



**Kenya Union of Commercial Food and Allied Workers v Nerix Pharma Limited  
(Cause E532 of 2021) [2023] KEELRC 724 (KLR) (23 March 2023) (Judgment)**

Neutral citation: [2023] KEELRC 724 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E532 OF 2021  
BOM MANANI, J  
MARCH 23, 2023**

**BETWEEN**  
**KENYA UNION OF COMMERCIAL FOOD AND ALLIED  
WORKERS ..... CLAIMANT**  
**AND**  
**NERIX PHARMA LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The Claimant is a Trade Union representing the several Grievants in the current action. It is contended on behalf of the Grievants, who were all employees of the Respondent, that they were unfairly relieved of their employment through a flawed redundancy process. As a result, the Claimant has brought this action on their behalf and for their benefit seeking various reliefs as more particularly set out in the Statement of Claim.
2. On the other hand, it is the Respondent’s position that the contracts of service for the various Grievants were properly terminated following a genuine redundancy at the workplace. It is the Respondent’s position that it followed the law in processing the redundancy.

**Claimant’s Case**

3. As pointed out earlier, the Claimant is a Trade Union that is said to have a recognition agreement with the Respondent. At the time the cause of action arose, the Claimant states that it was representing a number of employees of the Respondent who are its members. It is indicated that the parties had a valid Collective Bargaining Agreement at the time.
4. The Claimant states that around 12<sup>th</sup> March 2019, it received a notice from the Respondent dated 27<sup>th</sup> February 2019 by which the Respondent communicated its intention to release part of its workforce on account of redundancy. According to the Claimant, the notice did not mention the extent of the



- proposed redundancy. Allegedly, the notice was issued six months before the date the redundancy eventually crystallized. Therefore and in the Claimant's view, this notice was defective.
5. The Claimant contends that the redundancy only targeted its members from the general workforce of the Respondent. It was therefore discriminatory in nature.
  6. It is the Claimant's case that the redundancy notices that were served on the Grievants on 31<sup>st</sup> July 2019 did not meet the requirements of section 40 of the [Employment Act](#). According to the Claimant, the notices dated 24<sup>th</sup> July 2019 were served on the Grievants too late in time in contravention of the law.
  7. After the notices were delivered to the Grievants on 31<sup>st</sup> July 2019 the Grievants were prevented from accessing their workstations as from 1<sup>st</sup> August 2019 in contravention of section 40 of the [Employment Act](#).
  8. The Claimant states that in view of these developments, it called for a meeting with the Respondent scheduled for 5<sup>th</sup> August 2019. However, the meeting failed to take off after the Respondent's representatives failed to turn up for the session. The matter was therefore reported to the Ministry of Labour as a trade dispute.
  9. According to the Claimant, the Ministry appointed a conciliator to arbitrate on the matter. The Claimant states that despite the conciliator making recommendations for settlement of the dispute, the Respondent remained uncooperative. This prompted the conciliator to certify the dispute as unresolved paving way for the institution of this cause.
  10. It is the Claimant's position that the purported redundancy failed to follow the guidelines in the law and the Collective Bargaining Agreement between the parties. For example, it is stated that the employees relieved of employment were selected on the basis of their union membership contrary to the guidelines set out in law. Further, the Claimant states that out of the approximately 35 employees that the Respondent had at the time, only 13 of them had their contracts terminated. According to the Claimant all the 13 were members of the union. In the premises, the purported redundancy was unconstitutional and discriminatory.

### **Respondent's Case**

11. On its part, the Respondent asserts that it followed the law in terminating the Grievants' contracts. Therefore, the case by the Claimant challenging the process is a sham and ought to be dismissed.
12. It is the Respondent's case that the Chinese company that was supplying it with raw materials for the manufacture of its products closed down. This closure, the Respondent argues, resulted in inadequacy of raw materials to sustain its operations.
13. In order to remain afloat, the Respondent states that it took the decision to temporarily shut down its operations pending improvement in the supply of raw materials. In the Respondent's view, the inevitable consequence of this decision was job loss to some of its employees.
14. According to the Respondent, this reality led to the decision to issue the Claimant with the redundancy notice dated 27<sup>th</sup> February 2019. The notice was copied to the County Labour office.
15. In the notice, the Respondent mentions that due to a biting shortage of raw material it was unable to sustain its operations at optimal levels. The Respondent mentions that this situation was most likely going to result in staff layoffs that may affect some of the Claimant's members. It was indicated that the Respondent was to notify any members of staff affected by the process at the opportune time through notices addressed to them individually.



16. The Respondent contends that it subsequently issued notices to the Grievants and other members of staff conveying its decision to terminate their contracts of service due to redundancy. The notices, according to the Respondent, gave the affected employees notice of two months to terminate their employment. According to the notices produced in evidence, the Grievants' employment was to terminate on 1<sup>st</sup> August 2019.
17. The Respondent contends that it worked out the Grievants' redundancy dues in line with the applicable law and paid them. However, some of the employees were unwilling to close the matter thus precipitating this dispute.
18. The Respondent suggests that the Claimant unnecessarily escalated the dispute to the Ministry of Labour since the entitlements of every of the Grievants had been computed in line with the applicable law. It is the Respondent's case that the recommendation by the conciliator that the Respondent makes payments to the Grievants was irregular.

### **Issues for Determination**

19. Upon evaluating the pleadings on record and hearing the parties, it is clear that there is no contest that the Grievants were all employees of the Respondent. There is also no dispute that the Grievants were members of the Claimant at the time the cause of action arose. Further, there is no dispute that the Claimant and Respondent have a Recognition Agreement pursuant to which they negotiated the Collective Bargaining Agreement dated 3<sup>rd</sup> March 2017.
20. What is contested are the following:-
  - a) Whether the Respondent lawfully terminated the Grievants' contracts of service on account of redundancy.
  - b) Whether the parties are entitled to the remedies that they seek through their respective pleadings.

### **Analysis**

21. Although the Respondent initially took the position that all terminated employees' entitlements were computed and paid, during the defense trial, the Respondent's witness stated that the four Grievants are yet to be paid their dues because they declined to finalize the process. I therefore take it that notwithstanding the position expressed in the statement of defense, the Respondent acknowledges that some of the Grievants are yet to receive their terminal dues, whatever the reason.
22. The law on redundancy is now well settled. It is set out in sections 40, 43 and 45 of the [Employment Act](#). Section 40 of the [Act](#) prohibits employers from declaring employees redundant unless they comply with the procedure prescribed there-under. The procedure requires the following:-
  - a) The employer to issue notice of the intended redundancy to the employee and the local labour office. Where the employee is a member of a Trade Union, the notice should be addressed to the Trade Union. The notice: must issue at least one month before the date of termination; must state the reason for and extent of the proposed redundancy.
  - b) The employer must then undertake the selection process for the employees to be released from employment. The rule of the thumb is that in undertaking the selection, the employer must adhere to the "first in last out" principle meaning that the first individuals to be employed would ordinarily be the last to be let go. However, the law permits the employer to depart from this principle and consider other factors such as the skill, ability and reliability of individual



employees whilst undertaking the selection process. This is in recognition of the fact that redundancy is a tool available to the employer to re-organize his enterprise in order to optimize his business. And to be able to achieve this purpose, the employer may require employees with particular skills and abilities but who may have been hired later. To allow the employer to navigate such operational needs, the law permits him to depart from the “first in last out” principle and consider other factors whilst picking the employees to be released. However, the employer must justify this departure on solid and verifiable grounds. This underscores the need for the selection process to be open and objectively executed.

- c) The employer must then pay the employee terminal dues to include: severance pay; accrued leave; one month’s salary in lieu of notice; any other benefits agreed on under the prevailing Collective Bargaining Agreement where there is one.
23. Under section 43 of the *Employment Act*, the employer has the obligation of proving the reason for terminating an employee’s contract of service. Where the employer fails to discharge this burden, the termination shall be deemed unlawful in terms of section 45 of the Act.
24. It is not lost to the court that section 47 of the *Employment Act* places the burden of proving the unlawfulness of the decision to terminate employment on the employee. However and as has been observed a number of times, the duty on the employee is to place before the court evidence demonstrating, prima facie, that there has been a termination of the contract of service and that the circumstances surrounding the termination point to some form of irregularity in the decision. Once the employee does this, the burden shifts onto the employer to justify the decision.
25. Has the Claimant satisfied the requirements of section 47 of the *Employment Act*? On this question, there is evidence that the Grievants’ contracts were terminated through the notices issued by the Respondent dated 24<sup>th</sup> July 2019. These notices were tendered in evidence. In any event, the Respondent does not deny terminating the Grievants’ employment.
26. Second, the Grievants have given evidence challenging the validity of the termination. They argue that the redundancy notices do not meet the requirements of section 40 of the *Employment Act*. They also argue that the selection procedure under the Act was not followed.
27. I have looked at the notices issued. They are dated 24<sup>th</sup> July 2019 and are said to have been delivered to the Grievants on 31<sup>st</sup> July 2019. Although they are said to be two months’ notices, they clearly indicate that the Grievants’ contracts were to lapse on 1<sup>st</sup> August 2019. On the other hand, section 40 of the *Employment Act* requires that the employer issues the employee with a notice of “not less than a month prior to the date of the intended termination on account of redundancy”.
28. There is also the notice dated 27<sup>th</sup> February 2019 served on the Claimant. Whilst the Respondent argues that it is compliant, the Claimant indicates that it does not indicate the extent of the proposed redundancy.
29. There is also uncontroverted evidence that the Respondent had more employees than those whose contracts were terminated. Prima facie, this required that selection of employees to be terminated from employment be undertaken as prescribed by the law. The Grievants contend that no such procedure was undertaken.
30. The Respondent argues that it paid the Grievants in lieu of the notice required under section 40 (1) (a) and (b) of the *Employment Act*. On selection of employees to be sent home, the Respondent has on the one hand indicated that it laid off “all its employees” suggesting that there was no need for selection.



On the other hand, the Respondent's witness indicated through his oral testimony that only a section of the Respondent's employees were terminated.

31. The totality of the foregoing demonstrates that the Grievants have presented evidence pointing to prima facie irregularity in the redundancy notice that was issued and the selection procedure adopted in isolating the employees to be finally sent home. They have established a prima facie case pointing to deficiencies in the notices and a flawed selection process leading to their dismissal. This meets the requirements of section 47 of the *Employment Act*.
32. Under section 45 of the *Employment Act*, for an employer to prove the reasons for termination of a contract of service on account of redundancy, he is required to provide evidence on the following:-
  - a) That the reason for the termination is valid;
  - b) That the reason for the termination is a fair reason based on the operational requirements of the employer;
  - c) That the employment was terminated in accordance with fair procedure.
33. Therefore, in the case before me, the first issue to consider is whether the reason given for termination has been shown to be valid and fair based on the operational requirements of the Respondent. The second issue is whether the Grievants' employment was terminated in accordance with fair procedure. Whilst the first issue is concerned with the presence of substantive reasons for the decision to terminate, the second one looks at the propriety of the procedure followed in arriving at the impugned decision.
34. At paragraph 27 of its Statement of Claim, the Claimant states that the Respondent failed to observe both the substantive and procedural law in declaring the redundancy rendering the process illegitimate. In effect, the Claimant challenges both the reasons for and procedure adopted in declaring the impugned redundancy.
35. The validity of the reason for the impugned process turns on whether the Respondent has proved the allegations that it experienced a downturn in raw materials forcing it to scale down its operations. The Respondent made this allegation but never substantiated it by cogent evidence.
36. There was no evidence of correspondence between the Respondent and the alleged supplier of the raw materials demonstrating that there was a challenge in supplying the raw materials in question. There was no evidence to suggest that the alleged supplier was the only source of the raw material in question with the consequence that the Respondent could not find alternative sources of the material thus pushing it to take the decision to scale down its operations.
37. What the Respondent did was so to speak, to simply pluck from the air the fact of the alleged absence of raw material as the reason for the redundancy and throw it at the court without providing supportive evidence to establish its validity. Put differently, the Respondent did not provide evidence to establish that there was genuine absence of raw materials. It only made an allegation. In the premises, I find that the Respondent has failed to prove the reason for the purported redundancy.
38. Regarding the procedure adopted in processing the redundancy, the evidence on record shows that the Respondent issued the Grievants with individual notices dated 24<sup>th</sup> July 2019 intimating the decision to terminate their employment as from 1<sup>st</sup> August 2019 on account of redundancy. The notices are said to have been delivered to the Grievants on 31<sup>st</sup> July 2019, a day before their contracts came to a close. In its evidence, the Respondent does not deny that the notices dated 24<sup>th</sup> July 2019 were delivered to the Grievants on 31<sup>st</sup> July 2019.



39. If I understand the law on redundancy correctly, the one month notice contemplated under section 40 (1) (a) and (b) of the *Employment Act* is a pre-termination redundancy notice. It is a notice, not terminating the employee but advising of the impending termination on account of redundancy. This notice is intended to communicate the intention of the employer to terminate the employee on account of redundancy one month before the actual termination happens. By the notice, the employer indicates the reason and extent of the redundancy.
40. What the Respondent issued to the Grievants was the notice to terminate employment. It was not the redundancy notice contemplated under section 40 (1) (a) and (b) of the *Employment Act*. The title of the notice demonstrates this. It clearly reads "Termination of Employment on Account of Redundancy." It would be different if it was expressed as "Notice of Intention to Terminate Employment on Account of Redundancy". In my view, this error cannot be cured by paying the affected staff salary in lieu of notice under section 40 (1) (f) of the *Act*.
41. In my view, the employer must first issue the affected employee and or their Trade Union the one month pre-termination redundancy notice under section 40 (1) (a) and (b) of the *Act*. At the tail end of the process, the employer should pay the affected employees salary in lieu of the notice to terminate their contracts which ideally would have been the second notice under section 40(1) (f) of the *Act*. But as the court has observed in a number of decisions, the mention of notice under section 40 (1) (f) of the *Act* appears to have been a misnomer. No notice really needs to issue under this latter section. All that the employer is required to do is pay the affected employee salary equivalent to the notice period that is mentioned.
42. Having said thus, I note that the Grievants were members of the Claimant Trade Union. There is evidence that the Respondent issued the Claimant with a notice of intention to declare a redundancy dated 27<sup>th</sup> February 2019 several months before 1<sup>st</sup> August 2019 when the Grievants were eventually terminated from employment.
43. Section 40 of the *Employment Act* does not obligate the employer to issue employees who are members of a Trade Union with a pre-termination redundancy notice. In such case, the notice is directed at the affected employees' Trade Union at least one month prior to the termination of their contracts (see section 40 (1) (a) of the *Act* and *Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others* [2014] eKLR (Justice Maraga's decision (par47)).
44. In this case, the Claimant admits that it indeed received the pre-termination redundancy notice from the Respondent around 12<sup>th</sup> March 2019. Had the notice met the other parameters contemplated under section 40 (1) (a) of the *Act*, it would have been adequate for purposes of a redundancy notice.
45. I have scrutinized the notice dated 27<sup>th</sup> February 2019. Whilst the document mentions the absence of raw materials as the reason for the impending redundancy, it does not sufficiently deal with the aspect relating to the extent of the proposed redundancy. I understand the latter requirement to obligate the employer to indicate the approximate number of employees that may be affected in the process. The notice did not provide this number. All that the Respondent did was to assert that a majority of the Claimant's members might be laid off.
46. In effect, it is my finding that the redundancy notice dated 27<sup>th</sup> February 2019 is deficient. It does not meet all the parameters set under section 40 (1) (a) of the *Act*. It does not provide information regarding the extent of the proposed redundancy. To this extent, it is declared as irregular.
47. The other matter that needs consideration relates to the selection of the individuals who were eventually relieved of their employment. The Claimant asserts that out of the 35 employees that were



- serving the Respondent at the time, only 13 had their contracts of employment terminated. Yet, the Respondent did not provide evidence on how it selected the 13 out of a workforce of 35. The Claimant asserts that all the 13 individuals sent away were its members suggesting bias in the process on account of union membership.
48. The first reaction by the Respondent on this allegation is to be found in its letter to the conciliator dated 19<sup>th</sup> September 2019. In the letter, the Respondent suggests that the assertion by the Claimant is untrue because the redundancy affected all its employees and the Respondent actually shut down temporarily. I understand this communication by the Respondent to suggest that since it terminated the services of all its employees, there was no need to undertake the selection process.
  49. The second reaction by the Respondent on the matter comes out in the oral testimony of the Respondent's witness. In the evidence, the witness conceded that the company did not close. It only sent away half of its employees as it tried to keep afloat. However, the Claimant's members were not targeted in the process. Other non-union members were also sent home.
  50. What emerges from the foregoing is that the Respondent was less than candid on this issue. Whilst the Respondent finally conceded that it had sent away only part of its members of staff and not the entire workforce as earlier alleged, there was no evidence on how the employees whose contracts were terminated were selected. Further, whilst the Respondent alleged that the process also affected non-union members, there was no evidence provided of the non-union members who were relieved of their employment.
  51. In effect, the selection process was evidently obscure. In the Court of Appeal decision of *Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others* [2014] eKLR, the court emphasized the need for the selection process for employees to be declared redundant to be transparent. This is necessary in order to enable anybody evaluating the process to determine whether it complied with the law. It is necessary in order to prevent employers from victimizing employees under the guise of redundancy.
  52. The totality of the foregoing is that the procedure adopted in declaring the impugned redundancy was flawed. The notice issued to the Claimant did not satisfy the parameters under section 40 (1) (a) of the *Employment Act*. Further the selection procedure for the employees to be released was opaque in nature. Accordingly, I declare the redundancy as unfair.
  53. The last issue for consideration is whether the parties are entitled to the remedies that they seek through their respective pleadings. Having reached the conclusion that the Respondent's decision to declare the Grievants redundant was irregular, this court will not issue an order dismissing the Claimant's case as demanded by the Respondent. On the other hand, the court finds that the Claimant's case is merited. Accordingly the Grievants will be granted reliefs as more specifically indicated here-below.
  54. Only four (4) of the eleven (11) Grievants pursued the claim to its logical conclusion. For the avoidance of doubt these are the 2<sup>nd</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 8<sup>th</sup> Grievants.
  55. The Grievants' monthly salaries are set out in the table appearing as Appendix II in the Statement of Claim. Whilst the Respondent disputes that the Grievants are entitled to the reliefs sought in the Statement of Claim, there is no specific statement denying that the amounts pleaded as the Grievants' monthly salaries in the said Appendix are accurate. In the absence of evidence contesting the accuracy of the figures, I take the amounts pleaded in column three of the table as representing the monthly salary of each of the four Grievants.



56. I award every of these four Grievants compensation for unlawful termination that is equivalent to their individual gross salary for four months. This works out as follows:-
- a. George Githinji Ksh.23, 252 x 4 = Ksh. 93,008.00.
  - b. Musyimi Musyoka Musyimi Ksh. 18,818 x 4 = Ksh. 75,272.00.
  - c. Martin Kinyua Igweta Ksh. 19,969 x 4 = Ksh. 79,876.00.
  - d. Faith Wamuci Kahuria Ksh. 37,442 x 4 = Ksh. 149,768.00.
57. In making the award under paragraph 56 above, I have considered the fact that the Grievants' conduct did not contribute to termination of their respective contracts of service. I have further considered the fact that prior to the impugned decision the Grievants had worked for the Respondent considerably long periods of time.
58. I also award each of the four Grievants salary in lieu of notice for two months, that is to say, George Githinji Ksh.46,504.00, Musyimi Musyoka Musyimi Ksh. 37,636.00, Martin Kinyua Igweta Ksh. 39,938.00 and Faith Wamuci Kahuria Ksh. 74,884.00. This award is premised on the improved notice period under clause 5(b) of the Collective Bargaining Agreement between the parties dated 3<sup>rd</sup> March 2017.
59. Section 35 (5) of the Employment Act provides as follows:-  
"An employee whose contract of service has been terminated under subsection (1) (c) shall be entitled to service pay for every year worked, the terms of which shall be fixed."
60. Section 35 (1) (c) of the Act provides for the notice period to terminate a contract of service where the employee has been drawing a monthly salary. Such employee is entitled to a termination notice of not less than twenty eight days. By virtue of section 35 (5) of the Employment Act, employees who fall in this category are entitled to service pay on termination. However, the methodology of determining the quantum of this payment is not fixed by statute.
61. Under clause 5 (c) of the Collective Bargaining Agreement relied on by the parties, it is indicated that on termination of a contract of service, an employee shall be entitled to service pay that is equivalent to his salary for eighteen (18) days for each year worked. The table produced in evidence as Appendix II shows that at the time of termination of their respective contracts of service, each of the four Grievants had been in the service of the Respondent for a number of years. George Githinji had served for sixteen (16) years. Musyimi Musyoka Musyimi had served for eleven (11) years. Martin Kinyua Igweta had served for seven (7) years. Faith Wamuci Kahuria had served for eight (8) years.
62. No evidence was presented to the court to show that any one of them was a member of a provident or gratuity scheme that would disqualify him/her from benefiting from this terminal benefit. Thus, each one of them is entitled to service pay equivalent to their salary for eighteen (18) days for every year worked. Accordingly, they are awarded service pay as here-below:-
- a. George Githinji Ksh. 13,951 x 16 = Ksh. 223,219.00.
  - b. Musyimi Musyoka Musyimi Ksh. 11,290 x 11 = Ksh. 124,198.00.
  - c. Martin Kinyua Igweta Ksh. 11,981 x 7 = Ksh. 83,869.00
  - d. Faith Wamuci Kahuria Ksh. 22,465 x 8 = Ksh. 179,721.00



63. Each of the four Grievants is granted interest on the amounts awarded at court rates from the date of judgment till payment in full.
64. The sums awarded are subject to the applicable statutory deductions under section 49 of the *Employment Act*.
65. As the action was commenced without the benefit of representation by counsel, I allow the Claimant to only recover the disbursements incurred in mounting the action.

### Summary of the Decision

- a. The redundancy declaration against the Grievants by the Respondent is declared unlawful.
- b. The Grievants are awarded monetary compensation as follows:-
  - George Githinji
    - i. Compensation for unlawful termination Ksh. 93,008.00.
    - ii. Pay in lieu of notice Ksh. 46,504.00.
    - iii. Service pay Ksh. 223,219.00.
  - Musyimi Musyoka Musyimi
    - i. Compensation for unlawful termination Ksh. 75,272.00.
    - ii. Pay in lieu of notice Ksh. 37,636.00.
    - iii. Service pay Ksh. 124,198.00.
  - Martin Kinyua Igweta
    - i. Compensation for unlawful termination Ksh. 79,876.00.
    - ii. Pay in lieu of notice Ksh. 39,938.00.
    - iii. Service pay Ksh. 83,869.00.
  - Faith Wamuci Kahuria
    - i. Compensation for unlawful termination Ksh. 149,768.00.
    - ii. Pay in lieu of notice Ksh. 74,884.00.
    - iii. Service pay Ksh. 179,721.00.
- c. Each of the four Grievants is granted interest on the amounts awarded at court rates from the date of judgment till payment in full.
- d. The sums awarded are subject to the applicable statutory deductions under section 49 of the *Employment Act*.
- e. As the action was commenced without the benefit of representation by counsel, I allow the Claimant to only recover the disbursements incurred in mounting the action.

**DATED, SIGNED AND DELIVERED ON THE 23<sup>RD</sup> DAY OF MARCH, 2023**

**B. O. M. MANANI**

**JUDGE**



In the presence of:

..... for the Claimant

.....for the Respondent

**ORDER**

In light of the directions issued on 12<sup>th</sup> July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

**B. O. M MANANI**

