



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kenya Plantation & Agricultural Workers Union v Elgon Tea & Coffee Limited (Employment and Labour Relations Cause 44 of 2020) [2023] KEELRC 440 (KLR) (20 February 2023) (Judgment)**

Neutral citation: [2023] KEELRC 440 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET  
EMPLOYMENT AND LABOUR RELATIONS CAUSE 44 OF 2020  
NJ ABUODHA, J  
FEBRUARY 20, 2023**

**BETWEEN  
KENYA PLANTATION & AGRICULTURAL WORKERS UNION .. CLAIMANT  
AND  
ELGON TEA & COFFEE LIMITED ..... RESPONDENT**

**JUDGMENT**

1. Vide a Memorandum of Claim dated September 24, 2019, the Claimant sought the following Orders;
  - i. A declaration that the decision of the Respondent to declare the grievants redundant is unlawful and illegal.
  - ii. An order that the said redundancy by the Respondent against the grievants be declared void ab initio and the latter to be left in their normal positions of work without bias and victimisation from the respondent by them being union members of the claimant.
  - iii. Costs of this cause
  - iv. Any other relief that this Honourable court may deem fit and just to grant.
2. It was the Claimant's case that on November 1, 2016, the 1<sup>st</sup> grievant Mr Backson Ngetuka was appointed as a seasonal employee for a period of 2 months by the respondent to be assigned tasks by the factory manager as a general worker and that on January 1, 2018, he was appointed as a security guard in the administration department on contractual basis for a period of 24 months' renewable by mutual consent by both parties.
3. The 2<sup>nd</sup> grievant, Nicholas Ojuma Musugu was appointed as a security guard for a period of 2 months' probationary period with effect from August 1, 2015 and confirmed on January 29, 2016 as a security guard for one year contractual term.



4. The Claimant averred that the respondent continuously deducted union fees from its employees and remitted the same to the claimant and that on August 14, 2018, the grievants were elected as shop stewards by the claimant vide a letter to the Respondent.
5. It was contended that on September 14, 2019, the claimant received a letter from the respondent dated September 11, 2019 giving notice to the 1<sup>st</sup> and 2<sup>nd</sup> grievant that they wanted to outsource the two security officers out of ten security officers.
6. According to the claimant, the grievants are the only shop stewards in the respondent's company and the only ones in the applicant's union among the ten security officers and was therefore a clear indication of victimisation and intimidation of members of the applicant as no justifiable reason had been given to terminate their services excluding other guards.
7. It was contended that the respondent had not complied with the provisions of \*Article\* 40(1)(a), (c) of the Employment Act as regards redundancy and that the redundancy notice dated September 11, 2019 was less than a month and therefore a clear contravention of the provisions of the Employment Act.

### **Respondent's case**

8. The Respondent response was vide a replying affidavit dated September 30, 2019 and a supplementary affidavit dated October 15, 2019 wherein the deponent, Benard Kirui, the respondent's Human Resource officer, confirmed that the two grievants were issued with a redundancy notice.
9. According to the Respondent, it decided to outsource security in their company after a serious of insecurity was reported and the company was losing property over theft, thereby rendering the positions of ten employees, in particular, security guards in the company redundant.
10. It was averred that it was not true that the grievants herein were discriminated upon because of their membership to the union but that all the ten security guards were set to be declared redundant and that the union was only informed of the position of the two aggrieved persons since out of the ten security guards, because they were the only ones unionized.
11. As regards the short notice, the respondent averred that the notice was issued since it was no longer possible to continue having untrained security personnel in the premises.
12. It was the respondent's case that it had offered to pay the claimant's one month's salary in lieu of notice.
13. On November 1, 2022, the court directed the matter to be dispensed of through written submissions. The claimant filed its submissions on November 10, 2022. I perused the court file and it appears the respondent did not file its submissions.

### **Claimant's submissions**

14. The Claimant in its submissions has maintained that the respondent failed to comply in giving adequate notice to the grievants herein and that further, it has failed to make any necessary steps to compensate the grievants.
15. According to the Claimant, apart from issuing a one-month notice to the local Labour Officer, the respondent was also required to issue two separate notices of at least one month each, the first being a general communication to employees generally notifying them of the impending redundancy and the second being a specific notice to the affected employee.
16. It was also submitted that the grievants are entitled to severance pay of not less than 15 days' pay for each completed year of service and one month's notice in lieu of notice.



17. It was the claimant's submission that the balance of leave days not taken, unpaid overtime and holiday pay for the 1<sup>st</sup> grievant totalled Kshs 81,086.86 and for the 2<sup>nd</sup> grievant, the amount is Kshs 82,911 which should be paid by the respondent in exclusion of the severance pay and the one month's notice.

### **Determination**

18. Upon carefully considering the pleadings filed by the rival parties and the submissions on record, I find the main issues for determination are;
- i. Whether the termination of the 2 grievants on account of redundancy was procedural
  - ii. Whether the Claimant is entitled to the prayers sought.
19. Redundancy is defined by Section 2 of the *Employment Act* 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.'
20. Section 40 of *Employment Act* outlines essential requirements to be followed by the employer for termination of employment on grounds of redundancy as;-
1. Giving notice to the union or labour office at least a month before the process commences.
  2. If employee is not a member of trade union the employer should notify the employee personally in writing and the labour officer.
  3. The employer should demonstrate he used criteria of seniority, ability and reliability to each employee.
  4. If there is a Collective Bargaining Agreement, it should not be used to the disadvantage of an employee.
  5. Employee to be given one-month notice or pay in lieu of notice.
  6. Severance pay at the rate of not less the 15 days for each completed year of service.
21. In the instant case, the respondent through its HR manager deponed that the respondent's management decided to take internal measure to curb the rising of insecurity issues in the respondent's premises by outsourcing security services.
22. According to the Respondent, it would contract a duly registered security firm which firm would provide trained security personnel and in case of any eventuality, the said firm would be held vicariously liable for the acts or omissions of its agents.
23. It was averred that the sensitivity of the matter in question necessitated the actions of the Respondent to issue the notice of redundancy and that the short notice was because it was no longer possible to continue having untrained personnel as they would not be capable of indemnifying the Respondent in case of breach of security.
24. I must mention at this point that Section 40(1)(a) and (b) of the *Employment Act* is coached in mandatory terms in that the procedure to be followed by the employer when terminating an employee on account of redundancy must be in accordance with section 40 (1) (a) and (b) of the *employment Act*.



25. In this case, the respondent wrote a letter to the claimant on September 11, 2019 notifying them of their intention to declare the positions of the grievants redundant.
26. I have analysed the redundancy notice issued to the Claimant on September 11, 2019. The Respondent in the said informed the claimant that the security guard positions were to be redundant with effect from October 1, 2019. Which was less than the prescribed 30 days.
27. I have painstakingly looked in the court file for the specific notice of redundancy to the employees and particularly the grievants herein in vain.
28. In the case of *Hesbon Ngaruiya Waigi vs Equitorial Commercial Bank Limited (2013)eKLR* held that;
  - ' Where redundancy is declared by an employer, the procedure to follow is as set out under the provisions of Section 40 of the *Employment Act* and where not followed, any termination as a result will be deemed unprocedural and unfair. Any termination of an employee following a declaration of redundancy must be based on the law otherwise the same becomes wrong and if the grounds used to identify the affected employees are not as per the law, the same becomes unfair.'
29. It is therefore this court's view the Respondent's notice period was not as provided for under Section 40 of the Act and as such this court finds that the termination of the grievants on account of redundancy was unprocedural thus unfair. The grievants are therefore entitled to notice pay.
30. On severance pay , for the 1<sup>st</sup> grievant, for one completed years of service since he was appointed on January 1, 2018 is calculated at  $Kshs\ 18,319/30 \times 15 = Kshs\ 9,159.5$
31. The 2<sup>nd</sup> grievant was appointed January 29, 2016 at a salary of Kshs 11,500 meaning he had worked for 3 years as at the time he was terminated. His severance pay is therefore  $Kshs\ (11,500/30 \times 15) \times 3 = Ksh\ 17,250$ .
32. As for the claim of leave days not taken, unpaid overtime and holiday pay, this court will not make any award under the said heads as it was not proved.
33. In the end, I make the following orders
  - a. An order of declaration be and is hereby issued declaring that the decision by the Respondent to terminate the grievants on account of redundancy was unlawful for lack of procedural fairness.
  - b. The 1<sup>st</sup> grievant is awarded:
    - i. Notice pay Kshs 18,319.00
    - ii. Severance pay Kshs 9,159.50

27,478.00

The 2<sup>nd</sup> grievant is awarded

    - i. Notice pay Kshs 11,500.00
    - ii. Severance pay Kshs 17,250.00

28,750.00
  - c. The claimant is awarded costs and interests of this suit.



33. It is so ordered.

**Dated and delivered at Eldoret this 20<sup>th</sup> day of February, 2023**

**Abuodha Nelson Jorum**

