



**Ochieng v Tuko Media Limited (Cause E1070 of 2021)  
[2023] KEELRC 2117 (KLR) (21 September 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2117 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E1070 OF 2021  
L NDOLO, J  
SEPTEMBER 21, 2023**

**BETWEEN**

**EDWIN OCHIENG ..... CLAIMANT**

**AND**

**TUKO MEDIA LIMITED ..... RESPONDENT**

**JUDGMENT**

**Introduction.**

1. Edwin Ochieng, the Claimant in this case worked for the Respondent in the position of Cameraperson. He brought this claim following the termination of his employment on 2<sup>nd</sup> December 2021.
2. The claim is contained in a Memorandum of Claim dated 23<sup>rd</sup> December 2021 and filed in court on 28<sup>th</sup> December 2021. In its defence, the Respondent filed a Response to Claim dated 10<sup>th</sup> January 2022.
3. The matter went to full trial where the Claimant testified on his own behalf and the Respondent called its Managing Director, Gibendi Hanningtone Ramenya. The parties also filed written submissions.

**The Claimant's Case**

4. The Claimant states that he was employed by the Respondent as a Cameraperson from 16<sup>th</sup> June 2016. He worked in that position until October 2021 when his employment was terminated.
5. The Claimant accuses the Respondent of discriminating against him by issuing instructions to the then Head of Video Department not to issue the Claimant with headphones, which were required for his work as a Cameraperson.
6. The Claimant further states that on 26<sup>th</sup> November 2021, while he was on paternity leave, the Respondent summoned him and informed him of its decision to terminate his employment on account of redundancy.



7. The Claimant was issued with a termination letter on 27<sup>th</sup> November 2021. According to the Claimant, the termination was in contravention of Section 40 of the [Employment Act](#).
8. On 29<sup>th</sup> November 2021 to Claimant, through his Advocates, wrote to the Respondent, protesting against the termination. In response, the Respondent invited the Claimant to negotiate a settlement.
9. The Claimant claims that the Respondent's Managing Director, Gibendi Hannington Ramenya, informed him that another Cameraperson, by the name Pauline Mbugua had already been hired. The negotiations did not bear fruit.
10. The claimant avers that he received a second termination letter dated 6<sup>th</sup> December 2021.
11. The Claimant lays a claim of unfair termination against the Respondent and gives the following particulars:
  - a. Discrimination contrary to Section 5 of the [Employment Act](#);
  - b. Failing to notify the Claimant personally or the Labour Officer, the reasons for and the extent of the intended redundancy at least one month prior to the date of the termination, contrary to Section 40(1) (a) and (b) of the [Employment Act](#);
  - c. Failing to take into account, in the Claimant's selection for redundancy, seniority in time, the skill, ability and reliability of each employee affected by the redundancy, contrary to Section 40(1)(c) of the [Employment Act](#);
  - d. Unfairly terminating the Claimant's employment contrary to Section 45(1) of the [Employment Act](#).
12. The Claimant now seeks the following remedies:
  - a. A declaration that the Respondent is in breach of the provisions of the [Employment Act](#);
  - b. A declaration that the letter of termination by reason of redundancy dated 29<sup>th</sup> November 2021 is null and void and of no effect;
  - c. An order for re-instatement of the Claimant to the Respondent's employment;
  - d. An order for the re-engagement of the Claimant to the employment of the Respondent in work comparable to that in which the Claimant was employed prior to the termination;
  - e. An order of a permanent injunction prohibiting the Respondent, whether by itself, its servants and/or agents or otherwise howsoever from declaring the Claimant redundant;
  - f. General damages for breach of statutory duty;
  - g. Costs plus interest.

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

13. In its Response dated 10<sup>th</sup> January 2022, the Respondent states that it employed the Claimant on a probationary basis by letter dated 16<sup>th</sup> June 2016. The Claimant was issued with an employment contract dated 1<sup>st</sup> October 2016, upon completion of his probation.
14. The Respondent denies the Claimant's allegations of discrimination. The Respondent further denies that the termination of the Claimant's employment was unlawful and states that the termination was on account of redundancy as provided under Section 40 of the [Employment Act](#).



15. According to the Respondent, the redundancy occurred due to the elimination of the Claimant's position within the Company arising from poor financial performance of the Department where the Claimant was deployed.
16. The Respondent avers that on 26<sup>th</sup> November 2021, the Claimant was invited to a meeting during which he was informed of the Department's poor performance and the immediate need to cut costs which unfortunately entailed elimination of his Cameraperson position within the Department. The Respondent's Manager is said to have sent a follow-up email on 27<sup>th</sup> November 2021 reiterating the contents of the meeting and proposing payment of two (2) months' salary in lieu of notice. A draft termination deed was shared.
17. The Respondent then sent a formal notice dated 29<sup>th</sup> November 2021 to the Claimant, with a copy to the Labour Office, informing the Claimant of the redundancy and setting out his terminal dues which were subsequently paid and accepted by the Claimant. The Respondent asserts that the redundancy was in complete compliance with the law.
18. The Respondent denies issuing the Claimant with a termination letter dated 27<sup>th</sup> November 2021 but adds that its Managing Director sent an email on that date regarding the termination. According to the Respondent, a redundancy notice was issued on 29<sup>th</sup> November 2021.
19. The Respondent states that Pauline Mbugua was hired at the start of September 2021 to work in the Video Department where the Claimant worked. The Respondent states that the main function of the Department is to create videos for the Respondent's YouTube Channel <https://www.youtube.com/c/TukoKe>, which at the time Ms. Mbugua was hired, had between 300,000 and 600,000 views of videos uploaded and needed more content hence the need to increase capacity.
20. The Respondent states that the host of its YouTube Channel was Lynn Ngugi, who had issued notice in August 2021 to terminate her employment in September 2021 and left the Company on 9<sup>th</sup> September 2021. The Respondent adds that following Ms. Ngugi's departure, the views of its YouTube Channel dropped to approximately 100,000 and with it the Department's revenue. In addition, Ms. Ngugi proceeded to start a competitor Channel, which further eroded the Respondent's viewership.
21. The Respondent maintains that due process was followed in execution of the redundancy. In this regard, the Respondent points out that management was in fact unhappy with the Claimant's performance as he had decided to take it upon himself to start giving advice and directions to other employees, rather than carrying out his duties.
22. By way of Counterclaim as amended on 16<sup>th</sup> May 2022, the Respondent claims to have overpaid the Claimant by the sum of Kshs. 54,373.30 which the Respondent seeks as a refund from the Claimant.

### **Findings and Determination**

23. There are three (3) issues for determination in this case:
  - a. Whether the termination of the Claimant's employment was lawful and fair;
  - b. Whether the Claimant is entitled to remedies sought;
  - c. Whether the Respondent has made out a proper Counterclaim against the Claimant.



## The Termination

24. On 29<sup>th</sup> November 2021 the Respondent wrote to the Claimant as follows:

“Dear Edwin,

RE: Termination of your Employment by Reason of Redundancy

The purpose of this letter is to confirm the contents of our email dated 27<sup>th</sup> November 2021 to you in which we informed you that following the continued poor financial performance of the company’s video department a decision has been taken to cut costs. Unfortunately, as it appears that the department’s financial difficulties will persist for some time, the cost cutting measures will entail inter alia the elimination of your position in the department.

We regret the situation however, as you have been informed, your employment will terminate on 2<sup>nd</sup> December 2021. This decision is not a reflection on your performance.

We therefore now hereby give you notice of the termination of your employment due to redundancy. Your employment will end on the aforementioned date. As per your Employment Contract, your notice period is one (1) month. Instead of receiving that notice, you will be paid one (1) month’s salary in lieu of notice plus the redundancy entitlements set out below.

Due to your employment ending because of redundancy, you will also be paid redundancy pay at the rate of Fifteen (15) days’ pay for every year you have worked with the Company in accordance with section 40(1)(g) of the *Employment Act*. This amounts to Kenya Shillings Two Hundred Thousand (Kshs. 200,000/-) based on your Five (5) years of service.

In addition to the redundancy pay you will also be paid your salary for the outstanding leave days due to you which number is 23.

In total the redundancy pay to be paid on or before the 31<sup>st</sup> of December 2021 is made up as follows:

1. One month in lieu of notice – Kshs. 80,000
2. Severance pay as provided by Section 40(1)(g) of the *Employment Act* – Kshs. 200,000
3. Pay for 23 untaken leave days – Kshs. 84,597.701

We will also provide you with a Certificate of Service as required by Section 51 of the Act and will serve a copy of this notice on the Labour Office as prescribed by section 40(1)(b) of the Act.

Thank you for your valuable contribution during your employment with us.

Yours sincerely,

(signed)

Gibendi Hanningtone Ramenya

Director”

25. According to the evidence on record, the Claimant’s employment came to an end as a result of redundancy.



26. Section 2 of the *Employment Act* defines redundancy as:

“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.”

27. While the law recognises redundancy as a legitimate mode of termination of employment, it sets stringent conditions to be satisfied by the employer declaring redundancy. These conditions are codified in Section 40 of the *Employment Act* as follows:

40.

- (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 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 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.

28. The first 2 conditions under Section 40 require every employer declaring redundancy to issue a one-month notice of intention to the affected employee, their union (where applicable) and the local Labour Officer. By definition, this notice, should set out the reasons for and the extent of the intended redundancy.

29. It is now settled that the redundancy notice is separate and distinct from the termination notice provided under Section 40(1)(f).



30. In *Thomas De La Rue (K) Ltd v David Opondo Omutelema* [2013] eKLR the Court of Appeal stated as follows:

“It is quite clear to us that sections 40 (a) and 40 (b) provide for two different kinds of redundancy notifications depending on whether the employee is or is not a member of a trade union. Where the employee is a member of a union, the notification is to the union and the local labour officer at least one month before the effective redundancy date. Where the employee is not a member of the union, the notification must be in writing and to the employee and the local labour officer. Section 40 (b) does not stipulate the notice period as is the case in 40 (a), but in our view, a purposive reading and interpretation of the statute would mean the same notice period is required in both situations. We do not see any rational reason why the employee who is not a member of a union should be entitled to a shorter notice.”

31. In the subsequent decision in *Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others* [2014] eKLR Maraga JA (as he then was) rendered himself in the following words:

“The purpose of the notice under Section 40(1) (a) and (b) of the *Employment Act*, as is also provided for in...ILO Convention No. 158-Termination of Employment Convention, 1982, is to give the parties an opportunity to consider ‘measures to be taken to avert or to minimize the terminations and measures to mitigate the adverse effects of any terminations on the workers concerned such as finding alternative employment.’ The consultations are therefore meant to cause the parties to discuss and negotiate a way out of the intended redundancy, if possible, or the best way of implementing it if it is unavoidable.”

32. In the more recent decision in *The German School Society v Helga Ohany* (Civil Appeal No Nai 325 of 2018 consolidated with No 342 of 2018) the Court of Appeal held that the requirement for consultation is implied in Section 40 of the *Employment Act* and stated that:

“In essence, consultation is an essential part of the redundancy process and ensures that there is substantive fairness. The employer should ensure that it carries out the process as fair as possible and that all mitigating factors are taken into consideration.”

From the evidence on record, all the Respondent did was to issue a termination letter to the Claimant. The requirement for redundancy notice with attendant consultation was not complied with.

33. Under Section 40(1)(c) the employer is required to follow an objective selective criterion for redundancy, which takes into account seniority in time, skill, ability and reliability of each employee affected by the redundancy.

34. The Respondent’s Managing Director, Gibendi Hannington Ramenya, told the Court that the decision to select the Claimant for redundancy was informed by his performance and the fact that he was the most expensive employee in his job category of Camerapersons. The Court takes two issues on this; first, there was no evidence of the Respondent raising any prior concern with the Claimant’s performance and second, the cost of keeping an employee by itself cannot be a valid consideration for selection of that employee for redundancy.

35. Flowing from the foregoing, I find and hold that the termination of the Claimant’s employment on account of redundancy was unlawful and unfair.



## **Remedies**

36. The Claimant seeks re-instatement and/or re-engagement. However, in light of the Respondent's averment that it is experiencing financial difficulties and the time lapse from the date of termination, I find that neither re-instatement nor re-engagement is an appropriate remedy in this case.
37. Instead, I award the Claimant eight (8) months' salary in compensation. In arriving at this award, I have taken into account the Claimant's length of service, the Respondent's unlawful conduct in the termination transaction and the Claimant's averment that he is still unemployed.

## **The Respondent's Counterclaim**

38. The Respondent's Counterclaim is based on its assertion that the Claimant was overpaid by the sum of Kshs. 54,373.30. The Respondent did not however adduce any evidence to support Counterclaim which therefore fails and is dismissed.

## **Final Orders**

39. Finally, I enter judgment in favour of the Claimant in the sum of Kshs. 853,704 being eight (8) months' salary in compensation for unlawful and unfair termination of employment.
40. This amount will attract interest at court rates from the date of judgment until payment in full.
41. The Claimant will have the costs of the case
42. Orders accordingly.

**DELIVERED VIRTUALLY AT NAIROBI THIS 21<sup>ST</sup> DAY OF SEPTEMBER 2023**

**LINNET NDOLO**

**JUDGE**

Appearance:

Mr. Otieno for the Claimant

Mr. Gathu for the Respondent

