



**Mwashigadi v Highlands Drink Limited (Cause E046 of 2021)
[2022] KEELRC 13141 (KLR) (31 October 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13141 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
CAUSE E046 OF 2021
DKN MARETE, J
OCTOBER 31, 2022**

BETWEEN

MEHETABEL M'MBONI MWASHIGADI CLAIMANT

AND

HIGHLANDS DRINK LIMITED RESPONDENT

JUDGMENT

1. This matter was brought to court *vide* a Memorandum of Claim dated September 13, 2021. The issues in dispute are therein cited as;
 - i. Unlawful, wrongful and Unfair Termination from Employment
 - ii. Breach of Employment Contract and *Fair Administrative Action Act*
 - iii. Unfair labour practices
 - iv. Failure to pay terminal dues
2. The Respondent in a Memorandum of Response dated March 29, 2022 denies the claim and prays that the same be dismissed with costs.
3. The claimant's case is that at all material times during her employment with the Respondent, he served loyally, faithfully and exceptionally without any disciplinary issues and oversaw the Respondent's business growth throughout Kenya.
4. It is the claimant's other case that on October 23, 2013, he was employed as an Area Business Manager in the Sales Department and served under the Head of Sales and Marketing at a salary of Kshs.120,000/- and a car allowance of Ksh.45,000.00.
5. The claimant further avers that she diligently performed her duties in the position of Area Business Manager, completed the probation period and was confirmed on permanent basis as the Sales Manager



of the Respondent at the coastal region of Kenya. By reason of her outstanding service and performance in her position, she earned salary increments over the years and later in November 2019, she was promoted to the position of General Manager Trade earning a gross salary of Kshs.513,357.00 which position she held until when she was unfairly terminated on the ground of role redundancy.

6. It is her further case that on April 6, 2021, while she was on her annual leave away from Nairobi, the Respondent, without prior notice and or reasons, recalled her from her leave and demanded that she meets the Chief Executive Officer in the morning of April 7, 2021.
7. Further, she comes out as follows; On April 7, 2021 and upon meeting the CEO she was without any reasons particulars, notice or hearing asked to resign which she declined. She was referred to the Human Resource Manager for directions to resign or in the alternative appropriate action being taken against her. The Human Resource Manager accorded her an explanation of the basis and reason on the particulars of resignation but she was adamant and declined so to do. On April 12, 2021 she received a call from the Respondent HR Manager with directions to check email for communication that the Respondent had declared her position redundant. Upon further scrutiny, she realised that the CEO had already removed her from the Respondent Management Whatsapp Group which he was administrator. This was an indication of termination from employment. The email disclosed a termination of her employment on account of redundancy. Her position was Head of General Trade yet the position declared redundant was General Trade Manager South which position she had never held or served under.
8. The claimant's further case is that her purported termination on grounds of redundancy was an afterthought and flawed in law and facts. This is as follows;

Particulars of Unlawful and Unfair Termination, Breach of Contract and Statute

- a. Failure to hold consultation with the claimant prior to the purported role redundancy.
 - b. Termination of the claimant's contract without notice giving justifiable cause or reason to the claimant.
 - c. Failure to explain reasons of termination to the claimant in presence of her representative and or afford the claimant opportunity to comment on the said reasons prior to the purported role redundancy.
 - d. Failure to comply with section 40 of the *Employment Act* in purported restructuring the Respondent and or alleged termination of the claimant on alleged redundancy.
 - e. Termination of the claimant as a person on alleged redundancy yet without declaring the claimants employment position redundant.
 - f. Failure to pay the claimants terminal dues as per the law and the claimants contract of employment.
 - g. Discriminating the claimant in the purported termination of employment.
9. It is her case that the purported termination of her employment on grounds of redundancy was not only malicious and an unfair labour practice but also fails the legal threshold of section 40 of the *Employment Act, 2007* on redundancy. Again, this was a violation of Articles 41 and 47 of *the Constitution of Kenya, 2010* and as read with section 4 and 5 of the *Fair Administrative Actions Act*.



10. The claimant's further avers as follows; That her letter of termination was undated. The Respondent failed, defaulted and or deliberately failed to settle the claimant's terminal dues as per the law by a computation of the same based on basic pay instead of gross pay thus denying her the rightful entitlement on the subject.

She claims thus,

- i. Service pay at the rate of Kshs.513,357/30 days x 15 days x 7 years) less Kshs.1,312,500 paid.....Kshs. 484,249.50
- ii. 3 month in lieu of notice at the rate of
Kshs.513,357 less Kshs.375,000 paid.....Kshs.1,165,071.00
- iii. Kshs.1,119,642 for 64.5 accrued leave days' pay less Kshs.709,130.00.....Kshs. 410,512.00
Sub-Total..... Kshs.2,059,832.50

She prays thus;

- i. A declaration that the purported immediate termination of the claimants employment at the Respondent's company and all other consequential actions arising therefrom contrary to the *Employment Act*, the *Fair Administration Actions Act* and *the Constitution* amount to wrongful and unfair termination, unfair labour practice, illegal, unlawful, null and void.
- ii. Compensation for wrongful dismissal and unfair termination equivalent to 12 months' salaries being 12 x Kshs.513,357.00 amounting to Kshs.6,160,284.00.
- iii. Service pay at the rate of Kshs.513,357/30 days x 15 days x 7 years) less Kshs.1,312,500 paid.....Kshs. 484,249.50
3 month in lieu of notice at the rate of Kshs.513,357 less Kshs.375,000 paid.....Kshs.1,165,071.00
Kshs.1,119,642 for 64.5 accrued leave days' pay less Kshs.709,130.00.....Kshs. 410,512.00
Sub-Total..... Kshs.2,059,832.50
- iv. Interest on (b) and (c) at court rates from the date of judgment and 30/04/2021 respectively until payment in full.
- v. Cost of this suit.
- vi. Such other and further relief as this Honourable court may deem just and fit.

11. The Respondent agrees with the employment particular as enunciated in the claim.

12. The Respondent's further case is that in addition to the contract of employment, the parties and also signed an Employee Non-Disclosure Agreement. Again, after six months' probation period, the claimant's employment was confirmed to be on permanent and pensionable basis, and she was later promoted to the position of Head of General Trade.

13. It is the Respondent's further case that on or about early 2021, the Respondent embarked on the process of corporate restructuring and right-sizing of the company to abolish some offices which were no longer necessary and sustainable to the company. The restructuring and down-sizing procedure



resulted to reduced headcount across function and affected various roles of several employees in the Sales and Marketing Department and Finance Department including the claimant herein.

14. The Respondent further case is that on April 12, 2021, the Respondent gave the claimant a one month's written redundancy notice notifying her that her position was going to be declared redundant because it was not sustainable as the roles did not turn out as expected by the company. In the said notice, the claimant was further advised that upon separation, she would be paid the following terminal dues by the company;-
 - i. Monthly salaries up to and including April 12, 2021.
 - ii. Any unutilized annual leave days, which stood at 64.5 days as at April 12, 2021.
 - iii. Bonus balance of Kshs.1,012,600.00
 - iv. Severance pay of 15 days' pay for every completed year of service.
 - v. Three (3) months' salary in lieu of notice.
15. This *in toto* is a compliance with section 40 of the [Employment Act, 2007](#) on redundancy.
16. In the penultimate and in further response to paragraphs 12 and 13 of the Memorandum of Claim, the Respondent states that:-
 - i. Termination of the claimant's employment was done according to the laid down procedure stipulated by the law and cannot therefore be said to be wrongful, unlawful and/or unfair.
 - ii. The Respondent issued the claimant with a redundancy notice.
 - iii. The Respondent issued the labour officer with a redundancy notification.
17. The issues for determination therefore are;
 1. Whether the termination of employment of the claimant was wrongful, unfair and unlawful.
 2. Whether the claimant is entitled to the relief sought.
 3. Who bears the costs of this cause.
18. The 1st issue for determination is whether the termination of employment of the claimant was wrongful, unfair and unlawful. The claimant in her opener submission seeks to rely on section 2 of the [Employment Act](#) and Section 2 of the [Labour Relations Act](#) which 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.”
19. She further seeks to rely on the authority of [Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others](#) (2014) eKLR, the court observed thus;
 18. There are two broad aspects of this definition. The first one is that the loss of employment in redundancy cases has to be by involuntary means and at the initiative of the employer. It should not be a contrived situation. It has to be non-volitional. I understand this to refer to a situation in most cases an economic downturn, brought about by factors beyond the control of the employer, which leaves the employer with no option but to take an initiative the consequence of which will be inevitable loss of employment.



19. The second aspect is that the loss of employment in redundancy has to be at no fault of the employee and the termination of employment arises “where the services of an employee are superfluous” through “the practices commonly known as abolition of office, job or occupation and loss of employment.” In this case, what I understand as required to be determined in this aspect of the definition of redundancy is whether the appellant abolished the offices, jobs or occupations of the affected employees resulting in their services being superfluous hence their loss of employment. Corollary to that it is the justification for that abolition, if the appellant indeed abolished their offices. Determination of these two aspects will, determine the first issue of whether or not the redundancy in this case was necessary.
20. The claimant again submits in reliance on Article 35 (1) (b) of *the Constitution* of Kenya, 2010 provides each and every citizen the rights to information held by another person and required for the exercise or protection of any right or fundamental freedom. It is therefore important that this Honourable court does not allow Employers to arbitrarily make changes that in effect affect their employees and without informing their employees about them while the employees continue performing duties that they have been doing under the roles they allegedly previously held, and only informing them while its absolutely favourable to them.

Further,

Section 40 of the *Employment Act*, 2007 provides as follows;

“40. Termination on account of redundancy

1. An employee 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 seniority in time and to the skill, ability and reliability of each employee 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 redundant paid off the leave in cash;
- 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."

21. The claimant foments this by relying in the case of *Hebson Ngaruiya Waigi v Equitorial Commercial Bank Limited* (2013) eKLR, the court observed thus;

- h. "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 as a result will be deemed unprocedural and unfair. Any termination of an employee following a declaration of the law 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 law, the same becomes unfair."

22. It is the claimant's case that termination of employment in violation of section 40 above as in this case is unfair and unlawful.

23. She further seeks to rely on the authority of *Mary Nyawira Karimi v Pure Circle (K) Limited* (2018) eKLR, the court observed thus,

Even where an employer intends to pay for the notice period, the notice of intended redundancy must issue to the employees noting the extent and reasons leading to the same. It does not simply suffice that an employer picks on a specific employee and proceeds to attach a reason of redundancy for termination of employment as held in *Agnes Ongadi versus Kenya Electricity Transmission Company Limited* (2016) eKLR the court held;

A restructuring or abolition of office are not matters that just happen. They require serious considerations by the employer and based on the positions held by various officers, all efforts must be shown to have been made to retain or redeploy such officers as to abolish office and then advertise for recruitment of person with similar skills or abilities without giving a consideration internally. Would be to abuse the very essence of a restructuring and purpose of abolition of office as held in *Aviation and Allied Workers Union 7 others versus Kenya Airways Limited*, Cause No.1616 of 2014. This position is given affirmation by the Court of Appeal in the same case upon the employer going on appeal as cited above.

24. In all this, the claimant summed up his case of unlawful termination of employment.

25. The Respondent also submits in reiteration of her case. She posits that the termination of claimant's employment on grounds of redundancy fell within the ambit of section 45 (a), (b) and (c) of the *Employment Act*, 2007 and was therefore fair and lawful. She puts it thus;

26. Section 45 (1) of the *Employment Act*, 2007 outlines the conditions to be considered in determining whether termination is fair as follows;

"Termination of employment by an employer is unfair if the employer fails to prove-



- a. that the reason for the termination is valid;
- b. that the reason for the termination is a fair reason-
 - i.;or
 - ii. based on the operational requirements of the employer; and
- c. that the employment was terminated in accordance with fair procedure.”

27. The Respondent in further buttress of her case seeks to rely on the authority of Walter Ogal Anuro v Teachers Service Commission (2013) eKLR, the court observed thus;

“...for a termination of employment to pass the fairness test, there must be both substantive jurisdiction and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer to effect the termination.”

28. The Respondent further submits compliance with section 43 of the Employment Act, 2007 provides that;

“(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.

2. The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.”

29. It is her case that she offered the reasons for termination to the claimant beforehand.

30. The Respondent again buttresses her case by relying on section 2 of the Employment Act which 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.”

31. The Respondent further seeks to rely on the authority of Africa Nazarene University v David Mutevu and 103 others (2017) eKLR, the court observed thus;

“We agree that construction as well as observation of section 40 1(b) says nothing about the length of the notice or the contents. In our view however, the only difference between Section 40(1) (a) and 40(1) (b) is whether an employee is a member of a trade union or not a proper construction of both sections would show that the phrase:- ‘the reasons for and the extent of intended redundancy not less than a month prior to the date of redundancy’ is common to both kinds of employees.”



32. Further, in *Africa Nazarene University (supra)*, the court held as follows;

“As stated earlier, the trial court was of the view that after the issuance of the notice under sub-section (b), the employer was obligated to issue a second notice under subsection (f). With respect, we differ with that construction and concur with the appellant that the section relates to payment in lieu of notice. Admittedly, the subsection is inelegantly drafted as it talks about “payment of one month’s notice” or “payment of one month’s wages in lieu.” It is all about payment. If it was about a second notice, it should surely have said so in so many words.”

33. The Respondent in an undated letter addressed to the claimant and headed Role Redundancy informed her that *inter alia* the position of General Trade Manager South, earlier in the year created and awarded to herself as the first incumbent had been rendered redundant. Yet in another letter dated November 1, 2019 and headed Statement of Change- Promotion And Salary Adjustment she had been placed to the position of Manager General Trade. It is no wonder that the claimant complains that her position was never rendered redundant, or at all.

34. The claimant case is expressly formulated in her demand letter dated June 9, 2021 to which Respondent replies vide hers dated 13th July instant. In the response, the Respondent fails to positively answer the salient issues raised by the claimant on her redundancy. She merely denies irregularity and illegitimacy of the purported redundancy and leaves it at that.

35. The claimant brings out a narration of forceful overtures towards resignation by the Respondent’s CEO and further threats of adverse action in the event of failure to resign. This is not addressed by the Respondent in answer to the claim. Instead, she merely states, submits and reiterates a case of redundancy thus justifying the termination.

36. I agree with the claimant’s submission on the authority of *Mary Nyawira Karimi vs Pure Circle (K) Limited, supra*. A restructuring or abolition of office is not an everyday affair. It is a one of situation that requires serious considerations on the part of the employer. This is because of the consequences that would face employees affected by such move. It is no wonder that section 40 of the *Employment Act, 2007* is so articulate on the subject. It issues mandatory terms that have to be employed in a case of redundancy.

37. In the *Authority of Cammish v Parliamentary Service 12*, the Chief Justice of New Zealand succinctly expressed the place of redundancy as follows;

“Consultation has to be a reality, not a charade. The party to be consulted must be told what is proposed and must be given sufficiently precise information to allow a reasonable opportunity to respond. A reasonable time in which to do so must be permitted. The person doing the consulting must keep an open mind and listen to suggestions, consider them properly, and then (and only then) decide what is to be done.” (Emphasis supplied)

38. This is the essence of the process of redundancy. It is a serious affair that affords backlash to both the employer and the employee. This is the more why it should be applied with an open mind. In the interest of the parties and the public good involved. It should never be a callous enterprise to rid off unwanted employees as is the present case.

39. In the circumstances of this case, the Respondent brings out two letters dated April 12, 2021 and 10th May instant. The first one is on role redundancy while the second one is on redundancy notification. There is no indicator that the claimant was served with these letters. She does not expressly



acknowledge the same. I must admit that this was too casual an approach on this broad and matter of life subject.

40. In finality, the Respondent failed to comply with the requirements of section 40 of the Employment Act, 2007 on redundancy. A case of unlawful termination of employment therefore ensues and I find as such.
41. The 2nd issue for determination is whether the claimant is entitled to the relief sought. She is. Having won on a case of lawful termination of employment she becomes entitled to the relief sought.
42. I am therefore inclined to allow the claim and award relief as follows;
 - i. A declaration be and is hereby issued that the termination of the claimants employment at the Respondent's company and all other consequential actions arising therefrom contrary to the Employment Act, the Fair Administration Actions Act and the Constitution amount to wrongful and unfair termination, unfair labour practice, illegal, unlawful, null and void.
 - ii. One (1) month in lieu of notice at the rate of
Kshs.513,357 less Kshs.375,000 paid.....Kshs.138,357.00
 - iii. Six (6) months compensation for unlawful termination of employment= Kshs.513,357.00 x 6 amounting toKshs.3,080,142.00
 - iv. Service pay at the rate of Kshs.513,357/30 days x 15 days x 7 years) less Kshs.1,312,500 paid.....Kshs. 484,249.50
 - v. Accrued leave for 64.5 days'= Kshs.1,119,642.00 less Kshs.709,130.00..... Kshs. 410,512.00
Total of claim..... Kshs.4,113,260.50
 - vi. Interest at court rates from the date of judgment till payment in full.
 - vii. The cost of this cause shall be borne by the Respondent.

DATED AND DELIVERED AT NYERI THIS 31ST DAY OF OCTOBER 2022.

D.K.NJAGI MARETE

JUDGE

Appearances

1. Mr. Olala instructed by Litoro & Omwebu Advocates for the Claimant.
2. Mr. Rotich instructed by Nyaang & Mugisha Advocates for the Respondent.

