



**Ndung'u v Airtel Kenya Limited (Cause 810 of 2016)
[2023] KEELRC 3328 (KLR) (20 December 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3328 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 810 OF 2016
SC RUTTO, J
DECEMBER 20, 2023**

BETWEEN

EUNICE WANJIRU NDUNG'U CLAIMANT

AND

AIRTEL KENYA LIMITED RESPONDENT

JUDGMENT

1. Through a Statement of Claim amended on 6th January 2023, the Claimant avers that she was employed by the Respondent on 1st July 2006 as a Contact Centre Representative II. It is the Claimant's case that she held the said position faithfully and diligently and from time to time, received commendations with regard to her good performance. According to the Claimant, the Respondent underpaid her salary when she was made to perform the duties of an Express Cashier together with that of Contact Centre Representative II but was only paid the salary of Contact Centre Representative II. She avers that the unlawful exploitation continued until 18th September 2014 when she was formally appointed to the position of Express Shop Cashier.
2. The Claimant further avers that barely a few months after being confirmed to the position of Express Shop Cashier, she received a letter purportedly unlawfully and wrongfully terminating her services as Premier Executive with the Respondent on account of redundancy. In the Claimant's view, there was no genuine redundancy at the time. On account of the foregoing, the Claimant seeks the following reliefs against the Respondent:
 - a. Compensation for underpayment of salary and arrears for working as a Contact Center Representative II and an Express Shop Cashier from 16th December 2008 to 18th September 2014;
 - b. 12 months' salary being compensation for damages for wrongful dismissal and unfair termination.



- c. The balance of the loans guaranteed by the Respondent.
 - d. Overtime from 16th December 2008 to 18th September 2014;
 - e. Costs of the suit.
 - f. Interest on prayers (b), (c), (d), (e) and (f) herein.
 - g. Such further or other relief this Honourable Court may deem fit.
3. The Respondent has opposed the Claim through its Amended Statement of Response dated 18th April 2023, in which it denies exploiting the Claimant and contends that at all material times, she was aware that her terms and conditions of employment as an Express Shop Cashier were similar to the terms under her contract dated 1st July 2006.
 4. Admitting that the Claimant's employment was terminated on 1st July 2015 on account of redundancy, the Respondent avers that at the time of termination, the title for the Express Shop Cashier had changed to Premier Executive and that the position declared redundant was the one occupied by the Claimant. According to the Respondent, the role of cashier was outsourced and no longer forms part of its structure. Consequently, the Respondent contends that the Claimant is not entitled to the sum claimed or at all and prays that the suit be dismissed with costs.
 5. The matter proceeded for hearing on 18th September 2023, during which both parties called oral evidence.

Claimant's case

6. The Claimant testified in support of her case and for starters, sought to have her witness statements adopted by the Court to constitute her evidence in chief. She further produced the documents filed on her behalf as exhibits before Court.
7. It was the Claimant's evidence that her services as a Premier Executive with the Respondent were terminated on account of redundancy notwithstanding the fact that she had never worked as a Premier Executive.
8. She further averred that the nature of the Respondent's operations required the services of an Express Shop Cashier for the said position to be rendered redundant and that the said post still exists to date.
9. In the Claimant's view, the subsequent declaration of her services redundant on account of a position she never held was purely orchestrated by the Respondent to obscure the wrongful and unlawful termination of her services all in the pretext of redundancy.
10. Citing her termination as unfair and unlawful, the Claimant averred that the Respondent failed to notify her personally in writing and the Labour Officer of the intention to declare her redundant. She further averred that the Respondent failed to take cognizance of her seniority in time, skill, performance, ability and reliability vis a vis that of other employees before declaring her redundant.
11. The Claimant further stated that the Respondent encouraged her being a permanent employee, to take up loans which it offered to guarantee with the understanding that she was permanently employed. She proceeded to take up the loan only because the Respondent reassured her of its commitment to sustaining the contractual relationship they had entered into.
12. Subsequently, she faithfully serviced her loans up until her termination when she no longer had a salary to be able to continue servicing the loan. Despite being unable to service the loan due to the



- Respondent's acts and omissions, the Respondent has adamantly failed/refused to pay the loan in spite of being the guarantor thereby leaving her with a huge debt that she is unable to pay.
13. According to the Claimant, the Respondent's actions are a blatant infringement of her rights under the *Employment Act* and fair labour practices.
 14. She is aware that all the shops run by Airtel Kenya have an Express Shop Cashier designated to run the affairs of the shop and therefore the decision to single her out as redundant was unlawful, unfair, wrongful and tainted with malice.
 15. She is extremely prejudiced by the Respondent's action who ought to be compelled by court to compensate her for the wrongful and lawful termination of her services as set out in the Statement of Claim.

Respondent's case

16. The Respondent called oral evidence through its Human Resource Manager, Ms. Ann Njoka, who testified as RW1. Equally, RW1 adopted her witness statement to constitute her evidence in chief. She proceeded to produce the documents filed on behalf of the Respondent as exhibits before Court.
17. RW1 denied the Claimant's assertions that the position of an Express Shop Cashier was a more senior ranking position with superior pay packages. She contended that the positions of Contact Centre Representative II, Express Shop Cashier and Premier Executive, are all graded at Office level on the staff grading system which informs the salary band. According to her, the salary of a Contact Centre Representative was within the same band as that of the Cashier.
18. It was her evidence that at the time of termination, the title of Express Shop cashier had changed to Premier Executive and the position declared redundant was the one occupied by the Claimant.
19. She testified that the merging of some functions and the outsourcing of others resulted in certain employees being superfluous to the requirements of the business thus necessitating their retrenchment.
20. That in August 2013, a business decision was made to hand over the retail shops to a franchise holder (ART). It became necessary for the Respondent to restructure its Customer Service Department and rationalize its staffing levels. New roles were advertised and applicants were interviewed and appointed to the new roles. The Claimant was not successful.
21. During the restructuring of the Customer Service Department, a total of 11 positions spread across Customer Service were declared redundant in July 2015 out of which three were shop roles. The Claimant's position was one of the three positions within the Respondent's shops that were declared redundant.
22. RW1 further stated that the Respondent had valid reasons for separating with the Claimant and due process was followed. There was no pretext of redundancy on the Claimant's position.
23. It is her understanding that the obligation imposed upon the employer by Section 40(1) (b) of the *Employment Act* is to notify the employee personally in writing and the labour officer. No time frame is stipulated under that provision for the notification. That by making payment for that period, the Claimant was in no less a position than she would have been had she been a member of a trade union.
24. There were no reasons whatsoever to unfairly or wrongly terminate the Claimant's contract of employment. Her position ceased to exist and this necessitated the termination of employment on account of redundancy.



25. It was RW1's further evidence that the Respondent's business involves having employees manage accounts, handle cash and manage systems. These are sensitive processes which can be easily undermined. There was a real apprehension that the issuing of a notice of intention to declare redundancy prior to the termination of contract would result in either a de-escalation in the delivery of service, the loss of or failure by staff to account for revenue and a compromise of the Respondent's systems. The effect of this was that while notice was given to the Labour Office, the Claimant received one month's pay in lieu of such notice.
26. She further stated that the Respondent did not in any way encourage its employees to incur liability, or offer to guarantee any loan facilities. The Respondent's role extended only to confirming to the lending banks that the loan applicants were in its employment and confirming what their monthly salary was, in addition to confirming that it would carry out a check off against their salary for the loan repayments while the borrowers remained in its employment. That the Respondent was not under any liability as a guarantor or otherwise for the debt incurred by the Claimant.
27. In RW1's view, the Respondent has not infringed on the Claimant's employment rights and the claim requiring it to pay a debt on her behalf has no basis. She maintained that the Respondent discharged its obligations by paying the Claimant all her dues on separation.

Submissions

28. It was the Claimant's submission that the Respondent acknowledged in its amended response that she performed the role of an Express Shop Cashier. The Claimant further submitted that she never held the position of a Premier Executive and that RW1 did not present any evidence indicating when the role of an Express Shop Cashier changed to that of a Premier Executive as alleged. She further posited that the declaration of her redundancy from the position of Premier Executive, a role she had never occupied, only reinforces the lack of a genuine redundancy situation.
29. The Claimant further submitted that her purported redundancy was orchestrated by the Respondent to conceal the wrongful and unlawful termination of her services, all under the pretext of redundancy, even though there was no genuine redundancy at the time. She urged the Court to find that her termination was wrongful and unfair as a result of the substantial failure by the Respondent to comply with the mandatory provisions of Section 40 of the *Employment Act*. In support of the Claimant's arguments, the Court was invited to consider the determination in *Kenya Plantation and Agricultural Workers Union v Harvest Limited* [2014] eKLR and *Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others* [2014] eKLR.
30. The Respondent on the other hand submitted that in signing the Discharge Form, the Claimant discharged it from all liability. It thus urged the Court to look at the intention of the parties in considering the import of the said document. In support of its position, the Respondent placed reliance on the cases of *Coastal Bottlers v Kimathi Mithika* (2018) eKLR and *Joseph Chumba v Wells Fargo Limited (Cause E004 of 2021)* [2023] KEELRC 176 (KLR) (31 January 2023) (Judgment).
31. The Respondent further submitted that an employer has the right to restructure/reorganize its operations without interference from the Court provided that the relevant provisions of the law are followed. On this score, the Respondent posited that it adhered to the provisions of the law in implementing the redundancy herein. To buttress this argument, the Respondent cited the case of *Kenya Airways Corporation Ltd v Tobias Oganya Auma & 5 others* (2007) eKLR.
32. Referencing the case of *Abyssinia Iron & Steel Limited v Kenya Engineering Workers Union* (2016) eKLR, it was the Respondent's further submission that it decided to alter its business by outsourcing.



It further argued that saving costs and increasing its efficiency was a valid reason for declaring redundancy.

33. With regards to failure to place a notice to the labour office before the Court, the Respondent submitted that the said omission did not result in any prejudice against the Claimant. The Respondent further submitted that its business consists of sensitive processes and data as its employees manage accounts, handle cash and manage various systems that are integral to its business. It argued that it was reasonable for it to be apprehensive of the risk of tampering or interference with the system and data by the impacted employees who would understandably be unhappy about being declared redundant.

Analysis and Determination

34. Arising from the pleadings, the evidence on record as well as the rival submissions, the following issues stand out for consideration by the Court:
- i. Whether the Discharge Form absolved the Respondent from further liability and action arising from the termination;
 - ii. If the answer to (i) is in the negative, whether the Claimant's termination by way of redundancy was fair and lawful;
 - iii. Whether the Claimant is entitled to the reliefs sought.

Import of the Discharge Form

35. The Respondent has submitted that in signing the Discharge Form dated 28th July 2015, the Claimant discharged it from all liability. The Respondent further submitted that the intention of the parties was to execute the document that was to operate as a discharge by the Claimant of all claims against it. Notably, the Claimant did not submit on this issue.
36. The Discharge Form in question which is dated 28th July 2015 reads in part:
- “I Eunice Wanjiru Ndungu of...Nairobi do hereby acknowledge receipt of cheque no.s EFT Kshs 560,655/= being payment in full and final settlement of all dues from Airtel Networks Kenya. The payment comprises of full and final terminal dues as per the pay slip provided. ...I confirm that the above payments absolves Airtel Networks Kenya Ltd from any other or further claims whatsoever from myself regarding my employment at Airtel Kenya...”
37. Cross-examined, the Claimant admitted to signing the said Discharge Form and receiving the sum of Kshs 560,000.00 from the Respondent.
38. In the case of *Coastal Bottlers v Kimathi Mithika* [2018] eKLR, the Court of Appeal held as follows:
- “21. In our minds, it is clear that the parties had agreed that payment of the amount stated in the settlement agreement would absolve the appellant from any further claims under the contract of employment and even in relation to the respondent's termination. It is instructive to note that the respondent never denied signing the said agreement or questioned the veracity of the agreement. Further, from the record, we do not discern any misrepresentation on the import of the said agreement or incapacity on the respondent's part at the time he executed the same. It did not matter that the amount thereunder would



be deemed as inadequate. As it stood, the agreement was a binding contract between the parties.”

39. The Court proceeded to cite with approval its decision in the case of Trinity Prime Investment Limited v Lion of Kenya Insurance Company Limited [2015] eKLR where it was held that:

“The execution of the discharge voucher, we agree with the learned judge, constituted a complete contract. Even if payment by it was less than the total loss sum, the appellant accepted it because he wanted payment quickly and execution of the voucher was free of misrepresentation, fraud or other. The appellant was thus fully discharged.”

40. The above precedents are binding on this Court and I am enjoined to follow the same. In this regard, the Discharge Form executed between the Claimant and the Respondent constituted a binding contract between the parties and had the effect of absolving the Respondent from any claims whatsoever regarding her employment with the Respondent.

41. Applying the foregoing authorities to the case herein and in absence of any vitiating element, the Claimant was therefore estopped from bringing a suit in connection with the said employment seeking further reliefs.

42. On this score, I will follow the determination of the Court of Appeal in Coastal Bottlers v Kimathi Mithika [supra], where it was held that:

“Giving effect to the parties’ intention meant that the ELRC could not entertain the suit filed by the respondent. This is because the respondent had waived his rights to make any further claim in relation to his relationship with the appellant.”

43. In light of the above holding, the Court finds that through the Discharge Form dated 28th July 2015, the Claimant waived her right to bring any action connected to her employment with the Respondent. Having so found, it is not logical to examine the fairness of the Claimant’s termination.

Reliefs

44. The Claimant has sought underpayment of salary and arrears for working as a Contact Centre Representative II from 16th December 2008 to 18th September 2014.

45. From the record, the Claimant was appointed as an Express Shop Cashier on 18th September 2014. Prior to this appointment, there is no evidence that the Claimant was performing the duties of an Express Shop Cashier. Further, during cross-examination, the Claimant testified that she followed up with her then manager for confirmation to the position of Express Shop Cashier. She admitted that she did not have correspondence to this effect. Therefore, the Claimant’s claim in this regard was not proved to the requisite standard hence cannot be sustained.

46. What’s more, the claim for underpayment is in the nature of a specific claim hence the Claimant was duty bound to specifically plead and prove the same. In this regard, it is notable that despite being a specific claim, the Claimant did not state the amount she seeks to recover as underpayment against the Respondent. In light of this, I cannot help but question how the Court is expected to ascertain the amount due from the Respondent.

47. The claim with regards to overtime is similarly declined for want of proof. My position on this issue is fortified by the determination by the Court of Appeal in Patrick Lumumba Kimuyu v Prime Fuels (K)



Limited [2018] eKLR, where the Learned Judges cited with approval the case of Rogoli Ole Manadiegi vs General Cargo Services Limited (2016) eKLR, thus: -

“Addressing a similar issue this Court in its decision in Rogoli Ole Manadiegi vs. General Cargo Services Limited (2016) eKLR expressed as follows;

“It is true the employer is the custodian of employment records. The employee, in claiming overtime pay however, is not deemed to establish the claim for overtime pay by default of the employer bringing to court such employment records. The burden of establishing hours or days served in excess of the legal maximum, rests with the employee. The claimant did not show in the trial court when he put in excess hours, when he served on public holidays or even rest days... he did not justify the global figure claimed in overtime, showing specifically how it was arrived at...”

The Court disallowed that claim. This case is on all fours with the above case and we reiterate the above finding. The finding by the trial court that the appellant had failed to prove his claim with regard to compensation for public holidays and Sundays worked is without fault. That ground of appeal must therefore fail.”

48. With regards to the claim for the balance of the loans guaranteed by the Respondent, the same is equally declined as there is no evidence that the Respondent was privy to the loan contract executed by the Claimant or that it stood in as her guarantor. Further, it is instructive to note that the Claimant did not specifically plead this claim by stating the amount she is seeking against the Respondent. For the foregoing reasons, her claim is unsustainable.

Orders

49. In the final analysis, I dismiss the suit in its entirety with an order that each party bears its own costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20TH DAY OF DECEMBER, 2023.

STELLA RUTTO

JUDGE

Appearance:

For the Claimant Ms. Mugendi instructed by Mr. Ochieng

For the Respondent Ms. Muthiani

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 had 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.

STELLA RUTTO



JUDGE

