



**Simnake v Official Liquidator of Eldoret Mattresses Company Ltd in Insolvency & 2 others
(Cause 208 of 2017) [2024] KEELRC 13398 (KLR) (11 December 2024) (Judgment)**

Neutral citation: [2024] KEELRC 13398 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
CAUSE 208 OF 2017
MA ONYANGO, J
DECEMBER 11, 2024**

BETWEEN

SUSAN SIMNAKE CLAIMANT

AND

**OFFICIAL LIQUIDATOR OF ELDORET MATTRESSES COMPANY LTD IN
INSOLVENCY 1ST RESPONDENT**

KAILESH SOMCHAND SHAH 2ND RESPONDENT

MILAN KUMAR SOMCHAND KARNIYA 3RD RESPONDENT

JUDGMENT

1. The Claimant filed the Statement of Claim dated 11th July 2015 against the Respondents alleging that she was unfairly and unlawfully terminated from employment by the Respondent. That Statement of Claim was amended on 8th February 2023.
2. The Claimant averred that she was employed by Eldoret Mattresses Limited (In Insolvency) on 1st December 1999 as a cashier and served until 21st February 2015 when she alleges to have been unfairly retrenched.
3. It is the Claimant's case that she was unfairly and unlawfully terminated from employment on the basis that;
 - a. The purported redundancy carried out by the Respondent upon her failed to meet the requirements of sections 2 and 40 of the *Employment Act*
 - b. No notices of intended redundancy as required by law was given
 - c. The Claimant based on her skills and seniority in time at the work place was not accorded an opportunity to go and work at an alternative place that existed



- d. The Claimant was discriminated against since she was not a member of a trade union
 - e. The Labour Officer was not informed of the intended redundancy
 - f. Due leave was not paid
 - g. Overtime and rest days were not paid
 - h. The correct severance pay was not paid.
4. The Claimant therefore sought the following reliefs:
- a. Pay in lieu of notice.....Kshs 34,847
 - b. Payment of 4 years unpaid leave.....Kshs 139,388
 - c. Weekly rest day@51 days every year for 15 years.....Kshs 888,598.40
 - d. Public holidays pay @10 days annually for 15 years.....Kshs. 174,235
 - e. 12 months salary as compensationKshs 418,164
 - f. Damages for discrimination
 - g. Costs and interests.
5. The Respondent entered appearance and filed a response to the Statement of Claim on 22nd February 2016 through the firm of Gicheru & Company Advocates. On 19th June 2023, the Respondent through the firm of Aloo Romanus & Company advocates filed an Amended Reply to the Memorandum of Claim.
6. The Respondent denied the allegations made by the Claimant in the Amended Memorandum of Claim as amended on 8th February 2023. It averred that due to the economies of scale and financial difficulties, Eldoret Mattresses Limited (In Insolvency) had to reduce its workforce.
7. According to the Respondents, vide a notification in accordance with section 40 of the [Employment Act](#), it communicated to its employees, and particularly the Claimant herein, of the desire to declare her redundant.
8. The Respondent maintained that it considered the provisions of the [Employment Act](#) in selecting the employees to be declared redundant and thus the redundancy process was carried out in good faith and in accordance with the law.
9. The Claimant testified on 31st October 2017 as CW1. By and large, the Claimant reiterated the averments in her statement of claim. Additionally, she stated that as at the time she left employment, she was earning Kshs. 34,847. She further stated that she was never paid her leave and overtime dues.
10. In cross examination, the Claimant admitted that her payslip for August 2013 indicated that her basic pay was Kshs 18,364 and that at the time of separation with the Respondents, she was paid Kshs 224,006 as her terminal dues.
11. On 2nd October 2023, the defence case was closed as it was apparent that the Respondent was not ready to proceed despite being given several chances to defend the suit. Parties were then directed to file written submissions.
12. From a perusal of the record, it appears that only the Claimant filed written submissions.



Determination

13. Upon consideration of the pleadings, the oral testimony rendered before court and the submissions on record, the issues falling for the court's determination are:

- i. Whether the Respondents adhered to the provisions of section 40 in terminating the Claimant from employment on account of redundancy
- ii. Whether the Claimant is entitled to the reliefs he is seeking.

Whether the Respondents adhered to the provisions of section 40 in terminating the Claimant from employment on account of redundancy

14. As a general rule, redundancy is a fair reason for termination as long as the employer can prove that the redundancy was genuine.

15. The Respondent has attributed the termination of the Claimant's employment on account of financial difficulties experienced by Eldoret Mattresses Limited In Insolvency which led to the company reducing its workforce.

16. Section 40 of the [Employment Act](#) 2007 provides for the procedure to be complied with in the event of redundancy as follows: -

40 An employer shall not terminate a contract of service on amount of
(1) redundancy unless the employer complies with the following conditions: -

- a. Where the employee is a member of a Trade Union, the employer notifies the Union 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 intended date of termination on amount 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 him and to the still, ability and reliability of each employee of the particular class of employees affected by the redundancy,
- d. Where there is an existence of 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 and 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.
17. In the instant case, there is no dispute that the Respondents were justified in declaring the Claimant redundant.
18. The Claimant was paid salary for February, 2015 at Kshs. 16,835; pay in lieu of notice Kshs. 29,610; service pay for 15 years 2 months at Kshs. 160,504; and pay in lieu of annual leave for 2014 Kshs. 17,057. The Claimant filed the same as document 2 in her List and Bundle of Documents.
19. The Claimant admitted that she was paid Kshs. 224,006 during cross examination. She further admitted that she signed for final payment discharge.
20. The only reason the Claimant states the redundancy was unfair is because she was not notified of the intended redundancy at least one month in advance as provided for in section 40(1)(a) and (b). She further states that no similar notification was issued to the Labour Officer.
21. No evidence was tendered by the Respondents to prove that they complied with section 40(1)(a) of the *Employment Act* before terminating the Claimant employment on account of redundancy.
22. This court therefore finds and holds that the Respondent acted in disregard to Section 40(1)(a) and (b) by failing to notify the Claimant and the Labour Officer of the intention to carry out redundancy at least one month before the redundancy making the redundancy procedurally unlawful.

Whether the Claimant is entitled to the reliefs she is seeking

23. The remedies that the Claimant is seeking have been set out at the inception of this judgment. She sought Kshs 1,655,232.40 as her terminal dues comprising pay in lieu of notice, payment of 4 years unpaid leave, Weekly rest days at 51 days every year for 15 years, Public holidays pay at 10 days annually for 15 years, 12 months salary as compensation payment and damages for discrimination.
24. The Claimant was paid one month's salary pay in lieu of notice. She is therefore not entitled to the same.
25. With regard to the prayer for unpaid leave dues, the Respondent filed documents in the bundle dated 24th November, 2017 which prove that the Claimant took leave over the years she is claiming for the leave.
26. The Claimant also sought to be compensated weekly rest day at 51 days every year for 15 years and Public holidays pay at 10 days annually for 15 years. From the Claimant's testimony, she did not tender any evidence of her entitlement to rest days and public holidays. Further, the Respondent filed in its Further List and Bundle of Documents proof that the Claimant was paid Kshs. 500 daily as overtime.
27. In the case of *Miraj Bakari, Ali Nzembe & 24 others V Doshi Enterprises Limited* [2019] eKLR, the court held: -

“The prayer for off-duty days and public holidays is not supported by the evidence given by the 3 Claimants. There are no employment records exhibited by the Claimants showing they worked throughout. They acknowledged there were days when the galvanizing machine was under maintenance and days when they were not at work, for various reasons including illness. They were not at work all the time, and if they worked on public holidays, which



they have not established, they were adequately compensated through other forms of off-duty days.”

28. Being persuaded by the above authority, I decline to make any award under this head.
29. The Claimant having been declared redundant and the Claimant having been paid severance pay which was referred to as service pay, she is not entitled to compensation for unfair termination. However, because the Respondent did not prove that it issued notification of intended redundancy to Labour Officer and to Claimant as required under section 40(1)(a) as read with (b), I award the Claimant 2 months’ salary as compensation.
30. Lastly, on the claim for damages for discrimination, I decline to make any award as no evidence was tendered to support the said claim.
31. Consequently, judgment is entered in favour of the Claimant and the Claimant is awarded 2 months compensation for unlawful termination in the sum of Kshs. 59,220.
32. The amount above shall earn interest at court rates from the date of this judgment till payment in full.
33. The Claimant is awarded costs of this cause.

DATED, SIGNED AND DELIVERED VIRTUALLY ON* THIS 11TH DAY OF DECEMBER 2024.

MAUREEN ONYANGO

JUDGE

