



**Mutulu & another v Cowater International INC (Employment and Labour Relations Cause E898 of 2022) [2024] KEELRC 861 (KLR) (16 April 2024) (Judgment)**

Neutral citation: [2024] KEELRC 861 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS CAUSE E898 OF 2022**

**AN MWAURE, J**

**APRIL 16, 2024**

**BETWEEN**

**MWENDE MUTULU ..... 1<sup>ST</sup> CLAIMANT**

**MUKAMI MBOGO ..... 2<sup>ND</sup> CLAIMANT**

**AND**

**COWATER INTERNATIONAL INC ..... RESPONDENT**

**JUDGMENT**

1. The Claimants filed a Memorandum of Claim dated 29<sup>th</sup> November 2022.

**Claimants’ Case**

2. The Claimant aver that the Respondent is an international development consulting company that provides technical assistance, policy advice and implementation support across 12 major service lines, among them project management.
3. The Claimants aver that they were employed by the Respondent as Senior Project Manager and Project Manager vide contracts dated 25.07.2019 and 27.10.2021. The 1<sup>st</sup> Claimant was subsequently promoted to a Project Director effective 01.02.2022.
4. The Claimants aver that they have been diligent and loyal employees of the Respondent until 20.09.2022 when they received letters of notice of intended redundancy and subsequently letters of termination of employment on account of redundancy on 21.10.2022.
5. The Claimants avers that consultation meetings were held by the Respondent’s representatives however it was merely a tick box exercise. The Claimants were not informed the formula used to determine which employee is to be declared redundant.



6. The Claimants aver that there is no evidence that the Respondent informed the labour office in writing of the intended redundancy and there was no attempted to cushion them from the impact of the purported redundancy.
7. The Claimants aver that the reasons for redundancy as stated by the Respondent in their letters on intended redundancy and termination were inconsistent and unjustifiable. The reason being closure of operations did not match those presented in the termination letter.
8. The Claimants aver that the Respondent has never had live projects in Kenya neither have any predetermined corporate and commercial targets for Kenya hence the Claimants contracts are in no way attached to the financial viability of the Nairobi hub.
9. The Claimants aver that there is no evidence that the Respondent is facing any financial turmoil or difficulty. The economic downturn referred to is a global phenomenon therefore to single out Kenya operation and affix the resulting effects on the Claimants is discriminatory.
10. The Claimant avers that during the townhall meeting held on 16.06.2022, the Respondent presented the solid financial position of the company with no messaging of any sign of financial distress. Further, the 2<sup>nd</sup> Respondent was granted a salary increment on 01.04.2022 after successfully completing her probation period, this is not consistent with an economic downturn.
11. The Claimants aver that they have been involved in numerous business initiatives for prospective multi-dollar projects for the Respondent and they are aware business development is picking up in the region. Specifically, the 2<sup>nd</sup> Claimant supported the Respondent to earn the award of KPP Indonesia project valued at AUS 50 million in October 2022.
12. The Claimants aver that the Respondent retained other staff without indicating the criteria used to decided who to retain and who to terminate. The 1<sup>st</sup> Claimant's position as Local Representative has been replaced by Pauline Njiriani through a resolution dated 16.11.2022.
13. Further, the 2<sup>nd</sup> Claimant handed her duties on Revenue for Growth (R4G) project in Zambia to Tom Whitehead who was newly recruited in October 2022. And Japheth Ngure who was also declared redundant, was given a 3-month consultancy contract demonstrating there is need for his role and that of the Claimants.
14. The Claimants aver that the 1<sup>st</sup> Claimant received minutes and board resolution falsifying that she attended a meeting with the Respondent who produced a duly executed letter from her ceasing as local representative. She reported the matter to the Director of Criminal Investigations under OB number 09/19/11/2022.
15. The Claimants aver that the 1<sup>st</sup> Claimant was on maternity leave when she was served with the letter of termination by the Respondent; this was in violation of the [Employment Act](#).

### **Respondent's Case**

16. In opposition to the Claim, the Respondent filed its response dated 11<sup>th</sup> May 2023.
17. The Respondent avers that in September 2022, it was constrained to review its operations in Kenya following market changes and it decided to restructure its business with a view of mitigating the losses it was incurring.
18. The Respondent avers that the restructure was to result in the elimination and/or alteration of various positions and roles within it, therefore, it commenced a redundancy process.



19. The Respondent avers that it issued a 30-day notice of intended redundancy to all its staff including the Claimants on 20.09.2022 and subsequently held consultations with each employee during this period.
20. The Respondent avers that it also issued the notice to the Labour Officer and clearly set out the reasons for the intended redundancy and its extent.
21. The Respondent avers that the Claimants participated in in consultation meetings on 07.10.2022 and 29.09.2022 respectively where they were given an opportunity to give feedback and ask questions on the redundancy process.
22. The Respondent avers that through the consultations, it was able to minimize the redundancy impact from a possible 6 employees down to 3 employees.
23. The Respondent avers that the Claimants were terminated on account of redundancy vide letters dated 21.10.2022.
24. The Respondent avers that due to financial challenges, it considered redundancy or restructuring process. That on the onset of the redundancy process and consultations held by all the employees, it was able to formulate a formula that retained 3 employees as opposed to abolishment of all 6 positions.
25. The Respondent avers that it reviewed its operations in Kenya and considered it could not maintain an active hub in Kenya. There was insufficient workload in relation to the 3 roles that were declared redundant, therefore, it was unable to maintain these roles.
26. The Respondent avers that the financial difficulties which led to the redundancy related to costs of operations in Kenya and not in other jurisdictions as alleged by the Claimants. There was a 65% decline in its Kenya hub, necessitating the redundancy.
27. The Respondent avers that the 2<sup>nd</sup> Claimant's salary increment is irrelevant to the facts in issue, as it was pursuant to the completion of her probation period which occurred before the redundancy exercise commenced.
28. The Respondent avers that it considered the employees skills, ability, reliability and length of service in deciding which employees would be declared redundant. The Claimants previous roles were rendered superfluous and abolished.
29. The Respondent avers that Tom Whitehead was retained in July 2022 as a Project Manager in London, United Kingdom and Japheth Ngure was hired a Project Risk, Assurance and Finance consultant to assist in the transition period following the redundancy. Neither of the them took up the Claimants' previous positions.
30. The Respondent denied that the 1<sup>st</sup> Claimant was denied her right to resume work upon completion of maternity leave and says that she completed her maternity leave on 30.11.2022 and subsequently proceeded on annual leave. At the time she was declared redundant, she was on annual leave.

### **Evidence in Court**

31. The 1<sup>st</sup> Claimant (CW1) adopted her witness statement and bundle of documents dated 19.04.2023 as her evidence in chief and exhibits.
32. CW1 testified that she worked for the Respondent for about 3 years and in 2022, redundancy was effected when she was on maternity leave. She never returned to her position at work.
33. CW1 testified that she was not given a fair hearing and it was a witch hunt.



34. CW1 testified that her position as local representative was maintained and she was the Respondent's bank signatory and the court had to intervene. The position was later filled by Japheth Ngure.
35. During cross examination, CW1 testified that her maternity leave ended on 30.11.2022 and she took annual leave. The notice was issued on 20.09.2022 and was copied to 6 employees in the Kenya office.
36. CW1 testified that she was consulted about the redundancy. There is an email of 21.10.2022 by Anne Marie reminding her of a meeting scheduled that day, she responded that she had chatted with one Yavan and agreed to speak next week as the notice of consultation was coming to an end.
37. CW1 testified that Mr Ngure was not newly appointed, he worked in Finance and took over her role in addition to his role. There was no justification for the redundancy.
38. CW1 testified that she attended the consultation meeting but her questions were not adequately responded to, however, she does not have any document that shows she raised any concerns to the Respondent.
39. The 2<sup>nd</sup> Claimant (CW2) testified and produced her witness statement dated 19.04.2023 and accompanying documents and bundle of documents dated 29.11.2022 as her evidence in chief and exhibits.
40. CW2 testified that she was employed in November 2021 and was declared redundant on 21.10.2022. The redundancy process was unprocedural as the labour office was not informed and she did not get any notice from the labour office,
41. CW2 testified that her project was ongoing and she was asked to hand it over to Mr Tom from the UK, a new recruit. The Respondent stated they were closing operations in Kenya, however, to date it is still in operation.
42. CW2 testified that after one month of consultations, out of the 6 employees who received the notice, only 2 received termination letters.
43. CW2 testified that the Respondent's financial statements dated 30.03.2022, the company had no financial problems. Further, bonuses for September were paid but only the Nairobi team received the bonuses.
44. CW2 testified that the Respondent secured a 14 Million Australian Dollars project on 26.10.2022.
45. During cross examination, CW2 testified that notice was not given to the labour officer and she did not get a response from the labour officer. However, she received the letter of notice of redundancy dated 20.09.2022.
46. CW2 testified that she took part in the consultation process but she did not receive satisfactory responses. There are no records that raised any concerns.
47. CW2 testified that one of the main projects she was supporting was the Zambia project which she handed over to Mr Tom. She is not aware if Mr Tom was a team member in the UK, he was new in the team and she did not know when he was hired.
48. CW2 testified that her salary was increased after her probation period which was like 4 months before the redundancy. Bonuses were not given to the Kenya office and they are discretionary.
49. CW2 testified that the reasons given by the Respondent for redundancy were not consistent. The notices said they may shut down. The consultations were not for redundancy.



50. CW2 testified that the letter said the Respondent was downscaling and the redundancy was affecting Kenya and not other jurisdictions.
51. During re-examination, CW2 testified that the Claimant had a lot of work even when they had the notice of redundancy. The company was global and they could work in other countries.
52. CW2 testified that the redundancy was inconsistent because 6 got notices of redundancies but when the letters of termination came the reasons had changed and criteria for rendering them redundancy was not given.

### **Respondent**

53. The Respondent's witness (RW1), David Baron, adopted his witness statement dated 10.05.2023 as his evidence in chief and bundle of document as his exhibits.
54. RW1 testified that the company decided to declare redundancy as they lost a major contract worth 10 million pounds and one ended in 2022 funded by the U.K. When they lost the contract as they analysed the position, they had to downscale its operations.
55. RW1 testified that its accounts ending 31.03.2022 did not indicate any losses because Nairobi globally is a co-centre. The country had no contracts and revenue went down.
56. RW1 testifies that the financial statements were company revenues and the company has no employees and no contracts.
57. During cross examination, RW1 testified that the accounts done by Devela LLP were for Kenya and revenue was for Cowater Canada and UK to operate the Kenya office.
58. RW1 testified that there is a company called Transwater Brussels which operates in Kenya but has no staff in the country. Cowater has operations all over the world. The transacts has small staff in Kenya.
59. RW1 testified that the Respondent vide a notice of intended redundancy on October 2020, it stated it may involve all employees, later not all were declared redundant and justification showed it could keep 3 and terminate 3 employees.
60. RW1 testified that it made it clear the reasons why it declared the two Claimants redundant, however, it does not have any written documents why 3 were left when it went through downscaling.
61. RW1 testified that the Miss Mwende was replaced by somebody else, but he is not aware she had to be removed as a local representative by a court order. She was replaced by Japheth Ngure.
62. RW1 testified that the Japheth Ngure was initially declared redundant and was issued a consultancy agreement which ends this month.
63. RW1 testified that Mr Tom replaced Mukami but works from the UK. Mukami was not running projects in Zambia that was to end in 2026, there was a project manager and she was only part of the team.
64. RW1 testified that Kenya operations were run by the UK government but the project ended.
65. During re-examination, RW1 testified that Transet is a company purchased by Co-water from Brussels and had a small subsidiary in Kenya. The project is no longer in existence.



66. RW1 testified that the Respondent did not want to downscale but considered many issues before declaring redundancy. It looked at each employee and their jobs before deciding who to declare redundant.
67. RW1 testified that the two roles were abolished and there were no replacements, their duties were redistributed to other employees. The positions therefore no longer exist.

### **Claimants' Submissions**

68. The Claimants submitted that the Respondent did not give them any written notice of termination of employment as set in Section 35(1) of the *Employment Act*, the court should return that the Claimants have passed the test under Section 47(5) of the *Employment Act*.
69. The Claimants submitted that the Respondent did not prove redundancy and neither did they prove financial constraints in their testimony by dint of Section 40 of the *Employment Act*. Failure to ensure procedural fairness to the Claimants resulted in unfair termination of employment.
70. The Claimants submitted that they were not notified of the impending termination contrary to Section 35(1) of the *Employment Act* which provides for notice. The Claimants are entitled to notice pay as in *Mulyanga v Zitron Limited* [2023] KLR.
71. The Claimants submitted that there was no valid reason warranting the dismissal and the stipulated procedure were not equally followed, they therefore urge this court to award them 12-month gross salary compensation.

### **Respondent's Submissions**

72. The Respondent submitted that the 1<sup>st</sup> Claimant was terminated while on annual leave and not maternity leave. By her own evidence, the document email dated 11.08.2022 between the 1<sup>st</sup> Claimant and Anita of the Respondent clearly shows that she proceeded on a 3 month maternity leave on 01.07.2023 to 28.10.2023 and then proceeded to annual leave from October to December.
73. The Respondent submitted that as a general rule, an employer's valid reason for termination is based on the circumstances it believes to exist at the time. The redundancy was necessary due to market changes the business was experiencing in the period leading to September 2022.
74. The Respondent submitted that it saw the need to restructure its operations as the Kenyan hub was a cost centre which did not generate any revenue of its own and instead relied on service fee payments from its headquarters in Canada. It therefore carried out the restructure with a view of optimizing its costs and expenses in its Kenyan hub.
75. The Respondent submitted that the notice of intended redundancies dated 20.09.2022 were issued to the Kenyan hub employees and specified the reason for possible shut down due to market challenges, a fact that was discussed at the consultative meetings the Claimants were involved in.
76. The Respondent submitted that it followed due process before declaring the Claimants redundant. Vide letters dated 20.09.2022, the Respondent gave a written notice of intended redundancy to the Claimants; by the acknowledged copy of the letter dated 20.09.2022, the Respondent notified the County Labour Officer of the intended redundancy. As such it complied with Section 40 (1)(b) of the *Employment Act*.
77. The Respondent submitted that it had no part in the workings of the County Labour Office as to whether it would reach out to the affected employees or not.



78. The Respondents submitted that the Claimants participated in consultation meetings where they were provided an opportunity to give feedback and ask questions. It is also not uncontroverted evidence that following these consultations, it was able to minimize the redundancy impact from a possible 6 employees down to 3 employees.
79. The Respondent submitted that the selection process complied with the statutory requirement to consider seniority in time, skill and reliability; this was extensively discussed in the consultation meetings.
80. It is the Respondent's submission that it abolished the roles previously held by the Claimants. As part of mitigating loss, it reassigned some of the tasks of the 1<sup>st</sup> Claimant to Japheth Ngure to act as company representative within the provisions of the Companies Act, 2015 which requires a foreign company must have a local representative.
81. The 2<sup>nd</sup> Claimant's tasks were reassigned to Tom Whitehead. Both Tom and Japheth were existing employees of the Respondent and none took up the roles of Senior Project Manager or Project Manager.
82. The Respondent submitted that having demonstrated that the Claimants were lawfully and fairly terminated, they cannot be entitled to the award of damages and compensation as prayed.

### **Analysis and Determination**

83. Having considered the pleadings, witness statements, submissions and the evidence of record, the issues for determination are:
  - a. Whether the Respondent had valid reasons to terminate the Claimants' employment on account of redundancy.
  - b. Whether the termination was procedurally unfair.
  - c. Whether the Claimants are entitled to the reliefs sought.

### **Whether the Respondent had valid reasons to terminate the Claimants' employment on account of redundancy.**

84. Justice Nderitu in Daniel Mburu Muriu v Hygrotech East Africa Ltd [2021] eKLR held as follows in respect to substantive justification in termination on account to redundancy:

“Clearly, declaration of redundancy is a process and not an event. Further, even when an employee is to be terminated on redundancy such an employee should still be afforded a hearing on whatever it is that they would wish to say about the termination on redundancy. Further, Section 43 of the Act on proof of reason for termination by the employer, and Section 45 on unfair termination apply to termination on redundancy just as they apply on other terminations. Hence both substantive and procedural fairness apply on redundancy and an employer who fails either test stands to be held liable for unfair, or wrongful, and unlawful termination.

For avoidance of doubts, redundancy is a form of termination and therefore Sections 43, 45, 47 and 49 of the Act apply in cases of redundancy just like in other forms of termination. Therefore, Section 40 provides for an ideal situation where the reason for termination on redundancy is based on a valid and lawful reason. Once an employer has a valid and lawful



reason(s) for termination on redundancy, such an employer must apply and comply with Section 40 of the Act.”

85. Further, in *Ronald Kipngeno Bii v Unliver Tea Kenya Limited* [2022] eKLR the court held:

“I have held before, and repeat here that, an employer is entitled to make independent decision as to whether or not a position is necessary in his enterprise. Such decision is discretionary and amounts to a managerial prerogative which ought not to be interfered with unless, the employee shows that the procedure followed was wrong or unfair. Consequently, I find and hold that the respondent has proved that the termination of the claimant’s employment on account of redundancy was justified.

I seek support from case of *Kenya Airways Ltd v Aviation Workers Union Kenya* [2014] eKLR where the Court of Appeal held that:

“As long as the employer genuinely believed that there was existence of a redundancy situation, any termination was justified and it is not for the court to substitute its decision of what was reasonable. The court has no supervisory role.”

86. The Respondent submitted that the redundancy was necessary due to market changes. RW1 further testified during hearing that the company decided to declare redundancy as the company lost a major contract worth 10 million of pounds and one funded by the U.K. ended in 2022. Its operations in Kenya were run by the UK government but the project ended.

87. These reasons were well explained in the notice of intended termination through redundancy dated 20.09.2022 and the termination letters dated 21.10.2022. This court is guided by Section 45 (2) of the *Employment Act* which states:

“ A termination of employment by an employer is unfair if the employer fails to prove—

- (a) that the reason for the termination is valid;
- (b) that the reason for the termination is a fair reason—
  - (i) related to the employees conduct, capacity or compatibility; or
  - (ii) based on the operational requirements of the employer; and
- (c) that the employment was terminated in accordance with fair procedure.”

88. In the case of *Cargill Kenya Limited v Caroline Mutana Mwaka & others* Appeal Cause No 54 of 2019 the Court of Appeal held that the purpose of giving notice under section 40(1)(a) of the *Employment Act* was to give parties an opportunity to consider measures to be taken to avert or minimise the termination and measures to mitigate the adverse effects of any termination on the workers concerned such as alternative employment”.

89. As earlier said the respondent sent a notice of intended appeal to the labour officer dated 20<sup>th</sup> September 2022 and explained the reasons for the intended redundancy. As well on the same date the claimant Mukami received a notice of intended redundancy. Mwikali notice of redundancy is dated 20<sup>th</sup> September 2022 and their termination letters were issued on 21<sup>st</sup> October 2022 and explained the reason for termination due to redundancy.

90. The respondent states that the claimants attended a meeting to discuss the termination by redundancy process but Mwendu failed to attend the meeting to discuss the redundancy criteria.



91. Against this background the court is informed by the respondent that as a result of this discussion there was a restructuring and some three employees were retained but the claimants were released and their positions of project manager and senior project manager which the claimants respectively held were abolished.
92. The respondent in the termination letter offered to give the severance pay at the rate of 15 days for each year worked and accrued leave days. Of course they were given one month notice and so were not entitled to notice pay.
93. Against this background, the Respondent has proved that it had valid reason to terminate claimants on account of redundancy based on its operational requirements as provided under Section 43 and 45(2) of the *Employment Act*. The court is persuaded also by the case of *Mohamed Fanzan Chundri v CFC stanbic Bank 2017 eKLR* where court held: “businesses may need repositioning and internal re-organization including reassignment and subsequent reduction of human capital due to market challenges.”

**Whether the termination was procedurally unfair.**

94. The procedure for termination on account of redundancy is set out under Section 40 (1) of the *Employment Act* which reads:

- “(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.”

95. It is not in dispute that the Respondent issued its employees a notice of intended termination of employment through redundancy notice dated 20.09.2022. This letter was also duly served to the County Labour Officer, who acknowledged receipt on 21.09.2022.
96. Further to this, the Respondent conducted consultation meetings with its employees in which both the Claimants testified they took part in. they aver that their questions were not adequately answered during the meeting but failed to produce any evidence that they raised these concerns with the Respondent. Accordingly, the Respondent was compliant with Section 40(1)(b) of the Employment Act.
97. The Respondent submitted that the selection process complied with the statutory requirement to consider seniority in time, skill and reliability; this was extensively discussed in the consultation meetings, which led the Respondent to minimize the redundancy impact from a possible 6 employees down to 3 employees.
98. In view of the foregoing, the Respondent has proved that the redundancy process was procedurally fair.
99. Having established the termination of the Claimants’ employment was both procedurally and substantively fair, The court is of the view the claimants have failed to prove a case of unfair termination and so they are not entitled to the compensation prayed.
100. Each party will meet the costs of their suit.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 16<sup>TH</sup> DAY OF APRIL, 2024.**

**ANNA NGIBUINI MWAURE**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159 (2) (d) of the Constitution which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

**ANNA NGIBUINI MWAURE**

**JUDGE**

