



**Waweru v Mua Insurance (Kenya) Limited (Cause 397 of 2019)  
[2023] KEELRC 1961 (KLR) (27 July 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1961 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 397 OF 2019  
NZIOKI WA MAKAU, J  
JULY 27, 2023**

**BETWEEN**

**ESTHER WAMAITHA WAWERU ..... CLAIMANT**

**AND**

**MUA INSURANCE (KENYA) LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The claimant instituted this claim against the respondent for unlawful redundancy and prayed for judgment against the respondent for:
  - a. A declaration that the claimant suffered wrongful termination disguised as “redundancy”.
  - b. Reinstatement to her previous position/job without any loss of benefits.
  - c. Salary arrears for the entire period the claimant has been out of employment.
  - d. In the alternative, an order for payment of the claimant’s lawful terminal dues.
  - e. Maximum compensation of twelve months’ salary in respect of unfair termination.
  - f. Damages for discrimination.
  - g. Exemplary damages for lost opportunities.
2. The claimant averred that she was in the employment of the respondent from July 1, 2015 up to April 22, 2019 when she was unprocedurally declared redundant without reasonable notice and/or justification and despite having worked diligently and honestly for it. She further averred that on February 7, 2019, the respondent unlawfully terminated her services on account of redundancy canvassed as restructuring in order to discriminate against her as there was no due regard to her welfare and rights. She particularised the said discrimination to include inter alia the respondent replacing her with a new Regional Risk Officer without considering existence of her contract; singling her out in



the alleged redundancy; failing to offer her any other employment in the organization; and violating her constitutional rights to fair hearing and lawful expectation. The claimant further averred that the respondent's actions were malicious as it purported to declare her redundant without following the requirement of section 40 of the *Employment Act* and had failed to pay her lawful dues and make any offer to her for reabsorption. That she had consequently suffered loss and damage and was thus claiming three months' notice pay, 22 accrued leave days, 12 months' salary as compensation, and damages.

3. In her witness statement, the claimant asserted that upon her appointment in July 2015, she executed her duties through a Co-sourced Internal Auditor (KPMG) and she was to report to the Board Audit & Risk Committee and administratively to the Managing Director according to her contract. That when her title changed from Group Internal Auditor to Regional Risk Officer on April 10, 2017, she was to report to the Group MD and indirectly to the Head of Mauritius Group Risk, Legal and Customer Care. According to her, this change was the beginning of her problems because her previous roles of handling Internal Audit were also included in the scope of her duties of handling four (4) countries.
4. It was the claimant's position that before she was declared redundant and handed the redundancy letter on February 7, 2019, she was forced to take all her accrued leave in January 2019. That the said letter stated that the management wanted to focus on critical functions and contain management expenses and indicated that her last working day would be May 7, 2019. However, the HR Manager later informed her that because the Company would not pay her leave days earned in the course of notice period, her last working day would be April 18, 2019 but which date was then adjusted to April 26, 2019 to compensate for off duty she had allegedly taken more than 9 months earlier.
5. Subsequently, the respondent filed a statement of response and counter-claim averring that the claimant served it until May 6, 2019 and not April 22, 2019 as alleged. Further, that the claimant's employment was terminated on May 7, 2019 consequent upon a redundancy notice served upon her on February 7, 2019. According to the respondent, it fully complied with the requirements of the law as it issued the claimant with a three months' notification of the intended redundancy together with the reasons thereof and that the notice was also served upon the labour offices. That it had also had discussions with the claimant on February 6, 2019 and she had agreed to part ways with it there having been no alternative suitable position in the organization for her. In addition, it paid the claimant all her dues including salary for the notice period (February 7, 2019 to May 6, 2019) and severance pay comprising 15 days for each year of service and that there were no outstanding leave days payable to her.
6. The respondent further averred that the claimant's redundancy was borne out of genuine strategic decision to restructure its operations and consolidate the function of risk management to be handled by an employee in charge of Africa. It denied the allegations of discrimination and malice and asserted that it never replaced the claimant's position at all because her position became redundant and was non-existent. It further denied the claim for compensation having determined that the redundancy was fair, justified and lawful and averred that the claimant was also not entitled to exemplary damages for lost opportunity as she is bound to mitigate her losses. It thus prayed for the statement of claim to be dismissed with costs to it.
7. In the counter-claim, the respondent averred that the claimant had unlawfully and without authority obtained confidential matters namely minutes of Board Meetings that contained trade secrets and exposed the same to the public through filing of this suit. That the claimant had thus exposed it to serious financial and reputational loss and risks because she could have still pleaded her case without disclosing the said confidential documents. The respondent's position was that the claimant's conduct of accessing information was ipso facto a breach of her Contract of Employment and amounted to gross misconduct that would have entitled her to summary dismissal and disentitlement of any terminal



dues. The respondent (claimant) thus counterclaimed for judgment against the claimant (respondent) as follows:

- a. A declaration that the respondent in the counter-claim breached her duty of confidentiality towards the claimant in the counter-claim.
  - b. A declaration that the respondent in the counter-claim's breach aforesaid entitled the claimant in the counter-claim to summarily dismiss the employment of the respondent in the counter-claim.
  - c. Damages for breach of confidentiality.
  - d. Refund of the severance pay amount of Kshs 461,056.45
  - e. Costs of the counter-claim
  - f. Interests in (c) and (f) above until settlement in full.
8. In the witness statement dated May 23, 2023, the respondent's HR Manager, Jane Mukundi stated that the claimant's contract of employment as read together with the respondent's HR Policy prohibited her from unauthorized access, divulging, whether during or after termination of employment, any confidential information relating to the respondent's affairs, unless with express authority. That the claimant had no basis to unlawfully obtain the confidential information and file the same in court and that since her dues were paid without knowledge of the said breach, the same are recoverable as claimed in the counter-claim.

### **Evidence**

9. The claimant testified that she used to earn a gross salary of Kshs 313,640/=. She denied having had any discussions before the redundancy and asserted that she was no longer seeking reinstatement. Under cross-examination, the claimant confirmed having received an email of February 6, 2019 and the letter dated February 7, 2019 and having been paid full salary for 3 months. She further stated that she was entitled to 12 days between January and May and reiterated she was not paid notice and that her last working day was April 26, 2019.
10. The respondent's witness, Jane Mukundi (RW1), testified that since MUA Kenya was bearing expenses for the claimant and could not afford the claimant's position, MUA Mauritius advertised for a Group role headquartered in Mauritius. She asserted that they sought dismissal of claim, refund of the severance pay and damages for breach of confidentiality. Under cross-examination, RW1 confirmed she had no documents on leave dues and that the basis of their evidence on the same was the email sent to the claimant. She also confirmed that there was no record of the claimant's performance before court and neither had they produced the change of structure.

### **Claimant's Submissions**

11. The claimant submitted that the procedure of subjecting an employee to a redundancy is well set out at section 40 of the [Employment Act](#) and is to be strictly adhered to in order to guard against abuse and unfair treatment of employees. That section 40(1) of the [Employment Act](#) provides as follows:

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



- (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) .....
- (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. It was the claimant's submission that in light of the foregoing procedure, the employer has the duty to ensure that the employee is subjected to a fair redundancy as well as prove the basis on which the redundancy is premised. That however in her case, there was neither a meeting held at the company level to discuss the matter with her nor was the labour office involved and she was therefore declared redundant unprocedurally. That an analysis of the pleadings and evidence before court also indicates that she was not given any notice of the redundancy, the criteria for her selection or any reasons for her redundancy and that she thus suffered an unfair and wrongful dismissal. She urged this honourable court to find and hold that she suffered unfair, wrongful and punitive redundancy at the hands of the respondent and she be granted her prayer of reinstatement to her job/position.
13. The claimant urged the court to rely on the following court decisions: *Mebetabel Mwashigadi v Highlands Drink Limited* (Cause E046 of 2021) [2022] KEELRC 13141 (KLR) in which the court found that termination of the claimant's employment was wrongful, unfair, unfair labour practice, unlawful, null and void; *Mugo v Teachers Service Commission* (Cause E028 of 2021) [2022] KEELRC 13180 (KLR) wherein the court found that the claimant's termination of employment was unfair and unlawful and ordered that the claimant be reinstated back to employment without loss of emoluments, rank and promotion; *Mercy Omondi Omollo v Rama Homes Ltd* - ELRC Cause No 89 of 2020 in which the claimant was awarded compensation for the unfair termination of her employment. In her submissions, the claimant further sought damages for violation of her constitutional rights at Kshs 10 million and exemplary damages amounting to Kshs 5 Million.

### **Respondent Submissions**

14. Under the premise that the claimant was given three months' notice, the respondent submitted that courts have stated that only one notice is required (see *Cargill Kenya Limited v Mwaka & 3 others* (civil appeal 54 of 2019) [2021] KECA 115 (KLR) (22 October 2021) (Judgment) in which the Court of Appeal stated that a notice of termination before declaring a redundancy was not a requirement or condition under section 40(l)(f) of the *Employment Act*). It was the respondent's submission that in this case, the claimant confirmed receipt of the notification of redundancy dated February 7, 2019, which mentioned the meeting between the claimant and the respondent's CEO and HR Officer that had discussed the restructure.
15. The respondent further submitted that the notice to the labour office was received and stamped by County Labour Offices Nairobi as seen on the face of the notice. Moreover, that whereas it undertook



discussions with the Claimant, consultation is not provided for in the Employment Act as was stated by the Court of Appeal in *Pure Circle (K) Ltd v Paul K. Koech & 12 others* [2018] eKLR that the law in Kenya does not provide for pre-redundancy consultation as it gives the employer a free hand to organize its operations with a view to realizing profit. The Respondent noted that the Claimant herein did not protest to there not being any meeting and discussions as alleged and that he also did not raise any issues during the three months' notice period.

16. It was the Respondent's submission that it honestly understood that section 40(1)(f) gives an employer a right to elect between one month's notice or one month's wage in lieu of notice. That it thus elected to give the Claimant three (3) months' notice for her to raise any queries and source for another employment while still earning. As regards the claim for leave days, the Respondent submitted that the Claimant had not explained how she arrived at 22 leave days and how the same translates to Kshs. 287,503.30. It urged the Court to look at page 115 of the Claimant's Bundle and note that the tenor of the letter was clear that the only leave days pending were those earned during the notice period and that there were no due leave days before the notice period.
17. The Respondent urged this Court to further note that since the Claimant expressly abandoned the claim for reinstatement during the hearing, her submissions on the same are unmerited. As to whether the Claimant was discriminated against, the Respondent submitted that the issue of discrimination does not arise because the Claimant was the only officer in charge of risk management and there was nobody else in that department. That there is also evidence that other employees in the Respondent company were declared redundant and the Claimant would not therefore have been discriminated. That in any event, the Claimant had neither provided the particulars of discrimination nor tabled any evidence on the same.
18. On its claim that the Claimant had breached confidentiality, the Respondent submitted that the Claimant did not deny being bound by confidentiality as set out in its Human Resource Manual. It urged this Court to be persuaded by the case of *David Makau v Devson Industries Limited* [2019] eKLR in which although the Court found that the claimant was entitled to damages for unfair termination, it declined to award damages on account of the claimant having breached her duty to confidentiality. In sum, the Respondent submitted that it substantially complied with the requirements of section 40 of the *Employment Act*. It further urged the Court to note that the Respondent made the best effort since there were genuine reasons and was of the view that should the Court find in favour of the Claimant, one month's wage should suffice as the award herein.
19. The Claimant was declared redundant in a process she challenges as unfair. In answer, the Respondent accuses the Claimant of breach of confidentiality by attaching minutes of the board to these proceedings. It argues that the Claimant was terminated in accordance with the law and was not therefore entitled to recover any damages. It was asserted the Claimant should mitigate her losses and not seek exemplary damages for lost opportunity.
20. Termination for the reason stated (redundancy) is permitted under section 40 of the *Employment Act*. Section 40 provides as follows:-
  - (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) ...;
  - (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.
21. The Respondent did not demonstrate the criterion applied to identify the Claimant as the recipient of the offer of redundancy. Indeed, it is apparent the Respondent did not adhere to the cardinal principle – LIFO (last in first out) or the converse FILO (first in last out). Whether used on its own or alongside other criteria, the LIFO is applied by attention being paid to an employee's length of service. Employees with the least period of service or time served at the enterprise are selected for redundancy first or where a score is applied scored the highest and therefore potentially the first out of the door in redundancy termination. Those with a longer service time, essentially those who joined the company first, are last to leave the enterprise in the event of a redundancy. Section 40 incorporates other criteria and therefore LIFO or its converse FILO are not the rule of thumb or the only criteria applied. In the mind of the Court, it was clear the Claimant had a larger role and her role was subsumed by a smaller office in Mauritius. Her position may have been attractive to cap as she was earning a lot more than the resource in Mauritius. The Respondent was making significant savings even taking into account the tax regimes there which caused the collapse of the Kenya office into a branch of the Mauritius one. As such, it would seem the Respondent applied other criteria not necessarily that under the *Employment Act*. Under section 40, when an employee is declared redundant, they are not sent out to serve their leave but are required to be paid the leave dues in cash. This did not happen rendering the redundancy declared farcical. In the finding of the Court, the redundancy was carried out contra statute and therefore unfair and unlawful.
22. The Claimant sought exemplary damages and the Court is inclined to agree with the Respondent that yes, the redundancy happened but she had to mitigate her losses. All things being constant, she may have perhaps served the Respondent for some longer period but the position was not always guaranteed. Had she become footloose and left the employ of the Respondent for a better paying or perhaps a more satisfying job, would the Respondent have countenanced a suit to recover as they had lost a wonderful employee? I think not. The Claimant had to mitigate her losses by looking for an alternative engagement as she was not tied to the Respondent at the hip. She was not at the tail end of her career where prospects would be dim, her chances of attracting employment diminished. She thus will not recover any exemplary damages since section 49 of the *Employment Act* has more than sufficient remedy for an aggrieved employee. It is impracticable to offer her reinstatement or re-engagement and therefore her recourse is in the quantum of compensation she will receive which the Court, having considered the manner of termination and the position she held as well as the expectations that the service could have continued for a slightly longer period, is set at 12 months. That should suffice as compensation. She is entitled to costs of the suit as well.
23. Having found in her favour for the aforesaid reasons, the Respondent's counterclaim has to be considered as well. The Respondent asserts the Claimant has revealed confidential information in filing the suit and attaching thereto minutes/deliberations of the board. In order to succeed in any claim for the relief the Respondent seeks, it must establish the following. It must be demonstrated that the Respondent has an interest in the confidential information and this need not be merely in relation to ownership of the information. The information must be of a confidential nature and there must exist or have existed a relationship between the parties which imposes a duty on the Claimant to preserve the confidence of the information said to be confidential. It is clear in this case there was a relationship between the Respondent as employer and the Claimant as employee. The Respondent has to satisfy the Court that the Claimant knowingly appropriated the confidential information and made improper



use of that information, howsoever, to obtain an unfair advantage for herself. The Respondent is also required to demonstrate that it suffered damage as a result of the revelation of the so-called confidential information.

24. The Respondent did not show that the Claimant published the information to the world but merely used it in her suit. Whereas the claim in Court is not a confidential case or claim, the revelation of the information within the context of this suit was not, in my considered view, a disclosure in rem. It is inured against access as only those who are authorized to access the court file can ascertain from the pleadings what the Respondent seeks to assert is confidential. The Respondent did not in addition demonstrate that it suffered any loss on account of the alleged breach of confidentiality. The Court returns that the counterclaim is tenuous at best not for grant. The same is accordingly dismissed albeit with no order as to costs.
25. In the final analysis, I enter judgment for the Claimant against the Respondent as follows:-
- a. A declaration that the Claimant's termination was unfair and unlawful for breaching the statutory interdict of section 40 of the *Employment Act*;
  - b. Compensation for unfair and unlawful termination at 12 months salary compensation;
  - c. Costs of the suit;
  - d. Interest on the sum in (b) above at court rates from the date of judgment till payment in full.
- It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 27<sup>TH</sup> DAY OF JULY 2023**

**NZIOKI WA MAKAU**

**JUDGE**

