



**Ochieng v Karsan Ramji & Sons Limited (Cause E028 of 2021)  
[2022] KEELRC 13062 (KLR) (3 November 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13062 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU  
CAUSE E028 OF 2021  
CN BAARI, J  
NOVEMBER 3, 2022**

**BETWEEN**

**JOHN OTIENO OCHIENG ..... CLAIMANT**

**AND**

**KARSAN RAMJI & SONS LIMITED ..... RESPONDENT**

**JUDGMENT**

**Introduction**

1. The claimant's claim was first lodged on March 19, 2021, through a memorandum of claim dated March 11, 2021. The claimant filed an amended memorandum of claim dated May 28, 2021 and filed on similar date. The claimant's claim is for payment of salary arrears for the months of June, July, and August, 2020, full salary for the month of September, 2020, damages for unfair termination, severance pay, aggravated damages, pay *in lieu* of accrued leave, deducted statutory dues, tax rebates, damages for defamation, overtime pay, interest and costs of the suit.
2. The respondent filed a response to the memorandum of claim on May 18, 2021, followed by a response to the amended memorandum of claim on September 30, 2021.
3. The case was heard on June 7, 2022, with the claimant testifying in support of his case and the respondent case heard on June 28, 2022, leading to the close of the respondent's case. The respondent presented one Ms Ruth Nyakio Thuo to testify on her behalf.
4. Both parties filed submissions in the matter.

**The Claimant's Case**

5. The claimant's case is that he was employed by the respondent as a sales person in December, 2016. He states that he performed his duties as expected and that the respondent did not set any targets for his performance.



6. It is the claimant's case that the respondent barred him from their emailing list for close to five months before his subsequent termination.
7. It is his further case that he travelled to see his family during the covid period, and when he returned he was given a show cause letter and shortly thereafter, a letter declaring him redundant.
8. The claimant states that the reasons given for his redundancy was said to be related to the respondent's sales performance and restructuring. The claimant further states that he was not told how he was identified as the employee to be declared redundant, having been the only employee in the sales department.
9. It is the claimant's case that he was not given any notice prior to termination on ground of redundancy.
10. The claimant further states that the respondent raised issues concerning the customers he served.
11. The claimant states that he was not paid his terminal dues even after being sent to two different places to pick the pay, he did not find it.
12. The claimant states that the respondent defamed him and claims damages for defamation on this account. on cross-examination, the claimant admitted not having particularized what the defamation entailed.
13. it is the claimant's case that he did not complain when he was declared redundant.
14. It is the claimant's prayer that the court awards him three years severance pay, payment for leave not taken and salaries for the months of July, August and September, 2020.
15. The claimant states that his salary was not paid in full where in some months he was paid kshs 34,000.00, while in others Kshs 45,000.00. He further states that he never absconded duty so as to justify the reduction of his salary.
16. The claimant states that he filled leave forms and that at one time he commuted/encashed his leave.
17. The claimant admitted being issued a with a warning letter in 2018, but that he was not terminated on account of the issues subject of the warning.

### **The Respondent's Case**

18. The respondent's case is that claimant was terminated for reason that the respondent company was facing losses, which resulted in the claimant being declared redundant.
19. It is the respondent's position that the claimant begun his work with them in January, 2017 and not December, 2016, and that this is shown in the letter of appointment which also indicates where his salary would be banked.
20. The respondent states that the claimant was the only one declared redundant in the sales department. the respondent deny having defamed the claimant and further states that they did not write any letter that was defamatory to him.
21. It is the respondent's case that the claimant's terminal benefits are payable upon him clearing with the respondent and that to date, the claimant has not cleared.
22. It is the respondent's case that the claimant was in her service for a period of three years, from 2017 to 2020, and that he was terminated purely on the basis of redundancy and not for reason of misconduct.



23. It is the respondent's case that she invited the claimant, but that the claimant turned down the invite. The respondent states that they do not have minutes of the meeting that arrived at the decision to declare the claimant redundant.
24. It is the respondent's case that the claimant withheld customer details and that he failed to give the information even after various requests had been made to him. The respondent further states that she is ready to clear the claimant but only if he provides information on the two clients.
25. It is the respondent's case that the claimant never worked beyond hours and further that he was issued pay slips which show that statutory deductions were made.
26. It is the respondent's case that the months where the claimant earned/was paid a lower salary than usual, was only during the months when he absented himself from duty.
27. The respondent confirmed that she did not remit the claimant's salary for the month of September, 2020.

### **The Claimant's Submissions**

28. It is submitted for the claimant that the respondent did not follow the procedures laid down under section 40 of the [Employment Act](#), 2007, and for that reasons the claimant's termination was unlawful and illegal.
29. The claimant further submits that the respondent has not adduced evidence to show that a consultative meeting took place in relation to the redundancy. It is further submitted that there is no evidence adduced by the respondent to substantiate the criterion followed in terminating the services of the claimant.
30. The claimant submits that the respondent has not availed any evidence to proof that indeed it explained to the claimant the reasons for termination nor was he paid severance pay as required by law.
31. It is further submitted for the claimant that the respondent ought to have adduced a schedule of all leave days taken, and/or a bundle of leave application forms that had been approved to show that the claimant took his leave. It is submitted that no evidence has been adduced to proof that the respondent paid the claimant one-month salary *in lieu* of notice.

### **The Respondent's Submissions**

32. The respondent submits that the claimant did not adduce any evidence as prove that the respondent treated any other employee in a better or more favorable way, or that he was treated in any way different from the other employees.
33. It is the respondent's submission that the claimant's allegation that he was denied the opportunity to proceed for leave is baseless and that it was confirmed that he was allowed to go on leave and was able to access his work place,
34. The respondent submits that it is trite law in a claim for defamation, that the plaintiff must set out the particulars of defamation which include the words which are alleged to have been defamatory. The respondent further submits that the amended memorandum of claim did not plead any particulars of



defamation. The respondent sought to rely on the holding in *Protus Evans Masinde v Harleys Limited* [2020] eKLR, where the court stated: -

“Further, the claimant did not specifically plead the defamatory words stated in the notice neither did he claim for damages with respect to the defamation.”

35. The respondent submits that the termination of the claimant's employment was through redundancy and not summary dismissal. The respondent further submits that the termination was pursuant to a letter dated September 1, 2020, to the effect that the claimant had been declared redundant and that terminal dues were payable.
36. It is the respondent's submission that harsh economic conditions and challenges have been recognized as one of the reasons an employer may declare employees redundant. She had reliance in *Caroline Atieno Osweta v Kenya Yuncheng Plate Making Ltd* [2013] eKLR to support this position.
37. The respondent submits that it followed due process and urges the court to dismiss the allegation that it did not. The respondent submits that the claimant had a duty to prove that he had worked for overtime before claiming the same, and before the burden of proof could shift to the respondent to prove that it paid.

### **Analysis and Determination**

38. I have considered the pleadings, the witnesses' testimony and the submissions filed by both parties. The issues for determination are-
  - i. Whether the claimant termination was fair
  - ii. Whether the claimant is deserving of the reliefs sought.

### **Whether the claimant's termination was fair**

39. The question of whether or not a termination is fair, is dependent on whether the employer adhered to the rules of natural justice, specifically spelt out under section 41 of the *Employment Act*, and the reasons upon which a termination or dismissal is premised; broadly known as substantive justification.
40. The *Employment Act* requires that employers demonstrate that they had valid, fair and justifiable reasons for terminating or dismissing an employee.
41. The respondent herein, told the court that the reasons it terminated the claimant was as a result of harsh economic conditions at the time, which necessitated a declaration of redundancy.
42. The claimant on his part, averred that though his termination occurred during the period of the covid pandemic, the respondent was still in business and their sales were at their optimal level, and hence the declaration of redundancy was unwarranted.
43. In *Caroline Atieno Osweta v Kenya Yuncheng Plate Making Ltd* [2013] eKLR also cited by the respondent, the court opined thus on redundancy: -

“The right of an employer to declare redundancy is well secured in law” and *Super Group Supply Chain Partners v Arthbus Dlamini & Another* [JA 77/10] by the Labour Court of South America, thus, “It is trite that an employer is permitted to dismiss an employee for its operational requirements. However, for the employer to do successfully it is obliged to have a bonafide economic rationale for the dismissal.”



44. Further, section 40 of the *Employment Act*, states: -

“An employer 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 The *Employment Act*, 2007 47 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 declared 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.”

45. From the foregoing provisions, it is clear that a declaration of redundancy is a process that is well regulated and the employer cannot be heard to have skipped a single step of the elaborate procedure. This is largely informed by the fact that in a redundancy, the employee loses employment or is terminated for no wrong committed, and is thus susceptible to abuse by employers.

46. The respondent’s documents forming the court record, are awash with warning letters written to the claimant shortly before he was declared redundant. The respondent however confirmed to the court that the claimant was declared redundant, and not dismissed or terminated for any form of misconduct and for this reason, the court will not assign any weight to the warning letter produced before it.

47. Also produced before this court is a notice of redundancy dated March 25, 2020, to the Ministry of Labour, notifying the ministry of the respondent’s intention to declare redundancy. The respondent thereafter on September 1, 2020, wrote to the claimant informing him that he had been declared redundant on account of a harsh economy.

48. There is no indication that the claimant was issued with notice of the intended redundancy, similar to the one sent to the Ministry of Labour. All he received is notice that he had indeed been declared redundant.



49. It could be possible that the respondent faced a difficult economic period, the declaration of redundancy having occurred during the covid 19 pandemic. This notwithstanding, the requirements of section 40 of the Employment Act, are sacrosanct and must be satisfied.
50. The Court of Appeal in Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others [2014] eKLR stated thus in respect of redundancy:-
- “When the employer contemplates terminations for reasons of an economic, technological, structural or similar nature, the employer shall:
- (a) provide the workers' representatives concerned in good time, with relevant information including the reasons for the terminations contemplated, the number and categories of workers likely to be affected and the period over which the terminations are intended to be carried out;
  - (b) give, in accordance with national law and practice, the workers' representatives concerned, as early as possible, an opportunity for consultation on measures to be taken to avert or to minimise the terminations and measures to mitigate the adverse effects of any terminations on the workers concerned such as finding alternative employment.”
51. The claimant was neither notified of the impending redundancy nor told how he was identified as the sole employee to be declared redundant. The Employer/respondent did not demonstrate that the measures were taken to mitigate the job losses.
52. The respondent, the court concludes, did not adhere to the provisions of section 40 of the Employment Act, 2007, in arriving at the decision to terminate the claimant on account of redundancy.
53. The claimant's terminate is unfair and I so hold.

#### **Whether the claimant is entitled to the reliefs sought**

54. The claimant seeks payment of salary arrears for the months of June, July, and August, 2020, full salary for September, 2020, 12 months salary as compensation for unfair termination, severance pay, aggravated damages, pay *in lieu* of accrued and unpaid leave, statutory deductions that were not remitted, damages for defamation, unpaid tax rebates, overtime pay, interest and costs of the suit.

#### **Salary arrears for June, July, and August, 2020**

55. The pay slips produced before court indicate that the claimant was paid salaries for the months of June, July and August. The respondent confirmed that the amount paid was less than the claimant's monthly salary, owing to his absence from duty and thus payment related only to the period worked.
56. The claimant did not adduce evidence to prove that he worked the entire period for which he claims. The claim for salary arrears has thus not been proved and it fails and is dismissed.

#### **Full salary for the month of September, 2020**

57. The respondent's witness admitted in her oral testimony that the claimant was not paid his salary for the month of September, 2020, for reason that he did not clear with the respondent.
58. The respondent having declared the claimant redundant, were under obligation to pay him his salary up to the last day of work unconditionally.



59. The claim for full salary for September, 2020, is merited and is hereby awarded.

### **Compensation for unfair termination**

60. The claimant's termination having been found to be unfair, entitles him to compensation in accordance with section 49 of the *Employment Act*. The declaration of redundancy occurred at a time when the world faced the ravages of the Covid 19 pandemic, and would in my view have been justified had the respondent adhered to the provisions of section 40 of the *Employment Act*.

61. In this regard, I deem an award of two months' salary sufficient compensation for the unfair termination.

### **Severance Pay**

62. Section 40 (1)(g) of the *Employment Act*, 2007, entitles employees declared redundant to payment of severance pay. The claim is merited and is hereby awarded.

Aggravated damages, damages for defamation, tax rebates, unpaid leave, overtime pay

63. None of the claims under this heading were proved. The respondent produced evidence indicating that the claimant had commuted his leave into cash and the claimant did not adduce evidence to the contrary. The claims fail.

64. In conclusion, I make orders as follows:

- a. That the claimant's termination on account of redundancy is unfair.
- b. That the claimant is entitled to payment as follows-
  - i. Salary for September, 2020 at Kshs 112,000/-
  - ii. Two months' salary as compensation for unfair termination at Kshs 224,000/-
  - iii. Severance pay for the three years served at Kshs 168,000/-
  - iv. Costs of the suit and interest until payment in full.

65. Judgment of the court.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 3<sup>RD</sup> DAY OF NOVEMBER, 2022.**

**CHRISTINE N. BAARI**

**JUDGE**

#### **Appearance:**

Ms. Kisaka present for the claimant

Mr. Kamunda h/b for Mr. Mureithi for the respondent

Ms. Christine Omollo - C/A

