



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAKURU

ELRC PETITION NO. 009 OF 2019

IN THE MATTER OF: ARTICLE 22 (1) OF THE CONSTITUTION OF KENYA

IN THE MATTER OF: IN THE MATTER OF ALLEGED CONTRAVENTION OF

RIGHTS OR FUNDAMENTAL FREEDOMS UNDER

ARTICLE 27 (5), 35 (1), 41 (1) & 47 OF THE CONSTITUTION OF KENYA

BETWEEN

MILLICENT NYAMBURA NJOROGE.....PETITIONER

-VERSUS-

FLAMINGO HORTICULTURE (K) LIMITED.....RESPONDENT

JUDGMENT

1. The petitioner filed this petition dated 24<sup>th</sup> April, 2019 on 25<sup>th</sup> April, 2019 through the firm of Ms. Kinyua Mbaabu & company advocates. The petition was based on the annexed supporting affidavit of **Millicent Nyambura Njoroge**, sworn on 18<sup>th</sup> June, 2019 and a further affidavit sworn on 20<sup>th</sup> September, 2019. The petitioner seeks the following orders:

a. A declaration that the Petitioner employment service with the Respondent was terminated wrongfully, illegally, maliciously and unfairly.

b. A declaration that the Petitioner termination on account of Pregnancy was unconstitutional and amounted to discrimination and violation of the Petitioners Constitutional rights under Article 27 (5) and 41 (1).

c. A declaration that the Petitioner termination was in violation of her rights under Section 5 and 40 of the Employment Act.  
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d. An order that the Respondent compensates the Petitioner as follows:

i. One month unpaid maternity leave at Kshs. 12.000.

ii. Twelve months salary in compensation for wrongful/ illegal termination at Kshs. 144,000 /-

iii. Thirty days payment in lieu of leave days earned at Kshs. 12.000 .

iv. General Damages for discrimination on account of pregnancy and subjecting the petitioner to servitude and mental torture at Kshs. 3,000.000/-

e. Cost of this Petition.

f. Interest on D and E.

**g. Any other or further relief this Honourable court may deem fit and just to grant.**

2. The respondent opposed the petition by filing a replying Affidavit on 26<sup>th</sup> June, 2019, sworn on 18<sup>th</sup> June, 2019 by Tabitha Ndunge, the Human Resource Manager of the Respondent Naivasha Region.

**PETITIONER'S CASE.**

3. The petitioner avers that she was employed by Finlay's Horticultural Kenya Limited in the year 2012 at the company security department. The company later rebranded to Flamingo Horticultural Kenya Limited on 23<sup>rd</sup> November, 2015 and annexed the letter of 25<sup>th</sup> January 2016 marked as annexure **MNN-1**.

4. After rebranding, the Respondent retained the Petitioner at the same position and benefits and confirmed the same by a letter of 25<sup>th</sup> January, 2016.

5. The Petitioner avers that she went on maternity leave on 18<sup>th</sup> May, 2016 and was to report back to work on 15<sup>th</sup> August, 2016. Subsequently, the Petitioner's leave was approved and she was to resume duty on 16<sup>th</sup> August, 2016. She attached a copy of letter of leave approval marked as annexure **MNN-2**.

6. That on 27<sup>th</sup> July, 2016, while the Petitioner was still on maternity leave, she was called and issued with a Termination letter on Account of Redundancy that was to take effect immediately and annexed the letter of termination marked as annexure **MNN-3**.

7. The petitioner avers that, the Respondent indicated in the above letter that the Petitioner will be paid as follows;

- a. Salary from 1<sup>st</sup> July, 2016 to 27<sup>th</sup> July, 2016 (Maternity was to end on 15<sup>th</sup> August, 2016).
- b. One month pay in lieu of notice.
- c. 21 days' salary pay for every completed year of service.
- d. Unutilized leave earned.
- e. One-way travel allowance.
- f. Any overtime due.

8. The Petitioner states that she was directed to clear with the Respondent on the same day and on 31<sup>st</sup> July, 2016 her final dues reflected in her account. She annexed her pay slip marked as annexure **MNN-4**.

9. The petitioner contends however that she was not paid her earned 30 days leave days together with her maternity leave.

10. She avers that the Respondent has continued with his business and hired people in the same departments to undertake the duties of the Petitioner.

11. Accordingly, the petitioner alleges that the actions of the petitioner were illegal, unlawful and discriminatory based on her pregnancy and gave the particular of the discrimination as follows:-

- a. The Petitioner had been in the continuous employment of the Respondent for 5 years without a single case of indiscipline, insubordination or lack of skills to continue with her position.
- b. The Respondent terminated the Petitioner while on her Maternity leave which was very inhumane and degradable treatment.
- c. The Petitioner was not issued with any notice or reason for redundancy and the Respondent did not follow the procedure provided in law before declaring the position of the Petitioner redundant.
- d. The Respondent did not pay the leave due to the Petitioner.
- e. The Respondent went ahead to employ more people with equal or lesser qualifications with the Petitioner in the same position that was declared redundant.
- f. The Respondent discriminated the Petitioner and the facts before, during and after the termination of the employment of the Petitioner on grounds of redundancy only leads to one conclusion that she was only dismissed because of her pregnancy and that is evident in that the Respondent did not pay her full pay during her maternity leave and also her one month leave that the Petitioner had earned.

12. The Petitioner avers that the Respondent on the account of discrimination elaborated above, practiced unfair labour practices against her

contrary to the procedures laid out in the constitution and the employment Act.

## **RESPONDENTS CASE.**

13. The Respondent's affiant, confirmed that the petitioner was their employee since 21<sup>st</sup> January, 2012, However, she contended that the petitioner was earning a gross salary of Kshs. 11,916/- and not Kshs. 12,000/- pleaded by the petitioner. She produced a letter of Appointment and confirmation of Appointment dated 20<sup>th</sup> January, 2012 and 21<sup>st</sup> April, 2012 respectively both marked as Exhibit **FHL-1**.

14. She avers that Finlay's Horticultural (k) ltd was bought by an affiliate company one Sun European partners, LLP and the name duly changed to Flamingo Horticultural (k) limited engaging largely in flower farming. She indicated that the rebranding and change of name was communicate to the petitioner on 25<sup>th</sup> January, 2016 and annexed the letter of 25<sup>th</sup> January, 2016 marked as exhibit **FHL-2**.

15. The Respondent avers that, it was a term of the Petitioner's employment that the Petitioner would initially be based at the Respondent's Kingfisher Farm but may be deployed to work in other areas at the discretion of the Respondent. Consequently, the Petitioner was transferred from the Respondent's Kingfisher Farm to the Respondent's Flamingo Farm on 21st December 2013 and back to Kingfisher Farm on 21st September 2014 in the same position as Security Guardette. At the time of termination, the Petitioner was working at the Kingfisher farm and annexed letters of transfer dated 19<sup>th</sup> December, 2013 and 22<sup>nd</sup> September, 2014 both marked as exhibit FHL- 3.

16. The Respondents alleges that the Petitioner was involved in several incidents of indiscipline, insubordination or lack of skills and detailed the same as follows:

- a. The Petitioner had an indiscipline incident on 4<sup>th</sup> March 2015 at the Kingfisher farm where she was rude and acted menacingly to a fellow employee who was her supervisor. This incident was witnessed by other employees.
- b. On 14<sup>th</sup> March 2015, the Petitioner had another incident which constituted a breach of her employment terms and code of conduct for which she received a warning. The incident was that the Petitioner had left her place of assignment without communicating to her supervisor.
- c. On 29<sup>th</sup> March 2015, the Petitioner absented herself from work without permission or justifiable cause and was given a warning.
- d. On 3<sup>rd</sup> April, 2015, the Petitioner was insubordinate and disrespectful to her shift supervisor and was given a warning. In this they attached disciplinary meeting minutes together with the petitioner's statement all marked as annexure **FHL-4**.

17. The Respondent deponent avers that it is an equal opportunities employer and a law abiding company and does not engage in prohibited employment practices. Accordingly, she avers that as decreed by the law, the Petitioner proceeded on her maternity leave with full pay on 18<sup>th</sup> May, 2016 as provided for by law.

18. The Respondent states that it is fully aware and has always implemented the legal requirement that on expiry of a female employee's maternity leave, the female employee has the right to return to the work which she held immediately prior to her maternity leave or to a reasonably suitable job on terms and conditions not less favorable than those which would have applied had she not been on maternity leave.

19. She further stated that, an employer is permitted by the Employment Act to terminate a contract of service on account of redundancy based on operational requirements of the employer. Further that it is not discriminatory, and is not prohibited by law, for an employer to terminate a female employee's employment on account of redundancy at any time if necessitated by the circumstances then prevailing even if at the time the female employee is yet to resume from maternity leave.

20. She avers that, the retrenchment of the Petitioner on 27<sup>th</sup> July, 2016 had absolutely no connection to the Petitioner's pregnancy but was brought about solely by operational requirements of the Respondent. Infact 264 other male and female employees were also declared redundant at the same time as the Petitioner.

21. She contends that, the Respondent applied objective criteria in implementing the redundancy and in the case of the Petitioner the criteria were on the basis of "**last in first out**" which is well established and accepted as a fair labour practice. The Petitioner was thus not singled out for redundancy because of her pregnancy and her allegations to the contrary are false and attached list of all 265 employees who were rendered redundant marked as Exhibit **FHL-5**.

22. It was further stated that, the decision to declare redundant a number of Respondent's employees was necessitated by several factors including an escalation of operating costs. The Respondent's decision to lay off employees to remain viable was communicated to the Labour Officer, Naivasha on **28<sup>th</sup> June, 2016**, one month before termination of Petitioner's employment as is required by law and attached the same marked as exhibit **FHL-6**.

23. The Respondent avers that, it informed the Labour Officer in a transparent manner that the restructuring and redundancy process would be conducted on a criterion that was fair in full compliance with the labour laws and that each employee declared redundant would be paid their full terminal dues which in fact were paid.

24. Further that, as admitted by the Petitioner, the Petitioner was not a member of a Trade Union and therefore there was no obligation in law to notify any trade union.

25. It is stated that upon the petitioner's redundancy and clearance, the Petitioner was paid all her terminal benefits consisting of severance pay, notice pay in lieu, leave pay in lieu, travelling allowance, house allowance and salary from 18<sup>th</sup> July 2016 to 27<sup>th</sup> July 2016. Subsequently, the Petitioner accepted payment of her terminal dues of Kshs.39,090 in full and final settlement and discharge of all dues owed to her by the Respondent and further declared, without compulsion, that she had no further claims against the Respondent. In this they attached the termination letter and discharge form marked as Exhibit **FHL- 7 &8**.

26. The Respondent avers that it gave the petitioner certificate of service immediately following the redundancy and attached the certificate of service marked as Exhibit **FHL-9**.

27. The Respondent states that during the period starting January 2016 to 27 July 2016, the Petitioner took out and utilized a total of 24 annual leave days which were fully paid. These were on 24 February, 2016; on 4 to 6<sup>th</sup> February 2016; and on 1<sup>st</sup> to 20<sup>th</sup> June 2016. The Petitioner's claim for 30 days' payment in lieu of leave days earned therefore lacks merit and should be dismissed. However, the Respondent's admitted not paying the petitioner her maternity leave from 27<sup>th</sup> July, 2016 to 15<sup>th</sup> August, 2016 all adding up to 20 days and avers that the same has been rectified. On this they attached leave application forms marked as **Exhibit FHL-10**.

28. The Respondent denied hiring new people to fill in the position that the petitioner occupied and alleged that when the Petitioner was declared redundant, the position she occupied of Security Guardette was closed.

29. The Respondent avers that its actions were lawful, legal and constitutional and based on a fair and sound criteria. Further that, the Petitioner is not entitled to twelve months' salary for alleged wrongful/illegal termination and general damages for alleged discrimination as the redundancy was conducted lawfully without any discrimination towards the Petitioner.

### **HEARING.**

30. The petition herein proceeded for *viva voce* hearing on 2<sup>nd</sup> February, 2021.

31. The petitioner was sworn in and testified that she was employed by the Respondent in the year 2012 and her services were terminated in the year 2016. She adopted her supporting affidavit dated 24<sup>th</sup> April, 2019 and document filed therein as her testimony in Chief and prayed that the petition be allowed as prayed.

32. On cross- examination, the petitioner testified that she filed a further affidavit in response to the respondents Replying Affidavit sworn on 20<sup>th</sup> September, 2019.

33. She testified that she was discriminated against on the ground of pregnancy as the Respondent communicated the redundancy when she was on maternity leave. she avers that her termination was targeted.

34. She testified that she was among the last person to be employed but contends that there are people who were employed after her who are still in employment of the Respondent as such the formula used in declaring her position redundant was unfair. Infact she avers that 10 other employees, 3 of which are security cadets, were deployed to Maula company, a company which is part of kingfisher company.

35. The Petitioner testified that, she has never had any disciplinary issue when at the respondent's employ save for one disciplinary issue of absenteeism which came about as a result of shift change and the supervisor failed to communicate.

36. She testified that she never took her leave for the year 2016 and objected to the signature in the form produced indicating that she had filled for leave. Further that on 23<sup>rd</sup> February, 2016 she took 3 days off being compassionate leave. on 1<sup>st</sup> to 20<sup>th</sup> June the petitioner testified that she applied for leave but did not take it and only took maternity leave which commenced on 18<sup>th</sup> May, 2016. She then closed her case.

37. On the same day, the Respondent's case proceeded for hearing and called one witness, **Tabitha Ndunge**. She testified that she is the Human resource manager at the Respondent Naivasha region and adopted her replying affidavit sworn on 19<sup>th</sup> June, 2019 together with all annexed documents as her testimony in chief.

38. She testified that, at kingfisher farm, 4 cadets were declared redundant while at Maula farm all guards were declared redundant.

39. It is her testimony that the criteria used in declaring the petitioner herein redundant was not based on her pregnancy. Further that the company paid the petitioner all her terminal dues owing and due.

40. She agreed that the petitioner was paid till 31<sup>st</sup> July 2016 and the 15 days of August that the petitioner was on leave was not paid but proceeded to urge this Court to dismiss the petition.

41. On cross examination by **Mbaabu Advocate**, the Respondent's witness testified that the criteria used in declaring the petitioner redundant was not discriminatory as alleged further that no evidence has been adduced before this Court that other security guards were employed after the redundancy.

42. She confirmed that the petitioner was to return to work on 15<sup>th</sup> August 2016 and due to the redundancy her benefits were paid in advance. The respondent closed its case.

43. The parties filed submission on the petition with the petitioner filing hers on **16<sup>th</sup> February, 2021** and the Respondent filed theirs on **3<sup>rd</sup> March, 2021**.

#### **PETITIONER'S SUBMISSIONS**

44. The petitioner submitted on three main issues; **whether the termination was unlawful and illegal, whether the termination was discriminatory based on the petitioner's pregnancy and whether damages will be adequate compensation.**

45. **On the first issue**, counsel submitted that the termination was unlawful and illegal in that the procedure followed in declaring the petitioner redundant was not proper. He stated that in instances like this where an employee is declared redundant and the said employee is not a member of a trade union then Section 40 of the Employment Act mandates an employer to issue a notice in writing to the affected employee. He cited the case of **Thomas La rue –versus David opondo omutelema[2013] eklr.**

46. Counsel submitted that the petitioner was not given notice as required under section 40 of the Employment Act. Further that the effect of not giving notice to an employee limited and denied the employee chances for consultations on justifiability of the intended redundancy and a chance for the employee to mitigate the effects of termination like finding a new employment as stated by Maraga J. A (as he then was) in the Court of appeal case of **Kenya Airways limited –vesus- Allied workers union of kenya & 3 othersw[ 2014] eklr.**

47. Counsel took issue with the criteria used by the respondent in selecting the persons who were declared redundant. He submitted that the respondent failed to demonstrate before this court the selection criterion used and whether the same was structured and comparatively base as held in the case of **Kenya Airways limited –vesus- Allied workers union of kenya & 3 othersw[ 2014] eklr.(Supra)**

48. **On the second issue** of whether the termination of the petitioner was discriminatory based on her pregnancy. It was submitted that the petitioner was discriminated upon when a redundancy letter was send to her on 27<sup>th</sup> July 2016 when she was still on maternity leave. Further that the said letter indicated that the termination was to take effect immediately without regard to the fact that the petitioner was entitled to 3 months maternity leave which the law under **section 29** of the Employment Act provides that a female employee is entitled to 3 months paid leave and upon completion the said employee shall have a right to return to the job which she held or in the alternative to a favorable job with terms not less favorable than those which would have applied had she not been on maternity leave.

49. Counsel argued that there is no requirement for a lady to strictly proof allegation of being discriminated based on her pregnancy. He cited the case of **GMV –Versus- Bank of Africa Kenya Limited [2013] eklr where** court held;

**“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.**

50. Counsel juxtaposed the said condition to the petitioner case and submitted that the petitioner is a female employee who is protected by several statues. That she qualified for the said job as she has been in employment from 2012 to 2016 as a competent employee. Further that the petitioner had been informed on 25<sup>th</sup> January, 2016 about the company rebranding and that the respondent confirmed that the petitioner was to maintain her position. Counsel argues that, it was until the petitioner proceeded for leave that her service were terminated and further that the respondent has hired new employees to replace her when they had claimed redundancy.

51. It is on these premise that counsel submitted that the petitioner was therefore discriminated upon and urged this Court to find as such.

52. **On the issue of damages payable to the petitioner.** Counsel submitted that the fact that the petitioner signed a discharge voucher absolving the respondent from any claim has no basis in law as was held in **Thomas La rue –versus David opondo omutelema [2013] eklr(supra)** where the Court held that;-

**“...We would agree with the trial court that a discharge voucher *per se* cannot absolve an employer from statutory obligation and that it cannot preclude the Industrial Court from enquiring into the fairness of a termination.”**

53. In conclusion, counsel submitted that the termination of the petitioner service on purported redundancy was not done in accordance with laid down procedure and law as such urged this Court to find that the termination was unlawful and grant the prayers sought in the petition.

#### **RESPONDENT'S SUBMISSIONS.**

54. The respondent submitted on two main issues; **whether the termination of the petitioner on account of redundancy was discriminative merely because it was done during her maternity leave and what is the appropriate remedy for failure to issue notices to the petitioner under section 40(1)(c) of the Employment Act.**

55. Counsel submitted that discrimination was defined in the case of **Rose Wangui Mambo & 2 others –versus- Limuru country club & 17 others [2014] eklr** where the court relied on the case of **Peter K. Waweru v Republic [2006]eKLR** and defined discrimination as follows:

**“...Discrimination means affording different treatment to different persons attributable wholly or mainly to their descriptions by...sex whereby persons of one such description are subjected to...restrictions to which persons of another description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description...Discrimination also means unfair treatment or denial of normal privileges to persons because of their race, age, sex...a failure to treat all persons equally where no reasonable distinction can be found between those favoured and those not favoured”**

56. He submitted that the case of **GMV –Versus- Bank of Africa Kenya Limited [2013] eklr** (supra) established the criteria used in establishing discrimination and contends that the petitioner has not satisfied any of the conditions therein in fact he argued that the petitioner has not established a prima facie case as envisaged in the case of **Mrao Ltd –versus- first Africn Bank of eknya Limited & 2 others Civil Appeal No. 39 of 2002.**

57. He argued that the petitioner has not tendered any evidence that showed that indeed she was treated differently based on her pregnancy from the other 265 employees who were equally rendered redundant. Counsel pointed this Court to the respondent letters of **28<sup>th</sup> June, 2016** and **27<sup>th</sup> July, 2016** addressed to the District Labour Office produced as **Exhibit 6 and 7** respectively, and submitted that the petitioner has not pleaded, nor denied that the redundancy exercise that led to the termination of her employment and that of 264 others was not impelled by reasons given therein of uncontrollable cost factors that escalated the operation costs of the respondent and the need to manage the said costs for the respondent to remain afloat.

58. He this submitted that since the said reason were not challenged the petitioner cannot raise the same in submission stage. He stated that parties are bound by their pleadings and the court can only award that which parties pleaded and proved. He cited the Court of Appeal case of **David Sironga Ole Tukai –versus- Francis Arap Muge 2 others [2014] eklr.** Where the learned Judges held that;

**“It is well established in our jurisdiction that the court will not grant a remedy, which has not been applied for, and that it will not determine issues, which the parties have not pleaded. In an adversarial system such as ours, parties to litigation are the ones who set the agenda, and subject to rules of pleadings, each party is left to formulate its own case in its own way. And it is for the purpose of certainty and finality that each party is bound by its own pleadings. For this reason, a party cannot be allowed to raise a different case from that which it has pleaded without due amendment being made. That way, none of the parties is taken by surprise at the trial as each knows the other’s case is as pleaded. The purpose of the rules of pleading is also to ensure that parties define succinctly the issues so as to guide the testimony required on either side with a view to expedite the litigation through diminution of delay and expense.”**

59. Counsel submitted that the letter of 28<sup>th</sup> June 2016 addressed to the Labour officer contained the reasons of redundancy which stated that;

**“Flamingo operates in a very competitive environment by an array of variables and uncontrollable costs factors. Margins are low or are zero and we must manage our cost base and continually strive for stronger sales in order that we remain viable and competitive.**

**Despite these actions and as part of our commitment to ensure that our organization remains viable in the future, we are forced to make the difficult decision to restructure various operations within the business.”**

According to the respondent, the above reasons were equally contained in the petitioner’s termination letter dated 27<sup>th</sup> July, 2016.

60. He argued that parties are bound by their pleadings, and that since the above reasons for retrenchment was not rebutted by the petitioner this Court ought to proceed and affirm that the redundancy process of the 265 employees including the petitioner was lawfully conducted.

61. Counsel submitted that amongst the employees laid off were both male and female persons’ security guards and guardettes, general workers, laundry operatives, electricians, field controllers, tractor drivers, sprayers, tailor to mention some. Further that among the security guards laid off at the petitioners’ station (Kingfisher farm) were three female guards Rose Maende, Carolyne Barasa and Carolyne Adamba who were all employed earlier than the petitioner herein as illustrated in **Exhibit 5** of the respondents list of documents.

62. It was argued that the respondent considered seniority in time of the employee as held in the case of **Kenya Airways Ltd –versus- Aviation & Allied workers union Kenya & 3 others [2014]eklr.** Where Maraga J. A as he then was held that;-

**“The “seniority in time” in Section 40(1)(c) of the Employment Act and the “length of service” in Article 15 of the above ILO Recommendation No. 119-Terminationof Employment Recommendation, 1963, in my view, embrace the ILO principle of “last-in-first-out” and is among the criteria to be considered. It cannot therefore be an alien inapplicable principle as counsel for the appellants contended.”**

63. On the second issue of what is the appropriate remedy for failure to issue notices to the petitioner under section 40(1)(c) of the Employment Act. It was submitted that the Respondent issued only one notice to the labour office Naivasha region but inadvertently failed to copy the said notice to the petitioner. He however contends that the failure to issue the said notice to the employee had been mitigated under section 40(1)(f) of the employment Act where the law provides that the employee be paid one-month salary in lieu of Notice which respondent did.

64. Counsel buttressed his argument by citing the case of **Mara Ison technologies Kenya Limited –versus- Muriel Ogoudjobi [ 2019] eklr** where the Court of Appeal judges held that;-

**“We do not think that the respondent was entitled to claim for notice under section 40(1) (a) and again claim the same under section 40(1) (f) of the Employment Act. Section 40(1) (a) of the said Act requires an employer who declares an employee redundant to give 1-month notice of such intention to the Union and to the labour officer of the relevant area. Section 40 (1)(f) of the said Act requires that an employer who declares an employee redundant must give to the employee 1 month’s notice or one month’s wages in lieu of notice. The respondent made claims under both sections 40 (1) (a) and 40 (1) (f).”**

65. In addition, counsel cited the Court of Appeal case of **Africa Nazarene University –versus- David Mutevu & 103 Others [2017] eklr**. Where the judges held that;

**“The respondents in this matter were not unionised and therefore subsection (b) applied to them. As stated earlier, the trial court was of the view that after the issuance of the notice under subsection (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.”**

66. Accordingly, its submitted that having paid the petitioner one month’s salary in lieu of notice, the Respondent complied with section 40(1) (b) as read with section 40(1)(f) of the Employment Act.

67. In conclusion, the Respondent urged this Court to dismiss the petition herein with costs for lacking merit.

68. I have examined the evidence and the submissions of the parties herein. The issues for this court’s determination are as follows;-

**a. Whether the petitioner was unfairly declared.**

**b. Whether the respondent breached the petitioner’s constitutional rights by declaring her redundant while serving on her maternity leave.**

**c. Whether the petitioner is entitled to remedies sought.**

69. On the first issue, the petitioner has submitted that she was unfairly declared redundant as she was not issued with any notice before the termination. She also submitted that she was on maternity leave when she was terminated.

70. In order to determine whether the termination was unfair or not, I refer to Section 40 (1) of the Employment Act 2007 which provides as follows;

#### **40. Termination on account of redundancy**

**(1) 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.

71. The respondent submitted that they followed the procedure provided under the law. The petitioner indicated that the law was not followed.

72. Indeed for the evidence on record the redundancy was effected vide a letter dated 27/7/2016 and the redundancy was effected the ..... date of 27/7/2016. This explicitly shows that no notice was given to the petitioner before the termination.

73. To counter this preposition, the respondent have submitted that they paid the petitioner salary in lieu of notice.

74. That is indeed true that the petitioner was paid salary in lieu of notice however J.A. Maraga (as he then was) in Kenya Airways Ltd VS Aviation and Allied Workers Union Kenya & 3 others (2014) eKLR explained reasons why notice is important and opined as follows;

**“46.... My understanding of this provision is that when an employer contemplates redundancy, he should first give a general notice of that intention to the employees likely to be affected or their union. It is that notice that will elicit consultation between the parties and I will show that consultation is imperative, on the justifiability of that intention and the mode of its implementation where it is found justifiable.....”**

75. In the current case, indeed no notice was given and therefore the law was flaunted. Other than notice, the respondents have not explained the criteria used to pick the petitioner and leaving out others.

76. The petitioner had submitted that after she was terminated others who joined the respondent’s employment after her continued serving and others were even employed. The respondents didn’t provide any evidence contrary to what the petitioner submitted.

**77. Kenya Airways Case (Supra) Maraga J. A** (as he then was) also stated as follows;

**“57 The other important aspect of procedural fairness in redundancies in the criteria employed to determine the employees to be laid off. The requirement is expressly provided for in Section 40 (1) (c) of Act No. 12”.**

78. The Employment Act which places the burden of proving its compliance on the employer. In addition, Article 15 of the Supplementary Provisions to the ILO recommendation No. 119 – Termination Recommendation 1963, concerning reduction of the work also provides that:-

**“The section of workers to be effected by a reduction of the work force should be made according to precise criteria which it is desirable should be established wherever possible its advance and which give due weight both to the interest of the undertaking, establishment or service and to the interest of the workers.....”**

79. Indeed it has not been demonstrated by the respondents the criteria used in the redundancies carried out and how the petitioner fitted in this criteria.

80. In the absence of providing notice or explaining the criteria used in which case the petitioner fitted in it follows that the redundancy was carried out unfairly and unjustifiably as provided for under Section 45 (2) of the Employment Act 2007 which provides as follows;

#### **45. Unfair termination**

**(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 employ of the employer and;**

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

81. On the issue of breach of the petitioner’s constitutional rights the petitioner submitted that the redundancy occurred during her maternity leave and was therefore discriminatory.

82. As explained above, under Section 40 of the Employment Act 2007, the employer has a duty to follow laid down procedure before embarking on any redundancy.

83. In determining whether termination while on maternity leave is discriminatory and unfair or not, I ask myself why a woman would proceed on a maternity leave. The answer seems obvious but it is important to note that maternity leave or period in a protected period.

84. The Maternity Protection Conviction Number 183 (2000) provides as follows;

**“Article 8 Employment protection and non-discrimination.**

**(1) It shall be unlawful for an employer to terminate the employment of a woman during her pregnancy on absence of leave referred to in Act 4 or 5 or during a period following her return to work to be prescribed by natural laws or regulations except on grounds unrelated to the pregnancy on birth of the child and the consequences or nursing. The burden of proving that the reason for dismissal are unrelated to pregnancy or childbirth and the consequences or nursing shall rest upon the employer.**

**(2) A woman is guaranteed the right to return to the same position or an equivalent position paid at the same rate at the end of her maternity leave.....”**

85. My understanding of the above provisions is that termination during maternity period is prohibited. The burden of establishing that the termination is not related to the maternity rests with employer.

86. In the current case, the respondent have submitted that the termination was purely a redundancy and was in no way related to the pregnancy or maternity leave of the petitioner. In order to establish whether the redundancy was not related to the maternity leave, the respondent should demonstrate that the redundancy was genuine and whether the right procedure was followed in the termination.

87. The petitioner in this case was never given notice before the redundancy, she was also not consulted about it. The respondents have not established the criteria used to choose the petitioner among these singled out for redundancy.

88. It is therefore my finding that the petitioner having been declared redundant and without the respondents following the court procedure, the redundancy was discriminatory and the petitioner was targeted because she was on maternity leave.

89. As for the remedies available I find for petitioner and award her as follows;-

**1. 1 month unpaid maternity leave 12,000/=**

**2. 10 months salary as compensation for the unfair redundancy**

$$12,000 \times 10 = 120,000/=$$

**3. General damages for discrimination on account of maternity leave being 1,000,000/=**

$$\text{Total awarded } 1,132,000/=$$

**4. The respondent will pay costs of this suit plus interest at court rates with effect from the date of this Judgment.**

**DATED AND DELIVERED IN OPEN COURT THIS 18<sup>TH</sup> DAY OF MARCH, 2021.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Mbaabu for the petitioner – present

Obok for the respondent - present