, the Claimant met the Respondent's representatives in November, 2017 and it was agreed that another meeting was necessary. However,



the Respondent did not invite the Claimant for another meeting. Instead, it went ahead with the redundancies.

11. It is the Claimant's position that the redundancies violated Sections 40,41,43,44,45 and 46 of the *Employment Act* and Article 47 of *the Constitution*.
12. In response to the Amended Memorandum of Claim the Respondent filed a Response to the Amended Memorandum of Claim dated 16th September, 2019, in which it denied that it refused to allow the Claimant Union to access its members, or to deduct and remit union dues as alleged by the Claimant
13. It further denied that it victimized the Claimant's members on account of trade union affiliation or activities as alleged in the Amended Memorandum of Claim.
14. The Respondent stated that it is a private university with its main campus located in Langata, Nairobi County with a satellite Campus in Guba, Eldoret. That it endeavors to promote morally upright leaders based on the intellectual tradition of the Catholic Church.
15. The Respondent stated that the redundancies it carried out were informed by the University's plans for extensive restructuring. That this was due to funding reduction and declining student enrolment which led to great financial constraints. That the restructuring was designed to make the University more stable and sustainable and entailed closure of two campuses in Kisumu and Nairobi City Centre.
16. It was the Respondent's position that it complied with the law in carrying out the redundancies by notifying the Claimant and the Labour Commissioner in Nairobi with copies to County Labour Officers in Uasin Gishu.
17. The Respondent averred that subsequent to issuance of the redundancy notices it engaged the Claimant union which was kept abreast with the redundancy progress through letters and meetings held within the Respondent's premises.
18. It was the Respondent's position that it endeavored to the best of its ability to respond to the numerous requests and demands by the Claimant to the extent that was practical in the circumstances of the unfolding redundancy exercise.
19. It was the Respondent's position that the Claimant's resistance to the redundancy was predicated upon the wrong assumption that the redundancy targeted its members, which was not the case.
20. It was the Respondent's position that communication of the impending redundancy to its employees was done in a humane manner and the allegations of discrimination, humiliation and victimization were unfounded. That the letter of termination on account of redundancy issued to the affected employees detailed the redundancy package and the demand for 6 months compensation by the Claimant has no basis.
21. The Respondent prayed that the Claim be dismissed with costs.
22. The suit was disposed of by way of written submissions.

Claimant's Submissions

23. The Claimant submitted that the redundancy by the Respondent did not meet the Principles that have been set in various judicial decisions. It submitted that it was never served with any list of members of the union affected by the redundancy.



24. The Claimant reiterated that no formula was used in the identification of employees to be declared redundant the process was therefore unprocedural.
25. The Claimant submitted that while the Respondent was declaring its members redundant it was recruiting other staff. The Claimant relied on the decision in the case of *Gevisihons Mukhutsi Obonyo v DSTV Air and Sea Limited* [2018] eKLR where the court held;

The other issues contested by the Claimant is the selection criteria. The Claimant alleges that he was discriminately selected while the respondent avers that the Claimant was only one of the employees declared redundant. In the very elaborate statement of DORCAS MUNYI filed with the claim, she does not state the losses (or profits) by each department to prove that the Claimant's department incurred the losses. The notice to the Labour Officer gives the name of the Claimant, a General Manager, an Accounts Assistant in Finance Department. As is provided in Section 40(1)(c) comparison or selection criteria is for the same class of employees affected. A General Manager and an Accounts Assistant in a different department do not fall in the same class.

I find that although the Claimant questioned the criteria of selection, the respondent failed to satisfactorily demonstrate that the selection was rational.

For the foregoing reasons I find that the respondent failed to comply with the redundancy procedure set out under Section 40(a) of the *Employment Act* with the result that the redundancy of the Claimant was unprocedural and therefore unfair”

26. The Claimant submitted that the redundancy was a gimmick intended to replace its members. For emphasis it relied on the decision in *Josphat Cosmas Onyango v Tribe Hotel Limited* [2017] eKLR where the Court stated:

Courts have held that employers have the prerogative to determine the structures of their businesses and therefore make positions redundant. Positions and not employees, become redundant. When the position becomes redundant, the employee can be re-deployed, which means the employee is given another job, or the employee is retrenched, meaning the employee loses the job altogether. Reorganization is not defined in our law books. Dictionary describe reorganization to include significant modification made to legal, ownership, or operational structures of a company to make it more profitable. Although not expressly defined under the *Employment Act* 2007, reorganization is contemplated by section 45[2] as a fair termination reason. The provision refers to Operational requirements of the employer. ... No records were shared to convince this Court that indeed there were consultations within the respondent's business to ascertain the purpose and the need for a reorganization resulting in some positions being unnecessary thus the termination of the Claimant as the only persons affected.

27. It was submitted that there was no proof of changes as the Claimant did not exhibit the old and new structures. That there was further no proof of reduced funding or declining student enrollment. For emphasis the Claimant cited and relied on the decision in *Fatma Ali Dabaso v First Community Bank Limited* where the Court held:

“The notices under this provision are not mere for information. 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.”

28. On remedies the Claimant submitted that the Grievants were entitled to payment as prayed in the claim.

Respondent’s submissions

29. The Respondent submitted that it paid the Claimant’s members all their dues save for November 2017 salary for Janet Mongina Otoigo (Ksh. 28,243.00) and Duncan Murono Waluchio (Ksh.47,266.00).
30. The Respondent submitted that the Claimant had not proved its averments relying on the decision in *Raila Amolo Odinga & Another v IEBC & 2 Others* where the Supreme Court stated:
- (132) Though the legal evidential burden of establishing the facts and contentions which will support a party’s case is static and remains constant through a trial with the plaintiff, however, depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting and its position at any time is determined by answering the question as to who would lose if no further evidence were introduced.
31. On the validity of the redundancy the Respondent submitted that its reasons for carrying out redundancies fell within the definition of the redundancy in the *Employment Act* as demonstrated in the witness statement of Erick Omondi and replying affidavit of Dr. Pius Male Ssentumbwe.
32. The Respondent further submitted that it had demonstrated that it subjected all employees to the same process and considerations in the selection process for both members and non-members of the Claimant.
33. It submitted that the notices of redundancy met the requirements set out in law as interpreted by this Court in *Nairobi ELRC Cause 1149 of 2016 Mercy Wangari v Total Kenya Limited* [2020] eKLR.
34. The Respondent further submitted that it held discussions with the Claimant and its employees in general prior to issuing the redundancy notices as evidenced in minutes of the meeting held on 26th July 2017. That the Claimant not only had more than adequate notice of the impending redundancy but was actually involved in the consultations throughout the redundancy process.
35. It is submitted that the Respondent took into account of seniority and skill of its employees in the selection for the redundancy and did not discriminate against the Claimants members. It submitted that as of 21st November, 2017 only 6 of the 82 employees declared redundant were members of the Claimant Union.
36. It was further submitted that the Respondent had demonstrated that it paid one month’s salary in lieu of notice and severance pay as required under section 40(1)(f) and (g) of the *Employment Act*.
37. On the reliefs sought by the Claimant the Respondent submitted that the prayer for 6 months gross salary and general damages is bad in law as there was no proof of unlawful or unfair termination of employment.

Analysis and Determination

38. I have considered the pleadings and submissions on record. The issues arising in determination are whether the redundancies carried out by the Respondent were justified, whether the Respondent



complied with the procedures set out in the law, whether the Claimants members were discriminated and if the Claimant is entitled to the remedies sought.

Whether the redundancy was justified

39. In the redundancy notices sent to the Claimant and the Labour Officers, the Respondent gave the reasons for carrying redundancies to be extensive restricting by reducing the number of staff to cut costs. That the redundancy was necessitated by funding reduction and declining trend of student enrolment numbers which was the Respondent's main source of revenue. It stated that restructuring was intended to make the Respondent more stable and sustainable.
40. The Claimant avers that the Respondent did not prove any of these averments. That it did not exhibit the old and new structures, did not prove reduction in student numbers or reduced financing.
41. In the replying affidavit and witness statement filed by the Respondent the Respondent attached a list of all employees either declared redundant or transferred to other departments as reflected by its Annexure PMS 7, 8, 9A and 9B to the affidavit of Rev. Dr. P. M. Ssentumbwe.
42. On the averment of the Claimant that it was not consulted the Responded exhibited at Annexure PMS 5 minutes of a meeting held with the Claimant on 26th July, 2017 at which the redundancy was discussed under AOB.
43. The relevant minute reads:

“Mr. Momanyi said that the University is planning to carry out a redundancy due to its financial problems the University is facing at the moment. It was agreed that Union will be involved in the redundancy process when it will be due.”
44. On compliance with the redundancy procedure, the Respondent notified both the Claimant and Labour Officer in Nairobi, Kisumu and Uasin Gishu where the staff affected by the redundancy were stationed.
45. The redundancy notice to Labour Commission is reproduced below: -

Catholic University Of Eastern Africa

19th September 2017

The Labour Commissioner, State Department of Labour,

PO Box 40326-00100

NAIROBI.

Dear Sir/Madam,

RE: Notice Of Redundancy.

The Catholic University of Eastern Africa (CUEA) is a private University that promotes experience in research, teaching and community service by preparing morally upright leaders based on the intellectual tradition of the Catholic Church. It has a main campus located in Langata Nairobi County and Satellite Campuses in Kisumu and Gaba in Eldoret.

CUEA recently outlined plans for an extensive restructuring by reducing the number of staff to cut costs. This restructuring has been necessitated by funding reduction and declining trend of students' enrolment number which has been our main source of revenue. The restructuring is designed to make CUEA more stable and sustainable. It will involve



changes which will include more streamlined structure, focused on quality and clarity of purpose, prioritization of relevant skills; an alignment: of roles and skills and a clear career development path. There are certain, areas that are going to be automated; we may also close two campuses in Kisumu and Nairobi City Centre campus with effect from January 2018 that may lead to further redundancy of about 20 more staff. In the process, We regret to advise you that the services of some members of staff will become redundant as a result of the re-organization, after duly considering all other alternatives: Pursuant to Section 40 (1) (a) of the [Employment Act](#) 2007, this is to inform you that 111 employees, of whom are members of the union and non members will be declared redundant arising from this re-organization and rationalization of staff complement, with effect from 19th October 2017, or thereafter — to be mutually agreed.

The union and the employees who have been affected will be informed individually and paid terminal benefits applicable in respect of redundancy, in accordance with the [Employment Act](#) 2007 and their respective contract of service with CUEA, According to Section 40(1) of the [Employment Act](#) 2007, terminal benefit will include one month salary in lieu of notice, severance pay at the rate of 15 days for each completed year of service and accrued leave.

They will also be paid their retirement benefits in accordance with the Rules of the Provident Scheme of CUEA and the [Retirement Benefits Act](#).

Yours

Signed

Prof. Justus Mbae

Vice Chancellor

Cc: The Labour Commissioner, State Department of Labour

Kisumu County Labour Relations Officer

Uasin Gishu County Labour Relations Officer

46. The redundancy notice sent to the individual employees read as follows:

The Catholic University Of Eastern Africa

Office Of The Vice Chancellor

Our Ref: JGM/HRM/RDY/10/2017/36

15th November, 2017

Ms. Mary Mutune

CEA Gaba Campus

Eldoret

Dear Ms. Mutune

RE: Termination On Account Of Redundancy

Reference is made letter dated September, 2017 notifying you of the University plans for an extensive restructuring by reducing the number of staff to cut costs. As you are aware, this exercise has been necessitated by funding reduction and declining trend of students enrolment number which has been our main source of revenue and has been designed



to make CUEA more stable and sustainable. It involved changes which included a more streamlined structure, focused on quality and clarity of purpose, prioritization of relevant skills; an alignment of roles and skills and a clear career development path.

We regret to inform you that after due consideration of all other alternatives your position has been declared redundant with effect from 20th November, 2017. You will be paid three months; salary in lieu of notice. You will be paid terminal benefits applicable in respect of redundancy/pursuant to Section 40(1) of the Employment 2007. Terminal benefits will include severance pay at the rate of 15 days for each completed year of service, leave in cash where leave is due to you and outstanding salary increment or the last two (2) years and five (5) months. Your total redundancy package (taxable) shall be:

Outstanding Salary Increment (2 years: & 5 months) Ksh.56,920.00

Leave earned and not utilized Ksh. 127,798.36

Severance Pay Ksh 192,811.36

October 2017 Salary Ksh. 100,413.0

Three (3) months' Salary in Lieu of Notice Ksh. 301,239.00

You will also be paid your retirement benefits in accordance with the Rules of the Provident Scheme of CUEA and the *Retirement Benefits Act*. We wish also to inform you that all outstanding deductions have been settled by the University. You are advised to hand over all CUEA property in your possession to your immediate supervisor by 20th November, 2017. Please note that your benefits will be paid upon proper handing over and clearance.

The University will sustain your medical cover for one year. If you wish to study in CUEA, the University will issue partial scholarship for a program that is running and you qualify for.

Yours Sincerely

Prof. Justus G. MBAE

Vice-chancellor

Cc. Deputy Vice – Chancellor/Academic Affairs and Research

Deputy Vice – Chancellor/Administration, Finance and Planning

Chief Finance Officer

Director, CUEA Gaba Campus

Registrar, Administration and Human Resources

47. On the allegation of discrimination, the Respondent submitted that the selection criteria was applied uniformly for both members and non-members of the Claimant. That out of 82 employees declared redundant only 6 were members of the Claimant union.
48. From the analysis above I find the allegation of discrimination not proved by the Claimant. I am satisfied from the evidence on record that the redundancy carried out by the Respondent was for genuine and valid reasons and the Respondent complied with the procedure set out in section 40(1) of the *Employment Act*. I am further satisfied from the evidence on record that the Respondent paid all the employees declared redundant their rightful terminal dues except of Janet Mongina Otoigo and Duncan Murono Waluchio who were not paid salary for November, 2017 being Ksh.28,243.00 and Ksh. 47,266.00 respectively, which the Respondent admitted and offered to pay.



49. The foregoing being the case, I find no merit in the claim filed by the Claimant herein. The same is accordingly dismissed.

There shall be no orders for costs.

DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 25TH DAY OF APRIL, 2024

MAUREEN ONYANGO

JUDGE

