



**Chege v Tribeka Business Solutions Limited & another (Employment and Labour Relations Cause 888 of 2019) [2023] KEELRC 3195 (KLR) (1 December 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3195 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS CAUSE 888 OF 2019  
AN MWAURE, J  
DECEMBER 1, 2023**

**BETWEEN**

**JACQUELINE WANGUI CHEGE ..... CLAIMANT**

**AND**

**TRIBEKA BUSINESS SOLUTIONS LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**SIX ARMS LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

**Introduction**

1. The Claimant filed a Memorandum of Claim dated 15<sup>th</sup> November 2019.

**Claimant's Case**

2. The Claimant avers that she was employed by the Respondents on 1<sup>st</sup> December 2016 as a Sales Operations and Administration Manager earning a salary of Kshs 85,462 per month.
3. The Claimant avers that she worked for the Respondents loyally and diligently until June 2019 when she was unlawfully and wrongfully terminated without due process and failed to pay her terminal dues of Kshs 1,686,917.
4. The Claimant avers that on 28<sup>th</sup> June 2019, the Respondent's managing directors summoned her to the boardroom and informed her the company was undergoing financial constraints and they have decided to declare her position redundant and she was handed a termination letter dated 30<sup>th</sup> June 2019.
5. The Claimant avers that she had not been paid her salary arrears for January, February, march, may, august, September, October and November 2018 and February and March 2019 totalling to Kshs 216,875, however, on 19<sup>th</sup> September 2019, she only received Kshs 84,710 from the Respondents.



6. The Claimant avers that the Respondent did not issue her with sufficient notice or convene a meeting to discuss the impending redundancy.
7. The Claimant avers the Respondent did not give the Claimant or the local labour office an official redundancy notice or pay her salary in lieu as required by law.
8. The Claimant avers that her employment was continuous and uninterrupted and he never proceeded on any annual leave or was paid in lieu thereof.

### **Respondent's Case**

9. In opposition to the Claim, the Respondents filed their response dated 7<sup>th</sup> February 2020.
10. The Respondents aver that from the first quarter of 2018, the real estate market in Kenya hit a slump due to the 2017 general elections. The real estate market also got saturated with too many new malls, residential apartments and commercial developments leading to customer fatigue. This hit the Respondents hard by cash flow inflow challenges as real estate companies were forced to reduce their rents to hold off tenants or suffer empty buildings failing to recover its investments.
11. The Respondents aver that the Claimant was aware of these challenges to the extent it was unable to pay its employees salaries amidst other obligations.
12. The Respondents aver that at the time the Claimant was declared redundant on 30/06/2019, she was owed salary arrears and did not complain about it confirming she appreciated the Respondents' challenges.
13. The Respondents aver that their managing directors held a meeting with the Claimant on 30/06/2019 and explained their situation given the financial constraints it was not practicable to continue accruing salary arrears and that they had been forced to invoke section 40 of the Employment Act and indicated she would be paid one month's salary in lieu which the Claimant confirmed receipt in her claim.
14. The Respondents aver that having terminated the Claimant's employment under section 40 of the Employment Act, the Respondents are not required to pay her service pay.
15. The Respondents admit being in salary arrears to the Claimant and has called upon her to enter into an agreed schedule of payment of the outstanding amount.

### **Evidence in Court**

16. The Claimant (CW1) adopted her witness statement and list of documents dated 15/11/2019 as her evidence in chief and exhibits 1-5.
17. During cross examination, CW1 testified that all employees had not been paid for almost 6 months, she was offered to be paid in arrears but they were not paid.
18. CW1 testified that the Respondents were in a dire financial situation. She requested payment in lieu of notice which was paid.
19. CW1 testified that she has prayed for service pay but the Respondents were remitting her NSSF deductions.
20. CW1 testified that neither herself nor the labour office was issued a redundancy notice as required by law.
21. The Respondents did not produce any witness in court.



### **Claimant's Submissions**

22. The Claimant submitted that the Respondents did not call any witnesses or produce any documents at the hearing, therefore, all claims by the Claimant remains unchallenged and thus uncontroverted. He relied on the case of *Billiah Matiangi v Kisii Bottlers Limited & another* (2012) eKLR.
23. The Claimant submitted that the Respondents declared the Claimant redundant unprocedurally as it breached sections 41, 45(2) and 40(1) of the *Employment Act*.
24. The Claimant submitted that the Respondents did not issue her with a statutory notice and did not plead the selection criteria used to declare the Claimant redundant as no evidence was furnished before this court under section 40 of the *Employment Act*.
25. The Claimant submitted that the Respondents did not indicate the reason why she was declared redundant as such the Respondents failed the substantive test under section 45(2) of the *Employment Act*.
26. The Claimant submitted that the Respondents did not furnish this court with minutes of the hearing of the Claimant's representations before declaring her redundant as intended under section 41 of the *Employment Act*.
27. The Claimant submitted that the Respondents being the custodian of employee documents the onus is on him to controvert her claims. Her position that she did not go for leave and/or paid for the same, the burden of proof shifted to the Respondents.

### **2<sup>nd</sup> Respondent's Submissions**

28. The 2<sup>nd</sup> Respondent submitted that the Respondents demonstrated to the Claimant that they were going through difficult financial times and therefore could not discharge their obligations going forward necessitating the company's decision to declare some positions redundant. It relied on *Christopher Lebo & 331 others v Kenya Power and Lighting Company* [2021] eKLR.
29. The 2<sup>nd</sup> Respondent submitted that the Claimant's employment having been terminated under section 40 of the *Employment Act*, she is not entitled to the reliefs sought as all procedures under the Act were duly followed.
30. The 2<sup>nd</sup> Respondent submitted that the Respondents have demonstrated goodwill by promising to pay the Claimant and even issued proposals which have been shot down by the Claimant and his advocates.
31. The 2<sup>nd</sup> Respondent submitted that the Claimant has already been paid salary in lieu of notice as she admits to receiving Kshs 84,710 and therefore does not qualify for this relief. Further, notice is not a requirement under section 40 of the *Employment Act*, therefore, the Claimant is not entitled to compensation.
32. The 2<sup>nd</sup> Respondent submitted the Claimant was in top management therefore she was not required to fill leave forms while proceeding on leave, at the time of being declared redundant the Claimant only had 3 outstanding leave days.
33. The 2<sup>nd</sup> Respondent submitted that the Claimant agreed to the fact that she was a beneficiary of NSSF and NHIF and the Respondents used to remit her NSSF, therefore this claim was shot down during hearing.



## Analysis and Determination

34. The main issue for determination is whether the Claimant's termination on account of redundancy was wrongful and unlawful.
35. Section 40 (1) of the *Employment Act* provides the procedure for termination on account of redundancy as follows:
- “(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.”
36. In *Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others* [2014] eKLR, Githinji JA held:
- “... 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 employee.

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.”

37. The Respondents avers that it was forced to terminate the Claimant’s employment on account of the slump in the real estate market which brought about financial challenges. This was confirmed by CW1 in her testimony. She testified that at the time of being declared redundant, the Respondents employees had not received their salaries for almost 6 months. Therefore, the Respondents had a substantive justification to terminate the Claimant on account of redundancy.
38. However, the Respondents failed to follow due procedure as set out in Section 40 of the *Employment Act*. The Respondents did not serve upon the labour office with a notice of its intended redundancy; it has not provided any list of the employees affected by the redundancy process and their selection criteria; it did pay the Claimant her one month salary in lieu of notice but it has failed to pay her the required severance pay.
39. The respondent issued the claimant a termination letter on the basis of redundancy and she was terminated on the basis of redundancy and she was terminated the same day. There was no meeting called to explain the criteria used to determine why her department was the one to be declared redundant.
40. Accordingly, the Claimant’s termination on account of redundancy was unfair and unlawful as the Respondents did not satisfy the provisions of section 40 of the *Employment Act* and other numerous case laws on termination on basis of redundancy. In view of the foregoing the claimant is awarded the following reliefs:-
  1. Salary in arrears from January 2019 to June 2019 since the respondent has not proved otherwise at Kshs 216,875/-.
  2. Severance pay at 15 days equivalent for the 2 years worked Kshs 85,462/-.
  3. Leave days is not clear how many were pending and claimant as well admitted she took some days off. It is fair to give her one-year equivalent leave at 21 days as per her contract Kshs 59,823.
  4. Unfair termination compensation equivalent to 2 months’ salary amounting to Kshs 170,924/-
  5. Service pay is not deserved as claimant admitted she was a member of NSSF.
  6. She is however awarded costs and interest at court rates from date of judgment till full payment.



Total award is Kshs 533,084/04.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 1<sup>ST</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**

