

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. E264 OF 2025

DAVID MUANGA NZIOKA.....CLAIMANT

VERSUS

JOHN KIMANZI T/A

POTS & PALMS BAR AND GRILL.....1ST

RESPONDENT

POTS & PALMS LIMITED.....2ND

RESPONDENT

JUDGMENT

1. Through a Memorandum of Claim dated 2nd April 2025, the Claimant avers that he was employed by the Respondents under a contract of employment dated 31st December 2022 as a General Manager at the 2nd Respondent facility. The Claimant avers that the contract was to commence on 1st February 2023, with a consolidated monthly salary of Kshs. 120,000/=. He further adds that, upon the completion of his probation period, the Respondents confirmed his employment in accordance with the terms of the contract.
2. According to the Claimant, he served the Respondents with utmost diligence and loyalty, maintaining an impeccable employment record. He further avers that during his tenure as General Manager, the Respondents' business experienced increased patronage, at times achieving daily sales of up to Kshs. 1,500,000/=.

3. The Claimant further states that in February 2024, the 1st Respondent verbally and casually terminated his employment contract, allegedly on the ground that the business was no longer a going concern.

4. The Claimant contends that the Respondents' decision to declare him redundant was unlawful, procedurally improper, and in violation of the Constitution. Consequently, the Claimant seeks the following reliefs against the Respondents:

a) A declaration that the act of the Respondents to declare the Claimant redundant was unlawful.

b) Ksh.4,545,973/=.

c) Compensation for unlawful and unfair declaration of redundancy.

d) Costs of this suit.

e) Compliant Certificate of Service.

f) Interests on (b), (c) and (d) above until payment in full.

g) Any other order that this honorable court may deem fit to grant.

5. The Respondents neither entered an appearance nor filed a Defence, despite being duly served with the Notice of Summons and Statement of Claim. In this regard, an Affidavit of Service sworn by Charles Midenga on 4th June 2025 was filed on behalf of the Claimant, confirming that service was effected on the Respondents via electronic mail.

6. Satisfied with the proof of service, the Court directed that the matter proceed as an undefended suit. The case was subsequently scheduled for formal proof hearing on 30th September 2025, during which the Claimant gave evidence in support of his claim.
7. In his testimony before the Court, the Claimant adopted his witness statement as his evidence in chief. He further produced the documents filed on his behalf, as exhibits before the Court.
8. The Claimant testified that occasionally, the 1st Respondent would send him money through his mobile phone to purchase various items for the bar and restaurant. The 1st Respondent also paid his salary via the same mobile number.
9. He further averred that there was no valid ground or justification for the purported declaration of redundancy.
10. The Claimant further contended that the Respondents failed to follow the due legal process regarding redundancy. Specifically, the 1st Respondent did not discuss the situation with him prior to taking the impugned action and failed to provide prior notice to both him and the Labour Officer, as required by law.
11. The Claimant contended that to date, the Respondents have failed and/or refused to

pay him severance pay and other terminal dues.

12. He further stated that the Respondents communicated the decision to declare him redundant verbally, and to date have not provided any formal written communication outlining the reasons for the redundancy. Additionally, they have not issued him with a compliant Certificate of Service.

13. The Claimant also averred that the Respondents fraudulently failed to remit statutory deductions for the National Hospital Insurance Fund and National Social Security Fund, despite deducting these amounts from his earnings.

14. According to the Claimant, the Respondents' failure and/or refusal to pay him has caused him significant inconvenience, psychological distress, anguish, and financial loss.

15. In the Claimant's view, the Respondents' actions were malicious, wrongful, unlawful, actuated by malice, and carried out in bad faith.

Submissions

16. After the close of the hearing, the Claimant filed written submissions. It was his position that the Respondents were required to issue him with a notice of the intended redundancy. In support of this position, he relied on the decisions in **Cargill Kenya Limited v. Mwaka & 3 others (2021) eKLR; Kenya Airways Limited v. Aviation & Allied Workers Union Kenya & 3 others (2014) eKLR;**

and Thomas De La Rue (K) Ltd v. David Opondo Omutelema [2013] eKLR.

17. The Claimant further contended that the Respondents did not comply with the mandatory procedural requirements. In this regard, the Claimant argued that the Respondents failed to notify the Labour Office of the redundancy and further failed to undertake pre-redundancy consultations.

18. Referencing the case of **Betty Chemurgor v. Laico Regency Hotel Limited (2021) eKLR**, the Claimant argued that the Respondents did not file any response to substantiate their claim that the business was no longer a going concern. It was his further contention that no financial report was produced to demonstrate the facility's financial status at the material time.

19. On this basis, the Claimant urged the Court to find that the Respondents acted in bad faith and unreasonably.

20. Further citing the decision in **Cargill Kenya Limited v. Mwaka & 3 others (supra)**, the Claimant argued that the Respondents did not apply any criteria in selecting employees for redundancy.

Analysis and Determination

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

a) Whether the Claimant's termination from employment on account of redundancy was unfair and unlawful;

b) Whether the Claimant is entitled to the reliefs sought.

Unfair and unlawful termination of employment?

22. The Claimant contends that the 1st Respondent terminated his employment verbally and informally on the grounds of redundancy. He further asserts that there was no valid justification for the purported redundancy and that the Respondents failed to follow the due process required for terminating his employment.

23. It is the Claimant's further contention that the Respondents failed to provide him with any formal communication outlining the reasons for his redundancy.

24. Indeed, the record does not bear a letter of termination specifying the grounds that may have led to the separation between the Claimant and the 2nd Respondent.

25. Seeing that the Respondents did not file a Defence to the Claimant's claim, the Claimant's assertion that he was terminated on grounds of redundancy remains uncontroverted.

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

27. Whereas substantive justification pertains to the reasons for redundancy, procedural fairness relates to the manner in which the redundancy process is carried out.

28. With respect to substantive justification, the employer bears the burden of demonstrating that the termination was valid, fair, and based on its operational requirements. In the absence of such proof, the termination is deemed unfair under **Section 45(2)(b)(ii) of the Employment Act.**

29. As the Respondents did not file a Defence to the Claim, no evidence was presented to this Court to establish that the Claimant's termination from employment was valid, fair, or related to the 2nd Respondent's operational requirements.

30. Indeed, in the absence of any Defence from the Respondents, there is no evidence whatsoever justifying the Claimant's termination from employment.

31. Consequently, the Court finds that the Respondents have failed to meet the requisite standard to demonstrate substantive justification for the Claimant's termination on the grounds of redundancy.

32. With respect to procedural fairness in cases of redundancy, Section 40(1) of the Employment Act sets out the following conditions that an employer must fulfill before terminating an employee on the grounds 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.

33.As can be discerned from Section 40 (1) (a) and (b) aforesated, 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,”

34.As earlier stated, the Respondents did not file a Defence. Consequently, there is no evidence that the Claimant was notified of the Respondents' intention to declare a redundancy. Similarly, there is no proof that the Respondents complied with the second part of Section 40(1)(b), which requires an employer to notify the Labour Office of the intention to terminate an employee (s) on grounds of redundancy.

35. In light of the foregoing, it is evident that the Respondents failed to substantially comply with the statutory requirements under Section 40(1)(a) and (b) of the Employment Act regarding notice, and are therefore at fault.

36. Beyond the deficiency in the notice requirement, there was no evidence that the Respondents conducted any pre-redundancy consultations with the Claimant in accordance with **Article 13, Convention No. 158, and Recommendation No. 166 of the International Labour Organisation (ILO)**.

37. In the case of **The German School Society & another v. 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.

38. In the absence of any evidence of pre-redundancy consultations in the present case, the Court finds that the Respondents failed to comply with the mandatory procedural requirements attendant to termination on account of redundancy and are therefore at fault.

39. Another requirement that must be fulfilled before terminating an employee on the grounds of redundancy relates to the payments specified under 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.

40. In the present case, the Claimant contends that the Respondents have failed and/or refused to pay him severance pay and other terminal dues.

41. In view of the fact that the Respondents did not tender any Defence and evidence, there is no proof or confirmation that the Claimant received the statutory payments set out under Section 40(1)(e), (f), and (g) of the Employment Act.

42. In sum, it is evident that in terminating the Claimant's employment on the grounds of redundancy, the Respondents failed to comply with the provisions of Section 40(1) of the Employment Act. Consequently, the Claimant's termination was procedurally unfair.

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

Reliefs?

44. Having found that the termination of the Claimant's employment was both substantively and procedurally unfair, the Court awards him compensatory damages equivalent to three (3) months' gross salary. In determining this award, the Court has taken into account the relatively short duration of the employment

relationship and the Respondents' failure to substantially comply with the procedural requirements that must precede a termination on the grounds of redundancy.

45. The Claimant's claim for salary arrears is allowed, as there is no evidence that the same was paid in full during his employment. Furthermore, the Respondents, having failed to file a Defence, did not dispute that the Claimant's salary remained outstanding.

46. The Claimant is also entitled to one (1) month's salary in lieu of notice, as well as severance pay calculated at a rate of not less than 15 days' pay for one (1) completed year of service, given that there is no evidence that the Respondents made these payments prior to the Claimant's termination, as required under Section 40(1)(f) and (g) of the Employment Act.

47. The Claim for unpaid leave succeeds, as the Claimant's leave records were not produced. Accordingly, he is entitled to 21 days of leave in accordance with his contract of employment.

48. The Claim for overtime is disallowed as the Claimant has not provided any evidence showing that he worked beyond the statutory maximum hours without proper compensation.

Orders

49. In the final analysis, the Claim succeeds, and Judgment is consequently entered against the Respondents in the following terms:

- a) **A declaration that the termination of the Claimant's employment on the grounds of redundancy was unfair and unlawful.**
- b) **The Claimant is awarded Kshs. 486,650.00 in respect of withheld salary arrears.**
- c) **The Claimant is awarded one (1) month's salary in lieu of notice, amounting to Kshs. 120,000.00.**
- d) **The Claimant is awarded compensatory damages of Kshs. 360,000.00, equivalent to three (3) months' gross salary.**
- e) **The Claimant is awarded Kshs. 84,000.00 for 21 accrued leave days.**
- f) **The Claimant is awarded severance pay for one (1) year of completed service, amounting to Kshs. 60,000.00.**
- g) **The total award amounts to Kshs. 1,110,650.00.**
- h) **The sum in (g) shall accrue interest at court rates from the date of judgment until full payment.**
- i) **The Respondents shall bear the costs of the suit.**
- j) **The Respondents shall issue the Claimant with a Certificate of Service within 30 days from the date of this Judgment.**

DATED, SIGNED and DELIVERED at NAIROBI this 11th day of December 2025.

.....
STELLA RUTTO

JUDGE

In the presence of:

For the Claimant Mr. Midenga

For the Respondents No appearance

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 15th March 2020 and subsequent directions of 21st 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