



**Ng'ongah v Mount Kenya University (Cause 1 of 2022)  
[2023] KEELRC 2220 (KLR) (28 September 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2220 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU  
CAUSE 1 OF 2022  
CN BAARI, J  
SEPTEMBER 28, 2023**

**BETWEEN**

**BILLY GEORGE NG'ONGAH ..... CLAIMANT**

**AND**

**MOUNT KENYA UNIVERSITY ..... RESPONDENT**

**JUDGMENT**

**Introduction**

1. This suit was first instituted through a Memorandum of Claim dated 23<sup>rd</sup> September, 2020. The Claimant sought and was granted leave to amend his claim, and which he did vide an Amended Memorandum of Claim dated 29<sup>th</sup> September, 2022, and filed on 4<sup>th</sup> October, 2022.
2. Under the Amended Memorandum of Claim, the Claimant seeks orders for payment of 3 months' salary in lieu of notice, salary for the month of February, 2020, damages for wrongful termination, severance pay and leave earned, all amounting to Kshs. 4, 203, 800.00
3. The Respondent filed a response to the Claimant's claim on 10<sup>th</sup> June, 2021, and which remained unamended after the amendment of the claim.
4. The Claimant's case was heard on 24<sup>th</sup> January, 2023, when the Claimant testified in support of his claim. He adopted his witness statement and produced documents filed in support of his claim.
5. The Respondent's case was heard on 13<sup>th</sup> February, 2023. The Respondent presented a Ms. Janet Kajwang to testify on its behalf. She adopted her witness statement and produced documents filed in support of the Respondent's case.
6. Submissions were filed for both parties.



## The Claimant's Case

7. It is the Claimant's case that he was employed by the Respondent as a Senior Lecturer in the School of Education under a three (3) year contract with effect from 1<sup>st</sup> June, 2012, and which contract was subject to renewal on mutual agreement of both parties. It is his further case that his contract was renewed in 2016, and again in 2019, and that the termination of the contract of 2019, is the subject of the suit herein.
8. The Claimant states that at the time the issues in dispute herein, and to which this claim relates arose, he was engaged as a Senior Lecturer in the School of Education at the Respondent's Nakuru Campus.
9. The Claimant states that vide a letter dated 6<sup>th</sup> February, 2020, the Respondent terminated his employment on account of redundancy, alleged to have been occasioned by a change in operational requirements at the University following a workload analysis and harmonization of units across the University.
10. He further states that the letter informed him that his position had been rendered redundant and that his employment would terminate effective 10<sup>th</sup> February, 2020.
11. It is the Claimant's case that the termination of his employment on account of redundancy was unlawful, wrongful, unjustifiable and unprocedural on the grounds that the process by which the Respondent purported to terminate his employment was vague and discriminatory, as the reasons put forward in the letter of termination were false and designed to prop up an irregular process.
12. It is his case that the Respondent violated the express and mandatory provisions of Section 40 of the *Employment Act*, 2007 by terminating his employment on account of redundancy without informing the Labour Office of the intended declaration of redundancy, failure to consider his seniority in time, skill, ability and reliability, failure to pay his leave dues upon the declaration of redundancy, giving him 3 days notice of termination and for failure to pay the Claimant his severance pay.
13. The Claimant states that the Respondent's actions are unconstitutional and greatly violate the provisions of Articles 28, 41, and 47 of *the Constitution* of Kenya, 2010, the applicable ILO Conventions, and the *Employment Act*, 2007.
14. The Claimant further states that as a result of his unlawful and unprocedural termination, he has suffered great economic loss, damage and prejudice as regards his financial affairs.
15. It is the Claimant's further case that during the 8 years of engagement with the Respondent, he was involved in the supervision and graduation of twenty-two (22) Masters students at the Respondent's Nakuru Campus on separate terms, and for which he was yet to be paid at the time his employment was terminated.
16. It is his case that as per the Respondent's policy, the rate payable for such supervision as at the time the services were rendered was Kshs.30,000.00 for each student payable to each lead supervisor, which he was, thereby bringing the total amount due, owed and payable to him on this account to a total of (Kshs.30,000.00x22) =Kshs.660,000.00
17. The Claimant further states that upon the termination of his employment, the Respondent proceeded to deposit a sum of Kshs. 840,000.00 in two tranches into his bank account without any indications or a breakdown of what the amount covered.
18. In his evidence in chief, the Claimant told the Court that he was called by the Respondent's Human Resources Director on 1<sup>st</sup> February, 2020, and informed of the decision to declare his position



redundant and that he received a letter terminating his services on the ground of redundancy on 3<sup>rd</sup> February, 2020, and which letter was dated 6<sup>th</sup> February, 2020.

19. It is his testimony that his contract was continuously renewed for 8 years but that each contract was separate. It is his further position that he could not produce letters appointing him as supervisor as the letters were not issued by the Respondent and is the reason he did not claim the payments when he was still in service.

### **The Respondent's Case**

20. The Respondent's case is that it appointed the Claimant to the position of Senior Lecturer in the School of Education for a period of three (3) years with effect from June, 2012, which contract expired on the 31<sup>st</sup> May, 2015, and was not renewed as alleged by the Claimant.
21. It is the Respondent's case that upon expiry of the Claimant's first contract on the 31<sup>st</sup> May, 2015, he was duly informed of the expiry vide a letter dated 2<sup>nd</sup> January, 2016 and paid all his terminal dues through Cheque No. 9571 for Kshs.426,428.00
22. The Respondent states that the Claimant was not continuously in their service from the year 2012, up to the time of termination of his last contract with Respondent on the 6<sup>th</sup> February, 2020, as alleged.
23. The Respondent further states that after the expiry of the Claimant's initial contract on the 31<sup>st</sup> May, 2015, it appointed him as a Senior Lecturer for a period of three years with effect from the 1<sup>st</sup> May, 2016, by way of the letter dated 4<sup>th</sup> May, 2016, in what was a separate and distinct contract from the one which expired on 31<sup>st</sup> May, 2015.
24. It is the Respondent's position that the third contract was, by way of the Renewal of Contract letter dated 15<sup>th</sup> April, 2019, for a further period of five years with effect from the 1<sup>st</sup> May, 2019 on the terms, inter alia, that the Claimant would be based at the Respondent's Kakamega Campus in the same position of Senior Lecturer.
25. The Respondent states that the decision to declare the Claimant redundant was arrived at after extensive and elaborate discussions with him on how and why the Respondent had arrived at the said decision, and was mutually agreed as between the parties, inter alia, that instead of issuing the Respondent with a three month notice he would, instead, be paid his three months' salary in lieu of notice.
26. The Respondent further states that parties herein agreed that the Claimant was to be paid his gratuity, outstanding leave days, three months' salary in lieu of notice, severance pay and other entitlements based on his contract, and subject to his full clearance with the Respondent.
27. It is its further case that the Claimant, based on the elaborate discussion and agreement with Respondent, did clear with Respondent, and which clearance was confirmed in the Claimant's Staff Clearance Form dated 12<sup>th</sup> February, 2020, and that he was paid his terminal dues as outlined in his termination letter dated 6<sup>th</sup> February, 2020.
28. The Respondent states that it is both false, misleading and dishonest for the Claimant to allege that he did not know the purpose of Kshs.840,000.00 which the Respondent deposited in his account on various dates after the termination of his employment.
29. It is the Respondent's position that it complied with the procedural and substantive requirements of Section 40 of the [Employment Act](#), 2007 in declaring the Claimant redundant.



30. The Respondent states that Notice of Intention to declare the Claimant redundant was duly served on the Labour Officer, Thika as required by the law.
31. The Respondent denies that the termination of the Claimant was unprocedural and unlawful, and in particular denies that the Claimant suffered great economic loss, damage and prejudice as alleged or at all.
32. The Respondent states that all appointments of its Senior lecturers to act as supervisors for masters students, were done through specific letters of appointment addressed to the particular supervisor, identifying the student and the project to be supervised including the specific task the supervisor is to conduct in relation to the supervision.
33. The Respondent further states that it did not appoint the Claimant to supervise twenty-two (22) masters students as alleged.
34. Ms. Janet Kajwang (RW1) testifying for the Respondent, told Court that the Claimant was paid his dues at the end of his contract in May, 2015, and was issued a second contract in May, 2016, which contract was distinct and separate from the initial contract. She denies that the Claimant at any point served continuously.
35. It is RW1's testimony that the Claimant's contract was again renewed on 1<sup>st</sup> May, 2019, for a further 5 years.
36. RW1 further told court that the Claimant was informed verbally of the decision to declare him redundant, and later through the letter of termination. On cross-examination, she confirmed that there was no formal consultation with the Claimant on the decision.
37. On cross-examination, RW1 told Court that the Claimant served the Respondent for an aggregate 7 years and 5 months before he was declared redundant.
38. RW1 further stated that the redundancy was informed by a process of harmonization of units within the Respondent, but further confirmed that the taskforce report on the harmonization was not produced in evidence before Court.
39. RW1 further confirmed on cross-examination that the Claimant was issued with a 4 days notice prior to the termination. She further stated that the Claimant was paid a total of Kshs. 854,405 being 3 months' salary in lieu of notice, salary for February, 2020, a total of Kshs. 121,030 on account of 36.5 days of accrued leave, Kshs. 148,200 on account of severance pay,
40. On supervision of masters students, RW1 told court that the Claimant only submitted letters of appointment in respect of 5 students and not 22 as alleged.
41. The Respondent prays that the Claimant's suit be dismissed with costs.

### **The Claimant's submissions**

42. It is submitted for the Claimant that there was no basis at all for his redundancy and that the Respondent did not attempt to prove the reasons for redundancy. It is further submitted that the Claimant's termination was malicious, unfair, unjust and unlawful within the meaning of Section 45 of the *Employment Act*. They had reliance in *Daniel Mburu Muriu v Hygrotech East Africa Ltd* [2021] eKLR to support this position.



43. It is submitted that the Claimant is eligible for the reliefs provided for by Section 49(1)(c) of the [Employment Act](#) on the premise that his contract had just been renewed for a further five years and was ambushed with the decision of redundancy.

### **The Respondent's Submissions**

44. The Respondent submits that extensive and elaborate discussions had been held between the Claimant and the Respondent herein in the period following and preceding his position being declared redundant on the need for the same, discussions which the Claimant herein was privy to and well aware of. The Respondent sought to rely in the case of [Jane Khalechi v Oxford University Press EA Limited](#) [2013] eKLR Cause No. 924 of 2010 to buttress this position.
45. It is the Respondent's submission that contrary to the Claimant's averments, there is no requirement that redundancy has to affect more than one employee. It submits that one position can be declared redundant, as informed by the operational needs of a particular employer or institution whilst discharging its mandate, as was the case herein.
46. It is submitted that there existed a stipulated procedure for claiming supervision fees and which could only be paid upon graduating the supervised students, and that the Claimant never provided any evidence of having claimed for the same from the Respondent herein, save for orally stating the same. It is further submitted that the claims for supervision fees are time barred by virtue of Section 90 of the [Employment Act](#). Reliance was had in [Ndirangu v Henkel Chemicals E. A. Ltd](#) [2013] eKLR to support this position.
47. The Respondent submits that it fully complied with the terms of the individual contracts it entered with Claimant as read together with the [Employment Act](#) 2007 and [the Constitution](#) of Kenya 2010, and the Claimant was thus procedurally declared redundant and is not entitled to any of the remedies sought in his statement of Claim for unfair termination.
48. The Respondent finally submits that the interest of justice tilts in favour of allowing the Respondent's case, and pray that this Honourable Court dismisses the Claimant's Statement of Claim with costs to the Respondent.

### **Analysis and Determination**

49. I have considered the pleadings, the witnesses' testimonies and the rival submissions. The issues that arise for determination are:
- i. Whether the Respondent complied with the law in respect of the Claimant's redundancy.
  - ii. Whether the Claimant is entitled to the reliefs sought.
  - iii. Who should bear the costs of the suit.

### **Whether the Respondent complied with the law in respect of the Claimant's redundancy**

50. The [Employment Act](#), 2007, defines redundancy as loss of employment, occupation, job or career by involuntary means through no fault of the employee. It is termination of employment at the initiative of the employer where services of the employee are no longer needed. It is a fair reason for dismissal where an employer can show that actual redundancy was the reason for dismissal.
51. To determine the legality of a redundancy, the court has to examine the integrity of the entire process vis-a-vis the steps laid out under Section 40 of the [Employment Act](#). Further, the Court must also



determine whether the redundancy adhered to the strict provisions of Section 43 and 45 of the Act on unfair termination.

52. Section 40 of the *employment Act* states thus on redundancy: -

- “(1) An employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions—
- a. where the employee is a member of a trade union, the employer notifies the union to which the employee is a member and the labour officer in charge of the area where the employee is employed of the reasons for, and the extent of, the intended redundancy not less than a month prior to the date of the intended date of termination on account of redundancy;
  - b. where an employee is not a member of a trade union, the employer notifies the employee personally in writing and the labour officer;
  - c. the employer has, in the selection of employees to be declared redundant had due regard to seniority in time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy;
  - d. where there is in existence a collective agreement between an employer and a trade union setting out terminal benefits payable upon redundancy; the employer has not placed the employee at a disadvantage for being or not being a member of the trade union;
  - e. the employer has where leave is due to an employee who is declared redundant, paid off the leave in cash;
  - f. the employer has paid an employee declared redundant not less than one month’s notice or one month’s wages in lieu of notice; and
  - g. the employer has paid to an employee declared redundant severance pay at the rate of not less than fifteen days pay for each completed year of service.”

53. The foregoing provisions are couched in mandatory terms and an employer considering redundancy has to fully comply with the requirements of Section 40. (See *Kenya Union of Journalists and Allied Workers v. Nation Media Group*, (2013) eKLR).

54. The question then became whether the Respondent herein in declaring the Claimant redundant, adhered to the provisions of Section 40 of the *Employment Act*. RW1 in her testimony, told this Court that the Respondent did not know whether or not the Claimant belonged to a union.

55. For this reason, the requirement of Section 40(1)(b) then comes into play. The Respondent is by this provision required to have issued notice of redundancy to both the Claimant and the Labour Officer.

56. RW1 again confirmed in her testimony, that there was no formal communication or consultation with the Claimant on the decision to declare him redundant, save for a call by the Respondent’s head of department about two days to the issuance of the termination letter.



57. The Court of Appeal in *Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others* [2014] eKLR opined thus: -

“ 51. Kenya is a State party to the International Labour Organization (ILO), which it joined in 1964 and is bound by the ILO conventions. Article 13 of Recommendation No. 166 of the ILO Convention No. 158-Termination of Employment Convention, 1982 requires consultation between the employers on the one hand and the employees or their representatives on the other before termination of employment under redundancy.”

58. The Court further observed: -

“Section 40(1) of the *Employment Act* requires employers contemplating redundancy to give the employees or their trade union notice of at least one month. In addition to providing the parties with an opportunity to try and avert or minimize terminations resulting from redundancy and mitigate the adverse effects of such terminations...”

59. Further, although the Respondent purport to have had discussions with the Claimant on the decision to declare him redundant, no evidence was led to prove that the discussions actually took place. The only communication that is not denied in relation to the redundancy, is the call by the Respondent’s Human Resources Director informing the Claimant of the decision, before a letter terminating his service was issued to him two days later.

60. Although the Respondent states that Notice of Intention to declare the Claimant redundant was duly served on the Labour Officer, Thika as required by the law, no prove or evidence was led to show that the redundancy notice was actually served upon the Labour officer and for the requisite duration of one month prior to the declaration of redundancy.

61. The requirement of valid and fair reasons for termination, also apply to terminations premised on redundancy. The employer has thus to adhere to Sections 43 and 45 of the Act on the existence of a true or factual redundancy situation as to justify the declaration of redundancy.

62. The Respondent told the Court that the declaration of redundancy was informed by a process of harmonization of units within the Respondent, as recommended by a taskforce, but the taskforce report was not produced in evidence before court.

63. The Court could therefore not confirm that the need for redundancy was for true and factual reasons, and which then would have justified the termination. Radido J in *Kombo Kai Mtoro v Panel Freighters Ltd* [2013] eKLR the Court stated as follows:

‘In my view, termination of employment through redundancy is also subject to the fair termination provisions of section 45 of the *Employment Act*. A termination through redundancy is envisaged in section 45(2)(b)(ii) of the Act, in that it is based on the operational requirements of an employer and therefore an employer must prove that the operational requirement is both valid and fair....’

64. It is thus evident that the Claimant was neither issued with termination/redundancy notice nor informed of the reasons that informed the decision, and which renders the redundancy unprocedural and the termination unfair, and I so hold.



### Whether the Claimant is entitled to the reliefs sought

65. The Claimant seeks orders for payment of 3 months' salary in lieu of notice, salary for the month of February, 2020, damages for wrongful termination, severance pay and leave earned, all amounting to Kshs. 4, 203, 800/-
66. The Claimant confirmed having received a total of Kshs. 840,000/- from the Respondent upon his termination, but which he says could not figure out on what account the payments related.
67. RW1 on her part told this Court that the Claimant was paid a total of Kshs. 854,405 being 3 months' salary in lieu of notice, salary for February, 2020, a total of Kshs. 121,030 on account of 36.5 days of accrued leave, Kshs. 148,200 on account of severance pay.
68. Assuming that the amount paid related to the headings provided by the Respondent's witness, and the Claimant's salary under his last contract being Kshs. 190,000/- the Kshs. 854,404 would be less than the amount it ought to have paid by Kshs. 174,825/-
69. I therefore proceed to award the difference in the admitted amount of Kshs. 174,825/-
70. The Claimant has also made a claim for payment of supervision cost for having supervised 30 Masters students. The Respondent told court that supervision is by appointment and that the students supervised must first graduate before the payment to the supervisor becomes payable.
71. The Claimant has produced 5 appointment letters appointing him as a supervisor for masters students. Though no evidence was led to show whether or not the students graduated, graduation lists are the Respondent's documents which it ought to have produced to show that the students did not graduated as to make the Claimant ineligible for the payment.
72. Further, the Respondent's assertion that the claim for supervision costs is time barred, is not supported by evidence of when the supervised students graduated, for time to begin to run. The assertion is therefore baseless and cannot stand.
73. In the premise, I award the Claimant for payment of supervision costs at Kshs. 30,000/- per students for the five students he proved to have been assigned to supervise.
74. The Claimant's claim on account of discrimination was not proved and it fails and is dismissed.
75. On the claim for damages for wrongful termination, the finding of unfair termination premised on unprocedural declaration of redundancy, entitles the Claimant to compensation in accordance with Sections 49 and 50 of the *Employment Act*, 2007. (See *Benjamin Langwen v National Environment Management Authority* [2016] eKLR.)
76. The Claimant served the Respondent for an aggregate seven and half years. There was nothing in the evidence placed before court indicating that he could have contributed to his termination.
77. Considering that the termination arose from a declaration of redundancy which is a fair reason to terminate where procedure and substantive justification is given, I deem an award of 7 months' salary sufficient compensation for the unfair termination.
78. I conclude by holding that the Claimant's suit is merited and orders granted as follows: -
  - i. A declaration that the Claimant's redundancy was unprocedural and the termination unfair.
  - ii. Payment of Kshs. 174,825/- being the balance due and owing on account of 3 months salary in lieu of notice, severance pay, accrued leave and salary for the month of February, 2020.



- iii. Payment of 7 months' salary for the unfair termination at Kshs. 1,330,000/-
- iv. An order for payment of Kshs. 150,000 for supervision of Masters Students.
- v. Costs of the suit and interest until payment in full.

79. Judgment of the Court.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS  
28TH DAY OF SEPTEMBER, 2023.**

**CHRISTINE N. BAARI**

**JUDGE**

**Appearance**

Ms. Anuro h/b for Ms. Oduor for the Claimant

Mr. Kenyatta present for the Respondent

Ms. Christine Omolo – C/A

