



**Saisi v Geothermal Development Company Ltd (Cause 1357 of 2016)  
[2022] KEELRC 3884 (KLR) (1 September 2022) (Judgment)**

Neutral citation: [2022] KEELRC 3884 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 1357 OF 2016  
AN MWAURE, J  
SEPTEMBER 1, 2022**

**BETWEEN**

**PRAXIDIS MAMONI SAISI ..... CLAIMANT**

**AND**

**GEOHERMAL DEVELOPMENT COMPANY LTD ..... RESPONDENT**

**JUDGMENT**

1. The claimant filed a statement of claim dated July 12, 2016 and she says she was employed by the respondent as the Company Secretary. She was first employed as Chief Manager legal services on January 30, 2013.
2. Claimant says she was sent on leave pending investigations on corruption charges.
3. She says on November 17, 2015 she was charged at the Chief Magistrate's Court at Milimani on Anti-Corruption case No 20 of 2015 with three counts related to corruption and economic crimes. She was charged with 8 other colleagues.
4. She says on November 27, 2015 the Acting Managing Director CEO of the respondent gave the claimant a suspension notice in compliance to Anti-Corruption and Economic Crimes. She was to receive half pay during suspension period but otherwise would receive other benefits.
5. She says on December 16, 2016 she commenced judicial proceedings and sought to quash the decision of 1<sup>st</sup> interested then party from charging the claimant with corruption and economic crimes related charges.
6. She says meanwhile the term of the Managing Director came to an end in November 2015.
7. The High Court in Misc Application No 562 of 2015 heard the claimant's application and granted her prayers whereby the 1<sup>st</sup> interested party was ordered to direct the respondents to cease the prosecution



- of the client of charges related to economic crimes and corruption related charges and to stop prosecuting the suit against the claimant and the others in the aforesaid Chief Magistrate's case.
8. The claimant wrote a letter to the respondent on May 4, 2016 notifying him of the judgment and informing him that he would resume her duties on May 28, 2016 and requested payment of the retained emoluments. The respondent did not respond to that letter.
  9. The claimant reported back to work on May 30, 2016 and reported to the Managing Director. The Managing Director Johnstone ole Nchoe at the meeting on that day requested claimant not to resume her duties and to stay away pending constitution of the board. On May 31, 2016 the managing Director wrote to the claimant informing her that the position of her suspension had not changed.
  10. Claimant states the basis of her suspension was due to the charges against her on anti-corruption and yet the said charges were quashed by the High Court. She says the charges against her were trumped up and fictitious.
  11. She says the failure of the respondent to accept her back to her employment is unconstitutional and illegal and unofficial.
  12. The claimant says her suspension is unconstitutional against article 279(1) (2) and article 28 and 29 of the Constitution among others. Also articles 40, 41 and 47, 73(2) and 232 of the Constitution provide protection for every Kenyan by the Kenya Constitution.
  13. Section 5(3) of Employment Act also provide that there will be no discrimination against an employee. She avers that unless the respondent is restrained within the Constitution it will continue to violate the claimant's rights and so beseeches the court to vindicate protect, safeguard and uphold her constitutional and statutory rights and prays for reliefs tabulated in the claim.

### **Respondent's Reply**

14. The respondent filed a response dated September 22, 2016. They confirm the claimant was General Manager of the respondent in legal affairs and Company Secretary and her contract as dated on August 12, 2009.
15. She says on November 17, 2015 the claimant was charged in the Chief Magistrates Court Corruption Case No 20 of 2015 and the decision to charge the claimant with other respondent's employees was by Ethics and Anti-Corruption Commission and Director of Public Prosecutions and not the respondent.
16. By a letter dated November 27, 2015 the claimant was issued with a notice of suspension and was to be on half salary on account of anti-corruption and economic crimes. She was not paid for airtime as the same is only paid to staff who are on duty.
17. The case against the claimant on anti-corruption charges was quashed and the respondent's Managing Director asked claimant to keep away from work pending further investigations which the respondent instigated.
18. The investigations were not related to anti-corruption charges but was to do with performance issues. The claimant was issued with another suspension notice dated July 27, 2016 to allow investigations.
19. On July 13, 2016 the court directed the claimant not to be suspended and was to be reinstated to a full salary and full benefits. She was reinstated to her full salary on July 28, 2016 and the same was confirmed in writing. On September 14, 2016 respondent asked claimant to report to work immediately but she said she would be reporting on September 30, 2016.



20. While investigations were going on the respondent decided to restructure their organization and justification for the restructuring was explained.
21. There was a need to have a vibrant leadership team to enable growth to meet the market challenges in the environment. The respondent says the restructuring was justified and so was the re organization.
22. The respondent says the claimant did not prove the restructuring and the redundancy was unlawful and the court should not interfere with employer's legitimate and lawful human resource functions when no basis of interference have been established.
23. The respondent says the alleged violation of constitutional rights is unsubstituted and are not particularized. The said alleged violations under article 49 of the [Constitution](#) are denied.
24. The claimant is therefore not entitled to the reliefs sought and prays the claimant's cause be dismissed with costs.

### **Claimant's Submissions**

25. The claimant submits that the remedy for an award of damages or compensation for violation of the constitutional rights and fundamental freedoms is constitutionally anchored and depends not on other remedies granted by the court. She states that article 23(3) (d) of the [Constitution of Kenya, 2010](#) provides that any proceedings brought under article 22, of the [Constitution](#) a court may grant appropriate relief including an order for compensation.
26. She adds that a claim for compensation/damages for violation of the constitutional rights and fundamental freedoms is based on strict liability. Having pleaded the violations of the specific rights and fundamental freedoms in her amended statement of claim and having tendered evidence in support thereof through her testimony and documents and the respondent by consent adopted as the order of this court she avers the violations were proved and admitted by the respondent and she therefore states she is entitled to compensation/damages.
27. Furthermore, she relies on the decisions of the court in [Gichuru v Package Insurance Brokers Ltd](#) (Petition 36 of 2019) [2021] KESC 12 (KLR), [Ol Pejeta Ranching Limited v David Wanjau Muboro](#) [2017] eKLR and [Pandya Memorial Hospital v Geta Joshi](#) [2020] eKLR to support her position that she is entitled to damages of Kshs 4,176,000 for violation of her right to equality before the law, equal protection and benefits of the law (section 62(3) of the [Anti-Corruption and Economic Crimes Act, 2003](#)).
28. It is her submission that human dignity is the essence of all rights and liberties created by the [Constitution of Kenya](#). The respondent subjected her to undignified life where she was given a tag of a corrupt officer and further withholding her emoluments despite existence of the court order and quashing of the anti-corruption charges by the High Court.
29. Article 47 of the [Constitution](#) and the [Fair Administrative Action Act, 2015](#) were violated as her right to fair administrative action guaranteed by the quoted laws was infringed on. Additionally, she states her right to fair labour practice resident under article 41 of the [Constitution](#) and freedom not to be subjected to torture under article 29 were disregarded. She added that that declaration of redundancy was not as per section 40 of the [Employment Act, 2007](#) and the respondent's Human Resource manual. On this matter she relied on the court's decision in the case of [Kenya Union of domestic Hotels Educational Institutions, Hospitals and Allied Workers \(KUDHEIHA\) v Nairobi Hospital](#) [2022] eKLR.



## Respondent's Submissions

30. The respondent submits that it did not concede to the allegations that it had violated any of the claimant's constitutional rights by recording the consent. The settlement was intended to resolve the matter in full as it is an award contemplated under article 159 of *the Constitution* and section 15 of the *Employment and Labour Relations Court Act* and section 49 of the *Employment Act*.
31. Quoting the case of *Edward Akongo Oyugi & 2 others v Attorney General* [2019] eKLR the respondent states that burden of proof lies with the claimant. It adds that the claimant has failed to discharge this burden to the required standard. She has failed to prove with the requisite degree of precision the manner in which her rights were violated. On the principle of precision the respondent relied on the cases of *Mumo Matemu v Trusted Society of Human Rights Alliance* [2013] eKLR wherein the court relied on the case of *Anarita Karimi Njeru v Attorney General* [1979] KLR 154.
32. The respondent states that the claimant has not tendered any evidence as proof that the respondent caused her to suffer psychological torture. It contends that it has nothing to do with anti-corruption case and that any psychological harm during the pendency of the anti-corruption case should not be attributed to the respondent who was obligated statutorily to suspend the claimant for disciplinary issues.
33. The claim that the claimant was discriminated against is just mere speculation. The respondent says there is no evidence to support such allegations. Consequently, the reliefs sought by the claimant should not be granted. Additionally, the circumstances in the *Pandya Memorial Hospital v Geeta Joshi* [2020] eKLR cannot be compared to the claimant's case since she has numerous multiple opportunities to earn a living and her compensation cannot be awarded in the same range. In the event the court finds her right to equality was breached an award of Kshs 50,000 would be sufficient.
34. On human dignity, the respondent submits that the initial suspension in November 2015 was a statutory obligation and was not an act of malice by the respondent. It was not a flagrant breach of the court order with respect to the anti-corruption case. However, in the event the court finds that her right to human dignity was violated Kshs 50,000 would suffice as compensation.
35. Furthermore, any claim that the redundancy process was irregular is not established and any remedy for alleged breach of her right to fair practices do not therefore lie. The respondent submits that claimant was informed of the respondent's action at every step before mutual separation. There was no obligation on the respondent to seek representations or to hear the claimant while it was conducting its investigations. It states that the claims of unfair administrative action are without merit.

## Decision

36. The claimant was charged with others for charges related to Anti corruption and economic crimes. In the meantime she was suspended by the respondent and was placed on half salary but would receive other benefits. The claimant commenced a suit for judicial review on December 16, 2016 and she got orders thereafter for *certiorari* to the effect that the respondent was not to proceed with the charges against the claimant for anti-corruption charges in Anti-Corruption Case No 20 of 2015.
37. The claimant notified the respondent of the judgment and she asked if she could return back to her employment. The Managing Director of the respondent wrote to the claimant on May 31, 2016 and informed her the respondent's position on suspension had not changed. In other words she was still under suspension. This was despite the fact that she had been suspended because of the anti-corruption charges which had now been nullified in the judicial review.



38. The respondent then placed the claimant on further suspension pending investigations that arose from her performance of her duties according to the respondent. This was in order to ascertain if disciplinary action would be taken against her or not. She was placed on suspension again on July 27, 2016 in order to allow investigations. Meanwhile on August 24, 2016 her position was advertised and applications were invited to be received not later than September 12, 2016.
39. The respondent was ordered by the court to reinstate the claimant within 14 days of service of the order and the respondent avers he reinstated her on July 28, 2016 and paid her dues as ordered by the court.
40. At the same time the court notes that the respondent still wrote a letter of further suspension of the claimant to investigate further matters related to performance of duty which had arisen sometime before the claimant was charged with anti-corruption charges. The further suspension letter was issued on July 27, 2016.
41. The suspension letter is devoid of the reason pertaining to the investigation referred thereto. This failure to give reason for investigation is in contravention of the provision of section 45 of the Employment Act which makes it mandatory for an employer to give a valid reason to terminate the employee. The exact provision of the aforesaid section 45 is as:-

45.

- (1) No employer shall terminate the employment of an employee unfairly.
- (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 employee's 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.
- (3) An employee who has been continuously employed by his employer for a period not less than thirteen months immediately before the date of termination shall have the right to complain that he has been unfairly terminated.
- (4) A termination of employment shall be unfair for the purposes of this part where –
  - (a) the termination is for one of the reasons specified in section 46; or
  - (b) it is found out that in all the circumstances of the case, the employer did not act in accordance with justice and equity in terminating the employment of the employee .
- (5) In deciding whether it was just and equitable for an employer to terminate the employment of an employee, for the purposes of this section, a labour officer, or the Industrial Court shall consider –
  - (a) the procedure adopted by the employer in reaching the decision to dismiss the employee, the communication of that decision to the employee and the handling of any appeal against the decision;



- (b) the conduct and capability of the employee up to the date of termination;
- (c) the extent to which the employer has complied with any statutory requirements connected with the termination, including the issuing of a certificate under section 51 and the procedural requirements set out in section 41;
- (d) the previous practice of the employer in dealing with the type of circumstances which led to the termination; and
- (e) the existence of any previous warning letters issued to the employee.

42. The respondent in the court's opinion was bent on terminating the claimant's employment. When it did not give substantial reason for investigations which they informed her could lead to disciplinary proceedings they now reverted to attempts to restructure the claimant's position.

43. Once again the respondent failed to comply with section 40 of the Employment Act which provides the process to be followed by the employer who desires to declare positions redundant. Section 40 of Employment Act provides:-

- (1) An employer shall not terminate 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.

44. The court finds no evidence that the respondent attempted to follow the above provisions.

45. Finally the respondent gave claimant a notice to terminate her employment on account of redundancy by their letter dated September 21, 2016. The respondent did not table any evidence that they followed



the entire process as provided in section 40 of the Employment Act. In the case of Jane Khalechi v Oxford University Press EA Limited [2013] eKLR the court held that:

“Section 40 of the Employment Act give the conditions precedent before one is declared redundant. These conditions outlined in the law are mandatory and not left to the choice of the employer. Redundancies affect worker’s livelihood and where this must be done by an employer, the same must be put into consideration.”

46. Also in the case of Kenya Airways limited v Aviation & Allied Workers Union Kenya & 3 others [2014] eKLR the court held that redundancy should be substantially justified. This means it must fall within the definition of section 2 of the Employment Act which defines redundancy as

“loss of employment, occupation, job or career by involuntary means through no fault of the employee involving termination of employment by the employer where the service of an employee are superfluous and practice commonly known as abolition of office, job or occupation and loss of employment”.

The court held this could be caused by economic downturn brought about by factors beyond control of the employer which leaves the employer with no option but to take initiative the consequence of which will be inevitable loss of employment.

47. The court is not satisfied that the respondent tender evidence on their economic down turn.
48. The court also considered procedural fairness which includes giving notice and notice should set out reason for intended redundancy and consultation done and labour officer in charge of the area where employee operates should be involved. The employee should then be notified of the decision to declare them redundant.
49. The redundancy also requires selection criteria of the staff to be declared redundant to be systematic and fair across board and so if issuance of notice is not complied with and selection criteria then the court must find the procedural threshold has not been met.
50. In this case the court finds the respondent did not meet the threshold required to justify declaring the position of the claimant redundant considering the mandatory provisions laid down in section 40 of the Employment Act.
51. In conclusion the court rules the decision taken by the respondent to declare the claimant redundant was procedurally unfair and the same was furthermore not based on any reasonable grounds and so was substantially unfair. Consequently judgment is entered in favour of the claimant.
52. The parties by their consent dated December 13, 2016 marked as settled in all prayers except prayers b and m of the amended statement of claim dated September 6, 2016. The court therefore hereby awards 4 months equivalent of the claimant’s salary as per the pay slip as per termination as full settlement for the violations in paragraphs b and m of the amended memorandum of claim which is shown to be Kshs 522,000/- per month. The total award is therefore Kshs 2,088,000/-.
53. Costs are awarded to the claimant. Interest is also awarded from date of judgment till full payment.
- Orders accordingly.

**DELIVERED, DATED AND SIGNED IN NAIROBI THIS 1<sup>ST</sup> DAY OF SEPTEMBER 2022.**

**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 March 15, 2020 and subsequent directions of April 21, 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 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.

A signed copy will be availed to each party upon payment of court fees.

**ANNA NGIBUINI MWAURE**

**JUDGE**

