

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE NO. E929 OF 2024

FREDRICK KITONYI MUNYAO.....CLAIMANT
VERSUS
STEPHEN MASINDE MAKOHA T/A
NZOIA **NURSING**
HOME.....RESPONDENT

JUDGMENT

1. Through a Memorandum of Claim dated 30th October 2024, the Claimant avers that he was employed by the Respondent at the Pangani Nursing Home branch, as an Administrator, reporting directly to the Respondent, who was the Director of the facility.
2. The Claimant states that he discharged his duties with utmost effort, skill, diligence, and loyalty, going beyond the ordinary call of duty to ensure that his work was executed effectively and the Respondent's interests were safeguarded.
3. The Claimant further avers that although his contract of employment was for a fixed term commencing on 1st May 2020 and 1st August 2020, with an option for extension, he continued in the Respondent's service until 3rd December 2021, when

his employment was unceremoniously terminated without valid cause, fault on his part, notice, or adherence to due process.

4. The Claimant contends that the Respondent orchestrated an unlawful redundancy under the pretext of the sale of the hospital premises, notwithstanding that the facility had encountered financial difficulties and rent had gone unpaid for some time prior to its imminent closure, a situation he was aware of in his capacity as Administrator.
5. The Claimant asserts that the termination of his employment contravened the legal requirements governing redundancy and, as a result, he seeks the following reliefs against the Respondent: -
 - a) ***A declaration that the Respondent's termination of the Claimant's employment was unlawful and/or unfair.***
 - b) ***Compensation of the Claimant for unlawful and/or unfair termination under Section 49 of the Employment Act, at the rate of Kshs.1,800,000.00 (Kshs.150,000.00 (P.M.) X 12 months).***
 - c) ***Kshs.150,000.00 on account of Notice Pay.***
 - d) ***Kshs. 563,533.75 on account of unpaid salary arrears for 20 months.***
 - e) ***Kshs 75,000.00 on account of severance pay for one completed year of service.***
 - f) ***Kshs.21,600.00 on account of deducted but unremitted NSSF dues.***

- g) Kshs.450,000.00 on account of unpaid salary between 3rd December 2021 to 3rd March 2022.*
- h) Punitive and exemplary damages.*
- i) Costs of the Claim.*
- j) Interest on items (b), (c), (d), (e), (f) (g) and (i) above.*
- k) Any other relief the Court may deem fair, fit and just to grant.*

6. The Claim is opposed through the Respondent's Memorandum of Response dated 30th January 2025. The Respondent asserts that the Claimant was duly notified of the Respondent's inability to continue operating the hospital following its eviction from the premises where the business was conducted.
7. Putting the Claimant to strict proof, the Respondent avers that it settled all dues owing to the Claimant and denies terminating his employment as alleged. Accordingly, the Respondent urges the Court to dismiss the Claim with costs.
8. The matter proceeded for hearing on 24th June 2025 and 27th October 2025 during which both parties called oral evidence in support of their respective cases.

Claimant's Case

9. The Claimant testified in support of his case and, at the outset, adopted his witness statement as his evidence-in-chief. He further produced the list and bundle of documents filed on his behalf as exhibits before the Court.

10. The Claimant averred that he was issued with a Notice of Termination of Employment dated 3rd December 2021, indicating that his employment was to end with immediate effect on the purported ground that the building housing the Respondent's hospital had been sold. He maintained that this reason was neither substantiated nor proved, particularly given that the termination was not based on any misconduct on his part.

11. It was the Claimant's contention that the true basis of his termination from employment was redundancy, which was unlawful in the circumstances.

12. The Claimant further stated that despite the aforementioned irregularities, he was not paid his salary even though he was required to remain "active" for three months after his termination.

13. According to him, this meant that he continued working from home to address administrative matters arising from the post-closure operations of the Respondent's Pangani branch until 3rd March 2022.

14. The Claimant maintained that the termination of his employment contravened the law governing redundancy.

Respondent's Case

15. The Respondent testified in support of his case as RW1. He identified himself as the Director of Nzoia Nursing Home and similarly, he adopted his witness statement as his evidence-in-chief. He further produced the list and bundle of documents filed on his behalf as exhibits before the Court.
16. RW1 testified that the Respondent commenced operations in 2019, offering professional medical services to both inpatients and outpatients under the name Nzoia Nursing Home, located in Pangani.
17. He confirmed that the Claimant was employed as the Hospital Administrator effective 1st May 2020.
18. RW1 stated that the Claimant's employment was terminated because the Hospital could no longer sustain its operations, resulting in the need to render employees redundant.
19. He explained that the Hospital's financial strain was caused by unpaid income from NHIF, with whom it had contractual arrangements, and that outstanding claims amounting to approximately Kshs. 150,000,000/- remained unpaid. Consequently, the Hospital was unable to sustain even basic operational costs, including rent.
20. RW1 further testified that under a Lease Agreement dated 25th September 2019, the Respondent was required to pay rent quarterly in advance.

21.He added that in November 2021, through a letter dated 1st November 2021, the Respondent's landlord, F.M. Kamanga Medical Investments Limited, acting through its advocates, issued a notice terminating the lease, demanding vacant possession, and initiating distress for rent. This occurred slightly over one year after the execution of a five-year lease, owing to rent arrears of Kshs. 12,462,222/- arising from the Hospital's financial challenges.

22.RW1 stated that this development was communicated to the Claimant, in his position as Hospital Administrator, and to other staff members during a consultative meeting held at the hospital on 3rd December 2021. During the meeting, the Claimant was informed that the Hospital had been given 30 days' notice to vacate and was instructed to oversee and address all post-closure matters arising from the impending move.

23.Following this, the Claimant was issued with a termination notice, as the Hospital was shutting down and no longer conducting any medical operations or activities.

24.RW1 added that the Claimant was advised through the termination letter that all his dues, including redundancy payments, would be remitted on his last working day, which he stated was duly done. The Hospital also issued him a recommendation letter and certificate of service dated 31st January 2022.

25. RW1 testified that during the notice period to vacate, the Hospital did not carry out any operations, as it lacked alternative premises and had no income to sustain its business.

26. He further stated that due to the Respondent's financial incapacity, some of its assets were auctioned to recover unpaid debts, rendering the Hospital fully non-operational and effectively bankrupt, pending formal bankruptcy proceedings.

27. According to RW1, the Claimant's allegations of unfair termination are unfounded, as a redundancy notice was issued in compliance with the Employment Act, and the consultative meeting of 3rd December 2021 demonstrated that all employees, including the Claimant, were informed of the closure of the Hospital, whose premises had been sold to a third party and were subject to a notice to vacate.

28. In RW1's view, the Claimant and other employees were lawfully and procedurally declared redundant, and their dues were paid in accordance with the requirements of the Employment Act.

Submissions

29. The Claimant submitted that, upon the expiry of his initial fixed-term contract on 1st August 2020, an implied contract of indefinite duration arose and continued until his alleged unlawful termination on 3rd December 2021. In support of this

argument, reference was made to the case of *Lumutu v Kenya Civil Aviation Authority (Petition E074 of 2024) [2024] KEELRC 13242 (KLR) (27 November 2024) (Judgment)*.

30. It was the Claimant's further submission that the Respondent issued a Notice of Termination of Employment to take effect on the same date of issuance, without first issuing a notice of intention to declare redundancy, thereby contravening express statutory requirements.

31. It was further submitted that the Respondent failed to provide any selection criteria when deciding that all employees stationed at the Pangani Branch would be affected by the termination, including the Claimant, who was the most senior both in rank and tenure.

32. It was further posited that the Claimant was highly skilled, dependable, and had consistently demonstrated strong work performance. That despite the Respondent's assertions, there was no evidence that he was offered deployment to either of the Respondent's other two branches.

33. The Claimant maintained that the Respondent breached all statutory requirements governing a lawful redundancy under Section 40 of the Employment Act.

34. On its part, the Respondent submitted that its operational capacity had been

adversely affected, rendering continued operations unsustainable. The Respondent asserted that these challenges were communicated to the Claimant, who, by virtue of his role as Hospital Administrator, was also aware of the difficulties affecting the organization.

35. In support of the Respondent's position, reliance was placed on ***Kenya Airways Ltd v Aviation & Allied Workers Union [2014] eKLR.***

36. The Respondent further submitted that the Claimant was properly declared redundant and that all procedural requirements were followed, supported by legitimate reasons.

37. The Respondent maintained that it had demonstrated full compliance with the law in effecting the Claimant's redundancy and urged the Court to find accordingly.

Analysis and Determination

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

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

Unfair and unlawful termination of employment?

39. It is well settled that termination of employment on account of redundancy must be both substantively justified and procedurally fair. This position was affirmed by the Court of Appeal in *Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 Others (2014) eKLR*.

40. In this context, substantive justification concerns the reasons underlying the redundancy, while procedural fairness relates to the process followed in implementing it.

41. Regarding substantive justification, the record bears that the Claimant's employment was terminated on 3rd December 2021 on the grounds that the building in which the Respondent's hospital operated had allegedly been sold and that the Respondent had been issued with a notice to vacate the leased premises, resulting in the closure of the facility.

42. As can be discerned from the termination letter, it is clear that the primary basis for ending the Claimant's employment was the Respondent's operational requirements, thereby bringing the matter within the scope of **Section 45(2)(b)(ii) of the Employment Act**.

43. In support of its case, the Respondent exhibited a letter dated 1st November 2021 from *Gichamba & Company Advocates*, referenced: "*Termination of lease dated*

25th September 2019 and demand for outstanding rental arrears of Kshs. 12,462,222.00 on lease...”.

44. The letter required the Respondent to vacate the business premises within 30 days from the date of issuance.

45. In the Memorandum of Claim, the Claimant has pleaded that, as the Hospital Administrator, he was aware that the facility was experiencing financial challenges and had not paid rent for some time preceding the closure.

46. Therefore, notwithstanding the Respondent's assertion in the termination letter that the premises had been sold, rather than disclosing rent default, the essential fact remains that the Respondent had been compelled to vacate the premises, making continued operations impossible.

47. When considered in light of **Section 45(2)(b)(ii) of the Employment Act**, the Court is led to conclude that the reason for terminating the Claimant's employment was valid, fair, and connected to the Respondent's operational requirement.

48. The Court therefore finds that there was substantive justification for terminating the Claimant's employment.

49. Having reached this finding, the Court now turns to examine whether the Respondent complied with the procedural requirements governing termination on grounds of redundancy.

50. The procedure governing termination of employment on account of redundancy is set out under **Section 40(1) of the Employment Act**. Under this provision, the following conditions must be satisfied before a redundancy is effected: -

- 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.*

51. In the present case, it is evident that the Claimant was notified of the termination of his employment on 3rd December 2021, with the termination taking immediate effect. It is therefore clear that the Respondent did not issue the Claimant with a prior notice of its intention to declare redundancy. This was in contravention of **Section 40(1)(a) and (b) of the Employment Act**, which clearly requires that the notice period be at least one month and issued prior to any termination on grounds of redundancy.

52. It is unclear why, despite the Respondent having received the notice to vacate its business premises as early as 1st November 2021, it waited until 3rd December 2021 to communicate the redundancy to the Claimant.

53.Indeed, the Respondent had more than a month within which to notify the Claimant of the intended redundancy, yet it withheld this information and instead issued an immediate termination letter with no prior notice. The result was that the notice served on the Claimant amounted to a final termination notice rather than a notice of “intention” to declare redundancy, contrary to the requirements of **Section 40(1) (a) and (b) of the Employment Act.**

54.It is important to underscore that, under Section 40(1)(a) and (b), the notice to be issued is one of intended redundancy, not a final notice of termination. This is because such notice is meant to facilitate consultations between the parties with a view to exploring possible alternatives to redundancy.

55.On this point, I am guided by the decision in ***Kenya Airways v Aviation & Allied Workers Union Kenya & 3 Others (supra)***, where Maraga JA (as he then was) stated 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,”

56.Similarly, 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.

57. According to the termination letter, the Respondent referred to discussions held with the Claimant and other staff members on 3rd December 2021, the same day the termination notice was issued. This confirms that the abrupt notice left no opportunity for meaningful consultations between the Respondent and the Claimant.

58. Furthermore, the Respondent failed to meet the requirements of the second part of Section 40(1)(b) of the Act, as there was no evidence that the labour office was notified of the intention to terminate the Claimant's employment on grounds of redundancy.

59. Overall, the Court finds that the Respondent did not comply with the statutory requirements under **Section 40(1)(a) and (b) of the Employment Act** regarding notice and is therefore at fault.

60. On the issue of consultations, while the Respondent cited discussions held on 3rd December 2021 with staff members, the Court is not satisfied that these discussions constituted the consultations envisaged under **Article 13, Convention No. 158, and Recommendation No. 166 of the International Labour Organisation (ILO)**.

61. In the case of *Kenya Airways vs Aviation & Allied Workers Union Kenya & 3 Others (supra)*, the Court 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.

62. In the present case, there is no evidence that the discussions between the parties considered alternative means of preserving the employment relationship, such as redeploying the Claimant to another facility owned by the Respondent.

63. Accordingly, the Court finds that no pre-redundancy consultations, as envisaged under *Article 13, Convention No. 158 and Recommendation No. 166 of the ILO*, took place. The Respondent is therefore at fault for failing to comply with this requirement.

64. The Court finds that the requirement regarding selection criteria under **Section 40(1)(c) of the Act** is inapplicable in this case, as there is no indication that any other employee held the position of Administrator within the Respondent's employment, aside from the Claimant.

65. Another statutory requirement before terminating an employee on grounds of redundancy relates to payments under **Section 40(1)(e), (f), and (g) of the**

Employment Act. These include accrued leave, notice pay, and severance pay, calculated at a rate of not less than 15 days' pay for each completed year of service.

66. Although the Claimant was advised in the termination letter dated 3rd December 2021 that his final dues would be remitted to his account, there is no evidence that the Respondent actually paid the Claimant the statutory benefits specified under Section 40(1)(e), (f), and (g) aforesaid. Consequently, the Court finds that the Respondent is at fault to this extent.

67. In sum, it is evident that in terminating the Claimant's employment on grounds of redundancy, the Respondent did not comply with the provisions of Section **40(1) of the Employment Act** and as a result, the termination was procedurally flawed and unlawful.

Reliefs?

68. Having found that, although the termination of the Claimant's employment was substantively justified, it was procedurally unfair, the Court awards the Claimant compensatory damages equivalent to three (3) months' gross salary. In determining this award, the Court has considered the relatively short duration of the employment relationship and the circumstances attendant to the termination of the employment.

69. The Claimant's claim for salary arrears from 3rd December 2021 to 3rd March 2022 is allowed, as the termination letter is clear that the Respondent required the Claimant to remain active during this period to address closure matters, staff issues, and third-party relations. There is no evidence that the Claimant consented to render these services without remuneration. Accordingly, the Respondent is obliged to pay the Claimant for this period in accordance with **Section 17(1) of the Employment Act.**

70. The Claim for salary arrears in the sum of Kshs 563,533/- covering 20 months is also upheld, as the Respondent failed to provide evidence to refute the Claimant's assertions that he was not remunerated accordingly. If anything, the Respondent admitted during cross-examination that this sum was outstanding and due to the Claimant.

71. The Claimant is additionally 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 the one (1) completed year of service, given that there is no evidence that the Respondent made these payments prior to the Claimant's termination, as required under **Section 40(1)(f) and (g) of the Employment Act.**

72. The claim for unremitted NSSF contributions is dismissed, as the Claimant did not specify and prove the months during which the Respondent failed to remit these contributions.

73. In view of the reason for the termination of the employment relationship, the Claimant's claim for punitive and exemplary damages is declined.

Orders

74. Ultimately, the Claim succeeds, and judgment is entered against the Respondent on the following terms:

- a) A declaration that the termination of the Claimant's employment on grounds of redundancy was unfair and unlawful.**
- b) The Claimant is awarded Kshs. 450,000.00 being unpaid salary from 3rd December 2021 to 3rd March 2022.**
- c) The Claimant is awarded Kshs. 563,533.75 being unpaid salary covering 20 months.**
- d) The Claimant is awarded Kshs. 150,000.00 being one (1) month's salary in lieu of notice.**
- e) The Claimant is awarded compensatory damages of Kshs. 450,000.00, being equivalent to three (3) months' gross salary.**
- f) The Claimant is awarded severance pay for one (1) completed year of service, amounting to Kshs. 75,000.00.**

- g) **The total award amounts to Kshs. 1,688,533.75.**
- h) **The sum in (g) shall accrue interest at the court rate from the date of judgment until full payment.**
- i) **The Respondent shall bear the costs of the suit.**

DATED, SIGNED and DELIVERED at NYERI this 17th day of February 2026.

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STELLA RUTTO

JUDGE

In the presence of:

For the Claimant No appearance

For the Respondents Mr. Abiero

Court Assistant Ndati

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