



Muthuri & 3 others v Kibet & 3 others (All sued in their Capacities as the officials of Automobile Association of Kenya) (Cause E029 of 2021) [2023] KEELRC 130 (KLR) (26 January 2023) (Judgment)

Neutral citation: [2023] KEELRC 130 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
CAUSE E029 OF 2021
ON MAKAU, J
JANUARY 26, 2023**

BETWEEN

**DAVID M.MUTHURI 1ST CLAIMANT
JOSEPH MUSILI KIMANZI 2ND CLAIMANT
JOSEPH MORUKI 3RD CLAIMANT
HARRISON KAHURA NJOROGE 4TH CLAIMANT**

AND

**JINARO KIBET 1ST RESPONDENT
SAMUEL GACHOKA 2ND RESPONDENT
ENG.ERASTUS MWONGERA 3RD RESPONDENT
AGGREY BETT 4TH RESPONDENT**

ALL SUED IN THEIR CAPACITIES AS THE OFFICIALS OF AUTOMOBILE ASSOCIATION OF KENYA

JUDGMENT

1. The four claimants were employed by the respondent on diverse dates and served the company in different capacities until their services were terminated by the respondent allegedly on account of redundancy. They bring this suit alleging that the termination was unfair and unlawful vis-à-vis Article 41 and 47 of *the Constitution* and Section 40, 41, 43 and 45 of the *Employment Act*. Therefore they seek the following reliefs:-
 - a. A declaration that the claimants' termination of contract of service or employment vide the Respondents letter dated 15th November 2018 was



unfair, unlawful, wrongful and the same amounts to unlawful redundancy contrary to the provisions of section 40 of the *Employment Act*, 2007.

- b. Damages for unfair, unlawful and wrongful termination as provided under Section 49 of the *Employment Act*, 2007 or in the alternative prejudice to the foregoing the claimants' be reinstated to their employment unconditionally and on the same terms and conditions.
 - c. Cost of the suit and interests.
2. The respondent admits that it employed the claimants on diverse dates between 1986 and 1999 until it terminated their services on account of redundancy on 15th November 2018(in respect of 1st, 2nd and 3rd claimant) and retirement on 30th August 2018 (4th claimant). It avers that the 1st-3rd claimants lost their jobs after the company did job evaluation and organizational structure while the 4th claimant was retired after attaining the age of 60 years. It further avers that the benefits due to the claimants were calculated and they accepted the payments. Therefore it prays for the suit to be dismissed with costs because the claimants are not entitled to the relief sought.
 3. In their reply to defence the claimants averred that the applicable CBA required the respondent to arrange for alternative employment within the respondent association.
 4. The suit proceeded by written submissions on the strength of the pleadings, written statements and documentary evidence filed.

Evidence

5. The first claimant filed statement on behalf of the other claimants which attached a demand letter, copies of Appointment Letters, pay slips, Termination letters dated 15th November 2018, copies of certificates of service also dated 15th November 2018 and Collective Agreement dated 2018/2019.
6. The witness stated that at all material times, to this suit the claimants were employed by the respondent in different capacities earning Kshs.110,425, Kshs.110, 063, Kshs.99,690 and Kshs.88,664 per month respectively. He further stated that their contracts provided that they would continue until the end of their term or termination in accordance with the terms of the contracts namely by a notice or for gross misconduct as spelt in the *Employment Act*.
7. The witness stated that respondent breached their respective contracts by unlawfully and unfairly terminating their services on 15th November 2018 unjustifiably under the pretext that the claimants were redundant. He contended that the termination was contrary to Section 40(1) of the *Employment Act* as there was no good cause as the company is still operational. Consequently he contended that the claimants are all entitled to payment of compensatory damages under Section 49 of the *Employment Act*.
8. The respondent Association relied on the witness statement recorded by its HR Manager Ms Linda Kenelwa dated 12th April 2022 which annexed Appointment letters for the claimants, letter of intention to declare 1st, 2nd and 3rd claimant redundant, minutes of job evaluation process from 2017 to 2018, Retirement notice and clearance form for the 4th claimant, calculation and payment of the claimants. Final dues, and the final report of a new organizational structure approved by the Governing council in 2018.
9. The witness stated that the 1st claimant was employed in 1993 and rose through the ranks to become a Branch Manager earning a monthly salary of Kshs.110,425.00. After job evaluation and reorganization



- of the business the Branch manager role changed from administrative to Business Development which required higher skills which the 1st claimant lacked. Consequently, he was declared redundant after he was found to lack skills for other roles in the new structure.
10. The witness further stated that the 2nd claimant started as a Sales Representative but in February 1999 he became Debt Collection Officer earning Kshs.110,096.00. Following a job evaluation exercise done in 2017 to 2018, a new role of Customer Relations Officer replaced his role. The 2nd claimant lacked the minimum skills required for the new role and therefore he exited after his position was declared redundant.
 11. The witness further stated that the 3rd claimant was employed in November 1986 and served in various capacities ending as an Assistant Roads Service Manager earning Kshs.99,690.00 per month. Following the said job evaluation in 2017-2018, he did not possess the minimum skills required for the roles created and therefore he exited after his job was declared redundant.
 12. The witness stated that all the claimants were taken through the support process and their dues were paid. She stated that the review of the respondent's organizational structure was done by consultants of the FKE to drive its strategic plan and deliver effective services. The final report of the reorganization and job evaluation was approved by the Governing Council in 2018 for implementation.
 13. The witness further stated that the respondent issued the notice of intention to declare redundancy to all employees, labour officer and the union on 12th October 2018 as provided by Section 40 of the *Employment Act*, Section 62 (5) of the *Labour Relations Act* and the Collective Agreement. She contended that the Ministry of Labour and the union did not challenge the process or the reason for the intended redundancy.
 14. She further stated that all the employees affected by the redundancy were engaged individually on 15th November 2018 where they were explained how they were selected and the dues payable to them including salary for the days worked, any accrued leave days and allowances, any unpaid overtime, one month salary in lieu of notice, and severance pay equal to 22 days for each completed year of service. In addition their medical cover was exceeded up to March 2019, plus they would get relocation support of Kshs.30,000.00 each. All the affected staff including the claimants were paid.
 15. As regards the 4th claimant, the witness stated that he was employed as a Driving School Instructor in the Driving school until 30th July 2018 when he exited on normal retirement after attaining the age of 60 years. She contended that the 4th claimant was paid all his dues and therefore his claim is misplaced.

Submissions

16. It was submitted for the claimants that the redundancy was unlawfully and unfairly done since the procedure provided under Section 40 (1) of the *Employment Act* 2007. It was argued that their position are still in existence country wide; no evidence was adduced to show that alternative employment was considered before the declaration of redundancy; there is no evidence that the section criteria provided by Section 40 (a) and (b) of the Act was followed; no reason for redundancy is disclosed in the letter dated 15th November 2018; the area Labour Officer was not notified or copied the letter dated 15th November 2018 contrary to Section 40 (a) of the Act; the employer has not paid the claimants one month salary in lieu of notice; and the employees were not paid severance pay for each completed year of service.
17. Based on the foregoing submissions, it was urged that each claimant is entitled to 12 months' salary as compensation for unfair termination, one month salary in lieu of notice and severance pay at the rate of 20 months for each year served until the date of the unlawful redundancy. For emphasis, reliance



was placed on the Court of Appeal decision in Kenya Airways Limited v Aviation & Allied Workers Union of Kenya & 3 Others (2014) eKLR where the award of compensation for unfair termination of up to 12 months' salary was affirmed.

18. It was submitted for the respondent that the redundancy herein was lawful and fair because the reason and the procedure followed before the redundancy was within the law. It was contended that the employer did a restructuring and job evaluation exercise using a Human Resource consultant in 2017 which resulted to redundancies after some positions became superfluous while others were redefined requiring superior skills than the ones possessed by the existing staff.
19. It was further submitted that notice of intended redundancy dated 12th October 2018 is on record as evidence that it was served on the General Secretary of Kenya Long Distance Truck Drivers and Allied Workers Union and the County Labour Officer, Nyayo House.
20. It was further submitted that the Skills Audit Report for the 1st-3rd claimants has been produced as exhibits to support the case that the redundancy was based on the roles declared superfluous and the skills requirements for the redefined roles. Each claimant was engaged individually and each was given termination letter dated 15th November 2018 citing redundancy as the reason and not their performance.
21. It was further submitted that payment vouchers and clearance forms have been produced as proof that the claimants were paid one month salary in lieu of notice, severance pay of 22 days' salary for each completed year of service, accrued leave and outstanding leave allowances, and salary for 15 days worked in November 2018. The said payment was not of statutory deductions. They were also given discretionary support of medical cover up to March 2019 plus relocation support of Kshs.30,000.00 each.
22. It was further submitted that the claimants were given 14 days to appeal or protest the decision, method or criteria used for their selection but none filed any appeal or query. Finally the employer held consultation forums with all the staff affected by the redundancy process and further conducted Transition Management Training for all of them.
23. As regards the 4th claimant, the respondent reiterated that the claim is misplaced since the claimant exited on normal retirement at the age of 60 years through the notice dated 2nd July 2018. Likewise all his terminal dues were paid to him. Consequently, the respondent submits that the entire suit should be dismissed with costs.

Analysis and determination

24. The issues for determination herein are fairly straight forward:-
 - a. Whether the termination of 1st-3rd claimants employment on account of redundancy was unlawful and unfair.
 - b. Whether the 4th claimant left respondent's employment through normal retirement or unlawful redundancy.
 - c. Whether the claimants deserve the reliefs sought.



Unlawful and unfair redundancy

25. Section 45 of the Employment provides as follows concerning unfair termination of employment contract of an employee:-

- “(1) No employer shall terminate the employment of an employee unfairly.
- (2) A termination of employment by an employer is unfair if the employer fails to prove –
- a. That the reason for the termination is valid;
 - b. That the reason for the termination is a fair reason -
 - i. Related to the employee’s conduct, capacity or compatibility, or
 - ii. Based on the operational requirements of the employer; and
 - c. That the employment was terminated in accordance with fair procedure.”

26. In this case the reason for the termination is redundancy meaning that the factor to consider is the employer operational requirement. Such factor reflects on the owners of the business as the person exercising managerial prerogative on the direction of his business should take. The said prerogative is sacred and the courts have no discretion over the same provided the rights of employees are not sacrificed at the altar of business profitability. I concur with Mwaura J in *KUDHEIHA v The Nairobi Hospital* (2022) eKLR when she held that:-

“It is trite law that employers have prerogative to determine the structures of their business and therefore make positions redundant. Positions, not employees become redundant.”

27. In this case also the respondent has proved that it carried out its organizational review and job evaluations which resulted into some position becoming superfluous and others being redefined so as to require higher skills. The respondent has also produced evidence of skills audit on the claimants which showed that the claimants whose positions were redefined did not possess the required skills. Finally there is unrebutted evidence to prove that the attempt to place the claimants into alternative positions in the respondent Association was futile since they all did not possess the required skills.

28. Having considered the evidence and the submissions presented to the court, I am satisfied that the respondent has proved on a balance of probability that there existed a redundancy situation and therefore valid reason to justify separation on account of redundancy. The burden of proof under Section 43 and 47(5) of the *Employment Act* has therefore been discharged by the respondent herein.

29. As regards the procedure followed, Section 40 of the Act provides that:-

- “(1) 1) An employer shall not terminate a contract of service on account of 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 to 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 the intended date of termination on account 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 time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy;
 - (d) where there is in existence 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 an 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."
30. I have perused the various notices filed by the respondent and it is clear that on 12th October 2018, the respondent served all the staff with a general notice of intention to carry out redundancies. The respondent also served separate notices to the Secretary General of the claimants' trade union and also the area Labour Officer. The notices to the Union and the Labour officer also set out the particulars of terminal dues that would be paid to the affected staff. Finally the notices gave the selection criteria as roles rendered superfluous and necessary skills for the redefined roles.
31. The respondent has also produced a set of emails as prove that it engaged the claimants for consultations and trainings before the exit. It has also produced redundancy notices to the individual claimants dated 15th November 2018. There is evidence that the respondent computed terminal dues for all the claimants and they accepted except the 2nd claimant who protested the issue of accrued leave days only.
32. He did not however adduce any evidence herein on the issue of leave and I can only hold that he has not proved that he was entitled to 174 leave days indicated in his protest as appearing in the computation of his terminal dues by the respondent. In the end I am satisfied that the respondent has proved by evidence that it complied with the mandatory procedure set out under Section 40 of the [Employment Act](#). Coupled with the finding above that the reason for the termination was valid, I must hold that the redundancy of the 1st- 3rd claimant fell within the four corners of Section 40 and 45 of the [Employment Act](#) and therefore it was fair and lawful.

4th claimant

33. The 4th claimant alleges that he was also laid off with the other 3 claimants. He has not adduced any evidence to substantiate that allegation. However the respondent has produced a letter dated 2nd July 2018 referenced "RETIREMENT" giving one month retirement notice effective 31st July 2018. There is also on record Clearance Form dated 31st July 2018 showing when the claimant left the respondent. Therefore I am satisfied that the respondent has proved by evidence that the 4th claimant exited the Association before the redundancies were declared on 12th October 2018.



Reliefs

34. The evidence on record is overwhelmingly against the claimants. They were paid their terminal dues upon separation. They have not proved by bank statements or otherwise that the payment was not credited in their bank accounts. They have also not proved that they are entitled to any further dues. Consequently, I proceed to dismiss the suit with costs.

DATED, SIGNED AND DELIVERED AT NYERI THIS 26TH DAY OF JANUARY, 2023.

ONESMUS N MAKAU

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 April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE

