



**Chamara v Europer Tools Limited (Cause 416 of 2017)
[2022] KEELRC 13381 (KLR) (17 November 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13381 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 416 OF 2017
AN MWAURE, J
NOVEMBER 17, 2022**

BETWEEN

DAVID KAGALI CHAMARA CLAIMANT

AND

EUOPER TOOLS LIMITED RESPONDENT

JUDGMENT

1. The Claimant filed the memorandum of claim dated the 1st March 2017 on the 2nd March 2017 claiming unlawful redundancy and failure to duly pay his dues. He alleges that he has been working for the Respondent as a rider from 2012 and has rendered diligent service to the organization.

Claimants Case

2. The Claimant states that his dues were withheld as from 27th September, 2016. He avers that to date; he has not received his due totalling ksh 426,838/= and that the reason for redundancy is false as no other employee was affected except the Claimant and in fact after his termination, the position was filled and another driver Mr Samuel Maina was employed who worked for some time then left.
3. The Claimant says he was subjected to emotional distress in meeting financial obligations after Respondent denied to pay the Claimant's dues. The Respondent filed a memorandum of appearance dated the 3rd April 2017 which was filed on the 04th April 2017.

Respondent's Case

4. The Respondent says the Claimant was only employed afresh by the agreement made on the 10th December 2016 which commenced on 1st January 2016 for a further contract of one year. However in September 2016 there was reduction in business and the Claimant was declared redundant. The Respondent says this was communicated to him vide a letter dated 20th September 2016.



5. The Respondent asserts that upon the said redundancy declaration, in liaison with the labour office in Nairobi area, the Claimant's final computation was done in his presence and an amount payable of ksh 25,037 upon the deduction of the loan was to be paid. The Respondent says the Claimant refused to acknowledge by signing and receiving the said amount.
6. The Respondent avers that the Claimant was informed of the redundancy through the letter dated the 20th September 2016 and the Labour Officer was duly notified as required by the Employment Act 2007. The Respondent says that it fully complied with the law under section 40 of the Employment Act 2007 with regard to the redundancy procedures.

Claimant's Evidence

7. CW1 David Kagali Chamara gave sworn testimony and stated that he worked for the Respondent from 2013 to 2016. He testified that on the 20/9/2016 his boss Mr Savani Deepak wrote him a letter that work was low and gave him a written notice of one month but which was not copied to anyone else. That a labour officer then came to their office, counted his dues and told him to sign. He stated that he refused to sign. He states that he is the only person who got the letter and another person took over his work.
8. On cross examination, he said that his work was terminated vide a letter and he says he does not know if the labour officer was informed of his termination. He later stated that the labour officer came the following day and informed him that he was supposed to serve one month notice. He also stated that he used to deliver company goods and did not see the contract of Samuel Maina but was doing his work. He further says that he was not stealing petrol.
9. He further says that he was not paid his dues and was told to go for cheque in the labour office but did not go as he had not filed case in the labour office. He also said that he never saw a cheque of ksh 25,000/= and he has filed this case to get Courts assistance.

Respondent's Evidence

10. The Respondent made an application to be allowed to rely on the pleadings and witness statements and list of documents filed by the Respondent which was allowed. The parties were thereafter to file written submissions and Respondent did not tender any evidence in Court.

Claimant's written Submissions

11. The Claimant submits that his termination was wrongful and unlawful. He submits that the termination was in flagrant violation of Article 41 (1) and 47 (1) of the Constitution which entitles all persons to fair labour practices and fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. The Claimant states that this is because the Respondent did not cite any reason as provided under the Act for terminating the Claimant's employment. The Respondent never issued a notice to the Claimant and the area labour officer as required by section 40 of the Employment Act 2007.
12. The Claimant says that his termination was unfair as section 45 (1) provides that, no employer shall terminate the employment of an employee unfairly. The reason for the termination must be valid, that the reason for the termination is a fair reason and related to the employees conduct, capacity or compatibility or based on the operational requirements of the employer and that the employment was terminated in accordance with fair procedure.



13. The Claimant says that none of the above conditions were met by the Respondent, and they also failed to comply with the express provisions of section 40 of the [Employment Act](#) 2007 and the labour officer were not notified as required by the law with respect to redundancy.
14. The Claimant relied on the Court of Appeal case of [Thomas De la Rue \(K\) Ltd v David Opondo Omutelema](#) [2013], the Court of Appeal held that

“where the employee is a member of trade union, the notification is to the union and the labour officer at least one month before the effective redundancy date. Where the employee is not a member of the union, the notification must be in writing and to the employee and the local labour officer. Section 40 (b) does not stipulate the notice period as is the case in 40 (a), but in our view, a purposive reading and interpretation of the statute would mean the same notice period is required in both situations. We do not see any rational reason why the employee who is not a member of a union should be entitled to shorter notice.”
15. The Claimant contends that he was not given a proper notice nor did the Respondent give detailed reasons as to why he was declaring the Claimant redundant. He says that the letter did not even state why he was the only employee affected by the redundancy. The Claimant also relied on the case of [Kenya Plantation and Agricultural Workers Union v Harvest Limited](#) [2014] eKLR, that the employer must establish that all the parameters have been taken into account and in an objective manner.
16. The Claimant says that the Respondent unlawfully terminated his employment by failing to follow the laid down procedure as provided under section 40 of the [Employment Act](#) 2007 and thus inviting the provisions of section 45 of the [Employment Act](#) as regards unfair termination.
17. The Claimant also submitted that the Respondent did not discharge its obligation under section 10 (6) as read with 10 (7) and section 74 (1) (f) of the [Employment Act](#) by providing records to disprove the Claimant’s claims for leave and service pay. The Respondent did not provide any leave register to prove that the Claimant was not entitled to leave. The Claimant relied on the case of [Benard Wafula Sitokam v Jubilee Rafiki Hardware Limited](#) [2018] eKLR where the Court held that:-

“The employer has custody of employment records and if they do not provide the same then it is deemed that they chose to withhold from the Court evidence that would be unfavourable to them. The Claimant contends that the Respondent has not rebutted the Claimant’s claim by way of oral or documentary evidence with respect to leave.

Respondent’s Written Submissions

18. The Respondent submits that based on the written statements, it fully complied with the provisions of section 40(1) of the [Employment Act](#) 2007. That Exhibit 2, 3, confirms that the Claimant’s dues were correctly computed in liaison with the labour officer and a cheque of Kshs 25,037 after deductions was issued in favour of the Claimant who declined to collect the same, forcing the Respondent to avail the same to the labour office for the Claimant to collect.
19. The Respondent states that unpaid leave and service pay was duly paid based on the computation produced as exhibit 2. The Respondent says that due process having been followed, compensation for wrongful and unfair termination is not applicable under the circumstances. That due notice was issued by the Respondent before engaging on the redundancy process as provided for under section 40 of the [Employment Act](#), 2007 and the criteria for selection was very clear to the Claimant based on the required skills.



20. The Respondent contends that upon the reduction of business, the Respondent gave the Claimant one month notice vide letter for terminating his duties under the redundancy dated 20th September 2016, upon issuance of the same and advised the Claimant to collect his dues and to pay his loan advanced by the bank of Baroda failure of which the Respondent advised him that the same could be recovered from his final dues.
21. The Respondent says that it then did a computation deducting the loan amount and made a cheque to him but he declined to collect. The Respondent asserts that the letter was addressed to the labour officer Nairobi vide the letter dated the 12th August 2016 stipulating his duties and one Simon Maina did not replace the Claimant as the Claimant was a motorcycle rider and a salesman, performing distinct assignments.

Determination

22. It is common cause that the Claimant was terminated in his employment for reasons redundancy. In the notice dated the 20/09/2016, the Respondent says that due to reduced business it is giving one month notice in advance of the intention to terminate the claimant.
23. In *Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 Others* [2014] eKLR the Court of Appeal held that Section 40 (1) (a) stipulates.

“An employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions;- 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 termination”

.....the learned Judge of the High Court in the *Kenya Union of Commercial Food and Allied Workers v British American Tobacco* Cause No. 143 2008 outlined the manner in which redundancy consultations should be conducted when he stated,

“The legal obligation on the parties to consult on the matter is designed to enable the parties to explore ways and means of minimizing the social and economic impact of the loss of jobs. The obligation is primarily imposed on the employer. The union’s duty is to make reasonable counter proposals to the employer’s proposals with a view to giving the affected employees a “soft landing ground”. In our view such consultations must be meaningful and held within the true spirit of collective bargaining. The employer ought to give the union an opportunity to influence its decision. There must be a genuine attempt to resolve the matter through objective consideration of the proposals generated by the parties to mitigate the harsh impact of redundancy.

24. In *Mary Nyawira Karimi v Pure Circle (K) Limited* (2018) eKLR the court held that it does not simply suffice for an employer to pick upon a specific employee and attach a reason for the termination as held in *Agnes Ongadi v Kenya Electricity Transmission Company Limited* [2016] eKLR where it was held that:

“A redundancy must therefore be justified before an employer can commence recruitment of new officers to replace existing employees who have on-going contracts of employment and hold substantive offices in similar capacity as the advertised position. The justification of the redundancy is upon the employer as this cannot be applied as a general term so as to



lay off an employee on a whim as held by the Court of Appeal in *Kenya Airways Limited v Aviation and Allied Workers Union Kenya and Others* [2014] eKLR”

25. In the claim before Court, there is no evidence that demonstrate only the Claimant’s position became affected with the redundancy with no chance of redeployment. Also, all that is said in the redundancy letter is that there were financial challenges the Respondent was facing with no elaboration why the Claimant was the specific target of the redundancy and criteria applied to confirm he was the one to go. A redundancy cannot be undertaken to target a specific employee as this would run counter to what is envisaged under section 43(2) of the *Employment Act* 2007. The Court therefore finds the termination unlawful. Section 2 of Employment Act define redundancy as follows:-

“ redundancy 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 practices commonly known as abolition of office, job or occupation and loss of employment;

The understanding of section 2 of *Employment Act* is that redundancy is not aimed at declaring a person redundant but a position.

26. The Court is reliant on the often cited authority of *Mary Nyawira Karimi v Pure Circle (K) Limited* (2018) eKLR where Court held:

“ it does not simply suffice for an employer to pick upon a specific employee and attach a reason for termination”

The Court is in agreement also with the case of *Agnes Ongandi v Kenya Electricity Transmissions Company Limited supra*.

“ A redundancy must therefore be justified before an employer can commence recruitment of new officers to replace existing employees who have on-going contracts of employment and hold substantive offices in similar capacity as the advertised position. The justification of the redundancy is upon the employer as this cannot be applied as a general term so as to lay off an employee on a whim as held by the Court of Appeal in *Kenya Airways Limited v Aviation and Allied Workers Union Kenya and Others* [2014] eKLR”

27. As earlier said the Respondent did not adhere to procedural and mandatory requirement provided in employment laws and in particular section 40 of the *Employment Act* 2007. It also failed to follow fair administrative action as he did not discuss the redundancy process with the Claimant and he did not give him notice of redundancy. He further did not communicate to him the criteria applied to declare his position redundant.
28. In the case of *Jan Khalechi v Oxford University Press E.A Limited* [2013] eKLR the Court held that section 40 of *Employment Act* gives conditions precedent before one is declared redundant. It went on to say that the conditions are mandatory and not left to the choice of the employer.
29. The case before the Court here is one where the employer failed to adhere to the mandatory provision of the law related to redundancy. The Court therefore finds the act of declaring the Claimant redundant without adhering to the law can at best only be declared unlawful. Subsequently judgment is entered in favour of the Claimant.



Remedies

30. Having entered judgment in favour of the Claimant the court proceeds to award him the following remedies:-
- a. One month salary in lieu of notice Kshs 22,816/-
 - b. Unpaid salary for September 2016 Kshs 22,816/-
 - c. Remaining contract period pay is already covered in b above.
 - d. 21 days leave balance is awarded as Respondent failed to prove they paid his full leave Kshs 15,971/-
 - e. The prayers for the complete year of service is not clear and is declined.
 - f. Leave days balance for each completed year is not clear and is declined. Also general damages not applicable and so is declined and in fact claimant is awarded severance pay.
 - g. Instead Claimant will be awarded severance pay for 4 year and is $\frac{1}{2}$ pay for every year worked $22,816/2 \times 4 = 45,632/-$
 - h. Costs are awarded to the Claimant. Interest is also given at Court rates from date of judgment until full payment.
 - i. The upshot of the Claimant's award is Kshs 122,445/- this will be less the amount of loan admitted by the Claimant owed to the bank of Baroda Kshs 32,395/- as per his advocates letter of 7th February 2017 by P. Mugalo advocates. Therefore balance due is Kshs. 90,050/-

DELIVERED, DATED AND SIGNED IN NAIROBI THIS 17TH NOVEMBER, 2022.

ANNA NGIBUINI MWAURE

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 15th March 2020 and subsequent directions of 21st 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 had 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.

ANNA NGIBUINI MWAURE

JUDGE

