



**Katendeigwa v D Light Limited (Cause 770 of 2019)
[2023] KEELRC 1581 (KLR) (22 June 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1581 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 770 OF 2019
BOM MANANI, J
JUNE 22, 2023**

BETWEEN

GEORGE KATENDEIGWA CLAIMANT

AND

D LIGHT LIMITED RESPONDENT

JUDGMENT

Introduction

1. The parties to this action had an employment relation until 16th September 2019 when the Claimant's position was allegedly declared redundant. The Claimant disputes the Respondent's decision to declare his position redundant. And hence, this action.
2. The Respondent filed a Statement of Defense outside the time prescribed by law. Despite the court granting them an opportunity to regularize their client's position, the defense team did not make any efforts to cure the anomaly.
3. Meanwhile, the matter was set down for hearing on 14th March 2023. This date was fixed by consent of the parties.
4. On the trial date, the defense team was not in attendance. Besides, there was no indication that they had made effort to regularize their pleadings as suggested on 14th February 2023.
5. Upon the application of the Claimant's counsel, the matter proceeded as undefended. The Claimant's evidence was taken where after the court adjourned to enable the filing of closing submissions before delivery of judgment.



Claimant's Case

6. The Claimant stated that he was first hired by the Respondent on 1st November 2016 as the Respondent's Country Manager, Uganda. He served in this position until May 2019 when the Respondent attempted to end the relation between the parties by requiring the Claimant to sign a Mutual Separation Agreement.
7. According to the Claimant, despite his misgivings about the request, he finally agreed on the terms of separation. From the draft Deed of Separation that is on record, the Claimant was to be paid USD 274,851.12 as his exit package. However, as matter would later turn out this was not to be.
8. On the date that the parties were to execute the separation agreement, the Claimant avers that the Respondent offered him a new appointment. He was now to serve as the Respondent's Sales and Distribution Director, Africa. The parties signed a new contract of employment dated 15th May 2019.
9. Under the new contract, the Claimant's monthly emoluments are indicated as: guaranteed basic salary of USD 18,159.65 per month; house allowance of USD 2000 per month; and mileage allowance of USD 3000 per month. In addition, the Respondent was to provide the Claimant with an air ticket for travel to Uganda every quarter at full cost.
10. On 14th August 2019, the Respondent issued the Claimant with a redundancy notice. The notice intimated that the Respondent was undertaking restructuring and as a consequence, the Claimant's position was likely to be rendered unnecessary.
11. On 16th September 2019, the Claimant's employment with the Respondent was terminated. The reason for the termination of the contract was stated as redundancy. This communication was made through the Respondent's letter to the Claimant dated 16th September 2019.
12. The Claimant has contested the alleged redundancy. In his view, there was never a redundancy at the Respondent organization. The idea of redundancy was used as a smokescreen to unfairly terminate his contract of employment.
13. The Claimant justifies his position on a number of grounds: first, he questions why a position that had been established in May 2019 would be found unnecessary in September 2019 just four months down the line; second, the Claimant relates the purported redundancy to the earlier attempt to force him to quit his employment which the Respondent realized was going to be costly to it; third, the Claimant attributes his job loss to unpleasant relation that he had with his immediate supervisor.

Issues for Determination

14. There is evidence on record that the Claimant was in the employment of the Respondent. In any event, this would be the only logical basis for the Respondent trying to end the relation between the parties through the issuance of the impugned redundancy. In the premises, it is unnecessary for the court to spent time interrogating whether the parties had a subsisting employment relation at the time the cause of action arose.
15. That being the case, the court is called upon to interrogate only two questions in the dispute. These are: whether the decision to declare the Claimant's position redundant was valid in law; and whether the Claimant is entitled to the reliefs that he seeks through his pleadings.



Analysis

16. Employers have every right to restructure their enterprises in order to make them viable. In this process, it is acknowledged that there may be some job losses. So long as the job losses are attributable to a legitimate redundancy process, the law would not fault the employer's decision in this regard. However, redundancy ought not to be used to mask unfair termination of an employee's contract of service. It is for this reason that the law requires the redundancy process to be transparent and to be supported by valid reasons.
17. Section 40, 43 and 45 of the *Employment Act* are material in this respect. Section 40 of the *Act* sets out, in detail, the procedure to be followed when declaring a redundancy at the workplace.
18. The employer must issue the requisite redundancy notices to the employees likely to be affected by the process and or their Trade Unions. In addition, the employer is required to notify the Ministry of Labour about the redundancy.
19. The notices for the intended redundancy are required to be for a period of not less than one month before the date of the actual termination of the contract of service. The notices should address two critical issues: first they must indicate the reason for the proposed redundancy; and second, they must indicate the extent of the proposed redundancy.
20. The employer is required to select employees that should be released from employment using the procedure that is stipulated under the *Act*. Absent other considerations, the employer is expected to apply the 'first in last out' principle in picking the employees to be released from employment. This principle requires that all factors remaining constant, the first employees to have been hired by the organization should be the last ones to be released from employment.
21. However, in recognition of the role that the tool of redundancy is intended to serve at the workplace, the law permits the employer to sidestep the "first in last out" principle and apply other parameters to conduct the selection process. These include the skill, reliability and ability of employees.
22. Through this, the employer will be able to select employees that are most suitable for the enterprise to remain. For example, a recently recruited employee may be retained at the expense of a long serving employee because he has the skills that the enterprise requires.
23. However, when the employer resorts to the other parameters to undertake the selection process, he must do so in a manner that is transparent and verifiable. This will ensure that the employer does not invoke redundancy as an excuse for getting rid of employees that he does not like for reasons other than those that the law recognizes.
24. Finally, the employer is obligated to pay the employees released from employment in accordance with the law. Where the parties have a Collective Bargaining Agreement that provides for better exit terms, the employer is required to pay the employees in accordance with the terms of the Collective Bargaining Agreement.
25. Section 43 of the *Employment Act* requires the employer to justify the decision to terminate an employee's contract of service. Under section 45 of the *Act*, the employer is expected to satisfy the requirements of section 43 aforesaid by demonstrating that there was a valid and fair reason to terminate the employee's employment and that the employment was terminated in accordance with fair procedure. For redundancy, the employer must be able to provide evidence to demonstrate that there was an operational need that necessitated declaration of a redundancy.



26. It is not sufficient for the employer to merely refer to the need to reorganize the workplace as a reason for declaring a redundancy. In addition, the employer must provide empirical evidence to demonstrate that the reorganization was necessary and that it in fact did happen. Part of the evidence in this respect may be: evidence of surveys conducted by the employer demonstrating the need to restructure; evidence of minutes of meetings at which the proposed restructuring has been considered and approved for corporate agencies; evidence of the pre-existing corporate structure of the employer; and evidence of the post-restructuring organogram of the employer.
27. All these will go into demonstrating the need for the restructuring, the fact that the restructuring was implemented and the fact that some positions were lost as a result. It is not enough, in my view, for the employer to simply splash bare email correspondence between the parties as evidence of the need to restructure. Such email correspondence may not provide the empirical data that informed the decision by the employer. Similarly, such emails may not provide cogent evidence of certain positions having disappeared as a result of the alleged restructuring.
28. This is the unfortunate scenario that the Respondent finds itself in. Beyond the bare email correspondence suggesting the need to restructure the organization, there is no evidence presented to court providing data that informed the purported decision. There is no evidence of meetings at which the decision was considered. There are no resolutions by the Respondent's board sanctioning the purported restructuring. In effect, there was no cogent evidence to support the Respondent's assertion that it underwent a restructuring process whose consequence was the loss of the Claimant's position.
29. Besides, whilst the redundancy notice served on the Claimant speaks to the question of the probable reason for the redundancy, it does not indicate the extent of the redundancy. Beyond stating that the Claimant's position was likely to be lost, the notice is silent on whether the redundancy affected other positions in the company. This information was necessary in order to affirm that the exercise was both genuine and transparent.
30. It is also clear from the record that the Ministry of Labour was not served with the redundancy notice. The failure to serve the Ministry with the notice was in clear contravention of section 40 (1) (a) and (b) of the *Employment Act*.
31. As submitted by the Claimant's Advocates, the procedure set out above is intended to open avenues for the parties to negotiate ways of ameliorating the consequence of the redundancy decision. In the process, the parties may agree on ways of avoiding the redundancy by for instance re-deploying the employee to another department. There is no evidence that the Respondent made any effort in this respect before it released the Claimant.
32. In the case of *Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others* [2014] eKLR the court captures this spirit quite aptly when it expressed itself as follows:-

The purpose of the notice under Section 40(1) (a) and (b) of the *Employment Act*, as is also provided for in the said *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." The consultations are therefore meant to cause the parties to discuss and negotiate a way out of the intended redundancy, if possible, or the best way of implementing it if it is unavoidable. This means that if parties put their heads together, chances are that they could avert or at least minimize the terminations resulting from the employer's proposed redundancy. If redundancy is



inevitable, measures should to be taken to ensure that as little hardship as possible is caused to the affected employees.’ Emphasis added through underlining.

33. According to the notice of intended redundancy, the function of assessing new markets was to be moved to the global partnership team. From the Claimant’s job description, it is clear that his roles included strategic driving of sales and distribution. This mandate is correlated with the function of assessing and expanding into new markets which was to now vest in the global partnership team.
34. It unclear from the record what informed the Respondent’s conclusion that the Claimant was unsuited for deployment to the global partnership team to continue executing his functions from there. It is also unclear whether those serving in the global partnership team had better qualifications than the Claimant in order to take up his functions. If those in the global partnership team had similar skills and qualifications as the Claimant, it is unclear why and how the Respondent reached the conclusion that they should be retained at the expense of the Claimant. In effect, it is not clear which selection criteria the Respondent applied to arrive at its decision in this respect. Prima facie, there is no objective criterion which the Respondent is shown to have applied to determine who of these persons was to go and who was to remain.
35. In the case of *Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others* [2014] eKLR, the court emphasized the need for the selection process to be above board in order to insulate the redundancy exercise from being converted into a platform for victimization of employees. The court expressed itself as follows:-

I do not agree with the learned Judge that the “last-in-first-out” principle in Section 40(1)(c) must always be employed. The employer can use all or any of the criteria in that paragraph. In the present technological age, if the “last-in-first-out” principle is held to be mandatory, it may defeat the employer’s objective of employing modern technology to carry out his business because it may be that the last employees to be employed, who according to this principle should be the first to exit, are the ones with the technological knowhow that the employer requires. All this notwithstanding, however, in a nutshell, I find that the appellant employed an opaque criteria in the selection of the retrenched employees that did not meet the statutory threshold.”

36. Considering the turbulent events that preceded the redundancy process and in the absence of cogent evidence placing the redundancy declaration above board, it is reasonable to infer that the Respondent abused the redundancy procedure to achieve a predetermined decision to terminate the services of the Claimant. Otherwise, it is difficult to explain how a multinational corporation would establish a new position only to come to the realization that the position was in fact not required hardly four months down the line. Does the Respondent want a bystander to entertain the thought that it was groping in the dark and gambling with its business decisions in this respect?

Determination

37. Having regard to the totality of the evidence before me, I find that the Respondent has neither demonstrated that it had valid reason to declare the Claimant’s position redundant nor was the decision processed in accordance with due process. Consequently, I declare the decision unlawful.
38. The next question for determination is whether the Claimant is entitled to the reliefs that are pleaded in his Statement of Claim. Having come to the conclusion that the decision to terminate his employment was unlawful, the Claimant is entitled to the reliefs provided for under section 49 of the *Employment Act* as read with his employment contract.



39. I grant the Claimant compensation for unlawful termination of his contract of service that is equivalent to his gross monthly salary for eight (8) months. At USD 23,159.85 per month, the award under this head is USD 185,278.80. In making this award, I have considered that the Claimant's conduct did not contribute to his loss of employment. I have also considered the seniority of the Claimant's position, a fact that may make it difficult for him to secure similar employment in the job market.
40. The Claimant prayed for 45 days pay on account of accrued leave. However, during his testimony in court, the Claimant clarified that out of the 45 days, the Respondent had settled 21 leaving 24 days outstanding. At a gross salary of USD 772 per day, the Claimant is entitled to USD 18,528.00 under this head. I award this sum to cover accrued leave pay.
41. Although the Claimant prayed for accrued travel expenses, there was no evidence to support the figure he pleaded. Consequently, the claim is declined.
42. The Claimant has also prayed for service pay. Yet, his pay slip for September 2019 shows that he was paid gratuity accumulation of Ksh. 2,778,426.45. In his pleadings, the Claimant concedes that the Respondent paid him terminal dues amounting to USD 94,033.00. Having regard to the foregoing, I am convinced that the Claimant was paid gratuity accumulation and or service pay of USD 41,946.00 as part of the terminal dues comprised in USD 94,033.00.
43. Importantly, under the Kenyan law which was expressed to be the applicable law to the employment contract between the parties, service pay is only payable to persons who are not members of a gratuity or service pay scheme. Further, those who are registered as contributors to the National Social Security Fund (NSSF) are expressly excluded from benefiting from service pay by virtue of section 35 (6) (d) of the *Employment Act*.
44. The pay slips produced in evidence show that the Claimant was a contributor to the NSSF. Therefore, he cannot lawfully pursue service pay.
45. The Claimant has also prayed for USD 247,851.12 as the agreed exit package. Although the parties initially proposed this figure as the Claimant's exit package for the earlier contract, there is no evidence that this proposal eventually matured into a firm agreement between them. It is therefore not possible to hold that this figure had crystallized.
46. The fact that the figure of USD 274,851.12 did not crystallize is supported by the subsequent email from the Respondent's management dated 15th May 2019 offering the Claimant \$206K. The Claimant suggests that the sum of \$ 206K was a separate amount representing the agreed gratuity. If this was the case, then the proposed final settlement in the draft agreement appearing at page 16 of the Claimant's bundle of documents would have contained a higher figure than USD 274,851.12. This leads me to the inevitable conclusion that the figure of \$ 206K in the email of 15th May 2019 was intended as a counter offer to the figure of USD 274,851.12 that had been tabled earlier on. Therefore, it will be preposterous for me to treat the amount of USD 274,851.12 as the agreed exit package for the Claimant and issue an order for its payment.
47. Importantly, the figure of USD 274,851.12 was proposed as an exit package for the earlier contract between the parties dated 1st November 2016. However, this was superseded when the parties entered into the new contract dated 15th May 2019. In my view, a proposal that was intended to close the earlier contract of 1st November 2016 cannot be invoked to remedy a breach of the new contract between the parties as the new contract constituted an entirely distinct arrangement between them. For this reason, I decline to award the Claimant the sum of USD 274,851.12 as prayed in the Statement of Claim.



48. I grant the Claimant interest on the amount awarded at court rates from the date of the court's judgment till payment in full.
49. The award aforesaid is subject to the applicable statutory deductions.
50. Costs of the case are granted to the Claimant.

DATED, SIGNED AND DELIVERED ON THE 22ND DAY OF JUNE, 2023

B. O. M. MANANI

JUDGE

ORDER

In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

B. O. M MANANI

JUDGE

