



Wanjohi v Centum Investment Company PLC (Employment and Labour Relations Cause E696 of 2021) [2023] KEELRC 2465 (KLR) (13 October 2023) (Judgment)

Neutral citation: [2023] KEELRC 2465 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE E696 OF 2021**

**AN MWAURE, J
OCTOBER 13, 2023**

BETWEEN

LOUISE W WANJOHI CLAIMANT

AND

CENTUM INVESTMENT COMPANY PLC RESPONDENT

JUDGMENT

1. The Claimant filed a Memorandum of Claim dated 20th August 2021.

Claimant's Case

2. The Claimant avers that on 31st July 2018, he was offered and accepted a contract of employment with the Respondent in the capacity of communications associate with gross pay of Kshs. 300,000.00 per month.
3. The Claimant avers that upon completion of her probation periods he received a letter dated the 14th of May 2019 confirming her as a communications associate of the Respondent effective 1st May 2019.
4. The Claimant avers that on 23rd July 2019, he was summoned to a meeting with the Group CEO, Mr. James Mworira and in attendance at the meeting was the Group CEO, his assistant and the Claimant. And the Group Investor Relations Manager who the Claimant was answerable to was absent.
5. The Claimant avers that the purpose of the meeting was to outline to the Respondent's Group CEO the needs of the communication function and to brief the CEO on her role; and during the meeting, the CEO articulated the need for the communication function within the Respondent and went ahead and issued the Claimant with a new brief, which would require sign off by the Group CEO at the end of August 2019.



6. The Claimant avers that during the aforesaid meeting it was never communicated to her that the Respondent was considering restructuring the Investor Relations Department or declare the communications associate role redundant.
7. The Claimant avers that on the 26th July 2019, merely three (3) days after the Claimant's meeting with the Group CEO, the Claimant was summoned to a meeting by her direct supervisor, Ms. Suzanne Kilolo, advertised/communicated as a 'catch up' meeting.
8. The Claimant avers that the Respondent's Human Resource representatives was in attendance and the Claimant was notified for the first time that her position would be declared redundant and she was consequently instructed to sign a pre-prepared letter acknowledging and accepting the redundancy which she declined and requested for time to consult.
9. The Claimant avers that she was issued with a letter of notification of redundancy dated 5th August 2019 which informed her that the 'Investor Relations Function' of the Respondent would cease to exist as an independent function, hence her redundancy.
10. The Claimant avers that she objected to the redundancy through a letter dated 9th August 2019 challenging the procedure adopted by the Respondent in reaching the decision to dismiss her as employee as well as the insufficient communication of the alleged restructuring and redundancy exercise.
11. The Claimant avers that the Respondent reverted with a letter dated 29th August 2019, stating that the redundancy was necessitated by the fact that the 'Investor Relations Function' of the Respondent would cease to exist as an independent function in view of the Respondent's reassessment of the organizational structure.
12. The Claimant avers that in November 2019, barely a month after her termination through redundancy, the Respondent contracted the services of Mr. Ed Angima to perform the Public Relations/ Communications role previously undertaken by the Claimant at almost double the Claimant's salary and the Respondent's actions demonstrated discrimination towards the Claimant.
13. The Claimant avers that the Respondent discriminated against her and male members of staff like her replacement Mr. Ed Angima were far better remunerated and preferred by the Respondent as compared to female members of staff. There was an obvious disparity in the Respondent's labour practices and pay for equal work and the disparity was based on gender.

Respondent's Case

14. In opposition, the Respondent filed a memorandum of reply dated 10th March 2022.
15. The Respondent aver that shortly after onboarding, the Claimant proceeded on maternity leave and her manager was not in a position to review her performance, hence her probation was extended for another 3 months and upon her return from maternity leave her probation was further extended to 30th April 2019 and at the end of this period, the Claimant's performance was appraised and her employment confirmed.
16. The Respondent aver that if there was any meeting with the Group CEO it was meant to interrogate the priorities of the function to help him offer guidance and cascade a strategic plan for the wider business.
17. The Respondent avers that the Claimant was invited to a meeting on 26th July 2019 by her direct supervisor as requested by the HR Operations Manager who notified the Claimant of the imminent



- redundancy affecting her role and explained it was occasioned by a new operating model to have the investor relations function outsourced on a need-basis.
18. The Respondent avers that it has not hired or attempted to hire a communications specialist internally since the redundancy of the positions and Mr Ed Angima is a consultant hired on a need basis.
 19. The Respondent avers that the decision to have the investor relations function outsourced is a substantive reason for redundancy and both procedural and substantive fairness were met during the process.
 20. The Respondent avers that it is an equal employer with a HR policy on discrimination and there are many female employees leading some of its subsidiaries and affiliates.
 21. The Respondent avers:
 - a. Its management was forced to reassess its organizational structure to ensure it was able to remain viable and sustainable due to dynamic and volatile nature of the business.
 - b. A business decision was made to engage external consultants on need basis regarding the investor relations function as opposed to having permanent resources employed internally.
 - c. On 3rd June 2019, a notice of redundancy due to internal reorganization was sent to the ministry of labour and social protection in accordance with section 40 of the [Employment Act](#).
 - d. The Respondent tried its best working with the HR department to identify opportunities where the affected employees could be redeployed and hence why the Claimant was invited for a meeting on 26/07/2019 for consultations.
 - e. On 05/08/2019 a notice of redundancy was sent to the Claimant notifying her that her position would be declared redundant effective 05/09/2019.
 - f. On 7/08/2019, the Claimant acknowledged receipt and wrote a letter seeking clarification on the redundancy which the Respondent responded to on 29/08/2019 clarifying the redundancy and need for the internal reorganisation.
 - g. On 2/9/2019 the Claimant was sent a computation of the redundancy package and on 3/9/2019 she wrote a letter proposing a separation agreement.
 - h. On 6/9/2019 the Claimant was invited for a meeting to discuss the proposed separation agreement and she was informed that the redundancy could not be avoided.
 - i. On 12/9/2019 a notice of termination of contract was sent to the Claimant confirming the redundancy.
 - j. On the Claimant's last working day on 7/10/2019, she filled out the clearance forms and was issued with a certificate of service.
 - k. On 11/10/2019, the Claimant was paid her final dues and she acknowledged that the same were in order.

Evidence in Court

22. The Claimant testified and produced her witness statement and list of documents dated 10/02/2023 as her evidence in chief and exhibits respectively.



23. The Claimant testified that on 23/6/2019 she was summoned by the Respondent's CEO to go over what she had done as a communication strategy but her direct supervisor did not attend.
24. The Claimant testified that after the meeting, the CEO said she had not supported his office sufficiently and she would receive a brief on how to support his office and did not inform her they were considering declaring her redundant.
25. The Claimant testified that on 26/7/2019 she attended a meeting in which the HR Manager was in attendance and she was not aware of the meeting's agenda but was informed his role had been declared redundant. She was asked to sign a redundant letter and when she requested for some time she was told to sign or leave and she chose to leave the letter and she then received a redundancy and termination notice on 12/9/2019.
26. During cross examination, the Claimant testified that she was reporting to the head of investor but her role did not involve investor relations.
27. The Claimant testified that she was issued with a redundancy notice and the company wrote to her on the need for redundancy but did not inform her they were looking for other roles fit for her.
28. The Claimant testified she made a proposal for an amicable separation and that she understood Ed Angima was a consultant.
29. The Claimant testified she was paid her final dues.
30. The Respondent witness, RW1, Thomas Omondi testified and adopted his witness statement and list of documents as his evidence in chief and exhibits respectively.
31. During cross examination, RW1 testified that the Respondent produced its organisational structure for the specific department and reporting structure and this applied to the Claimant at the time of her employment.
32. RW1 testified that there was a difference between corporate communication associate and investor relations associate and the Claimant was answerable to the head of investor relations and corporate communication, Susan Kilolo.
33. RW1 testified that the Claimant was confirmed on 1/5/2019 and notice of redundancy was issued on 3/6/2019. When the Respondent made decision to declare redundancy it had not decided to confirm the Claimant.
34. RW1 testified that the Respondent attempted to get alternative placement for the Claimant, three employees were affected in which two were declared redundant and one was put in another position. The Claimant had only media training and the Respondent could not fix her in another position.

Claimant's Submissions

35. The Claimant submitted that the Respondent's reason for termination of the Claimant were not valid and/or fair reasons and the termination was not done in accordance with fair procedure, justice and equity.
36. The Claimant submitted that the Respondent did not tender any evidence to demonstrate that there was an operational need to initiate a redundancy exercise within the organisation.
37. The Claimant submitted that RW1 admitted during cross-examination that the Respondent did not outsource the investor relations functions. With this admission under oath, the whole basis on which the redundancy exercise was undertaken, collapses.



38. The Claimant submitted that the Respondent failed to discharge the legal and procedural burden placed on it by the law as it failed to have due regard to seniority, skill, ability and reliability; consider or secure alternative employment for the Claimant; notify the Claimant timeously and consult with the Claimant
39. The Claimant submitted that there was no basis in law or in fact in taking the Claimant through the redundancy exercise and she was targeted due to her gender and her then status as a new mother.
40. The Claimant further submitted that out of the 3 members of staff in the department, the only male, George Muchira, was promoted while the females in the team were declared redundant.

Respondent's Submissions

41. The Respondent submitted that it contracted the services of ProMedia Africa Limited to provide consultancy services relating to media publicity services and was therefore tasked with providing the services of the former Investor Relations department.
42. The Respondent submitted that it has always treated female employees fairly and has had female employees rise to the top to lead some of its subsidiaries and that the Claimant herself confirmed that she was hired when pregnant and was even offered flexible hours and any allegation of discrimination against her based-on gender is unsubstantiated and denied.
43. The Respondent submitted its decision to have investor relations department outsourced and the lack of internal opportunities for redeployment of the Claimant was the substantive reason for her redundancy but both procedural and substantive fairness was observed during the process.
44. The Respondent submitted the Claimant was declared redundant based on the operational requirements of the employer after an executive decision to restructure the Respondent's operations and outsource the Claimant's functions. Further, the provision of communication and media relations services is not part of the core functions of the Respondent and an outsourcing arrangement within the law cannot be faulted.
45. The Respondent submitted that the law of Kenya does not provide for pre-redundancy consultation but only post redundancy dispute resolution.

Analysis and Determination

46. The issues for determination are:
 - a. Whether the Claimant's termination on grounds of redundancy was unfair and/or unlawful.
 - b. Whether the Claimant was discriminated based on her gender.
 - c. Whether the Claimant is entitled to the reliefs sought.
47. Section 40 (1) of the [Employment Act](#) provides for procedural fairness in termination of account of redundancy as follows:

“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."

48. In *Cargill Kenya Limited v Mwaka & 3 others* (Civil Appeal 54 of 2019) [2021] KECA 115 (KLR) the court held the following on consultations:

"Furthermore, consultation is also now specifically required by article 47 of *the Constitution* and the *Fair Administrative Action Act*. Article 47 and section 4(3) of the *Fair Administrative Action Act* provide that where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-

- (a) prior and adequate notice of the nature and reasons for the proposed administrative action;
- (b) an opportunity to be heard and to make representations in that regard;
- (c) notice of a right to a review or internal appeal against an administrative decision, where applicable;
- (d) a statement of reasons pursuant to section 6;
- (e) notice of the right to legal representation, where applicable;
- (f) notice of the right to cross-examine or where applicable; or
- (g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.

An administrative action is defined under the Act to include any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates. Employers fall within the category of persons whose action, omission or decision affects the legal rights or interests of employees, and more so the redundancy by the Appellant in the present appeal is not contested. The Appellant was therefore also



bound by the provisions on consultation required by Article 47 and section 4(3) of the *Fair Administrative Action Act*

The nature and content of the consultations required to be undertaken in a redundancy process was explained by Maraga JA in *Kenya Airways limited and Aviation & Allied Workers Union Kenya & 3 others* (supra):

“The purpose of the notice under section 40(1) (a) and (b) of the *Employment Act*, as is also provided for in the said 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 minimise 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. This means that if parties put their heads together, chances are that they could avert or at least minimize the terminations resulting from the employer’s proposed redundancy. If redundancy is inevitable, measures should be taken to ensure that as little hardship as possible is caused to the affected employees”

49. The Claimant and Respondent both aver that notice was duly served to the Claimant and the Labour office by a letter dated 3rd June 2019. and subsequently the Claimant engaged the Respondent on the nature of the redundancy and if the same could be averted but however the same was unsuccessful. The claimant was accorded sufficient audience to discuss the redundancy process and to even attempt to get her alternative roles in the organisation but he same did not materialise.

50. On substantive fairness, Section 45 (2) of the *Employment Act* provides:

“A termination of employment by an employer is unfair if the employer fails to prove—

- (a) that the reason for the termination is valid;
- (b) that the reason for the termination is a fair reason—
 - (i) related to the employees conduct, capacity or compatibility; or
 - (ii) based on the operational requirements of the employer; and
- (c) that the employment was terminated in accordance with fair procedure.

51. Section 47 (5) of *employment act* states:

“For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.”

52. The Respondent submitted that the Claimant was declared redundant based on the operational requirements of the employer after an executive decision to restructure the Respondent’s operations and outsource the Claimant’s functions. Further, the provision of communication and media relations services is not part of the core functions of the Respondent and it was not possible to get her alternative placement in the organisation.

53. The Claimant’s argument on the other hand is that her job description did not entail investor relations. As per the Respondent’s organisation structure it is clear however that her role was under the investor



relations department which was affected by the restructure and its role outsourced to ProMedia Limited. Accordingly, this court hold the Respondent had a substantive justification to terminate the Claimant's employment hence her termination was lawful and fair and furthermore it was procedurally justifiable.

54. In respect to discrimination on grounds of gender, Section 5(2) and (3) of the [Employment Act](#), 2007 provides that:
- (2) An employer shall promote equal opportunity in employment and strive to eliminate discrimination in any employment policy or practice.
 - (3) No employer shall discriminate directly or indirectly, against an employee or prospective employee or harass an employee or prospective employee-
 - (a) on grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, pregnancy, mental status or HIV status;
 - (b) in respect of recruitment, training, promotion, terms and conditions of employment, termination of employment or other matters arising out of employment.”
55. In *Janine Buss v Gems Cambridge International School Limited* [2016] eKLR the court observed under Section 5(6) of the [Employment Act](#), the burden of disproving an allegation of discrimination lies with the employer.
56. The Respondent submitted that it had always treated female employees fairly and has had female employees raise to the top to lead some of its subsidiaries. That the Claimant herself confirmed that she was hired when pregnant and was even offered flexible hours after her maternity leave is testament to the above. Any allegation of discrimination against her based on gender is unsubstantiated and so is not proved.
57. The Claimant further testified she understands Mr Ed was retained by the Respondent as a consultant to undertake the role of the investor relations department among other roles and so was not just hired to replace her role.
58. RW1 further testified that the Claimant was not redeployed as she only had experience in media and could not handle multiple roles. As a result, this court holds the Claimant was not subjected to discrimination and the respondent's decision to declare her redundant was fair and procedural.
59. The Claimant is not entitled to the reliefs sought as she testified herself that she was paid her dues and executed a clearance form confirming the same. The record shows the dues paid were:-
1. One month salary in lieu of notice kshs 300,000/-
 2. Redundancy pay for kshs 300,000/= one month
 3. Severance pay for kshs 157,673/ 15 days per one year
 4. Balance of leave days kshs 357,142/-
 5. Insurance redundancy kshs 450,000/- which moneys have been settled.
 6. The court only orders Claimant to be given her certificate for service within 30 days if not already given.
 7. The claimant's suit is unmerited therefore in view of the above and is dismissed accordingly.
 8. At the court's discretion it is ordered each party will meet their respective costs.



Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 13TH DAY OF OCTOBER, 2023.

ANNA NGIBUINI MWAURE

JUDGE

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 has 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 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.

A signed copy will be availed to each party upon payment of Court fees.

ANNA NGIBUINI MWAURE

JUDGE

