



**Maina v Muriungi & 2 others (t/a Sheikh & Co Advocates) (Cause 23 of 2021) [2024] KEELRC 2252 (KLR) (19 September 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2252 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU  
CAUSE 23 OF 2021  
DN NDERITU, J  
SEPTEMBER 19, 2024**

**BETWEEN**

**MARY WAKARIMA MAINA ..... CLAIMANT**

**AND**

**DANIEL MURIITHI MURIUNGI ..... 1<sup>ST</sup> RESPONDENT**

**SUADA SHEIKH AHMED ..... 2<sup>ND</sup> RESPONDENT**

**NASRA SHEIKH AHMED ..... 3<sup>RD</sup> RESPONDENT**

**T/A SHEIKH & CO ADVOCATES**

**JUDGMENT**

**I. Introduction**

1. The claimant commenced this cause by way of a memorandum of claim dated 27<sup>th</sup> May, 2021 filed through Kimani & Muchiri Advocates LLP.
2. Alongside the memorandum of claim the claimant filed a verifying affidavit, a witness statement by the claimant, a list of documents and a bundle of copies of the listed documents.
3. Upon service the respondents entered appearance on 25<sup>th</sup> June, 2021 through Wetang'ula, Adan & Co. Advocates. A statement of defence and a counter-claim was filed on 22<sup>nd</sup> July, 2021 whereby the entire claim was denied and the court urged to dismiss the cause with costs. The respondents court-claimed for a sum of Kshs367,852/= from the claimant plus costs and interest thereon.
4. On 15<sup>th</sup> March, 2023 the respondents filed a list of documents and a bundle of the listed documents alongside a witness statement by Suada Sheikh Ahmed (RW1).



5. The cause came up for hearing in open on 28<sup>th</sup> November, 2022 when the claimant testified and was stood-down to 27<sup>th</sup> February, 2023 for cross-examination after which she closed her case. The defence was heard on 3<sup>rd</sup> May, 2023 when RW1 testified and the respondent's case was closed.
6. Counsel for both parties addressed the court through written submissions. Counsel for the claimant Mr. Wambugu filed his submissions on 3<sup>rd</sup> June, 2023 and Mr. Adano for the respondents filed on 18<sup>th</sup> September, 2023. Counsel for the respondents, with the leave of the court, filed further submissions on 18<sup>th</sup> September, 2023.

## **II. The Claimant's Case**

7. The claimant's case is expressed in the memorandum of claim, the oral and documentary evidence by the Claimant (CW1), and the written submissions by her counsel. The same is summarized as hereunder.
8. In the memorandum of claim, the claimant, an advocate of the High Court of Kenya, pleaded that she was engaged by the respondents in their law-firm as an associate advocate from 1<sup>st</sup> February, 2014 to 30<sup>th</sup> July, 2020.
9. It is pleaded that the claimant had a clean disciplinary record and that her last net salary was Kshs120,000/=.
10. It is pleaded that vide a letter dated 30<sup>th</sup> July, 2020 the respondents purported to declare the claimant redundant without due process and in total violation and breach of the law. Further, it is pleaded that the respondents did not pay due and payable terminal dues to the claimant upon termination on the purported redundancy.
11. It is pleaded that the respondents unilaterally and unlawfully slashed the claimant's salary by half in the months of May, June, and July, 2020. It is further pleaded that the respondents failed to pay to the claimant her duly earned commissions and failed to issue her with a certificate of service on termination.
12. It is further pleaded that during the entire period of employment the respondents failed, refused, and or neglected to remit statutory deductions to National Social Security Fund (NSSF) and National Hospital Insurance Fund (NHIF) made from the claimant's salary.
13. The claimant pleads that her termination was unfair and unlawful for lack of both substantive and procedural fairness and that despite demand made and notice of intention to sue issued the respondents failed, refused, and neglected to settle the claim rendering this cause absolutely necessary seeking the reliefs set out in the introductory part of this judgment.
14. In her testimony in court the claimant relied on and adopted her filed written statement dated 27<sup>th</sup> May, 2021 as her evidence-in-chief. She also produced her filed documents as exhibits 1 to 8.
15. The claimant stated that she was engaged by the respondents as an associate advocate from 1<sup>st</sup> February, 2014 at a starting monthly net salary of Kshs35,000/=. She was confirmed from 1<sup>st</sup> August, 2014 as an associate advocate in the law-firm and her monthly net salary raised to Kshs50,000/=. It is pleaded that the salary was either paid in cash or by direct bank transfer into her bank account with the National Bank. It is pleaded that as at the time of termination the claimant's monthly net salary was Kshs120,000/=. She stated that in addition to the monthly salary she earned commissions and bonuses based on fees collected per month.
16. The claimant stated that she was terminated on account of purported redundancy vide a letter dated 30<sup>th</sup> July, 2020.



17. The claimant stated that in the month of April, 2020, due to the effects of Covid-19 pandemic the respondents unilaterally and without any consultation issued an internal memo to the effect that her salary for April was to be paid at the rate of 50%. It is pleaded that while the communication was to the effect that the cut was for the month of April alone the respondents unilaterally and without any consultation with the employees continued deducting 50% monthly pay for April, May, and June before terminating the claimant in July, 2020 without paying her for that last month of employment.
18. The claimant stated that the respondents failed, refused, and or neglected to issue her with pay-slips for the entire period of her employment.
19. In cross-examination the claimant reiterated that her employment was founded on the letter dated 14<sup>th</sup> July, 2014 and she was based at the respondent's Nakuru office as an associate advocate. She stated that she performed all general advocacy/legal work including sourcing for clients, attending clients, and attending court. She stated that at no time was her performance questioned by the respondents.
20. The claimant stated that she did not report the dismissal to the Nakuru labour office before filing the claim in court but stated that the letter of demand was copied to the said office. She admitted that she received the respondents' memo dated 1<sup>st</sup> April, 2020 that reduced the salary for all advocates by 50% for that particular month due to the devastating effects of Covid-19 pandemic. The claimant stated that in her understanding and what she signed for and accepted was reduction of the salary for only the month of April, 2020. She stated that she protested on telephone to the subsequent deductions of 50% in the salary for May and June, 2020.
21. It is on the basis of the foregoing that the claimant prays that judgment be entered in her favour as prayed. The written submission by her counsel shall be considered in a succeeding part of this judgment.

### **III. The Respondent's Case**

22. The respondents' case is expressed in the statement of defence and counter-claim, the oral and documentary evidence adduced through RW1, and the written submission by their counsel.
23. The facts on the employment of the claimant by the respondents are admitted. However, it is pleaded that the claimant was a poor performer and that her last salary was Kshs50,000/= as per a letter dated 14<sup>th</sup> July, 2014. It is pleaded that the respondents declared the claimant redundant due to her poor performance as per the letter of termination dated 30<sup>th</sup> July, 2021. It is further pleaded that the claimant was in-charge of the respondents' Nakuru office and responsible for her leave schedule and as such she took all her leave days.
24. Further, it is pleaded that in April, 2021 in the middle of the Covid-19 pandemic the respondents in consultation with all employees, including the claimant, agreed on a 50% pay-cut until further notice or until such a time that the economic situation improved. It is pleaded that all the statutory deductions made from the earnings of the claimant were remitted to NSSF and NHIF without exception.
25. It is pleaded that the claimant failed and or refused to collect her certificate of service which is readily available for her collection.
26. It is pleaded that the claimant was fairly and lawfully terminated on redundancy due to her poor performance. It is denied that a demand notice was served upon the respondents before action.
27. On the counter-claim it is pleaded that on or about 11<sup>th</sup> November, 2014 the claimant applied for and was granted a personal loan of Kshs850,000/= as per a loan agreement of even date. It is pleaded that



the loan was repayable within 36 months commencing December, 2014. It is pleaded that as at the time of termination the claimant owed to the respondents a balance of Kshs367,852/= for which the respondents pray that judgment be entered plus interest and costs.

28. In her testimony in court RW1 relied on and adopted her filed written statement dated 8<sup>th</sup> November, 2022. She produced the filed documents as exhibits 1 to 13. She stated that the claimant's monthly salary was reviewed upwards during her employment from Kshs45,000/= to a last monthly pay of Kshs70,000/=.
29. She stated that the claimant was the manager of the respondents' Nakuru office and as such she was in-charge of her own leave schedule. She stated that the law-firm in consultation with the employees decided to apply a 50% pay-cut for all employees in April, 2020 due to poor business and the pay-cut was extended to May, 2020. She stated that as a result of the poor economic times brought about by Covid-19 pandemic the respondents declared the claimant redundant.
30. She stated that the respondents opened the Nakuru office in 2018 and the claimant was posted there as the in-charge. However, she alleged that the claimant performed dismally rendering the operations of the office untenable as no money was made and it had to be closed.
31. On the counter-claim RW1 stated that the claimant borrowed a sum of Kshs850,000/= from the respondents for purchase of a car. She stated that the claimant left a balance of Kshs367,851/= unpaid as at the time of termination which remains a debt to this day as the last instalment was made in July, 2020. She denied that any commission was due or payable to the claimant.
32. On cross-examination RW1 admitted that the claimant was not issued with pay-slips. She stated that the claimant was paid Kshs60,000/= for April, May, and June, 2020 being half of her full monthly net salary of Kshs120,000/=. She admitted that there were no records of leave days taken by the claimant but she insisted that the claimant was in-charge of her own leave schedule.
33. RW1 stated that the respondents' exhibit 13 is a schedule for the repayments made by the claimant against the advanced loan of Kshs850,000/=. She admitted that the amount indicated as advanced in that schedule of Kshs1,000,000/= is incorrect as the actual amount advanced was Kshs850,000/=. She stated that the respondents are claiming for the unpaid balance and that they are still holding the logbook to the car that the claimant purchased.
34. She admitted that there were no records of poor performance on the part of the claimant.
35. It is on the basis of the foregoing that the respondents pray that the claimant's cause be dismissed with costs and that judgment be entered in their favour as per the counter-claim with costs. The submission by the respondents' counsel shall be considered hereunder.

#### **IV. Submissions by Counsel**

36. On the one hand, in summary, counsel for the claimant identified the following five issues for determination by the court –
  - i. The issue of the client's salary;
  - ii. The issue of leave pay earned but unpaid;
  - iii. The issue of unpaid Commissions;
  - iv. The issue of loan balance; and
  - v. The issue of termination on account of redundancy.



37. On the first issue, it is submitted that the fact that the claimant was an employee of the respondents as an associate advocate from 2014 to July, 2020 is not in dispute. Further, it is submitted that it is not in dispute that the claimant was terminated on purported redundancy in July, 2020. It is also not in dispute that the claimant's last salary stood at Kshs120,000/= and that the claimant was only paid 50% of her salary, being Kshs60,000/=-, for the months of April, May, and June, 2020 and nothing was paid to her for July, 2020. It is further submitted that no pay-slips were issued to the claimant as required by the law.
38. It is submitted that as the custodian of the employment records the respondents were obligated in law to avail the same in court and in default the court is urged to presume that such withheld evidence if produced would have been against the respondents. The court is urged to take the evidence by the claimant as stated in the foregoing paragraph to be factual as the respondents availed no evidence in rebuttal. Counsel cited Julius Orina Oirere V Eastleigh Pharmaceuticals Limited (2020) eKLR and Kenya Akiba Micro Financing Limited V Ezekiel Chebii & 14 Others (2012) eKLR in support of the foregoing proposition.
39. On the second issue, it is submitted that Sections 74(f) & 28(1) of the *Employment Act* (the Act) entitle the claimant to at least 21 days of annual leave and the respondents were legally obligated to keep records of leave taken, among other records. It is submitted that the leave-pay claimed by the claimant is for 2018, 2019, and 2020 yet the respondents availed no records for the said years in rebuttal to the claim. The court is urged to be persuaded by the reasoning and holding in Rumba Mnyika Nguta V Southern Hills Development Agency Limited t/a Radio Kaya (2020) eKLR to the effect that leave not taken becomes a monetizable benefit payable to an employee.
40. On the third issue, it is submitted that the letter of confirmation dated 14<sup>th</sup> July, 2014 provided for payment of commissions to the claimant at 40% of the legal fees earned. It is submitted that the allegation of poor performance made by the respondents against the claimant are false and malicious as no records of such were produced or warning letters on the same. It is submitted that in their defence the respondents admitted that the claimant was entitled to commissions on fees earned for the law-firm yet they failed to avail records of fees earned for the period claimed. In the circumstances the court is urged to allow the claim of Kshs257,873/= in commissions as prayed by the claimant as the same has been proved on a balance of probabilities based on the contract dated 14<sup>th</sup> July, 2014. Counsel cited Saima Yusuf Kassim V African Safaris Destinations Limited (2021) eKLR, Catherine Waithera Rukorio & Another V Mediamax Network Limited (2022) eKLR, and Hudson Kidaha Kisigwa V Ramageco Kenya Limited (2018) eKLR as persuasive decisions in that regard.
41. On the counter-claim for Kshs367,852/= by the respondents it is submitted that the same was not proved on a balance of probabilities in that no evidence was adduced on actual disbursement and receipt of the alleged loan to the claimant, the schedule of payments availed in court by the respondents cannot and was not authenticated as it is neither signed by any of the parties in this cause nor prepared in the letter-head of the law-firm. In any event, the author of the said document is unknown and was not called as a witness in court. Further, it is submitted that the logbook to the car that the claimant allegedly bought with the funds which the respondents alleged to be holding as a lien was not availed in court. The court is urged to be guided by the decisions in Njuguna Wamuti V Simeon Koimburi (1977) KLR and Rebecca N. Nyangolo V Prashant Raval (2021) eKLR and find that the claim was not proved both in law and as of a fact.
42. On the issue of termination on account of alleged redundancy the court is urged to find that the respondents did not comply with Section 40 of the Act in that no notice(s) was issued to the claimant, no criterion was set out on how the redundancy was carried out, and the claimant was not consulted.



The court is urged to apply the reasoning in *Abigael Jepkosgei Yator & Another V China Hanan International Co. Ltd* (2018) eKLR. It is submitted that the manner and style in which the respondents executed the alleged redundancy against the claimant is alien to law and completely unlawful.

43. In the circumstances, the court is urged to find and hold that the claimant's case has been proved to the requisite degree and allow the same in its entirety as prayed with costs. The court is urged to find and hold that the respondents failed to prove their counter-claim and hence dismiss the same with costs.
44. On the other hand, counsel for the respondents identified two issues for determination – Whether the termination was fair; and, Whether the claimant is entitled to the reliefs sought.
45. On the first issue, it is submitted that the parties engaged before the claimant was declared redundant and that it was allegedly decided and agreed that the respondents' Nakuru office was to be closed. It is submitted that the respondents complied with Section 40 of the Act by issuing the claimant with one month's notice. Counsel cited *CMC Aviation Limited V Mohammed Noor* (2015) eKLR and *Kenya Broadcasting Corporation V Geoffrey Wakio* (2019) eKLR urging the court to find and hold that the termination of the claimant on redundancy was fair and that the respondent complied with the law.
46. Counsel insisted that the claimant's monthly salary was Kshs50,000/=. It is submitted that as a mitigating factor in award of compensation, if any, the court should consider that the claimant was in employment of another law-firm by September after leaving the respondents' law-firm in July, 2020.
47. It is further submitted that due to the devastating effects of the Covid-19 pandemic the respondents reached an agreement with its employees, the claimant included, to take a 50% pay-cut "until further notice". It is submitted that the claimant was terminated before that "further notice" was issued. The court is urged to hold that the claimant's pay as at the time of termination was Kshs50,000/ and not Kshs120,000/= as claimed. It is submitted that the claimant was paid a severance pay of Kshs50,000/= . It is submitted that as the head and manager of the respondents' Nakuru office the claimant was in-charge of her leave schedule and that she took all her leave days. It is further submitted that all statutory deductions made against the claimant's salary were remitted to NSSF and NHIF in accord with the law. It is further submitted that the claimant failed to prove the claim on any payable commissions to the required standard.
48. On the counter-claim it is submitted that while the respondents proved that the claimant was advanced a sum of Kshs850,000/= in 2014 the claimant failed to demonstrate and prove that she indeed repaid the loan. It is submitted that as at the time of her termination the claimant owed to the respondents a sum of Kshs367,852/= being unpaid balance on the loan as per the respondents' exhibit 13.
49. On compensation the court is urged to find that none is payable as the termination was fair and lawful. However, in case the court finds that the termination was unfair and unlawful it is urged that the court should consider that under the contract dated 14<sup>th</sup> July, 2014 either party could terminate the contract by issuing a one months' notice and as such one month's pay in lieu of notice should suffice for compensation. The court is urged to follow the reasoning in *CMC Aviation Limited V Mohammed Noor* (Supra) and *Kenya Broadcasting Corporation V Geoffrey Wakio* (Supra) and award no more than one month's pay in compensation. In any event, it is submitted that two months after termination the claimant was in employment of another law-firm *Kimani Muchiri Advocates* and as such she did not suffer unemployment for long.
50. In the further submissions the court is urged to find and hold that although the respondents failed to issue pay-slips to the claimant, the terms and conditions of service were well documented in the contract of 14<sup>th</sup> July, 2020.



51. It is submitted that the unpaid commission falls in the category of special damages that ought to be specifically pleaded and proved as held in *Hahn V Singh (1985) KLR* and *Anthony Gathii Muhuri V Scott Travel Group Limited (2022) eKLR*. It is submitted that the claimant did not support her claim with documentary or any other evidence and as such the authorities cited by her counsel did not support her case. Counsel for the respondents submitted that in all the decisions cited by the claimant's counsel the claimants in those cases strictly pleaded and proved their respective claims for commission.
52. On the loan balance it is submitted that the evidence on record confirms that the claimant was advanced the loan of Kshs850,000/= and she even negotiated for reduction of her monthly deductions from Kshs31,250/= to Kshs20,000/= as per filed documents including her own admission on the payments schedule attached to email correspondences. It is submitted that the claimant's denial of liability on the loan balance is dishonest and misplaced. It is submitted that in the course of her employment the claimant took out many other loans and advances and that as a matter of fact a balance of Kshs367,851/= was outstanding as at the time of her termination.
53. It is on the basis of the foregoing that the court is urged to dismiss the claimant's claim in its entirety and enter judgment in favour of the respondents as per the counter-claim with costs.

#### **V. Issues for Determination**

54. Upon careful examination and consideration of the pleadings filed, the oral and documentary evidence tendered from the claimant and the respondents through RW1 and the submissions by counsel for both sides, the court identifies the following issues for determination –
  - a. Was the termination of the claimant by the respondents on redundancy unfair and unlawful?
  - b. If (a) above is in the affirmative, is the claimant entitled to the reliefs sought?
  - c. Have the respondents proved the counter-claim against the claimant?
  - d. What are the appropriate orders on costs for the cause and the counter-claim?

#### **VI. Termination**

55. The terms and conditions of engagement of the claimant by the respondents are not really in contest. The evidence on record is that the claimant was engaged by the respondents in 2014 as an associate advocate based in Nairobi. In 2018 the respondents decided to open a branch office in Nakuru and the claimant was sent out there. It appears that by July, 2020 the respondents were contemplating closing the Nakuru office purportedly due to lack of sustainable flow of business and revenue and as such they decided that the services provided by the claimant were no longer required. It is on that thinking that the respondents issued the claimant with a notice of termination on redundancy dated 30<sup>th</sup> July, 2020. For ease of reference the said letter stated as follows –

To

Mary Wakarima Maina

Sheikh & Company Advocates

Thursday 30<sup>th</sup> July, 2020.

Dear Mary Wakarima,

Re: Termination of Employment on account of Redundancy



The Partners of the company have come to a decision that your position of Advocate in charge of conveyancing department in our Nakuru office has become untenable owing to the need to reorganize, reduce staff and restructure the business of the firm to viability.

In reference to our previous discussions on revenues and expenditures with the management, we regret to inform you that your employment contract is being terminated henceforth on basis of redundancy. Further note, we have taken this consideration based on the current situation and unfortunately, we have few or no transactions ongoing. Partners upon this discussion have no choice but to let you go.

As per our terms of engagement and in line with Section 40 of the *Employment Act*, you will be paid salary upto date, and the equivalent of one-month salary in lieu of notice, payment of un-utilized leave days if any and severance pay at the rate of 15 days for every year of service.

Further to this, kindly get in touch with our Human resource department for a discussion on how to settle liabilities owed to the firm and any other issue that you deem fit to be addressed. In the meantime, kindly hand over all the pending matters to Kenneth Kimathi and Daniel Muriithi together with all the office property in your possession. Ensure the said handing over is captured in handover report signed by the above mentioned staff.

We appreciate your contribution and we shall gladly recommend you to any employer besides issuing a certificate of service.

Yours sincerely

Sheikh & co. Advocates

Daniel Muriithi Suada Sheikh Ahmed

Partners Partners

56. While the respondents allege that they consulted and held discussions with the claimant prior to issuance of the said notice, the claimant's position is that she was neither consulted nor served with a notice or afforded due process as contemplated in law.
57. The notice of termination leaves no doubt that the respondents terminated the claimant on purported redundancy on the basis that her services were no longer desirable or necessary in the operations of the law-firm. The applicable law on redundancy is Section 40 of the Act that provides 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 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.
- (2) Subsection (1) shall not apply where an employee's services are terminated on account of insolvency as defined in Part IX in which case that Part shall be applicable.
- (3) The Minister may make rules requiring an employer employing a certain minimum number of employees or any group of employers to insure their employees against the risk of redundancy through an unemployment insurance scheme operated either under an established national insurance scheme established under written law or by any firm underwriting insurance business to be approved by the Minister.
58. The above provisions are self-explanatory with no need for the court to re-emphasize the mandatory nature of the provisions for an employer to comply therewith before declaring an employee redundant. Other than the notice of termination there is no evidence whatsoever that the respondents complied with the applicable law as recited above. There is no evidence that a notice of the intended redundancy was issued to the claimant and or the area labour office, there is no evidence that the claimant was consulted and or involved in the process, no criterion was disclosed on how and why the respondents targeted the claimant, there is no evidence of payment of leave due, severance pay, and notice pay, before redundancy. In fact, the manner of termination and the procedure adopted by the respondents amounted to unfair and unlawful dismissal. It is so held, declared, and proclaimed.

## VII. Reliefs

59. Having held that the Claimant was unfairly and unlawfully terminated for the massive failure by the respondents to comply with the applicable law, the court shall now consider each of the reliefs sought as hereunder.
60. Prayer (a) is for a declaration that the termination of the claimant on the purported redundancy was unfair and unlawful. The court has found and held as such in the foregoing part of this judgment and a declaration shall be proclaimed and issued to that effect.
61. Prayer (b) is for an order directing the respondents to issue the claimant with a certificate of service. A certificate of service is a right to an employee under Section 51 of the Act regardless of the circumstances under which such an employee is terminated or exits employment. The respondents are hereby ordered and directed to issue and deliver a certificate of service to the claimant.
62. Prayer (c) has several items as follows. Item (i) is for one month's pay in lieu of notice in the sum of Kshs120,000/=. This is a relief available to the claimant under Section 40(1)(f) of the Act and the same is hereby allowed. The evidence on record is that as at the time of termination the claimant was on net monthly pay as above. Item (ii) appears to be asking for the same prayer as above seeking for one month's salary in lieu of notice in the sum of Kshs120,000/=. In my view the two items relate to



- one and the same relief as the law does not provide for notice pay and pay “in lieu of redundancy” as claimed. This item is thus denied as granting the same would amount to double compensation over the same subject matter.
63. Item (iii) is for compensation for the unlawful termination and the claimant is seeking for the maximum compensation equivalent to 12 months’ net pay. Although no evidence was availed the respondents alleged that within two months of termination the claimant secured employment with another law-firm. The claimant did not expressly deny this but admitted having secured employment with another law-firm after she was terminated by the respondents. The court holds the considered view that with her qualifications, as an experienced advocate of the High Court, the claimant was fairly marketable and jobs were readily available for her as at that time and even now. The court takes the evaluated view that compensation equivalent to six months’ net salary is fair compensation in the circumstances. This award is calculated at Kshs120,000/= \* 6= Kshs720,000/=.
64. Item (iv) is for earned leave for 2018, 2019, and 2020 amounting to Kshs196,000/=. Sections 10 & 74 of the Act obligate the respondents as employers to keep employment records including those on leave due, leave taken, leave balance etc. While the respondents alleged that the claimant was in-charge of her leave schedule, the letter of termination confirms that the claimant was not the manager or in-charge of the Nakuru office as she is therein described as the head of the conveyancing department. The respondents did not avail such records as to rebut this claim for leave pay and the same is thus allowed and granted as prayed.
65. Item (v) is for severance pay under Section 40(1)(g) of the Act for the six and a half years that the claimant served the respondents in the sum of Kshs390,000/=. This relief is granted as a matter of the law and fact.
66. Item (vi) is for the court to issue an order directing the respondents to remit statutory deductions of Kshs2,160/= to NSSF and Kshs2,120/= to NHIF. However, no evidence of the deductions was availed as no pay-slips or any other documents were availed. Besides, the two statutory bodies are free to pursue the respondents, in an appropriate forum, for remittances of the same if the same is due and payable. There is no evidence that the two institutions have demanded such sums from the claimant as to push the burden to the respondents.
67. Item (vii) is for unpaid commissions in the sum of Kshs103,105/=. The evidence on record and more so the oral evidence by the claimant and RW1 is that the claimant was to earn commission on fees earned from clients. In that context it was upon the respondents as the employer to avail and submit records of the fees and commissions paid or payable to the claimant. That is the only way known to the law that the respondents should have done to rebut that claim. That is the very essence of Sections 10 & 74 of the Act that an employer is obligated to keep all records of employment to aid a court of law or labour officers in ascertaining the correct position in case of disputes. In the circumstances this claim is allowed.
68. Item (viii) is for salary arrears for the months of May, June, and July in the sum of Kshs180,000/=. On 1<sup>st</sup> April, 2020 the respondents issued a memo in the following terms –
- To: All Staff
- From: Daniel
- CC: Partners
- Date: 1<sup>st</sup> April, 2020
- Re: Covid 19 Pandemic



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In compliance with the directives issued by the National Council on the Administration of Justice and the National Emergency and Response Committee to mitigate the spread of Covid-19(Corona Virus) we are now experiencing cash flow problems since the major institutions which include the courts, various registries, and corporate clients have little or no activity to support our day to day operations.

The Partnership has decided that the partners and the Associates will take a 50% pay cut for the month of April, 2020. All the other staff will take a 20% pay cut for the month of April as we continue monitoring the new ICT guidelines from various constitutions which may enable us work from home.

We are positive that soon we will resume fully noting to advice you on any changes that will take place.

Yours Sincerely,

Daniel M. muriungi Nasra sheikh Ahmed

69. In my view the above notice was specific that the pay cut of 50% was only applicable for the month for April, 2020 and not indefinite as suggested by the respondents during the hearing. If the respondents wished to have the memo apply for May, June, and July, 2020 nothing would have been easier than for them to expressly state so. In the circumstances, the claimant is entitled to the salary arrears as claimed above and the same is hereby granted.

### **VIII. Counter-Claim**

70. The respondents' case is that vide an agreement dated 11<sup>th</sup> November, 2014 the claimant at her request and instance was advanced a loan of Kshs850,000/= to purchase a car which amount was repayable by way of monthly deductions from her salary for a period of 36 months. It is pleaded that as at the time of termination the claimant owed a sum of Kshs367,851/=. In her defence to the same, the claimant termed the claim as a sham and an afterthought. In her oral evidence in court the claimant did not testify on the same. The court has seen and read the above "Finance Agreement" between the parties confirming that indeed the claimant was advanced a sum of Kshs850,000/= by the respondents on 11<sup>th</sup> November, 2014. It was thus upon the claimant to avail evidence to prove that she indeed repaid the entire loan. Inasmuch as the claimant contested the unsigned schedule of the repayments she made produced as exhibit 13 by the respondents, it was upon her to avail what she considered to be a proper schedule of repayments that she made whether through deductions from her salary, a bank, cash, Mpesa, or any other method or mode. It was upon the claimant to rebut the evidence availed by the respondents as above and she failed to do so.
71. The court finds and holds that on a balance of probabilities the respondents proved that the claimant owed them the claimed balance and judgment is hereby entered accordingly.
72. However, the evidence on record is that the respondents are holding the logbook for the vehicle that the claimant purportedly purchased. Although the details pertaining to the said vehicle were not availed in court it is only fair and just that the said logbook be released to the claimant upon payment or set-off or settlement of the above balance. It shall be so ordered as hereunder to avoid further or future litigation between the parties over that subject matter and save precious judicial time.



73. Further, the court notes that the said balance should have been settled through monthly deductions from the claimant's salary had the respondents not unfairly and unlawfully terminated the claimant. In the circumstances no interest or costs shall be ordered on the said sum in the counter-claim.

### **IX. Disposal & Orders**

74. In disposal of this cause, the court issues the following orders: -

- a) A declaration be and is hereby issued that the termination of the claimant by the respondents on purported redundancy was unfair and unlawful.
  - b) The claimant is awarded a total of Kshs1,341,254/= made up as follows –
    - i. Notice pay .....Kshs120,000/=
    - ii. Compensation for wrongful, unfair, and unlawful dismissal .....Kshs720,000/=
    - iii. Leave pay ..... Kshs196,000/=
    - iv. Severance pay ..... Kshs390,000/=
    - v. Unpaid commission ..... Kshs103,105/=
    - vi. Salary arrears ..... Kshs180,000/=Total .....Kshs1,709,105/=
- Less set-off from the counter-claim ..... Kshs367,851/=
- Balance due and payable ..... Kshs1,341,254/=

This award is not subject to statutory deductions as the evidence on record is that the earnings/salary was net.

- c. The respondents shall issue and deliver to the claimant a certificate of service within 30 days of this judgment.
- d. The respondents shall release and deliver the logbook to the purchased vehicle within 30 days of this judgment.
- e. The claimant is awarded costs of the cause.
- f. Each party shall meet own costs for the counter-claim for reasons stated in the judgment.

**DELIVERED VIRTUALLY, DATED, AND SIGNED AT NAKURU THIS 19<sup>TH</sup> DAY OF SEPTEMBER, 2024.**

.....

**DAVID NDERITU**

**JUDGE**

