



**Ibrahim v Rahisi International Limited & another (Cause E362 of 2022) [2024] KEELRC 1317 (KLR) (27 May 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1317 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E362 OF 2022  
NJ ABUODHA, J  
MAY 27, 2024**

**BETWEEN**

**FEISAL IBRAHIM ..... CLAIMANT**

**AND**

**RAHISI INTERNATIONAL LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**HASSAN WAHAB ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. The Claimant filed his statement of claim dated 24<sup>th</sup> May, 2022 pleaded inter alia as follows: -
  - a. The Claimant was employed by the Respondent on or about March 2021 as a Sales Representative at its spare parts shop based along Kirinyaga Road in Nairobi, Kenya at a gross salary of Kshs 100,000.00 per month.
  - b. The Claimant averred that he commenced employment in March 2021 to May 2022 where he served the Respondent with verve, loyalty and diligence for a period of 1.2 years when the Respondent wrongfully and unlawfully purported to summarily dismiss and terminate his services actively and or constructively and failed to pay his terminal dues.
  - c. The Claimant averred that the terminal dues were to the tune of Kshs 1,576,000/= including notice pay, House Allowance, service pay and compensation for unfair termination.
  - d. The Claimant averred that his employment was at all times continuous and uninterrupted. That on or about 7<sup>th</sup> May, 2022 he reported to work as usual and at about 10:30 am the 2<sup>nd</sup> Respondent accused him of having a poor attitude and not wanting to work and told him that his employment was terminated immediately. That he was ordered to leave the shop immediately.



- e. The Claimant averred that on 11<sup>th</sup> May,2022 the 2<sup>nd</sup> Respondent called the Claimant to collect his purported terminal dues. That he collected and banked the cheque which was returned unpaid/dishonoured by the bank.
  - f. The Claimant averred that at the time of his termination, the Respondent did not communicate with him officially on the same or pay him his terminal dues making the same unfair.
  - g. The Claimant averred that prior to the termination the Respondent did not serve the Claimant with a show cause letter or invite him for a disciplinary hearing to defend himself against allegations of having poor attitude and not wanting to work.
  - h. The Claimant further averred that the Respondents actions amounted to unfair termination which was unlawful, unfair and contrary to the basic tenets of fair labour practices as enshrined in the Employment Act and the Constitution. That the Respondents acts also offended the Principles of natural Justice.
2. The Claimant prayed for the following against the Respondent;
- a. A declaration that the Claimant's termination was un-procedural and amounted to unfair termination.
  - b. Kshs 1,576,000/= as particularized above.
  - c. Certificate of service.
  - d. Costs of the suit and interests.
3. The Respondents filed they statement of Response dated 20<sup>th</sup> June, 2022 and they averred inter alia as follows;
- i. The Respondents denied the contents of the claim and averred that they offered to pay the Claimant terminal dues which was agreed at Kshs 163,332 vide a cheque issued to him which he collected.
  - ii. The Respondents averred that the cheque was mistakenly misdated and the year written as 2021 instead of 2022 which cheque returned to them and a new cheque with the correct date written. That since the 2<sup>nd</sup> Respondent was not available to sign the Claimant was told to come and collect the cheque later which he never did despite numerous phone calls.
  - iii. The Respondents denied dismissing the Claimant summarily without notice and averred that the Claimant was duly notified on 19<sup>th</sup> April,2022 that his services were no longer required as the Respondents could not sustain his salary due to low business returns.
  - iv. The Respondents denied the tabulation of claim and averred that the same had already been discussed by the parties.
  - v. The Respondents prayed that the claim be dismissed with costs the same being fraudulent and lacking good faith.
4. The Claimant did file a response to the Respondent's statement of Response dated 12<sup>th</sup> July,2022 and denied all the averments in the said statement.



## Evidence

5. The Claimant's case was heard on 3<sup>rd</sup> May, 2023 where Claimant testified and adopted his statement and the documents filed before the court as evidence in chief. In cross examination CW1 testified that they were around 15 people at place of work. That when the 2<sup>nd</sup> Respondent accused him of poor attitude and that his services would be terminated immediately he did not report the matter to the labour office. He did not bring any of his colleagues as witness in court.
6. The Claimant confirmed that he was claiming service pay of Kshs 60,000/= and even though he was being deducted NSSF it was not remitted. He never produced his NSSF statement to the court.
7. The Claimant confirmed that he was unfairly terminated and he was not given any termination letter or notice of termination. That he was not called upon to defend himself. That he had not been in touch with the Respondents since his termination. He confirmed to have been contacted to collect a cheque.
8. In re-exam the Claimant clarified that he was earning Kshs 100,000/- where he was not told that it included service pay. That he was not the custodian of employment records. He clarified that there were witnesses at the time of termination but they could not come to court as they feared for their jobs. The Claimant clarified that he was given a postdated cheque which was due in six months.
9. The Respondent's case on the other hand was heard on 9<sup>th</sup> November, 2023 where the Respondents called its only witness the 2<sup>nd</sup> Respondent and the director of the 1<sup>st</sup> Respondent who testified and adopted his statement and the document filed in court as his evidence in chief.
10. RW1 testified that he knew the Claimant and that the salary was all inclusive in that it included house allowance. RW1 testified that the Claimant was issued with 30 days -notice and the Respondents contributed NSSF and NHIF. That the Claimant was given reason for the redundancy and he was not alone.
11. RW1 testified that the business closed due to financial problems. That the certificate of service can be collected.
12. On cross-examination RW1 confirmed that the contract was not dated and the Claimant did not countersign the contract. RW1 confirmed that the company laid off workers due to financial reasons but did not provide financial statements in court. RW 1 did not produce the Board resolutions declaring the workers redundant.
13. RW1 confirmed that from the March pay slip the word consolidated did not appear. That they deducted the NSSF and NHIF from the gross salary of Kshs 100,000/= and remitted the same. RW1 did not produce evidence of the said remittance. RW1 could not recall if the Claimant went on leave. That the Claimant did not collect his terminal dues.
14. RW1 confirmed that the cheque was not banked as it was stale and the date needed to be corrected. RW1 confirmed that he has called the Claimant severally to collect the cheque but he never came to collect.
15. On re-examination RW1 clarified that the cheque had a wrong date which was a mistake. That the terminal dues were discussed and agreed. That NSSF was remitted. That the Claimant was aware his salary was consolidated. RW1 clarified that they were three directors but he was the Managing Director who made the decision to declare the workers redundant. That the Financial statement could be provided.



16. The court noted that the only contentious issue was legality or otherwise of the redundancy. The Court was informed that the Claimant was offered some payment which he has never collected. The court directed the parties to discuss the breakdown of the payment offered for terminal dues and record a consent if it is sufficient and the court will be left with the issue of redundancy.
17. By consent of the parties the sum of Kshs 163,332/= offered by the Respondents was to be paid in full and final settlement of the claim for terminal dues. The same was to be paid in 30 days' time.
18. Parties were to file submissions on the issue of legality or otherwise of the redundancy and whether the salary offered to the Claimant was consolidated salary including house allowance.

### **Claimants' Written Submissions**

19. The Claimant filed written submissions dated 11<sup>th</sup> November, 2023. On the issue of whether the Claimant was declared redundant procedurally the Claimant submitted that the Respondent did not follow the procedure as intended by the *Employment Act*.
20. It was the Claimant's submission that Section 2 and 40(1) of the *Employment Act* provides on the definition of redundancy and procedure of redundancy respectively.
21. The Claimant relied on among others the case of Gerrishom Mukhutsi Obayo v Dsv Air Sea Limited (2018) eKLR while submitting that at least one month notice should be given to the employee and the Labour Officer or the union officer before the redundancy is affected in order to confirm that the preconditions of redundancy have been complied with.
22. The Claimant submitted that there was no evidence that the Claimant was issued with a notice under section 40(a) and a notice to the Labour officer and termination notice was not given to the Claimant.
23. The Claimant submitted that redundancy is a process and not an event and that the provisions of part C of Section 40(1) requires the employer to have in place a fair and objective selection criterion while relying among others the case of Dennis Leak Ojuok v Population Services Kenya[2022] eKLR.
24. It was the Claimant's submission that the criteria applying to all the staff to decide on which employee was to be declared redundant was not placed before court.
25. The Claimant submitted that the Respondent contravened the *Employment Act* by failing to comply with Sections 41, 45(2) and 40 (1) in; failing to issue the Claimant with a statutory notice, failing to indicate the reason as to why they were declaring the Claimant redundant, failing to plead the selection criteria used to declare the Claimant redundant and failing to provide the minutes of hearing of the Claimant's representations before declaring him redundant.
26. On the issue of whether the Claimant is entitled to Reliefs sought, the Claimant submitted that having submitted that he was declared redundant in an unlawful manner, the Claimant is entitled to compensation as per section 49(1)(c) of the *Employment Act*.
27. On the issue of whether the Claimant's salary was consolidated, the Claimant submitted that the unsigned and undated Employment Contract before the court was unknown to him as the same was not offered by the Respondent.
28. The Claimant relied on the provisions of Section 9(2) and (3) of the *Employment Act* while submitting that the employer is responsible for creating a contract stating the details of employment and the employee must give their consent to the contract by either signing the contract or using their fingerprint in the presence of someone other than their employer.



29. The Claimant relied on the case of *Liech v Sameer Agricultural & Livestock (K) (now) Devyan Food Industries (K) Limited* while submitting that a party alleging that another party is bound by the terms and conditions contained in a written contract is obliged to produce an exhibit of said contract duly signed by the other failure to which the contract is not binding on the Claimant.
30. The Claimant submitted that he was not paid a house allowance for the years he was in service of the Respondent.
31. The Claimant relied on the case of *Trevar Marambe v For You Chinese Restaurant [2021] eKLR* in submitting that Section 31(1) of the *Employment Act, 2007* states that employers must provide reasonable housing for their employees or provide sufficient housing allowances and 31(2) states that the same does not apply to employees whose contracts include a provision that includes housing costs as part of their wages.
32. The Claimant submitted that the Respondent did not provide Pay slips as they do not indicate the Claimant's pay was consolidated.

### **Respondents' Written Submissions**

33. On the other hand, the Respondents filed their submissions dated 26<sup>th</sup> January 2024 and on the issue of whether the Claimant was unprocedurally, unlawfully and unfairly terminated submitted that the Claimant like other employees was affected by the downsizing of the employees owing to the fact that the company was no longer profitable despite the efforts put in place by the Respondents to make it profitable.
34. It was the Respondents' Submissions that this was not a case of unfair termination but a case of redundancy which is allowed under section 40(10)(b) of the *Employment Act* which was not contested by the Claimant. That the termination was not due to any misconduct to warrant a clam for unfair termination.
35. It was the Respondents' submissions that the Claimant was given one month Notice of the said redundancy vide a letter dated 19<sup>th</sup> April, 2022 and they relied on the case of *Nazarene Unversity vs David Mutevu & 103 Others(2017) eKLR*. That they complied with section 40(1) (b) as read with section 40(1)(f) of the *Employment Act*.
36. The Respondents submitted that the business was still doing bad and as a country business are doing bad with many employees at the verge of losing their jobs making redundancy necessary. The Respondents relied on among other cases the court of appeal case of *Kenya Airways Limited vs Aviation and Allied Workers Union of Kenya and 3 others (2014) eKLR* on the right of employer to declare employees redundancy after giving one month notice.
37. The Respondents further relied on the case of *Jane Khalechi Versus Oxford University Press E.A Ltd(2012) eKLR* to submit that the notice under section 40 as being different from that under section 41 of the *Employment Act*. The Respondents also relied on section 47(5) on respective burdens of proof by parties in unfair termination and submitted that the Claimant was aware of the redundancy.
38. The Respondents submitted that they complied with law in doing the redundancy and denied the Claimant's allegations that he was discriminated on grounds that he had poor attitude and not wanting to work since he was not the only one affected.
39. On the issue of whether the salary paid to the Claimant was consolidated the Respondents submitted that the Claimant was expressly informed through his employment letter that he was being paid a



consolidated salary of Kshs 100,000/=. That in cross-examination the Claimant confirmed that he was aware he was being paid a consolidated salary.

40. The Respondents relied on the cases of *Vipingo Ridge Limited v Swalehe Ngonge Mpitta*(2022) eKLR and *Charity Wambui Muriuki v M/d Total Security Surveillance Limited*(2017) eKLR that the employee ought to produce their pay slip to prove this. The Respondents submitted that the Claimant drew his salary which was consolidated for over a year without any complaint. That he was aware of his terms of employment hence he should have brought the issue forward to the employer and or produced any evidence that shows he was not being paid as per the contract of employment.
41. On the issue of whether the Claimant was entitled to the reliefs sought the Respondents submitted that the Claimant was not entitled to the reliefs sought as the Respondents proved that he was paid his terminal dues after redundancy. That the Claimant did not discharge the burden of proof required under section 47(5) of the *Employment Act* despite the Respondents proving that his post no longer existed.
42. It was the Respondents' submissions that they had the right to restructure their business due to hard economic circumstances and it would be punitive to award the Claimant 12 month's salary as compensation on account of such restructuring. The Respondents urged the court to take in to consideration that the Claimant worked for approximately 1 year and 2 months.
43. In conclusion the Respondents submitted that they followed *the Constitution*, the *Employment Act* and all other labour laws in rendering the Claimant redundant hence the termination being procedural and fair. The Respondents urged this court to dismiss the Claimant's claim in its entirety with costs to the Respondents.

#### **Opinion/analysis**

44. I have reviewed and considered the pleadings, testimonies and submissions by both counsel in support and opposition to the case. I have also considered authorities relied on by Counsels.
45. I have The court narrowed down the issues to the legality or otherwise of the Redundancy and whether the Claimant's salary was consolidated including house allowance. I have come up with three main issues from the above;
  - a. Aa. aa. Whether the redundancy was lawful and procedural.
  - b. Whether Whether the Claimants' salary was consolidated including house allowance
  - c. Whether the Claimant is entitled to the reliefs sought.

#### **Whether the redundancy was lawful and procedural.**

46. In this case, the Respondents alleged that they terminated the services of the Claimant on grounds of redundancy among other four employees due to hard economic times where the business was not doing well. They allege to have given the Claimant a redundancy notice dated 19<sup>th</sup> April, 2022.
47. Whereas the Claimant's case is that he was terminated on an invalid reason of redundancy but dismissed by the 2<sup>nd</sup> Respondent on 7<sup>th</sup> May, 2022 due to his poor attitude and not wanting to work. That even if it was on account of redundancy the Respondents did not follow procedure stipulated under section 40 of the *Employment Act* on redundancy. That the Respondents did not give him the redundancy notice or the said termination letter on account of redundancy.



48. Redundancy on the other hand has been defined under section 2 of the *Employment Act* as;
- 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.
49. The courts have stated severally that even in cases of redundancy the reason ought to be valid as provided for under section 43 of the *Employment Act* and the employee given a right to be heard under section 41 of the *Employment Act* hence unfair termination under section 45 of the *Employment Act* when the employer does not prove a valid reason for termination.
50. In Kenya Airways Limited VS. Aviation and Allied Workers Union of Kenya and 3 Others (2014) eKLR, the Court of Appeal pronounced itself as follows:
- “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. As Section 43(2) provides, the test of what is fair reason is subjective. The phrase “based on operational requirements of the employer” must be construed in the context of the statutory definition of redundancy.
- What the phrase means, in my view, is that while there be underlying causes leading to a time redundancy situation such as reorganization, the employer must nevertheless show that the termination is attributable to redundancy – that is that the services of the employee has been rendered superfluous or that redundancy has resulted in abolition of office, job or loss of employment.”
51. From the above precedent it is clear the reason has to be valid and a fair procedure has to be followed. In this case I do not agree with the Respondents that the Claimant was declared redundancy when there was no board resolutions this being a limited liability company declaring employees redundant. The Respondents witness confirmed that they did not also produce the company’s financial statement to illustrate that the Respondents were facing hard economic times. The Respondents have also not produced the letters to other employees declared redundant or criteria of how employees were declared redundant.
52. Assuming the reason for redundancy was valid the Respondents were bound to follow a fair procedure in terminating the Claimant under redundancy. In this case the Claimant has denied receiving the Redundancy notice or the termination letter on account of redundancy. The Respondents on the other hand have not produced evidence that the same notices were served upon the Claimant since none was signed by the Claimant.
53. The Claimant was not given a chance to think about this abrupt action by the Respondents who had already decided and he was not given sufficient notice. The Claimant was not given chance to express his views which is against the clear provisions of the law under section 41 of the *Employment Act* or even given a chance to prepare his representations on the said issue. The Claimant was also not consulted as it was held in the above case.
54. The Respondents also acknowledged during hearing that they never notified the labour office of the decision to terminate the Claimant on redundancy grounds which is a mandatory requirement under section 40 of the *Employment Act*.



55. In conclusion I am of the view that the Claimant's termination was substantively unjustified and procedurally flawed hence unlawful and unfair termination.
- Whether the Claimants' salary was consolidated including house allowance
56. It is noteworthy to note that parties are bound by their contract. The Respondents have produced an employment contract which is undated and which was not signed by the Claimant as an acceptance of the terms of the contract.
57. The Claimant maintained that he was unaware of the said contract hence he was not bound by the said contract which provided for his salary as consolidated.
58. The Claimant produced his March 2022 Pay slip which did not indicate that his salary was consolidated. In this instant case therefore it is clear that the Claimant was not paid his house allowance as per section 31 of [Employment Act](#).
59. This court in *Charity Wambui Muriuki v M/s Total Security Surveillance Limited* [2017] eKLR gave an interpretation to the phrase "consolidated salary" that:
- "the basic salary and allowances payable to an employee." These allowances may include house allowance. Of importance is that from the definition aforesaid, "basic salary" does not include allowances. It is to the basic salary that allowances are added to constitute "consolidated salary."
60. This position was amplified in the case of *Clifford Sosi Nyabuto v Board of Governors - Singhsaba Nursery Primary* [2016] eKLR as follows;
- "Having failed to produce the records and having found that the Respondent was not paying house allowance to the Claimant, I find that the Claimant is entitled to the difference between the consolidated minimum wage and the salary actually paid. I can however only award him such payment for 36 months, that being the maximum period for which an employer can be compelled to produce such records under section 53 of the [Labour Institutions Act](#) and section 74 of the [Employment Act](#)."
61. I fully adopt and echo the findings in the above case, to the effect that the Claimant's salary was not consolidated.
62. I therefore find and hold that the Claimant's minimum consolidated wage should have been 15% of the basic salary as housing allowance as provided in the General Order. The claimant was therefore entitled to the house allowance as prayed.
63. Whether the Claimant is entitled to reliefs sought.
64. Having found that the Claimant was unfairly terminated I therefore proceed to find that he was entitled to compensation for unfair termination as provided for under section 49 of the [Employment Act](#) but proceed to consider that the Claimant had only worked with the Respondents for almost one year two months and the fact that the Respondent paid the Claimant a sum of Kshs 163,332/= as terminal dues I will award compensation for unfair termination of four months.
65. Having established that the Claimant was entitled to house allowance I also award him house allowance at Kshs 216,000/=
66. The Claimant is also entitled to certificate of service as provided for under section 51 of the [Employment Act](#).



67. In conclusion the Claimant's claim is allowed with costs follows.

- a. Six months Compensation for unfair termination—Kshs 400,000/=
  - b. House Allowance-- Kshs 216,000/=
- Total KSHS 616,000/=
- c. Certificate of service.
  - d. Costs and interests of the suit.

**DATED THIS 27<sup>TH</sup> DAY OF MAY, 2024**

**DELIVERED THIS 27<sup>TH</sup> DAY OF MAY, 2024**

**ABUODHA NELSON JORUM**

**JUDGE**

