



Njuguna v Kariuki & 2 others (Sued respectively on behalf of, and in their capacity as Chairman, Secretary, and Treasurer of Ruiru Catholic Church Members Development Fund) (Cause 1577 of 2018) [2023] KEELRC 206 (KLR) (31 January 2023) (Judgment)

Neutral citation: [2023] KEELRC 206 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1577 OF 2018
J RIKA, J
JANUARY 31, 2023

BETWEEN

SIMON MUHIA NJUGUNA CLAIMANT

AND

MIKE MUTHII KARIUKI, PAUL MWANGI & LAWRENCE MUGA (SUED RESPECTIVELY ON BEHALF OF, AND IN THEIR CAPACITY AS CHAIRMAN, SECRETARY, AND TREASURER OF RUIRU CATHOLIC CHURCH MEMBERS DEVELOPMENT FUND) RESPONDENT

JUDGMENT

1. The claimant filed his Statement of Claim on December 5, 2018.
2. He states that he was employed by the respondent on November 1, 2007 as an Operations Manager. He was appointed as the Marketing / Relations Manager on January 10, 2014. His salary was Kshs. 73,332 monthly. He was appointed as the Public Relations / Funds Manager on January 3, 2017, on a salary of Kshs. 96,969 monthly.
3. On June 16, 2018, he received a letter of termination which advised him that his position had been declared redundant, following an operations review exercise. His employment would end immediately, he was told. He would be paid 1-month salary in lieu of notice.
4. He was not aware of any economic downturn necessitating his position to be rendered redundant. Staff reduction was discriminatory, as it targeted 2 Senior Employees- the claimant and one Lucy Wairimu.
5. The respondent created a new position of General Manager, whose role was similar to that of the claimant.



6. The respondent failed to pay the claimant all terminal dues, and made unlawful deductions of Kshs. 101,000 leaving the claimant with a net pay of Kshs. 390 in the final pay slip.
7. The respondent made deductions of Kshs. 18,500 which was to be remitted to CIC Jijenge Pension Plan, but was not remitted. He was denied leave and leave traveling allowance for the year 2018.
8. He prays for Judgment as follows: -
 - a. An order restraining the respondent from interfering with the claimant's constitutional right.
 - b. Declaration that termination was unfair.
 - c. Service pay for 11 years.
 - d. Damages equivalent of 12 months' salary in compensation for unfair termination.
 - e. Leave and leave traveling allowance.
 - f. Notice of 1 month.
 - g. Payment of unremitted CIC Jijenge Pension Plan dues.
 - h. Interest.
 - i. Costs.
 - j. Certificate of Service.
 - k. The respondent to produce employment records for the entire period of service.
9. The respondent filed its Statement of Response on July 11, 2019. It is not contested that the claimant was employed by the respondent as pleaded. He was not a member of the respondent's Board, and was not required to attend its meetings, where his lay-off was discussed. Termination was strictly in accordance with the law. There was no discrimination. The respondent issued notice to the claimant and adhered to section 40 of the *Employment Act*. The respondent discovered shortages on its accounts relating to the claimant, and made deductions on termination, to recover the shortages. Termination was on June 16, 2018, and the respondent had no obligation to remit CIC Jijenge Pension contribution for June, and July 2018. The respondent prays the Court to dismiss the Claim with costs.
10. The claimant gave evidence and rested his Claim on July 8, 2021. Former Chair of the respondent Fund, Mike Muthii Kariuki, gave evidence for the respondent on June 21, 2022, when the hearing closed.
11. The claimant adopted his Witness Statement, and 9 Documents as his exhibits, in his evidence-in-chief.
12. Cross-examined, he told the Court that his contract had a termination clause. There could be termination without assigning reason. There was no evidence of economic downturn. He sat in the Board as part of the Management team. He was not in the meetings where decisions were made. He claims pension deduction for July 2016, while termination was in June 2016. He had a loan, which was paid from his salary. He had not cleared the loan by the time he left. The respondent called him for a meeting after termination. He did not attend the meeting. He claims inhuman treatment because he was given short notice to attend the meeting. He did not have the respondent's book of accounts. Redirected, he told the Court that he did not cease membership CIC Jijenge Pension Plan, on termination.



13. Kariuki told the Court he was the Chair of the Fund, in 2015-2019. The Fund was having financial constraints. It imposed austerity measures. It paid the claimant notice. He had loan obligations. His dues were applied to offset the outstanding obligations. He had an outstanding staff loan balance of Kshs. 1,560,273. He did not attempt to clear. His shares were attached. Once terminated, the respondent did not have obligation to continue contributions to CIC. He was Marketing Manager. His position ceased to exist. Junior Officers discharge marketing roles. Decision was made by the Board.
14. Cross-examined, Kariuki confirmed that the claimant last held the position of Marketing Manager. His salary was Kshs. 96,999. The position was declared redundant. Redundancy procedure was followed. The Labour Office was not notified. Kariuki did not recall the total sum paid to the claimant on termination. The claimant is still a Fund member. The loan was taken from the respondent Fund, and was payable through salary check-off. Kshs. 101, 000 was deducted from his final package. It was not overly done. It was to reduce the risk of default. The salary was his security. CIC deductions were remitted as a block. Final sum paid to the claimant was Kshs. 390. Gratuity was paid every year. The respondent therefore did not pay severance. Redirected, Kariuki told the Court that termination was in accordance with the law. The loan was advanced to the claimant as an Employee. He could stay as a member. Loan was however payable, through salary check-off.
15. The issues are whether there was a genuine redundancy situation; whether the process was fair; and whether the claimant merits the remedies sought.

The Court Finds: -

16. It is not contested that the claimant was employed by the respondent, on November 1, 2007 as Operations Manager; he rose through the ranks, and was Public Relations / Funds Manager, when his contract was terminated on June 16, 2018; he had an outstanding loan on termination; and he was paid a net sum of Kshs. 390 [three hundred and ninety only] in redundancy package.
17. Genuineness of redundancy. The respondent's position, as borne out in the Witness Statement of Kariuki, is that it was undergoing an economic downturn resulting in poor results, that could not sustain its costs. Were there financial records exhibited by the respondent to establish this? The Court has not seen any. The Witness for the respondent did not avail any figures to support this economic downturn. It is not sufficient to come to Court and explain that termination was necessitated by an economic constraint. Financial records to support that economic position must be availed
18. This is more so, where only one or two Employees are affected, such was the case in the redundancy process under review. What financial change took place so as to justify termination of the claimant's contract on redundancy, while a General Manager was soon recruited, discharging the roles of the claimant? The economic change must be explained to the court through financial records.
19. The respondent did not establish through evidence, that there was a genuine redundancy situation, warranting termination of the claimant's position through redundancy.
20. Procedure. The claimant interacted with the redundancy process for the first time, on June 16, 2018. This was through the letter dated 16th June 2018, which informed him, that the Board had reviewed the respondent's operational requirements. He was advised for the first time, that there was an economic down turn. He was told he would not serve the notice period, and would be paid 1- month salary in lieu of notice.
21. There was no notice of redundancy, just payment in lieu of a notice of termination. There was no room given, to explain to the claimant why only him and Wairimu, were selected for redundancy. He was not advised on the reasons and extent of redundancy. He was not consulted on redundancy package. He



- was not even offered the elementary severance pay. It is not correct as submitted by the respondent, that an Employer has no obligation to consult, before declaring redundancy. Section 40 of the [Employment Act](#) contemplates consultation, at every turn of the redundancy process.
22. The respondent just offered last salary for June 2018, which was calculated at Kshs. 177,776. Deductions which included a sum of Kshs. 101,000 in loan repayment, resulted in a net pay of Kshs. 390. The claimant was set to leave employment, after 10 years of toil, with Kshs. 390 only, in his pocket.
 23. He may have been heavily indebted to the respondent. Kariuki told the Court that the claimant had taken a staff loan of Kshs. 2.74 million, and that the outstanding sum was Kshs. 1,560, 273 on termination. This indebtedness was not subject of a counterclaim. If the claimant was indebted, it did not justify the taking away of the claimant's final pay, and leaving him with Kshs. 390, in the way the respondent did. There are social aspects of redundancy, and that is why there is need for a notice of intended redundancy, to pave way for consultations with the Employee, Trade Union where applicable, and the State Authorities. Redundancy is a legal process, as well as a social process. There was need to consult the claimant, before sending him away on a redundancy package of Kshs. 390. The respondent was aware that the claimant was redressing his loan through salary check-off, and without the salary, there was a real likelihood of default, and complete ruination of the claimant socially, personally and at his family level. Employers must have a human face, and consult their Employees, Trade Unions and the State Authorities, on the social impact of their decisions. Issuing a mere notice of termination, or coldly paying notice, without a notice of intended redundancy and without subsequent consultations, is just another way of terminating the contract of employment at will, unmindful of the results.
 24. The respondent completely got the procedure wrong. It ended up harming an Employee who had rendered faithful service for over 10 years.
 25. Termination was grossly unfair. Validity of redundancy was not established. Procedure was appalling. sections 40, 41, 43 and 45 of the [Employment Act](#) were violated.
 26. Remedies. The claimant prays for an order that the respondent is restrained from violating his constitutional rights and from subjecting him to inhuman treatment.
 27. The Court does not see in what context this order is to be issued. The actions and omissions complained of, have taken place and are in the past. Redundancy took place. The claimant is no longer in employment. Mutuality of obligations ended in June 2018. The orders may have been worth considering if sought as provisional measures, while the claimant was still in employment. They are not helpful or logical, if issued as final orders, long after the event of termination.
 28. It is declared that termination was unfair.
 29. The claimant worked for about 11 years. He did not contribute to the circumstance which culminated in termination of his contract. He was in a senior managerial position, and had been promoted severally. He expected to continue working until retired honourably. He was sent home with a redundancy package of Kshs. 390. Although the respondent alleges that the claimant was heavily indebted to it at the time of termination, no counterclaim has been presented in the proceedings herein. The last pay slip for June 2018, shows the claimant's gross monthly salary at Kshs. 177,776. This was made up as follows: basic salary at Kshs. 96,969; house allowance at Kshs. 19,393; other allowances at Kshs. 51,716; and responsibility allowance at Kshs. 9,696. The prayer for compensation for unfair termination is granted, equivalent of the claimant's 10 months' gross salary, at Kshs. 1,777,760.
 30. The June 2018 payslip does not show that any notice was paid to the claimant. He left mid-June and what was offered, less deductions, resulting is a take-home of Kshs. 390, was the salary for June. There



was no notice of termination, and no notice of the intended redundancy. The Court accedes to the prayer for notice pay at Kshs. 177,776.

31. The claimant did not articulate the prayer for Jijenge Pension dues. He did not establish clearly when the pension contributions were unremitted, or clarify why for instance he claims refunds extending to July 2018, while he left employment mid-June 2018.
32. Certificate of Service to issue.
33. The prayer calling on the respondent to be compelled to produce employment records, is misplaced. The records are to be produced to what end, after the proceedings have closed? Where are they to be placed after the Court has closed its file with this Judgment? This again would perhaps have been an order worth considering, while proceedings were pending.
34. The respondent conceded that the claimant was not offered severance pay. The claimant pleads service/gratuity, but the correct term on redundancy, under section 40 of the *Employment Act*, is severance pay. It is payable at the minimum rate of 15 days' salary for every completed year of service. The argument by the respondent that it paid gratuity every year, and was not therefore obliged to pay severance, is flawed. Gratuity paid was not severance pay, and was not paid in contemplation of redundancy. The claimant worked for 11 years, which would yield severance pay at Kshs. 1,353,832.
35. Costs to the claimant.
36. Interest allowed at court rate, from the date of Judgment till payment in full.
37. In Sum, It Is Ordered: -
 - a. Termination was unfair.
 - b. The respondent shall pay to the claimant: compensation equivalent of 10 months' gross salary at Kshs. 1,777,760; severance pay of Kshs. 1,353,832; and notice at Kshs. 177,776 – total Kshs. 3,309,368.
 - c. Certificate of Service to issue.
 - d. Costs to the claimant.
 - e. 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

