



Omanyo v Chebett & 2 others (Sued as the Office Bearers of, and on Behalf of, and, as Officials of East Africa Petroleum Transporters Association (EAPTA)) (Cause E886 of 2022) [2023] KEELRC 3022 (KLR) (27 November 2023) (Judgment)

Neutral citation: [2023] KEELRC 3022 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E886 OF 2022
JK GAKERI, J
NOVEMBER 27, 2023**

BETWEEN

BRIAN HINDLEY OMANYO CLAIMANT

AND

JACK CHEBETT 1ST RESPONDENT

MOHAMED AHMED ABDULLE 2ND RESPONDENT

TWALIB BAYUSUF 3RD RESPONDENT

**SUED AS THE OFFICE BEARERS OF, AND ON BEHALF OF, AND, AS
OFFICIALS OF EAST AFRICA PETROLEUM TRANSPORTERS ASSOCIATION
(EAPTA)**

JUDGMENT

1. The Claimant commenced this suit by a Memorandum of Claim filed on 29th November, 2022 which was amended on 6th February, 2023 and 16th May, 2023 against the three Respondents, as officials of the East African Petroleum Transporters Association (EATPTA) alleging unfair termination.
2. The Claimant alleges that he was employed by the Respondent on 31st January, 2019 as the Association's Chief Executive Officer at a monthly gross salary of Kshs.140,000/= and served with dedication until his employment was terminated on 28th February, 2023.
3. That prior to the termination of employment, the Respondents had not paid the Claimant's salary for 9 months but paid when the instant suit was filed.
4. The Claimant alleges that the termination of employment was malicious on account of failure to pay salary, refusal to pay arrears notwithstanding a court order and false allegations among others.



5. According to the Claimant, since he was accused of having absconded duty, the proper cause of action would have to take him through a hearing for purposes of dismissal as opposed to redundancy.
6. It is the Claimant's case that he only received his salary after deductions and the Respondents dealt with statutory dues.
7. The Claimant prays for;
 - (i) 120 leave days earned but not taken Kshs.560,000/=.
 - (ii) Severance pay for 4 years Kshs.280,000/=.
 - (iii) Salary in lieu of notice Kshs.140,000/=.
 - (iv) 12 months compensation Kshs.1,680,000/=.
 - (v) Certificate of service.
 - (vi) Accrued PAYE with penalties.
 - (vii) Proof of remission of PAYE.
 - (viii) Cost of the suit and interest at court rate.
 - (ix) Any other relief that the court may find just and expedient to grant.

Respondents case

8. The Respondent avers that it was registered on 29th September, 2018 and its membership is voluntary and employed the Claimant in January 2019 to run the Association's financial and administrative functions of the Association.
9. That the Claimant's salary was paid from monthly subscription from members but from early 2022, the Association started experiencing financial challenges owing to non-payment by members, a fact within the Claimant's knowledge and no follow-ups were conducted to ensure payment.
10. That the Claimant's salary arrears have been settled.
11. The Respondent avers that the Claimant stopped working for it on 15th November, 2022 and he was declared redundant by letter dated 24th March, 2023 and his dues computed which the Claimant acquiesced but indicated that he would contest the termination of employment.
12. It is the Respondent's case that the dues were payable on clearance but the Claimant did not do so or handover to the Respondent's Secretary.
13. The Respondent avers that other than the redundancy package and certificate of service, the Claimant was not entitled to compensation.
14. That the Respondent was ready and willing to pay the Claimant's redundancy package.

Claimant's evidence

15. On cross-examination, the Claimant confirmed that he was the sole employee of the Respondents and the administrator was responsible for the filing of returns and before then the Treasurer was responsible.



16. That his last assignment was on 15th November, 2022 a meeting at Serena and had no evidence to demonstrate the contrary.
17. The witness admitted that payment of dues was subject to clearance.
18. The Claimant avers that although he prepared a handover report, he did not hand over to Mr. Twalib or clear with the Respondents.
19. The witness also admitted that the Respondents were ready and willing to pay his dues.
20. That he had a report belonging to the Respondents.
21. On re-examination, the Claimant testified that he had no credentials for Itax and could therefore not file returns.
22. That the handover he did was not physical.

Respondent's evidence

23. On cross-examination, Mr. Mohamed Abdulle confirmed that the letter dated 24th March, 2023 was a termination letter as well as a redundancy notice.
24. That the Claimant raised the issue of poor performance of the Association but did not prepare a report on it.
25. The witness confirmed that the Claimant was not a signatory to the Association's bank account.
26. It was also his testimony that the Respondents abolished the position of Executive Officer and the Claimant stopped working on 15th November, 2022.
27. That the Claimant was responsible for tax remittance.
28. On re-examination, the witness testified that the duties of the Claimant were clearly defined by the Letter of Appointment and that although the Claimant was not a signatory to the bank account, he could receive and pay monies into the account.
29. That it was the Claimant's duty to remit funds to the relevant bodies but did not.

Claimant's submissions

30. Counsel isolated three issues for determination namely; whether termination of the Claimant's employment on account of the redundancy was fair and procedural and whether it was the Claimant's responsibility to remit taxes and entitlement to reliefs.
31. On termination, counsel submitted that the substantive and procedural precepts of termination of employment applied to redundancies and cited the sentiments of the court in Daniel Mburu Muriu v Hygrotech East Africa Ltd (2021) eKLR and Kenya Airways Ltd v Aviation & Allied Workers Union of Kenya & 3 others (2014) eKLR to urge that the Respondent did not serve a notice of redundancy or invited him for a hearing and adduced no evidence of the alleged financial challenges.
32. As regards remittance of taxes, counsel cited part 2 of the Employers Guide as to Pay As You Earn in Kenya as well as Section 37 of the *Income Tax Act* to urge that it was the employer's duty to deduct and remit PAYE.
33. Counsel submitted if indeed the Claimant failed to remit taxes, why was he not subjected to disciplinary proceedings.



34. Finally on reliefs, counsel cited the provisions of Section 49(1)(c) of the *Employment Act*, 2007 to urge that the Claimant was entitled to maximum compensation on the premise that the Respondents had ulterior motives.

Respondent's submissions

35. As to whether the Claimant's redundancy was unfair, counsel submitted that the letter dated 24th March, 2023 informed the Claimant that he had been declared redundant on account that his position had been abolished due to the Association's inability to pay his salary and the Claimant's desertion.
36. Reliance was made on the provisions of Section 40 of the *Employment Act*, 2007, the Kenya Airways Ltd case (Supra) and the sentiments of Mbaru J. in a ruling delivered on 27th February, 2023 where the learned judge adverted to the issue of the alleged financial challenges the association was facing.
37. That the Claimant did not contest the reason given by the Respondent. That the association was struggling to pay the Claimant and was even unable to comply with a court order and the Claimant had initiated contempt proceedings against the Respondents.
38. According to counsel, since the Claimant deserted in November 2022, the Respondent had a reason to terminate his employment on account of redundancy and the provisions of Section 40 of the *Employment Act* were complied with, including notice to the Labour Officer.
39. Reliance was made on the Court of Appeal decision in Thomas De La Rue (K) Ltd v David Opondo Omutelema (2013) eKLR to urge that the notification required by Section 40(1)(b) of the *Employment Act* was effected.
40. Counsel further submitted that although the Respondents have been ready and willing to pay the Claimant, he had not cleared with the Association.
41. According to the Respondents, the termination of the Claimant's employment on account of redundancy was fair.
42. As regards the reliefs sought, counsel submitted that the Claimant was entitled to one (1) month's salary in lieu of notice and for 120 leave days but was not entitled to compensation as termination was not unfair and the relief was discretionary as held in Aristide Marege Nyangau v Lavington Security Guards Ltd (2021) eKLR but should the court find it was unfair, the equivalent of three months salary would be reasonable as the Claimant was an employee for less than 4 years and absconded duty.
43. The holdings in Stephen Ndaiga Wagana v Ambassadeur Hotel (2012) eKLR and Julius Mwangi v Meridian Hotel Ltd (2021) eKLR were cited to reinforce the submission on the 3 months' salary compensation.
44. Counsel submitted that the Claimant had already been paid the salary for November 2022 to February 2023 yet he rendered no services.
45. As regards settlement of accrued Pay As You Earn and penalties, counsel submitted that it was the Claimant's role to remit statutory dues but failed to do so and he had not proved how much was owing and/or accrued penalties or interest.
46. That the Association was ready to settle any tax arrears owed to the Kenya Revenue Authority (KRA).
47. That the Claimant was entitled to a certificate of service.



Determination

48. It is common ground that the contentious issues in this suit are whether termination of the Claimant's employment on account of redundancy was unfair and to a lesser extent clearance by the Claimant.
49. As regards clearance, counsels have adopted contrasting positions with the Claimant submitting that he handed over. The Respondent maintains that he did not handover.
50. Although the Claimant confirmed on cross-examination that he prepared a handover report and had undertaken a proper handover, he did not disclose how he handed over and to whom having admitted that he had been informed to meet Mr. Twalib.
51. He also admitted that it was possible to proceed to the Respondent's premises or where he was operating from to handover.
52. On re-examination, the Claimant testified that the handover report on record made no reference to a laptop he had been provided with by the Respondents for purposes of his employment.
53. The Claimant's behaviour after 15th November, 2022 and as regards the handover process would appear to show that he did not want to engage the Respondents in a physical meeting and or consultation and would appear to confirm the Respondent's witness testimony that the Claimant was unresponsive. The fact that his handover report makes no mention of a laptop he had been given reveal that he did not hand it over irrespective of its condition.
54. Closely related to the foregoing, is the uncontroverted testimony of the Respondent of its readiness and willingness to pay the Claimant's dues which the Claimant confirmed was subject to clearance.
55. From the evidence on record, it is the finding of the court that the Claimant has failed to demonstrate that he handed over to the Respondents or their nominees after his employment was terminated on account of redundancy and is blameworthy for the non-payment of dues as agreed upon by the parties.
56. As to whether termination of the Claimant's employment on account of redundancy was unfair, again parties have taken opposing positions with the Respondent urging that it complied with the provisions of Section 40(1) of the *Employment Act*, 2007 and the termination was not only fair but lawful. The Claimant on the other hand faults the termination for want of a substantive justification and fair procedure.
57. The Respondent's case is simply that the Claimant's position was abolished.
58. Puzzlingly, the witness adduced no evidence as to when the position was abolished.
59. In a redundancy, the employee loses employment involuntary without any fault at the instance of the employer where the services of the employee becomes superfluous, or the office, job or occupation is abolished and loss of employment ensues.
60. Although redundancy is one of the legitimate ways of bringing an employment relationship to an end on account of economic changes, technological innovations, re-organization and other types of restructuring precipitated by the commercial or business imperatives for sustainability of the business, it must be carried out in accordance with prescriptions of the law.
61. Analogous to a termination of employment, for a redundancy to pass muster, it must be substantively justifiable and must be conducted in accordance with a fair procedure.



62. As held by the Court of Appeal in *Barclays Bank of Kenya Ltd & another v Gladys Muthoni & 20 others* (2018) eKLR, the law places a heavy burden of proof on the employer to demonstrate that the redundancy process was fair.
63. Significantly, Section 40(1) of the *Employment Act*, 2007 prescribes the legal framework to be complied with for a termination of employment on account of redundancy to pass muster.
64. The seven conditions or requirements prescribed by Section 40(1) of the Act are mandatory, as emphasized by *Freight In Time Ltd V Rosebell Wambui Munene* (2018) eKLR as follows;

“Section 40(1) of the *Employment Act* prohibits, in mandatory tone, the termination of a contract of service on account of redundancy unless the employer complies with the following seven conditions ...”
65. The requirements include not less than one month notice to the union, if the employee is a member or the employee personally and the Local Labour Office. The notice must set out the reasons of and the extent of the redundancy, criterion used, no employee is disadvantaged by reason of being or not being a member of a union, payment of any leave due in cash, one month’s notice or pay in lieu of notice and payment of severance pay at the rate of 15 days for each completed year of service.
66. In addition, there is sufficient judicial authority for the proposition that consultations are an essential ingredient of the redundancy process.
67. I will now proceed to determine whether the Respondents complied with the requirements of Section 40(1) of the *Employment Act*, 2007 and the law generally.

Reason for termination

68. The letter of termination of employment due to redundancy dated 24th March, 2023 was unambiguous that the Claimant’s employment was terminated on account of redundancy effective 28th February, 2023 on the grounds that the role of Executive Officer was no longer in the structure of the Association, inability to pay the Claimant’s salary and desertion.
69. Strangely, the Respondents adduced no evidence of the old or new structure of the Association and bearing in mind that the Claimant was the sole employee at the time, it is unclear as to what organizational structure the Respondents were making reference to.
70. As regards the inability to pay the Claimant’s salary, the court is in agreement with the Respondent’s submission that the Claimant did not contest the allegation, even though the Respondents did not avail evidence of the Association’s performance.
71. The Claimant appear to have been aware of the financial challenges the Association was grappling with as evidenced by salary arrears for a long period of time.
72. Equally, the Respondents tendered no evidence as to when the challenges set in and how it was mitigating them granted that the Claimant was rendering services until 15th November, 2022.
73. A board resolution setting out the background of the challenges the Association was grappling with and how the board had proposed to address them to ensure the sustainability of the Association would have demonstrated that the Respondents were acting in the best interests of the Association.
74. Intriguingly, the alleged notice of redundancy by the Respondents is a kin to a termination notice as it inter alia includes desertion, which is a form of gross misconduct as opposed to a basis for redundancy.



75. The Respondent tendered no evidence of the steps it took to contact the Claimant, if indeed he had deserted.
76. Similarly, the notice makes no reference to the extent of the redundancy.
77. From the evidence on record, the court is satisfied that the Respondent's may have had a reason to declare the Claimant redundant.

Procedure

78. Although the Respondents submitted that they complied with the provisions of Section 40(1) of the Employment Act, 2007, they adduced no evidence to show that the redundancy notice was sent to the local Labour Officer as ordained by the provisions of Section 40(1)(b) of the Employment Act, 2007.
79. In the absence of a notification of the Labour Officer, the notice of redundancy on record is ineffectual.
80. On consultations, it is common ground that none took place. The Claimant was not consulted nor afforded an opportunity to consult the Respondents on the issue of redundancy.
81. In Barclays Bank of Kenya Ltd & another V Gladys Muthoni & 20 others (Supra), the Court of Appeal cited with approval the dicta of Murgor J.A and Maraga J.A (as he then was) in Kenya Airways Ltd v Aviation & Allied Workers Union Kenya & 3 others (Supra) for the proposition that consultations prior to declaration of redundancy reasonated with the Constitution of Kenya, 2010 and international law domesticated under Article 2(6) of the Constitution of Kenya, 2010.
82. Similarly, in Cargill Kenya Ltd v Mwaka & 3 others (2021) KECA KLR, the Court of Appeal stated as follows;

“Having regard to the legislative intention of the provisions of Section 40 of the Employment Act, the international law and decided cases, it is our finding that consultations on an intended redundancy between the employer and the relevant unions, labour officials and employees is implied by Section 40(1)(a) and (b) of Employment Act.

Furthermore consultation is also now specifically required by article 47 of the Constitution and the Fair Administrative Act ... ”

83. The court is guided by these sentiments.
84. Since the Claimant and the Respondents did not consult at any point before or after the notice had been given, the Respondents did not comply with the provisions of Section 40(1)(b) of the Employment Act, 2007 as regards notification to the Local Labour Officer and consultations thus rendering the redundancy procedurally flawed which is tantamount to an unfair termination of the Claimant's employment.
85. For the above-stated reasons, it is the finding of the court that the termination of the Claimant's employment by the Respondent on account of redundancy was unfair.

Reliefs

- a) 120 leave days



86. This prayer was admitted and is awarded as agreed upon.
- b) Severance pay for 4 years
87. This prayer was not contested and is awarded as agreed upon.
- c) Salary in lieu of notice
88. The claim was uncontested and is awarded.
- d) Certificate of service
89. The Claimant is entitled to a certificate of service by dint of Section 51 of the Employment Act, 2007.
- e) Maximum compensation
90. Having found that the termination of the Claimant's employment on account of redundancy was unfair, the Claimant is entitled to the relief under Section 49(1)(c) of the Employment Act, 2007.
91. In determining the level of compensation, the court has taken into consideration the following;
- (i) The Claimant was an employee of the Respondent for about 4 years which is not long.
- (ii) The Claimant did not contribute to the termination of employment and had no record of misconduct.
- (iii) The Claimant did not appeal the Respondent's decision or express his wish to continue in the Respondents' employment.
- (iv) The Respondents paid the Claimant's salary arrears upto the date of termination, notwithstanding the fact that the Claimant confirmed on cross-examination that his last assignment was on 15th November, 2022 at the Serena Hotel, and were still ready and willing to pay redundancy dues but for the Claimant's failure and/or refusal to hand over.
92. In the circumstances, the court is satisfied that the equivalent of 3 months salary is fair, Kshs.420,000/=.
- f) Accrued PAYE with penalties
93. The Claimant adduced no evidence to prove this prayer. The Claimant provided no particulars of the prayer.
94. More significantly, this court has no mandate to enforce the provisions of the Income Tax Act.
The prayer is dismissed.
- g) Proof of remission of PAYE
95. Analogous to the prayer on accrued PAYE and penalties, the Claimant adduced no evidence to sustain this prayer and it is accordingly dismissed.
96. In the end, judgement is entered in favour of the Claimant against the Respondents in the following terms;
- a) 120 leave days.



- b) Severance pay for 4 completed years of service.
- c) One month's salary in lieu of notice.
- d) Equivalent of 3 months salary Kshs. 420,000/=.
- e) Certificate of service.
- f) Costs of this suit.
- g) Interest at court rates from date hereof till payment in full.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 27TH DAY OF NOVEMBER 2023

DR. JACOB GAKERI

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 *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.

DR. JACOB GAKERI

JUDGE

