



**Kimani v Copy Cat Limited (Employment and Labour Relations Cause  
1386 of 2018) [2023] KEELRC 2982 (KLR) (15 November 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2982 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS CAUSE 1386 OF 2018  
AN MWAURE, J  
NOVEMBER 15, 2023**

**BETWEEN**

**ESTHER WAITHIRA KIMANI ..... CLAIMANT**

**AND**

**COPY CAT LIMITED ..... RESPONDENT**

**JUDGMENT**

**Introduction**

1. The Claimant filed a Memorandum of Claim dated 3<sup>rd</sup> August 2018.

**Claimant's Case**

2. The Claimant avers that she was employed by the Respondent on 30<sup>th</sup> October 2015 as a Service Delivery Lead whereat she worked diligently under various capacities, her last assignment being Contract Management.
3. The Claimant avers that on 9<sup>th</sup> May 2017, the Respondent's Human Resource Manager, Mr Kobia handed her a letter informing her of an ongoing restructuring which would render her services redundant. The letter further stated there would be a consultative meeting to highlight the reasons for the restructure, employee selection criteria, calculation of terminal dues and expected timelines.
4. The Claimant avers that without a consultative meeting between herself and the HR Manager, on 5<sup>th</sup> June 2017, the Respondent served her with a letter dated 17<sup>th</sup> May 2017 setting out her entitlements and last working day as 8<sup>th</sup> June 2017.
5. The Claimant avers that the Respondent's actions amounted to unlawful termination and/or declaration of redundancy as it was unprocedural, discriminatory and in contravention of provisions of the [Employment Act](#), Constitution and fair labour practices.



## Respondent's Case

6. In opposition to the Claim, the Respondent filed its response dated 4<sup>th</sup> September 2019.
7. The Respondent avers that due to volatility of the market in its line of work and harsh financial situation, it was forced to restructure to survive in the market.
8. The Respondent avers that all its employees were informed of the restructure via communication from the Group Managing Director dated 8<sup>th</sup> May 2017, titled "Important Announcement".
9. The Respondent avers that since none of its employees was a registered member of a trade union, in line with section 40 (1) (b) of the Employment Act, it gave notice of the intended restructure to the Labour Office vide a letter dated 9<sup>th</sup> May 2017.
10. The Respondent avers that it notified all affected employees including the Claimant and invited the Claimant to a consultative meeting between herself and the Head of HR held on 11<sup>th</sup> May 2017, which the Claimant attended and signed the minutes thereof.
11. The Respondent avers that during the consultative meeting, the Claimant was informed of the terminal dues she would receive which included:
  - a. Leave salary for the period of leave (pending 25 days)
  - b. One-month salary in lieu of notice
  - c. Remuneration for may and days worked in June
  - d. Severance pay: 16 days of basic pay multiplied by the number of completed years worked (1 year)
  - e. Certificate of service.
12. The Respondent avers that the Claimant was informed she would be issued with a termination letter on grounds of redundancy on 17<sup>th</sup> May 2017 which would take effect on 8<sup>th</sup> June 2017.
13. The Respondent avers that the Claimant was paid her terminal dues of Kshs 289,667 less deductions making the amount payable Kshs 72,745. The payment was made via cheque no 088134 and 088125 and the Claimant acknowledged receipt by signing the payment certificate dated 15<sup>th</sup> June 2017.
14. By consent, the parties agreed to proceed by adopting the submissions documents filed in pleadings and witness statements.
15. The court has considered the claimants submissions dated dated 27<sup>th</sup> June 2023 and the respondent's submissions also dated 6<sup>th</sup> July 2023.

## Analysis and Determination

16. The main issue for determination is whether the Claimant's termination on account of redundancy was unfair and unlawful.
17. It was submitted for the Claimant that the Respondent did not provide any evidence of how many employees were affected by the redundancy, the decline in the company operations necessitating the redundancy and how the Claimant was arrived as the person to be declared redundant.



18. The Claimant submitted that the declaration of redundancy was irregular and against the law and that it was targeted termination of the Claimant without basis.
19. On the other hand, the Respondent submitted that the process was fair and justifiable as:
- a. After it was convinced on the need of redundancy, it proceeded to issue a redundancy notification to the Claimant dated 9<sup>th</sup> May 2017 and another to the local labour office dated 4<sup>th</sup> September 2019.
  - b. It held a consultative meeting between itself and the Claimant on 11<sup>th</sup> May 2017.
  - c. It adopted a reasonable criterion for selection of ‘last in first out’, the Claimant having joined the company in 2015 and working for the company for 1 year 7 months, her skills and abilities were inferior to those she left in employment.
  - d. The Claimant was issued a termination letter dated 17<sup>th</sup> May 2017, informing her termination on grounds of redundancy was to take effect on 8<sup>th</sup> June 2017.
  - e. The Claimant was paid her terminal dues and acknowledged she was paid in full and final settlement and discharge of all sums due to her and that she had no other claims against the Respondent.
20. According to Section 40 (1) of the *Employment Act*, 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.”
21. The issues arising are:



- a. Whether the Respondent had a substantive justification to terminate the Claimant's services on account of redundancy.
  - b. Whether the proper criteria of selection of employees to be declared redundant was applied by the Respondent.
22. On the first issue, Githinji JA held in *Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others* [2014] eKLR:

“.....section 40(1) of the EA is merely procedural by its tenor. It has to be read together with sections 43, 45 and section 47(5) of EA. It is implicit from the four sections that to establish a valid defence to a claim for unfair termination based on redundancy, an employer has to prove:

- i. the reason or reasons for termination.
- ii. that reason for termination is valid and that
- iii. the reason for termination is fair reason based on the operational requirements of the employer and
- iv. that the employment was terminated in accordance with fair procedure.

However, as section 43(2) of EA provides the reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist and which caused the employer to terminate the services of the employer.

Further, as section 47(5) of EA provides the burden of proving unfair termination of employment rests with the employee while the burden of justifying the grounds for termination rests with the employer.

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. 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.”

23. Although the Respondent avers that the Claimant's termination was necessitated by volatility of the market in its line of work and harsh financial situation, it has failed to prove that indeed it was undergoing a decline due to those factors or that the Claimant was aware of the same.
24. The Respondent has failed to show the Claimant's termination was based on fair reason as set out in section 43(2) of the *Employment Act* and why her role was the only one targeted. The selection criteria was not proved.



25. With regard to the selection criteria applied by the Respondent, Maraga JA held as follows in Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others (supra):

“I do not agree with the learned Judge that the “last-in-first-out” principle in section 40(1)(c) must always be employed. The employer can use all or any of the criteria in that paragraph. In the present technological age, if the “last-in-first-out” principle is held to be mandatory, it may defeat the employer’s objective of employing modern technology to carry out his business because it may be that the last employees to be employed, who according to this principle should be the first to exit, are the ones with the technological know how that the employer requires. All this notwithstanding, however, in a nutshell, I find that the appellant employed an opaque criteria in the selection of the retrenched employees that did not meet the statutory threshold.”

26. Further, in Cargill Kenya Limited v Mwaka & 3 others (Civil Appeal 54 of 2019) [2021] KECA 115 (KLR) (22 October 2021) (Judgment) the court held:

“.....the requirements in fulfilling the threshold set by section 40(1)(c) of the Employment Act can therefore be surmised as follows. First, an employer should include the factors set out in section 40(1)(c) of the Employment Act in the criteria for evaluating and selecting the employees to be declared redundant. Second, the employer is required to prove that the criteria was objectively, uniformly and fairly applied.”

27. The Respondent has not produced before this court any list of employees who were considered together with Claimant to enable this court to decipher the selection criteria it applied and whether it was objectively, uniformly and fairly applied. In the meeting held the focus seemed to have only been on the claimant.

28. Therefore, the Claimant’s termination on account of redundancy was unfair and unlawful as the Respondent has failed to prove it had substantive justification and that it duly followed procedure as set out in section 40 of the Employment Act. The court therefore enters judgment in favour of the claimant.

29. The claimant is awarded compensatory damages totalling 3 months equivalent having worked for less than 2 years for the respondent and as per guidelines in section 49 of the Employment Act. The total awarded is therefore kshs 330,000/-.

30. Claimant was paid her other dues as well submitted by the respondent.

31. Costs are awarded to the claimant and interest at court rates from date of judgment till full payment.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 15<sup>TH</sup> DAY OF NOVEMBER, 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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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**

