



**M'Itirithia v Hava Net Limited (Cause E1027 of 2021)
[2023] KEELRC 1972 (KLR) (11 July 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1972 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E1027 OF 2021
NZIOKI WA MAKAU, J
JULY 11, 2023**

BETWEEN

PATRICK TUTI M'ITIRITHIA CLAIMANT

AND

HAVA NET LIMITED RESPONDENT

JUDGMENT

1. The Claimant brought this suit against the Respondent claiming unlawful redundancy. In sum, he prayed for judgment against the Respondent for:
 - a. A declaration that the Claimant suffered wrongful and unfair termination disguised as “redundancy”
 - b. Reinstatement to his previous position/ job without any loss of benefits.
 - c. Salary arrears for the entire period the Claimant has been out of employment.
 - d. In the alternative, an order for payment of the Claimant’s lawful terminal dues.
 - e. Maximum compensation for twelve months salary.
 - f. Damages for Discrimination.
 - g. Exemplary Damages for lost opportunity.
 - h. Costs of this suit with interest.
2. The Claimant averred that he accepted employment in the Respondent Company as a Corporate Sales Account Manager earning a monthly basic salary of Kshs 148,890.50 and the employment contract commenced on November 2, 2020. His employment was for a contract period of one (1) year. He recounted how on June 4, 2021 the Respondent, issued him with a letter reducing his salary from a



net pay of Kshs 110,000/- to Kshs 50,000/- while citing financial constraints, but did not issue him with a new contract or consult him on the same.

3. It was the Claimant's averment that on or about July 5, 2021 and August 2, 2021, the Respondent issued him with a termination notice on allegation that he had not met his targets. That thereafter through letters dated August 20, 2021 and September 22, 2021, the Respondent unlawfully without any notice, reason, cause and/or justification, terminated his services on account of a redundancy canvassed as restructuring. That the alleged redundancy was effected maliciously without regard to his welfare and rights and was an exercise to discriminate against him as his position was later advertised. In further particularising the discrimination, the Claimant averred that the Respondent failed to offer him any other employment within the Organization, failed to consider the concerns he raised and violated his rights to a fair hearing and lawful expectation.
4. He further averred that the Respondent purported to declare him redundant without following the requirements of section 40 of the *Employment Act*. That it issued him with two termination of employment letters before later issuing him with a redundancy letter and failed to pay him his lawful dues relating to the shortfall of his contract. That he consequently suffered loss and damage and thus sought unlawful underpayments for three months, unpaid 10% salary increment for February to September 2021, service pay for 10 months, pay in lieu of accrued leave of 18 days, damages for wrongful/ unfair termination of employment, and unpaid house allowance.
5. In his Statement, the Claimant asserted that upon joining the Respondent Company, his salary was to be increased by 10% after three months and also earn a 3% commission which was to be distributed quarterly. He stated that there was no appraisal done or a warning letter issued to him concerning his performance. According to the Claimant, he was among the first people to be employed by the Respondent and if there was any legitimate redundancy, he would have been the last person to be terminated.
6. The matter proceeded undefended in the absence of defence.
7. During formal proof, the Claimant testified that he worked for the Respondent for 10 months. That the Labour Office was not involved in the redundancy procedure and he did not understand why the Respondent would cause a redundancy and then continue to employ. He stated that it had been hard for him because he was no longer employed and he prayed for the Court to grant him his prayers and order payment of his dues.
8. The Claimant submitted that section 2 of the *Employment Act* defines "Redundancy" as 'the loss of employment, occupation, job or carrier 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.' Further, on the importance of fairness in redundancy, he submitted that the Court in the case of *Titus Muriuki Ndirangu v Beverly School of Kenya Limited* [2022] eKLR stated that the right for an employer to terminate an employee under the *Employment Act* is subject to sections 40, 43, and 45 of the Act and that section 40 specifically places obligations and conditions that an employer must meet before declaring an employee redundant. According to the Claimant, the Respondent did not follow procedure while declaring his position redundant as stipulated by section 40 of the *Employment Act* and that its action was therefore unfair and unlawful.
9. It was the Claimant's further submission that sections 43, 45, 47 and 49 of the *Employment Act* apply in cases of redundancy just like in other forms of termination. That under section 43 of the Act, the Respondent as the employer is obligated to prove the reason(s) for termination and that the same was lawful as under section 45 of the Act. That once an employer has a valid and lawful reason(s)



for termination on redundancy, such employer must apply and comply with section 40 of the Act. That in the present case, the Respondent issuing him with two termination letters and later issuing him with two redundancy letters was a clear indication that it had resolved to unlawfully terminate his services and hire another person to take over his position in the company. In addition, that since the Respondent did not adduce evidence to dislodge his claim against it, he prayed for this Court to find and hold that the termination of the Claimant's employment was malicious, unfair, unjust, and unlawful.

10. As to whether his termination was procedurally fair, the Claimant cited the case of *Kenya Airways Limited v Aviation and Allied Workers Union of Kenya & 3 others* [2014] eKLR in which the Court of Appeal pronounced itself that redundancy is a legitimate ground for terminating a contract of employment provided there is a valid and fair reason based on the operational requirements of the employer and the termination is in accordance with a fair procedure. He also relied on the decision of the Court of Appeal in *Janet Nyandiko v Kenya Commercial Bank Limited* [2017] eKLR on the procedure an employer is obligated to follow when considering termination or summary dismissal of an employee.
11. The Claimant submitted that the Respondent had not demonstrated to this Court that a notice of not less than a month was issued to him and the area Labour Officer prior to the termination. That there was also no evidence on the criteria the Respondent applied in selecting him for termination, nor was there evidence of payment of pending leave days in cash prior to the termination, despite the due leave days. That the evidence on record was not rebutted and it remained that he was not invited for a hearing to make presentations prior to being issued with letters of redundancy. That he was thus denied due process as enshrined in Article 47 of the [Constitution](#), section 4 of the [Fair Administrative Actions Act](#), and section 45 of the [Employment Act](#).
12. The Claimant submitted that he was entitled to the remedies sought. That section 49(4)(i) of the [Employment Act](#) states that an employee has the right to claim for his unpaid wages. That the Employment Contract dated November 2, 2020 stipulated at clause 9.1.1 that he was entitled to 10% salary increment after three months and clause 9.1.2 provided he was entitled to 3% Commission from his corporate accounts, but none of which the Respondent paid.
13. On the prayer for notice pay, he submitted that section 49(1)(a) of the [Employment Act](#) provides that an employee is entitled to the wages which the employee would have earned had the employee been given the period of notice to which he was entitled under this Act or his contract of service. That section 40(1)(f) of the Act states that an employer should pay an employee declared redundant not less than one month's notice or one month wages in lieu of notice.
14. He further sought a maximum award as compensation for unfair and unprocedural termination as under section 49(1)(c) of the Act and relied on the case of *Daniel Mburu Muriu v Hygrotech East Africa Ltd* [2021] eKLR. He urged this Court to note that he had, in his Statement of Claim, calculated the damages under this head using his net salary of Kshs 110,000/- instead of Kshs 148,890.50 which was his basic pay. That the amount was thus erroneously indicated as Kshs 1,320,000/- instead of Kshs 1,786,686/- as damages.
15. For the prayer for house allowance, he submitted that the same is a statutory right under section 31 of the [Employment Act](#). That the Court of Appeal in *Grain Pro Kenya Inc. Ltd v Andrew Waitbaka Kiragu* [2019] eKLR observed that house allowance should be calculated in accordance with the General Wages guide at the rate of 15% of the monthly salary. For unpaid leave days, the Claimant submitted that section 40(1)(e) of the [Employment Act](#) provides that an employer should pay an employee any pending leave days in cash before letting him go. That he is also entitled to severance



pay as section 40(1)(g) of the Act stipulates that an employer shall pay the employee on redundancy severance pay at the rate of not less than 15 days for each completed year of service. He also asked for a Certificate of Service as under section 51 of the Act and for costs of the suit.

16. The Claimant asserts that the Respondent did not follow procedure while declaring his position redundant as stipulated by section 40 of the *Employment Act* and that its action was therefore unfair and unlawful. He draws a parallel between a termination on account of redundancy and the requirement under sections 43 of the *Employment Act*. The Court is not persuaded that the same emphasis on reasons for termination apply in the case of redundancy. In the case of redundancy, what an employer has to show is the basis for the harsh move of declaring the employee redundant. In some instances it could be on account of a change in circumstances for the company leading to certain positions being obsolete, I am avoiding the use of the word redundant, and therefore affecting the employees holding that position. At times it is a financial conundrum leading to the declaration causing the offices to be abolished or merged. There must be evidence for these scenarios I have presented. However, once an employer embarks on the process of redundancy, there must be scrupulous adherence to section 40 of the *Employment Act*. The Labour Officer for the area must be notified of the reason and extent of the redundancy and where employees belong to a union, the union must be notified. The employee must be notified as well meaning the letter notifying the employee must be copied to the relevant offices – Labour Officer, Union or both. The employer must then apply the principle of first in last out meaning the employees who joined earlier are the last to be shown the door. Regard must also be had to the skills, experience and competence of the employee before the employee is let go.
17. In the case before me, there was no demonstration that the employer applied any of these filters before declaring the Claimant redundant. The redundancy was preceded by a salary cut from Kshs 110,000/- to less than half – Kshs 50,000/- for which the employer cited financial constraints. Where an employer wishes to change any aspect of the employee's terms, there must of necessity be some consultation. The Claimant was neither consulted nor was he asked to give his views on the intended salary reduction. His concurrence was not sought thus making the deduction unlawful. The Claimant unfortunately was not in employ for a year and therefore the issue of severance pay does not apply since his service period fell short of the statutory minimum. Instead, the Court can only grant relief by way of compensation for the unlawful termination which the court sets at 5 months given the manner of termination. The Claimant did not prove discrimination as he did not avail evidence to demonstrate he was targeted or the solitary person declared redundant.
18. The foregoing paragraphs are ample to show the Claimant was successful, for the larger part, in his claim and the Claimant is thus entitled to the following reliefs:-
 - i. A declaration that the redundancy meted was unlawful and did not accord with the mandatory provisions of section 40 of the *Employment Act*;
 - ii. Refund of unlawfully deducted salary – @60,000/- a month from June – September 2021 Kshs 300,000/-;
 - iii. Compensation for the unlawful termination of employment – 5 months salary – Kshs 550,000/-;
 - iv. Payment for accrued leave – Kshs 66,000/-;
 - v. One month's salary in lieu of notice – Kshs 110,000/-;
 - vi. Interest on the sums in (ii), (iii), (iv) and (v) above at court rates from the date of judgment till payment in full;



vii. Costs of the suit.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 11TH DAY OF JULY 2023

NZIOKI WA MAKAU

JUDGE

