Njeru v Nampak Kenya Limited (Employment and Labour Relations Cause 501 of 2019) [2023] KEELRC 2434 (KLR) (6 October 2023) (Judgment)

Neutral citation: [2023] KEELRC 2434 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

EMPLOYMENT AND LABOUR RELATIONS CAUSE 501 OF 2019

AN MWAURE, J

OCTOBER 6, 2023

BETWEEN

JACOB NJERU ..... CLAIMANT

AND

NAMPAK KENYA LIMITED ..... RESPONDENT

JUDGMENT

1. The Claimant filed a memorandum of claim dated 8th July 2019.

Claimant's Case

2. The claimant avers that vide a letter of offer dated 11th October 2000, the respondent (then known as Carnaud Metalbox Kenya) offered him a position as a senior financial accountant and the claimant accepted the same by signing the offer letter and started his employment.

3. The claimant avers that he was promoted to finance manager Kenya vide a letter dated 13th February 2001 and he continued working diligently for the respondent and eventually given a portfolio for finance director Kenya and Tanzania.

4. The claimant avers that vide a letter dated 1st March 2019 he was informed that his contract will be terminated by end of April 2019 on account of redundancy and that he was required to work till then.

5. The claimant avers that the respondent represented that the position of financial director was no longer required in Kenya, but however it has come to the claimant's knowledge that the respondent misled and misrepresented the position to the claimant as the position of financial director is still available in the respondent's employment structure. The claimant states that the respondent notified its employees by a notice of the employment of Mr Shaun Du Plessis as the new finance director effective 1st June 2019.

6. The claimant avers that the respondent acted in breach of the *Employment Act* as the redundancy was discriminatory as it affected the claimant only and the respondent failed to explain the extent of the redundancy.

7. The claimant avers that even if it were held that the redundancy was in accordance with the law (which is denied) the respondent failed and/or neglected to make full payment of the amount due to the claimant under the contract of employment.

Respondent's Case

8. The respondent opposed this suit and filed a defence to the claim dated 13th September 2019.

9. The respondent admitted the claimant joined the respondent on 11 October 2000 and gradually rose to the rank of finance director.

10. The respondent avers that in the year 2016 it started experiencing drastic reduction in demand of its products due to establishment of inhouse packaging manufacturing equipment by its customers, influx of cheap imports and shift in customer preference which led to a decrease in its annual production between 2016-2019 and in consequence it incurred huge financial loss that could not be sustained.

11. The respondent avers that in November 2018, measures were proposed to ensure the continuity of the business in the region including a possible restructure to reflect the reduced activity levels.

12. The respondent stated that it held numerous consultative meetings with its employees including the claimant in respect to the proposed restructure as follows:

    a. An initial staff meeting on 6th December 2018 addressing the employees on the financial challenges experienced over the years and the decree by Nampak Group requiring the immediate restructure of the respondent.

    b. A follow-up meeting on 16th January 2019 during which proposals for the turnaround strategy were discussed extensively.'

    c. Notice published on 21st January 2019 on the group consultative meetings that were to be held with each department and the claimant attended the meeting held with the finance department on 11th February 2019.

    d. That it welcomed individual consultative meetings with its human resources office.

13. The respondent avers that it addressed the employees concerns and on 13th February 2019, issued a frequently asked questions (FAQ) explaining the nature of redundancy and its impact; difference of redundancy and voluntary early retirement (VER); and the redundancy package.

14. The respondent avers that on 22nd February 2019 it held a team briefing to discuss the outcome of the consultative meetings held and communicated its final decision that the restructuring would be in 3 phases:

    a. Phase 1: shutdown of all loss-making departments and the staff compliment was expected to reduce from 217 to 168.

    b. Phase 2: development of a new organisation structure to align the size of the business by enlarging, amalgamating, downgrading and/or abolishing certain roles in the company.

c. Phase 3: review of its human resource policies and practices, performance management and establishment of support programs for effective management of change.

15. The respondent avers that it opened a VER programme upon request by some employees but was clear it would exercise its discretion with respect to acceptance and rejection of application. The claimant wrote to the respondent on 27th February 2019 applying for consideration of VER but however his conditions were not acceptable to the respondent.

16. The respondent avers on 28th February 2019 it issued a notice to the labour office communicating the intended restructure of its business and providing reasons thereof and list of employees whose roles would be impacted as at 31st March 2019.

17. The respondent avers it thereafter issued notices of redundancy to individual employee who were affected in phase 1 of the process which included the claimant who received his redundancy letter on 1st march 2019 and the claimant was also informed that he was required to continue working until end of April 2019 and aid Nampak Tanzania and he would receive additional payment for the same.

18. The respondent avers that the claimant served his 2 moths notice until 30th April 2019 and was paid Kshs 1,441,947.15 being one month's payment in lieu of notice.

19. The respondent avers that it received an email from the claimant in May 2019 disputing the computation of his final dues and that at no time did he dispute the redundancy. The respondent subsequently clarified to the claimant that his dues had been properly computed.

20. The respondent avers the claimant's severance pay out was in excess of what he was entitled to contractually.

21. The respondent states that the restructuring process was at all times lawful and justified and in accordance with section 40 of the *Employment Act*.

22. The respondent denies that it misled and/or misrepresented the position of its restructure and avers that the claimant was at all material times aware of the factors that necessitated the restructure.

23. The respondent denies that the role of finance director held by the claimant was retained as alleged. It avers prior to the restructure, the Nampak Group covering Kenya, Tanzania, Ethiopia, Malawi and Zambia ('the Division') had 2 Financial directors and 2 Managing directors and the position of the 2 financial directors were merged to form the role of divisional finance director which Mr Shaun du Plessis was appointed on 1st June 2019 to oversee operations in the division.

24. The respondent further avers that the claimant's duties did not extend to the geographical areas which Mr du Plessis has been engaged and that the restructuring process which is still ongoing will lead to the amalgamation of the roles of the 2 managing directors to one divisional managing director by the end of 2019.

25. The respondent denies that the claimant's redundancy was discriminatory as alleged and avers that the claimant's position was not the only one affected, as at 28th February 2019 40 employee roles were impacted and further finance directors in the region were also affected and in phase 2 of the restructure led to abolition of the role of the chief accountant.

26. The respondent denies the claimant is entitled to an additional sum of Kshs 5,920,257.91 and reiterates the claimant's redundancy package was over and above his contractual entitlements and his assessment has no contractual or legal basis.

Evidence in Court

Claimant

27. The claimant adopted his witness statement and supplementary witness statement dated 8/7/2019 and 15/9/2019 respectively as his evidence in chief and produced his list of documents and supplementary list of documents dated 8/7/2019 and 25/9/2019 respectively as his exhibits to be marked exhibits 1-26 in terms of index.

28. During cross examination, the claimant testified that his letter of appointment provided for 3 months' notice however he was only paid for one-month payment in lieu of notice.

29. The claimant testified that his termination letter was dated 1st March 2019 and his exit date was 30th April 2019 however it was not clear that he was serving notice.

30. The claimant testified that he was underpaid his severance as he worked for 18 years and there were 23 days per year. As per his letter of appointment, redundancy is 21 days per years worked.

31. The claimant testified that he was discriminated upon as his salary was the highest in the finance department tied to his responsibility in the region and he had applied for VER in 2017 and 2019 and would not think the employer should have found it reasonable to release him.

32. The claimant testified he was put through an elaborate explanation about the redundancy and vide an email he acknowledged some people needed to leave the company for rationalization and turnaround.

33. The claimant testified that he was not given a chance to take an alternative role in the organisation.

Respondent

34. The Respondent's witness RW1 Paul Okwemba adopted his witness statement and supplementary witness statement dated 13/9/2019 and 1/2/2021 as his evidence in chief and produced documents annexed to the defence marked 1-26 as his exhibits.

35. RW1 testified that the claimant is aware the restructuring was to reduce expenditure and so the role of finance director was reduced to finance manager and referred the court to page 89-90 which showed the respondent's current employment structure to confirm the same.

36. RW1 testified that the claimant's core role as finance director Kenya did not change for supporting other regions and he was compensated for his additional duties in Tanzania which was on a need to basis and was not a substantiated position.

37. RW1 that the claimant did not handle Malawi and Zambia which was added to Mr Sean's role and his letter of appointment was issued 6 months after the claimant had left.

38. RW1 further testified that the respondent had no obligation to offer the position taken by Mr Sean and the claimant did not plead he was competent to take over the job.

Claimant's Submissions

39. It was submitted for the claimant that RW1 is not a truthful witness as he testified that the decision to employ Mr Shaun Du Plessis was not made until 6 moths from the claimant's date of termination while the notice issued by the respondent indicated that Mr du Plessis employment as regional finance director was effective from 1st June 2019.

40. The claimant submitted that RW1 testified that Mr Du Plessis was employed to cover Kenya, Tanzania, Ethiopia, Malawi and Zambia. The claimant avers the appointment notice at page 12 of the respondent's supplementary list documents confirms Zambia was not part of the appointment and the respondent was placed in the onus to provide evidence that the position of finance director was rendered superfluous and that the claimant's office was abolished and it is clear from the foregoing that the position was never abolished.

41. The claimant submitted that it has been demonstrated from the evidence adduced that he undertook assignments for Tanzania and Ethiopia and RW1 confirmed he was competent finance director therefore capable to handle such assignments if given to him. In contrast, the respondent did not give the claimant any alternative role either locally or regionally but instead declared him redundant and hired someone else to handle his work and added one country to his portfolio which the claimant submits amounts to unfair labour practices and relied on *Tibbs Vincent Robert vs SGS Kenya Ltd* (2022) eKLR.

42. The claimant submitted that the respondent did not adduce any evidence to demonstrate how the claimant was identified for redundancy, the selection criteria used, alternatives proposed and the extent of the redundancy. The validity and fairness of the redundancy was not proved by the respondent in violation of section 43 and 45 of the *Employment Act*.

43. The claimant submitted that his termination by way of redundancy did not meet substantive fairness and the action of the respondent failing to make full disclosure and practising discrimination against him is a violation of section 40 of the *Employment Act*.

44. The claimant submitted that there was a binding agreement between himself and the respondent to peg the payment of service pay on 23 days and he demonstrated through clear calculation that the respondent owes him Kshs 3,061,196.

45. The claimant submitted that his termination letter of 1st March 2019 required him to continue working until April, 2019 when his termination would take effect and thereafter be paid 3 months pay in lieu of notice and that the letter did not indicate he was serving his notice period that would be deducted from his dues.

Respondent's Submissions

46. The respondent submitted that while the claimant's duties still exist, they were reassigned to a lower grade at the manager's level supervised by Mr du Plessis overseeing many regions.

47. Further, there is no role of finance director in the new structure of the respondent, Nampak Kenya, the notices before this court relating to du Plessis's appointment originated from Nampak Group confirming the appointment was at group level and not Kenya level.

48. The respondent submitted that the claimant's termination was on account of redundancy as disclosed in the letter dated 1st March 2019 and it was lawful and justified and there was a fair and valid reason based on operational requirements of the employer.

49. The respondent submitted that it has proved that due to heavy losses incurred by the respondent and Nampak Tanzania which the claimant as the financial director was aware of and after intensive consultative period, the respondent made the decision to restructure the organisation which led to the merging of the finance director's position to form the role of divisional finance director thereby abolishing the claimant's position.

50. The respondent submitted that it has proved that the claimant's role was taken up as a joint role within the region and a downgraded role of finance director was created and Mr Paul Munga was appointed as the finance manager.

51. The respondent submitted that the restructure was genuine and warranted and the claimant's role was abolished and absorbed by a new position covering a larger geographical area to save costs and hence the claimant's termination on account of redundancy was justified.

52. The respondent submitted the claimant's assertion that his termination was discriminatory is denied and has been proved to be false and without legal or factual basis. The claimant was actively part of the restructuring process and was incharge of finance and the restructuring focused on financial turnaround.

53. The respondent submitted that on the objectivity of the selection criteria applied including the fact that the claimant applied for voluntary early retirement during the redundancy process and as admitted during his cross examination, in abolishing the claimant's role a substantial amount was saved by the company within its objectives.

54. The respondent submitted it has proved that it complied with the mandatory conditions for termination on account of redundancy as set out in section 40 of the *Employment Act*.

55. The respondent submitted that it complied with the requirements as regards statutory notices issued to the claimant and the labour office. A notice to the labour office communicating the intended restructure and list of employees whose roles would be impacted was issued on 28th February 2019 and 31st March 2019 respectively. The claimant was issued his redundancy notice on 1st March 2019 which also served as notice.

56. The respondent submitted that it has proved that it held several and frequent consultative meetings and communication with all employees that were to be declared redundant including the claimant.

57. The respondent submitted that the claimant was declared redundant together with 48 other employees and that the claimant admitted his role was the highest in finance with significantly higher earnings and in a bid to save cost it abolished the claimant's position and it was absorbed by the role of divisional financial head with an expanded jurisdiction. The respondent has proved Mr Du Plessis took up the expanded role over a bigger geographical territory.

Analysis and Determination

58. The following issues have been raised for this court's determination:

    1. Whether the claimant's termination on account of redundancy was unfair and/or unlawful

    2. Whether the claimant is entitled to the reliefs sought

59. On the first issue, for termination to be fair and lawful it must be both procedurally fair and be based on a substantive justification. Section 40(1) and 45 (2) clearly provides for the same as follows:

> Section 40
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> " 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 the 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 to 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."

Section 45(2)

" A termination of employment by an employer is unfair if the employer fails to prove—

(a) that the reason for the termination is valid;

(b) that the reason for the termination is a fair reason—

(i) related to the employees conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer; and

(c) that the employment was terminated in accordance with fair procedure."

60. The respondent informed the labour officer in writing the reasons, and the extent of the intended redundancy but only a few days before they issued the termination letter to the claimant. The labour office received the letter dated 28th February 2019 on 4th March 2019. By then the claimant had already been issued with the letter of termination dated 1st March 2019.

61. The claimant was well aware of the financial constraints of the respondent and was fully involved with the consultative meetings organised by the respondent as it undertook the proposed restructuring up until it made the final decision to proceed.

62. The claimant submitted that the respondent did not adduce any evidence to demonstrate how the claimant was identified for redundancy, the selection criteria used, alternatives proposed and the extent of the redundancy.

63. The court of appeal in *Cargill Kenya Limited v Mwaka & 3 others* (Civil Appeal 54 of 2019) [2021] KECA 115 (KLR)held:

> " On the burden of proving that the applicable selection criteria was applied, Githinji JA held as follows in Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others (supra):
>
> > " ....section 40(1) of the EA is merely procedural by its tenor. It has to be read together with sections 43, 45 and section 47(5) of EA. It is implicit from the four sections that to establish a valid defence to a claim for unfair termination based on redundancy, an employer has to prove:
> >
> > (I) the reason or reasons for termination.
> >
> > (II) that reason for termination is valid and that
> >
> > (III) the reason for termination is fair reason based on the operational requirements of the employer and
> >
> > (IV) that the employment was terminated in accordance with fair procedure.
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> However, as section 43(2) of EA provides the reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist and which caused the employer to terminate the services of the employer.
>
> Further, as section 47(5) of EA provides the burden of proving unfair termination of employment rests with the employee while the burden of justifying the grounds for termination rests with the employer.
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> Thus, redundancy is a legitimate ground for terminating a contract of employment provided there is a valid and fair reason based on operational requirements of the employer and the termination is in accordance with a fair procedure. As section 43(2) provides, the test of what is a fair reason is subjective. The phrase "based on operational requirements of the employer" must be construed in the context of the statutory definition of redundancy. What the phrase means, in my view, is that while there may be underlying causes leading to a true redundancy situation, such as reorganization, the employer must nevertheless show that the termination is attributable to the redundancy – that is that the services of the employee has been rendered superfluous or that redundancy has resulted in abolition of office, job or loss of employment."

47 From the above provisions and decisions, the requirements in fulfilling the threshold set by section 40(1)(c) of the *Employment Act* can therefore be surmised as follows. First, an employer should include the factors set out in section 40(1)(c) of the *Employment Act* in the criteria for evaluating and selecting the employees to be declared redundant. Second, the employer is required to prove that the criteria was objectively, uniformly and fairly applied."

64. The respondent proved to this court that due to heavy losses incurred on account of drastic reduction in demand of its products from 2016 and in an effort to return to profitability it decided to restructure and the claimant testified he was well aware of the same.

65. RW1 testified that the claimant's role was abolished and its finance department was downgraded taken up by a finance manager while others were absorbed by a regional director with an expanded jurisdiction which saved the respondent cost as the claimant was the highest paid in the department. Further, we were provided with the employment structure of the respondent's finance department which confirm the abolition of the claimant's office.

66. Further, the respondent submitted the claimant opted for voluntary early retirement showing he was ready to leave employment and this made him a ready candidate for redundancy. There is his letter dated 27th February 2019 but his offer was unacceptable to the respondent.

67. In view of the foregoing, this court holds the respondent had a valid reason to declare several of his employees redundant including the claimant.

68. The claimant testified that the respondent misrepresented and misled him on the reasons for redundancy as his role is still in existence and that he was replaced within one month by one Mr Du Plessis.

69. However, both the claimant and RW1 testified that the claimant's role was to be abolished and the same be oversighted from South Africa. RW1 further testified that Mr Du Plessis was issued his letter of appointment 6 moth's after the claimant's was declared redundant and that his role involved a larger geographical region but however this was opposed by the claimant as he testified that his role involved aiding the said regions in exception of Zambia and that he was not offered the said regional position.

70. In the Court of Appeal case, *Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others* [2014] eKLR the court stated:

> " In *Aoraki Corporations Limited V. Collin Keith McGavin*; CA 2 of 1997 [1998] 2 NZLR 278 the Court of Appeal of New Zealand:
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> > " ...It is convenient in other termination cases, and essential in redundancy cases, to consider whether the dismissal was substantively justified. Thus if dismissal is said to be for a cause it may be substantively unjustified in the sense of a cause not being shown or being subject to significant procedural irregularity as to cast doubt upon the outcome....
> >
> > Redundancy is a special situation. The employees have done no wrong. It is simply that in the circumstances the employer faces, their jobs have disappeared and they are considered surplus to the needs of the business. Where it is decided as a matter of commercial judgment that there are too many employees in the particular area or overall, it is for the employer as a matter of commercial judgment to decide on the strategy to be adopted in the restructuring exercise and what position or positions should be dispensed with in the implementation of that strategy and whether an employee whose job has disappeared should be offered another position elsewhere in the business.
> >
> > It cannot be mandatory for the employer to consult with all potentially affected employees in making any redundancy decision. To impose an absolute requirement of that kind would be inconsistent with the employer's prima facie

> right to organize and run its business operation as it sees fit. And consultation would often be impracticable, particularly where circumstances are seen to require mass redundancies. However, in some circumstances an absence of consultation where consultation would reasonably be expected may cast doubt on the genuineness of the alleged redundancy or its timing. So, too, may a failure to consider any redeployment possibilities."

That passage is apt. In the present case the Airline gave the reasons for staff difficulties in most of the markets it operates in, downturn in passenger volumes in some traditional routes occasioning sharp short falls in expected revenue, the unstable fuel prices and increasing competitive environment that had impacted negatively on operation margins; high operating costs and unsustainable employee costs disproportionate to rise in revenue. The fact of declining revenues for the period from 2005 to September 2012 was supported by the audited and unaudited accounts and by the evidence.

There was evidence that the Airline made a huge loss in 2009 and had made loses in the six months up to September 2012. There was also evidence that apart from staff rationalization, the Airline had applied company-wide measures to cut costs and to improve efficiency. The Industrial Court made a finding that the Airline has been experiencing economic problems.

There are jurisdictions like South Africa where the law provides that the employer must consult before contemplating dismissing employees on the basis of employer's operational requirements. Section 189(1) of *Labour Relations Act* of South Africa provides so. There are also jurisdictions like Philippines as exemplified by the decision of the Supreme Court in Fasap v Philippine Airlines GR No. 178083 where the law provides that the employer's prerogative to bring down labour costs by retrenching must be exercised as a measure of the last resort.

That is not the law of Kenya. There is also the ILO's recommendation No. 166 (supra) which recommends consultation. There was however no evidence that the recommendation has been ratified by Kenya. The CBA does not provided for such consultation nor does Article 10 of the *Constitution* which provide for National Values and Principles of Governance apply to private contracts between employers and employees. The law of Kenya does not provide for pre-redundancy consultation but only post redundancy dispute resolution. The learned Judge had a negative view of outsourcing of labour as mode of reducing costs of employees. However, this is an accepted cost saving strategy worldwide."

71 Lastly, the judge's finding that the Airline had employed foreign staff to replace local staff was denied. There was no such allegation in the statement of claim or in the supporting affidavits. The finding was not supported by any concrete evidence."

There was evidence that the redundancy was implemented by various means such as abolition of roles and reconfiguration of roles. Indeed, the summary annexed to the statement of response shows that most of the employees were rendered redundant by the abolition of roles. The Judge's finding to the contrary was against the weight of evidence. Only 447 unionisable employees out of 3,756 unionisable employees were affected.

It is not necessary to consider all the reasons that the learned Judge gave for essentially deciding that redundancy was not commercially necessary and that more consultation was necessary. This was a wrong test. As long as the employer genuinely believed that there was a redundancy situation, any termination was justified and it was not for the court to substitute its business decision of what was reasonable. The Court has no supervisory role."

72. Flowing form the above the court finds from the pleadings and exhibits in court, the evidence adduced and submissions the respondent had a valid reason to declare its various employees redundant. He failed to give formal notice of redundancy to the claimant save as alluded in the termination letter. They however gave a notice and reason thereto to the Ministry of Labour.

73. This is a case therefore the claimant for several months was in the picture that he among others was to be declared redundant. That must be the reasons he applied for voluntary retirement but his terms were not acceptable to the respondent. The court is not satisfied the claimant was discriminated in being declared redundant as indeed other positions were also declared redundant.

74. The court is also satisfied by the respondent's position that Mr Du Plessis did not take over the claimant's role who was the finance director Kenya. Although, the claimant would assist with the other regions we take note that his employment contract only provided that his role and this position was downgraded to finance manager and the role of regional/divisional finance manager in charge of Kenya, Tanzania, Ethiopia and Malawi subsequently created in a bid to save on costs and serve the bigger region.

75. In view of the foregoing, the court is satisfied the respondent complied with the provisions of sections 40 of the *employment act* in declaring not only the position of the claimant redundant but the other roles. The court therefore holds that the claimant was not unlawfully terminated and his claim is dismissed.

76. In respect to severance pay, this court holds the claimant's computation of 23 days is not merited. As submitted by the respondent, the employment contract clearly states under clause 15 that an employee declared redundant shall be entitled to severance pay at the of 21 consecutive calendar days for each completed year of service but in good faith this was enhanced to 23 days hence he was well compensated with kshs 24,490,917/-

77. On the issue of two months' notice pay, the claimant testified he received the letter dated 1st march 2019 however, the body did not indicate he was serving his notice period but the heading was termination of employment. The letter said his termination was to be end of April.

78. The court in *Cargill Kenya Limited v Mwaka & 3 others* (Civil Appeal 54 of 2019) [2021] KECA 115 (KLR) held:

> "It is thus our finding that the above interpretative factors discount a construction that a notice of termination is required by subsection (1)(f), or within the timelines held by the learned judge of the trial court. While such a notice may eventually require to be given in a termination on account of redundancy, it is definitely not one of the conditions to be met under section 40 subsection 1(f) of the *Employment Act* before the redundancy. In our view, the learned judge in the trial court appears to have conflated the payment in lieu of notice under section 40 subsection (1)(f), with the final declaration of termination by redundancy, and erred in finding that there is a requirement to issue a notice of termination before the redundancy under section 40(1)(f) of the *Employment Act*."

79. In *Africa Nazarene University v David Mutevu & 103 others* (2017) eKLR where this Court held as follows:

> "As stated earlier, the trial court was of the view that after the issuance of the notice under sub-section (b), the employer was obligated to issue a second notice under subsection (f). With respect, we differ with that construction and concur with the appellant that the section

relates to payment in lieu of notice. Admittedly, the subsection is inelegantly drafted as it talks about "payment of one months' notice" or "payment of one month's wages in lieu". It is all about payment. If it was about a second notice, it should surely have said so in so many words."

80. This court therefore holds that the claimant's argument is not merited as he was given notice of two months and paid for the one month he was released. The prayers for two months' salary in lieu of notice is unmerited.

    The claimant is not entitled to compensation for unlawful termination as the court has held that he was not unlawfully terminated.

81. The court however in its discretion will order respective parties to meet the costs of their suit.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 6TH DAY OF OCTOBER, 2023.

ANNA NGIBUINI MWAURE

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 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.

ANNA NGIBUINI MWAURE

JUDGE