



Were v Laborex Kenya Limited (Employment and Labour Relations Cause E6460 of 2020) [2025] KEELRC 2621 (KLR) (29 September 2025) (Judgment)

Neutral citation: [2025] KEELRC 2621 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE E6460 OF 2020
HS WASILWA, J
SEPTEMBER 29, 2025**

BETWEEN

PHILIP ONYANGO WERE CLAIMANT

AND

LABOREX KENYA LIMITED RESPONDENT

JUDGMENT

1. The Claimant instituted this claim vide a Memorandum of Claim dated 3rd November 2020 and prays for judgment against the Respondent for:
 - a. Declaration that the redundancy notice dated 6th June 2019 issued to the Claimant constitutes unlawful and unfair termination.
 - b. Damages for wrongful and unlawful termination.
 - c. Maximum of 12 months compensation for wrongful termination.
 - d. Costs of this suit with interest thereon from date of filing until payment in full.
 - e. Any other relief(s) that this Honourable Court may deem fit in circumstances.

Claimant's Case

2. The Claimant avers that he is a pharmaceutical technology graduate with a Diploma in Pharmacy as well as a supply chain and logistics graduate and he has worked as a medical representative for various companies for 9 years.
3. The Claimant avers that he was employed by the Respondent on 15th January 2019 as a medical representative earning an initial monthly salary of Kshs. 195,000. He was promoting products



- manufactured by Merck Serono (Laborex being the agent and Merck Serono the principal) covering Mt. Kenya East and Nairobi regions with a target of approximately 2,500,000 SA Rands.
4. The Claimant avers that on 21st and 22nd March 2020, they were tasked by his immediate manager to merge some territories. Initially, the territories were divided into 7,6 within Nairobi 1,2,3,4,5,6 and 1 in Mombasa referred to as coast. The manager directed them to merge and collapse some 2 territories or customers from those regions so as to have 4 in Nairobi and 1 in Mombasa.
 5. The Claimant further avers that he and his colleagues participated fully and actively in merging the territories by assigning customers from his territory to other territories now referred as Nairobi 1,2,3,4.
 6. The Claimant avers that upon inquiring from his supervisor on the fate of those that will lack regions to work, she advised him there was no need to worry as she had allegedly re-designed the territories to accommodate everyone. Therefore, the proposal to move two medical representatives to fully cover the county business and mission hospitals across the country which never materialized and instead it ended up in redundancy declaration two months after re-design of the territories.
 7. The Claimant avers that on 25th May 2019, he was summoned to the Respondent's office where he met his immediate supervisor, Emmy Musembi and Merck office administrator, Desderian with the General Manager for Africa, Marie Andrea who was on skype.
 8. During the meeting, he was advised that the Respondent was downsizing and unfortunately, he was among the new entrants and some of his colleagues were being laid off. He enquired why the Respondent was using last in first out strategy and why he joined the Respondent with four of his colleagues at the same time in January 2018 yet three if them were singled out and one of them were retained, however, he never got a response.
 9. The Claimant avers that he was advised that the redundancy was due to the restructuring of the Respondent company and had nothing to do with his performance and that the Respondent would issue the redundancy letters hence the urgent need to clear with the Respondent as soon as possible.
 10. Consequently, on 6th June 2019, the Respondent informed the Claimant that the redundancy letters were ready and he proceeded to collect the same coupled with the signing of the clearance form and payment of his final dues.
 11. It is the Claimant's case that the Respondent's unlawful actions caused him to let go of his four dependants, stop his house construction, change his daughters' school due to lack of finances, engage his bank in terms of loan rescheduling, manage his entire family stress and frustrations that comes with job loss and relocation from his previous neighbourhood which his family has never reconciled with to date.
 12. The Claimant avers that even though the Respondent sought to comply with the provisions of the *Employment Act* by issuing a pre-redundancy notice on the 6th June 2019, the notice was un-procedural and unlawful as at no time were there consultations between the Claimant and the Respondent prior to him being declared redundant.
 13. The Claimant avers that his termination was not only sudden but inhumane as he was only summoned once on 25th May 2019 when he was verbally informed of the restructuring and on the intended redundancy.
 14. It is the Claimant's case that the notice issued on 6th June 2019 failed to satisfy the bare minimum threshold set under the provisions of Section 40 of the *Employment Act*.



15. The Claimant avers that despite being declared redundant, the Respondent retained his job description and shared it out among his other colleagues who were retained by the Respondent.
16. The Claimant contends that under redundancy, the termination of employment is an initiative where his services were longer required due to restructuring of the business and abolition of office thus his job description should have ceased to exist.
17. The Claimant avers that immediately after he was declared redundant, his daughter, baby Chloe Amanda Were fell ill resulting to medical treatment at MP Shah hospital which he had to pay personally after the Respondent's withdrawal of his medical insurance.
18. It is the Claimant's case that the Respondent's action of terminating his employment on redundancy basis and retaining other employees in the exact position he held amounted to unlawful and unfair termination couched as redundancy.

Respondent's Case

19. In opposition to the Claim, the Respondent filed a Statement of Response dated 27th January 2021.
20. The Respondent avers that it entered into a Service Agreement with Merck, a pharmaceutical company based in South Africa dealing with the production, marketing and distribution of pharmaceutical products.
21. Pursuant to the service agreement, the Respondent was obligated to provide Merck with management services in relation to the distribution and marketing of Merck's pharmaceutical products in Kenya.
22. The Respondent avers that it interviewed the Claimant for the position of a medical representative to be seconded and attached to work at Merck. It admitted the averments on the Claimant's employment and his monthly salary but denied the target earnings of Kshs. 2,500,000 SA Rands.
23. The Respondent avers that vide his letter of appointment dated 19th December 2017, the Claimant was informed of his employment effective 15th January 2018. The letter notified him of his duties as a medical representative at Merck reporting to the Respondent's Sales Manager. Further, he was assigned duties in geographical territories which would be altered from time to time based on operational timelines of Merck and the Respondent.
24. The Respondent avers that medical representatives were organised to operate in nine geographical territories around the country and they were each assigned a territory which comprised various hospitals, pharmaceutical companies and doctors to promote Merck's products.
25. In early 2019, Merck resolved to restructure and reorganise its operations in Kenya due to the strained market conditions and economic resources. Merck then undertook a comprehensive review of its organisational structure to ensure adaptation to the new business environment and requirements.
26. Merck resolved to restructure its geographical operational territories from nine to four namely Nairobi 1,2,3 and 4 in the General Medicine and Endocrinology Department.
27. The Respondent avers that vide an email dated 18th January 2019, Merck communicated its intended restructure which would affect the entire company in all its global branches except Nigeria
28. It is the Respondent's case that the employees were informed of the intended restructure and reorganization at Merck to reflect and fit its global operational demands. The employees were invited for a meeting on 31st May 2019.



29. During the meeting, the Claimant was informed of Merck's decision to restructure its operations and in effect rationalize some of its staff after several meetings with top managers were conducted where the financial situation, market environment and proposed restructuring were discussed.
30. The Claimant was further informed that previous numerous reorganizations of their department did not yield any positive results to support sustainability of the company business. He was informed that the medical representative job descriptions and scope of work at Merck had been affected. Consequently, it decided to restructure the job descriptions under the department rendering certain positions redundant.
31. The Respondent avers that the Claimant was advised that the Respondent's criteria to be used in considering the affected employees was last in first out with regard to seniority specifically from the date of employment. Thus, his position was affected based on these criteria and the company was considering his termination.
32. The Respondent avers that the Claimant was accorded an opportunity to make his representations and give his views on the Company's decision to declare his description and position as redundant.
33. The Claimant was informed that the termination process on account of redundancy would be undertaken in full compliance of the *Employment Act*.
34. It is the Respondent's case that the Claimant was later invited for further deliberations meeting held at the Respondent's Human Resource Manager's office on 4th June 2019. During the meeting, Merck's decision to restructure its operations in Kenya in its General Medicine and Endocrinology Department was discussed.
35. The Respondent considered its internal operations requirements and availability of other positions to accommodate the affected employees, however, it did not have any available position.
36. Based on the criteria used to consider the affected, the Claimant was informed his position was declared redundant. He was granted an opportunity to make his representations and any mitigating considerations.
37. The Claimant was then advised a formal notification of redundancy would be issued and that the Respondent would settle all terminal dues entitled to him. He was subsequently issued the notice of intention to terminate his employment on account of redundancy vide a letter dated 6th June 2019 and the same notice issued to the Labour Officer dated even date.
38. It is the Respondent's case that the Claimant's employment was terminated in accordance with the law.
39. The Respondent avers that after the reorganization, the Claimant's position automatically ceased to exist and that the Respondent's remaining employees in the affected department were reassigned new portfolios and territories.
40. The Respondent avers that Merck was experiencing financial difficulty occasioned by the strained market conditions and prevailing economic constraints. Due to this, the company was forced to restructure and reorganize its operations not only in Kenya but globally.
41. As a result of the reorganization at Merck, the Claimant's position ceased to exist and his job description and position was declared redundant.
42. It is the Respondent's case that it considered whether there was any other available position within it but unfortunately, there was no available position.



43. The Respondent avers that all the affected employees were given an opportunity to make their representations and views with regards to their positions being declared redundant and any mitigating considerations. Subsequently, the Respondent issued requisite statutory notices the affected employees and the Labour Officer and paid all terminal dues in compliance with the law.
44. The Respondent reiterates that it settled all the Claimant's terminal dues payable to him amounting to Kshs. 453,484.61 particularised under item 26 of its Statement of Response.

Evidence in Court

45. The Claimant (CW1) adopted the Memorandum of Claim and his witness statement dated 3rd November 2020 as her evidence in chief and produced his filed list of documents dated even date as his exhibits.
46. During cross-examination, CW1 testified that the Respondent was his employer not Merck and he was working as a medical representative selling pharmaceutical products for Merck Serona.
47. CW1 testified that the Respondent called him for a meeting on 25th May 2019 whereby the intention to declare certain positions redundant was discussed. However, they only discussed the details of redundancy and there was no reason for appeal.
48. CW1 testified that upon termination, his dues were tabulated and paid to him and was paid voluntarily thus he has no future claim, he is only challenging the redundancy process.
49. CW1 testified that there was no room for consultations and the duration of time given i.e. 25th May to 6th June 2019 was short.
50. CW1 testified that several of them were declared redundant but one the employees employed with them was retained. He later learnt of other vacancies in the company and he gave the Respondent notice to sue.
51. The Respondent's witness, Lydia Wairimu (RW1) stated that she is the Respondent's Human Resource Manager. She adopted her witness statement dated 24th October 2024 as her evidence in chief and produced a list of documents dated 11th October 2024 as her exhibits 1 to 7.
52. During cross-examination, RW1 testified that she has worked for the Respondent since 2015 and she was present when these issues occurred.
53. RW1 testified that the Claimant was to assist the Respondent in following up with the clients' debts and he had agreed to refund the Respondent the money owing.
54. RW1 testified that the Respondent had seconded its employees to Merck and they had six employees from 2016 to the time of termination.
55. She testified that the Respondent was notified by Merck that they were restructuring their operations and it was then agreed that they proceed with a redundancy.
56. RW1 testified that the Respondent had meetings with the employees, however, there are no minutes of these meetings.
57. RW1 testified that procedure for redundancy was last in first out and the Claimant did not approach her consider him due to the hard-financial problem.



Claimant's Submissions

58. The Claimant submitted that the Respondent was under an obligation to conduct consultations prior to declaration of redundancy. He relied on paragraph 52 and 55 of the Court of Appeal case of Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others [2014] KECA 404 (KLR) wherein the court held: "As I have said, besides this Convention, the requirement of consultation is implicit in the principle of fair play under Section 40(1) of the *Employment Act* itself and our other labour laws. The notices under this provision are not merely for information. Read together with Part VIII of the *Labour Relations Act*, 2007 which provides for reference to the Minister for Labour of trade disputes, including those related to redundancy (see Section 62(4)) for conciliation, I am of the firm view that the requirement of consultations implicit in these provisions. The purpose of the notice under Section 40(1) (a) and (b) of the *Employment Act*, as is also provided for in the said ILO Convention No. 158-Termination of Employment Convention, 1982, is to give the parties an opportunity to consider "measures to be taken to avert or to minimise the terminations and measures to mitigate the adverse effects of any terminations on the workers concerned such as finding alternative employment." The consultations are therefore meant to cause the parties to discuss and negotiate a way out of the intended redundancy, if possible, or the best way of implementing it if it is unavoidable. This means that if parties put their heads together, chances are that they could avert or at least minimize the terminations resulting from the employer's proposed redundancy. If redundancy is inevitable, measures should be taken to ensure that as little hardship as possible is caused to the affected employees. In the circumstances, I agree with counsel for the 1st respondent that consultation is an imperative requirement under our law. Mr. Oraro's criticism of the learned trial Judge's reliance on the UK Employment Appeals Tribunal's decision in Mugford v. Midland Bank, UK Employment Appeal Tribunal,¹⁰ and the treatise by Rycroft and Jordan, - "A guide to the South Africa Labour Law" both of which dealt with the requirement of consultation, was therefore unfair. Those were authorities on comparative jurisprudence which the learned Judge was perfectly entitled to make reference to and where appropriate rely on.

.....

Unless the circumstances are such that it would be an utterly futile exercise to hold any meaningful negotiations, consultation has to be real and not cosmetic."

59. The Claimant submitted that a review of the Respondent's list of documents demonstrates that the Respondent is diligent in keeping records. If indeed, the alleged meetings had taken place, the Respondent would have produced minutes or documentation evidencing the same. Notably, the minutes of the alleged meetings are absent from its bundle of documents and the Respondent's witness confirmed there was no such evidence of minute of the meetings placed before this court.
60. It is the Claimant's submissions that either the consultations occurred and the Respondent failed to notify the Claimant and/or deliberately withheld evidence of such meetings or more likely, the consultation were never held as required by law. Thus, it is safe to conclude that there were no consultative meetings.
61. The Claimant submitted that Section 40(1)(b) of the *Employment Act* provides in mandatory terms that where an employee is not a member of any trade union, the notice must be given to both the employee and the labour officer for the area where the employer's business operates.
62. The Claimant submitted that the Respondent claims to have served the notice of intention to terminate on account of redundant to both the Claimant and the Labour Officer vide a letter dated 6th June 2019. However, the letter produced by the Respondent is addressed solely to the Claimant



and no evidence has been adduced to demonstrate that a similar notice was served upon the Labour Officer as required by law.

63. It is the Claimant's submissions that the Respondent had no discretion to choose which party to serve as Section 40(1)(b) is couched in mandatory terms and both the employee and the Labour Officer were required to receive written notice.
64. The Claimant submitted that by failing to give notice of the intended termination to the Labour Officer for the area, the Respondent failed to comply with the requirements of Section 40(1)(b) of the *Employment Act*.
65. The Claimant further submitted that the Respondent was required to satisfy the methodology used in determining the employees to be laid off according to Section 40(1) (c) of the *Employment Act*. According to the Respondent, the criteria used to determine the employees to be laid off was 'Last in First Out', however, out of the four employees hired concurrently, only three were selected for termination on the basis of redundancy.
66. The Claimant submitted that had the Respondent applied the 'Last in First Out' principle, then all four employees having been engaged simultaneously, would have been affected equally. Therefore, it was incumbent upon the Respondent to demonstrate and justify the specific criteria used to select the three out of the four employees for redundancy.
67. It is the Claimant's submissions that he made inquiries regarding the criteria applied but the Respondent failed to provide any response. The Respondent neither provided an explanation nor provided any documentation to that effect. Consequently, the Respondent was opaque and failed to meet the statutory threshold.
68. The Claimant submitted that the redundancy was not genuine but rather a disguised termination as following the declaration of redundancy, the Respondent continued to retain the Claimant's job description within its organizational structure.
69. The Claimant submitted that the essence of redundancy is that the specific position or duties previously performed by the affected employee are no longer necessary or have ceased to exist. In the present suit, the continued existence of the Claimant's job description after declaration of redundancy undermines the Respondent's justification for declaring the position redundant.

Respondent's Submissions

70. The Respondent submitted on five issues: whether the present claim is competent on account of the discharge agreement dated 1st July 2019; whether there existed an employee-employer relationship between the Claimant and the Respondent and whether the court has jurisdiction to determine the dispute; whether the Respondent was unfairly declared redundant; whether the Claimant is entitled to the reliefs sought; and who should bear the costs of the present application.
71. On the first issue, the Respondent submitted that the discharge agreement constituted a valid and enforceable contract between the parties employment relationship. Pursuant to the agreement, the Claimant waived his legal entitlement against the Respondent and discharged the Respondent from any liability arising out of the employment relationship. The Claimant is thus estopped from maintain a claim against the Respondent.
72. The Respondent submitted that in determining the enforceability of the discharge agreement, the Court of Appeal in *Coastal Bottlers Limited v Kimathi Mithika* [2018] KECA 523 (KLR) held that: "This much was restated by this Court in *Krystalline Salt Limited vs. Kwekwe Mwakele & 67 others*



[2017] :- “... it is important to bear in mind that in Kenya, employment is governed by the general law of contract as much as by the principles of common law now enacted and regulated by the Employment Act and other related statutes. In that sense employment is seen as an individual relationship negotiated between the employee and the employer according to their needs.”

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Whether or not a settlement agreement or a discharge voucher bars a party thereto from making further claims depends on the circumstances of each case. A court faced with such an issue, in our view, should address its mind firstly, on the import of such a discharge/ agreement; and secondly, whether the same was voluntarily executed by the concerned parties.”

73. The Respondent submitted that the import of the discharge is easily discernable from its terms. The Claimant accepted the sum of Kshs. 453,485.61 in full and final settlement. The effect of his acceptance extinguished all the Claimant’s claims against the Respondent past, present and future.
74. The Respondent submitted that the Claimant further undertook to indemnify the Respondent against any past, present or future claims arising out of the employer relationship.
75. It is the Respondent’s submission that the Claimant executed the discharge free from any coercion duress or undue influence and he acknowledged acceptance of the terms therein by appending his signature of his own free volition.
76. The Respondent submitted that the Claimant neither challenged receipt of the dues therein nor his acceptance of the terms of the discharge agreement. As such, the Claimant freely and of its own volition agreed to be bound by the terms of the contract. It relied in *Guha v Shah & 6 others (As office bearers of the Oshwal Education & Relief Board (OERB))* [2024] KEELRC 2358 (KLR) “Having admitted that she signed the Final Dues Discharge Notice dated 14th April, 2023 and understood its import, the Claimant is estopped from contending that she had a claim against the Respondent as she by the signature waived her right to pursue further claims against the Respondent. The foregoing is fortified by the fact that the Claimant did not testify or contend that her signature was procured by duress, misrepresentation, undue influence, mistake or other vitiating element of a contract, and thus admitted its binding nature as a contract.”
77. It is the Respondent’s submissions that in considering the appropriate relief per Section 49(4)(a) of the Employment Act, is the wishes of the employee. The discharge agreement represents the Claimant’s wishes which are expressed in plain, clear and unambiguous language thus this court is bound to give effect to the Claimant’s wishes.
78. The Respondent submitted that the instant claim is unsustainable and the only recourse available is its dismissal with costs.
79. On the second issue, the Respondent submitted that the jurisdiction is everything and without it anything done outside the jurisdictional tether of the court is a nullity. It relied in *Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd* [1989] KECA 48 (KLR) the court held: “Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”
80. The Respondent submitted that the jurisdiction of this court is captured under Section 12 of the Employment & Labour Relations Act. The jurisdiction of this court can only invoke upon the



establishment of the existence of an employer employee relationship. In absence of such a relationship, the court lacks jurisdiction to entertain the claim.

81. The Respondent submitted that before adjudicating the claim, the court must examine the nature of the relationship between the Claimant and the Respondent to satisfy the jurisdictional imperative.
82. The Respondent submitted that the employment contract is only a part of the agreement and does not reflect the true agreement between the parties and in the present case, it would be inconsistent with the purpose of this legislation to treat the terms of a written contract as the starting point in determining whether an individual fall within the definition of a worker.
83. It is the Respondent's submissions that no employment relationship existed between the Respondent and the Claimant to invoke the authority this court. Further, the employment contract between the Claimant and the Respondent does not support the reality of the situation between the parties.
84. The Respondent submitted that there is an apparent inconsistency between the physical contract and the operational reality of the relationship between the parties.
85. On the control test, the Respondent submitted that the Claimant attended the interviews with Merck and Merck exercised control over the entire interview process and set the parameters for the interaction. After gauging the Claimant's skill, Merck informed the Claimant of his success following the interview and offered him a job opportunity. The Claimant's job description was set by Merck, his targets and terms of performance were assigned by Merck and he equally reported to Merck offices. Additionally, Merck oversaw the separation and clearance process and the monitoring and evaluation process was equally undertaken by Merck.
86. On the integration test, the Respondent submitted that the Claimant was an employee of Merck Sereno as per his employment contract and the Respondent solely promoted products manufactured by Merck. The Respondent reported to Merck's officers at Lenana Place, Nairobi and his activities were central to Merck not the Respondent. Additionally, his duties were integrated with Merck's and not the Respondent's core business, therefore, he was integrated into Merck's business architecture.
87. In respect to the multiple test, the Respondent submitted that the Claimant's tools of trade and equipment were all provided by Merck and all drug samples and business cards came from Merck. Thus, none of the Claimant's tools of trade were supplied by the Respondent.
88. It is therefore the Respondent's submissions that it was acting solely as a liaison between the Claimant and Merck and there existed no employment relationship between the Claimant and the Respondent. Thus, this court lacks jurisdiction to adjudicate this claim and the court should strike off the claim in its entirety with costs to the Respondent.
89. On the third issue, the Respondent submitted that it is common ground that there was a restructuring at Merck where the Claimant worked as a sales representative. The restructuring saw the revision of the territories from the initial 9 territories to 4. The restructuring saw the elimination of 5 territories under the previous operational structure. Additionally, the restructure affected Merck's operations globally and not just in Kenya. Globally, Merck had to lay off its staff to fit the needs and goals under the new operational architecture. Further the termination of the Claimant's employment was at the Respondent's behest. The Claimant played no role whatsoever as so aptly captured in his notice of intention to terminate and equally his termination notice.
90. On substantive justification, the Respondent submitted that as a rule of thumb, the internal organization and operation of a business is the prerogative of the owners/employers. It is upon the business to adopt the most efficacious model to attain its economic and business objectives. As observed



by Maraga JA in *Kenya Airways Limited v Aviation & Allied Workers Union Kenya* (supra) as follows: "...so long as the employer genuinely believed that there was a redundancy situation, then any dismissal was justified, and it was not for the court, or the union, to substitute their business judgment with that of the employer...The decision to declare redundancy, as I have said, is that of the employer based on purely commercial considerations and not on principles such as sustainable development, noble and lofty as they may be."

91. The Respondent submitted that the operations of a business are the prerogative of the business and as observed by Murgor JA in *Kenya Airways Limited v Aviation & Allied Workers Union Kenya* (supra) relying on the decision of the court in *G.N. Hale & Sons Limited Vs Wellington Caterers* that, "a worker does not have the right to continue employment if the business can run more efficiently without him. As long as the employer genuinely believed that there was a redundancy situation, any dismissal was justified, and it was not for the court or the union to substitute their business judgment."
92. It is the Respondent's submission that it was the Respondent who was justified in declaring a redundancy and ultimately relieving the Claimant from his duties.
93. On procedural fairness, the Respondent submitted that Section 40 of the *Employment Act* sets out the mandatory requirements that any termination on account of redundancy must satisfy to attain procedural fairness. It further relied *Hassan Kibwana Said v ATo Z Transporters Limited* [2021] KEELRC 2168 (KLR) wherein the court) condensed the requirements under Section 40 of the *Employment Act* into 3 broad categories that is redundancy and termination notices, objective selection criterion and payment of statutory dues.
94. The Respondent submitted that from the evidence on record it is clear that the Claimant was part of the team involved in the restructure and revision of the territories from 9 to 4 within the Nairobi area. It is also clear as demonstrated by the email communication on 18th January 2025 that Merck notified all impacted teams of the implementation of what the email refers to as "phase 2 of the reorganization of our region." It is not disputed that the email served a general notification to all affected staff on the commencement of the restructuring plan.
95. It is the Respondent's submission that the Claimant and employees were well aware and duly notified of the restructuring and the intention to declare certain positions redundant.
96. On consultation, the Respondent submitted that the Claimant conceded that he was summoned on 25th May 2019 and notified of the restructure. The Respondent held a further consultative meeting on 31st May 2019 between the Claimant and HR office together with other officials and a further meeting on 4th June 2019 as evidenced in the letter dated 6th June 2019 which refers to the same. The Claimant neither rejected the letter nor challenged its content.
97. It is the Respondent's submission that the Claimant cannot now turn to disown the said meeting this the court should find that meaningful consultations were conducted.
98. On notification, the Respondent submitted that the Claimant did not raise the issue of notification of the labour office in his statement of claim and only surfaced in his submissions. Having failed to raise the issue at institution of the suit, the Claimant cannot now change tune and make alive the issue before this court. The Claimant is estopped from raising the same at this juncture.
99. On selection criteria, the Respondent submitted that as the proprietor of the business, it retains the sole mandate to dictate its operations. The Respondent has the sole discretion to adopt such formulae as best fits its operational goals and best conforms with the mandate of the business. Further, it has the sole obligation is to satisfy the court that the criterion adopted was not only legally justifiable but



procedurally fair as affirmed in *Tobias Ongaya Auma & 5 Others Vs Kenya Airways* [2007] eKLR where the court held that: "it is not the role of any tribunal to prevent an employer from restructuring or adopting modern technology so long as it observes all relevant regulations".

100. The Respondent submitted that the Claimant had only been its employee on a permanent basis for less than a year, having completed his probationary period on 15th June 2018. It would be unfair and against business sense to retain the Claimant and let go of employees with more experience at the institution.
101. The Respondent further submitted that the Claimant's complaint that all four employees having been engaged simultaneously should have been affected equally is unsupported by any real evidence. Additionally, no particulars were supplied of the alleged employee who had been retained nor any evidence tendered in support of this Claim.
102. It is the Respondent's submissions that the Claimant's grievance against it is simply, "it should have been the other person and not me." Therefore, it urged the court to find the selection criterion satisfied the requirements of Section 40(1)(c).
103. On retention of the Claimant's job description, the Respondent submitted that it changed as the new role covered larger areas with additional roles and responsibilities and an entirely new hierarchical structure. The restructuring altered the scale, structure and scope of operations. Within the institution there were other sales representatives, more senior and with more experience and who had a longer employment relationship with Merck. Therefore, this line of argument is misguided and should be entirely disregarded.
104. On the fourth issue, the Respondent submitted that the only remedies available to the Claimant are as per Section 49 of the *Employment Act*. It relied in *E.M Githinji JA's* decision in *Kenya Airways* (supra) where he held that: "In my view, the normal remedy for a genuine redundancy even in cases where the services were not terminated in accordance with a fair procedure would be compensation by way of damages in accordance with ... Section 49 of the *Employment Act*... because the damages or compensation for unfair termination are either contractual or statutory. By Section 49(1)(c) monthly wages and salaries can only be awarded for period not exceeding twelve months."
105. It is the Respondent's submission that the powers of the court to make award under Section 49 is discretionary which discretion is to be exercised judiciously bearing in mind the circumstances of the case and the considerations under Section 49(4) of the *Employment Act*.
106. The Respondent submitted that the maximum 12 months award is reserved for cases where a Claimant, through credible and reliable evidence, demonstrates the existence of exceptional circumstances which do not exist in the present case. The Claimant's employment with Merck commenced on 15th January 2018 and he subjected to a 6-month probationary period which concluded on 16th June 2018. At the time of termination, the Claimant had barely completed a year of service with Merck.
107. The Respondent further submitted that the Claimant's termination was neither informed by malice nor ill will. It was solely informed by operational constraints which demanded a complete overhaul of Merck's business architecture to streamline its operations and boost efficiency. Therefore, it would be cruel to burden the Respondent with hefty awards where the separation of the parties was occasioned by circumstances outside either party's control. The court be inclined to find in the Claimant's favour that an award of one month's salary as sufficient compensation.
108. On costs, the Respondent submitted that it should be awarded costs, as the Claimant has failed to discharge his legal and evidentiary burden to warrant a favourable finding. Additionally, the Respondent has incurred significant costs in defending the present proceedings.



109. I have examined all the evidence and submissions of the parties herein. From the evidence on record the claimant had worked for the respondent since 1st September 2018 but vide a letter of 6/6/2019 he was served with a notice of intent to terminate on account of redundancy but the same was served on him on 17/6/2019 and the termination was effective 31/7/2019.
110. On 25/6/2019, the claimant had already cleared from employment as per the clearance form and was discharged from work on 3/7/2019 even before the alleged termination notice which makes it suspect that the claimant had to clear from work on 25/6/2025 and had to return all work implements. The CP access, mail access and internet access was also disabled.
111. The averment by the respondent that the termination on account of redundancy was as per the law however beats logic. He even handed over his access card keys, ID card, medical card etc. He produced evidence that by 4/7/2019 he took his daughter to hospital and had to pay cash as his medical card had also been disabled.
112. It is true that the claimant signed a discharge agreement with the respondent dated 3/7/2019 indicating that upon receipt of his dues amounting to kshs 453,484.61 from the respondent he had no further claim against the respondent.
113. The respondents averred that this discharge voucher exonerates the respondents from any further claim as held in *Guha vs Shah & 6 Other* (supra). This was also the holding in *Coastal Bottlers Ltd* (supra).
114. That as the case may be, the respondents decision to terminate the claimant on redundancy without following due process is a breach of his rights and can be corrected by court on its own discretion any agreement notwithstanding. That notwithstanding the respondents have also submitted that they never employed the claimant. I have looked at the contract of employment and note that the same was issued by the respondent and even the termination notice was issued by the respondent and therefore the contention by the respondent that they did not employ the claimant was found not merited.
115. In para 27 of the respondents response they aver that they paid the claimant his full terminal dues on 25th June 2019 and this includes his June salary. The notice was said to end on 31/7/18 but the claimant was never paid any salary for July this therefore implies that he was terminated on 25/6/2019 and the consultation that was to take place never took place.
116. This being the case, I find the claimant's termination was done without following the due process as per section 40 of the *Employment Act* 2007 which 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.
117. The consultation envisaged as held in the Kenya Aviation Workers Union case (supra) which envisages that consultation must be done before redundancy. Considering the evidence before court, it is my finding that the claimants termination was unfair and unjustified and I award him compensation for the same amounting to 6 months salary whilst considering the abrupt nature of the termination and the suffering encountered by the claimant after the termination = 6x205,725/-= kshs 1,234,350/- Less statutory deduction.
118. The respondents will pay costs of his suit plus interest at court rates with effect from the date of this judgment.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 29TH DAY OF SEPTEMBER 2025.

HELLEN WASILWA

JUDGE

