



**Loketo v International Rescue Committee (IRC) (Cause 4 of 2021)
[2023] KEELRC 22 (KLR) (20 January 2023) (Judgment)**

Neutral citation: [2023] KEELRC 22 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KITALE
CAUSE 4 OF 2021
NJ ABUODHA, J
JANUARY 20, 2023**

BETWEEN

MOSES KAPOMO LOKETO CLAIMANT

AND

INTERNATIONAL RESCUE COMMITTEE (IRC) RESPONDENT

JUDGMENT

1. The claimant herein filed the instant claim *vide* a statement of claim dated October 4, 2021 and filed in court on October 8, 2021 seeking for the following reliefs as against the respondent:
 - a. A declaration that the termination of the services of the claimant is arbitrary, illegal and unlawful and that the claimant is entitled to general and exemplary damages for wrongful termination.
 - b. Payment of salary arrears, benefits totalling to Kshs 544,500.
 - c. Costs and interest from the date of payment
 - d. Any other relief that the court shall deem fit to grant.
2. The claimant avers in his statement of claim that he was employed by the respondent as a security and safety officer and subsequently promoted to the position of a safety and security assistant with effect from April 18, 2016 on an annual basis subject to renewal, and that the same was renewed and extended upto May 14, 2021 when the same was terminated at the instance of the respondent.
3. The claimant maintained that his services were terminated on the basis of malicious falsehoods on the grounds that his position had been declared redundant.
4. According to the claimant, prior to his termination from service, he conducted investigations in regard to distribution of emergency back up tanks in Turkana Central and Loima as per the distribution list



- submitted by the Washofficer Mr James Lachule on August 13, 2018 and duly submitted a report to the management.
5. He maintained that the termination is in itself illegal, arbitrary, unlawful, sinister and motivated by ulterior motives arising from the damning report prepared and forwarded by the claimant and that as such, the said termination was in breach of the terms and conditions of service and the [*Employment Act, 2007*](#).
 6. The respondent filed its memorandum of defence on November 12, 2021 and denied that the claimant's employment contract was unlawfully terminated as alleged and maintained that the claimant was terminated on grounds of redundancy and not on other grounds as alleged.
 7. According to the respondent, it received communication from the Office of US Foreign Disaster Assistance (OFDA) stating that it would no longer fund the Lodwar Nutrition, WASH and Livelihoods Project beyond its expiry date of June 30, 2020 and that on April 20, 2020, the respondent notified the Lodwar staff on the end of the OFDA grant and further explained that those who were fully funded by OFDA would be issued with the end of contract notices as per contracts ending on June 30, 2020.
 8. It was further contended that notices on the intended redundancy were then issued to the affected staff and also to the Minister of Labour and the National Employment Authority on June 8, 2020.
 9. It was maintained that all the affected staff were paid their dues and that in fact, as regards the claimant, in June 2020, he was paid in full as he had worked for the whole month while in July 2020, his basic pay was pro-rated plus gratuity and severance pay.
 10. The respondent reiterated that the claimant, the Labour Office and the National Employment Authority were issued with a month's notice of the intended redundancy in accordance with sections 40(1)(b) and section 78 of the [*Employment Act*](#).
 11. It was therefore the respondent's contention that it fully complied with the relevant provisions of the [*Employment Act, 2007*](#) in carrying out the redundancy process.
 12. The claimant testified on July 26, 2022 as CW1 and adopted his witness statement filed in court on October 4, 2021.
 13. CW1 reiterated the contents of his statement of claim and sought to be compensated for unlawful termination.
 14. On the other hand, the respondent called one Mr Antony Wachira who testified as RW1 in furtherance of its case and adopted his witness statement recorded on November 11, 2021.
 15. RW1 basically reiterated the averments in the respondent's memorandum of defence that the claimant and other staff members were terminated from employment on account of redundancy after the donor withdrew from funding some of the respondent's projects.
 16. With that evidence, the court directed parties to file written submissions. The claimant's submissions were filed on September 29, 2022 whereas the respondent's submissions were filed on September 26, 2022.
 17. The claimant in his submissions has majorly argued that the entire process of termination was flawed as there was no consultations carried out to include the labour office and the claimant or his representative of choice as provided for under section 40 of the [*Employment Act*](#) as regards redundancy. The case of [*Amalgamated Union of Kenya Metal workers v Kenya Coach Industries*](#) (2021) eKLR was cited to



buttress the position that consultation between parties is imperative before an employee is declared redundant.

18. In conclusion the claimant prayed for 6 months' salary into account the position of the claimant and the conduct of the respondent, unpaid salary arrears, benefits and pension contribution totalling to Kshs 554,500.
19. The respondent on the other hand submitted that the redundancy was lawful and justified.
20. It was submitted that the respondent had proved that its decision to declare the claimant's position redundant was involuntary as it was influenced by external factors and therefore based on a genuine belief as provided under section 43(2) of the *Employment Act*. In support of this position, the cases of *Carol Atieno Osweta v Kenya Yungbeng Plate Making Ltd* (2013) eKLR, *Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others* (2014) eKLR and *George Buoro v Kenindia Assurance Company* (2020) eKLR were cited.
21. As regards the reliefs sought by the claimant, the respondent submitted that the claimant was not entitled to the said prayers as it failed to present any evidence before the court for it to arrive at a finding of procedural unfairness.
22. I have carefully considered the pleadings filed by the parties, the evidence on record and the submissions of the parties and I find the two main issues for determination to be;
 - i. Whether the termination of the claimant on account of redundancy amounts to unfair termination.
 - ii. Whether the claimant is entitled to the prayers sought.
23. Section 2 of the *Employment Act* define redundancy as;

“Loss of employment, occupation, job 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 the employee are superfluous and the practices commonly known as abolition of office, job or occupation and loss of employment.”
24. Section 40 of the *Employment Act, 2007* provides for the procedure to be complied with in event termination of employee on account 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 due to an employee who is declared redundant paid off the leave in cash."

25. The respondent in this case averred that the claimant's employment together with other affected employees was terminated on account of redundancy after the respondent, which is a humanitarian aid, relief and development non-government organization which relies entirely on donor funding, received communication from the office of United States Foreign Disaster Assistance, that it would no longer fund the Lodwar Nutrition, WASH and livelihoods project beyond its expiry date of June 30, 2020.
26. The claimant on the other hand has maintained that his employment was terminated unfairly as the respondent did not comply with the provisions of section 40 of the *Employment Act* when terminating him on account of redundancy.
27. From the onset I must mention that an employer cannot be denied its right to declare an employee redundant. The court will only be called to intervene in ensuring that section 40(1) of the *Employment Act, 2007* was followed to the letter in the termination of an employee on account of redundancy.
28. I have analysed at length the pleadings presented by both parties in this case. I have read the claimant's contract of employment signed by the claimant and the Country Director of the respondent in detail. At paragraph 5 of the said document, it is provided that renewal of the contract would be subject to funding and program needs. To that extent, it follows that the respondent was justified in terminating the claimant on account of redundancy as his tenure of service was dependent on donor funding.
29. On the issue as to whether due process was followed on termination as envisaged by section 40(1)(b) of the *Employment Act*, the respondent has contended that it issued notices to the labour offices and the claimant of its intention to terminate the claimant on account of redundancy.
30. I have perused the notice of end of employment contract issued to the claimant and a letter addressed to the National Employment Authority on end of contracts for IRC Kenya staff in detail. In the said notice, the respondent explained the reasons for the redundancy to the claimant and I therefore find that the procedure followed was in accordance with the mandatory procedure set out in section 40 (1) (b) of the *Employment Act*
31. In the end, I find the claim non-meritorious and is hereby dismissed with costs.
32. It is so ordered.

DATED AND DELIVERED AT ELDORET THIS 20TH DAY OF JANUARY, 2023

ABUODHA NELSON JORUM

JUDGE ELRC

