



**Kenya Engineering Workers' Union v M/S Insteel Limited (Cause E654 of 2020) [2022] KEELRC 13553 (KLR) (15 December 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13553 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E654 OF 2020  
MN NDUMA, J  
DECEMBER 15, 2022**

**BETWEEN**  
**KENYA ENGINEERING WORKERS' UNION ..... CLAIMANT**  
**AND**  
**M/S INSTEEL LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The suit was filed by the claimant Union by a Statement of Claim dated 15<sup>th</sup> October, 2020 on behalf of 27 grievants who were employed on diverse dates but were all declared redundant and issued with termination notices dated 18<sup>th</sup> October, 2019 in terms of Clause 16 of the parties Collective Bargaining Agreement and Section 40 of the *Employment Act*, 2007.
2. The claimant prays for the following reliefs:-
  - 4.1. That, the Honourable Court deem fit and find the Respondent action of declaring redundant the grievants herein to be unprocedural, unlawful and unfair and declare it null and void.
  - 4.2. That, the Honourable Court deem fit and Order the Respondent herein to reinstate all the grievants herein back to their employment without loss of any benefit.
  - 4.3. That, in the alternative the Honourable Court deem fit and order the Respondent herein to pay the grievants herein their redundancy benefits of 18 days worked in the month of October, 2019, one month notice, accrued leave, severance pay, service gratuity and 12 months compensation for unprocedural, unlawful and unfair redundancy as per the tabulation at Appendix WAN 9 of this Memorandum of Claim less any money paid in advance plus interest at the Court's rate within the shortest time possible.
  - 4.4. That, the Respondent herein be ordered to issue the grievants with certificates of service.
  - 4.5. That, the Respondent herein be ordered to meet the costs of this suit.



- 4.6. That, any other Relief the Honourable Court may deem fit to grant.
3. C.W.1 Peter Oduor Makedi testified on behalf of the 27 claimants. He told the Court that he was Assistant Shop steward at the shop floor. He adopted a witness statement dated 15<sup>th</sup> October, 2020 as part of his evidence in chief. C.W.1 produced bundle of documents marked exhibit 'C' in support of his testimony. That he worked until 18<sup>th</sup> October, 2019 when he left the employment together with his 26 colleagues. C.W.1 testified that they were not issued with notice of redundancy and the respondent did not explain the reason for the redundancy to all the grievants.
  4. That they were given the letter of redundancy on 18/10/2019 at 4.30 p.m. while going home after work.
  5. That the redundancy was to take effect immediately.
  6. That the 26 other claimants have received their final dues twice and signed payment vouchers which purported to be in full and final settlement and absolved the respondent from any further liability. That C.W.1 declined to sign the vouchers due to the said clause and has not been paid to-date and has not received Certificate of Service.
  7. C.W.1 stated that the respondent employed new employees upon terminating their employment on grounds of redundancy.
  8. C.W.1 stated that payment was to be in terms of the Collective Bargaining Agreement and could not be compromised. C.W.1 said the payments made did not conform to the relevant Collective Bargaining Clause.
  9. Under cross-examination, C.W.1 stated that he was not aware of any prior engagement between the workers and the respondent before the termination.
  10. C.W.1 stated that he saw the notice dated 11<sup>th</sup> April, 2019 to the County Labour Office in Court and the same did not bear the Union's stamp. C.W.1 also said he saw a notice of the same date to the Union in Court for the first time.
  11. C.W.1 stated that as the Deputy Shop Steward, he ought to have been given the copies of the said notices but it did not happen.
  12. C.W.1 stated that there was a meeting on 14<sup>th</sup> April, 2019, where the General Secretary came to the shop floor and told the workers that some workers would be declared redundant but Union members would not be affected and if it happened the employees would be notified. C.W.1 stated the meeting he attended was not convened by the respondent to discuss redundancy. C.W.1 admitted that he had signed the attendance list of the meeting which was held to discuss productivity.
  13. C.W.1 agreed under cross-examination that the notice of redundancy was given but he was not aware of it until he saw it in Court. C.W.1 also admitted there was consultation between the respondent and the union but he was not involved. C.W.1 stated that there was no agreement on Voluntary Early Retirement (VER). C.W.1 stated that he was not sure if any employee accepted the Voluntary Early Retirement. C.W.1 admitted also that the 26 other grievants were paid in terms of the exit package contained in the exit notice dated 18<sup>th</sup> October, 2019. C.W.1 admitted that all other grievants signed the exit package and received payment in full and final settlement in two batches except himself. C.W.1 stated that he was opposed to the Confidential Clause in the document hence his reluctance to sign.
  14. C.W.1 admitted that the exit was based on Clause 16 'G' of the Collective Bargaining Agreement depending on the number of years each of the grievants had served. C.W.1 stated there was no prior



- consultation before the package was given to them. C.W.1 stated he was not sure if the calculation was correct or not. C.W.1 stated that he did not collect his pension from Kenindia Insurance. C.W.1 admitted there was a letter to the claimant to collect the pension payable.
15. C.W.1 stated some grievants were paid gratuity and others were not. He prays that the claim be allowed accordingly.
  16. R.W.1 testified for the respondent. Julius Ochieng told the Court that he was the Human Resource Manager of the respondent. That he relied on his witness statement dated 27<sup>th</sup> October, 2021 as his evidence in Chief. R.W.1 produced bundle of documents, dated 27<sup>th</sup> October, 2021 marked 'R' in support of the respondent's case. R.W.1 told the Court that the respondent held elaborate consultations with batches of staff members on intended restructuring of the company. That the first retrenchment was on 2<sup>nd</sup> April, 2019 and all staff involved signed exit agreements. That the Chief Steward attended the meetings and the Respondent wrote to the Union severally through the Secretary General of the Union. That the Secretary General had agreed that he could not stand against the retrenchment exercise and requested for Voluntary Early Retirement. That the Respondent sent out notice of intended redundancy. That only one employee took the Voluntary Early Retirement. That 26 grievants collected their final dues upon being declared redundant. That only C.W.1 declined to collect his final dues. R.W.1 told the Court that he called C.W.1 to go and take his final dues but he did not turn up.
  17. That the first batch of retrenchment followed a conciliation process at the Ministry of Labour. R.W.1 told the Court that the Collective Bargaining Agreement was in place and that employees who had a Pension Scheme were not entitled to payment of gratuity in terms of Clause 23(b) (a) of the Collective Bargaining Agreement. R.W.1 told the Court that the 27 grievants were all part of the Pension Scheme with Kenindia Insurance Company. That the Pension Scheme was introduced in the year 2001. Prior to 2001, employees were paid gratuity.
  18. R.W.1 testified that the declaration of redundancy followed lawful procedure in terms of the Collective Bargaining Agreement and Section 40 of the *Employment Act, 2007* and was lawful and fair and the suit has no merit.
  19. Under cross-examination R.W.1 stated that Clause 23(b) does not mention Pension Schemes but Clause 23(B) (a) provides that employees who join provident Fund are not entitled to gratuity. That all the grievants were members of the Provident Fund.
  20. R.W.1 stated that the respondent notified Ministry of Labour of the redundancy exercise.
  21. R.W.1 stated that meetings were held with each unionisable employee explaining the issue to them on a one on one basis. That the last meeting was on the day letters of termination on grounds of redundancy were issued to the grievants.
  22. R.W.1 stated that they did not file minutes of such meetings with the Court. R.W.1 stated that extra money was paid to the employees after the conciliation exercise. R.W.1 prays that the suit be dismissed with costs.

### **Determination**

23. The issues for determination are:-
  - (a) Whether the 27 grievants were declared redundant lawfully and in terms of the laid down law and procedure.



- (b) Whether the grievants are entitled to the reliefs Sought.
24. The parties filed written submissions which the Court has carefully considered together with the evidence adduced before Court.
25. It is not in dispute that all the 27 grievants were members of the Claimant Union and the redundancy Clause 16 of the Collective Bargaining Agreement produced before Court applied to all of them. Clause 16 of the Collective Bargaining Agreement provides:-

“

“(a) Redundancy

Redundancy shall mean loss of employment through no fault of the employee.

(b) Consultation

The Union shall be informed by the Employer, the reason for and the extent of the intended redundancy.

(c) Selection of Redundancy employee

The Principle of “last in, first out” shall be adopted in the categories of employees affected subject to all other factors such as skill, relative merit, ability, reliability and operational requirements of the employer.

(d) Re-Engagement

Redundant employees will be given priority in consideration for re-engagement by the company should a vacancy arise.

(e) Entitlement to Redundant Employee

Redundant employees will be entitled to one month notice or pay in lieu of the notice.

(f) *Pro-rata* leave

In case of termination of service on grounds of redundancy prior to the completion of one year unbroken service, the employee shall be entitled to payment for the number of working days proportionate to his leave earnings of service with the employer.

(g) Severance pay

A severance pay shall be paid to employees for each completed year of service as follows:-

1-10 years 24 days basic wage

Over 10 years 30 days basic wage

For avoidance of doubt, where an employee has served the company for 10 months or more in the last year, this year shall be considered as a complete year of service for computation of severance.”

26. Furthermore, it is mandatory that any intended redundancy be conducted in terms of Section 4 of the [Employment Act, 2007](#).



27. In this regard, Section 40(1) provides:-

Termination on account of redundancy

1. 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 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."

28. Where the terms in the Collective Bargaining Agreement are more favourable to the employees than those provided under Section 40, the substantive and procedure requirements in the Collective Bargaining Agreement would be applicable.

29. The redundancy notice under Section 40(1) (a) to the Union and the Labour office must state:-

- (i) reasons for intended redundancy,
- (ii) extent of the intended redundancy, and
- (iii) the notice must be issued at least not less than a month prior to the date of the intended redundancy.

30. The notice by the Human Resource Manager to the County Labour Office dated 11<sup>th</sup> April, 2019 only notified the labour office that they were engaged in "a restructuring exercise that would result in a reduction of Insteel workforce."



31. The extent of the redundancy was not indicated in the letter by stating the number of employees to be retrenched. The notice must have a list of departments and positions to be affected by the intended redundancy for it to be deemed to be in compliance with Section 40 of the *Act*. The letter of 11<sup>th</sup> April, 2019 was not compliant. It is the same letter which was written to the General Secretary of the Union and on the same date. The same did not comply with the mandatory provisions of Section 40(1) (a) of the *Employment Act*.
32. The General Secretary of the Union in a response letter dated 15<sup>th</sup> April, 2019 notified the Human Resource Manager that the notice sent to them dated 11<sup>th</sup> April, 2019 was not compliant with the law.
33. The Human Resource Manager then requested for a meeting with the Union by a letter dated 17<sup>th</sup> April, 2019. The intended meeting was to be held on 24<sup>th</sup> April, 2019. The Union accepted to meet the respondent but on a different date of 30<sup>th</sup> April, 2019 which proposal the respondent accepted.
34. The Court notes that the meeting resulted in a proposed voluntary retirement scheme which was communicated to the staff by an internal memo dated 6<sup>th</sup> May, 2019. As per the testimony of R.W.1, only one employee accepted the Voluntary Early Retirement.
35. What followed then was the issuance of a “Notice of Termination on Account of Redundancy” dated 18<sup>th</sup> October, 2019 to the 27 grievants. In terms of the notice, the last working day was to be 18<sup>th</sup> October, 2019, the same day. This notice violated Section 40(1) (a) of the *Act* which provides for a mandatory one month notice of intended redundancy to the Union as stated herein above.
36. In terms of the notice letter, each employee was entitled to receive:-
  - (i) Payment in lieu of one month notice.
  - (ii) Redundancy pay for every completed year of service.
  - (iii) Payment in lieu of outstanding leave days.
  - (iv) Salary for worked days up to and including 18<sup>th</sup> October, 2019.
  - (v) Pension benefits in terms of the rules and regulation of the Pension Scheme.
  - (vi) Certificate of Service.
  - vii) Terms of the notice were said to be confidential and not to be communicated to any third party.
  - (viii) The notice constituted full and final settlement of all and any claims between the parties in relation to the termination.
  - (ix) The employee had to sign the notice before receiving the exit payout (Emphasis added)
37. C.W.1 told the Court that 26 grievants signed the notice upon being paid their terminal dues in two batches. That he himself declined to sign the notice and was denied payment of the terminal dues up to the time of hearing of the suit.
38. This notice of 18<sup>th</sup> October, 2019, not only violated Section 40(1) ( e) of the *Act*, but also violated Section 40(1) (c) in that the employees were not in the notice told of the reason and selection criteria used by the respondent in the sudden termination on grounds of redundancy.
39. The notice did not comply with Section 40(1) (d) in ensuring that the grievants were not placed at a disadvantage as provided under Clause 16 of the Collective Bargaining Agreement.



40. In terms of Clause 16(g) employees who had served 1-10 years were to receive Severance Pay calculated at 30 days basic salary for each completed year of service.
41. The notices, which the grievants were mandated to sign as a pre-condition of payment provided for what was stated to be redundancy pay of much less than that provided under Clause 16(g) of the Collective Bargaining Agreement. For example, in the notice of Zacharia Mutinda Mutunga at page 28 of the respondent's bundle, he was to be paid Kshs 173,806.40 instead of Kshs 235,76.60 having worked for 8 years and at the time of exit earned a basic salary of Kshs 36,839.
42. This underpayment is repeated in all the exit notices dated 18<sup>th</sup> October, 2019 for all the grievants provided in the respondent's bundle "R" from page 28 to page 282.
43. The redundancy exercise failed in procedural and substantive fairness. The exit notices were oppressive to the employees in that they were to leave work on the same day of the notice and were compelled to sign exit package offering disadvantageous exit package to them as was provided in Clause 16(g) of the Collective Bargaining Agreement and Section 40 of the Employment Act.
44. R.W.1 testified that upon conciliation, the payment package was improved, but R.W.1 did not satisfy the Court that the respondent fully complied with the dictates of Clause 16.
45. The Court is satisfied however that the 27 grievants were all members of a Pension/Provident Fund Scheme and so were not entitled to any payout under Clause 23 of the Collective Bargaining Agreement "Gratuity Scheme."
46. C.W.1, was within his rights not to be subjected to mandatory execution of the exit notice in full and final settlement and which also bound him to confidentiality. The grievants had an automatic right to the benefits under Clause 16 of the Collective Bargaining Agreement upon being declared redundant and losing their employment for no fault on their part.
47. It was therefore unlawful and unfair for the respondent to withhold the benefits due and owing to C.W.1 upon his refusal to sign the exit notice. It was also a violation of Section 40 of the Act for the respondent to subject the grievants to Clause '5' and '6' of the redundancy notices dated 18<sup>th</sup> October, 2019 as a pre-condition for their redundancy benefits under Section 40(1) (d) (c) (f) and (g) as read with Clause 16 of the Collective Bargaining Act.
48. The Court therefore finds that the redundancy exercise failed the substantive and procedural test and was in violation of Sections 40, 41, 43 and 45 of the Employment Act, 2007 and the Court declares the termination both substantively and procedurally unfair. The Grievants are entitled in addition to their full benefits under Clause 16 of the Collective Bargaining Agreement as read with Section 40 of the Employment Act, to compensation for the unlawful and unfair termination of employment.

### **Terminal Benefits**

49. The Court has found that the respondent was bound to pay terminal benefits to the grievants, without any conditions precedent, upon declaring the 27 grievants redundant. The payments were to be done strictly in terms of Clause 16 of the Collective Bargaining Agreement read with Section 40 of the Employment Act, 2007.
50. Accordingly, the Court orders the respondent to pay all the 27 grievants, less any amounts received by the 26 grievants except C.W.1 who was not paid at all terminal benefits calculated as follows:-
  - (i) One month salary in lieu of notice.
  - (ii) Salary for days worked.



- (iii) Payment in lieu of leave days not taken.
- (iv) Severance pay calculated as follows:-
  - (a) 24 days basic salary for all grievants who had served for between one and 10 years for every completed year of service.
  - (b) 30 days basic salary for all grievants who had served for over 10 years for every completed year of service.
 

The respondent is to note for the avoidance of doubt that an employee who had served the company for 10 months or more in the last year, shall be considered as a complete year of service for computation of severance pay.
  - (c) The respondent is to facilitate payment of Pension/Provident Fund to C.W.1 and any other grievant who had not yet received their pension from Kenindia Insurance Limited in terms of Clause 23B (a) of the Collective Bargaining Agreement.
  - (d) Provide Certificate of Service.

### Compensation

51. The grievants are entitled to compensation for the unlawful and unfair termination of employment in violation of the Collective Bargaining Agreement and Section 40 of the Employment Act. The Court has considered that the grievants had served the respondent faithfully and were terminated from employment unprocedurally for no fault of their own. The Court has also considered that the grievants had served for a period ranging from 8 to 24 years. That the grievants were terminated from employment suddenly without any preparation on the same date they received the termination notices. The grievants suffered loss and damage due to the unprocedural manner in which the exercise was conducted. The grievants lost future career prospects and growth. The Court considers that the termination was for operational reasons although it was mishandled by the respondent.
52. The Court is guided by Clause 16 of the Collective Bargaining Agreement also and the case of
- (i) Liz Ayany v Leisure Lodges Limited ELRC Cause No. 2210 of 2014.
  - (ii) Willy Kipkoech Langat -vs- County Public Service Board and 2 Others.
  - (iii) ELRC Cause No. 2029 of 2017 – Deepesh Subshaschandra Modi -vs- Pan African Express Transport and awards the grievants compensation as follows:-
    - A.
      - (a) Four months' salary in compensation for those employees who had served the respondent for between 20 and 24 years.
      - (b) Three months' salary in compensation for those employees who had served the respondent for between 10 to 15 years.
      - (c) Two months' salary in compensation for those employees who had served the respondent for between 1 and 9 years of service.
    - B. The terminal benefits and compensation to be computed by the respondent and filed within 30 days of this judgment. The claimants to file a confirmation and/or response within 15 days of service.



- C. The unpaid terminal benefits to be paid with interest at Court rates from 18<sup>th</sup> October, 2019 until payment in full.
- D. Compensation to be paid with interest from date of judgment till payment in full.
- E. Respondent to provide Certificate of Service to the grievants within 30 days of the judgment.
- F. The respondents to pay the costs of the suit.

53. For the avoidance of doubt, the 27 grievants are as set out at page 86 (Annexure 9) to the Statement of Claim.

**DATED AND DELIVERED AT NAIROBI (VIRTUALLY) THIS 15<sup>TH</sup> DAY OF DECEMBER, 2022**

**MATHEWS N. NDUMA**

**JUDGE**

Appearances

Mr. Patrick Makale for claimant

Mr. Thuita for Respondent

Ekale – Court clerk

