



**Ngege v Kamagambo Adventist College & another (Cause E034 of 2021) [2023] KEELRC 1566 (KLR) (29 June 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1566 (KLR)

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU**  
**CAUSE E034 OF 2021**  
**CN BAARI, J**  
**JUNE 29, 2023**

**BETWEEN**

**ODONGO SALMON NGEGE ..... CLAIMANT**

**AND**

**KAMAGAMBO ADVENTIST COLLEGE ..... 1<sup>ST</sup> RESPONDENT**

**DR. SAMUEL MISIANI, PR. JAPHETH OCHOROKODI & ELD. DAVID SANDE  
(SUED IN THEIR CAPACITY AS LEADERSHIP OF SDA CHURCH-WEST  
KENYA UNION CONFERENCE) ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

**Introduction**

1. The Claimant's Statement of Claim is dated 26<sup>th</sup> February, 2021, and filed on 6<sup>th</sup> April, 2021. He seeks a declaration that the decision of the 1<sup>st</sup> Respondent to reduce his salary is unlawful and malicious; an order for payment of the salary deducted; an inquiry into the payment of statutory deductions, loan deductions and monies deducted from his salary on account of HELB, and an order for the reimbursement of the deductions; one month salary in lieu of notice; payment on account of accrued leave; a declaration that his redundancy is unfair, compensation for unfair termination; costs of the suit and interests.
2. The Respondents entered appearance and subsequently filed a Reply to the statement of Claim on 13<sup>th</sup> May, 2021, together with their witness statement and list and bundle of documents.
3. Both the Claimant's and the Respondents' cases were heard on 28<sup>th</sup> February, 2023. The Claimant testified in support of his case, adopted his witness statement as his evidence in chief, and produced the documents filed.



4. The Respondents presented a Mr George Odoyo to testify in support their case. Mr Odoyo sought to adopt his witness statement and produced the documents filed as exhibits in the matter.
5. Both parties filed submissions in the matter.

### **The Claimant's Case**

6. It is the Claimant's case that he was in the service of the 1<sup>st</sup> Respondent from 3<sup>rd</sup> June, 2014 to 30<sup>th</sup> July, 2018, and that he earlier served the Kendu Adventist Hospital from 2011.
7. The Claimant's further case is that he was presented with a letter dated 30<sup>th</sup> July, 2018, informing him of the decision of 1<sup>st</sup> Respondent's Board to declare him redundant effective 30<sup>th</sup> July, 2018. It is his case that the reason said to have informed the redundancy, is a dire financial situation faced by the 1<sup>st</sup> Respondent at the time.
8. The Claimant states that the redundancy notice indicated that the Board had earlier met on 26<sup>th</sup> July, 2018, and passed a resolution to declare him redundant effective 30<sup>th</sup> July, 2018.
9. The Claimant states that the redundancy notice was shared with the County Labour Officer in a bid to comply with the requirements of Section 40(1)(b) of the *Employment Act*, 2007. It is his further case that the labour officer in his response to the redundancy notice informed the 1<sup>st</sup> Respondent that the procedure it had adopted was flawed and that the same will be deemed as an unfair termination.
10. The Claimant states that he diligently served the Respondents and even received a letter of appreciation from the 2<sup>nd</sup> Respondent on his outstanding service.
11. The Claimant states that his salary was Kshs 80,669.14/- up to December, 2017. It is his case that at the end of January, 2018, his salary was reduced to Kshs 59,008.18/- without notice or a basis for the reduction, but that he continued working full time and with the same zeal and dedication.
12. It is the Claimant's case that the Principal of the 1<sup>st</sup> Respondent, and RW1 in this matter, informed him that the reduced figure would be his salary going forward owing to financial difficulties the 1<sup>st</sup> Respondent was facing at the time.
13. The Claimant states that he expected to receive his salaries for the Months of April, May, June and July, 2018, upon receipt of the redundancy notice, but none has been paid to date.
14. The Claimant states that months after his termination, he discovered that the deductions made from his salary towards a credit facility he had with Eco Bank of Ksh 14,163.21, were never remitted in the months of February, April, May, June and July, 2018, despite having been deducted from his salary.
15. It is his case that deductions in respect of Pay As You Earn (PAYE) and the Higher Education Loans Board (HELB) were equally not remitted though deducted from his salary over similar period.
16. The Claimant told the Court that the 2<sup>nd</sup> Respondent approved a service call to have him in the service of the 1<sup>st</sup> Respondent, and are thus aware of his employment with the 1<sup>st</sup> Respondent. He however confirmed not having at any one time drawn a salary from the 2<sup>nd</sup> Respondent.
17. It was the Claimant's testimony that when his salary was reduced, he only complained about it verbally but did not write a letter to the 1<sup>st</sup> Respondent protesting the reduction.
18. It is his further testimony that he was the financial advisor of the 1<sup>st</sup> Respondent having been appointed to the position of Acting Business Manager, and that he prepared the wage audit sheet that carried the



- reduced staff salaries for the 1<sup>st</sup> Respondent, which sheet he signed, and was applicable to the entire work force of the 1<sup>st</sup> Respondent.
19. The Claimant told the Court that though he was the senior most accountant in the entity, he was the only one to be declared redundant. It is his testimony that he was not told the criteria used to arrive at the decision why it was him to be to be declared redundant.
  20. It was the Claimant's further testimony that he was given three days upon receipt of the redundancy notice to leave the 1<sup>st</sup> Respondent's premises and employ, and that he had no option but to leave.
  21. It is his prayer that this Court declares the process of his redundancy unprocedural and award him the reliefs listed in his statement of claim. The Respondents' Case
  22. The Respondents' case is that the 2<sup>nd</sup> Respondent is not a legal personality and lacks the capacity to be sued or to sue, and hence the Claimant's claim as against it is invalid and incompetent. It is the Respondents' further case that the 2<sup>nd</sup> Respondent was not the employer of the Claimant and that the Claimant has not led any prove against it and prays that the claims made as against the 2<sup>nd</sup> Respondent be dismissed with costs.
  23. It is the Respondents' case that the Claimant's employment with the 1<sup>st</sup> Respondent was based on a service call generated by the 1<sup>st</sup> Respondent to Kendu Adventist Hospital where the Claimant worked previously, and for which the 2<sup>nd</sup> Respondent had no role to play.
  24. The Respondents state that the Claimant being their business manager, prepared a financial position which indicated that the 1<sup>st</sup> Respondent is insolvent and could not pay salaries to employees, resulting in the need to declare redundancies.
  25. It is the 1<sup>st</sup> Respondent's position that the Claimant was declared redundant upon a review of their staff establishment by the human resources and administration sub-committees on account of liquidity challenges.
  26. The 1<sup>st</sup> Respondent states that the Claimant in the Audit Wage Sheet recommended reduction of salaries including his own, and which recommendation the 1<sup>st</sup> Respondent accepted. It is their case that the Claimant is estopped from alleging that the adjustment of his salary was done without his knowledge.
  27. The 1<sup>st</sup> Respondent further states that it fell in arrears on employee salaries for the period January, 2018 to June, 2018, and that it could not continue keeping employees when it did not have the financial capacity to pay.
  28. It is the 1<sup>st</sup> Respondent's case that contrary to the Claimant's assertion that he was given a three day notice of redundancy, he was in fact offered a one month's pay in lieu of the notice on account of redundancy, together with any terminal dues that were due and owing upon him making a decision on the mode of payment.
  29. The 1<sup>st</sup> Respondent states that it did follow procedures relating to declaration of redundancy and had in fact held consultations with the labour officer in regard to the redundancy. It is the Respondent's case that prior to the declaration of redundancy, their employees engaged in demonstrations related to non-payment of salaries.
  30. It is the 1<sup>st</sup> Respondent's case that it is agreeable to account for deductions made from the Claimant's salary and that issues to do with deductions were to be dealt with during the Claimant's clearance process, and any amount due would be made as part of the Claimant's final settlement.



31. In his testimony before court, RW1 told the court that the 1<sup>st</sup> Respondent is a registered entity with capacity to sue and to be sued, while the 2<sup>nd</sup> Respondent only plays an advisory role to the 1<sup>st</sup> Respondent, is unregistered, and does not have capacity to be sued.
32. It was his further testimony that the Claimant was employed by the 1<sup>st</sup> Respondent and had no employment relationship with the 2<sup>nd</sup> Respondent.
33. RW1 told the Court that the decision to declare redundancies arose out of financial difficulties tied to low student enrollment owing to policy changes by the Ministry of education.
34. He further told the court that upon failing to pay salaries for six consecutive months and street demonstrations by staff, they resolved with the advice of the Labour Officer to go the redundancy way, hence the decision to declare the Claimant redundant.
35. RW1 confirmed to Court that statutory deductions were not remitted for reason that it did not have the money, and which is the same reason it did not pay salaries even after the Claimant had prepared the payroll.

### **The Claimant's Submissions**

36. It is the Claimant's submission that there exists an employer/employee relationship between the Claimant and the Respondents going by the conduct and involvement of the 2<sup>nd</sup> Respondent in the employment of the Claimant. The Claimant had reliance in the holding in *Maurice Oduor Okech v Chequered Flag Limited* [2013] eKLR where Ndolo buttressed this position.
37. It is submitted for the Claimant that it is an employer's prerogative to elect to declare its employees redundant if there is a justifiable reason for doing so. It is further submitted that failure to have a justified reason for declaring an employee redundant, leads to unfair termination disguised as redundancy or unfair declaration of redundancy. He sought to rely in the holding of Justice David Nderitu in the case of *Daniel Mburu Muriu v Hygrotech East Africa Ltd* [2021] eKLR to support this position.
38. It is the Claimant's submission that the Respondents failed to provide proof that the company was facing liquidity issues and that a statement of cash flows may paint a more complete picture of a company's liquidity (the ability to pay bills and creditors and fund future growth) than the income statement or the balance sheet, but which was not produced in evidence. He had reliance in *Daniel Mburu Muriu v Hygrotech East Africa Ltd* [2021] eKLR to support this assertion.
39. It is submitted that even where an employer has a good reason for declaring a position redundant, the employees affected have to be chosen through a fair process, while in this case, the Respondents failed in its selection criteria, the need for consultation with the Claimant and/or labour officer and notice to the labour officer as well as notice to the Claimant.
40. The Claimant submitted that on preponderance of evidence, the Respondent terminated his services on account of redundancy without complying with the mandatory provisions of Section 40 of the *Employment Act*, and hence the termination was rendered unfair. He placed reliance in *Paul Ngeno v Pyrethrum Board of Kenya Limited* [2013] eKLR to support this position.
41. The Claimant submitted that for salary to be reduced, the Respondents ought to have communicated the intention in writing to him, and that he on the other hand, ought to have expressly accepted the proposal in writing before the reduction can be effected.
42. The Claimant finally submits that he is entitled to the prayers spelt out in his statement of claim.



## **The Respondents' Submissions**

43. It is submitted for the Respondents that there is no cause of action that has been disclosed as against the 2<sup>nd</sup> Respondent to warrant any reliefs sought in the Statement of Claim against the 2<sup>nd</sup> Respondent.
44. The Respondents further submit that in terms of compliance with the provisions of Section 40(1)(a) and (b) of the *Employment Act*, the 1<sup>st</sup> Respondent was in full compliance. It is their further submission that the Claimant's own testimony was that in the Accounts department of the 1<sup>st</sup> Respondent, there were three Accountants, the Claimant being the senior most. The Respondents placed reliance in Malindi Employment and Labour Relations Court Claim No 35 of 2018 *Abmed Mwarumba Mwavita v Kocos Kenya Limited* to support this position.
45. The Respondents submitted that there was no criteria that was to be followed by the Respondents as is alleged, and pleaded at paragraph 29 of the Statement of Claim to declare that the Claimant was the ideal candidate for redundancy. It is their submission that the Termination Notice elaborated that the 1<sup>st</sup> Respondent "was experiencing extreme difficulties, cash flow problems and the drastic reduction of student enrolment leading the 1<sup>st</sup> Respondent to borrow in order to sustain salaries payable to employees and suppliers".
46. The Respondents submitted that with regard to leave pay, the 1<sup>st</sup> Respondent in the Termination Notice indicated that the Claimant's dues were to be paid at handover and upon clearance.
47. It is the Respondents' submission that the only reason the Claimant has not been paid is for opting to file suit against the Respondents, instead of presenting himself for clearance and handover which is the standard practice with all employment contracts.
48. It is their further submission that the Claimant admitted on cross examination that he has never bothered to collect his dues nor present himself for clearance with the 1<sup>st</sup> Respondent, hence the fault is not with the Respondents but the Claimant.

## **Analysis and Determination**

49. I have considered the pleadings, the witnesses' testimonies and the Parties' written submissions. The issues that fall for determination are:
  - i. Whether the Claimant has proved a valid claim as against the 2<sup>nd</sup> Respondent
  - ii. Whether the declaration of redundancy was within the law
  - iii. Whether the Claimant is entitled to the remedies sought.

## **Whether the Claimant has proved a Valid Claim as against the 2<sup>nd</sup> Respondent**

50. The 2<sup>nd</sup> Respondent has prayed to this Court to find that it was wrongfully joined in these proceedings, and an order issued dismissing the suit as against the 2<sup>nd</sup> Respondent with costs.
51. The Claimant's position is that he joined the 2<sup>nd</sup> Respondent to this suit for reason that it approved a service call that resulted in his transfer from Kendu Adventist Hospital to the service of the 1<sup>st</sup> Respondent.
52. RW1 and by extension the 1<sup>st</sup> Respondent, submitted that the Claimant was in their employ and further that the 2<sup>nd</sup> Respondent is an unregistered entity without capacity to either sue or be sued.



53. The Black law dictionary defines an employee in the following as follows:
- “A person who works in the service of another person (the employer) under and express or implied contract of hire, under which the employer has the right to control the details of work performance”.
54. Further, the *Employment Act*, 2007, defines an employee as: -
- “a person employed for wages or a salary and includes an apprentice and indentured learner; and an “employer” means any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual and includes the agent, foreman, manager or factor of such person, public body, firm, corporation or company;..”
55. The Claimant’s position is that the West Kenya Union had an oversight role over the 1<sup>st</sup> Respondent and that his transfer could not have been made without the authority of the 2<sup>nd</sup> Respondent.
56. By a letter dated 3<sup>rd</sup> June, 2014, the Kendu Adventist Hospital notified the Claimant of a service call from the 1<sup>st</sup> Respondent through the West Kenya Union conference to serve as a senior account with the 1<sup>st</sup> Respondent
57. The issue then become whether the approval of transfer by the 2<sup>nd</sup> Respondent created an employer/employee relationship between the 2<sup>nd</sup> Respondent and the Claimant. In *Yewens v Noakes* (1880) 6 QB. The Court defined an employer/employee relationship as: -
- “A servant is a person subject to the command of his master as to the manner in which he shall do his work”
58. It is not disputed that the Claimant’s salaries was paid by the 1<sup>st</sup> Respondent, and further that the redundancy notice issued to the Claimant on 30<sup>th</sup> July, 2018, and which terminated his employment, was not copied to the 2<sup>nd</sup> Respondent.
59. It is however worth noting that the letter dated 30<sup>th</sup> August, 2016, appointing the Claimant to the position of Acting Deputy Principal Finance and planning was copied to the West Kenya Union Conference/2<sup>nd</sup> Respondent amongst others.
60. The Claimant was issued with letters of appreciation for outstanding work by both the 1<sup>st</sup> and 2<sup>nd</sup> Respondent in the years 2018 and 2017 respectively, while in the service of the 1<sup>st</sup> Respondent.
61. In my view, going by the analysis in the foregone paragraphs, the 2<sup>nd</sup> Respondent had considerable control over the Claimant’s work performance, which qualifies it as an employer.
62. I thus return that the joinder of the 2<sup>nd</sup> Respondent to this suit, is not misplaced and decline the prayer to strike it out of the suit.

### **Whether the Declaration of Redundancy was within the Law**

63. Section 40(1) of the *Employment Act*, 2007 provides for redundancy as follows: -

“40. Termination on account of redundancy

- (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 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."

64. The redundancy notice served upon the Claimant is dated 30<sup>th</sup> July, 2018. The notice indicates that it was to take effect from the date of the letter/immediately. Further, the Claimant was notified that the redundancy was attributed to the extreme financial difficulties and cash problems owing to the reduced student enrolment at the college.
65. The 1<sup>st</sup> Respondent's assertion is that it fully complied with the provisions of Section 40 of the *Employment Act*, in declaring the redundancy.
66. The Claimant on his part contends that the Respondents as employers, have the prerogative to elect to declare employees redundant for justifiable reasons. It is his position that the Respondents' financial difficulties upon which the redundancy is premised was not proved.
67. The Court of Appeal in *Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others* [2014] eKLR had this to say on redundancy: -

" 54. Section 40(1) of the *Employment Act* requires employers contemplating redundancy to give the employees or their trade union notice of at least one month. In addition to providing the parties with an opportunity to try and avert or minimize terminations resulting from redundancy and mitigate the



adverse effects of such terminations, the other objective of a reasonable notice, as was stated in the English case of *Williams v Compare Maxam Ltd* 11 is:

“to enable the union and employees who may be affected to take early steps to inform themselves of the relevant facts, consider possible alternative solutions and, if necessary, find alternative employment in the undertaking or elsewhere.”

68. The redundancy notice clearly indicates that the same was to take effect immediately. The Claimant was thus not at all given a notice of redundancy as envisaged under Section 40(1)(b) of the [Employment Act](#).
69. Nothing shows that the Claimant was a member of a union. The Respondents were thus under obligation to issue him a thirty (30) days redundancy notice copied to the labour officer. Indeed, the Labour officer was copied with the redundancy notice, and who in return informed the 1<sup>st</sup> Respondent, that the redundancy issued violated the law on account of the notice period, and in not detailing the dues payable to the Claimant.
70. The Claimant told the Court that out of the 1<sup>st</sup> Respondent’s three accountants, he was the senior most accountant, both in time and seniority. He further contends that for reason of his seniority, the 1<sup>st</sup> Respondent violated the requirements of Section 40 (1)(c) of the [Employment Act](#), in arriving at the decision to declare him redundant.
71. The 1<sup>st</sup> Respondent has not shown how they arrived at the decision to declare the Claimant redundant having confirmed that he was the senior most accountant both in title and in time.
72. In [Paul Ngeno v Pyrethrum Board of Kenya Limited](#) [2013] eKLR the Court opined thus: -

“... termination on account of redundancy would be unfair where the claimant was not accorded the redundancy procedure as provided for in section 40 of the *Employment Act*, 2007 or he was not given any notice or prepared for the redundancy and the selection criterion was not disclosed to the claimant. Where an employee is one of several employees holding a similar office or position, the Court holds that the employee is entitled to be informed the criteria used to select him for the redundancy or the fact that all offices similar to the one held by the claimant have been rendered redundant.”
73. In the circumstances, I find and hold that the Claimant’s redundancy was unlawful on account of notice period and the criteria adopted.

### **Whether the Claimant is Entitled to the Remedies Sought.**

74. The Claimant’s claims against the Respondents are a declaration that the decision of the 1<sup>st</sup> Respondent to reduce his salary is unlawful and malicious; an order for payment of the salary deducted; an inquiry into the payment of statutory deductions, loan deductions and monies deducted from his salary on account of HELB, and an order for the reimbursement of the deductions; one month salary in lieu of notice; payment on account of accrued leave; a declaration that his redundancy is unfair, compensation for unfair termination; costs of the suit and interests.

### **Reduction of Salary**

75. The 1<sup>st</sup> Respondent’s position is that the Claimant in the Audit Wage Sheet recommended reduction of salaries including his own, and which recommendation the 1<sup>st</sup> Respondent adopted. It is their case



that the Claimant is estopped from alleging that the adjustment of his salary was done without his knowledge.

76. The Claimant admitted being the Respondents' financial advisor and having prepared and signed the Audit Wage sheet which recommended reduction of salaries for all the employees of the Respondents.
77. It is also not disputed that the Claimant drew the reduced salary for over five months without complaining- at least not formally, if he did verbally as he alleged.
78. For a reduction of salary to be valid, an employer ought to obtain the approval of an employee by communicating the reduction to an employee in a letter, and causing the letter to be accepted by the employee.
79. It is my view, it is clear that the Claimant was indeed alive to the Respondent's financial situation, and that the 1<sup>st</sup> Respondent had obtained the approval of the employees to reduce salaries as evidenced by the wage sheet prepared and executed by the Claimant in January, 2018.
80. I thus find the Claimant's claim for payment of reduced salaries lacking in merit and is dismissed.  
Reimbursement of unremitted statutory deductions, loan deductions and HELB
81. The 1<sup>st</sup> Respondent did not deny owing the Claimant on account of deductions made and not remitted. It however did not come clean on the actual amount it deems due and owing as to enable the court decide on the actual amount payable.
82. The Court thus returns that the Claimant's claim on deductions is uncontroverted and is awarded as prayed in respect only of the loan and HELB deductions.
83. PAYE is a Statutory deduction which ceases being the employee's money once deducted, and which instead, becomes a legal entitlement of the statutory body on whose behalf the deduction is made.
84. The law provides mechanisms for recovery of unremitted statutory deductions. Consequently, the claim for reimbursement of unremitted deduction in respect of PAYE is declined.

#### **One Month Salary in Lieu of Notice**

85. The 1<sup>st</sup> Respondent admitted this claim, and their only reason for not remitting the notice pay was for failure of the Claimant to indicate the mode of payment.
86. The 1<sup>st</sup> Respondent paid the Claimant salary for 7 years and cannot now pretend not to know the Claimant's preferred mode of payment.
87. The claim is merited and Claimant awarded one-month salary in lieu of redundancy notice.

#### **Payment on Account of Accrued Leave**

88. The Respondents admitted this claim in their submission and further indicated that the Claimant's dues were to be paid at handover and upon clearance.
89. Leave accrues annually and is thus considered a continuing injury per Section 90 of the Employment. Although the Claimant claims payment for leave accrued over three years, he is awarded one month salary on account of leave being the only valid portion of the claim.
90. In whole, the Court makes orders that: -
  - i. A declaration that the Claimant's redundancy is unfair



- ii. The Respondent pays the Claimant three months' salary as compensation for the unfair termination at Kshs 177,025.38/-
- iii. The Claimant be paid one month's salary in lieu of notice at Kshs 59,008.46/-
- iv. Payment of unremitted loan deductions at Kshs 70,816.05/-
- v. Unremitted HELB deductions at Kshs 14,591.50/-
- vi. Payment for leave not taken at Kshs 59,008.46/-
- vii. The Claimant be issued with a certificate of service unconditionally
- viii. The Respondent shall bear the costs of the suit and interest until payment in full.

91. Judgment accordingly.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 29<sup>TH</sup> DAY OF JUNE, 2023.**

**C. N. BAARI**

**JUDGE**

Appearance:

Ms. Anyango present for the Claimant

Mr. Onyango present for the Respondents

Christine Omolo- C/A

