



**Kibe v Mr. Green Trading Africa (K) Limited (Employment and Labour Relations Cause E6489 of 2020) [2023] KEELRC 3227 (KLR) (5 December 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3227 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS CAUSE E6489 OF 2020  
AN MWAURE, J  
DECEMBER 5, 2023**

**BETWEEN**

**GLADYS WAIRIMU KIBE ..... CLAIMANT**

**AND**

**MR. GREEN TRADING AFRICA (K) LIMITED ..... RESPONDENT**

**JUDGMENT**

**Introduction**

1. The Claimant filed a Statement of Claim dated 19<sup>th</sup> November 2020.

**Claimant's Case**

2. The Claimant avers that she was employed as a sourcing manager on 24<sup>th</sup> July 2015 and due to her exemplary performance, she was promoted to Head of Sourcing earning a monthly salary of Kshs 174,016.
3. The Claimant avers that she was summarily dismissed on 16<sup>th</sup> July 2020 by the Respondent citing redundancy as the reason for termination.
4. The Claimant avers that the days leading to her termination were marred with witch hunting and unsubstantiated accusations which depicted the Respondent's malicious intent to terminate her employment.
5. The Claimant avers that in April, 2020 the Respondent hired her replacement, Emily Mutua and proceeded to suspend her from employment on fictitious allegations. She was directed to forward all her duties to her replacement during her suspension.
6. The Claimant avers that she was reinstated on 18<sup>th</sup> May 2020 when the Respondent absolved her from any wrong doing.



7. The Claimant avers that when she resumed on duty, she found over and above her replacement, the Respondent had transferred to her department two extra employees, Purity and Jacqueline who were performing the duties she had been performing solely before suspension. And since she had experience, the Respondent tasked her to orient them into the department.
8. The Claimant avers that she asked the Respondent's head of human resource what was happening in her department and she was directed to her replacement who was equally confused on what role each was to play. The Respondent's Chief of Sourcing then tried to solve the confusion by assigning the Claimant's role among the 4 of them.
9. The Claimant avers she was frustrated due to the overlapping roles and dependence of the 3 other ladies on her to show them how the duties were performed within the department.
10. The Claimant avers that it became apparent the frustrations and earlier suspension were deliberate as the Respondent without any due regard summarily terminated her employment citing redundancy.

### **Respondent's Case**

11. In opposition to the Claim, the Respondent filed its response dated 8<sup>th</sup> February 2021.
12. The Respondent avers that the Claimant was engaged by the Respondent from August 2015 to February 2018 for fixed terms under various contracts, however, the obligations under these fixed term contracts were performed and later terminated by effluxion of time.
13. The Respondent avers that the Claimant was subsequently employed as Head of Sourcing vide an employment agreement which commenced on 1<sup>st</sup> March 2018.
14. The Respondent avers that the Claimant and Labour Office were given adequate and detailed notices on the termination of the aforesaid contract by redundancy.
15. The Respondent avers the redundancy was attributed by the fact that it was under immense financial pressure which necessitated a restructuring exercise to improve on its operations.
16. The Respondent avers that consequently the Head of Sourcing and Head of General Trade roles were merged leading to the creation of the role of Head of Strategic Sourcing to conduct and oversee the merged roles and resultant increased responsibilities that surpassed the Claimant's capacity and abilities.
17. The Respondent avers that it communicated and discussed these factors and valid reasons behind the restructuring both in writing and verbally.
18. The Respondent avers in attempts to avoid terminating the Claimant, it tried to redeploy the Claimant to a new position with different responsibilities under similar terms. This was unsuccessful leading to the issuance of the termination notice dated 16<sup>th</sup> July 2020.

### **Evidence in Court**

19. The Claimant (CW1) testified and adopted her witness statement and list of documents dated 19/11/2020 as her evidence in chief and exhibits 1-7.
20. During cross examination, CW1 testified that the contract dated 1/3/2018 was terminated and her salary was Kshs 157,500 per month and that she had worked for the company 2 years under that contract but had worked for the company for 5 years.



21. CW1 testified that she prayed for Kshs 1,218,112 for loss of contract income as the contract was meant to terminate in 2021.
22. CW1 testified that she received Kshs 545,005 after termination and was paid one month salary in lieu of notice but not for redundancy.
23. CW1 testified that she received a notice to show cause and suspension on 12<sup>th</sup> April 2020. The Respondent then conducted a hearing and she was recalled back to work.
24. CW1 testified that she has no proof of the chaotic and non-conducive work environment which she claimed.
25. CW1 testified that she was terminated due to restructuring, however, the procedure for redundancy was not followed and the labour office was not informed.

### **Respondent's Evidence**

26. The Respondent's witness (RW1), Mandela Mutesa and adopted his witness statement dated 28/07/2022 and list of documents dated 19/07/2021 as his evidence in chief and exhibits no 1-24.
27. RW1 testified that the Claimant was the Head of Sourcing and her last contract was for the period between 19/2/2019 to 18/2/2021, however, her position was declared redundant and no other person was hired for that position.
28. RW1 testified that Emily Mutinda was employed in February 2020 as the Head of Strategic Sourcing and wording and job description was different from the Claimant's contract.
29. RW1 testified that Purity and other employees were brought to the department when the Claimant was terminated. Emily was paid over Kshs 300,000 against the Claimant's salary of Kshs 157,000.
30. RW1 testified that the Claimant was not part of the audited accounts hence she not was aware of the Respondent's financial constraints.
31. RW1 testified that one more position was declared redundant, Mburu Muiruri who was in a different department.
32. RW1 testified that he served a letter dated 20/7/2020 to the Labour Officer received on 27/7/2020 notifying it of the redundancy. However, the Claimant was terminated on 16/7/2020 and was with immediate effect.
33. RW1 testified that there are emails on the company restructure dated 23<sup>rd</sup> January 2020 and the affected contracts were those ending in 2020 and the Claimant's contract was ending in 2021.
34. RW1 testified that there is no evidence that the Claimant was aware her position was to be declared redundant.
35. RW1 testified that the Claimant was paid ex-gratia payment and severance pay and all her dues were paid.

### **Claimant's Submissions**

36. The Claimant submitted that her termination was unlawful for lack of procedural fairness as no notice of redundancy was issued and served on the Claimant or the labour office and neither was payment in lieu of redundancy notice paid. That the letter dated 20<sup>th</sup> July 2020 relied by the Respondent indicates



it was written four days after her termination and was equally served to the labour office on 27<sup>th</sup> July 2020.

37. The Claimant submitted that the Respondent did not give a valid or fair reason as there was no prior notice of the intended redundancy and only her position was affected with no chance of redeployment. Further, perusal of the job description between Emily's and her final contract indicate similar roles though differently worded.
38. The Claimant submitted that the Respondent attempted to justify its reasons by pleading financial distress and provided its financial statements. However, RW1 testified the Claimant was not aware of the same or participated in its preparation. And even if the Respondent's averments were to be true it is ironical that the Respondent hired Emily in February 2020 on a salary of Kshs 347,000 and an additional allowance of Kshs 40,000 being transport allowance which basic salary was twice what the Claimant was earning.
39. The Claimant submitted that it was alleged that the Respondent made efforts to redeploy her to a new position and in support of its case relied on the email exchange and Coach's notes.
40. The Claimant submitted that the Coach unequivocally reported that the Claimant was moved to a new role which no one, not even the Respondent was aware what it involved and it required incorporating the boss's needs and suggestions as they come. Further in the email of 14<sup>th</sup> June 2021, the Coach reiterated that among the topics covered were to gain clarity on where she fits in at Mr Green Africa: what her new role would involve and how she wanted to add value. This is after the Coach on page 133 noted the invaluable input that the Claimant had on the organisation and she stated:

“The importance of the role as this middle person isn't to be underestimated. Gladys is in a unique position because she understands how MGA works and at the same time she's someone who waste pickers can resonate with.”
41. The Claimant submitted that despite her skills, seniority in time and great performance, these factors were deliberately ignored in contravention of Section 40(1)(c) of the *Employment Act*. No employment appraisal was presented by the Respondent to determine the criteria used to determine the Claimant's role as redundant.

### **Respondent's Submissions**

42. The Respondent submitted that that there is no prior contract which the Claimant can purportedly rely upon, in any manner whatsoever, for a claim against the Respondent on account of the fact that any prior contracts to the Employment Contract dated 1st March 2018 were fixed term contracts, whose provisions are entirely inapplicable in the Respondent's 2019 and 2020 redundancy process, given the nature of the same and aforesaid termination by effluxion of time.
43. The Respondent submitted that it has demonstrated that it applied fair procedure, reasonableness and consultations in utmost good faith while going through the company's restructuring process.
44. The Respondent submitted that the termination notice dated 16<sup>th</sup> July 2020 communicated the Claimant's termination on account of the restructuring at the company as confirmed by the Claimant during cross examination.
45. The Respondent submitted that it issued the Claimant a Certificate of Service and Kenya Revenue Authority P9 Form; and immediately paid into her bank account the terminal dues totalling to KShs. 545,005.24.



46. The Respondent submitted that the Claimant did not adduce evidence that laid the basis for the grant of damages in the alleged sum of KShs. 1,218,112 for lost income for the remaining period of the contract dated 1<sup>st</sup> March 2018.

### **Analysis and Determination**

47. The main issue for determination is whether the Claimant's termination on account of redundancy was wrongful and unlawful.

48. For an employee's termination to be fair and lawful, the employee must prove that the same was procedurally fair and that it had a valid reason to terminate the employee's employment.

49. Procedural fairness during termination on account for redundancy is clearly set out under Section 40 (1) of the *Employment Act* which states:

- “(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.”

50. RW1 testified that the Claimant was terminated vide a letter dated 16/7/2020 and the termination was immediate. He further testified that he served the notification of intended redundancy after the Claimant's termination on 27/7/2020 and the said letter was dated 20/7/2020.

51. This means the Respondent did not notify either the Claimant or the labour office of the intended redundancy at least one month before termination of the Claimant. The Claimant's termination was instant.

52. The Respondent also did not consult the Claimant on the redundancy as RW1 testified that the Claimant was not aware that her position will be declared redundant as her contract did not fall within the purview stated by the Respondent when informing its employees of the restructuring. Those to



be affected were employees whose contracts were ending in the year 2020, the Claimant's contract was to end in February 2021.

53. In respect to the selection criteria, the Respondent testified that the Claimant was declared redundant together with one Mburu Muiruri, however, it did not tender to this court any list of the affected employees and the criteria used to select the said employees. Mburu Muiruri's termination letter was not produced in court, therefore it seems the Claimant was the only employee declared redundant
54. In view of this, the Respondent fell short of provisions section 40(1) (c) of the *Employment Act*.
55. In the case of *Kenya Airways Limited vs Aviation & Allied Workers union Kenya & 3 others* Nairobi civil Appeal No 46 of 2013 (2014) eKLR the court held:

My understanding of this provision is that when an employer contemplates redundancy, he should first give a general notice of that intention to the employees likely to be affected to their union; it is that notice that will elicit consultation between the parties, and I will shortly show that consultation is imperative, on the justifiability of that intention and the mode of its implementation where it is found justifiable. At that initial stage, the employer would not have identified the employee(s) who will be affected. So that notice cannot have the names of the employees as Mr Mwenesi contended. It does not have to be a calendar months' notice a Mr Mwenesi contended. The act requires one months notice. The period runs from the date of service of that notice. It is after the conclusions of the consultation on all issues of the matter that notices will be issued to the affected employees of the decision to declare them redundant."

56. In view of the foregoing, the Respondent are clearly in breach of Section 40 of the *Employment Act* and this court holds the Claimant's termination on account of redundancy was procedurally unfair.
57. On substantive justification, it is the Respondent's case that the redundancy was forced by financial constraints faced by the company. However, this is overshadowed by the fact that the Respondent employed another person to take over the Claimant's role with a salary and benefits twice what the Claimant was earning.
58. The Claimant was also not aware of the said financial constraints, therefore, this court finds that the Respondent has failed to satisfy this court that it had a valid reason to terminate the Claimant's employment. The court was not availed the criterial used by the respondent to decide the claimant's position was the one to be declared redundant.
59. Having established that the Claimant's termination was unlawful and unfair as the Respondent has failed to show it had any valid reason and followed procedural fairness. The claim herein is merited.
60. The respondents discharge addressed to the claimant which the claimant signed laid the payments that were made to the claimant at the exit as follows:
  1. 15 days salary kshs 81,290/-
  2. Transport allowance ksh 40,439
  3. 10 days leave kshs 60,576/-
  4. One month in lieu of notice kshs 157,500/-
  5. Severance pay kshs 315,500/-



The respondent covered some of the awards provided in section 40 of the Employment Act in redundancy separation.

61. The letter of termination dated 16<sup>th</sup> July 2020 also refers to 15 days for every year worked in different capacities since August 2015. However, it is not clear from the records in court how much that amount was it would be fair for respondent to present a clear statement of how the kshs 545,006 being amounts paid to the claimant was made up of.
  62. Meanwhile court will grant her 2 months equivalent for unfair termination which will translate to a total of kshs 315,000/-.
  63. The amount prayed for the remainder of the contract is not legally supported and is declined.
  64. Claimant is entitled to costs and interest at court rates from date of judgment till full payment.
  65. The case will be mentioned on 8/2/2024 for respondent to table in the court the statement of funds paid to the claimant at termination and how they were made up to enable court to close the judgment.
- Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 5<sup>TH</sup> DAY OF DECEMBER, 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**

