



Kerrow & 40 others v Kenya Power & Lighting Co Limited (Employment and Labour Relations Cause E041 of 2022) [2023] KEELRC 1608 (KLR) (4 July 2023) (Judgment)

Neutral citation: [2023] KEELRC 1608 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
EMPLOYMENT AND LABOUR RELATIONS CAUSE E041 OF 2022**

HS WASILWA, J

JULY 4, 2023

BETWEEN

ADEN ABDULLA KERROW & 40 OTHERS CLAIMANT

AND

KENYA POWER & LIGHTING CO LIMITED RESPONDENT

JUDGMENT

Background

1. This suit was initially instituted by the plaintiffs, now claimants, in High Court by a plaint dated 10th June, 2003 and filed on 27th June, 2003, serialized as High Court Civil case number 103 of 2003. The Defendant, now Respondent, entered appearance by a memorandum of appearance dated 11th July, 2003 and filed their defence on 25th July, 2003. The claimants' case was fully heard at the High Court. After claimants' witnesses testified and before their suit was closed, they filed an application, Notice of motion dated 28th April, 2014, seeking to amend its plaint. The Application was opposed by the Respondent who filed a replying affidavit deposed upon on the 21st July, 2014 by Owiti Awuor, the the Respondent's Acting principal legal officer. Directions for hearing the Application were taken before Justice Wendoh, however before hearing of that Application, Judge Wendoh was transferred and the matter mentioned before Justice Mulwa who directed that the proceedings to be typed in order for him to take over the matter. From the record, typing of proceedings delayed till 3rd October, 2017 when they were ready and certified by the Deputy registrar.
2. The Parties did not take any action on the matter till 3rd October, 2022 when it was mentioned before Justice. T. M Matheka for direction. On 17th October, 2022 the Judge made an order for the case herein to be transferred to this court. When the file was placed before this Court, the parties took direction for Respondent's defence hearing and the Respondent's case was therefore heard before this Court. It's evident from the proceedings, that the Application for amendment of plaint was never prosecuted and therefore the plaint, subject for determination is the one dated 10th June, 2003.



Claimant's case.

3. The claimants, by the Plaint dated 10th June, 2003 alleged that they were unfairly declared redundant and underpaid terminal dues.
4. It is stated that the claimants herein were all employed by the Respondent occupying various position and paid diverse salaries in respect of the position they held. That they served the Respondent until sometime in March, 2002 when the Respondent served them with letters declaring their position redundant on the basis of what was called 'Staff reduction programme'.
5. It is contended that, this staff reduction programme was carried out in total disregard to the provisions of the Collective Bargaining Agreement which required a three months' notice before redundancy could be effected. Further that the 'Last in First out' policy was not adopted as senior staff were declared redundant leaving behind junior staff in total violation of the CBA, therefore that the redundancy procedure was discriminatory.
6. It is stated that upon redundancy, the claimants were not paid all their dues and entitlements as required under the CBA. They therefore prayed for the following reliefs;
 - a. A declaration that the dismissal of the plaintiffs from their employment was contrary to the Collective Bargaining Agreement and was therefore wrongful and illegal and a nullity.
 - b. General damages.
 - c. Costs of this suit and interest.
 - d. Any other or further relief as the Court deems fit.
7. A total of 22 witnesses testified for the claimants'. The first witness was Joseph Mwangi Wanyeki, the 14th Claimant, who testified as CW-1. In his testimony he testified that he was employed in 1996 till 19th March, 2002 earning a basic salary of Kshs 43,841. He testified that he was paid Kshs 109,323 as three months' notice pay instead of Kshs 138,082. On severance pay, he was paid Kshs 1, 150,826 instead of 2,105, 756.25, when he had worked for the Respondent for 15 years 3 months. He also told this Court that he was not paid the Golden handshake of Kshs 100,000 which all employees that were retired early received. He also testified that there was cost cutting from 1998 to 2001 where their travel allowance, lunch allowance and overtime were reduced in the bid to save the company from collapsing for the benefit of the employee, however that they were eventually retrenched and not paid the withheld salaries.
8. Upon cross examination, he testified that he was a member of the Union. He testified that he was told he was retrenched and was to receive 3 months' notice pay. He testified that they were subjected to deduction of salary to save the company and keep their jobs but now that they were declared redundant, they were to be given back their money.
9. The second witness was Sammy Rodgers Nyogesa. He testified as CW-2 and stated that he was also declared redundant in March, 2002 when he had remained with 3 years, 3 months to retire. He stated that they were to be paid three months' notice and 2 months' pay for all the completed years of service. He testified that he earned a gross salary of Kshs 41,730.78 therefore that he prays for the balance of his terminal dues, together with salary he would have earned till retirement in 2007. He also claimed the Golden handshake of 100,000 which he did not receive. On cross examination he testified that some employees that left before him were paid Golden handshake of Kshs 100,000. He testified that the Respondent used basic pay in calculating the terminal dues instead of Gross pay.



10. Eunice Orengo Ragira testified as CW-3. She testified that she was employed by the Respondent in 1979, earning a salary of Kshs 31,094. That on termination, she was paid Kshs 121,835.10 being 3 months' notice instead of Kshs 136,025. She testified that as per her calculation the severance which she was to be paid is Kshs 2,679,589 but she was paid Kshs 460, 321 because she had served the Respondent and remaining with 2 years 9 months to hit 55 years, her retirement age. She also prayed for the Respondent to be compelled to pay her golden handshake which was paid to her colleagues in 1998-1999.
11. Upon cross examination, she testified that the Respondent restructured its operation and in 1998-1998 people were asked to volunteer for an early retirement, however in 2002, the Respondent caused some more people to be retired. She confirmed that the people who were paid Golden Handshake were those that volunteered for the early retirement. She also confirmed to have received all the terminal dues as indicated in her redundancy letter.
12. Grace chepkeino, testified as CW-4 and stated that she was employed in 1992 and worked till March, 2002. She earned a basic salary of Kshs 19,664 and allowance of Kshs 4600. That she was a member of the Union. On termination, she stated that she was the senior store officer who was declared redundant while other junior officers were allowed to stay contrary to page 2 of the CBA that provided for 'Last in First out' policy. She stated that she was not paid the 3 months' notice in lieu and only received Kshs 272,970 and not Kshs 755,003.
13. On cross examination, she testified that she was declared redundant but did not know why. She also confirmed that she received Notice pay but not all of it. She confirmed that the criteria used is not the 'Last in First out'.
14. Colonel Amoshe Mutongoi testified as CW-5. In his testimony he told this Court that he worked for the Respondent for 18 years, earning a salary of Kshs 37,783.46 and house allowance of Kshs. 5100. That on the fateful day, he had been transferred to Molo when he received a letter that his services were terminated. That he was paid Notice pay of Kshs 107, 350 and severance pay of Kshs 1,841,644 but that it was not the full amount. He also testified that more junior officers remained in employment while he was declared redundant.
15. On cross examination, he testified that he was a member of the Union. That the calculation of terminal dues did not follow the provisions of the CBA. He admitted that the calculations were carried out by experts and that the Union did not raise any questions on the calculations.
16. Roseline Cheruto Saina, testified as CW-6 and stated that she was employed as a telephone operator in 1987, earning a salary of Kshs 34, 690 at the time of termination. She testified that she was paid 88,710 notice pay instead of Kshs 109,332 and severance pay of 840,416 instead of Kshs 726,796.65. Further that all other staff were paid salary increase but she was not paid the same. She also urged this Court to order the Respondent to pay her Golden hand shake and pay that she would have earned till retirement.
17. On cross examination, she testified that she was to be paid 17 Million instead of what was paid. She also confirmed that she was paid according to the letter issued. That the letter did not mention anything on the Golden Handshake. Further that the Golden handshake was given to those that volunteered for early retirement.
18. Henry Mbirangu, testified as CW-7 and stated that he was employed by the Respondent in 1989 as a clerk and declared redundant in 2002. That he was paid notice and severance pay but the calculations were improper. He stated that the Respondent owes him Kshs 3,352,362, together with Golden hand shake of Kshs 100,000.



19. On cross examination, he testified that he received Kshs 1,182,238 but this was not the total terminal dues he was entitled to.
20. Margaret Katia testified as CW-8- and stated that she was also terminated in March, 2002. She confirmed that she received the cheque of three months but the money paid was less by Kshs 24, 372. She was paid Kshs 817,00 as severance pay instead of Kshs 1,498,244. Also that she was not paid the Golden hand shake of Kshs 100,000.
21. On cross examination, she maintained that the total sum paid out was less. She testified that there was salary increased negotiated by the Union for the claimant from 2001 which was not paid to her.
22. Samuel olendo Kitunguhu, testified as CW-9 and stated that he was employed in 1989 earning a salary of Kshs 21,082. On termination he was paid notice pay of Kshs 63,246. But that the money was less. He testified that he does not know how to read and that a friend did the calculation and informed him that he is to be paid Kshs 3,824,338.
23. Japheth Kizimandu keranga, testified as CW- 12 and told this Court that he was employed 1993 earning a salary of Kshs 39,110. That in 1997 there was costs cutting measures which were introduced and their salaries slashed to save the company from collapsing and protect them from losing employment, however from 1998, employee were requested to volunteer to take early retirement and in return they were paid 3 months' notice pay, 3 months' salary for each completed year of service. In 2002, the company is the one that volunteered employees and declared them redundant but failed to pay as per the early employees. He testified that he was paid Kshs 750,656 instead of Kshs 11, 076,077.
24. On cross examination, he testified that he was paid notice and severance pay but that the Respondent did not pay him the entire sum.
25. Torethine Waithira, testified as CW- 11 and stated that he was employed in 1983 and declared redundant in March, 2003 and issued with a cheque of Kshs 1,916,530 which she was not satisfied with because it did not factor in the 6% salary increase. She also complained that she was not paid the correct notice pay.
26. On cross examination, she testified that the letter said it is staff reduction programme not redundancy, which procedures are different. She maintained that a balance of Kshs 2,630,479 is yet to be paid.
27. Jane Wambui Thiongo testified as CW-12. She stated that she was employed in 1986 and terminated in March, 2002. She stated that she received the letter reference 'Staff reduction' with enclosed cheque of Kshs 104,019 as notice pay. Later on she was paid Kshs 1,479,195 as severance pay instead of Kshs 2, 653, 220, leaving a balance which was never paid to date. She also claimed Kshs 100,000 being Golden Hand Shake pay and 6% salary increment from 2001 till termination.
28. On cross examination, she testified that the money received was less tax. She also stated that she was paid 3 months' notice instead of one-month notice.
29. John Kiptanui Rono, testified as CW-13 and stated that he was employed in 1981 as a driver earning Kshs 39,086. On termination, he was issued with a letter which enclosed a cheque of Kshs 145, 820 and paid severance pay of Kshs 1,116,344.05. on cross examination, he testified that he was not paid the cumulative sum, together with his pension.
30. Richard Yavan testified as CW-14 and testified that on termination he was paid notice pay of Kshs 97,020 instead of Kshs 125,041. Also that he was paid severance pay of Kshs 387,310. He also prayed to be paid Kshs 100,000 Golden handshake. On cross examination he admitted receiving Kshs million but



claiming 8 Million balance being the salary increase which was not factored in, pay till his retirement at 55 years and balance of the terminal dues.

31. Hebisiba Bosibori testified as CW- 15 and stated that she was employed in 1994 earning a gross salary of Kshs 44,259. On termination she was issued with a cheque of Kshs 44,316 which was one-month notice instead of three months' notice pay. That she was paid severance pay of Kshs 440, 445 instead of Kshs 678, 952. She also claimed Kshs 100,000 Golden hand shake and the 6 % salary raise. On cross examination she testified that she was a member of the Union and the Union used to talk on their behalf, however that they did not inform them of the looming staff reduction programme. She admitted to receiving salary increase of 6% in the month of January, February and March, 2002.
32. Bosco Kenneth Mohonga- testified as CW- 16. He testified that he was employed by the Respondent in 1989 with his last salary at Kshs 18,159. On termination he was paid Kshs 54,479 as notice pay and service pay of Kshs 543, 971 instead of Kshs 71,545 and Kshs 894, 320 respectively. He prayed for the difference of the above, together with Golden hand shake of Kshs 100,000, Salary increase of 6 % and money he would have earned till retirement of Kshs 4,028,810. On Cross examination, he confirmed that he was a member of the union and reiterated that the Respondent owes him. He stated that he did not know what the CBA provided with regard to redundancy.
33. Nancy Ruto testified as CW- 17. She told this Court that she was employed by the Respondent in 1998 earning a gross salary of Kshs 28,602. On termination, she was issued with a cheque of Kshs 71,982 as notice pay and Kshs 990, 427.55 being service pay. However, that she was underpaid her terminal dues and does not know how the said dues were calculated. She also claimed for the Golden hand shake of Kshs 100,000 and money she would have earned till retirement all adding up to Kshs 6,018,566. On cross examination, she maintained that she was not paid her dues in full.
34. Kennedy Amyeema Wairua testified as CW- 18. He testified that he was employed in 1989 and was one of the employee affected by the staff reduction programme effected in March, 2002. That he was paid notice pay and service pay of Kshs 70,553 and Kshs 879,606 respectively, which pay was less considering that her salary was Kshs 23,521. He also stated that he was paid Kshs 100,000 Golden handshake. However, that he was not paid the balance of his employment period till retirement. on cross examination he testified that the Union represented him well but that he is still owed by the Respondent Kshs 7, 420, 158.
35. Omomg Magoma, testified as CW-19 and stated that he was employed in 1989 earning a gross salary of Kshs 30,359. On termination he was paid Kshs 63,246 as notice pay and Kshs 549,050 as severance pay which calculation were wrongly done. He prayed for the difference together with the pay he would have earned till retirement. On cross examination, he testified that the Union negotiated an increment of 6% which was never effected or used in calculating the terminal dues.
36. Geoffrey Maina testified as CW-20 and stated that he was employed in 1992 earning Kshs 26,395 and on termination he was paid Kshs 63,879 as notice pay and service pay of Kshs 854,865. He claims the Golden Hand shake of Kshs 100,000. on cross examination, he testified that he did not know why he received the said cheque.
37. Vincent Kathiari Kogo- testified as CW-21 and stated that he used to work for the Respondent as a server technician and rose through the ranks to be in the management of the Respondent. He stated that he the one that assisted his colleagues in calculating their terminal dues. He stated that the staff reduction programme was done in phases, Group one composed of new employees to 45 years, group two was for employees from 46 years to 49 years, while group three was made up of employee of over 50 years of age. Employee over 50 years were to be retired early and paid 3 months' notice pay, employees in group two were to be paid Kshs. 100,000 Golden handshakes while the one below 45 years were to be



- paid 3 months' salary notice, three months' salary service pay for each year completed and Kshs 100,000 as Golden hand shake. Additionally, that they were to be given their pension contribution refund. He testified that the employer did not follow the circular in paying the claimants' and no reason was given for the deviance. He reiterated that the Respondent did not factor in the increased salary in calculating the terminal dues therefore the calculation was erroneous and the claimants were all underpaid.
38. On cross examination he testified that he was a shop steward and was speaking on behalf of the employees. He testified that the management and Union negotiated but did not give a chance to the employees. He told this Court that the 6% increase did not apply to everyone but only union members. He testified that his calculations are based on the staff salary payment circular. He contends that the claimants herein should, at the very least, have been paid 6% salary increase together with the Golden hand shake of Kshs. 100,000 as provided for under the circular of payment.
39. The last witness was Emolke Manyu testified as CW-22 and stated that he is a consultant on human resource management issues. He testified that he worked for KPLC from 1985 till 2001. He reiterated the averment by Vincent Kathiari Kogo, with regard to payment of employees on the three categories. He however stated that the staff reduction programme was effected from 1995. He testified that in 2001, there were changes in that the company selected the persons to terminate and the employee was not given an opportunity for hearing. He stated that unlike 1995, the 2001 staff reduction programme did not have a circular. He testified that there was a meeting where the Respondent requested employees to take pay cuts in order to save the company and retain their jobs only to be declared redundant after the company saved more than a Billion. He stated that the move to reduce some staff was unfair.
40. On cross examination he reiterated his qualification as an HR expert and stated the Union was informed of the move by the Respondent to reduce staff but could not tell whether the Union agreed with the Respondent. He confirmed that there was no circular followed in payment of terminal dues for the staff terminated in 2002. He testified that he was also fired and filed a case at Eldoret court together with other 331 former Respondent's staff.

Respondent's case.

41. The respondent entered appearance on the 11th July, 2003 and filed a defence on the 25th July, 2003 admitting to employing the claimants' herein. They also admitted that they declared the claimants' redundant with effect from March, 2002. However, that before the said staff reduction programme was implemented, the Respondent had notified Kenya Electrical Trades Allied Workers Union('Union') by the Notice of redundancy dated 23rd April, 2001, as such the claimants' and the Trade union were duly given notified. Additionally, that the staff reduction programme was approved by the ministry of labour.
42. It is averred that all affected employees of the Respondent were paid their terminal dues in accordance with the agreement relating to the Remuneration and Working Conditions of Trade Union representing employees(CBA), as such nothing is owing to the claimants.
43. It denied the allegation that the redundancy was carried out in defiance of the Collective Bargaining Agreement or that the Respondent was bound by the 'Last in First Out' policy. It also denied the allegation that the claimants' were entitled to three months' notice. The Respondent further denied discriminating the claimants herein in effecting the Staff reduction programme.
44. In support of their case, the Respondent called two witnesses. The first one was David Monandi, the Respondent's human resource manager who who testified as RW-1 and adopted his witness statement of 14th February, 2023 which in summary states that he was employed by the Respondent in 1996. That



the claimants herein were all employed by the Respondent in various capacities and all were members of Kenya Electrical Trades Allied Workers Union except the 7th, 19th, 30th and 37th claimants. He stated that members of the Union were governed by the CBA and the employees who had not joined the union had separate contracts.

45. He testified that the circumstances that led to the filling of this case is that in October, 2000 the minister of Energy issued a press statement that the Respondent was to be restructured with a view of privatizing it. As a consequence, some offices were scrapped off and others positions reduced. By a letter of 23rd April, 2001, the Respondent informed the Union of the move and another letter was sent to the labour office dated 26th June, 2001. The ministry of labour gave its approval by the letter of 12th July, 2001. and soon after the staff reduction programme was implemented which affected 2010 employees. The Union filed a suit being Nairobi High court case number 739 of 2001 seeking to stop the staff reduction programme but they were not successful and the programme continued as planned. The programme was guided by the CBA in that employees who were between 1-5 years were paid 1-month salary severance pay for each completed year, employees between 6-10 years got 1 ¼ months' salary for each completed year of service, employees between 11- 20 years got 1 ¾ months' salary for each complete year of service and those above 21 years got 2 ¼ months' salary for each completed year of service. In addition, the employees were entitled to benefits as provided in their provident fund scheme and retirement benefits scheme. They were also paid salary in lieu of notice and to demonstrate good faith, the Respondent negotiated with KRA to exempt tax from the service pay given to the terminated employees which was effected by Gazette notice number 60 of 2001. He maintained that the claimants herein were duly paid their terminal dues and nothing is owing.
46. On cross examination he testified that he is privy of the contents of the CBA and that employees who were not members of the Union had a packaged devised for them which is exhibited at page 29-30 of the claimant's documents. He testified that the Notice pay was calculated based on basic pay as per the CBA while severance pay was based on gross pay. He testified that the Golden Handshake was payable to employees of 45-49 years of age. He stated that the Union agreed to have the restructuring implemented, thus the Union and by extension its members were involved in the process throughout.
47. Peter Misango-testified as RW-2. he testified that he is the pay master of the Respondent and currently the Chief Finance officer for Coastal region. He adopted his statement dated 5.8.2013 which in summary states that he was employed in 1990. That all claimants herein were issued with a letter of 19th March, 2002 which laid out the terms of redundancy. Before the said employees were declared redundant, the Respondent and the Union had extensive negotiations over the issue and agreed on the package awarded to the employees and withdrew a case they had filed in Court. He testified that the Notice pay was calculated using basic pay as provided for under the CBA while the service pay was calculated using Gross pay. Therefore, that the calculations were properly done and nothing is owing to the claimants.
48. On cross examination, he testified that the payments were made following the restructuring package approved and which was done in accordance with the provisions of the CBA. That he maintained that he paid notice pay based on basic salary as provided for under the CBA, while the service pay was based on gross pay.

Claimant's Submissions.

49. The claimant submitted from the onset on whether the Respondent complied with redundancy procedure. It was argued that the procedure of termination is provided for under *Labour Relations Act* and the *Employment Act*, as well as the Trade Disputes Act cap 234. It was argued that before redundancy is effected the issue must be reported to the minister. Unlike this case the letter of 23rd



April, 2001 was served to the Union and copied to the commissioner for labour who is not the minister contemplated under section 4(5) of the Trade Dispute Act. It was argued that the subject letter addressed to the minister of 26th June, 2001 was only for information purposes and not to notify the minister of the looming redundancy. Therefore, that they did not comply with the law in declaring the claimants redundant.

50. It was submitted further that the Respondent failed to adhere to clause 4(iii) of the CBA of 1999/2000 which required the Respondent to give the employees and the Union three months' notice before declaring employees redundant. This is because the first notice was issued on 23rd April, 2001 and by 29th June, 2001 another letter had been written, requiring terminations of the first 210 staff with effected from 30th June, 2001 before the three-month notice lapse.
51. The claimants submitted that Clause 4(iii) of the CBA provided for the 'last in first out' procedure of termination which was not followed by the Respondent in declaring the claimants redundant. It was argued that compliance of the law and the CBA was necessary to achieve justice. In this they relied on the case of KUDHEIHA Vs Aga Khan University Hospital, which was cited by the court in the case of Benard Misawo Obara V Cola Juices Kenya Limited [2015] eKLR where the Court held that :-
- “The notices envisaged under section 40 of the *Employment Act* are not mechanical or issued for the sake of going through a process. These processes affect employees and their jobs. Such notices should be carefully crafted prior to being issued. Such notices affect the employees behind the redundancy process.”
52. The claimants reinforced their position by relying on the case of Adaah Odhiambo Obiro V Ard inc [2014] eKLR where the Court held that; -
- “The Respondent has however failed to prove that the Claimant and the Labour officer were notified of the reasons for and extent of the redundancy at least one month prior to the redundancy. The Claimant and the Labour officer were notified on 20th January 2012 the very date that the redundancy took effect. To the extent that the Claimant was not notified of the redundancy at least one month prior to the date of redundancy, I find that the Claimant's redundancy was not in accordance with the procedure in the law and therefore amounted to an unfair termination of her employment contract.”
53. It was submitted that in failing to demonstrate the selection criteria used in declaring the employees redundant, the redundancy was unfair. In this they relied on the case of Gerrishom Mukhutsi Obayo v Dsv Air and Sea Limited [2018] eKLR.
54. The claimants submitted that clause 34 of the CBA expressly provided that the CBA was for a duration of two years. Therefore, at the time of redundancy the CBA that should have been followed in determining the terminal dues payable to the claimants was the one for 2001/2002.
55. On whether the claimants were paid their terminal dues in full, it was submitted that the claimant were paid terminal dues however the same was not in full because the Respondent did not factor in the long service worked by the claimants in calculating severance pay and failed to award the Golden hand shake which awards were given to the employees that had exited employment earlier. He argued that the claimants herein had agreed to pay cut to save their jobs only to be declared redundant, a fact which was not controverted, therefore that the Respondent should be compelled to pay back the surrendered allowance and salary cuts because they reneged on their word to retain the claimants in employment.



56. On whether the claimants were discriminated against, it was submitted that the claimants herein had served the Respondent for several years and more senior than most of the employees left in employment, which move demonstrated that the Respondent discriminated against the claimants herein by declaring redundant the older employees instead of the young ones. In this they relied on the court of Appeal case of Telkom Kenya Limited v John O. Ochanda [2013] eKLR, where the court held that

“The right to work is a basic human right where as here, the employer decides to retrench its employees, it is under a duty to do so fairly and equitably. In such a situation, equality of treatment is key. The application of the correct formula cannot amount to discrimination. But where as in this case, the appellant deliberately decided to use a formula which resulted in preferential treatment of employees, that action amounted to blatant discrimination.”

57. Accordingly, that since the formula of ‘last in first out’ was not used, the Respondent breached the CBA and thus the procedure of termination was unfair.

58. In conclusion, the claimant urged this Court to find that the Respondent failed to follow the law in declaring the claimants redundant and underpaid the said claimant and as a result caused them paid and suffering which they should be compensated for. He urged this Court to allow the claim as prayed.

Respondent’s Submissions.

59. The Respondent submitted from the onset that the plaint, subject for determination herein is the one dated 10th June, 2003, because the application seeking to amend the plaint was never prosecuted. He argued that parties are bound by their pleadings as was held in Raila Odinga & Another V IEBC & 2 others [2017] eKLR and the case of IEBC & Another V Stephen Mutinda Mule & 3 others [2014] eKLR. therefore, any evidence that is led by the claimants in variance with the orders sought in the plaint should be disregarded as was held in Law Society of Kenya V Hillary Mutyambai Inspector General of [Police & 4 others [2020] eKLR.

60. The Respondent submitted that Order 1 Rule 12 of the *Civil Procedure Act* demands that in instance where there is more than one plaintiff, one or more of them may be authorized to plead on behalf of the others which was not done in this case. However, the claimants filed an authority to Act dated 27th April, 2003 on the 27th June, 2003. Thus this issue is not up for determination.

61. On whether sufficient notice was given, the Respondent submitted that the first notice was issued to the Union on 23rd April, 2001 for the redundancy to take effect on 30th June, 2001 which took place in phases with the last group leaving in June, 2003. Therefore, that since claimants confirmed to have been members of the Union and their Union was notified, the notice was duly served as per the CBA before the redundancy process began. It was also argued that the employees that could have been affected by the short notice were those terminated in July, 2001 and not the second and third group that were terminated in 2002 and 2003 respectively. Being that all claimants herein were terminated in March, 2002, they were not affected by the alleged short notice.

62. On the claim of notice by the employees who were not members of the Union, the Respondent submitted that the requirement to issue notices before declaring employees redundant was first introduced in our law by *Employment Act*, 2007, therefore that the claimants who were not members of the Union should not claim requirement for notice at all.

63. Contrary to the submission by the claimants, the Respondent submitted that the Trade Dispute Act at section 4(4) was amended in 1994 by the Finance Act that expressly stated that any dispute on



termination of employee can be reported to the minister except Redundancy. Therefore, that the amendment made by the finance Act, removed the obligation to report redundancy to the minister. in any case that even if the same was a requirement, the commissioner of labour was notified which is as good as notifying the minister as was held in Christopher Lebo & 331 others V Kenya Power and Lighting Co. limited [2023] KEELRC 37(KLR) where Abuodha J held that;

“ Counsel for the claimants submitted that the respondent wrote to the Minister for Labour a letter dated 26th June, 2001. The said letter referred to a letter dated 23rd April 2001 in which the respondent stated that it had served the Minister for Labour but instead the letter dated 23rd April, 2001 had been copied to the Commissioner of Labour and not the Minister. The Court however considers the Ministry of Labour as an institution and the relevant department or personnel appropriate to deal with the issue before the Court was the Commissioner for Labour. The Court further upon consideration of several correspondences between the respondent and the Ministry of Labour particularly the letter dated 26th June, 2001 from the respondent’s Managing Director and a response thereto by the Minister dated 12 July, 2001 is persuaded that the Ministry was made aware of the intended redundancy.”

64. Similarly, that the minister in this case was aware of the looming redundancy and gave the go ahead by its letter of 12th July, 2001 and affirmed that the redundancy was in conformity with the law.
65. The Respondent submitted that in instances where redundancy involves abolishing some positions as intimated in the letter of 23rd April, 2001, the issue of ‘Last in First out’ does not apply. It was argued that the Union was served with the list of people and offices that the redundancy would target and they had no objection. Being that the Union is the employees’ mouthpiece their input was considered by the Respondent.
66. On the allegations that the Respondent defrauded the claimants in cost cutting scheme and eventually terminated them, the Respondent submitted that particulars of these allegations have not been raised in the plaint and particulars of the said fraud pleaded and therefore this Court should ignore it. In this they relied on the case of Vijay Morjaria V Nansingh Madhusingh Darbar & Another [2000] eklr. Additionally, that the allegation of fraud pleaded at paragraph 7 of the plaint was not particularized as required and thus should also be ignored. In this they relied on the case of Solomon Mummah V Kenyatta University [2019] eklr and the case of IEBC & Another V Stephen Mutinda Mule and 3 other (Supra).
67. The Respondent also submitted that the CBA used in calculating the claimants’ terminal dues is the one of 1999/2001 because there was no new CBA in force and clause 34 of the said CBA expressly stated that this CBA will be in force until a new CBA is mutually agreed by the parties. He added that the allegation that there was another CBA is far from the truth. In any case that the same has not been produced in evidence.
68. It was argued that the claimants have not denied receiving payments as evidence by the list at page 53-57 of the Respondent’s list of documents. It was argued that the notice pay was paid using basic salary while severance pay was paid using gross salary which was effected uniformly for all employees. Thus the allegation that the claimants were not paid in full has not been demonstrated and urged this Court to decline the offer to make blanket orders without specific figures being sought. To support this



argument, they relied on the Court of Appeal decision in Kenya Tourist Development Corporation V Sundowner Lodge limited [2018] eKLR where the Court held that;

“The same situation applies to the case at bar in that the respondent having quantified what it considered to have been the loss it suffered, and gone on to particularize the same, there would be absolutely no basis upon which the learned Judge would go ahead to award the totally different, unrelated, unclaimed and unquantified sum of Kshs. 30 million merely because he believed that the respondent “had suffered serious damages” (sic). What was suffered or was believed to have been suffered, the damage that is, to be compensated by way of damages, could only be known by the respondent and it claimed it in specific terms which, in the event, it was unable to prove. To award it anything else would be to engage in sympathetic sentimentalism as opposed to proof-based judicial determination.”

69. Accordingly, it was submitted that the alleged retention on of 1 Billion, the Golden Handshake and retirement benefits were not pleaded in the plaint subject for determination herein. Neither was evidence tendered in support. Thus the court should disregard them and dismiss the entire claim with costs to the Respondent.
70. I have examined all the evidence and submissions of the parties herein. The issues for this court’s determination are as follows;
1. Whether the redundancy process implemented by the respondents was unfair and unlawful.
 2. Whether the claimants were paid dues due to them.
 3. Whether the claimants are entitled to the remedies sought.

Issue No. 1 Redundancy Process

71. The process of redundancy commenced in March 2002 when the respondent wrote letters to the claimant herein declaring them redundant on the basis of “Staff Reduction Programme”.
72. The letters were dated 19th March 2002 and indicated as follows;-

“Staff Reduction Programme

As you are aware, the Government of Kenya is in the process of restructuring the company in preparation for eventual privatization. The restructuring involves among other things, staff reduction.

In this regard, we regret to advise you that you have been affected by the staff reduction programme. Consequently, your services with the company will cease with effect from 19th March, 2002.

You will be paid salary and benefits up to and including 19th March, 2002.

Your redundancy package will be as detailed below;-

Payment in lieu of Notice as per the attached cheque.

Payment for years worked in accordance with the relevant provisions of the staff regulations.

Refund of both employees and employer’s contributions in accordance with the Retirement Benefits Scheme Rules.



Members of Provident fund will be refunded both employee's and employer's contributions plus accrued interest.

Payment in lieu of notice will be paid in accordance with your Terms of Employment.

Attached please find a cheque for kshs.107,350.40 being notice payment. Your other entitlements under the above package will be paid upon submission of a duly completed and signed Clearance Certificate (copy is enclosed herewith).

Further you will be entitled to receive a Certificate of Service for the years worked.

I once again regret that the company has been compelled by circumstances to undertake this programme and wish to thank you for the service you have rendered to this company for the last 18 years and 1 month(s). I wish you success in all your future endeavours”.

73. The respondent admitted that it is true that these claimants were terminated as part of the staff reduction programme which had been approved by the Ministry of Labour and of which the Kenya electrical Trades Allied Workers Union was given notice on 29th June 2001.
74. The respondent exhibited a letter dated 23rd April, 2001 addressed to the National General Secretary of the Kenya Electrical Trades Allied Workers Union, herein after referred to as the Union giving notice of the intended redundancy under Clause 4 of the CBA between the respondent and the Union.
75. Vide another letter dated 26th June, 2001 the respondent informed the Minister of Labour of the redundancies envisaged under the Trade Disputes Act.
76. In the meantime HCCC No. 739 of 2001 was filed by the Union stopping the redundancies however on 27th June 2001, a consent was recorded by the parties allowing commencement of the redundancy and final orders were obtained as follows;-
 - a. The employees to be retrenched and/or declared redundant be paid their terminal benefits in accordance with the Collective Bargaining Agreement dated 23rd December, 1998 once the affected employees furnish a duly completed Clearance Certificate.
 - b. The employees be provided with Certificate of Employment.
 - c. Suit be listed for mention as regards costs on 20th September, 2001.
77. Following this consent, the respondent wrote to the Union vide a letter of 29th June again reiterating their intention to proceed with the redundancy in conformity with the Labour Laws and the CBA.
78. At the time, the relevant Labour legislation relating to redundancy was the Employment Act Cap 226 (now repealed) which states as follows at Section 16 A

“ 16A.

- (1) A contract of service shall not be terminated on account of redundancy unless the following conditions have been complied with;
 - a. The union of which the employee is a member and the Labour Officer in Charge of the area where the employee is employed shall be notified of the reasons for, and the extent of, the intended redundancy;



- b. The employer shall have 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;
- c. The employer shall be placed at the disadvantage for being or not being a member of the trade union;
- d. Any leave due to any employee who is declared redundant shall be paid off in cash;
- e. An employee declared redundant shall be entitled to one month's notice or one month's wages in lieu of notice;
- f. An employee declared redundant shall be entitled to severance pay at the rate of not less than 15 days pay for each completed year of service as severance pay.

(2) For purposes of this section;-

“trade Union” means a trade union registered under the Trade Union Act (Cap 233) and
“redundancy” has the meaning assigned to it in Section 2 of the Trade Disputes Act (Cap 234).

- 79. Under this law, redundancy would only be effected where if an employee is a member of a Trade Union by giving notice to the union and the labour officer at least a month prior to the date of the intended redundancy.
- 80. The notice to the Union was actually given vide a letter of 23rd April, 2001. Notice to the Labour Officer was issued through the Ministry of Labour vide the letter of 26th June, 2001.
- 81. The parties had attempted to have the process arbitrated upon through the court process and a consent recorded allowing the process to proceed.
- 82. The question then on whether the due process was followed or not to allow the redundancy process is answered in the positive because parties entered a consent to proceed with it.
- 83. It is after this consent was recorded in court that the claimant employees were now declared redundant vide letters dated 19th March, 2002.
- 84. It is my finding therefore in answer to issue No. 1 herein that the redundancy was carried out fairly and justly.

Issue No. 2

- 85. Following the redundancy, the letter declaring the redundancy indicated the redundancy package as follows;-
 - a. “Payment in lieu of notice (paid in advance).
 - b. Payment for years worked in accordance with the relevant provision of the staff regulation.
 - c. Refund of both employees and employers contribution in accordance with the Retirement Benefits Scheme Rules.



- d. Members of the provident fund to be refunded both employees and employers contribution plus accrued interest.
- e. Payment in lieu of notice to be paid in accordance with their terms of employment”.
86. The claimants content that they were not paid as per the law. They have contented that they were paid less in terms of redundancy notice.
87. I will take an example of CW14. Richard Yavan who testified that he was paid notice of 97,020/= instead of 125,041/= and a severance pay of 387,310/=.
88. Richard Yavan had served the respondent for 14 years. As per clause 2.1.4 of the CBA he was entitled to 3 months salary in advance and severance pay was to be one and three quarter month’s salary for each completed year.
89. As per the claimant’s evidence, his salary was kshs.32,340/= and house allowance was 7,400/= the gross salary was therefore 39,640/=.
90. The notice pay was therefore to be 39,640/= x 3 = 118,920/=. The claimant was however paid 97,020/= as notice pay in which case tax deduction was taken into consideration.
91. As concerns severance pay, the claimant indicated that he was paid 1,000,000/= Severance pay should have been calculated as follows for him;
- 14years x 1 $\frac{3}{4}$ x 39,640 = 971,181/=
- Less statutory deductions
92. Going by this sample in relation to Richard Javan, I find no miscalculation in the payment of his notice and severance pay.
93. All other claimants indicated they were paid notice pay though little and also severance pay as per years worked. Their only contention is that the money was not calculated well.
94. In view of the evidence of the claimants on record depending on how much each was earning, I find that all the claimants were paid as per the redundancy notice and as per the CBA prevailing at the time.

Issue No. 3

95. In view of my findings above, that there was due process before redundancy was effected and that the claimants were paid according to the CBA and the law, I find that the prayers sought by the claimants are not tenable and the claim fails.
96. This claim is therefore dismissed accordingly.
97. There will be no order of costs.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 4TH DAY OF JULY, 2023.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Kimeli holding brief for tororei for Claimants – present

Nerea holding brief for Mwihuri for Respondent - present



Court Assistant – Fred

