



REPUBLIC OF KENYA



**Masika v Ngao Credit Limited (Appeal E209 of 2022)
[2024] KEELRC 2543 (KLR) (18 October 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2543 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL E209 OF 2022
SC RUTTO, J
OCTOBER 18, 2024**

BETWEEN

CHRISTINE NASIMIYU MASIKA APPELLANT

AND

NGAO CREDIT LIMITED RESPONDENT

(Being an appeal against the Judgment delivered by Hon. Rawlings Liluma Senior Resident Magistrate, Milimani Chief Magistrate Court at Milimani-Nairobi delivered on the 7th November 2022)

JUDGMENT

1. The Appellant instituted a suit at the Chief Magistrate's Court at Milimani being CMEL Cause No. 1765 of 2019 through which she averred that she was employed by the Respondent as a Credit Officer vide a letter of appointment dated 17th June 2014. It was the Appellant's case that during the period of employment, she held various positions being that of Credit Officer, Assistant Branch Manager and Debt Collection Manager. The Appellant averred that on 19th July 2019 whilst in the course of her employment, as a Debt Collection Manager, the Respondent's General Manager unlawfully, illegally and unprocedurally terminated her services.
2. According to the Appellant, the Respondent arranged a meeting on 22nd July 2019 to cover up her wrongful and unfair termination. That on 23rd July 2019, she received an email from the Respondent referring to a non-existent meeting and urging her to collect the cheque.
3. Against this backdrop, the Appellant sought the following reliefs at the trial Court;
 - i. Kshs 1,140,000/= being salary for 12 months at a rate of Kshs 95,000/= per month and remedy for wrongful dismissal and unfair termination.
 - ii. One (1) month salary in lieu of notice being Kshs 95,000/=.



- iii. Salary for 22 worked days in the month of July 2019 being Kshs 60,167/=.
 - iv. Severance pay for five (5) complete years Kshs 95,000 x 5 (Kshs 475,000/=).
 - v. Eight (8) leave payment Kshs 25,333/=.
 - vi. Interest on (i), (ii), (iii), (iv) and (v) with effect from 19th July 2019 until full payment is made.
 - vii. Costs of the suit.
 - viii. Any other relief the Court may deem fit and just to award.
4. Opposing the Claim, the Respondent filed a Response dated 7th November 2019, through which it averred that the termination of the Appellant's employment was on account of redundancy and that this was duly explained to her and the procedure set out under Section 40 of the *Employment Act* strictly adhered to. According to the Respondent, the Appellant's claim was unfounded and a clear ploy to enrich herself.
 5. The Respondent maintained that the Appellant was given the reason for her termination which was that, as a result of a Board meeting, the Debt Collection Manager position had been declared redundant as the Respondent chose to outsource the services of the said department. On account of the foregoing, the Respondent asked the trial Court to dismiss the Appellant's suit with costs.
 6. At the trial Court, the Appellant testified in support of her case while the Respondent called oral evidence through Ms. Forence Wanjiru Ndung'u. Upon close of the trial, both parties filed written submissions.
 7. Upon evaluating and analyzing the evidence on record as well as the parties' written submissions, the trial Court delivered its Judgment on 7th November 2022, thereby dismissing the Appellant's Claim with an order that each party bears its own costs. In dismissing the Appellant's Claim, the trial Court found that the Respondent was justified in terminating the services of the Appellant on account of redundancy and that it applied the procedure set out in Section 40 of the *Employment Act* hence the termination was procedural.

The Appeal

8. The Appellant being dissatisfied with the Judgment of the trial Court, lodged the instant Appeal through which she raises the following six (6) grounds: -
 1. That the Learned Trial Magistrate erred in Law and fact by failing to analyze the entire evidence on record and hence arrived on a wrong judgment in the circumstances.
 2. That the Learned Trial Magistrate erred in law and fact by finding that the Respondent followed the procedure set out in Section 40 of the *Employment Act* and thus made an erroneous finding that the termination of the Appellant was procedural.
 3. That the Learned Trial Magistrate erred in law and fact by not making a finding that the Appellant was not a member of a Trade Union and hence entitled to the Provisions of Section 40 1(b) of the *Employment Act*.
 4. That the Learned Trial Magistrate erred in law and fact by making a finding that the Appellant did not establish her case on balance of probability.
 5. That the Learned Trial Magistrate erred in law and fact by making an erroneous finding and thus denying the Appellant interest and costs of the Suit.



6. That the Learned Trial Magistrate erred in law and fact by failing to consider the Claimant's (sic) evidence and thus arrived at a wrong decision/judgment in the circumstances.

The Submissions

9. The Appeal was canvassed by way of written submissions pursuant to the Court's directions issued on 20th February 2024. On her part, the Appellant submitted that the Respondent did not fully adhere to the procedure of termination under redundancy as they failed to prove that they had consulted with the employees to be affected before they declared their positions redundant on 20th June 2019. In support of the Appellant's submissions, reliance was placed on the case of Kenya Airways Limited vs Aviation & Allied Workers Union Kenya (2014) eKLR.
10. It was the Appellant's further position that the Respondent failed to demonstrate to the Honourable Court what criteria they used to terminate her employment. Further, the Appellant submitted that the Respondent did not adduce any evidence to prove that her position was abolished and replaced with an outsourced service.
11. While acknowledging that the employer has the prerogative of declaring positions redundant, the Appellant argued that the Respondent in exercising its rights, had failed to exercise the fairness test in the termination of employment of an employee and also failed to follow the mandatory procedure outlined under Section 40 of the *Employment Act*. On this issue, the Appellant sought to rely on the case of Kenya Union of Domestic, Hotel Education, Institutions and Allied Workers Union (Kudheiha) vs Rabai Road Primary School.
12. The Respondent did not file written submissions as directed by the Court as the same were missing from the Court's physical record and the online portal.

Analysis and determination

13. This being the first appeal, this Court is enjoined to re-evaluate the evidence before the trial Court as well as the Judgment and draw its own independent conclusion. In so doing, the Court ought to bear in mind that it did not have the opportunity of seeing and hearing the witnesses firsthand. This position was reiterated by the Court of Appeal in the case of JSM v ENB [2015] eKLR.
14. That said, I have carefully considered the record before me, the Appellant's submissions, as well as the law, and the following issues fall for determination by the Court: -
 - i. Whether the Appellant's termination by way of redundancy was unfair and unlawful;
 - ii. Whether the remedies sought by the Appellant lie in law.

Whether the Appellant's termination by way of redundancy was unfair and unlawful

15. It is discernible from the letter of termination dated 22nd July 2019 that the Appellant's contract of employment came to an end on account of redundancy. In the said letter of termination, the Respondent notified the Appellant that the Debt Collection Manager's role which she held at the time, had been declared redundant. The question that now comes to the fore is whether the said redundancy was fair and lawful.
16. As was held by the Court of Appeal in Kenya Airways Limited vs Aviation & Allied Workers Union Kenya & 3 Others (2014) eKLR, termination of employment through redundancy ought to be both substantially justified and procedurally fair.



17. Whereas substantive justification refers to the reasons ascribed for the redundancy, procedural fairness has to do with the procedure applied in effecting the redundancy. I will now proceed to consider the two elements under separate heads.

(i) Substantive Justification

18. From the record, the reason for the Appellant's termination was that her role as Debt Collection Manager had been declared redundant. According to the Respondent, it did not require a full-time employee for the role as it intended to outsource the management of debt collection work.
19. In support of its case at the trial Court, the Respondent exhibited a copy of a Board Resolution which indicates that on 20th June 2019, it was resolved by the Board of Directors that the positions of Debt Collection Manager, Marketing Manager, Corporate Manager and Branch Risk Officer had been declared redundant owing to the department being restructured.
20. In light of the foregoing, one would have reasonably expected that the Respondent would adduce evidence in the form of its organizational structure/chart/organogram, following the restructure, to prove that indeed, the said positions had been abolished from its structure. Alternatively, the Respondent would have adduced evidence in whatever form or manner to prove that it had outsourced the management of debt collection services.
21. In the case of *Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others* [supra], the Court reckoned that while there may be underlying causes leading to a true redundancy situation, such as reorganization, the employer must nevertheless show that the termination is attributable to the redundancy and that the services of the employee have been rendered superfluous or that the redundancy has resulted in the abolition of office, job or loss of employment.
22. In further analyzing the definition of the term redundancy, the Court rendered itself thus:
- “There are two broad aspects of this definition...The second aspect is that the loss of employment in redundancy has to be at no fault of the employee and the termination of employment arises “where the services of an employee are superfluous” through “the practices commonly known as abolition of office, job or occupation and loss of employment.” In this case, what I understand as required to be determined in this aspect of the definition of redundancy is whether the appellant abolished the offices, jobs or occupations of the affected employees resulting in their services being superfluous hence their loss of employment. Corollary to that is the justification for that abolition, if the appellant indeed abolished their offices. Determination of these two aspects will, determine the first issue of whether or not the redundancy in this case was necessary.” Underlined for emphasis
23. Applying the above determination to the case herein, I cannot help but find that the Respondent failed to prove to the requisite standard that the Appellant's role was abolished from its organizational structure. Consequently, it failed to prove that there was substantive justification for the termination of the Appellant's employment on account of redundancy.
24. I find it worth mentioning that whereas it is apparent under Section 40 of the *Employment Act* that an employer is allowed to declare a redundancy, the same ought to be justified. Therefore, this right notwithstanding, the Respondent was duty-bound to prove that the Appellant's redundancy was attributable to the alleged restructuring hence was substantively justified.



25. To this end, the trial Court fell into error when it concluded that the Respondent was justified in terminating the services of the Appellant.
26. I now turn to consider whether the Respondent applied a fair procedure in declaring the Appellant redundant.

(ii) Procedural Fairness

27. Section 40(1) of the [Employment Act](#) stipulates the following conditions that an employer must comply with prior to an employee being terminated from employment on account of 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.
28. With respect to the notice requirement under Section 40(1) (b), the record bears that the Appellant was not issued with a Notice indicating the Respondent's intention to declare her redundant. What is on record is a letter dated 22nd July 2019 informing the Appellant that her role had been declared redundant and that her employment had been terminated as a consequence. With due respect to the Respondent, this was not the Notice contemplated under Section 40 (1) (b) of the [Employment Act](#).
29. In my view, the Notice contemplated under Section 40 (1) (b) is an "intention to declare a redundancy" and is to be issued by the employer before the redundancy takes effect. In the case herein, the Appellant was merely notified of her termination which had already taken effect. In essence, her position had already been declared redundant.
30. I am fortified by the position taken in the case of *Kenya Airways v Aviation & Allied Workers Union Kenya & 3 Others* (supra) by Maraga JA, (as he then was) thus: -

“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,”



31. Another issue I deem imperative to address is the fact that the Appellant was advised that she would be paid one (1) month's salary in lieu of notice. On this score, I must point out that payment of one month's salary is undertaken in compliance with Section 40(1)(f) of the *Employment Act*. As such, the payment does not supplant the requirement for notice under Section 40(1) (b). Such was the determination by the Court of Appeal in the case of *Cargill Kenya Limited vs Mwaka & 3 others (Civil Appeal 54 of 2019)* [2021] KECA 115 (KLR) thus:
- “In this respect, it is notable that a plain and contextual reading of subsection 1(f) shows that its express objective and purpose is the payment required to be made to employees affected by redundancy, and not the issuance of a notice. It is also notable that the legislative intention from the arrangement and content of the enactments in section 40 subsection (1) (d) to (g) was the provision of payments to be made to affected employees in a redundancy, and section 1(f) can only thus be construed within this context, as was done by Maraga JA in *Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others Nairobi Civil Appeal No. 46 of 2013* (supra)...”
32. The total sum of my consideration on this issue is that it is apparent that the Respondent did not substantially comply with the statutory requirement for Notice under Section 40 (1) (b) of the *Employment Act* and to that extent, is at fault.
33. 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.
34. In this case, the Respondent stated in its letter dated 21st June 2019 that in reaching the decision to declare the Appellant redundant, it had taken into consideration all the requirements under Section 40(1) (c) of the *Employment Act*.
35. Notwithstanding the Respondent's assertions, there is no indication that there were other Debt Collection Managers besides the Appellant. My understanding of the requirement under Section 40(1) (c) aforementioned is that, it only applies in a scenario where the redundancy affects a number of employees in a particular class. That said, I hold the view, that the said requirement with respect to selection was not applicable in this case.
36. Turning to the requirement for consultations, the Court does not discern anything on record confirming that consultations were undertaken in accordance with Article 13, Convention No. 158 - Recommendation No. 166 of the International Labour Organisation (ILO) convention, prior to the Appellant being declared redundant.
37. Notably, the letter of termination dated 22nd July 2019 made reference to a meeting that was held on the same date. However, the Respondent did not exhibit a copy of the minutes attendant to the said meeting. Therefore, there was no conclusive evidence that the said meeting if at all held, constituted consultations envisaged under Article 13, Convention No. 158 - Recommendation No. 166 of the International Labour Organisation (ILO) convention.
38. Further to the foregoing, the meeting if at all held, was clearly after the decision to declare the Appellant redundant had been made. It was post-redundancy. As was held by the Court in *Kenya Airways v Aviation & Allied Workers Union Kenya & 3 Others* (supra), 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. Differently expressed, consultations should not be cosmetic but rather meaningful and should be geared towards mitigating the adverse effects of the redundancy.

39. In light of the foregoing and having concluded that there was no evidence that the parties undertook pre-redundancy consultations, in accordance with Article 13, Convention No. 158 - Recommendation No. 166 of the International Labour Organisation (ILO) convention, I return that the Respondent is at fault to that extent.
40. As to the payments under Section 40(1) (e) (f) and (g) of the *Employment Act*, the Appellant was notified through the letter dated 22nd July 2019 that she would be paid salary as of 22nd July 2019, leave days (8) days, payment in lieu of notice, and severance pay. This very well covered the payments due to the Appellant as contemplated under Sections 40(1) (e) (f) and (g) of the *Employment Act*. It is interesting to note that the Appellant sought to be paid these items at the trial Court. I must say that this was superfluous.
41. All in all, the Respondent did not substantially comply with the provisions of Section 40 (1) of the *Employment Act* hence the Appellant's termination by way of redundancy cannot be said to have been procedurally fair.
42. To this end, the trial Court fell into error in finding that the Respondent applied the procedure set out in Section 40 of the *Employment Act* and that the Appellant's termination was procedural.

Reliefs?

43. As this Court has found that the Respondent failed to prove that the Appellant's termination by way of redundancy was substantively and procedurally fair, she is awarded compensatory damages equivalent to five (5) months of her last salary. This award takes into account the length of the employment relationship as well as the circumstances pertaining the redundancy.
44. The claims with respect to notice pay, salary for days worked, unpaid leave and severance pay are declined as the Appellant was advised that the same would be paid out to her as part of her final dues. Consequently, the Appellant is at liberty to collect the said payments from the Respondent.

Orders

45. The upshot of the foregoing is that the Appeal is allowed and the Court makes the following orders: -
 - a. The trial Court's order dismissing the Appellant's suit in its entirety is hereby set aside.
 - b. The Appellant is awarded compensatory damages in the sum of Kshs 475,000.00 being equivalent to five (5) months of her last salary.
 - c. Interest on the amount in (b) at court rates from the date of this Judgment until payment in full.
46. As the Appeal has succeeded, costs in this Court and at the trial Court shall be borne by the Respondent.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 18TH DAY OF OCTOBER, 2024.

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STELLA RUTTO

JUDGE

In the presence of:



For the Appellant Mr. Osoro

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

