



**Njiri & 3 others v Insteel Limited (Cause E647 of 2020)
[2023] KEELRC 733 (KLR) (23 March 2023) (Judgment)**

Neutral citation: [2023] KEELRC 733 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E647 OF 2020
L NDOLO, J
MARCH 23, 2023**

BETWEEN

**DAVID NDUNGU NJIRI 1ST CLAIMANT
EVANS CHRIS OBUTUNDU 2ND CLAIMANT
REUBEN MBURU NJUGUNA 3RD CLAIMANT
FREDRICK OCHIENG 4TH CLAIMANT**

AND

INSTEEL LIMITED RESPONDENT

JUDGMENT

1. On October 18, 2019, the respondent issued the following letter to the claimants:

Subject: Notice of Termination on Account of Redundancy

As you are aware and as discussed with employees previously, Insteel has been restructuring and rationalising its organisation structures so as to enhance the effectiveness and efficiencies of Insteel operations. As a result of this exercise your position is redundant.

The company has decided after due consultation, to give you notice of termination of your contract of employment with the Company on account of redundancy.

Your last working day with the Company will be October 18, 2019.

Following the above, you will receive the following terminal payments:

1. Notice provision and pay One (1) month notice of redundancy which amounts to KES...



2. Redundancy Payment Redundancy Pay for every completed year of service which in your case is...years and amounts to KES...
3. Benefits and leave
 1. All benefits will cease after your redundancy date i.e. October, 19 2019.
 2. The company will pay out your outstanding leave balance as at October 18, 2019.
 3. All monies worked up to and including October 18, 2019.
 4. Pension benefits will be handled as per the rules and regulations of the pension scheme.

All amounts will be paid less statutory deductions and money owed to the Company.

4. Certificate of Service Your Certificate of Service will be handed to you on or before the October 18, 2019.
5. The parties record that the terms of this Notice are confidential and are not to be communicated to any person whatsoever other than between the parties themselves.
6. This Notice constitutes full and final settlement of all and any claims whatsoever which either party may have arising in any court of law or any other labour related tribunal in Kenya, directly or indirectly out of the contract of employment between the Employee and the Company, or the termination on account of redundancy thereof, and whether arising by operation of law, in delict, in contract or in terms of any statutory enactment, or otherwise. Neither the employee on the one hand nor the Company on the other hand has any further claim of any nature whatsoever, howsoever arising, against the other.

I take this opportunity to thank you for the contribution you have made during your employment with Insteel Limited. I wish you all the best with your future endeavours.

(signed)

Christine Onyango

Human Resource Manager

[Duly authorised]”

2. This letter triggered the present dispute between the claimants and the respondent.

The Claimants’ Case

3. The claimants state their claim in a Statement of Claim dated October 9, 2020. They aver that they were employed by the respondent on various dates between 1985 and 2019.
4. The claimants worked for the respondent until October 2019 when their employment was terminated on account of redundancy. They term the termination as wrongful and unlawful.



5. The claimants 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 state 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 unionized 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' respective claims against the respondent are as follows:

1st claimant: David Ndungu Njiiri

- a. 1 month's salary in lieu of notice.....Kshs. 114,014.00
- b. Balance of severance pay for 29 years of service (calculated on the basis of 30 days as per CBA).....1,432,775.93
- c. 12 months' salary in compensation for unfair termination of employment.....1,368.168.00

2nd claimant: Evans Chris Obutundu

- a. 1 month's salary in lieu of notice..... Kshs. 54,993.00
- b. Balance of severance pay for 22 years (calculated on the basis of 30 days as per CBA)..... 555,430.00
- c. 12 months' salary in compensation for unfair termination of employment.....659,916.00

3rd Claimant: Reuben Mburu Njuguna

- a. 1 month's salary in lieu of notice.....Kshs. 101,743.00
- b. Balance of severance pay for 23 years (calculated on the basis of 30 days as per CBA).....1,209,538.57
- c. 12 months' salary in compensation for unfair termination of employment..... 1,220,916.00

4th Claimant: Fredrick Ochieng

- a. 1 month's salary in lieu of notice.....Kshs. 77,099.00
- b. Balance of severance pay for 22 years (calculated on the basis of 30 days as per CBA).....873,788.67
- c. 12 months' salary in compensation for unfair termination of employment.....925,188.00

10. The claimants also ask for general damages and costs of the case.



The Respondent's Case

11. The respondent's defence is by way of a Statement of Response dated January 15, 2021.
12. The respondent admits having employed the claimants as pleaded in the Statement of Claim.
13. 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.
14. 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.
15. The respondent denies recruiting any person to replace the claimants.
16. The respondent further denies the claimants' assertion that they were targeted for not being members of a trade union. The respondent states that by virtue of the supervisory and confidential duties carried out by the claimants, they could not be members of the union.
17. The respondent further states that the staff rationalization program was implemented on a business-wide level without regard to trade union membership.
18. The respondent 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 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.
19. The respondent maintains that all employees declared redundant were paid all their terminal dues as per the provisions of the law.
20. 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.
21. 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.
22. The respondent denies that the claimants were placed at a disadvantage for not being unionized.

Findings and Determination

23. 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?

24. 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.



25. 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.”

26. 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.

27. 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).

28. 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.”

29. 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.”

30. The claimants told the court that they had no prior notice of the redundancy by which they lost their employment.
31. 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.
32. 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, Reuben Mburu Njuguna testified that the title on the list was superimposed after the employees had signed the attendance sheet.
33. 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.
34. 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*.
35. 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.
36. 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.
37. 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 that they were not unionized.

38. 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. The claimants are therefore entitled to compensation and balance of severance dues.

Remedies

39. In light of this I make the following awards:

1st Claimant: David Ndungu Njiiri

- a. 1 month's salary in compensation...Kshs. 114,014
- b. Balance of severance pay.....1,432,776
- Total.....1,546,790

2nd Claimant: Evans Chris Obutundu

- a. 1 month's salary in compensation.....Kshs. 54,993
- b. Balance of severance pay.....555,430
- Total.....610,423

3rd Claimant: Reuben Mburu Njuguna

- a. 1 month's salary in compensation.....Kshs. 101,743
- b. Balance of severance pay.....1,209,539
- Total.....1,311,282

4th Claimant: Fredrick Ochieng

- a. 1 month's salary in compensation.....Kshs. 77,099
- b. Balance of severance pay.....873,789
- Total.....**950,888**

40. These amounts will attract interest at court rates from the date of judgment until payment in full.

41. The claimants will also have the costs of the case.

42. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 23RD DAY OF MARCH 2023

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JUDGE

Appearance:

Mr. Miritto for the Claimants

Mr. Thuita for the Respondent

