

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**  
**CAUSE NO. E195 OF 2023**

**MARTIN MURIGI KAGWAMBA.....CLAIMANT**  
**VERSUS**  
**BIO ZEQ KENYA**  
**LIMITED.....RESPONDENT**

**JUDGMENT**

1. Through an Amended Statement of Claim dated 10<sup>th</sup> February 2025, the Claimant avers that he was employed by the Respondent on 7<sup>th</sup> January 2019 as an accountant, at an agreed monthly salary of Kshs 106,423.28. The Claimant contends that he served the Respondent diligently until his services were arbitrarily terminated in December 2022. On this basis, the Claimant seeks the following reliefs against the Respondent:

- a) The sum of Kshs 106,423.28 in lieu of notice per clause "J" of the contract.*
- b) The sum of 635,539.68 compensation per clause "K" of the contract.*
- c) The sum of Kshs223,488.89 leave allowance for 3 years per clause "G" of the contract.*
- d) The sum of Kshs212,846.56 being service pay.*
- e) General damages for wrongful/arbitrary termination of employment.*
- f) Costs of suit.*

*g) Interest on the above at court rates.*

*h) Any other or further relief that the court may deem just and mete*

2. In its response to the Claim, the Respondent avers that it was experiencing severe financial difficulties, which rendered it unable to continue meeting its expenses. It further contends that the Claimant, being the company's accountant, was aware of these circumstances. Accordingly, by a letter dated 11<sup>th</sup> November 2022, the Claimant was served with a 30-day termination notice and was paid his full salary.
3. The Respondent asserts that the termination of the Claimant's employment was lawful and in accordance with the terms of the employment contract. It therefore prays that the Court dismisses the Claim with costs.
4. The matter proceeded for hearing on 19<sup>th</sup> June 2025 and 22<sup>nd</sup> July 2025, during which both parties presented oral evidence in support of their respective cases.

#### **Claimant's Case**

5. The Claimant testified in support of his case, and for starters, he adopted his witness statement as his evidence in chief. He also tendered a list and bundle of documents, filed on his behalf, which were admitted as exhibits before the Court.
6. The Claimant stated that he was terminated from employment without notice after serving the Respondent for four years. He contended that his termination was procedurally flawed and that he had not engaged in any misconduct.

7. He further averred that his termination was not communicated in writing and that he was not paid his entitlements upon termination.

### **Respondent's Case**

8. The Respondent presented oral evidence through **Mahmoud Nganga** (RW1), who identified himself as one of the Directors of the Respondent.

9. RW1 testified that, due to economic constraints, the Respondent was compelled to terminate certain employees. Accordingly, the Claimant was served with a 30-day termination notice by a letter dated 11<sup>th</sup> November 2022, in accordance with Clause J of the Employment Agreement.

10. RW1 added that the Claimant was paid his full salary for the notice period, which he acknowledged receiving.

11. He further averred that the Respondent had informed the Claimant and other employees, via an internal memo dated 28<sup>th</sup> July 2020, that annual leave was to be taken within the year of accrual and that any leave not taken within that year would be forfeited.

12.RW1 further stated that the Claimant never submitted leave application forms as required, and the Respondent had to direct him to proceed on 14 days of leave via a letter dated 24<sup>th</sup> February 2022.

13.He further testified that upon termination of the Claimant's employment, the Respondent paid him Kshs. 99,353.34 on 19<sup>th</sup> December 2022, representing leave pay and remuneration for nine days worked in December 2022.

#### **Submissions**

14.The Claimant submitted that the documents relied upon by the Respondent to demonstrate issuance of notice, payment of dues, and approval of leave are not credible, as they lack company letterheads, stamps, or signatures from authorized officers, and some bear inconsistent signatures purported to be his. The Claimant maintained that these documents were never authenticated and cannot be treated as conclusive evidence in support of the Respondent's case. He further reiterated that he neither received a termination notice nor was he given any valid reason for the termination of his employment.

15.Citing the decision in **CMC Aviation Limited v Mohammed Noor [2015] eKLR**, the Claimant argued that the Respondent failed to establish a valid reason for his termination and should therefore be held liable and ordered to compensate him.

16. On its part, the Respondent asserted that the Claimant's termination was lawful, having been effected on grounds of redundancy, and the Claimant duly notified of the termination one month prior to his final day at work.

17. The Respondent further contended that the termination resulted from severe financial constraints beyond its control. Relying on the decision in **Kenya Airways Limited v Allied Workers Union Kenya & 3 Others (2014) eKLR**, the Respondent submitted that the Claimant's separation was lawful and not done in isolation.

18. The Respondent maintained that its actions in effecting the Claimant's termination were both procedurally sound and reasonable.

### **Analysis and Determination**

19. Flowing from the record, the Court has identified the following issues for determination:

- a) Whether the Claimant's termination from employment was unfair and unlawful;**
- b) Whether the Claimant is entitled to the reliefs sought.**

### **Unfair and unlawful termination?**

20.The Claimant contends that he was arbitrarily terminated from employment and was not issued with a letter of termination. The Respondent, however, asserts that the Claimant was served with a termination letter dated 11<sup>th</sup> November 2022.

21.In explaining the reasons for the Claimant's termination from employment, RW1 averred that the Respondent was facing severe financial difficulties, which made it impossible to meet operational expenses, including employee salaries, and consequently necessitated the termination of staff.

22.In the termination letter, the Respondent cited the prevailing economic conditions, declining sales volumes, and its inability to sustain daily operations as the reasons for terminating the Claimant's employment.

23.It is evident from the termination letter and RW1's testimony in Court that the primary reason for the Claimant's termination from employment was attributable to the Respondent's operational requirements. As such, this constituted a case of redundancy.

24.It is well settled that a termination on account of redundancy must be both substantively justified and procedurally fair, as held by the Court of Appeal in **Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 Others (2014) eKLR.**

25. Substantive justification concerns the reasons for redundancy, whereas procedural fairness relates to the process applied in effecting the redundancy. The Court will first consider substantive justification.

26. Pursuant to **Section 45(2)(b)(ii) of the Employment Act**, the Respondent, as the employer, bore the burden of proving that the termination of the Claimant's employment was fair, valid, and based on its operational requirements.

27. Given this evidential burden, it was reasonably expected that the Respondent would lead evidence supporting the reasons it cited for terminating the Claimant, particularly the alleged decline in sales volume. Regrettably, the Respondent failed to adduce such evidence.

28. Accordingly, no evidence was presented in Court to show that economic constraints existed or that the Claimant's termination was attributable to redundancy.

29. As was held in the case of **Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others [supra]**, the Court reckoned that while there may be underlying causes leading to a true redundancy situation, such as reorganization, the employer must nevertheless show that the termination is attributable to the redundancy.

30. Applying the provisions of Section 45(2)(b)(ii) of the Employment Act to the present case, the Court finds that the Respondent has failed to establish a valid and fair reason for terminating the Claimant's employment based on its operational requirements.

31. Consequently, the Court finds that the Respondent has not met the requisite standard to establish substantive justification for the Claimant's termination from employment on account of redundancy.

32. While Section 40 of the Employment Act allows an employer to terminate an employment contract on the basis of redundancy where its operational requirements demand, the Respondent was nonetheless duty-bound to prove that the Claimant's redundancy was substantively justified.

33. Regarding procedural fairness with respect to redundancy, Section 40(1) stipulates the conditions that an employer must comply with prior to terminating an employee on account of redundancy:

- 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.

34. As can be discerned from Section 40 (1) (a) and (b), the notice contemplated thereunder is an **“intention to declare a redundancy”** and is issued before the redundancy takes effect. This position was amplified in the case of **Kenya**

**Airways v Aviation & Allied Workers Union Kenya & 3 Others (supra), Maraga JA** (as he then was), as follows: -

*“My understanding of this provision is that when an employer contemplates redundancy, he should first give a general notice of that intention to the employees likely to be affected or their union. It is that notice that will elicit consultation between the parties, ....”*

35. Further, in the case of **The German School Society & another vs Ohany & another [2023] KECA 894 (KLR)**, the Court of Appeal held that a notice to the employee/trade union/labour officer opens up the door for a consultative process with the key stakeholders.

36. As stated herein, the Claimant denies having received the termination letter exhibited by the Respondent. Be that as it may, it is evident that the notice issued in the said letter did not comply with the requirements of Section 40(1)(a) and (b) of the Employment Act.

37. This is because the notice exhibited by the Respondent was not the general notice contemplated under Section 40(1)(a) and (b). Instead, it communicated the Respondent's decision that the Claimant's employment had already been terminated. The notice was final in nature, rather than serving as a declaration of the employer's intention to effect a redundancy, as mandated by the Act.

38. Since the notice issued to the Claimant was final in nature, there was no opportunity for pre-redundancy consultations.

39. In view of the foregoing, it is evident that the Respondent did not substantially comply with the statutory requirements under Section 40(1) (a) and (b) of the Employment Act regarding notice, and is therefore at fault.

40. The Respondent further failed to meet the second requirement under Section 40(1) (b), as there was no evidence that the labour office was notified of the intention to terminate the Claimant on grounds of redundancy.

41. Beyond the deficiency in the notice requirement, the Respondent neither indicated nor suggested that it conducted any pre-redundancy consultations in accordance with **Article 13, Convention No. 158, and Recommendation No. 166 of the International Labour Organisation (ILO)**.

42. To underscore the significance of pre-redundancy consultations, the Court in **Kenya Airways v Aviation & Allied Workers Union Kenya & 3 Others (supra)** held that consultations are meant to cause the parties to discuss and negotiate a way out of the intended redundancy, if possible, or the best way of implementing it if it is unavoidable.

43. In the absence of any evidence of pre-redundancy consultations, the Court finds that the Respondent is at fault in this regard.

44. Another requirement that must precede termination on the grounds of redundancy concerns the payments outlined in Section 40(1)(e), (f), and (g) of the Employment Act. These payments pertain to accrued leave, notice pay, and severance pay, which must be calculated at a rate of not less than 15 days' pay for each completed year of service.

45. This is yet another point of divergence between the Claimant and the Respondent. The Respondent contends that it paid the Claimant Kshs 99,353.34, a sum said to include his leave entitlements. However, the Respondent did not specify the number of leave days accounted for in that amount.

46. The Respondent asserts that the Claimant did not submit any leave application forms in accordance with the internal memo dated 28<sup>th</sup> July 2020.

47. The Claimant seeks payment of Kshs 223,488.89, representing three years' accrued leave.

48. Section 28(4) of the Employment Act sets out the time frame within which an employee must take their statutory annual leave, thereby preventing indefinite accumulation and potential forfeiture of leave days. Under this provision, an employee is required to take leave within the initial 12 consecutive months in

which it is earned, with any remaining leave to be taken no later than 18 months after the end of the leave-earning period.

49. Applying the provisions of Section 28(4) of the Employment Act to the present case, it is evident that the issue of forfeiture of the Claimant's leave days, as referenced in the Respondent's internal memo dated 28<sup>th</sup> July 2020, does not arise. Accordingly, the Claimant is entitled to recover accrued leave days but only up to a maximum of 18 months, rather than the three years claimed.

50. The record contains no evidence that the Claimant was compensated for his accrued leave days, as required under Section 40(1)(e) of the Employment Act.

51. Furthermore, there is no evidence that the Claimant was paid one month's salary in lieu of notice or severance pay, in accordance with Sections 40(1)(f) and (g) of the Employment Act, respectively.

52. In sum, it is evident that in terminating the Claimant's employment on grounds of redundancy, the Respondent failed to comply with the provisions of Section 40(1) of the Employment Act. As a result, the Claimant's termination from employment was procedurally unfair.

53. Ultimately, the Court finds that the termination of the Claimant's employment was both substantively and procedurally unfair, hence unlawful.

### **Reliefs?**

54. Having found that the termination of the Claimant from employment was substantively and procedurally unfair, the Court awards him compensatory damages equivalent to five months' gross salary. In arriving at this award, the Court has considered the duration of the employment relationship and the circumstances attendant to the termination.

55. For the reasons set out elsewhere in this Judgment, the Claim for accrued leave is allowed only for the 18 months immediately preceding the termination of employment.

56. The Claimant is further entitled to one month's salary in lieu of notice, as well as severance pay calculated at a rate of not less than 15 days' pay for each completed year of service.

### **Orders**

57. In the final analysis, the Claim succeeds. Judgment is therefore entered against the Respondent and the Claimant is awarded the following:

- a) One month's salary in lieu of notice, amounting to Kshs 106,423.28;**
- b) Compensatory damages in the sum of Kshs 532,116.40, equivalent to five months' gross salary;**
- c) Payment for accrued leave days for 18 months, totaling Kshs 111,744.44;**

- d) Severance pay for four years of service, amounting to Kshs 212,846.56;
- e) The total award is Kshs 963,130.68;
- f) The sum in (e) shall attract interest at court rates from the date of judgment until payment in full;
- g) The Respondent shall bear the costs of the suit.

**DATED, SIGNED and DELIVERED** at **NAIROBI** this **1<sup>st</sup>** day of **December** 2025.

.....

**STELLA RUTTO**

**JUDGE**

**In the presence of:**

For the Claimant      Ms. Kiongi

For the Respondent    Mr. Obuya instructed by Ms. Munyasya

Court Assistant      Mohammed

**ORDER**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article 159(2)(d) of the Constitution which requires the

court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B** of the **Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**STELLA RUTTO**

**JUDGE**

ORIGINAL