



**Nyanga v Afrilog Limited (Cause 2376 of 2017)
[2024] KEELRC 2104 (KLR) (2 August 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2104 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 2376 OF 2017
NZIOKI WA MAKAU, J
AUGUST 2, 2024**

BETWEEN

JEDIDAH NYANGA CLAIMANT

AND

AFRILOG LIMITED RESPONDENT

JUDGMENT

1. The Claimant filed this suit after her employ with the Respondent came to an end. The Respondent is an entity engaged in peace initiatives relative to consultancy to peace and security in the horn of Africa and elsewhere in the Continent. Prior, the Claimant had been engaged by its initial CEO Mr. Jimmy Baburam, the son of the current owner of the company Brig. (Ret). David Baburam. Mr. Jimmy Baburam sadly passed away in July 2016. The Claimant was his personal assistant. Being a military man, Brig. David Baburam decided to focus on peace and security as opposed to the previous focus on general trade and business under the stewardship of Mr. Jimmy Baburam. At the time of hearing, Brig. (Ret.) Andrew Nyandong was running the day to day operations of the company. The Respondent asserted that it gave the Claimant a chance to fit in the new outfit but she was ill equipped for it given that it had a new focus. She had a discussion with the directors both military men who seemed stern to her and she felt harassed. She avers she was terminated with 3 month salary arrears outstanding and thus sought Kshs. 150,000/- for the same, one months' pay in lieu of notice – Kshs. 150,000/- (erroneously indicated as Kshs. 4,320,000/- (192 months- 16 years), compensation for unfair termination – Kshs. 1,800,000/-, severance pay of Kshs. 1,385,000/- making a claim of a staggering Kshs. 7,805,000/-. She also sought costs, a certificate of service as well as interest thereon at court rates.
2. The Respondent filed a response which it amended. In the amended memorandum of response, the Respondent averred that Claimant's salary was Kshs. 150,000/- a month. The Respondent averred that the Claimant's position became redundant, a fact that was well within the Claimant's knowledge having been communicated to her orally and that whilst the Claimant and the Respondent were negotiating in good faith, the terms of separation under which the Claimant would be declared



redundant, the Claimant chose to leave employment and file suit. The Respondent averred that it had since paid the Claimant the sum of Kshs. 150,000/- which was the salary arrears pleaded in the claim. The Respondent averred that the demand made by the Claimant was on erroneous figures and that the Claimant nor her representatives had not availed themselves for a discussion. The Respondent averred that the suit ought to be dismissed with costs.

3. The Claimant and the Respondent's two witnesses Brig. Baburam and Brig. Nyandong testified. The sum total of the same was that the Claimant asserted she was unfairly dismissed while the Respondent's witnesses testified that the Claimant could no longer serve the Respondent hence the end of her contract. The witnesses asserted that initially it was possible to work with the Claimant but increasingly they needed to have people with military background in peace and security. It was roundly denied that the Claimant was discriminated against on account of her pregnancy and that the Respondent made concessions on account of her stint in service under Mr. Jimmy Baburam. The witnesses indicated that the relationship with the Claimant was cordial. It was stated that the Claimant was even transferred to a sister company BBS when it became apparent she was not a right fit for the Respondent. Brig. Nyandong stated that the Claimant was in a position that seemed like a demotion as all she could do was menial tasks as opposed to her previous occupation as a personal assistant. Brig. Baburam testified that he needed a retired Colonel as a PA and not the Claimant.
4. Submissions were to be filed and the Claimant was to file her submissions before the Respondent responded to them. However, as at time of writing the decision, the Claimant's submissions were not on the file. The Respondent submitted that the issues for determination were whether there was discrimination against the Claimant, whether the Claimant was unfairly terminated, whether the Claimant is entitled to the relief sought and who should bear the costs of the suit. The Respondent cited the provisions of sections 107(1), (2) and 108 of the *Evidence Act* and submitted that he who alleges must prove. It relied on the case of *Samson Gwer & 5 others v Kenya Medical Research Institute & 3 others* [2020] eKLR where the Supreme Court held that the petitioners in that case bore an overriding obligation to lay substantial material before the Court, in discharge of the evidential burden establishing their treatment at the 1st respondent as unconstitutional. The Respondent cited the case of *SWM v Hardware Trading Store Limited & another* [2021] eKLR where Mbaru J. dismissed a claim for discrimination on account of pregnancy. The Respondent submitted that the case of *G M V v Bank of Africa Ltd* [2013] eKLR established that there must be a demonstration of nexus between the adverse employment decision and the pregnancy. The Respondent submitted that the Claimant had not met the threshold or the conditions set in the *G M V v Bank of Africa* (supra) case. The Respondent submitted that the Claimant was not unfairly terminated. The Respondent submitted that the Claimant was aware her office was abolished and that the Respondent made efforts to retain her so that she did not lose her livelihood by transferring her to another enterprise when the CEO realised the aspect of trading the Claimant had been handling had ceased as he was majorly involved in consultancy in the military, a role she could hardly handle. The Respondent submitted that retaining her was an uphill task that the CEO did not need a personal assistant thereby rendering her services superfluous. The Respondent submitted that despite making the Claimant an offer, she stormed out of the meeting promising to institute legal proceedings and later accepted the offer by enquiring of the dues. The Respondent submits that in the spirit of mutual separation and in good faith, it was accumulating the dues the Claimant was owed with intention to remit them in November but was shocked to receive court documents. The Respondent submitted that the Claimant did not adduce any evidence that she was unfairly terminated. The Respondent submitted that the Claimant is not entitled to the reliefs sought but submitted that if the Court were to find in her favour then one month's salary would suffice as held in the case of *Mung'oni v Rama Homes Limited t/a Rama Group of Companies & another (Cause E6500 of 2020)* [2024] KEELRC 839 (KLR) (16 April 2024) (Judgment). The



Respondent also cited the cases of *Nyalingu v Ali (Cause 1328 of 2017)* [2024] KEELRC 390 (KLR) (27 February 2024) (Judgment) where the Claimant was awarded 2 months' pay as compensation and the case of *Polkey v Dayton Services Ltd* [1988] AC 344, [1987] All ER 974, [1987] IRLR 503 where the House of Lords held that where a dismissal is unfair for procedural reasons, it is not rendered fair merely because the dismissal would probably have occurred in any event even if proper procedures had been adopted. The dismissal remains unfair but the compensation is calculated by reference to the extent of the chance that the employee would have remained in his job had proper procedures been adopted. If dismissal was a certainty, there is no loss. The Respondent submitted that on service pay, section 35(6) and (7) of the *Employment Act* provides that where an employee is a member of a pension scheme such as NSSF, the said employee is not entitled to service pay. The Respondent submitted that the Claimant herein was a member of NSSF, and more so the one who was tasked to ensure compliance of both NHIF and NSSF payments. The Respondent submitted that the fact that NSSF and NHIF payments were made was not controverted by the Claimant. In fact, the Claimant produced her NSSF statement in which payments were being made by the Respondent as exhibited in the document at page 3 of the Claimant's bundle. The Respondent submits that the Claimant's prayer on service pay should fail as she was enrolled in the NSSF scheme and on the authority in *Okumu v Prime Power Batteries E.A. Limited (Cause E176 of 2021)* [2024] KEELRC 1229 (KLR) (9 May 2024) (Judgment). The Respondent urged the dismissal of the claim with costs.

5. The Claimant was terminated on account of her role becoming obsolete in the Respondent after it was re-engineered by the new CEO. The Claimant thus had her position become obsolete. The *Employment Act* at section 2 defines 'redundancy' as the loss of employment, occupation, job or career by involuntary means through no fault of an employee, involving the 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. This is precisely what the Claimant suffered. Under the *Employment Act*, it is provided for at section 40 what the employer is to do. The Respondent transitioned from trading to providing military consultancy and as such deliberately caused the abolition of the Claimant's office. As such it was supposed to follow the parameters laid out in section 40 which include, but are not limited to, payment of all leave in cash, notification to the employee in writing at least one month prior and payment of severance pay. The Claimant is not entitled to the compensation for termination beyond a month since she has been granted service pay. As such I will award her only one month as compensation. The Claimant is thus entitled to the following:-
- a. One month's salary as notice – Kshs. 150,000/-
 - b. Severance pay at the rate of 15 days for every year of completed service which is Kshs. 75,000/- multiplied by the 16 years she served – Kshs. 1,200,000/-.
 - c. One month's pay as compensation – Kshs. 150,000/-.
 - d. Costs of the suit.
 - e. Interest at court rates on the sums in (a), (b) and (c) above from date of judgment till payment in full.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 2ND DAY OF AUGUST 2024

NZIOKI WA MAKAU

JUDGE

