



**Muchunku v Water for People (Cause E865 of 2017)
[2023] KEELRC 1462 (KLR) (8 June 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1462 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E865 OF 2017
MN NDUMA, J
JUNE 8, 2023**

BETWEEN

HILDA MUCHUNKU CLAIMANT

AND

WATER FOR PEOPLE RESPONDENT

JUDGMENT

1. The claimant filed suit on May 23, 2017 seeking the following reliefs:-
 - a. A declaration and finding that the Respondent terminated the employment of the claimant unlawfully and unfairly.
 - b. A declaration that the purported redundancy was null and void.
 - c. An order directing the Respondent to reinstate the Claimant to her employment without loss of position, status or benefits or alternatively an order directing the Respondent to pay the Claimant 12 (twelve) months' compensation for loss of employment, status and benefits amounting to Kshs 6,883,247/=.
 - d. Payment of accrued leave days (21.62 days) totaling to Kshs 505,178/=.
 - e. Any further and better relief that this Honourable Court may deem fit to grant.
 - f. Costs and interest at Court rates from the date of filing of this claim until payment in full.
2. The claimant testified that she was employed by the respondent as a Regional Finance and Administrative Manager - AFRO from August 1, 2014.
3. That the claimant served continuously until March 17, 2017.



4. That on the said February 17, 2017, the claimant received a notice of intended redundancy which was to take effect immediately. That the reason for the redundancy was the merging of business in Kenya, Uganda, and Rwanda.
5. That on March 8, 2017, the claimant received computation of terminal dues. That the computation left out 21.62 days *in lieu* of leave days not taken.
6. The claimant testified that she was shocked to learn on March 3, 2017, that there was already an advertisement of two vacancies to be filled in March, 2017. That one of the positions to be filled was “Regional Finance and Administrative Manager, an office that the claimant held.”
7. Claimant testified that she sought clarity on why her employment was being terminated in unprocedural manner but no sound explanation was given.
8. The claimant testified that the redundancy declaration was unlawful and unfair as it was not for a valid reason and was unprocedural as Section 40(1) and (6) of the Employment Act, 2007 was not followed.
9. The claimant prays for the reliefs sought.
10. The claim is opposed vide a Memorandum of Defence filed on August 28, 2017. RW 1 Nick Burn testified that he was the respondent’s Chief of Programs at all material times and was familiar with the facts of the case. That the respondent is an international organization based in Denver, USA, and which had operations around the world, including office in Kenya; Malawi, Rwanda and Uganda.
11. That Kenya office had four (4) employees including the claimant who held the position of Regional Finance and Administrative Manager, Africa Regional Office (“RFAM – AFRO”).
12. That the respondent decided to consolidate its operations in Africa in early 2017. That the consolidation was worldwide operation and had been done in Central and South America.
13. That the consolidation necessitated the closing of the Regional Office in Nairobi and relocation of the Regional Director and Regional Finance and Administration Manager positions to one of the Africa countries i.e. in Rwanda, Uganda or Malawi.
14. That on February 13, 2017, the respondent informed the claimant of the proposed redundancy and reasons thereof in terms of Section 40(1) (b) of the Act. That the respondent informed the claimant that they were to consult first to make a final decision on her position.
15. That the claimant received the notice on February 15, 2017 and she duly acknowledged receipt of it.
16. That on the same date the respondent notified the Deputy Labour Officer of the intended redundancy in terms of Section 40(1) (b) of the Act.
17. That the respondent informed the claimant that it was exploring alternative options before making final decision. That the Respondent had three (3) consultative meetings with the claimant in which the claimant was offered options that included; taking the redundancy package or continue to work for the Respondent in the new position in either Rwanda or Uganda.
18. That on February 14, 2017, the respondent met again with the claimant to discuss the matter. The claimant stated at the meeting that she was willing to accept the new position in Rwanda or Uganda as long as she got training on Human Resource.
19. On February 15, 2017, the respondent briefly, discussed a third option with the claimant to provide a short term consultancy for the claimant in Kenya.



20. On February 16, 2017, the respondent Interim Chief People Officer had another meeting with the claimant in which the parties discussed the claimant's options in detail. It was understood that the jobs offered in either Uganda or Rwanda would commence on April 1, 2017. Transcript of the minutes of the meetings were produced before Court. In an email dated February 13, 2017, RW 1 informed the respondents' worldwide staff, that the claimant was offered the new position but had stated that she would be reviewing her own future path and evaluating the option to relocate to the new location. The email was produced before Court.
21. RW 1 testified further that by an email dated February 17, 2017, the claimant voluntarily opted to take the redundancy package with the option of consultancy to train the new finance managers in the region. The claimant was offered the respondent's standard consultancy contract for the Consultancy she had opted for. Upon conclusion of the consultation the respondent gave the claimant one month notice of termination on grounds of redundancy on February 17, 2017 as per Article 150 of the employment contract.
22. On the same day, the respondent notified Ministry of Labour of the termination of the employment of the claimant on grounds of redundancy. The notice to Labour office was produced before Court.
23. RW 1 testified that the claimant was not entitled to carry forward any un-utilised leave days in terms of Section 3.2 of her contract which stated:-

“Untaken annual leave in any fiscal year may not be carried forward to any calendar year and such leave will be forfeited without any right to payment in lieu.”
24. That the respondent paid the claimant an ex-gratia payment equivalent to 10 leave days carried forward from 2016 in the spirit of good faith negotiations.
25. That the claimant was paid a package as follows:-
 - (i) Salary Kshs 303,718.
 - (ii) Un-utilised leave accrued Kshs 11,681.
 - (iii) Redundancy calculated at 15 days for each completed year of service Kshs 506,196.
 - (iv) Negotiated 10 days carried forward from 2016 – Kshs 233,629.Total terminal package – Kshs 1,055,224.
26. RW 1 testified further that the respondent later advertised two positions including that of 'Regional Finance and Administrative Manager' in May, 2017. This position was not for the same role that the claimant held. This position was to be located in Rwanda, Uganda or Malawi.
27. This position had been offered to the claimant on February 13, 2017 but the claimant had declined the same on February 17, 2017. The advertisement was only published after the claimant declined the same.
28. That the document produced by claimant marked “HN4.” is not a copy of the advertisement but an internal document that the claimant obtained during consultation.
29. That the actual print advertisement was published in Uganda, Rwanda and Malawi from 8th to May 20, 2017 with all the necessary contract details as opposed to the internal document produced by the claimant.



30. That the respondent subsequently closed down its Kenya office, a fact the claimant is fully aware of as she participated in the process of winding down operations. Emails produced in Court confirm the closure.
31. That the claimant eventually declined the offer of a Consultancy by an email dated March 27, 2017 produced before Court.
32. That the declaration of redundancy was for a valid reason and the respondent followed a fair procedure in terminating the employment of the claimant.

Determination

33. The parties filed written submissions which the Court has carefully considered together with the testimony by the claimant and RW.1. The issues for determination are:-
 - a. Whether the termination on grounds of redundancy was for a valid reason and or was genuine.
 - b. Whether the respondent followed a fair procedure in effecting the termination.
34. The Court has carefully considered the testimony by the claimant vis a vis that by RW 1. The Court has come to the inevitable conclusion that the respondent has since closed its operations in Kenya. That the claimant fully participated in that exercise. The Court is satisfied that the reason for the declaration of redundancy as per the testimony of both the claimant and RW 1 was a genuine one. The Court is also satisfied that the respondent fully discussed the matter of intended redundancy with the claimant and offered her three options to ameliorate her situation. In particular, the claimant was offered an equivalent job in Rwanda or Uganda since Nairobi office was being closed for operational reasons. The Court is satisfied that the claimant fully discussed the options with the respondent and in the end declined to take the new position in Rwanda or Uganda; also declined to take up a Consultancy agreement with the respondent to train new managers and decided voluntarily to take up the redundancy package which was the third option.
35. The Court is satisfied that the claimant notified the claimant and, the Ministry of Labour of the intended redundancy. The notice given to the Labour office was for not less than a month prior to the date of the intended date of termination on account of redundancy in terms of Section 40(1) (b) having been issued on February 13, 2017 and termination took place on March 17, 2017.
36. With regard to the notice to the employee Section 40(1) (b) does not specify the period for the notice but this is guided by the contract of employment between the parties and Section 36 of the [Employment Act](#), 2007, which allows for payment *in lieu* of the notice period provided in the contract of employment.
37. From the employment contract before Court, Article 15, provides for a 30 days termination notice. The termination notice was served on the claimant on February 13, 2017 and the termination took place on March 17, 2017. The respondent therefore fully complied with Sections 40(1) (b) of the [Employment Act](#), 2007.
38. The respondent also complied with Section 40(1) (c) by engaging fully with the claimant to explain the reasons for the termination and explaining suitable ways to ameliorate the effects of the intended termination.
39. Furthermore, the respondent satisfied the requirements of Section 40(1) (g) by paying the claimant severance pay calculated at not less than 15 days salary for each completed year of service.



40. The claimant was paid salary for the period February 13, 2017 to March 17, 2017. The respondent therefore also satisfied Section 40(1) (f) which provides that the employer has paid an employee declared redundant not less than one months' notice. Clearly, the claimant received a full salary for the notice period.
41. The respondent however did not fully comply with Section 40(1) (e) which provides:-
- “40(e) the employer has where leave is due to an employee who is declared redundant, paid off the leave in cash;”
42. The claimant has established that as at the time of termination he had 21.62 days untaken leave days which amounted to Kshs 505,178. RW 1 admitted that they did not consider these leave days in the final redundancy package because the company policy as per the contract of employment did not allow annual leave carry over to the next year.
43. Section 28(1) of the Employment Act provides:-
- “ An employee shall be entitled:-
- a. after every twelve consecutive months of service with his employer to not less than twenty-one working days of leave with full pay.”
44. Section 28(1) does not provide or limit the time within which the twenty one leave days would be taken by the employee. Indeed, a reading of Section 28(1) shows that the 21 days leave are due “after “twelve Consecutive months of service.” Meaning that leave due ought to be taken in the period following the twelve months consecutive service.
45. Clearly, Article 3.2 of the contract of employment between the parties to the extent it provides:-
- “Untaken annual leave in any fiscal year may not be carried forward to any following calendar year and such annual leave will be forfeited without any right to payment *in lieu*.” is in violation of Section 28(1) of the Employment Act, 2007 and is null and void to that extent.
46. Accordingly, the claimant was entitled upon termination to payment in lieu of 21.62 days in the sum of Kshs 505,178 and the Court orders accordingly notwithstanding any ex-gratia payments made to the claimant by the respondent.
47. In the final analysis the Court finds that the respondent fully complied with the substantive and procedural requirements as provided under Section 36, 40, 41, 43, and 45 of the Employment Act, in terminating the employment of the claimant on grounds of redundancy. Failure to comply with Section 40(1) (e) as explained above did not negate the redundancy process. This was a result of a misguided clause in the contract of employment which the respondent should consider to delete in all its agreements with other employees.
48. The Court finds that the termination of the claimant on grounds of redundancy was lawful and fair and the suit is dismissed to this extent.
49. In the final analysis, the court makes judgment in favour of the claimant as against the respondent as follows:-
- (a) Kshs 505,178 *in lieu* of 21.62 days leave days not taken.
- (b) Interest at Court rates from date of filing suit till payment in full.



(c) The respondent to pay half (½) the costs of the suit.

DATED AND DELIVERED AT NAIROBI VIRTUALLY THIS 8TH DAY OF JUNE, 2023.

MATHEWS N. NDUMA

JUDGE

Appearance

M/s Mulilanja for Claimant

Mr. Kahura for respondent

Ekale: Court Assistant

