



**Maranga v Aids Healthcare Foundation Kenya (Cause E302 of 2022)  
[2024] KEELRC 1467 (KLR) (13 June 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1467 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E302 OF 2022  
NZIOKI WA MAKAU, J  
JUNE 13, 2024**

**BETWEEN**

**PATRICK WAMAE MARANGA ..... CLAIMANT**

**AND**

**AIDS HEALTHCARE FOUNDATION KENYA ..... RESPONDENT**

**JUDGMENT**

1. Through the Amended Memorandum of Claim dated 11<sup>th</sup> August 2023, the Claimant raises against the Respondent issues of unlawful termination of employment and failure to pay him terminal dues and/or benefits. He averred that the Respondent employed him as a Deputy Bureau Chief - Africa under various contracts, with the final contract running from 9<sup>th</sup> April 2020 to 1<sup>st</sup> June 2023. He stated that on 26<sup>th</sup> October 2021, the Respondent terminated his services on account of redundancy and that at the time of termination of his employment, he was earning a gross salary of Kshs. 1,207,046.63. It was the Claimant's case that in terminating his employment, the Respondent did not engage in consultations as envisaged in the law and that termination of his employment on account of redundancy was unfair, unprocedural and illegal. He posited that the criteria applied to declare him redundant was not objectively, uniformly and/or fairly approved and that the redundancy was driven by malice, bias and discrimination. That further, the Respondent did not take into account his contract, skills, long service and qualifications and that the Officer who alleged to terminate his services was not the appropriate authority and therefore lacked the jurisdiction and capacity to exercise such authority. The Claimant stated that he is consequently entitled to compensation for the unlawful termination of his employment and to salary for the remaining part of his contract period of one (1) year, six (6) months. He further prays that this Honourable Court awards him outstanding contractual and terminal dues, compensation for unlawful and unfair termination, costs of the suit claim plus interest, certificate of service, and any other relief the Court may deem just.



2. In his Further Statement dated 21<sup>st</sup> September 2023, the Claimant asserted that he joined the Respondent NGO on 2<sup>nd</sup> June 2015 as the Country Director for the Kenya program. That it was sometime in December 2016 that he got an informal personal request to consider taking up, as a promotion, the position of Deputy Bureau Chief – Africa. That he accepted the offer and took over the said position from January 2017 and that in 2019, he was overseeing the entire program in Africa. He noted that with the outbreak of Covid-19 in 2020, he was the Deputy Lead in the emergency response and support that ensured the NGO continued to operate in all their countries of support. The Claimant stated that the termination of his employment was in contravention of the express terms of his Contract of Employment and that he seeks damages due to the impact on his reputation, reduced employability and discrimination based on his nationality and gender.
3. In reply, the Respondent filed an Amended Memorandum of Response dated 15<sup>th</sup> September 2023, wherein it denied that the Claimant’s employment contract was unfairly terminated as alleged or at all. According to the Respondent, the termination of the Claimant’s employment contract on grounds of redundancy was lawful and justified and the redundancy process was carried out in accordance with the terms of the applicable laws. That the Claimant was duly paid his terminal dues following the redundancy and is therefore not entitled to any further claims. The Respondent averred that at the time of the termination, the Claimant was earning a basic salary of Kshs. 1,168,426/- per month, which was subject to income tax and applicable statutory deductions.
4. The Respondent’s case was that on or about August 2021, it sought to restructure its operations by streamlining the leadership of each core department, with particular focus on the managerial and directorship positions. That it was noted that the position of Deputy Bureau Chief (DBC) held by the Claimant was not required because the said position entailed the oversight and supervision of six (6) countries, which could be sufficiently managed by the Respondent’s Country Program Managers or Directors in charge of the overall strategic and operational leadership of their country programs. That it was further noted that the reporting line to the DBC was administrative and did not contribute to the core functionality and performance of the Respondent’s client’s Africa Bureau Department. The Respondent fronted that it therefore was left with no option but to consider the restructure of the DBC role and that on 30<sup>th</sup> August 2021, it issued an Internal Memo to its Bureau Team notifying them of the intended restructure of the DBC position. It averred that it also held an informal meeting with the Claimant on 10<sup>th</sup> September 2021 to discuss the same and that following the discussion, it issued him with a formal Notice on 16<sup>th</sup> September 2021, a copy of which was also shared with the Nairobi County Labour Office. It further averred that when it further failed to secure a suitable alternate role for the Claimant, it had no option but to issue him with a Confirmation of Redundancy Notice on 26<sup>th</sup> October 2021. The Respondent asserted that the selection criteria applied to declare the Claimant redundant was fair and transparent and that severance pay was computed and fully paid out to him in accordance with sections 40(1)(e), (f) and (g).
5. The Respondent further denied that the Claimant’s termination on account of redundancy was in contravention of the express terms of his contract of employment. It also refuted the allegation that the Claimant is entitled to salary for the remaining part of his contract period, asserting that a claim for anticipatory benefits is not anchored anywhere in law. It contended that the redundancy process was at all times justified and that the Claimant’s performance had nothing to do with the restructuring process as alleged or at all. That the Claimant is therefore not entitled to compensation for unfair redundancy or the orders sought for the reasons set out herein. The Respondent therefore asked the Court to dismiss the Claimant’s Claim with costs.



6. The Respondent also filed an Amended Witness Statement made on 14<sup>th</sup> September 2023 by Ms. Belinda Micho who asserted that the Claimant served his notice period as provided under his Employment Contract and his terminal dues were duly computed and paid out to him as set out in the Confirmation of Redundancy Notice dated 26<sup>th</sup> October 2021. She stated that a copy of the transcript of the consultative meeting held between the Claimant and the Respondent was exhibited in the Respondent's Supplementary Documents and a video recording in the attached Compact Disc.

### Evidence

7. The Claimant testified that only seven (7) employees were terminated from employment out of all the staff targeted. He stated that there was no redundancy but a termination of employment and that the Respondent simply used legal means to eliminate her. On the other hand, the Respondent's witness, Ms. Belinda Micho (RW1), stated under cross-examination that out of 15 people who received the email titled Restructuring of the Bureau Leadership Team only one position was declared redundant. She maintained that the Claimant was paid up to the last working day of November 2021. RW1 stated in re-examination that the Claimant's Certificate of Service was ready for collection and had even been produced before Court. She denied that the redundancy was discriminatory as all correspondence showed that the redundancy targeted all members of the leadership team but confirmed that it was only the Claimant who was declared redundant.

### Claimant's Submissions

8. The Claimant submitted that the issues for determination before this Court are:
  - a. Whether the process of declaring the Claimant redundant was procedural, fair and open.
  - b. Whether the termination of the Claimant's employment on account of redundancy amounts to unfair termination and if the Claimant has a right to be compensated by way of damages and if so, how much.
  - c. Whether the Claimant should be compensated for the remainder of his unexpired contract.
  - d. Who should bear the costs of this suit?
9. It was the Claimant's submission that termination on account of redundancy is provided under section 40 of the *Employment Act* and that section 40(1) states that an employer shall not terminate a contract of services on account of redundancy unless the employer complies with various conditions, inter alia, having 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 per section 40(1)(c). That sections 40(1)(a) and (b) provide requirement for consultation between the employer, labour unions and employee on an intended redundancy, which requirement is also set out under Article 13 of Recommendation 166 of the *ILO Convention No. 158* - Termination of Employment Convention, 1982. In addition, that consultation is also a requirement under Article 47 of the *Constitution* of Kenya and section 43 of *Fair Administrative Action Act*. The Claimant further submitted that the evidence before Court demonstrated that no consultation took place before the termination of his employment under redundancy. He urged the Court to be persuaded by the analysis of the Court of Appeal on the issue of redundancy in the case of *Cargill Kenya Limited v Mwaka & 3 others* (Civil Appeal 54 of 2019) [2021] KECA 115 (KLR). The Claimant argued that the Respondent had failed to produce to the Court the criteria used to identify and select him as the only one to be terminated on account of redundancy. That the Respondent did not also produce his performance appraisal for the years he had worked for the NGO so as to demonstrate his inability to perform his responsibilities.



10. Further, the Claimant submitted that the circumstances for unfair termination of employment are set out under section 45(4) of the *Employment Act*. That in his case, his skills, abilities or reliabilities were not shown to be inferior to warrant termination of his services, as enshrined in section 40(1)(c) of the *Employment Act*. That in the case of *Cargill Kenya Ltd v Mwaka & 3 others* (supra), the Court of Appeal emphasized that ordinarily a trial court ought to further establish whether the criteria used to terminate the services through redundancy was legal, and professionally and independently done. He argued that redundancy is a legitimate ground for terminating a contract of employment provides there is a valid and fair reason based on operational requirement of the employer and the termination is in accordance with fair procedure. That in the case of *Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others* [2014] eKLR, Githinji JA held that section 40(1) of the *Employment Act* is merely procedural in its tenor and has to be read together with sections 43, 45 and 47(5) of the Act and that to establish a valid defence to a claim for unfair termination based on redundancy, an employer has to prove the reasons for termination. It was the Claimant's submission that the quantum payable is determined after considering the provisions under section 49(4) of the Act and his evidence herein. That to wit, this Court should consider that he has not managed to get any other employment to date, his age at the time of termination and his seniority at the place of work.
11. The Claimant further submitted that from the evidence tendered, it is not in doubt that he had time remaining on his contract before the termination of his employment. He urged the Court to find that he is entitled to the amount he would have earned in the remaining part of his contract as pleaded in the Claim. That in making the said award, the Court could be persuaded by the findings of the Court in *Pravin Bowry v Ethics & Anti-Corruption Commission* [2013] eKLR wherein the Court applied the principal of legitimate expectation in making a determination on quantum to award the remaining part of an expired contract. The Claimant further urged this Court to award him damages for the unfair termination of his employment and in so doing, to assess the same by awarding eight (8) times the gross salary he was earning at the time of termination of his employment.

### **Respondent's Submissions**

12. According to the Respondent, the termination of the Claimant's employment on grounds of redundancy was lawful, fair and justified as expressed in the Court of Appeal case of *Kenya Airways v Aviation & Allied Workers Union Kenya & 3 others* [2014] eKLR. That the right of an employer to declare redundancy is well secured in law and that it had proved its reasons and case for the Claimant's redundancy in the instant suit. It submitted that it had demonstrated compliance with section 40 of the *Employment Act* through issuance of one month's notices to the Claimant and Labour Officer, applying a fair and transparent selection criteria, holding consultative meeting with the Claimant, and paying the Claimant his terminal dues including severance pay. The Respondent argued that the burden of proof regarding claims of unfair and unlawful termination of employment on grounds of redundancy can only be discharged when the Claimant establishes a prima facie case that the termination did not fall within the confines of section 45 of the *Employment Act*. It relied on the case of *Galgalo Jarso Jillo v Agricultural Finance Corporation* [2021] eKLR wherein it was held that once the employee makes a prima facie case, the burden of proof shifts onto the employer to justify the termination. It was the Respondent's submission that it had discharged its burden of proof by justifying the rationale for the redundancy as fair and transparent within its business prerogative and that due process was followed.
13. As whether due process was followed, the Respondent cited the case of *Thomas De La Rue (K) Ltd v David Opondo Omutelema* [2013] eKLR in which the Court expounded on the statutory redundancy notices to the employee, labour office and union where such employee is a member of a union. It



maintained that it had proved compliance with the requirements on consultation and relied on the case of *Gladys Muthoni Mwangi & 20 others v Barclays Bank of Kenya Limited & another* [2016] eKLR where it was stated that consultations are necessary to give reasons for, and the extent of the intended redundancy. Further, the Respondent denied the allegations of discrimination, which it submitted were not proved or particularized and fronted that the selection criteria set out in section 40 of the *Employment Act* is a guideline and was in any case inapplicable to the circumstances of this case. It referred the Court to the Organogram of the restructure at page 9 of the Respondent's Documents that confirms the changes in structure. It further submitted that it had proved that it considered the possibility of finding a suitable alternate role for the Claimant but none could be found.

14. The Respondent further submitted that the Claimant is not entitled to the orders sought. That the Claimant had failed to prove the claims for outstanding contractual and terminal dues and the same was thus untenable. Moreover, the Claimant admitted he was paid his terminal dues and the Respondent had proved the payments as set out in the payslip at page 18 of the Respondent's documents. It relied on the holding of the Court of Appeal in *Jivanji v Sanyo Electrical Company Limited* [2003] eKLR that It is now trite law that special damages must first be pleaded and then strictly proved. The Respondent noted that the claim for payment for the remaining part of his contract period was also not particularized and is in any event not one of the remedies set out in section 49 of the *Employment Act*. That considering he did not work for the said period, it would be unjust enrichment to receive payment on the basis of a contract that was terminated. As regards the claim for compensation for unlawful and unfair termination, the Respondent submitted that it had proved on a balance of probabilities that the termination of the Claimant was lawful and fair and he is thus not entitled to compensation. It maintained that it had forwarded the Claimant's Certificate of Service to his Counsel on 21<sup>st</sup> September 2023 and sought costs of the suit and interest for the trouble taken in defending the case.
15. The Claimant was terminated on account of redundancy. It is trite law that he who asserts must prove. The Claimant denied that he was consulted. He asserts he was discriminated against. It is the employer's prerogative to organise its business and therefore unless the contrary is shown, it is assumed that the reorganisation of the Respondent was in keeping with sound managerial prerogatives as the Respondent asserts the Claimant's role ceased being relevant as it could be performed by the country directors in the country specific programmes of the Respondent. The Respondent is said to have failed to adhere to the provisions of the law in particular, the provisions of section 40 of the *Employment Act*. The provision of Article 13 of Recommendation 166 of the *ILO Convention No. 158* was said to have been also impacted. The Article provides in parre materia as follows:-
  - (1) A worker who has been notified of termination of employment or whose employment has been terminated should be entitled to receive, on request, a written statement from his employer of the reason or reasons for the termination.
16. The Claimant was given all the safeguards under this Article as he was notified of the reason for termination. From the evidence adduced, the Claimant was extensively engaged in consultation to the point he gave suggestions on the handling of the programmes. He indicated the difficulty he had working with the team from Lesotho which he had to abandon because of the hostility. He went on to ask even how the Respondent would manage the profiles in the remaining countries. This all showed that as of October 2021 he knew the position was to be declared redundant, the reason for the same and the fact that he was consulted. The Respondent undertook the process in a manner that does not detract from legal provisions. The Claimant was even paid as required under the law. The Claimant sought for payment of the sums due on the balance of his contract. The principles in the case of *D. K. Njagi Marete v Teachers Service Commission* [2013] eKLR come into focus. My learned brother Rika J. held thus:-



26. A grant of anticipatory salaries and allowances for a period of 11 years left to the expected mandatory retirement age of 60 years, would not be a fair and reasonable remedy. The Claimant has moved on after the unfortunate and capricious decision of the TSC. He no longer renders any Labour to the Teachers Service Commission. The *Employment Act*, 2007 requires he moves on as he has done, and mitigated the loss of his job as the Senior Legal Principal Officer of the TSC. [Emphasis provided]
17. Just like in that case, the Claimant herein does not provide any services to the Respondent to entitle him to a salary for 1½ years. He should move on and mitigate his losses given that the position he held in the Respondent ceased to exist. The Claimant's only plausible grouse was the non-delivery of the certificate of service something the Respondent remedied before the decision of the Court was rendered. The Claimant therefore had no reason to claim as he did that the termination was either discriminatory or flawed. The Claimant is therefore not entitled to any of the remedies he has sought. The suit is accordingly dismissed albeit with no order as to costs.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 13<sup>TH</sup> DAY OF JUNE 2024.**

**NZIOKI WA MAKAU**

**JUDGE**

