



Gibson v Broll Kenya Limited (Employment and Labour Relations Cause E550 of 2022) [2024] KEELRC 13442 (KLR) (18 December 2024) (Judgment)

Neutral citation: [2024] KEELRC 13442 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE E550 OF 2022**

**HS WASILWA, J
DECEMBER 18, 2024**

BETWEEN

STUART JOHN GIBSON CLAIMANT

AND

BROLL KENYA LIMITED RESPONDENT

JUDGMENT

1. The Claimant instituted this suit through a Memorandum of Claim dated 8th July 2022, alleging unfair and unlawful termination of employment by the Respondent. The Claimant contends that the Respondent failed to follow due process in effecting the termination, particularly in relation to redundancy, and breached the rules of natural justice. Consequently, the Claimant seeks compensation for wrongful and unfair dismissal, as well as damages for work-related psychological harm. He sought the following reliefs: -
 - a. A declaration that the Claimants dismissal by the Respondent was wrongful, unfair and in breach of the Rules of natural justice.
 - b. An order for payment of Claimant’s pension fund entitlements (Kshs. 2,708,101.70).
 - c. An amount of Kshs. 20,229,846/= being 12 Months compensation for wrongful and unfair dismissal.
 - d. Damages claims
 - e. An unconditional letter of reference.
 - f. Interest on b and c.
 - g. Costs of the suit.
 - h. Any other relief that this Honourable Court may deem fit and just to grant.



2. The Claimant states that he was employed by the Respondent as a Retail Portfolio Executive – East Africa since 2018, this post a period of employment as General Manager of Garden City Mall since 20017. The Claimant was employed until he attained the age of Sixty (60) years unless otherwise terminated and was permanent and pensionable. He reported directly to the Managing Director and his duties were as per the employment agreement. The Claimant was entitled to a monthly basic salary of USD 10,686.50/=-, house allowance of USD 1,500.00/=-, monthly car allowance of USD 1,000.00/=-, medical allowance of Kshs. 11,000/=- and airtime allowance of Kshs. 15,000/=-. The Claimant worked diligently until he was terminated on alleged grounds of redundancy on 15th February 2022.

Respondent's Case

3. The Respondent, in a Memorandum of Defence dated 10th March 2023, denied most of the claims in the Claimant's Memorandum of claim. The Respondent further stated that the Claimant was employed by the Respondent as a Retail Portfolio Executive-East Africa (Director, Investor Services) under an employment contract dated 14th March 2018. His responsibilities included providing technical support before, during, and after the implementation of client projects. However, the Respondent faced reduced income due to the loss of clients, resulting in an unsustainable workforce. This prompted a restructuring process during which the Claimant's position was declared redundant. The Respondent notified the area labour office of the intended redundancy via a letter dated 15th February 2022, issued at least one month before the effective date of 31st March 2022. Consultations were held with the Claimant, involving several of the Respondent's representatives, explaining the redundancy decision and outlining the operational need for restructuring.
4. The Claimant expressed reservations about the redundancy in an email dated 24th February 2022, acknowledging the reduced income that formed the basis for the restructuring. Following further consultations, it was explained to the Claimant that his position was restructured into two new functions: Head of Facilities Management and Head of Property Management. On 10th March 2022, the Claimant was issued a confirmation of redundancy letter detailing his terminal dues, which were paid less statutory deductions after the Claimant cleared with the Respondent. The Respondent maintained that the redundancy was necessitated by operational requirements and was procedurally fair.
5. The Respondent submits that the Claimant's role was abolished during a restructuring process necessitated by economic challenges, including the impact of the COVID-19 pandemic, which led to reduced income. The restructuring resulted in the creation of two separate management roles—Head of Facilities Management and Head of Property Management—at reduced remuneration rates. The Respondent asserts that the redundancy was justified and conducted in compliance with the provisions of the law.
6. In response to the Claimant's allegations of unfair termination and breach of natural justice, the Respondent denied those claims. The Respondent maintains that the redundancy was based on operational requirements, as provided under Section 45(2)(b)(ii) of the *Employment Act*, and that the Claimant's position was lawfully and procedurally declared redundant. The Respondent further argues that there were no conflicting reasons for the redundancy and reiterates that the process complied with the legal requirements, including notifying the area labour office and engaging the Claimant in consultations.
7. The Respondent denies liability for the prayers sought by the Claimant, including commissions, relocation costs, and maximum compensation. It argues that the redundancy adhered to the terms of the Claimant's employment contract and Section 40 of the *Employment Act*, which governs



redundancy procedures. The Respondent contends that the Claimant's claims lack merit and constitute an abuse of the court process.

8. The Respondent prays for the dismissal of the Claimant's suit with costs, asserting that the redundancy was fair, lawful, and conducted in compliance with statutory provisions. It further seeks the court's affirmation that the Claimant is entitled to a certificate of service only.

Claimant's written submissions

The Claimant raised four issues for determination:

Whether the Redundancy was Justified

9. The Claimant asserts that the redundancy was not justified, alleging malice in the reasons advanced for his termination. He testified that on 15th February 2022, he received a notice of redundancy to take effect on 1st March 2022. The notice cited economic challenges, including a loss of key accounts such as Hub Karen, Fedha Plaza, and One Padmore. However, during cross-examination, the Respondent's witness confirmed that these accounts had been replaced by Next Gen Mall, Zep Re Place, and Rosslyn Riviera Mall, suggesting continuity in operations rather than financial strain.

Furthermore, the Respondent failed to substantiate claims of financial loss. The income statements presented lacked proper authentication, including letterheads, signatures, or stamps, and no audited financial reports were submitted. This court is guided by the principle in *Daniel Mburu Muriu v Hygrotech East Africa Ltd* [2021] eKLR, where failure to provide evidence of financial difficulties invalidated a redundancy claim. The Respondent also approved salary increments for four managers, including the Claimant's position, and proposed hiring additional staff, further undermining its claim of financial instability. Redundancy must relate to positions, not individuals, as affirmed in *Kenya Union of Domestic, Hotels, Educational Institutions, Hospital and Allied Workers (KUDHEIHA) v Nairobi Hospital* [2022]. In this case, the redundancy was targeted at the Claimant personally, rendering it unjustified.

Whether the Claimant's Termination was Lawful and/or Procedural.

10. The Claimant challenges the procedural fairness of his termination. Section 45(2) of the *Employment Act*, 2007, requires that termination be based on valid and fair reasons and follow a fair procedure.
11. The Respondent alleged that a consultative meeting took place on 15th February 2022, but no minutes or documentation were tabled in court to confirm this. Additionally, the Respondent failed to present a list of positions declared redundant or the criteria used to select employees for redundancy.
12. The court is guided by *Kenya Airways Ltd v Aviation and Allied Workers Union Kenya and 3 Others, Civil Appeal 46 of 2013*, which held that consultation must be meaningful, aimed at exploring alternatives to termination, and conducted transparently. No evidence was provided to show that the Claimant was offered alternative positions or packages, further undermining the procedural fairness of the redundancy. This aligns with the court's finding in *KUDHEIHA v Nairobi Hospital* [2022], where the absence of consultation and documentation rendered the redundancy process unprocedural and unlawful.

Whether the Claimant Received His Pension Dues.

13. The Claimant testified that he was not paid his pension fund entitlements amounting to Kshs. 2,708,101.70, as provided under Clause 6.1 of his Employment Agreement dated 21st March 2018.



This was corroborated by the Respondent's witness, who admitted during cross-examination that the pension benefits were still owed. The Respondent has not disputed this claim or provided evidence of payment. The court should find that the Claimant is entitled to his pension fund entitlements, together with interest.

Whether the Claimant is Entitled to the Reliefs Sought

14. The Claimant was employed under permanent and pensionable terms until his termination, which he contends was wrongful, unfair, and unprocedural. He seeks damages for unfair termination and the reliefs outlined in his Memorandum of Claim dated 8th July 2022. The Claimant served the Respondent diligently until his alleged redundancy on 15th February 2022. Section 43 of the *Employment Act* obligates the employer to prove the reasons for termination, while Section 45 requires fairness in termination. The Respondent has failed to meet these statutory requirements, as evidenced by the lack of substantiation for financial difficulties and procedural lapses. Guided by the principles in *Daniel Mburu Muriu v Hygrotech East Africa Ltd* [2021] eKLR and *Kenya Airways Ltd v Aviation and Allied Workers Union Kenya* [2013], the court should find that the Claimant's termination was unfair and unlawful and conclude that the Claimant proved his case on a balance of probabilities and is entitled to the reliefs sought, including damages for unfair termination, payment of pension dues with interest, and other remedies as prayed in his claim.

Respondent's Written Submissions

The Respondent raised two issues for determination:

15. Was Fair Procedure Applied Before Declaring the Claimant Redundant?
The *Employment Act*, 2007, defines redundancy as the loss of employment through no fault of an employee, where their services become superfluous. Section 40 of the Act provides clear conditions that must be met by an employer before declaring redundancy, including issuing notices, consulting with affected employees, and paying terminal dues such as leave, notice pay, and severance pay.
16. The Claimant produced a contract of employment confirming his role as Retail Portfolio Executive-East Africa. The Respondent, in its defense, provided evidence of a business restructure aimed at reducing its wage bill and redistributing duties to other departments. Pages 14 and 15 of the Respondent's bundle of documents elaborated on the operational changes made to sustain the business.
17. During the Claimant's testimony, he admitted that the Respondent's operations had been adversely affected by COVID-19, causing financial strain. The Respondent submitted financial statements reflecting its financial position, which were adopted by the witness, Mr. Michael Kibe. The Claimant acknowledged the financial challenges faced by the Respondent and the necessity of restructuring.
18. The Respondent issued a written redundancy notice and engaged in discussions with the Claimant, as evidenced by documents in its bundle (pages 17–23). The Claimant was well aware of the redundancy procedure and process. The Respondent demonstrated compliance with Section 40 of the *Employment Act*, which outlines the legal framework for redundancy. The court is guided by the decision in *Ochola v Standard Chartered Bank Kenya Limited (Cause E343 of 2021)* [2024] KEELRC 13176 (KLR), where Ndolo, J emphasized that fair procedure in redundancy must adhere to statutory requirements. The Respondent's actions in this case meet this threshold. Thus, the termination of the Claimant was lawful, fair, and procedurally sound.



Is the Claimant Entitled to the Prayers Sought?

19. The Claimant sought several remedies, including:
 - i. A declaration that his dismissal was wrongful, unfair, and in breach of natural justice.
 - ii. Payment of pension fund entitlements.
 - iii. 12 months' compensatory damages.
 - iv. Damages as outlined in paragraph 12 of his claim.
 - v. An unconditional letter of reference.
 - vi. Interest on the awarded amounts.
 - vii. Costs of the suit.
20. The Respondent submits that the Claimant was not dismissed but declared redundant through a fair and lawful process. Sufficient evidence has been presented to demonstrate that the redundancy complied with the provisions of the *Employment Act*. The Claimant has failed to substantiate his allegations of unfair dismissal or breach of natural justice.
21. During cross-examination, the Claimant was unable to present evidence to support his claim for damages as outlined in paragraph 12 of his statement of claim. The burden of proof lies with the Claimant, as established in cases such as *Charles Kariuki Mwangi v Intersecurity Services Limited* [2018] eKLR and *Patrick Lumumba Kimuyu v Prime Fuels (K) Ltd* [2018] eKLR. The court in these cases underscored that a claimant must prove their claims with substantive evidence.
22. The Respondent also notes that the Claimant was paid all redundancy dues as required by law, and no outstanding amounts remain. The Claimant's claim for damages appears to be an attempt at unjust enrichment. The Respondent conducted the redundancy process in accordance with the law, fulfilling all statutory requirements under Section 40 of the *Employment Act*. The Claimant has failed to prove his case on a balance of probabilities. The Respondent prays for the dismissal of the suit with costs, as the claims lack merit and have not been substantiated.

Whether the redundancy was justified

23. I have examined all the evidence and submissions of the parties herein. The issue for the court's consideration are as follows: The claimant avers that he was served with a redundancy notice on 15/2/2022 and the redundancy was effective 31/3/2022. The notice cited various reason for the redundancy.
24. The claimant submitted that the reason for the redundancy were not valid because there was evidence of financial loss on respondents part and that the respondent admitted that their with Hub Karen, Fedha Plaza and one Padmore were closed but were replaced by Next Gen Mall, Zep Re Plaza and Rosslyn Rivera Mall suggesting continuity in operations.
25. The claimant also submitted that after his redundancy the respondents went ahead and hired more staff and even approved salary increments of four of its managers.
26. The claimant has also averred that the redundancy was unprocedural as there was no consultation. There is evidence from the claimant himself that he received the redundancy notice on 15/2/22 and this was to take effect on 31/3/22. There was adequate notice period in the circumstances.



27. The had agreed that he sent an email to the respondent on 24/2/2022 and expressed reservations on the redundancy with an email of even date. He even admitted there was reduced income with the respondent's business.
28. Despite the respondent denying there was consultation between him and the respondents, the email trails point to the fact that the parties discussed the issue of his redundancy. Despite not agreeing with the respondents on the reasons of redundancy, consultations need not necessary mean agreement.
29. It is therefore my finding that the claimant and respondent did consult on this redundancy issue.
30. The claimant was also granted adequate notice on the redundancy as provided for under section 40 of the *Employment Act*.
31. As regards reason for the redundancy, the fact that the claimant in his email of 24th February 2022 mentioned loss of the business and /or breaching others is evidence that there was some change in business spectrum and the respondent indeed retain a prerogative to manage their business in the best way possible.
32. It is therefore my finding that the redundancy process was done procedurally and fairly whilst following the laid down legal procedures.

Remedies

33. The claimant has sought various remedies including payment of his pension of kshs 2,708,101.70 plus damages.
34. Having found the redundancy fair and justified the issue of compensation and damages does not arise.
35. On the issue of pension, I have considered the employment agreement between the claimant and respondent dated 21st March 2018. Clause 6 of the contract provides that the claimant was indeed entitled to become a member of a pension scheme and life assurance scheme operated by the respondent subject to terms and conditions of that scheme's trust fund and rules.
36. The rules of the said scheme are however not known to Court neither were they disclosed. I was unable to adequately examine how the scheme was operated and how much the claimant would in the circumstances be entitled to be paid under the scheme.
37. That notwithstanding, if the claimant was a member of the pension scheme, he should claim his benefits as per the scheme's rules and thus this court is unable to enforce his rights as the requisite forum would be under the *Retirement Benefits Act*.
38. The claimant also sought to be issued with a certificate of service which I find he is entitled to and I accordingly order the issuance.
39. Given the nature of this claim I will direct that each party pays this own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 18TH DAY OF DECEMBER, 2024.

HELLEN WASILWA

JUDGE

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 has 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 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.

A signed copy will be availed to each party upon payment of Court fees.

HELLEN WASILWA

JUDGE

