



REPUBLIC OF KENYA



KENYA LAW
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**Muli v Acumen Communications Limited (Cause E076 of 2021)
[2023] KEELRC 2072 (KLR) (22 August 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2072 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E076 OF 2021**

J RIKA, J

AUGUST 22, 2023

BETWEEN

MAXINE MWENDE MULI CLAIMANT

AND

ACUMEN COMMUNICATIONS LIMITED RESPONDENT

JUDGMENT

1. The Claimant filed her Statement of Claim on February 2, 2021.
2. She states that she was employed by the Respondent as an Accounts Officer, on March 1, 2016, earning a monthly salary of Kshs 80,000.
3. The Respondent terminated her contract on February 7, 2018, citing the ground of redundancy.
4. She was issued a 1-day notice on February 7, 2018, effective February 8, 2019. Her contract provided for notice of 3 months. There was no notice of intention to terminate issued to her. The Labour Office was not notified. She was not called for any consultative meeting. The services of an Accounts Officer were still required.
5. She had 12 pending annual leave days on termination. She was not paid severance. She prays for Judgment for: -
 - a. Declaration that termination was unfair and unlawful.
 - b. 3 months' salary in lieu of notice at Kshs 240,000.
 - c. Severance pay for 1 complete year of service.
 - d. 12 days of annual leave pay for year 2017, at Kshs 36,923.
 - e. 12 months' salary in compensation for unfair termination at Kshs 960,000.



- f. Costs and interest.
6. The Respondent filed its Statement of Response, dated March 9, 2021. It is conceded that the Claimant was employed by the Respondent, as an Accounts Officer, on March 1, 2016, earning a monthly salary of Kshs. 80,000. It is conceded that her contract was terminated by the Respondent on February 7, 2018, on account of redundancy.
 7. She was paid 3 months' salary in lieu of notice. Termination was not unfair. The labour office was notified. All procedural requirements were met. Her immediate supervisor consulted the Claimant on redundancy. She was informed by Respondent's Finance and Administration Department, that the Respondent's revenues had diminished, and that there was need to downsize. It was not the Claimant's responsibility, to determine if her services were still required by the Respondent. It was in the discretion of the Respondent to do this.
 8. The Claimant had taken all her annual leave on termination. She was paid full terminal benefits, totalling Kshs 185,109. The Respondent prays the Court to dismiss the Claim with costs.
 9. The Claimant gave evidence, and rested her Claim, on November 9, 2022. She adopted her witness statement and documents [1-4] on record, in her evidence. She reiterated that her contract was terminated abruptly. Her supervisor was not even aware of termination. She was paid 3 months' salary in lieu of notice. Leave was not paid.
 10. Cross-examined, the Claimant told the Court that she was Finance Officer, as per her contract, not Accounts Officer. She handled financial transactions. The Respondent was a start-up. She also dealt with operations. She did statutory returns. The Respondent was 2 years in business, when the Claimant joined. There was in place, a Finance Manager, who was her boss. There was an Operations Manager. Both could perform the Claimant's role. The organizational structure was ambiguous. The Finance Manager was retained. Kshs 80,000 was the gross monthly salary. Net pay was Kshs 61,703. Redirected, she told the Court, perplexingly, that she did not know what 3 months' salary paid to her, represented.
 11. Finance and Administration Manager Robert Mutuku, gave evidence on June 27, 2023, closing the hearing. The matter was last mentioned on July 28, 2023, when Parties confirmed filing and exchange of closing submissions.
 12. Mutuku adopted his witness statement and original, supplementary and further set of documents, filed by the Respondent. The Claimant's contract was terminated on account of redundancy. The Respondent's business was underperforming. The Claimant was informed about the position. She was paid 3 months' salary in lieu of notice. She was issued a letter of termination. She had staff annual leave calendar, and was aware about the Respondent's policy of no annual leave carry-over. The Labour Office was notified.
 13. Cross-examined, Mutuku told the Court that the Claimant worked for 2 years. Termination was on account of redundancy. Termination letter issued on February 7, 2018. There was no other notice concerning redundancy. Mutuku called the Claimant for a meeting the same date. Notice to the Labour Office issued on February 14, 2018, after termination. The Claimant was not paid salary for 7 days worked. The Respondent indicated severance would be paid; it was not. Termination was not abrupt. The Claimant was the custodian of annual leave records. She did not supply these to the Court. Mutuku told the Court that he is the Finance Manager, and took over the Claimant's responsibilities. He did not exhibit the annual leave records. Notice was paid for 3 months via M-pesa. It was a staggered payment. Redirected, the witness told the Court that the Claimant did not plead for salary for 7



days worked. She had the duty to exhibit annual leave records. Notice was paid, even though paid staggeringly.

14. The issues are, whether termination on account of redundancy, met the requirements of section 40 of the [Employment Act](#); whether it was fair; and whether the Claimant merits the prayers sought.

The Court Finds:

15. The Claimant's contract executed on March 1, 2016 between the Claimant and the Respondent, indicated she was appointed to the position of Accounts Officer. The contract was open-ended.
16. Her gross monthly salary was Kshs 80,000.
17. The Respondent issued her a notice of termination of employment on account of redundancy. The notice issued on February 7, 2018. She was advised that her last working day would be February 8, 2018. The Respondent quoted Section 40 of the [Employment Act](#), to justify termination.
18. The Respondent did not offer evidence to establish that it was encountered with a genuine redundancy situation, and secondly did not adhere to the minimum statutory standards of termination through redundancy, prescribed by Section 40 of the [Employment Act](#).
19. The Respondent alleged that its business was performing poorly, but offered no financial business records to sustain the submission. There were no account records, showing the business financial position. It was just a bare pleading and statement made in evidence. Redundancy was limited to one Employee, who had been working seamlessly, for 2 years.
20. Notice issued a day prior to its becoming effective. There was no notice communicated to the Claimant by the Respondent, of the intended redundancy. There was no consultation in any form, preceding termination. Selection criteria was not made known. Notice to the Labour Office was cosmetic, issued on February 14, 2018, a week after the Claimant's contract had been terminated. The cosmetic notice informed the Labour Office that the Respondent, intended to terminate the contract of employment of the Claimant, while that contract had already been terminated. It informed the Labour Office that the Respondent would, within 30 days from February 14, 2018, give notices to the affected Employees. There was only one affected Employee, whose contract had already been terminated. Severance benefit was not paid.
21. The Court is satisfied that there was no genuine redundancy situation established; procedure under Section 40 of the [Employment Act](#) was disregarded; and termination was not fair.
22. The Claimant had worked for 2 years. Her contract was open-ended, and entitled her to work until she attained the Respondent's mandatory retirement age of 65 years. Termination was not through any fault of hers. She was paid nothing except notice of 3 months, which was paid staggeringly, well past the date of termination. She merits and is granted compensation for unfair termination, equivalent of 7 months' gross salary at Kshs 560,000.
23. She worked from March 1, 2016 to February 7, 2016. She had 1 complete year of service, and is granted severance at 15 days, over a period of 1 year, at Kshs 40,000.
24. Notice of 3 months was paid at Kshs 240,000.
25. The Respondent did not provide the Claimant's annual leave records, to discount her prayer for 12 days of annual leave, at Kshs 36,923. Section 74 [1] [f] of the [Employment Act](#), requires the Employer to keep records of an Employee's annual leave entitlement, days taken and days due. Whenever a dispute is brought to Court on annual leave, it is the duty of the custodian of these records to assist the Court in



arriving at the correct annual leave position, by availing the records. Failing which the Court can only uphold the oral evidence of the Employee. The Claimant is awarded annual leave pay at Kshs 36, 923.

26. Costs to the Claimant.
27. Interest allowed at court rate, from the date of Judgment till payment is made in full.

In Sum, It Is Ordered: -

- a. It is declared that termination through redundancy was unfair and unlawful.
- b. The Respondent shall pay to the Claimant equivalent of 7 months' gross salary in compensation for unfair termination at Kshs 560,000; severance pay at Kshs 40,000; and annual leave at Kshs 36,923 – total Kshs 636,923.
- c. Costs to the Claimant.
- d. Interest allowed at court rate, from the date of Judgment, till payment is made in full.

DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY, VIA E-MAIL AT NAIROBI, UNDER PRACTICE DIRECTION 6[2] OF THE ELECTRONIC CASE MANAGEMENT PRACTICE DIRECTIONS, 2020, THIS 22ND DAY OF AUGUST 2023.

JAMES RIKA
JUDGE

