



Mburu v Bata Shoe Company (Employment and Labour Relations Cause E757 of 2021) [2024] KEELRC 468 (KLR) (29 February 2024) (Judgment)

Neutral citation: [2024] KEELRC 468 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE E757 OF 2021
AN MWAURE, J
FEBRUARY 29, 2024**

BETWEEN

ROBERT IRUNGU MBURU CLAIMANT

AND

BATA SHOE COMPANY RESPONDENT

JUDGMENT

Introduction

1. The Claimant filed a Statement of Claim dated 13th September 2021.

Claimant's Case

2. The Claimant avers that he was employed by the Respondent on an indefinite contract effective from 8th March 2004 as a Business Development Manager and was confirmed after 6 months' probation as an Advertising Manager.
3. The Claimant avers that he worked diligently and competently executed his duties until early 2017 when he was involved in a road accident and got admitted at Aga Khan University Hospital. He was discharged in May 2017 and continued with his duties while still undergoing physiotherapy.
4. The Claimant avers that he reported to the Retail Manager and his basic salary was Kshs 136,656 with underpayment of house allowance at Kshs 4,000. He since realised his house allowance ought to be 15% of the basic salary amounting to Kshs 20,543, he now prays for house allowance underpayments of Kshs 16,543 for 204 months.
5. The Claimant avers that he was served a memo dated 08.01.2018 demoting him to an Advertising Specialist reporting to the new Advertising Manager who had been hired to take over his role. Although the new position was subordinate to his previous position, he took it up despite reservations he had been discriminated against and demoted on account to his accident which caused partial paralysis.



6. The Claimant avers that the partial paralysis did not affect his performance as the Advertising Manager since his role was mainly supervision and coordination which he executed from the comfort of his office despite hindered mobility as he pursued physiotherapy.
7. The Claimant avers that the Respondent stopped payment of his medical bills after he was demoted on account that he had overspent his cover vis a vis the bills availed by the Aga Khan University Hospital.
8. The Claimant avers that as a consequence, he registered with the National Council for Persons with Disability from 12.03.2018 which entitled him to rights and benefits and special treatment and protection of his employment according to the Persons with Disabilities Act. He further got registration with the Kenya Revenue Authority for exemption on income tax from 01.06.2018 to 01.06.2023.
9. The Claimant avers that on 05.07.2021, he was summoned by the Respondent's Chief Human Resource Manager, Mr John Ngoru, who informed him that due to his disability, he was disadvantaged at coping with the Respondent's business and the management had decided to terminate his services. To provide him a soft landing, it was to be treated as redundancy.
10. The Claimant avers that he was served a redundancy notice on 07.07.2021 giving him 30 days' notice that would lapse on 31.07.2021.
11. The Claimant says the notice period was less than 30 days in breach of clause 4 of his contract of employment which provided for at least 60 days' notice.
12. The Claimant avers that the Respondent issued him a termination letter on account of redundancy on 30.07.2021 indicating he will be paid 20 days for every of the 17 years worked amongst other entitlements along with a certificate of service.
13. The Claimant avers that the Respondent has declined to pay his terminal dues although he has cleared with the Respondent.
14. The Claimant avers he has suffered mental anguish, financial embarrassment and emotional trauma after being terminated without adequate notice and in disregard with the Employment Act, Persons with Disability Act, Convention on Rights of Persons with Disability and the Constitution of Kenya.

Respondent's Case

15. In opposition to the Claim, the Respondent filed its response dated 7th February 2022.
16. The Respondent denied that the Claimant was involved in a road accident and avers that the Claimant suffered a serious stroke in early February 2017 which left him partially disabled and he received treatment at the Aga Khan University Hospital from then till he exited employment.
17. The Respondent avers that the Claimant was employed as an Advertising Manager although at the time of exit, he worked as an Advertising Specialist albeit enjoying the same benefits and earning the same amount he used to enjoy as an Advertising Manager.
18. The Respondent avers that it does not owe the Claimant any arrears in house allowance as claimed and puts him to strict proof.
19. The Respondent avers that the position of an Advertising Manager was strenuous and as per the recommendation by the consultant at the hospital he received treatment. The Respondent decided to lessen his duties by assigning him a job that did not involve strenuous activities hence the Advertising Specialist which was more of consultancy work.



20. The Respondent avers the new position was solely to ensure that the Claimant continued to work for it while adhering to the doctor's instructions so he could recuperate quickly and properly.
21. The Respondent avers that besides the change in job title, no other term of service was changed including salary and benefits including insurance benefits.
22. The Respondent avers that the Claimant's impairment was so severe that in one of the consultant's notes he stated the Claimant could not be able to do anything without being assisted by his wife which would explain why he is listed as a person with disability and exempted from paying tax for his disability.
23. The Respondent avers that it catered for the Claimant's bill as per the medical insurance scheme provide by its insurance provider. Over and above this, the Respondent facilitated the process of getting tax exemption and listed as a person with a disability by providing the Claimant with the necessary documentations
24. The Respondent avers that the Claimant's medical scheme did not change as a result of the alleged demotion but due to the discovery that his disability/injuries did not result from an accident but from the said stroke which changed the status of the claim from an accident to critical illness.
25. The Respondent avers that Kshs 3,206,572.80 was booked onto Factory Accident (WIBA GPA) account was written off by the company in favour of the Claimant.
26. The Respondent avers that it followed redundancy procedure as per the law by issuing all relevant notices for the appropriate period of time. The position 'Advertising Specialist' had been created to accommodate the Claimant, it became redundant and no longer exists and there has never been replacement for this position.
27. The Respondent avers that it is ready and willing to pay the Claimant his dues but the Claimant made this impossible by refusing to collect his cheques which he has been asked severally to collect.
28. The Respondent avers that it never discriminated the Claimant but created a conducive environment to accommodate the Claimant and his needs. The Respondent supported the Claimant when he suffered a similar ailment and was forced to be away from work in previous years.
29. The Respondent avers that it was well within its legal rights to terminate the Claimant's employment on grounds of redundancy and it followed due procedure and the claim is thereof baseless.

Evidence in Court

30. The Claimant (CW1) adopted his witness statements dated 13.09.2021 and 25.03.2022 as his evidence in chief and produced his bundle of documents from page 1-178 and further list of documents numbered 1-7 as his exhibits.
31. CW1 testified that on 05.07. 2021 and 07.07.2021, he was called by Mr Ngoru and informed him that the company had decided to terminate his services on account of redundancy because of his condition. He objected and he was told Bata will win the case.
32. CW1 testified that the Respondent's Managing Director (MD) thanked him for his services and told him they would hire somebody else to replace him.
33. CW1 testified that he was involved in an accident on 12.02.2017 which triggered a medical condition and he got temporary physical disability.



34. CW1 testified that vide a memo from the company manager that he was no longer an Advertising Manager but an Advertising Specialist reporting to the new Advertising Manager. He served in this position until his termination and his salary stagnated till then.
35. CW1 testified that he applied to be a registered as a person living with disability when he no longer enjoyed his medical benefits. At the time of termination, he never requested for any special accommodation and the former HR Manager was aware of his condition.
36. CW1 testified that at the time of his termination he was out of the staff quarters for more than 8 years and was paid house allowance of Kshs 4,000, which was an underpayment as his salary was Kshs 136,956.
37. CW1 testified that he received a letter dated 07.07.2021 referring to the redundancy and was give 23-day notice period which was to end on 31.07.2021. He was to be paid 2 months in lieu of notice however he was only paid one months in lieu of notice.
38. CW1 testified that he was asked to clear with the company and upon presentation of the clearance certificate he was told to sign and waive his rights which he refused, to date the Respondent have not paid his dues.
39. CW1 testified that he is exempted from tax however he was deducted taxes.
40. CW1 testified that the Respondent received critical illness money which was released on 16.12.2020 and this was never released to him.
41. CW1 further testified that the Respondent's HR Policy provided for salary review but his salary was never reviewed from 2017 to 2021. Further, his performance was rated B+ which meant he was high performer with potential.
42. CW1 testified that he was due for promotion in 2019, however, he was demoted. He never enjoyed better terms due to his disability though his performance was not affected.
43. During cross examination, CW1 testified that he was involved in an accident with a matatu while driving his vehicle on 12.02.2017, which was on a Sunday. He was not at work hence the injury was not a work injury.
44. CW1 testified that the medical report dated 25.03.2022 did not state he got a stroke and caused the accident.
45. CW1 testified that he provided an abstract which said his vehicle registration number KBG 183M was to be blamed.
46. CW1 testified that the Claimant paid his medical expenses, his medical cover was for 2 million inpatient and Kshs 500,000 outpatient. The Respondent paid more than Kshs 3 million and he was not to pay for his medical treatment.
47. CW1 testified that when he was admitted at the hospital he was told he suffered a stroke, this affected his speech but he got better. His walk was also affected.
48. CW1 testified that he was a junior manager in charge of the Respondent's marketing strategy. His condition did not affect the advertising work.
49. CW1 testified that the Respondent created a position of Advertising Specialist which he retained while taking time off to go to the hospital. He did not get a pay-out.



50. CW1 testified that the law provides severance pay is 15 days for every year worked but the Respondent gave him 20 days.
51. CW1 testified that he was discriminated due to his disability.
52. CW1 testified that he claimed house allowance underpayment from when he was employed but the Respondent provided him a house from 2004 to 2013.
53. CW1 testified that he did not decline to collect his insurance compensation and it was not part of his package.
54. CW1 testified that the Britam Life Insurance documents shows money due to him. The critical illness benefit was his benefit but he was asked to waive his right to get this benefit.
55. CW1 testified that Mr Ngoru did not empathise with his situation. He did not discuss his medical condition with him and they only discussed his termination. The Claimant testifies that he did not agree with the termination on account of redundancy.
56. CW1 testified that he left the Respondent's house as he had built his house in Membley Estate. He had no difficulty preparing to get to work as he hired a driver to assist him.
57. CW1 testified during re-examination that it was not his desire to leave the Respondent's service, he complained to Mr. Ngoru that he did not intend to leave and affirmed he did not have difficulties to get to work.
58. CW1 testified that as an Advertising Manager, his duty was to come up with ideas and people would implement. His condition did not affect his position and he never asked for any preferential treatment as a result of the accident.

Respondent's Evidence

59. The Respondent's witness (RW1), John Ngoru, stated that he is the Respondent's Chief Human Resource Officer, and that he has been the Respondent's employee since December 2020 and he is familiar with the Claimant.
60. RW1 relied on his witness statement dated 07.02.2022 as his evidence in chief and the attached list of documents were produced before this court
61. RW1 testified that the Claimant was living in the Respondent's premises until he left employment. The Claimant used to pay for electricity and there are exhibits to that effect.
62. RW1 testified that from 01.06.2018, the Claimant had a disability exemption which stated exempted amounts should not exceed Kshs 150,000 and anything above that would be taxed. When the Claimant received his final dues, the tax exemption was also included.
63. RW1 testified that there is an amount Kshs 1,545,260 which was related to his illness including his medical bills. The Claimant had a policy which was part of the Respondent's group policy for its employees which would be paid if an accident happened at the place of work. The amount was paid to the Respondent and the benefit was passed to him as part of his exit package.
64. RW1 testified that despite being summoned, the Claimant has never collected his dues.
65. RW1 testified that the Respondent gave the Claimant the redundancy option instead of releasing him on medical grounds.



66. RW1 testified that the Claimant's portfolio changed to cover Kenya, Uganda, Zambia, Malawi and South Africa and Ghana and he could not manage.
67. RW1 testified that he discussed with the Claimant a month before his exit on whether to terminate on medical grounds or redundancy. He even gave the Claimant time to think about it and he informed RW1 he was okay with it and there was no disagreement until the Respondent received the demand letter.
68. RW1 testified that the Claimant's duties were mostly in the field and the Respondent gave him light duties. The Claimant was not discriminated against and even during covid, the Claimant gave him an increment and medical benefits.
69. RW1 testified that during the Claimant's exit he received a gross salary of Kshs 140,956.
70. During cross examination, RW1 testified that there was an agreement that the terminal illness benefits was to be paid to the Respondent but the same has not been produced in court.
71. RW1 testified that the money was paid to the Claimant and the Respondent has produced invoices from Aga Khan hospital. The Claimant was covered by the Respondent's medical scheme, his hospital bills was paid by the Respondent hence their undertaking.
72. RW1 testified that the insurance was general for all employees and could be paid to the Respondent or a specific patient. The Respondent had an agreement with the insurance and the benefits applied to both the employee and employer.
73. RW1 testified that the Claimant was not performing because he was graded during evaluation of January 2019 at B+ which meant high performer with potential.
74. RW1 testified that the Claimant suffered this condition in February 2017. He was promotable in 2019 but he was in early recovery.
75. RW1 testified that the Respondent did not produce the Claimant's performance for 2020, it was a covid year and Respondent did not review its employees. The Claimant did not perform well in 2020 and his condition was proof of his mobility as a person.
76. RW1 testified that the Claimant's contract provided for 2 months termination notice, the Respondent undertook 2 months pay in lieu in the terminal dues' calculations. The Claimant was given 1 months' notice vide the letter dated 05.07.2021, however, the days did not add up to 30 days.
77. RW1 testified that the Claimant was to be paid his terminal dues upon presenting his clearance certificate. It is normal declaration that the Claimant has to waive his legal rights in order to follow his dues and the Claimant signed the voucher.
78. RW1 testified that the Claimant was terminated because of his disability. The Respondent did a letter to the labour office advising that it was abolishing some positions but that letter is not in court.
79. RW1 testified that the Respondent had a conversation with the Claimant and the Respondent did not rely on any medical report when terminating the Claimant.
80. RW1 testified that the Claimant had worked for the Respondent for 17 years, three of which was on disability. The Respondent has documents to show the Claimant asked to be leaving work at 12 mid-day and sick sheets.



81. RW1 testified that the evidence in court shows that the Claimant's position changed as he was now reporting to the Advertising Manager rather than the Retail Manager as set out in his job description. The Claimant never raised any issues.'
82. RW1 testified that the Claimant was the Advertising Manager but he got sick for a long time and in 2017, the Respondent hired an Advertising Manager.
83. During re-examination, RW1 testified that vide a letter dated 08.01.2018, the Claimant was appointed as an Advertising Specialist reporting to the Advertising Manager. This position did not exist prior to 2018. The Claimant was to get a new job description but other terms remained the same.
84. RW1 testified that the position was created when he was still recovering as the Advertising Manager had charged to cover Africa and Middle East.
85. RW1 testified that the Britam benefit medical scheme was financed by the company. The employee is compensated on death or indisposed, it is a compensation to the Respondent.
86. RW1 testified that the money from Britam was paid to the Respondent and they continued to pay the Claimant as ex gratia payment. On terminal dues, there was a figure and the Respondent are still willing to pay.
87. RW1 testified that the Respondent was aware that the Claimant was living with disability and assisted him. The Respondent never discriminated the Claimant and it honoured all his benefits. His dues are still available to the Claimant.

Claimant's Submissions

88. The Claimant submitted that CW1 testified that he was involved in a road accident on 12.02.2018 and was admitted at Aga Khan University Hospital and discharged on 18.02.2018 as evidence by the police abstract dated 21.02.2017 together with the Certificate of Examination and Test of motor vehicle KBG 183M by the National Transport and Safety Authority (NTSA) issued on 19.02.2012 and the Clinical Summary at Discharge issued by the hospital on 18.02.2018 as well as the confidential medical report dated even date by Dr Dilraj Singh Sokhi produced in this court.
89. The Claimant submitted that his duties as Advertising Manager and Advertising Specialist were similar as they involved coordination and planning and not strenuous activities, therefore, the Respondent's decision to relegate him was made in bad faith and was discriminatory as he served diligently and competently despite his temporary paralysis.
90. The Claimant submitted that the Respondent never sought his indulgence before the demotion and no alternative job description was provided to him or in this court. His duties never changed, his terms of employment never improved in 5 years despite his needs for disposable cash as had to hire a driver besides pay for physiotherapy.
91. The Claimant submitted that RW1 admitted that neither the Respondent's doctors report nor another doctor's report informed its decision to terminate the Claimant on account of disability. No negative performance report was availed in court which shows he was terminated because of his disability. The Respondent failed in proving the Claimant's disability made him incapable of performing his duties.
92. The Claimant submitted that he has discharged the burden of demonstrating to the court that his temporary paralysis never affected his duties. The onus shifted to the Respondent who never provided any reasonable justification for dismissing the Claimant. The Respondent decision to terminate was solely informed on the Claimant's disability as it never accorded the Claimant reasonable



- accommodation. He relied on Antony Kipkorir Sang –Versus- Attorney General [2014]eKLR in which the court opined that a person with disability can still execute his duties albeit disability.
93. The Claimant submitted that he was notified of his intended termination vide a letter dated 07.07.2021. The notification was not made to the labour office and it was shorter than the one month as provided under Section 40(1) of the *Employment Act*. Further, the notice did not disclose the reason for the redundancy and therefore the termination of account of redundancy was unprocedural and amounted to unfair termination.
 94. The Claimant relied in the case of Linnet Ndolo v Registered Trustees of the National Council of Churches of Kenya [2014] eKLR and submitted that if the termination was mutually discussed as alleged by RW1, why did the Respondent fail to issue adequate notice or document minutes of the alleged mutual separation meetings if the termination was not clothed with malice and discrimination on account of disability.
 95. The Claimant submitted that the 12 hours straight whether in a day or night shift and the Respondent did not produce any records as anticipated under Section 74 of the Act and they being the custodians of the same. The Court is left with only the Claimant’s version of what occurred and he therefore urges the court to proceed to award him overtime for the extra four hours worked.
 96. It was submitted for the Claimant that he is entitled to 2 months salary payment in lieu of notice in line with clause 4 of his contract of employment.
 97. It is the Claimant’s submission that considering the discriminatory and unlawful termination of the Claimant’s employment, he is entitled to maximum compensation prescribed under Section 49(1)(c) of the *Employment Act* as guided by Linnet Ndolo v Registered Trustees of the National Council of Churches of Kenya [Supra].
 98. The Claimant submitted that he is entitled to house allowance underpayment from January 2013 to July 2021 as the Respondent only remitted Kshs 4,000 which is grossly low, the correct amount should have been 15% of the Claimant’s basic salary. He relied on *Nisha Nilesbbhai Bhavsar v Kensalt Limited* [2022] eKLR.
 99. The Claimant submitted that he is entitled to severance pay and pension benefits granted by the Respondent in the letter of termination albeit recalculated at the correct gross salary of Kshs 157,499. RW1 confirmed that the Respondent is amenable to grant the Claimant his terminal dues which include severance pay and critical illness payment from Britam Life Assurance Company LTD.
 100. The Claimant submitted that he served the Respondent for over 17 years without a negative record and was willing to work till his retirement. Further, he possesses limited chances of securing a new job due to his disability, his job defined his human dignity and life motivation. Therefore, the general damages of Kshs 10,000,000 as prayed is reasonable considering the constitutional violations and breach in fair labour practices.

Respondent’s Submissions

101. It is the Respondent’s submission that the accident on 12.02,2018 was a result of other factors that affected the Claimant at the time he was in control of his vehicle.as buttressed by the Claimant’s documents, the condition affected his motor skills leading to the accident, as a result, the Claimant cannot purport he suffered paralysis as a result of the accident. The Claimant failed to discharge the burden on the allegation that he suffered paralysis as a result of the accident.



102. The Respondent submitted that while the burden of disproving elements of discrimination lay on the employer, the Supreme Court in *Samson Gwer & 5 others v Kenya Medical Research Institute & 3 others* [2020] eKLR upheld the legal maxim, 'he who alleges must prove' which is expounded by Section 108 of the *Evidence Act*. The Respondent submits that it is only after the Claimant substantiates these claims that the burden shifts to the employer.
103. The Respondent submitted that upon being rendered disabled, the Respondent considered the Claimant's doctor's recommendation to relieve him from strenuous duties and put him on lighter duties. It is undisputed that while the Claimant's job description changed, his salary and all other benefits remained the same.
104. Further, during hearing, it emerged that the Respondent had changed and revised its management post covid, it decided to merge the duties of its employees, and one of the affected departments was advertising. The Respondent merged roles such that it had a Regional Manager for the advertising department who oversee East and Central Africa regions and would receive report from local managers.
105. It is the Respondent's submission that it made consideration that the Claimant despite his vast work experience, the same would greatly disadvantaged him as he had suffered an illness that curtailed his movement. The position held at the time required great movement hence the creation of a role that fits him.
106. The Respondent submitted that it is undisputed that the Claimant was laid off in May 2021 and there were discussions over the approach the parties would choose. The Respondent was to either let the Claimant go on medical grounds or on redundancy grounds and it opted on redundancy. This was based on the package under medical grounds would be minimal as compared under redundancy.
107. The Respondent submitted that the Claimant was first issued with a notice in May 2021 and received his subsequent salaries while at home hence it complied with the 2 months' notice envisioned in the contract.
108. The Respondent submitted that the position of Advertising Specialist was tailor made to accommodate the Claimant as such he cannot claim he was discriminated as the position was not a demotion but meant to cushion him from strenuous activity at his previous post.
109. The Respondent submitted that upon review, it found that there was need to relieve the Claimant off his duties completely hence the redundancy of the post, rightly so because it was solely created to accommodate him. The allegation that there was a replacement is unfounded and without proof as the position was scrapped out. Therefore, the Claimant was not discriminated.
110. The Respondent submitted the Claimant stated the termination was informed by his illness and placed reliance on Section 43 of the *Employment Act* stating the termination was justified and reasonable at the time given the circumstances both parties found themselves at the time.
111. The Respondent submitted that it is on record that the Claimant's paralysis was not as a result of the accident but from a stroke. This was buttressed by various doctor reports and discharge summaries and the insurance company made the same observation that the payments were made arising from critical illness and not an accident as alluded by the Claimant.
112. It is the Respondent's submission that the Claimant was not discriminated on the ground of withheld insurance. Further, the Claimant has failed to discharge the burden of proof that the Respondent discriminated against him in any way.



113. The Respondent submitted that when the Claimant was first employed, he was housed by the company alongside receiving compensation of house allowance factored into his salary. The Claimant left the company house when he built his own house and notwithstanding, the Respondent kept remitting house allowance as reflected in the payslip. Therefore, the Respondent complied with Section 32 of the *Employment Act*.
114. The Respondent submitted that in the event the Respondent is subjected to pay house allowance, the same ought to be calculated from August 2021. The claim for house allowance is statute barred and ought not be allowed.
115. The Respondent submitted that it tried to ensure fairness when the Claimant was at work and at the time of termination, therefore, it invites the court to hold the termination of employment was fair and procedural.
116. The Respondent submitted that it issued cheques at termination but the Claimant declined to pick them on grounds that the computation by the insurance was erred. However, it is undisputed that the insurance company gave the benefits form which read the Claimant was entitled to Kshs 1,545,160 from the benefit of critical illness.
117. It is the Respondent's submission that the Claimant insisted that the sum was erroneous as he suffered injuries from an accident, though, the documents adduced by the Claimant show he suffered a stroke as an illness and not accident. The Respondent had to revise his insurance to that of critical illness.
118. The Respondent submitted that the amount of Kshs 10,000,000 as damages on basis of discrimination, the Claimant has failed to discharge his burden of proof on the allegations. Further, the amount pleaded is inordinately high in the circumstances as the Respondent has demonstrated its actions were never out of malice rather geared to ensure the Claimant was comfortable.

Analysis and Determination

119. Having considered the pleadings, witness statements, submissions and the evidence of record, the first issue for determination is whether the termination of the claimant was unfair and unlawful on account of redundancy.
120. It is the Claimant's submissions that he was terminated because of his disability as the Respondent failed to prove incapacity made him incapable of performing his duties.
121. In contrast, the Respondent submitted that there were discussions whether to let the Claimant go on medical grounds or on redundancy grounds and it opted on the redundancy route. The Respondent submitted that it created the position of an Advertising Specialist to accommodate the Claimant and upon review it found need to relieve him off his duties hence the declaration of redundancy.
122. The requirements for terminating an employee on account of sickness was laid out in *Kennedy Nyanguncha Omanga v Bob Morgan Services Limited* [2013] eKLR: -

“While employers are entitled to terminate employment on the ground that an employee is too ill to work, they must exercise due care and sensitivity. First, the employer must show support to the employee to recover and resume duty. Second, once the employer begins to consider termination, they must subject the employee to a specific medical examination aimed at establishing the employee's ability to resume work in the foreseeable future. Treatment notes and sick off sheets do not qualify as medical reports for purposes of termination of employment on medical grounds. Third, the employer must give the



employee specific notice of the impending termination. Failure to follow this procedure even where there is overwhelming evidence of an employee’s inability to work amounts to unfair termination for want of procedural fairness.”

123. Further, the court observed in *Ayub Imbira v Teachers Service Commission* [2018] eKLR that:

“Under section 41 of the Act, before the employer terminates the services of his employee on account of misconduct, poor performance or physical incapacity, he must explain to the employee in a language he understands, the reason for which the termination is being considered and the employee is entitled to have another employee or shop floor union representative of his choice present. After the said explanation the employer is required to invite the employee and his chosen companion to air their representations for consideration before the termination is decided. In this case, the foregoing mandatory procedure was not followed. The claimant was never called to any meeting with the employer in the presence of another employee of his choice for explanation that termination of his services was being considered on medical grounds and thereafter accorded a chance to defend himself.”

124. RW1 testified that the Respondent did not rely on any medical report before deciding to terminate the Claimant. The Respondent did not subject the Claimant to any medical examination with the aim of establishing his incapacity but relied on the Claimant’s sick sheets and doctor’s reports. Accordingly, the Respondent did not have a valid reason to terminate the Claimant and it did not follow due procedure.

125. In respect to termination on account of redundancy, Section 40 (1) of the *Employment Act* clearly lays down the requirements as follows:

“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.”

126. Hon. Justice *David Nderitu in Daniel Mburu Muriu v Hygrotech East Africa Ltd* [2021] eKLR held that:

“Clearly, declaration of redundancy is a process and not an event. Further, even when an employee is to be terminated on redundancy such an employee should still be afforded a hearing on whatever it is that they would wish to say about the termination on redundancy. Further, Section 43 of the Act on proof of reason for termination by the employer, and Section 45 on unfair termination apply to termination on redundancy just as they apply on other terminations. Hence both substantive and procedural fairness apply on redundancy and an employer who fails either test stands to be held liable for unfair, or wrongful, and unlawful termination.”

127. Although the Respondent states that it had discussions with the Claimant in respect to the termination of redundancy, it failed to produce in court any evidence to prove this.

128. Further, the Respondent did not notify the Labour Officer of the intended redundancy.

129. In *Kenya Union of Domestic, Hotels, Educational Institutions, Hospital And Allied Workers (Kudbeiba) V Nairobi Hospital* [2022] Eklr the court cited *Kenya Airways Limited Vs Aviation & Allied Workers Union Kenys* (Supra) and stated:-

“The court held that consultation with employee is necessary under Article 13 of Recommendation No.166 of the International Labour Organization Convention No.15 and Termination of Employment Convention 1982.

The court therefore observed consultation is aimed at giving parties, one an opportunity to consider measures to be taken to avert or to minimize the termination and secondly measures to mitigate the adverse effects of termination on the workers concerned such as alternative employment.

The court observed consultation must be real not cosmetic. It is not a charade so they warned.

“The consultation must be a two-way discussion between employer and the union/employees to be conducted with candor, reasonableness and commitments towards addressing the concerns of both the management and the employees and focused on reaching solutions” as further observed by the court.”

130. In consideration of the above, the Respondent failed to meet the procedural requirements set out under Section 40 of the *Employment Act*. The Respondent failed to produce evidence in court that it held consultative meetings with the Claimant, gave reasonable notice to the labour office and Claimant of the intended redundancy and or provide a list of employees declared redundant other than the Claimant.

131. Accordingly, the termination of the Claimant’s employment was unfair and unlawful.

132. The second issue for determination is whether the Respondent discriminated on the Claimant on account of his physical incapacity.



133. Discrimination is defined in *Hesbon Ngaruiya Waigi v Equitorial Commercial Bank Limited* [2013] eKLR where the court had the following to say:

“Where a person is treated differently from others similarly situated like him, then this amounts to discrimination.”

134. Section 5 (3) of the *Employment Act* prohibits discrimination against an employee and states:

“No employer shall discriminate directly or indirectly, against an employee or prospective employee or harass an employee or prospective employee—

- a. on grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, pregnancy, marital status or HIV status;
- b. in respect of recruitment, training, promotion, terms and conditions of employment, termination of employment or other matters arising out of the employment.”

135. in *LC v Sotik Tea Company Limited* (Petition E002 of 2020) [2022] Keelrc 563 (KLR) (10 March 2022) (Judgment) the court held as follows:

“I have carefully considered the contentions by both sides. I am persuaded by the saying that disability is not inability. It follows that, disability per se alone does not translate to incapacity to perform employment duties. Therefore, when an employer cites disability as the reason for dismissing his employee, he must prove that the employee lacks capacity to perform his / or her duties. The foregoing view is grounded on section 43(2) of the *Employment Act* which defines reason for termination that:

“...the matters that the employer at the time of termination of contract genuinely believed to exist, and which caused the employer to terminate the services of the employee”.

The said view is further fortified by section 46 (g) of the Act which provide that the following does not constitute fair reason for dismissal or imposition of disciplinary penalty:

“(g)An employee’s race, color, tribe, sex, religion, political opinion or affiliation, national extraction, Nationality, social origin, marital status, HIV status or disability”. [Emphasis added]

In this case, it is clear that the claimant was dismissed for alleged incapacity due to her visual disability. It is also clear that before the dismissal the petitioner had undertaken training on the use of Braille and the white cane. The burden shifted to the employer to prove that it provided the petitioner with reasonable accommodation and failed to perform her duties, or that the facilities required to accommodate the petitioner could not reasonably be expected to be provided by it.

The foregoing is in line with the provision of section 15 (2) of the PWD Act which provides that, an employer shall not be deemed to have discriminated a person with disability if the special facilities or modifications, whether physical, administrative or otherwise, are required at the work place to accommodate the person with a disability, which the employer cannot reasonably be expected to provide.



.....
.....
Putting all facts into consideration, I am satisfied that the respondent has failed to prove that the petitioner lacked capacity to perform her duties even if she was afforded reasonable accommodation. It also did not prove the species facilities required to accommodate the petitioner were not reasonably within its ability.”

136. In the instant suit, the Claimant testified that he was employed in 08.10.2004 as an Advertising Manager and the job description assigned to him by the Retail Manager. However, following the road accident and partial paralysis suffered, he was demoted to an Advertising Specialist reporting to the new Advertising Manager, who was previously the Brand Manager thus his equal. However he court would fairly state the respondent was attempting to find a more fitting job role befitting his health condition and would not find it was discrimination.
137. The Respondent submitted that it tried to accommodate the new reality of the Claimant by maintaining him in the workplace under a less strenuous position by creating a new position which did not exist before. The Claimant maintained his salary and benefits.
138. The Claimant testified that the temporary disability did not affect his duties as an Advertising Manager and even in his performance evaluation in 2019, he was rated B+ which meant he was high performer with potential. The reality of the claimant therefore changed and obviously would have been strenuous to keep traveling for his job of advertising manager and hence the less strenuous role of an advertising consultancy.
139. The court has considered the pleadings by the respective parties, the evidence adduced as well as the submissions and have therefore established that the Claimant’s employment was unlawfully and unfairly terminated for failure to follow section 40 and 41 and 45 of the *employment act* and the court now addresses whether the Claimant is entitled to the reliefs sought.

a. 2 months’ pay in lieu of notice

140. The Claimant submitted that he is entitled to 2 months pay in lieu of notice as provided under clause 4 of his contract of employment dated 16.02.2004 it states:

“At any time after your appointment has been confirmed, the Company may terminate your employment by giving 2 months written notice or by paying you 2 months’ salary in lieu of notice.”
141. The Claimant avers that the Respondent gave his 23 days’ notice period as he was served a redundancy notice on 07.07.2021 which lapsed on 31.07.2021 in breach of the contract of employment.
142. In view of the foregoing, the Claimant is entitled to 2 months’ pay in lieu of notice as prayed. So he is entitled to 2 months’ salary $140,956 \times 2 = 281,912/-$.

b. House allowance underpayment

143. Section 31 of the *Employment Act* provides that:

“An employer shall at all times, at his own expense, provide reasonable housing accommodation for each of his employees either at or near to the place of employment, or



shall pay to the employee such sufficient sum, as rent, in addition to the wages or salary of the employee, as will enable the employee to obtain reasonable accommodation.”

144. RW1 testified that the Claimant was provided housing by the Respondent and the Claimant moved out of the premises when he built his home in Membley. This was affirmed by the Claimant’s own testimony.

145. In *Mibeso v Kaimosi Tea Estate Limited* (Cause 346 of 2013) [2014] KEELRC 610 (KLR) (14 March 2014) (Judgment) the court held as follows:

“The court has considered the evidence and finds that the claimant opted to stay at his home throughout the employment despite the respondent’s provision of reasonable housing at the farm. The claimant confirmed in his testimony that the respondent’s General Manager had issued an internal memo and at a meeting with the workers explained the availability of reasonable housing at the farm. Thus, the court finds that the prayer shall fail.

In making the finding, the court is not setting a principle that an employer shall not pay reasonable house allowance where the employer has imposed reasonable available housing accommodation for the employee but nevertheless, the employee has opted to stay in own better or equally reasonable housing.”

146. Having established that the Claimant was afforded reasonable housing by the Respondent but he voluntarily opted to move out once he built his home, the prayer for house allowance fails. And since the claimant moved to his own house there is no evidence that claimant demanded house allowance and so this prayer is an afterthought and is denied.

(c) Severance pay

147. In its submission and RW1’s testimony, the Respondent reiterated that it calculated all dues owed to the Claimant owed to the Claimant which included severance pay and the benefits awarded by the insurance company. However, despite issuing cheques, the Claimant has failed to collect his dues so respondent was in agreement he owes claimant terminal dues.

148. The Respondent has made it clear that it is ready to release the said amounts at anytime, the Claimant is entitled to the same as encapsulated final settlement so claim for severance pay is allowed at Kshs 2,059,602

(d) General damages unlawful and illegal termination Compensation for unfair /unlawful declaration of termination via redundancy.

149. This court has declared that the termination of the Claimant’s employment on account of redundancy was unfair and unlawful, therefore the Claimant is entitled to compensation. This court will grant compensation at 10 months equivalent kshs 1,409,560/-

150. The court as held there was no proof of discrimination so the prayer of compensation of kshs 10,000,000 is declined.

151. Work injuries benefits, critical illness benefit Kshs 1,545,160/-Total award translates to kshs 5,296,234/-.

Costs of the suit.

152. Interest at court rates from the date of judgment till full payment.



DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 29TH DAY OF FEBRUARY, 2024.

ANNA NGIBUINI MWAURE

JUDGE

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 has 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 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.

A signed copy will be availed to each party upon payment of Court fees.

ANNA NGIBUINI MWAURE

JUDGE

