



**Mukunza v AC Nielsen Kenya Limited (Cause 1021 of 2017)  
[2023] KEELRC 861 (KLR) (14 April 2023) (Judgment)**

Neutral citation: [2023] KEELRC 861 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 1021 OF 2017**

**SC RUTTO, J  
APRIL 14, 2023**

**BETWEEN**

**OLIVER MUKUNZA ..... CLAIMANT**

**AND**

**AC NIELSEN KENYA LIMITED ..... RESPONDENT**

**JUDGMENT**

1. Through a memorandum of claim dated May 26, 2017 and subsequently amended on January 30, 2017, the claimant avers that he was employed by the respondent with effect from September 1, 2015, as the Director Retail Vertical (EA). That on September 30, 2017, a consultation meeting was held at the respondent's offices where the claimant was informed that his services would be terminated due to redundancy. It is the claimant's case that the redundancy was not in compliance with the mandatory requirements of the law. Consequently, the claimant seeks the following reliefs against the respondent: -
  - a. An order of reinstatement of the claimant to employment with the respondent without any loss of rank, salary and/or benefits;
  - b. A declaration that the act of the respondent in terminating the claimant from employment is illegal and unlawful and therefore null and void under section 45 of the [Employment Act](#);
  - c. Damages for illegal and unlawful redundancy from employment;
  - d. Costs of the suit; and
  - e. Any other relief that this Honourable Court may deem fit to grant.
2. In answer to the Amended Statement of Claim, the respondent filed an Amended Memorandum of Defence dated March 27, 2017, through which it avers that the claimant's termination on grounds of redundancy were fair and valid. That the claimant's position ceased to exist as at May 2, 2017 and no



suitable alternative position was available for him. That further, the claimant's termination was lawful and his dues were calculated and paid accordingly.

3. The matter proceeded for hearing on October 6, 2022, during which both sides presented oral evidence.

#### **Claimant's case**

4. The claimant testified in support of his case and to start with, he sought to rely on his witness statement to constitute his evidence in chief. He further produced the bundle of documents filed together with the Statement of Claim and his further list and bundle of documents as exhibits before Court.
5. It was the claimant's evidence that he conducted all duties assigned to him diligently without any supervision and he was able to meet the deadlines. That on March 30, 2017 he held a consultative meeting with the respondent where he was informed of the intended redundancy. That on May 2, 2017 he received a notice from the respondent, terminating his employment on the basis of redundancy.
6. According to the claimant, his redundancy was illegal and unlawful as he was not guilty of any act of omission or commission that would warrant termination from employment by redundancy.
7. It was his further testimony that his position was not scrapped and that currently, there is someone by the name James Mutua, doing his job.

#### **Respondent's case**

8. The respondent called evidence through Ms. Faith Wanderi who testified as RW1. She identified herself as the respondent's Managing Director. For starters, she adopted the respondent's Amended Memorandum of Defence, list and bundle of documents as well as her witness statement to constitute her evidence in chief.
9. RW1 testified that the claimant's termination on grounds of redundancy was fair and valid. That the respondent's research market had been adversely affected. That in particular, the East African market failed to meet the required targets and had been operating at a negative "Earnings Before Interest, Tax, Depreciation and Amortization" (EBITDA). That due to the rapidly declining market for its services and despite best efforts made to sustain its global presence in the research industry, the position was reviewed and certain roles were declared redundant. That further, the respondent was impacted by the macro environment and it was not making any profit at the time.
10. That it is against this background that the respondent held consultative meetings with the claimant on March 30 and 31, 2017 to discuss the intention to restructure the company and the possibility of his position being declared redundant. That the claimant was subsequently issued with a notice of intention to declare redundancy on March 31, 2017. It was RW1's further testimony that the claimant was not the only one affected by the redundancy process. That there were other roles that were affected in the process.
11. That reasonable efforts were made to find an alternative suitable role to which the claimant could be reassigned but no suitable role was identified. That the claimant was thereby issued with a termination letter on May 2, 2017 and was paid his terminal dues.
12. It was her further evidence that the claimant's redundancy was not actuated by malice or bad faith as alleged or at all. That he was given adequate notice of redundancy and discussions with him were held regarding the structural changes. That upon receiving the notice, the claimant did not raise any concerns except with regards to the Performance Improvement Plan (PIP) process.



13. She further denied that the claimant's contract was terminated on account of performance as alleged. That although the claimant had challenges in his performance and was placed under a PIP to assist him to improve on his technical skills, the PIP did not proceed after the claimant's role was identified as one of those that would be impacted by the reorganization process. That therefore, the two processes were not related as alleged or at all.
14. That the position that was held by the claimant was not been retained and therefore, he cannot be reinstated. That further, his claim is brought in bad faith and the company has lost trust and confidence in him.

### Submissions

15. It was submitted on behalf of the claimant that no evidence was adduced by the respondent showing that the notice to declare redundancy was served upon the local area labour officer stating the reasons and extent of the redundancy. That in this case, the respondent did not notify the labour officer of the impending redundancy. That the purported consultation carried out by the respondent without the involvement of the labour officer cannot be said to have been a real consultation. In support of these arguments, the cases of *Kenya Airways Limited vs Aviation & Allied Workers Union of Kenya & 3 others* (2014) eKLR, *Barclays Bank of Kenya Limited & another vs Gladys Muthoni & 20 others* Civil Appeal No 301 of 2016 and *Emmanuel Limo Chang'oka vs Plan International Kenya*, Malindi Cause No. E007 of 2021 were cited in support.
16. It was the claimant's further submission that no records of performance appraisals were produced in Court by the respondent to enable the Court assess whether he was skilled, able and reliable. That further, no document was produced to show how the selection was carried out. That in fact, the number of people declared redundant was not disclosed and from the record, only the claimant was declared redundant. That in view of the opaque criteria in the selection, the Court was urged to find that the termination by redundancy was unfair and wrongful for lack of application of a fair selection procedure under Section 40 (1) (c) of the *Employment Act*.
17. In further submission, it was stated that there was no justification for termination of the claimant's employment through redundancy. That the respondent has failed to prove by evidence that valid grounds existed for declaration of a redundancy. That no statements of account were produced proving the alleged financial constraints and no audit report was produced showing a mismatch between income and expenditure on the basis of which a restructure was necessary. In this regard, the case of *Emmanuel Limo Chang'oka vs Plan International Kenya (supra)* was cited in support of this argument.
18. On its part, the respondent submitted that the redundancy was lawful and justified within the meaning set in Section 2 of the *Employment Act*. That the decision to declare the claimant redundant was involuntary and was influenced by external factors hence based on a genuine belief as provided under Section 43 (2) of the *Employment Act*. In support of this position, the respondent placed reliance on the case of *Kenya Airways Limited vs Aviation & Allied Workers Union Kenya & 3 others* (2014) eKLR.
19. That further, the redundancy had to be effected as a necessity for business continuity. That the decision to undertake the redundancy process had nothing to do with the claimant as alleged. That the claimant's position was identified as one of the roles that would be affected by the intended redundancy. That the claimant did not support his claim that the position of director retail services continued to exist.
20. The respondent stated in further submission that the claimant was given adequate notice of the redundancy and was fully appraised of the factors culminating in the same. That further, the claimant



has not led any evidence to support the assertion that he was terminated based on a Performance Improvement Plan. That there was no record of any complaints or concerns by the claimant from his last consultative meeting held on March 31, 2017 to the issuance of his termination on May 2, 2017. To fortify its argument, the respondent placed reliance on the cases of *Carol Atieno Osweta vs Kenya Yungheng Plate Making Ltd* (2013) eKLR and *Kenya Airways Limited vs Aviation & Allied Workers Union Kenya & 3 others* (*supra*).

21. The respondent further submitted that it had demonstrated compliance with Section 40 of the *Employment Act*. That it admittedly failed to notify the labour office of the intended redundancies. That however, failure to give the proper notice does not invalidate the redundancy process. To this end, the Court was invited to consider the determination in the cases of *Addah Adbiambo Obiero vs Ard Inc* (2014) eKLR, *Edgar Maingi Mwinzi vs Total Kenya Limited* (2020) eKLR and *Mercy Wangari Muchiri vs Total Kenya Limited* (2020) eKLR. That the claimant has not demonstrated the prejudice suffered because of the respondent's failure to notify the labour office to warrant a higher award. That the omission should only culminate in the payment of one month's notice to the claimant.

### **Analysis and Determination**

22. Arising from the pleadings, the evidence on record and the opposing submissions, the following issues stand out for determination: -
  - i. Whether the claimant's termination by way of redundancy was fair and lawful.
  - ii. Whether the claimant is entitled to the reliefs sought.Whether the claimant's termination by way of redundancy was fair and lawful.
23. It is not in doubt that the claimant was terminated from the respondent's employment through redundancy. The question is whether the same was fair and lawful in terms of the *Employments Act*, 2007.
24. Any termination of employment under redundancy ought to be both substantially justified and procedurally fair. Such was the holding by the Court of Appeal in *Kenya Airways Limited vs Aviation & Allied Workers Union Kenya & 3 Others* (2014) eKLR.
25. Whereas substantive justification refers to the reasons for which the redundancy was effected, procedural fairness has to do with the procedure applied in effecting the redundancy. I will start by considering substantive justification.

#### **i. Substantive justification**

26. Substantive justification in cases of redundancy is to be considered in the context of the definition of the term redundancy under Section 2 of the *Employment Act*, thus: -

“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”.
27. What this means is that, the circumstances or reasons leading to an employee being declared redundant must fall within the above definition that is to say, that the loss of employment was involuntary and the employee is at no fault, rather it is the initiative of the employer. That further, the services of the employee have been rendered superfluous.



28. In addition to the foregoing, regard must also be had to the provisions of Section 45(2) (b) (ii) of the Employment Act which renders a termination unfair, where an employer fails to prove that the reason for the termination is valid, fair and based on its operational requirements. Essentially, this means that there must be genuine, valid and fair reasons. It is the employer to prove such reasons otherwise, the termination is rendered unfair.
29. Turning to the instant case, the claimant's termination was effected through a letter dated May 2, 2017 referenced "Termination of employment due to redundancy" which reads in part: -
- "We refer to the above subject matter and our letter dated March 31, 2017. Kindly note that your position Director, Retailer Services has been declared redundant due to adverse business conditions occasioned across the Nielsen Business globally and has impacted revenue and costs and the same affect has been seen in the Emerging Markets...please note that we shall make payment of the following redundancy dues..."
30. The claimant's termination was preceded by a notice of intention to declare redundancy dated 31<sup>st</sup> March, 2017 which sets out the reasons for the redundancy. The said Notice is couched as follows: -
- "Dear Oliver,
- RE: NOTICE OF INTENTION TO DECLARE REDUNDANCY
- We refer to the above subject matter and wish to advise you that the business intends to restructure the company due to adverse business conditions occasioned across the Nielsen business globally which was communicated by email to all Nielsen associates by our Global CEO Mitch Barnes. This impacted revenue and the same effect has been seen in the Emerging Markets and East Africa as well. In addition the East Africa business did not meet the Q1 targets and is still at negative EBITDA which has been ongoing for a while the situation is critical to the point that the business has given a directive to all Nielsen markets to reduce head count and achieve better efficiency. This involves a review of all roles, span of control and layers to ensure efficiency and address the cost challenges given the revenue gaps. Following this a review was done of the East West Africa and Maghreb business and roles were identified that would be declared redundant. Your role is among those affected as the retailer services will be restructured and the role will no longer exist going forward.
- Regrettably this means that your employment will terminate with effect from 1<sup>st</sup> May, 2017. Upon the lapse of the 30 days, you will be paid the applicable redundancy dues including: salary up to the last day worked, outstanding leave if any, notice pay and severance pay.
- The Management of the Nielsen Company will be available for any clarifications and consultations within the 30 days' period before the effective date of termination on account of redundancy..."
31. What can be deduced from the correspondence above is that the reason cited for the claimant's termination on account of redundancy was adverse business conditions hence necessitating review of roles, span of control and layers to ensure efficiency. That as a result, the claimant's role was among those to be restructured hence was to cease existing going forward.
32. Noting the reasons advanced for the claimant's termination, it was incumbent for the respondent to justify the same. Specifically, that due to the adverse business conditions, there was a restructure and the claimant's role was no longer existing within its structure.



33. As was held in the case of Kenya Airways (supra), “The phrase “based on operational requirements of the employer” must be construed in the context of the statutory definition of redundancy. What the phrase means, in my view, is that while there may be underlying causes leading to a true redundancy situation, such as reorganization, the employer must nevertheless show that the termination is attributable to the redundancy – that is that the services of the employee has been rendered superfluous or that redundancy has resulted in abolition of office, job or loss of employment.” Underlined for emphasis
34. In support of its case, the respondent exhibited an email of March 23, 2017 referenced “Newsbreak: 2017, A Transition Year: Here’s What You Need to Know”. It reads in part: -
- “What’s happening? A mix of things. We’re getting closer to launching our connected system, which will be a major differentiator for Nielsen. At the same time, we’re facing a more challenging growth environment, as are many of our clients. What are we doing? We’re making incremental investments in initiatives that will have major impacts on the industry- particularly the connected system. And we’re looking to increase efficiency by simplifying, reducing or rescheduling discretionary spending...”
35. Subsequent to the above email, a further email was dispatched the same day to what appeared to be a group email being emergingmarketsleadership@nielsen.com from Nick Papagregoriou which reads in part: -
- “As Mitch highlighted in his recent message, we are in the midst of a significant transformation for our Buy Business, while the external environment is becoming more challenging. Many of our fmcg clients are struggling for growth and unavoidably this reflects on our growth opportunities. In EM we continue to grow strongly in several markets and services but we do face challenging market conditions in others. We need to work together and find the right balance between productivity/business model optimization and growth opportunities.....this means we will be looking at the following areas:-
- Hiring: we will rely heavily on internal moves (vs external hires) for our talent needs. The HR team’s current focus on talent movement will help us a lot here and continue to create great opportunities for our associates.
- Specifically, for the next 3 weeks, we are suspending all commercial roles external hiring. If a written offer has been made, we will honour that; if however, an offer is pending, put it on hold....
- Spans and layers: we will examine the spans and layers of management in our organisation to better understand where we have opportunities to organize more efficiently.
- Operating expenses: we will continue to seek ways to reduce costs and find operational efficiencies wherever possible...
- Regards
- Nick.”
36. From the above email trail, it is apparent that the respondent was facing business challenges that were impacting its operations. Therefore, in as much as this may have been an underlying reason to restructure, the respondent was still required to prove that the claimant’s termination was attributable to the said adverse business conditions and that indeed, his position was not existing in its structure beyond May 2, 2017.



37. From the respondent's end, the claimant's position as well as others within its establishment, had been done away with. The claimant disputed this position advanced by the respondent and contended that there was someone by the name, James Mutua who was performing his duties. Refuting this position, RW1 stated during cross examination that the said James Mutua was performing extended duties including those of the claimant and that it has never made a replacement for the claimant's erstwhile role of Director Vertical.
38. Despite the respondent's assertions, it failed to prove that there was restructuring of roles and that the claimant's role was done away with and ceased to exist beyond May 2, 2017. Being the reason behind the claimant's redundancy, at the very least, the respondent would have been expected to provide evidence in terms of Sections 43 and 45 of the *Employment Act*. Such evidence would have been in the form of an organization structure/ organogram/chart or such evidence through which the respondent uses to depict its structure.
39. Such a structure would have indeed proved that the position of Director Vertical (EA) was no longer in existence and that the roles within that office had been brought under the position being held by the said James Mutua. Without such evidence, it is not possible to indeed ascertain whether the claimant's position was really affected by the restructure.
40. Coupled with the foregoing, it was the respondent's case that besides the claimant's role, other roles were affected in the redundancy process. Nonetheless, it did not disclose which other roles were affected. Again, if this was indeed true, this would have been evident from its structure. But as none was exhibited, I am unable to find that there was a restructure and that the claimant's position as well as others, had ceased to exist within the respondent's structure.
41. There being no evidence that the claimant's position was indeed done away with and ceased to exist, I am unable to find that the respondent has proved that the claimant's termination on account of redundancy was justified. His termination in that respect was therefore substantively unfair.

**(ii) Procedural fairness**

42. The procedure to be applied in effecting a redundancy is stipulated under Section 40(1) of the Act. Under the said provision, the following conditions must precede a redundancy: -
  - 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.
43. I must emphasize at the outset, that all the conditions stipulated above are mandatory and it is not open for the employer to cherry pick and selectively apply the same.
44. For starters, the claimant was notified of the intended redundancy through a letter dated March 31, 2017. This was in apparent compliance with the first part of the requirement under Section 40(1) (b) of the *Employment Act*. However, the respondent failed the test under the second part of the said requirement when it failed to prove that it issued a redundancy notice to the labour office. This position was undisputed and was confirmed by RW1 who testified under cross examination that the county labour office was not notified of the claimant's intended redundancy. To this extent, the respondent was at fault.
45. With regards to consultations, the respondent exhibited minutes of a consultative meeting held on March 30, 2017 with the claimant. This was prior to the issuance of the notice of the intended redundancy. Notably, the claimant did not dispute being in attendance at the said meeting. From the record, his concern was the ongoing PIP process. On this score, the respondent cannot be faulted as it engaged the claimant prior to the redundancy and evidently, he was allowed to give his views with regards to the process.
46. The other issue that has come to the fore is in respect of the selection criteria under Section 40 (1) (c) of the Act. It was the respondent's case that there were more redundancies beyond the claimant. However, it did not provide let alone suggest the criteria it applied in determining which employee to let go. For instance, how did it determine that out of all its employees, it was the claimant to be declared redundant? In other words, what was the criteria for selecting him for redundancy? Indeed, evidence of a selection a criteria and the manner in which the same was applied in the redundancy process would have provided an objective assessment of the decision by the respondent.
47. In light of the foregoing, it is apparent that the respondent did not wholly comply with the provisions of Section 40 (1) of the *Employment Act* hence it is at fault for want of procedure.
48. Summing up on this issue, I wish to reiterate the sentiments of the Court in the case of *Hesbon Ngaruiya Waigi vs Equitorial Commercial Bank Limited* (2013) eKLR thus: -
- “Where redundancy is declared by an employer, the procedure to follow is as set out under the provisions of Section 40 of the *Employment Act* and where not followed, any termination as a result will be deemed unprocedural and unfair. Any termination of an employee following a declaration of redundancy must be based on the law otherwise the same becomes wrong and if the grounds used to identify the affected employees are not as per the law, the same becomes unfair.”
49. Having found that the respondent did not fully comply with the mandatory requirements stipulated under Section 40(1) of the *Employment Act*, I cannot help but find that the claimant's termination on account of redundancy was unprocedural hence unlawful.
50. The total sum of my consideration is that the claimant's termination on account of redundancy was unfair and unlawful within the meaning of Sections 40, 43 and 45 of the *Employment Act*.



### **Remedies available to the claimant**

51. As the Court has found that the respondent failed to prove that the claimant's redundancy was substantially and procedurally fair, he is awarded compensatory damages equivalent to 4 months of his gross salary. This award takes into account among other factors, the length of the employment relationship.

### **Orders**

52. In the final analysis I allow the claim and enter Judgment in favour of the claimant against the respondent as follows: -

- a. A declaration that the claimant's termination by the respondent by way of redundancy was unfair and unlawful.
- b. The claimant is awarded compensatory damages being Kshs 2,929,500.00 which sum is equivalent to 4 months of his gross salary.
- c. Interest on the amount in (b) at court rates from the date of Judgement until payment in full.
- d. The claimant shall also have the costs of the suit.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 14<sup>TH</sup> DAY OF APRIL, 2023.**

.....

**STELLA RUTTO**

**JUDGE**

**Appearance:**

**For the Claimant Mr Mungai**

**For the Respondent Ms Onyango**

**Court assistant Abdimalik Hussein**

**ORDER**

**In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.**

**STELLA RUTTO**

**JUDGE**

