



**Asava v Fashion Forthe Kenya Limited (Cause 741 of 2018)  
[2024] KEELRC 2613 (KLR) (28 October 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2613 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 741 OF 2018  
K OCHARO, J  
OCTOBER 28, 2024**

**BETWEEN**

**EMILY JAREGA ASAVA ..... CLAIMANT**

**AND**

**FASHION FORTHE KENYA LIMITED ..... RESPONDENT**

**JUDGMENT**

**Introduction**

1. The Claimant filed a Memorandum of Claim dated 18<sup>th</sup> May 2018 charging that the Respondent unfairly and unlawfully terminated her employment and thus sought the following reliefs:
  - i. A declaration that the termination letter dated 31<sup>st</sup> January 2018 is unlawful and therefore, null and void.
  - ii. General damages amounting to Kshs. 428,688 being 12 months' salary for the unlawful and unfair redundancy;
  - iii. Severance pay due at KSHS. 82,440.
  - iv. Payment of KSHS. 71, 448 being cash payment in lieu of two months' notice under the Claimant's employment contract.
  - v. Payment of KSHS. 38, 472 being payment in lieu of pending leave days;
  - vi. Costs of this suit; and
  - vii. Any other relief that this Honourable Court may deem just and fair to grant.



2. The Respondent resisted the Claimant's claim through the Response to Claim dated 4<sup>th</sup> June 2018. It denied that the Claimant's employment was unfairly terminated, and her entitlement to the reliefs sought.
3. At the close of pleadings, the matter was destined for hearing inter partes on merit. Subsequently, the parties' respective cases were heard on the 22<sup>nd</sup> of May 2022.
4. At the full hearing of the parties' respective cases this Court directed the filing of written submissions within specific timelines. The parties adhered to the directions, this judgment is with the benefit of the submissions.

### **The Claimant's case**

5. The Claimant stated that she came into the employment of the Respondent on the 1st of January 2014, as a Sales Representative at a monthly gross salary of Ksh. 35, 724. She performed her duties diligently and honestly with dedication and per the terms of employment up until 31<sup>st</sup> January 2018, when the Respondent terminated her employment through a letter of the even date on the grounds of redundancy.
6. It was the Claimant's case that the termination was arbitrary and in violation of the stipulations of the Employment Act, as the Respondent failed; to issue her with a one-month notice in writing, explaining the reasons and extent of redundancy; to issue the labour officer with notice; undertake a selection process in the manners prescribed by law, before deciding to render her position superfluous; engage her in consultations before the termination; and pay her terminal dues.
7. The Respondent's assertion that it was facing economic turndown, hence the termination, was unjustified and was only being used to sanitize the unfair termination. The Respondent wasn't at any time in an economic crisis. The Respondent's business continued to operate normally and in fact, underwent an expansion.
8. When cross-examined, she testified that her employment with the Respondent commenced on the 2<sup>nd</sup> day of December 2013. She executed an indemnity bond which bound her to serve the Respondent for 3 continuous years. However, at separation, she had served the Respondent for 4 years.
9. It was her testimony that the contract of employment provided for a two-month termination notice. In the termination letter, this notice was given. She asserted that despite the notice, there was a process that needed to be followed.
10. After the termination she joined the employment of another company. She has never gone back to the Respondent to collect her certificate of service.
11. I her evidence under re-examination, she stated that she hasn't collected the certificate of service and her terminal dues from the Respondent. The Respondent has never reached out to her, requiring her to go collect. They were supposed to avail the same immediately after the termination.
12. The Respondent did not have the right to terminate her employment at will as the contract between them did not embody such a right.

### **The Respondent's case.**

13. The Respondent's case was presented by Joshua Muturi Kaburu [RW1] and Margret Mathenge[RW2]. RW1 adopted his witness statement herein filed, as his evidence in Chief. He stated that he was first employed by the Respondent on 4<sup>th</sup> December 2013, as a Sales Executive. He denied



being the author of the letter- the Claimant's exhibit EJA 1. Further, he was never at any time Head of Operations and Administration at Respondent's.

14. Cross-examined by the Claimant's Counsel, the witness testified that he worked with the Claimant for 4 years and one month. He never issued her with any letter confirming her employment. Both he and her were of the same rank, therefore, he couldn't write any letter confirming her employment.
15. RW2 testified that she is a Director of the Respondent Company. She adopted her witness statement dated 28<sup>th</sup> March 2023 as her evidence in chief and tendered the documents filed under the list of documents dated 4<sup>th</sup> June 2018 as the Respondent's documentary evidence.
16. She further testified that the Claimant was the Respondent's employee. Her employment was terminated under the terms of her employment contract. The Contract allowed the Respondent to terminate her employment by giving a two months' notice.
17. In the termination letter issued to the Claimant, the Respondent put forth the reason for the termination of her employment. It was a business decision not redundancy as alleged by her.
18. After receiving the termination letter, the Claimant left the Respondent's, not to be seen again, until the Respondent received a demand letter from her Counsel. The demand letter was responded to. In it, the Respondent proposed to pay the Claimant's terminal dues in instalments.
19. Cross-examined by Counsel for the Claimant, the witness testified that under the employment contract, either party had the right to terminate the employment relationship.
20. The termination of the Claimant's employment was a result of an economic decision by the Respondent. The decision was influenced by several factors, inter alia, economic reasons.
21. The witness asserted that the termination was not on account of redundancy, therefore the Respondent didn't need to employ the procedure set by the law for termination of employment on grounds of redundancy.

### **The Claimant's submissions**

22. The Claimant's Counsel filed written submissions on the 26<sup>TH</sup> June 2023 distilling four issues for determination thus:
  - i. Whether the Claimant was an employee of the Respondent.
  - ii. Whether the Respondent followed the Redundancy procedure as provided for under section 40 of the *Employment Act*, if not is the Claimant entitled to damages?
  - iii. Whether the Claimant deserves to be paid for the services rendered during her employment.
  - iv. Who should bear the cost of the suit?
23. The Claimant submitted that to prove that there existed an employee-employer relationship between her and the Respondent, the Claimant tendered in evidence documents that spoke to the existence, inter alia, the letter by the Operations and Administrative manager, the pay slip and the termination letter dated 31<sup>st</sup> January 2018. Further, the Respondent's witness admitted the same.
24. It was further submitted that looking at the letter of termination dated 31<sup>st</sup> January 2018, it comes out that the Claimant's employment was terminated on account of redundancy. As such, the Respondent needed to adhere to the procedure set out under section 40 of the *Employment Act* to effect the termination. There wasn't any evidence by the Respondent's witnesses that the procedure was



followed. It was not demonstrated that the notices contemplated in the provision were issued and that in settling on the Claimant as the employee to be let go, the selection criteria set out thereunder were followed. To support this point, reliance was placed on the case of *Ancient Mumo Kalani v Nairobi Business Ventures Limited* [2018] eKLR.

25. It was further submitted that duty lay upon the Respondent to demonstrate that it had a genuine reason to terminate the Claimant's employment, under sections 43 and 45 of the *Employment Act*. However, it didn't produce any evidence to demonstrate that indeed at the material time, it suffered a financial turndown. To buttress the point that duty lay on the Respondent, reliance was placed on the decision in *Kenya Airways Ltd vs- Aviation & Allied Workers Union of Kenya & 3 others, Civil Appeal No. 46 of 2013*.
26. By reason of these submissions, the Claimant asked the Court to find that the termination of her employment was both procedurally and substantively unfair.
27. On the reliefs sought, it was submitted that having demonstrated that the termination was unlawful and unfair, the Claimant is entitled to the damages sought, 12 months' gross salary, KSHS. 428, 688.
28. Section 40 [1] [g] provides for severance pay. As the Claimant has established that her employment was on account of redundancy, she should be awarded the relief under this head, computed at 15 days' salary for every year worked. Thus, KSHS. 82,440.
29. It is clear that the Claimant's employment was terminable by issuance of a two months' notice, and none was issued. The Claimant should be paid in lieu of notice, KSHS. 71, 448.
30. The Claimant pleaded that she was entitled to compensation for untaken leave days, KSHS. 38, 472, which sum should be granted in her favour.

### **The Respondent's submissions**

31. Counsel for the Respondent identified three issues for determination, thus; whether the Claimant's service was lawfully terminated under the terms and conditions of her employment contract; Whether the Claimant's terminal dues and accrued benefits were paid by the Respondent; and who should bear the costs of this suit?
32. It was submitted that the Claimant's contract of employment under clause 8, provided that her employment could be terminated by the issuance of a two months termination notice or payment in lieu. Thus, her employment was terminated in conformity with the terms of the contract as the notice was issued.
33. The Claimant's assertion that her employment was terminated on account of redundancy flows from her total misunderstanding of the letter of termination, misled by the word economic reasons, as employed therein. Therefore, premising her case on the stipulations of section 40 of the *Employment Act*, was misguided.
34. The Respondent terminated the Claimant's employment in accordance with her employment contract. To support this submission, reliance was placed on the case of *Hassan Awadhan v Mkomani Clinic Society* [2017] eKLR.
35. It was further submitted that there can be termination of an employee's employment without cause for as long as the termination is done within the parameters set out in the contract between the parties.



36. It was further argued that in the circumstances of the instant case, the termination was by reason of the operational requirements of the employer following the restructuring that was being undertaken. This was a valid reason for the termination.
37. It was argued that if a contract provides for an exit clause and the same is terminated lawfully in terms of the said contract, then the employee is only entitled to payment equivalent to the notice period provided in the contract.
38. There is no dispute that the Claimant is entitled to terminal benefits, salary for two months in lieu of notice and compensation for untaken leave days. The Respondent undertook to settle them in two instalments, however, the Claimant has never availed herself to collect the same.
39. The Claimant's case should be dismissed with costs.

#### **Analysis and determination.**

40. From the pleadings, the evidence on the record and the submissions by the Counsel for the parties, the following issues present themselves for determination thus:
  - i. Was the termination of the Claimant's contract of service both procedurally and substantively fair?
  - ii. Whether the Claimant is entitled to the reliefs sought.
  - iii. Who should bear the cost of the suit?

#### **Was the termination of the Claimant's contract of service both procedural and substantive fair?**

41. Before delving any further into the issue, I find it imperative to pronounce myself on how the termination of the Claimant, as there was no common cause on the same. The Claimant argued that the termination flowed from the Respondent's decision to, on account of redundancy. The Respondent on the other hand denied that the termination was on the grounds of redundancy but as a result of a business decision and pursuant to the its contractual right to by either giving notice or making payment in lieu thereof.
42. However, it was common cause that the termination of the Claimant's employment was through the Respondent's letter dated 31<sup>st</sup> January 2018. The reason for the termination can only be discerned from the letter. A proper discernment can only be by reading and understanding the entire letter and not part[s] thereof in isolation from the other.
43. The letter read in part;

“Ref: Termination Notice

The poor economic and political environment led to a very challenging trading environment that adversely affected our businesses.

As you are aware, we did not achieve our sales budget last year and the business did not post a profit in 2017. Sadly, we have also had to significantly reduce our trading space in order to adjust to this difficult trading environment. Nonetheless, the Directors still gave you a bonus in December as a reflection of our appreciation for your effort.



Regrettably, after a complete review of the current economic environment and harsh times facing our institution, we can no longer continue your position with the company [emphasis mine] .....

44. The Respondent consistently and persistently maintained that the reason that led to the termination of the Claimant's employment was an 'economic decision'. In my view, and with great respect, this was a very ambiguous and global assertion that could, and I hold didn't, aid its case. In the realm of employment law, economic dismissals which form a distinct category within the law governing termination of employment, involve redundancy, reorganization and business transfer. As such, it won't suffice for an employer to just assert that the termination of an employee was an economic termination without being particular as to which, or giving a clear explanation from which, the exact economic reason can be discerned.
45. Section 2 of the *Employment Act*, 2007 defines redundancy as;

“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 practice commonly known as abolition of office, job, or occupation and loss of employment.”
46. For reasons known to them, the Respondent would want to give their letter whatever interpretation, away from what it actually means and what they actually intended to communicate to the Claimant, but for this Court, the letter speaks clearly to the reason for the termination, which genuinely looked cannot meet any other description other than redundancy.
47. This Court hasn't lost sight of the submissions by the Respondent to the effect that the termination was by reason of an operational reason, and therefore a valid reason for termination. In my view, at this point, an admission was made that termination was on the grounds of redundancy.
48. The Respondent's Counsel urged this Court to find that there can be termination of employment by an employer without cause. That for as long as requisite notice is issued or salary in lieu of notice is paid, the termination will be considered valid. It bears repeating that an argument like the Respondent's here, is with great respect in ignorance of the import of the post-2007 employment and labour relations legal regime, and more specifically the expansive rights and protections for, and obligations on, the employees and employers, respectively, that the regime set in with. In the Kenyan context, termination without cause is not permissible. The clear stipulations of Section 45 of the *Employment Act* provide an anchor for this position.
49. With the above analysis, I come to the conclusion that the termination of the Claimant's employment was on an alleged redundancy situation.
50. Having stated as I have hereinabove, I now turn to consider whether the termination was fair. Just like terminations by reason of an employee's misconduct, poor performance, or physical incapacity, a termination on grounds of redundancy can only be considered fair, where the employer demonstrates that procedural and substantive fairness were present. However, it is pertinent to note that, for the reason that terminations on account of redundancy are often upon no fault on the part of the employee, but at the initiation of the employer, the law [ Section 40 of the *Employment Act*] has in detail specifically set out matters and steps that the employer contemplating terminating the employee's employment, must consider and undertake respectively. All that aimed at ensuring maximum fairness.



51. It is now trite law that the employer must issue a 30-day redundancy notice to the employee to be affected [ if the employee is not a member of a trade union], or a 30-day redundancy notice to a trade [if the employee is a member of a trade union]. Further, the notice must be served on the Labour Officer. The issuance of the notices opens the door for consultations between the employer and the employee[s] to be affected on the best way[s] to avoid redundancy or mitigate the impact thereof. The Employer must have and be able to demonstrate the criteria used to arrive at the specific employee[s] as those to be affected by the redundancy.
52. Where the employer has failed to demonstrate all the above, any termination expressed to be on grounds of redundancy, has often been declared unfair. I think blurred by the position it took concerning the reason for the termination and the alleged right to terminate without cause, the Respondent failed to present evidence to demonstrate that the termination of the Claimant's employment conformed with the dictates of Section 40 of the *Employment Act*, and there existed genuinely a financial turndown to be the basis for the termination.
53. By reason of the foregoing premises, I find that the termination of the Claimant's employment was without procedural and substantive fairness.

### **Whether the Claimant is entitled to the reliefs sought.**

#### **i. 12 months' salary compensation for the unfair termination**

54. The Claimant sought compensation for the unfair dismissal. This Court is cognizant of the fact that 12 months' gross wages or salary is the maximum awardable compensation provided under section 49 [1] [c] of the *Employment Act* 2007. Granting of the relief is discretionary. Whether maximum compensation depends on the circumstances of each case.
55. I have considered the; length of service by the Claimant to the Respondent; the fact that inexplicably, the Respondent failed to adhere to the statutory requirements of procedural and substantive fairness; and that she didn't contribute to the termination of her employment in any manner, and conclude that she is entitled to a compensatory relief contemplated in the stated provision, but only to the extent of six [6] months' gross salary.

#### **ii. salary in lieu of notice**

56. The Respondent admitted that the Claimant is entitled to two months' salary in lieu of notice. As a result, the relief is hereby granted.

#### **iii. Unpaid leave days.**

57. Equally, the Claimant's claim under this head was admitted. Consequently, there cannot be any difficulty on the part of this Court to grant the same. The figures pleaded are hereby granted.

#### **iv. Severance pay.**

58. Having held that the Claimant's employment was unfairly terminated on grounds of redundancy, I see no good reason why this statutory remedy cannot be availed to the Claimant. I find that she is entitled to service pay for the four years worked computed at 15 days' salary for each year worked.

### **Who should bear the cost of the Claim?**

59. As costs follow the event, and as there is no reason to compel a departure from this general principle, the Respondent shall bear the costs of this suit.



60. In the upshot, Judgment is hereby entered in favour of the Claimant against the Respondent in the following terms:
- a. A declaration that the termination of her employment was both procedurally and substantively unfair.
  - b. Two months' salary in lieu of notice.....KSHS. 71, 448.00.
  - c. 5 [ five] months' gross salary as compensation under the provisions of section 49[1] [c] of the Employment Act .....KSHS. 178, 620.00.
  - d. Compensation for earned but unutilized leave days.....KSHS. 38, 472.00.
  - e. Severance pay.....KSHS. 82, 440.00
  - f. Interest on the sums awarded above at court rates from the date of this judgment till full payment.
  - g. Cost of the suit.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN MOMBASA THIS 28TH DAY OF OCTOBER 2024.**

**OCHARO KEBIRA**

**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 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 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 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.

A signed copy will be availed to each party upon payment of Court fees.

**OCHARO KEBIRA**

**JUDGE**

