



**Mwita v Fep Holdings Limited (Employment and Labour Relations Cause 79 of 2020) [2023] KEELRC 2044 (KLR) (24 August 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2044 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS CAUSE 79 OF 2020**

**MN NDUMA, J  
AUGUST 24, 2023**

**BETWEEN**

**PATRICIA MWITA ..... CLAIMANT**

**AND**

**FEP HOLDINGS LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The suit was filed on February 7, 2020 by the claimant against the respondent. The claimant seeks the following reliefs:-
  - a. Reinstatement to his previous position/job without any loss of benefits.
  - b. Salary arrears for the entire period the claimant has been out of employment.
  - c. Damages for wrongful and/or unlawful termination disguised as redundancy.
  - d. Maximum 12 months compensation for unlawful redundancy.
  - e. Costs of this suit and interest thereon.
2. CW1, the claimant testified that she was employed by the respondent on March 1, 2015 as a Group Marketing Manager reporting to the Group Chief Operations Manager. That she was stationed at the head office in Nairobi. That she earned a monthly salary of Kshs 444,000 at the time her employment was terminated on grounds of redundancy on July 6, 2017. That she had worked diligently and had no prior notification or good reason for the termination. That the termination took place when she was on sick leave and had incurred medical expenses in the sum of Kshs 24,650 that were not reimbursed by the respondent in terms of the medical cover she had. That she was also not paid car allowance reimbursement in the sum of Kshs 12,620 upon termination.



3. That the respondent did not provide justification for the termination and did not follow a fair procedure in selecting her for termination. That they were called to a meeting and simply informed that some of them would be given letters of termination. That no other details were given to them. That top managers were targeted for termination without providing any reasons. That a notice was sent to the Labour office but same was not shared with CW1. That she was paid for leave days not taken.
4. Under cross-examination, CW1 told the Court that she had attended Agha Khan hospital for treatment at the time and the medical expenses had not been reimbursed at the time of termination. That she had also used her motor vehicle for field trips and was not reimbursed some expenses upon termination.
5. CW1 said she did not write to the respondent about the unpaid expenses but had provided receipts to Judy. That the criteria for selection was not given to them. CW1 said that she was not told that her position had been abolished. That she paid outstanding loan she had at the time upon selling her car. CW1 said she got the letters dated July 6, 2017; July 7, 2017 and August 18, 2017. CW1 conceded that she was paid in lieu of three months' notice; unutilized leave days and severance pay as per the tabulation before Court in the sum of Kshs 1,953,600.
6. RW1 Onesmus Muasa testified that he was the Human Resource Manager of the Respondent. That at the time of termination of the employment of the claimant, the respondent was not doing well financially and so some positions were scrapped and others retained. That even the position of Procurement and project Managers that had been retained were eventually scrapped after the end of the project. That the position of Marketing Manager held by the claimant was scrapped until to date. That the criteria used to select positions to be scrapped was the pay level due to financial difficulties the organization was experiencing. That upon termination, the employees including the claimant were paid their final dues in terms of the law.
7. RW1 stated that the notice of redundancy was dated July 6, 2017 and the reason given in the notice was failure to achieve revenue projection by the company. RW1 said the financial details were not shared with the claimant. That a top down criteria was used in the retrenchment exercise. That the respondent looked at all the highly paid positions and abolished them. The notice did not however state so clearly but had indicated the targeted grades in a top-down order.
8. That failure to achieve revenue was the reason to restructure and the affected employees were informed in the meeting called. That notice was given to the labour office.
9. RW1 said that the claimant is entitled to medical and travel expenses reimbursement upon production of receipts. RW1 said grades G to F which were the highest were affected by the retrenchment exercise since they made greater financial impact on the organization. That the suit has no merit and it be dismissed.
10. The parties filed written submissions which this Court has carefully considered together with the evidence adduced by CW1 and RW1.
11. The issues for determination are as follows:-
  - i. Whether the termination of employment of the claimant was for a valid reason.
  - ii. Whether the respondent complied with the mandatory provisions of Section 40(1) of the [Employment Act, 2007](#) in the termination process.
  - iii. What remedies are available to the claimant.



12. The claimant was employed on November 30, 2014 by the respondent in the position of Group Marketing Manager at a monthly salary of Kshs 444,000. By a notice dated July 6, 2017, the respondent informed the claimant that it was engaged in a restructuring exercise and that the position held by the claimant may be affected by that exercise which was due for completion on August 8, 2017. The reason given for the restructuring was failure by the respondent to achieve revenue targets. The claimant received this letter on the same day and signed for it.
13. By a letter dated August 18, 2017, the claimant and other staff were served with letters of termination of employment on account of redundancy. The termination was to take effect on August 31, 2017.
14. In terms of the letter, the respondent had declared positions in job Groups G - I redundant which were senior positions targeted to cut the costs of running the respondent to ensure its survival. The letter informed the claimant that she would be paid three months' notice pay, severance pay calculated at 15 days salary for each completed year of service and in respect of any untaken leave days. The claimant received the notice on the same day. The Court finds that it is not correct as told by the claimant that they were informed of the intended termination on grounds of redundancy without notices. The Court finds that the respondent communicated the intention to retrench staff on grounds of redundancy first in their letter dated July 6, 2017 when a meeting of staff was held with senior management.
15. That the actual termination took place more than a month later by a notice dated August 18, 2017 but termination was to take place on August 31, 2017. The Court finds that the respondent complied with the provisions of Section 40(1) (b) in this respect since the notice given to the claimant for the intended redundancy was more than one month.
16. Furthermore, the Court is satisfied that both notices dated July 6, 2017 and August 18, 2017 gave the reasons for the intended termination to be abolition of positions to cut operational costs of the respondent to ensure survival.
17. The Court finds that the reason given by the respondent for the intended declaration of redundancy was in conformity with Section 2 of the *Employment Act*, 2007 which defines redundancy as follows:-

“redundancy” means “Loss of employment of occupation; job or career by involuntary means through no fault of an employee, involving termination of employment at the initiative of the employer where the services of an employee are superfluous and the practice commonly known as abolition of office, job or occupation and loss of employment.”
18. The notice also was in conformity with the Standard applied by the Court of Appeal on the nature of notices for intended redundancy in the case of *Kenya Airways Limited v Aviation & Allied Workers Union Kenya and 3 Others* [2014] eKLR as follows:-
  46. I disagree with Mr. Mwenesi that the appellant's letter of 1<sup>st</sup> August 2012 did not constitute the notice envisaged by section 40(1) (a) of the *Employment Act* as it did not have the names of the affected staff and there was no notice addressed to the appellant's individual employees. My understanding of this provision is that when an employer contemplates redundancy, he should first give a general notice of that intention to the employees likely to be affected or their union. It is that notice that will elicit consultation between the parties, and I will shortly show that consultation is imperative, on the justiciability of that intention and the mode of its implementation where it is found justiciable. At that initial stage, the employer would not have identified the employee(s) who will be affected. So that notice cannot have the names of the employees as Mr. Mwenesi contended. It does not have to a calendar months' notice as Mr.



Mwenesi contended. The Act requires one month’s notice. The period runs from the date of service of that notice. It is after the conclusions of the consultations on all issues of the matter that notices will be issued to the affected employees of the decision to declare them redundant.”

19. In the present case, the claimant was part of Senior Management and it is apparent that discussions by Senior Management were held on the intended redundancy upon issuance of the general notice on July 6, 2017 before the specific notice was given to the individual employees on August 18, 2017. It is also common cause that the notice of July 6, 2017 was copied to the Ministry of Labour. The Court is therefore satisfied that the management meetings referred to in the notice of August 18, 2017 satisfied the requirement under Section 40(1) (c) of the *Act*.
20. The Court finds that the respondent had a valid reason to terminate the employment of the claimant and other members of Senior Management on grounds of redundancy.
21. With regard to substantive and procedural compliance with the provisions of Section 40 of the *Act*, it is clear that over and above the claimant and others being served with a more than (1) month actual notice, the respondent also paid the claimant three months’ salary as notice pay. This action by the claimant satisfied requirement of Section 40(1) and (f) of the *Act*.
22. Furthermore, the claimant was paid for leave days not taken in terms of Section 40(1) (c). Again the respondent satisfied the requirement of Section 40(1) (g) by paying the claimant not less than 15 days salary for each completed year of service.
23. The Court finds therefore that the respondent satisfied the substantive and procedural requirements set out in the law of the land upon terminating the employment of the claimant on grounds of redundancy.
24. The claimant did not write to the respondent with regard to the outstanding medical and travel allowances before the separation took place. We cannot therefore fault the employer for not settling the outstanding reimbursements set out in the statement of claim and in respect of which RW1 told Court that are payable provided receipts are provided. The claimant informed Court that she had provided the required receipts to one Judy. The Court therefore awards the claimant as prayed in respect of the claimed reimbursement in the sum of Kshs 24,650 being medical reimbursement and Kshs 12,620 being travel reimbursement.
25. Accordingly, the suit in respect of the termination on grounds of redundancy lack merit and is dismissed in its entirety. Judgment is however entered in favour of the claimant against the respondent for the special damages set out above in the sum of Kshs 37,270. This particular award is payable with interest at Court rates from date of termination till payment in full.
26. Taking into account all the circumstances of the case, each party to meet their costs of the suit.

**DATED AND DELIVERED AT NAIROBI THIS 24<sup>TH</sup> DAY OF AUGUST, 2023.**

**MATHEWS N. NDUMA**

**JUDGE**

Appearance

Mr. Museve for claimant

Mr. Kihara for Respondent

