



**Ndua v Demand Solutions Limited (Cause E398 of 2020)
[2024] KEELRC 2406 (KLR) (3 October 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2406 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E398 OF 2020
L NDOLO, J
OCTOBER 3, 2024**

BETWEEN

DAMARIS WANGARI NDUU CLAIMANT

AND

DEMAND SOLUTIONS LIMITED RESPONDENT

JUDGMENT

1. By a Statement of Claim dated 8th July 2020, the Claimant filed a claim alleging wrongful and unfair dismissal by the Respondent.
2. Despite due service, the Respondent did not file a defence and the matter therefore proceeded as an undefended cause.

The Claimant's Case

3. The Claimant states that she was employed by the Respondent on 7th March 2019, in the position of Commercial Director, at a monthly salary of Kshs. 200,000. The Claimant claims that she was paid only Kshs. 80,000 in the month of April 2019 and nil salary for the subsequent months of May, June, July, August and September 2019.
4. The Claimant avers that upon inquiring about her unpaid salaries, the Respondent extended her probation period by one month, effective 2nd September 2019, citing failure by the Claimant to meet her performance targets.
5. On 20th September 2019, the Claimant's employment was terminated on the ground of redundancy. The Claimant claims that there was no genuine case of redundancy and that the termination of her employment was unlawful and un-procedural. She faults the Respondent for failing to issue the requisite redundancy notice to her and the Labour Office.



6. The Claimant tabulates her claim as follows:
 - a. Salary arrears for April-September 2019.....Kshs. 1,120,000
 - b. 1 month's salary in lieu of notice.....200,000
 - c. 12 months' salary in compensation.....2,400,000
 - d. Severance pay for 6 months.....50,000
 - e. General and aggravated damages
 - f. Certificate of service
 - g. Unremitted PAYE, NSSF and NHIF dues;
 - h. Costs plus interest.

Findings and Determination

7. There are two (2) issues for determination in this case:
 - a. Whether the termination of the Claimant's employment was lawful and fair;
 - b. Whether the Claimant is entitled to the remedies sought.

The Termination

8. On 20th September 2019, the Respondent <gilbert @ nycemedia.net> sent the following email to the Claimant:

“Dear Wangari,

We refer to your appointment contract dated 7th March 2019 and recognize that as per articles 6(c) about probation period conditions and 18(d) about contract termination, we hereby wish to terminate your employment contract effective immediately due to the following reasons:

1. The business of the company has been much lower than earlier anticipated when you joined hence your pay has become unsustainable for us going forward. We are trying to avoid a situation where we do not pay you and thus arrears keep growing every month.
2. The harsh economic conditions necessitated for the business to cut down on numbers and only retain those on lower levels and packages in the short term and shall be reviewed from time to time.

Demand Solutions Ltd (Nyce Media) however still recognizes that your investment in the company is still due with interest. This commitment will be upheld by the company as already indicated in the prior communication in writing.

Finally, Demand Solutions wishes to thank you for your services since you joined the company and wishes you all the best in your future endeavours.

Demand Solutions is law abiding company and intends to keep all these matters within the [employment act](#) of Kenya (2007; and reviewed in 2012).

Regards”



9. According to this communication, the Claimant's employment was terminated on account of redundancy.
10. Section 2 of the *Employment Act* and the corresponding provision in the *Labour Relations Act* define 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 practices commonly known as abolition of office, job or occupation and loss of employment.”
11. While the law recognises redundancy as a legitimate mode of termination of employment, it sets stringent conditions to be satisfied by the employer declaring redundancy. These conditions are codified in Section 40 of the *Employment Act* as follows:
 1. An employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions –
 - a. where the employee is a member of a trade union, the employer notifies the union to which the employee is a member and the labour officer in charge of the area where the employee is employed of reasons for, and the extent of, the intended redundancy not less than a month prior to the date of the intended date of termination on account of redundancy;
 - b. where an employee is not a member of a trade union, the employer notifies the employee personally in writing and the labour officer;
 - c. the employer has, in the selection of employees to be declared redundant had due regard to seniority in time and the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy;
 - d. where there is in existence a collective agreement between an employer and a trade union setting out terminal benefits payable upon redundancy; the employer has not placed the employee at a disadvantage for being or not being a member of the trade union;
 - e. the employer has where leave is due to an employee who is declared redundant, paid off the leave in cash;
 - f. the employer has paid an employee declared redundant not less than one month's notice or one month's wages in lieu of notice; and
 - g. the employer has paid to an employee declared redundant severance pay at the rate of not less than fifteen days pay for each completed year of service.
12. The first 2 conditions under Section 40 require every employer declaring redundancy to issue a one-month notice of intention, to the affected employee, their union (where applicable) and the local Labour Officer. By definition, this notice should set out the reasons for, and the extent of the intended redundancy.
13. The law is now settled that the redundancy notice under Section 40(1) (a) and (b) is separate and distinct from the termination notice provided under Section 40(1)(f).



14. In *Thomas De La Rue (K) Ltd v David Opondo Omutelema* [2013] eKLR the Court of Appeal stated as follows:

“It is quite clear to us that sections 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 and to the employee and the local labour officer. Section 40 (b) does not stipulate the notice period as is the case in 40 (a), but in our view, a purposive reading and interpretation of the statute would mean the same notice period is required in both situations. We do not see any rational reason why the employee who is not a member of a union should be entitled to a shorter notice.”

15. In the subsequent decision in *Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others* [2014] eKLR Maraga JA (as he then was) rendered himself thus:

“The purpose of the notice under Section 40(1) (a) and (b) of the *Employment Act*, as is also provided for in...ILO Convention No. 158-Termination of Employment Convention, 1982, is to give the parties an opportunity to consider ‘measures to be taken to avert or to minimize the terminations and measures to mitigate the adverse effects of any terminations on the workers concerned such as finding alternative employment.’ The consultations are therefore meant to cause the parties to discuss and negotiate a way out of the intended redundancy, if possible, or the best way of implementing it if it is unavoidable.”

16. In the more recent decision in *The German School Society & another v Obany & another (Civil Appeal 325 & 342 of 2018)* (Consolidated) [2023] KECA 894 (KLR) (24 July 2023) (Judgment) the Court of Appeal re-affirmed that consultation in the wake of a redundancy is implied in Section 40 of the *Employment Act*, holding that:

“In essence, consultation is an essential part of the redundancy process and ensures that there is substantive fairness. The employer should ensure that it carries out the process as fair as possible and that all mitigating factors are taken into consideration.”

17. In the case now before me, the Respondent did not comply with any of the conditions set by Section 40 of the *Employment Act*. The termination of the Claimant’s employment was therefore unlawful and unfair and she is entitled to compensation.

Remedies

18. Flowing from the foregoing, I award the Claimant three (3) months’ salary in compensation. In arriving at this award, I have taken into account the short employment stint but also the fact that the Claimant did not in any way contribute to the termination. I have further considered the Respondent’s failure to comply with the law on termination of employment on account of redundancy.
19. I further award the Claimant one (1) month’s salary in lieu of notice.
20. In the absence of any evidence to show that the Claimant was paid her due salary, the claim for salary arrears succeeds and is allowed.



21. The Claimant's service period having been less than a year, the claim for severance pay fails and is disallowed.
22. The claims for general and aggravated damages as well as unremitted statutory dues were not supported by any evidence. They are therefore dismissed.
23. Finally, I enter judgment in favour of the Claimant as follows:
 - a. 3 months' salary in compensation.....Kshs. 600,000
 - b. 1 month's salary in lieu of notice.....200,000
 - c. Salary arrears for April-September 2019...1,120,000Total.....1,920,000
24. This amount will attract interest at court rates from the date of judgment until payment in full.
25. The Claimant is also entitled to a certificate of service plus costs of the case
26. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 3RD DAY OF OCTOBER 2024

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JUDGE

Appearance:

Mr. Kegode for the Claimant

No appearance for the Respondent

