



**Musili & 7 others v Insteel Limited (Cause E670 of 2020)  
[2023] KEELRC 695 (KLR) (23 March 2023) (Judgment)**

Neutral citation: [2023] KEELRC 695 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E670 OF 2020  
L NDOLO, J  
MARCH 23, 2023**

**BETWEEN**

**FRANCIS KALII MUSILI ..... 1<sup>ST</sup> CLAIMANT  
DANIEL MUIRURI MBUGUA ..... 2<sup>ND</sup> CLAIMANT  
HULDER GAY MAKUMBI ..... 3<sup>RD</sup> CLAIMANT  
BENJAMIN MULINGE MUTUA ..... 4<sup>TH</sup> CLAIMANT  
TERESIA NJERI MAINA ..... 5<sup>TH</sup> CLAIMANT  
SAMUEL NJUKI NDIRANGU ..... 6<sup>TH</sup> CLAIMANT  
JUDITH ANNE ORIEDO ..... 7<sup>TH</sup> CLAIMANT  
ANN GACAMBI NDUNGU ..... 8<sup>TH</sup> CLAIMANT**

**AND**

**INSTEEL LIMITED ..... RESPONDENT**

**JUDGMENT**

**Introduction**

1. The issues in dispute as stated in the claimants’ statement of claim dated October 15, 2020 and filed in court on October 22, 2022 are:
  - a. Unprocedural and unfair termination on account of redundancy;
  - b. Dues owed to the Claimants as terminal benefits.
2. In its defence the Respondent filed a Statement of Response dated January 15, 2021.



3. The matter went to full trial where the 1<sup>st</sup> Claimant, Francis Kalii Musili testified on his own behalf and on behalf of his co-claimants. Julius Ochieng testified on behalf of the Respondent.

### **The Claimants' Case**

4. The claimants were employed by the Respondent on various dates between 1985 and 2019. They worked until May 2019 when their employment was terminated on account of redundancy.
5. The claimants term the redundancy as wrongful and unlawful. They claim that there were no consultations or negotiations prior to the declaration of redundancy. They add that they did not get any communication on the reasons for and extent of the redundancy nor the selection criteria used by the Respondent to declare them redundant.
6. The claimants aver that they were not given sufficient notice of the intended redundancy before it was effected and that soon after they were declared redundant, new recruits were hired in their place.
7. The claimants accuse the Respondent of targeting them for redundancy and discriminating against them on account of their being non-unionized. They aver that the severance package paid to them was substantially less than that payable to unionisable employees under collective bargaining.
8. The claimants' case is that they were placed at a disadvantage for being non-unionized employees, contrary to the provisions of section 40(1)(d) of the *Employment Act*.
9. The claimants tabulate their respective claims as follows:

#### 1<sup>st</sup> Claimant: Francis Kalii Musili

- a. Balance of severance pay for 5 years of service (calculated on the basis of 28 days as per CBA) .....Kshs 393,042.00
- b. 12 months' salary in compensation unfair termination of employment..... 4,042,716.00

#### 2<sup>nd</sup> Claimant: Daniel Muiruri Mbugua

- a. Balance of severance pay for 30 years of service (calculated on the basis of 28 days as per CBA) .....Kshs 2,367,301.00
- b. 12 months' salary in compensation for unfair termination of employment.....2,462,508.00

#### 3<sup>rd</sup> Claimant: Hulder Gay Makumbi

- a. Balance of severance pay for 24 years of service (calculated on the basis of 28 days as per CBA) .....Kshs 1,068,611.20
- b. 12 months' salary in compensation for unfair termination of employment.....1,457,196.00

#### 4<sup>th</sup> Claimant: Benjamin Mulinge Mutua

- a. Balance of severance pay for 29 years of service (calculated on the basis of 28 days as per CBA) .....Kshs 629,839.90
- b. 12 months' salary in compensation For unfair termination of employment.....1,156,920.00

#### 5<sup>th</sup> Claimant: Teresia Njeri Maina



- a. Balance of severance pay for 20 years of serviceV(calculated on the basis of 28 days as per CBA) .....Kshs 871,445.30
- b. 12 months' salary in compensation for unfair termination of employment.....1,418,256.00

6<sup>th</sup> Claimant: Samuel Njuki Ndirangu

- a. Balance of severance pay for 16 years of service (calculated on the basis of 28 days as per CBA) .....Kshs 1,229,430.80
- b. 12 months' salary in compensation for unfair termination of employment.....2,514,714.00

7<sup>th</sup> Claimant: Judith Anne Oriedo

- a. Balance of severance pay for 23 years of service (calculated on the basis of 28 days as per CBA) .....Kshs 808,269.20
- b. 12 months' salary in compensation for unfair termination of employment..... 1,093,188.00

8<sup>th</sup> Claimant: Ann Gacambi Ndungu

- a. Balance of severance pay for 15 years of serviceC(calculated on the basis of 28 days as per CBA) .....Kshs 493,053.00
- b. 12 months' salary in compensationCFor unfair termination of employment.....1,075,752.00

10. The Claimants also ask for general damages for discrimination under Section 40(d) of the [Employment Act](#).

**The Respondent's Case**

- 11. In its Statement of Response dated January 15, 2021, the Respondent admits having employed the Claimants as pleaded in the Statement of Claim.
- 12. The Respondent however denies the Claimants' allegations that the termination of their employment, on account of redundancy, was unlawful or unfair. The Respondent states that it informed its employees of an impending restructuring of its business and further advised them that the said restructuring could lead to reduction in the Respondent's workforce.
- 13. The Respondent adds that the restructuring process commenced with the full participation of the Claimants and was carried out transparently, in full compliance with all applicable laws and was above board.
- 14. The Respondent denies recruiting any person to replace the Claimants.
- 15. The Respondent further denies the Claimants' assertion that they were targeted for not being members of a trade union. The Respondent states that the staff rationalization program was implemented on a business-wide level without regard to trade union membership.
- 16. The Respondent also denies the Claimants' claim that their severance package was substantially less than that payable to union members. The Respondent states that the Claimants, being management staff, earned higher salaries than the unionized employees and to this end, the terminal benefits paid to the Claimants were more than those that would have been ordinarily paid to unionized employees.



17. The Respondent maintains that all employees declared redundant were paid all their terminal dues as per the provisions of the law.
18. The Respondent states that the Claimants acknowledged the computation of their terminal benefits and signed against the computation as reflective of their terminal benefits and are therefore estopped from disowning the amounts.
19. The Respondent further states that the terms of the Collective Bargaining Agreement were not incorporated into the Claimants' contracts of employment as they were not members of the trade union.
20. The Respondent denies that the Claimants were placed at a disadvantage for not being unionized.

### **Findings and Determination**

21. There are two (2) issues for determination in this case:
  - a. Whether the Claimants have made out a case of unlawful termination of employment;
  - b. Whether the Claimants are entitled to the remedies sought.

### **Unlawful Termination?**

22. The letter terminating the Claimants' employment is dated May 21, 2019 and states as follows:

“Re; Redundancy Notification

We have commenced implementation of the new operational model across Insteel aimed at streamlining operations, logistics, costs and ensuring our business is structured for the future to cater for the changing market conditions and the aggressive competition that we are experiencing today.

We have also restructured and enhanced our service delivery to more efficiently meet the market needs at lower operating costs that enable us to meet the market expectations.

In light of these significant changes, we wish to notify you that resultant changes will necessarily need to be made to our manning structures which will result in reduction of Insteel workforce.

The Management has reviewed the entire organization at a Departmental level, we regret to inform you that your position is one among those that will be declared redundant effective June 21, 2019. The purpose of this letter is give you one month's notice in accordance with the law. We have taken this decision due to increased competition and high cost of operation which is making it difficult for us to remain afloat in this difficult business environment.

Prior to your last day of employment, we will have a session with you where payment of your final dues will be communicated. We wish to point out that we have made a management decision to pay you a package above the government guidelines.

We take this opportunity to thank you most sincerely for the service rendered to the company for the period you have served.

We sincerely wish you well in your future endeavors.

Yours faithfully,

For: Insteel Limited



(signed)

Christine Onyango

Human Resource Manager”

23. The parties are agreed that the termination of the Claimants’ employment was on account of redundancy. What falls for determination by the Court is whether, in executing the redundancy, the Respondent complied with the law.

24. Section 2 of the *Employment Act* and the corresponding section in the *Labour Relations Act* define redundancy as:

“the 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 an employee are superfluous and the practices commonly known as abolition of office, job or occupation and loss of employment.”

25. The law on termination of employment on account of redundancy is codified in Section 40 of the *Employment Act* as follows:

40.

(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 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 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 first two conditions under Section 40 require the employer to issue a one-month redundancy notice to the employee or their trade union (where one exists) as well as to the local Labour Officer, giving reasons for and extent of the intended redundancy. This notice is distinct from the termination notice which may be satisfied by pay in lieu, as provided under condition (f).

27. In its decision in *Thomas De La Rue v David Opondo Omutelema* [2013] eKLR, the Court of Appeal clarified that in a termination of employment on account of redundancy, there are two distinct notices of a month each. The Appellate Court stated as follows:

“It is quite clear to us that sections 40(a) and 40(b) provide for two different kinds of redundancy notifications depending on whether the employee is or is not a member of a trade union. Where the employee is a member of a union, the notification is to the union and the local labour officer at least one month before the effective redundancy date. Where the employee is not a member of the union, the notification must be in writing to the employee and the local labour office. Section 40(b) does not stipulate the notice period as is the case in 40(a), but in our view, a purposive reading and interpretation of the statute would mean the same notice period is required in both situations. We do not see any rational reason why the employee who is not a member of a union should be entitled to a shorter notice.”

28. In the subsequent case of *Kenya Airways Limited v Aviation & Allied Workers Union of Kenya & 3 others* [2014] eKLR Maraga JA (as he then was) rendered himself as follows:

“...when an employer contemplates redundancy, he should first give a general notice of the intention to the employees likely to be affected or their union. It is that notice that will elicit consultation between the parties...the requirement of consultation is implicit in the principle of fair play under section 40(1) of the *Employment Act* itself and other labour laws. The notices under this provision are not merely for information...The purpose of the notice under section 40(1)(a) and (b) of the *Employment Act*, as is also provided for in the...ILO Convention No 158-Termination of Employment Convention, 1982, is to give the parties an opportunity to consider measures to be taken to avert or to minimize the terminations and measures to mitigate the adverse effects of any terminations on the workers concerned such as finding alternative employment.”

29. The Claimants told the Court that they had no prior notice of the redundancy by which they lost their employment.

30. In his testimony before the Court, the Respondent's Human Resource Manager, Julius Ochieng made an attempt to pass off a failed voluntary early retirement program as a redundancy notice. I find no legal basis for such a proposition.



31. Ochieng further referred the Court to a copy of an attendance list titled ‘staff briefing held on April 2, 2019 on Insteel future and restructuring’. According to the Claimants, the subject of the meeting of April 2, 2019 was training on safety and health. The Claimants’ witness, Francis Kalii Musili, testified that the title on the list was superimposed after the employees had signed the attendance sheet.
32. For some reason that was not clear to the Court, the Respondent chose not to record the proceedings of the meeting and the Court could not tell whether it was indeed a town hall meeting on restructuring.
33. In the circumstances of this case, the Respondent was unable to prove issuance of redundancy notice to the Claimants as required under Section 40(1) (b) of the *Employment Act*.
34. The Claimants further complain that their redundancy dues were calculated on the basis of 17 days’ pay for every year of service, while their colleagues who were members of the Union were paid using the factor of one month, as provided in the obtaining Collective Bargaining Agreement.
35. While conceding that the Claimants’ redundancy dues were tabulated on the basis of 17 days for every completed year of service, the Respondent justified its action by stating that the Claimants, who were within the management staff category, earned higher salaries than their unionized colleagues.
36. Section 40(1)(d) of the *Employment Act* is clear that an employer cannot, in executing redundancy, place any affected employee at a disadvantage for being or not being a member of the union. Since the Respondent had negotiated a Collective Bargaining Agreement fixing the factor to be used in tabulating redundancy dues, it could not deny its management employees this benefit on the basis of their being non- unionized.
37. On the whole, I find and hold that the redundancy in this case was unprocedural for want of due notification and disparity in tabulation of redundancy dues.

## Remedies

38. In light of the foregoing, I make the following awards:

1<sup>st</sup> Claimant: Francis Kalii Musili

- a. 1 month’s salary in compensation.....Kshs 336,893
- b. Balance of severance pay.....393,042
- Total.....729,935

2<sup>nd</sup> Claimant: Daniel Muiruri Mbugua

- a. 1 month’s salary in compensation.....Kshs 215,209
- b. Balance of severance pay.....2,367,301
- Total.....2,582,510

3<sup>rd</sup> Claimant: Hulder Gay Makumbi

- a. 1 month’s salary in compensation.....Kshs 121,433
- b. Balance of severance pay.....1,068,611
- Total.....1,190,044

4<sup>th</sup> Claimant: Benjamin Mulinge Mutua



- a. 1 month's salary in compensation.....Kshs 96,410
- b. Balance of severance pay.....629,840
- Total.....726,250

5<sup>th</sup> Claimant: Teresia Njeri Maina

- a. 1 month's salary in compensation.....Kshs 118,188
- b. Balance of severance pay.....871,445
- Total.....989,633

6<sup>th</sup> Claimant: Samuel Njuki Ndirangu

- a. 1 month's salary in compensation.....Kshs 209,562
- b. Balance of severance pay.....1,229,431
- Total.....1,438,993

7<sup>th</sup> Claimant: Judith Anne Oriedo

- a. 1 month's salary in compensation.....Kshs 91,099
- b. Balance of severance pay.....808,269
- Total.....899,368

8<sup>th</sup> Claimant: Ann Gacambi Ndungu

- a) month's salary in compensation.....Kshs 89,646
- b) Balance of severance pay.....493,053
- Total.....582,699

- c. These amounts will attract interest at court rates from the date of judgment until payment in full.
- d. The Claimants will also have the costs of the case.
- e. Orders accordingly.

**DELIVERED VIRTUALLY AT NAIROBI THIS 23<sup>RD</sup> DAY OF MARCH 2023**

**LINNET NDOLO**

**JUDGE**

Appearance:

Mr. Miritto for the Claimants

Mr. Thuita for the Respondent

