



**Kenya Union of Domestic, Hotels, Educational, Institution Hospitals and Allied Workers v Nakuru War Memorial Hospital (Employment and Labour Relations Cause 470 of 2016) [2023] KEELRC 3482 (KLR) (11 December 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3482 (KLR)

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU**  
**EMPLOYMENT AND LABOUR RELATIONS CAUSE 470 OF 2016**  
**HS WASILWA, J**  
**DECEMBER 11, 2023**

**BETWEEN**

**KENYA UNION OF DOMESTIC, HOTELS, EDUCATIONAL, INSTITUTION HOSPITALS AND ALLIED WORKERS ..... CLAIMANT**

**AND**

**NAKURU WAR MEMORIAL HOSPITAL ..... RESPONDENT**

**JUDGMENT**

**Introduction**

1. By a memorandum of claim dated 28<sup>th</sup> November, 2016, the claimant sued the Respondent for alleged unfair declaration of redundancy. On 23<sup>rd</sup> January, 2017, the claimant filed an Amended Memorandum of claim, indicated the main issue as termination of services of its members; Simon Ndirangu, Dan Muthui, Erick Okiri and Simon Gachigi on account of unfair redundancy. The claimant sought for the following reliefs; -
  1. That this Honourable Court be pleased be find and declare that the redundancy is indeed an unfair and unlawful termination.
  2. That the grievants herein be reinstated without loss of benefits and continuity of service. or in the alternative -:
  3. That this Honourable court be pleased to order the Respondent to pay the grievants 1. Mr Simon Ndirangu (ii) Mr Erick Okiri (iii) Mr Dan Muthui and (iv) Mr Simon Gachigi their terminal benefits as provided for under the Collective Bargaining Agreement-(C.B.A).
  4. That the Honourable court be pleased to order the Respondent to pay to each grievant 12 months' salary compensation for the unfair termination.



5. That this Honourable court be pleased to order the Respondent to pay each of the grievants their terminal benefits of 30 days for each completed year of service as per clause 10 of the C.B.A.
6. That this Honourable court be pleased to order the Respondent to pay each of the grievants the appropriate notice as per clause 12 of the C.B.A.
7. That the Respondent pays to each of the grievants their salary for 9 days worked in the month of December.
8. That the Respondent meets the costs of this suit.
9. That the Claimant prays for any further and better relief that this Honourable court may deem fit to grant:

### **Claimant's Case**

2. The claimant states that it is a registered trade Union representing employees of the Respondent. That the claimant and the Respondent signed and registered a Collective Bargaining Agreement covering the period between 1<sup>st</sup> July, 2014 and 30<sup>th</sup> June, 2016. Upon the lapse of that CBA, the parties commenced further negotiations to sign new CBA for the period between 2016 and 2018 as per the meeting of 24<sup>th</sup> August, 2016.
3. The parties commenced their negotiations between the said 24<sup>th</sup> August, 2016 and 26<sup>th</sup> October, 2016, holding Five (5) negotiations meetings. In all these meeting the issue of looming redundancy was not raised by the Respondent.
4. Nonetheless, that the claimant's members were declared redundant on 9<sup>th</sup> December, 2016, which redundancy was unfair because the Respondent did not inform the labour office the places where the said employees were based and also the fact that while the negotiations on another CBA was going on, the Respondent was busy terminating its employees, a move which the claimant felt, was a ploy to intimidate other employees from joining the Union.
5. The Claimant stated that redundancy process caused it loss as they lost union dues and their members were intimidated from continuing with the Union.
6. During hearing, the claimant called one witness Erik Okeri, who testified as CW-1 and stated that he joined the Respondent's employment in the year 1994 and deployed to work in the laundry department to clean and iron clothes. That he served the Respondent well till November, 2016, when he was issued with a redundancy notice together with three of his colleagues being Ndirangu, Muchiri and Muthui.
7. He testified that he was informed by the Respondent's management that the redundancy had been negotiated and agreed upon between it and the Union, however on approaching the claimant, he was informed that there was no meeting on such negotiations.
8. He told this Court that upon receiving such information, they instructed the Claimant Union to file the current case on their behalf and obtain orders to stop the said termination, which orders were issued in their favour, however the Respondent refused to comply with the said orders. He urged this Court to compel the Respondent to comply with the said orders and allow them back to work but in the alternative, order for their compensation according to the CBA.



9. Upon filing the case in court, further negotiations ensued where the Respondent agreed to pay them as per the CBA on condition that they resign from the Union, but they refused to resign from the Union hence this case.

#### **Respondent's case.**

10. The Respondent entered appearance and filed a response to claim on the 6<sup>th</sup> December, 2016 and admitted to signing a CBA for the year 2014-2016 and the fact that CBA run its course.
11. The Respondent however denied the allegations that the redundancy was unprocedural and stated that the letter declaring the claimant's members redundant was duly dated and the parties even negotiated on the amounts to be paid to the said employees.
12. The Respondent maintained that notifications for the said redundancy wa issued in accordance with the law as such the redundancy was not unfair as alleged.
13. The respondent further stated that the termination did not in any way violate the constitution or international labour rather that it was done in accordance with the CBA and the labour law.
14. In conclusion, the Respondent stated that it is willing to abide by the law and pay all sums that have fallen due.
15. This matter was listed severally for hearing from 4<sup>th</sup> October, 2022, however on all occasions, the parties indicated that they were negotiating till 19<sup>th</sup> April, 2023, when Mr. Hezron Ounga, counsel for the claimant told this Court that the negotiations had collapsed and sought for a hearing date which was slated for 30<sup>th</sup> May, 2023. On the 30<sup>th</sup> May, 2023, Mr, Kamau, Counsel for the Respondent informed this court that the parties had carried out further discussions and agreed on three issues including payments however had disagreed on interpretation of the clauses of the CBA with regard to Redundancy and retirement.
16. The Court then directed parties to submitted on the two issues, which Claimant filed its submissions on 31<sup>st</sup> July, 2023 and the Respondent filed on 5<sup>th</sup> October, 2023.

#### **Claimant's Submissions.**

17. The Claimant submitted on one issues; whether the grievants are entitled to service gratuity and severance pay as provided in clause 10 and 11 of the parties Collective Bargaining Agreement.
18. He submitted that clause 10 on Retirement/Termination Benefits states that;
  - (a) Every employee who leaves the hospital for any reason other than gross misconduct shall be paid benefits at the rate of 30 days for each completed year of service and including house allowance for each completed year of service.
  - (b) For the purpose of calculation the payment of service benefits, wages shall be based on the last payment of monthly wages paid to him/ her by the hospital.
19. Clause 11 on the other hand states that;

“In the event of redundancy the following principles as set out in the Industrial Relations Charter will apply:

  - i. The union concerned shall be informed of the reasons for and the extent of intended redundancy at least 30 days before the date of intended redundancy.



- ii. The principles shall be adopted of Last In First Out in the particular category of employees affected subject to all other factors such as skill, relative merit, ability and reliability being equal.
  - iii. The redundant employee(s) will be entitled to all terminal benefits provided for in this agreement. (iv) The redundant employee shall be entitled to severance pay at the following rate:
    - (a) For an employee with one to ten years of service 25 days for each completed years of service. Over ten years of service 30 days for each completed
    - (b) year of service.
20. The Claimant submitted that service Gratuity is an amount payable to an employee or employees who have been terminated or their contract is terminated on account of redundancy. He argued that section 59 of the *Labour Relations Act* provides that;
- i. A collective agreement binds for the period of the agreement:
    - a. the parties to the agreement.
    - b. All unionisable employees employed by the employer, group of employers or members of the employers' organization party to the agreement: or.
    - c. The employers who are or become members of an employers' organization party to the agreement to the extent that the agreement relates to their employees.
  - ii. A collective agreement shall continue to be binding on an employer or employee who were parties to the agreement at the time of its commencement and includes members who have resigned from that trade union or employer association.
  - iii. The terms of the collective agreement shall be incorporated into the contract of employment of every employee covered by the collective agreement.
21. Based on the above extract, the claimant submitted that the grievants are entitled to paid all their benefits as provided for under clause 10 and 11 of the C.B.A as agreed by the parties.
22. The claimant therefore urged this Honourable Court to award the grievants termination benefits as provided for under clause 10 and 11 of the CBA.

### **Respondent's Submissions.**

- 23. The Respondent submitted from the onset urging this Court to interpret Clause 10 and 11 of the CBA (Collective Bargaining Agreement) between the Claimant and the Respondent dated 24<sup>th</sup> August, 2015.
- 24. The Respondent submitted that the issues in dispute relate 3 workers who were declared redundant by the Respondent. He argued that parties have tried an out of court settlement and agreed on all issues save for interpretation of clause 10 and 11 of the CBA to guide on the calculations of dues for the said employees.
- 25. He submitted that unlike the claimant's arguments that want the computation to be done by factoring both the amount as contemplated in clause 10 and 11, the Respondent is of the view that the dues be calculated based on the provisions of clause 11 only.



26. He submitted that the Respondent did follow fully the provisions of the CBA agreement and section 40(a) of the [Employment Act](#) in notifying the Claimant of the intention to terminate the services of the said employees. Therefore, that the claimant was the one mandated under [Labour Relations Act](#), section 62(4), to report a trade dispute to the cabinet secretary after receipt of the Notice of termination of employment. Hence the claimant cannot now allege that it had issues regarding the redundancy of the said employees.
27. On the essence of redundancy, the Respondent cited the case of [Addah Abbiambop Obiero -v ARD Inc](#) ELRC Cause No.421 of 2012 where Justice Maureen Onyango ruled that the import of a redundancy package is to compensate and reward the employees in view of the long service and not pay them for loss of employment.
28. Given the fact that the correct procedure was followed as it is not in contention (as established during our negotiation to have the matter settled) section 40(1) (g) of the [Employment Act](#) provides that the Employer shall pay to an employee declared redundant severance pay at the rate of not less than fifteen days' pay for each completed year of service. The same does not provide for terminal benefits as alluded by the claimant.
29. He argued that subjecting the Respondent to pay terminal benefits, together with severance pay is akin to demanding the Respondent to pay the declared redundant employees loss of employment too. Nonetheless, that while the Respondent acknowledges the sub clause in relation to computation of redundancy package that states “the employee shall be entitled to all terminal benefits as provided for in this agreement”, the Respondent opines that the same is only applicable if and when it is discovered that the declaration of redundancy was not procedural or lawful.
30. Further that though the Respondent confirmed signing the CBA, as is, it is stated that its understanding on handling of redundancy will be in line with the said clause and also the provisions of section 40 of the [Employment Act](#). To support this, they relied on the case of [Nairobi City County Government-Vs-Kenya County Government Workers Union, Salaries and Remuneration Commission \(interested Party/Applicant\)](#) (2019) eKLR , where the Court held that;
 

“ ... a CBA generally is a binding Contract between the parties whose effect is provided under section 59 of the [Labour Relations Act](#) and whose implementation takes effect after its registration in court. Consequently, a CBA just as a contract may be set aside on the same principles that would apply in setting aside a contract. In social service league, MP Shah Hospital Vs. Kenya Union of Domestic, Hotels, Education Institutions and Allied Workers (2018) Eklr, (the court held): A collective agreement is a contractual agreement like any other left to party autonomy, save that it is underpinned by specific statutory provisions which if breached would render it or the offending clause illegal. Apart from the illegality, the normal legal principles in setting aside a contract would apply, and these include establishment that there was fraud and misrepresentation.”
31. In that regard the Respondent submitted that application of terminal benefits alongside severance pay while calculating dues in relation to redundancy is not intertwined with section 40 of the [Employment Act](#) thus making it illegal and unenforceable as in relation to terminal benefits.
32. Based on the foregoing, the Respondent urged this court to to order for the payment of severance pay only, which it has already paid and not for the terminal dues.
33. I have considered the submissions of the parties herein in relation to whether the grievants are entitled to payment of both terminal dues/service pay and redundancy package.



34. An employee while being declared redundant is entitled to payment of his dues on redundancy as provided for under Section 40 (1) of the [Employment Act](#) 2007 which provides as follows:-

“40. Termination on account of redundancy

- (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 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”.

35. An employee can only be paid for an unfair redundancy if the process of redundancy was not followed.

36. As it were, the union was served with a notice of redundancy of its members on 4/11/2016. The notice was to run for 30 days and so was to end on 4/12/2016. The notice having fallen short of the 30 days envisaged in the law was therefore an unfair redundancy.

37. Despite this unfairness, when it comes to calculation of a redundancy package clause 10 of the CBA between the parties state as follows;

- “(a) Every employee who leaves the hospital for any reason other than gross misconduct shall be paid benefits at the rate of 30 days for each completed year of service and including house allowance for each completed year of service.
- (b) For the purpose of calculation the payment of service benefits, wages shall be based on the last payment of monthly wages paid to him/her by the hospital”.

38. Clause 11 on the other hand states as follows;

“ 11. Redundancy



In the event of redundancy the following principles as set out in the Industrial Relations Charter will apply:-

- i. The Union concerned shall be informed of the reasons for and the extent of intended redundancy at least 30 days before the date of intended redundancy.
- ii. The principles shall be adopted of “Last In, First Out” in the particular category of employees affected subject to all other factors such as skill, relative merit, ability and reliability being equal.
- iii. The redundant employee(s) will be entitled to all terminal benefits provided for in this agreement.
- iv. The redundant employees shall be entitled to severance pay at the following rate:-
  - a. For an employee with one to ten years of service – 25 days for each completed year of service.
  - b. Over ten years of service – 30 days for each completed year of service”.

39. Clause 11 (iii) above is clear that a redundant employee will also be entitled to all terminal benefits provided for in the agreement and also a severance package.

40. It is clear therefore that the grievants are entitled to their terminal benefits provided for under clause 10 as their departure is not based on gross misconduct.

41. They are also entitled to their redundancy package under clause 11 above.

42. It is therefore my finding that the dues of the grievants shall be calculated based on the above clauses and a figure agreed upon by the parties for adoption of this court as part of this judgment.

43. Costs to the claimants.

**DATED AND DELIVERED IN OPEN COURT THIS 11<sup>TH</sup> DAY OF DECEMBER, 2023.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

In the presence of:-

Chomba for Respondent – present

Hezron Onwonga for claimant – present

Court Assistant – Fred

