



REPUBLIC OF KENYA



KENYA LAW
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**Kiliru v Savannah Brands Company Limited (Cause E493 of 2022)
[2023] KEELRC 2508 (KLR) (18 October 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2508 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E493 OF 2022
L NDOLO, J
OCTOBER 18, 2023**

BETWEEN

RAYMOND VIDONYI KILIRU CLAIMANT

AND

SAVANNAH BRANDS COMPANY LIMITED RESPONDENT

JUDGMENT

Introduction

1. The Claimant, Raymond Vidonyi Kiliru, brought this claim by a Statement of Claim dated 7th July 2022, alleging that his employment was wrongfully terminated on account of redundancy. The Respondent filed a Memorandum of Response dated 28th September 2022.
2. At the trial, the Claimant testified on his own behalf and the Respondent called its Human Resource and Administration Associate, Christine Opiyo. The parties also filed written submissions.

The Claimant's Case

3. The Claimant states that he was employed by the Respondent on 30th November 2020, in the position of Operations Manager. He was confirmed in August 2021 upon completion of his probation period.
4. The Claimant avers that in December 2021, the Respondent, through its Managing Director, surreptitiously altered the Claimant's responsibilities and transferred major roles in his portfolio to the incoming Head of Manufacturing & Operations, and the Chief Operating Officer, who joined the Company around November 2021 and January 2022, respectively.
5. The Claimant accuses the Respondent of making fundamental changes to his employment contract and job description, without consultation or notification, contrary to Section 10 of the *Employment Act*.



6. Following these changes, the Claimant wrote an email dated 29th January 2022 addressed to the Managing Director, raising his concerns on how the transfer of his duties and responsibilities was done.
7. The Claimant was subsequently issued with a revised organization chart on 3rd February 2022, that gave a graphical representation of the Company's structure. Notably, the Claimant's duties and responsibilities were fundamentally altered, with key roles and functions transferred to the incoming Head of Manufacturing & Operations.
8. The Claimant wrote further emails on 4th February 2022 and 19th May 2022 reiterating his concerns on the major alterations made to his job profile and the Respondent's lack of commitment to fulfil its contractual obligations to the Claimant.
9. The Claimant states that instead of the Respondent addressing his concerns, it went ahead to terminate his employment unlawfully under the guise of redundancy.
10. The Claimant's case is that there was no genuine redundancy and due process was not followed. He contends that the alleged redundancy did not meet the mandatory statutory prerequisites of a redundancy as envisaged in Section 40 of the *Employment Act*.
11. He now claims the following:
 - a. Salary increase for February to June (Kshs. 350,000 - 400,000) as per clause 5.8 of the employment contract..... Kshs. 250,000.00
 - b. 12 months' salary in compensation.....4,800,000.00
 - c. 3 months' salary in lieu of notice.....1,200,000.00
 - d. Severance pay for each completed year of service.....365,384.62
 - e. Unremitted pension contributions (2020 to June 2022).....690, 000.00
 - f. Leave accrued and not taken.....192,307.69
 - g. Certificate of service
 - h. Costs plus interest

The Respondent's Case

12. In its Memorandum of Response dated 28th September 2022, the Respondent states that a performance appraisal on the Claimant's performance disclosed that he was underperforming, hence the decision to offload some of his roles and functions to other officers.
13. The Respondent asserts that it reserved the right to alter the Claimant's job description, as provided in the employment contract.
14. The Respondent further states that pursuant to creation of the new positions and offloading of the Claimant's duties, his position became redundant. The Respondent maintains that it fully complied with the relevant provisions of the *Employment Act*. The Respondent adds that the Claimant was paid all his dues.

Findings and Determination

15. There are two (2) 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 the remedies sought.

The Termination

16. On 30th May 2022, the Respondent wrote to the Claimant as follows:

“RE: Redundancy

We refer to the discussion you had with the Chief Operating Officer, the Director and Human Resource department and on 30th May 2022 regarding termination of your employment on grounds of redundancy, due to organizational structural changes within Savannah Brands Company limited effective 13th June 2022.

We agreed that you will be paid the following: -

1. Salary for days worked in June 2022
2. Two months and two weeks’ notice pay
3. Leave accrued and not taken as at 13th June 2022
4. Severance Pay of 15 days of each completed year of service

Please accept this as the final settlement and acknowledge the terms and conditions on this separation by signing below and return a copy to us.

We take this opportunity to thank you for your contribution to Savannah Brands Company Limited and wish you all the best in your future endeavors.

Yours Sincerely,

Alexandra Chappatte

Director

(signed for)”

17. This letter gives redundancy as the reason for the termination of the Claimant’s employment.
18. Section 2 of the [Employment Act](#) and the corresponding Section of the [Labour Relations Act](#) define 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.”

19. Section 40 of the [Employment Act](#) sets out the mandatory procedure to be followed by an employer declaring redundancy 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.

20. The first 2 conditions under Section 40 require every employer declaring redundancy to issue a one-month notice of intention to the affected employee(s), 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.
21. Section 40(1)(c) requires the employer to deploy an objective selection criterion for redundancy based on seniority in time, skill, ability and reliability of each affected employee.
22. It is common cause that the Claimant's position was declared redundant after his duties and functions were transferred to the two positions of Head of Manufacturing & Operations and Chief Operating Officer, created after a restructuring exercise. The Respondent's witness, Christine Opiyo told the Court that the transfer of the Claimant's functions and responsibilities was occasioned by the Claimant's failure to meet certain Key Performance Indicators (KPIs).
23. The Claimant submits that the evidence adduced by the Respondent defied the 'no fault of an employee' character of redundancy.
24. If indeed the Claimant was guilty of poor performance as alleged, he ought to have been subjected to a capability hearing within the confines of Section 41 of the *Employment Act*. It was not open for the Respondent to take the redundancy route to deal with a case of poor performance.
25. As held by Mbaru J in *Jane Khalechi v Oxford University Press E.A Ltd* [2013] eKLR it is not a genuine redundancy, where the roles performed by the affected employee(s) continue unchanged.
26. In its decision in *Barclays Bank of Kenya Ltd & another v Gladys Muthoni & 20 others* [2018] eKLR the Court of Appeal held as follows:

“It is...not sufficient for an employer to state that there is a business reorganization, the business has moved or that there is a 'section 40 situation' and therefore the Court must infer a redundancy...There must be a justification. The employer must demonstrate that there



exists a genuine reason that requires the business to reorganize, reduce staff or restructure the business to viability...”

27. In the instant case, all the Respondent did was to offload the Claimant’s functions and duties to other officers. I therefore find and hold that there was no genuine redundancy.
28. Regarding the issue of notice, the courts have firmly established that redundancy notice under Section 40(1)(a) & (b) is separate and distinct from the termination notice provided under Section 40(1)(f). This was settled by the Court of Appeal in its decisions in *Thomas De La Rue v David Opondo Omutelelma* [2013] eKLR and *Kenya Airways Limited v Aviation & Allied Workers Union of Kenya & 3 others* [2014] eKLR.
29. In the Kenya Airways Case (*supra*) Maraga JA (as he then was) rendered himself as follows:

“The notices under this provision are not merely for information. 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.”
30. From the evidence on record, all the Respondent issued to the Claimant was a two weeks termination notice; there was no evidence of a redundancy notice. Further, the termination notice issued to the Claimant fell short of the one-month requirement and there was no prior notice to the Labour Office as required in law.
31. I therefore find and hold that the Respondent failed to comply with the condition for notice under Section 40(1) (a) & (b) of the *Employment Act*.
32. Pursuant to the foregoing findings, I award the Claimant six (6) months’ in compensation. In arriving at this award, I have taken into account the Claimant’s length of service in addition to the finding that the Respondent failed to establish a genuine case of redundancy and did not follow due procedure.

Other Claims

33. The Claimant claims salary increment for the period between February and June 2022. This claim is based on clause 5.8 of his employment contract which provides:

“Gross salary to increase to 400,000 Kes monthly following the set up of spirits production and still. A further salary increase to be reviewed based on performance, following 12 months in role. Equity offer to be discussed following 18 months within role and will be dependent on performance achievements to date and long-term commitment to the company.”
34. The parties took divergent views as to whether the condition given for salary increment in Clause 5.8 of the employment contract was satisfied. In advancing his case in this regard, the Claimant relied on a letter from the National Authority for the Campaign Against Alcohol and Drug Abuse (NACADA) dated 14th March 2022, giving clearance to the Respondent to commence production of alcoholic drinks.



35. A reading of this letter however reveals that the Respondent was expected to obtain licences from the National Government Agencies as well as the relevant County Government before commencement of production. The letter from NACADA cannot therefore be used as proof that the condition given for increase of the Claimant's salary had crystallised. The claim thereon therefore fails and is disallowed.
36. According to the termination letter issued to the Claimant, he was given two weeks' notice and the shortfall of two months and two weeks was paid in cash. The same letter also confirms payment of severance pay and accrued leave.
37. The claim for unremitted pension contributions was not proved and is disallowed.
38. Finally, I enter judgment in favour of the Claimant in the sum of Kshs. 2,100,000 being six (6) months' salary in compensation for unlawful and unfair termination of employment.
39. This amount will attract interest at court rates from the date of judgment until payment in full.
40. The Claimant will have the costs of the case.
41. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 18TH DAY OF OCTOBER 2023

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JUDGE

Appearance:

Mr. Haggai for the Claimant

Mr. Amalemba for the Respondent

