



**Omondi v Medisel (Kenya) Limited & another (Cause E038 of 2023)  
[2024] KEELRC 1582 (KLR) (21 June 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1582 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E038 OF 2023**

**SC RUTTO, J**

**JUNE 21, 2024**

**BETWEEN**

**KETTY AKINYI WINFRED OMONDI ..... CLAIMANT**

**AND**

**MEDISEL (KENYA) LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**DAWA LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. The instant suit was commenced by way of a Memorandum of Claim filed on 25<sup>th</sup> January 2023. The Claimant avers that she was employed by the 1<sup>st</sup> Respondent as a Customer Care Service and Tele Sales Manager vide a written contract dated 14<sup>th</sup> December 2020 and was to serve at the 2<sup>nd</sup> Respondent's offices in Ruaraka. Seemingly, the employment relationship was short-lived as the Claimant avers that on 28<sup>th</sup> December 2021, she received a notice of intended redundancy through her work email. The reason for the redundancy was that the 2<sup>nd</sup> Respondent had been facing financial losses in the year 2021. She later received a letter of termination on 27<sup>th</sup> January 2022 on grounds that after the intended notice of redundancy, the 2<sup>nd</sup> Respondent was not able to find alternative employment for her. Her claim against the Respondents is for the sum of Kshs 1,125,692.30 being payment for 8 unutilized leave days, salary underpayment and maximum compensation for unfair termination.
2. The Respondents opposed the Claim through the Memorandum of Response dated 3<sup>rd</sup> August 2023, in which it contends that the termination of the Claimant's employment was done according to the Employment Act and passes the substantive and procedural test. Consequently, the Respondents have asked the Court to dismiss the Claimant's Claim with costs.
3. During the hearing which proceeded on 5<sup>th</sup> March 2024, both parties called oral evidence.



## Claimant's Case

4. The Claimant testified in support of her case as CW1 and for starters, she sought to rely on her witness statement to constitute her evidence in chief. She further produced the list and bundle of documents filed on her behalf as exhibits before Court.
5. It was the Claimant's evidence that her duties included, coordinating order processes/supplies; ensuring orders were properly recorded; making calls to make sales; overseeing a team of seven people; overseeing the Tele-sales Department; and overseeing the daily procedures.
6. She further averred that she was on a six months' probation and thereafter, she was confirmed vide a letter dated 7<sup>th</sup> June 2021.
7. That in November 2021, three members of the Tele Sales team were taken and given to one of the team members by the name of Fred as the team leader. The company employed four more people to that team and they were now a total of seven members. She remained with only two members.
8. She inquired from the Human Resources Manager, who told him that Madam Reema (wife of the Managing Director) had given instructions for the same and which instructions were effected by Mary Ndunge who was the Head of the Essential Health Department.
9. At this time, the Department of Tele Sales was restructured and she became the Customer Service Manager, and the two people who remained in her department were now known as Customer Care Agents.
10. The Claimant further averred that on 23<sup>rd</sup> December 2021, she took eight days' leave for the Christmas holiday. She was to report back to work on 4<sup>th</sup> January 2022. She further stated that at that time and throughout the time she was there, there was no indication that the company was doing badly financially.
11. On 28<sup>th</sup> December 2021 she received a notice of intended redundancy through her work email signed by the Group Managing Director Dr. Ajay Patel. The reason for the redundancy was that the company had been facing financial losses in the year 2021 and hence was forced to review its business operations and cost structure. The notice was for 30 days and she was to continue working during the notice period.
12. She resumed work on 4<sup>th</sup> January 2022 and worked until 14<sup>th</sup> January 2022 but she decided to leave and continue working from home as she did not have access to her work e-mails.
13. The Claimant further averred that the notice had indicated that there would be consultative meetings with employees likely to be affected by the redundancy to discuss the alternatives to the proposed redundancy, but this was not done to her.
14. She further stated that the redundancy notice did not make sense because whereas she had been made the Customer Service Manager, the letter still referred to her as the Tele sales Manager which was being considered for redundancy, and yet the position was being held by Fredrick Mwendwa.
15. On 27<sup>th</sup> January 2022, she received a letter of termination based on the reason that after she was given the notice of intended redundancy dated 28<sup>th</sup> December 2021, the company was not able to find alternative employment for her. She was also told that her role had become redundant with effect from 27<sup>th</sup> January 2022.
16. The Human Resources Manager called her and told her to clear on 24<sup>th</sup> January 2022, which she did.



17. She came to learn that apart from herself, there were other six employees who received the notices of the intended redundancy and two middle management employees were retained in their old positions.
18. She was not given a recommendation letter/certificate of service and she is yet to be paid the terminal dues as indicated on the termination letter.

### **Respondents' Case**

19. The Respondents called oral evidence through its Human Resource Officer, Mr. Patrick Mwendwa who testified as RW1. Equally, RW1 adopted his witness statement to constitute his evidence in chief. He proceeded to produce the documents filed on behalf of the Respondents as exhibits before Court.
20. It was RW1's testimony that the Claimant's written contract of employment had the job description of a Customer and Tele Sales Manager despite the clerical error describing her position as a Tele Sales Manager.
21. As part of the terms of employment, the Claimant was to report to the Group Sales and Marketing Manager. All other terms and conditions of the Claimant's appointment remained the same in line with the Respondent's policies and staff manual.
22. The Claimant accepted the employment contract in which she indicated that she understood the conditions and terms set out in the employment contract and accepted the offer for the position of Customer Service and Tele Sales Manager.
23. During the probationary period, the Claimant performed her duties according to her position of Customer and Tele Sales Manager as stipulated in the employment contract.
24. After six months, and based on a performance review, the 1<sup>st</sup> Respondent issued a confirmation letter dated 7<sup>th</sup> June 2021 indicating that the Claimant had successfully completed her probationary period under her contract.
25. The letter confirmed her appointment as the Tele Sales Manager reporting to the Group Sales and Marketing Manager. According to RW1, the confirmation letter contained a clerical error, which erroneously confirmed the Claimant to the non-existent position of Tele sales Manager as opposed to the position of a Customer and Tele Sales Manager.
26. Nevertheless, the Claimant enjoyed the benefits that accrued to her in her appropriate position in the original contract despite the clerical error in the letter of confirmation.
27. The Claimant took her annual leave by application through the leave application forms which were approved by her supervisor. The Claimant had 7.25 leave days of leave by the end of November. She accrued an additional 1.75 leave days in December bringing her total tally of leave days to 9. She utilized these leave days by going on leave for 8 days in December leaving her with a balance of 1 leave day. She came back in January and accrued a further 1.75 days bringing her leave days total balance to 2.75 leave days by the end of January.
28. RW1 further averred that due to financial challenges, the Respondents opted to streamline their expenditure by conducting a review of the current organizational structure. The Respondents made the decision to declare several positions redundant.
29. That the Respondents issued a Notice of Redundancy on 28<sup>th</sup> December 2021 to the Claimant explaining the reasons why they were considering declaring positions redundant. It explained that the Company would seek to hold consultative meetings with all its employees likely to be affected by the restructuring to discuss possible alternatives.



30. The Respondents further notified the County Labour Officer of the intended redundancy via a Notice of Redundancy issued on 28<sup>th</sup> December 2021.
31. The Notice of Redundancy specified that the employees were to continue working from the office during the 30 days that the notice was effective. All employees were expected to comply with the directive. The Claimant resumed work on 4<sup>th</sup> January 2022, after her eight days' leave.
32. It was RW1's evidence that the Claimant neither arrived at her designated workplace nor did any work from 13<sup>th</sup> January 2022 until the moment she ceased being an employee on 27<sup>th</sup> January 2022.
33. The Respondents tried to get hold of the Claimant for consultations before termination of the contract of employment on account of redundancy. However, they were unable to reach her because she was not present at work and neither was, she reachable on phone.
34. RW1 further averred that the Respondents used the Last in first out (LIFO) principle as among the criteria for determining which employees were to be declared redundant. That in this regard, the Claimant was employed on 14<sup>th</sup> January 2021 and was terminated barely a year later.
35. That the Respondents also used the criteria of evaluating the skills, seniority and the reliability of the Claimant.
36. A termination letter was eventually issued by the Human Resource Department dated 27<sup>th</sup> January 2022 wherein the decision to terminate the Claimant's employment was communicated to her.
37. With regards to Mr. Fredrick Mwendwa RW1 averred that he is aware that he (Mr. Mwendwa) had been employed by the Respondent in the position of Sales & Marketing Assistant in the Sales and Marketing Division on 2<sup>nd</sup> January 2019 reporting to the General Manager -Branded, Sales and Marketing.

### **Submissions**

38. It was the Claimant's submission that she was given a notice period of only 21 days. In the same vein, the Claimant submitted that the Notice to the labour office was not for 30 days and did not even indicate that she was facing redundancy. That further, there was no list of employees facing redundancy. In support of her submissions, the Claimant cited the cases of Mary Nyawira Karimi v Pure Circle (K) Limited (2018) eKLR, Gerrishom Mukhutsi Obayo v Dsv Air and Sea Limited (2018) eKLR and Barclays of Kenya Ltd & another v Gladys Muthoni & 20 others (2018) eKLR.
39. The Claimant further submitted that there was no indication of any change of structure and no proof of any financial struggles or losses by the Respondents. In her view, the termination was unfair.
40. In further submission, the Claimant stated there was no list of the employees facing termination on account of redundancy and how and on what basis they were selected for termination.
41. Citing the case of Cargill Kenya Limited v Mwaka & 3 others (2021) KECA 115 (KLR) 22 the Claimant submitted that there was no prior or any other consultation with her before termination.
42. On the Respondents' part, it was submitted that they have demonstrated that there was justification for the termination of the Claimant's employment contract on account of redundancy as the position was done away with in the new structure. In support of the Respondents' argument, reliance was placed on the cases of Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others (2014) eKLR and Lebo and 331 others v Kenya Power & Lighting Co. Ltd (2013).
43. The Respondents further submitted that the Claimant was served with the requisite notices. With respect to selection, the Respondents argued that there was no need for the consideration of the specific



criterion for redundancy as the entire position/class was done away with. To this end, the case of *Muraguri v Mpala Research Center & 2 others* [2024] KEELRC 440 (KLR) was cited in support of this position.

44. In further submission, the Respondents stated that there were no other Tele Sales Managers for the Claimant to be measured against and for the purposes of ascertaining the criteria to be used in declaring such redundancies. To buttress this position, further reliance was placed on the case of *Ngaira & 126 others v Sendwave Limited (ZEPZ) (Cause E532 of 2023)* (2024) KEELRC 567 (KLR).
45. The Respondents further posited that as a result of the Claimant's absence from work, they were denied the opportunity to engage her in any meaningful consultations.

### **Analysis and Determination**

46. Arising from the pleadings, the evidence on record as well as the rival submissions, the following issues stand out for consideration by the Court:

- i. Whether the Claimant's termination by way of redundancy was fair and lawful;
- ii. Whether the Claimant is entitled to the reliefs sought.

Whether the Claimant's termination by way of redundancy was fair and lawful.

47. It is common ground that the Claimant was terminated from employment on grounds of redundancy. It is now settled that any termination of employment under redundancy ought to be both substantially justified and procedurally fair. Such was the holding by the Court of Appeal in the case of *Kenya Airways Limited vs Aviation & Allied Workers Union Kenya & 3 Others* (2014) eKLR.
48. Substantive justification refers to the reasons ascribed for the redundancy while procedural fairness has to do with the procedure applied in effecting the redundancy. I will start by considering substantive justification.
49. As can be discerned from the letter dated 28<sup>th</sup> December 2021, issued to the Claimant, the main reason advanced by the Respondent for its intention to declare her redundant was that the company had been faced with financial losses in the year 2021 and as a result, the Board of Directors and relevant stakeholders had been forced to review the business operations and its cost structure. In this regard, the Claimant was notified that the position of Tele Sales Manager, which she was holding at the time, was being considered for redundancy.
50. Flowing from the above, it is evident that the Claimant's intended termination was based on the operational requirements of the Respondents and hence falls within the ambit of Section 45 (2) (b) (ii) of the *Employment Act* (Act).
51. As was held in the case of *Kenya Airways Limited vs Aviation & Allied Workers Union Kenya & 3 others* [2014] eKLR, the phrase "based on operational requirements of the employer" must be construed in the context of the statutory definition of redundancy.
52. Section 2 of the Act defines the term "redundancy" to mean "the loss of employment, occupation, job or career by involuntary means through no fault of an employee, involving termination of employment at the initiative of the employer, where the services of an employee are superfluous and the practices commonly known as abolition of office, job or occupation and loss of employment".
53. Fundamentally, the circumstances or reasons leading to an employee being declared redundant must fall within the above statutory definition.



54. In this case, the Respondents have argued that the cost of paying employees in a bloated structure would have significantly contributed to the strain already faced by the company due to its financial performance in 2021. The Respondents further submitted that several positions and not just the Claimant's, were considered and eventually declared redundant.
55. On her part, the Claimant has contended that there was no indication of any change of structure.
56. Notably, the Claimant admitted during cross-examination, that she was not the only employee who was declared redundant.
57. In light of the above, I have no reason to doubt that the Respondents were facing a situation where they needed to declare some of their employees redundant. That being the case, the pertinent question that comes to the fore is whether the Claimant's role was affected by the redundancy exercise carried out at the time, by the Respondents.
58. It is worth noting that despite the Respondents stating that the Claimant's position had been declared redundant and done away with, they failed to lead evidence to prove this assertion. Indeed, there was no evidence that the position of Tele Sales Manager had been abolished and ceased to exist within the Respondents' organization structure.
59. On this issue, I will follow the determination in the case of Kenya Airways Limited vs Aviation & Allied Workers Union Kenya & 3 others [supra] where it was held that while there may be underlying causes leading to a true redundancy situation, such as reorganization, the employer must nevertheless show that the termination is attributable to the redundancy- that the services of the employee has been rendered superfluous or that redundancy has resulted in abolition of office, job or loss of employment.
60. In further analyzing the definition of the term redundancy, the Court reckoned as follows:

“There are two broad aspects of this definition...The second aspect is that the loss of employment in redundancy has to be at no fault of the employee and the termination of employment arises “where the services of an employee are superfluous” through “the practices commonly known as abolition of office, job or occupation and loss of employment.” In this case, what I understand as required to be determined in this aspect of the definition of redundancy is whether the appellant abolished the offices, jobs or occupations of the affected employees resulting in their services being superfluous hence their loss of employment. Corollary to that is the justification for that abolition, if the appellant indeed abolished their offices. Determination of these two aspects will, determine the first issue of whether or not the redundancy in this case was necessary.” Underlined for emphasis
61. As the Respondents have failed to prove that the Claimant's position was abolished, I cannot help but find that they have not proved to the requisite standard that there was substantive justification for the termination of the Claimant's employment on account of redundancy.
62. It is worth pointing out that a reading of Section 40 of the Act allows an employer to declare a redundancy provided that the same is justified. Therefore, this right notwithstanding, the Respondents were duty-bound to prove that the Claimant's redundancy was substantively justified.
63. Further, the emerging jurisprudence in this area is that courts should not limit employers, in determining what strategic and business decisions to take and implement, within their operations. Be that as it may, the burden rests on the employer to prove substantive justification. In this case, I find that the Respondents have failed to satiate their evidential burden.



64. Turning to the procedural aspect of the redundancy process, Section 40(1) stipulates the following conditions that an employer must comply with prior to an employee's termination on account of redundancy:
- a. where the employee is a member of a trade union, the employer notifies the union to which the employee is a member and the labour officer in charge of the area where the employee is employed of the reasons for, and the extent of, the intended redundancy not less than a month prior to the date of the intended date of termination on account of redundancy;
  - b. where an employee is not a member of a trade union, the employer notifies the employee personally in writing and the labour officer;
  - c. the employer has, in the selection of employees to be declared redundant had due regard to seniority in time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy;
  - d. where there is in existence a collective agreement between an employer and a trade union setting out terminal benefits payable upon redundancy; the employer has not placed the employee at a disadvantage for being or not being a member of the trade union;
  - e. the employer has where leave is due to an employee who is declared redundant, paid off the leave in cash;
  - f. the employer has paid an employee declared redundant not less than one month's notice or one month's wages in lieu of notice; and
  - g. the employer has paid to an employee declared redundant severance pay at the rate of not less than fifteen days' pay for each completed year of service.
65. In this case, the Claimant has faulted the Respondents for not issuing the requisite notice within 30 days stipulated under Section 40(1) aforesaid. From the record, the Notice of the intended redundancy was issued on 28<sup>th</sup> December 2021 and was to take effect on 28<sup>th</sup> January 2022.
66. In her testimony before Court, the Claimant stated that she received the Notice of the intended redundancy through her work email on 28<sup>th</sup> December 2021. Therefore, the notice given was within the stipulated 30 days period.
67. I must add that despite the Claimant's assertions that she received the physical copy of the Notice on 4<sup>th</sup> January 2022, what counts is the fact that she was notified and was aware of the intended redundancy as of 28<sup>th</sup> December 2021 which period was within 30 days prior to the termination.
68. What I find to be faulty is the Notice dated 28<sup>th</sup> December 2021, issued to the County Labour Office. I say so because the said Notice did not state the extent of the redundancy exercise. In this regard, the Notice merely stated that certain positions in the company would be declared redundant. Indeed, even the number of employees to be affected by the redundancy was not indicated. More importantly, it did not even mention that the Claimant's position was among those to be affected by the redundancy exercise.
69. Suffice to say, the Notice issued by the Respondents was not substantially in compliance with the provisions of Section 40(1) (b) of the *Employment Act*.
70. The other requirement is in respect of the selection criteria stipulated under Section 40 (1) (c) of the *Employment Act*. In this regard, the employer is required to prove that in the selection of employees to



be declared redundant, it has paid 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.

71. According to RW1, the Respondents used the Last In First Out (LIFO) principle for determining which employees were to be declared redundant. That in this regard, the Claimant a recent hire and hence was terminated barely a year later. RW1 further stated that the Respondents used the criteria of evaluating the skills, seniority and reliability of the Claimant.
72. Despite RW1's assertions, there was no evidence for instance a score sheet, demonstrating the manner in which the Respondents applied the stipulated criteria and zeroed in on the Claimant as the employee to go.
73. Indeed, lack of evidence to prove the manner in which the Respondents applied the selection criteria it states to have applied, leaves room for doubt as to whether the selection of the Claimant for purposes redundancy, was undertaken objectively. To that extent, the Respondents failed the test under Section 40(1) (c) of the Act.
74. Further, it is worth pointing out that RW1's assertions in this respect are in sharp contrast with the Respondents' submissions to the effect that the position of Tele Sales Manager was completely done away with hence there was no need for consideration of a specific criterion for redundancy.
75. As to the payments under Section 40(1) (e) (f) and (g) of the *Employment Act*, it is notable that the Claimant was advised through the letter of termination dated 27<sup>th</sup> January 2022 that she would be paid: Salary upto and including 27<sup>th</sup> January 2022, notice pay, severance pay of fifteen days for each completed year of service and payment of any accrued leave days.
76. In support of its case, the Respondent exhibited a copy of the Claimant's pay slip for the month of January 2021. A careful perusal of the said pay slip reveals that she was not compensated for the outstanding leave days. This is despite the Respondents admitting that at the time of her termination from employment, the Claimant had a balance of 2.75 leave days.
77. Therefore, the Respondents were not wholly compliant with regards to the payment due to the Claimant under Section 40(1) (e) of the *Employment Act*.
78. With respect to the requirement for consultations, the Respondents stated that they could not get hold of the Claimant as she was not present at work and was not reachable on phone. To buttress this position, the Respondents exhibited a copy of the staff attendance report.
79. On her part, the Claimant stated that she resumed work from leave on 4<sup>th</sup> January 2022 and worked until 14<sup>th</sup> January 2022. That she continued working from home as she did not have access to her work emails which had been disabled. Testifying under cross-examination, the Claimant stated that she needed access to her emails to enable her undertake her duties. Notably, the Respondents did not discount this position.
80. Further, the Respondents did not adduce evidence to prove that they attempted to reach the Claimant through whatever means to initiate the consultations alluded to in the letter of 28<sup>th</sup> December 2021.
81. In the event the Claimant was away from her workstation without lawful authority, one wonders why the Respondents failed to issue her with a notice requiring her to explain her whereabouts and to present herself at the workplace.
82. In sum, I am led to conclude that the Respondents failed to initiate the pre-redundancy consultations as decreed under Article 13, Convention No. 158 - Recommendation No. 166 of the International Labour Organisation (ILO) convention.



83. To this end, it is apparent that the Respondents did not substantially comply with the provisions of Section 40 (1) of the Employment Act. To that extent, the Claimant's termination by way redundancy cannot be said to have been procedurally fair within the meaning of Section 40(1) of the Act.

### **Reliefs?**

#### Compensatory damages

84. As the Court has found that the Respondents failed to prove that the Claimant's termination by way of redundancy was substantively and procedurally fair, she is awarded compensatory damages equivalent to three (3) months of her salary. This award takes into account the length of the employment relationship which was relatively short.

#### **Unutilized leave days**

85. The Claimant has further sought to be paid leave for eight days which she says remained unutilized following her termination. According to the Respondent, the Claimant utilized her leave days and by the end of January 2021, her leave balance was 2.75 days. To this end, the Respondents exhibited the Claimant's leave records which indicate that at the end of December 2021, she had utilized 20 leave days hence had a leave balance of one day. Therefore, by the time she was terminated at the end of January 2022, her outstanding leave days were 2.75. As such, the Respondents' computation was accurate in this regard. However, since there is no evidence that she was paid for her pending leave days, she is entitled to payment accordingly.

#### **Underpayments**

86. The Claimant has sought to be paid the sum of Kshs 18,000.00 being underpayment. In terms of the Claimant's contract of employment, she was to earn airtime facilitation in the sum of Kshs 1,500.00. Notably, this was topped up directly to the Claimant's phone hence was not paid together with her salary. In support of its case, the Respondents exhibited air time top-up forms. Notably, from the said top-up forms, the Claimant only received airtime top-up once on 6<sup>th</sup> December 2021. There is no evidence that she received airtime top-up for the remaining 11 months. To this extent, she is entitled to unpaid overtime Kshs 1,500.00 for 11 months.

#### **Orders**

87. In the final analysis, the Claim is allowed and Judgment is entered in favour of the Claimant against the Respondents in the following manner: -
- a. A declaration that the termination of the Claimant from employment was unfair and unlawful.
  - b. The Claimant is awarded the sum of Kshs. 265,500.00 being compensatory damages for unfair termination.
  - c. The Claimant is awarded unpaid overtime for 11 months in the sum of Kshs. 16,500.00.
  - d. The Claimant is awarded unpaid leave (2.75 days) in the sum of Kshs. 8,112.50.
  - e. The total award is Kshs. 290,112.50.
  - f. Interest on the amount in (e) at court rates from the date of Judgment until payment in full.
  - g. The Claimant shall have the costs of the suit.



DATED, SIGNED AND DELIVERED AT NAIROBI THIS 21<sup>ST</sup> DAY OF JUNE 2024.

.....

**STELLA RUTTO**

**JUDGE**

**In the presence of:**

For the Claimant Mr. Rakoro

For the Respondents Mr. Ochieng

Court assistant Millicent Kibet

**ORDER**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**STELLA RUTTO**

**JUDGE**

