



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA**

**CAUSE NO 112 OF 2018**

**PURITY YULA DAVID.....CLAIMANT**

**VS**

**PRAFULLA ENTERPRISES LIMITED.....RESPONDENT**

**JUDGMENT**

**Introduction**

- 1. In this claim, Purity Yula David proceeds against her former employer, Prafulla Enterprises Limited, seeking compensation for unlawful termination of employment as well as terminal dues.
- 2. The Respondent’s defence to the claim is found in a Response dated 27<sup>th</sup> March 2018 and filed in court on 6<sup>th</sup> April 2018.
- 3. At the trial, the Claimant testified on her own behalf and the Respondent called its Mombasa Branch Manager, Nereah Akinyi Adaka. The parties also filed written submissions.

**The Claimant’s Case**

- 4. The Claimant states that she was employed by the Respondent on 8<sup>th</sup> June 2015, in the position of Secretary. She worked as such until 30<sup>th</sup> May 2017 when she was served with a letter terminating her employment, on account of reduced work.
- 5. At the time of termination, the Claimant earned a monthly salary of Kshs. 25,000.
- 6. The Claimant’s case is that the Respondent declared her redundant without following due process as provided under Section 40 of the Employment Act. In this regard, the Claimant states that the Respondent failed to:
  - a) Notify the labour office of the impending redundancy;
  - b) Pay the Claimant severance pay;
  - c) Take into account seniority in time, skill and reliability of the employees in selection of those to be declared redundant.
- 7. The Claimant further claims that the Respondent failed to pay her any terminal dues. Moreover, the Claimant states that she was not paid house allowance.
- 8. The Claimant now claims the following:
  - a) 12 months’ salary in compensation.....Kshs. 300,000
  - b) House allowance.....90,225
  - c) Severance pay.....25,000
  - d) Costs plus interest

**The Respondent’s Case**

9. In its Response dated 27<sup>th</sup> March 2018 and filed in court on 6<sup>th</sup> April 2018, the Respondent denies the Claimant's claim and states that if at all the Claimant was declared redundant, then the redundancy was executed within the law.

10. The Respondent further denies that it failed to comply with Section 40 of the Employment Act.

### **Findings and Determination**

11. There are two (2) issues for determination in this case:

- a) Whether the termination of the Claimant's employment was lawful and fair;
- b) Whether the Claimant is entitled to the remedies sought.

### **The Termination**

12. The termination of the Claimant's employment was communicated by letter dated 30<sup>th</sup> May 2017 stating as follows:

**"RE: TERMINATION**

*The above subject refers.*

*We regret that we have no alternative but to terminate your services due to less work load and we hereby give you a one month notice until **June 30, 2017**.*

*You are instructed to hand over all the company's property and also details of pending projects currently being handled by yourself to the head of Department Mr. Joseph Ongwae.*

*However, we thank you for the services that you have extended to us.*

*Thanking you,*

*(signed)*

**RAMESH KARIA**

**DIRECTOR**"

13. A plain reading of this letter reveals that the Claimant's employment was terminated on account of redundancy.

14. Section 2 of the Employment Act and the corresponding section in the Labour Relations Act define redundancy as:

***" 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."***

15. While the law allows an employer to terminate employment on account of redundancy, there are stringent conditions to be complied with. These conditions are set out under Section 40 of the Employment Act as follows:

***40. (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 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 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.*

16. The first two conditions under Section 40 require the employer to issue a one-month redundancy notice to the employee or their trade union (where one exists) as well as to the local labour officer, giving reasons for and extent of the intended redundancy. This notice is distinct from the termination notice which may be satisfied by pay in lieu as provided under condition (f).

17. In its final submissions filed on 7<sup>th</sup> May 2020, the Respondent, while relying on the Court of Appeal decision in *Thomas De La Rue v David Opondo Omutelema [2013] eKLR*, suggests that the redundancy notice is only available to unionised employees.

18. I have looked at the relevant portion of *David Opondo Omutelema* (supra) which states the following:

***“It is quite clear to us that sections 40(a) and 40(b) provide for two different kinds of redundancy notifications depending on whether the employee is or is not a member of a trade union. Where the employee is a member of a union, the notification is to the union and the local labour officer at least one month before the effective redundancy date. Where the employee is not a member of the union, the notification must be in writing to the employee and the local labour office. Section 40(b) does not stipulate the notice period as is the case in 40(a), but in our view, a purposive reading and interpretation of the statute would mean the same notice period is required in both situations. We do not see any rational reason why the employee who is not a member of a union should be entitled to a shorter notice.”***

19. I find nothing in this decision to support the Respondent's proposition that because the Claimant was not unionised, she was not entitled to redundancy notice. At any rate, such a proposition would fly in the face of condition (d) which outlaws discrimination in tabulation of final dues on account of union membership.

20. The third condition under Section 40 of the Employment Act deals with the selection criteria, including seniority in time, skill ability and reliability of each employee within the affected establishment.

21. The Respondent's Mombasa Branch Manager, Nereah Akinyi Adaka admitted in cross examination that there was no known selection criteria for the redundancy.

22. The last three conditions in Section 40 deal with statutory benefits that are payable to employees declared redundant. The Respondent states that the Claimant was offered the sum of Kshs. 43,200 being salary for June 2017 (less an advance of Kshs. 3,000) and two years' service pay, which offer the Claimant declined.

23. Overall, the Court finds and holds that in terminating the Claimant's employment, the Respondent did not observe the mandatory conditions set under Section 40 of the Employment. This lapse renders the termination unfair within the meaning of Section 45 of the Act.

## **Remedies**

24. I therefore award the Claimant six (6) months' salary in compensation. In arriving at this award, I have considered the Claimant's length of service, her employment record, as well as the Respondent's failure to observe the law in terminating the Claimant's employment.

25. The Claimant also claims house allowance. Section 31(1) and (2) of the Employment Act provides as follows:

***(1) An employer shall at all times, at his own expense, provide***

***reasonable housing accommodation to each of his employees either at or near to the place of employment or shall pay to the employee such sufficient sum, as rent, in addition to the wages or salary of the employee, as will enable the employee to obtain reasonable accommodation.***

***(2) This section shall not apply to an employee whose contract of service-***

***(a) contains a provision which consolidates as part of the basic wage or salary of the employee, an element intended to be used by the employee as rent or which is otherwise intended to enable the employee to provide himself with housing accommodation; or***

***(b) is the subject matter of or is otherwise covered by a collective agreement which provides consolidation of wages as provided in paragraph (a).***

26. According to her letter appointment dated 8<sup>th</sup> June 2015, the Claimant was paid a basic monthly salary without a housing component. I therefore allow the claim for house allowance at 15% of the basic salary and adopt the resultant figure of Kshs. 28,750 as the Claimant's salary for purposes of this claim.

27. Having been declared redundant, the Claimant is entitled to severance pay at 15 days' pay for every completed year of service.

28. Finally, I enter judgment in favour of the Claimant as follows:

a) 6 months' salary in compensation.....	Kshs. 172,500
b) House allowance for 24 months (3,750x24).....	90,000
c) Severance pay for 2 years of service (28,750/30x15x2).....	<u>28,750</u>
<b>Total.....</b>	<b>291,250</b>

29. This amount will attract interest at court rates from the date of judgment until payment in full.

30. The Claimant will have the costs of the case.

31. Orders accordingly.

**DATED SIGNED AND DELIVERED AT MOMBASA THIS 27<sup>TH</sup> DAY OF JULY 2020**

**LINNET NDOLO**

**JUDGE**

**ORDER**

In view of restrictions in physical court operations occasioned by the COVID-19 Pandemic, this ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of court fees.

**LINNET NDOLO**

**JUDGE**

Appearance:

Mr. Jumbale for the Claimant

Mr. Ngaine for the Respondent