



**Azaka v Mombasa Island Cargo Terminal Ltd (Cause 37 of 2019)  
[2023] KEELRC 1893 (KLR) (27 July 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1893 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
CAUSE 37 OF 2019**

**AK NZEI, J  
JULY 27, 2023**

**BETWEEN**

**JAMES EDWIN OTIENO AZAKA ..... CLAIMANT**

**AND**

**MOMBASA ISLAND CARGO TERMINAL LTD ..... RESPONDENT**

**JUDGMENT**

1. The suit herein was instituted by the Claimant on July 2, 2019 *vide* a statement of claim dated July 1, 2019. The Claimant pleaded that he was employed by the Respondent as a Security Manager *vide* a contract dated December 22, 2014 effective February 1, 2015, earning a basic gross salary of ksh 105,000. That *vide* a letter dated December 22, 2014, the Claimant's salary was increased to include ksh 5,000 monthly airtime allowance and ksh 15,000 monthly travelling allowance.
2. The Claimant further pleaded:-
  - a. that the Claimant's employment was confirmed on May 28, 2015, and that on March 1, 2017, the Respondent issued a letter reviewing the Claimant's salary to a consolidated gross in the sum of ksh 134,500.
  - b. that the Claimant was on December 3, 2015 handed the security procedures by the Respondent, and was on January 21, 2018 issued with a letter reviewing the Claimant's salary to a consolidated gross in the sum of ksh 170,000.
  - c. that on June 29, 2018, the Respondent issued a letter reviewing the Claimant's salary to a consolidated gross reduced by 15% to the sum of ksh 144,500 to the Claimant's detriment, allegedly to cushion the Claimant against massive redundancies; which terms the Claimant had reluctantly accepted in a meeting held on June 28, 2018.



- d. that on July 13, 2018, the Claimant issued an email to the Respondent seeking clarification on the date of implementation of the downward salary review.
  - e. that the Claimant had been added the duties of the Terminal Manager from August 2015 until October 4, 2018 when his services were terminated on account of redundancy vide a letter dated September 4, 2018, contrary to the salary review agreement dated June 28, 2018.
  - f. that in reducing the Claimant's salary and subsequently declaring him redundant, the Respondent did not follow the law, that therefore no proof (sic) to warrant redundancy, and that the same was null and void.
  - g. the Claimant tabulated and set out his claim against the Respondent as follows:-
    - i. salary increase 2016@ 10% of 105,000  
for 12 months .....(10,500X12)ksh 126,000
    - ii. car allowance 2017@15,000x19  
months.....ksh. 285,000
    - iii. reduced salary July, August & September 2017 @(25,000x3)..... ksh 75,000
    - iv. airtime allowance reduced by 1000  
w.e.f March 2017 to  
March 2018 (1000x12)..... ksh 12,000
    - v. airtime allowance reduced by 4000  
w.e.f. March 2018 to September 2018 (4000x7 months).....ksh 128,000
    - vi. severance pay for each completed  
year .....ksh 300,000
    - vii. terminal dues for Terminal Manager not paid and pension.
    - viii. damages for breach of contract as a result of unlawful redundancy.
    - ix. costs of the suit and interest.
3. Other documents filed by the Claimant together with the statement of claim included an affidavit in verification of the claim, the Claimant's written witness statement replicating the averments made in the memorandum of claim, a list of documents dated July 1, 2019 listing 15 documents and a supplementary list of documents dated 06/11/2020 listing one (1) document. The listed documents include the Claimant's contract of employment dated December 22, 2014 and commencing on February 1, 2015, a letter by the Respondent to the Claimant dated December 22, 2014 issued further to the letter of employment, informing the Claimant of his entitlement to monthly budgetary airtime allowance of ksh 5000 and monthly car allowance of ksh 15,000.
4. Other documents listed and filed by the Claimant included a letter of confirmation of the Claimant's employment dated May 28, 2015, salary review letters dated March 1, 2017 and January 21, 2018 respectively, a salary adjustment agreement signed by the Claimant on June 28, 2018, a salary adjustment letter to the Claimant dated June 29, 2018 adjusting the Claimant's salary downwards to ksh 144,500 and the Respondent's email to the Claimant dated November 5, 2020 proposing negotiations and review of the Claimant's claim and amicable settlement of the same, among others.



5. The Respondent defended the suit *vide* a Response to the Claimant's memorandum of claim dated October 14, 2020. The Respondent admitted the averments made in the Claimant's memorandum of claim, but pleaded and maintained:-
  - a. that the Claimant had been paid all the salaries and allowances that he was claiming; and that his salary was consolidated.
  - b. that reduction of the Claimant's salary, to which the Claimant agreed, had been necessitated by deteriorating business environment, of which the Claimant was aware.
  - c. that all the Respondent's employees, including the Claimant agreed to a 15% pay cut because the business was not doing well.
  - d. that the Claimant is not entitled to the reliefs sought.
6. Other documents filed by the Respondent is a list of documents dated October 14, 2020 listing 3 documents and a supplementary list of documents dated November 15, 2021 listing 2 documents; and witness statements of one Teddy Onyango dated October 24, 2022 and January 31, 2023 respectively.
7. Documents listed and filed by the Respondent included a discharge voucher, tabulation of terminal dues, a cheque for ksh 55,138 issued to the Claimant, the Respondent's letter to the County Labour Office (Mombasa) dated August 1, 2018 and an email dated December 11, 2019 (from the Respondent's Managing Director to the HR Manager).
8. When trial opened on October 21, 2021, the Claimant adopted his witness statement dated July 1, 2019 as his testimony and produced in evidence the documents referred to in paragraph 3 and 4 of this judgment. The Claimant further testified:-
  - a. that on March 1, 2017, his salary was reviewed from ksh 105,000 to ksh 134,500, and was consolidated; and that on January 21, 2018, his consolidated salary was reviewed from ksh 134,500 to ksh 170,000.
  - b. that on June 28, 2018, the Respondent's General Manager called a meeting of all the Respondent's Managers and departmental heads in Mombasa to discuss the movement of cargo from Mombasa to Nairobi by SGR and how that was going to affect the Respondent company's business; and that it was agreed that there would be salary cuts, for those who agreed, and that those who did not agree would be terminated on redundancy basis.
  - c. that those who agreed to salary cuts signed agreements and were issued with letters reducing their consolidated earnings by 15%, and that the Claimant was one of those.
  - d. that those who did not agree to salary cuts were issued with redundancy letters.
  - e. that it was not agreed when the salary cuts would take effect but on June 29, 2018 letters were written by the Respondent indicating that the salary adjustment would take effect as from July 1, 2018; and that the Claimant received his letter (dated June 29, 2018) on July 11, 2018.
  - f. that on September 4, 2018, the Claimant received a one month redundancy notice (from September 4, 2018 to October 4, 2018), and was on September 13, 2018 issued with a certificate of service and a recommendation letter "to whom it may concern", confirming his titles and duties. That although the Claimant held the posts of Security Manager and Terminal Manager, the latter mandate having been added verbally after employment, the Claimant was never remunerated for the same though the two posts (Security Manager and Terminal



Manager) were in two different departments of the Respondent company, hence the claim for payment.

- g. that although the Claimant signed a voucher while receiving a cheque from the Respondent, the writing on the voucher (discharging the Respondent) were not there when he signed the voucher. That he only signed for the cheque which was not for final dues, and that this was why much later (on November 5, 2020), the Respondent wrote an email to the Claimant proposing that the Claimant's claim herein be reviewed, negotiated and settled amicably.
  - h. that the Claimant's final dues were never paid.
9. The Respondent called one witness, Teddy Onyango (RW-1), who told the Court that he was the Respondent's Group Legal Officer, having joined the Respondent company in the year 2020. RW-1 adopted his witness statements dated October 14, 2020 and January 31, 2023 respectively as his testimony, and produced in evidence the documents referred to in paragraph 7 of this judgment. He further testified:-
- a. that the Respondent followed dues process in terminating the Claimant's employment on account of redundancy vide a letter dated September 4, 2018.
  - b. that the Claimant had no salary/allowances arrears owed to him at the time of termination. That he earned a consolidated salary and that all the claims that he is making were loaded there.
  - c. that the Claimant had agreed to take up additional duties on a connected role, and that compensation for the additional roles formed part of his salary; this being the reason why the Claimant never complained during the period of his employment.
  - d. that the witness (RW-1) left it to the Court to interpret (draw the import) of the Respondent's email to the Claimant proposing negotiations and amicable settlement of the Claimant's claim herein.
  - e. that the Respondent's letter to the Labour Office (dated 1/8/2018) did not name the 10 to 15 employees earmarked for redundancy.
10. It is to be noted that when the Respondent was issued with a redundancy notice on September 4, 2018, no similar notice was send to the labour officer pursuant to Section 40(1) (b) of the [Employment Act](#).
11. Before isolating the issues for determination herein, I must state that it was a common ground that the Claimant's employment was terminated on account of redundancy whose validity/legality the Claimant Challenged. Section 40(1) of the [Employment Act](#) provides:-

- (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.

12. In the present case, the employer (the Respondent) did not demonstrate compliance with section 40(1) (c), and in particular did not demonstrate the criteria used in selecting the Claimant in his class of employees (Managers) for redundancy. Further, and as already stated in this judgment, the employer/ the Respondent did not notify the area Labour Officer of the intention to declare the Claimant redundant. Indeed, even the purported redundancy notice said to have been issued by the Respondent on August 1, 2018 did not name/specify any employees targeted for redundancy, either by names, class or positions held.

13. Upon considering the pleadings filed and evidence presented by both parties herein, issues that present for determination, in my view, are as follows:-

- a. whether termination of the Claimant's employment on account of redundancy was unfair.
- b. whether the Claimant is entitled to the reliefs sought.

14. On the first issue, I have already demonstrated in the foregoing paragraphs of this judgment that the Respondent did not comply with specific provisions of Section 40(1) of the [Employment Act](#), which is couched in mandatory terms. An employer cannot cherry pick on which provisions of the said section to comply with and which not to comply with. Every provision of the said section, in as far as it applies to an employee being declared redundant, must be complied with in the manner provided. Failure to comply renders the whole redundancy process unlawful, and therefore unfair. I find and hold that termination of the Claimant's employment on account of redundancy was unfair.

15. It was held as follows in [Kenya Airways v Aviation & Allied Workers Union & 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 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.....”

16. The Court held as follows in *Judy Gakii Njeru v Mwananchi Group (k) Limited* [2021] eKLR: -

“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 employee before picking which employee to declare redundant. There is nothing in a 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.”

17. Before delving into the third issue, it is important to first establish the Claimant’s monthly salary at the time of termination. The Claimant testified that on June 28, 2018, he signed an agreement consenting to reduction of his salary from ksh 170,000 to ksh 144,500, and that the reduction was effective July 2018. The Claimant was, therefore, earning ksh 144,500 per month as at the time of this termination.

18. On the third issue, and having found that termination of the Claimant’s employment on account of redundancy was unfair, I award the Claimant the equivalent of nine months’ salary being compensation for unfair termination of employment, which is ksh 144,500X9 = 1,300,500.

19. The claim for car allowance for 12 months (ksh 10,500X12) = ksh 126,000 is declined. The Claimant testified that he earned a consolidated salary as from March 2017. It was not demonstrated that the consolidated monthly salary did not include the agreed monthly car allowance.

20. The claim for ksh 126,000 being (unpaid) salary increase (2016 @ 10% of ksh 105,000 for 12 months) is declined. The Claimant did not demonstrate that increment of his salary was a contractual right under his contract of employment. Indeed, Clause 6.3 of the Claimant’s contract of employment stated:-

“6. 3. Your salary may be reviewed by the company annually at the end of each calendar year at the sole discretion of the management. However, such review shall only be applicable to those who have completed 12 calendar months on continuous employment with the company.”

21. The claim for ksh 75,000 being reduced salary for July, August & September 2018 @ksh 25,000 per month is declined. The Claimant signed an agreement on June 28, 2018 consenting to a 15% salary reduction after a consultative meeting held between the Respondent and its Managers, who included the Claimant.

22. The Claim for unpaid airtime as from March 2017 is declined, as it was not demonstrated that consolidation of the Claimant’s salary with effect from March 2017 did not include the already payable airtime allowance. Indeed, the Respondent (RW-1) testified that consolidation of the Claimant’s salary in March 2017 was meant to consolidate the Claimant’s salary with his payable allowances.

23. Having made a finding that termination of the Claimant’s employment on account of redundancy amounted to an unfair termination of employment, I disallow the claim for severance pay.



24. The claim for terminal dues and pension for Terminal Manager not paid is disallowed. Clause 5.1 of the Claimant's contract of employment provided that the Claimant's duties included:-
- “all such functions and duties as are from time to time assigned to you and are reasonable or lawful.”
25. The Claimant did not demonstrate that the functions/duties of the Terminal Manager that were verbally added to him upon his confirmation in 2015 were unreasonable and unlawful, and were not connected to his duties as the Security Manager. Indeed, the Claimant did not demonstrate that he at any time complained over the additional duties, or sought additional remuneration in respect of such duties.
26. On its part, the Respondent (RW-1) testified that the Claimant agreed to take up additional duties on a connected role, that compensation for such additional role, was part of his salary, and that the Claimant never complained during the period of his employment. It is also to be noted that the Claimant did not specifically plead his claim under the Terminal Manager heading, though such claim is in the nature of special damages.
27. In sum, judgment is hereby entered in favour of the Claimant against the Respondent for ksh 1,300,500 being compensation for unfair termination of employment.
28. The Claimant is awarded costs of the suit and interest at Court rates.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 27<sup>TH</sup> JULY 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:**

**N/A for Claimant**

**Ms. Chano for Respondent**

