



**Ogallo v Feba Radio aka Baraka FM Limited (Cause 53 of 2018)  
[2023] KEELRC 1441 (KLR) (2 June 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1441 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
CAUSE 53 OF 2018**

**AK NZEI, J  
JUNE 2, 2023**

**BETWEEN**

**CHARLES OWINO OGALLO ..... CLAIMANT**

**AND**

**FEBA RADIO A.K.A BARAKA FM LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The suit herein was filed by the Claimant vide a Memorandum of Claim dated January 25, 2018. The Claimant pleaded that he was employed (engaged) by the Respondent as a news reporter on 1/7/2004, earning a monthly salary of Kshs 15,000 which was subsequently increased to Kshs 15,500 in October 2007 and then to Kshs 50,000 per month.
2. The Claimant further pleaded that on 25/2/2016, he was issued with a letter declaring him redundant and that the redundancy letter further informed the Claimant that he would be furnished with details of his service pay. It was the Claimant's further pleading:-
  - a. that on 1/4/2016, the Respondent send the Claimant an email attached with a letter detailing terminal dues payable to the Claimant, and asking the Claimant to respond to the same, which the Claimant did on 6/4/2016 by addressing the Claimant on severance pay for the years worked between 2001 and 2004, which the Respondent had not included in its computation.
  - b. that the Respondent did not pay the Respondent's terminal dues and on November 13, 2017, the Claimant wrote an email to the Respondent, but the same was not responded to.
  - c. that the Claimant's Advocates wrote a demand letter to the Respondent on 4/12/2017, and that on 6/12/2017, the Claimant was telephoned by the Respondent and requested to go to the Respondent's Mombasa office and that when he went, he was given a letter dated 30/6/2016, whose contents he did not agree with.



- d. that the redundancy was unfair, and that the principle of first in last out and last in first out was not followed.
3. The Claimant set out his claim against the Respondent as follows:-
    - a. a declaration that the Claimant's termination on account of redundancy was procedurally unfair.
    - b. severance pay @ 15 days for each completed year of service  $50,000/2 \times 11 = \dots\dots\dots$   
275,000
    - c. maximum compensation for unfair termination .....Kshs 600,000  
Total Kshs 875,000
    - d. certificate of Service.
    - e. costs of the suit and interest.
  4. Other documents filed by the Claimant included an affidavit in verification of the claim, the Claimant's written witness statement dated 25/1/2018 and an evenly dated list of documents listing ten documents. The listed documents included the Claimant's contract of employment dated 1/7/2004, a salary review letter dated 16/10/2007, emails dated 1/8/2014 and 1/9/2014 respectively, copies of the Claimant's payslips, the Respondent's letter and email dated 25/2/2016 and 1/4/2016 respectively, the Claimant's email dated 6/4/2016, the Claimant's email dated 13/11/2017, demand notice dated 4/12/2017, response to demand dated 15/12/2017 and the Respondent's letter dated 30/6/2016.
  5. The Respondent entered appearance on 5/1/2018 and filed response to the claim on 19/2/2018, denying the Claimant's claim. The Respondent further pleaded that the Claimant was paid all his dues and that nothing is outstanding or payable to the Claimant by the Respondent.
  6. The Court's record shows that on 15/5/2015, long after closure of pleadings and without leave of the Court, the Respondent filed yet another response to the Claimant's claim, and a set-off and/or counter-claim dated 30/4/2018. The Respondent, in the second response, denied the Claimant's claim and further stated that the Claimant was issued with a letter dated 1/4/2016 clearly indicating that his severance pay due amounted to Kshs 236,500.
  7. The Respondent further pleaded that an internal audit had revealed that the Claimant had consistently drawn full salary even in months that he did not attend all working days between 2015 and 2016, resulting to overpayment amounting to Kshs 661,667; which the Respondent claimed against the Claimant. The Respondent further pleaded that proper redundancy procedure had been adhered to in accordance with provisions of the *Employment Act, 2007*.
  8. Other documents filed by the Respondent included witness statements of Joseph Akwiri and Patricia Wayua filed on 15/5/2018 and 30/5/2022 respectively, and a list of documents dated 30/4/2018 listing copies of the Respondent's letters dated 1/4/2016 and 30/6/2018 respectively.
  9. The Respondent filed a supplementary list of documents dated 20/3/2020, listing a bundle of emails and a report of the Respondent's management committee held on 27/2/2015.
  10. The Court's record shows that trial opened on 8/10/2019 when the Claimant testified. The Claimant adopted his filed witness statement as his testimony and produced in evidence the documents referred to in paragraph 4 of this judgment. The Claimant further testified:-



- a. that before the termination letter dated 25/2/2016, he had not been informed of any issue that would have led to redundancy and that he had worked for the Respondent for 11 years at the time of termination.
  - b. that the letter dated 30/6/2016 on salary overpayment was received by the Claimant in 2017, and that prior to this, the Claimant had never received any letter on salary overpayment, and had not been over paid.
  - c. that regarding dates on which the Claimant was shown not to have signed the employee attendance register, the Claimant testified that he was working outside the office and that it was normal for him to be called on phone to go and over news.
11. Cross-examined, the Claimant testified that his salary was Kshs50,000 as per his payslips, and that his salary had been reviewed in 2014. The Claimant further testified that he was not a union member, and that he was not aware that the Respondent company was going through financial difficulties, that he (the Claimant) was not the only one affected by the redundancy.
12. The Respondent's witness, Patricia Wayu Mbithi (RW1), told the Court that she is the Respondent's Operations Manager and that she doubles up as the HR, Accountant and presenter of a programme that airs on Saturdays. She adopted her witness statement dated 23/5/2022 as her testimony. She further produced in evidence the Respondent's documents referred to in paragraphs 8 and 9 of this judgment. RW-1 further testified:-
- a. that the Claimant's gross salary was Kshs 50,000 and that he under-performed, leading to poor media rating of the Respondent and loss of business. That this necessitated re-branding of the Respondent, which affected some positions including the Claimant's position, and that the affected positions were declared redundant.
  - b. that the Claimant's job attendance between 2015 and 2016 was not satisfactory as he was absenting himself and at the same time continued drawing full salary even for months he had not worked.
  - c. that the Claimant was issued with a break down of the amounts payable to him.
13. Cross-examined, RW-1 testified:-
- a. that there was no set scale to measure performance; and that there was nothing on record to show poor rating, and that there was nothing on record to show that listeners were not interested in the Claimant's broadcast, and there was nothing to show that the Respondent engaged consultants to do re-branding.
  - b. that there was no specific criteria used in declaring the Claimant redundant.
  - c. that there is nothing on record to show that the redundancy notice was (also) served on the labour officer and that the stamp on it emanated from that office.
  - d. that the Respondent realized that it had over-paid the Claimant by Kshs 661,667 after computing his dues but before paying them. That this was after an internal audit.
  - e. that the internal audit had not been produced in Court.
  - f. that there was nothing on record to show that the Claimant did not work on some days, or that he had been issued with show cause or warning letters. That RW1 would not tell who had prepared the staff attendance register.



- g. that there was nothing on record to show when the Respondent’s letter dated 30/6/2016 was served on the Claimant.
  - h. that the Claimant used to be paid at the end of the month and payslips were issued.
  - i. that the Claimant had never been issued with any demand.
  - j. that there were emails written by the Claimant to other staff on dates that the Claimant was said not to have been working.
  - k. that vide the letter dated 25/2/2016, the Claimant was asked to proceed on leave, and did not go back to work until 1/4/2016 when termination occurred. That the letter gave the Claimant a whole month notice before termination.
14. Upon considering the pleadings filed and evidence adduced by both parties, issues that present for determination are:-
- a. whether the Respondent has a valid counter-claim and/or set off on record.
  - b. whether termination of the Claimant’s employment was unfair.
  - c. whether the Claimant is entitled to the reliefs sought.
15. On the first issue, and as I preceded to state in paragraph 5 of this judgment, the Respondent filed a statement of Response on 19/2/2018 through Muturi Gakuo & Kibaara Advocates. The Claimant did not file reply to the Respondent’s said response pursuant to Rule 13(3) of the Employment and Labour Relations Court (procedure) Rules 2016, and pleadings herein therefor closed fourteen days after service of the Respondent’s response. Although there is no affidavit of service on record indicating when the Respondent’s statement of Response filed on 19/2/2018 was served on the Claimant, Counsel for both parties appeared in Court on 23/2/2018 and told the Court that they had complied with pre-trial directions and asked the Court to fix the suit for hearing, which the Court did. The Claimant did not complain to the Court of not having been served with the Respondent’s response to the claim. The Respondent’s statement of response had therefore been served on the Claimant as at 23/2/2018.
16. On 15/5/2018, over two months after the suit was fixed for hearing, the Respondent filed yet another response to the claim and a set-off/counter-claim through his aforesaid Advocates. This the Respondent did without leave of the Court, and purported to proceed with hearing of the suit on the basis of two pleadings. There cannot be two different primary pleadings on record by the same party at any given point in time. The purported pleading filed after closure of pleadings and without leave of the Court must be struck off. Consequently, the Respondent’s Response to the memorandum of claim and setoff/counter-claim filed on 15/5/2018 is hereby struck off. This answers to the first issue.
17. On the second issue, the Claimant’s employment was terminated by the Respondent on account of redundancy vide a letter dated 25/2/2018. The [Black’s Law Dictionary](#) defines redundancy as follows:-
- “ a situation in which an employee is laid off from work because the employer no longer needs the employee”
18. Section 40(1) of the [Employment Act](#) states as follows:-
- “(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."

19. In the wording of the foregoing provision of the statute, all the conditions set out therein are to be complied with to the letter, and failure to comply with any one of the conditions renders the entire process illegal, invalid and unfair.
20. In the present case, the Respondent did not disclose or demonstrate the procedure or criteria used in selecting the Claimant and any other employee declared redundant, and whether the same was based on seniority in time, skill, ability, and reliability of the particular class of employees affected by the redundancy. Indeed, the Respondent's witness (RW-1) testified that the redundancy process did not follow any specific procedure or criteria. This failure on the part of the Respondent rendered the entire redundancy process unprocedural, unlawful and therefore unfair
21. The allegations of poor performance made by the Respondent against the Claimant were never proved. The Respondent (RW-1) testified, under cross-examination, that there was no specific criteria used in declaring the redundancy, that there was no set scale to measure performance and to show poor performance, and that there was nothing to show that the Claimant had not worked on some days or that he had been issued with show cause or warnings letters. I find and hold that the entire process of terminating the Claimant's employment on account of redundancy amounted to unfair termination of employment, and I so declare.
22. It was held as follows in the case of *Kenya Airways -vs- Aviation & Allied Workers Union Kenya & 3 others* (2014) eKLR:-

“ 57. The other important aspect of procedural fairness is the criteria employed to determine the employees to be laid off. This requirement is expressly provided for in Section 40(1) (c ) of the *Employment Act* which places the burden of proving its compliance on the employer...



the selection of workers to be affected by a reduction of the workforce should be made according to precise criteria, which it is desirable should be established wherever possible in advance, and which gives due weight both to the interest of the undertaking establishment or service and to the interests of the workers...”

23. It was also stated as follows in the case of *Judy Gakii Njeru -vs- Wananchi Group (K) Limited* [2021] eKLR where the Court stated:-

“ 13...There is also the criteria to be applied in determining the employees to be declared redundant where the employer must consider seniority in time, skill, ability, and reliability of the employees before picking which employee to declare redundant. There is nothing in the curriculum vitae of the Claimant’s replacement to show that she had seniority in time, skill, ability and reliability as the employee who took over from the Claimant had no experience to do the job...”

24. Before determining the third issue, it is important to first establish the Claimant’s salary at the time of termination. The Claimant pleaded and testified that he earned a gross salary of Kshs 50,000 per month. He produced his payslips in evidence confirming that his gross salary at the time of termination was indeed Kshs 50,000. The Respondent (RW-1) confirmed this position in evidence.

25. On the third issue, and having found that termination of the Claimant’s employment was unfair, I award the Claimant the equivalent of nine months’ salary as compensation for unfair termination of employment. I have considered the circumstances in which the claimant’s employment was terminated. I also award the Claimant one-month salary in lieu of notice pursuant to Section 35(1) (c) of the *Employment Act*. The claim for severance pay is declined, in view of my finding that the Claimant’s employment was terminated unfairly. The claim for issuance of a certificate of service is allowed.

26. The Respondent’s allegations of salary overpayment to the Claimant were not proved. The Respondent (RW-1) testified that there was nothing to show that the Claimant did not work on some days; that the Claimant was being paid at the end of the month and that payslips were being issued, that the Claimant was never issued with any warning or show cause letter, and that there was nothing on record to show when the Respondent’s letter dated 30/6/2016 was given to/served on the Claimant. The Claimant testified that the said letter was given to him in February 2017, long after his termination. Further, the Respondent did not produce in Court the internal audit report that RW-1 alluded to. This I have stated for record purposes as I have already struck off the Respondent’s counter-claim/set-off.

27. Finally, and having considered written submissions filed by Counsel for both parties, judgment is hereby entered for the Claimant against the Respondent as follows:-

- a. Compensation for unfair termination of employment .....Kshs 450,000
  - b. One month salary in lieu of notice .....Kshs 50,000
- Total Kshs 500,000

28. The awarded sum shall be subject to statutory deductions pursuant to Section 49(2) of the *Employment Act*.

29. The Respondent is directed to issue the claimant with a certificate of service within 30 days from the date of this judgment.

30. The claimant is awarded costs of the suit and interest.



**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 2<sup>ND</sup> JUNE 2023**

**AGNES KITIKU NZEI**

**JUDGE**

**ORDER**

This judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of the applicable Court fees.

**AGNES KITIKU NZEI**

**JUDGE**

Appearance:

..... for Claimant

..... for Respondent

