



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mwangi v Jiangxi Water & Hydropower Construction [K] Limited (Cause  
1706 of 2017) [2022] KEELRC 1247 (KLR) (14 July 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1247 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 1706 OF 2017  
K OCHARO, J  
JULY 14, 2022**

**BETWEEN**

**VINCENT K MWANGI ..... CLAIMANT**

**AND**

**JIANGXI WATER & HYDROPOWER CONSTRUCTION [K]  
LIMITED ..... RESPONDENT**

**JUDGMENT**

**Introduction**

1. At all material times, the Claimant was an employee of the Respondent as a translator, up to the 28<sup>th</sup> March 2017 when his service of employment came into termination. Asserting that the termination was wrongful, unlawful and unfair, the Claimant through a memorandum of claim dated 12<sup>th</sup> June 2017, sued the Respondent seeking the following reliefs:
  - a) A declaration that the Claimant was wrongfully and unfairly terminated from his employment.
  - b) 12 [twelve] months' salary as compensation for wrongful and unfair termination, Kshs. 21,995 x 12 = Kshs. 263,940.00.
  - c) Punitive and Aggravated Damages for breach of the Claimant's constitutional rights.
  - d) Costs.
2. Upon being served with summons to enter appearance, the Respondent did, and filed a Response to the Memorandum of Claim. While admitting the employer-employee relationship between it and the Claimant, the Respondent denied the Claimant's cause of action and his entitlement to the reliefs sought.



3. To the Respondent's response, the Claimant filed a Reply to the memorandum of reply.
4. The Claimant's case was heard on the 12<sup>th</sup> October 2021, while the Respondent's was on the 19<sup>th</sup> November 2021. Parties were directed by this Court to file written submissions and they did.

#### **The Claimant's case**

5. At the hearing, the Claimant urged the Court to adopt his witness statement that was contemporaneously filed with his statement of claim as his evidence in chief, and admit the documents that he had filed under his list of documents dated 12<sup>th</sup> June 2017 as his documentary evidence. As there was no objection on the part of the Respondent, the contents of the statement and the documents were so adopted and admitted respectively.
6. It was his case that he came into the employment of the Respondent on the 3<sup>rd</sup> December 2015 as a translator at a salary of Kshs. 21,995.00. That during his tenure he performed his duties with zeal and determination and to the expectation of the Respondent.
7. The Claimant contended that his contract of service was terminated on the 28<sup>th</sup> March 2017. On this day he was called to the office of the Human Resource Manager, whereat he was informed that his supervisor did not require his services any more.
8. The Claimant contended that he was not given any notice prior to the termination. Too, that he was not accorded any hearing. There was neither a redundancy notice to him nor the Labour Officer.
9. Accordingly, the termination of his employment was wrongful and unfair.
10. The termination notice filed by the Respondent herein was a document that he was never served with.
11. Cross examined by counsel for the Respondent, the Claimant acknowledged that he was employed under a written contract. The salary was Kshs. 21,955.00, paid monthly.
12. He acknowledged that in his Witness Statement he did not mention that the termination of his contract of employment came in immediately after he had reported back from sick leave. That the supervisor told him that there was no more work for him is also a thing he did not capture in his Statement.
13. The Notice dated 7<sup>th</sup> April 2017, filed herein by the Respondent, was not served on him. He received his dues on the 7<sup>th</sup> April 2017 inter alia Kshs. 36,000, leave pay. The document shows that he received Kshs. 52,136 as his salary. He executed the document.
14. The Claimant testified that he was paid all his dues except the Notice pay.
15. In his evidence under re-examination, the Claimant stated that the Respondent's alleged Notice is dated 7<sup>th</sup> April 2017, yet his employment was terminated on the 28<sup>th</sup> March 2017.

#### **The Respondent's case**

16. The Respondent's sole witness was Kennedy Aluoch Rawago. The witness also urged the Court to adopt his witness statement dated 13<sup>th</sup> August 2018 as his evidence in chief and the Respondent's documents filed herein as its documentary evidence. The Court did so adopt and admit.
17. The witness presented himself as an employee of company, a Foreman/Construction site Manager.
18. The witness stated that the Claimant was in the employment of the Respondent from December 2015 to March 2017. The termination of the Claimant's employment occurred on the 28<sup>th</sup> March 2017.



19. The witness alleged that prior to this date, the Claimant had been issued with a notice indicating that the Respondent would no longer need his services since the problem of communication was no longer. The directors of the company would then speak to employees without any difficult.
20. The situation was duly explained to the Claimant, in the presence of other employees.
21. Subsequently, the Claimant was paid his dues and executed an agreement to the effect that he had no further claims against the Respondent as far as terminal dues were concerned.
22. The termination of the Claimant's employment was justified and procedurally correct.
23. In his evidence under cross examination, the witness stated that his statement to the effect that the services of the Claimant was no longer required, meant that he was redundancy. He maintained that the Respondent followed the known procedure in a redundancy situation.
24. He acknowledged that there was no notice that was issued to the Labour Officer.
25. The Claimant was issued with a notice dated 7<sup>th</sup> April 2017, which notice he received on the same date. He was paid all his dues on this day.
26. The Chinese directors and employees of the Respondent company had now gotten acquainted to English, the Claimant's services were no longer required.
27. The Respondent did not consider giving him an alternative job.
28. The Claimant was paid severance pay as exhibited by the Respondent's document before court.

#### **Analysis and Determination.**

29. From the material placed before this Court, the following broad issues emerge for determination; thus:
  - a) Whether the termination of the Claimant's employment was fair.
  - b) Whether the Claimant is entitled to the reliefs sought or any of them.
  - c) Who should bear the costs of this matter?

#### **Whether the termination of the Claimant's employment was fair.**

30. The *Employment Act* defines redundancy; thus:

“ means 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 practice commonly known as abolition of office, job or occupation and loss of employment.”

It is common cause that the Claimant's employment was terminated on an account that his service with the Respondent had become superfluous.

31. Where a termination of an employee's employment is alleged to have been terminated on grounds of redundancy and a dispute arises out of the termination as between the employer and the affected employee[s], the Court has the responsibility to inquire into the procedural and substantive fairness of the termination. A verdict that the termination was fair can only be attracted if there is presence of the two aspects in, the process that led to the termination and the decision to terminate. Procedural fairness is in regard to the process and substantive fairness to the decision.



32. The procedure to be followed where an employer contemplates to terminate and terminates an employee's employment obtains under Section 40 of the Employment Act. One can confidently assert that the provision of the law is couched in mandatory terms and leaves no room for the employer to bypass the procedure. The Section provides:

“40 [1]. An employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions:

- 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 the seniority in time and to the skill, ability and reliability of each employer 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 case;
- 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.”

33. The Respondent's submissions largely dwelt on the substantive fairness aspect of the termination but in ignorance of the procedural fairness aspect. The Claimant's submissions have only dwelt on the procedural fairness and failed to address substantive fairness of the termination.

34. Under Section 45 [2] [c], a termination of an employee's employment becomes unfair if there is default on the part of the employer to demonstrate that the termination was procedurally fair. In the case of Hesbon Ngaruiya Waigi vs. Equitorial Commercial Bank Limited [2013] eKLR cited by counsel for the Claimant, the Court held:

“Where redundancy is declared by an employer, the procedure to follow is as set out under the provisions of Section 40 of the employment Act and where not followed, any termination of an employee following a declaration of redundancy must be based on the law otherwise – the same becomes wrong and if the grounds used to identify the affected employees are not as per the law the same becomes unfair.”

35. Section 40 of the Employment Act contemplates that in the entire process leading to the termination of an employee's employment on account of redundancy, there have to be two notices issued.



36. The 1<sup>st</sup> notice is a general notice, expressing the employer's intention to declare an employee [s] redundant. This notice is issued to the employee personally where she/he is not a member of a union and to the union [where the to be affected employee[s] is a member of the union], and a labour officer. It is in the notice that the employer brings out the reason[s] for the situation, and the persons to be affected. As the Court of Appeal stated in the case of *Kenya Airways Limited v. Aviation & Allied workers Union & 3 others* [2014] eKLR, it is upon issuance of this notice that the stage for consultation is set.
37. There is no doubt that the notice was neither given to the Claimant nor the Labour Officer. The Respondent's witnesses in fact admitted this in his evidence under cross examination.
38. It is during the consultation process that the parties consider the possibility of averting lose of job through redundancy. This taking into account the fact that lose of employment through redundancy is a "no fault" on the part of the employee, termination. Possibilities like the employee taking up an alternative employment are considered. The importance of a consultation process in redundancy situations cannot be downplayed. This is what the Court of appeal aptly brought out in the Kenya Airways Limited case [supra].

In my view, lack of genuine consultations or at all, would always speak to want of, procedural fairness in, and substantive justification of, the termination on account of redundancy.

39. The Claimant contended that prior to the termination of his employment he was not consulted. The Respondent's witness admitted in his evidence in cross examination that there were no consultations as between the Respondent and the Claimant.
40. The second notice is the one which expresses the termination of the contract of service and it is served on the employee individually. The notice just like the first notice has to be a 30 days' notice. The Respondent's notice purportedly issued on the 7<sup>th</sup> April 2017, which apparently was issued same day when the Claimant was paid "his terminal dues" cannot be said to suffice the notice contemplated under Section 40 [1] [6].
41. In the upshot, for lack of issuance of the notices that are contemplated under Section 40 [1] [6] of the Act and, consultations, I find that the termination of the Claimant on account of redundancy was procedurally unfair. I am not persuaded by the Respondent's submissions that there was adherence to the procedural fairness enveloped under Section 40 of the Act.
42. On substantive fairness, counsel for the Respondent submitted that in the circumstances of the matter the termination was justified, and that termination of employment on account of redundancy is a lawfully recognized mode of termination. He cited the case of *Daniel Muchiri Ndungu v. Comply Industries Limited* [2019] eKLR where the Court expressed itself:

"Termination of employment for operational reasons is accepted as a lawful mode of ending employment as such results from a business decision and does not relate to a disciplinary matter on the employee. Section 45 [2] [6] therefore provides that it is a fair reason to terminate employment due to operational reasons ....."

43. On this point the Respondent further placed reliance on the holding in *Kenya Airways Limited v. Aviation & Allied Workers Union Kenya & 3 others* [2014] eKLR, thus:

"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 fair 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 the termination was attributable to the redundancy – that the services of the employee has been rendered superfluous or that redundancy has resulted in abolition of office, job or loss of employment.”

44. This Court has considered that the Claimant was employed by the Respondent as a translator in December 2015, and that his employment was terminated almost one and a quarter years after. The reason being that the persons whom he was to assist in communication with others had a language barrier, but now had become capable of communicating with others without the aid of a translator. The Claimant did not assert that contrary to their assertion, they still needed, or were using a translator. I am persuaded that the reason for the termination of the Claimant’s employment was a genuine reason based on operational requirements of the Respondent. the Claimant’s service became superfluous.
45. The termination was therefore substantively justified.

### **Of the Reliefs**

46. The Claimant sought for a compensatory relief for unfair termination to the maximum extent that is contemplated under Section 49 [1] [c] of the *Employment Act*. The Respondent argues that this is a relief that is not available to the Claimant having received his “terminal dues” and signed an acknowledgment to that effect. That he too acknowledged that he had no more claim against the Respondent.
47. This Court is not persuaded by the argument by the Respondent. It is my view that the acknowledgment of the payment and the declaration relating to “no more claim” only related to the sums that were paid at that time under the various items. The declaration cannot be taken as a bar to his search for the statutory compensatory relief.
48. I have considered all the circumstances of this matter, including the finding hereinabove that the termination of Claimant’s employment was substantively fair, that the Respondent is faulted on having not adhered to the statutory procedure substantively, that the Claimant did not in any manner contribute to the termination and hold the view that the Claimant is entitled to an award of the compensatory relief but only to the extent of [five] months gross salary.
49. I am unable to hold that the Claimant is entitled to any award under the head “punitive and aggravated damages” as the Claimant did not lead any evidence that can justify the award.
50. In the upshot, Judgment is hereby entered in favour of the Claimant in the following terms:
- a) A declaration that the termination of the Claimant’s employment was procedurally unfair.
  - b.) Compensation for unfair termination, pursuant to the provisions of Section 49 [1] [c] of the *Employment Act*, Four [4] months’ gross salary, Kshs. 87,980.
  - c) Interest at Court rates from the date of this Judgment till full payment.
  - d) d. Costs of the suit.

**READ, DATED AND DELIVERED VIRTUALLY AT NAIROBI THIS 14<sup>TH</sup> DAY OF JULY, 2022.**

**OCHARO KEBIRA**



## **JUDGE**

In presence of

Mr. Kaaya for the respondent.

Mr. Kiptanui holding brief for Waiganjo for the Claimant.

## **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.

**OCHARO KEBIRA**

**JUDGE**

