



**Nyagah v Telkom Kenya Limited (Employment and Labour Relations Cause 1254 of 2018) [2024] KEELRC 1540 (KLR) (13 June 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1540 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS CAUSE 1254 OF 2018**

**MN NDUMA, J**

**JUNE 13, 2024**

**BETWEEN**

**ANNE NJERI NYAGAH ..... CLAIMANT**

**AND**

**TELKOM KENYA LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The claimant filed suit on 26/7/2019 against the respondent Telkom Kenya Limited, seeking the following reliefs:
  - a. Three months' salary in lieu of notice – Kshs 1,374,864.00
  - b. Car allowance earned until 20<sup>th</sup> June 2018 – Kshs 60,000.00
  - c. Salary for the days worked till 20<sup>th</sup> June 2018 – Kshs 245,525.00
  - d. Accrued leave days as at 20<sup>th</sup> June 2018 – Kshs 209,254.00
  - e. Severance pay at 1 month for every year worked – Kshs 4,124,592.00
  - f. Damages for unfair termination (12 months' pay) – Kshs 5,499,456.00
  - g. Pay for the remainder of term being 9 years – Kshs 49,495,104.00
  - h. Damages for discrimination
  - i. Damages for psychological torture and trauma occasioned by the demeaning and unfair conduct of the respondent
  - j. Costs of the suit.
  - k. Interest at court rates



1. Any other or further relief that this honourable court may deem fit to grant in favour of the claimant.
2. The claimant testified as CW1 and adopted a witness statement dated 26/7/2018 as her evidence in chief. CW1 also produced exhibits '1' to '23' in support of her case.

### **Claimant's case**

3. The evidence by the claimant (CW1) may be summarized that the claimant was employed by a contract dated 15/4/2009 as a Lifecycle Administration Manager with effect from 11/5/2009. CW1 stated that upon commencement of service to the respondent and due to her diligence and excellent service her salary was regularly reviewed from the initial salary of Kshs 133,500/= at the time of employment to Kshs 368,288/= at 1<sup>st</sup> July 2017.
4. The claimant was also promoted to Deputy Head of Customer Care as at 29/9/2017 and Head of Customer Care, a position that reported to the Chief Executive Officer (CEO) as at the time of the termination.

### **Dispute**

5. The respondent introduced a position of Director Customer Experience which according to the claimant assumed the roles and functions of the position of Head of Customer Care.
6. The claimant raised concerns on the matter by email dated 12/3/2018 noting that the two positions had same responsibilities; the entire team under the supervision of Head of Customer Care was taken away leaving the claimant without a support team and any deliverables; and that the company was now paying two people to perform the same role.
7. That these issues raised by the claimant were never responded to.
8. The claimant followed up with several emails seeking a response from the Chief Human Resource or the Managing Director Mobile between 12<sup>th</sup> March 2018 and April 30<sup>th</sup> 2018. There was no help forthcoming however from the top management on the matter.

### **Escalation**

9. Instead of responding to the matters raised by the claimant, CW1 stated that the respondent made it impossible for CW1 to work by directing CW1's team to report to the Director Customer Experience; locking the claimant from departmental meetings which were now convened by Director Customer Experience and the claimant's support team; allocated the office previously occupied by CW1 to Director Customer Experience and left CW1 without a functional office space; failing to pay the claimant rightfully earned annual bonus in 2017 and under salary review letter dated 29/9/2017, the variable pay previously earned by the claimant monthly was consolidated into the basic pay, denying CW1 an increment and denying CW1 salary increment for the years 2017 and 2018.
10. The claimant said she did not challenge verbally or in writing the creation of the new position of Director Customer Experience but only sought clarity as to the performance of her duties which had been taken over, without notice, advice or discussion by the Director Customer Experience.
11. That the respondent went ahead to incorrectly allege that CW1 had demanded removal of the Director Customer Experience position, which was not true. That this was done to paint CW1 in bad light as a non-team player.



12. CW1 stated further that until the date of termination of the employment, neither the Chief Human Resource Officer nor the Managing Director Mobile responded and/or advised CW1 the difference between the job description and key performance indicators of the two positions. CW1 said it was a well-orchestrated plot to get rid of CW1 from the employment of the respondent and wrongly and deceitfully alleged that CW1 had demanded to know the rationale of the new position and insisted on reporting directly to the Managing Director – Mobile.
13. Furthermore, contrary to what the respondent stated, the Director Customer Experience who was to be the new line manager of CW1 never allocated any key performance indicators (KPIs) to the claimant. That CW1 continued to wait in vain for clarity on the new role.
14. That the respondent having created a difficult and untenable work environment for CW1 attempted to negotiate a” mutual separation.” In this respect CW1 was summoned to the office of Managing Director – Mobile and offered what was titled a separation package computation printed on a plain paper which comprised of: -
  - i. 3 months’ basic salary in lieu of notice – Kshs 1,104,864.00
  - ii. 3 months car allowance in lieu of notice Kshs 270,000.00
  - iii. Severance pay at 1 months’ salary for every year worked Kshs 3,367,060.00
  - iv. 12.5 leave pay out Kshs 209,255.00Total gross payment Kshs 4,951,179.00
15. CW1 stated that she asked MD- Mobile for time to consider the offer and that it be put on a formal company letterhead and it be dated and signed. That the said MD – Mobile shouted at CW1 and threatened CW1 that she must accept the offer or else there would be consequences.
16. The respondent having failed to formalize the offer turned around surreptitiously and alleged that CW1 had declined to take the mutual separation offer.
17. CW1 said the conduct by the respondent had made her work environment untenable and had viciously and callously terminated employment of CW1 without any warning, notice to show cause or hearing to the loss and detriment of CW1. This was done by a letter of termination dated 19/6/2018 to which was attached clearance form which they insisted CW1 had to sign before her final dues were computed and settled.
18. The claimant stated that she was opposed to an indemnity clause against any future claim and that she had to acknowledge that the terminal benefits paid were in full and final settlement of all claims due to her and that CW1 would have no further claims against the respondent in future. CW1 refused to sign the clearance forms.
19. That the respondent’s conduct amounted to unfair labour practice in violation of Article 41 of the Constitution and the termination violated the provisions of the Employment Act, 2007.
20. That the claimant suffered immense loss and damage and continues to suffer today on account of the unlawful conduct by the respondent. That she faced possible loss of a deposit of Kshs 3,000,000.00 placed in partial purchase of an off-plan house on mortgage. That CW1 suffered psychological trauma and torture due to the abuse meted on her by the respondent. That she suffered financial loss due to loss of employment, reputation and character in the eyes of society and has been put to considerable expense as a result thereof.



21. That despite demand and notice of intention to sue, the respondent has not yielded to date to make good the prayers sought in this suit.
22. CW1 states the termination was unlawful and unfair and prays to be awarded as set out in the claim.
23. Advocate Makori closely cross-examined CW1. CW1 admitted that the respondent was 60% owned by Orange in 2009 and 40% by Government of Kenya. CW1 admitted that in the year 2016 the company had a new shareholding. That the French sold shares to Helious, UK based company. That as a result, the top management of the company changed and there was a new set of Directors.
24. That we now had a new position of Director Customer Experience and there were new Directors Courier Services and Corporate business. CW1 admitted that the changes were informed by a new strategy put in place by the new owners but she was not privy to it as she did not attend meetings that preceded the changes.
25. CW1 admitted that in November 2017 further changes were discussed in a meeting held on 11/12/2017 in terms of which corporate communication was to report to corporate affairs; Director Customer Experience was to report to MD – Mobile. That this was a new position being created. That the position of Chief Finance Officer was always there and that of Chief HR Officer; Head of Legal and Regulatory Affairs, was a combination of existing roles into one.
26. That Chief Marketing Officer was an old position and that of Chief Strategy Officer.
27. CW1 said as Head of Customer Care she had a team of 6 section managers and below had team leaders and call centre agents. CW1 said she had a total of 50 employees under her who attended to customer care issues depending on the level. CW1 said that she wanted to understand the new structure and roles upon introduction of Director Customer Experience which position appeared to have taken all her job description and deliverables but her quest to get that clarity did not bear fruit.
28. CW1 insisted that the new position had left her position redundant. CW1 said she was not given opportunity to apply for the new position. It was just filled. CW1 said she experienced a lot of intimidation during this transition especially upon asking questions surrounding her role and the new role. CW1 stated that there was obvious duplicity in the role of the two positions. CW1 said she was left with no role to play. Nobody stated what her new role was. CW1 said she had no letter that her new line manager was Director Customer Experience.
29. CW1 said at a meeting held on 12/3/2018 between the Chief Human Resource Officer and MD-Mobile and herself she was asked to switch off her phone. CW1 said she told them that she was recording the minutes of the meeting. CW1 said she asked for clarity of her new role. At the meeting Chief, HRO repeated that CW1 should quit since CW1 had claimed that the work environment was not conducive. Claimant said she needed to be given a clear role. CW1 wrote a letter restating her commitment to serve the respondent.
30. CW1 said on 6/4/2018, separation was discussed and at the meeting MD – Mobile and Chief HRO said they would no longer tolerate CW1. The MD – Mobile gave the separation agreement to the claimant to sign on a plain paper which the claimant declined. CW1 said she was asked to tender her resignation if she refused to sign the separation agreement by 10/4/2018. They said if by that date, CW1 had not signed the agreement, or resigned, her employment would be terminated. The claimant reiterated her testimony in chief in every respect.
31. CW1 said that her salary was reviewed down wards on 31/7/2017. CW1 said bonus remained but was never paid. That introduction of variable salary was a reduction of her basic salary. CW1 said even



before she received letter of termination, she was in limbo with no role to play since the creation of the new position of Director Customer Experience.

32. CW1 said that she was paid Kshs 1,881,643 upon termination. That she was not paid what had been tabled in the separation agreement after she refused to sign the letter. CW1 said she did not know if her pension scheme had been issued by Zamara, the pension provider.

## **Defence**

33. RW1 Catherine Olaka the former Chief HRO of the respondent testified as RW1. RW1 adopted a witness statement dated 19/2/2018 as her evidence in chief.
34. RW1 confirmed the employment details of the claimant in all material aspects. RW1 confirmed the review of her salary from time to time as with other employees.
35. RW1 stated that in 2017, the respondent conducted a review of its operational requirements and reporting structure. That management noted that the existing customer care Centre structure was inadequate to sustain the respondent's operation requirements and strategic imperative. That in a meeting held on 20/11/2017, the respondent took a decision that the position of Director Customer Experience be introduced to enhance delivery of the respondent's customer experience as demanded by its operational requirements.
36. That although the claimant missed the meeting, the reasons leading to the decision to introduce the position were communicated to her vide an email forwarding the minutes to the claimant.
37. That the roles and functions of the Director Customer Care would be different and distinct from the roles and functions of the Head of Customer Care.
38. That the primary role of the position of the Head of Customer Care is to manage a quality customer care life cycle experience resulting in customer satisfaction, loyalty and advocacy for the brand while decreasing related customer operational costs within set budgets. RW1 referenced a copy of the claimant's role profile at page 13 to 17 of the claimant's bundle.
39. In contrast, the role of the position of Director Customer Experience was to develop, implement and improve the experience strategy at the respondent to oversee end to end contact center and digital engagements drive and to add quality management initiatives among others. A copy of the role profile of the Director Customer Experience was produced by RW1 at page 1 to 6 in the respondent's bundle.
40. Reporting lines also changed to avoid duplication of roles and dual reporting and reduce the span of control of certain positions to enable the effectiveness.
41. RW1 said that the change in reporting lines did not impact on employees standing in the company. That reporting lines of the claimant had been changed in the past. That the claimant knew the rationale of the changes which was that there was need to reduce the CEO's span of control to enhance effective delivery of service by reducing several direct reports to the CEO.
42. RW1 stated that as a consequence, the position of Head Customer Care, held by the claimant was to report to Director, Customer Experience. As both positions could not report to MD – Mobile.
43. RW1 said that the claimant raised no objections or concerns with the respondent on the change of reporting lines as she knew the rationale for it.
44. RW1 said that it was also necessary to move the claimant from her previous office and place her next to Customer Care Manager to supervise them as they reported to her. That the claimant acknowledged



- the relocation and did not raise any protest as she understood the need for re-organization of the office space.
45. RW1 added that the new Director Customer Experience reported on 16/3/2018. RW1 said she was aware the claimant was unhappy with these developments and set upon a course of conduct that demonstrated her reluctance to adjust and started challenging the respondent's decision to establish the office.
  46. RW1 denied that the claimant had no clear role and that she was still required to supervise and conduct the appraisal of the customer care staff even after the arrival of the Director Customer Experience. RW1 denied that claimant support staff were taken away from her. That Director Customer Care Experience was required to attend departmental meetings as was the claimant as each had specific roles.
  47. RW1 said, the claimant on occasions failed to attend meetings that she was required to attend. For example on 25/4/2018, the claimant failed to attend a meeting she was invited to and later wrote to RW1 claiming that she had not received feedback of her performance.
  48. RW1 denied that the claimant had been demoted nor was her position rendered superfluous as she stated. That her job description and remuneration were not changed.
  49. RW1 said that the claimant in her email dated 12/3/2018 titled "concerns regarding my current work environment at Telkom Kenya" raised various allegations and sought to assert her position as overall head of Customer Care. RW1 also stated that the claimant also challenged, the decisions of the MD – Mobile and took issue with instructions for further action by the team.
  50. RW1 added that the claimant sought to assert her position as the most senior in the department (when she in fact was not) challenged the decision by the MD Mobile to pass the instructions to the new Director and not to the claimant.
  51. RW1 stated further that the claimant complained that the MD Mobile had not appraised her for the year 2017.
  52. That the respondent addressed the claimant's issues raised in the email of 12<sup>th</sup> March 2018 in several meetings with the claimant but the claimant continued to challenge the respondent's authority. RW1 stated that she made it clear to the claimant that the company was not going to rescind its decision regarding the position of director in the department she worked and that she needed to take a decision as to whether she was prepared to work.
  53. RW1 added that the claimant did not cooperate notwithstanding the discussions and said she needed time to think about her options.
  54. That the respondent was left with no option but to consider mutual separation.
  55. That MD – Mobile and RW1 met with the claimant on 6/4/2018 to discuss possibility of a mutual separation. The claimant was offered a package computed as follows:-
    - a. 3 months' salary in lieu of notice Kshs 1,104,864.00
    - b. Accrued leave as at April 2018 – Kshs 435,249.45
    - c. (Discretionary) ex-gratia payment Kshs 1,841,440.00Total Kshs 3,839,841.45
  56. RW1 said the claimant being a senior officer could not be coerced or threatened as alleged or at all.



57. RW1 said the claimant declined the offer and the respondent had no alternative but to terminate the claimant's employment by a letter dated 19/6/2018. The claimant was paid in lieu of three months' notice although she was entitled to one month salary in lieu of notice. The terminal dues were paid despite that the claimant declined to sign the clearance and discharge certificate which is a standard procedure of the company.
58. The claimant was paid all her dues in the net sum of Kshs 1,315,365.65 made up of:
- a. Three months' salary in lieu of notice.
  - b. Car allowance earned until 20<sup>th</sup> June, 2018
  - c. Salary for days worked until 20<sup>th</sup> June 2018 and
  - d. Accrued leave days as at 20<sup>th</sup> June 2018
59. RW1 added that the claimant prays to be paid some of the terminal benefits already paid to her. The tabulation of the terminal benefits was forwarded through the claimant's advocate.
60. RW1 concluded that the claimant was not declared redundant. The claim for severance pay at one months' salary for every year worked is without basis. The ex-gratia offer made to her was discretionary and once she rejected the same cannot now demand it vide this suit.
61. RW1 said that the termination was for a valid reason and the claim for damages is not warranted. The claimant simply refused to accept change hence the separation. The employer did not occasion the claimant any trauma, psychological torture, or harassment. There is no evidence to support the claim for damages. The claim for discrimination is also unfounded and without basis. There is no evidence to demonstrate how she was discriminated upon.
62. This is an attempt for the claimant to unjustly enrich herself. The suit be dismissed with costs.

### **Submissions**

63. The parties filed written submissions which the court has carefully considered together with the evidence adduced by CW1 and RW1.
- The issues for determination are:
- a. Whether the separation of the claimant with the respondent was a constructive redundancy or was a normal termination of employment?
  - b. If it was a constructive redundancy whether the claimant is entitled to the reliefs sought?
  - c. If it was a normal termination whether the respondent had valid reasons to terminate the employment of the claimant and if the respondent followed a fair procedure before terminating the employment?
  - d. If it was a termination, whether the claimant is entitled to the reliefs sought?
64. The court will deal with the issues simultaneously.
65. The indisputable salient features in this matter that the court finds have been proved on a balance of probability are that:
- a. The claimant was employed by the respondent on 15/4/2009 as a life cycle administrative manager and was promoted to the position of Deputy Head of Customer Care to Head



of Customer Care which position she held until her employment was terminated by the respondent by a letter dated 19/6/2018.

66. The letter stated that the termination was in terms of clause 11 of the employment contract between the parties dated 15/4/2009.

Clause 11(a) provides

“Either party may at any time after successful completion of the probationary period terminate the contract by serving on the other 30 days written notice on payment to the other of one months’ basic salary in lieu of notice.”

The reasons given in the letter for termination were summarized as follows:-

“The above have resulted in an untenable and intolerable work environment; in particular your resistance to adhering to the new chain of command and insisting on reporting to the MD – Mobil Division resulting in a dysfunctional structure.

We have held meetings with you to explore whether you were agreeable to negotiating a mutual separation which you have declined to engage on.”

- b. Until the time of separation, the claimant held position of Head of Customer Care reporting directly to Managing Director Mobile services. From the role profile of the position of Head of Customer Care, five to six employees reported directly to the position and indirect reports were at the time 50 employees with an optimum number of 79 employees. Furthermore, the number of 3<sup>rd</sup> party staff e.g. contractors, consultants and out sourced service providers reporting to the position were a hundred plus.

The position was described as “Leader of Customer Care Managers, CC teams and across the business on customer care.”

- c. As per the salary review of 29/9/2017 the claimant was entitled a monthly salary of Kshs 368,288/=with effect from 1<sup>st</sup> July 2017.
- d. At a meeting held on 20/11/2017 the respondent created the position of Director of Customer Experience. The claimant was not present at the meeting. The new director customer experience reported to office on 16/3/2018.

The Director Customer Experience was the new Head of Customer Care and reported directly to the managing director mobile services. The claimant, who retained the position of Head of Customer Care was to report directly to the new Director Customer Experience. The new Director took over the office formerly occupied by the claimant. The new Director Customer Experience reported directly to Managing Director mobile, like the claimant used to report before.

In short, the Director Customer Experience was now the new head of Customer Care and the claimant as the Head of Customer Care was his subordinate.

The claimant adduced compelling evidence indicating that the entire team that used to report directly to her now reported directly to the new director customer care.

The claimant also adduced compelling evidence to the effect that she was excluded in meetings held between the new Director Customer Experience and managers and staff in the Customer Care department who previously reported to the claimant.



The claimant adduced compelling evidence to the effect that she was left hanging in limbo and her position had been rendered redundant.

- e. The respondent placed before court the new organization structure of the respondent after restructuring of the company.

The profile of Director Customer Experience shows that five managers in the customer care department directly reported to the new office of Director Customer Experience. The profile also shows that the position had 50 indirect reports who reported to the five managers reporting to the Director Customer Experience.

These included managers corporate customer retention; manger corporate customer care; manger mobile customer care; manager operations and manager billing and summing.

It is most pertinent to notice that the position held by the claimant of Head of Customer care did not feature anywhere in this customer care sub-structure of the organization.

It is clear further, that the title Head of Customer Care held by the claimant was no longer featuring directly or otherwise in the customer care structure headed by Director Customer Experience.

The evidence by the claimant that her position had been rendered superfluous hence redundant by the restructuring done by the respondent is most compelling, apparent and true and the court agrees fully with the evidence adduced by the claimant in this respect.

RW1 was less than candid and was at pains during cross-examination to explain the role if any that was left under the claimant as Head of Customer Care upon introduction of the position of Director Customer Experience.

- f. The claimant protested vehemently against the new changes that had wholly undermined her position without her involvement or consultation.
- g. The court finds that the efforts made by RW1 and MD Mobile were not genuine and did not address the key issues raised by the claimant regarding the naked position she had been left holding.

- 67. The duo of Chief HRO and MD Mobile became apparently hostile to the persistent demands by the claimant to be given clarity of roles and to be placed properly so as to remain effective as she had been all along. The efforts by the claimant were evidently judged to be hostile and insubordinate hence the arbitrary decision by the duo to initiate a separation arrangement with the claimant which arrangement was rebutted by the claimant by rejecting the take or quit initiative by the duo of RW1 and MD Mobile.

The respondent did not table a new structure for the reviewed position of Head of Customer Care showing the reporting lines and the number of employees who reported to the Head of Customer Care and who did not report directly to the new position of Director Customer Experience. The court does not know yet which line managers now reported to the position of Head of Customer Care to rebut the damning evidence by the claimant that her position had been made irrelevant in the organizations' purview of customer care. The court finds that the narrative by RW1 that CW1 had retained all her roles is not supported by any tangible evidence and was indeed not credible in the court's view.

## Law

- 68. The *Employment Act*, 2007, at section 2 defines redundancy as follows: "redundancy" means 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;”

69. The effect of the restructuring done by the respondent vis a vis the position of Head of customer care fits well into the above definition of redundancy. Indeed the position of Head of Customer Care had been constructively rendered superfluous hence redundant. It behooved the respondent to genuinely engage the claimant in an open manner in terms of section 40 of the *Employment Act*, 2007 by firstly notifying the claimant that her position had become redundant and that her employment would be terminated on grounds of redundancy in terms of the notice, which should not have been for a period less than one month.
70. Secondly, the respondent ought to have notified the labour office of the intended restructuring that resulted in rendering the position held by the claimant redundant. The notice should have been for at least a period of one month.
71. Thirdly, the respondent should have engaged the claimant in a genuine open, discussion in good faith to explore other options including being allocated an equivalent position to that she had previously held and/or accept to hold a lesser position, that was genuinely available.
72. This open discussion should have been held in good faith which is not what happened in the various meetings held between the claimant, RW1 and MD – Mobile. It is the court’s finding that these meetings were not conducive to broker a fair solution and/or engender a fair and just separation between the claimant and the respondent.
73. In any event what prevented the respondent from elevating the claimant to the position of Director Customer Care given her previous good performance? In the least, the position ought to have been filled competitively as part of the plan to diminish the effects of constructive abolition of the position of Head of Customer Care.
74. The Court of Appeal in the case of *Kenya Airways Ltd v Aviation & Allied Workers Union Kenya and 3 others* Civil Appeal No 46 of 2013 laid out the minimum requirements for termination on the basis of redundancy thus:

“Redundancy is a legitimate ground for terminating a contract of employment provided there is a valid and fair reason based on operational requirements of the employer and the termination is in accordance with a fair procedure. As section 43(2) provides, the test of what is a fair reason is subjective. The phrase “based on operational requirements of the employer” must be construed in the context of the statutory definition of redundancy. What the phrase means, in my view, is 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 is that the services of the employee has been rendered superfluous or that redundancy has resulted in abolition of office, job or loss of employment”

75. As regards procedural fairness, the Court stated that ‘this Court in *Thomas De La Rue (K) Limited v David Opondo Umutelema* eKLR said:

“It is quite clear to us that section 40(a) and 40(b) provide for two different kinds of redundancy notifications depending on whether the employee is or is not a member of a trade union. Where the employee is a member of a union, the notification is to the union and the local labour officer at least one month before the effective redundancy date. Where the



employee is not a member of the union, the notification must be in writing to the employee and the local labour officer...”

76. The respondent deposes that the termination was not a redundancy but was a disciplinary termination for the intransigent conduct by the claimant as stated in the letter of termination. Even if this was the case, the court finds that the respondent did not notify the claimant of any intention to take disciplinary action against her by giving her a notice to show cause why her employment should not be terminated for misconduct. The respondent did not prefer any charges against the claimant giving her opportunity to explain herself in writing followed by a disciplinary hearing if the explanation by the claimant was not sufficient.

77. The respondent evidently violated the mandatory requirements under section 41(1) of the Employment Act, 2007 which provides:

“Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation’.

78. In the case of Anthony Mkaala Chitave v Malindi Water and Sewerage Company Ltd [2013] eKLR Radido J. elaborated the ingredients of procedural fairness under section 41 of the Employment Act as follows:

“And what does section 41 of the Act require. The first observation is that the responsibility established is upon the shoulders of the employer. In a claim for unfair termination or wrongful dismissal on the grounds of misconduct, poor performance or physical incapacity, it is the employer to demonstrate to the court that it has observed the dictates of procedural fairness.

The ingredients of procedural fairness as I understand it within the Kenyan situation is that the employer should inform the employee as to what charges the employer is contemplating using to dismiss the employee. This gives a concomitant statutory right to be informed to the employee.

Secondly it would follow naturally that if an employee has a right to be informed of the charges he has a right to a proper opportunity to prepare and to be heard and to present a defence/state his case in person, writing or through a representative or shop floor union representative if possible.

Thirdly if it is a case of summary dismissal, there is an obligation on the employer to hear and consider any representations by the employee before making the decision to dismiss or give other sanction.”

79. It follows that the respondent failed the procedural fairness test dismally and in doing so failed to prove a valid reason for terminating the employment of the claimant as is required of the respondent under section 43(1) and (2) of the Employment Act, 2007.

80. The ELRC has variously stated that the employer bears the burden of proving that it had a valid reason to terminate the employment of an employee which reason is established upon granting the employee



an opportunity to be heard in a disciplinary hearing convened in terms of section 41 of the Employment Act. In the case of Thomas Sila Nzivo v Bamburi Cement Limited [2014] eKLR the Court said that

“The Employer was not required to have conclusive proof of the Claimant’s involvement; it was only expected to have reasonable and sufficient grounds.

81. The Court of Appeal in Kenya Revenue Authority v Rewel Waitihaka Gitahi & 2 others [2019] eKLR said as follows: -

“The standard of proof is on a balance of probability, not beyond reasonable doubt, and all the employer is required to prove are the reasons that it “genuinely believed to exist,” causing it to terminate the employee’s services”

82. The respondent failed also in this respect. The conclusion of the court is that, the argument by the Respondent that the termination of the claimant was not on grounds of redundancy but was a disciplinary issue arising from misconduct by the claimant was not sufficiently proven and at any rate does not sanitise the otherwise un-procedural, unlawful and unfair termination of the employment of the claimant by rendering firstly her position redundant followed by an unlawful issue of a letter of termination without following the provision of sections 40, 41, 43 and 45 of the Employment Act, 2007.

83. The bottom line is that by the time the letter of termination was issued to the claimant, her position had already been rendered redundant un-procedurally and therefore in an unlawful and unfair manner.

84. The claimant is entitled to the remedies available under section 40(1) and 49(1) and (c) of the Employment Act, 2007.

#### **Reliefs available to the claimant**

85. Upon termination of the employment of the claimant, the respondent paid her final terminal dues tabulated as follows: -

- a. Three (3) months’ salary in lieu of notice Kshs 1,104,800/=
- b. Mileage allowance earned until 20<sup>th</sup> June 2018 Kshs 60,000/=
- c. Mileage allowance in lieu of notice Kshs 270,000/=
- d. Salary for days worked until 20<sup>th</sup> June 2018 Kshs 245,525/=
- e. Accrued leave days as at 20<sup>th</sup> June 2018, Kshs 209,125.

Total Kshs 1,889,643/=

86. The respondent withdrew the ex-gratia payment it had hitherto offered the claimant upon her refusal to accept and sign separation agreement in the sum of Kshs 1,841,440/=.

87. The court finds that in addition to the aforesaid payments, the claimant having been constructively declared redundant followed by actual separation from her employer by the letter of 20<sup>th</sup> June 2018, is entitled in terms of section 40 of the Employment Act, to payment of severance pay equivalent to at least 15 days salary for each completed year of service. The claimant had served the respondent from 15<sup>th</sup> April 2009 up to 20<sup>th</sup> June 2018 a period of over eight (8) completed years of service in the sum of Kshs 2,062,296/= being half the amount of severance claimed in the memorandum of claim.

88. The claimant is also entitled to issuance of certificate of service with immediate effect.



## Other remedies

89. Having found that the position of the claimant was rendered redundant unlawfully and the subsequent termination was also in violation of sections 41, 43 and 45 of the Employment Act for lack of a fair procedure and valid reason, the court finds that the cumulative effect of the evidence adduced by the claimant proved the unlawful and unfair termination of her employment by the respondent. The evidence was not sufficient to establish that the respondent discriminated against the claimant and or was subjected to psychological torture and trauma to warrant the court to award the claimant damages in respect thereof.

90. Following the decision by the Supreme Court in the case of Kenfeight (EA) Limited v Benson K. Nguti [2014] eKLR which is similar to this case, the court relies on the guideline given by the court as follows:

“On an award on damages, the Act limits the award a court of law can make to a maximum of 12 months’ salary. In as much as the trial Court therefore does have a discretion in the quantum of damages to award for unfair or wrongful termination of employment, it must be guided by the principles and parameters set under sub-Section 4 of Section 49 of the Employment Act. What then did the Court of Appeal do in addressing the above issue and as determined in CMC Aviation Limited v Mohammed Noor; Civil Appeal No 199 of 2013, [2015] eKLR (the CMC Aviation Case)”

The Supreme Court also went to state;

“We have also taken note that the ex gratia payment was never an issue in the CMC Aviation Case although the question on how binding company policies are in employment matters came up when the learned Judges found in the CMC Aviation case, that the Respondent’s demotion was done according to the Appellant’s Staff Policies and Procedures Manual and Performance Evaluation Policy which the Respondent was aware of. In the instant case, the Court of Appeal found that the payment of Kshs 3,258,245.00, was not ex gratia as alleged by the Appellant but a payment made based on an established practice of the Appellant company. We therefore do not find any inconsistency in the Court of Appeal’s determination on the extent to which company policies or put differently, company practices are binding. We indeed note that the Court of Appeal was consistent in its determination in both cases and therefore do not find any basis to make any further pronouncement on the issue”

91. We have considered the period of 8 years served by the claimant in which the service of the claimant was very good resulting in several awards of salary raise and promotions which culminated in the very senior position of Head of Customer Care. That the claimant in our view did not contribute to her position being constructively rendered redundant and the subsequent unlawful termination; the claimant was not granted certificate of service upon being terminated to assist her to secure an alternative job quickly, the claimant lost great prospects of career advancement in the respondent’s organization. The claimant wished to continue serving the respondent; the claimant was harassed by MD – Mobile before being ejected unlawfully from her employment; the claimant was not compensated for the job loss. The claimant was paid some of the terminal benefits upon termination.

92. The court having considered all the above awards the claimant the equivalent of six (6) months’ salary in compensation for the unlawful and unfair termination in the sum of Kshs 368,288 x 6) 2,209,728/=.

93. In the final analysis judgment is entered in favour of the claimant against the respondent as follows:



- a. Issuance of certificate of service within 30 days of this judgment.
- b. Compensation in the sum of Kshs 2,209,725/=.
- c. Kshs 2,062,296/= severance pay  
Total amount Kshs 4,272,024/=
- d. Interest at court rates for date of judgment till payment in full.
- e. Costs of the suit

**DATED AT NAIROBI THIS 13TH DAY OF JUNE, 2024**

**MATHEWS NDERI NDUMA**

**JUDGE**

Appearance:

Mr. Onsare for claimant

Mr. Makori for respondent

Mr. Kemboi, Court Assistant

