



REPUBLIC OF KENYA



**Mathenge v DLR Group Africa Limited (Cause E942 of 2021)  
[2024] KEELRC 960 (KLR) (2 May 2024) (Judgment)**

Neutral citation: [2024] KEELRC 960 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E942 OF 2021  
BOM MANANI, J  
MAY 2, 2024**

**BETWEEN**

**PATRICK MUNENE NJOGU MATHENGE ..... CLAIMANT**

**AND**

**DLR GROUP AFRICA LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The instant dispute raises a plethora of issues. First, the parties disagree on the nature of their relation between 4<sup>th</sup> September 2015 and 1<sup>st</sup> September 2017. Second, the Claimant contests the legitimacy of the Respondent's decision to withhold part of his salary between April 2020 and February 2021. Finally, the Claimant contests the propriety of the Respondent's decision to terminate the employment relation between them.
2. As the record shows, the parties have taken diametrically different positions on the matters in controversy. And hence the necessity for this decision.

**Claimant's Case**

3. The Claimant filed a lengthy Memorandum of Claim dated 12<sup>th</sup> November 2021 spanning over fifteen (15) pages. In the instrument, he contends that he begun working for the Respondent on 4<sup>th</sup> September 2015 after he executed a contract of even date with DLR Group Inc.
4. The Claimant avers that the Respondent hired him through DLR Group Inc. the latter's parent company. He contends that he was first hired under the title of consultant and his initial role was to assist in setting up the Respondent's business in Kenya and providing the Respondent with both regional and office leadership. The Claimant contends that even though the initial contract which was executed between him and the Respondent's parent company referred to him as a consultant, he was hired as an employee of the Respondent.



5. The Claimant avers that on 22<sup>nd</sup> September 2017, he entered into yet another contract with the Respondent in which his designation was now clearly described as that of an employee. It is his case that under the latter contract, the Respondent engaged him as its General Manager – Business Development with effect from 1<sup>st</sup> September 2017.
6. It is the Claimant’s case that the engagement between him and the Respondent was for an indefinite term. His gross annual salary was agreed at Ksh. 12,051,000.00. As such, his monthly salary was Ksh. 1,004,250.00. This amount included allowances as set out under schedule 2 to the agreement.
7. The Claimant contends that despite the parties having entered into the aforesaid contract, the Respondent failed to provide him with his Job Description. He contends that this remained the position until the parties parted ways on 28<sup>th</sup> February 2021.
8. Although the parties signed a contract on 22<sup>nd</sup> September 2017 titled “Employment Contract”, the Claimant’s position is that he begun rendering services to the Respondent in the position of an employee from 4<sup>th</sup> September 2015 after he executed the consultancy agreement with the latter’s parent company. Between 4<sup>th</sup> September 2015 and the time he was relieved of his position, the Claimant contends that he served the Respondent diligently and with dedication. It is his case that he singlehandedly set up the Respondent’s operations in Kenya and ensured that its business was thriving.
9. He contends that through his efforts, the DLR brand gained traction not just in Kenya but Africa. He further contends that he played a critical role in: recruiting competent staff for the Respondent; setting up internal policies for the Respondent; and providing general leadership for the Respondent.
10. The Claimant avers that because of the foregoing, the Respondent appointed him as one of its directors. In addition, he was given a salary increment from Ksh. 1,004,250.00 to Ksh. 1,054,463.00 per month and was guaranteed an annual bonus of USD 1,500.
11. The Claimant avers that when the world was struck with the COVID–19 pandemic, the Respondent took emergency measures intended to mitigate the effects of the pandemic on its business. These included directing that its shareholder and director, one Christopher Osore, to forego his monthly salary for an indefinite period. Further, all members of staff, including the Claimant, were to have a 50% salary cut for the first three months to wit April, May and June 2020.
12. The Claimant avers that it was agreed that this position was to be reviewed after three months depending on how the spread of the pandemic was managed. He avers that it was further agreed that once the Respondent stabilized after the pandemic, the staff whose salaries had been cut would be paid the accumulated salary arrears.
13. It is the Claimant’s case that the measures which were agreed on to mitigate the effects of the pandemic were implemented. As a result, his monthly salary was reduced to Ksh. 527,231.50.
14. The Claimant avers that he trusted that the Respondent would reinstate his full salary from July 2020 in accordance with the agreed COVID response measures. He also hoped that his salary arrears for April, May and June 2020 would be paid as agreed.
15. The Claimant contends that contrary to his expectations, the Respondent unilaterally continued to withhold 50% of his salary after June 2020. Further, the Respondent gave no commitment on when it was going to pay the withheld salary arrears.
16. The Claimant avers that on 16<sup>th</sup> October 2020, Mr. Christopher Osore handed him a draft contract dated 13<sup>th</sup> October 2020 which proposed to do away with the Claimant’s position as the Respondent’s



- General Manager and convert him into an independent contractor consulting for the Respondent at a monthly fee of Ksh. 50,000.00.
17. The Claimant avers that on 25<sup>th</sup> November 2020, he received an email from Mr. Christopher Osore which forwarded to him (the Claimant) the Respondent's letter dated 24<sup>th</sup> November 2020. He contends that the Respondent considered the letter of 24<sup>th</sup> November 2020 as a redundancy notice.
  18. The letter spoke to the difficulty that had been occasioned by the COVID-19 pandemic. According to the letter, the effects of the pandemic had informed the need to restructure the Respondent's business with the consequence that the position of business development held by the Claimant was no longer required on full time basis.
  19. The email forwarding the aforesaid letter allegedly insinuated that due to the impact of the COVID-19 pandemic on the Respondent's business, it was no longer viable to continue with its prevailing business model. As a consequence, it (the Respondent) was considering doing away with the Claimant's position and instead engaging him on consultancy basis.
  20. The Claimant contends that the contents of the Respondent's letter dated 24<sup>th</sup> November 2020 and the email of 25<sup>th</sup> November 2020 were false. The Claimant denies that prior to the aforesaid communication, the Respondent had carried out an evaluation of its operational requirements as asserted.
  21. The Claimant contends that as one of the directors of the Respondent, he would have been privy to discussions regarding reviews of the Respondent's operations. He denies knowledge of any meeting at which the operational requirements of the Respondent were discussed. He denies that the Respondent held any meetings during which the issue of restructuring its operations was considered. It is his case that if there were any such meetings in which he was not involved, they were unlawfully convened.
  22. The Claimant also denies receiving any correspondence prior to the ones of 24<sup>th</sup> and 25<sup>th</sup> November 2020 in which the question of restructuring the Respondent was raised. Similarly, he avers that he is not aware of any correspondence prior to the above dates which suggested that the position of business development manager was no longer required by the Respondent.
  23. The Claimant avers that on 11<sup>th</sup> December 2020, he asked for a clarification of the matters that had been alluded to in the Respondent's correspondence of 24<sup>th</sup> and 25<sup>th</sup> November 2020. He avers that following this request, the Respondent's representatives (Mr. Christopher Osore and Mr. Wambaa Mathu) convened a meeting on 21<sup>st</sup> December 2020 to discuss the matter. However, no agreement was reached at the meeting. Further, the three could not agree on the content of the minutes for the meeting.
  24. The Claimant contends that Mr. Christopher Osore's position at the meeting was that although the Claimant was a director of the Respondent, this was purely for administrative purposes. Further, Mr. Osore allegedly insisted, without the benefit of supporting evidence, that the Respondent was no longer able to sustain the Claimant's position of General Manager – Business Development on full time basis.
  25. The Claimant contends that on 28<sup>th</sup> January 2021, he received yet another email from Mr. Christopher Osore to which a letter of even date was attached. He avers that although the letter was marked as a redundancy notice, it turned out to have been a notice for termination of his employment. By the said letter, he was notified that his contract of service was to terminate with effect from 28<sup>th</sup> February 2021.



26. The Claimant avers that although the aforesaid letter mentioned that he will be paid severance pay and commuted leave days, it made no mention of his salary arrears. Further, it made no mention of his salary for February 2021.
27. He asserts that after the termination notice ran its full course, the Respondent did not pay him any dues contrary to its earlier pledge to settle some of his terminal dues. Instead, the Respondent's officials informed him that the matter had been held in abeyance pending reconciliation of accounts.
28. The Claimant avers that on 1<sup>st</sup> March 2021, the Respondent's officials called him to a meeting during which they tried to force him to resign from the position of director of the Respondent. The said officials also allegedly tried to get him to waive all his claims against the Respondent and release it from liability.
29. The above meeting was allegedly followed by an email from Mr. Christopher Osore dated 10<sup>th</sup> March 2021 which forwarded to the Claimant a purported final settlement agreement. The draft agreement indicated the Claimant's February 2021 salary as Ksh. 502,125.00 instead of Ksh. 1,054,463.00. Similarly, the draft had computed his severance pay based on three years from 2017 instead of 2015. Further, the draft had not provided for commutation of his leave days up to the point of his exit.
30. The Claimant also states that the draft settlement: had not provided for his salary arrears; had made an unexplained deduction of Ksh. 1,000,000.00 from his benefits on account of his membership to the Capital Club yet this was his contractual benefit; and had effected a further unexplained deduction of Ksh. 300,000.00 from his dues. As a result, he was to receive a paltry Ksh. 708,000.00 as his final dues.
31. The Claimant contends that the Respondent subjected him to other malpractices which in his view amounted to unfair labour practices. First, he accuses the Respondent's management of having unilaterally transposed his electronic signature onto the Respondent's resolution of 31<sup>st</sup> March 2020 to give the impression that he had attended the meeting that gave rise to the resolution and sanctioned it when he had not. Second, he accuses the Respondent of having made a false representation to him that the salary cut that was effected in response to the challenges that had been brought about by the COVID-19 pandemic was going to be temporary when this was not the case.
32. The Claimant challenges the validity of the decision to terminate his contract of service. It is his case that the decision was unlawful and a violation of his constitutionally protected employment rights.
33. It is his case that the purported redundancy notice dated 24<sup>th</sup> November 2020 did not meet the parameters set under section 40 of the *Employment Act*. He avers that the Respondent did not serve the local labour office with the requisite notice of intention to declare redundancy.
34. Further, he contends that there was no valid reason for the Respondent to issue the purported redundancy notice. The Claimant believes that if there was a genuine redundancy at the Respondent, it ought to have impacted the entire staff and not just him.
35. The Claimant contends that the decision to terminate his contract had been made long before the purported redundancy notice of 25<sup>th</sup> November 2020. Further, he contends that no consultations were made with him on the matter in line with the law prior to closure of his contract on account of redundancy.
36. He also contends that the Respondent did not utilize the selection procedure provided for in law to determine which employee should be released from employment for reasons of the alleged redundancy. Finally, he contends that the Respondent has failed to pay him his dues as required by law.



## Respondent's Case

37. On its part, the Respondent does not admit the Claimant's claim. As such, it has filed a response to the claim dated 10<sup>th</sup> January 2022.
38. The Respondent denies that the Claimant was its employee before 1<sup>st</sup> September 2017 when the two signed a contract of employment. It is the Respondent's case that prior to this date, the Claimant was serving as a Consultant based on a consultancy agreement which was concluded between him and the Respondent's parent company on 4<sup>th</sup> September 2015.
39. It is the Respondent's case that on his appointment on 1<sup>st</sup> September 2017, the Claimant was given his Job Description. According to the Respondent, the Claimant's function was primarily one of business development.
40. The Respondent admits that the Claimant was appointed as one of its directors. However, it contends that this appointment was for administrative purposes only.
41. The Respondent contends that the Claimant's position was declared redundant in late 2020. The Respondent avers that it followed the law in making this declaration.
42. The Respondent avers that on 1<sup>st</sup> April 2020, it convened a meeting with all its employees including the Claimant to agree on how to stabilize its operations in the face of the ravaging effects of the COVID-19 pandemic. The Respondent contends that during the meeting, it was agreed that salaries for all members of staff for the months of April, May and June 2020 were to be reduced by 50%. Further, it was agreed that this decision was to be reviewed at a later date depending on the effects of the pandemic on its (the Respondent's) stability.
43. The Respondent avers that all employees except the Claimant signed a consent to have their salary reduced. However, the Claimant accepted the reduction notwithstanding that he did not sign the agreement. The Respondent relies on the Claimant's acceptance of the reduced pay as proof of his concurrence with the decision.
44. The Respondent denies that the parties agreed that the 50% pay cut was to constitute salary arrears to be paid to the affected employees at a later date. Further, the Respondent contends that since the effects of the pandemic remained persistent, the Claimant remained on half salary until the time his position was declared redundant.
45. The Respondent avers that in June 2020, the Claimant proceeded on sick leave for approximately five (5) months. The Respondent contends that despite the Claimant's absence from work, it continued paying his salary for the entire period.
46. The Respondent avers that prior to issuing the Claimant with the draft contract dated 13<sup>th</sup> October 2020, the parties had engaged through several meetings to consider ways of sustaining the Respondent in the face of the COVID-19 pandemic. As such, the proposals in the draft agreement were just some of the strategies which had been considered.
47. The Respondent contends that prior to sending the Claimant its letter dated 24<sup>th</sup> November 2020 on redundancy, it held several discussions with him during which it was indicated that his position was no longer tenable. As such, it was under consideration for redundancy. It is in this context that the Claimant was offered the consultancy position through the draft contract dated 13<sup>th</sup> October 2020.



48. It is the Respondent's case that once it became apparent that it was no longer possible to keep the Claimant's position, a redundancy notice dated 24<sup>th</sup> November 2020 was issued to him. As a result, his position was lost on account of redundancy.
49. The Respondent avers that it adhered to the requirements of the Employment Act in declaring the impugned redundancy. As such, the process was lawful.
50. The Respondent contends that it yielded to the Claimant's request for a meeting and held the meeting on 21<sup>st</sup> December 2020. At the meeting, the Claimant was allegedly informed that the effects of the COVID-19 pandemic had necessitated the restructuring of the Respondent's Middle East and African operations by the parent company. The Respondent contends that during the meeting, the Claimant alluded to an earlier discussion with Mr. Christopher Osore about the matter. As such, the Claimant was allegedly always in the know about the impending redundancy.
51. The Respondent avers that following the redundancy notice of 24<sup>th</sup> November 2020, the Claimant was issued with a letter of termination of his employment dated 28<sup>th</sup> January 2021. The letter indicated that the termination of employment was to take effect as from 28<sup>th</sup> February 2021 thus giving the Claimant the requisite one month's notice as required in law.
52. The Respondent contends that it offered the Claimant his final dues on account of redundancy as provided for in law. However, the Claimant has failed to undertake the clearance process thus delaying release of the payments.

### **Issues for Determination**

53. After analyzing the pleadings and evidence on record, it is apparent that the following are the issues that require resolution in the cause:-
  - a. Whether the parties entered into the employment contract in September 2015 or September 2017.
  - b. Whether the Respondent legitimately reduced the Claimant's salary and whether the Claimant is entitled to arrears arising from the said reduction.
  - c. Whether the Claimant's contract of service was terminated in line with the applicable redundancy law.
  - d. Whether the Claimant is entitled to the reliefs that he seeks through this action.

#### Analysis

Whether the parties entered into the employment contract in September 2015 or September 2017.

54. The evidence on record shows that the Claimant entered into a service contract with DLR Group Inc. on 4<sup>th</sup> September 2015. The agreement was to run for one year. However, the parties had the liberty of extending it.
55. The agreement indicates that the Claimant was hired as a consultant at the time. It further specifies that the relation between the parties was one of independent contractor.
56. The agreement is explicit that it did not intend to establish an employment relation between the parties or those whom they represented. Further, it provides that should the parties enter into an employment contract, this would void the subsisting independent contractor relation between them.



57. Although clause 5 of the agreement describes the Claimant's compensation as "base salary", this alone cannot be the basis for holding that the parties had an employment relation. I say so because by virtue of clause 6(b) of the agreement, the Claimant could only be paid compensation for his services after invoicing DLR Group Inc. This is not what happens in an ordinary employment relation where the employee's remuneration is payable at the close of the agreed period of service without the need for him invoicing the employer. The fact that the Claimant was required to raise an invoice before his compensation could be released by the DLR Group Inc. suggests that he was working as an independent contractor under a consultancy agreement and not as an employee of either the Respondent or DLR Group Inc. (Kenya Hotels & Allied Workers Union v Alfajiri Villas (Magufa Ltd) [2014] eKLR).
58. Further, in an employment relation, the employer is the one who is tasked with the obligation of deducting tax from the employee's salary in the form of Pay as You Earn (PAYE) and remitting it to the Government (Kenya Hotels & Allied Workers Union v Alfajiri Villas (Magufa Ltd) [2014] eKLR). Yet, under clause 8 of the agreement dated 4<sup>th</sup> September 2015, this obligation lay with the Claimant. DLR Group Inc. was not obligated to withhold taxes from the Claimant's compensation as would an employer in an employment relation. This arrangement suggests that the relation between the parties was one of an independent contractor.
59. By virtue of section 28 of the *Employment Act*, annual leave is an integral component of an employment contract. It is a statutory right that is guaranteed to employees by the law. However, this right does not apply to other forms of service contracts including those by independent contractors (Gilbert Sule Otieno v Seventh Day Adventist Church (East Africa) Ltd (sued on behalf of S.D.A. Church, Kiamunyi East) [2014] eKLR).
60. It is instructive that the agreement of 4<sup>th</sup> September 2015 does not provide for annual leave for the Claimant. The absence of this entitlement under the arrangement tends to suggest that the relation between the parties was not one of employment.
61. Apart from the foregoing, the contract dated 4<sup>th</sup> September 2015 lacks other features that are usually present in a contract of service as prescribed by section 10 of the *Employment Act*. These include: hours of work; entitlement to public holidays and holiday pay; entitlement to pension; and entitlement to housing or house allowance. As was observed in Gilbert Sule Otieno v Seventh Day Adventist Church (East Africa) Ltd (sued on behalf of S.D.A. Church, Kiamunyi East) [2014] eKLR, the absence of these features which are foundational in a contract of service tends to suggest that the relation between the parties was not one of employment.
62. It is apparent from the evidence on record that at the time that the Claimant entered into the aforesaid agreement with DLR Group Inc., the Respondent was already in existence having been incorporated on 6<sup>th</sup> March 2015. If the intention of DLR Group Inc. was to hire the Claimant as an employee of the Respondent and not a consultant, nothing would have stopped it (DLR Group Inc.) from making this known in the contract. However and as is evident from the contract, there is nothing to suggest that this was the case.
63. From the evidence on record, it is apparent that when the DLR Group Inc. engaged the Claimant as a consultant, the Respondent's administrative and operational structures were still being put in place. As such, the Respondent was yet to start hiring its own staff.
64. Indeed, the Claimant acknowledges this fact when he states that at the time he was hired on 4<sup>th</sup> September 2015, the Respondent was still developing its administrative and operational structures to



enable it commence its activities including hiring of its staff. The Claimant stated that at the time, the Respondent had no means to hire its own staff.

65. The Claimant has relied on various email correspondence to argue that although the agreement between the parties dated 4<sup>th</sup> September 2015 indicates that they had entered into a consultancy contract, the true intention of the instrument was to establish an employment relation between them. However, the position in law is that the court cannot admit parole or extrinsic evidence to interpret a contract unless it (the contract) is riddled in ambiguity (*Fidelity Commercial Bank Limited v Kenya Grange Vehicle Industries Limited* [2017] eKLR). As such, I cannot rely on the email correspondence referred to by the Claimant to arrive at the conclusion that the parties intended that the contract dated 4<sup>th</sup> September 2015 be something other than what it purports to have been.
66. Having regard to the foregoing, I arrive at the conclusion that between 4<sup>th</sup> September 2015 and September 2017 when the parties signed the employment contract dated 22<sup>nd</sup> September 2017, the Claimant offered his services to the Respondent as a consultant based on the consultancy agreement between him and DLR Group Inc. dated 4<sup>th</sup> September 2015. Thus, the employment relation between the parties commenced on 1<sup>st</sup> September 2017 after they signed the contract of employment dated 22<sup>nd</sup> September 2017.  
  
Whether the Respondent legitimately reduced the Claimant's salary and whether the Claimant is entitled to arrears arising from the said reduction.
67. The parties agree that following the crisis that was precipitated by the COVID-19 pandemic, there was a general agreement that staff salaries be reduced by a margin of 50% in order to give the Respondent room to stabilize. It is also agreed that the reduction was agreed to last for three (3) months from April 2020 to June 2020 in the first instance.
68. There is indication that there was general consensus that the situation was to be reviewed after the lapse of June 2020. However, it is unclear whether the Claimant and the Respondent consulted on the way forward after June 2020.
69. Although the parties agree that there was consensus in respect of the salary cut for April 2020 to June 2020, there is no agreement on what was to happen to the 50% salary that the Respondent was allowed to withhold during this period. Whilst the Claimant's position is that the amount was to be treated as salary arrears which was to eventually be paid to the employees, the Respondent suggests that employees agreed to forfeit the amount. As such it was not recoverable by them as salary arrears.
70. Employment contracts are personal in nature. Except in instances where there has been collective bargaining in respect of certain aspects of the contracts, the terms and conditions of these contracts cannot be handled collectively or communally.
71. The Respondent contends that its employees agreed to a salary reduction in April 2020. Although other employees entered into a written agreement in this respect, the Claimant did not. However, he signified his concurrence with the arrangement when he acquiesced to salary deduction as from April 2020 until he left employment in 2021. According to the Respondent, the salary cut was not to result in salary arrears which were to be paid to the employees later on.
72. On his part, the Claimant readily admits that he did not oppose the decision to reduce his salary by 50%. However, he contends that he understood this decision to have been temporary for the duration between April 2020 and June 2020. Further, he understood the arrangement to have been that the amount withheld by the Respondent was to be paid to him once it (the Respondent) stabilized.



73. I have considered the contrasting positions expressed by the parties on the matter against the applicable law. Part IV of the *Employment Act* deals with employee remuneration. By virtue of section 17 of the Act, the employer has a duty to pay employees salary for work done. The employer has no right to do otherwise. He can only make deductions from an employee's salary in the circumstances that are set out under section 19 of the Act.
74. Thus the Respondent was not entitled to unilaterally withhold the Claimant's salary under the guise of stabilizing its business in response to the COVID pandemic. Since the Claimant did not signify his readiness to forfeit his withheld half pay for the period between April 2020 and June 2020, the Respondent was not entitled to consider the amount as forfeited by him. Further, since the Claimant did not signify his concurrence with the Respondent's decision to withhold half of his salary for the period running between June 2020 and February 2021, the Respondent had no right to withhold the half salary for this period. As such, all the amounts withheld from the Claimant's salary between April 2020 and February 2021 is recoverable by him.
75. The above position does not just flow from the provisions of Part IV of the *Employment Act*. It is also supported by section 10(5) of the Act which frowns upon any attempts by the employer to alter the terms of an employee's contract, including those on remuneration, without the concurrence of the employee.
76. This position is also anchored on clause 15.2 of the contract dated 22<sup>nd</sup> September 2017 between the parties. The Clause expressly forbids unilateral amendments to the contract. During his testimony in court, the Respondent's witness readily conceded that variations to the Claimant's salary entitlements required amendments to the contract with the concurrence of the Claimant.
77. The Respondent's decision to unilaterally treat the Claimant's half salary for the period between April 2020 and February 2021 as forfeited is a direct affront to these provisions of statute and the contract between them. It amounts to unfair labour practice contrary to article 41 of *the Constitution* of Kenya 2010 (*the Constitution*). It also offends the Claimant's right to fair administrative action under article 47 of *the Constitution*.
78. Consequently, I arrive at the conclusion that the Claimant is entitled to recover the half salary that the Respondent has withheld together with accrued interest thereon. The accumulated salary arrears for the ten (10) months between April 2020 and January 2021 before interest works out to Ksh.  $537,231.50 \times 10 = \text{Ksh. } 5,272,315.00$ .
- Whether the Claimant's contract of service was terminated in line with the applicable redundancy law.
79. The law on redundancy in Kenya is enshrined in sections 40 and 45 of the *Employment Act*. These provisions are complemented with the right to fair labour practice that is protected under article 41 of *the Constitution*. There is also a substantial amount of case-law on the subject (see *Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others* [2014] eKLR and *Cargill Kenya Limited v Mwaka & 3 others (Civil Appeal 54 of 2019)* [2021] KECA 115 (KLR) (22 October 2021) (Judgment)).
80. Although Kenya is yet to ratify ILO Convention No. 158 on termination of employment, a number of judicial pronouncements have invoked it as a guide on the process of termination of employment through redundancy in Kenya. Whilst this Convention does not apply to Kenya for reasons of non-ratification, the guidelines it provides already exist in the country's laws. These guidelines are mirrored in sections 40 and 45 of the *Employment Act* and articles 41 and 47 of *the Constitution*.



81. The employer who proposes to declare redundancy must exhibit a valid reason to support the decision. In addition, he must follow the procedure that is set out under section 40 of the [Employment Act](#) to process the redundancy. If he fails to do so, then by virtue of section 45 of the Act, the resultant decision will be deemed unlawful.
82. The employer must provide justification for the decision to declare redundancy. This must be a factor that goes to the operational requirements of the employer.
83. In the instant case, the Respondent has relied on the ravaging effects of the COVID-19 pandemic as the reason for its decision. The Respondent's position is that following occurrence of the pandemic, it was forced to downsize its Middle East and African operations.
84. The Respondent has indicated that as a result of the adverse consequences of the pandemic, it was forced to take a decision to reduce its operating costs. This included making salary cuts.
85. There is evidence that the Respondent indeed cut salaries for its members of staff in order to remain afloat during the pandemic. This fact is confirmed by the Claimant whose salary was reduced to half from April 2020.
86. Although it is contested whether the withheld salary was to be paid to staff at a later date, the fact that salary cuts were effected speaks to the difficult business environment that the Respondent found itself in. As such, there is credible evidence to suggest that the Respondent had a valid reason to consider downsizing.
87. Section 40 of the [Employment Act](#) sets out a plethora of procedural requirements in relation to a valid declaration of redundancy. These include: the issuance of notice for the proposed redundancy; adherence to a selection mechanism for the employees to be released from employment for reasons of redundancy; and payment of redundancy dues to the affected employees.
88. With regard to notice, the employer is required to issue the employee a notice of intended redundancy whose duration should be for one calendar month. This notice is to be issued directly to the employee if he is not a member of a trade union. However, if the employee is in a trade union, the notice is to be directed to the union.
89. The notice should set out the reasons for the proposed redundancy. As well, it should speak to the extent of the anticipated redundancy.
90. Besides the foregoing, the law also obligates the employer to issue the redundancy notice to the Ministry of Labour. This latter notice must contain similar information and be of the same duration as the notice that is issued to the employee or his trade union.
91. Once the employer has complied with the requirements with respect to notice of intended redundancy, he must undertake a selection process for the employees to be released from employment. However, this requirement only has significance in situations where the employees to be released are to be drawn from a pool consisting of more than one individual.
92. In selecting the employees for release, the employer must be guided by certain principles. These include: the seniority of the affected employees; their skills; and their reliability.
93. All factors remaining constant, the first employees to be hired into the organization would usually be the last to be released from employment on account of redundancy. The foregoing notwithstanding, the employer is allowed some latitude to select senior employees for release instead of the more suitable



junior employees. However, this process must be undertaken in a manner that is objective and must be justified on the basis of the requirements of the employer.

94. Although Kenyan law is not explicit on the requirement for consultations with the affected employees on the process, courts have developed jurisprudence which underscores the need for consultations. This has essentially been on account of the general spirit of the *Employment Act* which underscores the need for consensus on critical decisions in the employment space. The courts have also invoked ILO Convention No. 158 to push the case for consultations (*Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others* [2014] eKLR).
95. Once the affected employees have been identified, the employer must pay them: salary in lieu of notice; any salary arrears; commuted leave days; and severance pay.
96. I have examined the evidence on record to determine whether the Respondent adhered to the aforesaid procedure. There is evidence that the Respondent issued the Claimant with a redundancy notice dated 24<sup>th</sup> November 2020. From the record, the notice was forwarded to the Claimant as an attachment to the Respondent's email of 25<sup>th</sup> November 2020.
97. The notice cites the difficult economic environment occasioned by the COVID-19 pandemic as the reason for the proposed redundancy. It also identifies the Claimant's position as the one that was likely to be affected by the declaration. In this context, it is apparent that the notice spoke to the reason and extent of the proposed redundancy.
98. Despite the notice meeting the aforesaid requirements, it does not indicate the duration it was to run. Under section 40 of the *Employment Act*, it is imperative that a redundancy notice runs for a period that is not less than a month.
99. That said, it appears to me that the intention of section 40(1)(a) and (b) of the *Employment Act* is to require that the redundancy notice should run for at least one month before the decision to terminate the employee's contract is rendered. As such, so long as the employer is able to demonstrate that he observed this requirement, it is not fatal for the notice to have failed to expressly indicate that it was to run for one month.
100. In the instant case, the evidence on record shows that the Respondent sent the Claimant the notice of redundancy dated 24<sup>th</sup> November 2020 through the email of 25<sup>th</sup> November 2020. The notice does not state the period it was to run. However, the record shows that after the Respondent sent out this notice, it invited the Claimant for a meeting on 21<sup>st</sup> December 2020. This was eventually followed with the notice of termination of the Claimant's contract on account of redundancy dated 28<sup>th</sup> January 2021. The notice indicated that the Claimant's employment was to terminate on 28<sup>th</sup> February 2021.
101. Evidently, the period between 25<sup>th</sup> November 2020 when the redundancy notice was sent to the Claimant and 28<sup>th</sup> January 2021 when the notice of termination of the Claimant's contract was issued is more than one calendar month. As such, notwithstanding that the redundancy notice did not specifically indicate when it was to lapse, the Respondent let it run for more than one calendar month. In my view, this satisfied the requirements of section 40(1) (a) and (b) of the *Employment Act*.
102. The Claimant's counsel has argued that the redundancy notice ought to have been delivered to the Claimant physically and not through email. With respect, I do not think that this is what the law contemplates. All that the law is concerned with is that the employee is given the notice of redundancy. As long as there is evidence of delivery of the notice, it does not matter whether it was delivered physically or electronically.



103. The other notice that is critical to the process is the one to be delivered to the local labour officer. All that the law requires in this respect is that the employer notifies the local labour officer of the proposed redundancy. As indicated earlier, the notice to the labour officer must also state the reasons and extent of the proposed redundancy.
104. The Respondent avers that it complied with this requirement. To support this averment, it (the Respondent) tendered in evidence a copy of the notice addressed to the Claimant but copied to the Labour Office, Nairobi County. The document bears a stamp of the County Labour Office, Nairobi. The stamp shows that the said office received the notice on 9<sup>th</sup> December 2020.
105. The Claimant argues that the law requires the employer to send a distinct notice to the local labour officer. As such, the purported notice by the Respondent does not meet this requirement since it was addressed to the Claimant and copied to the labour officer.
106. Prima facie, the document that has been produced in evidence by the Respondent shows that it was received by the labour officer, Nairobi County on 9<sup>th</sup> December 2020. Despite the purported anomaly which the Claimant suggests, the fact of the matter is that the document was received by the labour office.
107. The law only obligates the employer to notify the local labour officer about the proposed redundancy. In my view, it does not matter whether this is done through a letter which is directly addressed to this officer or to the employee and copied to the labour officer. Whichever way the notice is done, the information will have reached the labour officer once he receives it. As such, it counts for nothing that the notice to the Nairobi Labour officer was a copy of the correspondence that had purportedly been addressed to the Claimant.
108. The Claimant has also suggested that there are indicators in the letter to the labour officer that it was doctored. However, he did not take up this objection at the right time. He did not object to production of the instrument on the grounds that it was not authentic. He did not insist on the labour officer being summoned to testify on the document. He did not seek to subject the document to forensic examination.
109. Coming this late, it is impossible for the court to reach the conclusion that the document is not authentic. There is simply no credible basis upon which the court can make such a finding. This is particularly in view of the fact that the document bears a receipt stamp by the Nairobi Labour office. As such, the court rejects the Claimant's contention in this respect and arrives at the conclusion that the Respondent indeed delivered notice of the intended redundancy to the Nairobi Labour Office which is within the local limits of where the Respondent operates.
110. The notice to the labour officer speaks to the reasons and extent of the proposed redundancy. It was issued on 9<sup>th</sup> December 2020 more than one month before the decision to terminate the Claimant's contract which was communicated through the Respondent's letter of 28<sup>th</sup> January 2021. Therefore, the notice was valid.
111. The Claimant has suggested that the Respondent did not undertake the selection process before it settled on him for release from employment. As such, he contends that the redundancy process was flawed for want of proper selection.
112. The record shows that the position that was affected by the redundancy was that of General Manager, Business Development. From the evidence that is on record, there was only one position of General Manager- Business Development within the rank and file of the Respondent which was held by the Claimant. It is this single position which was held by one individual which was declared redundant.



113. It will not make sense to require an employer who seeks to declare redundant a position that is held by one individual to undertake the selection process. Selection only has meaning where the proposed redundancy affects a pool of employees. In such case, the employer must demonstrate how he selected the affected employees from the pool.
114. This is essential in order to minimize the possibility of abuse of the process to victimize employees. As such and having regard to the facts of this case, I am satisfied that the Respondent was not required to go through the motions of selection before it declared the position of the Claimant redundant.
115. The Claimant has also averred that there was no meeting held at which the decision to restructure the company was taken. He contends that in his position as director of the Respondent, he would have known of such meeting since he was expected to attend all board meetings in that capacity.
116. In response, the Respondent's witness stated that the decision to restructure the company was taken during the period when the Claimant was away from work on account of the COVID-19 pandemic. The Respondent avers that following the Claimant's infection by the virus, he was taken ill and forced to stay away from work for some time from June 2020. However, the Respondent had to continue running during his (the Claimant's) absence. As a result, the Respondent set up a senior management team to undertake the day to day operations of the organization.
117. The witness stated that this team was working in close consultations with both the Claimant and him (Mr. Christopher Osore), the two directors of the Respondent. The witness stated that most of the decisions by the team were taken after oral consultations with the Claimant through telephone calls but these conversations were not minuted.
118. It is true that decisions by corporate bodies are made through resolutions at board meetings. However, nothing prevents these entities from delegating certain functions to either an individual or a select group.
119. Having regard to the circumstances under which the Respondent was operating during the COVID-19 pandemic, I am convinced on a balance of probabilities that its management delegated some responsibilities to its senior management team as asserted by its (the Respondent's) witness. This is particularly in view of the fact that the Respondent had only two directors one of whom had been taken ill with COVID. As such, he had to physically stay away from work for some while. Yet, the Respondent's operations had to continue. In such circumstances, it would not have been unusual for the senior management team to consult the Respondent's directors remotely and render decisions that were necessary for the organization to continue to run.
120. With regard to consultations on the redundancy declaration, both parties agree that after the Respondent issued the impugned redundancy notice on 25<sup>th</sup> November 2020, its management convened a meeting with the Claimant on 21<sup>st</sup> December 2020. Minutes of this meeting were produced in evidence. There is indication that the Claimant signed the minutes to confirm not just their content but the fact that he attended the meeting.
121. The minutes show that the purpose of the meeting was to deliberate on the redundancy process against the Claimant. The meeting was to elicit the Claimant's views on the process.
122. There is also evidence from the minutes that the parties had held an earlier meeting on the matter in September 2020 at Art Caffee in Nairobi. This fact was confirmed by the Claimant during his testimony in court. He confirmed that the September 2020 meeting discussed the issues of his salary and restructuring of the Respondent.



123. Having regard to the foregoing, I am satisfied that there were consultations between the parties on the redundancy process. There is no format which these consultations should take. As such, it is sufficient if the employer is able to demonstrate that there were meaningful consultations on the matter.
124. The evidence on record shows that following the decision to terminate the Claimant's contract, the Respondent offered to pay the Claimant the following:-
- a. Commuted leave days.
  - b. Salary for February 2021.
  - c. Severance pay at the rate of fifteen (15) days for every year worked from 2017.
125. Despite the above offer, the Respondent excluded the proposal to pay commuted leave days from the final settlement tabulation. The Claimant's case is that at the time of his release from employment, he had accumulated 69 leave days. In response, the Respondent has denied the claim.
126. During trial of the case, the Respondent's witness asserted that the Claimant had utilized all his leave days. Yet, he provided no data to support this assertion.
127. Under sections 10(6) and 74 of the *Employment Act*, the employer has the duty of maintaining employment records and producing them for inspection whenever there is a dispute with regard to a term of employment. Being the custodian of the employment records, the employer is presumed to have special knowledge of particulars of the employment contract between him and the employee.
128. Section 112 of the *Evidence Act* places the burden of proving a disputed fact on the party who has special knowledge of the fact irrespective of who has disputed it (the fact). Thus, in relation to whether an employee had utilized all his leave days, the burden will ordinarily be on the employer to shade light on the issue on account of his obligation to maintain the employment records. This position was affirmed by the Court of Appeal in the case of Jackson Muiruri Wathigo t/a Murtown Supermarket v Lilian Mutune [2021] eKLR.
129. Despite the Respondent arguing that the Claimant had utilized his leave days, it did not provide the employment records in its custody to clarify the issue. As such, the Claimant's contention that he had 69 unutilized leave days remains uncontroverted. Accordingly, the court finds in the Claimant's favour on this matter. The Claimant is awarded commuted leave pay of Ksh. 35,148.70 (daily wage) x 69 days = Ksh. 2,425,264.90.
130. The evidence on record shows that the Respondent purported to deduct Ksh. 1,000,000.00 from the Claimant's final benefits under the guise of recovering membership fees it had paid on his behalf to the Capital Club. The schedule to the contract between the parties dated 22<sup>nd</sup> September 2017 shows that the Respondent offered to pay club membership fees for the Claimant as a means of supporting business development efforts. The provision on this benefit does not suggest that the Respondent was to recover the money from the Claimant in the event that the contract between them was terminated. As such, the attempt by the Respondent to recover this money was irregular.
131. There is also indication that the Respondent purported to deduct some Ksh. 300,000.00 from the Claimant's final benefits purporting to be towards a computer. However, this was not cogently explained. The Claimant's obligation was to return the Respondent's gadgets and get his benefits in full. As such, the Respondent is not entitled to make this deduction as long as the Claimant is ready to return its gadgets.



132. As regards severance pay, the principle which was adopted by the Respondent in computing the figure that is payable was correct. However, the Respondent was wrong in applying the Claimant's reduced salary to compute this benefit. The benefit ought to have been computed using the Claimant's full salary of Ksh. 1,054,463.00. Thus, the Claimant's severance pay for the three years that he was in the Respondent's employment works out to Ksh. 527,231.50 x 3 = Ksh. 1,581,694.50.
133. The evidence on record shows that the Respondent issued the Claimant with a notice of termination of his employment with effect from 28<sup>th</sup> February 2021. In effect, the Claimant remained in employment for the entire of February 2021 and was entitled to a salary for that month. As such, the court finds that the Respondent was to have paid the Claimant the sum of Ksh. 1,054,463.00 being salary for February 2021. Accordingly, the Claimant is awarded this amount to cover his salary for the said month.
- Whether the Claimant is entitled to the reliefs that he seeks through these proceedings
134. As demonstrated earlier, there is evidence to demonstrate on a balance of probabilities that the Respondent's decision to terminate the contract between the parties was informed by the ravaging effects of the COVID-19 pandemic. This is evident from the redundancy notice which the Respondent served on the Claimant on 25<sup>th</sup> November 2020.
135. The court has also noted that the Respondent substantially complied with the procedural requirements under section 40 of the *Employment Act* before it declared the impugned redundancy. As such, it arrives at the conclusion that the redundancy was processed in accordance with the law.
136. Having regard to the foregoing, the court declines to grant the Claimant the following prayers:-
- a. The request to declare the impugned decision to terminate his contract of service as illegal.
  - b. The prayer for general damages for unfair labour practice.
  - c. The prayer for compensation amounting to Ksh. 12,633,556.00 on account of unfair termination of his contract of service.
137. However, the court finds that although the Respondent substantially complied with the law in declaring the impugned redundancy, it nevertheless understated the Claimant's exit entitlements. As such the court declares the following as the correct exit entitlements for the Claimant:-
- a. Salary arrears for the months of April 2020 to January 2021 amounting to Ksh. 5,272,315.00.
  - b. Leave commutation for 69 days amounting to Ksh. 2,425,264.90.
  - c. Salary for the month of February 2021 amounting to Ksh. 1,054,463.00.
  - d. Severance pay of Ksh. 1,581,694.50.
138. The court finds the Respondent's attempts to make the following deductions from the Claimant's aforesaid benefits irregular:-
- a. Deduction of Ksh. 1,000,000.00 purportedly in recovery of club membership fees.
  - b. Deduction of Ksh. 300,000.00 on account of a computer.
139. As such, the court declares the attempts by the Respondent to recover the amounts set out in paragraph 138 above as unlawful. Unless the parties agree otherwise, the Claimant is required to surrender the Respondent's computer gadget in order to secure release of the aforesaid amount of Ksh. 300,000.00.
140. Consequently, the court makes the following final orders:-



- a. The Claimant's case against the Respondent for unfair termination of his contract of service is dismissed.
- b. However, the Respondent is ordered to pay the Claimant the redundancy terminal dues that are listed in paragraph 137 of this decision, that is to say the sum of Ksh. 10,333,737.40.
- c. The Respondent is prohibited from deducting the amount of Ksh.1,000,000.00 towards recovery of club fees from the amount awarded in paragraph 137 above.
- d. The Respondent is barred from effecting recovery of the amount of Ksh. 300,000.00 from the amount awarded under paragraph 137 above conditional on the Claimant returning the computer supplied to him by the Respondent to enable him to execute his mandate under the contract of service between them.
- e. The amount awarded to the Claimant in paragraph 137 above attracts interest at court rates from the date of this judgment.
- f. The sum so awarded is subject to the applicable statutory deductions.
- g. Each party to bear own costs for this litigation.

**DATED, SIGNED AND DELIVERED ON THE 2<sup>ND</sup> DAY OF MAY, 2024**

**B. O. M. MANANI**

**JUDGE**

In the presence of:

..... for the Claimant

.....for the Respondent

**Order**

In light of the directions issued on 12<sup>th</sup> July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

B. O. M MANANI

