



**Maloba v Mua Insurance (Kenya) Ltd (Cause 398 of 2019)
[2024] KEELRC 13403 (KLR) (27 November 2024) (Judgment)**

Neutral citation: [2024] KEELRC 13403 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 398 OF 2019
DKN MARETE, J
NOVEMBER 27, 2024**

BETWEEN

ZERA WESONGA MALOBA CLAIMANT

AND

MUA INSURANCE (KENYA) LTD RESPONDENT

JUDGMENT

1. This matter came to court by way of a Statement of Claim dated 13th May, 2019. The issue;
The unlawful redundancy of Ms. Zera Wesonga Maloba.
2. The Respondent in a statement of Response and Counter Claim dated 22nd July, 2019 denies the claim and prays that it be dismissed with costs. He prays for the counter claim.
3. The Claimant's case is that she was in the employment of the Respondent from 1st August, 1998 up to 11th May, 2019 when she was declared redundant unprocedurally and without reasonable cause or justification.
4. The Claimant's other case is that she worked diligently and honestly until her unlawful redundancy. This is as follows;
 5. On or about the 12th day of February, 2019 the Respondent unlawfully, without any notice, reason cause and/or justification terminated the services of the Claimant on account of redundancy canvassed as restructuring without any reasonable justification whatsoever or any regard to the procedural requirements as envisaged under Section 44 of the *Employment Act* of Kenya 2007.
 6. The alleged redundancy was in substance a normal internal exercise of laying off staff and replacing them secretly reducing hiring time lines for industry programs but opportunistically canvassed as a redundancy exercise to discriminate against the claimant.



5. It was in effect effected maliciously and in due disregard of the Claimants welfare and rights accruing to her and she was discriminatively replaced by one Lydia Jepkemoi Tanui who took over her full responsibilities. She cites the following as particulars of discrimination and malice;
 - i. Discriminating against the Claimant by isolating her for alleged redundancy without any basis and/or justification.
 - ii. Replacing the Claimant with a new Senior Administration Officer without considering the existence of the Claimant’s Contract.
 - iii. Singling out the Claimant in the alleged redundancy.
 - iv. Failing to offer the Claimant any other employment in the organization.
 - v. Recruiting the Claimant’s replacement after unlawfully declaring her redundant.
 - vi. Violating the Claimant’s Constitutional rights to fair hearing and lawful expectation.
 - a. Purporting to declare the Claimant redundant without following the requirements of Section 40 of the Employment Act.
 - b. Failing to pay the Claimant her lawful dues relating to the shortfall of her conduct.
 - c. Failing to make any offer to the Claimant for reabsorption.
6. The Claimant further avers that she suffered loss and claims this from the Respondent. This is as follows;

Particulars of Special Loss suffered by the Claimant and payable by the Respondent

- i. Pay in lieu of 3 months’ notice pay @Ksh.169,556.80.....Kshs.508,670.40
 - ii. Pay in lieu of accrued leave days 22 daysKshs.155,427.00
 - iii. Pay for 12 months’ compensation @Kshs.169,556.80.....Kshs.2,034,681.60
- TOTAL Kshs.2,698,778.00

7. She prays thus;
 - a. A declaration that the Claimant suffered wrongful termination disguised as “redundancy”
 - b. Reinstatement to his previous position/job without any loss of benefits.
 - c. Salary arrears for the entire period the Claimant has been out of employment.
 - d. In the alternative, an order for payment of the Claimant’s lawful terminal dues as set out above at paragraph 8.
 - e. Maximum compensation of twelve months salary in respect of unfair termination.
 - f. Damages for discrimination.
 - g. Exemplary damages for lost opportunities.
8. The Respondent denies the claim.



9. The Respondent inasmuch admits paragraph 3 and 4 of the claim on their descriptive aspects and also that she had employed the claimant as Senior Administrative Officer until 11th May, 2019.
10. The Respondent further denies the allegation that the claimant was terminated on 12th February, 2019 and pleads that this was indeed on 11th May, 2019 consequent upon a redundancy notice served onto him on 12th February 2019. The Respondent pleads and contends full compliance with Section 44 of the *Employment Act*, 2007 as follows;
 - a. The Claimant was on 12th February, 2019 given a three (3) months notification of the intended redundancy which was to take effect on 12th May, 2019, the reasons underpinning the redundancy and the extent thereof. This notice was served upon the Labour offices.
 - b. The Respondent had a discussion with the Claimant including 11th February, 2019 during which the Claimant was informed of the intended redundancy, the reasons thereof and the extent and the Claimant agreed to part ways there having been no alternative suitable position.
 - c. The Claimant was paid all her dues as tabulated hereunder; -
 - a. Salary for the period of the notice; that is from 12th February, 2019 up to 11th May, 2019.
 - b. Severance pay comprising of fifteen days for each year of service.
 - c. There were no outstanding leave days payable.
11. Again, the Respondent denies the contents of paragraph 6 of the claim and pleads that redundancy was borne out of a genuine strategic decision as demonstrated hereunder;
 - a. The Respondent with an objective of countering declining revenues, reducing the extremely high operating costs and streamlining its operations made a commercial decision to restructure its organizational structure.
 - b. Previously, the Respondent occupied two floors including an executive floor on the 17th floor at its previous location namely Ambank House before relocating to the Mirage where it currently occupies a single floor. The executive floor was done away with to cut on costs. Each floor had a receptionist, the Claimant being one of the two.
 - c. The Claimant tasks at the 17th floor before relocation entailed executive support, handling incoming calls, dispatch of mails, filing and updating a manual attendance register, organizing in house marketing cocktails among other tasks. Most of the front office tasks she handled at the 17th Floor, Ambank house are handled by the receptionist at The Mirage.
 - d. The manual attendance register was replaced with a biometric finger reader due to technological advancement thus effectively taking over one of the Claimant's day to day activity.
 - e. The Respondent no longer organizes in house marketing cocktail functions which was another core function of the Claimant.
 - f. As a result of the above, the Claimant's position became redundant. There can be no reinstatement.
12. The Respondent's other case is a counter claim arising out of the Claimant's exposure of confidential information and trade secrets relating to the Respondent thereby occasioning her loss.



13. The Respondent in the penultimate prays as follows;
 - a. A declaration that the Respondent in the counter-claim breached her duty of confidentiality towards the Claimant in the Counter-claim.
 - b. A declaration that the Respondent in the counter-claim's breach aforesaid entitled the Claimant in the Counter-claim to summarily dismiss the employment of the Respondent in the counter-claim.
 - c. Damages for breach of confidentiality.
 - d. An order of permanent injunction restraining the Respondent in the counter-claim from further publishing of the confidential information whether or not lawfully obtained during his employment.
 - e. Dismissal of the Claim.
 - f. Refund of the severance pay in the sum of Kshs.1,652,615.01
 - g. Costs of the Counter-Claim.
 - h. Interests in (c) and (f) above until settlement in full.
14. This matter came to court variously until 28th November, 2023 when it was heard inter partes.
15. The issues for determination are;
 1. Whether the termination of the employment of the Claimant by the Respondent was wrongful, unfair and unlawful.
 2. Whether the Respondent is entitled to the counter claim.
 3. Whether the Claimant is entitled to the reliefs sought.
 4. Who bears the costs of this cause?
16. The 1st issue for determination is whether the termination of the employment of the Claimant by the Respondent was wrongful, unfair and unlawful. The Claimant in its written submissions dated 1st December, 2023 reiterates his case of unlawful termination of employment.
17. The Claimant in her evidence in chief stated that she was employed by the Respondent company as an Administrative Assistant on the 1st August, 1998 until 12th February, 2019 when she was without any reason, particulars or notice and/or any hearing served with a redundancy letter.
18. The Claimant further submits that redundancy letter was in contravention of Section 40(1) of the [Employment Act](#) which defines the procedure for lawful redundancy as follows;

An employer shall not terminate a Contract of Service on account of redundancy unless the employer complies with the following conditions:-

 - a.
 - b. Where an employee is not a member of the union, the Employer notifies the employee personally in writing and the Labour Office.
 - c. the Employer has 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.
 - 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.
 - 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 years of service.
19. It is the Claimant's further submissions that she was declared redundant without involving the labour office thereby making it unprocedural. Again, she was only one amongst the employees declared redundant which speaks in the issue of profiling a discrimination and the Respondent has not in any way demonstrated to court the selection criteria for the redundancy to the Claimant.
 20. The Respondent in the penultimate submits that whereas the Respondent may have had good grounds to terminate the services of the Claimant through redundancy, it failed to avail to the Claimant an opportunity to present her case in a formal meeting where she could be heard on this. No evidence in support of the allegations restructuring or the extent and level of redundancy was placed before the Claimant or the Ministry of Labour as required by the law. On this, the Claimant sought to rely on the authority of *Esther Waweru V Mua Insurance (Kenya) Ltd ELRC Cause No. 397 of 2019* and [*Jane Kirigo Gikubi Alias Jane Kirigo Waigwa v Mt. Kenya Academy Foundation ELRC Cause No. 12 of 2019*](#) where redundancy was put down in favour of the Claimants cases.
 21. The Respondent submits a case of lawful redundancy in her written submissions dated 23rd February, 2024. It is her case that she was compliant with Section 40 of the *Employment Act, 2007* as she was served with a notice dated 5th April, 2019 which notice was stamped by the Nairobi County labour office.
 22. Again, it is not a requirement of the law that consultation be had with the Claimant prior to redundancy as was enunciated in the authority of *Pure Circle (K) Ltd v Paul K. Koech & 12 others [2018] eKLR* where the court held thus;

“We agree. The law in Kenya does not provide for pre-redundancy consultation as it gives the employer a free band to organize its operations with a view of realizing profit.”
 23. The Claimant's case overwhelms that of the Respondent. The procedure of redundancy was not in compliance with Section 40 of the *Employment Act, 2007* and therefore the redundancy becomes faulty. This is because the Respondent has not adduced evidence of rallying behind the labour officer and involving her in a notice of retirement. Again, the Respondent has failed to tender evidence of involving the Claimant in this process.
 24. The Respondent further has not tendered any evidence of the criteria used in selecting the employees to involve in the redundancy. This renders the redundancy process invalid and unlawful and I find as such. And this answers the 1st issue for determination.
 25. The 2nd issue for determination is whether the Respondent is entitled to the counter claim. I have looked at this item and found it slimy. It calls for a finding in favour of the Respondent from the Claimant on the basis of disclosure of confidential matters relating to the Respondent's affairs. This material was utilized in articulating the Claimant's case. It does not therefore make sense to penalize the Claimant on such account. The Counter claim therefore fails.



26. The 3rd issue is whether the Claimant is entitled to the reliefs sought. She is. Having won on a case of unlawful redundancy, she becomes entitled to the reliefs sought.

27. I am therefore inclined to allow the claim and order reliefs as follows;

- i. A declaration that the Claimant suffered wrongful termination of employment disguised as redundancy.
- ii. One (1) month's salary in lieu of noticeKshs.169,556.80
- iii. Pay in lieu of accrued and untaken leave days.....Kshs.155,427.00
- iv. Six (6) months compensation for unlawful termination of employmentKshs.169,556.80
x 6 =.....Kshs.1,017,340.80
Total of claim.....Kshs.1,342,327.60.
- v. The costs of this cause shall be borne by the Respondent.

DELIVERED, DATED AND SIGNED THIS 27TH DAY OF NOVEMBER 2024.

D. K. NJAGI MARETE

JUDGE

Appearances:

1. Ms Guserwa instructed by J.A. Guserwa & Company Advocates for the Claimant.
2. Mr. Abdulahi instructed by Waweru Gatonye & Company Advocates for the Respondent.

