



REPUBLIC OF KENYA



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Olang & 49 others v Airtel Networks (k) Limited (Cause 335, 831, 823, 833, 834, 835, 836, 1545, 1546, 1547, 1548, 1549, 1550, 1551, 1552, 1553, 1554 & 1555 of 2016 (Consolidated)) [2022] KEELRC 10 (KLR) (27 April 2022) (Judgment)

Neutral citation: [2022] KEELRC 10 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 335, 831, 823, 833, 834, 835, 836, 1545, 1546, 1547, 1548, 1549, 1550, 1551, 1552, 1553, 1554 & 1555 OF 2016 (CONSOLIDATED)

NZIOKI WA MAKAU, J

APRIL 27, 2022

BETWEEN

KENNETH OLANG & 49 OTHERS CLAIMANT

AND

AIRTEL NETWORKS (K) LIMITED RESPONDENT

JUDGMENT

1. The Claimants instituted separate suits in 2016 against Airtel Networks Kenya Limited for unfair termination of employment on account of redundancy and non-payment of house allowances and bonuses accrued to them. They also take issue with the Respondent for unfair exposure on account of loans from commercial banks and car loan facilities to territory managers, all negotiated and guaranteed by the Respondent. The Claimants pray for judgment against the Respondent for:
 - i. A declaration that the Respondent's termination of the Claimants' employment was illegal, unlawful, unfair and inhumane.
 - ii. A mandatory injunction compelling the Respondent to reinstate the Claimants' employment.
 - iii. In the alternative to (b) above, the payment of the Claimants' 12 months' salary in respect thereof being Kshs. 102,280,236/-
 - iv. Severance pay at the rate of 15 days for each completed year.
 - v. General Damages for unlawful termination of employment.
 - vi. An order directing the Respondent to pay the Claimants' bonuses for the year ending 2015 being the total sum of Kshs. 11,218,419/-



- vii. An order directing the Respondent to clear the balances of the loans as at the date of filing this claim, loans which the claimants acquired by virtue of their employment amounting to Kshs. 35,342,186/-
- viii. An order directing the Respondent to see the payment of house allowance for the respective period under employment being Kshs. 88,082,387/-
- ix. An order directing the Respondent to see the payment of car allowances for the Claimants in the managerial roles in the total sum of Kshs. 21,258,580/-
- x. Compensation on basis of Net Earnings for loss of expected income being Kshs. 1,018,421,556/-
- xi. Costs of the Claim from the date of filing thereon.
- xii. Interest on c, d, e, f, g, h, i & j
- xiii. Any other award as the Court may deem fit.

Factual Background

2. The Claimants aver that they have been employees of the Respondent serving as such in various capacities until they were each issued with termination letters which purportedly terminated their services by reason of redundancy with immediate effect without any prior notice. That the said termination letters were issued in a malicious, vicious and mischievous betrayal of their efforts, commitment and exemplary performance and they were further in total disregard of the Kenyan labour laws. It is the Claimants' averment that they were soon thereafter forced to clear with the Respondent's various departments. That John Musonye Livasia, Dean Kiti Charo, Charles Ngewe Kiute and Stephen Maranga Muriuki, who worked for the Respondent as Territorial Managers, had on 14th December 2010 on the directive of the Respondent, acquired car loan facilities from commercial banks to purchase vehicles for use in their day to day work. They aver that the Respondent would contribute to the loan payment by awarding them car allowances which they would use to liquidate the loans. That however the Respondent unilaterally rescinded this arrangement and withdrew the allowances before prematurely terminating their services and leaving them with loans facilities to repay. The other Claimants similarly aver that they had also acquired loan facilities negotiated by the Respondents and commercial banks and secured only by their salaries and favourable interest rates pegged on their employment status at the Respondent. That thus with the sudden unfair termination on account of redundancy, the Claimants are unable to pay the same and more so suffer because of the revised bank rates. It is their averment that the Respondent acted irresponsibly by approving the said loans with prior knowledge of the impending termination ostensibly on account of redundancy. That this is so because under normal procedure, an employer is not supposed to approve a loan application where there is evidence or information that an applicant intends to resign or be terminated from employment.
3. The Claimants further aver that the termination was unfair because the Respondent retained the same roles as the ones performed by them and even moved to employ other personnel to undertake the roles despite having been declared redundant. That it did not in any way involve them in any consultation regarding the redundancy and neither did it follow the procedure required in a redundancy process as laid down under Section 40 of the *Employment Act*, 2007, such as giving prior notification to both them and the Labour office and following the required selection criteria of employees to be declared redundant. Further, communication of the redundancy was inhumane and the Respondent did not also consider the loans it had guaranteed to them. It is further the Claimants' averment that their



termination was discriminatory because they were terminated from their employment at the time they were supposed to receive their bonuses which they were entitled to for each ending year. They aver that the Respondent further refused, neglected and/or denied to pay the said bonuses upon termination of their employment. They also aver that they had a legitimate expectation that the loans advanced to them and guaranteed by the Respondent would be paid in the course of their employment with the Respondent. The Claimants' averments are reiterated in the filed witness statements of the 10th, 11th and 25th Claimants.

4. The Respondent filed a consolidated statement of response dated 27th November 2018 from indications in testimony but a copy thereof is not in the court file. The Respondent also filed a witness statement made on 7th March 2019 by its HR Director, Susan Onyach, who was the Respondent's Compensation and Benefits Manager during the period in question. She states that sometime in the year 2014 the Respondent conducted an evaluation of its business in the Africa region to ensure optimum utilization of its key resources and thereafter determined the need to rationalise its operation costs in order to enable it remain competitive in the market. That one way to achieve this was to identify those roles which could either be merged or which could be undertaken at a lower level through a process referred to as de-layering. That the management at the group level came up with a structure to be adopted in all offices within Africa and that most of the target positions were in the business' sales sector which had both zonal and territorial sales managers, business managers and business executives. That the positions of territorial managers were then to be abolished as their functions could be undertaken by the zonal managers at a more cost efficient level while some positions were also removed from the Respondent's structure and outsourced. She states that a total of 63 positions were to be abolished as a result of the evaluation and rationalization and the roles performed by the Claimants were affected. That the employees of the Respondent were aware of the on-going restructure process the result of which compelled the Respondent to declare a redundancy for the positions that were abolished including the functions that had been outsourced. That outsourcing a function means the function has been abolished within the organization notwithstanding that the services may still be undertaken by a third party. She further asserts that by a letter dated 7th December 2015 the Respondent issued a notice of the redundancy to the Labour Officer Nairobi, received and acknowledged on 9th December 2015, with information on the reason for the redundancy, extent of the redundancy and indicating that it would comply with the law in carrying out the redundancy. That although there was no need to issue any notice to a trade union since the Respondent's employees were not members of any trade union, the Labour Officer indicated to the Respondent's advocates by a letter dated 31st May 2016 that the redundancy notice issued to his office was unlawful for having not been issued to a trade union.
5. She states that the Respondent complied with other legal procedures including a fair selection process taking into account factors such as seniority in time, skill, ability and reliability of each employee to fit into the new organizational structure. That these considerations however did not arise where an entire level was being eliminated and where the functions were being outsourced, the Respondent in good faith encouraged the employees to apply to the outsourcing entity for consideration, whereafter a number of employees were in fact engaged as employees of that entity. It is further her assertion that the Respondent terminated the Claimant's contracts on account of redundancy through letters dated 15th January 2016 and offered them one month's pay in lieu of notice over and above their contractual notice pay. She admits the Respondent did not issue redundancy notices to individual employees but that regard should be given to the sensitive processes in the Respondent's business which could easily be undermined through de-escalation in service and compromise of service by staff if notices were to be issued. That the Respondent thus opted to make payment to the Claimants in lieu of such notice



of redundancy and following their termination, the Respondent paid the Claimants all their terminal dues as indicated in their termination letters.

6. With respect to the Claimants' claim for bonuses, she states that bonus payment was not a contractual entitlement but an exercise of the Respondent's discretion to encourage performance. That the Claimants were not entitled to bonus payment since they were not qualified for bonus for the year they were rendered redundant. On the claims regarding car allowances, she asserts that the Respondent provided a car allowance as an option for employees to own or lease vehicles they used on a daily basis and travel, as contained in the Sales Car Allowance Policy. That the employees were also always aware that the said car policy could be further revised and which happened in 2012 and that when the Claimants were terminated on account of redundancy, the practice of paying car allowance had stopped and are therefore not entitled to payment of car allowance. With respect to claims on loans including car loans, she denies that the Respondent guaranteed loans to any of its employees and states that the Respondent only confirmed to the lending banks of having employed the loan applicants and that it would carry out a check off against their salary for the loan repayments. That the claim for housing is vexatious and an abuse of the court process since the Claimants' letters of offer, contracts and payslips clearly exhibited that they received a consolidated salary. She further contends that a claim for damages is unwarranted because the Respondent implemented the redundancy after adhering to procedure. Furthermore, the Claimants received a severance pay equivalent to 15 days' pay for each year of service in addition to their salary for days worked and leave accrued but not taken. That in any case, there cannot be an award of general damages in contractual claims.

Claimants' Submissions

7. The Claimants submit that it is important for the court to first establish whether the process undertaken by the Respondent was actually a redundancy process as opposed to a mere termination of employment. That Section 2 of the *Employment Act* defines Redundancy as the loss of employment, occupation, job or career by involuntary means through no fault of an employee, involving termination of employment at the initiative of the employer, where the services of an employee are superfluous and the practices commonly known as abolition of office, job or occupation and loss of employment. That the Court in its decision in *Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 Others* [2014] eKLR adopted the definition of Redundancy given in the *Employment Act*. That the Court of Appeal in the case of *Kenya Airways Limited v Aviation & Allied Workers Union & Others* [2013] eKLR held that 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.
8. The Claimants further submit that courts have upheld that redundancy should target the roles and not the employee meaning that the said roles declared redundant would no longer be required in the organization. They submit that however this was not the case as confirmed by the Respondent's witness that the Claimants' roles were still required and the Respondent was engaging another entity to provide the said services. That this demonstrates that the said purported process by the Respondent falls short of what redundancy is as envisaged by law. Furthermore, the Respondent's actions were discriminatory and infringed on Article 27 (5) of *the Constitution* of Kenya which protects every citizen's right from discrimination on any ground. It is also their submission that the Respondent has a duty to show that it is the positions that were declared redundant and not the employees/ Claimants. They rely on the case of *Paul Wachiuri Ndonga v Keroche Breweries Limited* [2018] eKLR wherein the Court held that even where there may be underlying causes leading to redundancy as defined under Section 40 of the *Employment Act*, 2007, the employer is bound by the mandatory requirement of the law to show that termination of employment was necessary and the only available option. They urge the Court to find



that the Respondent's actions against them were unfair and violate Section 45 of the *Employment Act* and Article 27(5) of *the Constitution* of Kenya, 2010.

9. It is the Claimants' submission that where termination of employment occurs on account of redundancy, Section 40 of the *Employment Act* is very clear on the procedure applicable before an employer can declare an employee redundant. On notice of the intended redundancy, they submit that the Respondent has not tendered any evidence before court showing that it gave the Claimants notice of the re-organization. They submit that the Respondent has also admitted through its witness statement sworn by its HR Director and further her testimony in court that they did not issue individual notices to the Claimants because they held sensitive company information. They submit that however, the excuse by the Respondent does not hold water and is an afterthought as the law does not give any exceptions on the issue of notice and that the one month salary in lieu of notice is in fact the contractual one month salary that should be paid to an employee when the employer terminates their employment in the normal manner but not under redundancy. They submit that redundancy notice is so important that it ought to be actually given and cannot be compensated monetarily in lieu and that Courts have resoundingly expressed themselves on this issue in the case of *KUDHEIHA v The Aga Khan University Hospital Nairobi, Cause No. 815 of 2015* as cited in *Bernard Misawo Obora v Coca Cola Juices Kenya Limited [2015] eKLR* wherein the court emphasized that the notices envisaged under Section 40 of the *Employment Act* are not mechanical or issued for the sake of going through a process but are mandatory. It is their submission that in any case there is no evidence of what sensitive information they held and what falls within the meaning of sensitive information which is after all still covered in clause 6 of their contracts of employment under confidentiality.
10. Regarding notice to the labour office as under Section 40(1)(b) of the Act, the Claimants submit that the notice period to both the affected employees and the labour office should not be less than a month as specified under Section 40(1)(a) of the Act. The Claimants submit that this position was also adopted by the Court of Appeal in *Thomas De La Rue (K) Ltd v David Opondo Omutelema [2013] eKLR* that

“...Section 40(b) does not stipulate the notice period as is the case in 40(a), but in our view, a purposive reading and interpretation of the statute would mean the same notice period is required in both situations...”

The Claimants submit that in the instant case, the County Labour Officer in the Ministry of Labour and Social Security Services confirmed in their correspondence that the Respondent never notified them thus demonstrating that the Respondent failed to comply with the requisite notices stipulated under Section 40 of the Act. They also rely on the case of *Margaret Mumbi Mwago v Intrabealth International [2017] eKLR* where the Court found that the redundancy of the claimant was un-procedural and therefore unfair as the respondent had failed to comply with the redundancy procedure set out under Section 40(a) of the *Employment Act*.

11. The Claimants submit that the Respondent has also failed to produce any records showing how all employees were categorized and how the selection requirement was observed and that the Claimants' witness, Mr. Kahara, testified to the effect that he had worked with the Respondent for a long period but was declared redundant while his junior both in age and experience was retained. That this is replicated in all the affected departments with territory managers having been replaced by employees who had barely completed six months and had actually been trained by the said territory managers. They therefore urge this Court to find that the procedure adopted by the Respondent in declaring them redundant is unlawful, null and void in contravention with Section 40 of the *Employment Act*, 2007.



12. The Claimants further submit that the Respondent offered them new employment contracts in 2011 which did not mention house allowance or it being a consolidated. On this submission they rely on [Geoffrey Makana Asanyo v Nakuru Water and Sanitation Services Company & 7 Others](#) [2014] eKLR wherein the court stated that a person whose office is abolished is entitled to redundancy payments in accordance with the relevant statutory provisions and the provisions of the contract between the parties. It is also their submission that declaring them redundant just two months to the distribution of bonuses and then denying them payment of the bonuses for that financial year was an outright injustice meant to deny them their bonus entitlement for that year. The Claimants submit that in the least, the bonus accumulated for the months the Claimants worked should have been paid and that denying them the same infringes on their right to fair labour practices under Article 41 of [the Constitution](#) of Kenya. They pray for this Court to thus order the Respondent to pay their accrued house allowance and bonuses. On the issue of loans, they submit that they seek remedy from this Court against the Respondent for the unfair exposure to personal loans with prior knowledge of a termination on account of Redundancy. The Claimants submit that the court in [Esther Mbinya Musau v National Bank of Kenya Limited](#) [2015] eKLR acknowledged the claimant's right to challenge the respondents for the unfair exposure to a loan obtained through the Staff Loan Policy. With respect to the car loan facilities granted to the territory managers, they submit that lack of provision in the Car Allowance Policy of what happens in case the employer terminates the employment of such an employee should not be visited unfairly upon an innocent employee. The Claimants submit that having been unfairly and without notice declared redundant, they should not be made to pay for such exposures and that in any case, the Respondent made the decision to declare them redundant with full knowledge of the said loans exposure. The Claimants submit that the Respondent should have in fact been paying them for using the vehicles as tools of trade when they were directly paying for them from their allowances, as the vehicles were now private and personal. The Claimants submit that such use of an employee's personal facility for company work ought to be compensated for and that Courts have dealt with this issue severally such as in [Joshat Kyalo Ngumbi v Security Guards Services Limited](#) [2017] eKLR where Mbaru J. held that an employer is vested with the duty to provide an employee with the tools of trade. It is the Claimants' submission that it is only fair in the circumstances for the Court to order the Respondent to take up and shoulder the said burden of the loans.
13. The Claimants cite the finding ELRC Cause No. 502 of 2016 – [Angela Shiukuru Ilondaga v Airtel Networks Kenya Limited](#), [2018] eKLR wherein the claimant was declared redundant during the same period and similar circumstances as them. The Claimants submit that in the said foregoing case, Ongaya J. rendered himself on almost all the issues herein and found that the redundancy process was illegal and unfair. They finally submit that the Respondent has not raised any legal grounds to warrant the unfair and unprocedural termination of the Claimants' contracts of service on account of redundancy and denial of dues accruing to the Claimants.

Respondent's Submissions

- 14 The Respondent submits that the termination of the Claimants' employment on account of redundancy was lawful. The Respondent cites the case of [Jemmah Akoth Nvadera Onyosi & 6 Others v Kenya National Trading Corporation](#) [2014] eKLR wherein the court held that rationalisation of staff (which includes de-layering and reorganization) may result to loss of employment and is a valid reason for termination on account of redundancy. It heavily relies on the holding of Murgor JA in the Court of Appeal's decision in [Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 Others](#) [2014] eKLR, that the trial court's finding that a redundancy exercise resulting from the operational requirements of the employer was unjustified amounted to usurping the employer's managerial prerogative. It is the Respondent's submission that to the extent that it has demonstrated



that it rationalised its staff by de-layering and outsourcing the roles undertaken by the Claimants, it has proven there was a valid reason for redundancy. It urges the court to consider that the decision to restructure was for sustenance of the Respondent which operates in a highly competitive market and be persuaded by the holding of the Court of Appeal in *Pure Circle (K) Ltd v Paul K. Koeh & 12 Others [2018] eKLR* that an employer should not be penalized when it has taken a commercial decision to restructure for sustenance.

15. The Respondent submits that it had no obligation to consult the Claimants on the intended redundancy and was only required to comply with the law in declaring them redundant. The Respondent submits that the Court of Appeal affirmed in the Pure Circle case (supra) that “the law in Kenya does not provide for pre-redundancy consultation as it gives the employer a free hand to organize its operations with a view to realizing profit”. The Respondent submits that it has extensively pleaded on the issue of the notice to the Labour Office and that there is also evidence that a notice was issued and indeed received by the Labour Officer, Nairobi. On its admission of having omitted to issue individual notices to the Claimants, it submits that payment of salary in lieu of issuing the notice did not prejudice the Claimants and instead mitigated the salary they would have lost for the month they would be serving notice. The Respondent submits that it thus in the circumstances complied with all the provisions of Section 40 of the *Employment Act* as regards notices and payment of redundancy dues and that there is no basis for a declaration that the Claimants’ terminations were unfair and unlawful.
16. Without prejudice to the foregoing, the Respondent further submits that this Court should consequently consider that maximum compensation cannot be due to the Claimants further because there was a valid reason for terminating their services. On this submission it cites the case of *Standard Group Limited v Jenny Luesby [2018] eKLR* wherein the Court of Appeal awarded two month’s salary where there were valid reasons for termination but the employer did not follow the procedure in terminating the employee. It is the Respondent’s submission that an award of one month’s salary would thus be fair compensation in the instant case.
17. The Respondent also submits that its evidence of having paid the Claimants severance pay was not controverted and even confirmed by the Claimants’ witness and that the same should thus fail. For the claim of general damages, it submits that there is no basis laid for this claim and that there are no special circumstances that would warrant an award for general damages to the Claimants. On bonuses, it cites the case of *Nicholas Mbuva & 4 Others v Alice Gesare Moninda [2015] eKLR* wherein the Court of Appeal held that a bonus dispute is left exclusively to the province of the agreement between the parties. It further submits that a bonus liability cannot thus arise where there is no agreement on the same and that it is not in dispute that none of the Claimants’ employment contracts provided for bonus. The Respondent submits that the testimony that the Claimants were entitled to a pro-rated award of bonus for the 6 months they had served is without basis and simply inviting this Court to award a bonus. It maintains its stance on the issues of the Claimants’ outstanding loans, car allowances and house allowance as averred in the Respondent’s witness statement. On the claim for loss of expected income, the Respondent urges the court to dismiss this claim and relies on the case of *Ethics and Anti-Corruption Commission v Nicholas Mwenda Mtwaruchiu & 8 Others [2018] eKLR* wherein the Court of Appeal held that a claim for salary and other benefits to retirement (expected income) cannot be maintained in law.
18. The Claimants were terminated on account of redundancy. It is clear that Section 40 of the *Employment Act* gives an employer the right to determine the issue and upon deciding that it makes prudent financial sense to let go of some staff then redundancy would be triggered. Section 40 is very clear on the steps. The employer is required to notify the Ministry of Labour of the intent and extent of the redundancy contemplated. Thereafter the employer must notify the employee and their union



(where the employees are unionisable). It is evident the Respondent never informed the Ministry as the County Labour Officer in the Ministry of Labour and Social Security Services confirmed in their correspondence produced in evidence before me that the Respondent never notified them of the intended redundancy. This was confirmed by the Respondent. It must be repeated here that the notices envisaged under Section 40 of the *Employment Act* are not mechanical nor are they issued merely for the sake of going through a process but are mandatory. In this case it was asserted that the employer was apprehensive that the employees held sensitive information hence the inability to issue any notice since the information could be compromised. There was no evidence of what sensitive information the Claimants held. There was no attempt to even suggest that indeed their holding of said information would in the event of notice of termination lead to any effects on the business. The other issue that did not sit well with these allegations is that what falls within the meaning of 'sensitive information' is undefined and being so amorphous cannot be basis for denial of statutory imprimatur. The issue of confidentiality is well covered in clause 6 of their contracts of employment under the heading Confidentiality. As such, the employees of the Respondent were bound then and even post employment from revealing the confidential information that came into their knowledge as a result of their employment with the Respondent. As the redundancy in respect to the Claimants before the Court was declared illegally and without regard to Section 40, each of the Claimants is entitled to recover the following:-

- i. Three month's salary as compensation for the unfair and unlawful termination;
- ii. Interest at Court rates on the sums in i) above from the date of judgment till payment in full.
- iii. Costs of the consolidated suit.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 27TH DAY OF APRIL, 2022

NZIOKI WA MAKAU

JUDGE

