



**Zewde v Sauti Moja Marsabit & another (Cause E003 of 2020)  
[2022] KEELRC 4101 (KLR) (28 September 2022) (Judgment)**

Neutral citation: [2022] KEELRC 4101 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MERU  
CAUSE E003 OF 2020  
DKN MARETE, J  
SEPTEMBER 28, 2022**

**BETWEEN**

**JACOB ALEMU ZEWDE ..... CLAIMANT**

**AND**

**SAUTI MOJA MARSABIT ..... 1<sup>ST</sup> RESPONDENT**

**BERNARD NDAMBO ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. This matter was originated by way of a statement of claim dated November 15, 2020. It does not disclose any issue in dispute on its face.
2. The respondent in a respondents response to claim dated January 18, 2021 denies the claim and prays that this be dismissed with costs.
3. The claimant's case is that the 1st respondent is a community based organization working with poor and vulnerable communities in Marsabit County. It is headed by the 2nd respondent as Executive Director.
4. The claimant's further case is that sometimes in December, 2016, he was employed by the respondent as a Project Manager in the Food and Nutrition Section. This entailed, *inter alia*, leading the food, nutrition affairs of the organization throughout the cycle, co-ordination of activities of project staff and other resources. He earned Kshs 112,270.00 including a medical allowance of Kshs 2,270.00.
5. The claimant's other case is that on August 30, 2019, he was issued with a one (1) year renewable contract w.e.f. August 31, 2020, renewable subject to availability of funds. This ordinarily runs from September 1, 2019 to August 31, 2020 of the following year.

The claimant in the course of his work identified various lapses in the administration system of the respondent and on highlighting these become a target of destruction and removal. He was ultimately



terminated from employment on May 4, 2020 on ground of redundancy. This was malicious, wrongful and illegal on the following grounds;

- a. The claimant was no report made to any labour office over the impending redundancy (sic);
- b. There was no criterion used to declare the claimant redundant having regard to the claimant's skills, abilities and reliability;
- c. The claimant was the only one who was declared redundant;
- d. The claimant was part of the management team by virtue of his position and at no point in time was there discussion on declaration of redundancies;
- e. The food and nutrition project was never discontinued, terminated or abolished; far from it the project was a three year (3) program, fully funded and budgeted with the bulk of the project awaiting implementation; the project was just about to enter its second year;
- f. There was no genuine redundancy but just a smokescreen by the 2nd respondent to send the claimant packing and replace him even before the ink had dried; and
- g. The respondents acted contrary to justice and equity.

**Further;**

24. The claimant contends that taken in totality, his termination was substantively, procedurally infirm and visited unacceptable violence to the principles of fair labour practice for reason he is entitled to compensation.
26. The claimant also contends that the respondents denied him housing allowance throughout his tenure contrary to Employment law.

**He Seeks Relief As Follows;**

- a. A finding that the notice of redundancy issued on May 4, 2020 was wrongful and unlawful.
- b. A finding that the claimant's termination was substantively and procedurally unfair.
- c. Salary for the months of May, June, July and August 2020 @ Kshs 112,750 x 4 =Kshs 451,000/-
- d. Staff Benefit Gratuity at 5% monthly salary for 21 months from December 2018 to August 31, 2020 at 5% of Kshs 112,750 x 21= Kshs 118,387.50
- e. 6 untaken leave days @ Kshs 5736.5 (Gross salary/20 working days a month) x6 =Kshs 33,825/-
- f. Housing allowance at the rate of 15% of the gross monthly salary for 21 months @ 15% x Kshs 112,750 x 21= Kshs 355,162.50
- g. Compensation for wrongful redundancy and unfair termination at 12 months Gross Monthly wage @ 12 x Kshs 112,750=Kshs 1,353,000/=
- h. Costs of this claim.
- i. Interest on the awards at court rate.
- j. An order that the respondents issue a certificate of service to the claimant.
6. The respondent in defence raises a myriad of issues, including capacity, competency and jurisdiction of involvement and placement of the course of action.



**They In Toto Deny The Claim And Posit As Follows;**

- i. The contract period was subject to performance and availability of funds,
- ii. The gross salary was inclusive of all benefits and allowances, and subjected to tax and other statutory deductions,
- iii. The contract was terminable by giving the employee one months written notice or being paid one months salary in lieu thereof,

**She Further Avers As Follows;**

- i. It is the employing body that made decision to terminate.
- ii. The claimant's position had undergone restructuring,
- iii. There was no funding from donors
- iv. The contract permitted termination by notice in any event
7. The respondent's further case is that the redundancy applied to the claimant was in accordance with his contract of employment and the law and that it was not his duty to dictate terms or working programs for the respondent.

Further, by agreeing to work during the notice period, the claimant had by his voluntary action conceded to termination or redundancy and is now estopped from raising fingers against it.

8. It was also contractual that his term would be terminated and therefore he lacked the capacity to extend this unilaterally. His entitlements were also limited to the contractual ones but declined to accept this. The respondents in the penultimate deny all relief as prayed. They also deny jurisdiction and aver that the appropriate court to determine this is at Marsabit and that the claimant and his counsel are not serving the overriding objectives set out in sections 1A and 1B by bringing this matter to Meru.
9. The matter came to court variously until the July 15, 2021 when the parties agreed on a determination by way of written submissions.

The issues for determination therefore are;

1. Whether there was a termination of employment of the claimant by the respondents.
2. Whether the termination of the employment of the claimant by the respondents was wrongful, unfair and unlawful.
3. Is the claimant entitled to the reliefs sought?
4. Who bears the costs of the claim?
10. The 1st issue for determination is whether there was a termination of employment of the claimant by the respondents. The claimant in his written submissions dated August 26, 2021 spells out a case of unfair and unprocedural termination of employment. On this, he seeks to rely on the authority of *Kenya Union of Commercial, Food & Allied Workers v Kisii Bottlers Limited* [221] eKLR where the court observed as follows;

“Section 45 of the *Employment Act* sets out instances in which terms of employment would be unfair. Unfair termination is where the employer fails to prove that the reasons for



termination is valid, or a fair reason related to the employee's conduct, or that he was terminated in accordance with the following of due procedure."

11. The claimant's termination of employment was occasioned by a restructuring program through which his position became a casualty. He was given a one months notice to prepare for his exit.

It is his case that this was not a genuine redundancy and was crafted to get rid of him. This is for the following reasons;

The respondents do not discount the claimant's averments that their working relationship took a sour turn and was frosty immediately preceding the notice. There is no evidence that the claimant's position was restructured on request by donors. There is no evidence of discontinuation of funding by the donor. That the respondent did a cosmetic face lift of the claimant's position from Project Manager to Project Officer and called for applications and filled this by June 5, 2020 which date coincided with the claimant's last working day as provided by the redundancy notice.

12. The claimant's further submission also mentions that the redundancy as alleged by the respondents did not comply with section 40(1)(b) of the Employment Act and no evidence has been adduced in court to this extent.

The respondent denies legal liability in that he has been sued in his own name and through the board Chairperson. The proper way should have been to name the office holders who would have been sued in a representative capacity.

13. It is also their case and submission that the termination of the claimant was contractually legitimate as it provided for termination midstream and without offering any reasons. Again, the redundancy involved was occasioned by restructuring and insistence of the donors. The claimant was always aware of this and his employment was subject to availability of funds.

The claimant's case overwhelms that of the respondent on a balance of probabilities. He has laid out a case discounting the procedural aspects of redundancy and faulted the respondents for not pursuing the religious ingredients of section 40 of the Employment Act on redundancy.

14. Again, the claimant posits a case of concocted redundancy designed to get him out of employment due to some internal disagreements with the management. This is not in any way controverted by the respondents. Their defence comes out as hollow and not convincing. I therefore find a case of termination of employment and hold as such.

For all intents and purposes, the termination of the employment of the claimant by the respondents was wrongful, unfair and unlawful. This is a fair conclusion based on the circumstances and evidence of the case. This answers the 1st and 2nd issues for determination.

15. The 3rd issue for determination is whether the claimant is entitled to the reliefs sought. He is. Having succeeded in a case unlawful termination of his employment, he becomes entitled to the reliefs sought.

I am therefore inclined to allow the claim and order relief as follows;

- i. A declaration be and is hereby issued that the termination of the employment of the claimant by the respondents was substantively and procedurally unfair.
- ii. One (1) months salary *in lieu* of notice .....Kshs 112,750.00.
- iii. Six (6) months salary as compensation for unlawful termination of employment – Kshs 112,750.00 x 6 months = .....Kshs 676,500.00.

Total of claim ..... Kshs.789,250.00



iv. The costs of the claim shall be borne by the respondents.

**DATED AND DELIVERED AT NYERI THIS 28TH DAY OF SEPTEMBER 2022.**

**D.K.NJAGI MARETE**

**JUDGE**

Appearances

Mr.Muriithi instructed by Muriithi & Company Advocates for the Claimant/respondent.

Mr.Mwirigi instructed by Mukira Mbaya & Company Advocates for the Objector/Respondent.

