



**Master & 10 others v Africa Apparels EPZ Ltd (Cause 344 of 2018)
[2023] KEELRC 1743 (KLR) (12 July 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1743 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 344 OF 2018**

JK GAKERI, J

JULY 12, 2023

BETWEEN

**JUDY OGAKE MASTER 1ST CLAIMANT
JULIUS HAMISI SORO 2ND CLAIMANT
JANET MORAA OGERO 3RD CLAIMANT
SALOME KAMENE MULANDI 4TH CLAIMANT
MAXIMILA NASIMIYU WANGILA 5TH CLAIMANT
FITINA MOKEIRA NYANGAU 6TH CLAIMANT
FLORENCE NTHENYA MAINGI 7TH CLAIMANT
MERCYLINE MORAA NYABUTO 8TH CLAIMANT
ANDREW OMONYA JUMA 9TH CLAIMANT
SERAH KAVUU MUIA 10TH CLAIMANT
JAZZY MWANGO OKENYE 11TH CLAIMANT**

AND

AFRICA APPARELS EPZ LTD RESPONDENT

JUDGMENT

1. The Claimants initiated this claim by a Memorandum of Claim filed on 9th March, 2018 alleging unlawful and unfair termination of employment and non-payment of terminal dues.



2. The Claimants aver that they were employed by the Respondent from 14th February, 2012 in various Departments as tailor assistant, general labour, machine operator or assistant or checker and worked diligently until their employment was terminated on 22nd February, 2016.
3. The Claimants state that on 4th January, 2016 after reporting to the work place, management informed them that the amount of work available had declined and were directed to report on 8th January, 2018 on which date they were told to return on 14th January, 2016 and the reporting continued for sometime.
4. It is the Claimants case that they did not render any services to the Respondent from the beginning of the year 2016 and argue that the same amounted to constructive dismissal by the Respondent.
5. The Claimants pray for various reliefs as follows;
 - Judy Ogake Master Kshs.236,021/=
 - Julius Hamisi Soro Kshs.236,021/=
 - Janet Moraa Ogero Kshs.267,474/=
 - Salome Kamene (Checker) Mulandi Kshs.267,474/=
 - Maximila Nasimiyu Wangila Kshs.267,474/=
 - Fitina Mokeira Nyangao Kshs.151,188/=
 - Florence Nthenya Maingi Kshs.267,474/=
 - Mercyline Moraa Nyabuto Kshs.236,021/=
 - Andrew Omonya Juma Kshs.276,474/=
 - Serah Kavuu Muia Kshs.276,474/=
 - Jazzy Mwango Okenye Kshs.236,021.3/=
6. All the Claimants pray for salary in lieu of notice, unpaid salary for January 2016 and 22 days worked in February 2016, salary for remainder of the contract and damages for unlawful termination of employment as follows;
 - i. A declaration that the constructive dismissal by the Respondent was unlawful and unfair.
 - ii. Entitlement to terminal benefits as tabulated above.
 - iii. Compensatory damages.
 - iv. Costs of the suit plus interest.

Respondent's case

7. The Respondent filed a Memorandum of Response on 8th October, 2018 admitting that the Claimants were its employees but denies having terminated their employment unlawfully.
8. It is the Respondent's case that it scaled down its activities due to shortage of orders which occasioned a redundancy of 150 employees.
9. That the Claimants were employed on short term contracts of 3 to 6 months extended on the basis of availability of work, a fact the Claimants were aware of.
10. The Respondent avers that it notified the Claimants its predicament by letter dated 9th March, 2016.



11. That the 5th and 10th Claimants deserted work from December 26th 2015.
12. The Respondent avers that it laid off 150 employees owing to work shortages and would re-engage the Claimants if its work received a boost.
13. That the 4th and 11th Claimants were re-employed in March and April 2016 on temporary contracts.
14. That the Respondent paid the Claimants pay in lieu of notice, January salary and 22 days in February 2016.
15. That they were given certificates of service.
16. The Respondent prays for dismissal of the suit with costs.

Claimant's evidence

17. The Claimants' written statement of Andrew Omonya Juma who had authority of the other Claimants to testify, rehearses the contents of the Memorandum of Claim. Regrettably, the statement makes no reference to the particulars of each of the Claimants.
18. On cross-examination, the witness confirmed that he had authority to testify on behalf of the Claimants but could not tell whether the employment of Salome Kamene Mulandi and Jazzy Mwangi was terminated.
19. He testified that he had Kavuu's contract of employment but not Maximila's and was unaware that they left in 2015.
20. The witness confirmed that they were not given termination letters and could not tell why their employment was terminated.
21. The witness further testified that the Claimants were members of the NSSF and the NHIF and the employer was making contributions and were members of the union whose name the witness could not tell due to passage of time.
22. That the payslips on record related to previous contracts.
23. On re-examination, the witness testified that the Claimants were employed by the Respondent in 2013, 2014 and 2015 on 6th months contracts renewed from time to time by signing a new contract and the 2016 contract was due to lapse in June 2016.

Respondent's evidence

24. RWI, Mr. John Wambua confirmed on cross-examination that not all Claimants were employees of the Respondent.
25. That the only employees were;
 1. Judy Ogake
 2. Julius Hamisi
 3. Janet Moraa
 4. Salome Kamene
 5. Fitina Mokeira



6. Florence Nthenya
7. Andrew Juma
8. Jazzy Mwango
9. Mercyline Moraa Nyabuto
26. That Maximila and Serah Kavuu left in December 2015.
27. The witness was emphatic he had no evidence to prove that the Claimants were employees of the Respondent after December 2015.
28. That those who reported on January 6th, 2016 were given 6 months contracts but the witness had no evidence of those who reported.
29. That the Claimants was declared redundant due to shortage of work and were released in March 2016.
30. That the Claimants were paid notice and service pay and Serah Kavuu Muia deserted in December 2015 and did not clear and no payment was made.
31. That the Respondent did not give prior notice of the redundancy and it was verbal.
32. The witness testified that he had no evidence of who was paid and how much.
33. On re-examination, the witness testified that the employees were paid and signed clearance certificates as evidenced of receipt of payment.
34. That some employees were in employment after others had been off-loaded by the Respondent.
35. That payslips on record showed that service and notice payments were made.

Claimants' submissions

36. Counsel submitted generally on the provisions of Section 40 of the *Employment Act*, 2007 to urge that the Respondent did not comply with the provisions of the Act as it did not issue notice to the Claimants.
37. Counsel submitted that the Respondent had not adduced evidence of actual payment, payslips and certificates of clearance notwithstanding.
38. That the Claimants were unlawfully dismissed in the name of redundancy.

Respondent's submissions

39. Counsel isolated four issues for determination touching on the number of employees whose employment was terminated, whether the termination was unfair, wrongful and unprocedural, payment of terminal dues and the reliefs sought.
40. On the number of employees whose employment was terminated, counsel submitted that only 5 of them were, namely; Judy Ogake (1st Claimant), Julius Hamisi (2nd Claimant), Janet Ogero (3rd Claimant), Andrew Omonya (9th Claimant) and Jazzy Mwango (11th Claimant) and the Respondent produced letters of the 5 employees.
41. That the Claimants had not availed evidence of termination of employment despite producing contracts for a few of them and payslips and 10 of them tendered no evidence of termination from employment.



42. Reliance was made on the provisions of Section 47(5) of the *Employment Act*, 2007 on the Claimants burden of proof as were the sentiments of Nduma J. in *Amalgamated Union of Kenya Metal Workers V Associated Motors Ltd* (2021) eKLR.
43. Counsel submitted that Salome Kamene Mulandi (4th Claimant) and Jazzy Mwangi Okenye were reinstated with contracts ending on 30th June, 2016 and were thus employees.
44. It was further submitted that Maximila Nasimiyu (5th Claimant), Florence Nthenya Maingi (7th Claimant) and Serah Kavuu (10th Claimant) deserted work in December 2016.
45. With regard to the alleged termination of employment, counsel submitted that the Respondent complied with the procedure prescribed by law and in particular Section 45 of the *Employment Act*, 2007.
46. Reliance was made on the sentiments of Ndolo J. in *Walter Ogal Anuro V Teachers Service Commission* (2013) eKLR to underscore the test of a fair termination of employment.
47. Counsel submitted that the Claimants employment was terminated on account of redundancy and they were notified in writing and paid terminal dues, leave days, severance and notice and the Claimants had failed to prove that their termination was unlawful.
48. Counsel urged that it was not the duty of the Claimants to determine the commercial viability of the Respondent's business.
49. On payment of terminal dues, counsel relied on the payslips on record for the 1st, 2nd, 3rd, 9th and 11th Claimants and clearance certificates for the 1st, 2nd, 3rd and 11th Claimants to submit that they had been paid.
50. That the 9th Claimant did not sign the clearance certificate.
51. As regards the reliefs sought, counsel submitted that the Claimants were not entitled to any.

Findings and determination

52. The issues for determination are;
 - i. Whether the Claimants were employees of the Respondent.
 - ii. Whether termination of the Claimants employment was unfair.
 - iii. Whether termination of the Claimants' employment was unfair.
 - iv. Whether the Claimants are entitled to the reliefs sought.
53. As to whether all the Claimants were employees of the Respondent, parties have adopted contrasting positions in relation to some of them.
54. While according to the Claimants they were employed from 14th February, 2012, the Respondent's witness testified on cross-examination that only Judy Ogake, Julius Hamisi, Janet Moraa, Salome Kamene, Fitina Mokeira, Florence Maingi, Andrew Juma, Jazzy Mwangi and Moraa Nyabuto were employees.
55. The Claimant produced payslips for 2015 belonging to Moraa Nyabuto, Julius Hamisi, Serah Kavuu, Judy Ogake and Mirasi Shadrack (not a Claimant) as evidence of employment in 2015.



56. The Claimants also provided copies of employment letters for the contract ending in June 2015 for Julius Hamisi, Andrew Omonya, Jazzy Mwango, Florence Nthenya, Serah Kavuu, Salome Kamene, Judy Ogake and Janet Moraa.
57. None of the Claimants provided a contract of employment for the contract ending in December 2015.
58. On its part, the Respondent produced payslips for the month of March and January 2016 belonging to Judy Ogake, Janet Moraa, Jazzy Mwango, Julius Hamisi, Maximila Nasimiyu, Serah Kavuu and Andrew Omonya and employment contracts for the contract ending on 30th June, 2016 for Jazzy Mwango Okenye and Salome Kamene Mulandi.
59. From the documents on record, it is clear to the court that neither the Claimants nor the Respondent has filed comprehensive records of the employment status of the Claimants as of February 2016. However, since the Respondent admitted in its Memorandum of Response dated 4th October, 2018 that the Claimants were its employees, it is the finding of the court that not all Claimants were indeed employees of the Respondent as it availed no comprehensive particulars of the employees consistent with the provisions of Section 74 of the *Employment Act*, 2007 on record. Neither the documentary nor the oral evidence adduced in court showed an employment relationship between the 6th Claimant and the Respondent. It is the finding of the court that the 6th Claimant has failed to prove on a balance of probabilities that she was an employee of the Respondent.
60. As regards termination of the Claimants' employment, parties have adopted diametrically opposing positions. While the Claimants argue that the termination on account of redundancy was unfair for non-compliance with the provisions of the *Employment Act*, 2007, the Respondent submitted that the termination was conducted lawfully.
61. It is not in dispute that the Claimants employment was terminated on account of redundancy and RWI confirmed as much on cross-examination stating that the Respondent was experiencing shortage of work.
62. It is trite that redundancy is a form of termination of the employment relationship between parties exclusively at the instigation of the employer and the employee is free from blame.
63. A redundancy may be occasioned by a re-organization or restructuring of business operations for purposes of efficiency and cost reduction among other reasons.
64. Mechanization and technological changes may also precipitate a redundancy and as correctly submitted by the Respondent's counsel, it is a commercial decision made by the employer and to the extent that the employer genuinely believes that the process is justifiable, the same passes muster as held by the Court of Appeal in *Kenya Airways Ltd v Aviation & Allied Workers Union Kenya & 3 others* (2014) eKLR.
65. However, although the law permits employers to declare employees redundant when commercial and businesses change and demands render it imperative, the process is regulated by law to ensure that it is substantively justifiable and procedurally fair as ordained by the provisions of Section 45(2) of the *Employment Act*, 2007.
66. Section 40(1) of the *Employment Act* prescribe the seven (7) mandatory conditions to be complied with by the employer for a redundancy to pass muster.



67. Section 40(1) provide in mandatory tone that;

“An employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions – . . .”

as held by the Court of Appeal in [Barclays Bank of Kenya Ltd & another V Gladys Muthoni & 20 others](#) (2018) eKLR.

68. The conditions as paraphrased by the court are;

- a. If the employee to be declared redundant is a member of a union notice to the union and Local Labour Office of the reasons and extent of the redundancy at least one month before the date when the redundancy is to take effect.
- b. Notice to the employee personally and the Labour Officer if the employee is not a member of the union.
- c. Consideration of the seniority in times, skill, ability, reliability of the employee.
- d. Where terminal benefits are set under a Collective Agreement, an employer shall not place an employee at a disadvantage on account of the employee being or not being a member of a trade union.
- e. The employer must pay the employee any leave due in cash.
- f. The employer must pay the employee at least one month’s notice or one month’s wages in lieu of notice and
- g. The employer must pay the employee severance pay at the rate of not less than 15 days for each completed year of service.

69. I will now proceed to determine whether the Respondent complied with the provisions of Section 40(1) of the [Employment Act](#), 2007. Although counsel for the Respondent submitted that the redundancy was conducted in accordance with the law, the Respondent adduced no evidence on how it conducted the process.

70. It is common ground that the employees in this case were not members of a union and the notice required by Section 40(1)(b) of the [Employment Act](#) should have been issued to them personally.

71. The Respondent provided copies of four letters allegedly written to Judy Ogake, Janet Moraa, Jazzy Mwangi and Julius Hamisi under the reference Termination of Employment dated 9th March, 2016.

72. The letter makes reference to the final dues payable to the four (4) Claimants but has neither a date of termination nor acknowledgement by any of the Claimants. Evidently, the letter is not the notice envisioned by Section 40(1)(b) of the [Employment Act](#), 2007.

73. There is no evidence that a notice of the redundancy was given to the Labour Officer. Although the letter indicated that the redundancy affected 150 employees, no list was attached. More significantly, RWI confirmed on cross-examination that the Respondent did not give the Claimants prior notice of the intended redundancy.

74. In the court’s view, the letter was an ordinary letter of termination of employment. The Respondent adduced no evidence of consultations or selection criteria or the payments actually made.



75. The Claimants denied having received the letters produced by the Respondent and why four (4) letters only and how were they served on the Claimants.
76. It requires no emphasis that the Respondent terminated the Claimants employment on account of redundancy without compliance with the provisions of the Employment Act, 2007, thereby rendering the purported redundancy an unlawful termination of employment.
77. Closely related to the foregoing finding, although RWI testified that Serah Kavuu Muia and Maximila Nasimiyu Wangila deserted duty in December 2015 and were not in employment from January 2016, the Respondent tendered no evidence of the steps it took to ascertain why they were not reporting to work and issue notices to show cause or dismissal letter as required. (See Felistas Acheba Ikatwa v Charles Peter Otieno (2018) eKLR as well as Judith Atieno Owuor v Sameer Agriculture & Livestock Ltd (2020) eKLR on the obligations of an employer who alleges that an employee absconded duty or deserted the work place.
78. More significantly, the payslips for both Maximila Nasimiyu Wangila and Serah Kavuu Muia for the month of January 2016 show that they had indeed rendered services though absent for many days.
79. While Maximila Nasimiyu earned Kshs.4,536.30, Serah Kavuu earned Kshs.4,582.40 for the month of January 2016.
80. For the foregoing reasons, it is the finding of the court that the Respondent has failed to prove on a balance of probabilities that Maximila Nasimiyu Wangila and Serah Kavuu Muia deserted that work place in December 2016.
81. Flowing from the foregoing, the court is satisfied that termination of the Claimants employment by the Respondent was unfair.
82. It is essential to highlight that contrary to the Respondent counsel's submission that the Claimants had not adduced evidence that their employment was indeed terminated by the Respondent, the Respondent's witness admitted on cross-examination that the employees were infact declared redundant due to shortage of work.
83. As to whether all the Claimants excluding the 6th Claimant were dismissed from employment, the Respondent's counsel submitted that Salome Kamene Mulandi (4th Claimant) and Jazzy Mwango Okenye (11th Claimant) were reinstated and had contracts ending on 30th June, 2016. However, neither the Respondent's witness statement dated 4th October, 2018 nor the oral testimony adduced in court make reference to a reinstatement of any employee.
84. Be that as it may, the two contracts produced by the Respondent under the name Salome Kamene Mulandi and Jazzy Mwango Okenye effective 3rd March, 2016 to 30th June and 5th April 2016 to 30th June, 2016 respectively reveal that the two employees were reinstated to employment and RWI confirmed as much on re-examination.
85. As regards the reliefs sought, the court proceeds as follows;
 - a. Having found that termination of the Claimant's employment on account of redundancy was unfair, a declaration to that effect is merited.
 - b. On terminal dues, although the Respondent filed termination letters of four (4) employees which tabulated the dues payable including severance pay; and additionally produced four (4) clearance certificates executed by the four employees, it did not avail evidence of actual payment.



However, neither of the four (4) employees denied having signed the clearance certificates or receiving the amount allegedly paid to them. RWI confirmed that they were paid in full and certificates of service issued.

86. The Clearance certificate read as follows;

I of P.O. Box hereby confirm having received the sum of Kshs (Net pay) (words) which have been paid to me by Africa Apparels EPZ Ltd in full and final settlement of all sums to me by virtue of my employment or otherwise with Africa Apparels EPZ Ltd.

I confirm that I have no further claim against the company as a result of my employment with Africa Apparels EPZ Ltd.

I further confirm that I have no other claim(s) in regard to medical expenses arising from any accident or any nature of illness arising out of my employment with the company.

Employee:

EMP. No. Signature

Id No. Date

Witness

Name:..... Signature:

Date:

87. The foregoing contents are analogous to a discharge voucher or settlement agreement which bind the maker or parties thereto unless it is proved that the signature was not voluntary or there were other vitiating elements such as misrepresentation of the contents, duress or undue influence or the signatory was labouring under an incapacity.

88. None of the Claimants alleged that the clearance certificate was vitiated in any respect.

89. In arriving at the foregoing conclusion, the court is guided by the sentiments of the Court of Appeal in *Thomas De La Rue (K) Ltd v David Opondo Omutelema* (2017) eKLR on the necessity of the court to determine whether the discharge voucher was freely and willingly executed also emphasized in *Coastal Bottlers Ltd v Kimathi Mithika* (2018) eKLR and earlier in *Trinity Prime Investments Ltd v Lion of Kenya Insurance Co. Ltd* (2015) eKLR.

90. In the court's view, the Claimants who executed the clearance certificate on diverse dates between 15th April, 2016 and 16th April, 2016 agreed that the sums paid to them in full and final settlement of their dues discharged the Respondent from liability under the contract of employment between them and the Respondent.

91. In sum, it is the finding of the court the claims by Judy Ogake Master (1st Claimant), Janet Moraa Ogero (3rd Claimant), Julius Hamisi Soro (2nd Claimant) and Jazzy Mwangi Okenye (11th Claimant) are not sustainable and are accordingly dismissed.

92. Although, Jazzy Mwangi Okenye indicated the date as 14th March, 2012, the copy of the payslip for March 2016 show that the amount paid is identical to the amount indicated on the clearance certificate.



93. Having found that Fitina Mokeira Nyangau tendered no evidence to prove that she had an employment relationship with the Respondent, her claim is for dismissal for want of prosecution and it is accordingly dismissed.
94. Having further found that Salome Kamene Mulandi and Jazzy Mwangi Okenye were reinstated, their claim for unlawful termination on account of redundancy is unsustainable and is accordingly dismissed.
95. The only Claimants who have a case against the Respondent are;
1. Maximila Nasimiyu Wangila (5th Claimant)
 2. Florence Nthenya Maingi (7th Claimant)
 3. Mercyline Moraa Nyabuto (8th Claimant)
 4. Andrew Omonya Juma (9th Claimant)
 5. Serah Kavuu Muia (10th Claimant)

i. Salary in lieu of notice

96. The Respondent adduced no evidence that it paid the Claimants salary in lieu of notice having admitted that it did not accord them notice.

The Claimants are awarded one month's salary in lieu of notice.

ii. Unpaid salary for January 2016

97. None of the Claimants tendered evidence of outstanding salary for January 2016. Similarly, neither the written statement by the 9th Claimant dated 30th August, 2017 nor the oral testimony adduced in court makes reference to outstanding salaries for January 2017.

The claim is declined.

iii. Salary for 22 days worked in February 2016

98. Analogous to the claim for the salary for January 2016, the Claimants tendered no shred of evidence to show that they rendered services for 22 days and were not paid the salary due.

The claim is declined.

iv. Salary for the remainder of the contract

99. In addition to the fact that the fact that the Claimants tendered no evidence of their entitlement to payment for the remaining period of the contract, this is a claim for anticipatory earnings and has no anchorage in law as held by the Court of Appeal in *D.K. Njagi Marete v Teachers Service Commission* (2020) eKLR and thus not sustainable.

The claim is declined.

v. Damages for unlawful termination

100. Having found that termination of the Claimant's employment on account of redundancy was unfair for want of compliance with the provisions of the *Employment Act, 2007*, and thus transitioned to an unlawful and unfair termination of employment, the Claimants are entitled to the relief under Section



49(1)(c) of the Employment Act, 2007 subject to taking into consideration the relevant factors under Section 49(4) of the Act.

101. In the instant suit, the court has considered the following;
- i. The Claimants were employees of the Respondent for less than 3 years bearing in mind that none adduced evidence on the date of employment.
 - ii. The Claimants did not contribute to the termination of employment.
 - iii. The Claimants did not express their wish to remain in the Respondent's employment.
 - iv. None of the Claimants appealed the decision of the Respondent to terminate their employment.
102. In the circumstances, the court is satisfied that the equivalent of 2 months gross salary is fair.
103. In the upshot, judgement is entered for the 5th Claimant, 7th Claimant, 8th Claimant, 9th Claimant and 10th Claimant against the Respondent in the following terms;
- a. Declaration that termination of the Claimants' employment on account of redundancy was unfair.
 - b. One month's salary in lieu of notice.
 - c. Equivalent of 2 months salary to the 5th, 7th, 8th, 9th and 10th Claimant.
 - d. Costs of this suit.
 - e. Interest at court rates from date of judgement till payment in full.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 12TH DAY OF JULY 2023

DR. JACOB GAKERI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE

