



**Mberia v Majlis Lamu Ltd (Cause E205 of 2022)
[2024] KEELRC 1662 (KLR) (28 June 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1662 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E205 OF 2022**

SC RUTTO, J

JUNE 28, 2024

BETWEEN

CHARITY JEMTAI MBERIA CLAIMANT

AND

THE MAJLIS LAMU LTD RESPONDENT

JUDGMENT

1. The Claimant avers through her Memorandum of Claim dated 1st April 2022 that she was employed by the Respondent as a Reservations Officer on contract with effect from 14th September 2020. According to her, she served the Respondent diligently for about one year and three months. It is the Claimant's case that vide a letter dated 24th December 2021, the Respondent unfairly and wrongfully terminated her employment on grounds of redundancy. Consequently, the Claimant claims the following reliefs against the Respondent:
 - a. One (1) month pay in lieu of redundancy notice Kshs 100,000.00;
 - b. One (1) month pay in lieu of notice Kshs 100,000.00;
 - c. Annual leave Kshs 100,000.00;
 - d. Compensation for unlawful termination (12 months) Kshs 1,200,000.00;
 - e. Costs of the suit;
 - f. Interest on (a), (b) and (c) above at court rates;
 - g. Any other order and/or relief that this Honourable Court may deem fit and just and expedient to grant.
2. The Respondent opposed the Memorandum of Claim through its Response dated 4th July 2022. The Respondent avers that it followed the laid down procedure for termination on account of redundancy.



In the Respondent's view, the Claimant does not have any tenable claim under the *Employment Act* and as such, she is not entitled to recompense and/or damages sought in the Memorandum of Claim. On this account, the Respondent has asked the Court to dismiss the Claim with costs.

3. The matter proceeded for hearing on 29th February 2024 and 13th March 2024 during which both parties called oral evidence.

Claimant's Case

4. The Claimant testified in support of her case and at the outset, she sought to rely on her witness statement to constitute her evidence in chief. She further produced the list and bundle of documents filed alongside the Memorandum of Claim as exhibits before Court.
5. The Claimant stated that she did not receive the email from the Respondent dated 22nd November 2021 and was not notified of the intended redundancy.
6. She further stated that following her termination, she handed over to the Reservations Manager by the name Bella.
7. It was her further testimony that at the time of her termination, the Respondent's business was very busy and it was at full occupancy.
8. The Claimant further stated that at the time of her termination, there were five staff members in the Respondent's Reservations Section in Nairobi.
9. She maintained that her contract of employment was unfairly and wrongfully terminated by the Respondent.
10. Closing her testimony in chief, the Claimant asked the Court to award her compensation for unfair termination.

Respondent's Case

11. The Respondent called oral evidence through Mr. Stefano Moccia who testified as RW1. He identified himself as the Director of the Respondent company. Equally, RW1 adopted his witness statement to constitute his evidence in chief. He further produced the list and bundle of documents filed on behalf of the Respondent as exhibits before Court.
12. RW1 stated that the Claimant's main responsibility was to book reservations and send confirmation of the said bookings to the hotel and special requests by guests and tourists. That the Claimant served the Respondent in the aforesaid capacity until or on or about 24th December 2021 when her employment was terminated on account of redundancy.
13. It was RW1's evidence that the Respondent being in the hotels, tours and tourism industry, had its operations grossly affected by the Covid-19 pandemic. That the International and Domestic travel restrictions worsened the situation of the Respondent's business.
14. RW1 further stated that the Respondent's revenue experienced a drastic decline as the pandemic affected the reservations of guests up to a point where no reservations were being made to the hotel during the period.
15. That as the virus continued to affect the global and international spheres, the Respondent was faced with a serious business challenge forcing it to reduce its operations and it became extremely difficult for it to accommodate all its employees.



16. With the impact of the pandemic on the Respondent's cash flow position, it took measures to help stay afloat by effecting changes in its organizational structure. The changes affected the Claimant herein and her position.
17. RW1 further stated that in effecting the organizational structural changes, the Respondent issued the Claimant among others, with a notice of redundancy on 22nd November 2021 and a copy to the area labour officer.
18. The Respondent also conducted pre-notice consultations which needed to be conducted before the issuance of the notice and this was to ensure that the process was as consultative as possible.
19. It was his testimony that the Respondent carried out consultations effectively with the affected employees including the Claimant.
20. According to RW1, the key reason for the redundancy was the severe downturn of clients due to the travel restrictions internationally and locally due to the spread of the virus which majorly affected the hotels, tours, travel and tourism sector especially at the coastal region whether the Respondent is based. This exercise was also not unique to the Respondent as it was taking place locally and globally as a coping mechanism.
21. The notice of redundancy as issued by the Respondent outlined the extent and reasons for the redundancy thus the termination was procedurally done in compliance with the provisions of Section 40 of the *Employment Act*.
22. At the end of the consultation period, the termination letter dated 24th December 2021 was issued to the Respondent wherein she was declared redundant subject to payment of all her full terminal dues which comprised all pending annual leave; severance pay; end month salary; and pay in lieu. The Claimant was paid her full terminal dues and cleared with the Respondent.
23. The Claimant's employment was thus lawfully, validly and procedurally terminated on account of redundancy.
24. In RW1's view, the Claimant is thus not entitled to the prayers sought. According to him, the effect of the prayers sought is to ask the Court to step in, perform and usurp the powers of the Respondent in determining whether it should or should not declare redundancies even when it is rightful to do so.

Submissions

25. The Claimant submitted that the Respondent did not produce any audited financial statements demonstrating it was experiencing any financial difficulties/uncertainty to justify the redundancy. In the Claimant's view, this demonstrates that the Respondent was not in any economic strife as a result of the pandemic or at all.
26. In the same breath, the Claimant posited that in the absence of any evidence adduced by the Respondent to demonstrate its alleged difficult financial situation, there was no valid, lawful or reasonable basis for the Respondent to declare her employment redundant.
27. The Claimant further submitted that she was not issued with the notice terminating her employment on account of redundancy.
28. It was further submitted by the Claimant that there was no evidence placed before the Court by the Respondent on the selection criteria it used to select her to be declared redundant.



29. The Claimant further submitted that the statutory threshold of procedural fairness in the implementation of the termination on account of redundancy was not met as the Respondent failed to give her and the labour officer proper and adequate notice of the intended redundancy.
30. In support of its submissions, the Claimant cited the case of Kenya Airways Limited vs Aviation & Allied Workers Union Kenya & 3 others (2014) eKLR.
31. On the other hand, the Respondent submitted that it had provided evidentiary proof that it notified the Claimant of the looming termination and thus discharged the burden of proof laid on it by virtue of Sections 43 and 47(5) of the *Employment Act*. In support of its submissions, the Respondent cited the case of Peter Otabong Ekisa vs County Government of Busia (2017) eKLR and Titus Muriuki Ndirangu vs Bevery School of Kenya Limited (2022) eKLR.
32. The Respondent further submitted that before terminating the services of the Claimant, it considered prowess in technology, reduction of the duplicity of roles, merging various offices that undertook inter-related roles and bringing them under one office. In this regard, the Respondent posited that the Claimant's seniority, skill and efficiency were surpassed by her junior's reliability.
33. Arguing along the same lines, the Respondent further submitted that the principle of "last - in - first - out" is a thing of the past as it prevents the employer from retaining young vibrant employees who are up to the task in a bid to nurture them into seniority. According to the Respondent, it was looking to retain employees who could take lesser pay and work for long hours.
34. On this issue, the Respondent invited the Court to consider the determination in the case of Kenya Airways Limited vs Aviation & Allied Workers Union Kenya & 3 others (supra).

Analysis and Determination

35. Having considered the pleadings, the evidentiary material before me and the submissions on record, the Court isolates the following for determination: -
 - i. Whether the Claimant's termination by way of redundancy was fair and lawful; and
 - ii. Whether the Claimant is entitled to the reliefs sought.Whether the Claimant's termination by way of redundancy was fair and lawful.
36. As was held in the case of Kenya Airways Limited vs Aviation & Allied Workers Union Kenya & 3 Others (2014) eKLR, for any termination of employment under redundancy to be lawful, it must be both substantially justified and procedurally fair.
37. Whereas substantive justification refers to the reasons for which the redundancy was effected, procedural fairness has to do with the process applied in effecting the redundancy. I will proceed to address the two elements under separate heads.
 - i. Substantive justification
38. In the instant case, the reasons leading to the Claimant's termination can be discerned from the email dated 22nd November 2021 addressed to her by one Shamim Idris. The said email which is referenced "Notice of Termination on Account of Redundancy" is couched as follows:

"Dear Charity Jemtai Mberia,



As you are aware, the COVID-19 pandemic has greatly affected bookings and reservations majorly due to travel restrictions. This has rendered various positions at the company including that of reservations officer redundant.

It is with regret therefore, that we inform you of the Company's decision to terminate your employment as it is no longer able to sustain all the employee's wages and salaries.

Please allow this email to serve as a 30-day notice of the termination in line with the conditions of your employment contract.”

39. It is unequivocal that the outbreak of COVID-19 which was declared a global pandemic by the World Health Organization (WHO) sometime in March 2020, caused massive disruptions in business operations not only in Kenya but in most parts of the world.
40. It is also common knowledge that following the outbreak of the COVID-19 pandemic, drastic measures were taken worldwide to curb its spread. In Kenya, the Government adopted drastic response measures to contain the spread of the pandemic. Some of these measures included but not limited to travel restrictions within and out of the country.
41. It is common ground that the Respondent operates in the tourism industry. It thus goes without saying that at the onset of the COVID-19 pandemic and in the period that followed, the Respondent was not undertaking its normal business operations.
42. As a matter of fact, this Court takes judicial notice of the effect of the COVID-19 pandemic on many sectors of the economy including the tourism industry. As such I do not find the Claimant's argument that the Respondent was operating at full occupancy to be plausible.
43. To this end, the Court has no reason to doubt that the Respondent's operations were adversely affected by the COVID-19 pandemic due to the measures imposed by the Government on travel restrictions.
44. Accordingly, it is this Court's finding that the reason given by the Respondent to declare a redundancy, was fair, valid, and based on its operational requirements hence was in line with the requirements of Section 45(2) (b) (ii) of the *Employment Act*.
45. To this end, the Court is unable to find that the Claimant's termination was not substantively justified.
 - (ii) Procedural fairness
46. The procedure to be applied in effecting a redundancy is stipulated under section 40(1) of the *Employment Act*. In this regard, the following conditions must precede a redundancy: -
 - 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.
47. With respect to the notice requirement under Section 40(1) (b), the record bears that the Claimant was issued with a Notice of Termination dated 22nd November 2021. Notably, this was the same Notice that communicated the Respondent's decision to terminate the Claimant's employment on account of redundancy.
48. It is this Court's view that the notice contemplated under Section 40 (1) (b) is an "intention to declare a redundancy". It is issued before the redundancy takes effect. In this case, the said notice was issued to the Claimant after her position had already been declared redundant. It was a notice declaring the Claimant redundant as opposed to an "intention" to declare a redundancy as contemplated under Section 40 (1) (b) of the *Employment Act*. Put another way, the Respondent had already made the decision to declare the Claimant redundant.
49. In *Kenya Airways vs Aviation & Allied Workers Union Kenya & 3 Others* (supra) Maraga JA, (as he then was) addressed this issue as follows: -
- “My understanding of this provision is that when an employer contemplates redundancy, he should first give a general notice of that intention to the employees likely to be affected or their union. It is that notice that will elicit consultation between the parties,”
50. Applying the above determination to the case herein, it becomes apparent that the Respondent did not substantially comply with the statutory requirement under Section 40 (1) (b) of the *Employment Act* and to that extent is at fault.
51. The other requirement is in respect of the selection criteria stipulated under Section 40 (1) (c) of the *Employment Act*. In this regard, the employer is required to prove that in the selection of employees to be declared redundant, it has paid 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.
52. The Claimant testified that at the material time, five employees were working at the Respondent's Reservations Section. As such, one wonders how the Respondent settled on the Claimant as the one to go and not any of her colleagues.
53. In this case, the Respondent did not indicate, let alone suggest the criteria applied in selecting the Claimant for redundancy. Notably, it is only in its submissions that the Respondent stated that the Claimant's seniority, skill and efficiency were surpassed by her junior's reliability, especially with the advent of technology and therefore the "last in first out" principle could not work at the given time.
54. It is worth noting that despite the Respondent's submissions, there was no evidence for instance a score sheet, demonstrating the manner in which it applied the stipulated criteria and zeroed in on the Claimant as the employee to be declared redundant.



55. In any event, the Respondent's submission in this regard comes across as an afterthought having not been raised in its pleadings. As was held by the Court of Appeal in the case of Daniel Toroitich Arap Moi vs Mwangi Stephen Muriithi & Another [2014] eKLR, submissions cannot take the place of evidence. The Court proceeded to hold that submissions are generally parties' "marketing language", each side endeavouring to convince the court that its case is the better one.
56. Back to the instant case, it is this Court's finding that failure by the Respondent to adduce evidence to prove the manner in which it applied the selection criteria in earmarking the Claimant for redundancy, leaves room for doubt as to whether such selection, if any, was undertaken objectively. To that extent, the Respondent failed the test under Section 40(1) (c) of the Employment Act.
57. Turning to the requirement for consultations, RW1 stated that the Respondent conducted pre-notice consultations. Notwithstanding these assertions, there was no evidence that such consultations were undertaken in accordance with Article 13, Convention No. 158 - Recommendation No. 166 of the International Labour Organisation (ILO) convention.
58. In *Kenya Airways vs Aviation & Allied Workers Union Kenya & 3 Others* (supra) Maraga JA (as he then was) expressed himself as follows on the issue: -
- “Although it also does not expressly provide for consultation between the employer and the employees or their trade unions before the final decision on redundancy is made, on my part I find the requirement of consultation provided for in our law and implicit in the Employment Act itself. By dint of Article 2(6) of the Constitution, the treaties and conventions ratified by Kenya are now part of the law of Kenya. The Kenya Constitution, 2010 was promulgated on 27th August, 2010...The notices under this provision are not merely for information. Read together with Part VIII of the Labour Relations Act, 2007 which provides for reference to the Minister for Labour of trade disputes, including those related to redundancy (see Section 62(4)) for conciliation, I am of the firm view that the requirement of consultations implicit in these provisions.”
59. The Court of Appeal echoed this position in the case of *Barclays Bank of Kenya Ltd & another vs Gladys Muthoni & 20 others* [2018] eKLR and *Cargill Kenya Limited vs Mwaka & 3 others* (Civil Appeal 54 of 2019) [2021] KECA 115 (KLR).
60. In *Kenya Airways vs Aviation & Allied Workers Union Kenya & 3 Others* (supra), it was held that consultations are 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.
61. Fundamentally, consultations should not be cosmetic but rather meaningful and should be geared towards mitigating the adverse effects of the redundancy.
62. As I have found that there was no evidence of consultations between the parties in the instant case, I return that the Respondent is at fault to that extent.
63. With respect to the requirement for payments under Sections 40(1) (e), (f) and (g), of the Employment Act, the Court finds that the Respondent complied in principle since the letter of termination dated 24th December 2021 advised the Claimant that she was to be paid all pending annual leave, severance pay, end month salary and notice pay.
64. In support of its case, the Respondent exhibited a copy of a payment receipt in the sum of Kshs 134,100.00. During cross-examination, the Claimant admitted that the bank account number



appearing on the copy of the payment receipt was hers. She further admitted that the sum of Kshs 134,100.00 was credited to her bank account.

65. In as much as the Claimant stated that her terminal dues were underpaid, she did not plead with precision the extent to which she was underpaid.
66. Therefore, it can very well be said that the Respondent complied with the requirements under Section 40(1) (e) (f) and (g) of the *Employment Act*.
67. The total sum of my consideration is that the Respondent did not substantially comply with the provisions of Section 40 (1) of the *Employment Act*, in that it failed to comply with the notice requirements under clause (a), apply the selection criteria stipulated under clause (c) and engage the Claimant in consultations prior to the redundancy.
68. Consequently, the Claimant's termination by way of redundancy cannot be said to have been procedurally fair within the meaning of Section 40(1) of the *Employment Act*.

Remedies?

69. As the Court has found that the Respondent had a valid and fair reason to declare the Claimant redundant but failed to prove that the redundancy was undertaken procedurally as decreed under Section 40(1) of the *Employment Act*, she is awarded compensatory damages equivalent to two (2) months of her last salary. This award takes into account the length of the employment relationship which was relatively short as well as the circumstances leading to the redundancy.
70. The claim with respect to leave pay and notice pay is declined as it is evident from the record that the Claimant received payments in that regard.

Orders

71. In the final analysis, the Claim is allowed and Judgment is entered in favour of the Claimant against the Respondent and she is awarded the sum of Kshs 200,000.00 being compensatory damages equivalent to two (2) months of her last salary. Interest shall apply on the said award at Court rates from the date of Judgment until payment in full.
72. The Respondent shall bear the costs of the suit.

DATED, SIGNED and DELIVERED at NAIROBI this 28th day of June 2024.

.....

STELLA RUTTO

JUDGE

In the presence of:

For the Claimant Mr. Kibera

For the Respondent No appearance

Court assistant Millicent Kibet

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 15th March 2020 and subsequent directions of 21st 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 had 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 *Civil 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.

STELLA RUTTO

JUDGE

10

