



**Njenga v World Vision International & 2 others (Cause E013 of 2023)
[2023] KEELRC 2170 (KLR) (22 September 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2170 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E013 OF 2023
SC RUTTO, J
SEPTEMBER 22, 2023**

BETWEEN

JOYCE KABURA NJENGA CLAIMANT

AND

WORLD VISION INTERNATIONAL 1ST RESPONDENT

VISION FUND INTERNATIONAL LIMITED 2ND RESPONDENT

VISION FUND KENYA 3RD RESPONDENT

JUDGMENT

1. Through a Memorandum of Claim filed on 17th January, 2023, the Claimant avers that she was employed by the 3rd Respondent through a letter dated 15th October, 2014. That she was subsequently seconded to the 2nd Respondent which is a wholly owned subsidiary of the 1st Respondent. She was issued with a contract amendment dated 11th July, 2017 wherein her terms of employment were duly amended effective 1st August, 2019. The Claimant further avers that *vide* a letter dated 15th February, 2019, she was issued with a letter of employment by World Vision East Africa Regional office to the office of Regional Insurance Manager- Africa. It is the Claimant’s case that as a manifestation of her exemplary work, she was promoted through the years from hay grade 14 and hay grade 16. She further states that despite diligently performing her duties, she was verbally informed in September, 2019 that she was to be placed on Performance Improvement Plan (PIP). She was not informed of the outcome of her PIP and neither was she subjected to review and/or assessment upon the end of the PIP period. She was later issued with a redundancy notice dated 15th July, 2020 wherein she was informed that her last day of employment would be 15th August, 2020.
2. The Claimant contends that her redundancy was not undertaken in accordance with the provisions relating to redundancy.



3. It is on account of the foregoing that the Claimant seeks several reliefs against the Respondents, being notice pay, compensatory damages, unpaid severance pay, costs of the suit as well as interest.
4. The Respondents did not enter appearance despite being served with the Summons and Statement of Claim. In this regard, the Claimant filed an Affidavit of Service sworn by one Peter Ng'eno on 26th May, 2023.
5. Subsequently, the matter was set down for formal proof hearing on 20th June, 2023, during which the Claimant testified in support of her case. The Respondents did not participate in the formal proof hearing despite being served with the notice to that effect.

Claimant's case

6. At the outset, the Claimant sought to rely on her witness statement and documents filed together with her Claim, to constitute her evidence in chief.
7. It was her evidence that as a demonstration of her employment, vide a letter dated 1st May, 2019, to Standard Chartered Bank Kenya Ltd, it was duly communicated that she was confirmed as an employee of World Vision International based at the East Africa Regional Office in Nairobi. Her role was stated to be within Vision Fund International, a wholly owned subsidiary of World Vision International.
8. She further stated that vide a letter dated 13th May, 2019, she was notified of a salary adjustment, wherein her salary was increased by 2.65% effective from 1st April, 2019. Accordingly, her annual salary was adjusted to Kshs 4,846,701 in Grade 16.
9. She further averred that as a manifestation of her exemplary work, she was promoted through the years from hay grade 14 and hay grade 16 and a regional expert through promotions.
10. That despite diligently performing her duties with the organization, she was verbally informed in September, 2019, that she was to be placed on Performance Improvement Plan (PIP). The actual PIP issued to her was to commence on 1st January, 2020 and end on 31st March, 2020.
11. It was the Claimant's case that she was never informed of the outcome of her PIP and neither was she subjected to a review and/or assessment upon the end of the PIP period.
12. The Claimant proceeded to state that despite never receiving any feedback as to her performance, she was issued with a redundancy notice dated 15th July, 2020, wherein she was informed that her last day of employment would be 15th August 2020. This was a one month notice of termination of employment.
13. Immediately after the redundancy discussion held on 15th July, 2020, a job titled "Business Support Manager" was advertised. The job had a strikingly similar job description as that of the regional lead which she was holding. According to the Claimant, this was an attempt to interview her for the same job but there was no written feedback on her success or failure to clinch the position.
14. She further stated that she was notified that she was ineligible for rehire for a period of 12 months from the date of separation. That this is when the 1st Respondent advertised the vacancy of Insurance Business Development Manager in 2021. She was effectively barred from applying.
15. The Claimant further stated that at the time of the declaration of redundancy, she was an employee of World Vision International and not Vision Fund International. That the grounds of the redundancy were due to a restructuring at Vision Fund International. However, the same does not address itself to the fact that Vision Fund International was not her employer.



16. She further contended that in all pay slips issued to her months preceding the illegal and unlawful termination, her employer was noted as World Vision East Africa Regional.
17. That in an attempt to sanctify the illegal and unlawful conduct, she was issued with a Certificate of Service pursuant to the termination of her employment. She contends that the Certificate of Service does not appropriately state the various roles she held in the various Respondent organizations.
18. Having been in World Vision employment for close to 6 years, she had seen groups of world vision staff declared redundant. However, during her termination, certain condition precedents were not followed to her prejudice. According to the Claimant, the Respondents' failure to accord her similar treatment from the previous employees who were declared redundant, amounted to discrimination contrary to Article 27 of the Constitution of Kenya 2010 and Section 5 of the Employment Act 2007.

Submissions

19. The Claimant adopted the submissions contained in her Memorandum of Claim. Citing the case of *Hesbon Ngaruiya Waigi vs Equitrial Commercial Bank Limited* (2013) eKLR, it was the Claimant's submission that the redundancy procedure undertaken was in breach of the law. It was further submitted that as a demonstration of bad faith, the Respondents re-advertised a job that was of a similar job description as the Claimant's. To this end, the Claimant argued that the redundancy was a smoke screen to her termination as the Respondents intended for her duties to continue being performed. On this score, reliance was placed on the case of *The Queen vs Industrial Commission of South Australia; ex parte Adelaide Milk Supply Cooperative Limited* (1977) 44 SAIR 1202.
20. It was further submitted that the Claimant having been placed on a PIP to which no feedback was issued and subsequently being denied a right to be heard prior to her termination, was calculated at disenfranchising her right to be heard. In support of this argument, the Claimant referred to the case of *Kenfreight (E.A) Limited vs Benson K. Nguti* (2016) eKLR.

Analysis and Determination

21. Arising from the Claim before me, the evidence on record and the Claimant's submissions, the following issues stand out for determination:
 - i. Whether the Claimant's termination by way of redundancy was fair and lawful; and
 - ii. Whether the Claimant is entitled to the reliefs sought.

Whether the Claimant's termination by way of redundancy was fair and lawful.

22. From the record, the Claimant's employment was terminated by way of redundancy. The question is whether the same was fair and lawful.
23. As was held the Court of Appeal in the case of *Kenya Airways Limited vs Aviation & Allied Workers Union Kenya & 3 Others* (2014) eKLR, for any termination of employment under redundancy to be lawful, it must be both substantially justified, and procedurally fair.
24. Substantial justification refers to the reasons for which the redundancy was effected, while procedural fairness has everything to do with the procedure applied in effecting the redundancy. I will start by addressing the question of substantive justification.



i. Substantive justification

25. The term redundancy is defined under Section 2 of the [Employment Act](#) to mean “the loss of employment, 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 practices commonly known as abolition of office, job or occupation and loss of employment”.
26. Essentially, what this means is that the circumstances or reasons leading to an employee being declared redundant must fall within the above statutory definition.
27. In addition, for termination by way of redundancy to be fair, the same ought to be in compliance with Section 45(2) (b) (ii) of the [Employment Act](#) which requires an employer to prove that the reason for the termination is valid, fair and based on its operational requirements.
28. Turning to the instant case, the Claimant’s termination was effected vide a letter dated 15th July, 2020 referenced “Redundancy” which reads in part:

“Following the recent review, of the Vision Fund International office structure, I regretfully confirm that your role has been made redundant effective from 16th August, 2020. You are encouraged to explore any suitable open positions within the partnership you may wish to be considered for. If you are unable to find a new assignment, your last day of employment will be on 15th August, 2020.... Furthermore, as per Vision Fund International’s Redundancy Policy, your eligibility for rehire may only be considered after a period of 12 months from the separation date...”
29. Noting the reasons advanced for the Claimant’s termination, it was incumbent for the Respondents to prove the said reasons so as to pass the test of substantive justification. Specifically, the Respondents were required to prove that the Claimant’s role was no longer existing within the organizational structure and that the same had indeed been declared redundant.
30. As was held in the case of Kenya Airways Kenya Airways Limited vs Aviation & Allied Workers Union Kenya & 3 Others (supra), “The phrase “based on operational requirements of the employer” must be construed in the context of the statutory definition of redundancy. What the phrase means, in my view, is that while there may be underlying causes leading to a true redundancy situation, such as reorganization, the employer must nevertheless show that the termination is attributable to the redundancy – that is that the services of the employee has been rendered superfluous or that redundancy has resulted in abolition of office, job or loss of employment.”
31. As stated herein, the Respondents neither filed a defence nor participated in the hearing. Therefore, they did not lead evidence in whatever form or manner to prove that the Claimant’s role had been declared redundant. Without such evidence, it is impossible to tell whether the Claimant’s position was really affected by the restructure of the Respondent organizations.
32. Besides, the Claimant’s assertion that shortly after her termination the Respondents advertised for a position which had a strikingly similar job description to that she was holding, remained uncontroverted.
33. Revisiting the provisions of Sections 43 (1), 45 (2)(a) and (b) and Section 47(5) of Act, it is clear that the Respondents were bound to prove that the reasons for the Claimant’s termination were fair, valid and related to its operational requirements. As stated herein, the same has not been proved in whatever form or manner hence the Respondents’ burden under the [Employment Act](#) was not discharged.



34. Evidently, under Section 40 of the *Employment Act*, an employer has the right to a declare redundancy situation provided the same is justified. Indeed, if the Respondents' intention was to restructure and reorganize the operations of the organisation, thus resulting in the Claimant's redundancy, they were free to do so provided such action was justified under the law.
35. On this score, I will reiterate the sentiments of the Court of Appeal in the case of *Kenya Airways vs Aviation & Allied Workers Union Kenya & 3 others* (supra) thus:
- “Thus, redundancy is a legitimate ground for terminating a contract of employment provided there is a valid and fair reason based on operational requirements of the employer and the termination is in accordance with a fair procedure. As section 43(2) provides, the test of what is a fair reason is subjective.”
36. There being no evidence that the Claimant's position was indeed declared redundant within the Respondents' structure, I am led to conclude that there was no justification for the Claimant's termination by way of redundancy hence her termination in that respect was unfair.

(ii) Procedural fairness

37. With regards to procedural fairness in redundancy cases, Section 40(1) of the Act stipulates the following as the conditions precedent:
- 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.
38. I must emphasize at the outset, that all the conditions stipulated above are mandatory and it is not open for the employer to cherry pick and selectively apply the same.
39. In the instant case, there was no evidence of compliance with the requirement under Section 40(1) (b) from the Respondents' end. I say so because, the letter dated 15th July, 2020 is not the one contemplated



under Section 40(1) (a) and (b) of the Act. Seemingly, the letter was issued to the Claimant after the decision to declare her redundant had already been made by the Respondents.

40. It is my position that the notice contemplated under Section 40 (1) (b) is an “intention to declare a redundancy”. It is issued prior to declaring an employee redundant. What was issued to the Claimant in this case was notification that she had already been declared redundant. This was unprocedural. On this issue, I find useful guidance in the finding by Maraga JA, (as he then was) where he opined as follows in the case of Kenya Airways case vs Aviation & Allied Workers Union Kenya & 3 others (supra):

“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,”

41. The Respondents were therefore at fault for not complying with the requirement under Section 40(1) (b) with regards to issuance of a notice to the Claimant of the intention to declare a redundancy.
42. The Respondents further failed the test under the second part of Section 40(1) (b) as there was no evidence that the labour office was notified of the intention to declare a redundancy.
43. In addition, there was no evidence that the Respondents engaged in consultations with the Claimant prior to declaring her position redundant. Granted, the requirement for consultations is not one of the pre-redundancy requirements under the Employment Act. Be that as it may, Article 13, Convention No. 158 - Recommendation No. 166 of the International Labour Organisation (ILO) convention provides for the same. I wholly subscribe to the position taken by Maraga JA (as he then was) in the Kenya Airways case vs Aviation & Allied Workers Union Kenya & 3 others (supra) with regards to the requirement for consultations, thus:

“Although it also does not expressly provide for consultation between the employer and the employees or their trade unions before the final decision on redundancy is made, on my part I find the requirement of consultation provided for in our law and implicit in the Employment Act itself. By dint of Article 2(6) of the Constitution, the treaties and conventions ratified by Kenya are now part of the law of Kenya. The Kenya Constitution, 2010 was promulgated on 27th August, 2010...The notices under this provision are not merely for information. Read together with Part VIII of the Labour Relations Act, 2007 which provides for reference to the Minister for Labour of trade disputes, including those related to redundancy (see Section 62(4)) for conciliation, I am of the firm view that the requirement of consultations implicit in these provisions.”

44. This position was reiterated in subsequent decisions by the Court of Appeal [see Barclays Bank of Kenya Ltd & another vs Gladys Muthoni & 20 others [2018] eKLR and Cargill Kenya Limited vs Mwaka & 3 others (Civil Appeal 54 of 2019) [2021] KECA 115 (KLR)].
45. I am therefore of the firm view that consultation is a key requirement during a redundancy exercise.
46. In terms of Article 13 of the ILO Convention No. 158, consultations should be aimed at averting and minimizing the terminations or mitigating the adverse effects of any terminations on the employees concerned. Therefore, pre redundancy consultations are very significant.
47. As I have found that there was no evidence of consultations between the parties in the instant case, I return that the Respondents are at fault to that extent.



48. The other pertinent issue is in respect of the selection criteria as stipulated under Section 40 (1) (c) of the *Employment Act*. As the Respondents did not tender any defense, there was no evidence with regards to the selection criteria applied in singling out the Claimant for redundancy. For instance, how was it determined that out of all its employees, it was the Claimant to be declared redundant? In other words, what was the criteria for selecting her for redundancy against other employees? Indeed, evidence of a selection a criteria and the manner in which the same was applied would have provided an objective assessment of the decision by the Respondents. In absence of such evidence, I arrive at the inevitable conclusion that the Respondents erred in that respect.
49. With regards to payment of one month’s salary in lieu of notice under Section 40(1) (f), it is evident from the letter of 15th July, 2020, that the same did not constitute the payments due to the Claimant following her redundancy.
50. I further find it worth mentioning, that compliance with Section 40(1)(f), is in respect to payment of one month’s salary as opposed to issuance of the actual notice. Such was the determination by the Court of Appeal in *Cargill Kenya Limited vs Mwaka & 3 others* (Civil Appeal 54 of 2019) [2021] KECA 115 (KLR), thus:
- “In this respect, it is notable that a plain and contextual reading of subsection 1(f) shows that its express objective and purpose is the payment required to be made to employees affected by redundancy, and not the issuance of a notice. It is also notable that the legislative intention from the arrangement and content of the enactments in section 40 subsection (1) (d) to (g) was the provision of payments to be made to affected employees in a redundancy, and section 1(f) can only thus be construed within this context, as was done by Maraga JA in *Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others* Nairobi Civil Appeal No. 46 of 2013 (supra)...”
51. Therefore, as there is no evidence that the Claimant was paid as appropriate, the Respondents are at fault to that extent.
52. In light of the foregoing, it is apparent that the Respondents substantially failed to comply with the conditions precedent under Section 40 (1) of the *Employment Act*.
53. Concluding on this issue, I wish to echo the sentiments of the Court in the case of *Hesbon Ngaruiya Waigi vs Equitorial Commercial Bank Limited* (2013) eKLR thus:
- “Where redundancy is declared by an employer, the procedure to follow is as set out under the provisions of Section 40 of the *Employment Act* and where not followed, any termination as a result will be deemed unprocedural and unfair. Any termination of an employee following a declaration of redundancy must be based on the law otherwise the same becomes wrong and if the grounds used to identify the affected employees are not as per the law, the same becomes unfair.”
54. In the same fashion, and having found that the Respondents did not substantially comply with the mandatory requirements stipulated under Section 40(1) of the *Employment Act*, I cannot help but find that the Claimant’s termination on account of redundancy was unprocedural hence unlawful.
55. The total sum of my consideration is that the Claimant’s termination on account of redundancy was unfair and unlawful within the meaning of Sections 40, 43 and 45 of the *Employment Act*.



Remedies?

56. Having found that the Claimant's termination by way of redundancy was substantively unjustified and unprocedural, hence unfair and unlawful, she is entitled to compensatory damages pursuant to Section 49 (1) (c) of the *Employment Act*. Taking into account the length of the employment relationship and the fact that there was no justification for the Claimant's termination by way of redundancy, she is awarded compensatory damages equivalent to five (5) months of her gross salary.
57. The Claimant is further awarded one month's salary in lieu of notice in accordance with Section 40(1) (f) of the *Employment Act*.
58. The Claimant has further sought to be paid the sum of Kshs 12,559.36 being equivalent to the underpayment of her severance pay. From the record, she was paid the sum of Kshs 1,152,490.60. It is however not clear how the Respondents arrived at the said sum. I will therefore go by the Claimant's tabulations and award her the difference of Kshs 12,559.36 being the underpayment of her severance pay.

Orders

59. In the final analysis, I allow the Claim and enter Judgment in favour of the Claimant against the Respondents jointly and severally as follows:
- a. The Claimant is awarded one month's salary in lieu of notice being the sum of Kshs 532,601.35.
 - b. The Claimant is awarded compensatory damages in the sum of Kshs 2,663,006.75 which sum is equivalent to 5 months of her gross salary.
 - c. The Claimant is also awarded the sum of Kshs 12,559.36 constituting the underpayment of her severance pay.
 - d. The total award is Kshs 3,208,167.11
 - e. Interest on the amount in (d) at court rates from the date of Judgment until payment in full.
 - f. The Claimant shall have the costs of the suit.
60. The Respondents to issue the Claimant with a Certificate of Service reflecting accurately, the positions she held in the Respondent organizations.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 22ND DAY OF SEPTEMBER, 2023.

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STELLA RUTTO

JUDGE

Appearance:

For the Claimant Mr. Kithinji

For the Respondents No appearance

Court assistant Abdimalik Hussein

ORDER



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

STELLA RUTTO

JUDGE

