



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO.E.6519 OF 2020**

**(Before Hon. Lady Justice Anna Ngibuini Mwaure)**

**DR. CATHERINE WANGECI THUITA.....CLAIMANT**

**VERSUS**

**MOUNT KENYA UNIVERSITY.....RESPONDENT**

**JUDGMENT**

**CLAIMANT'S CASE**

1. The Claimant states she was employed by the Respondent as a Senior Lecturer for three years from 1<sup>st</sup> January, 2016. Her starting salary was Kshs.190,000/= but increased to Kshs.350,000/=. There was to be a gratuity payment at the end of the contract. She was entitled to the benefits of the Respondent like medical benefits.

2. She says that on 8<sup>th</sup> February, 2019 her contract was renewed for a period of 5 years from 1<sup>st</sup> January, 2019. The same terms of contract were implied.

3. She says she was allocated further duties as a post graduate coordinator for the years 2018 to 2019 at an allowance of Kshs.20,000/= per month.

She was also to supervise Masters and PHD – students thesis at Kshs.5,000/= per student.

She was as well allocated other classes in December, 2019 at Kshs.42000/= per class.

4. It was a term of her contract between the parties and on the prevailing policies schemes, procedure and practices and written agreements that the Respondent would pay the Claimant her monthly salary, extra duties at Kshs.20,000/= per month, thesis supervision at Kshs.5000/= per student and Kshs.42,000/= per class for extra classes.

She says she was also entitled to 10% per month on the basic pay as her gratuity upon completion of her contract.

5. She also says she was entitled to her medical scheme benefits together with her family.

6. The Claimant states that on 6<sup>th</sup> February, 2020 the respondent unlawfully and without sufficient reasons terminated her employment with effect from 10<sup>th</sup> February, 2020.

7. She says her constitutional rights to fair labour practices were breached.

8. The Respondent having been served with the hearing notice by Ms Wanjira & Co. Advocates on 9<sup>th</sup> February, 2021 via their email [info@mku.ac.ke](mailto:info@mku.ac.ke) failed or neglected to put a response. The affidavit of service is filed in court and is dated 10<sup>th</sup> March, 2021.

The file records also show they were served with a mention notice on 16<sup>th</sup> June, 2021 and once again did not respond.

The hearing proceeded as an undefended claim.

9. The case proceeded with the Claimant's evidence on 12<sup>th</sup> October, 2021 and the Claimant adopted her witness statement and her support documents being exhibits in this case.

### **ISSUES FOR DETERMINATION**

10. (a) Was Claimant fairly terminated on the grounds of redundancy?

(b) is she entitled to her prayers.

### **DETERMINATION**

11. The court has considered the evidence and the submission by the Claimant.

The Claimant employment was terminated on grounds of redundancy as per the letter, she received from the Respondent dated 6<sup>th</sup> February, 2020. She was informed that the effective date of the end of her employment was 10<sup>th</sup> February, 2020.

12. Section 40 of the Employment Act provide that an employer shall not terminate the contract of service on account of redundancy unless the employer complies with the following conditions among others:-

(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 reasons for, and the extent of, the intended redundancy not less than a month prior to the date of the intended date of determination 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) where an 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.

13. The Respondent did not put a response and so did not prove to the court that he informed the Claimant at least one month in advance that he intended to declare her redundant.

He did not inform her in writing or the labour officer of his decision to render her redundant.

14. The criteria provided in the law is that in deciding to declare an employee or employees redundant the employer must demonstrate he took regard to Seniority in time and skills, ability and reliability of employee.

The Respondent has not tendered any evidence to prove he followed the provisions of law as well articulated in the said Section.

15. Indeed in their letter of termination the Respondent assured the Claimant that the termination was not a reflection of her performance. The said Section 40 of the Employment Act gives conditions precedent before one is declared redundant and these conditions are mandatory and not left to the choice of the employer.

16. In the case of **JANE I KHALECHI VS OX FORD UNIVERSITY PRESS E. A LIMITED (2013) eKLR** a Claimant on resuming from leave was served with a letter advising her of her termination on account of redundancy.

The court held that the decision taken by the Respondent to terminate employment of the Claimant was procedurally unfair and the same was not based on any reasonable grounds and therefore substantially unfair. It was in the same matter that the court observed that the provision in Section 40 of Employment Act was not left to the choice of the employer but was mandatory.

The court observed that redundancy affects workers livelihood and that an employer has to comply with Section 40 of the Employment Act.

17. In the case **KENYA AIRWAYS LIMITED VS AVIATION & ALLIED WORKERS UNION KENYA & 3 OTHERS 2014 eKLR** the court held that the Appellant had not complied with the requirements on issuance of notices, consultation on selection evidence and so held the statutory threshold of procedural fairness in the implementation of redundancy decision was not met. Notice was not given to the labour officer and also to the affected employees or their union. There was no consultation with the affected employees and section of affected employees was not based on objective and open criteria.

18. In the present case the Respondent failed to follow the requirements set out in Section 40 of the Employment Act in making a decision to render employee redundant.

Therefore the termination of the Claimant is found to be unfair and against fair labour practices.

19. As observed in the Claimant's submissions the Respondent did not inform some of his students that the Claimant had been declared redundant and they kept consulting her even after her termination. That demonstrates that her position had not been declared redundant and the Respondent were not truthful in informing the Claimant's position had become redundant. The court therefore declares the Claimant was unlawfully terminated and her rights to fair labour practices were infringed upon.

**THE RELIEFS AWARDED**

20. The Claimant has prayed for reinstatement to her position. The reinstatement to a position of employment is not mandatory but depends on the discretion of the court. Section 49 of the Employment Act provides grounds to consider in reinstating an employee.

The court considers the practicability of the relief sought and practicability includes reasonableness which invoked broad inquiry into the equities of the parties cases such considerations would include prospective effects of the order of reinstatement not only on the employer and employee but also on other employees and third parties.

21. Further it is a general principle that courts will not force parties in personal relationships to continue in such relationship against the will of one of them.

That may create unnecessary friction which is not healthy and in a place like a university.

I am hesitant to grant reinstatement in this situation.

I will address instead other available reliefs.

22. The reliefs available are as set out in Section 40 and 49 of the Employment Act.

**SPECIAL DAMAGES**

(1) The Claimant has no evidence that they had a contract of payment of.....Kshs.350,000/= per month. The Claimant did not pursue it during employment so this prayer is not premised on any proof and so is declined. As it is her salary remains at Kshs.190,000/= and so no award on this prayer.

(2) Gratuity is provided in the contract of the Claimant Kshs.1,174,000/= so is allowed.

(3) Pay for post graduate coordination

2018 -2019..... Kshs.480,000/=

(4) Pay for extra classes December, 2019... Kshs.154,000/=

(5) Pay for post graduate thesis supervision Kshs.195,000/=

**TOTAL.....Kshs.2,003,000/=**

23. The court has considered the trauma of being sacked abruptly and the stress associated thereto which is only second to loss of a loved one through death according to some research by some psychologists. Therefore the court will award the Claimant general damages for stress and loss which will be twelve months equivalent of her salary amounting to Kshs.2,280,000/=.

24. As for the prayers for future salary for the remaining 4 years amounting to Kshs.16,800,000/=.

I will not award that as I am convinced the general damages of 12 months will cushion the Claimant comfortably as she looks for other opportunities.

I am in agreement with the observations of my brother in the case **ELIZABETH WAKANYI KIVE VS TELKOM KENYA LIMITED (2014) eKLR** where the court held that compensation by way of an award of damages is not meant to facilitate unjust enrichment of an aggrieved party but to redress an economic injuries suffered by an aggrieved party in appropriate circumstances.

25. Similarly the award for future gratuity is therefore also not awarded.

26. In conclusion the Claimant is awarded a total of Kshs.2,003,000/= being special damages and Kshs.2,280,000/= for general damages.

Costs are also awarded to the Claimant.

Interest will accrue till full payment.

It is so ordered.

**DELIVERED, DATED AND SIGNED IN NAIROBI THIS 16<sup>TH</sup> DAY OF DECEMBER, 2021.**

**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 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 has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

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

**ANNA NGIBUINI MWAURE**

**JUDGE**