



Ayieko & 3 others v Samaritan Purse (Employment and Labour Relations Cause 312 of 2017) [2023] KEELRC 1411 (KLR) (9 June 2023) (Judgment)

Neutral citation: [2023] KEELRC 1411 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
EMPLOYMENT AND LABOUR RELATIONS CAUSE 312 OF 2017**

NJ ABUODHA, J

JUNE 9, 2023

BETWEEN

**PATRICK OMONDI AYIEKO 1ST CLAIMANT
FRED WANYONYI MAFUGA 2ND CLAIMANT
SAMUEL MUGEKE KWENDHO 3RD CLAIMANT
CHARLES ODUNDO AYIEKO 4TH CLAIMANT**

AND

SAMARITAN PURSE RESPONDENT

JUDGMENT

1. The claimants alleged that they were employees of the respondent in various positions based in Eldoret. On March 1, 2017 they were issued with notification of redundancy which culminated in their employment being declared redundant on April 19, 2017.
2. According to the claimants the said notices and declaration of redundancy was in contention of Section 40 of the *Employment Act, 2007* was procedurally unlawful and unfair and amounted to unfair termination for the following reasons:-
 - a) The reasons advanced for the said redundancy, that the importation of goods by NGO's to South Sudan had become onerous due to the enforcement of regulations and restrictions implemented by the Government of South Sudan is not a factor that was beyond the control of the Respondent to justify redundancy. The purported redundancy was therefore effected devoid of valid and justifiable reasons.
 - b) No meaningful, real and bonafide consultations were held and/or conducted in good faith or at all before the Claimants were declared redundant. The



Claimants were not supplied with sufficient information to enable them respond neither were they given sufficient time within which to respond and as such proper negotiations did not take place. Further all the issues raised by the Claimants were never addressed and or considered at all and were basically met with '7 do not have answers now', '7 cannot make promises', and "we will get back to you" responses.

- c) The Eldoret Labour officer was not notified of the reasons for and the extent of the intended redundancy in contravention of Section 40(1) (b) of the [Employment Act 2007](#).
 - d) The criteria adopted in the selection of employees to be declared redundant was not in compliance with Section 40(1) (c) of the [Employment Act 2007](#) and extraneous matters were taken into consideration in reaching the said decision. Indeed of the employees declared redundant, two of them were later recalled and retained by the Respondent and are still working for the Respondent at the Respondents' offices in Eldoret.
 - e) The decision to render the Claimant's redundant was made and or arrived at before the redundancy process was initiated and the process of issuing the notices was merely for information and or cosmetic purposes and not meant to elicit proper negotiations for purposes of consultations with a view to mitigating the adverse effects of the termination of the Claimants' employment.
 - f) To date the Claimants are yet to be issued with their respective certificates of service.
 - g) The Claimants further aver that even if the redundancy was justified, which is denied, the notification of intended redundancy and the termination notices were tainted with illegalities as they were issued in Kenya at the Eldoret office by one Mark Anderson who at the material time was working in the country illegally having not obtained and or been issued with a work permit under the [Kenya Citizenship and Immigration Act](#) No 12 of 2011 and as such the said notices were therefore null and void.
3. As a result the claimants claim against the respondent maximum compensation for unfair termination of employment equivalent to 12 months gross salary. That is to say the claimants claimed the total sum of Kshs 7,112,844/= for the four of them.
 4. The respondent filed a statement of response on January 17, 2018 in which it stated inter-alia
 - i) Respondent admits the contents of paragraph 3 of the Memorandum of Claim to the extent that the Claimants were employed in various positions at its Eldoret office but states that the Claimants' positions were declared redundant,
 - ii) The Respondent partly admits tire contents of paragraph 4 of the Memorandum of Claim insofar as notifications of intended redundancies were issued but states that it is the Claimants positions of employment that were declared redundant. The Claimants are put to strict proof to die contrary.



- iii) Respondent denies the contents of paragraph 5(a-f) all-inclusive of the Memorandum of Claim that it contravened section 40 of the [Employment Act 2007](#) and states in denial as follows:
- a) The reasons advanced for the said redundancy touched on matters that existed at the time of termination to wit the enforcement of regulations implemented by the Government of South Sudan (GOSS) which impacted on the operations of the Samaritan's Purse South Sudan office,
 - b) That upon issuance of letters of Notification of Intended redundancies, which were duly acknowledged by the Claimants, the Respondent invited the Claimants' and sought their views and/or responses on the matter upon which no objection was raised by the Claimants on the procedure and substance of the redundancy. Additionally, issues and concerns raised by the Claimants were ably dealt with by the Respondent.
 - c) The EJDoret Labour Office and the Claimants were personally notified of the reasons for and the extent of the intended redundancy in strict compliance with section 40(1) (b) of the [Employment Act](#).
 - d) The selection procedure was in compliance with section 40(1)(c) and other requirements of the [Employment Act 2007](#). There were no extraneous matters within the knowledge of the Respondent. In any event; the Claimants have not provided proof on the fact that employees allegedly recalled to work in department or positions declared redundant.
 - e) The Claimants' were duly notified the reasons for redundancy as stated in paragraph 4(a) above of the Response to Memorandum of Claim.
- iv) The Respondent denies the contents of paragraph 6 of the Memorandum of Claim and reiterates the contents of paragraph 4 (above of the Respondent's Response to Memorandum of Claim. Additionally, the Respondent states that it complied with the mandatory provisions of section 40 of the [Employment Act](#). The Claimant is put to strict proof to any allegations to the contrary.
- v) In response to paragraph 7 of the Memorandum of Claim, the Respondent states that the claim compensation has no basis in law since it complied with the mandatory provisions of the [Employment Act](#) when declaring the Claimants positions redundant. Similarly, the Respondent states that it paid the Claimants all their dues as provided by the Employment. Act, The Claimants are invited to strict proof to anything to the contrary.

5. At the hearing the 1st claimant Mr Patrick Omondi gave evidence on behalf of the rest. He stated that he recorded a witness statement on July 17, 2017 which he relied on as his evidence in chief. He also relied on the document filed with the claim as well as supplementary documents.



6. According to him, Mr Fred and himself were employed on permanent basis which Charles and Samuel were on contract. Samuel and Charles were employed in 2011 while Fred and himself joined in 2002 and 2006 respectively. They however all left on May 1, 2017 when they were declared redundant. They served with redundancy notices but they felt the process was not fair and procedural. They were not engaged in the discussion prior to the declaration of the redundancy. They were just told about their redundancy and their views were not sought. The witness further stated that he was not aware of the view of the Labour Officer was sought. He also stated that their dues were paid upon being terminated but they thought they were not sufficient as the respondent deducted most of the money. They went home empty handed and this had a serious impact on their lives.
7. Patrick further stated that the respondent was an international. There was no warning that it planned to close down and as logistics manager, he was linked to avenues they could have exemptions in South Sudan but the manager never took his advise seriously. The respondent had two branches, logistics where he was closed but the airport branch, never closed.
8. In cross-examination he stated that his advise was never considered and that he wrote to the Operations Manager in South Sudan informing him of how the organization could e assisted but he never responded. He conceded that he was aware of the challenges in South Sudan and further that they were served with redundancy notice. The notices stated the grounds for the redundancy. A meeting was called before the notices were issued but was not a meeting where they could all engage. They were paid terminal dues but with huge deductions.
9. Mr Ayieko further stated that he was aware of the redundancy procedure and that the respondent were considered the procedure of last in first out. Fred was the Senior most but was knocked out.
10. Mr Ayieko was shown the redundancy notice and stated that he saw the same for the first time in court. The document was addressed to the Labour Office in Eldoret. The respondent had two offices one in Nairobi and one in Eldoret. He was in the Nairobi office, but overseeing the Eldoret office.
11. It was further his evidence that WASH procurement and logistics were called back and further that parts procurement and medical coordination were also called back.
12. The officers called back were junior to him but they had served for more or less the same period.
13. concerning the final dues document, it was his evidence that they were earlier informed about it and that it provided for severance pay, leave days and basic salary. At the point of payment of their dues the respondent deducted over and above statutory payments, their co-operative loans in lumpsum and this placed a burden on them. The respondent knew they had loans and never gave them a soft landing.
14. In further cross-examination, Mr Ayieko stated that his role was to oversee Eldoret Operations. He further stated that money was deducted by the respondent on account of loans. They received a letter dated April 19, 2017, the letter mentioned about additional deductions on the final dues but were never given an opportunity to complain.
15. The respondent witness one Janet Wahu Kinyua informed the court that she recorded a witness statement on November 10, 2020 which she relied on as her evidence in chief. She further relied on the documents filed with the response. According to her the redundancy was because of regulations that were being implemented in South Sudan. The regulations impacted on the respondents South Sudan Office.
16. A notice was therefore issued that affected staff on March 1, 2017. The respondent invited the affected staff and for their view. The minutes were signed. According to her, staff were given opportunity to ask questions in all meetings. Further a notice was served to the Eldoret Labour Office and that in both



Nairobi and Eldoret office were affected. They were both working on the South Sudanese Project. The 1st claimant was based in Nairobi but oversaw Eldoret and South Sudan as area coordinator.

17. Concerning loans she state that these had to be deducted and the forms the claimants signed permitted the respondent to deduct the outstanding loans upon exit of staff. The Respondent also used to deduct monthly loan repayments. She acknowledged that staff raised an issue over loan repayments but were told these were personal staff matters and that the respondent could not retain staff because of loans.
18. Ms Kinyua further stated that claim for unlawful termination was not true and that all due process was followed.
19. In cross-examination she stated that she was the respondents Human Resource Officer and that she kept all the employee records. She did not have the regulations for the Government of South Sudan in court but the respondent held meetings with them on two occasions.
20. About email, she stated that she had the record of the emails but was not aware of the email produced before the court and that she only had what was produced.
21. Concerning the notification of the Labour Officer she stated that the Labour Office Nairobi was notified and that they produced Labour Officer's letter for Eldoret because the claimants filed a suit in Eldoret.
22. Section 40 of the *Employment Act* provides;

"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.
- (2) Subsection (1) shall not apply where an employee's services are terminated on account of insolvency as defined in Part VIII in which case that Part shall be applicable.
 - (3) The Minister may make rules requiring an employer employing a certain minimum number of employees or any group of employers to insure their employees against the risk of redundancy through an unemployment insurance scheme operated either under an established national insurance scheme established under written law or by any firm underwriting insurance business to be approved by the Minister"

23. In the case of *Aoraki Corporation Limited v Collin Keith McGavin* CA2 of 1997[1998] 2NZLR278 the court held that;-

"Redundancy is a special situation. The employees have done no wrong. It is simply that in the circumstances the employer faces, their jobs have disappeared and they are considered surplus to the needs of the business. There it is decided as a matter of commercial judgment that there are too many employees in the particular are or overall, it is for the employer as a matter of commercial judgment to decide on the strategy to be adopted in the restructuring exercise and what position or positions should be dispensed with in the implementation of that strategy and whether an employee whose job has disappeared should be offered another position elsewhere in the business. It cannot be mandatory for the employer to consult with all potentially affected employees in making any redundancy decision. To impose an absolute requirement of that kind would be inconsistent with the employer's prima facie right to organize and run its business operation as it sees fit.

Kenya Airways Corporation Limited -vs- Tobias Oganya Auma & others where it was held that the court has no jurisdiction to prevent an employer from restructuring or adopting modern technology so long as it observes all relevant regulations. The decision to declare redundancy has to be that of the employer."

24. The burden on the employer therefore is to show that there was substantive justification for the employees redundancy and that the employer substantially complied with Section 40 of the *Employment Act*.
25. In *Kenya Airways Corporation Limited v Tobias Oganga Auma & others* (2003)eklr the Court of Appeal held that the court has no jurisdiction to prevent an employer from restructuring or adopting modern technology so long as it observes all relevant regulations. The decision to declare redundancy has to be that of the employer.
26. From the foregoing Legal pronouncements, the court has carefully considered this case and has noted that the claimants main complaint seems to be their deductions for loans they received while in employment left them wit little money as the redundancy package. They do not seem to have



satisfactorily contested the issue of notification of intention to declare them redundant, the ensuing discussion and the actual declaration of redundancy.

27. To this extent the court is satisfied that the respondent followed the law in declaring the claimants redundant. On the issue of recovery of the loans, this was an obligation on the respondent and in any event the respondent continued to do this when the claimants were in employment.
28. In conclusion the court finds the claim without merit and hereby dismisses the same with costs.

It is so ordered

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 9TH DAY OF JUNE 2023

ABUODHA J. N.

JUDGE

In the presence of:-

.....for the Claimant

.....for the Respondent

