



Aungo & another v Pathfinder International (Cause 63 & 12 of 2019 (Consolidated)) [2022] KEELRC 13074 (KLR) (4 November 2022) (Judgment)

Neutral citation: [2022] KEELRC 13074 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 63 & 12 OF 2019 (CONSOLIDATED)**

**B ONGAYA, J
NOVEMBER 4, 2022**

BETWEEN

JUSTUS BWONDERI AUNGO 1ST CLAIMANT

MOSES KATANA NZARO 2ND CLAIMANT

AND

PATHFINDER INTERNATIONAL RESPONDENT

JUDGMENT

1. The 1st claimant filed the memorandum of claim on September 19, 2019 through Wanjugu Waweru & Associates. His case is pleaded as follows. The respondent employed him on April 1, 2018 being a fixed term contract for 2-years lapsing on March 31, 2020 and deployed in Mombasa as the Gender & Right Technical Advisor. He earned Kshs 450,000.00 per month plus 13th month salary payable after 30 days on prorated terms of Kshs 37,485.00. He was on contributory pension with the respondent contributing Kshs 37,485.00 per month. His termination was on July 31, 2019 on account of redundancy. On July 18, 2019 the claimant received a letter dated July 1, 2019 titled “Notice of Intent to Terminate Employment Contract on Account of Redundancy”. The letter referred to the meeting with management on July 1, 2019 notifying the claimant of the respondent’s intent to conduct staff rationalization. It stated Kenya had budget cuts to its USAID/PEPFAR funded projects including Afya Pwani Program. USAID had therefore guidelines to its implementing partners to rationalise staffing at all levels to ensure that resources are applied more towards direct service delivery. Accordingly, the respondent had reviewed the staffing structure for Afya Pwani Program and the position held by the 1st claimant declared redundant. The letter stated that the last working day would be on July 31, 2019 within which the claimant was to take any outstanding annual leave days. He would be paid salary to the last day; severance pay at 1 month’s pay for each year worked on the current contract; and prorated 13th month pay but, less statutory deductions. The letter required the 1st claimant to commence the clearance procedure. The letter was signed by Eileen Mokaya, the



respondent's Country Director and Chief of Party Afya Pwani. The claimant denies attending the meeting of July 1, 2019 referred to in the letter. He claims 21 accrued but not taken annual leave days at Kshs 551,250.00. He claims the termination was unfair because the area labour officer was not notified; seniority in time, skill and ability was not considered, no hearing prior to termination and in presence of a representative, no termination notice, no exit interview to verify the reason for the redundancy, and, the principal of first in last out was not followed. He prayed for judgment against the respondent for:

- a. The declaration the termination on account of redundancy was procedurally unfair.
 - b. One-month salary in lieu of the notice Kshs 450,000.00.
 - c. 18-days wages for period notice was not served Kshs 270,000.00.
 - d. Wages for remainder of 8-months of contractual tenure Kshs 3,600,000.00.
 - e. Pro-rated 13th month salary for remainder of 8-months Kshs 299,880.00.
 - f. Severance payment at one-month salary for each completed year of service Kshs 450,000.00.
 - g. Prorated severance payment for 4-months served Kshs 150,000.00.
 - h. Maximum compensation for unfair termination Kshs 5,400,000.00.
 - i. Total claimed Kshs 10,979,880.00.
 - j. Certificate of service
 - k. Costs and interest of the suit from the date of filing until full payment.
2. The 2nd claimant equally filed the memorandum of claim on September 24, 2019 at the court's Malindi Sub-registry through Wanjuguna Waweru & Associates Advocates. The 2nd claimant has pleaded as follows. The respondent employed him on July 1, 2018 in Kilifi within Kilifi County as the Service Delivery Clinical Manager HIV/AIDS TB. He earned Kshs 270,400.00 per month plus a 13th salary paid prorate on monthly basis at Kshs 22,524.00. he was on contributory pension with the respondent contributing Kshs 27,040.00 per month. The contract of service of July 1, 2018 was for fixed term tenure of 2 years lapsing on June 30, 2020. On July 1, 2018 he received the letter on redundancy similar to the one the 1st claimant had received. He also denied an earlier meeting of July 1, 2019 referred to in the letter. As at July 1, 2018 he had 17 outstanding annual leave days for Kshs 268,146.70 which was not paid. After the redundancy the respondent advertised other positions which were understaffed. The 2nd claimant like the 1st claimant alleged that the procedure for the redundancy and the termination decision were unfair. He claimed and prayed for judgment against the respondent for:
- a. The declaration the termination on account of redundancy was procedurally unfair.
 - b. One-month salary in lieu of the notice Kshs 270,000.00.
 - c. 7-days wages Kshs 63,093.00.
 - d. 11-days wages for the period in which notice was served Kshs 99,146.70.
 - e. Wages for remainder of 11-months of contractual tenure Kshs 2,974,400.00.
 - f. Pension contribution for remaining 11-months of service Kshs 297, 440.00.
 - g. Pro-rated 13th month salary for remainder of 11-months Kshs. 247,764.00.
 - h. Severance payment at one-month salary for each completed year of service Kshs 270,400.00.



- i. Prorated severance payment for 1-month not served Kshs 22,533.30.
 - j. Maximum compensation for unfair termination Kshs 3,244,800.00.
 - k. Total claimed Kshs 7,758,124.00.
 - l. Certificate of service
 - m. Costs and interest of the suit from the date of filing until full payment.
3. The claimants changed their advocates to Kitoo & Associates Advocates.
4. The respondent filed statements of response on November 7, 2019 and on November 8, 2019 respectively and through the Federation of Kenya Employers. The respondent pleaded as follows. They were its employees as respectively pleaded for them. The reason for termination was valid. In particular, on April 26, 2019 the USAID which was the respondent's main donor held a meeting in Nairobi with respondent's Chief of Party Dr Eileen Mokaya. The agenda was on USAID vision on the journey to self-reliance aimed at ending the need for foreign assistance. The USAID was to drastically cut down budgets and the respondent was to down-size staff to following reduced funding. The Country Director convened a meeting with staff on May 6, 2019 and the claimants attended. At the meeting staff were informed about the new USAID vision of the journey of self-reliance and organogram. Staff were also informed about the staff rationalization exercise in view of the budget cuts. By the email of May 2, 2019 the respondent had informed staff including the claimants about the meeting of April 26, 2019.
5. The respondent further pleads that on July 1, 2019 it issued the notice of intention to declare redundancy of affected staff including the claimants. The notice was copied to the labour officer stating reasons for redundancy, number of employees affected, date of redundancy, and proposed payments. On July 1, 2019 the respondent arranged a meeting with each of the affected employees such as the claimants. Each claimant attended individually per the scheduled meetings. The 1st respondent attended the individual meeting and after being informed about the redundancy he hurriedly and rudely walked away stating he was going for a holiday at the Maasai Mara and at a time his leave had not been approved. The 1st claimant returned on July 18, 2019 and picked his letter of 0July 1, 2019 and his allegations of short notice are unfounded. He had been reminded by email of July 11, 2019 to collect his letter but had failed to respond. The respondent had applied 7 questions in identifying positions to be declared redundant and it had been objective. Consequential to the redundancy the respondent paid the 1st claimant as follows:
- a. Salary upto July 31, 2019 Kshs 450,000.00.
 - b. Severance pay Kshs 417, 832.00.
 - c. 13th month provision Kshs 183,676.50.
 - d. Less statutory deductions.
 - e. A certificate of service was available but the claimant failed to pick it.
 - f. The claimant executed a clearance form duly exhibited showing he had no pending leave days.
6. For the 2nd respondent, the respondent pleaded as follows. The reasons and circumstances for the redundancy were as for the 1st claimant. The notice to the labour officer had issued as pleaded for the 1st claimant. The 2nd claimant individually attended the meeting of July 1, 2019. The 2nd claimant held the discussions on July 1, 2019 and he acted positively about the notice. He had also received the earlier email to staff about the redundancy. He was paid final dues at his bank account computed as follows:



- a. Salary up to July 31, 2019 Kshs 270,400.00.
 - b. Severance payment Kshs 204,462.22.
 - c. 13th month provision Kshs 110,367.00.
 - d. Less statutory deductions.
 - e. He had no leave days pending per clearance form he signed.
 - f. The certificate of service was issued but the claimant refused to collect it
7. The respondent prayed that the claimants' respective suits be dismissed with costs.
 8. The claimants testified to support their respective cases. The respondent's witness (RW) was Salome Kibuna, the respondent's human resources and administration manager.
 9. The court has considered the pleadings, the evidence and the final submissions filed for the parties. The court returns as follows.
 10. To answer the 1st issue, there is no dispute that parties were in a contract of service and as pleaded for the claimants and admitted by the respondent.
 11. To answer the 2nd issue, each claimant's contract of service was terminated per the letter dated July 1, 2019 and on account of redundancy.
 12. To answer the 3rd issue, the court returns that the reasons for the termination upon redundancy and the procedure adopted were fair. The termination was fair both in procedure and substance. First, the claimants confirmed attending the meeting of May 6, 2019 at which the respondent discussed the USAID vision on the journey to self-reliance and which would result in job cuts. While the record of the proceedings as exhibited was not signed, there is no reason to doubt the substance of that meeting. Secondly, the respondent issued a notification to the area labor officer on the extent of the redundancy and the reasons thereof as per section 40 of the [Employment Act, 2007](#). Thirdly, the respondent issued to each employee a 30 days' notice at the meeting held with individual employees on July 1, 2019. There is no reason to doubt the respondent's account and evidence that the 1st claimant had left the meeting in a hurry without taking along his letter on redundancy notice. The evidence is that an email was equally issued as a reminder as urged and demonstrated for the respondent. Fourth, the claimants appear to have raised issues suggesting opaque manner of their selection for the redundancy. However, the evidence was that they held singly established positions or offices so that the court returns that in the instant case the issue of their selection did not strictly arise. There is no reason to doubt that USAID had initiated staff rationalization in the respondent through the vision of journey to self-reliance. While it was evidence that the respondent eventually advertised certain positions, they were different from those held by the claimants. Accordingly, the court returns that the termination by way of redundancy was substantially per section 40 of the [Act](#) and the reason was valid per section 43 of the [Act](#). CW1 testified that on September 15, 2019 and long after the redundancy decision had taken effect, he met Dennis Chiratsi Ali, the respondent's Director of Finance. CW1 testified that at that meeting held at Java restaurant in Nyali Centre, Dennis discussed with him the issue of the case and asked him to drop the case because prior information from Nairobi showed his name was not in the list of those to be declared redundant but it was hurriedly included on June 30, 2019. CW1 appears to have invoked that evidence to show that he was not fairly identified for redundancy. However, by his own evidence he says he was included on June 30, 2019 and he does not state any breaches of section 40 of the Act on the criteria for selection for redundancy that may have been committed. The court has already found that the claimants have not shown that they held similar positions as those held by others and were retained



in the respondent's service. While the respondent urged that the audio evidence be rejected as Dennis never consented to the recording and there was no compliance with section 106B (4) of the *Evidence Act* on the relevant certificate by a responsible person with respect to management of the device used for the recording, for the stated reasons, the testimony did not aid CW1's case – CW1 being the 2nd claimant. The submissions made for the respondent are upheld that the termination on account of redundancy was not unfair and the prayers for compensation for unfair termination will collapse.

13. The 4th issue for determination is whether the claimants are entitled to the other remedies as prayed for. The court returns as follows:
- a. The claimants have not established the basis for payment of salaries, prorated 13th salary and pension for the period of the remainder of the contractual term being 8 months for 1st claimant and 11 months for the 2nd claimant. Once the parties lawfully separated, the benefits under the contract now claimed for ceased to apply. The same are declined.
 - b. The claimants signed clearance forms stating that they had no pending leave days. They are bound accordingly and the prayers for payment of leave days will collapse.
 - c. The respondent has stated the certificate of service has been ready and the same will be delivered to the claimants.
 - d. While the court has found that the respondent substantially served the one-month notice per section 40(1) (b) of the *Act* upon each claimant and the labour officer, there was no evidence of payment of not less than one month's notice or wage in lieu of notice per section 40(1) (f) and which is now awarded. The 1st claimant is awarded Kshs. 450,000.00 and the 2nd claimant Kshs 270,400.00 as submitted and prayed for and less PAYE.
 - e. The court has considered the parties' respective margins of success, the circumstances of the case, and, the respondent's enterprise and source of funding. The court returns that the respondent will pay only 15% of each claimant's costs of the suit.
14. In conclusion, the claimants' respective suits are hereby determined with orders:
1. The respondent to pay the 1st claimant Kshs 450,000.00 and the 2nd claimant Kshs 270,400.00 less PAYE by December 31, 2022 failing interest to be payable thereon at court rates from the date of filing the suit till the date of full payment.
 2. The respondent to deliver to each claimant the certificate of service by December 1, 2022 as per section 51 of the *Act*.
 3. The respondent to pay each claimant's 15% costs of the suit.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 4TH NOVEMBER, 2022.

BYRAM ONGAYA

JUDGE

