



**Mohan v CCI Kenya Limited (Cause E588 of 2023)
[2024] KEELRC 2347 (KLR) (30 September 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2347 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E588 OF 2023
JK GAKERI, J
SEPTEMBER 30, 2024**

BETWEEN

VINEETA KHEMANI MOHAN CLAIMANT

AND

CCI KENYA LIMITED RESPONDENT

JUDGMENT

1. The Claimant commenced this suit by a Statement of Claim dated 25th July, 2023 claiming unlawful and unfair termination of employment on account of redundancy.
2. The Claimant's case is that she was competitively recruited by the Respondent as its Head of Compliance, Quality and Training effective 1st March, 2022 at Kshs.1,277,100.00 for an indefinite term and employment would automatically lapse on attainment of the age of 65.
3. The Claimant avers that she relocated from India with her family and the Respondent was responsible for all visa and associated costs for her and the family and served diligently until 7th June, 2023 when she was summoned to the Chief Human Resources Officer's office and in the presence of the Respondent's Managing Director, was given a notice of termination of employment on account of redundancy of even date.
4. That after two (2) weeks, the Claimant received another notice stating that she did not report to work in June as she was not needed and the last working day was changed from 30th June, 2023 to 19th June, 2023 and directed to hand over and notify the Respondent the preferred dates to travel back to India.
5. The Claimant avers that the process was malicious and the redundancy was a facade to terminate her employment unfairly.
6. It is the Claimant's case that no consultations took place before or after 7th June, 2023 on restructuring or rationalization.



7. That on 21st June, 2023, the Respondent hired a Senior Manager for a new role to carry out the Claimant's previous role and no attempt was made to redeploy her and the termination of employment violated the provisions of the constitutional, international law and the provisions of Section 40(1) of the *Employment Act*, 2007.
8. It is the Claimant's case that no reason of or extent of the redundancy was given and the notice was less than one (1) month. The Labour Officer was not notified and there were no consultation.
9. That the Claimant was forced to sell her belongings cheaply, vacate the apartment at a cost of Kshs.380,000/= and Kshs.123,500/= for withdrawing her children from school without sufficient notice.
10. That the Respondent treated the Claimant inhumanely, cruel and discriminatively.
11. The Claimant prays for:-
 - i. A declaration the termination of employment on account of redundancy was unprocedural, discriminatory, unfair, unlawful and unconstitutional.
 - ii. 12 months compensation Kshs.15,325,200.00
 - iii. Refund of Kshs.380,000/= being the penalty for vacating the apartment without sufficient notice.
 - iv. Refund of Kshs.123,000.00 being the penalty for withdrawal of children from school without sufficient notice.
 - v. Punitive and aggravated damages.
 - vi. Certificate of service.
 - vii. Interest on (ii), (iii) and (iv) above from date of filing the suit.
 - viii. Costs of the suit.
 - ix. Any other relief that the Court may deem appropriate to grant.

Respondent's case

12. The Respondent filed a Memorandum of response dated 13th December, 2023 admitting that the Claimant was its employee and was hired competitively.
13. It also admits that it issued a notice of redundancy on 7th June, 2023 and sought the Claimant's travel plans for purposes of pre-planning.
14. It denies having changed the last working day.
15. That the Claimant was paid an ex-gratia sum as a sign of good will and was consulted.
16. It is the Respondent's case that it is not party to contracts entered into by the Claimant and the termination of employment was fair.
17. The Respondent prays for dismissal of the Claimant's case with costs.



Claimant's evidence

18. On cross-examination, the Claimant confirmed that she relocated from India and the contract of employment did not provide for relocation of the family to Kenya as the family was not privy to the contract.
19. That she received the notice of redundancy as well as the email dated 5th May, 2023 on Organization Structure Discussion.
20. That the Respondent was expanding and more people were required and her dues did not change.
21. That the employer had not covenanted to take care of the Claimant's stay in Kenya.
22. It was the Claimant's testimony that she enrolled her children at the Oshwal Academy and withdrawal of a child requires a one (1) term notice.
23. That the Claimant received all her dues as per the letter dated 7th June, 2023 and the flight back to India was paid for.
24. On re-examination, the Claimant testified that Respondent had undertaken to meet expenses and the Respondent knew that the Claimant would bring her family to Kenya.
25. That since the organization was growing, the Claimant requested for two Senior Managers.
26. The Claimant admitted having refused to acknowledge receipt of the letter of redundancy.

Respondent's evidence

27. RWI, Jeniffer Luseno confirmed that the Respondent was a Call Centre and the Claimant's position was no longer a department and was unaware that the Claimant incurred expenses.
28. That the Respondent had received complaints about the Claimant and was a poor performer but was not put on a Performance Improvement Plan (P.I.P), was declared redundant and consultations took place as per the emails and the Claimant spearheaded the process.
29. That the letter sent to the Labour Officer was not filed and the redundancy process was complied with but witness had no evidence of compliance.
30. That the Claimant's last day of work was 19th June, 2023 and consultations were verbal.
31. That the Claimant relocated her family to Kenya from India but the claims for rent and school fees was denied.
32. On re-examination, the witness testified that the contract of employment required her to relocate the family and was fully paid for the entire month of June.

Claimant's submissions

33. On the reason for termination of employment, counsel submits that Claimant's case was based on the notice of redundancy dated 7th June, 2023 and the Respondent had not filed evidence of consultations or notice to the Labour Officer or notice to declare redundancy on all employees as required by Section 40(1) of the *Employment Act*.
34. Reliance was made on the sentiments of Maraga JA in Kenya Airways Ltd V Aviation & Allied Workers & others (2014) eKLR as well as KUDHEIHA V Aga Khan University (2015) eKLR and Charles



Nyangi Nyamohanga V Action Aid International (2015) the latter on notices of redundancy where Ndolo J. alluded to two notices.

35. Counsel submitted that the Claimant was unaware of the redundancy and no evidence was filed to show that the position of Head of Quality and Compliance ceased to exist.
36. Counsel cited the sentiments of Ocharo J. in Onesmus Kinyua Magoiya V Prudential Life Assurance Kenya (2022) eKLR on the burden of proof of the employer to urge that the Respondent had not provided sufficient material to justify the redundancy.
37. On the prayers sought, counsel submits that all are merited as prayed as the Respondent did not comply with the applicable law, the Claimant was not at fault, the penalties were incurred because of the unfair termination of employment and punitive damages were justified as held by the Court of Appeal in PN Mashru Ltd V Ojenge (2023) KECA 473.

Respondent's submissions

38. By 1st September, 2024 when the Court retired to prepare this judgment, the Respondent had not filed submissions.
39. The Claimant filed submissions on 8th August, 2024.

Analysis and determination

40. It is common ground that the Claimant was an employee of the Respondent effective March 1st 2022 as Head of Quality and Compliance at Kshs.1,277,100.00 per month having relocated from India to take up the position after a competitive recruitment process. The family joined her later.
41. It is equally not in contest that the Claimant remained an employee until 7th June, 2023 when she received a Notice of termination on account of redundancy but the Claimant refused to acknowledge receipt. The effective date was 1st July, 2023.
42. Puzzlingly, while under the notice of termination, the last date of the Claimant's employment was 30th June, 2023. It was subsequently changed to 19th June, 2023 vide letter dated 15th June, 2023.
43. The Claimant assails the redundancy on substantive and procedural grounds and characterizes it as an unfair, unlawful, unprocedural and unconstitutional termination of employment by the Respondent.
44. It is trite law that for a termination of employment to pass the fairness test under the provisions of Section 45 of the *Employment Act*, it must be substantively justifiable and procedurally fair as held in Naima Khamis V Oxford University Press (EA) Ltd (2017) eKLR and Walter Ogal Anaro V Teachers Service Commission (2013) eKLR among others.
45. Needless to emphasize, redundancy is one of the legally sanctioned and legitimate methods of separation between an employer and an employee and may take the form of re-organization, restructuring, rightsizing or downsizing occasioned by economic and business imperatives or technological changes.
46. It is trite that redundancy is only available to the employer and the resultant separation is through no fault of the employee.
47. The provisions of Section 2 and Section 40(1) of the *Employment Act* define and set out the conditions to be complied with in a redundancy respectively.



48. The provisions of Section 40(1) of the *Employment Act* must be complied with for a redundancy to pass muster.
49. In *Barclays Bank of Kenya Ltd & another V Gladys Muthoni & 20 others* (2018) eKLR, the Court of Appeal stated;
- “Section 40(1) of the *Employment Act* prohibits, in mandatory tone, the termination of a contract of service on account of redundancy unless the employer complies with the following seven conditions namely . . .”
50. The seven conditions are;
- a. Written notice to the union and local labour officer of the reasons of and extent of the redundancy at least one month before the redundancy takes effect, if the employee(s) affected is a member of a union.
 - b. Notice to the employee personally and the local labour officer, if the employee declared redundant is not a member of the union.
 - c. Consideration of the seniority in time, skill, ability and reliability of the employee(s).
 - d. Where terminal benefits payable are set out under a collective agreement, no employee should be placed at a disadvantage on account of being or not being a member of the union.
 - e. Employer must pay any leave in cash.
 - f. One month’s notice or salary in lieu of notice.
 - g. Severance pay at the rate of 15 days for each completed year of service.

Reasons for redundancy

51. In its Memorandum of response, the Respondent avers that termination of the Claimant’s employment on account of redundancy was fair and lawful.
52. The response makes no reference to the circumstances that triggered the redundancy, when and what department(s) was affected or how many employees.
53. In her written statement, Jeniffer Lusén, RWI, the Respondent’s Chief People Officer stated that the Respondent decided to restructure its organizational structure and resolved that risk and compliance duties be discharged by the Chief Technological Officer. The statement is, however, reticent on essential details such as when the decision was made and reason(s) including the number of employees affected.
54. The Respondent attached a single email from the Claimant to RWI and copied to others under reference Organization Structure Discussion – Compliance dated 5th May, 2023 forwarding the structure.
55. Copies of the 3 organizational structures filed have the Claimant’s office or position and none is a proposal for re-organization.
56. In fact, the Respondent did not file its new organization structure to demonstrate the re-organization.
57. Particulars showing when the decision was made as well as the circumstances which precipitated the restructuring would have strengthened the Respondent’s case significantly.



58. The provisions of Section 40(1)(a) of the *Employment Act* are unambiguous that the notice to the union and the local labour officer is “on the reasons for and the extent of the intended redundancy.”
59. According to the Respondent’s letter dated 7th June, 2023, the notice of termination leaves no doubt that the Claimant’s dockets were divided into two and separated with Quality as a standalone unit.
60. For unexplained reasons, the Claimant was not considered for any role in quality, having served as the head of the larger docket.
61. In *Barclays Bank of Kenya & another V Gladys Muthoni & 20 others (Supra)*, the Court of Appeal expressed itself as follows:

“There is a heavy burden of proof placed upon the employer to justify any termination of employment. As stated earlier, the appellants here ought to have given the “reasons and the extent of the redundancy” but there is no evidence on record sufficient to discharge that burden . . .”
62. These sentiments apply on all fours to the circumstances of the instant suit as the Respondent tendered no evidence as to when and why it decided to undertake a restructuring of its department of Compliance and Quality and what were the intended objectives.
63. Why for instance, was it necessary to transfer Compliance to Chief Technology Officer?
64. A summary of the circumstances, modalities and desired outcomes of the re-organization would have demonstrated that the Respondent had a justification for the re-organization.
65. For the above reasons, it is the finding of the Court that the Respondent has failed to demonstrate that it had a valid and fair reason to terminate the Claimant’s employment on account of redundancy within the meaning of Section 45 of the *Employment Act*.

Procedure

66. As regards the notice, Section 40(1) (a) and (b) of the *Employment Act* provides that the notice of intended redundancy must be sent to the union and the local labour officer or to the employee personally and the Local Labour Officer not less than “a month” prior to the date of the intended termination on account of redundancy.
67. In this case, the notice of termination on account of redundancy was dated 7th June, 2023 and the intended date of termination was 30th June, 2023.
68. By simple arithmetic, since the term “month” under Section 40(1)(a) of the *Employment Act* refers to a calendar month under Section 3(1) of the *Interpretation and General Provisions Act*, Cap 2, the requisite number of days was not met and the notice was thus ineffectual.
69. The ineffectiveness of the Respondent’s notice was exacerbated by the fact that the Respondent by letter dated 15th June, 2023 brought forward the date of termination on account of redundancy to 19th June, 2023.
70. Contrary to the submission by the Claimant’s counsel that two notices are required, the provisions of Section 40(1) of the *Employment Act* provide for only one mandatory notice and the Court of Appeal has so held.
71. A second notice may be made but it’s not a legal requirement.



72. Similarly, under Section 40(1)(b) of the *Employment Act*, the notice of intended redundancy by the employer must be given to the employee to be declared redundant, (the Claimant in the instant case) and the local labour officer.
73. The Respondent availed no evidence of having given a copy of the notice to the Local Labour Officer.
74. Although RWI alleged that a notice was sent, she admitted that the same was not filed or served as confirmatory evidence.
75. In a nutshell, the Respondent has failed to prove that it complied with the provisions of Section 40(1)(b) of the *Employment Act*.
76. In sum, the alleged notice of the intended redundancy issued by the Respondent was ineffectual for purposes of Section (40)(1) of the *Employment Act*.
77. On consultations, it is evident that the Respondent adduced no evidence to prove that it consulted the Claimant on the issue of her being terminated from employment on account of redundancy.
78. The single email dated 5th May, 2023 by which the Claimant forwarded the organizational structure, and it is unclear as to which one, is in the Court's view insufficient to prove that consultations took place.
79. A trial of emails on the issue with relevant structures could have fortified the Respondent's case.
80. It is trite law that in redundancies, consultations are necessary as held in *Barclays Bank of Kenya Ltd & another V Gladys Muthoni & 20 others (Supra)* where the Court of Appeal stated as follows;
- “Furthermore, consultation was necessary before the redundancy notices were issued. Article 13 of Recommendation No. 166 of the ILO Convention No. 158 Termination of Employment Convention, 1982 provides: . . .
- This law is applicable in this country. The purpose of the provision as Maraga JA emphasized . . .
- The learned judge further emphasized that the consultation must be real and not cosmetic citing with approval the New Zealand case of *Cammish V Parliamentary Service (1996) 1 ERNZ 404* stating thus: . . .
- Murgor JA in the same case stated as much, adding . . .
- We respectfully agree with the views expressed by the two learned judges. *The Constitution* in Article 41 is fairly loud on the rights to fair labour practices and we think it accords with *the constitution* and international best practice that meaningful consultations be held pre-redundancy. We agree with the trial Court that redundancy notices are not mechanical so as to satisfy the motions of the law . . .”
81. In sum, it is the finding of the Court the Respondent has not placed sufficient material before the Court for a finding that there were meaningful consultations with the Claimant before the notice dated 7th June, 2023 was issued.
82. On selection criteria, it is common ground that there was none as it is apparent that only the Claimant's position was declared redundant.



83. Finally, the Respondent paid one month's salary in lieu of notice, outstanding leave days, severance pay and an ex-gratia sum equivalent to one month's salary and thus complied with the other requirements of Section 40(1) of the *Employment Act*.
84. The totality of the foregoing is that the Respondent's failure to conduct meaningful consultations and comply with the provisions on the notice of intended redundancy as regards the number of days and notice to the Local Labour Officer rendered the redundancy procedurally flawed and thus unfair.
85. In a nutshell, it is the finding of the Court that the termination of the Claimant's employment on account of redundancy transitioned to an unfair termination of employment within the meaning of Section 45 of the *Employment Act*.

Appropriate Relief

Declaration

86. Having found that the termination of the Claimant's employment on account of the redundancy by the Respondent was unfair, a declaration to that effect is merited.

Refund of penalty of Kshs.380,000/= for vacating the apartment without sufficient notice

87. The Claimant provided letters showing that she was required to pay the sum of Kshs.380,000/= as penalty for insufficient notice to the landlord.
88. From the landlord's letter Status Investment Ltd, the Claimant gave a 50 days' notice as opposed to 60 days yet the Respondent's responsibility to pay for the entire families air ticket was due to lapse on 31st August, 2023.
89. The Claimant tendered no evidence as to why she gave a shorter notice only to incur the penalty for which this Court cannot find the Respondent liable.

The prayer is declined.

Refund of Kshs.123,500/= for withdrawal of children from school without sufficient notice

90. Was the Respondent responsible for the penalty? The Claimant argued that the "loss" was traceable to the Respondent's act of declaring the Claimant redundant.
91. In the Court's view, the Respondent was not liable, for the simple reason that it was unaware of the terms of the contract, and was not a party thereto.
92. To the Respondent, the Claimant was its employee and ought not be held liable for obligations contracted for by the employee independently.
93. It is trite law that employment contracts are not permanent and typically have exit clauses available to both parties at any time perhaps because of the vicissitudes of life.
94. The Claimant entered into an arrangement with the third party willingly and without the Respondent's involvement or notice and is thus liable for the consequences.

The prayer is declined.



Punitive and aggravated damages

95. The Claimant prays for punitive and aggravated damages without providing particulars on which the prayer is grounded.
96. This is essential because punitive damages and aggravated damages do not involve the typical award of compensatory damages.
97. In *PN Mashru Ltd V Ojenge* (Supra), the Court of Appeal observed as follows;

“On the award of punitive damages, in *Bank of Baroda (Kenya) Ltd V Timwood Products Ltd* Civil Appeal 132 of 2001, this Court citing *Obongo & another V Municipal Council of Kisumu & others* (1971) EA 91 and *Rookes V Barnard* (1964) AC 1129 held that in Kenya punitive or exemplary damages are awardable only under two circumstances, namely (i) where there is oppressive, arbitrary or unconstitutional action by servants of the government; and (ii) where the defendant’s action was calculated to procure him some benefit not necessarily financial, at the expense of the plaintiff. The third scenario is, of course where such damages are authorized by statute . . .”
98. Granted that punitive or exemplary damages are not compensatory, their award must be grounded on sufficient grounds, which the Claimant neither pleaded nor demonstrated evidentiary.
99. Averments of malice, bad faith, discrimination among others, without availment of supportive evidence leaves the allegations unproved.
100. From the evidence on record, the Court is not satisfied that the Claimant has not made a case for the award of punitive or aggravated damages.
The prayers are declined.

12 Months Compensation

101. Having found that termination of the Claimant’s employment by the Respondent on account of redundancy was unfair for want of a substantive justification and fair procedure, the Claimant is entitled to compensation under Section 49(1)(c) of the [Employment Act](#).
102. The Court has taken into consideration the fact that the Claimant was an employee of the Respondent for a fairly short time, slightly over one (1) year and 3 months.
103. Second, the Claimant did not appeal the decision considering that she was a foreigner and had children.
104. The Claimant did not express her wish to remain in the Respondent’s employment.
105. The Claimant admitted that complaints had been made about her performance as Head of Quality and Compliance.
106. Third, the Claimant was paid severance pay and an ex gratia sum equivalent of one (1) month’s salary.
107. In the circumstances, the Court is satisfied that the equivalent of 3 months gross salary is fair, Kshs.3,831,300.00

Certificate of service

108. The Claimant is entitled to a certificate of service by dint of Section 51 of the [Employment Act](#).



109. In the upshot, judgment is entered in favour of the Claimant against the Respondent as follows;
- a. Declaration that termination of employment on account of redundancy was unfair.
 - b. Equivalent of 3 months gross salary Kshs.3,831,300.00.
 - c. Certificate of service unless already issued.
 - d. Costs of this suit.
 - e. Interest on (b) above at Court rates till payment in full.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 30TH DAY OF SEPTEMBER 2024

DR. JACOB GAKERI

JUDGE

ORDER

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

