



**Kenya Commercial Food and Allied Workers Union v London Distillers (K) Ltd
(Cause E490 of 2020) [2024] KEELRC 897 (KLR) (12 April 2024) (Judgment)**

Neutral citation: [2024] KEELRC 897 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E490 OF 2020
MA ONYANGO, J
APRIL 12, 2024**

**BETWEEN
KENYA COMMERCIAL FOOD AND ALLIED WORKERS UNION CLAIMANT
AND
LONDON DISTILLERS (K) LTD RESPONDENT**

JUDGMENT

1. The Judgment in this suit was delivered on 19th January, 2022 in favour of the Claimant as follows:
 61. From the foregoing, it is evident that both the redundancies and the retirements by the Respondent amounted to unfair termination of employment of all the affected employees for failure to comply with the statutory and contractual (CBA) provisions. I therefore find and declare both the redundancies and the retirements unfair.

Remedies
 62. The Claimant prays for reinstatement of the grievants. Taking into account the very hostile attitude of the Respondent that is so manifest in the pleadings, reinstatement will not be a viable option for the grievants. I will therefore instead award the grievants compensation which was in the alternative prayers of the Claimant.

For the employees declared redundant I award the following:

 - i. Salary up to date of leaving employment being 31st August 2020.
 - ii. Pay lieu of notification of intended redundancy being one month's gross salary as per Section 40(1)(a) of the *Employment Act*.
 - iii. Pay in lieu of notice as per clause 23(c) as read with Clause 6 of the CBA.
 - iv. Severance pay according to Clause 23(d) as read with Clause 6 of the CBA.



- v. Any leave due and not taken.
 - vi. Compensation equivalent to 10 months' salary.
65. For employees retired by the Respondent, I award the following: -
- i. Salary up to date of leaving employment being 31st August 2020.
 - ii. Pay lieu of notice of 45 days as per Clause 22(f) of CBA.
 - iii. 70 days service pay per completed year of service as per Clause 22(d) of CBA.
 - iv. Kshs.27,000/- lumpsum as per Clause 22(f) of the CBA.
 - v. Any leave due and not taken.
 - vi. Compensation equivalent to 10 months' salary.
66. Any payments in relation to any of the above heads already made to the employees shall be deducted from the amount payable.
67. Interest shall accrue from date of filing suit for all items except compensation which will accrue interest from date of judgment.
68. The Claimant is awarded costs of this suit.
2. The parties disagreed on the tabulation of the said judgment and were directed to each file their tabulation together with submissions in support of the same. The Claimant's submissions are 6th dated April 2023 while the Respondent's submissions are dated June, 2023.
3. The Claimant further filed supplementary submissions dated 19th May, 2023.
4. From the tabulations filed by the parties, the parties agreed on the following items for each of the employees affected: basic pay and gross pay, years worked, notice pay and leave as per table below:
- A. Benefits for Employees Decalred Redundant



S/N	Employees Name	Basic Pay	Gross Pay	Yrs Worked	Notice As Per (ii) of Judgment	Leave
1.	Patrick Chege Mwangi	31,288	36,088	16	36,088	6,819
2.	Ezekiel Musembi Musyoki	31,116	35,956	12	35,956	-62,630
3.	Michael Rapando	20,631	25,431	12	25,431	21,160
4.	Fredrick Gwiyaya Aradi	24,447	29,247	11	29,247	-54,222
5.	Benson Bett (disputed)	63,197	72,674	7	72,674	-
6.	Acquilina Kaveke (Disputed)	76,210	87,642	20	87,642	-
7.	Benard Mwangi Gikonyo	42,339	48,690	33	48,690	-61,337
8.	Christopher Mwaura Gatherere	32,482	37,354	10	37,354	14,575
9.	Titus M Mutua	32,482	37,354	18	37,354	10,410
10.	Judy Sichangi Murumba (Disputed)	107,255	125,893	18	125,893	

B. Benefits for Retired Employees



No.	Employees Name	Pay Roll No.	Basic Pay	Gross Pay	YRS/ worked	Notice (as per ii of the judgment)	LEAVE	Lumpsum (per iv of judgment)
1.	Juliana Mbaika Kivai (Disputed)	1309	31,288	38,710	16	66,998		27,000
2.	Ndangwa Musembi (Disputed)	0515	38,788	46,210	30	79,979		27,000
3.	Joseph Amoche Litaba	1707	20,604	25,404	11	43,968	3,698	27,000
4.	David Ogando	1199	52,600	60,490	17	104,694	-50,576	27,000
5	Albert M. Libere (Disputed)	0844	84,678	99,230	22	171,744		27,000

5. The parties did not agree on severance pay and notice.

6. Severance pay is provided for in 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.

7. The parties CBA on the other hand provides for redundancy as follows:

In the event of redundancy, the following principles shall apply: -

- a. The union shall be informed by the employer the reasons for the extent of the intended redundancy.
- b. The principle shall be adopted of "last in, first out in the particular category of employees affected, subject to all other factors such as skills, relative merit, ability, and reliability being equal.
- c. The redundant employee will be entitled to the appropriate period of notice or pay in lieu as per clause No 6(b) of this CBA.
- d. The redundant employee will be entitled to a service pay as per clause No. 6(c) of this CBA"

8. According to the Respondent, severance pay is not provided for in the CBA and should not be tabulated. The Respondent however does not state what should be paid to the employees declared redundant.

9. Section 26 of the [Employment Act](#) provides as follows

Basic minimum conditions of employment

- (1) The provisions of this Part and Part VI shall constitute basic minimum terms and conditions of contract of service.
- (2) Where the terms and conditions of a contract of service are regulated by any regulations, as agreed in any collective agreement or contract between the parties or enacted by any other written law, decreed by any judgment award or order of the Industrial Court are more favourable to an employee than the terms provided in this Part and Part VI, then such favourable terms and conditions of service shall apply.

10. Further section 48 of the [Labour Institutions Act](#) provides as follows

48. Wages Order to constitute minimum terms of conditions of employment

- (1) Notwithstanding anything contained in this Act or any other written law—
 - (a) the minimum rates of remuneration or conditions of employment established in a wages order constitute a term of employment of any employee to whom the wages order applies and may not be varied by agreement;
 - (b) if the contract of an employee to whom a wages order applies provides for the payment of less remuneration than the statutory minimum remuneration,



or does not provide for the conditions of employment prescribed in a wages regulation order or provides for less favourable conditions of employment, then the remuneration and conditions of employment established by the wages order shall be inserted in the contract in substitution for those terms.

- (2) An employer who fails to—
 - (a) pay to an employee to whom a wages regulation order applies at least the statutory minimum remuneration; or
 - (b) provide an employee with the conditions of employment prescribed in the order, commits an offence.
- (3) If an employer is found guilty of an offence under subsection (2), the court may in addition to any other penalty order the employer to pay the employee the difference between the amount which ought to have been paid in terms of the wages order and the amount which was actually paid.
- (4) Where proceedings are brought under subsection (2) in respect of an offence consisting of a failure to pay remuneration at the statutory minimum remuneration or to provide an employee with the conditions of employment prescribed in the order, then—
 - (a) if an employer is found guilty of the offence, evidence may be given of any like contravention on the part of the employer in respect of any period during the twelve months immediately preceding the date of the offence; and
 - (b) on proof of such contravention, the court may order the employer to pay the difference between the amount which ought to have been paid during that period to the employee by way of remuneration and the amount actually paid:
Provided that evidence shall not be given under paragraph (a) unless notice of intention to give such evidence has been served upon the employer together with the summons, warrant, information or complaint.
- (5) The powers given by this section for the recovery of sums due from an employer to an employee shall be in addition to and not in derogation of any right to recover such sums by civil proceedings:
Provided that no person shall be liable to pay twice in respect of the same cause of action.

11. In the instant case the parties agreed on what should be paid to employees declared redundant to be what is provided for in clause 6 as follows-

“23: Redundancy:

“23 In the event of redundancy, the following principles shall apply:-

- e. The union shall be informed by the employer the reasons for the extent of the intended redundancy.
- f. The principle shall be adopted of “last in, first out in the particular category of employees affected, subject



to all other factors such as skills, relative merit, ability, and reliability being equal.

- g. The redundant employee will be entitled to the appropriate period of notice or pay in lieu as per clause No 6(b) of this CBA.
- h. The redundant employee will be entitled to a service pay as per clause No. 6(c) of this CBA”

- 12. It is therefore evident that the parties agreed in their CBA that instead of paying an employee declared redundant severance pay, such employer would be paid service pay as set out in clause 6 of the CBA.
- 13. The parties further agreed that notice to an employee declared redundant would also be given or paid in accordance with clause 6 of the CBA.
- 14. The Respondents employees declared redundant are therefore entitled to severance pay tabulated at the rate of service pay as produced in clause 6 of the CBA. They are further entitled to notice or pay in lieu therefor of as provided in clause 6 of the CBA.
- 15. The parties appear to have disagreed over the application of the clause 6 (c) of the CBA which reads.

Termination of Service

- a. After the completion of the probationary period in employment, an employee may be terminated by giving one month’s notice or one month’s salary in lieu of notice.
 - b. An employee with the service of between on (1) year – 4 years shall be given 1 (one) months’ notice or salary in lieu of the one-month notice. 5-9 years, shall be given 4 months’ notice or salary in lieu of four months. An employee who is above 9 years in employment shall be paid 5 months’ notice or salary in lieu of five month’s salary.
 - c. The affected employee will be entitled to service pay of:-
 - I. 1 year. – 4 years (30 days)
 - II. 5 years to 8 years (50 days)
 - III. 9 years and above (60 days)
- 16. The Claimant states that the days are per completed year of service while the Respondent states it is one lumpsum as the words “per completed year of service” are missing from the clause.
 - 17. The Claimant has submitted that this was an error in the drafting and that the Respondent has always interpreted the clause to mean the stated number of days is per completed year of service.
 - 18. The Claimant has given examples of employees who have previously been paid by the Respondent under the said clause as follows:

Termination of employment

- i. Mr. Guyo Bonaya who terminated his services by way of resignation from employment on 16th December, 2014 after serving for a period of six (6 years was paid his service based on 50 days per year for six years.



- ii. Mr. Nzioki Mbandu who terminated his services by way of resignation and left employment on 18th December, 2014 and had served Respondent for ten years was paid a service of 60 days for each complete (year of service).
- iii. Mr. John Musyoki Kioko whose services were terminated on 3rd August 2016, and had served for a period of seven (7) years was paid service based on 50 days each year.

Retirement

- (iv) Mr. Isaiah Alubala Mukangala who retired on 2nd August 2017 after service of twenty-five (25) years was paid his service based on 70 days for each year worked.
19. Should we go by the argument of the Respondent, it would mean that the Clause is in violation of section 40(1)(i) of the Employment Act which provides for payment of severance pay at a rate of not less than 15 days pay per completed year of service.
 20. The only logical interpretation is therefore that advanced by the Claimant which as the Claimant has demonstrated, was the method used by the Respondent to tabulate pay for employees who have left service before on either grounds of redundancy or retirement.
 21. I therefore find that the days referred to in clause 6(c) of the CBA are per completed year of service.
 22. The Respondent has in its submissions on tabulation referred the court to the agreements signed by employees who received their terminal benefits while the suit was pending in court. As observed in the Judgment, these employees are to be paid as tabulated in respect of the judgment less the amount they already received.
 23. From the foregoing it is evident that the tabulation by the Claimant is the correct one. The Court notes that the only points of disagreement were on severance pay and notice pay. The parties were in agreement on all other items of the tabulation. The court thus awards each of the Grievants as herebelow. The tabulation is as set out in table A and B attached.

A. Benefits For Employees Declared Redundant

Employees Name Total Amount

1. Patrick Chege Mwangi Ksh.1,775,564
2. Ezekiel Musembi Musyoki Ksh.1,410,341
3. Michael Rapando Ksh. 997,197
4. Fredrick Gwiyaya Aradi Ksh.808,643
5. Benson Bett Ksh.4,152,150
6. Acquilina Kaveke Ksh. 7,293,599
7. Benard Mwangi Gikonyo Ksh. 1,646,067
8. Christopher Mwaura Gathera Ksh. 1,998,845
9. Titus M Mutua Ksh.1,994,680
10. Judy Sichangi Murumba Ksh.6,595,389

B. Benefits For Retired Employees



Employees Name Total Amount

1. Juliana Mbaika Kivai Ksh.1,867,599
2. Ndangwa Musembi Ksh. 3,748,166
3. Joseph Amoche Litaba Ksh. 964,305
4. David Ogando Ksh. 3,153,970
5. Albert M. Libere Ksh.6,305,817

The total sum awarded is therefore Ksh. 28,652,475 per employees declared redundant and Ksh.16,039,857 for employees who were retired.

24. The court awarded the Claimant costs. In view of the fact that the Claimant was not represented by an advocate, it is not eligible to file a bill of costs under the advocates remuneration order.
25. Taking into account the reasonable expenses and disbursements since the suit was instituted. The court assesses the costs of the Claimant at Ksh. 200,000 which I accordingly award.
26. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 12TH DAY OF APRIL 2024

MAUREEN ONYANGO

JUDGE

A. Benefits For Employees Declared Redundant



S/N	Employed Name	Roll No	Basic Pay	Gross Pay	Years Worked	Severance (per iv of the judgment)	Notice As Per (ii) of Judgment	Notice As Per (ii) of Judgment	Leave	Compensation (as per vi of the judgment)	Total (G+S +N +N +L +C)
1.	Patrick Chege Mwangi	1364	31,288	36,088	16	1,155,249	36,088	180,440	6,819	360,880	1,775,564
2.	Ezekiel Musembi Musyoki	1565	31,116	35,956	12	861,674	35,956	179,825	-62,630	359,560	1,410,341
3.	Michael Rapando	1704	20,631	25,431	12	523,710	25,431	127,155	21,160	254,310	997,197
4.	Fredrick Gwiyaya Aradi	1880	24,447	29,247	11	394,913	29,247	116,988	-54,222	292,470	808,643
5.	Benson Bett (disputed)	0923	63,197	72,674	7	2,916,692	2,674	363,370	-	726,740	4,152,150
6.	Acquiline Kaveke (Disputed)	027	76,210	87,642	20	5,803,688	87,642	438,210	-	876,420	7,293,599
7.	Benard Mwangi Gikonyo	1745	42,339	48,690	33	977,054	48,690	243,450	-61,337	486,900	1,646,067
8.	Christopher Mwaura Gatherer	1077	32,482	37,354	10	1,349,253	37,354	186,770	14,575	373,540	1,998,845
9.	Titus M Mutua	1088	32,482	37,354	18	1,349,253	37,354	186,770	10,410	373,540	1,994,680
10.	Judy Sichangi Murumba (Disputed)	1154	107,255	125,893	18	4,455,208	25,893	629,465		1,258,930	6,595,389

B. Benefits for Retired Employees



S/N	Employee's Name	Roll No	Basic Pay	Gross Pay	Years Worked	Severance (per iii of the judgment)	Notice As Per (ii) of Judgment	Leave	LUMP SUM (iv) of Judgment	Compensation (as per vi of the judgment)	Total (G+S +N +L +C)
1.	Juliana Mbaika Kivai	1309	31,288	38,710	16	1,347,791	6,998		27,000	387,100	1,867,599
2.	Ndangwa Musembi	0515	38,788	46,210	30	3,132,877	9,979		27,000	462,100	3,748,166
3.	Joseph Amoche Litaba	1707	20,604	25,404	11	610,195	43,968	3,698	27,000	254,040	964,305
4.	David Ogando	1199	52,600	60,490	17	2,407,462	104,694	-50,576	27,000	604,900	3,153,970
5.	Albert M. Libere	0844	84,678	99,230	22	5,015,543	17,744		27,000	992,300	6,305,817

DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 12TH DAY OF APRIL 2024

