



**Kalume v Action Africa Help International (Employment and Labour Relations Cause 689 of 2019) [2024] KEELRC 992 (KLR) (11 April 2024) (Judgment)**

Neutral citation: [2024] KEELRC 992 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS CAUSE 689 OF 2019**

**MN NDUMA, J**

**APRIL 11, 2024**

**BETWEEN**

**CHRISTINE KALUME ..... CLAIMANT**

**AND**

**ACTION AFRICA HELP INTERNATIONAL ..... RESPONDENT**

**JUDGMENT**

1. The suit was filed on 16/10/2019 by the claimant against the respondent seeking an order in the following terms:-
  - a. A declaration that the claimant is cleared with respect to the disciplinary process initiated by the respondent.
  - b. General damages
  - c. Damages in accordance with section 49 of the Employment Act.
  - d. Costs and interest.
2. CW1, the claimant testified that she was employed by the respondent on 1/1/2014 in the position of operations manager. That she served diligently and was promoted to the position of County Programme Manager for the respondent's Somalia programme based in Mogadishu commencing on 1/6/2015.
3. In December 2015, following loss of a colleague and threats received, a decision was made by the respondent's leadership to remove the claimant from the management of the Somalia programme to ensure claimant's safety.



4. The respondent later amended the claimant's contract and appointed her to the position of partnerships manager effective from 1/1/2016 which position she performed well according to her testimony.
5. The claimant stated that by a letter dated 21/7/2016, the claimant was asked to show cause why disciplinary action should not be taken against the claimant on allegation of failure to reach acceptable levels of performance.
6. The claimant responded to the letter by a letter dated 26/7/2016 explaining why such disciplinary action should not be taken against her. A disciplinary hearing was scheduled for 29/7/2016.
7. The respondent however, wrote a letter to the claimant dated 18/8/2016 titled "Redundancy" in terms of which the employment of the claimant was terminated on grounds of redundancy.
8. The claimant stated that she was unfairly targeted for termination and there were no genuine reasons for that action. That the termination was unlawful and un-procedural.
9. That the proximity between the intended disciplinary action and the subsequent redundancy without conducting the intended disciplinary hearing was suspect and was evidence of ill motive on the part of the respondent.
10. That the process of redundancy fell short of the Human Resource Manual and Employment Act, 2007 procedural requirements in that no adequate notice was given, the respondent did not notify the labour office, there was no due regard to seniority in time and to skills, ability and reliability of the particular class of employees affected by the redundancy exercise. That the court grants the claimant the prayers sought.
11. Under cross-examination the claimant said that she was informed of the outcome of the disciplinary hearing by a letter dated 27/9/2016. She told the court that the matter was overtaken by the redundancy process but was not closed. That failure to close the disciplinary process was her main problem. The claimant denied any wrong doing restating that the audit queries raised happened during her absence.
12. The claimant said that she appealed to the director to close the disciplinary process to enable her get other employment. That the respondent told her that the disciplinary process was of no relevance but was not closed. The claimant says that she was neither charged nor cleared and was left in limbo and could not get alternative employment for a long time. CW1 said she now worked as a mobiliser for an international company. She said that she suffered for four (4) years before she could get the present job. That her child suffered due to lack of income as a result. That the respondent did not give the claimant a letter of reference since she was not cleared. That her final dues were not paid.
13. The claimant denied that USD 23,459/= was paid into her account on 20/1/2017 but stated that she received Kshs. 1.89 million as gratuity and not other dues. The claimant said that she joined the programme on 2/1/2015 and the job ended on 16/12/2015.
14. The claimant said she refused to sign the discharge letter and so was not paid her dues. She further said she did not sign letters regarding the redundancy.
15. RW1 Job Githaiga Kamau, testified for the respondent. He adopted a witness statement dated 15/7/2022 as his evidence in chief and produced documents marked exhibit '1' to '14' in support of the respondent's case.



16. RW1 told the court that the disciplinary process against the claimant was concluded and a decision made. That the disciplinary process and the redundancy exercise were two separate issues. RW1 told the court that he served the respondent from March 2014.
17. According to RW1, the respondent sent a letter dated 27/9/2016 to the claimant titled “outcome of disciplinary hearing” after the hearing took place on 29/7/2016 in which the respondent considered written submissions by the claimant and her response to the issues raised in the notice to show cause dated 21/7/016. RW1 stated that systemic weaknesses were identified but that the claimant as acting programme manager at the time could have done more to prevent loss of organizational funds. However, the respondent told the claimant that “This matter, has however, been overtaken by events with the redundancy process. AAHI has thus opted to close the matter.”
18. RW1 told the court that the claimant was issued with clearance certificate and certificate of service which documents are not before court.
19. RW1 stated that the respondent informed the labour office of the intended redundancy and the notice was before court. RW1 admitted that the said notice was not dated nor signed explaining that it was a copy since the original had been sent to the labour office. RW1 explained that the notice was a standard document the respondent used.
20. RW1 said that other people who worked with the claimant in the accounts and finance office went through the disciplinary process just like the claimant. RW1 said that the disciplinary process was still going on when the claimant and others were declared redundant. That the two processes took place simultaneously. RW1 said that the claimant with others were found guilty of the charges raised in the notice to show cause. However, organizational weakness were also identified by the audit process.
21. RW1 said that the claimant as the programme head had the overall responsibility to remedy any weaknesses inherent in the system she joined. Her position was managed from Headquarters. RW1 said that the redundancy notice was given a month earlier. RW1 said the claimant was requested to apply for alternative positions which were at the head office since the Somali programme lacked funds. That the culpability found was not personal to the claimant so the respondent could still give her alternative jobs at the head office. That the weaknesses found were systemic and not personal to the claimant.
22. That the respondent was ready to train her in other positions which are based on donor funding.
23. That the claimant failed to take up the opportunity and apply for any new position as such her services were no longer required as of 30/9/2016 and her employment was terminated by default.
24. That the claimant was accorded one month notice required in lieu when terminating the employment. That she even got 12 extra days’ notice.
25. That the termination had nothing to do with the initial show cause letter and was purely as a result of the reorganization. That she was not targeted as alleged or at all. The termination was evidently amicable and that the disciplinary proceedings against her were dropped and both parties separated well
26. The claimant was paid exit benefits including one month salary, 13<sup>th</sup> month pro-rata for 2016; inpatient cover until 31<sup>st</sup> December 2016; gratuity and 15 days severance pay for each completed year worked.
27. The claimant was not treated maliciously as alleged. The respondent complied with all section 40 procedures and the termination was lawful and fair. That the suit be dismissed for lack of merit.



## Determination

28. The parties filed written submissions which the court has carefully considered together with the evidence adduced by CW1 and RW1. The issues for determination are:-
- i. Whether the termination of employment of the claimant was for a valid reason following a fair procedure.
  - ii. Whether the claimant is entitled to the reliefs sought.
29. The evidence common to the parties in this matter is that the claimant worked for the respondent from 1/9/2013 for about 3 years until she was declared redundant on 30/9/2016. That prior to the separation on grounds of redundancy the claimant was undergoing a disciplinary process commenced by a show cause letter dated 21/7/2016 to which she responded on 26/7/2016 and was scheduled to attend a disciplinary hearing on 29/7/2016.
30. That before the disciplinary process was concluded the respondent informed the claimant by a letter dated 18/8/2016 that her role as partnerships manager had become redundant.
31. The claimant's case is that the disciplinary process and the redundancy declaration were so interlinked that the inevitable conclusion is that the claimant was unlawfully and unfairly targeted for termination under the pretext of redundancy which was not genuine. The respondent refutes this claim stating that the portfolio the claimant held was no longer needed and was not sustainable. That she had to be declared redundant lawfully. That the fact that she had during the time faced disciplinary process for misconduct was a mere coincidence. That she was offered opportunity to apply for other equal positions but she declined. That the respondent followed a fair procedure and paid all due benefits to the claimant upon termination.
32. Declaration of redundancy is guided by the provisions of section 2 and 4 of the *Employment Act* 2007 and case law propagated by the courts over time.
- Section 2 defines redundancy as:-
- “Redundancy means 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.”
33. Section 40(1)(a) to (g) sets out the minimum procedural and substantive requirements to be followed by an employer.
34. In *Gerrishom Mukutsi Obayi versus DSV Air and Sea limited* (2018) eKLR the court held:-
- “In both sections, the provision is that the notice is given to the employee and the labour office, or the union and the labour officer. It means that in each case, the labour officer must be entitled to at least one months' notice before the redundancy is effected and the employee or union must also be notified at least one month before the redundancy is effected.”



35. The first notice is one of intention to conduct a redundancy to avail opportunity to the parties to pursue matters provided for under section 40(1) (c) which mandates in the following manner:

“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 or the particular class of employees affected by the redundancy.”
36. It is clear therefore, a general notice of intention to declare a class of employees must first be issued providing at least a period of one month of meaningful engagement and or consultation with employees likely to be affected and in which period these employees are given opportunity to explain why they ought not to be the ones to be sent home on grounds of redundancy. This must be a meaningful exercise but not a by the way to fulfill the procedural step. The engagements conducted must be recorded as evidence of the genuineness of the exercise and that the process was just, fair and conducted in a reasonable manner minding all the sensibilities of the moment.
37. It is only after conclusion of this exercise that the individuals to be terminated on grounds of redundancy are identified in person and the employer at that point is bound to issue a further one months’ notice of termination to the individual employees. Each employee notified at this point may serve the actual one month notice or the employer may opt to pay each employee one month’s salary in lieu of notice.
38. The labour officer must be engaged in the consultation process upon issuance of the first, general notice to the class of targeted employees.
39. Where only one employee is targeted for redundancy, which was not the case in this matter, the employee must also be afforded the initial period of meaningful engagement for the purpose of exploring ways and means of avoiding the retrenchment and or minimizing the effect of the redundancy on the employee.
40. In the present case, the claimant was right to feel mistreated having been subjected to a disciplinary process simultaneously with the redundancy exercise. The claimant was right to feel that her goose had been cooked and was not going to be treated fairly.
41. The court finds that indeed no reasonable person would consider her selection for redundancy during the process of a disciplinary action for alleged, unproved misconduct to have been fair.
42. Indeed the claimant remained haunted by that unfair process and it took her about four years to obtain alternative employment upon being retrenched.
43. The respondent took time to avail her terminal documentation and payments on account of redundancy.
44. The respondent admitted that it had equal and similar positions to be filled and were infact filled upon declaration of redundancy of the claimant.
45. Simple internal transfer would have amicably resolved the issue instead of engaging in a pretext of affording the claimant alternative employment in the same organization only if she applied to be selected competitively with persons who were not yet employees of the respondent.
46. The court finds that the respondent lacked a valid reason to terminate the claimant from employment on grounds that there was more work to be done by her in the organization. The respondent did not engage in any meaningful discussion with the claimant to preserve her employment in alternative capacity and or to minimize the effects of the separation.



47. The termination violated sections 40, 41, 43 and 45 of the *Employment Act*, 2007 and was unlawful and unfair.
48. In the case of *Kenya Airways Limited versus Aviation and Allied Workers Union of Kenya and 3 others* [2014] eKLR, the court of Appeal held;
- “Thus redundancy is a legitimate ground for terminating a contract of employment provided there is a valid and fair reason based on operational requirements of the employer and the termination is in accordance with a fair procedure.”
49. In a situation such as in the present case where there was an open opportunity for internal deployment, an employer acting genuinely, fairly and reasonably should present facts and exclusive opportunity to the employee whose work was affected to transfer to the sectors of the organization that remained busy.
50. The respondent admitted this was the case, but failed to deploy the claimant appropriately.
51. In the final analysis, judgment is entered in favour of the claimant against the respondent and declares that:-
- a. The termination of the employment of the claimant on grounds of redundancy was unlawful and unfair.
  - b. It was patently unlawful and unfair to conduct an inconclusive disciplinary process simultaneously with a redundancy exercise targeting the claimant. This amounted to an unfair labour practice.
52. The claimant is entitled to damages in terms of section 49(1) (c) and (4) of the *Employment Act*, 2007. In this regard the claimant lost a top project management job with the respondent; suffered unemployment and lack of income for a period of four years before she got alternative employment.
53. The claimant having been exonerated from any liability through the disciplinary process according to RW1, did not contribute to the unlawful termination.
54. The conduct by the respondent amounted to harassment and coercion to exit her employment.
55. The claimant had served the respondent diligently for a period of three years. The claimant suffered loss and damage.
56. The court has relied on the *Kenya Airways case* (*Supra*) to award the claimant the equivalent of four (4) months’ salary in compensation for the unlawful and unfair termination of her employment.
57. In conclusion judgment is entered in favour of the claimant against the respondent and the following orders made:
- a. The claimant is awarded (USD 6440 X 4) USD 25,760 in compensation for the unlawful and unfair termination of employment.
  - b. The disciplinary process hitherto commenced and not finalized against the claimant is declared unlawful and unfair and the record of that process is quashed from her employment record.
  - c. The award is payable with interest at court rates from date of judgment till payment in full.
  - d. Costs of the suit to be borne by the respondent.

**DATED AT NAIROBI THIS 11 DAY OF APRIL, 2024**



**MATHEWS NDERI NDUMA**

**JUDGE**

**Appearance:**

Mr. Lumallas for claimant

Ms. Bwire for respondent

Mr. Kemboi Court Assistant

