



**Ngunia v Charm Industries Limited (Cause 433 of 2018)
[2024] KEELRC 974 (KLR) (11 April 2024) (Judgment)**

Neutral citation: [2024] KEELRC 974 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 433 OF 2018
L NDOLO, J
APRIL 11, 2024**

BETWEEN

KEN WAMBUA NGUNIA CLAIMANT

AND

CHARM INDUSTRIES LIMITED RESPONDENT

JUDGMENT

Introduction

1. The issues in dispute as listed by the Claimant in his Memorandum of Claim dated 27th March 2018 are; redundancy, discrimination & harassment, severance pay and unfair termination. The Respondent filed a Memorandum of Defence dated 24th May 2018, to which the Claimant responded on 3rd February 2021.
2. At the trial, the Claimant testified on his own behalf with the Respondent calling its Human Resource Manager, Duncan Lumati Ashiono.

The Claimant's Case

3. The Claimant states that he was employed by the Respondent on 23rd December 2015, as a Data Entry Clerk. He adds that he was subsequently promoted to be in charge of stores for raw materials and finished goods and later on assigned responsibility in dispatch and transport.
4. The Claimant avers that sometime in July 2016, he was notified that the original shareholders of the Respondent Company had sold their shares to Godrej Kenya Limited. He claims that the employees were assured that the business would continue to run as usual.
5. On 9th March 2018, the Claimant was issued with a termination notice on account of redundancy. While his last working day was stated as 30th March 2018, the notice period was to run up to 8th April 2018.



6. The Claimant faults the Respondent for failing to issue a redundancy notice as stipulated in law. He states that there was no communication to the local Labour Office.
7. The Claimant's case is that there was no real basis for the redundancy and no fair selection criteria. He states that in the midst of the redundancy, there was an influx of expatriate employees, in addition to local employees hired in the Claimant's Department.
8. The Claimant accuses the Respondent of unlawfully demoting him prior to the termination of his employment. He claims to have suffered discrimination, victimisation and harassment in the hands of the Respondent's management.
9. The Claimant's claim is as follows:
 - a. 12 months' salary in compensation.....Kshs. 364,320.00
 - b. 1 month's salary in lieu of notice.....30,360.00
 - c. Untaken leave days.....7,517.70
 - d. Bonus due as at 30th March 2018.....30,360.00
 - e. Severance pay for 2 years.....30,360.00
 - f. General damages for discrimination.....5,000,000.00
 - g. Punitive and exemplary damages
 - h. Costs plus interest

The Respondent's Case

10. In its Memorandum of Defence dated 24th May 2018, the Respondent admits having employed the Claimant on 23rd December 2015, in the position of Data Entry Clerk. At the time of separation, the Claimant earned a basic monthly salary of Kshs. 25, 806 plus a house allowance of Kshs. 4,554.
11. The Respondent states that by letter dated 23rd January 2018, it notified the Labour Office, Industrial Area of its intention to declare 20 employees redundant in the months of March, April and May 2018, due to the cost of doing business.
12. Subsequently, the Claimant was issued with a letter dated 9th March 2018, giving him a 30 days' notice informing him that his contract of service would terminate on 13th April 2018, on account of redundancy. The letter also detailed the Claimant's terminal benefits.
13. The Respondent states that the Claimant's terminal benefits were duly tabulated and a cheque for Kshs. 61,795 issued but the Claimant refused to collect the cheque.
14. The Respondent denies the Claimant's allegations that there was an influx of foreign workers at the time of the redundancy.
15. The Respondent defends the redundancy and points out that 2017, being an election year, presented an unfavourable business environment which affected the Respondent's business.
16. The Respondent denies that the Claimant was ever demoted as alleged and maintains that the Claimant retained his position and remuneration.



17. The Respondent denies the allegations of discrimination, harassment and victimisation, pointing out that the Claimant had, in September 2017, lodged a complaint against his workmate, Hitesh Gohil, which was investigated and appropriate action taken.
18. The Respondent avers that the Claimant was paid severance pay, which he refused to accept.
19. The Respondent's case is that the termination of the Claimant's employment on account of redundancy was in accordance with Section 40 of the [Employment Act](#).

Findings and Determination

20. 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

21. On 9th March 2018, the Respondent wrote to the Claimant as follows:

“Dear Mr. Wambua,

Re: Redundancy

As you are aware, we are in the process of restructuring our operations in Kenya to optimize business performance and some positions would be redundant. The Company has explored ways in which your redundancy could be avoided and the possibility of alternative employment but regrettably, this has not been successful. We therefore, have no option but to declare you redundant with effect from 8th April, 2018.

This is a one month's notice to terminate your contract as per your terms and conditions of employment. However, you will not serve your entire notice of one month as the company will be releasing you at the end of March, 2018 but will pay you up to and including 8th April 2018.

You will be paid your contractual dues as follows: -

1. Your salary up to and including 13th April 2018.
2. 15 days' pay for each completed year of service. (FY 2016/2017)
3. Earned but unutilized leave.

The above payments will be less any monies you may be owing to the Company and the Superlite Sacco Ltd/Strategic Sacco Ltd. The same will be subject to tax and other statutory deductions where applicable.

The payments will also be subject to the return of any company assets in your possession.

Payment of NSSF dues is the responsibility of the Fund. You are however advised to obtain the relevant claim forms from the Funds' offices (if or when you are qualified for payment) and bring the same to the Human Resources office for updating and confirmation of your contributions.

A schedule of payments as detailed above, a cheque for the net pay together with a Certificate of Service will be ready for collection on or after Friday, 30th March, 2018.



Finally, I wish, on behalf of the Company to thank you for your service and wish you a very successful life outside Charm Industries Ltd.

Yours sincerely,

(signed)

Margaret Geno

HR Head – East Africa”

22. It is not disputed that the Claimant’s employment came to an end on account of redundancy.
23. Section 2 of the *Employment Act* and the corresponding provision 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.”
24. Redundancy is a legitimate mode of termination of employment, subject to compliance with the following conditions set out in Section 40 of the *Employment Act*:
 - (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;
 - (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.
25. The first two 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.
26. The Court of Appeal has firmly established that the redundancy notice under Section 40(1)(a) and (b) is separate and distinct from the termination notice provided under Section 40(1)(f).



27. In *Thomas De La Rue (K) Ltd v David Opondo Omutelema* [2013] eKLR the Appellate Court rendered itself in the following terms:

“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.”

28. In the subsequent decision in *Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others* [2014] eKLR Maraga JA (as he then was) stated 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.”

29. In the more recent decision in *The German School Society v Helga Ohany* (Civil Appeal No Nai 325 of 2018 consolidated with No 342 of 2018) the Court of Appeal held that the requirement for consultation is implied in Section 40 of the *Employment Act*, stating 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.”

30. Regarding notice, the Claimant faults the Respondent on two fronts; first, that the notice to the Labour Office was not served within the local area of the Claimant’s place of employment and second, that the Claimant himself was only issued with a termination notice and not a redundancy notice.

31. By its own admission, the Respondent served a redundancy notice on the Labour Office at Industrial Area and not Mavoko within whose jurisdiction the Claimant worked. More significantly, the evidence on record shows that the first official communication issued to the Claimant was a termination notice.

32. In its decision in *Fredrick Mulwa Mutiso v Kenya Commercial Bank Limited* [2017] eKLR this Court held that the notice to the Labour Officer serves the dual purpose of eliciting advice on modalities to be employed in the redundancy process, while acting as a control measure to curb against unlawful termination clothed in redundancy language.

33. From the evidence on record, the Claimant was not issued with a redundancy notice as required by law nor was there prior consultations on the possibility of averting the redundancy or mitigating its negative impact.



34. The Claimant further complains that in executing the redundancy, the Respondent did not follow any known selection criteria. Under Section 40(1)(c) an employer declaring redundancy is required to follow objective selection criteria, which takes into account seniority in time, skill, ability and reliability of each employee.
35. The Claimant told the Court that he was targeted for redundancy, based on his previous encounter with his superiors, who he accused of racial discrimination against him. While the Respondent denied the allegations of discrimination, it admitted having received a complaint from the Claimant concerning maltreatment by one of the employees of the Respondent. The Respondent was obscure on the details regarding this complaint and the action taken against the offending employee.
36. With this background, the Claimant's concern that he may have been targeted for redundancy for collateral reasons was credible and the only way the Respondent would have acquitted itself on this account would have been to lay before the Court the actual selection criteria used. The Respondent however failed the test and the Court was left guessing as to the real selection criteria used to pick the Claimant for redundancy.
37. There is evidence that the statutory dues payable to the Claimant were tabulated but the Claimant declined to receive the payment. In the circumstances, I find no basis to fault the Respondent on account of conditions (e), (f) and (g) set out in Section 40 of the *Employment Act*.
38. In the ultimate, I find and hold that the termination of the Claimant's employment was unlawful for breach of the conditions on redundancy notice and selection criteria.

Remedies

39. I therefore award the Claimant four (4) months' salary in compensation. In arriving at this award, I have considered the Claimant's length of service and the fact that the Respondent had made efforts to pay the Claimant's terminal dues.
40. The claims for notice pay, leave pay and severance pay are admitted and are payable.
41. The claims for bonus, general damages for discrimination, punitive and exemplary damages were not proved and are disallowed.
42. Finally, I enter judgment in favour of the Claimant as follows:
 - a. 4 months' salary in compensation.....Kshs. 121,440
 - b. Notice pay.....11,677
 - c. Leave pay.....7,590
 - d. Severance pay.....30,360
 - Total.....171,067
43. This amount will be subject to statutory deductions and will attract interest at court rates from the date of judgment until payment in full.
44. The Claimant will have the costs of the case.
45. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 11TH DAY OF APRIL 2024

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JUDGE

Appearance:

Ms. Mudaye for the Claimant

Mr. Okeche for the Respondent

