



REPUBLIC OF KENYA



**Kiogora v Style Industries Limited (Cause 179 of 2018)
[2023] KEELRC 693 (KLR) (23 March 2023) (Judgment)**

Neutral citation: [2023] KEELRC 693 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE 179 OF 2018
DN NDERITU, J
MARCH 23, 2023**

BETWEEN
SCHOLASTICA KENDI KIOGORA CLAIMANT
AND
STYLE INDUSTRIES LIMITED RESPONDENT

JUDGMENT

I. Introduction

1. In a Statement of Claim dated 18th May, 2015 and filed in court on 22nd May, 2015 through Mongeri & Co Advocates the Claimant prays for: -
 - a. Severance pay for 5 years $(15 \times 94,280 \times 5)/30$ - Kshs.235,700/=
 - b. 1 month salary in lieu of notice - Kshs. 94,280/=
 - c. Salary for 20 days worked in March, 2018 - Kshs. 62,853.33
 - d. Pending leave for 2018 - Kshs. 94,280/=
 - e. Damages unlawful terminationTotal Kshs. 487,113.33/=
2. Together with the statement of claim, as expected, was filed a verifying affidavit by the Claimant and also a witness statement and list of documents dated 18th May, 2018 and a bundle of the listed documents.
3. On 10th July, 2018 the Respondent through Federation of Kenya Employers (FKE) entered appearance and filed a statement of defence to the claim on 21st September, 2019 alongside a bundle of documents.



A witness statement by Daniel Ongoya was filed on 27th January, 2020. However, on 1st March, 2022 the Respondent filed a witness statement by Duncan Lumati (RW1) to substitute the earlier one.

4. In its statement of defence the Respondent prays that the Claimant's cause be dismissed with costs for want of merits.
5. This cause came up in court for hearing on 7th March, 2022 when the Claimant (CW1) testified and closed her case. The defence was heard on 30th May, 2022 when Duncan Lumati (RW1) testified for the Respondent and the Respondent's case was closed.
6. Counsel for the Claimant, Miss Moenga, filed her written submissions on 12th July, 2022 while Counsel for the Respondent, Miss Obonyo and Mr. Masese did not file any written submissions, notwithstanding that the matter was mentioned severally to allow the said submissions to be placed on record.

II. The Claimant's Case

7. The Claimant's case is expressed in the statement of claim, the oral and documentary evidence of the Claimant (CW1), and the written submissions by her Counsel, and the same is summed up as hereunder.
8. In her statement of claim, the Claimant pleaded that she was engaged by Strategic Industries in 2005 but the said company was bought by the Respondent in 2012. She signed a new contract with the Respondent in 2012 and worked with the Respondent until March, 2018 when she was declared redundant and terminated.
9. The letter of appointment dated 29th October, 2012 reads that the Claimant was engaged as customer care manager at a monthly gross salary of Kshs.35,130/= with effect from 1st November, 2012. The Claimant accepted the job offer and countersigned a copy of the letter of appointment on even date.
10. The Claimant testified that in 2013 the Respondent opened a branch in Nakuru to serve the Rift Valley and western regions and she was posted to Nakuru as the customer care manager.
11. She further testified that on 19th March, 2018 she was summoned to the Respondent's headquarter at Nairobi via a telephone call. When she showed up at the head office on 20th March, 2018 at 1000hrs she was served with a notice of redundancy dated 19th March, 2018 declaring her redundant with effect from 20th April, 2018.
12. For ease of reference the redundancy notice is reproduced as follows –

Style Industries Limited

Ref: HR/MG/043/18 19th March, 2018

Ms. Scholastica Kendi Kiogora

ST2089

CO Style Industries Ltd

Nairobi

Dear Ms Kiogora

Re: Redundancy



As you are aware, we are in the process of restructuring our operations in Kenya to optimize business performance and some positions would be redundant. The Company has explored ways in which your redundancy could be avoided and the possibility of alternative employment but regrettably, this has not been successful. We therefore have no option but to declare you redundant with effect from 20th April, 2018.

This is one month's notice to terminate your contract as per your terms and conditions of employment. However, you will not serve your entire notice of one month as the company will be releasing you at the end of March, 2018 but will pay you up to and including 20th April, 2018.

You will be paid your contractual dues as follows:-

1. Your salary up to and including 20th April, 2018
2. 15 days' pay for each completed year of service
3. Earned but unutilized leave

The above payments will be less any monies you may be owing to the Company and the Superbrite Sacco Ltd/Strategic Sacco Ltd. The same will be subject to tax and other statutory deductions where applicable.

The payments will also be subject to the return of any company assets in your possession.

Payment of NSSF dues in responsibility of the Fund. You are however advised to obtain the relevant claim forms from the Fund's offices (if or when you are qualified for payment) and bring the same to the Human Resources office for updating and confirmation of your contributions.

As schedule of payments as detailed above, a cheque for the net pay together with A Certificate of Service will be ready for collection on or after Friday, 30th March, 2018.

Finally, I wish, on behalf of the Company to thank you for your service and wish you a very successful life outside Style Industries Ltd.

Yours sincerely,

Signed

Margaret Geno

HR Head-East Africa

13. It is the Claimant's case that the declaration of her redundancy by the Respondent was un-procedural, unfair, and unlawful. She argues that the said redundancy amounted to unlawful termination.
14. The Claimant alleges that the Respondent failed to compensate her for the unlawful termination and even failed and or refused to pay her the terminal dues as undertaken by the Respondent in the redundancy notice.
15. It is on the basis of the foregoing that the Claimant prays as per the memorandum of claim.
16. The submissions by the Claimant's Counsel shall be considered in the succeeding parts of this judgment.



III. The Respondent's Case

17. The Respondent's case is contained in the defence to the claim and the oral and documentary evidence adduced through RW1, and the same is summarized hereunder.
18. The Respondent's case is that the Claimant was declared redundant with effect from 20th April, 2018 following a decision by the Respondent to restructure its production and marketing units following huge losses. RW1, a human resources assistant, testified that it is for the foregoing reason that the Claimant was served with the notice of redundancy dated 19th March, 2018. He alleged that the Claimant was paid all her terminal dues upon her termination on redundancy.
19. RW1 relied on the Claimant's pay-slip for March, 2018 in support of his allegation that the Claimant was paid all her terminal dues. He also produced a certificate of service issued to the Claimant and a declaration form executed by the Claimant to the effect that she had no other or further claims against the Respondent besides what she had been paid and received.
20. In cross-examination RW1 insisted that the salary paid for April was in lieu of notice as per the pay-slip for March, 2018. He stated that the Claimant was paid severance pay, unutilized leave days, but no service pay was made.
21. It is on the basis of the foregoing that the Respondent takes the view that it owes the Claimant none of the claims made and prays that this cause be dismissed with costs.

IV. Issues for Determination

22. After a careful and thorough scrutiny of the pleadings filed, the oral and documentary evidence tendered from both sides, and the submissions by counsel for the Claimant, this court identifies the following issues for determination –
 - a. Was the termination of the Claimant by the Respondent on redundancy unfair and unlawful?
 - b. If (a) above is in the affirmative, is the Claimant entitled to the reliefs sought in the claim?
 - c. Who meets the costs in this cause?

V. The Termination on Redundancy

23. The terms and conditions of service of the Claimant are not in dispute. They are as alluded to in an earlier part of this judgment. As at the time of termination on redundancy the Claimant was Respondent's customer care manager at Nakuru at a monthly gross salary of Kshs.94,280/=. This is admitted by the Respondent in the defence filed on record.
24. The chronology of events leading to declaration of the Claimant as redundant is not in dispute either as the evidence by the Claimant on this stands unchallenged. That evidence is that the Claimant was summoned to Nairobi office on 19th March, 2018 via a phone call. When she presented herself in the morning of 20th March, 2018 she was served with the notice of redundancy as alluded to above.
25. Redundancy is one of the several ways through which an employer may lawfully terminate an employee and hence end the employment relationship. Section 40 of the *Employment Act* (the Act) provides 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 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.

26. The above provisions of the Act are couched in mandatory terms. For redundancy to be lawful an employer shall comply with those provisions and apply the same to the affected employee(s). It is through that lens that the action of the Respondent against the Claimant in this cause shall be viewed, weighed, and scaled to determine if and whether the said redundancy was lawful.
27. The notice of redundancy served upon the Claimant is dated 19th March, 2018 and the same was served upon the Claimant on 20th March, 2018 to take effect from 20th April, 2018. There is no evidence whatsoever that the said notice was served upon the union to which the Claimant belonged, if she was a member of such union, or at all. There is also no evidence that the said notice was served upon the area labour officer or at all.
28. There is no evidence availed by the Respondent on the criteria that was applied in determining that the Claimant was to be terminated on redundancy.
29. The Respondent alleged that the redundancy was necessitated by huge losses incurred yet no attempt was made in availing any evidence in support of or in proving such losses. No audited accounts were availed or any other evidence or at all in establishing and confirming such losses.
30. While redundancy is clearly an innovation of the law to enable, allow, and aid an employer in getting rid of employees who may be an excess in the strategic and operational capacity of an employer, it is not intended to be used by the employer whimsically, capriciously, or discriminately in getting rid of employees that it may consider undesirable without attaching any lawful justification informing such a decision. For this reason, the action by the Respondent in declaring the Claimant redundant is declared unfair and unlawful – See Kenya Airways Limited v Aviation and Allied Workers Union & 3 Others (2014) eKLR, Geoffrey Andabwa Ashino v Coconut (K) Ltd (2019) eKLR, and Paul Ng'eno v Pyrethrum Board of Kenya (2013) eKLR.



31. There is no evidence that any other employee of the Respondent was affected by the redundancy and no explanation was offered on the criteria that was applied in determining that the Claimant was a candidate for the redundancy.
32. There is no evidence at all on any consultation or hearing accorded to the Claimant leading up to the redundancy notice issued. Redundancy is an administrative action to which Article 47 of the *Constitution* and the provisions of *Fair Administrative Action Act* apply. The Claimant was entitled to a fair hearing leading to issuance of the notice of termination on redundancy. The Respondent failed to provide the Claimant with a fair hearing in whatever form both in substance and procedure adopted.

VI. Reliefs

33. Having held that the Claimant was unfairly and unlawfully terminated on redundancy, this court shall now consider each of the reliefs sought as set out at the introductory part of this judgment.
34. Prayer (a) is for severance pay in the sum of Kshs.253,700/=. The pay-slip for March, 2018 shows that the Claimant was paid severance pay at Kshs.202,262.50. As submitted by counsel for the Claimant there is a clear underpayment in the sum of Kshs. 33,437/= based on the correct gross monthly pay of Kshs.94,280/=. The sum of Kshs.33,437/= is hence awarded to the Claimant on this account.
35. Prayer (b) is for one month's salary in lieu of notice in the sum of Kshs.94,280/=. The pay-slip for March, 2018 shows that this item was paid but at a lower rate in gross salary of Kshs.70,352/=. The Claimant is therefore awarded the difference in the sum of Kshs.23,928/=.
36. Item (c) is for salary for 20 days worked in March (April is the correct month), 2018 amounting to Kshs.62,853/=. This court is inclined to granting this claim as the Claimant remained in employment of the Respondent until 20th April, 2018 when the redundancy notice took effect. The notice pay is a completely different item from the salary that was due and payable for the 20 days as the evidence on record is that the Claimant continued to work until 20th April, 2018 when the redundancy notice took effect. The Claimant is therefore awarded the sum of Kshs. 62,853.33 as claimed.
37. Item (d) is for pending leave for 2018 in the sum of Kshs. 94,280/=. There is no evidence on how this figure is arrived at and nothing is submitted by Counsel to substantiate this claim. In any event the pay-slip for March, 2018 indicates that the Claimant was paid a sum of Kshs.69,320.17 for leave. It is noted that the Claimant did not work for the entire year of 2018 as she was terminated in April, 2018. In the circumstances, this court shall not interfere with the amount paid and no award is made on this account.
38. Item (e) is for damages for unlawful termination. This court has stated again and again in many a decision that unless there is any special or unique damage or loss pleaded and proved, the only loss or damage that an employee suffers from unlawful termination can only be compensated under Section 49(1)(c) of the *Act*.
39. This court has considered the circumstances under which the Claimant was declared redundant and terminated. The court has also examined the factors that should be considered in considering the award to be made under Section 49 of the *Act*. Clearly, the Claimant played no part in her termination. She was not given a fair hearing, accommodation, and consideration as provided for in law. No valid reasons have been demonstrated by the Respondent for declaring the Claimant redundant.
40. However, the Respondent made some effort in paying to the Claimant what it considered to be her terminal dues, albeit the same have been found not sufficient and is incomplete.



41. There is no evidence adduced by either party as to whether the Claimant has since termination found another job, and how long it took her to locate such a job if at all.
42. Considering the entire circumstances of this cause and the factors alluded to above, I consider a sum equivalent to 10 months' gross salary to be fair compensation. The same is calculated as Kshs.94,280/= *10= Kshs.942,800/=. This amount is subject to statutory deductions.

VII.Costs

43. The Claimant is awarded costs of this cause.

VIII. Disposal

44. In final disposal of this cause, this court issues the following orders: -
- a) A declaration be and is hereby issued that the termination of Claimant by the Respondent on redundancy was unfair and unlawful.
 - b) The Claimant is awarded a sum of Kshs.1,063,018.33 made up as hereunder –
 - i. Severance pay.. Kshs. 33,437.00
 - ii. Balance of pay in lieu of notice.. Kshs. 23,928.00
 - iii. Salary for 20 days worked in April 2018.. Kshs. 62,853.33
 - iv. Compensation for unlawful termination.. Kshs. 942,800.00
 - v. Total Kshs.1,063,018.33
 - c) The Claimant is awarded costs of this cause.
 - d) All the other claims are denied.

DATED, DELIVERED VIRTUALLY, AND SIGNED AT NAKURU THIS 23RD DAY OF MARCH, 2023.

DAVID NDERITU

JUDGE

