



REPUBLIC OF KENYA



**KENYA LAW**  
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**Ouko v Imperial Managed Solutions [EA] Limited (Cause 716 of 2019)  
[2023] KEELRC 2058 (KLR) (23 August 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2058 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 716 OF 2019  
J RIKA, J  
AUGUST 23, 2023**

**BETWEEN**

**PATRICK OKETCH OUKO ..... CLAIMANT**

**AND**

**IMPERIAL MANAGED SOLUTIONS [EA] LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The claimant filed his statement of claim on October 28, 2019.
2. He states that he was employed by the respondent on June 1, 2013, as the East Africa Security Manager. He was promoted to the position of Risk Manager. His last salary was Kshs 203,687 monthly.
3. He was informed by the respondent on May 24, 2019, that the respondent was ‘redesigning,’ and his position had been declared redundant, with immediate effect. He was issued redundancy letter the same date- May 24, 2019. He states that redundancy was contrary to section 40 of the [Employment Act](#).
4. There was no notice issued to the Labour Office. There was no consultation. Selection criteria was unknown. The Human Resource Manager was on leave, and the Finance Director took it upon himself, to terminate the claimant’s contract.
5. The claimant was regularly appraised, with good performance consistently registered. He states that in reply to his letter of demand before the claim was filed, the respondent alleged it was not bound by section 40 of the [Employment Act](#), having paid to the claimant, notice.
6. The claimant prays for judgment in the following terms: -
  - a. Declaration that termination was unfair and unlawful.
  - b. 1-month salary in lieu of notice at Kshs 203,687.
  - c. 12 months’ salary in compensation for unfair termination at Kshs 2,444, 248.



- d. Costs.
7. The respondent filed its statement of response, on December 19, 2019. It is denied that the claimant's contract was terminated by the Finance Director, on May 24, 2019. On the material day, the Finance Director was in Mombasa attending a conference. The redundancy was handled by the Human Resource Manager, and the Human Resource Director based at South Africa.
  8. The respondent owned the premises from which it conducted its business, but continued to operate from the premises under lease, executed with the new owner. The claimant as Risk Manager, was involved in management of the premises. However, the new owner took over the premises and the property management function, previously discharged by the claimant. The respondent had to release the claimant.
  9. The Labour Office was notified. The claimant had been consulted before the decision was made. It was only the claimant's position that was affected, and it was not possible to apply the statutory selection criteria. Other employees were junior to the claimant, discharging the roles of cleaners and technicians. They could not be ranked alongside the claimant.
  10. The Human Resource Manager was not on leave, and drafted and signed the termination letter on behalf of the Finance Director, who was away on conference at Mombasa. The respondent paid severance and notice to the claimant. Abolishment of office was not premised on poor performance.
  11. His appraisal in any event was not stellar. He made comments admitting to have withheld facility related requisitions; failure to offer management support; and attempts to frustrate security discipline. The reply to demand letter, did not justify illegality but was a candid restatement of the law as held by the Court of Appeal.
  12. The respondent prays the court to dismiss the claim with costs.
  13. The claimant gave evidence, and closed his case on September 20, 2022. Respondent's Human Resource Manager, Sarafin Njiru, gave evidence on April 19, 2023 and June 30, 2023. The matter was last mentioned on July 26, 2023, when parties confirmed filing and exchange of their closing submissions.
  14. The claimant adopted his witness statement and documents [1-8] on record. He confirmed the that he was respondent's Risk Manager. There were 35 employees working under him. He was the only one selected for redundancy. There was no communication. The respondent was not undergoing financial downturn. Termination came immediately after appraisal. He had raised certain issues concerning the Finance Director in the appraisal, which he felt the Finance Director was failing to do. He was not aware that any notice issued to the Labour Office.
  15. Cross-examined, he stated that he was paid salary for days worked. He did not recall if, 3 months' salary was paid in notice. He had an outstanding loan with Stanbic Bank. The respondent had given him recommendation letter, when the loan was obtained.
  16. His appraisal had behavioural aspects that should stop. He input these aspects. Achievements and disappointments were noted. Human Resource Manager was absent on termination. The claimant did not know how the Human Resource Manager signed the letter, if absent. Notice period was 1 month. The letter of termination bears the stamp of the Labour Office. He was not involved in discussions leading to change of premises ownership. 35 employees worked under him. They could be appointed as Managers.



17. The claimant received terminal dues in his bank account. He did not recall the amount received. Redirected, he told the court that the Labour Office received the notice on June 11, 2019. The claimant left employment on May 24, 2019.
18. Sarafin Njiru relied on her witness statement and documents filed by the respondent. Cross-examined, she told the court that she issued redundancy letter to the claimant. She signed it. Sarafin reported to the Finance Director. She could not fire the claimant because she was, at the same level with him. She signed the letter on behalf of the Finance Director, who was away from office.
19. The respondent made a decision to sell the premises, but continue tenancing. There was no restructuring of the business. The claimant's position would no longer be required, because management of the premises had been taken over by the new landlord. The claimant's duties included security and property management.
20. He was paid severance through his bank account. He was paid notice of 3 months.
21. The claimant held that he did not receive any money through his bank account. Hearing was adjourned on April 19, 2023, to enable the witness to avail the Claimant's bank statement, showing payment. On April 20, 2023, parties informed the court they had filed a consent, showing that the claimant was paid through his bank account, Kshs 1,426, 072 in severance.
22. Sarafin continued to give evidence on redirection, on June 30, 2023, when the hearing closed. She explained that severance, annual leave and notice was paid, at Kshs 1,426,072. The employees working under the claimant were junior, and could continue discharging their roles under the new premises management.
23. The issues are whether termination of the claimant's contract through redundancy was carried out lawfully and fairly, in accordance with sections 40, 43 and 45 of the *Employment Act*; and whether he merits the prayers sought.

**The Court Finds: -**

24. The claimant was employed by the respondent on June 1, 2013 as the East Africa Security Manager. He was promoted to the position of Risk Manager. He oversaw security and management of the respondent's business premises.
25. He was informed by the respondent on May 24, 2019 that his position had been declared redundant. Termination was effective the same date the letter issued.
26. It is not material to the dispute, whether the letter of termination was signed by the Human Resource Manager or, by or on behalf of the Finance Director. It suffices that the decision was made by the respondent, and communicated through an officer acting for the respondent.
27. There is evidence that the claimant's position was declared redundant on change of ownership of respondent's business premises.
28. The respondent continued to operate its business from the premises, but on lease agreement, executed with the new owners.
29. The new owners took over the role of managing the premises. The claimant's role was therefore taken over by the new premises owner. The respondent logically would not continue to employ the claimant, to oversee a property it no longer owned, or controlled.



30. Junior employees under the claimant, were taken over by the new owner. These were subordinates, such as cleaners. Redundancy principles, including LIFO/FILO; job experience; skills; ability; and reliability under section 40[1] [c] of the *Employment Act*, would not apply to the claimant in relation to the 35 employees who worked under him. They were not his comparators. Selection criteria could only apply to employees similarly positioned.
31. The claimant's position that he had been appraised, and good performance recorded, is neither here nor there. His contract was not terminated because he was involved in disciplinary infractions or poor performance; termination was by involuntary means. The respondent ceased to have control over management of the business premises, a role that was discharged by the claimant. There was a genuine redundancy reason, justifying termination of the claimant's contract.
32. The existence of a genuine redundancy reason, does not justify the procedure adopted by the respondent, in terminating the claimant's contract.
33. The claimant was informed that his position had been rendered redundant, on the same date he was released- the May 24, 2019. This was not legally justifiable, and was completely irregular.
34. The sale of the business premises, and lease of the premises by the respondent, were not transactions that happened on May 24, 2019. They did not happen, at the drop of a hat. The transactions must have been going on prior to May 24, 2019, and the respondent knew that the claimant's position would be rendered redundant, well before May 24, 2019.
35. The respondent ought therefore, to have adequately engaged the claimant early, before May 24, 2019.
36. Section 40 of the *Employment Act* states that an employer, shall not, terminate a contract of service on account of redundancy, unless the employer complies with the conditions ranging from section 40 [1] [a] to [g].
37. Section 40 [1] [b] requires that where the employee is not a member of a trade union, the employer notifies the employee personally in writing, and the Labour Officer, not less than a month prior to the date of termination on account of redundancy.
38. The claimant was not issued, not less a month's notice, of the intended redundancy.
39. The purpose of this initial notice is to enable parties to consult, and explore whether redundancy can be avoided or mitigated, and agree on severance package, with the involvement of the Labour Office. It would not be issued simultaneously to the notice issued to the Labour Office, if it was only of informational value, to the employee. It is not merely a notice, announcing end of the contract. It is a notice of intended redundancy, paving way for tripartite consultations, involving the employer, the employee or his Trade Union, and the Government. Notice of termination of the contract comes after, when a redundancy decision has been made, upon consultations.
40. Once consultations have taken place, and it is determined that there is no alternative to redundancy, and the employee must leave on account of redundancy, after all mitigation factors have been taken into account, section 40 [1] [f] requires that the employee is issued termination notice, or paid not less than 1-month salary in lieu of notice. This is a notice of the actual termination of the contract of employment.
41. There is no provision under section 40 of the *Employment Act*, which suggests that an employer can avoid the express provisions of this law, by payment of notice, under section 40 [1] [f] of the *Employment Act*. All conditions, including issuance of notice of intended redundancy and notice to



the Labour Office, and by implication consultations, must take place. Consultations would involve the Employer, the Employee/ Trade Union, and the Labour Office.

42. Section 40 of the [Employment Act](#) is to be read with sections 43 and 45 of the [Employment Act](#), requiring an employer to give valid reasons, justifying termination. Redundancy must be shown to be a valid and genuine termination reason. Employment is no longer at the will of an employer, terminable merely by notice or notice pay. Redundancy must be based on valid reason, and procedural conditions under section 40 of the [Employment Act](#), must be met in full.
43. The respondent only issued a notice of termination, on May 24, 2019, the same date the claimant was asked to leave employment, and went on to pay 3months' notice, well after termination had taken effect.
44. The Labour Office Athi River, wrote to the claimant's Advocates on October 3, 2019, confirming that it did not receive a notice concerning redundancy on May 24, 2019.
45. The claimant indicated in his evidence, that the Labour Office was issued a notice, dated June 11, 2019, after termination of his contract on May 24, 2019.
46. Such a notice would not serve its intended purpose, and amounted to no notice at all.
47. The respondent paid to the claimant through his bank account, 3 months' notice at Kshs 937,365. He was paid what was described as 3 months' severance pay, at Kshs 937,365, and unspecified pending leave days, at Kshs 118,000. The total amount paid, after statutory deductions, and bonus saver, was Kshs 1,426,072.
48. The amount paid in severance satisfied section 40 [1] [g] which requires severance is paid at a rate of not less than 15 days' salary for each complete year of service. Notice was paid, as was pending leave.
49. While the respondent paid to the claimant severance package subsequent to termination, redundancy procedure remained unfair and unlawful, for reasons shown above. It amounted to unfair and unlawful termination. There was no notice issued on intended redundancy; termination was abrupt, at the will of the respondent; there was no room for tripartite consultations; and, the Labour Office confirmed it was not notified, while the claimant told the court that the Labour Office was issued a notice, after his contract was terminated.
50. The claimant had worked for 5 years, 11 months. He was not at fault, and termination was involuntary. He was paid redundancy benefits at Kshs 1,426, 072. He is granted compensation for unfair termination, equivalent of 4 months' gross salary at Kshs 814,748. Costs to the claimant.

**In Sum, It Is Ordered : -**

- a. It is declared that termination on account of redundancy, was not in compliance with section 40 of the [Employment Act](#), and was unfair and unlawful.
- b. The respondent shall pay to the claimant equivalent of 4 months' salary in compensation for unfair termination at Kshs 814, 748.
- c. Costs to the claimant.

**DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY VIA E-MAIL, AT NAIROBI, UNDER PRACTICE DIRECTIONS 6[2] OF THE ELECTRONIC CASE MANAGEMENT PRACTICE DIRECTIONS 2020, THIS 23<sup>RD</sup> DAY OF AUGUST 2023.**

**JAMES RIKA**



**JUDGE**

