

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MALINDI

CAUSE NO. E003 OF 2024

PATRICK KIHIA MWARANGU

CLAIMANT

VERSUS

CATHMED LIMITED

.....RESPONDENT

JUDGEMENT

Introduction

1. By a Statement Claim filed herein dated 21st May, 2024, the Claimant sued the Respondent seeking the following reliefs;
 - (a) A declaration that the Respondent's action of summarily dismissing the Claimant from employment was unlawful and unfair dismissal.

- (b) A declaration that the Claimant is entitled to payment of his terminal dues and compensatory damages as pleaded.
- (c) An order for the Respondent to pay the Claimant his due terminal benefits and compensatory damages amounting to Kshs. 61,700,000/=.
- (d) Interest on (c) above at the court rate from the date of filing the claim till payment in full.
- (e) Cost of this suit plus interest thereon.

2. The Respondent challenged the Claimant's claim through a Response to the Memorandum of Claim dated 13th June 2024. It acknowledged that the Claimant was, at all material times, its employee, and maintained that his employment was lawfully and fairly terminated due to redundancy. His terminal dues were paid in full.

The Claimant's case

3. The Claimant stated that he was employed by the Respondent in October 2018 as a Sales Manager on a three-year contract with a monthly salary of Kshs. 350,000/=.
4. He served diligently for approximately six years, making substantial contributions to the Respondent's growth.
5. Throughout his tenure, the Claimant served as the sole specialist and undertook the principal responsibilities of the company. His duties encompassed sales, client relations, technical product demonstrations, market monitoring, training, and support with device implantation.
6. The Claimant avers that he had never been subjected to any disciplinary action or performance review during his employment.
7. On 11th April 2024, he received an email from the Respondent summoning him to a meeting on 15th April 2024 without being informed of its agenda.
8. At the meeting, he was informed that his position had been declared redundant and was issued with a termination letter

dated the same day. He declined to sign the letter, contending that the termination was predetermined, procedurally unfair, and in violation of the law.

9. He argues that the termination of his employment was without a genuine cause. His role was never rendered redundant at any point. This is demonstrated by the fact that, on the same day as his termination, Nairobi West Hospital placed an order worth over KShs—600,000 for the Respondent's products. Furthermore, even after his termination, the Respondent's Director and clients continued to seek his professional services.
10. The Claimant states that he worked tirelessly, often without leave, on weekends or holidays, and without compensation for the extra workload.
11. He claims that his final salary and payment in lieu of notice have not been paid. Efforts to recover the dues have been unsuccessful, as the Respondent has been evasive.

12. The Claimant asserts that his dismissal infringed the Constitution, the Employment Act, and principles of natural justice, as he and the Labour Office were not notified in writing of the planned redundancy. He was not given one month's notice or severance pay. The criteria used to select him for redundancy were never disclosed, and he was neither given a fair hearing nor the chance to defend himself.

13. The Claimant seeks the following payments;

- a) Salary in lieu of notice - Kshs. 350,000/=
 - b) Salary for the last month - Kshs. 350,000/=
 - c) Non-remittance of NHIF & NSSF - Kshs. 100,000/=
 - d) Leave accrued (6 years) - Kshs. 25,200,000/=
 - e) Service pay (6 years) - Kshs. 25,200,000/=
 - f) Unpaid house allowance - Kshs. 6,300,000/=
- Total: Kshs. 57,500,000/=

14. Additionally, he seeks damages for sudden loss of income and the resulting trauma, as well as compensation equivalent to 12 months' gross salary (Kshs. 4,200,000/=), for unfair termination of employment.
15. Cross-examined by Counsel for the Claimant, the Claimant testified that he first joined the Respondent's employment under a written contract in October 2017, and subsequently executed another employment contract with them in 2022.
16. Due to COVID-19, business dynamics shifted, impacting performance. Some products did not sell well because of market conditions. The Respondent held strategic meetings periodically.
17. The Respondent was promoting more than thirteen products.
18. The company would pay for the samples of the products that they were promoting, and would only start earning from the sale of the same after hospitals started purchasing the same.

19. He was made aware on the 15th April 2024 that the Respondent had lost promotion contracts for three products.

20. His pay slips included an item for statutory deductions. However, he isn't aware that the amounts on the slips include the house allowance.

Respondent's case

21. The Respondent presented one of its Directors to testify on its behalf.

22. The Respondent admits that the Claimant was employed by it from 2017 on a contractual basis with a gross salary of Kshs. 250,000/=. The initial contract ran from 1 October 2017 to 30 September 2021, and all dues were fully settled and acknowledged through a letter dated 31 August 2021, along with associated payment documents. The Respondent argues that any claim related to this period is misplaced.

23. The Respondent contends that after the initial contract expired, the Claimant agreed to new terms.
24. The Respondent denies that the Claimant was diligent and competent, asserting instead that he was arrogant, disrespectful, and had disciplinary issues.
25. The Respondent argued that it sponsored training for the Claimant at its own expense both locally and abroad, including in France and Italy, as he initially lacked essential skills for his role.
26. The Respondent further argued that the Claimant was not the only specialist, citing the employment of Shem Ong'eri, who later left after the company lost part of its market. It is misleading, therefore, for the Claimant to claim he was the sole driver of the Respondent's operations. The Respondent also employed other staff, including an administrator, accountant, secretary, and auditor.
27. The Respondent states that its directors, Francesco Duranti and Marco Bonaccini, played a key role in marketing

products; therefore, the Claimant cannot claim to have managed operations on their own.

28. In December 2020, the Respondent's contract with the pacemaker supplier expired. This resulted in Shem becoming redundant, as he was only trained to handle pacemakers, and the supplier was no longer dealing in that product.

29. Following this, the Claimant was left alone to handle the remaining stock of the pacemakers as well as other line products. Upon exhausting the pacemaker stock, the Respondent would not continue to purchase more, as their contract had expired and attempts to renew it had failed. However, as some doctors still insisted on having pacemakers in their Hospitals, the Directors of the Respondent company were forced to register a sister company [African Heart Rhythm Ltd] to distribute the pacemakers. The Respondent had failed to meet the distributorship requirements set by the manufacturer.

30. The distributorship was granted to the sister company for a period of two years. Consequently, the Claimant was

appointed to serve within both companies. This led to the termination of the original contract. Subsequently, a new agreement was signed to include additional terms, such as the management of the pacemaker product line by the sister company. His salary was increased from KShs. 250,000 to 350,000.

31. The new contract also included the promotion and sale of the intensive care line of products [ICU] from SCW Medicath company and the PBMV Balloon Catheter from SYMMED company, as well as any other new product the management could find viable for the Kenyan market.
32. Because the new pacemaker role was demanding, the Claimant would sometimes be called to work during holidays, weekends or after the regular working hours. In return, he would be given a day off to compensate for the number of days he spent overtime.
33. The Claimant failed to carry out his duties with dedication and diligence. This led to multiple issues between the Respondent and its clients, as well as with its suppliers. By

the end of 2023, the Respondent had lost the representation of Sorin /Microport products [pacemakers]. The Claimant did not take any initiative to promote the intensive care products, despite the Respondent purchasing a substantial number of samples, along with seven pieces of PBMV Balloon, which subsequently expired.

34. The Claimant was at all material times in breach of his contractual commitments for failing to sell the products despite several discussions regarding the same. Furthermore, he retained some products that he never sold or placed in Hospitals until the end of April 2024, when he returned more than 90% of them. Some of the PBMV Balloons had expired. As a result, the Respondent lost revenue.

35. Having lost distributorship, his services and more specifically, under the second contract, became no longer needed.

36. The Respondent decided to discuss with the Claimant regarding its status and explore ways of improving sales and

increasing revenue earnings. The Claimant was invited to a meeting scheduled for April 15, 2024. The Respondent *inter alia* paid for his flight from Nairobi to Malindi.

37. During the meeting on 15th April 2024, the Claimant was asked to address those present as the agenda of the day related to his line of duty. Surprisingly, he refused to contribute, stating that he would do so in writing. He later chose to terminate his employment and did not return to work.

38. The Labour officer was served with a notification of the Respondent's intention to terminate the Claimant's employment on account of redundancy. The Claimant was requested to choose between working during the notice period and getting paid his dues in lieu of notice; however, he never communicated to the Respondent which option he had chosen.

39. The Claimant was paid his salary up to April 2024, through Jubilee Insurance Co Ltd.

40. The issue of selection criteria does not arise as the Claimant was the only remaining employee in his department, since Shem Ongeru had earlier left them.
41. The Respondent avers that the Claimant should pay one month's notice as he 'terminated himself.' NHIF and NSSF contributions were remitted at all material times, and at the time of separation, he had utilised all his earned leave days. He was on leave from April 16th to April 30th, 2024. Severance pay was remitted monthly to Jubilee Life Insurance, and his salary included a house allowance, as specified in his contract.
42. The Respondent further states that the claim for 12 months' salary is unsustainable, as they followed fair procedures, and the Claimant voluntarily exited from his employment.
43. During cross-examination by the Claimant's Counsel, the witness stated that clause 2.1 of the employment contract dated 5th January 2022 explicitly specified that the Claimant was responsible for selling products. Nonetheless, the clause does not expressly delineate the particular products.

44. After separation, the witness's co-director continued to market and sell the products of the Respondent company.
45. The Claimant had the skills to sell other products other than the three.
46. The minutes of the meeting of 15th April 2024 explicitly delineate the agenda thereof. Redundancy was not among the items for deliberation.
47. The witness further testified that the Claimant was allowed to explain himself; however, he requested 72 hours to do so. The minutes reflect this. Nevertheless, the Respondent issued him a termination letter dated the same day, 15th April 2024.
48. The delivery documents exhibited in evidence demonstrate that the Respondent continued delivering products to its customers, including Kenyatta University Hospital, even after they had terminated the Claimant's employment. The delivery notes are dated 15th April 2024 and 8th May 2024.

49. During his re-examination, the witness stated that redundancy was discussed at the meeting.

50. Clause 3.4 of the contract of employment did set out the specific products that the Claimant was to promote.

51. Due to financial constraints, the Respondent was unable to retain the Claimant in their employment.

Claimant's submissions

52. The Claimant raised two main issues for determination: whether there was a valid reason for redundancy and whether the procedure for redundancy was followed.

53. Regarding the first issue, the Claimant stated that the Respondent's redundancy notice dated 15th April 2024 cited loss of two product lines and financial difficulties as reasons for declaring the Claimant's position redundant. However, the Respondent failed to provide evidence to support these claims.

54. Specifically, no documentation was tendered to show loss of the pacemaker distribution contract or the PBMV balloon catheter distribution contract. Additionally, the Respondent did not provide financial statements for 2024 to prove financial struggles.

55. The Claimant argued that in the absence of such records, the redundancy was baseless and contrary to Section 40 of the Employment Act. He further relied on invoices, delivery notes, and emails showing that the Respondent continued to receive orders from clients even after the alleged redundancy, thus proving that business was ongoing.

56. Accordingly, the Claimant submitted that the redundancy was unfounded, unjustified, and amounted to unfair termination.

57. On the second issue, the Claimant argued that the Respondent failed to comply with the redundancy procedure under Section 40 of the Employment Act.

58. First, the Respondent failed to issue a proper 30-day notice as required under Section 40(1)(b). Although a notice dated 15th April 2024 was purportedly issued, the Claimant had already been placed on compulsory leave, making the notice ineffective.
59. Second, notices to the Labour Officer and the Union were defective. The notice allegedly dated 15th April 2024 was only delivered on 8th May 2024 after the Claimant had written a demand letter. The notice was therefore an afterthought, backdated to sanitize an unlawful process.
60. The Claimant submitted that the notices failed to specify the position affected, the number of staff impacted, or the extent of redundancy, thereby contravening Section 40(1)(a) of the Act and ILO Convention No. 158. He relied on the cases of **Wilson Githu Rutinu v Orpower 4 Inc Limited [2020] eKLR**, **Thomas De La Rue (K) Ltd v David Omutelema [2013] eKLR**, and **Gerrishom Mukhutsi Obayo v Dsv Air and Sea Limited [2018] eKLR** to support this submission.

61. Third, the Claimant submitted that there was no genuine consultation prior to the termination. He relied on the Court of Appeal's decision in **Kenya Airways Limited v Aviation & Allied Workers Union** and **Helga Ohany v Germany School Society [2017] eKLR**, arguing that the process was a mere charade since consultation cannot occur without proper notice.
62. Fourth, the Claimant argued that no fair criteria were used to select him for redundancy as envisaged under Section 40(1) (c). No criteria were made public or shared with him. He relied on *Hesbon Ngaruiya Waigi v Equitorial Commercial Bank Limited [2013] eKLR*, *Francis Maina Kamau v Lee Construction [2014] eKLR*, and *Kenya Airways Limited v Aviation & Allied Workers Union Kenya (supra)* to emphasise that redundancy conditions are mandatory and not optional.
63. In conclusion, the Claimant submitted that the redundancy process was unlawful and unfair, falling short of both substantive and procedural requirements under Sections 40 and 45 of the Employment Act. He therefore prayed for

compensation under Section 49(1)(c), noting that he had remained unemployed for twelve (12) months following the unlawful termination.

Respondent's submissions

64. The Respondent submitted that the termination of the Claimant's employment was justified under the stipulations of Section 40 of the Employment Act. It was necessitated by business restructuring following the loss of two product lines.

65. Responding to the submissions by the Claimant that their failure to tender in evidence financial statements to show that they were at the material times struggling financially was a fact that fortified his claim that the termination was without a valid reason, the Respondent submitted that the law does not require the production of audited accounts, the only proof of restructuring. All that the employer is supposed to do is demonstrate operational requirements. What matters is that the employer demonstrates that operational requirements led to the termination.

66. Regarding the second issue, the Respondent stated that it complied with Section 40 of the Employment Act. The Claimant received a redundancy notice dated 15 April 2024, effective from 1 May 2024. The Labour Officer and the Claimant's Union were also informed of the planned redundancy. The Respondent contended that even if the notice was served later than claimed, it did not prejudice the Claimant.

67. The Respondent noted that in the present case, notice was duly issued, and the Claimant was aware of the redundancy process.

68. The Respondent further submitted that consultation was not entirely absent. Meetings were held and discussions undertaken with the Claimant, but the redundancy could not be avoided.

69. On the issue of criteria, the Respondent argued that the Claimant's role as Sales Manager was no longer necessary following the structural changes. Section 40(1)(c) was

satisfied because the redundancy affected only one position, which was entirely abolished. There was therefore no requirement for a comparative selection process.

70. The Respondent submitted that the redundancy was substantively justified and procedurally compliant with Section 40 of the Employment Act. As such, the Claimant is not entitled to the reliefs sought.

Analysis and determination

71. The issues for determination are;

- 1. Was the termination of the Claimant's employment fair and lawful?**
- 2. Is the Claimant entitled to the reliefs sought?**

Was the termination of the Claimant's employment fair and lawful?

72. There is no dispute that at all material times, the Claimant was an employee of the Respondent. However, what isn't clear is on what account the separation between him and his employer [the Respondent] occurred. Unclear, why. The

Respondent, in their pleadings and the witness statement of the witness who testified on their behalf, tend to explicitly posit that the termination was both at the initiative of the Claimant, when he “opted to terminate himself,” and at the Respondent's initiative on account of redundancy. This position is legally untenable. It was either the termination initiated by the employer, the employee, or by mutual agreement.

73. Section 47[5] of the Employment Act places a distinct legal burden on both the employee and the employer in a dispute regarding the termination of an employee's employment. The employee bears the initial burden to demonstrate that an unlawful termination occurred. It is essential to point out that to discharge the burden, they are supposed to prove *prima facie* that the termination was without procedural and or substantive fairness. It is after discharge of this burden that the evidential burden shifts to the employer to prove the reasons for the termination [section 43 of the Employment Act], that procedural edicts were adhered to

[section 41 of the Act], and that the reason[s] for the termination were fair and valid [section 45 of the Act].

74. I have carefully considered the material placed before me by the Claimant, weighed against that by the Respondent, and have no hesitation in concluding that the Claimant discharged the aforementioned legal burden.

75. With the untenable position postulated by the Respondent as stated hereinabove, it isn't difficult for it to be concluded that the Respondent did not prove the reason for the termination under section 43 of the Act and or that the reason was valid and fair under section 45 of the Act.

76. Having stated as I have, hereinabove, it is vital to point out that the parties heavily submitted on redundancy as the reason for the termination, thus inviting this Court to determine whether the termination on the said reason was procedurally and substantively fair. This I do as hereunder.

77. Undoubtedly, an employer has the right to terminate an employee's contract due to redundancy; however, such

termination must be based on a genuine operational reason. The key feature of redundancy is that it represents a no-fault termination. The reason why the law places specific obligations on employers contemplating terminating an employee's employment due to redundancy is to ensure fairness.

78. In the Kenyan context, the obligations are comprehensively outlined in section 40 of the Employment Act. Failure to fulfil any of these obligations, as specified in the section, renders the termination unfair. See also **Kenya Airways Limited vs Aviation & Allied Workers Union Kenya & 3 others [2014] eKLR**, where the Court stated *"All the paragraphs of this subsection are clearly conjunctive, meaning that they all have to be satisfied for termination on account of redundancy to be lawful."*

79. For any termination of employment under redundancy to be lawful, it must be both substantively justified and procedurally fair.

80. The Claimant contended and his counsel submitted that the Respondent did not issue the mandatory notices contemplated under section 40 of the Act. The Respondent, on the other hand, argued that the letter dated 15th April 2024, served on the Claimant, sufficed as the notice contemplated under the provision, and this, combined with the fact that a notice was issued to the labour officer, is a testament that there was due compliance with the procedural dictates outlined in the said provision.

81. I have carefully considered the letter dated 15th April 2024, titled "*Notice of Termination of contract on the basis of redundancy*". The notice contemplated under section 40[1] [b] must be in character one that gives rise to consultation between the employer and the employee, noting that consultation, as shall be discussed shortly hereafter, is a statutory requirement in Kenya. I must say without hesitation that the letter didn't take the character contemplated in the provision. To the contrary, in my view, it was a termination letter which curtailed any consultations.

82. The letter read in part;

“Due to the above reasons, your services as a sales manager have since become redundant, and as a result, the Management of Cathmed Limited hereby wish to serve you with a one-month notice effective 1 May 2024, up to and including 31 May 2024, after which the contract shall have been terminated on the grounds of redundancy.

Additionally, the management has decided that you will proceed for your annual leave as from 16th April 2024 up to and including 30th April 2024.”

83. The letter did not prepare the ground for consultations. In fact, this Court has not lost sight of the fact that during cross-examination, the Respondent's witness stated that at the meeting of 15th April 2024, which I consider was a strategy meeting for the Respondent enterprise, the Claimant requested 72 hours to provide his input in writing,

and that inexplicably, the Respondent issued the notice of termination on the same day of the meeting without receiving the Claimant's views. If indeed the discussion in the meeting was, inter alia, about redundancy, then the letter stymied the consultations.

84. By reason of the foregoing, I return that the letter dated 15th April 2024 was not the notice contemplated under section 40[1][b] of the Act. See also **The German School Society & another v Ohany & another [2023] KECA 894 [KLR]**.

85. It was not denied that the notice allegedly served on the Labour Officer was indeed served upon him on 8th May 2024. The notice period was therefore shorter than the 30 days contemplated under the provision. Counsel for the Respondent argued that since the service of the notice is not denied, it has no prejudicial effect that it did not meet the time threshold set out in the sub-section. To agree with the thinking of Counsel would, without doubt, render useless the purpose for which statutes set timelines for actions. I find the argument to be without merit.

86. In the upshot, I return that the termination of the Claimant's employment on the alleged account of redundancy was procedurally unfair.

87. The Claimant argued, and for the reasons set out below, I agree with him, that there was no genuine operational reason that could justify the termination of his employment due to redundancy.

88. The Claimant tendered in evidence documents demonstrating that even after the purported termination of his employment, the Respondent continued trading with its customers as usual, and concluded that the reason for the termination was camouflaged. This evidence was not sufficiently rebutted. There cannot be redundancy where the requirements of the employer entity continue just the same as before.

89. The Respondent didn't place any document before this Court to show that, indeed, it lost contracts for the promotion of two products, thus occasioning a financial downturn for

them, that would not allow them to continue employing the Claimant. In a matter of proof, substantive justification, mere assertions without sufficient support would not suffice to enable the employer to discharge the legal burden as expected of them.

90. As I stated before, consultation between the employer and the affected employee is a legal requirement in Kenya. See **Cargill Kenya Limited. Mwaka & 3 others [2021] KECA115 [KLR]** From the material placed before me, I do not doubt that there were no consultations between the Respondent and the Claimant before the decision to terminate his employment was reached.

91. By reason of the premises, I find that the termination of the Claimant's employment was both procedurally and substantively unfair.

Whether the Claimant is entitled to the reliefs sought.

92. The Claimant sought *inter alia* compensation for unfair dismissal. Section 49[1][c] of the Employment Act bestows the Court with the authority to grant compensatory relief for an employee who has successfully challenged their employer's decision to terminate their employment. However, it is essential to note that the authority is discretionary, exercised on a case-by-case basis.

93. I have considered the circumstances surrounding the termination of the Claimant's employment, which can easily constitute unfair labour practice on the part of the Respondent, the Respondent's failure to adhere to the dictates of procedural and substantive fairness, the longevity of the Claimant's service, and that he didn't in any proven way contribute to the termination, and hold that he is entitled to the compensatory relief, to the extent of four months' gross salary, KShs. 1,400,000.

94. The Claimant further sought payment of the salary for April 2024, contending that the same was not paid to him. In my view, his evidence regarding the non-payment of the salary

was not sufficiently challenged. I have no reason not to award him the relief. Consequently, I award him Kshs. 350,000 under this head.

95. He claimed Kshs. 6,300,000, asserting that although he was legally entitled to a house allowance, he was not compensated for it throughout his entire period of employment. This Court notes that, according to the Claimant's employment contract, the Kshs. 350,000 was his gross salary. I find it difficult to understand why the Claimant believes the amount does not include the house allowance. In light of the contractual term and the absence of a justifiable reason why the Claimant believes he is entitled to the relief despite the term, this Court declines to grant the relief.

96. The Claimant also claimed Kshs—100,000, classifying it as unpaid NHIF and NSSF contributions. I have seen no evidence in support of his claim to this amount. The sum was simply presented to the Court. Without specific proof to support it, it cannot be awarded to him.

97. Having implicitly admitted that he was a member of the National Social Security fund, he is not entitled to the benefit of service pay under section 35 of the Employment Act.
98. The Claimant asserted that he did not take any of his annual leave, and therefore, he is entitled to compensation for accrued but unused leave days. It should be noted that the notice of termination placed him on annual leave for 15 days. He does not deny this. The question then arises: why did he not deduct these days from those for which he is claiming compensation? This suggests a lack of candour on the part of the Claimant regarding this claim, and I am unwilling to reward the same.
99. In the upshot, Judgment is hereby entered for the Claimant in the following terms;
- a. A declaration that the termination of the Claimant's employment was both procedurally and substantively unfair.
 - b. Compensation pursuant to section 49[1][c] of the Employment Act, KShs. 1,400,000.
 - c. Salary for April 2024, KShs. 350,000.

d. Costs of the suit.

e. Interest on the sum awarded in [b]and [c] above
at court rates from the date of this Judgment till
full payment.

**Read, Delivered and Signed this 30th Day of September
2025.**

OCHARO KEBIRA

JUDGE