



**Prafulbhai v ISS Global Forwarding [Kenya] Limited (Cause E6523 of 2020) [2024] KEELRC 2125 (KLR) (9 August 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2125 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E6523 OF 2020**

**J RIKA, J  
AUGUST 9, 2024**

**BETWEEN**

**AMRISH PANDYA PRAFULBHAI ..... CLAIMANT**

**AND**

**ISS GLOBAL FORWARDING [KENYA] LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The Claimant filed his Statement of Claim on 4<sup>th</sup> December 2020.
2. He states that he was employed by the Respondent as the Finance Controller, East Africa. The commencement date was 17<sup>th</sup> February 2020.
3. Commencement was subject to grant of the necessary permits. The Claimant reported for duty on 2<sup>nd</sup> March 2020.
4. He was to serve under probation for 6 months. The notice period for termination while on probation, was 7 days.
5. Probation was to last until 31<sup>st</sup> August 2020.
6. He received a letter of termination on 31<sup>st</sup> August 2020, informing him that his contract would be terminated effective 15<sup>th</sup> September 2020. The reason for termination was poor business performance and the need to restructure.
7. He states that during the probation, the Respondent reduced his monthly salary on account of the challenges posed by Covid-19 pandemic, and deducted PAYE tax, but failed to remit to the tax authorities.
8. He states that termination was contrary to Sections 40, 43 and 45 of the *Employment Act*. He suffered immense loss, damage and psychological distress, having moved from India to Kenya, and having left



a senior position offered by another company, Fortune 500. He legitimately expected to be confirmed, and serve out his contract in full. He incurred expenses in relocation from India to Kenya, and on return back to India. He incurred loss of 2 months' rent deposit, and sold his household items at throwaway price on departure from Kenya.

9. He prays for Judgment as follows: -
  - a. Declaration that termination was unfair, unlawful and un-procedural.
  - b. Damages for unlawful termination.
  - c. 2 months' salary in lieu of notice at Kshs 1,540,000.
  - d. 12 months' salary in compensation for unfair termination at Kshs 9,240,000.
  - e. Loss of rent security deposit at Kshs 90,000.
  - f. Roll back of salary from April to August 2020, amounting to Kshs 1,095,589.
  - g. Loss of sale of household items at Kshs 222,000.
  - h. Costs.
  - i. Interest.
  - j. Any other suitable remedy.
10. The Respondent filed its Statement of Response, dated 22<sup>nd</sup> January 2021. It is conceded that the Respondent employed the Claimant as Finance Controller, East Africa Region. The effective date was 17<sup>th</sup> February 2020, but was subject to obtaining by the Claimant, of work permit and any other required documents. He commenced employment on 2<sup>nd</sup> March 2020.
11. He was placed on probation of 6 months. Confirmation depended on satisfactory performance. Probation was to end on 1<sup>st</sup> September 2020.
12. His performance was found to be unsatisfactory. He failed to complete monthly reports; he was not familiar with the company systems; and was not a team player.
13. The Respondent's business suffered a downturn in 2020, necessitating restructuring. Some Employees would be compelled to leave on redundancy. The Claimant was notified on 31<sup>st</sup> August 2020, that his contract would be terminated, with effect from 15<sup>th</sup> September 2020 as part of the redundancy process. He was consulted on 24<sup>th</sup> August 2020 before notice issued.
14. He was paid his final dues in full. His flight to India was financed by the Respondent. The Respondent met the cost of his Covid-19 test, a prerequisite at the time, for travel. The Respondent paid for his accommodation in Dubai on his transit journey home. He was paid Kshs 90,000 *ex gratia*, to assist him with his tenancy obligations. He was issued with the Certificate of Service.
15. He agreed to temporary reduction of his salary, during Covid-19 pandemic. He did not have a tax PIN, and the Respondent was hampered in remitting his PAYE tax. The Respondent communicated this, to the tax authorities. Despite obtaining his alien card from immigration, the Claimant failed to apply for PIN registration. The Respondent was not privy to the Claimant's personal work arrangements.
16. His Claim is frivolous. He is not entitled to the prayers sought. The Respondent urges the Court to dismiss the Claim, with costs to the Respondent.



17. The Claimant testified and rested his case, on 24<sup>th</sup> November 2022. The Respondent's Vice-President Projects/ Oil & Energy, Magesh Ganesan testified on 22<sup>nd</sup> March 2023 and 18<sup>th</sup> October 2023. Regional Human Resource Manager, Sangeeta Susan Mathai, testified on 18<sup>th</sup> October 2023, when the hearing closed. The Claim was last mentioned on 18<sup>th</sup> December 2023, when the Parties confirmed filing and exchange of their submissions.
18. The Court has taken a considerable time in preparation and delivery of this Judgment, owing to the large number of Claims progressed to conclusion at a faster rate than usual, under the virtual hearing platform. The que for Judgments awaiting delivery, is quite long.
19. While the Parties merit an apology from the Court for this delay, it is noted that the Court has delivered the piling-up Judgments, in accordance with the age of the respective Claims; their urgency and complexity; and as soon as practicable. It is to be appreciated that while justice delayed is justice denied, justice hurried is justice buried, and the Court must endeavour not to deliver microwave Judgments, no matter the size of its caseload.
20. The Claimant relied on his witness statement and documents [1-6] in his evidence-in-chief. He restated his employment history with the Respondent, and the terms and conditions of service, as summarized in his Statement of Claim above. He was diligent for the period of probation. The regional economy was booming. The probationary performance appraisal exhibited by the Respondent, was not brought to attention of the Claimant. Termination letter did not question the Claimant's performance. The Respondent instead, stated that it was restructuring. He was not issued a redundancy notice. There was no consultation involving the Claimant, Magesh and one Sangeeta Susan Mathai, as alleged by the Respondent. The Claimant was only paid his salary for the last month worked. He was not paid other dues.
21. He conceded that he was reimbursed Kshs 90,000 by the Respondent as rent deposit. He would not have agreed to salary deduction, if he had been notified, that his contract would only last 6 months. He was 50 years at the time of giving evidence, and could not secure alternative employment, in his native India. Employers back there, are only interested in youthful Employees.
22. Cross-examined, he told the Court that his contract was executed in December 2019. He was to commence work in February 2020. Covid-19 pandemic was detected in Kenya, from around February 2020. It was not clear how the economic situation would turn out to be. He applied for work permit, and started working in March 2020. He was to work on probation for 6 months. His supervisor was Wendy. She did not state that the Claimant's performance was below par, and probation would be extended.
23. He was not aware that all other staff, had their contracts terminated subsequently. He was not aware that the company shut down entirely in Kenya, in 2021 due to financial constraints. He accepted salary deduction because of Covid-19. Deduction, he was assured, was a temporary adjustment. He would not have accepted it, if he was aware that he would only work 5-6 months. He agreed that PAYE tax was not remitted to tax authorities, because he did not have PIN registration. The correct alien identity card was issued only after he had left employment. The Respondent had advised him to apply for PIN registration online. The Respondent referred to the amount paid to the Claimant as final settlement. There was no such final settlement. He challenged the agreement, but not in writing. He did not have receipts to show that he sold his household goods at a loss. Termination was based on redundancy.
24. Redirected, he told the Court that the Respondent did not indicate that termination would be after 6 months of service. He expected to bring his family from India to Kenya. His reports, except on one



- occasion, were always prompt. The Respondent did not encounter serious financial challenges. He did not meet Magesh and Susan for consultation, prior to termination.
25. Magesh Ganesan relied on his witness statement and documents filed by the Respondent, marked exhibit 1-23, in his evidence-in-chief.
  26. Cross-examined, he testified that he worked with the Respondent from its inception in 2018. The Respondent opened its business in Kenya in 2019. It has a presence in 26 countries. After Covid-19, the Respondent closed down in Kenya, but retains its operational licences in the country.
  27. Magesh was based in Dubai, overseeing the East Africa Region. He reported directly to the CEO. Magesh and Susan made human resource decisions with respect to the Kenya office. They did not have minutes of meetings, where these decisions were made, but recorded their deliberations on e-mail.
  28. Magesh confirmed that the Claimant's probation ended on 31<sup>st</sup> August 2020. He continued to work, for 15 days, until 15<sup>th</sup> September 2020 when he left employment. He was appraised during probation. Business was down. The Respondent reduced salaries, and then its staff. Magesh did not have the Respondent's financial statements. The Claimant was the Financial Controller and familiar with the Respondent's financial position. Magesh did not know where the Claimant worked before he joined the Respondent.
  29. The Claimant left employment on redundancy. Magesh declared redundancy. Relevant notices issued to the Labour Office and to the Claimant. Consultative meeting between the Management and all staff, took place on 24<sup>th</sup> August 2020. Magesh did not have minutes of the meeting. There is no evidence of the agenda for the meeting. Magesh and Susan oversaw the meeting virtually.
  30. Termination was based on one ground- restructuring. Performance was not mentioned on termination. The Claimant received all his contractual dues. There are no pending dues.
  31. Redirected, Magesh told the Court that financial status was not the issue; operations was the issue. The Claimant did not contest redundancy.
  32. Sangeeta Susan Mathai relied on her witness statement and documents filed by the Respondent, in her evidence-in-chief.
  33. On cross-examination, she reaffirmed that the Claimant left on redundancy, but that performance could also have been an issue. Regardless of redundancy, the Respondent was going to terminate the Claimant's contract. Mathai did not have a record of resolution passed by the Respondent, declaring redundancy. She did not know on which date, notice of redundancy was sent out to the Claimant. She did not recall exactly when consultation with the Claimant took place. The whole business shut down. The Claimant could not be moved to another location. The Claimant had resigned from his previous job, to take up employment with the Respondent. The Respondent was aware that he would encounter challenges, in securing alternative employment, after leaving the Respondent. Susan was based in Dubai, managing Middle East and East Africa Regions. The Claimant delayed in submitting his alien card, hampering payment of PAYE tax. The Respondent intended to remit PAYE, once the Claimant obtained PIN registration.
  34. Redirected, Mathai testified that redundancy notice issued in August 2020. Employees exited from August 2020. By the time Mathai left in September 2023, there was not a single Employee working for the Respondent. The Claimant attended the meeting leading to termination on account of redundancy.



35. The issues are, whether the Claimant left employment on account of poor performance or redundancy; whether procedure in any case was fair; and whether he merits the prayers sought.

### **The Court Finds**

36. The Claimant was employed by the Respondent, as the Finance Controller, East Africa Region.
37. His contract of employment is dated 12<sup>th</sup> December 2019. He was to begin working on 17<sup>th</sup> February 2020. The contract states that commencement, was subject to issuance of visa and required licences if applicable.
38. It is common evidence that the Claimant started working on 2<sup>nd</sup> March 2020.
39. The contract required him to serve on probation for 6 months, which expired on 31<sup>st</sup> August 2020.
40. Upon expiry, there is nothing on record to indicate if the Respondent considered him to have served probation successfully. There is no letter on record, from the Respondent to the Claimant, indicating that he had been confirmed, or his probation would be extended, or that he was unsuccessful and therefore, to be released at the end of probation.
41. Reason: Rather than advise the Claimant in clear language, on the outcome of probation, the Respondent shifted to termination on account of redundancy.
42. It is to be presumed that probation was therefore successfully completed, and the Respondent considered the Claimant a regular Employee, for the 15 days he worked after 31<sup>st</sup> August 2020.
43. The Court says it is to be presumed, because the Respondent's witness, Sangeenta Susan Mathai, appeared to wobble, in explaining the reason why the Respondent terminated the Claimant's contract.
44. She stated, "We had financial issues. We had redundancy... performance could also have been in issue."
45. The Respondent had the option of ending its relationship with the Claimant at the end of probation, on 31<sup>st</sup> August 2020, under Section 42 of the *Employment Act*. There would have been no need to go the redundancy route, and go through the rigours of redundancy process, under Section 40 of the *Employment Act*.
46. Since the Respondent retained the Claimant after his probation ended, for 15 days, there is no need to explore performance as the reason advanced by the Respondent, in justifying termination. The Claimant successfully completed probation, otherwise he would not have gone on working, after 31<sup>st</sup> August 2024. It is noted that in its termination letter to the Claimant dated 31<sup>st</sup> August 2020, the Respondent reassured the Claimant that termination decision, "is not a reflection of your performance, but as result of the necessary structural changes."
47. The question that must follow therefore is, whether the Respondent established that a redundancy situation occurred; and, whether it dealt with that situation in accordance with the demands of Section 40 of the *Employment Act*.
48. The evidence from both Parties is adequate to lead the Court to the conclusion, that the Respondent encountered a genuine redundancy situation.
49. It is accepted by both Parties that the Claimant's arrival and employment in Kenya, coincided with the arrival and quick spread of the Covid-19 pandemic. The global economy went into a downward spiral. The Respondent had set shop in Kenya only in 2018, and was compelled to rethink sustainability of



- operations in 2020. The Claimant himself testified on cross-examination that, “ I am aware that the company had financial constraints... I accepted the salary deduction because of Covid-19...”
50. Magesh agreed with the Claimant, testifying that, “ Business was down. We reduced salaries. We reduced staff... the problem started in early 2020.”
51. Mathai stated, “We had financial issues. We had redundancy.”
52. With this common position, it was not necessary as suggested by the Advocate for the Claimant, to have the Respondent present before the Court, its financial records, to establish that there was a genuine redundancy situation.
53. There was a genuine redundancy situation.
54. Procedure: The Respondent has not established that it executed redundancy fairly and lawfully, in accordance with Section 40 of the *Employment Act*.
55. Mathai told the Court that the Respondent issued a notice to the Labour Office on 6<sup>th</sup> August 2020. There was no evidence of notice issued to the Claimant. She did not know when consultative meeting with the Claimant was held. There are no minutes of any meeting exhibited before the Court. The witness told the Court that all Employees were affected, because the business was closing down. She did not present evidence of discussions about closure of business, held with the Claimant. Instead, the Respondent vacillated between redundancy and poor performance. She told the Court that, “ regardless of redundancy, we were going to terminate.” It did not matter what reason was on offer in justifying termination, the Respondent was going to adopt the procedure discarded by the *Employment Act*, 2007 decades ago, known as termination-at-will, in getting rid of the Claimant.
56. Magesh told the Court that the Respondent operated in 26 countries. Mathai told the Court that the Claimant could not be moved to any of the 26 countries. There was no evidence that alternatives to redundancy, for a man who had been flown all the way from India to work in Kenya, were discussed. Magesh and Susan themselves continued to work from Dubai. The Court is not convinced that redundancy was preceded by notices and consultations and, there is no evidence that, the Respondent paid to the Claimant redundancy benefits, in accordance with Section 40 of the *Employment Act*.
57. While there was a genuine redundancy situation, the Respondent did not adhere to a fair and lawful procedure, in terminating the Claimant’s contract on redundancy.
58. Remedies: It is declared that termination was unfair and unlawful, on account of procedure adopted by the Respondent.
59. The Claimant’s salary, as shown in his contract, was Kshs 770,000 monthly, as of the date of termination. During probation, it was Kshs 744,200.
60. Clause 15 of the contract provided for a notice period of 2 months, or payment of 2 months’ salary, in lieu thereof. There is no evidence that this was paid to the Claimant. He is granted salary of 2 months at Kshs 1,540,000 in notice.
61. The prayer for damages for unlawful termination, is not justified, in light of the prayer for compensation for unfair termination. The Court considers that the grievances the Claimant endured, have adequate remedy in statute.
62. He worked for 6 months and 15 days. Clause 3 of his contract, indicates that the contract was permanent and pensionable. The Claimant flew from India to Kenya, expecting to work until he was retired. He abandoned his senior position with his previous Employer in India, on the promise



of a secure job in Kenya. He did not contribute to the circumstances leading to termination. The Respondent cannot similarly be blamed for the appearance of Covid-19, and the business downturn leading to redundancies. Nonetheless the Claimant was lured to Kenya by the Respondent's promises of a permanent and pensionable job. He utilized a lot of resources moving in and out of Kenya. He told the Court that he intended to bring his family to Kenya, on the promises made by the Respondent, of a permanent and pensionable job. He contemplated a long stay in Kenya.

63. His dreams were shattered and although the Respondent made some effort by facilitating the Claimant to travel back to India, it could never take back the Claimant to the job he held before he was lured to Kenya. The Respondent could not secure him an alternative job in any of the 26 countries where it has a presence. The Claimant could not adequately be compensated for loss of his previous job in India, and loss of his job in Kenya, and in particular, the shattering of his dream for job security in Kenya.
64. He told the Court that he was 50 years old, at the time of giving evidence. He could not compete for alternative and comparable job back in India, with the Millennials and the Gen Zs. Employers in India preferred the young blood.
65. The Court has taken into stock all these factors, looking critically at the short period of 6 months, and 15 days that the Claimant worked, and his expectation of a long-term service, on permanent and pensionable contract. The Respondent certainly ought to have done more, to mitigate, if not fully compensate the Claimant, for the regrettable position, he was placed in. It was not enough to pay for his air ticket back to India, to finance his accommodation on transit in Dubai, and reimburse his forfeited rent deposit of Kshs 90,000. Fair dealing required the Respondent to first fully acknowledge its role in the Claimant's situation, and secondly, endeavour to reasonably mitigate his tragedy.
66. He is granted the equivalent of 3 months' salary in compensation for unfair termination, at Kshs 2,310,000.
67. The Respondent paid to him a sum of Kshs 90,000 upon termination, which was sufficient to redress his loss of rent security deposit.
68. From April to August 2020, the Respondent imposed a pay cut on the Claimant, on account of the financial challenges relating to Covid-19. The total deduction is computed at Kshs 1,095,589.
69. The Respondent described deduction of salary, in its letter to the Claimant dated 11<sup>th</sup> April 2020, as temporary change. The reassurance to the Claimant that deduction of his contracted salary was a temporary measure, was repeated on 17<sup>th</sup> June 2020, in a communication from Berline Wabwire to the Claimant. He was told deduction was a temporary change. Magesh stated in his witness statement that deduction was temporary.
70. On 6<sup>th</sup> September 2020, the Respondent wrote to the Claimant advising that his September salary, would be paid without deduction. The Respondent however, refused to pay the cumulative deductions made on the Claimant's salary, from April to August 2020.
71. The Court does not think that the Respondent acted reasonably and was justified, in retaining the rest of Claimant's salary, from April to August 2020. He was leaving employment, and the least the Respondent could do, was honour its obligation to pay him in full, what was contracted as his monthly salary, from the beginning. The Respondent brought him to Kenya from India, on the promise of a monthly salary of Kshs 744,200 while on probation, and Kshs 770, 000 upon completion of probation. The withholding of part of his salary, was correctly described as temporary, intended to help the Respondent navigate through the business challenges, arising from Covid-19. If the situation changed, there would be restoration, as shown in the full payment, of the Claimant's September 2020, salary. It was not fair dealing between capital and labour, for the Respondent to ignore that it had not paid the



Claimant's full salary from April to August 2020. It ought to have been paid with the Claimant's exit. Magesh told the Court that the Respondent paid to the Claimant all contractual dues. The Court does not think this statement was entirely true, considering that what was described as temporary deduction, appears to have been made permanent, until the end of probation on 31<sup>st</sup> August 2020. The full salary was paid for the month of September 2020.

72. If deduction was temporary, it ought not to have resulted in deprivation of the Claimant's full monthly salary for 4 months, particularly when it became clear to the Respondent, that it would not be in a position to continue employing the Claimant, and that he had to return home to India unemployed. Deduction was with effect from April 2020, while the Claimant had only started working on 2<sup>nd</sup> March 2020. The Respondent disregarded the covenant of good faith and fair dealing.
73. The prayer for withheld salary of Kshs 1,095,589 is allowed.
74. The Claimant has not exhibited receipts on purchase and sale of his household goods, to support the prayer that he sustained loss, claimed at Kshs 222,000. The prayer is declined.
75. There was no prayer specific to unremitted tax. The Respondent stated that it is amenable to remitting the Claimant's PAYE to tax authorities, on being availed the Claimant's tax account. This is a matter that the Claimant should pursue with the tax authorities if he is minded to do so, from India.
76. Costs to the Claimant.
77. Interest allowed at court rate, from the date of Judgment, till payment is made in full.

**In Sum, it is Ordered:**

- a. Termination was unfair and unlawful
- b. The Respondent shall pay to the Claimant, notice at Kshs 1,540,000; equivalent of 3 months' salary in compensation for unfair termination, at Kshs 2,310,000; and, salary arrears of 4 months at Kshs 1,095,589 – total Kshs 4,945,589.
- c. Costs to the Claimant.
- d. Interest allowed at court rate, from the date of Judgment, till payment is satisfied in full.

**DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY AT NAIROBI, UNDER PRACTICE DIRECTION 6[2] OF THE ELECTRONIC CASE MANAGEMENT PRACTICE DIRECTIONS 2020, THIS 9<sup>TH</sup> DAY OF AUGUST 2024.**

**JAMES RIKA**

**JUDGE**

