



**Wambugu v Bharti Airtel International (Netherlands) BV-Kenya Branch (Cause 934 of 2016) [2022] KEELRC 13436 (KLR) (8 December 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13436 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 934 OF 2016  
L NDOLO, J  
DECEMBER 8, 2022**

**BETWEEN**

**NEWTON WAHOME WAMBUGU ..... CLAIMANT**

**AND**

**BHARTI AIRTEL INTERNATIONAL (NETHERLANDS) BV-KENYA  
BRANCH ..... RESPONDENT**

**JUDGMENT**

1. Newton Wahome Wambugu, the Claimant in this case, was an employee of the Respondent, Bharti Airtel International (Netherlands) BV-Kenya Branch. He brought this claim, following termination of his employment.
2. The claim is contained in a Memorandum of Claim dated May 18, 2016 and filed in court on May 19, 2016. The Respondent filed a Memorandum of Response on June 14, 2016 to which the Claimant responded on July 27, 2016.
3. The matter was initially heard by O N Makau J, who took the Claimant's testimony in chief. When I became seized of the matter, the parties agreed that I proceed from where my brother Judge had stopped. The Claimant testified on his own behalf and the Respondent called its Lead Human Resource and Payroll Manager, Alvin Kirui. The parties further filed written submissions.

**The Claimant's Case**

4. The Claimant states that he was employed by the Respondent as Category Manager, Facilities and Admin Supply Chain Management. By a contract dated March 9, 2015, the Claimant was elevated to the position of Senior Sourcing Manager within the Supply Chain Management, effective April 1, 2015.



5. The Claimant adds that he was later deployed as SCM- Head for an international assignment in Congo Brazzaville for a period of 20 months running from September 3, 2013 to May 2015.
6. The Claimant's employment was terminated by letter dated March 31, 2015. The Claimant terms the employment as unlawful and unfair on the grounds that:
  - a. The reason for termination was invalid;
  - b. There was no prior notice of the impending restructuring of the Company that would affect the Claimant's position as Senior Sourcing Manager;
  - c. The termination was substantively and procedurally unfair;
  - d. The termination was in breach of the Claimant's legitimate expectation since his position was permanent and pensionable and he was to retire upon the attainment of the retirement age of 60 years as prescribed under the law;
  - e. The Claimant had been appointed and given a new designation barely 22 days before the termination on account of redundancy;
  - f. Barely a month after the termination, the Claimant's position was re-advertised;
  - g. The Labour Office was not notified of the redundancy.
7. The Claimant further complains that he was not given adequate notice as required under Section 40 of the *Employment Act*.
8. The Claimant avers that for him to be deployed as SCM-Head he executed a short term assignment document, which formed part of his local employment agreement. He adds that his deployment was to run for only 12 months but was extended to 20 months.
9. The Claimant further avers that it was provided in the short term assignment policy that where the period exceeded 12 months, he would be paid as per the provisions of the local mobility policy and guidelines.
10. According to the Claimant, for the 20 months spent in Congo Brazzaville, he was to be paid a total of USD 150,000 but was only paid USD 37,965.05
11. The Claimant claims the following from the Respondent:
  - a. 12 months' salary in compensation.....Kshs 6,283,994.40
  - b. Loss of earning for 10 years.....40,885.074.00
  - c. Payment of arrears of USD 112,034.95
  - d. Costs plus interest

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

12. In its Memorandum of Response dated and filed in court on June 24, 2016, the Respondent admits having employed the Claimant.
13. Respondent states that by an employment contract issued in December 2010, the Claimant was offered employment and deployed in Nairobi.



14. The Respondent adds that the Claimant's employment was subject to transfer and variation by virtue of the Respondent's short term assignment policy.
15. The Respondent avers that whereas the short term assignment policy provided that the duration of the assignment would typically be 3 to 12 months, the Respondent could engage an employee for a period exceeding 12 months, if the specific assignment lasted for a longer period than the typical one alluded to in the policy.
16. The Respondent states that in September 2013, the Claimant was assigned duties as SCM Head in Congo Brazzaville for an anticipated term of 6 months.
17. It was agreed between the parties that the Claimant would be entitled to:
  - a. Living allowance of USD 2,500;
  - b. Annual leave in terms of the home country policy;
  - c. The cost of a one-way ticket back to Kenya, in the event of a voluntary termination;
  - d. Cost of return to home country plus an allowance of 23 Kgs extra luggage in addition to normal airline baggage allowance, in the event of involuntary termination.
18. The Respondent asserts that it fully discharged its obligations to the Claimant in accordance with the short term assignment policy.
19. The Respondent counters the Claimant's allegations of unlawful and unfair termination of employment.
20. The Respondent states that it held consultations with the Claimant regarding his placement within the Respondent's establishment. The Respondent further states that in spite of these consultations, the Claimant proceeded to terminate his contract of employment by letters dated April 25, 2016 and April 26, 2016.

### **Findings and Determination**

21. There are two (2) issues for determination in this case:
  - a. Whether the Claimant has made out a case of unlawful termination of employment;
  - b. Whether the Claimant is entitled to the remedies sought.

### **Unlawful Termination?**

22. According to the evidence on record, the Claimant was issued with a notice of separation on March 31, 2014, which was extended by letter dated March 31, 2015, stating as follows:

“Dear Newton,

Re: Extension Letter

Reference is made to the Notice of Separation issued to you on 31<sup>st</sup> March 2014 in which your role was to cease to exist on 31<sup>st</sup> March 2015.

This letter serves to extend the period by a further 12 months. Consequently your role in the company will cease to exist effective 31<sup>st</sup> March 2016.



Between now and the above date, the Company shall look for any appropriate alternative role for your placement within our operations. In the event that the opportunity arises earlier than 31<sup>st</sup> March 2016, then your current position will also cease immediately upon the new appointment.

In the unlikely event that no opportunity arises by the above date, this letter serves as notice for your separation with the Company on 31<sup>st</sup> March 2016. Your separation package will be confirmed at least two months before the anticipated last working day of 31<sup>st</sup> March 2016.

Yours sincerely,

For and On behalf of Airtel Africa

(signed)

David Ssegawa

**Chief Human Resource Officer**

23. The Respondent's defence against the Claimant's claim of unlawful and unfair termination of employment is that the parties executed a binding mutual separation agreement. The Respondent did not however produce the agreement, which is said to have been misplaced. The Court was unable to understand how such an important piece of evidence could be mislaid. As a result of this lapse on the part of the Respondent, the Court missed the opportunity to interrogate the terms of separation.
24. The Respondent's witness, Alvin Kirui testified that the position held by the Claimant ceased to exist as a result of restructuring. This, coupled with the fact that the Claimant received severance pay as part of his terminal dues, places the separation within the ambit of redundancy.
25. Section 2 of the [Employment Act](#) and the corresponding section in the [Labour Relations Act](#) define redundancy as:  
  
"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."
26. While the law allows an employer to terminate employment on account of redundancy, there are stringent conditions to be complied with. These conditions are set out under Section 40 of the [Employment Act](#) as follows:

40.

- 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 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 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.

27. The Court of Appeal addressed the issue of notice in a redundancy in *Thomas De La Rue v David Opondo Omutelema* [2013] eKLR as follows:

“It is quite clear to us that sections 40(a) and 40(b) provide for two different kinds of redundancy notifications depending on whether the employee is or is not a member of a trade union. Where the employee is a member of a union, the notification is to the union and the local 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 to the employee and the local labour office. 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 a shorter notice.”

- 28. Regarding selection criteria in a particular redundancy, Section 40(1)( c) of the *Employment Act* requires the employer to take into account seniority in time, skill, ability and reliability of each employee affected by the redundancy.
- 29. The last three conditions in Section 40(1) of the *Employment Act* set out the statutory benefits payable to employee(s) declared redundant.
- 30. I have examined the manner in which the Claimant's exit from the Respondent's employment was handled and find that apart from paying terminal dues, the Respondent did not comply with the dictates of Section 40 of the *Employment Act*.
- 31. As a result, I find and hold that the Claimant has proved a case of unlawful termination of employment and he is entitled to compensation.



## Remedies

32. I therefore award the Claimant six (6) months' salary in compensation. In arriving at this award, I have considered the Claimant's length of service as well as the Respondent's unlawful conduct in the termination transaction.
33. The Claimant also seeks payment for loss of earning which he bases on the assumption that he would have continued to work for the Respondent up to the retirement age of 60 years. The only thing I will say on this issue is that employment is intrinsically a contractual relationship with no proprietary attachment.
34. This issue was settled a long time ago in *East African Airways v Knight* (1975) EA, 165 in the following terms:

“...permanent employment does not mean that it is necessarily employment for life or until retirement, it merely means that the employment is can continue for an indefinite period with an element of permanency and a degree of security of tenure. It is not necessarily a life appointment with the status of irremovability.”
35. This remains good law and the current *Employment Act*, in recognition that the employment relationship is terminable, has provided avenues within which this may happen and where the law is not complied with, remedies have been provided.
36. The claim for loss of earning is therefore misplaced and is dismissed.
37. The Claimant further claims arrears amounting to USD 112,034.95 on account of his deployment at Congo Brazzaville. This claim is based on the Claimant's averment that his allowances, while on this assignment, were tabulated on the basis of an inferior protocol being the short term assignment policy, rather than the local plus mobility policy.
38. The Claimant argues that because his stint in Congo Brazzaville was in excess of the period anticipated in the short term assignment policy, then his allowances ought to have been paid in accordance with the local plus mobility policy. This would have been a persuasive argument had the Claimant specifically pleaded and proved his claim under this head to the standard required for special damages. He failed to achieve this threshold and the claim is thus disallowed for want of proof.
39. In the end, I enter judgment in favour of the Claimant in the sum of Kshs 3,141,997 being six (6) months' salary in compensation for unlawful and unfair termination of employment.
40. This sum will attract interest at court rates from the date of judgment until payment in full.
41. The Claimant will have the costs of the case.
42. Orders accordingly.

**DELIVERED VIRTUALLY AT NAIROBI THIS 8<sup>TH</sup> DAY OF DECEMBER 2022**

**LINNET NDOLO**

**JUDGE**

**Appearance:**

**Mr Omenya for the Claimant**

**Mr Luseno and Miss Mwangi for the Respondent**

