



Mapenay & 4 others v Kiluani New Life Secondary School & 3 others (Cause 424 of 2018) [2023] KEELRC 526 (KLR) (28 February 2023) (Judgment)

Neutral citation: [2023] KEELRC 526 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 424 OF 2018
J RIKA, J
FEBRUARY 28, 2023**

BETWEEN

**ELIZABETH NATUTA MAPENAY 1ST CLAIMANT
SHOKOINE OKE KIRINYIA 2ND CLAIMANT
DAVID PAPAYAI KERU 3RD CLAIMANT
NAAYU OLE KUYA [SAITOTI SITELU] 4TH CLAIMANT
MERCY WAIRIMU MACHARIA 5TH CLAIMANT**

AND

**KILUANI NEW LIFE SECONDARY SCHOOL 1ST RESPONDENT
BOM KILUANI NEW SECONDARY SCHOOL 2ND RESPONDENT
PRINCIPAL KILUANI NEW SECONDARY SCHOOL 3RD RESPONDENT
ATTORNEY-GENERAL 4TH RESPONDENT**

JUDGMENT

1. The 5 Claimants were employed by the Respondent Boys’ Secondary School, which is based in Kajiado County.
2. The 1st Claimant was employed as a Secretary on June 1, 2006; the 2nd held the position of Accounts Clerk from November 18, 2002; the 3rd was a Messenger from November 18, 2002; the 4th was a Watchman employed on July 29, 2004; and the 5th was a Caterer employed on September 27, 2016.
3. The 1st, 2nd and 3rd Claimants were informed by the 3rd Respondent, on January 28, 2018, that their respective contracts of employment were being terminated on account of redundancy. It was explained



that the School had a debt of Kshs. 8.4 million, and had recorded a low Student enrolment. The 4th and 5th Claimant were informed about the decision to terminate their contracts, on January 29, 2018.

4. They aver that redundancy was not in compliance with the law. Their positions were taken over by Employees who were employed way after the Claimants joined the School. They were only paid salary for days worked, in the month of January 2018.
5. Their last salaries were paid at the monthly rates of Kshs 17,583; Kshs 15,336; Kshs 12,224; Kshs 9,482; and Kshs 7,000 respectively.
6. They pray for Judgment against the Respondents for: -

1st Claimant-

- a. 1-month salary in lieu of notice at Kshs 17,583.
- b. House allowance at Kshs 367,133.
- c. Severance pay at Kshs 117,670.
- d. Compensation for unfair termination at Kshs 210,996.

2nd Claimant

- a. 1-month salary in lieu of notice at Kshs 15,336.
- b. House allowance at Kshs 419,592.
- c. Severance pay at Kshs. 134,484.
- d. Compensation for unfair termination at Kshs 184,032.

3rd Claimant -

- a. 1-month salary in lieu of notice at Kshs 12,324.
- b. House allowance at Kshs 334,448.
- c. Severance pay at Kshs. 107,195.
- d. Compensation for unfair termination at Kshs 146,688.

4th Claimant –

- a. 1-month salary in lieu of notice at Kshs 9,482.
- b. House allowance at Kshs 215,051.
- c. Severance pay at Kshs 68,926.
- d. Compensation for unfair termination at Kshs 113,784.

5th Claimant –

- a. 1-month salary in lieu of notice at Kshs 7,000.
- b. House allowance at Kshs 16,800.
- c. Severance pay at Kshs 5,653.



- d. Compensation for unfair termination at Kshs 84,000.
7. They pray for costs and any other relief the Court may deem fit.
 8. The Respondents filed their Statement of Response dated September 20, 2018. They concede that the Claimants were employed by the Respondent School. The School Principal convened a meeting of the Board of Management during which redundancy in support staff establishment, was discussed. Redundancy was occasioned by financial constraints, as well as misconduct and incompetence on the part of the Claimants. Termination was carried out in accordance with the law. The Respondents pray that the Claim is dismissed with costs.
 9. The 1st Claimant was given authority by the Co-Claimants, filed on March 28, 2018 to prosecute the Claim on behalf of all the Claimants.
 10. She, and Jared Nyagaka, the School Principal, gave evidence on July 13, 2022, when the hearing closed. The Claim was last mentioned on October 25, 2022, when Parties confirmed filing and exchange of their Submissions.
 11. The 1st Claimant adopted the Witness Statements and Documents [exhibit 1-6] filed by the Claimants, in her evidence. She restated the employment history, and terms and conditions of service, concluded between the Parties. The Claimants worked for long. They were told by the Principal that the School was experiencing financial problems and low enrolment. They were told that there was no more work. There was no notice or consultation. Another Secretary who was the 1st Claimant's understudy, was taken in her place. The Co-Claimants were similarly succeeded by Employees who were junior to them. They were not paid house allowance, severance and notice. There were no disciplinary charges or hearing for any of the Claimants.
 12. Cross-examined, the 1st Claimant told the Court that she was employed in 2006. She was not acquainted with the chair of the Board, Isaack Mapenay. The 1st Claimant finished form 4 in 1991, and attended a Secretarial College in 1996. She attended Moi Girls Isinya, and did her secretarial course at St. Joseph Catholic in Nairobi. Her letter of employment differed from that of her colleagues. The stamp on her letter reads 'Kilwani,' while others read 'Kiluani.' She worked at Kiluani Secondary School. The problem with the stamp was from the makers of the stamp. The name is in Kimaasai and variation was expected. Isaack Mapenay is the 1st Claimant's brother. There was no conflict of interest in her employment. She did not reside at the School. The Principal called the Claimants and informed them that the School was steeped in heavy debts. They were told that there was need to restructure. Several Principals at the School had left in quick succession. The 1st Claimant did not know why they left. She did not know that it was because Teachers incited the Students against them. The 1st Claimant was trained on secretarial confidentiality. She protected privileged communication passing through her.
 13. The 1st Claimant further testified that Claimants were advised to reapply for available positions. They did not, because they already held those positions. There were about 18 support staff. The Claimants were only paid salaries for January 2018. Other staff could have applied for the advertised positions, after the Claimants had left employment. Redirected, the 1st Claimant closed her evidence with the clarification that she did not author, or issue the employment letters, and would not know about the variance in the stamping.
 14. Principal Nyagaka adopted his Witness Statement and Documents filed by the Respondent [exhibit 1-25]. He found the School in a state of chaos, when he was employed in 2017. He was informed that his predecessors were chased away by Students. Principals who were considered from outside Maasailand, were chased away. There was incitement by Students and Teachers. A Student was killed



- at the School in 2016 in the midst of the strife. Parents withdrew their Children from the School. Enrolment went down from 520 to about 260 Students. The School decided to restructure and rationalize its staff structure. There were 2 secretaries which was unusual. The 1st Claimant was difficult to handle. She leaked confidential information and could not be disciplined. The School had debt in the tune of Kshs. 8.4 million. It had to restructure in accordance with a circular from the parent Ministry.
15. Out of 17 Employees affected by the process, 13 reapplied for the freshly offered jobs. 4 declined to reapply, including the Claimants. The School looked at the applications and determined who to reemploy, and who to release. The school favoured Employees who could multi-task. The 3rd Claimant supplied the School milk and was its storekeeper. The School recruited a storekeeper who could handle food, and stationery. The secretary who applied for the position, Faith Leeson, was employed. The Claimants were paid salaries for January 2018, on February 2, 2018. They were paid notice in May 2018. The 1st Claimant resided at the School, until June 2018, well beyond the date of her exit. She was arrogant and could not be disciplined because she was protected by her brother Isaack, Board member. The Principal acted without malice. The 3rd Claimant for instance, continued to supply the School milk.
 16. Cross-examined the Principal told the Court that the 1st and 3rd Claimants incited Students. He was told about this. The School has not had strikes, after the 2 Claimants left. The Principal had worked for just a month, by the time the Claimants left employment. There was no change in the Board, after the Claimants left. The same Board which was protecting the Claimants, interfered with their records. It interfered with minutes of the Board, where various decisions were made. The 1st Claimant deliberately messed the records after the Claim was filed before the Court. There was nepotism. A relative of a member of the Board was not barred from working for the School, if due process was followed in her recruitment.
 17. The Principal told the Court that termination was occasioned by redundancy. Decision was made in January 2018. There was no notice of intention to declare redundancy. Employees were required to reapply for their positions. The staff meeting took place on 1 January 5, 2018. The Labour Office was not involved. The Claimants were not paid severance. Other Employees who were junior to the Claimants were retained. The Respondent looked at discipline, qualifications and ability to multi-task. The Principal did not have enough evidence of the Claimants' misconduct. He did not have documents to show that the 1st Claimant resided at the School. Redirected, the Principal told the Court that the main reason for termination was redundancy. Criteria for the process is not before the Court. Misconduct was considered, but the main concern was the financial position.
 18. The issues are whether termination of the Claimants' respective contracts of employment was based on fair procedure; whether it was justified; and whether they merit the remedies pleaded. The relevant law is contained in sections 40, 41, 43 and 45 of the *Employment Act, 2007*.

The Court Finds: -

19. The Claimants were employed by the 2nd Respondent School in various support roles, on divergent dates. Their contracts were terminated on January 28, 2018 / January 29, 2018.
20. Procedure. The School through its Principal explained that the Claimants' contracts were terminated on account of redundancy, and misconduct.
21. There is no record of the procedure contemplated by Section 40, in the termination of the Claimants' contracts. The Principal told the Court he did not issue Notice of the School's intention to declare



- redundancy; he only met the Claimants on January 15, 2018; he did not involve the Labour Office; he did not avail severance pay to the Claimants; some Employees who were junior to the Claimants were retained; and misconduct on the part of the Claimants was considered, although the Principal did not have enough evidence of such misconduct.
22. This procedure was contrary to Section 40 of the *Employment Act*, which requires that there is notice of intention to declare redundancy; consultation with the affected Employees or their Trade Union; consideration of experience, skills, ability and the doctrine of LIFO; involvement of the Labour Office; notice of termination on account of redundancy; and payment of redundancy package, including severance pay of at least 15 days' salary for each complete year of service.
 23. Most, if not all statutory procedures, prescribed under section 40 of the Employment Act, were disregarded by the school.
 24. Disciplinary record of an Employee, is not one of the factors to be taken in, on redundancy under Section 40 of the *Employment Act*. If there are disciplinary concerns, there are other provisions under the *Employment Act*, which the Employer can invoke, in termination of an Employee's contract.
 25. Validity of termination. There was no valid reason shown to justify termination. The Respondents went on a wild goose chase, questioning the recruitment of the 1st Claimant, alleging that she was employed through the influence of her brother Isaack Mapenay, who was in the School's Board of Management. It was alleged that she was arrogant, and disclosed the School's confidential information, safe in the knowledge that her brother protected her. The dispute was not about the manner of any of the Claimant's recruitment; it was about redundancy. The Claimants had been working for several years, and their recruitment was never in issue.
 26. The School did not demonstrate that it was faced with a genuine redundancy situation, requiring that the Claimants' contracts are terminated on redundancy. It was not even clear to the School if the Claimants were being placed on suspension, or had their contracts terminated on account of redundancy. The letter dated January 25, 2018 from Principal Nyagaka to the 5th Claimant for instance, advised that her services had been suspended with effect from February 1, 2018, and that she would be recalled, when the situation improved. This was not a redundancy situation, where an Employee is advised that due to an economic position, her position has been phased out.
 27. The Employees were just being told to step aside, to allow the new Principal reorganize the School, which was considered for reasons to do with finances, staff and student discipline, to be in need of re-organization. Not every re-organization in an Institution or a Business, amounts to a redundancy situation. The Court does not think that re-organization spearheaded by Principal Nyagaka, amounted to a genuine redundancy process, as known in law.
 28. Horror stories the new Principal encountered when he reported, about a Student being killed in the past, and Non-Maasai Principals being ejected, did not warrant declaration of redundancies.
 29. The School advertised for the same positions held by the Claimants, and required them to reapply. At the same time, the Claimants were advised that they had been suspended, and would be recalled when finances improved. Did the School terminate the Claimants' contracts on redundancy, or just require them to step aside? And if they were going to be recalled when finances improved, what was the wisdom in requiring them to reapply for their jobs?
 30. This in the view of the Court was a foul termination process, where the Employer looked for justification from multiple sources, and found none. In the end, the Employer was not sure whether it should suspend or terminate the Claimant's contracts.



Remedies.

31. It is declared that termination was unfair.
32. The 1st Claimant worked for 12 years; the 2nd and 3rd Claimants for 16 years; the 4th Claimant for 14 years; while the 5th Claimant worked for 2 years. They all were in permanent and pensionable positions. They did not contribute to the circumstances leading to termination of their contracts. They are awarded compensation for unfair termination, guided by these factors, and the length of their service, in the following amounts: -
 - 1st Claimant, equivalent of 10 months' salary at Kshs 175, 830.
 - 2nd Claimant, equivalent of 12 months' salary at Kshs 184,032.
 - 3rd Claimant, equivalent of 12 months' salary at Kshs 146,688.
 - 4th Claimant, equivalent of 11 months' salary at Kshs. 113,784.
 - 5th Claimant, equivalent of 2 months' salary at Kshs 14,000.
33. The Bank Statements of the Claimants, exhibited by the Respondents indicate that the School deposited the Claimants' last salaries, on February 2, 2018. The Principal told the Court that Notice was paid in May 2018, months after the Claimants left employment. Payment of Notice is not recorded in any document, availed to the Court. The Respondents shall pay Notice as follows: -
 - 1st Claimant, notice pay at Kshs 17,583.
 - 2nd Claimant, notice pay at Kshs 15,336.
 - 3rd Claimant, notice pay at Kshs 12,224.
 - 4th Claimant, notice pay at Kshs 9,482.
 - 5th Claimant, notice pay at Kshs 7,000
34. The Claimants did not establish their prayers for house allowance in arrears. They worked for many years except for the 5th Claimant, who worked for 2 years. Did they make any demands for house allowance during their prolonged service? They filed letters of introduction to Kenya Commercial Bank, which issued in 2017. The gross and net salaries are indicated separately in these letters. They did not supply the Court with pay slips, or other documents to show that house allowance was not included in the monthly salaries paid. There was considerable doubt in the evidence of the 1st Claimant, on her assertion that she resided outside the School. There was no evidence by her Co-Claimants, that they too resided outside the School. Their claim for house allowance in arrears has no merit and is declined.
35. There was common evidence that the Claimants were not paid severance. The minimum rate payable under section 40 of the *Employment Act*, is 15 days' salary for each complete year of service. That has been the minimum rate from 2007, when the *Employment Act* was enacted. The Employees' purchasing power, consumer price indices, and inflation rates have not been static, and the Court awards severance at the rate of 18 days' salary for each complete year of service. The Respondents considered that there was a redundancy situation, but failed to adhere to the law on redundancy. This prayer is allowed in the following ratio: -
 - 1st Claimant, 18 days' salary for 12 complete years of service at Kshs 146,074.



2nd Claimant, 18 days' salary for 16 complete years of service at Kshs 168,875.

3rd Claimant, 18 days' salary for 16 complete years of service at Kshs 135,404.

4th Claimant, 18 days' salary for 14 complete years of service, at Kshs 91,902.

5th Claimant, 18 days' salary for 2 complete years of service, at Kshs 9,692.

36. Parties shall meet their own costs of the Claim.

37. In sum, it is ordered

a. It is declared that termination was unfair.

b. The respondents shall pay to-

1st Claimant: compensation at Kshs 175,830; notice Kshs 17,583; and, severance at Kshs 146,074 – total Kshs 339,487.

2nd Claimant: compensation at Kshs 184,032; notice at Kshs 15,336; and, severance at Kshs 168,875 – total Kshs 368,243.

3rd Claimant: compensation at Kshs 146,688; notice at Kshs 12,224; and, severance at Kshs 135,404 – total Kshs 294,316.

4th Claimant: compensation at Kshs 113,784; notice at Kshs 9,482; and, severance at Kshs 91,902 – total Kshs. 215,168.

5th Claimant: compensation at Kshs 14,000; notice at Kshs 7,000; and, severance at Kshs 9,692 – total Kshs 30,692.

c. Parties to meet their own costs of the claim.

DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY, AT NAIROBI, UNDER THE MINISTRY OF HEALTH AND JUDICIARY COVID-19 GUIDELINES, THIS 28TH DAY OF FEBRUARY 2023.

JAMES RIKA

JUDGE

