



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

**CAUSE NO. 2213 OF 2015**

(Before Hon. Lady Justice Hellen S. Wasilwa on 13<sup>th</sup> October, 2020)

**DICKSON MUTETI MAKAU.....CLAIMANT**

**VERSUS**

**AAR HEALTHCARE KENYA LIMITED.....RESPONDENT**

**JUDGEMENT**

1. The Claimant Dickson Muteti Makau instituted this suit vide a Memorandum of Claim dated 9<sup>th</sup> December 2015 for unfair termination or wrongful dismissal against the Respondent, AAR Healthcare Kenya Limited.
2. He avers he was employed by the Respondent as a Sales Manager on permanent basis at a monthly gross salary of Kshs. 135,000/= and a 1% override commission of direct billings revenue. That his contract of employment dated 22/09/2011 was effective from 15/08/2011 and that the Respondent duly confirmed his employment in accordance with the terms of his contract upon completing the 3 months probationary period.
3. He avers that the Respondent unceremoniously and without justifiable cause sent him on compulsory leave on or about November 2013. That while he was still on compulsory leave, the Respondent wrote to him on 28/11/2013 advising that his office had been rendered redundant due to restructuring of the business model by the Respondent and further terminated his services with effect from 01/12/2013.
4. He contends that the said Notice of Redundancy was illegal and unfair as it did not follow the laid out procedure and that the termination was wrongful and unjustified as it was based on untruthful allegations of redundancy and he was also not paid his terminal benefits. That his fundamental rights enshrined in Article 41 of the Constitution have been violated.
5. He further avers that at the time of his termination, he was earning a basic salary of Kshs. 145,800/= plus commission and had taken two loans of Kshs. 700,000/= and Kshs. 200,000/= with the Respondent's sister company, AAR Credit. That the two loans were guaranteed and secured by his salary and were to be repaid with interest.
6. He contends that due to the unlawful termination of his employment and not being able to secure another stable job, he has been unable to continue servicing the loans which continue to accrue interest. That prior to the unlawful termination of his employment, the total outstanding balance of the two loans was approximately Kshs. 635,444/= and Kshs. 267,555/= respectively.
7. The Claimant prays that this Honourable Court do order against the Respondents for: a declaration that his services were wrongfully and/or unfairly terminated; one month notice pay; payment of his terminal benefits; 12 months' compensation for wrongful termination; payment of the unpaid commission under Clause 2(ii) of his appointment letter; 11 days unpaid leave; a declaration that he is willing to pay the outstanding loan balance as it stood at the time of termination of his employment and to be paid upon him receiving his terminal dues from the Respondent; issuance of a certificate of service by the Respondents; costs of the suit; interest at court rates; and any other further relief this Court may deem fit and just to grant.
8. In his witness statement made on 19<sup>th</sup> August 2019, the Claimant states that the Respondent used to unlawfully deduct Kshs. 8,381/= monthly from the direct billing revenue during his employment so as to purportedly cover the existing business which was there prior to his appointment. That the said deduction which was contrary to clause 2(ii) of his appointment letter was clearly unlawful and oppressive and that he is therefore entitled to the same per month for the 27 months he worked for the Respondent at Kshs. 2,262,870/=.
9. The Respondent filed Memorandum of Defence on 7<sup>th</sup> March 2016 averring that the Respondent company was formed after the initial company split into two AAR companies with the other company formed being AAR Insurance K Ltd. That while the Claimant remained

with the Respondent company, the sales department was shifted to the AAR Insurance Company and the Claimant's office became redundant one year after the split since sales activities were no longer required. It avers that it was the decision of the Board of Management to scrap offices which were redundant through its recommendation that all holders of the offices affected be sent on paid leave pending a formal notification.

10. It further avers that the Claimant earned his November salary in full and accepted the process and that the Claimant only insisted on unpaid commissions. It admits the jurisdiction of this Court save that the Claimant's employment contract prescribed arbitration as the first forum of resolution of any dispute arising therefrom. It thus prays that the Claim herein and/or prayers sought be dismissed with costs to the Respondent.

11. The Respondent filed a Witness Statement made by its HR, Joan Karanja who states that in terminating the Claimant's employment, the Respondent indicated in the notice dated 28/11/2013 that the Claimant's compensation was calculated at Kshs. 480,270/= to include: severance pay for each year served; leave days due; and one month's salary in lieu of notice.

12. That according to records which include meetings held in the Human Resource and Managing Director's offices, the Claimant was aware of the redundancy measures and she refers to an email sent by the Claimant to the HR on 29/11/2013 wherein he insisted on commission payments.

13. That the Claimant did not protest at any one time of the redundancy being illegal/unfair and that he even completed his employees' departing form from the various departments upon receiving the Notice. That the Claimant however declined to receive his final dues which he was engaged in calculating and that the Respondent is awaiting collection of the same by the Claimant.

14. She further states that the claim for unpaid commission by the Claimant is untenable as his monthly dues evidenced in several payslips included payment of commissions and that the figure for the same is not argued/ tabulated in the body of the claim nor is it proven. That **prayer in the Claim** is also untenable as the said loans were for personal benefits and that the Respondent was neither a guarantor nor a beneficiary for the same.

15. The Claimant filed a response to the Respondent's defence on 12/05/2016 averring that the functions of AAR (K) Ltd were already split by the time he was joining the Respondent company and that the Respondent's decision to create a sales and marketing department was to strengthen the healthcare business.

16. That he was the pioneer Sales Manager for the Respondent after the split, reporting directly to the General Manager of the Respondent and that the function of sales was not shared between the split companies. He prays for the Respondent's defence to be struck out with costs and together with interest and that judgment be entered for the Claimant as prayed in the Claim herein.

17. The Claimant testified in court while adopting his witness statement as his evidence in chief. He stated that the Respondent employed him to manage AAR Healthcare and not for the insurance and that he was not aware of any board resolution deciding that he be retrenched. He thinks he is the only one who was declared redundant after having an altercation with the Managing Director on the delivery of a report which he could not do since his laptop had gotten lost. That the Managing Director then told him to resign or be terminated and when he refused, he was declared redundant.

18. Under cross-examination, he stated that he received the letter of his redundancy which was also his termination letter on 05/12/2013 and denied that he took part in the calculation of his redundancy package. He further stated that the package offered by the Respondent included December 2013 pay. In re-examination, he stated that the position he occupied at the Respondent still exists.

19. RW1, Rachel Ndanda, an assistant to the Respondent's Human Resource adopted the statement made by Joan as her evidence and stated that the Claimant's termination was lawful as all procedures were followed. She also relied on the records filed by the Respondent in court and stated that they should not be condemned to pay costs since it is the Claimant who refused to pick his final dues. Under cross-examination, RW1 confirmed not having the board resolution that led to redundancy and did not also have proof of other offices that were affected by the redundancy or knowledge of whether the labour office was given notice before the said redundancy.

### **Claimant's Submissions**

20. The Claimant submits that **Section 2 of the Employment Act** defines redundancy as follows:-

***“Redundancy” means 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”.***

21. Further, that **Section 40(1) of the Employment Act** sets out the conditions (a) to (g) to be fulfilled by an employer before declaring an employee redundant. That though **Section 40(1) (b)** does not indicate the length of notice to be issued to an employee who is not a member of a trade union, courts have held that such an employee should also be notified not less than a month, of the intended date of termination due to redundancy. He relies on the case of **Thomas De La Rue (K) Ltd v David Opondo Omutelema [2013] eKLR** where the Court of Appeal held that the one month notification period provided for in **Section 40(1) (a)** also applies to the notification under **subsection (b)**.

22. The Claimant submits that while he was given only 3 days' notice, the said notice was not forwarded to the labour office contrary to the law. He cites the case of **Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others [2014] eKLR** where the Court held that the purpose of the notice under Section 40(1) (a) and (b) of the Employment Act is to give the affected parties an opportunity to consider measures of minimising the terminations and mitigating the effects of any terminations such as finding alternative employment. That Abuodha J also stated in the case of **Banking Insurance & Finance Union (Kenya) v Kirinyaga District Co-operative Union Ltd &**

another [2014] eKLR that the intent and purpose of the redundancy is to enable the union and labour officer to understand and appreciate the purpose of the redundancy.

23. That the Respondent cannot state it complied with the law simply because it was willing to pay him in lieu of notice. Also provided under **Section 40(1) (f)**, the said payment does not oust the notice set under Section 40(1) (a) and (b). That this proposition was similarly held in the case of Paul Wachiuri Ndonga v Keroche Breweries Ltd [2018] eKLR wherein the Court further held that a redundancy cannot be undertaken to target a single employee as it would defeat the purpose of the law set out in Section 43(2) of the Act. That the Court in Andrew Waitthaka Kiragu v Grain Pro Kenya Inc Ltd [2017] eKLR further stated that the payment in lieu of notice does not sanitise an otherwise unlawful process.

24. It is submitted by the Claimant that the Respondent is also required to prove that the reasons for the redundancy are valid and fair under **Section 45 of the Employment Act** and further based on the operational requirements of the employer. That the Respondents has however failed to prove that the reasons it gave for the Claimant's redundancy were valid and fair and reiterated that he was employed by the Respondent after the initial company had already split. That the Respondent did not also act in accordance with justice and equity while terminating his employment which is contrary to **Section 45(4) (b) of the Act**.

25. The Claimant submits that he is entitled to all the prayers sought in his claim as he has proven the termination of his employment by reason of redundancy and that since the Respondent has not disputed **prayers b, c and f**, the same should be awarded by this Court. That he is entitled to the 12 months maximum compensation because he did not contribute to his termination; he was specifically targeted for redundancy by the Respondent contrary to the law; and is yet to get gainful employment.

26. He also invites the Court to look at the email at **Appendix 5(a)** which he sent to the then Human Resource with regards to the claim for commission. The Claimant further submits that having proven his case for wrongful, unfair and unlawful termination, it is only fair that he pays the loan as it stood at time of termination further because if the loans plus interest are forced on him, the entire award may go towards settlement of the same.

### **Respondent's Submissions**

27. The Respondent relies on the appellate case of Kenya Airways vs. Tobias Onganya Auma & 5 Others [2007] eKLR where the Court stated that one cannot prevent an employer from declaring employees redundant where there were genuine reasons to do so. Further, an employer cannot be denied their right to reorganization or declaring a redundancy if the situation arises as long as they follow the law.

28. It submits that it complied with **Section 40(1) (b) of the Employment Act** because it notified the Claimant of the redundancy in writing and contends that the Claimant only took issue with his commissions and not the decision to declare him redundant. It notes that the Claimant's appointment letter produced in his **annexure 1** reveals he was employed by AAR Kenya Limited as a Sales Manager in-charge of healthcare yet the Claimant has contradicted the same by insisting he was employed by the Respondent herein.

29. The Respondent submits that it indeed paid the Claimant in his final dues, one month pay in lieu of notice which is also set under **Section 40(1) (f) of the Employment Act** but that the Claimant has failed to collect the said dues. It also submits that consultations whether written or oral are therefore sufficient and relies on the case of Africa Nazarene University v David Mutevu & 103 others [2017] eKLR where the Court of Appeal held as follows:-

*“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 sub-section (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 month’s 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. The reasoning adopted by the trial court for importing the second notice was that the first notice was for facilitating consultations and the opportunity by employees to internalize the impending loss of employment. But Section 40 says nothing about consultations although it is necessary to infer fair labour practices in every employment and labour relationship. Indeed it is a Constitutional imperative under Article 41.*

*It is in evidence that the University held meetings with the affected employees to explain the restructuring process and provided counselling services amongst other initiatives to address the respondents' impending plight, before issuance of the notice envisaged under subsection (b).*

*...In sum, and we so find, the University not only complied with the statutory requirements but also paid each employee one month's salary in addition to one month's notice when they were not working. That hardly amounts to unfair labour practices.*

*We are satisfied that the trial court made an error in the construction of the relevant law in this matter and there is sufficient basis for interfering with its finding and discretion. We allow the appeal on that account .... Considering the circumstances of this matter where the respondents lost their employment for the benefit of the University, we order that each party bears its own costs here and in the court below.”*

30. It is submitted by the Respondent that what is important for purposes of identifying a redundancy is whether the holder of the former position has any duties left to discharge after the reorganisation as was held by the Court in Jones vs. Department of Energy and Minerals (1995) IRCA 292.

31. The Respondent opposes the claim for wrongful termination and urges the Court to dismiss **prayer d in the Claim** because general damages cannot be awarded in a case of wrongful or lawful termination as held in Civil Suit No. 2094 of 2000, Kenya Commercial Bank

**Ltd v Eddy Ndetu Gitetu.** That Prayers b, c and f do not warrant orders from this Court as they have been pending collection from the Respondent's office for the last 8 years. That since the Claimant opted not to receive his terminal benefits, costs cannot suffice and further because he instituted the suit herein 2 years later as an afterthought.

32. I have examined all the evidence and submissions of the Parties herein. The issues for this Court's determination are as follows:-

1. *Whether there was a redundancy situation.*
2. *Whether the redundancy of the Claimant was lawful and procedural.*
3. *Whether the Claimant is entitled to the remedies sought.*

#### **Issue No. 1**

33. The Claimant contends that there was no redundancy situation because the post he occupied still exists in the Respondent's company todate.

34. The Respondents averred that the Respondent Company was formed after the initial company split into two AAR Companies with the other Company being AAR Insurance Kenya Limited. They indicate that whereas the Claimant remained with the Respondent Company, the sales activities shifted to the AAR Insurance Company and so the Claimant's position became redundant.

35. The Claimant denied this position indicating that the functions of AAR (K) Limited were already split by the time he joined the Respondent's Company and that it is the Respondent who decided to create the Sales and Marketing Department in order to strengthen the healthcare business.

36. From the evidence on record, the Claimant was employed vide the contract dated 22/9/2011 with effect from 15/8/2011. The Respondents indicated that the Company underwent restructuring in year 2012 to 2013 due to changes in the law.

37. The Respondents did not however present any evidence how this restructuring happened and when it was. Indeed he who claims must prove. The Respondents have not demonstrated when the law changed and how the change affected their operations.

38. There is no indication that the 2 Companies were split after the Claimant joined the Respondent's employment. Indeed the appointment letter of the Claimant shows that he was employed by the Respondent and not any other Company and if indeed the Respondent split occasioning the Claimant his job, this evidence is in the Respondent's hands and has not been presented to Court.

39. The reason given by the Respondent that the Claimant had to be terminated due to a split in the Company into 2 leading to a redundancy situation is therefore not proved and neither is it proved that there was a redundancy situation.

#### **Issue No. 2**

40. The Claimant submitted that he was notified of his redundancy vide a letter dated 28/11/2013. The termination was effective 1/12/2013. This indicates that he was given 3 days' notice before termination. There is also no indication that the Labour office was informed of the redundancy.

41. The Respondents contend that there was discussion around the redundancy which the Claimant understood and they referred to an email by the Claimant to Human Resource on 29/11/2013. In the email in question, the Claimant refer to a meeting with one Ruth held on 18/11/2013 and another on 28/11/2013 and he complains of the fact that the meeting was held after he had been told to stay out of his office.

42. There is no indication that there was any meeting outside the notice period of 1 month and that a meeting actually took place as an afterthought when a decision to restructure had already been made.

43. Section 40(1) of the Employment Act 2007 states as follows:-

***(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".*

44. The law provides what ought to be done before a redundancy takes place. Notice of 1 month is compulsory. The labour officer must also be informed of the impending situation. Indeed the need for consultation cannot be over emphasised.

45. In the case of the Claimant's case there is no indication that the above requirements of the law were adhered to. There is also no indication that consultation took place before he was finally declared redundant.

46. It is therefore my finding that the redundancy took place in contravention of the law and therefore the termination of the Claimant on account of redundancy was unfair and unjustified.

### **Issue No. 3 – Remedies**

47. The Claimant sought a number of remedies from the Respondent amongst them deduction made from direct billing revenue. The Claimant has not explained what this is but from the payslip, this appears to be medical deduction.

48. I have looked at the Claimant's payslip and there is no indication that the Claimant was to pay for his medicals because one of the benefits he was entitled to was a medical cover for self and family.

49. The Respondents have not explained why they then deducted 8,132/= from his salary every month and also NHFI payments.

50. From the Complaint however, the Claimant did not seek refund of this deducted amount only bringing it out in his evidence in Court. Since Parties are held by their Pleadings and since this amount was not pleaded, I will not award it.

51. Other than this, having found that the redundancy was conducted without regard for law and procedure, I find the Claimant is entitled to compensation equivalent to 12 months' salary for the unfair and unjustified redundancy. This is =  $12 \times 155,000 = 1,869,600/=$

52. I also award the Claimant 1 month's salary as notice = 155,800/=.

53. The Claimant is also entitled to is redundancy dues = 15 days' pay for each year worked =  $\frac{1}{2} \times 155,800 \times 2 = 155,800/=$

54. I also award Claimant leave pay for 11 days =  $\frac{11}{30} \times 155,800 = 57,127/=$

**Total = 2,238,327/=**

### **Less statutory deductions**

55. The rest of the Claim is not tenable.

56. The Respondent will pay costs of this suit plus interest at Court rates with effect from the date of this judgement.

**Dated and delivered in Chambers via zoom this 13<sup>th</sup> day of October, 2020.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Njoroge for Claimant – Present

Mbichire for Respondent – Present