



**Lebo & 331 others v Kenya Power & Lighting Co Ltd (Cause  
17 of 2019) [2023] KEELRC 37 (KLR) (20 January 2023) (Judgment)**

Neutral citation: [2023] KEELRC 37 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET  
CAUSE 17 OF 2019  
NJ ABUODHA, J  
JANUARY 20, 2023**

**BETWEEN  
CHRISTOPHER KIPKORIR LEBO & 331 OTHERS ..... CLAIMANT  
AND  
KENYA POWER & LIGHTING CO LTD ..... RESPONDENT**

**JUDGMENT**

1. This matter has a long and chequered history having been filed for the first time as HCCC No. 74 of 2003 long before the present Court came into existence. It has therefore naturally passed through several judges who may have made directions or observations which I might not have been able to notice and appreciate from the voluminous court file.
2. When I became seized of the matter during my tour of duty in Eldoret I requested counsel for the parties to pick out the pleadings documents and witness statements they intended to rely on and compile for me an updated and lean bundle which I could quickly go through in order to understand the nature and scope of the dispute. The counsel duly complied and I commend them for their cooperation.
3. From the foregoing disclaimer, the court in this judgment entirely relies on the summary, pleadings witness statements as compiled by counsel as true rendition of the facts and issues in dispute.
4. The claimants herein commenced the present suit via Amended, Amended, Amended plaint dated 19<sup>th</sup> June, 2013 seeking reliefs inter alia:
  - a. A declaration that termination of their Employment through “staff Reduction Programme” and/or retrenchment is unknown both to law and their term as of service and is thus null and void.



- b. A declaration that retrenchment being a borrowed idea its implementation ought to have been explained to the claimants and the rules governing the same to abide those of the donor.
  - c. A declaration that the amount of Ksh. 1.0 Billion retained by the Respondent as a result of the Claimants' forfeiture of their allowances does in fact belong to the claimants and other employees of the respondent and an order that the same paid out to them.
  - d. A declaring that the respondent is not entitled to retain the sum of Ksh. 240,214,425.00/= deducted and retained by it from the 1<sup>st</sup> to 332<sup>nd</sup> claimants' leave, travelling, medical overtime, salary increments and other allowances and that the said sum should be refunded to the said claimants.
  - e. A declaration that the claimants' services having been terminated pursuant to a specific package the claimants are entitled to know the terms and particulars thereof including the amount.
  - f. A sum of Ksh.2,235, 130, 185.00/= being the amount of money retained by the respondent as a result of misapprehension of the terminal benefits due to the claimants and the illegal deduction at the time to their termination.
  - g. An order that the provident fund contributions by both the claimants and the respondent are now due and payable to the claimants and that the respondent should give a full and accurate account of sums and upon an account being taken, an order directing the respondent to release or facilitate the release of any money that shall be found to be due and owing to the claimants.
  - h. A declaration that in computing the claimants' terminal benefits the respondent sought to have taken into account the 6% salary increment awarded in the CBA and backdated to January, 2002.
  - i. A declaration that the manner of termination of the claimants serviced was inhuman and discriminatory with an order for appropriate compensation.
  - j. Costs of the suit.
5. The brief background of the claim was that:
- a. The claimants were employees of the respondent in various capacities and categories as listed in paragraphs 3A, 3C, and 3D of the Amended Amended Amended plaint. The termination of the claimants was effected on diverse dates between 30<sup>th</sup> June, 2001 and 19<sup>th</sup> March, 2002 in what the respondent referred to as Staff Reduction Programme, popularly known as Retrenchment. It was as a result of the said Staff Reduction Programme that the claimants were terminated from service and hence resulted into the commencement of this suit. Though this matter was filed in the year 2003, for a number of reasons, the same never proceeded to hearing until 18<sup>th</sup> March, 2022 when the claimants' witness Enock Manyu testified in Court and closed the claimant's case on the said date and the matter was adjourned to 26<sup>th</sup> April, 2022 when the respondents' witnesses David Mmandi and Peter Misango testified and the respondent's case was closed and parties took directions to file their written submissions.
6. The parties agreed issues for trial were as follows
- b. Whether the respondent carried out a redundancy affecting the claimants' or a normal termination.
  - c. Whether the respondent had a justifiable basis to declare redundancy and/or retrenchment of the claimants.



- d. Whether the respondent complied with the legal procedure in terminating the claimant's employment on account of redundancy and/or retrenchment.
  - e. Whether the redundancy and/or retrenchment was carried out in accordance with the law, collective Bargaining agreement and the respondents Staff Rule/Regulation.
  - f. Whether the respondent paid the claimants' all their terminal dues following the redundancy and/or retrenchment.
  - g. Whether the respondent undertook to retain the claimants in employment if they agreed to the cost cutting measures and whether the subsequent termination was unfair, un-procedural, wrongful, discriminatory in view of the respondents alleged undertaking.
  - h. Whether the claimants are entitled to the monies in respect of allowances, salary increments and benefits allegedly withheld.
  - i. Whether the claimants are entitled to the relief sought in their amended plaint.
  - j. Who should pay the costs of this case.
7. Subsequently the claimants through application dated 16<sup>th</sup> March, 2021 sought for leave to amend the Amended Amended Amended plaint dated 19<sup>th</sup> June, 2013 to introduce particulars of fraud and revival of suits that had abated. The Honourable Court on its ruling delivered on the 1<sup>st</sup> day of October, 2021 granted the prayer for amending the plaint to introduce the particulars of fraud and directed that parties make submissions on the revival of the suits that had abated in their final submissions after the hearing had been concluded.
  8. At the hearing Mr. Enoch Manyu gave evidence on behalf of the claimants. He stated on the main that he was staying in Nakuru and was involved in church Ministry work. He worked for the respondent from 1995 to 2001. It was his evidence that he started as Human Resource Officer and by the time he was leaving he was Assistant Human Resource Manager. The witness informed the court that he recorded a statement on 26<sup>th</sup> August, 2019 which he adopted as his evidence in chief. He also adopted his supporting documents filed with the statement.
  9. Mr. Manyu briefly stated that in 2001 and 2002 the respondent purported to terminate their service in what the respondent termed Staff Reduction program. They were issued with standard letters of termination but were later changed to redundancy.
  10. According to him, they never knew whether they were being retrenched or not. He further stated that they understood they were being retrenched under the World Bank Initiative to reduce Government Involvement in investment. It was his evidence that it was not a normal redundancy and that the Managing Director wrote to the Minister for Labour through a letter dated 26<sup>th</sup> June, 2001. The letter was talking about staff reduction. The Minister responded through a letter dated 12<sup>th</sup> July, 2001.
  11. According to Mr. Manyu, redundancy was a process under section 4(5) of the repealed Trade Disputes Act. Their termination according to him, was neither a redundancy nor a retrenchment. The respondent combined retrenchment and redundancy.
  12. The witness contended that the respondent started discharging employees on account of redundancy even before the Minister responded to their letter and further that the process never followed the law. He further stated that the payment was neither here nor there because the termination was wrongful and further that the compensation was not adequate.



13. Concerning the PWC Report, it was his evidence that he analysed the same and found out that it was not complete. For instance, it never had terms of reference, there was no mode of operation and the report was not signed. According to him, the PS – Energy quoted a report dated August, 2001. The Report was dispatched in April, 2002 hence the Board could not have approved the report in March 2001 when the report had not been released.
14. Regarding CBA, it was his evidence that the existing CBA was one of 1999/2000 and that it expired on 3<sup>rd</sup> December, 2000. There was no letter of extension of the CBA. According to him, there was no CBA in place when they got terminated. There was a lacuna therefore the CBA signed in 2003 covered them.
15. In cross – examination he stated that in 1997 he was appointed Assistant Human Resource Manager. He was in charge of Industrial Relation matters and in that capacity interacted with a lot of unions. He stated that he was also in charge of Human Resource administration issues. It was further his evidence that he used to be involved in discussions relating to termination of employment of staff. These included redundancies, normal termination or dismissals.
16. Regarding the claim before the Court he stated that they were 331 claimants although the respondent had denied some of them were its employees. He admitted that the letters of appointment, termination and payslips were not filed before the Court. He was further aware that some of claimants had died and was not aware if they had been substituted.
17. Concerning redundancy he stated that there was a difference between redundancy and retrenchment. They both however lead to loss of jobs and the loss is through no fault of an employee. Both are initiated by the employer. The circumstances triggering redundancy could be financial difficulty or need by the employer to improve efficiency.
18. It was Mr. Manyu’s evidence that the retrenchment was not part of the CBA but redundancy was. The documents marked as 20A and 20B in the claimants bundle of documents related to the events that took place in 1998. The termination however took place in 2001 and 2002.
19. According to him, drought and job contracting was alleged to have affected the respondent’s operations. Back then the respondent used to generate and supply power. The main source was Hydro-electric power and acknowledged that drought would lead to low power generation.
20. Mr. Manyu confirmed that at page 27 of the claimant’s bundle were minutes of a meeting between the respondent’s management and the Union. According to him the minutes were not signed but were confirmed by the respondent. He further stated that he attended the meeting and the minutes reflected what transpired at the meeting. It was further his evidence that the management communicated to the union the difficulties the respondent was going through.
21. These included severe drought, fuel costs and fluctuation of the shilling. The respondent’s profits reduced from 1.2 billion to 456 million in a span of a year. The revenue could not therefore sustain the operations of the respondents. Available options therefore included redundancy and reduction of running costs however there was still a problem despite the implementation of cost cutting measures. At page 34 of the respondents bundle of documents was a statement from the Minister for Energy it was a press release. It was neither dated nor signed. It was released on 19<sup>th</sup> October, 2000. He further stated that he was aware of the Technical Committee but was not part of it.
22. Mr. Manyu further testified that it was resolved that a consultant be appointed to review the organizational structure and recommend restructuring. He was aware PWC was appointed as the management consultant.



23. The consultants interacted with his boss but was kept abreast on what the consultant was doing. However, his boss never asked for his advice or input on the restructuring process.
24. According to him he saw only one report in Court. It was an addendum which meant there was a main report.
25. At pages 108 – 109 of the respondents bundle of documents was a letter written by Bilhah Ndubai who was his boss. He did not draft the letter. He only saw it after it had been released. The letter stated that some jobs would be lost/abolished. At pages 63 to 67 of the respondent's bundle of documents was the Board paper. It was prepared by Ms. Ndubai. The paper talked of the need to reduce the number of staff by approximately 600 by June 2002 and a further 1,431 by June, 2003 making a total of 2031. The Board was asked to ratify the plan, approve the proposed organizational structure and approve the staff-right-sizing, proposed retrenchment and package so that the management could source funding. The new organizational structure abolished some jobs and at page 44 of the claimant's bundle of documents was a letter addressed to the union and copied to the Commissioner for Labour and Chair of the Restructuring Task Force. At page 46 of the claimants bundle of documents was a letter written by the respondent's Managing Director Mr. Gichuru to the Minister for Labour. The letter served as a report under the Trade Disputes Act and a notice under clause 4 of the 1999/2000 CBA. According to Mr. Manyu, however, there was no running CBA when they were terminated. A new one came into force in 2003.
26. The claimant further stated that the redundancy took place after the issuance of the notice to the Union and Ministry of Labour. Some redundancies however took place before the expiry of the three months' notice.
27. Mr. Manyu further stated that the dispute was referred to Mediation but the claimants never agreed with the opinion of the Mediator. He further contended that not all employees were unionisable and that the CBA never applied to non-unionisable employees. He further stated that he was paid Ksh. 4,896,884/55 and that the money was from the pension fund and Stima Sacco. He also stated that the rest of the claimant's received monies stated in the schedule at page 161 of the respondent's bundle but the money from pension scheme was included which was wrong. Pension was a separate entity with its own management.
28. The claimant further stated that if the redundancy was correct, the payment may have been sufficient.
29. In re-examination he stated that the Minister was not aware of the redundancy until the communication by the Managing Director dated 26<sup>th</sup> June, 2001 and further that the addendum was not sufficient reason for the respondent to act on it.
30. The respondent's 1<sup>st</sup> witness Mr. David Monandi stated that he was the manager in charge of Human Resource at the Respondent and that he recorded a statement on 31<sup>st</sup> January, 2020 which he adopted as his evidence in chief. He also adopted the documents filed with the claim he stated that he knew Enoch Maiyo. He was his Senior colleague. It was his evidence that when a CBA expires it remains in force until a new one is signed. The CBA found at page 89 to 107 of the respondent's bundle was the applicable CBA. Clause 34 provided that it remained in force until such a date as a new agreement is reached. There was therefore no lacuna.
31. Concerning notice, it was his evidence that there was sufficient notice to the claimants and the union and that some of the notifications were verbal. Further there were earlier meetings between the union and the respondent over the redundancy.



32. Mr. Monandi further clarified that he was speaking from the records kept by the respondent. He further stated that in 2003 CBA never applied to the claimants.
33. In cross-examination he stated that employees are hired by the leadership and records kept by the Human Resource. Termination was done by the Board or Human Resource depending on the seniority of the employee concerned. Human Resource can partner with the department concerned to carry out a termination.
34. It was further Mr. Monandi's testimony that Staff Reduction letters were signed by Regional Managers and that he was not in direct contact with the employees concerned during the relevant period.
35. Regarding redundancy, it was his evidence that clause 4 (ii) of the CBA provided that the redundancy was on the basis of last in first out but where applicable merit could apply. According to him, all requirements were adhered to. The notice of redundancy was three months and was to take effect from 23<sup>rd</sup> July, 2001. The letter dated 29<sup>th</sup> June, 2001 stated that staff had to leave by 30<sup>th</sup> June, 2001. The notice period had not expired by then.
36. Mr. Monandi further stated that the restructuring was based on discussions between the Government and the World Bank and the timelines had already been set and that the redundancy was triggered by internal business challenges and not the World Bank. He maintained that there was both formal and informal/verbal discussions on the redundancy process.
37. Regarding PWC, it was his evidence that they were hired to see through the process. They were to support the respondent in analysing the challenges and recommend solutions. One of the recommendations was redundancy.
38. In re-examination he stated that KPLC advised the Union that some jobs would be abolished. The notice was to run until 23<sup>rd</sup> July, 2001. The notice was issued under 1999/2000 CBA and confirmed earlier verbal communication on the matter and further that the employees declared redundant were paid in lieu of notice.
39. The respondent's second witness Mr. Peter Misango stated that he worked for the respondent as Chief Financial Officer and that he recorded his statement on 28<sup>th</sup> January, 2022 which he relied on as his evidence in chief. He also relied on the documents filed with the claim.
40. In cross-examination, he stated that he was aware of the matter before the Court and was partially aware of the negotiations and agreements on cost cutting. The purpose of the cost cutting was to see the company through the turbulence.
41. Concerning payments, it was his evidence that employees were paid in lieu of notice and that they left on account of redundancy. The redundancy was provided for in the CBA. It was further his evidence that Pension Fund and Sacco were separate from the respondent.
42. In re-examination he stated that cost cutting measures were to save jobs but jobs were lost because despite restructuring, the respondent could not sustain operations hence jobs had to be lost. He further stated that the respondent processed claimants' terminal dues and paid them as per the Human Resource instructions and that pay in lieu of notice was made to affected employees.
43. The court has endeavored as above to summarise the pleadings and evidence. The Court further has considered submissions by Counsel and identifies only two major issues which require to be determined between the parties. First, whether in purporting to declare the claimants redundant the respondent had justifiable reasons and followed the law applicable to declaration of redundancies at the material time. This included the packages paid to the claimants on account of redundancy. Second,



- whether the respondent by asking the claimants to forego some of their allowances as part of cost reduction measures, and subsequently declaring the claimants redundant, the respondent committed an act of fraud against the claimants and whether the amounts so foregone could be reimbursed to the claimants.
44. On the first issue, it was common ground that the applicable law then was the now repealed [Trade Disputes Act](#) and the applicable CBA for unionisable employees at the material time.
45. Section 4 subsection 4 of the repealed [Trade Dispute Act](#) provided as follows:
- “ Any trade dispute involving the dismissal of an employee or termination of any contract of employment except termination by way of redundancy, shall be reported to the Minister within twenty eight days of the dismissal or termination of employment.”
46. Subsection 5 of the said [Act](#) further provided that:
- “the termination of employment through redundancy shall, whether or not there is agreement between the employer and the employee as the terms of the redundancy, be deemed to constitute a trade dispute for the purposes of subsection 4.”
47. A plain reading of the above two provisions yields an interpretation that whereas termination of employment on account of redundancy constituted a trade dispute, there was no obligation to report the same to the Minister. However, in this particular case it is clear from the record that the Minister was notified and was aware of the intended redundancy. The Court takes judicial notice of the fact that the cost cutting programme of the respondent was an initiative of the Government hence the decision must have been a cabinet decision to which the Minister was an integral part of.
48. Counsel for the claimants submitted that the respondent wrote to the Minister for Labour a letter dated 26<sup>th</sup> June, 2001. The said letter referred to a letter dated 23<sup>rd</sup> April 2001 in which the respondent stated that it had served the Minister for Labour but instead the letter dated 23<sup>rd</sup> April, 2001 had been copied to the Commissioner of Labour and not the Minister.
49. The Court however considers the Ministry of Labour as an institution and the relevant department or personnel appropriate to deal with the issue before the Court was the Commissioner for Labour. The Court further upon consideration of several correspondences between the respondent and the Ministry of Labour particularly the letter dated 26<sup>th</sup> June, 2001 from the respondent’s Managing Director and a response thereto by the Minister dated 12<sup>th</sup> July, 2001 is persuaded that the Ministry was made aware of the intended redundancy.
50. Mr. Mathai for the claimants contended that apart from failure to notify the Minister of the redundancy, there was no CBA in force to guide the redundancy since the 1999/2000 CBA had expired at the time the redundancy took place. However clause 34 of the 1999/2000 CBA provided that:
- “ until such date as a new agreement is agreed upon, the existing agreement shall remain in force.”
51. It is a standard practice in Labour Relations that until a new CBA is negotiated, finalized and registered, the expired CBA remains operational. It is therefore not correct as submitted by Counsel that there was no CBA in existence at the time the redundancies were effected.



52. Having established from the evidence that the Ministry and the Union was aware and were involved throughout the process of the redundancy the next question that requires to be answered is whether the respondent had sufficient and justifiable reasons to declare the claimants redundant.
53. Section 2 of the *Trade Disputes Act* defined redundancy as:
- “redundancy means loss of employment, occupation, or career by involuntary means through no fault of an employee involving termination of employment at the initiative of the employer where the services of an employee are superfluous and the practice commonly known as abolition of office, job or occupation.”
54. It was common ground that between 1998 and 2003 the respondent’s business was adversely affected by prolonged drought which significantly affected power generation. This necessitated cutting down of costs. The minutes produced at pages 27 – 33 of the claimants bundle of documents and the Minister’s statement at pages 34-36 captures the scenario. The Court has reviewed and considered the above documents and is persuaded that they constituted valid reasons for the declaration of redundancy.
55. The Court further observes that a declaration of redundancy is a managerial prerogative driven by business operations and market dynamics. This being a strategic business decision the court is reluctant to interfere unless it is sufficiently demonstrated that there was no valid and or justifiable reason for the redundancy which is not the case here.
56. The Court having so found that there was justifiable reason for the declaration of redundancy and further that due process was followed in the declaration, the issue of redundancy package need not be delved into since the claimant’s lead witness Mr. Enock Manyu conceded that the respondent paid him Ksh. 4,896,884.55. He further stated that five of the claimant’s selected by sampling received the payments set out in schedule found at page 161 of the respondent’s bundle of documents. Mr. Manyu further stated in his evidence that if the termination was to be considered as a redundancy then the payments made to the claimants may have been sufficient.
57. The main thrust of this aspect of the dispute was premised primarily on the validity of the reasons and the process of termination through redundancy. The Court has pronounced itself on this by stating that there existed valid and justifiable reasons for the redundancy and further the Court has found that due process was followed in the declaration; Further there is on record the concession by the claimants’ lead witness that if the Court were to find that the redundancy was proper then the payments made to the claimants were sufficient. From the foregoing, it would not be necessary to delve into the quantum and details of the redundancy package.
58. The final issue to be resolved is whether the respondent by asking the claimants’ to forego some of their allowances as part of cost reduction measure and subsequently declaring them redundant, the respondent committed an act of fraud against the claimants and further whether the amounts foregone could be ordered reimbursed to the claimants.
59. The court has observed as above that the respondent was undergoing difficult financial period which necessitated cost cutting measures. It is not unusual for any corporate body or institution undergoing financial difficulty to withdraw or reduce allowances and benefits payable to employees. The allowances that were foregone included leave travelling, medical, overtime and salary increments. The claimants’ salaries remained unaffected.
60. The Court noted that these were initial cost cutting measures which were hoped could mitigate the adverse situation however this did not work. The respondent therefore proceeded to declare



redundancies in line with the recommendations of the Consultant. This could not reasonably be said to be fraudulent.

61. Blacks Law Dictionary 10<sup>th</sup> Edition define fraud as:

“knowing misrepresentation or knowing concealment of material fact made to induce another to act to his or her detriment.

62. The court has considered the facts and circumstances of this dispute and based on the findings made in respect of the reasons and the process of the redundancy herein and is not persuaded that the claimants have sufficiently demonstrated that the respondent knowingly misrepresented or concealed any material fact to them in this particular matter to constitute fraud. The Court therefore rejects this claim.

63. In conclusion the Court finds this claim in its entirety without merit and is hereby dismissed.

64. I would like to observe that this case has caused me a lot of anxiety and distress and the decision herein a difficult one for me considering the number of years the case has taken before its decided. I figure out in my mind the number of anxious years of wait and costs the claimants herein may have incurred in prosecuting this claim. How about those who died during the wait leaving their families with expectation that something additional could come from the respondent who declared, most likely, their sole bread winners redundant? It is difficult for me to fathom the scope and extent of the disappointment occasioned to them by the inevitable direction that the wheels of justice have driven me to but such is the nature of my work.

65. The only respite therefore I can grant at this juncture is to order that either party bear their own costs of the suit.

66. It is so ordered

**DATED AND DELIVERED AT ELDORET THIS 20<sup>TH</sup> DAY OF JANUARY, 2023**

**Abuodha Nelson Jorum**

**Judge ELRC**

