



REPUBLIC OF KENYA



**Amalgamated Union of Kenya Metal Workers v Complete Auto Centre Ltd
(Cause E557 of 2021) [2023] KEELRC 778 (KLR) (24 March 2023) (Judgment)**

Neutral citation: [2023] KEELRC 778 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E557 OF 2021
AN MWAURE, J
MARCH 24, 2023**

**BETWEEN
AMALGAMATED UNION OF KENYA METAL WORKERS CLAIMANT
AND
COMPLETE AUTO CENTRE LTD RESPONDENT**

JUDGMENT

1. The claimant filed a memorandum of claim dated 9th July 2021. He avers that the claimant is a registered Trade Union under section 19 of *Labour Relations Act* 2007 which mandates it to represent employees in metal and motor trades sectors.
2. He further says the grievant was employed by the respondent on 17th February 2010 at a salary of Kshs 19,000/-. He served the respondent for a period of 10 years. His salary rose over the years to Kshs 32,959 but on 20th January 2020 and his services were unprocedurally terminated. He was terminated on account of redundancy.
3. He says he was declared redundant and yet was not paid his terminal dues. He says he wrote to the union about his dues and the union wrote to the respondent who promised to settle but the respondent never did.
4. He also says Sacco money was deducted from his salary but was never remitted to the Sacco (Ardhi Sacco).
5. He says they even met with a conciliator but the respondent neither implemented conciliators report or the labour office report. He says it was inhuman for the respondent to refuse to pay his dues including the last month salary and furthermore the respondent did not have any evidence to prove the reduction in business to warrant redundancy.



6. The claimant prays for court to reinstate him to his position and in the alternative to award terminal benefits as per redundancy clauses of the law and Sacco money be remitted.

Respondent's case

7. The respondent did not file a response or submissions and so case proceeded as undefended cause.

Claimant's submissions.

8. The claimant in his submissions says he was terminated on account of redundancy by a letter dated 20th January 2020 served on the grievant the same day and was to take effect the seam day. The grievant Mr Simon Kinyanjui Kariuki was not notified nor was the labour office and the union as mandated in section 40 of the *Employment Act*.
9. The grievant submit that alongside violating section 40 of the *Employment Act* they also breached article 41(1) of *the Constitution* of Kenya 2010, article 47(1) of *the Constitution* and section 45(1) of the *employment act* as no valid reason was given for terminating the grievant from his employment.
10. So the grievant is urging the court to be guided by the concillators report dated 23rd November 2020, and the case No 68 of 2015 *Barack Otieno Ombima vs Rarouk & 2 Others* where court found that the due process as provided or in section 41 of *employment act* 2007 was flouted. The termination of the employee was found unfair and unjustified.

Analysis & Determination

11.
 - (a) The issue for determination was whether the termination of the grievant was procedural and fair.
 - (b) Secondly is he entitled to any remedies.
12. On the issue of the fairness or otherwise for the grievant's termination the grievant who avers he had worked for the respondent for 10 years says on 20th January 2020 he received a letter from his employer titled "Termination of service." The brief contents of the said letter was to inform him that he was terminated effective 20th January 2020. He was informed business was low and respondents were facing challenges in paying salaries and meeting companies' obligations.
13. He was told his dues would be calculated and communicated later. In other words the grievant was declared redundant. The law of employment and in particular section 40 of the *Employment Act* provide in clear and mandatory terms the process to be followed in declaring an employee redundant. Section 40 states as follows:
 - (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 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 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.
14. The respondent was therefore mandated to inform union if employee was a member of the union and their decision to declare a member redundant and also inform the labour office of the area where employee was operating from one month prior to the date of termination on the basis of redundancy.
 15. If employee was not a member of union the employee was to be notified together with the labour officer about the redundancy.
 16. The employer has to show the criteria used in selecting who to declare redundant considering seniority in time and skill among others.
 17. The employer is to comply with the provision of a collective bargaining agreement where there is one and pay employee any pending leave days and one month salary in lieu of notice and fifteen days equivalent of salary for every year worked.
 18. This case the respondent by the way did not comply with any of the above provisions of the law but only gave grievant a letter of termination effective the same day. He informed him in the letter of low business and challenges in financing but no evidence on the same. The grievant was not given an opportunity to be heard as provided in section 41 of the [Employment Act](#). Section 41 of the [Employment Act](#) provides as follows:

41. (1). Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.
 19. In the case of *Jane Khalechi vs Oxford University Press EA Limited* (2011) eKLR the court could not have put it any better as it stated “section 40 of the [Employment Act](#) gives the conditions precedent before one is declared redundant. These conditions outlined in law are mandatory and not left to the choice of an employer. Redundancies affect workers livelihood and where this must be done by an employer the same must be put into consideration.”
 20. The court further said “an employer should not be simply allowed to cite re-organisation during a redundancy and without any basis identify and single out an individual employee for termination.”



21. Flowing from the above the court is persuaded the respondent very unfairly and un procedurally terminated the grievant and failed to follow the law and to pay his dues.
22. The respondent did not controvert the averments of the claimant as he did not defend the case and did not file any submissions. Respondents admitted to the conciliator he would pay the dues but did not pay.
23. Going by the grievants pleadings and submissions and the law, the court is convinced the respondent failed to follow the law in declaring the grievant redundant but merely issued him with a termination letter. The court therefore declares the termination of the grievant illegal, unprocedural and wrongful. Consequently judgment is entered in his favour.
24. He is awarded the following remedies:-
 - a. One month notice of termination Kshs 32,959/-
 - b. Severance pay at 15 days for 10 years Kshs 164,795
 - c. Salary for January 2020 Kshs 21,973
 - d. Leave days as respondent never produced evidence to prove he gave him leave days or cash pay Kshs 26,367
 - e. Leave traveling allowance is not proved and is not prayed and is declined.
 - f. Unremitted Sacco money to be remitted as the respondent never gave evidence that he remitted the same Kshs 101,850.
 - g. The grievant was actually unfairly terminated. He was awarded 2 months' salary as compensation totalling Kshs 65,918/-
TOTAL AWARDED Kshs 413,859/-
 - h. Costs follow the event and claimant is awarded costs and interest at court rates from date of judgment till full payment.
 - i. He should also be given certificate of service if he had not been given before within 14 days from today's date.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 24TH DAY OF MARCH, 2023.

ANNA NGIBUINI MWAURE

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 March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the *Civil Procedure Rules*, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of *the Constitution* which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of



Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

ANNA NGIBUINI MWAURE

JUDGE

