



**Bakery Confectionery Food Manufacturing and Allied Workers Union v Good Water Company Limited & another (Cause 1715 of 2016) [2023] KEELRC 1182 (KLR) (18 May 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1182 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 1715 OF 2016**

**L NDOLO, J  
MAY 18, 2023**

**BETWEEN**

**BAKERY CONFECTIONERY FOOD MANUFACTURING AND ALLIED  
WORKERS UNION ..... CLAIMANT**

**AND**

**GOOD WATER COMPANY LIMITED ..... 1<sup>ST</sup> RESPONDENT  
ENERGY FOODS LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. In its initial Memorandum of Claim dated August 25, 2016, the Claimant cited two issues in dispute; being, refusal to conclude a Collective Bargaining Agreement (CBA) and unlawful redundancy affecting 43 unionisable employees, who were members of the Claimant.
2. The Claimant later filed an amended Memorandum of Claim dated May 4, 2022, with the surviving issue in dispute being alleged unlawful declaration of redundancy.
3. The Respondents filed a joint Statement of Defence dated October 13, 2022.
4. The matter proceeded by way of written submissions.

**The Claimant’s Case**

5. The Claimant states that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents are sister companies engaged in the business of water and related products.
6. The Claimant further states that it had a Recognition Agreement with the Respondent, executed on November 10, 2014 and taking effect from November 1, 2014.



7. In the month of February 2015, the Claimant and the Respondents embarked on the process of negotiating and concluding a CBA.
8. The Claimant claims that there were delays in the process, occasioned by the Respondents as a consequence of which the Claimant reported a trade dispute, to the Minister for Labour, on November 3, 2015.
9. The conciliation process culminated with a draft CBA, which the Respondents are said to have declined to sign, citing inability to pay arrears arising therefrom.
10. The Claimant avers that in an unexpected turn of events, the Respondents issued a notice on August 5, 2016, notifying the County Labour Officer of an intended closure of business and operations which would result in declaration of redundancy.
11. The Claimant contends that the notice issued to the County Labour Officer was not copied to it as required under Section 40(1)(c) of the [Employment Act](#). The Claimant points out that the notice was delivered to its office on August 22, 2016, 17 days after it was delivered to the County Labour Officer. By letter dated August 22, 2016, the Claimant protested the Respondents' actions.
12. On August 24, 2016, the Respondents availed a list of employees to be declared redundant and advised that the affected employees would be issued with termination letters by the end of the month of August 2016.
13. The Claimant states that the Respondents subsequently closed down operations thereby rendering the Claimant's members redundant.
14. The Claimant accuses the Respondents of executing an unlawful redundancy, in violation of the procedural requirements of Section 40 of the [Employment Act](#). The Claimant cites the following requirements in this regard:
  - a. The notice to the Labour Officer dated 5<sup>th</sup> August 2016 was not copied to the Claimant as the representative body of unionisable employees within the Respondents' enterprise;
  - b. The notice fell short of the requirements of Section 40(1)(a) of the [Employment Act](#), which requires that such notice be issued not less than one month prior to the date of termination;
  - c. The Respondents issued termination letters to the Claimant's members without consulting the Union;
  - d. The Respondents failed to disclose the extent of the intended redundancy as required by law.
15. The Claimant seeks the following remedies:
  - a. A declaration that the termination of the employment of the Claimant's members by way of redundancy as communicated by letter dated August 5, 2016 was wrongful, null and void;
  - b. An order for payment of terminal dues and redundancy benefits in respect of each of the affected employees, including salary, one month's salary *in lieu* of notice, severance pay, leave pay and leave travelling allowance as computed by the Respondent less any sums paid;
  - c. 12 months' salary in compensation for unlawful and unfair termination of employment.



## The Respondents' Case

16. In their Statement of Defence dated October 13, 2022, the Respondents deny the Claimant's claim and state that:
- a. They had all along informed the Claimant of their commitment to finalise the CBA despite financial constraints the Respondents were facing since 2015 that caused them to close down their operations in 2016;
  - b. They tabulated the terminal dues payable to all the Grievants, amounting to Kshs 13,203,679, including salary, increment to be awarded after finalisation of the CBA, severance pay, leave days, notice pay and leave travelling allowance;
  - c. They have been paying the terminal dues in instalments;
  - d. The payments were made directly to the Grievants' bank accounts in good faith and to date, Kshs 12,064,816 had been paid, leaving an outstanding balance of Kshs 1,138,863.
17. The Respondents state that following meetings held on February 22, 2017 and April 6, 2017 between the Claimant and the Respondents, the dues payable to the Grievants were tabulated and paid, save for five (5) Grievants whose dues had not been paid.

## Findings and Determination

18. There are two (2) issues for determination in this case:
- a. Whether the Claimant has made out a case of unlawful redundancy against the Respondents;
  - b. Whether the Claimant is entitled to the remedies sought.

## The Redundancy

19. It is not in dispute that the Respondents declared a redundancy by which the Claimant's members lost their employment. What is in issue is whether in executing the redundancy, the Respondents observed due procedure.
20. Section 2 of the *Employment Act*, 2007 defines 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.”
21. While the law recognises redundancy as a legitimate mode of termination of employment, it sets stringent conditions to be complied with. These conditions are 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.

22. The first two conditions under Section 40 of the *Employment Act* require every employer declaring redundancy to issue a one-month notice of intention to all employees likely to be affected by the redundancy, their union (where applicable) and the local Labour Officer. By definition, this notice, should set out the reasons for and the extent of, the intended redundancy.
23. This notice is separate and distinct from the termination notice provided under Section 40(1)(f) of the *Act*. In its decisions in *Thomas De La Rue v David Opondo Omutelelma* [2013] eKLR and *Kenya Airways Limited v Aviation & Allied Workers Union of Kenya & 3 others* [2014] eKLR the Court of Appeal confirmed the distinction between a redundancy notice and a termination notice, both of which are required under Section 40 of the *Employment Act*.
24. In the *Kenya Airways Case* (supra) Maraga JA (as he then was) stated the following:

“...both the notices themselves and their duration of 30 days under this provision are mandatory. Section 40(1) of our *Employment Act* does not expressly state the purpose of the notice. Although it also does not expressly provide for consultation between the employer and the employees or their trade unions before the final decision on redundancy is made, on my part I find the requirement of consultation provided for in our law and implicit in the *Employment Act* itself.

By dint of Article 2(6) of the *Constitution*, the treaties and conventions ratified by Kenya are now part of the law of Kenya...



Kenya is State Party to the International Labour Organization (ILO), which it joined in 1964 and is bound by the ILO Conventions. Article 13 of Recommendation No. 166 of the [ILO Convention No 158-Termination of Employment Convention](#), 1982- requires consultation between the employers on the one hand and the employees or their representatives on the other before termination of employment under redundancy...”

25. In the more recent decision in [Cargill Kenya Limited v Mwaka & 3 others](#) [2021] KECA 115 (KLR) the Court of Appeal confirmed the requirement for pre-redundancy consultation in the following terms:

“While the requirement of consultation was not expressly provided in section 40 of the [Employment Act](#), that requirement was implied, as the main reason and rationale for giving the notices is section 40(1)(a) and (b) to the unions and employees of an impending redundancy.”

26. In the present case, it is evident that the Respondents did not comply with the aforesaid notice requirement. According to the evidence on record, the Respondents wrote to the County Labour Officer on August 5, 2016, stating their intention to close down operations.
27. By this letter, the Respondents indicated that the final dues payable to the affected employees would be calculated and paid out on or before September 30, 2016. By the time the letter of August 5, 2016 was sent to the County Labour Office, the Union had not been notified of an impending redundancy. Indeed, it is not until August 22, 2016, when the Claimant was served with a copy of the letter addressed to the County Labour Officer. The Court took note of a handwritten inscription on the face of the letter indicating that it was copied to the Claimant Union.
28. Further, by letter dated August 24, 2016, the 1<sup>st</sup> Respondent confirmed having terminated the employment of 8 employees effective August 20, 2016. The 1<sup>st</sup> Respondent indicated that it would issue termination notices to another 15 employees, by the end of the month.
29. The 2<sup>nd</sup> Respondent also confirmed that it had terminated the employment of 7 employees, effective August 20, 2016 and that it would issue termination notices to 12 more employees, at the end of the month.
30. The last three conditions under Section 40 of the [Employment Act](#) serve as instructions to an employer declaring redundancy to settle all outstanding statutory dues, before the redundancy takes effect.
31. By their own admission, the Respondents have not paid the sum of Kshs 1,38,863 in redundancy dues. The conditions on payment of statutory dues were therefore breached and as held by this Court in its decision in [Fatma Ali Dabaso v First Community Bank Limited](#) [2018] eKLR, a redundancy that ignores any of the conditions set by Section 40 of the [Employment Act](#) amounts to an unfair termination of employment as defined in Section 45 of the Act.

## Remedies

32. Pursuant to the foregoing findings, I award each of the Grievants three (3) month’s salary in compensation for unlawful and unfair termination of employment. The respective amount payable to each Grievant under this head will be tabulated jointly by Counsel on record for the parties, and paid out within the next forty (45) days from the date of this judgment.
33. In addition, I enter judgment in favour of the Claimant as against the 1<sup>st</sup> and 2<sup>nd</sup> Respondents in the sum of Kshs 1,138,863 being outstanding redundancy dues on account of the Grievants, as admitted



by the Respondents. This amount will attract interest at court rates from the date of judgment until payment in full.

34. The Respondents will also meet the costs of this case.

35. Orders accordingly.

**DELIVERED VIRTUALLY AT NAIROBI THIS 18TH DAY OF MAY 2023**

**LINNET NDOLO**

**JUDGE**

**Appearance**

**Mr. Amalemba for the Claimant**

**Miss Njagi for the Respondent**

