



REPUBLIC OF KENYA



**Waithera v Haltons Pharmacy Limited (Cause 1960 of 2017)
[2024] KEELRC 874 (KLR) (8 April 2024) (Judgment)**

Neutral citation: [2024] KEELRC 874 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1960 OF 2017**

JK GAKERI, J

APRIL 8, 2024

BETWEEN

TABITHA WAITHERA CLAIMANT

AND

HALTONS PHARMACY LIMITED RESPONDENT

JUDGMENT

1. The Claimant commenced this suit by a Statement of Claim filed on 29th September, 2017 alleging unfair termination of employment by the Respondent.
2. It is the Claimant's case that she joined the Respondent sometime in 2016 as the Chief Finance Officer at a monthly salary of Kshs.450,000/= with a variable pay of Kshs.75,000/= on attainment of KPIs, and served diligently but her employment was unjustifiably terminated by the Respondent on 12th May, 2017 on account of redundancy which was not genuine.
3. That the Respondent did not notify the Labour Officer the reasons for and extent of the redundancy and there were no consultations.
4. The Claimant prays for;
 - a. Specific damages;
 - i. Compensation for unlawful, wrongful and unfair termination Kshs.5,400,000/=.
 - ii. Two month's salary in lieu of notice Kshs.900,000/=.
 - iii. Unpaid salary for April, May, June and ½ of July Kshs.1,575,000/=.
 - iv. Unpaid 14 leave days Kshs.210,000/=.
 - v. Severance pay Kshs.375,000/=.



- vi. Unpaid salary increment Kshs.9,210,000/=.
- b. General damages for mental anguish and emotional distress caused by the Respondent.
- c. Any other relief the court may deem fit to grant.
- d. Costs of the suit.
- e. Certificate of service.

Respondent's case

5. The Respondent admits that the Claimant was its employee under a written contract of service but denies that she executed her duties diligently averring that the Claimant was inconsistent, an absentee and not a team player. It however admits that she had no record of misconduct or adverse performance ratings and at the time the Respondent had a new Acting Chief Executive who was familiarising herself with its business.
6. The Respondent denies having terminated the Claimant's employment unfairly and avers that it notified the Labour Officer on 11th April, 2017 and accorded the Claimant 2 months' notice.
7. That the Claimant worked for only 4 days during the notice period.
8. That the Claimant's final dues amounted to Kshs.880,503/= and denies owing her the amount prayed for as unpaid salary increment.
9. That the Claimant refused to collect the certificate of service.
10. The Respondent prays for dismissal of the Claimant's suit with costs.

Claimant's evidence

11. On cross-examination, the Claimant confirmed that she was employed on 15th May, 2016 and her last date of employment was 12th July, 2017 and was accorded a 2 months' notice and the Respondent was struggling in many ways.
12. That the variable of Kshs.75,000/= was payable Quarterly on attainment of the KPIs.
13. The witness admitted that she was paid salary in lieu of notice Kshs.960,549.00.
14. That the general damages prayed for relate to the cold treatment by the Chief Executive Officer (CEO) and the notice of redundancy caught her unexpected as she had not been notified of the redundancy or involved in any discussion.
15. That confirmation of employment was subject to evaluation by the boss but it had not taken place and was not paid the variable pay and had no confirmation letter.
16. The witness testified that she met and exceeded many KPIs.
17. It was her testimony that the termination letter was sent on email as she had challenges with the landlord due to non-payment of rent and was thus not in the office on 12th May, 2017.
18. That the Claimant had no other proof of a complaint other than the letter dated 12th May, 2017 addressed to one Mary.
19. That she worked throughout the notice period unless away with permission.



20. That she was dismissed because of differences with the Chief Executive Officer.
21. On re-examination, the Claimant testified that a Finance Manager or Accountant took over after she left and the Respondent was acquired by a new owner and closed non-performing branches.

Respondent's evidence

22. RWI, Mr. Isaiah Mutuma testified that he joined the Respondent on 3rd January, 2022 and was not an employee of the Respondent when the Claimant was.
23. That the Respondent was conducting performance reviews or appraisal once a year but had no evidence of any and was unaware of the Claimant's performance.
24. It was his testimony that the Claimant's employment was terminated on account of redundancy and the Labour Officer was notified on 11th May, 2017.
25. He admitted that no consultations took place.
26. It was his testimony that the Respondent was undergoing restructuring and 39 employees were declared redundant.

Claimant's submissions

27. Counsel submitted on termination of account of redundancy and entitlement to the reliefs sought.
28. On termination, counsel relied on the sentiments of Maraga J.A (as he then was) in Kenya Airways Ltd V Aviation & Allied Workers Union Kenya & 3 others (2014) eKLR to highlight the requirements of a redundancy and urge that the Claimant's services were essential to the running of the Respondent and the position had not become superfluous.
29. Counsel further submitted that the Respondent did not comply with the provisions of Section 40(1) of the Employment Act, 2007 as there were no consultations.
30. The Court of Appeal decision in Freight In Time Ltd V Rosebell Wambui Munene (2018) was cited to emphasize the essence of Section 40(1) of the Employment Act and urge that the Respondent did not take the Claimant through a fair procedure and did not prove the reason for redundancy. Also cited were the sentiments of the court in Daniel Mburu Muriu V Hygrotech East Africa Ltd (2021) eKLR to reinforce the submission.
31. Counsel urged that no notice of redundancy was issued rendering the termination unlawful.
32. On entitlement to the reliefs sought, counsel urged that the Claimant suffered financial, social and economic loss owing to the conduct of the Respondent and cited the decision in Kenfreight (EA) Ltd V Benson K. Nguti (2016) eKLR to emphasize that termination of the Claimant's employment on account of redundancy was unfair.
33. On 12 months compensation, counsel cited the decision in Paul Ngeno V Pyrethrum Board of Kenya (2013) eKLR to urge the court to do the same.

Respondent's submissions

34. By 13th February, 2024, the Respondent's counsel had neither filed nor served submissions and had not when the court retired to prepare this judgment on Friday 23rd February, 2024.



Determination

35. The issues for determination are;
- i. Whether termination of the Claimant's employment on account of redundancy was unfair.
 - ii. Whether the Claimant is entitled to the reliefs sought.
36. On the 1st issue, it is common ground that the Claimant was an employee of the Respondent from 16th May, 2016 and served until 12th July, 2017 when her employment ended on account of redundancy.
37. The termination letter dated 12th May, 2017 under the reference Termination of your employment by reason of redundancy was dispatched to the Claimant via email as she was not in the office on that day.
38. The letter cited persistent poor/low performance of the Respondent as a whole which lead to its inability to sustain operational costs including salaries and closure of branches.
39. The letter gave the Claimant 2 months' notice and was signed by the Ag C.E.O, Mary Ngige.
40. As correctly submitted by the Claimant's counsel, redundancy is one of the legitimate ways of terminating the contract of employment and is provided for by the law.
41. The reasons for declaring an employee(s) redundant are various and include re-organization, restructuring, cost cutting, technological changes or economic challenges.
42. Other than the definition of the term redundancy in Section 2 of the [Employment Act](#), 2007, Section 40(1) of the Act prescribes seven conditions that must be met for a redundancy to pass muster.
43. In *Freight-In Time Ltd V Rosebell Wambui Munene* (Supra) cited by the Claimant's counsel, the Court of Appeal underscored the centrality of the provisions of Section 40(1) of the [Employment Act](#), 2007 as follows;
- “In addition, Section 40(1) of the [Employment Act](#) prohibits, in mandatory tone, the termination of a contract of service on account of redundancy unless the employer complies with the following seven conditions, namely . . .”
44. (See also *Thomas De La Rue (K) Ltd V David Opondo Omutelema* (2013) eKLR).
45. The conditions include notice, selection criteria, equity in cases of a collective agreement, pay of leave in cash, one month's salary or one month's notice and severance pay.
46. Courts have in addition held that consultations are an integral part of the redundancy process. (See *Cargill Kenya Ltd V Mwaka and 3 others* (2021) KECA 115), *Kenya Airways Ltd V Aviation & Allied Workers Union Kenya & others* (Supra).
47. As regards the notice of redundancy, the Respondent sent a letter dated 12th May, 2017 giving the Claimant two (2) months' notice of termination on account of redundancy.
48. Section 40(1)(b) of the [Employment Act](#), 2007 requires that an employee who is not a member of the union must be given a written notice personally. In the court's view, the notice to the Claimant was sufficient.
49. Equally, the notice of redundancy must be sent to the local Labour Office at least one month before the effective date of the redundancy.



50. Although the Respondent's witness testified that it notified the Labour Office vide letter dated 11th May, 2021, and the list of documents filed identify the letter as No. 7, the court was not given a copy or none was traceable in the portal.
51. The court cannot therefore confirm whether this requirement was complied with.
52. It is the duty of parties to avail copies of documents they intend to rely on as evidence to facilitate the other party and the court in appreciating the entire context of dispute.
53. Closely related to the foregoing are the contents of the notice.
54. The law requires the notice set out the reasons for and extent of the redundancy to enable the recipients understand why the process is being undertaken and how many departments and employees are affected.
55. It enables the Labour Officer assess the potential impact of the exercise on the labour market and engage the employer on ways of averting or mitigating it.
56. This requirement reinforces the provisions of Section 45(2) and 43 of the [Employment Act](#), 2007 on the reason(s) for termination of employment.
57. Although the Respondent's letter cited poor/low performance and inability to sustain operations including salaries and cited restructuring in its evidence, it provided no verifiable evidence.
58. However, the Claimant confirmed that the Respondent was facing many challenges and payment of salaries for the last two months had been a challenge. Indeed, the Claimant admitted that on 12th May, 2017, she was out of the office sorting issues with the landlord over unpaid rent.
59. The foregoing notwithstanding, the Respondent adduced no evidence of the purported restructuring.
60. From the evidence on record, it is clear that the Respondent had no selection criteria and did not conduct any consultations with the Claimant and RWI confirmed as much during cross-examination.
61. In a nutshell, the Respondent did not comply with the provisions of Section 40(1) of the [Employment Act](#), 2007, thus rendering the termination of the Claimant's employment on account of redundancy an unfair termination of employment.
62. The Claimant also alleged that her relationship with the Acting Chief Executive Officer was the reason for her termination and relies on a letter to the C.E.O dated 12th May, 2017, the day her employment was terminated.
63. It is unclear to the court as to which letter was dispatched before the other and the Respondent's perception of the Claimant's letter of even date.
64. The crux of the Claimant's concern is that the supervisor was cold towards her. Were the communications from both sides coincidental? Perhaps.
65. The conduct or treatment of staff by their supervisors is a wide spectrum ranging from too friendly to hostile. It is indeed a continuum. Being cold falls in between and depends on how the coldness is manifested. The Claimant led no evidence of any animosity between her and the Acting Chief Executive Officer.
66. From the evidence on record, it is the finding of the court that the Claimant has failed to demonstrate that her relationship with the Acting Chief Executive Officer precipitated the termination of employment.



Whether the Claimant is entitled to the reliefs sought

67. During the hearing, the Claimant admitted that the sums claimed as pay in lieu of notice and unpaid salary was paid.
- a. Unpaid leave days (14)
68. Neither the Claimant's further witness statement nor the original statement explain how the 14 leave days accrued and the statement dated 28th September, 2017 is contradictory as it cites 12 days leave but prays for 14.
69. In the court's view, the Claimant is only entitled to the actual number of leave days outstanding which the court hereby awards.
- b. Severance pay
70. As the termination of employment transitioned from redundancy to unfair owing to the non-compliance with the requirements of Section 40(1) of the *Employment Act*, 2007, the prayer for severance pay is unsustainable and is declined.
- c. Unpaid salary increment (Kshs.75,000 x 10) = Kshs.750,000/=
71. Clause 7.2 of the Claimant's Letter of Appointment provided for a variable pay portion of Kshs.75,000/= per month, paid Quarterly in arrears on attainment of the agreed Quarterly KPIs. The same was payable after completion of probation successfully. Unfortunately, the Claimant was not evaluated by the supervisor to ascertain whether she met her KPIs or exceed.
72. Although the Claimant testified that she met and exceeded some of the KPIs, she had no evidence of the meeting or exceeding and availed no record of having prompted the supervisor to conduct an evaluation as required by Clause 7.2.
73. It is unclear to the court as to why the Respondent did not appraise the Claimant Quarterly as required by the Third Schedule to the Letter of Appointment.
74. Appraisals or assessments are conducted at the instance of the employer as agreed upon with the employee.
75. It is typically the duty of Human Resource to initiate the process by email or internal memo and ensure that it is conducted and finalised and results provided.
76. In this case, the Respondent made no effort to appraise the Claimant for purposes of payment of the variable pay.
77. RWI testified that he was not privy to any appraisal and according to him, it was conducted once a year but had no evidence of any review or appraisal.
78. The witness testified that he was unaware of the Claimant's performance.
79. Evidently, the Respondent treated the Claimant unfairly by not appraising her for purposes of payment of the variable pay.
80. Although the Claimant testified she met and exceeded the KPIs, she had no supportive evidence and the court cannot assume that she exceeded the KPIs for the entire duration of employment.
81. The court is however prepared to find and hold that based on her uncontroverted testimony, the Claimant met the KPIs as agreed upon.



82. In the court's view, it is unconscionable for the Respondent to argue that the Claimant is not entitled to the contractual variable pay on the ground that there was no appraisal yet it was the Respondent's duty to ensure that the appraisal was conducted.
83. Notwithstanding the fact that the Claimant did not claim the sum for over one (1) year, it remained the Respondent's obligation to conduct the appraisal.
84. In the circumstances, the Respondent cannot benefit from its indolence.
85. The court is satisfied that the Claimant met the KPIs and is awarded the sum of (Kshs.50,000/= for 10 months) total Kshs.500,000/=.
- d. 12 months compensation
86. Having found that termination of the Claimant's employment on account of redundancy transitioned to an unfair termination within the meaning of Section 45 of the Employment Act, 2007, the Claimant is entitled to compensation under Section 49(1)(c) of the Act.
87. In determining the quantum of compensation, the court has taken into consideration the following;
- i. The Claimant was an employee of the Respondent for a very short time.
 - ii. The Claimant did not express her wish to remain in the Respondent's employment or appeal the decision.
 - iii. The Claimant did not contribute to the termination of employment.
 - iv. The Claimant had no recorded cases of misconduct or warning.
 - v. The Respondent was at the time experiencing cash flow and other challenges, facts within the Claimant's knowledge as the Chief Finance Officer of the Respondent.
88. In the circumstances, the court is satisfied that the equivalent of 3 months gross salary is fair, Kshs.1,350,000.00.
- e. General damages for mental anguish and emotional distress
89. The Claimant adduced no verifiable evidence of the alleged loss or damage or entitlement to general damages.
- The prayer is dismissed for want of proof.
- f. Certificate of service
90. The Claimant is entitled to a certificate of service by dint of Section 51 of the Employment Act, 2007.
91. In the upshot, judgement is entered in favour of the Claimant against the Respondent as follows;
- a. Actual unpaid leave days.
 - b. Variable pay Kshs.500,000.00
 - c. Equivalent of 3 months' salary Kshs.1,350,000.00
 - d. Costs of this suit.
 - e. Certificate of service.
- It is so ordered.



DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 8TH DAY OF APRIL 2024.

DR. JACOB GAKERI

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 *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.

DR. JACOB GAKERI

JUDGE

