



**Nasumaye v DHL Exel Supply Chain (K) Ltd (Cause 991 of 2018)  
[2023] KEELRC 3152 (KLR) (30 November 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3152 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 991 OF 2018  
SC RUTTO, J  
NOVEMBER 30, 2023**

**BETWEEN**

**JOYCE NASUMAYE ..... CLAIMANT**

**AND**

**DHL EXEL SUPPLY CHAIN (K) LTD ..... RESPONDENT**

**JUDGMENT**

1. The instant suit was commenced by way of a Statement of Claim filed on 19<sup>th</sup> June 2018 and subsequently amended on 22<sup>nd</sup> March 2019. The Claimant avers that on 29<sup>th</sup> March 2012, she executed an employment contract with the Respondent under which she was to serve as a Stock Analyst. She further avers that through an employment contract executed on 8<sup>th</sup> January 2013, her job description changed from a Stock Analyst to a Process Controller. She was subsequently appointed to the position of Process Manager with effect from 1<sup>st</sup> August 2013 and thereafter confirmed on 11<sup>th</sup> February 2014 following successful completion of her probation period.
2. The Claimant further states that her job description was thereafter changed from that of Process Manager to that of Inventory, Reconciliation and Stock Audit Manager and subsequently to that of Control Tower Planner.
3. It is the Claimant's case that she was served with a letter of potential redundancy dated 31<sup>st</sup> May 2018, which indicated that her job as Process Manager was at risk of redundancy. That after clarification with the Human Resources, that she no longer occupied the office of Process Manager, she was dismayed and shocked to receive another letter of potential redundancy from the Respondent indicating that her current position of Control Tower Planner was at risk of redundancy.
4. According to the Claimant, the actions of the Respondent were directly aimed at her with the intention to illegally and unfairly terminate her employment. She contends that the same had nothing to do



with the redundancy of the office she occupies. To this end, the Claimant has cited the Respondent for discrimination.

5. The Claimant's claim against the Respondent is as follows:

- a) A declaration that the actions of the Respondent Company were discriminatory towards the Claimant.
- b) General damages for discrimination, psychological torture and unfair labour practices.
- c) A permanent injunction restraining the Respondent from enforcing the impending redundancy against the Claimant.
- d) An order to issue restraining the Respondent from terminating or interfering with the insurance and medical cover benefits available to the Claimant.
- e) A permanent injunction restraining the Respondent against victimizing/discriminating against the Claimant herein.
- f) Cost of this suit and interest thereto.  
In the alternative
- g) A declaration that the actions of the Respondent amount to constructive dismissal.
- h) Twelve months pay being Ksh99,000/- net pay multiplied by 12.
- i) Severance pay at the rate of 15 days for each year completed.
- j) General damages for discrimination, psychological torture and unfair labour practices amounting to Ksh10,000,000/-
- k) Three months' pay in lieu of notice.
- l) The Respondent be compelled to issue the Claimant with a certificate of service.
- m) The Respondent be permanently restrained from giving any negative information to prospective employers of the Claimant.
- n) Any other award that the court may deem fit.

6. The Respondent opposed the Claim through the Memorandum of Response dated 6<sup>th</sup> July 2018, in which it avers that it has a right under the [Employment Act](#) to declare a redundancy subject to compliance with the provisions of the Act. The Respondent further denied that its actions are unlawful or discriminatory as pleaded by the Claimant. Consequently, the Respondent has asked the Court to dismiss the Claim with costs.

7. It bears to note that on 4<sup>th</sup> July 2018, both parties consented to the Claimant's Application restraining the Respondent from declaring her redundant. The interim orders were extended on 16<sup>th</sup> July 2018, hence at the time the main suit proceeded for hearing on 5<sup>th</sup> July 2023, the Claimant was still in the Respondent's employment.

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

8. The Claimant testified in support of her case as CW1 and called an additional witness Mr. William Karanja, who testified as CW2.



9. For starters, the Claimant sought to rely on her witness statement and the documents filed on her behalf to constitute her evidence in chief.
10. It was the Claimant's evidence that after almost two years working as a Control Tower Planner, she was served with a letter of potential redundancy dated 31<sup>st</sup> May 2018 which indicated that her job as a Process Manager was at risk of redundancy.
11. She was utterly shocked by the said letter as she had already taken up her new role as the Control Tower Planner pursuant to discussions held between herself and the Respondent and a letter dated 18<sup>th</sup> August 2016 confirming the same.
12. She was at the very least assured that there was a mistake on the part of the management as she had ceased working as a Process Manager for more than one year and nine months by the date the said letter of potential redundancy was served upon her and as such she no longer held that office.
13. She raised the concern with the Respondent's Human Resource office, seeking clarification on the same and on 4<sup>th</sup> June 2018, the Human Resource Officer called an operation realignment meeting with the senior management, whereby she raised the issue of the defective notice of potential redundancy which had been addressed to her indicating that she occupied the position of Process Manager which was affected by the redundancy.
14. On 5<sup>th</sup> June 2018, she was dismayed and shocked to receive another letter of potential redundancy from the Respondent indicating that her current position as a Control Tower Planner was at risk of redundancy.
15. According to the Claimant, the Respondent's action of redrafting another letter of potential redundancy was an afterthought after its oversight in the first letter dated 31<sup>st</sup> May 2018.
16. The Claimant further averred that the said positions and offices that were purportedly at the risk of redundancy, have not been scrapped. She contended that her role was still important and relevant.
17. She termed the actions of the Respondent as rightly discriminatory and a travesty of her Constitutional rights in view of the fact that she was nine months pregnant and the Respondent's action was clearly prompted by her condition. The Respondent was not sensitive to her plight.
18. The Claimant further averred that the operational realignment meetings were being cancelled from time to time and day to day which was frustrating to her as she did not know her position with the company. This occasioned a lot of stress, frustration and draining, as she was expecting a child.
19. After delivery and during her recovery period, she was put in a position to sign legal documents in the hospital.
20. She further told the Court that upon obtaining the court order staying her redundancy and following her resumption of work after maternity leave, she was victimized and there was a time she stayed without work for 8 months.
21. That she was later demoted to the position of a Control Tower Expeditor which was not a managerial position as the one she was holding before. She contended that her position had been occupied by a male colleague.
22. The Claimant told the Court that she was frustrated and demoralized hence her claim for constructive dismissal.



23. Mr. William Karanja, who testified as CW2, identified himself as the Claimant's husband, and as such, he is aware of the circumstances under which her relationship with the Respondent deteriorated.
24. Similarly, CW2 adopted his witness statement to constitute his evidence in chief.
25. He told the Court that he was also working with the Respondent at the material time and that his position was declared redundant in 2018.
26. It was his testimony that until the month of May 2018, the Claimant worked as the Control Tower Planner having been promoted on several occasions due to her impeccable performance. That in the said month of May 2018, together with the Claimant, they were issued with letters of potential redundancy of the different offices and/ or positions that they held with the Respondent.
27. Surprisingly, the notice that was issued to the Claimant indicated that the position of Process Manager was being declared redundant effective 31<sup>st</sup> May 2018 which position the Claimant no longer occupied.
28. On 4<sup>th</sup> June 2018, the Human Resource Officer called an operational realignment meeting with the senior management of the Respondent whereby the Claimant raised the issue of the defective notice of potential redundancy which had been addressed to her indicating that she occupied the position of Process Manager which was affected by the redundancy.
29. Immediately the Respondent was notified of the mishap with the notice, it issued the Claimant with a notice of potential redundancy for the office that she actually occupied.
30. According to CW2, this made it quite apparent that the redundancy was personal and targeted at specific people and not the office itself.
31. CW2 further stated that the offices that were purportedly being declared redundant are still in existence and have not been scrapped, which would have been the effect of a genuine redundancy exercise.
32. It was his further evidence that in the month of April 2018, the Control Tower Planner East Africa, one Benedict Nyambu, who was the Claimant's immediate manager had enquired from her (Claimant) why she didn't work on weekends to which she responded that she had to attend prenatal clinic over the weekend.
33. Further, in the month of September 2017, the said Benedict Nyambu approached him during working hours in his personal capacity and asked him why the Claimant's performance had deteriorated over the last couple of months and that he wasn't happy with her job performance.
34. He immediately talked to the Claimant informing her of her Manager's concerns as regards her job performance. The Claimant was quite livid due to the said Manager's conduct and unprofessional approach that she consequently requested for a meeting in order to clarify the concerns he had raised.
35. According to CW2, it is clear beyond peradventure that the declaration of redundancy was done as a reaction to some underlying and perceived personal issues that the Respondent had with the Claimant and the redundancy was a clandestine and calculated move to terminate her employment.
36. He further stated that at the time the Claimant was issued with notices of potential redundancy, she was nine months pregnant and was on the verge of proceeding for her maternity leave and this information had already been communicated to the Respondent as the Claimant had already filled the maternity leave forms well in advance.



37. It was his testimony that the foregoing developments occasioned a lot of stress, frustrations and apprehension on the Claimant in view of the fact that she was expecting a child, which is resource-draining while at the same time, she was on the verge of being unemployed.

### **Respondent's case**

38. The Respondent called oral evidence through its Senior Human Resource Business Partner for East Africa, Ms. Janet Munguti, who testified as RW1. Equally, RW1 adopted her witness statement to constitute her evidence in chief. She proceeded to produce the documents filed on behalf of the Respondent as exhibits before Court.
39. It was RW1's testimony that the Claimant's employment was subject to the terms and conditions of the employment contract as amended from time to time and of the *Employment Act*.
40. That under both the Claimant's employment contract and the law, the Respondent has a right to declare her redundant.
41. She stated that in 2018, the Respondent experienced a difficult year after losing some of its major clients, leading it to consider a restructuring process. To that end, the Respondent held meetings with its staff to discuss the financial ramifications and possible redundancies.
42. On 31<sup>st</sup> May 2018, the Respondent sent the Claimant a notice of potential redundancy of her role. According to RW1, the letter referred erroneously to her previous position as Process Manager.
43. Due to the error in the letter, it was reissued on 5<sup>th</sup> June 2018 confirming that the Claimant's position as a Control Tower Planner has been identified as being at risk of redundancy.
44. RW1 further stated that the redundancy process affected several other employees of the Respondent, including unionisable employees. She averred that Notices were similarly sent out to the affected employees.
45. With regards to the allegation that the Claimant was discriminated against, RW1 stated that the same is untrue as the redundancy affected several other employees.

### **Submissions**

46. It was the Claimant's submission that the Respondent did not follow the laid down procedure in implementing the redundancy and as such, the declaration of the redundancy was marred with irregularities. To this end, she placed reliance on the case of Jane Khalechi vs Oxford University Press EA Limited (2013) eKLR.
47. Further impugning the redundancy process, it was the Claimant's submission that the Respondent did not issue the labour office with the potential redundancy letter touching on her as alleged.
48. In further submission, the Claimant argued that despite being served with the letters of the intended redundancy, she was never heard but was instead asked to leave the premises with immediate effect.
49. She further urged that these actions by the Respondent are in violation of her rights as guaranteed under Article 47 of *the Constitution* and Section 4(3) of the *Fair Administrative Action Act*. On this score, the Claimant made reference to the case of Cargill Kenya Limited vs Mwaka & 3 Others (Civil Appeal 54 of 2019) (2021) KECA 115 (KLR).
50. On the issue of discrimination, the Claimant submitted that the instant claim is a classic example of the fact that she was discriminated against because she was pregnant and was scheduled to take up



her maternity leave. She posited that the same is prima facie when she was issued with the letter of potential redundancy of her previous position and upon her seeking clarification on the same, she was then issued with another letter which then addressed her position as the Control Tower Planner.

51. It was further submitted by the Claimant that she was targeted as an individual as it is evident that there was no notice issued to the labour officer other than the one that was only applicable to the unionized cadre.
52. She further argued that the Respondent has not in any way whatsoever produced any evidence to demonstrate the criteria/methodology used to arrive at the fact that her employment was to be terminated on grounds of redundancy other than the fact that she was pregnant. In support of this argument, she sought to rely on the case of *Mokaya vs Kithure Kindiki t/a Kithure Kindiki & Associates* (Petition 62 of 2019) (2021) KEELRC 1 (KLR).
53. On the Respondent's part, it was submitted that the redundancy was lawful and justified within the meaning of Section 2 of the *Employment Act*. On this issue, the Respondent referenced the Court of Appeal decision of *Kenya Airways Limited vs Aviation & Allied Workers Union Kenya & 3 Others* (2014) eKLR.
54. It was the Respondent's further submission that it has proved that its decision to declare the Claimant's position redundant was involuntary and had nothing to do with her as it was influenced by external factors and was therefore based on a genuine belief as provided for under Section 43(2) of the *Employment Act*.
55. Citing the case of *Jane Khalechi vs Oxford University Press* (Supra), the Respondent submitted that companies and organizations are entitled to restructure and take measures that would alleviate its financial constraints and for the good governance of the institution. According to the Respondent, it had a right to re-organize its business and declare a redundancy and the only question therefore is whether it complied with the provisions of the *Employment Act*.
56. It was the Respondent's further submission that the redundancy was carried out in accordance with the procedural requirements of Section 40 of the *Employment Act*. That first, the Claimant was notified of the Respondent's intention to declare redundancies as per Section 40(1) (b) and secondly, it planned consultative meetings with her prior to the intended redundancy. The Respondent maintained that it was only when the Claimant filed this suit and obtained an injunction that it was unable to conclude the redundancy process.
57. In the Respondent's view, the redundancy process was both substantively and procedurally fair. It urged the Court to be guided by the decision of *George Buoro vs Kenindia Assurance Company* (2020) eKLR.
58. With respect to discrimination, the Respondent submitted that the redundancy in issue did not only affect the Claimant. It was posited that the process affected several other employees, including unionisable employees and notices were similarly sent out to the affected employees. As such, it follows that there was no evidence whatsoever that the Claimant was sent on redundancy purely because of her pregnancy.

### **Analysis and Determination**

59. Arising from the pleadings, the evidence on record as well as the rival submissions, the following issues stand out for consideration by the Court:
  - i. Whether the Claimant's intended termination by way of redundancy is fair and lawful;



- ii. Whether there is a case of discrimination;
- iii. Whether the Claimant is entitled to the reliefs sought.

**Whether the Claimant's intended termination by way of redundancy is fair and lawful.**

- 60. At the heart of this dispute is the Claimant's potential redundancy which was communicated to her through the letters of 31<sup>st</sup> May 2018 and 5<sup>th</sup> June 2018. According to the Claimant, the Respondent's action was aimed at her directly with an intention of unfairly terminating her employment. She contends that the redundancy had nothing to do with the position she was occupying at the material time.
- 61. Countering the Claimant's allegations, the Respondent contends that under her (Claimant) contract of employment and the Employment Act, it has a right to terminate her contract on grounds of redundancy. It is the Respondent's case that the redundancies affected several other employees besides the Claimant.
- 62. It is now settled that any termination of employment under redundancy ought to be both substantially justified and procedurally fair. Such was the holding by the Court of Appeal in the case of Kenya Airways Limited vs Aviation & Allied Workers Union Kenya & 3 Others (2014) eKLR.
- 63. Substantive justification refers to the reasons for which the redundancy was effected while procedural fairness has to do with the procedure applied in effecting the redundancy. I will start by considering substantive justification.
- 64. The main reason advanced by the Respondent for its intention to declare the Claimant redundant as can be discerned from the letters issued to her, was that the Respondent had had a difficult year with the loss of some of its major clients in Kenya. The Respondent further stated that this aspect had occasioned significant financial ramifications for the company.
- 65. In light of the foregoing, it is evident that the Claimant's intended termination was based on the operational requirements of the Respondent hence falls within the ambit of Section 45 (2) (b) (ii) of the Employment Act (Act).
- 66. As was held in the case of Kenya Airways Limited vs Aviation & Allied Workers Union Kenya & 3 others [2014] eKLR, the phrase "based on operational requirements of the employer" must be construed in the context of the statutory definition of redundancy.
- 67. Under Section 2 of the Act the term "redundancy" has been defined to mean "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".
- 68. Fundamentally, the circumstances or reasons leading to an employee being declared redundant must fall within the above statutory definition.
- 69. In support of its case, the Respondent stated that the Claimant was not the only employee who was declared redundant and to this end, exhibited letters issued to other employees who were declared redundant around the same time as the Claimant. Indeed, even CW2 testified that he was declared redundant around that time.
- 70. Therefore, I have no reason to doubt that the Respondent was facing a situation where it had to declare some of its employees redundant. That being the case, the pertinent question that comes to the fore



is whether the Claimant's role was affected by the redundancy exercise carried out at the time, by the Respondent.

71. The record bears that the Claimant was initially issued with a letter dated 31<sup>st</sup> May 2018, through which she was notified that her position as Process Manager was one of those that had been provisionally identified to be at risk of redundancy.
72. Subsequently, the Claimant was issued with another letter dated 5<sup>th</sup> June 2018, through which she was notified that her position as Control Tower Planner had been identified for potential redundancy.
73. According to the Claimant, at the material time, she was working as a Control Tower Planner and it had been two years since she worked as a Process Manager. She contended that the Respondent amended the initial notice of potential redundancy issued to her on 31<sup>st</sup> May 2018, after she raised the issue clarifying that she was not occupying the said position of Process Manager.
74. The Respondent's witness attributed the issuance of the first notice with reference to the position of Process Manager to an error. According to RW1, "the letter erroneously referred to the Claimant's previous position as Process Manager."
75. Revisiting the statutory definition of the term "redundancy", it is clear that it is an employee's role that is declared redundant as opposed to an individual employee. Therefore, redundancy should not be targeted at an individual employee and regard should be had to the position being held by the employee and a consideration made as to whether the said role is superfluous and is to be abolished.
76. In this case, by the Respondent issuing the Claimant with the first notice dated 31<sup>st</sup> May 2018 and subsequently a second notice dated 5<sup>th</sup> June 2018, after she had clarified that she was not holding the position of Process Manager, leads me to conclude that it is the Claimant who was being targeted by the redundancy as opposed to the position she was holding.
77. Indeed, it is rather suspect that the initial notice issued to the Claimant referred to the position of Process Manager and upon her clarifying that she was not holding the said position, she was promptly issued with a fresh notice indicating that her actual position of Control Tower Planner, was the one at risk of being declared redundant.
78. What's more, the Respondent did not lead evidence to prove that indeed, the Claimant's position of Control Tower Planner had been abolished and ceased to exist within its structure.
79. On this issue, I will follow the determination in the case of Kenya Airways Limited vs Aviation & Allied Workers Union Kenya & 3 others [supra] where it was held 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 the services of the employee has been rendered superfluous or that redundancy has resulted in abolition of office, job or loss of employment.
80. In further analyzing the definition of the term redundancy, the Court reckoned as follows:

"There are two broad aspects of this definition...The second aspect is that the loss of employment in redundancy has to be at no fault of the employee and the termination of employment arises "where the services of an employee are superfluous" through "the practices commonly known as abolition of office, job or occupation and loss of employment." In this case, what I understand as required to be determined in this aspect of the definition of redundancy is whether the appellant abolished the offices, jobs or occupations of the affected employees resulting in their services being superfluous hence their loss of employment. Corollary to that is the justification for that abolition, if the



appellant indeed abolished their offices. Determination of these two aspects will, determine the first issue of whether or not the redundancy in this case was necessary.” Underlined for emphasis

81. Having failed to prove that the Claimant’s position was abolished and as I have found that the redundancy was targeted at her as an individual, I cannot help but find that the Respondent has failed to prove to the requisite standard that it was justified to commence termination of the Claimant’s employment on account of redundancy.
82. Indeed, it is clear from a reading of Section 40 of the Act that an employer has a right to declare a redundancy provided that the same is justified. Therefore, the Respondent was duty-bound to prove that the Claimant’s potential redundancy was substantively justified.
83. Further, the emerging jurisprudence in this area is that courts should not limit employers, in determining what strategic and business decisions to take and implement, within their operations. However, as stated herein, the burden rests on the employer to prove substantive justification. In this case, I find that the Respondent has failed to satiate its evidential burden.
84. Turning to the procedural aspect of the redundancy process, Section 40(1) stipulates the conditions precedent an employer must comply with prior to an employee’s termination on account of redundancy.
85. In this case, the Claimant has faulted the Respondent for not issuing the requisite notice to the labour officer under Section 40(1) (b). Indeed, the notice exhibited by the Respondent was with regards to the unionisable employees. The Claimant did not fall under the category of unionisable employees. Therefore, the notice did not cover her. To that extent, the Respondent was at fault.
86. Be that as it may, it is clear from the record that the Claimant moved the Court and obtained orders on 4<sup>th</sup> July 2018 thereby restraining the Respondent from proceeding further with the redundancy process.
87. In the circumstances, the Respondent cannot be faulted for not wholly complying with the procedural requirements under Section 40(1).
88. That said, I now turn to consider the question of discrimination.

### **Discrimination?**

89. The Claimant has cited the Respondent for discrimination on account of her pregnancy. It is the Claimant’s case that at the time she was declared redundant, she was nine months pregnant. In her view, the Respondent’s action was prompted by her condition.
90. Opposing the Claimant’s assertions, the Respondent contends that she was not the only employee who was declared redundant at the time.
91. From the record, the Claimant was expecting a child at the time she was issued with the notification that her role was to be affected by the redundancy exercise that was ongoing at the time.
92. Article 27 of *the Constitution* guarantees every person equality and freedom from discrimination. Specifically, Article 27(5) provides as follows:
  - (5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).



93. The grounds listed under Clause (4) include race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.
94. In addition to the foregoing, Section 5(3) of the *Employment Act*, prohibits discrimination of an employee or prospective employee on grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, pregnancy, marital status or HIV status.
95. Further, under Section 46(a), it is deemed as an outright unfair decision to terminate a female employee on the basis of her pregnancy, or any reason connected with her pregnancy.
96. By dint of Section 5(7), the employer bears the burden of proving the fact that the discrimination did not take place as alleged and that the discriminatory act is not based on any of the grounds specified within that section.
97. This provision was amplified by the Supreme Court in the case of *Gichuru vs Package Insurance Brokers Ltd* (Petition 36 of 2019) [2021] KESC 12 (KLR) as follows: -
- “The protection of employees against any form of discrimination at the work place is therefore a significant matter and the burden placed upon an employer to disprove the allegations of discrimination is enormous. The employer must prove that discrimination did not take place as alleged and that where there is discrimination, it was not with regard to any of the specified grounds.”
98. As was held by the Court of Appeal in the case of *Barclays Bank of Kenya Ltd & Another versus Gladys Muthoni & 20 Others* [2018] eKLR, arbitrary discrimination in the workplace is outlawed at the highest level of *the Constitution* and has always been.
99. In the case of *GMV vs Bank of Africa*, the Court in addressing the question of discrimination on account of pregnancy had this to say:
- “[68]. The Court must make it clear that there is absolutely no requirement for ladies who claim to have been discriminated against by their employers on the ground of pregnancy, to strictly prove that they were indeed, discriminated against on such ground. The starting point is Section 5(6) of the *Employment Act* 2007.....This law places the burden of proof on the employer, not the employee. This position has adequate support in Section 43 of the Act, which requires the employer to prove the reason for termination...”
100. The Court in the *GMV* case went ahead to state that “All the ladies are required to do, is establish a prima facie case, through direct evidence or statistical proof, that they have been discriminated against at employment, on account of their pregnancies. Courts have stated that the employee needs to:- Establish she belongs to a protected class; Demonstrate she qualified for the job she lost; Show she suffered adverse employment action, directly as a result of her pregnancy. She must provide prima facie proof, that other explanations by the employer are pretextual, and the real reason for termination was the pregnancy; Lastly, the employee must as a minimum, establish that there is a nexus between the adverse employment decision, and her pregnancy...”
101. Applying the criteria set out in the *GMV* case, it is factual that the Claimant was pregnant at the time she received the notice of potential redundancy. Being pregnant places a woman in a protected class hence the reason for the existence of constitutional and statutory safeguards against discrimination on account of pregnancy. A clear example is Article 27(4) of *the Constitution*, Sections 5(3) & 46 (a) of the



Employment Act, and the ILO Maternity Protection Convention Number 183 of 2000. Suffice to say, the Claimant belonged to a protected class.

102. As to whether the Claimant qualified for the job she lost, the same is not in doubt, as her intended termination was not based on her competence or capacity to perform her assigned duties. In any event, the record reveals that she rose through the ranks to hold the position of a Control Tower Planner.
103. With regards to whether the Claimant had shown that she suffered adverse employment action directly as a result of her pregnancy, the Respondent has not disputed the Claimant's assertions that at the time she was served with the notice of potential redundancy, she was close to nine months pregnant.
104. In my view, the timing of the intended termination is very questionable noting that the Claimant was issued with two notices of potential redundancies, with the second one being issued upon her prompting the Respondent that the initial one was not with respect to the position she was holding at the time. Secondly, the Respondent did not discharge its evidential burden by proving that the Claimant's position of Control Tower Planner, had been abolished and ceased to exist within its structure.
105. As stated herein, the Respondent had the right to declare the Claimant redundant. However, in the circumstances, it has failed to prove that the same was substantively justified with respect to the Claimant. To this end, I cannot help but conclude that the Claimant's intended termination was a direct result of her pregnancy. I say so because there is no other reason advanced by the Respondent to justify the Claimant's intended termination on account of redundancy.
106. From the foregoing analysis, I find that the Claimant's assertion that she was discriminated against on account of her pregnancy, has met the criteria set out in the GMV case. The Claimant was only required to establish a prima facie case and I find that she has done so.
107. On its part, the Respondent had the evidential burden under Section 5(7) of the Act to demonstrate and prove that the reasons for the Claimant's termination were non-discriminatory. This it has failed to do.
108. Further, applying the determination by the Supreme Court in the case of Gichuru vs Package Insurance Brokers Ltd (supra) to the case herein, and taking into consideration the Respondent's evidential burden under Section 5(7) of the Act, it is my finding that the Respondent did not prove that it did not discriminate against the Claimant on grounds of pregnancy.
109. Whichever way one looks at it, it would only appear that the real reason for the Claimant's termination was her pregnancy. Ultimately, I find that the Claimant was subjected to pregnancy discrimination which resulted in her being declared a candidate for termination on account of redundancy. To this extent, the Claimant's claim with respect to discrimination succeeds.

## **Reliefs**

110. As the Court has found that the Claimant was discriminated on grounds of pregnancy, she is entitled to compensation which the Court assesses at Kshs 500,000.00. In assessing the damages payable to the Claimant, the Court has had due consideration to a number of authorities. For instance, in the case of Gichuru vs Package Insurance Brokers Ltd (supra), the Supreme Court reduced the award of damages from Ksh.5,000,000 to Ksh.2,000,000. And in the case of VMK vs CUEA [2013] eKLR the learned Judge awarded the Claimant Kshs. 5,000,000 as exemplary damages for discrimination.
111. In this case, the Court notes from the record that the Claimant obtained interim orders staying the redundancy hence has continued serving as an employee of the Respondent to date. Therefore, any



damage she may have suffered as a result of the impending redundancy, was well mitigated by the fact that she remained in employment as the redundancy was put on hold.

112. Accordingly, taking into account the circumstances of this case and drawing parallels with the authorities mentioned above, in my estimation, an award of damages in the sum of Kshs 500,000.00 is appropriate.

113. With regards to the claim for constructive dismissal, the same does not lie as the Claimant is still in the Respondent's employment. The Black's Law Dictionary (10<sup>th</sup> Edition) defines constructive dismissal or discharge to mean:

“An employer's creation of working conditions that leave a particular employee or group of employees little or no choice but to resign, as by fundamentally changing the working conditions or terms of employment; an employer's course of action that, being detrimental to an employee, leaves the employee almost no option but to quit.”

114. In addressing the issue of constructive dismissal, the Court of Appeal, in its decision in Coca-Cola East & Central Africa Limited vs Maria Kagai Lugaga [2015] eKLR had this to say:

“The key element in the definition of constructive dismissal is that the employee must have been entitled to or have the right to leave without notice because of the employer's conduct. Entitled to leave has two interpretations which gives rise to the test to be applied. The first interpretation is that the employee could leave when the employer's behaviour towards him was so unreasonable that he could not be expected to stay- this is the unreasonable test. The second interpretation is that the employer's conduct is so grave that it constitutes a repudiatory breach of the contract of employment- this is the contractual test.”

115. Bearing in mind the definition of the term “constructive dismissal” and applying the determination in the Coca-Cola case, it is evident that in the case herein, the essential elements that are necessary to infer constructive dismissal, are lacking. Case in point is the fact that the Claimant is still an employee of the Respondent.

## **Orders**

116. The net sum of my consideration is that as I have found that there was no justification for the Claimant's termination by way of redundancy, the Respondent is hereby restrained from enforcing the redundancy communicated through its letters dated 31<sup>st</sup> May 2018 and 5<sup>th</sup> June 2018, against the Claimant.

117. The Respondent is further restrained from victimizing or discriminating against the Claimant.

118. The Claimant is awarded the sum of Kshs 500,000.00 being compensation for discrimination on account of pregnancy.

119. Due to the parties continuing employment relationship, there will be no orders as to costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 30<sup>TH</sup> DAY OF NOVEMBER, 2023.**

**STELLA RUTTO**

**JUDGE**

**Appearance:**

For the Claimant Mr. Okatch



For the Respondent Mr. Kahura

Court assistant Abdimalik Hussein

## **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 had 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 *Civil 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.

**STELLA RUTTO**

**JUDGE**

