



REPUBLIC OF KENYA



KENYA LAW
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**Kathuri v Scania East Africa Limited (Cause E392 of 2021)
[2023] KEELRC 180 (KLR) (31 January 2023) (Judgment)**

Neutral citation: [2023] KEELRC 180 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E392 OF 2021
J RIKA, J
JANUARY 31, 2023**

BETWEEN

LEAKEY TOM KATHURI CLAIMANT

AND

SCANIA EAST AFRICA LIMITED RESPONDENT

JUDGMENT

1. The claimant filed his statement of claim on May 12, 2021.
2. He states that he was employed by the respondent, on July 22, 2016, as a Sales Director Trucks.
3. He earned a monthly consolidated salary of kshs 904,000, as of the date he left employment.
4. He received a letter referenced 'redundancy,' from the respondent, dated October 30, 2020, notifying him that his position had been abolished, and his contract terminated effective November 30, 2020.
5. He was ambushed with this letter by respondent's Human Resource Director in the early morning of October 30, 2020, while in the ordinary course of his daily duty. He was on the same date, summarily placed on terminal leave.
6. The respondent quantified his terminal benefits to comprise salary up to November 30, 2020; 1-month salary *in lieu* of notice; 12 days of unutilized leave; 18.72 days of *pro-rata* leave; and severance pay of 72 days, calculated at 18 days for 4 complete years of service.
7. The claimant contends that redundancy was unfair and unlawful because, there was no consultation; the right of fair labour practices was violated; all other processes were not exhausted; the respondent's human resource policy provided that in all redundancies, redeployment would always precede termination; and, the policy required that the respondent handles termination transparently, and to have dialogue with the employee representative, where applicable.



8. There was no identifiable criterion adopted by the respondent in declaring the claimant's position redundant. There was no regard to seniority in time, skill, ability and performance of the claimant. The Country Sales Manager and the Sales Manager, who were junior to the claimant, retained their positions.
9. The claimant states that there was no genuine redundancy situation. It was an unfair termination clothed as redundancy. The position of Sales Director was not abolished, but rather, was 'redistributed' between the Managing Director, the Country Manager and the Sales Manager. The said Officers would perform the same tasks, carried out by the claimant.
10. The respondent paid the claimant 1-month salary in lieu of notice, while clause 13 of the contract executed by the Parties, provided for notice of 3 months.
11. The redundancy letter stated that the existing medical cover in favour of the claimant, would remain in force, after termination, until February 28, 2021. On December 23, 2020, the claimant's Child had a medical emergency treatment at The Nairobi Hospital. He was advised that the medical cover had been withdrawn. The claimant was compelled to finance the medical emergency from his own pocket. The medical cover was reinstated after the claimant's Advocates issued demand letter, but there was no reimbursement to the claimant.
12. The claimant makes 2 prayers against the respondent: -
 - a. 12 months' salary in compensation for unfair termination at kshs 10,848,000.
 - b. Reimbursement of hospital bill incurred at kshs 13,787.
13. The respondent filed its statement of response dated June 9, 2021. It is conceded that the claimant was employed by the respondent as pleaded in the claim, until October 30, 2020, when his contract was terminated through redundancy. The respondent fully complied with section 40 of the [Employment Act](#).
14. The respondent's global head office undertook a study of respondent's operations sometime in June 2020, in response to the challenges posed by Covid-19 pandemic. It was determined to restructure operations and optimize efficiencies. The respondent needed to reduce Staff globally, to ensure business sustainability.
15. The CEO shared an e-mail with top management, including the claimant, dated June 9, 2020 communicating the proposal. A report of the study carried out by the respondent was likewise shared. The claimant was also notified of the redundancy process through respondent's weekly bulletin dubbed 'Reflex.' Copies of the e-mail and the bulletin, are exhibited by the respondent.
16. The business marked out 20 positions regionally, including the claimant's, that would be affected. His position did not fit in the new business structure. The roles discharged by the Sales Director-Trucks, was reassigned to the Managing Director and Country Sales Director. The claimant did not have the qualifications for either of these positions.
17. Notice of redundancy issued to the Labour Office, on October 30, 2020. Majority of the affected positions were white collar. The claimant was informed that his position would be affected, on the same date, in a meeting held with the Human Resource Director. He was not ambushed. He was handed his notice of redundancy on the same date, October 30, 2020. He was advised that the respondent was not able to redeploy him. Termination would take effect on November 30, 2020. He was advised on the terminal dues payable. He was all along, consulted.



18. Without prejudice on the pleading concerning consultation above, the respondent states, that it is not mandatory for an Employer to consult its Employees at all times, in the process of redundancy. To impose such an obligation would be inconsistent with the Employer's right to organize its business operation as it sees fit.
19. There was delay in paying the claimant the balance of 2 months' salary, in lieu of notice, but the same was paid, on March 10, 2021. There was an error leading to his removal from the respondent's Medical Scheme. The error was corrected, and the claimant restored to the Scheme, until the agreed date of February 28, 2021, when the medical cover lapsed. He did not claim for reimbursement, in accordance with the respondent's policy. Redundancy was fair, and there is no basis for award of 12 months' salary in compensation for unfair termination. He was paid all his terminal dues, including: salary up to November 30, 2020; all pending annual leave days; *pro-rata* leave days; severance pay at 18 days' salary for each complete year of service; refund of Scania Staff Retirement Fund contribution; and *pro-rata* leave traveling allowance.
20. The respondent urges the court to dismiss the claim with costs.
21. There is on record additional pleadings filed by the parties. The respondent filed a further statement of response dated September 28, 2021. It is restated, that review of the respondent's operations, was carried out by its global head office, which recommended restructuring. Restructuring led to some positions, being phased out. The Regional Sales docket was held by 2 individuals – Sales Director Retail and Regional Director Wholesale. The positions were merged, into one position of Regional Sales Director, Wholesale and Retail. The claimant worked as Sales Director Retail, and did not possess the requisite skills for the new role. Mohammed Ibrahim, formerly serving as the Country Sales Manager, was appointed in the new role in an acting capacity. The respondent states that termination of the claimant's contract on account of redundancy, was fair and lawful.
22. The claimant filed reply to statement of response and reply to further statement of response, dated June 25, 2021 and October 21, 2021 respectively. He states that the appointment of Mohammed meant that operational requirements had not changed.

Hearing.

23. The claimant, and the respondent's former Human Resource Director Githaiga Kamwenji, gave evidence on June 14, 2022, when hearing closed. The matter was mentioned in court on July 28, 2022, when parties confirmed filing and service of their submissions.
24. There was a hitch in preparation of the Judgment, highlighted in a ruling of the court dated October 11, 2022. The problem was resolved through Investigations carried out by the Deputy Registrar. The report of the Deputy Registrar is on record. The matter was last mentioned in court on December 9, 2022, when parties confirmed that all their pleadings were in order. The court has noted however, that a copy of the wrong statement of response, dated February 10, 2021 is still in the court file. The registry and the parties shall ensure that this statement of response is physically removed from the record, and placed where it belongs. Its retention is still harmful to the record, and distorts the pleadings.
25. The claimant adopted his witness statement, documents originally filed, supplementary documents, and restated the contents of his statement of claim, in his evidence. He emphasized that he was summoned by the Managing Director and informed that his contract had been terminated through redundancy. He was required to hand over immediately. He did so, and his e-mail account was disabled. That is how he left employment.



26. Cross-examined, he told the court that he worked for 4 years and 18 days. His contract is dated December 1, 2016. He joined as Sales Director Trucks. In November 2020, he was Sales Director - Trucks and Buses. He was the sole Sales Director. The respondent had 3 products- trucks, buses and generators. There was no separate Director for Generators. The claimant had dealt with generators in the past, and it was his suggestion to the respondent, that led to opening of the generator section. Sales Director, was a regional position. The claimant covered Kenya, Uganda, Tanzania and Rwanda. His contract stated that he could be sent around the region.
27. He had a Sales Manager under him. There were also Sales Ladies and Sales Gentlemen, working under the claimant. The claimant reported directly to the Managing Director. The letter of October 30, 2020 states that the claimant's duties, would be distributed amongst the Managing Director, the Country Manager, and the Sales Director. There was no Country Manager at the time. The claimant signed the letter. He had no option. He was advised that he had paid leave, until November 30, 2020. Terminal benefits were tabulated. He consulted the Managing Director to understand why his contract was terminated. He had delivered on his role. He oversaw the BPRT Project for the respondent. He wanted to know about his commission, but never got to discuss with the Managing Director.
28. He received his terminal dues on November 30, 2020. He was paid 1-month salary in lieu of notice. 2 months' salary was added, as per contract. He was paid what was tabulated. He was not reimbursed medical expenses. His medical cover was still valid. He could not file for refund regularly with the respondent, because he was already out of employment, and the matter was before the court. The Managing Director was a Mechanical Engineer. The incoming Sales Director Mohammed, held an MBA from Daystar University. Documents indicate he held the position of Sales Director, while the claimant held the position of Sales Director-Trucks. The contract allowed parties to terminate, on written notice, or notice pay. The claimant confirmed that there was a redundancy process. A number of Senior Staff left. The claimant did not know if this applied to other regions.
29. On redirection, the claimant told the court that other than the contract, the parties were subject to the human resource policy. The policy required that redeployment, would precede redundancy decision. redeployment was not considered. The respondent never questioned the claimant's capabilities. He received bonus annually.
30. Kamwenji told the court that he stopped working for the respondent in July 2021. He adopted the documents filed by the respondent, and his own witness statement, in his evidence. He confirmed that the claimant served the respondent as Sales Director. The claimant's position was not retained after he left employment. Mohamed became Sales Director, 6 months after the claimant left. There was a thin line between the role discharged by the claimant and Mohammed. There was marginal difference. Difference was in the qualification of the incoming Sales Director.
31. Cross-examined, Kamwenji testified that the claimant was a Sales Director, in charge of EA region. The claimant was issued a redundancy notice dated October 30, 2020. Staff had been notified in June and September 2020 by the Group Human Resource Office, about impending redundancy. The process was in 2 phases. The claimant's phase was in October 2020. The process was scheduled by the incoming Managing Director, on his own motion. Redundancy is involuntary. It has nothing to do with the conduct, or the Employee's qualifications. The claimant was very senior. The Managing Director identified him for redundancy. Kamwenji doubted whether skill, ability and experience were considered. The Group Human Resource Policy, has a clause on redundancy. The claimant was not considered for redeployment before redundancy. He was not offered assistance by the respondent, to find a new job.



32. Mohammed, who was the Sales Manager, reporting to the claimant, became the Sales Director. It is the same position the claimant held. Mohammed was appointed in the same position 6 months after the claimant left. The claimant's contract was terminated. There was no document saying that the claimant did not have the requisite qualifications. The former Managing Director only held a diploma certificate. Redundancy was not based on lack of qualifications. Kamwenji testified that he advised the incoming Managing Director, that the process of termination of the claimant's contract, was not legally fair. The Managing Director told Kamwenji that the neck, could not supersede the head. The claimant was paid notice and all normal pay. Medical Cover was terminated inadvertently, before February 2021. The amount he spent should have been refunded.
33. Redirected, Kamwenji testified that redundancy in October 2020, was at the instance of the new Managing Director. He was the President of the respondent, with authority to commence redundancy. He reorganized and identified personalities he could work with, in carrying out his mandate.

Issues.

34. The issues are: whether redundancy was fair, in accordance with sections 40 and 45 of the [Employment Act](#); and whether the claimant merits compensation and refund of hospital bill incurred while his medical cover was prematurely terminated.

Uncontested.

35. There is no dispute that the claimant was employed by the respondent, as the Sales Director- Trucks, on July 22, 2016. His consolidated monthly salary was kshs 904,000. He was issued a letter by the respondent, dated October 30, 2020, referenced 'redundancy.' He was told that his position had been abolished. He was placed on notice of 30 days, and immediately sent on terminal leave the same day. Notice would become effective on November 30, 2020. It is not disputed that he was paid terminal benefits, including salary for days worked, notice, pending annual leave, pro-rata leave and severance. Balance of notice pay equivalent of 2 months' salary was paid late. He worked for 4 years and 3 months.

The Court Finds: -

Medical Cover.

36. The respondent concedes that removal of the claimant's medical cover was premature and made in error. Parties had agreed that the cover would run after termination, until February 28, 2021. The claimant took his son for treatment at The Nairobi Hospital, while the cover was still valid. He found the cover had been terminated and was compelled to pay the hospital bill from his own pocket. The amount claimed of kshs 13,787 is not disputed and is allowed ad prayed.

Redundancy.

37. The evidence adduced by the claimant, and the respondent's Witness, former Human Resource Director of the respondent, Githaiga Kamwenji, would persuade the court that redundancy was not fair.
38. Kamwenji was the Human Resource Director, and well familiar with the circumstances leading to the termination of the claimant's contract.
39. He told the court that: -There was a thin line between the position the claimant held, and the position filled 6 months later, by Mohammed. The roles were marginally different, but not fundamentally different. Redundancy notice dated October 30, 2020 was issued upon the claimant the same date he



left employment. Redundancy is involuntary, and has nothing to do with qualifications. It was doubtful if skills, ability and experience were considered. The claimant was not considered for redeployment, in accordance with the respondent's Human Resource Policy. The claimant was not assisted to find a new job. Mohammed was previously the Sales Manager, reporting to the claimant. Mohammed became the Sales Director, after about 6 months' of the claimant's departure, and held the same position that the claimant held. There was no evidence that the claimant had no qualifications to discharge the role. The former Managing Director only held a Diploma Certificate. Kamwenji advised the Managing Director that redundancy was not fair. The Managing Director pooh-poohed the advice, stating that the neck could never supersede the head.

40. This evidence from the respondent, coupled with what the claimant told the court, leads to the conclusion that redundancy was unfair, and did not conform to the minimum standards of fairness, contemplated under sections 40 and 45 of the *Employment Act*.
41. Kamwenji gave added weight to this conclusion on redirection when he told the court that there was a new Managing Director, who went about reorganizing, by identifying personalities he could work with. Redundancy is not about personalities a Managing Director feels he can work with, but about genuine economic reasons, skills, experience and abilities. The new Managing Director took the wrong approach, considering favourite personalities, and ended up denying the claimant a role he had discharged for over 4 years, in favour of the Sales Manager Mohammed, who was the claimant's junior.
42. Kamwenji's evidence suggests that there, was no genuine redundancy situation, in so far as the position of the Sales Director was concerned, but a colourable exercise. None other than the Human Resource Director Kamwenji, advised the new Managing Director about this, but the new Managing Director went on to profile personalities he could work with, without use of legal and accepted human resource management tools. Termination of the claimant's contract on the ground that his position was abolished, or that he was not qualified for the role of Sales Director, was a colourable exercise. He had been performing a similar role, for over 4 years.
43. The evidence by the claimant and the respondent's witness, is sufficient to support the claim.
44. It is declared that redundancy amounted to unfair termination, and the claimant deserves compensation.
45. He worked for 4 years and 3 months. He did not leave employment on account of poor performance, or on disciplinary grounds. He was on a regular contract, with the retirement age fixed at 60 years. He was not considered for redeployment in accordance with clause 5.4 of the respondent's group policy. Redeployment did not precede termination, and did not include all the companies in the Scania Group, within the legal possibilities. The claimant was head-hunted by the respondent at Tanzania. He had carried out business as Sales Director, in Tanzania, Kenya, Uganda and Rwanda. Why would he become unqualified, over 4 years later, and not find redeployment under the respondent's Group Policy, when it was felt he was no longer the right personality to work with the new Managing Director? He expected to see out his contract until retirement. He did not contribute to the circumstances leading to termination. Termination was characterized as redundancy. In the view of the respondent, termination was involuntary, with no blame assigned to the claimant. It is noted that he was paid and received all legal entitlements under section 40 of the *Employment Act*, including notice and severance. Termination was however unfair, on both the manner of its execution, and the validity of reason.
46. The claimant is awarded equivalent of 4 ½ months' salary in compensation for unfair termination at kshs 4,068,000.
47. Costs to the claimant.



48. Interest granted at court rate, from the date of Judgment, till payment is made in full.

In Sum, It Is Ordered :-

- a. The Respondent shall pay to the claimant reimbursement of medical bill at kshs 13, 787, and equivalent of 4 ½ months' salary in compensation for unfair termination at kshs 4,068,000 – total kshs 4,081,787.
- b. Costs to the claimant.
- c. Interest granted at court rate, from the date of Judgment, till payment is made in full.

DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY, AT NAIROBI, UNDER THE MINISTRY OF HEALTH AND JUDICIARY COVID-19 GUIDELINES, THIS 31ST DAY OF JANUARY 2023.

JAMES RIKA

JUDGE

