



**Nyogensa v Tophill Hospital Brain and Spine Centre (Cause  
41 of 2019) [2023] KEELRC 1484 (KLR) (9 June 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1484 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET  
CAUSE 41 OF 2019  
NJ ABUODHA, J  
JUNE 9, 2023**

**BETWEEN**

**KENNEDY OSIKE NYOGENSA ..... CLAIMANT**

**AND**

**TOPHILL HOSPITAL BRAIN AND SPINE CENTRE ..... RESPONDENT**

**JUDGMENT**

1. In his statement of claim filed on September 12, 2019, the Claimant pleaded among others that:
  - i. At all material times to this suit, the Claimant was permanently employed by the Respondent as a Project Manager with effect from January 6, 2018.
  - ii. The Claimant's duties entailed coordinating internal resources and vendors for flawless execution of the project and ensure resource availability and mobilization. The Claimant was further in charge of setting up the various departments and coordination of hospital operations, human resource management including management of staff grievances, patients and all other respondent's clients. The claimant further oversaw effective maintenance of the hospital, the hospital facilities, equipment, and regular maintenance of civil works. The claimant was further in charge of regular team meetings of various departments to ensure flawless communication and information sharing, service delivery and other development concerns etc.
  - iii. The Claimant further avers that at the time of employment he was earning a salary of Kshs 106,000/- which remained constant up to the time of his unfair and unlawful termination from employment on account of redundancy. The salary was made up of Basic pay of Kshs 75,000/- and House Allowance of Kshs 31,000/- making a total of Kshs.106,000/- as reflected on the claimant's pay slips.



- iv. The Claimant served the Respondent with loyalty, diligence and with full dedication and commitment until March 31, 2019 when the Respondent unfairly, un - procedurally and unlawfully terminated the Claimant's services and refused to pay him his terminal dues and accrued benefits.
- v. The Claimant avers that the Respondent terminated his services on account of redundancy *vide* a letter dated March 26, 2019 and received by the claimant on the March 29, 2019 stating that the construction work at the Respondent's premises had been concluded thus declaring the Claimant's services redundant.
- vi. The Claimant aver that the allegations that the construction work was over is not true as the hospital is still under construction. The portioning is still ongoing. The pathways are still under construction and tiling works is still ongoing including expansion etc.
- vii. That the claimant's services to the respondent went beyond construction works and supervisions thereof. The claimant's services to the respondent is as described above. The reasons for redundancy on allegations of lack of work is therefore not true.
- viii. The claimant was not issued with the relevant notices as envisaged under section 40 of the *Employment Act*, 2007. The claimant was not paid leaves dues and severance pay. The claimant worked overtime without pay. The claimant worked during the public holiday and without rest for the entire period of service without pay.
- ix. The claimant aver that for the entire period of service, he reported to work at 7:30 am and left at 8:30 pm. That work attendance records of proof of overtime averments are with the respondent and the claimant in circumstance thereof gives notice to the respondent to produce the same at the time of pre - trial and trial of this suit.

2. The Respondent filed a statement of response in which it averred inter alia:

- a. That it is indeed not in dispute that the Claimant was employed by the Respondent on January 1, 2018 as a Project Manager on contract basis.
- b. The Claimant's employment status remained contractual for the entire employment period.
- c. The Claimant was terminated for the reason that the Respondent's construction project has concluded rendering the Claimant's position as Project Manager of the construction work redundant.
- d. The Respondent reiterates that the construction work in the Respondent's buildings and premises have concluded. The Claimant's averment that expansion is being done is inaccurate. The construction of the Hospital concluded and the Claimant's position became redundant and obsolete.
- e. The Respondent avers that indeed the Claimant acknowledged that his job became redundant when he applied and was interviewed for the position of Marketing & General Manager but did not succeed in the interviewing. The Claimant's claim is an afterthought and a reaction to his unsuccessful application for the job of Marketing and General Manager.
- f. The Claimant's terms of employment only pertained to Project Management and not human resource management, procurement, effective running of the hospital, quality assurance and customer care services as alleged by the Claimant suffice to say it is not tenable for one individual to run all those departments single-handedly.



- g. The Respondent has a Chief Executive Officer who oversees all other departments in the institution and the claim that the Claimant was performing the roles that fall under the docket of the Chief Executive Officer is misleading and inaccurate.
  - h. The Claimant was paid one month's salary in lieu of notice pursuant to Section 40 (f) of the *Employment Act*.
  - i. The Claimant did not work on leave days or rest days and has no arrears due from the Respondent.
  - j. The Claimant did not work overtime and during holidays neither did he make any application for the payment of work done during alleged overtime and public holidays.
  - k. The Claimant was terminated pursuant to the provisions of Section 40 of the *Employment Act* and that does not constitute unfair termination as averred by the Claimant.
3. At the hearing, the Claimant stated that he was employed from 2018 to 2019 as a project manager. He was to oversee the setting up of the Hospital and all departments. He also oversaw construction. According to him, he was terminated in March 2019. The reason for termination was redundancy. It was his evidence that he never received any prior notice of redundancy and further that he was never paid in lieu of notice. The redundancy was never discussed with him and the Labour Office was never informed of it.
  4. The Claimant further testified that he was never paid severance pay. During the period he worked, he claimed he never went on leave and was never paid overtime although he worked overtime. He used to report to work at 7:30 am and leave at 8.00 pm. There was a biometric clock in machine. It was further his evidence that he worked from Monday to Saturday and at times on Sundays. His monthly salary was Kshs 106,000/- 0(gross pay). The pay slips were before the Court. It is further his evidence that his appointment letter never stated the period of the contract and also never assigned him the duty of supervising the construction works.
  5. He admitted receiving a cheque for Kshs 158,000/- and did not know what the extra amount was for.
  6. In cross examination he stated that he worked as the project manager and that his appointment letter stated he was such. The letter further stated that he was employed on contract basis. The appointment letter further stated that his salary was Kshs 65,333/- and a house allowance of Kshs 21,167/-.
  7. Concerning overtime, he stated that he never wrote any letter asking to be paid overtime. He further stated that he never protested working on Sunday and never applied for leave.
  8. The Respondent witness Mr Florentinus Koech informed the Court that he was the CEO of the Respondent and that the Respondent was employed in January 2018 as project manager. At the time, the Respondent was doing construction and partitioning. These were completed in early 2019. The Claimant was never assigned any duties thereafter. He recorded a statement on January 23, 2020 which he sought to rely on as his evidence in chief. He also relied on his documents filed with the claim.
  9. Mr Koech stated that the Claimant was terminated at the conclusion of the project because there was no other work for him. On the issue of leave, he stated that the Claimant had worked under one year and had not qualified for leave and further that there was no overtime work. They worked according to schedule of the project and there were no designated working hours.



10. Concerning the cheque, it was his evidence that it was for one month's salary in lieu of notice. He further stated that the Claimant after the project applied for Marketing Manager position but was unsuccessful.
11. In cross examination he stated that the Claimant's gross salary was Kshs 55,000/- and his house allowance was Kshs 18,000/- and that his total salary was Kshs 106,000/- per month.
12. According to him, the Claimant was hired as a project manager and the appointment was over the construction. The Respondent had not started operation when he was hired. He further state that the Claimant was not issued with any notice letter specifying his duties.
13. On redundancy he state that the Claimant was issued with the notice of redundancy and further the Respondent informed the Labour Office of the redundancy. He however did not have the notice in Court and further that the Claimant was not given one month's notice but was paid *in lieu* of notice the payment of Kshs 158,000/- included notice.
14. It was common ground by both parties that the termination of the claimant's service was on account of redundancy. What was in dispute was whether the redundancy process adhered to the provisions of section 40 of the *Employment Act*.
15. Section 40 of the *Employment Act* provides:

40(1) An employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions—

  - (a) not relevant
  - (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) not relevant
  - (d) not relevant
  - (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.
16. The claimant herein alleged that the respondent terminated his service on account of redundancy because he was never issued with a redundancy notice and that he was never paid in lieu of notice. Further that the redundancy was never discussed with him. The respondent on the other hand states that the claimant was a project manager limited to the construction and finishing of the Hospital and once this was done, his services became redundant. The respondent further stated that it paid the claimant in lieu of notice and that the Labour Office was informed of the intention to declare the claimant redundant. The respondent however did not produce before the Court a copy of the letter to the Labour Office notifying them of the intention to declare him redundant. On the issue of leave the claimant had worked for the respondent from January 6, 2018 to March 31, 2019. This was a period of one year and two months.



17. The Court of Appeal in the case of *Kenya Revenue Authority Vs Menginya Salim Murgani*, Civil Appeal No 108 of 2009 observed thus:

“There is ample authority that decision making bodies other than courts and bodies whose procedures are laid down by statute are masters of their own procedures. Provided that they achieve the degree of fairness appropriate to their tasks. It is for them to decide how they will proceed.

It is of course a requirement that before a redundancy is declared that the provisions of section 40 of the *Employment Act* be adhered to. This is especially so where such redundancy concerns a large number of employees and more so unionisable employees or employees of lower cadre, not capable bargaining on equal footing the employer. This intended to ensure good labour and industrial relations. However not every declaration of redundancy especially where it involves one or two employees and who are of a higher cadre and capable of bargaining their exit should undergo the full rigours of section 40 of the Act. To this extent the Court agrees with the sentiments of the Court of Appeal in *Kenya Revenue Authority Vs Menginya Salim Murgani* case cited above.

18. The claimant was a fairly senior employee and a perusal of his letter of appointment dated January 6, 2018 which he acknowledged and signed states that he was appointed as a project manager on contract basis with effect from January 1, 2018 which was to be converted to permanent and pensionable basis depending on continuous evaluation. The respondent did not actualize the permanent and pensionable bit but instead declared the claimant redundant. In the case of *Kenya Airways Corporation Ltd versus Tobias Oganya Auma & others*:

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. In the New Zealand case of GN Hale & Sons Ltd, it was held that so long as the employer genuinely believed that there was a redundancy situation, then any dismissal was justified, and it was not for the court, or the union, to substitute their business judgment with that of the employer.”

The decision not to continue the services of the claimant herein was therefore at the sole discretion of the respondent provided in substantively complied with the provisions of section 40 of the *Employment Act*. The Claimant under this section was, upon declaration of redundancy, entitled to notice or pay *in lieu*, leave pay and severance pay. According to the claimant’s letter of appointment his gross monthly pay was Kshs 106, 500/-. Calculating the claimant’s entitlement based on the above heads would entitle him as follows:

- a. One month’s pay in lieu of notice 106, 500
- b. One month’s salary in lieu of leave 106, 500
- c. Severance calculated as per section 40 53,250  
266,250

19. On the issue whether the claimant herein while working as a project manager, the scope of his duties were restricted to that of supervising the construction and completion of the Hospital or he was as such a permanent employee of the respondent. This question has been partially answered the only pending issue is the issue of overtime and work on Sundays and public holidays. A project is like a piece rate work at the conclusion of which the project should be delivered. The claimant was the Manager of this project and his responsibility was to deliver the project. He negotiated or was in a position to negotiate



the task he was embarking on. He was given an offer which he signed without any amendments. He further did not produce any evidence that he requested for payment of overtime and he was turned down. The Court cannot therefore rewrite a contract between parties and introduce a matter the parties never agreed upon yet was within their reasonable contemplation and which they could have further bargained. These claims are therefore rejected.

20. In conclusion the Court awards the claimant the sum Kshs 108,074. Which is the amount calculated under paragraph 18 above less Kshs 158,176 already paid to the claimant. The award shall attract interest at Court rates from the date of judgment until payment if full but subject to statutory deductions. The claimant shall further have costs of the suit.

21. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 9<sup>TH</sup> DAY OF JUNE 2023**

**ABUODHA J. N.**

**JUDGE**

In the presence of:-

Mwako Kirwa for the Claimant

Yego for the Respondent

