



**Kara v Medanta Africare Limited (Cause 11 of 2019)  
[2023] KEELRC 17 (KLR) (19 January 2023) (Judgment)**

Neutral citation: [2023] KEELRC 17 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU  
CAUSE 11 OF 2019  
CN BAARI, J  
JANUARY 19, 2023**

**BETWEEN**

**NAQEEB IMTIAZ KARA ..... CLAIMANT**

**AND**

**MEDANTA AFRICARE LIMITED ..... RESPONDENT**

**JUDGMENT**

**Introduction**

1. By a Memorandum of Claim dated February 6, 2019, and filed on similar date, the Claimant seeks judgment against the Respondent for the following reliefs:
  - a. A declaration that his employment was unfairly terminated
  - b. One month's pay in lieu of termination notice at Kshs. 200,000/-
  - c. 12 months' salary as compensation for unfair termination
  - d. Unpaid salaries amounting to Kshs. 2,400,000/-
  - e. Severance pay
  - f. A certificate of service
  - g. Costs of the suit and interest.
2. The Respondent entered appearance through the Firm of Ruiru Njoroge & Associates on February 27, 2019, and later on July 14, 2022, and with the leave of court, filed a response to the Memorandum of Claim dated July 12, 2022, together with the Respondent's list of documents.



3. The case was heard on September 27, 2022, when the Claimant testified in support of his case. He adopted his witness statement and produced a bundle of documents filed in the matter in support of his case.
4. The Respondent did not file any witness statements, and consequently did not call any witness. The Respondent's reply to claim and documents filed were also not admitted in evidence for similar reason.
5. Submissions were filed for both parties.

### **The Claimant's Case**

6. The Claimant's case is that he worked as a general practitioner Doctor for the Respondent at their Kisumu Clinic under a contract agreement, which agreement was to run for one year. It is the Claimant's case that the start of his contract was November 1, 2017 and was to run until October 1, 2018, at a monthly salary of Kshs. 200,000
7. The Claimant states that on April 9, 2018, he received a letter indicating that his services will be terminated on May 8, 2018, but no reasons were given for the termination.
8. It is the Claimant's case that although he was given a one-month termination notice, he was not paid salary for the month he served under notice.
9. The Claimant states that he rendered service with due care and diligence to the Respondent and was never issued with a warning in relation to any form of misconduct.
10. It is the Claimant's case that the Respondent did not explain to him the reasons for the termination, nor was he given a chance to present his case in the presence of a representative of his choice. It is the Claimant's further case that he was not given a hearing on the reasons for his termination.
11. The Claimant states that the Respondent failed to observe the provisions of Section 40 of the Employment Act, for having failed to issue notice to the County Labour Officer on his redundancy.
12. The Claimant further states that the Respondent violated the requirements of Sections 43, 45 and 47 of the Employment Act, 2007, hence his termination is unfair.
13. The Claimant's prayer is that the court awards him the reliefs listed in his statement of claim.

### **The Claimant's Submissions**

14. The Claimant submits that he was terminated without being afforded a hearing and that his terminal dues were not paid upon termination.
15. It is submitted that the Claimant was terminated premised on low patients' turnout at the Respondent's clinic, while it was not his duty to market the Respondent's medical services.
16. It is submitted that the Claimant's termination was a redundancy which did not adhere to the provisions of Section 40 of the Employment Act. The Claimant had reliance in the cases of *Mary Chemweno v Kenya Pipeline Company Limited* (2014) eKLR and *Walter Ogal Anuro v Teachers Service Commission* (2013) eKLR, to buttress this proposition.

### **The Respondent's Submissions**

17. It is submitted for the Respondent that Clause 10 of the contract between the Claimant and the Respondent allowed termination by either party giving a one month's notice. The Respondent sought to rely in *Kenfreight (E.A) Limited v. Benson K. Nkuti* (2019) eKLR, for the holding that the



Employment Act provides for various forms of terminating an employment contract; one being by issuance of termination notice under Section 35 of the Act.

18. The Respondent further submits that the Claimant was given reasons for the termination, even when the Respondent did not have an obligation to give him reasons for the termination.
19. It is submitted for the Respondent that the Claimant was paid all his dues and is thus not entitled to the reliefs sought under his statement of claim.
20. The Respondent submits that the contract of service between the parties herein carried an arbitration clause which ousts this court's jurisdiction, as the Claimant should have at first instance referred this matter for arbitration. The Respondent had reliance in the holding in Heather Hayes v Africa Medical Research Foundation (AMREF) (2014) eKLR to support this position.

### **Analysis and Determination**

21. I have considered the pleadings, the Claimant's testimony and the parties' written submissions. The issues that arise for determination are:
  - i. Whether the Claimant was unfairly terminated
  - ii. Whether the Claimant is deserving of the remedies sought

### **Whether the Claimant was unfairly terminated**

22. The question of whether a termination is fair, has largely been settled to be depended on the employer's adherence to the tenets of fair process and the substantive justification test.
23. The Claimant was terminated upon being issued with a one-month termination notice in accordance with clause 10 of his contract of service. This position was confirmed by the Claimant; both in his evidence in chief and on cross-examination. There is therefore no doubt that the Claimant was issued with a termination notice.
24. The question for this court then become whether termination upon notice meets the tenets of fair procedure. The Claimant told the court that the Respondent's reason for terminating his services was low patients' turnout at the clinic where he served. He further confirmed that indeed the Respondent's clinic experienced low business at the time of his termination.
25. As correctly submitted by the Claimant, his was a case of redundancy, and the Respondent needed to strictly adhere to the requirements of Section 40 of the Employment Act, to achieve a fair termination on the ground of redundancy.
26. In Kenya Airways limited v Aviation & Allied Workers Union Kenya & 3 Others [2014] eKLR the Court of Appeal held: -

“... redundancy is a legitimate ground for terminating of a contract of employment provided there is a valid reason based on operational requirements of the employer and the termination is in accordance with a fair procedure.”
27. The Claimant confirmed that the Respondent's clinic was experiencing low patients' turn out, which obviously translates to low sales, and which in my view, is a valid ground for declaration of redundancy.



28. Section 40 of the [Employment Act](#) provides as follows on procedural fairness: -

“(1) an employer shall not terminate a contract of employment of service on account 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 the reason 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) ...”

29. The Claimant admitted receiving the termination notice which also doubled up as the letter of termination. He however faulted the notice premised on the reason that it was not served upon the labour officer.

30. According to Section 40 (1)(b) of the [Employment Act](#), notice of redundancy is required to be served upon the employee and the labour officer.

31. The rationale for redundancy notice was emphasized by the Court of Appeal in the [Kenya Airways case \(supra\)](#) thus: -

“In addition to providing the parties with an opportunity to try and avert or minimize terminations resulting from redundancy and mitigate the adverse effects of such terminations, the other objective of a reasonable notice as was stated in the English case of *William v Compare Maxam Ltd* is:

“to enable the union and employees who may be affected to take early steps to inform themselves of the relevant facts, consider possible alternative solutions and, if necessary, find alternative employment in the undertaking or elsewhere.”

32. The notice issued to the Claimant does not in my view, meet the requirements of Section 40(1)(2) of the [Employment Act](#). The Respondent did not lead evidence to show that the notice was served on the Labour Office.

33. Further, the law on redundancy envisages that redundancy or Termination on ground of redundancy, notice will precede termination, while in the Claimant’s case, notice and termination were made on the same letter.

34. I find and hold that the Respondent’s termination notice is fatally defective, and which then renders the termination unfair.

### **Whether the Claimant is entitled to the remedies sought**

35. The Claimant’s claim is for a declaration that his termination is unfair, pay in lieu of termination notice, unpaid salaries, interest and costs of the suit.



### **Compensation for unfair termination**

36. A finding of an unfair termination no doubt entitles the Claimant to compensation in accordance with Sections 49 and 50 of the [Employment Act](#), 2007. (See [Benjamin Langwen v National Environment Management Authority](#) (2016) eKLR)
37. The Claimant was half-way through his contract of service at the time of termination. The measures of compensation are guided by the statutory considerations spelt out under Section 49(4) of the [Employment Act](#), (See [Kenya Ports Authority v Festus Kipkorir Kiprotich](#) [2014] eKLR)
38. Considering the opportunities available to the Claimant to secure comparable employment, coupled with his reasonable expectation as to the length of time for which his employment with the Respondent might have continued but for the termination on account of dwindling business, I deem an award of two months' salary as sufficient to compensate the Claimant for the unfair termination.

### **One Month's Salary In lieu of Notice**

39. The Claimant admitted receiving notice and serving for the entire notice period. He however told the court that his salary was not paid for the notice month. This thus entitles him to pay of salary for the month of April, 2018, and which is hereby awarded.

### **Unpaid salaries**

40. The Claimant's claim in this respect is for unpaid salaries for the months of December, 2017 to November, 2018. He contends that he was not paid salary for the months of December, 2017 to May 8, 2018, when he was still in the service of the Respondent, and the claim for salaries for May, 2018 to November, 2018, is for the unexpired term of his contract.
41. The Respondent's assertion was that the Claimant was paid all his dues. The Respondent did not adduce any evidence to show that the Claimant was paid his dues. Section 74 of the [Employment Act](#) places the obligation to keep employment records on the employer's door step. Without producing any documents to prove that the Claimant was paid his dues, leaves the court no option but award the claim as prayed.
42. The Claimant is awarded four months' salary on account of the unpaid salaries for the months of December, 2017 to March, 2018.

### **Severance pay**

43. Section 40 (1) (g) of the [Employment Act](#), states thus on severance pay: -

“ 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.”
44. The Claimant was in the service of the respondent for just close to five (5) months. This being less than a year of service, means that severance pay had not vested, and is thus not payable. The claim for severance pay fails and is dismissed.

### **A Certificate of Service**

45. An employer has the obligation under Section 51 of the [Employment Act](#) to issue an employee with a certificate of service. The Claimant was in the service of the Respondent for more than four weeks, and is which time entitles him to issuance of a certificate of service.



46. In sum, Judgment is entered for the Claimant as against the Respondent as follows: -
- i. A declaration that the Claimant's termination is unfair.
  - ii. Payment of 2 months' salary as compensation for unfair termination at Kshs. 400,000/-
  - iii. Unpaid Salaries for the Months of December, 2017 to March, 2018, at Kshs. 800,000/-
  - iv. Unpaid salary for the notice period (April) at Kshs. 200,000/-
  - v. Costs of the suit and interest at court rates.

47. Judgment accordingly.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 19<sup>TH</sup> DAY OF JANUARY, 2023.**

**CHRISTINE N. BAARI**

**JUDGE**

**Appearance:**

Ms. M. J. Ochieng Present for the Claimant

Mr. Ruiru present for the Respondent

Christine Omollo- C/A

