



**Kenya Union of Commercial Food and Allied Workers v Meera Umoja (K) Limited
(Cause 50 of 2021) [2023] KEELRC 1012 (KLR) (27 April 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1012 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE 50 OF 2021
HS WASILWA, J
APRIL 27, 2023**

BETWEEN
**KENYA UNION OF COMMERCIAL FOOD AND ALLIED
WORKERS CLAIMANT**
AND
MEERA UMOJA (K) LIMITED RESPONDENT

JUDGMENT

1. The claimant, a registered trade Union within the laws of Kenya, sued the Respondent, a registered company, operating wholesale shops within Nakuru Town, vide a memorandum of claim dated 9th September, 2021, alleging that one of its members, Alberone Cyrene Wesonga (herein after referred to as the ‘grievant’) was unfairly terminated through a sham redundancy process. The claimant prayed for the Court to find in its favour and; -
 - i. Declare the redundancy unfair/ unlawful and unprocedural.
 - ii. Order the Respondent to pay the grievants all his terminal dues as follows;
 - a. One month pay in lieu of notice of Kshs. 19,445.
 - b. Severance pay of Kshs 33,815.8.
 - c. Salary for 12 days worked I May, 2019-Kshs 8,974.6
 - d. Salary underpayment arrears of May, 2015 to April, 2017 of Kshs 26,121.6, May, 2017 to April, 2018 of Kshs. 42,537 and May, 2018 to May, 2019 of Kshs 52,198.80 .
 - e. House allowance arrears of May, 2015 to April, 2017 of Kshs 49,128, May, 2017 to April, 2019 of Kshs 28,984.80 and May, 2018 to May, 2019 of Kshs 30,434.40.
 - iii. 12 months’ gross pay as compensation for unlawful and unprocedural redundancy.



- iv. Costs of the suit to the claimant.
- v. Any other relief that the Hon. Court may deem fit to meet the ends of justice.

Claimant's case.

2. The claimant states that the grievant was employed by the Respondent on 6th May, 2015 as a shop assistant earning a basic salary of Kshs 12,558 per month.
3. That the grievant worked for the Respondent until 9th May, 2019 when the Respondent issued notice to its employees of relocating business premises and since it was operating two shops, it closed one shop and moved all employees, including the grievant to one shop located along Mburu Gichua road in Nakuru Town, with effect from 11th May, 2019.
4. That the grievant worked for two days and on 13th May, 2019, the second shop which the grievant had moved to was closed without any notice and the shop was moved to industrial area within Nakuru town but that the grievant was not allowed into the new shop at Industrial areas. Upon following up with the director of the Respondent, the grievant was informed that the shop had been closed due to low business and that the grievant was to be paid all his terminal dues in 30 days.
5. The Respondent did not communicate with the grievant even after the lapse of the 30 days, forcing the grievant to approach the claimant union to follow up the issue on his behalf.
6. The claimant wrote to the Respondent on 26th June, 2019, proposing a meeting on 2nd July, 2019 to amicably settle the issue but the Respondent failed to attend the said meeting.
7. On 11th July, 2019, the Respondent wrote back to the Union seeking for a sitting on the 27th July, 2019 and since the said date was not convenient for the claimant, both parties agreed to reschedule to 25th July, 2019. On the day of the meeting, the Respondent became unresponsive and the meeting did not materialize.
8. The trade dispute was escalated to the labour office, who confirmed receipt of the trade dispute on 1st August, 2019 and nominated Margaret Obegi as the conciliator in the issue. The claimant submitted their proposal to the conciliator who invited the parties for a meeting in their letter of 28th August, 2019 and 6th December, 2019. Another meeting was scheduled for 24th January, 2020, which the Respondent sought for an adjournment till 10th February, 2020. However, on the very date proposed by the Respondent, they failed to attend.
9. Due to the adamant nature and obstinate behaviour, exhibited by the Respondent, the conciliator issued a certificate of unresolved issue on the 3rd December, 2020 informing the filing of this case.
10. The claimant reiterated that the Respondent failed to follow due procedure in declaring the grievant redundancy and urged this court to allow the claim as prayed.
11. During hearing the claimant summoned the grievant, Alberone Cyrene Wesonga, as its CW-1 who testified that he was employed by the respondent from 6th May, 2015 till 9th May, 2019. He adopted his witness statement of 9th September, 2021 which basically reiterated the claim herein and in addition stated that on 13th May, 2019, he came to work to find the shop closed and when he called the Respondent's director, he directed them to the new shop in industrial area and on arrival, they were informed that the Respondent no longer needs their services and they were chased away. He testified that the Respondent has never been in touch with him from that day and that at the time of termination was he was earning Kshs 12,558 but did not even receive his May, salary.



12. Upon cross examination, he testified that he received the notice of relocation to the new shop on 9th May, 2019. He told this Court that they were many employees who found the shop locked and on calling the manager, he directed them to the new shops in Nakuru plastics in industrial area but on arrival they were chased away. He also stated that the Respondent did not attend conciliatory meetings.

Respondent's case.

13. The Respondent entered appearance on 15th November, 2021 through the firm of Mahida & Maina Company advocates and filed a defence to claim on 24th November, 2021 denying the entire claim terming it as inept, bad in law, ambiguous as it does not disclose proper particulars of claim and cause of action and the same ought to be struck out.
14. It is stated that the grievant was indeed their employee but that he was employed in the position of a general worker. That he worked for them and on 9th May, 2019, a notice of relocation was issued to all workers including the grievant, who instead of relocating with the Respondent tendered in his oral resignation, terminating his own services.
15. The Respondent denied declaring the grievant redundant as pleaded and maintained that the grievant resigned orally from its employ as such the allegation of termination is without basis and the suit herein ought to be dismissed with costs.
16. During hearing the Respondent called it manager Viren Rakesh Gudka, as its RW-1. He adopted his statement of 22.6.2022 and stated in addition that the grievant worked for the Respondent as a general worker from May, 2015 to November, 2019 or thereabouts. He testified that before shifting their shop to the different location, they informed all workers including the grievant vide the letter of 9th May, 2019 but the grievant refused to acknowledge receipt of the letter.
17. Upon cross-examination, the witness testified that the grievant absconded duty after 9th May, 2019 without cause. He stated that the grievant was issued with a show cause letter but he never turned up. He then stated that the show cause letter was handed to the grievant when he visited the go down in industrial area but he refused service. He stated that on termination, the termination was taken to the labour office and the labour officer called the grievant who failed to pick her call. He admitted that the grievant was not issued with employment letter detailing his duties
18. On re-examination, the witness reiterated that the grievant was a general worker.

Claimant's Submissions.

19. The claimant submitted on four issues; whether the grievant was unfairly terminated/declared redundant, whether the grievant absconded duty, whether the grievant worked a shop assistant and what remedies are available.
20. On the first issue it was submitted that the grievant was issued with a notice of relocation of shop dated 9th May, 2019 which they accepted and reported to the new shop at Mburu Githua road and even worked for 2 days. That the said shop was also closed and the Respondent relocated to a difference place without informing the grievant and upon calling the manager of the Respondent, he was directed to another premises in industrial area and on reaching the new premises he was informed his services were no longer required as there was no work for him. He argued that the fact that the manager informed him that there was no work was tantamount to redundancy as defined under section 2 of the *Employment Act* and the procedure for declaring employees redundant provided for under Section 40 of the *Employment Act*, ought to have come to play. It was submitted that the procedure under section 40 of the *Employment Act* is mandatory and cannot be circumvented by any employer. To support this



argument, they relied on the case of Benard Misawo Obora V Coca Cola Juices Kenya limited [2015] eklr where the Court relied on the case of KUDHEIHA versus The Aga Khan university Hospital Nairobi, Cause No. 815 of 2015 where the Court noted that;

“The notices envisaged under section 40 of the *Employment Act* are not mechanical or issued for the sake of going through a process. These processes affect employees and their jobs. Such notices should be carefully crafted prior to being issued. Such notices affect the employees behind the redundancy process...The procedures applicable in a redundancy are therefore set out in law and are mandatory. Such provisions being mandatory, an employer has to meet them and where not met, in their element, by an act of omission or commission, the resulting action that disadvantages the employees is inherently unprocedural and unfair.”

21. On whether the grievant absconded duty, the claimant relied on the case of Florence Audiah Adhiambo V Kenjap Motors Limited [2020] eklr where the Court held that:-

“The employer has the duty to address the provisions of section 44(4) (a) read together with section 41(2) of the *Employment Act*, 2007 where an employee is of gross misconduct and has absconded duty to issue notice and hear the employee in the defence. Where the employee is notified and invited to attend and fails to do so, the notices issued by the employer can be submitted as evidence to vilify the employer in accordance with section 10(6) and (7) of the Act.”

22. Accordingly, it was submitted that the grievant ought to have been issued with a notice to show cause and invited for disciplinary hearing in accordance with section 41 of the *Employment Act*. He argued that the purported notice to show cause that was issued to the grievant was issued to the labour office and not the grievant as stated by RW-1 and thus the grievant was not in a position to respond to the same. Furthermore, that if indeed such process was indeed followed by the Respondent and them being the custodians of employees records, they ought to have exhibited all records including the muster roll up to May, 2019 to ascertaining the desertion allegation. In this they relied on the case of Florence Audiah Adhiambo(Supra), where the Court held that:-

“The statutory duty to produce evidence is on the employer. Without any notices issued to the claimant for the alleged absconding duty, the court has to believe the claimant that employment terminated without notice and without any reasons being given. This is contrary to section 45 of the *Employment Act*, 2007 and under section 49 compensation is due and in this case, on a balance of probabilities, the respondent is found to have unfairly terminated employment.”

23. It was further submitted that the Respondent has not demonstrated before this Court any steps it took in tracing the grievant after he allegedly he deserted duty.

24. On the third issue on whether the grievant was employed as shop assistant as opposed to general worker, it was submitted that the work carried out by the grievant include selling products to customers, arranging products, organizing deliveries, assisting in stocking depleted products and doing all other work allocated to him in the shop, which duties are those ordinarily undertaken by a shop assistant. Being that no records of employment were produced by the Respondent to justify the position it employed the grievant in, as is required under section 74 of the *Employment Act* and reinforced in the case of Abigael Jepkosgei Yator and another V China Hanan International Co. Limited [2018] eklr, the testimony by the grievant remains unchallenged and thus this Court should believe him.



25. On remedies available, it was submitted that section 40 (1)(a) of the *Employment Act*, required, the employer to issue two notice to the employee and the Union when declaring an employee redundant. He argued that since not redundancy notice was issue and the employee chased away for lack of work, the Respondent violated the law under Section 40 of the *Employment Act* and thus should be condemned to pay the employee as prayed in the claim.
26. He argued that the grievant was underpaid as per the regulations of wages order because he used to earn Kshs 12,558 as basic salary and house allowance of Kshs. 1,833 which was below the wage Order. He therefore, urged this court to allow the claim under this head as prayed.

Respondent's Submissions.

27. The Respondent submitted on the four issue as submitted by the Claimant being; whether the grievant was unfairly terminated/declared redundant, whether the grievant absconded duty, whether the grievant worked a shop assistant and what remedies are available.
28. On the first issue, the Respondent submitted that the termination of the grievant was not as a result of redundancy as alleged by the claimant. He argued that the termination of employment occurred as a result of insubordination on the part of the employee as indicated in the notice to show cause letter of 22nd May, 2019. Further that the termination was not initiated by the Employer as envisaged in redundancy termination but that the employer expressed the need to relocate its business from one premises to another within Nakuru Town and communicated this relocation in the notice of 9th May, 2019. Finally, that the services of general workers such as the grievant were not rendered superfluous as required in redundancy, therefore the termination cannot be said to have occurred as a result of redundancy. To support this argument, he relied on the case of Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others [2014] eKLR, where the Court held that;-

“loss of employment in redundancy has to be at no fault of the employee and the termination of employment arises “where the services of an employee are superfluous” through “the practices commonly known as abolition of office, job or occupation and loss of employment.
29. Conversely, it was submitted that the termination of the grievant was done in accordance with section 44 of the *Employment Act*. He added that the grievant was issued with a show cause dated 22nd May, 2019, detailing the offenses committed and invited for a disciplinary hearing which he did not attend. He was thus terminated by the letter of 15th June, 2019 for absconding duty and insubordination.
30. On whether the grievant absconded duty, the Respondent cited the case of Julius Kyalo Malonza v Ruth Osolo t/a Eraeva Catering Services [2021] eKLR, where the Court relied on Seabolo v Belgravia Hotel [1997] 6 BLLR 829 (CCMA) to give the difference between desertion and absence without leave where the Court stated that –

“...desertion is distinguishable from absence without leave, in that the employee who deserts his or her post does so with the intention of not returning, or having left his or her post, subsequently formulates the intention not to return.”
31. He also relied on the case of n Joseph Nzioka v Smart Coatings Limited [2017] eKLR Nduma J. observed that

“Dismissal on account of absconding must be preceded by evidence showing that reasonable attempt was made to contact the employer concerned and that a show cause letter was issued



to such employee calling upon such employee to show cause why his services should not be terminated on account of absconding duties.”

32. Further cited the case of Boniface Francis Mwangi v B.O.M. Iyego Secondary School [2019] eKLR

“It is good practice for an employer to take the initiative of contacting the employee where an employee absconds work and find out the reason for the failure to present themselves for work.”

33. On that basis, it was submitted that the grievant on being notified of the Respondent intention to relocate his business to another premises, did not express his interest in relocating with the employer but instead absconded duty. It was argued that the notice to show cause for absconding duty was served on the grievant and when he failed to acknowledge receipt, a copy was served to the labour office.

34. On the position held by the grievant, it was submitted that the main duties of the grievant as testified by RW-1 and confirmed by the grievant in his submissions were to offer assistance in selling produced to the customer, arranging goods on the shelves, organizing deliveries, assisting in restocking depleted goods and doing other duties allocate to him. These duties, according to the Respondent are not similar to those carried out by shop assistant as defined under the Wholesale and Retail Distributive Trade Order Legal Notice No. 249 of 1973 because the grievant did not carry out transactions with the customers in sales either wholly or mainly. To support this assertion, the Respondent cited the case of Amwata Mutahi Nicolus & another v Ukwala Supermarket Nakuru & Kericho Branch [2016] eKLR, where the Court stated the duties of a shop assistant to include;

“the duties carried out by the 1st Claimant do not qualify him as a shop assistant. He did not prove that he was responsible for sales. Getting change from the bank and confirming price tags and expiry dates do not primarily involve transacting business with customers/shoppers.”

35. On the remedies sought, the Respondent submitted that the grievant was summary dismissed under section 44 of the [Employment Act](#), therefore is not deserting of the Notice pay sought herein.

36. On the claim for underpayment, the Respondent submitted that the allegation of underpayment is based on the presumption that the grievant was a shop assistant which was not the case therefore is not entitled to any underpayment.

37. In conclusion, the Respondent submitted that the separation of the grievant from the Respondent’s employ was not instigated by the Employer but by the employee for deserting duty, therefore the claim of unfair termination and the compensation sought should be dismiss with costs to the Respondent.

38. I have examined the evidence and submissions of the parties.

39. The grievant herein avers that he was declared redundant unfairly after the respondent moved their shop to a different location.

40. The respondents on their part aver that the claimant absconded duty after the relocation.

41. The respondents have not indicated that they thereafter sought to terminate his services on account of absconding.

42. There is no indication that they served him with a NTSC letter to explain why his services should not be terminated for absconding letters.



43. In view of this position, it is my finding that the grievant was terminated without due process and the termination was unfair and unjustified.
44. I therefore award the grievant as follows;-
1. 1 months salary in lieu of notice = 19,445/=
 2. Severance pay = $\frac{1}{2} \times 19,445 \times 4$
= 38,890/=
 3. Salary for 12 days worked in May 2019 = 8,974.6
 4. Underpayments of salary as pleaded from 2017 to 2019 = 94,735/=
 5. House allowance arrears as pleaded from 2017 to 2019 = 108,547/=
 6. Compensation of 6 months salary for unlawful redundancy = $6 \times 19,445 = 116,670/=$
TOTAL = 367,816/=
Less statutory deductions
 7. The respondent will pay cost of this suit plus interest at court rates with effect from the date of this Judgment.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 27TH DAY OF APRIL, 2023.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Mwenda for Respondent – present

Buda for claimant – present

Court Assistant – Fred

