



**Mwarora v Roofing Kenya Limited (Cause E103 of 2021)  
[2022] KEELRC 13068 (KLR) (4 November 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13068 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
CAUSE E103 OF 2021  
B ONGAYA, J  
NOVEMBER 4, 2022**

**BETWEEN**

**HASSAN ATHMAN MWARORA ..... CLAIMANT**

**AND**

**ROOFING KENYA LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The claimant filed the memorandum of claim on December 15, 2021 through Akanga Alera & Associates Advocates. The respondent employed the claimant as a Human Resource and Administration Manager effective January 20, 2020 per the contract of employment dated December 20, 2020 and signed by the claimant in acceptance on December 23, 2019. He was employed at the inception of the respondent company. He initially served on probation and was confirmed in service by the letter dated May 31, 2021. His monthly salary was Kshs 200, 000.00. On July 22, 2021 and without a prior notification, the claimant received a termination letter and was directed to leave the respondent's premises forthwith. The letter stated that the management regretted to notify the claimant that due to the on-going restructuring and re-organisation of the respondent, the claimant's services had been terminated effective Thursday July 22, 2021. Further, based on his length of service and contracted termination period, his last day at work would be August 22, 2021. However, since his contracted roles entailed handling confidential information, he was to leave the site immediately. The letter stated that his days worked and notice up to August 22, 2021 plus outstanding leave would be paid. He was asked to clear per the Human Resource Manual as he left. The letter was signed by Andrew Fleming, Chief Executive Officer (CEO).
2. The claimant pleaded that on the morning of August 22, 2022 prior to being summoned by the CEO to be handed the termination letter, he had met the plant manager who sarcastically told him thus, "We have a very good day planned for you." Further, prior to giving to him the termination letter, the CEO informed him that he had received some complaints about him from both Santosh the Plant Manager and Fara the General Manager.



3. The claimant's case is that the termination was a redundancy in violation of section 40 of the [Employment Act, 2007](#). In event of any misconduct, he was not accorded a hearing per section 41 of the Act. The claimant pleaded that Article 27(4) of the [Constitution](#) prohibits discrimination on account of race, ethnicity, religion, health status or colour. His case is that he was reprimanded on July 21, 2021 by the Plant Manager for employing an expectant woman and who demanded that the female employee be terminated despite the rule against discrimination. The claimant pleaded that the Plant Manager had also threatened the claimant for not employing Indians and telling him thus, "You Africans like worshipping Europeans but you will soon know who calls the shots in this company" and the claimant protested at the Plant Manager referring to him as an "African". The claimant pleaded that on July 20, 2021 he received a complaint from an employee one Ahmed Francis Kasiwa, a Fork Lift Driver, that the Plant Manager had referred to the employee as a "monkey" shouting "Hassan, I will grab your black balls and teach you a lesson. Please leave my office." It is pleaded that when the claimant raised the complaint with the Plant Manager, the Manager told the claimant that he did not, "come all the way from India to come and laugh with Africans."
4. The claimant states that after the termination he was not given a certificate of service per section 51 of the Act.
5. The claimant prayed for judgment against the respondent for:
  1. A declaration and an order that the termination of the claimant by the respondent was wrongful, unlawful, unfair, null and void for want of compliance with sections 40, 41, 43 and 45 of the [Employment Act, 2007](#) and in contravention of Articles 3 and 4 of the [International Labour organization's \(ILO\) Convention no 158- termination of employment convention 1982](#).
  2. Payment of compensation equivalent to one month's salary for failure to notify him and the Labour officer in writing of the intended restructuring which period he would have been working and paid salary as consultations regarding the intended redundancy ensued in accordance with the provisions of section 40 (1)(b) of the [Employment Act](#) amounting to Kshs 200,000.
  3. Payment of severance pay due to him for termination on account of redundancy at the rate of fifteen (15) days salary for each of the one and a half years of service amounting to Kshs 150,000
  4. Payment of the balance of his leave days which the respondent wrongly calculated using a base of 30 days instead of 26 days for his 44 days unutilized leave amounting to Kshs 45,129
  5. Payment of compensation for wrongful termination equivalent to twelve (12) month's salary amounting to Kshs 2,400,000
  6. Payment of aggravated damages for discrimination and infringement of his constitutional rights to equality and freedom from discrimination in the sum of Kshs 7,200,000.
  7. Payment of compensation for 29 years being the remainder of his contract of service prior to attaining the retirement age of 60 years amounting to Kshs 69,600,000
  8. Issuance of certificate of service pursuant to the provisions of section 51 of the [Employment Act, 2007](#)
  9. Interest on prayers (b) to (g) above until full settlement
  10. Costs of this suit



11. Any other order, remedy and relief this honourable court may deem just and fit
6. The respondent filed a reply to memorandum of claim on February 18, 2022 through Waithera Ngigi & Company advocates. The respondent pleaded that the claimant was served with a termination letter July 22, 2021. The respondent states that in re-organizing its operational structures it found it necessary to add or merge the roles of a human resource manager with those of a corporate responsibility manager. Following the restructuring the position of the claimant was declared redundant leading to the identification of the claimant as one of the employees to be terminated from employment. It is pleaded that the termination was genuine, valid and fair. The respondent states that the termination was on grounds of redundancy and was carried out procedurally as it was not on the basis of disciplinary charges. The respondent prayed that the claimant's claim be dismissed with costs.
7. The claimant testified that he signed a letter of appointment dated December 23, 2019 and he undertook per full purpose of the letter. He was confirmed after probation service. He says his contract has a clause on one-month notice or pay in lieu of notice but it did not apply in his case of redundancy. After the termination he was paid one-month termination notice, and, 44 leave days. However, he claimed outstanding leave days because instead of dividing the outstanding days of leave by 26 days per respondent's practice, they were divided by 30-days. Thus he claimed the difference in computation of leave payment due. Further, he worked from January 20, 2020 to July 22, 2021 for 1 year 6 months. On July 18, 2022 he saw the contract of employment of Desmond Kadenge Asisi (RW1) who was employed in his place as Human Resources and Corporate Responsibility Manager at Kshs 150, 000.00 per month. The claimant's witness (CW2) Ahmed Francis Kisiwa, testified that the respondent's Plant Manager insulted him. The claimant told him that he would act on it but the claimant was dismissed before he so acted.
8. The respondent's witness Desmond Asisi (RW1) testified that his letter of offer is dated July 15, 2021 and he does recall that the claimant was the human resource and administration manager. When the claimant was terminated, RW1 took up the job. Further, he did not have a chance to work with the claimant and he did not participate in the claimant's termination process. Further, the respondent is the one who can explain the circumstances of the claimant's termination and he understands the procedure for redundancy and the process had been fair. Further, CW2 never mentioned that he had been insulted due to racism. The claimant left notes but there was no report on racial discrimination. He urged that the suit be dismissed.
9. Respondent witness No 2 (RW2) was Santosh Yadav, the Plant Manager. He testified that he knew the claimant but he did not terminate him because he did not participate in the procedures to terminate the claimant. He stated that the claimant was terminated based on the on-going restructuring in which the company needed to cut down costs. In March 2021 he got a salary increment. His testimony was to show there was no racial discrimination, an allegation which was hurting the company. RW2 testified the CEO had since left the respondent's employment and he was not a witness in the suit.
10. The Court has considered the pleadings, the evidence, and the final submissions filed for parties. The Court returns as follows.
11. To answer the 1<sup>st</sup> issue there is no dispute that parties were in a contract of service running for 1.5 years. The respondent paid the claimant Kshs 200, 000.00 per month as the Human Resource and Administration Manager.
12. To answer the 2<sup>nd</sup> issue, the Court returns that the contract of service was terminated by the letter dated July 22, 2021 on account of restructuring and re-organisation. The Court finds that whether the re-organisation was due to abolition or re-designating the office held by the claimant or was for better



- economy to get a cheaper employee than the claimant, the termination amounted to redundancy as defined under the *Employment Act, 2002*. The respondent purported to urge that it was by operation of the termination clause. However, the reason given in the letter was not exercise of the termination clause and which is clearly separable from redundancy.
13. To answer the 3<sup>rd</sup> issue for determination the Court returns that the termination was unfair in procedure and substance because the procedure under section 40 of the Act was not followed and the alleged reason for redundancy was not genuine. Section 40 required the respondent to serve the claimant and the area labour officer a mandatory one-month notice on the nature and extent of the redundancy. That was not done. Thereafter, payment of a one-month salary was mandatory under the section and prior to the claimant proceeding on termination. That was not done. The Court finds that the claim of one-month salary of Kshs 200,000.00 is justified in view of the 2 notices in the section. It is awarded.
  14. As for the reason of the termination, it is clear that after the claimant's termination and as urged for the claimant, RW1 was engaged to perform the same duties and at a lower monthly salary. Even if there had been financial difficulties due to the COVID-19 pandemic, the evidence is that the claimant was not engaged in negotiations to consider a pay cut. Other than a slight difference in the office held by the claimant and RW1, the respondent has failed to show that indeed the office was substantially different. The material on record show that the claimant and RW1 were essentially engaged as human resource experts and in absence of detailed job descriptions, the Court finds that having engaged RW1, the reason for termination was not valid as envisaged in section 43 of the Act. It is that the alleged abolition of the office held by the claimant and the alleged creation of office held by RW1 was never notified to the Director of Employment as prescribed in section 76 of the Act. The Court makes the inference that the abolition and creation was fictitious as was pretentious.
  14. The Court has considered the factors in section 49 of the Act. The claimant wished to continue in service. He had an indefinite contract of service terminable only per its terms and conditions and, provisions of the *Employment Act, 2007*. The claimant had served for only 1.5 years but had a clean record. The aggravating factor appears to be that the respondent created a difficult environment inhibiting the professional performance of duty by the claimant such as the highhandedness by RW2 in denying the claimant space to deal with staff grievances. The Court considers that in the circumstances of the case, 4-months' salaries will meet the ends of justice making Kshs 800,000.00 – having taken into account the mitigating factor in favour of the respondent that the prevailing COVID-19 situation indeed made financial times difficult for all enterprises. The claimant's case that leave payment was miscalculated per respondent's practice of denominator of 26 was not challenged and is found probable. He is awarded Kshs 45,129.00 being due but outstanding leave payment. The claimant has also established that the purported certificate of service did not bear his correct identification card number. He is entitled to a proper certificate per section 51 of the Act.
  15. To answer the 4<sup>th</sup> issue, the Court finds that the claimant has failed to establish the alleged discrimination. By his own evidence the claimant testified that he was not discriminated but that discrimination was visited upon other staff. He testified thus, "Allegations are made against the Plant Manager on account of racial discrimination. But I say I was not racially discriminated. It is only others. See my C9 In Kenya No 4 is Kenyan Asian and No 2 in Uganda is Asian. See Page R19 and R 12 of initial list. Page R. 19 I say was Procurement Manager and page 12 for Hassina Noorani. The two are Kenyan Asians by Indian descent. I was told Finance and Procurement was for Asians. I see page R54-56 of further list. I see majority of staff are Kenyans. 4 out of 84 employees are Asian. For certain positions only Asians were employed. I say my claim was not an afterthought. I do not play race card to make my claim sensational." By that evidence the Court returns that the claimant has not established



discrimination on account of race. It is that he was employed in an influential position and only 4 out of 84 employees were Asians. The Court therefore finds that the claimant has as well failed to establish that the respondent embraced a pro-Asian and against black Africans policies. The allegation will collapse. In re-examination the claimant alleged he had been discriminated because he was the only employee affected by the re-organisation and restructuring. The Court has already considered that factor in awarding the claimant compensation for unfair termination. It should be sufficient that he has been compensated for the unfair redundancy and which does not spread to the alleged discrimination. Aggravated damages for discrimination as prayed for are found not justified.

16. Similarly, the prayer for remainder of 29 years of service is found unjustified as not based on contractual provisions. There was no agreement to serve for the 29 years alleged as unexpired and, there is nothing attributable to the respondent disabling the claimant from gainful engagement after the termination.
17. The claimant has succeeded in his claims and he is awarded costs of the suit. In conclusion judgment is hereby entered for the claimant against the respondent for:
  - 1) The declaration the termination was unfair and unlawful.
  - 2) The respondent to deliver a certificate of service per section 51 of the Act with proper particulars.
  - 3) The respondent to pay the claimant a sum of Kshs. 1,045,129.00 by December 31, 2022 failing interest to be payable thereon at Court rates from the date of judgment till full payment.
  - 4) The respondent to pay the claimant's costs of the suit.

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

**BYRAM ONGAYA**

**JUDGE**

