Ileli v Telkom Kenya Limited (Cause 1617 of 2016)
[2022] KEELRC 1571 (KLR) (7 June 2022) (Judgment)

Neutral citation: [2022] KEELRC 1571 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 1617 OF 2016

JK GAKERI, J

JUNE 7, 2022

BETWEEN

JUSTUS MUNYAMBU ILELI ..... CLAIMANT

AND

TELKOM KENYA LIMITED ..... RESPONDENT

JUDGMENT

1. By a statement of claim dated August 8, 2016 and filed on August 12, 2016, the claimant sued the respondent alleging that his declaration of redundancy on April 30, 2016 was unlawful.

2. The claimant prays for:

   (i) Damages for wrongful redundancy

   (ii) Compensation for injuries sustained while on duty

   (iii) Refund of illegal deductions of Kshs 618,131.64

   (iv) Payment of salary till retirement

   (v) Costs of the suit

Claimant's Case

3. The claimant avers that he was employed by the respondent in 1988 and served until April 30, 2016, when he was unlawfully declared redundant and that the amount paid was not a reflection of what he ought to have been paid for wrongful redundancy.

4. It is also averred that the declaration of redundancy was illegal, unlawful, unfair, discriminatory and a violation of the claimant's constitutional right to affair administrative action and legitimate expectation.

5. It is further averred that the respondent refused or failed to make a specific risk assessment of the claimant's place of work and totally failed to make the necessary contacts with external service first aid, emergency medical care and rescue as a result of which the claimant was injured in two separate grenade attacks and suffered 45% quantum disability.

Respondent's Case

6. The respondent case in pleaded as follows:

7. That the claimant was lawfully and procedurally retrenched and paid Kshs 2,060,438.81 as his entitlement and the retrenchment was legal, fair, non-discriminatory and conducted in accordance with the provisions of the *Employment Act* as held in ELRC Cause No 2287 of 2015 and the sum of Kshs 618,131.64 deducted was PAYE.

8. The respondent avers that it took all necessary measures within its capacity to ensure that the claimant received first aid, emergency medical care and was air lifted and treated at the Mater Hospital, Nairobi after the two grenade explosions and the claimant acknowledged and appreciated the same in writing.

9. That the claimant suffered no disability and was not entitled to compensation.

10. It is the respondent's case that the claimant was paid the sum of Kshs 121,517/= as compensation by AIG Insurance Company Limited as per the applicable policy.

11. That after the first injury the claimant continued to perform reliever duties at Wajir and enjoyed the allowances due.

12. He travelled to Wajir on February 1, 2012 less than 2 months after the attack.

13. The respodnnt avrs that the claim for salary till retirement was misconceived.

14. Finally, it is the respondent's case that since the claimant was 52 years in April 2016 when he was retrenched and was due to retire on August 2, 2018 at a gross salary of Kshs 66,352 per month, the retrenchment package was more than the salary he would have earned and continues to draw pension benefits.

Claimant's Evidence

15. In his evidence in chief as captured in the written statement, the claimant testified that he was due to retire in 2018 and was injured on December 24, 2011 in Wajir and on December 1, 2014.

16. That doctors at the Mater Hospital assessed his disability at 45%. That the respondent declared him redundant upon receipt of the medical report.

17. On cross-examination, the witness stated that he had not been trained in finance although he was a financial representative. He testified that his employment was terminated but had no termination letter.

18. The witness acknowledged having received a letter under reference "Release upon Company Transformation and Redundancy" dated April 12, 2016 from the respondent.

19. The witness confirmed that he was declared redundant and the letter made no reference to his alleged incapacity.

20. The witness confirmed that he was unaware of any negotiations between the respondent and the union but admitted that he was a member of the union.

21. It was his testimony that the union had sued to stop the redundancy and judgement was delivered. After being taken through the judgement in ELRC Cause No 2287 of 2015, the claimant admitted that there were negotiations and the redundancy continued to its logical conclusion. The claimant admitted having received payment and neither protested nor complained to the union or the respondent.

22. The witness confirmed that he performed supervisory visits in Wajir about 100 times. He admitted having received medical assistance and thanked the employer in writing.

23. He further testified that he continued working until he was declared redundant and did not write to the company about the alleged incapacity not did the respondent complain about his performance at the workplace.

24. The witness admitted having received Kshs 121,517/- from the insurance company as compensation.

25. Further, the witness admitted that he had not pleaded the injuries sustained in the first attack for which he was claiming compensation.

26. That he had not provided particulars of the alleged illegal deductions of Kshs.618,131.64.

27. The claimant confirmed that the injuries were sustained in a hotel where he was having dinner at 7.30 pm and was flown to Nairobi by the Kenya Air Force, did not pay any hospital bill and was a member of the Alexander Forbes Pension Scheme.

28. In re-examination, the witness stated that he was not an accountant since his position did not require any qualifications and had not been invited for the pre-redundancy talks. That the law not followed in the declaration of redundancy.

29. Finally, the witness testified that he did not request for payment for the injuries sustained in the first attack in 2011.

Respondent's Evidence

30. RW1, Rose Wairimu Muraguri adopted the written statement which rehashes the contents of the statement of response and was cross-examined.

31. The witness testified that the claimant was declared redundant because his position as a financial representative was abolished and was paid subject to statutory deductions such as PAYE.

32. On cross-examination, the witness confirmed that the redundancy was occasioned by a new Company structure and all financial representatives were declared redundant and the respondent followEd the law as prescribed.

33. The witness confirmed that the claimant was injured twice but was only paid for the last attack in 2014.

34. That for the first attach he was paid Kshs 13,500/- since the insurance covered medical expenses only.

35. That the redundancy was a general process and affected all employees and the alleged illegal deductions of Kshs 618,131.64 was PAYE. That although a tax waiver had been agreed, tax was still deducted and submitted to the Kenya Revenue Authority (KRA).

36. Finally, the witness confirmed that the respondent had group insurance cover and the insurer advised on the payability of claims.

37. On re-examination, the witness testified that after the first attack, the claimant resumed duty and never claimed compensation.

Claimant's Submission

38. The Claimant submits that on account of the two attacks his disability stood at 65% and it was on this basis that he was declared redundant having served for 28 years in high-risk areas of North Easter Kenya.

39. That the respondent had determined that the claimant had become useless to it.

40. Further that the respondent deliberately refused to assess the risks of the place of work and failed to provide first aid, emergency medical care and rescue and seeks compensation for pain and suffering.

41. The decision in *Mwangi Macharia & another v Peter Mwangi Mugo* Nairobi HCCC No 4641 of 1987 is relied upon to reinforce the submission.

42. It is submitted that the redundancy was supervised by the court in ELRC Cause No 2287 of 2015 and a concession had been made that there would be a tax waiver but the Respondent did not take into account the tax waiver which had created an expectation of payment of a higher sum.

43. That the respondents witness failed to show that the PAYE was remitted to the KRA.

44. The claimant submits that the claimant's termination was unfair as he had only two years to retirement and no evidence was led on how much he would have earned at retirement.

45. On pension, the claimant submits that had he worked till retirement, he would be on pension which is not taxable and paid monthly till after death and was denied the same after 28 years of service.

46. That the sum of Kshs 121,517/- paid by AIG was undesignated and no evidence show that it reached the claimant.

47. It is further submitted that the respondent did not explain the criteria used on who was declared redundant yet Garissa and Wajir were understaffed.

48. It is the claimant's submission that he was targeted for redundancy on account of the injuries he sustained in the two attacks.

49. The court has jurisdiction to award compensation for the injuries going by the decision in *Law Society of Kenya v Attorney General and another* [2019] eKLR where the Supreme Court upheld the decision of the Court of Appeal.

Respondent's Submission

50. The respondent's submissions address the specific prayers sought by the claimant.

51. As regards damages for wrongful redundancy, it is submitted that the statement of claim has not pleaded particulars of the unlawfulness or illegality of the redundancy and no evidence was adduced to that effect.

52. That the claimant received the redundancy letter dated April 12, 2016. It is submitted that the respondent was restructuring which led to the redundancies and all financial representatives were declared redundant.

53. It is submitted that the court confirmed in ELRC Cause No 2287 of 2015 that the respondent had not violated the provisions of section 40 of the *Employment Act*, 2007.

54. It is further submitted that notice was given, meetings held and consultations took place.

55. That the ruling in ELRC Cause No 2287 of 2015 settled the issue of compliance with the provisions of the law and no appeal was preferred against the decision.

56. That the claimant tendered no evidence to demonstrate that he was declared redundant for the disabilities alleged to rebut the respondent's reason as communicated.

57. The court is urged to find that the declaration of redundancy was not unlawful.

58. As regards compensation for the injuries sustained while on duty, it is submitted that the claimant tendered no evidence of the injuries and no particulars were pleaded. The Court of Appeal decision in *Antony Francis Wareham t/a AF Wareham & 2 others v Kenya Post Office Savings Bank* [2004] eKLR is relied upon to reinforce the submission.

59. As regards the alleged illegal deductions, it is submitted that the respondent pleaded that the alleged deduction was PAYE and was thus not illegal.

60. That PAYE is payable by employees on the basis of the emolument due. The decision in *Andrew Mukite Saisi v Tracker Group of Companies Limited* [2020] eKLR is relied upon to urge that an employer is obligated to recover the appropriate tax from any lump sum payment whether voluntary or involuntarily made to compensate an employee for termination of employment services.

61. That PAYE is payable whether consent judgement makes provision of it or not.

62. Sentiments of the Court of Appeal were relied upon to buttress the submissions.

63. It is submitted that the *Income Tax Act* makes it obligatory for employers to deduct and remit the amount of tax payable by an employee on amounts paid to such employee falling which the employer is liable to penalties. An agreement not to deduct PAYE is illegal.

64. The respondent submits that the claimant did not plead that the deduction was PAYE or that it had not been remitted to the KRA for the respondent to respond accordingly. That the respondent responded to the prayer as pleaded.

65. As regards payment of salary till retirement, it is the respondent's submission that the claimant was declared redundant and paid a sum of Kshs 2,060,438.81 more than what he would earned in 2 years to retirement and furnished no evidence of loss of pension.

66. Reliance is further made on the Court of Appeal decision in *Antony Francis Wareham t/a AF Wareham & 2 others v Kenya Post Office Savings Bank* (*supra*) to underscore the essence of pleadings in dispute resolution in adversarial systems of litigation.

Analysis And Determination

67. After careful consideration of the pleadings, evidence on record and submissions by counsel, the issues for determination are:

    i. Whether the declaration of the claimant as redundant was unlawful or illegal;

    ii. Whether the claimant is entitled to the reliefs sought.

68. As to whether declaration of the claimant redundant was unlawful, the claimant pleaded that it was.

69. In the written statement, the witness states that he was declared redundant when the respondent received his medical report. He does not allege that it was unlawful.

70. Redundancy is one of the many ways in which a separation between an employer and an employee may take place lawfully. The provisions of the *Employment Act* recognize redundancy as one of the legitimate ways of bringing an employment contract to an end.

71. Section 2 of the *Act* defines redundancy as follows:

> "redundancy" means the loss of employment, occupation job through no fault of an employee involving termination of employment at the initiative of the employer, where the services of the practices commonly known as abolition of office, job or occupation and loss of employment."

72. Section 40 of the *Employment Act*, on the other hand prescribes the substantive and procedural steps to be complied with.

73. In *Freight In Time Limited v Rosebell Wambui Munene* [2018] eKLR the Court of Appeal 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;
>
> a) If the employer to be declared redundant is a member of a union, the employer must notify the union and the local labour officer of the reasons and the extent of the redundancy at least one month before the date when the redundancy is to take effect.
>
> b) If the employee is not a member of the union, the employer must notify the employee personally in writing together with the labour officer.
>
> c) In determining the employees to be declared redundant the employer must consider seniority in time, skills, ability, reliability of the employee.
>
> d) Where the terminal benefits payable upon redundancy are set under a collective agreement, the employer shall not place an employee at a disadvantage on account of the employee being or not being a member of a trade union.
>
> e) The employer must pay at least one month's notice or one month's wage in lieu of notice; and
>
> f) The employer must pay the employee severance pay and the rate not less than 15 days for each completed year of service."

74. Analogous to other forms of termination, the employer is bound to demonstrate that it was conducted fairly as dictated by section 45 of the *Employment Act*.

75. It is not in dispute in this case that the respondent was undergoing a restructuring and adopted a new and leaner structure which necessitated the redundancies.

76. From the documents on record, it is apparent that the respondent engaged the union who at one point sought the courts help to stop the process by filing ELRC Cause No 2287 of 2015 filed in December.

77. Among the prayers sought was an injunction to stop the redundancy pending the inter partes hearing and determination of the application. The court declined to grant the order sought as in its opinion, the respondent had complied with the law governing redundancies. Wasilwa, J was emphatic that:

> " The court therefore makes a ruling that the redundancy exercise should continue so long as the law is being observed. The applicants may proceed and seek an early date for the hearing of the main suit".

78. It is unclear whether the applicants took up the gauntlet and how the suit was determined.

79. The court found as follows

> " In terms of consultations as defined by the law and as discussed in case law listed above, there have been various meetings between applicant and respondent where each party is seen to have ceded their ground in an attempt to reach a solution in the matter. It is clear that the parties discussed the matter in 3 different meetings.
>
> The respondents were able to point out the difficulties the firm was facing hence the need for the redundancy exercise.
>
> It is also apparent that the last consultation between applicant and respondent was in December 2015 and on December 16, 2015 the respondent informed the applicant that they were unable to pay the members a higher package than what had been suggested upon and therefore closed consultation...
>
> The position of this court is that consultation did occur and the fact that the parties did not fully agree with each other's proposals, the parties met and discussed the issues at hand and therefore consultations were given a chance."

80. Finally, the court stated that:

> " On issue of the law the proposal by the respondents met the requirements of section 40 of the *Employment Act*..."

81. The court is in agreement with the respondent's submission that no appeal was preferred against these findings of the learned judge.

82. On consultations see *Thomas De La Rue (K) Ltd v David Opondo Omutelema* [2013] eKLR as well as *Kenya Airways Limited v Aviation and Allied Workers Union Kenya & 3 others* [2014] eKLR.

83. In the former, the Court of Appeal was unequivocal that

> " Where an employee is a member of a trade union, the law contemplated that the employer will deal with the employee through the union.... It is only in cases where the employee is not a member of the union that the employer has to deal directly with the employee"

84. The court is guided by these sentiments.

85. Although the claimant testified that he was terminated alone as the Finance Representative for the North Eastern Region (Garissa and Wajir), he tendered no evidence to that effect.

86. Similarly, on cross-examination he stated that he was unaware of the negotiations between the union and the respondent. He, however, admitted on cross-examination that he was a member of the union.

87. Relatedly, in ELRC Cause No 2287 of 2015, the court found that negotiations had taken place.

88. In a similar vein, the claimant produced copies of two letters from the Chief Executive Officer (CEO) Mr Vincent Lobry to all staff dated March 11, 2016 and April 11, 2016 on the intended redundancy.

89. RW1 testified that it was a general process and affected all employees and that all finance representatives were declared redundant as the office was abolished.

90. The concluding paragraphs of both letters is an appeal to members of staff to raise any concerns or comments through one Mercy Nduku the Chief Human Resource Officer or the CEO himself.

91. For the foregoing reasons, it is the findings of the court that the claimant was aware of the proposed redundancy and that the union was negotiating on hiss behalf and the process affected the entire organization.

92. The statement that he was declared redundant alone was not supported by any evidence.

93. Further, it is the finding of the court that the claimant led no evidence and placed no material before the court to demonstrate that the redundancy process was unlawful in any manner.

94. At any rate, the court found that as of March 8, 2016, the respondent had complied with the law and the orders sought could not issue to stall a lawful process being undertaken in a lawful manner.

95. As to whether the claimant was declared redundant on account of the injuries sustained, the claimant led no evidence to demonstrate the connection between the two.

96. According to the claimants evidence, the first attack took place on December 24, 2011 and after treatment he resumed work and worked continuously. The second attack occurred on December 1, 2014 after which he resumed duty and worked until he was declared redundant in 2016.

97. On cross-examination, the claimant confirmed that he received the letter dated April 12, 2016 and further confirmed that the letter made no reference to his alleged incapacity and the letter gave the reason for his being declared redundant. That his position was among those declared redundant.

98. More significantly, the claimant admitted that he never wrote to the employer about the alleged incapacity and the employer did not write or complain about his performance.

99. Finally, RW1 confirmed on cross-examination that all financial representatives were declared redundant, evidence the claimant did not controvert.

100. For these reasons, it is the finding of the court that the claimant has on a balance of probabilities failed to demonstrate that he was declared redundant on account of the alleged incapacity as submitted.

101. If the injuries were the causa causan for the redundancy, it begs question why the respondent had to wait for almost 14 months to declare the claimant redundant if he had become a burden to it as submitted.

102. The claimant placed no material before the court to justify such a finding.

103. This finding is supported by the fact that the claimant has no prayer for damages for discrimination and led no evidence of being targeted.

104. As regards, the relief sought the court proceed as follows:

A) Damages For Wrongful Redundancy

105. Having found that the claimant failed to establish that the redundancy violated any provision of law or was unfair, the claimant is not entitled to damages under this prayer.

The prayer is dismissed.

B) Compensation For Injuries Sustained While On Duty

106. Although the claimant avers and submits that the respondent did not undertake specific risk assessment of the claimant's workplace and failed to provide emergency medical care and was not assisted for two days after the attacks, the letter dated March 11, 2014 paints a different picture.

107. First, the unfortunate attack on innocent people including the claimant cannot be blamed on the respondent's failure to conduct any risk assessment. The attack could have happened at any other place. Secondly, the claimant admits that he was rushed to the Wajir General Hospital by the police, the first responders to the attack and was airlifted to Nairobi the following day and taken to the Mater Hospital courtesy of the Human Resource Department of the respondent.

108. The claimant thanks the CEO and Madam Nduku of Human Resource for visiting him at the hospital and by the same token claims compensation for the two attacks "now that there is a policy concerning terror attacks..."

109. The claimant appears to acknowledge that there was no insurance policy of terror attack in 2011. He admitted having been paid the sum of Kshs 121,517/- for the injuries.

110. Strangely, the claimant testified on cross-examination that he was helped by the member of parliament for Wajir to fly to Nairobi yet flew in a Kenya Air Force plane. This was intended to portray the respondent as a non-caring organization forgetting that he had stated the facts in a letter authored on March 11, 2014.

111. Finally, the claimant admitted that he did not pay any medical bills. In a nutshell, the claimant prays for compensation for pain and suffering.

112. Puzzlingly, other than the prayer for compensation, the claimant did not plead the particulars of the injuries suffered and led no evidence to that effect. He admitted as much on cross-examination and that the attack took place in a hotel.

113. In *Antony Francis Wareham t/a AF Wareham & 2 others v Kenya Post Office Savings Bank* (*supra*). The Court of Appeal stated as follows as regards pleadings.

> " ... It follows from those principles that only evidence of facts pleaded is to be admitted and if the evidence does not support the facts pleaded, the party with the burden of proof should fail. It also follows that a court should not make any findings on unpleaded matters or grant any relief which is not sought by a party in the pleadings.
>
> ...He relied heavily on this court's decision in Nairobi City Council v Thapili Enterprises Ltd for the propositions that a judge does not have jurisdiction to determine a matter which has not been pleaded unless the pleadings are suitably amended, that it is a serious breach of a fundamental rule of pleadings to grant relief which has not been sought and that there was no power to decide on an issue not raised in the pleadings"

114. The court is bound by these sentiments. Further, in *Meru South Farmers' Co-operative Union Limited v Moses Otando Munaka & another* [2015] eKLR, the Court of Appeal expressed itself as follows:

> " In this appeal damages can only be assessed based on the injuries suffered. It is therefore difficult to quantify the amount. Failure to tender medical showing the kind of injuries sustained is take unlike the authority cited by the trial Magistrate. Damages are awarded purely not only on the injuries suffered but on the extent or seriousness of such injuries. The damages awarded are pegged in such injuries. Without the evidence it is impossible to assess the damages with respect, the trial magistrate fall into error. There was no credible medical evidence to prove the injuries suffered by the 1st respondent. There was therefore no basis to award damages".

115. Similarly, in *George Kebaso Mabbeya v Crown Industries Limited* [2012] eKLR, the appellate court held that:

> " ...The above quotation shows the importance of the connection between an event-causing injury, the injury itself and the treatment of it. For the Court to satisfy itself as to the nature of the injury, the severity of the same and how and when it emanated and the progress on recovery, the experts report must be explicit and make explicit connections with an alleged attack. Thus, the importance of the treating doctor's notes, report or evidence."

116. The court is guided by these sentiments.

117. In the instant case, the claimant did not particularize the injuries in the statement of claim and led no evidence on the injuries sustained.

118. Although the written statement stated that he suffered multiple injuries in 2011 and was injured again in 2014, the specific injuries are not set out, their nature, severity and recovery remain unspecified. The tests established by the decisions above has not been satisfied.

119. In addition, the claimant admitted having received Kshs 121,517.00 from AIG Insurance Company as per the insurance policy as submitted by the respondent. Although the date of payment is not disclosed, it must have been after March 11, 2015, after the claimant had communicated his appreciation by which he claimed compensation for the two attacks.

120. For the foregoing reasons, the prayer for compensation for injuries sustained while on duty is declined.

c. Refund Of Illegal Deductions Of Kshs 618,131.64

121. Although the claimant prays for refund of the illegally deducted Kshs 618.131.64, he neither pleaded the particulars of the illegal deduction nor led evidence of what the deductions were, why they were illegal and justify that refund.

122. Similarly, neither the written statement nor the oral evidence made reference to the deductions.

123. In his submissions the claimant submitted that the deduction of Kshs 618,131.64 from the amount due under the redundancy was contrary to the agreement between the Union and the respondent as tax waiver was one of the issues the parties had agreed.

124. The agreement had created an expectation that PAYE would not be deducted from his dues.

125. That he had a legitimate expectation and the respondent did not show that the amount was in fact forward to the KRA.

126. The respondent on the other hand stated in evidence that the amount was deducted as PAYE which is payable by employees on amounts due to them as ordained by section 37 of the *Income Tax Act* and thus not illegal.

127. In *Kioko Joseph v Bamburi Cement Limited* [2015] eKLR the Court of Appeal stated as follows:

> "Furthermore, section 37 (1) of the Income Tax required an employer paying emoluments to an employee to deduct there from and account for Income Tax thereon to such extent and in such manner as may be prescribed. Such tax is deducted under section 3(1) of the Income Tax. "In the following manner..."

128. Section 3(1) and (2)(a) of the *Income Tax Act* provides that:

(1) Subject to and in accordance with this Act a tax to be known as Income Tax shall be charged for each year of income upon all the income of a person, whether resident or non-resident which accrued in or was derived from Kenya.

(2) Subject to this Act, income upon which tax is chargeable under this Act is income in respect of –

(a) Gains or profits from

(i) any business, for whatever period of time carried on;

(ii) any employment or services rendered;

(iii) any right granted to any other person for use or occupation of property;

129. Section 5(2) of the *Act* explains the gains and profits as follows:

(2) For the purposes of section 3(2)(a)(ii), the "gains or profits" includes –

(a) any wages, salary, leave pay, sick pay, payment in lieu of leave, fees commission, bonus, gratuity or subsistence, travelling entertainment or other allowance received in respect of employment or services rendered and a year of income other than the year of income in which it is received shall be deemed to be income in respect of that other year of income.

130. Noteworthy, the list of "gains and profits" enumerated by section 5(2) of the *Income Tax Act* is not exhaustive and as the Court of Appeal observed in *Kioko Joseph v Bamburi Cement Limited* (*supra*), the KRA Employers Guide on PAYE provides *inter alia* that:

> "Every employer has an obligation under section 37 of the *Income Tax Act* to recover appropriate tax from any lump sum amount before releasing the difference/balance to the employee and liability extends to any payment whether made to a person to compensate him for the termination of his contract of employment or services whether the contract is written or verbal and whether or not there is provision in the contract for such payment."

131. In *Directline Assurance Co Ltd v Jeremiah Wachira Ichaura* [2016] eKLR the Court of Appeal stated that –

> "It is trite law that any lump sum payment for ay terminal dues is subject to statutory deductions for the years taken into account ..."

132. The court is bound by the sentiments of the Court of Appeal in these decisions.

133. From the foregoing, it is clear that the amount due to the claimant under the redundancy was subject to statutory deductions.

134. Contrary to the claimant's submission that he had a legitimate expectation that PAYE would not be deducted, the claimant confirmed on cross-examination the he was not aware of any negotiations between the Union and the respondent and was unaware of the amount due to him.

135. A more pertinent of question, however is whether the agreement between the union and the respondent that there would be a tax waiver was legal.

136. The court made reference to a meeting held on December 8, 2015 to which the union and the respondent agreed that the employees would be given a tax waiver but no details were provided.

137. The claimant furnished no details of the tax waiver and when it was granted and by whom.

138. In the absence of details about the tax waiver agreed upon between the parties, the court is of the view that such agreement was ineffectual in law.

139. An employer has no capacity to waive payment of taxes by an employee.

140. At any rate at common law, a contact or arrangement between an employer and employee not to enable the employee evade tax is illegal.

141. For the above reasons, it is the finding of the court that the agreement between the union and the respondent to waive tax was ineffectual.

142. Having found that the claimant had no balance of probabilities failed to prove that the deductions of Kshs 618,131.64 from his dues wall illegal, the Claimant is not entitled the refund sought.

D. Payment Of Salaries Till Retirement

143. Granted that redundancy is one of the various ways a contract of employment may be terminated in law and having found that the redundancy process conducted by the respondent was not sustainably faulted by the claimant, the contract of employment between and the respondent came to an end and the claim for salary till retirement is not sustainable and is dismissed.

144. In the end, the claimant has failed to establish his claim and the same is dismissed with no order as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 7TH DAY OF JUNE 2022.

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 March 15, 2020 and subsequent directions of April 21, 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