



REPUBLIC OF KENYA



KENYA LAW

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**Odumo & 29 others v Steel Makers Limited (Cause 202 of 2018)
[2022] KEELRC 12841 (KLR) (14 October 2022) (Judgment)**

Neutral citation: [2022] KEELRC 12841 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 202 OF 2018
B ONGAYA, J
OCTOBER 14, 2022**

BETWEEN

**RAPHAEL OTIENO ODUMO 1ST CLAIMANT
NYAMANI NDURYA KADZOYO 2ND CLAIMANT
RUWA GWEDE NYENJE 3RD CLAIMANT
JAMES ONYANGO OJIAMBO 4TH CLAIMANT
ALI KILUMO KOMBE 5TH CLAIMANT
PATRICK CHOMBO WALE 6TH CLAIMANT
SAMWEL MISIKO WENANI 7TH CLAIMANT
WALTER JARED JAOKO ODUMO 8TH CLAIMANT
ALFRED MARANO 9TH CLAIMANT
MURENJE MOGA MURENJE 10TH CLAIMANT
PATRICK MWANGI NYAMBURA 11TH CLAIMANT
PATRICK OPUKA MBAYI 12TH CLAIMANT
SAMUEL KAMAU WAITITU 13TH CLAIMANT
PHILIP OLUM ATITO 14TH CLAIMANT
JOEL MUSEMBI KITIVI 15TH CLAIMANT
MOHAMED MWINYI MOYO 16TH CLAIMANT
ALI LUMBWA MBINU 17TH CLAIMANT
PIUS MUTUNGA MUNGUTI 18TH CLAIMANT
MOHAMED TSUMA MGANGA 19TH CLAIMANT**



NICODEMUS DZUYA NDUNGI	20 TH CLAIMANT
NYERERE RHUMBA LEWA	21 ST CLAIMANT
TITUS NTHIGA MURINGI	22 ND CLAIMANT
KIZITO MWENESI SAGALA	23 RD CLAIMANT
NZAKA MWALUKONGO MZUNGU	24 TH CLAIMANT
CHIFU BIMBA KOMBO	25 TH CLAIMANT
BEMAHCHE JAMES NZAKA	26 TH CLAIMANT
MVUKO ZIRO NDUNE	27 TH CLAIMANT
DAVID MLEVU MWASARU	28 TH CLAIMANT
CHARLES OKAYO LIGAWA	29 TH CLAIMANT
KOMORA ALFAYO ZABLON	30 TH CLAIMANT

AND

STEEL MAKERS LIMITED	RESPONDENT
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JUDGMENT

1. The claimant filed the memorandum of claim on April 5, 2018 through Oyugi Kitoo & Company Advocates. The claimants' case is as follows. They are all members of the trade union known as the Kenya Engineering Workers Union (KEWU) and their employment with the respondent was governed by the collective bargaining agreement (CBA) concluded between KEWU and the respondent. At all material times they were employed by the respondent at its factory at Mazeras, serving in the various departments and earning monthly salaries per the exhibited respective pay slips. They worked for the respondent until September 1, 2015 when their employment was abruptly terminated under unclear circumstances and on account of alleged redundancy as per the letters dated August 26, 2015 and a related circular duly exhibited. It is their case that an alleged meeting about the redundancy did not take place or that it was a ploy by the respondent to evade consequences of their illegal actions. The meeting was a sham as no procedure was followed or any shop steward and branch representatives consulted. It is the claimant's case that the declaration of redundancy was contrary to section 40 of the [Employment Act, 2007](#) and the provisions of the CBA because of the following grounds:
 - a. The reason for redundancy does not meet the definition of redundancy in section 2 and 40 of the [Act](#).
 - b. The mandatory 30 days' notice under section 40 of the [Act](#) was not issued.
 - c. The respondent did not consider requirements of the law and CBA as to skills, seniority, ability, reliability but instead made a blanket declaration of redundancy to victimise the claimants.
 - d. The severance pay was wrongly calculated at 15 days instead of 16 days as provided in the CBA.
 - e. The respondent's plant is still in operation and continues to hire new employees and the alleged redundancy was a malicious targeting of the claimants to get rid of them due to their support of the branch union officials.



- f. The claimants have not been paid their rightful terminal dues contrary to article 41(1) of the [Constitution 2010](#) and the [Employment Act, 2007](#).
2. Each of the claimants claimed and prayed for judgment against the respondent for:
 - a. 12-months' wages as compensation for unfair or unlawful termination.
 - b. Severance pay rightly calculated as per the CBA clause 29.
 - c. 8-months' salary arrears as per the new CBA.
3. For each claimant the amounts for compensation and severance payment claimed were particularised but no specific amount was pleaded under the heading of 8-months' salary arrears as per the new CBA. The claimants also prayed for costs of the suit.
4. The respondent filed the response to the statement of claim on January 31, 2018 through M.L. Alwenya & Company Advocates. On August 17, 2021, the respondent filed a notice of change of advocates to Musa, Boaz & Thomas Advocates. The respondent admitted employing the claimants and the CBA signed on December 20, 2013 applied. The respondent further pleaded as follows. It manufactures steel and steel products by smelting scrap metal and steel billets which are largely sourced from overseas international markets. Towards the end of 2013 the respondent started experiencing a downturn in the availability and supply of scrap metal and steel billets raw materials from the overseas markets and which negatively affected the respondent's production capacity. In 2014 and 2015 the situation became acute with the respondent's production reducing to almost 50% thereby forcing the respondent to restructure operations and to downsize the man power to help manage the difficult times. The problem of getting raw materials persisted to 2017 forcing the respondent to scale down the number of employees by declaring some redundant. The respondent closed its operations at her Athi River Plant and some departments at its main plant at Mazeras. Thus the claimants and other employees were rendered redundant as per provisions of section 40 of the [Employment Act, 2007](#) and the CBA dated November 20, 2013.
5. In particular, the respondent pleaded as follows:
 - a. By the letter dated July 7, 2015 the Secretary General of KEWU was notified, with a copy to the County Labour Officer, that 49 employees would be declared redundant on account of lack of raw materials and difficult financial times due to reduced production. A meeting was requested for July 23, 2015 at which the respondent satisfied the union on the reasons for the redundancy.
 - b. By the letter dated July 9, 2015 the County Labour Officer responded to the respondent's letter giving the go ahead.
 - c. The consultations with the union on July 23, 2015 saw employees to be declared redundant reduce from 49 to 39 including the claimants. On August 22, 2015 the respondent placed a circular on its notice board for general information of all employees listed as affected by the redundancy. Individual employees then received the letter dated August 26, 2015 on the effective date of the redundancy and the terminal dues to be paid.
 - d. The terminal dues were computed and the affected employees summoned on September 4, 2015 to collect the same in presence of the Union Shop Steward, the Kilifi County Labour Officer, and the respondent's representatives. The claimants attended and peacefully received their final dues.



- e. The respondent acknowledged the error in calculating the severance pay on 15 days instead of 16 days. The claimants have been asked to collect their balances but have failed to do so.
 - f. The redundancy was as per the CBA and section 40 of the [Employment Act, 2007](#) so that the claim for unfair termination and compensation is unfounded.
 - g. The claim for 8-months' pay under new CBA is unfounded and unjustified.
6. The respondent prayed that the claimants' suit be dismissed with costs.
 7. At the hearing on May 18, 2022, by consent it was ordered that the only issues for determination are:
 1. Whether redundancy was not in accordance with section 40 of the [Employment Act, 2007](#).
 2. Whether claimants are entitled to compensation for unfair termination as prayed for.
 3. Issue of 8-months' salaries as claimed.
 4. Issue of costs.
 8. The 1st claimant was the claimants' witness No. 1(CW1). His evidence was that there were two CBAs. The first was for the period 2013 to 2014 and the second one for January 2015 to December 2016. His case was that they were terminated on August 31, 2015 and so they are entitled to 8-months' salary increment per the second CBA for January 2015 to December 2016. As to how they were laid off, his evidence was that on August 22, 2015 he saw a list of names for staff being rendered redundant on the respondent's notice board and it was to be effective September 1, 2015. At that time, he had been elected as the Regional Union Representative, Mombasa Branch – as Branch Chairman. He testified that the union headquarter officials had a dispute with his regional officials. Thus the headquarters officials got the employer to declare the branch officials redundant.
 9. In cross-examination, CW1 testified that not all the claimants were regional branch officials but were all union members. He confirmed that the second CBA was signed in 2016 when all claimants had left employment. Further per clause 5 of that second CBA wage increase was only for staff in service as at November 18, 2016 whereas, on that date all the claimants had left employment. CW1 confirmed that the wording of the CBA locked out the claimants from benefiting from the salary increment. CW1 also confirmed seeing minutes of the meeting held on July 23, 2015 and the General Secretary of the union had attended. The minutes showed that the union was informed about the looming redundancy. The Kilifi County Labour Officer was also present. CW1 also confirmed that there was a letter dated July 7, 2015 to the union Secretary General and copied to the Kilifi County Labour Officer about the looming redundancy. Further by the letter of July 9, 2015 the County Labour Officer confirmed that the strike could proceed.
 10. The respondent witness No. 1 (RW1) was the Kilifi County Labour Officer at the time one Moses Haron Kellah. He confirmed receiving the letter dated July 7, 2015 from the respondent about a proposed redundancy. On September 4, 2015 he was at the respondent's premises when all employees declared redundant were paid final dues. He witnessed their acknowledgement of the payment.
 11. The respondent witness No.3 (RW3) was the Group General Manager one Samuel Vasand Johnson. His testimony confirmed the issuance of the redundancy notice to the union and labour officer as well as the meeting with union Secretary General prior to the redundancy taking effect - and as was pleaded for the respondent. His further testimony was that the respondent's management ran the company and were not involved in rivalry of union officials and related conflicts. Further, in the ensuing redundancy process the respondent dealt with the union national Secretary General being the union



- ultimate authority. RW3 testified that the selection criteria in clause 29 (d) of the CBA was followed because the merits of claimants and their abilities was based on consultation with supervisors and their managers and claimants. The recommendations had been by the works manager and the supervisors. After such considerations and discussions, only 39 employees were declared redundant and they were from different departments. Like for 1st claimant (also CW1) he was a first aider and his position was abolished because supervisors and other staff with other substantive roles were trained as first aiders and in event of an accident, staff would be rushed to hospital.
12. To answer the 1st and 2nd issues for determination, the court returns that the redundancy was in accordance with clause 29 (d) of the CBA and the provisions of section 40 of the *Employment Act, 2007* as no compensation is due. There is no reason to doubt that the respondent served the area labour officer and the secretary general of the union the notice of looming redundancy as per the letter dated July 7, 2015. The union officials led by the secretary general and the respondent met on July 23, 2015. The redundancy was discussed. The reason for the redundancy namely difficult times the respondent was undergoing were acknowledged by the union secretary general one Charles Natili. There is no evidence to show that the claimants were identified for redundancy on account of being union branch officials. Indeed, CW1 confirmed that not all the claimants were such branch union officials. Further, the Court finds that there was no evidence that as at the time of redundancy the respondent's management was aware of any conflicts between the national and branch union officials. The evidence is that on 04.09.2015 each claimant signed acknowledging receipt of the final dues and acknowledging that the redundancy had been in accordance with section 40 of the *Employment Act, 2007* and the payment as per the provisions of the CBA. The Court finds that the claimants are thereby barred and precluded from renegeing on their own acknowledgement that the redundancy had been per section 40 of the Act including the selection criteria they purport to dispute about. The claimants have provided no material evidence to show that the selection criteria in clause 29 (d) of the CBA and section 40 of the *Act* on relative merits and ability of the employees and then seniority were not complied with. On the other hand, the respondent has shown that the union was consulted as per clause 29 (c) of the CBA. The Court returns that the termination by way of redundancy was not unfair both in procedure and substance. The respondent has shown that the statutory notice under section 40 of the Act was served upon the union and labour officer. Further, the reasons leading to the redundancy were fair as they existed as at the time of redundancy. The claim for compensation will collapse.
 13. To answer the 3rd issue for determination, the court returns that as per evidence by CW1 and RW3, clause 5 of the CBA effective January 1, 2015 and signed on November 18, 2016 provides that wage increase was for unionisable employees in employment as at on November 18, 2016. The claimants had left employment on September 4, 2015. The court finds that the wage increase did not therefore apply to the claimants and the prayer for 8 months' pay in wage increase will collapse.
 14. The parties failed to file their respective final submissions as was directed by the court. The respondent has since corrected the error in calculating severance payment. In the circumstances each party will bear own costs of the suit.
 15. In conclusion the suit is determined with orders each party to bear own costs of the suit.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 14TH OCTOBER, 2022.

BYRAM ONGAYA

JUDGE

