



**Nyangorora v Longhorn Publishers Limited (Cause 2040 of 2017)
[2023] KEELRC 3247 (KLR) (6 December 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3247 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 2040 OF 2017
JK GAKERI, J
DECEMBER 6, 2023**

BETWEEN

VICTOR OMARE NYANGORORA CLAIMANT

AND

LONGHORN PUBLISHERS LIMITED RESPONDENT

JUDGMENT

1. The Claimant commenced this suit by a Memorandum of Claim filed on 11th October, 2017 alleging unfair termination on account of redundancy.
2. The Claimant prays for;
 - i. A declaration that the termination of the Claimant’s employment was illegal, unlawful, unfair and inhumane.
 - ii. 12 months gross salary Kshs.2,160,000.00.
 - iii. Bonuses amounting to Kshs.180,000.00.
 - iv. General damages for wrongful termination of employment.
 - v. Costs of this claim.
 - vi. Interest on (ii), (iii) and (iv) above.
 - vii. Any other award as the court may deem fit.
3. It is the Claimant’s case that he joined the Respondent from 1st November, 2011 as Warehouse Manager and served diligently and was promoted to the position of Deputy-Research and Business Development Manager – Stores and value Chain.



4. That his predicament begun in May 2015 when one Simon Gachomo Ngigi joined the Respondent company as Managing Director as he was determined to ensure that the Claimant's employment was terminated through witch hunt, omitted his name from the 1st Strategic Management Meeting he and Simon had with the Respondent's board and the Deputy Manager was included.
5. The Claimant avers that there was bad blood between him and the Managing Director.
6. That on 22nd February, 2016, Mr. Gichuki informed the Claimant that the organization had created the position of Logistics Manager and the Claimant was the best suited for the position and assumed office on 1st March, 2016 but on 29th July, 2016, the Claimant was notified that the Respondent intended to scrap the position of Logistics Manager rendering his position redundant and he was not consulted.
7. That the Respondent retained the same roles and employed other persons.

Respondent's case

8. In its response filed on 23rd November, 2017, the Respondent denies the allegations made by the Claimant against its Managing Director.
9. It admits that the redundancy was necessitated by the need to improve operational efficiency within the Sales and Logistic Department as the positions of Logistics Manager and Stores and Value Chain and had to be abolished and the Department restructured and discussions took place.
10. It is the Respondent's case that positions of Logistic Manager and Value Chain Manager were temporal and 3 positions were abolished and the position of Warehouse and Logistics Manager was established.
11. That the restructuring was carried out across the entire organization and culminated in several redundancies.

Claimant's evidence

12. On cross-examination, the Claimant confirmed that the alleged communication from the Chief Human Resource Officer was verbal and he had no evidence of the communication as was the alleged communication with Mr. Godfrey Gichuki.
13. The witness stated that he was unaware of the causes of the restructuring.
14. The witness further confirmed that only 2 positions were declared redundant and he received the redundancy notice together with a copy of the notice to the Labour Officer.
15. The witness maintained that he was targeted and the redundancy was improper.
16. The Claimant admitted that he was paid all terminal dues.

Respondent's evidence

17. RWI, Agnes Njambi confirmed that she was the Order Supervising Supervisor.
18. RWI testified that although Heads of Department used to attend meetings with the Managing Director, not all Managers were Head of Department.
19. That the company had established branches in Uganda and Tanzania and the Claimant was delivering on the job.
20. On consultations, the witness confirmed that she had no record of the deliberations.



21. It was her testimony that while the Claimant was notified of the redundancy on 26th July, 2016, the Labour Officer was notified on 28th July, 2016.
22. The witness testified that the roles of Logistics and Value Chain were merged and the position of Warehouse and Logistics Manager for the entire region was created after the redundancy.
23. That the Claimant's position of Logistics Manager was temporal.
24. On re-examination, the witness testified that the Labour Officer had been notified of the restructuring of the Sales Department on 10th May, 2016.

Claimant's submissions

25. Counsel for the Claimant addressed the issue whether the redundancy was lawful and fair and costs.
26. On the 1st issue, counsel submitted that the conditions set out in Section 40(1) of the [Employment Act](#), 2007 required a redundancy and a termination notice. The former to the employee or union and labour officer and the later to those leaving and cited the decision in Thomas De La Rue V David Opondo Omutelema (2013) eKLR and Kenya Airways Ltd V Aviation & Allied Workers of Kenya & 3 others (2014) eKLR to buttress the submission.
27. Counsel further submitted that the Respondent held only one meeting on improvement of efficiency and the Claimant was not consulted.
28. That the Respondent did not observe the procedural requirements of a redundancy and cites the decision in Jane Khalechi V Oxford University Press EA Ltd.
29. Counsel submitted that there ought to be a general and a specific notice in a redundancy and cites the decision in Bernard Misawo Obura V Coca Cola Juices Kenya Ltd (2015) eKLR to urge that the notice to the Labour Officer was intended to elicit advice to the employer.
30. The sentiments of the court in Margaret Mumbi Mwago V Intra Health International (2017) eKLR on the two notices were also cited.
31. Counsel urged that the provisions of Section 40(1) of the [Employment Act](#), 2007 were mandatory.
32. The decision in the Kenya Airways Ltd Case (Supra) was relied upon to demonstrate the essence of consultations.
33. According to counsel, the Respondent had no selection criteria and the law prescribed the last in first out (LIFO) principle.
34. Counsel urged that the Respondent did not follow due procedure.
35. Reliance was made on the decision in John Njue V Nicholas Njiru Nyaga & another (2013) eKLR to underscore the equitable principle of clean hands and urge the court to hold that the redundancy was neither lawful nor fair.
36. On costs, counsel relied on the provisions of Section 27 of the [Civil Procedure Act](#) and case law to submit that costs should be borne to the Respondent.

Respondent's submissions

37. Counsel for the Respondent addressed similar issues.



38. On the 1st issue, counsel submitted that the Labour Officer had been notified of the redundancy as early as May 2016 and later on 28th July, 2016 and the Claimant was also notified.
39. Counsel urged that the provisions of Section 40(1)(b) of the *Employment Act*, 2007 were complied with as the notices were issued 2 months prior to the effective date.
40. The Court of Appeal decision in *Cargill Kenya Ltd V Mwaka & 3 others* (2021) was relied upon to buttress the submission on notices.
41. Counsel urged that Section 40(1)(f) of the Act did not provide for a termination notice as held in the *Cargill Kenya Case* (Supra).
42. According to counsel, after notice was given in May 2016, the Respondent had consultations with affected employees on the matter and thus complied with Article 13 of Recommendation No. 166 of the ILO Convention No. 158 Termination of Employment Convention, 1982 on consultations.
43. Counsel submitted that the redundancy was occasioned by the need for a person to handle regional logistics hence the temporary appointment of the Claimant but the same did not enhance efficiency and the position was abolished.
44. It was submitted that the Respondent applied the (FILO) principle and the Claimant was paid all dues under Section 40(1) (d) (e) (f) (g) of the *Employment Act*, 2007 as evidenced by the payslip on record, a fact the Claimant did not dispute.
45. Counsel urged that if the court found the redundancy unfair, it ought to be guided by the provisions of Section 49(4) of the *Employment Act*, 2007 in determining the quantum of compensation and the 12 months' salary prayed for was excessive.
46. On costs, counsel submitted that since it had shown that the redundancy was fair, the Claimant's suit was for dismissal with costs to the Respondent.

Findings and determination

47. The issues for determination are:
 - i. Whether termination of the Claimant's employment on account of redundancy was fair.
 - ii. Whether the Claimant is entitled to the reliefs sought.
48. Before delving into these issues, it is important to dispense with the peripheral issue of whether the Claimant was targeted by the Respondent's Managing Director, Mr. Simon Gachomo Ngigi as alleged.
49. In his written statement, the Claimant alleges that Mr. Simon Gachomo witch hunted him and had deliberately omitted his name on a particular list on a Strategic Management Meeting held with the board.
50. The statement makes no reference to the particulars of the witch hunt or the form they took.
51. It is unclear to the court whether the list alleged was for those to attend, or those who attended and who prepared the list.
52. Relatedly, neither the date of the alleged meeting nor the alleged list was provided as evidence.
53. Secondly, paragraphs 8, 9 and 10 of the written statement make reference to conversations with the Chief Human Resource Officer, one Emma Maina.



54. The Claimant provided no scintilla of evidence to buttress the allegations.
55. Copies of email communication to confirm the discussions would effortlessly have exemplified the allegations and contextualized them.
56. Finally, the Claimant makes no reference to an encounter with the Managing Director, Mr. Simon Gachomo and what they discussed.
57. Viewed in totality, the allegations that the Claimant was targeted for removal lacks supportive evidence and has no effect on this judgement.
58. As to whether the redundancy was fair, it is common ground that the provisions of the *Employment Act*, 2007 define the term redundancy and prescribe the circumstances in which an employee may be declared redundant, Section 2 and 40(1) of the Act respectively.
59. In a redundancy, an employee loses his or her employment, occupation, job or career at the instigation of the employer and the employee is free from blame. The services of the employee are no longer required which may be occasioned by abolition of the office, job or occupation.
60. No doubt redundant is a form of separation and terminates the employer/employee relationship owing to operational requirements of the employer and may be occasioned by technological changes, restructuring, re-organizations or other changes informed by business and/or economic considerations to enhance efficiency or ensure sustainability of the organization.
61. It is therefore a legitimate way of termination of the employment relationship.
62. However, analogous to other forms of termination of employment, the provisions of Section 45 of the *Employment Act*, 2007 lay it bare that a redundancy must be justifiable and be conducted in accordance with the provisions of Section 40(1) of the *Employment Act*, 2007.
63. Section 40(1) of the Act prescribes the seven mandatory conditions to be complied with for a redundancy to pass muster. This was underscored by the Court of Appeal in *Freight in Times Ltd V Rosebell Wambui Munene* (2018) eKLR, where the court stated as follows;
- “In addition, 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 namely; . . .”
64. The conditions relate to notice to the Labour Officer and the union or the affected employee and the Labour Officer, selection criteria, fairness in the case of a Collective Bargaining Agreement, payment of any leave days, one month’s notice or pay in lieu of notice and severance pay.
65. As regards the reason(s) for the redundancy, Section 43(1) of the *Employment Act*, 2007 is unequivocal that;
- “In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of Section 45.”
66. Similarly, Section 40(1)(a) of the *Employment Act*, 2007 provides that;
- “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 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.”

67. This provision requires the employer to justify the redundancy.
68. The letter to the Claimant dated 26th July, 2016 states that the redundancy was occasioned by restructuring of the Sales Operation Department and 2 positions were declared redundant, Logistics Manager and Deputy Manager Stores and Value Chain.
69. The letter to the Labour Officer dated 28th July, 2016 re-states the reason and adds that only one of the two positions had a substantive holder, the Claimant.
70. Both letters stated that the effective date would be 26th September, 2016.
71. The notice was about 2 months.
72. Although the Claimant’s counsel faulted the Respondent for the different dates on the letters, the law only requires a notice of not less than one (1) month to either party before the effective date.
73. From the evidence on record, it is common ground that the Respondent had established branches in Uganda and Tanzania and appear to have been struggling with the regional logistics which appear to have informed the Claimant’s temporary assignment as the Logistics Manager before the position was declared redundant.
74. The Respondent’s letter to the Claimant dated 29th February, 2016 adverts to the restructuring of the Sales Operations Department and the Claimant’s designation as Logistics Manager was temporary. This would appear to suggest that the restructuring of the department had not been concluded.
75. Although the Claimant alleges that he was targeted for the redundancy, it affected two positions and he held one of them and as the Organogram of the Operations Department as at 1st August, 2017 reveals and the Respondent created the position of Warehouse and Logistics Manager.
76. It is however unclear as to what the position was prior to 1st August, 2017.
77. From the foregoing, the court is satisfied that the Respondent has demonstrated that it had a restructuring of its Sales and Operations Department which led to a redundancy as the letter to the Labour Officer exemplifies.
78. As regards the notices, counsel for the Claimant submitted that the Respondent was supposed to send two notices, a general one to all employees and a specific one to affected employees.
79. Contrary to the Claimant’s counsel’s submission that Section 40(1) of the *Employment Act*, 2007 requires an employer to issue two notices, one to the employees generally and a second to affected employees, it does not.
80. The Court of Appeal decision in *Thoma De La Rue Ltd V David Opondo Omutelema* (Supra) made reference to the two different notifications under Section 40(1)(a) and (b) of the *Employment Act*, 2007 where the employee is a member of a trade union and when he/she is not.
81. According to the learned judges, in either case, the notice period is similar, at least one month.
82. The court did not make a finding that a second notice was required to be issued under Section 40(1) (f) of the *Employment Act* before a redundancy.



83. Equally, a differently constituted bench of the court save for Hon. Justice W. Karanja JA considered the issue in *Cargill Kenya Ltd V Mwaka & 3 others* (Supra), where the court held that;

“Lastly, it would also be an illogical result to give a literal meaning to the sub-section of payment of one month’s notice, and it would also be straining it too far to give it a meaning of one month’s notice of termination before redundancy, in trying to resolve any grammatical ambiguity in the sub-section.

It is our finding that the above interpretative factors discount a construction that a notice of termination is required by sub-section (1)(f) or within the timelines held by the learned judge of the trial court. While such a notice may eventually require to be given in termination on account of redundancy, it is definitely not one of the conditions to be met under Section 40 Subsection (1)(f) of the *Employment Act* before the redundancy.

In our view, the learned Judge in the trial court appear to have conflated the payment in lieu of notice under Section 40 Subsection 1(f), with the final declaration of termination of redundancy and erred in finding that there is a requirement to issue a notice of termination before the redundancy under Section 40(1) of the *Employment Act* . . .”

84. From the foregoing sentiments, it is evident that counsel’s submission that it was settled that the employer is required to issue two separate notices of at least two months has no legal anchorage.

85. As regards consultations, the Claimant testified that he was not consulted. The Respondent did not controvert this testimony.

86. Although the provisions of Section 40 of the *Employment Act*, 2007 do not make consultations a requirement, courts have domesticated the requirement as mandatory by virtue of Recommendation No. 166 of the ILO Convention No. 158 – Termination of Employment Convention, 1982, which is part of the law of Kenya by dint of Article 2(6) of *the Constitution* of Kenya, 2010.

87. The forgoing finds support in *Cargill Kenya Ltd V Mwaka & others* (Supra), where the court was an ambiguous that;

“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 the employees is implied by Section 40(1)(a) and (b) of the *Employment Act*.

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

88. (See the sentiments of the Court of Appeal in *Barclays Bank of Kenya Ltd, Bank of Africa Group SA Ltd V Gladys Muthoni & 20 others* (2018) eKLR.)

89. The nature and content of the consultation was explained by Maraga JA (as he then was) in *Kenya Airways Ltd V Aviation & Allied Workers Union Kenya* (Supra).

90. As the Respondent did not provide documentary evidence of any consultations and RWI did not adduce any, it is the finding of the court that the termination of the Claimant’s employment on account of redundancy was unfair for want of consultations as by law required.



91. As regards the selection criteria, RWI did not provide any or explain how the Claimant's department was selected, which is puzzling because RWI testified that the "restructuring was carried out across the entire organization leading to several redundancies and it was not unique to the Claimant.
92. Section 40(1)(c) of the [Employment Act](#) requires the employer to consider seniority in time, skill, ability and reliability of each employer in the class of those affected by the redundancy.
93. According to Maraga JA in Kenya Airways Ltd V Aviation and Allied Workers Union Kenya (Supra) the "last in first out" (LIFO) principle need not be applied in all circumstances and as emphasized in Williams V Compare Maxam Ltd (1982) IRLR 83, cited in the Cargill Kenya Ltd Case, the criteria employed must reasonable and applied rationally and objectively.
94. The Respondent tendered no evidence of the criteria it employed or how it did so.
95. In the absence of a criteria, it is the finding of the court that the provisions of Section 40(1)(c) of the [Employment Act](#), 2007 were not complied with.
96. Viewed panoramically, the evidence provided and adduced by the parties reveal that although the Respondent attempted to comply with the provisions of Section 40(1) of the [Employment Act](#), 2007, it did not do so effectively rendering termination of the Claimant's employment on account of redundancy unfair and the court so finds.
97. As to whether the Claimant is entitled to the reliefs sought, the court proceeds as follows;

a. Declaration that termination of the Claimant's employment by the Respondent was unlawful and unfair

98. Having found that the Respondent did not strictly comply with the provisions of Section 40(1) of the [Employment Act](#), 2007, and having further found that the termination was unfair, a declaration to that effect is merited.

b. Bonuses amounting to Kshs.180,000/=

99. The Claimant tendered no evidence of entitlement to bonuses as neither the written statement on record nor the evidence adduced in court establish entitlement or promise.
100. The copy of the contract of employment dated 21st September, 2011 has no provision on bonuses, which would suggest that it was not a contractual term.
101. Although copies of letter dated 19th December, 2013 and 17th December, 2014 show that the Respondent paid a bonus of one and a half of the Claimant's basic salary, the Claimant made no reference to any of them and explain the circumstances in which bonuses were payable.
102. More significantly, the Claimant tendered no evidence that the Respondent had made a profit in the year ended June 2015.

The prayer is declined.

c. 12 months gross salary

103. Having found that the termination of the Claimant's employment by the Respondent was unfair, the Claimant is entitled to the relief under Section 49(1)(c) of the [Employment Act](#), 2007 having regard to the provisions of Section 49(4) of the Act.



- i. Records show that the Claimant was an employee of the Respondent from 1st November, 2011 to 26th September, 2015, about 4 years which is short.
- ii. The Claimant did not appeal the Respondent's decision or express his wish to continue in the Respondent's employment as exemplified by his letter to the Respondent's Group Managing Director dated 8th August, 2015.
- iii. Documentary evidence on record reveal that the Claimant was a diligent employee and had no recorded warning or misconduct.
- iv. The Claimant did not contribute to the termination of his employment.

104. In the circumstances, the court is satisfied that the equivalent of two (2) months' salary is fair.

d. General damages for wrongful termination of employment

105. The Claimant adduced no evidence to prove entitlement to general damages.

The prayer is dismissed.

106. In conclusion, judgement is entered for the Claimant against the Respondent in the following terms;

- a. Declaration that termination of employment was unlawful and unfair.
- b. Equivalent of 2 months gross salary.
- c. Costs of this suit with interest at court rates from date hereof till payment in full.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 6TH DAY OF DECEMBER 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

