



REPUBLIC OF KENYA



**KENYA LAW**

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**Lomulen & 17 others v Minyann, Clerk Turkana County Assembly & 2 others  
(Petition 02 'A' of 2019) [2022] KEELRC 1529 (KLR) (8 June 2022) (Ruling)**

Neutral citation: [2022] KEELRC 1529 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET  
PETITION 02 'A' OF 2019**

**NJ ABUODHA, J**

**JUNE 8, 2022**

**BETWEEN**

**ALICE LOMULEN ..... 1<sup>ST</sup> CLAIMANT**  
**MARTHA KIKEI ..... 2<sup>ND</sup> CLAIMANT**  
**PATRICK NACHUCH ..... 3<sup>RD</sup> CLAIMANT**  
**PHILIP EWAAR ..... 4<sup>TH</sup> CLAIMANT**  
**ESTHER NANGIRO ..... 5<sup>TH</sup> CLAIMANT**  
**SELIAN AKUWOM ..... 6<sup>TH</sup> CLAIMANT**  
**CONCEPTA KOKOI ..... 7<sup>TH</sup> CLAIMANT**  
**MARIANA EBENYO ..... 8<sup>TH</sup> CLAIMANT**  
**HELLEN ARUKUDI ..... 9<sup>TH</sup> CLAIMANT**  
**GEOFFREY NGOMOE ..... 10<sup>TH</sup> CLAIMANT**  
**AGNES ERENG ..... 11<sup>TH</sup> CLAIMANT**  
**CECILIA ESURON ..... 12<sup>TH</sup> CLAIMANT**  
**ROSE AKAI ..... 13<sup>TH</sup> CLAIMANT**  
**LILIAN ALIMLIM ..... 14<sup>TH</sup> CLAIMANT**  
**SCHOLASTICA EPEM ..... 15<sup>TH</sup> CLAIMANT**  
**ALICE AKIRU ..... 16<sup>TH</sup> CLAIMANT**  
**ALICE LOYAMA ..... 17<sup>TH</sup> CLAIMANT**  
**ANTHONY TOPOS ..... 18<sup>TH</sup> CLAIMANT**

**AND**



**LINUS LOKAWA MINYANN, CLERK TURKANA COUNTY  
ASSEMBLY ..... 1<sup>ST</sup> RESPONDENT**

**ERASTUS EKITELA, SPEAKER TURKANA COUNTY ASSEMBLY .... 2<sup>ND</sup>  
RESPONDENT**

**TURKANA COUNTY ASSEMBLY SERVICE BOARD ..... 3<sup>RD</sup> RESPONDENT**

### **RULING**

1. By a Motion dated 10<sup>th</sup> June, 2021, the Petitioner/Applicants sought orders among others that the court reviews its judgment delivered on 27<sup>th</sup> April, 2021 and further that the court gives directions on the petitioners' tabulations filed with the application. The applicant further sought orders that the petitioners be paid the costs of the petition.
2. The application was supported by the affidavit of one Geoffrey Ngimeo Atogo who deponed on the main that:
  - a. That I am the petitioner's chairpersons hence competent and authorized to deponed to this affidavit.
  - b. That this honourable court delivered directions regarding the said petitioner's suit (Petition 2/2019) to the effect that all the 18 petitioners be paid all their entitlements accordingly.
  - c. That the relevant tabulations for all the petitioners have been effected by an employment and labour expert one Josphat Amachika Ojuok Kenya Union of commercial Food and Allied Workers (KUCFAW Kisumu) and the same has been filed and presented before the honourable Judge.
  - d. That the respondents have refused to accept the said tabulations.
  - e. That the petitioners pray that the honourable court do adopt the said tabulations as court order.
  - f. That before the petitioners were terminated from their employment, they were servicing loans in various banks, which they have since defaulted.
3. The respondent filed a Replying Affidavit though one Linus Lokawa Miinyan who deponed in the main that:
  - a. That I am the clerk, Turkana County Assembly and the 1<sup>st</sup> respondent herein (hereinafter referred to as "the Assembly"), thus, competent and duly authorized to make and swear this Replying Affidavit.
  - b. That by virtue of my aforestated position, I am fully conversant with the facts herein and duly authorized by the County Assembly service Board to swear this affidavit on behalf of the respondents.
  - c. That I make this affidavit in opposition to the applicant's application seeking a review of the judgment of the Honourable Court delivered on April 28, 2021, on account that the same is merely an attempt by the Petitioners/Applicants at taking a second bite at the cherry and opening up the suit for fresh determination.



- d. That as the record of the Honourable Court will bear witness, on or about September 26, 2019 vide a Partial judgment delivered by the honourable Court, the parties herein were directed to submit to the jurisdiction of the Public Service Commission in accordance with the provisions of Section 77 of the County Government Act, No. 17 of 2012.
- e. That in compliance with orders of the Honourable Court, parties herein submitted to the jurisdiction of the commission, in turn resulting to the decision of the commission dated March 03, 2021 which was similarly filed before the Honourable Court.
- f. That it is noteworthy that the Public Service Commission arrived at a finding that the redundancy process undertaken by the County Assembly/Respondents was indeed fair, lawful, justified, and procedural consequently, on account of the finding that no evidence had been adduced to prove payment of terminal benefits arising when there is termination of employment on account of redundancy, the Commission expressly directed the Assembly to ensure payment of severance pay in accordance with section 41(1)(g) of the Employment Act.
- g. That the record of the Court will once again bear witness, that during the proceedings of the Court on April, 28, 2021, the Honourable Court entirely adopted the decision of the Public Service Commission.
- h. That owing to the decision of the Public Service Commission and the orders of the Honourable Court, the Respondents were only directed to endure settlement of severance pay.
- i. That it is similarly noteworthy, and cannot be contradicted, that the petitioners/Applicants have neither appealed the decision of the Public Service Commission not the decision or orders of the Honourable Court.
- j. That in view of this, the amounts as tabulated by the Petitioners are not only unjustified and unfounded, but the same are in blatant disregard of the findings and directions of the Public Service Commission, but also in disregard of the orders of this Honourable Court.
- k. That the amounts claimed by the Petitioners, including one month pay in lieu of notice, damages in the equivalent of 12 month's wages, and loss of earnings have no basis whatsoever in the decisions of the Commission and the Court, and similarly cannot be an error of law or an error on the face of the record. As such, orders or tabulations sought by the Petitioners are disguised appeal against the decision of the Court.
- l. That I am advised by the Assembly's advocates on record, which advice I place reliance on and verily believe to be sound in law that for a party to succeed in an application for review of the Honourable Court's judgment, the applicant must show to the satisfaction of the Court that:
  - i. There is discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge of that person or could not be produced by the person at the time when the decree was passed or the order made.
  - ii. There is some mistake or error apparent on the face of the record.
  - iii. The judgment or ruling requires clarification; or
  - iv. There is any other sufficient reason.
- m. That I am advised by the Assembly's advocates that the applicants have not satisfied any of the grounds for review to warrant exercise of this Honourable Court's discretion.



- n. That in compliance with the decision of the Public Service Commission and the Honourable Court, the County Assembly Service Board has since tabulated the severance pay due and owing to the Petitioners. Where leave days are outstanding at the moment redundancy was declared, the same has been taken into account.
- o. that it is noteworthy, that in compliance with the Law, while effecting the redundancy process, the Petitioners were all served with one Month's Notice of Termination of employment. It is in view of this that the Commission entered a finding that all the necessary Notices under Section 40 of the *Employment Act* had been complied with. In view of this, where one month's notice had been afforded to the Petitioners, one month's wages in lieu of notice is not applicable to the present circumstance.
- p. That with respect to the order seeking costs of the suit, the Honourable Court has discretion as to whether costs are payable by one party to another, the amount of those costs and when they are paid. Thus, where costs are in the discretion of the Court, a party has no right to costs unless and until the Court awards them to him and the Court has an absolute and unfettered discretion to award costs to any party to the proceedings. In the present matter, where the Petition by the petitioners was substantively unsuccessful, costs should follow the suit and awarded to the respondents.
4. In its Judgment delivered on 26<sup>th</sup> September, 2019 this Court stated among others that the respondent did not demonstrate anywhere in the pleadings and evidence before the Court, that they were exempted from the provisions of section 40 of *Employment Act*. The Court in the said judgment however noted that the petitioners had not exhausted appeal process set out under section 77 of the County Government Act and therefore directed that the dispute be submitted to the Public Service Commission by way of an appeal. This order was complied with and by a decision made on 23<sup>rd</sup> March, 2021 the Public Service Commission found among others that in declaring the petitioners redundant, due process was followed. The appellants were involved in the process, notices were issued and that the termination was justified.
5. The Public Service Commission however held that the Respondent did not produce any evidence to show that the appellants had been compensated upon termination of employment as required by law. According to Public Service Commission, they were entitled to severance pay in line with section 40(1) (g) of the *Employment Act* and directed that the appellants be compensated accordingly.
6. In its directions issued on 27<sup>th</sup> April, 2021, the Court concurred with the findings of the Public Service Commission and directed that the petitioners be paid their entitlements as provided under Section 40(f) and (g) of the *Employment Act*.
7. Mr. Oburu in support of his application for review submitted among others that since the petitioners were terminated before being paid all their entitlements as required by section 40 of the employment Acts then the same was unprocedural and illegal hence the petitioners were entitled to benefits that accrue in a termination which is unlawful and that attracts a twelve months salary compensation based on gross pay.
8. According to Mr. Oburu, the respondents grossly misinterpreted the judgment of the Court by expressing that the Petitioners were only entitled to severance pay.
9. The Public Service Commission and this Court concluded that the declaration of redundancy against the petitioners was procedural. However, the respondent did not demonstrate that upon such declaration they were paid their redundancy dues as per the Act. A failure or omission to pay dues or entitlements required under section 40 of the Act constitute a separate cause of action which does not



- negate or nullify an otherwise a procedural process under Section 40 of the Act. The contention by Mr. Oburu that because the Public Service and this Court found that the respondent did not show or demonstrate that the petitioners were paid their dues upon declaration of redundancy means they were unlawfully and unfairly declared redundant is a wrong interpretation of Section 40. Failure, omission or delay in payment could be as a result of other factors not connected with the redundancy process.
10. This Court and Public Service Commission directed that the petitioners be paid their entitlements in accordance with Section 40(f) and (g) of the [Employment Act](#).
  11. Section 40(f) makes reference to payment of wages or salaries in lieu notice where such notice has not been given while 40(g) refers to severance pay at the rate of not less than fifteen days' pay for each complete year of service.
  12. The Public Service found that the Petitioners were issued with one month's notice and given opportunity to make representations. In that regard no payment is due under section 40(f) of the Act.
  13. The applicants in their application for review have attached computations of what they consider their entitlement as a result of the declaration of redundancy. These include House allowance, special allowance, hardship allowance, unpaid leave and loss of earnings. These computations had allegedly been done by an expert and Counsel for the Petitioners urged the Court to adopt the same.
  14. The Court has looked at petition as filed on 27<sup>th</sup> March, 2017 and in respect of which the Court rendered its partial judgment on 26<sup>th</sup> September, 2019 and noted that the prayers sought in the petition were.
    - a. A declaration that the decision of the 1<sup>st</sup> respondent contained in the notice/memo dated 12<sup>th</sup> March, 2019 sending the petitioners on an indefinite compulsory leave, was made in excess of the 1<sup>st</sup>, 2<sup>nd</sup> 3<sup>rd</sup> respondents' jurisdiction and therefore null and void.
    - b. An order of certiorari to call the said notice/memo to this honourable court and quash the same
    - c. A declaration that the conduct of the respondents is in violation of the constitutional rights of the petitioners.
    - d. An order of permanent injunction restraining the respondents or anyone else claiming through the respondent from advertising, receiving applications, hiring people to fill their respective dockets of any of the petitioners or doing anything to threaten the security of their jobs.
    - e. An order that the petitioners do resume duty in their respective stations forthwith.
  15. This petition was never amended to include the heads of claim now contained in the so called expert computation filed by the petitioners. It is therefore too late to sneak them in through an application for review. They are therefore rejected by the Court.
  16. Regarding the issue of costs, the petitioners were technically not entirely successful in the petition. The Court found that the declaration of redundancy was procedural but the respondent failed to show that the petitioners' dues as per section 40 of the Act were paid. Each party should therefore bear their own costs of the petition.
  17. In conclusion the Court reiterates that the petitioners be paid their redundancy dues as ordered by the Public Service Commission and this Court through its directions made on 27<sup>th</sup> April, 2021.
  18. The Motion dated 10<sup>th</sup> June, 2021 for review stands disallowed with no orders as to costs.



19. It is so ordered.

**DATED AT ELDORET THIS 8<sup>TH</sup> DAY OF JUNE, 2022**

**DELIVERED THIS 8<sup>TH</sup> DAY OF JUNE, 2022**

**ABUODHA J.N**

**JUDGE**

