

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT NAIROBI

CAUSE NUMBER 426 OF 2019

KENNEDY KIMATHI NGONGO.....CLAIMANT

-VERSUS-

ROCHE KENYA LIMITED.....RESPONDENT

Coram

Before Lady Justice J.W. Keli

C/A Otieno

JUDGMENT

1. Vide a statement of claim dated the 19th of June 2019, the Claimant sued the Respondent and sought the following Orders:-
 - a) Kshs 3,675,020.88 being the equivalent of 12 month's salary as compensation for the discrimination and unlawful redundancy of the Claimant.
 - b) Backdated house allowance from the time of employment to the time of unfair declaration of redundancy at 15% of the gross monthly pay at the time of redundancy.
 - c) Interest in (a) and (b) above at court rates from the date of filing suit until payment in full.
 - d) Costs of this suit;
 - e) Any other or further relief as this Honourable Court deems fit and just to grant.

2. The Claimant in support of the claim filed his list of witnesses dated 19th June 2019; witness statement of even date; and list and bundle of documents of even date.
3. The Respondent entered appearance through the law firm of Hamilton Harrison & Mathews Advocates on 16TH July 2019 and filed a statement of response, in support of the claim, filed his list of witnesses dated 19th June 2019; witness statement of the same date; and list and bundle of documents of the same dated 22nd August 2019. In support of their response, they filed a list of witnesses dated 22nd August 2019; a witness statement of FRANK LOEFFLER dated 22nd August 2019; and an index and bundle of documents dated 22nd August 2019.
4. The Claimant replied to the response to the memorandum of claim vide a reply dated 29th August 2019.

Hearing and evidence

5. The claimant's case was heard on the 8th May 2025, when the claimant testified under oath as the only witness in his case, produced a witness statement dated 19th June 2019, filed in court on 28th June 2019, and filed documents produced as C-exhibits 1-14. The claimant was cross-examined by counsel for the respondent, Ms Kirimi. He was re-examined by his counsel, Tollo.
6. The respondent's case was heard on the 15th July 2025 when Frank Loeffler testified as RW1. He adopted as his evidence in chief his witness statement dated 22nd August 2019 and

produced documents under the respondent's list of documents as exhibits 1-10. The witness told the court his evidence would apply to suits in ELRC cause NO. 427 of 2019 exhibits 1-10 and in the ELRC cause NO. 429 of 2019 exhibits 1-9. RW1 was cross-examined by counsel for the claimants, Ms Tollo and re-examined by their counsel, Ms. Kiriimi.

The Claimant's case in summary

7. The Claimant's case is that he was employed on or about 7th July 2010 by Hoffman La Roche Kenya Limited as a Medical Representative, earning a monthly salary of Kshs. 92,000/=, with the employment commencing not later than 1st August 2010. The employment was subject to an initial three-month probation period. In 2013, following a global restructuring, Roche Kenya Limited was incorporated and took over the operations of Hoffman La Roche Kenya Limited. The Claimant, along with other staff, was offered employment with Roche Kenya Limited by a letter of offer dated 14th June 2013, effective 1st July 2013, with continuous service recognised from 1st August 2010, and the Claimant's gross monthly salary was Kshs. 145,374.63. On 22nd March 2014, the Claimant was promoted to Junior Product Manager effective 1st April 2014 with a revised gross salary of Kshs. 210,000/=. He rose through the ranks to the position of Specialty Franchise Head, which he held until 31st May 2018. It is the Claimant's case that during the course of his employment, he was not paid a house allowance or provided with housing accommodation.

8. The Claimant states that on 3rd May 2018, the Respondent served him with a notice of intention to terminate his employment on account of redundancy, and the termination took effect on 31st May 2018. As at the time of termination, the Claimant earned a monthly salary of Kshs. 306,251.74. It is the Claimant's grievance that the redundancy process conducted by the Respondent was unlawful and discriminatory for the reasons that it was haphazard and had no guidelines; and it had a premeditated outcome that ensured that the Respondent's expatriate employees were retained, while its Kenyan employees faced termination of their employment contracts under the pretext of redundancy. While the then Country Manager Andre Mendoza indicated, during the meeting held on 2nd May 2018, that the redundancy was intended to create more field focussed positions to stimulate more revenue, the new organogram displayed showed that the reporting lines for the field force remained the same and there was no addition of field force employees. Further, the responsibilities and accountabilities for the field force roles remained the same. There was merely a change of the titles held, and a proposal to base two of these positions outside Nairobi, that is, in Eldoret and Mombasa. According to the Claimant, therefore, the reorganisation of the respondent first put forward on 2nd May 2018 and implemented immediately and unilaterally ought not to have caused redundancies.

9. To illustrate his point, the Claimant highlighted the Respondent's 2016 reorganization where the same field positions were transitioned from Medical Representatives to the then new job title of Products Access Specialists with an expanded role of integrating implementation of access programs and key account management as a new way of

aligning the business. During this reorganization, redundancy was not declared because the same role was maintained with expanded functions. Salaries were also not increased for the expanded role. The Claimant was one of the employees who was affected by the change of title and expansion of roles, with no corresponding salary increment, when the Product Management position was changed to Franchise Head.

10. On account of the 2016 reorganization, the Claimant states, new employment positions were created and filled exclusively by expatriates. Specifically, the Respondent created the following positions: Market Access Managers, 2 positions; Health Economist, 1 position; Commercial Head, 1 position; Chief Operating Officer, 1 position; Regional Head, 1 position; General Manager, Sub Saharan Africa, 1 Position; and Communications Manager, 1 position. Most of these positions were Management positions that led to complaints of disenfranchisement and discrimination of the local Kenyan employees in career growth prospects, compensation and benefits, and sustainability of the business since the wage bill went up and there was no significant growth of business.
11. The Claimant further argues that the Respondent acted in a discriminatory manner towards its Kenyan employees, by indicating that in the May 2018 redundancy, the newly recruited expatriates were retained, while the Kenyan employees lost their positions. The expatriates, apart from being excluded in the redundancy, also received additional benefits such as house allowances or provision of a fully furnished house, free housing in exclusive neighbourhoods, education of their children in international schools, all to the exclusion of the Claimant and the employees who were not foreign nationals. He clarifies

that following the May 2018 redundancy, all Product Access and Franchise Head positions were scrapped and new positions created which have the same job responsibilities and accountabilities as the previous Product Access and Franchise Head positions.

12. It is the Claimant's case that the issue of discrimination in the Respondent company was raised previously during its Global Employee Opinion Survey (GEOS) held in November 2017 at its Atrium Boardroom where the respondent's employees complained *en masse* against the respondent's unfair, discriminatory and unlawful labour practises consisting of unequal compensation of employees in terms of monthly salaries, house allowances, development and career growth and benefits, which disadvantaged the Respondent's Kenyan citizen employees as compared to its expatriate employees employed within the same staff cadre. A survey that was conducted by the Respondent by way of questionnaires also unearthed complaints of, among other things, favouritism and poor leadership, promotion interviews that were shrouded in secrecy in favour of expatriates and disregarded work experience and qualifications, and discrimination in awarding and sponsoring training and development courses both within and outside the country, and in housing. Another issue that was raised was skewed remuneration for work of equal value in favour of expatriates. The feedback given during the above stated survey which was supposed to be anonymous, was instead used to victimize local employees approximately six months later, by declaring them redundant.

13. The Claimant states that after the redundancy, the Respondent's dismissed employees were encouraged to apply for the KAM position which on scrutiny revealed that it had the

same job accountability and reporting lines as the position as a Product Access specialist. Upon inquiry on the difference between the two titles that would justify the redundancy, it was indicated that the claimant and other employees would be offered new alternative roles. Despite the declaration of redundancy, the Respondent advertised for a vacant position to be filled and the same has already been filled. The redundancy was therefore not only unlawful, but also unnecessary and had extraneous aims as aforesaid.

14. The true reason for the redundancy, according to the Claimant, is explained as follows:- Andre Mendoza, an expatriate and the then Respondent's Country Manager, was employed by the Respondent in the year 2015 and by the end of the year 2017, he had created five other positions for expatriates which qualified Kenyans could perform, namely: Chief Operating Officer held by Frank Loeffler (Lawyer); Commercial Head held by Ndeye Makalou (Pharmacist); Market Access Head held by Charles Ngoh (Economist); Market Access East Africa held by Delali Atipoe (Engineer); and Health Economist held by Christina Fang (Political Scientist). These were soft positions with high perks, while technical roles of driving the business were left to the locals. Once the business grew, some locals were declared redundant.
15. Of the six (6) expatriates who were employed by the respondent as at the time of the redundancy in May 2018, none was declared redundant. Conversely, ten (10) out of twenty four (24) locals were declared redundant, six (6) of whom were orally urged to reapply on the basis that their reapplication for appointment would most likely be successful. The employees declared redundant were: (a) Kennedy Kimathi; (b) George

Muriuki; (c) Liz Kamandu; (d) Walter Wanjala; (e) Lucy Olero; (f) Edwin Kung'u; (g) Gitangu Mangutha; (h) Susan Njoru; (i) Frankie Samena; and (j) Wangui Mathenge. The list of the employees who were declared redundant but later reapplied successfully is as follows: (a) George Muriuki; (b) Liz Kamandu; (c) Edwin Kung'u; and (d) Gitangu Mangutha.

16. The Claimant concludes that the alleged declaration of redundancy and reappointments of employees by the respondent negated any alleged restructuring of the respondent's operations and it can only be deduced that the said restructuring by way of redundancy was a charade to mask the unlawful termination of the claimant and other employees.

17. It is the Claimant's case that his right to fair labour practices as guaranteed by Article 41 of the Constitution of Kenya was gravely infringed by the actions of the Respondent. He was also denied an equal opportunity of employment with the respondent on account of his nationality in contravention of Article 27 of the Constitution. The respondent's actions and omissions also injured the Claimant's inherent dignity and disrespected his nationality; violated the terms of employment contained in the Claimant's employment contract and the Respondent's own code of conduct; and violated the provisions of the Employment Act 2007.

Respondents' case in brief

18. The Respondent admits that the Claimant was its employee, but his employment with the Respondent ended on 31st May 2018 when it was terminated on account of redundancy. At the time of termination, the Claimant held the position of Franchise Manager.

19. It is the Respondent's case that in 2018, it conducted a review of its operations aimed at restructuring its operations and optimizing efficiencies. Upon evaluating its structure, it concluded that some positions would have to be declared redundant. The respondent complied with the conditions laid out under section 40 of the Employment Act, 2007 by informing the claimant of the decision to declare him redundant in a meeting held on 2nd May 2018 which was followed by a letter of the same date constituting notice of intention to terminate on account of redundancy; sending a separate notice of intention to terminate on account of redundancy dated 2nd May 2018 to the Labour Officer, Nairobi County; making a justified and lawful decision to declare the Claimant redundant; abolishing the claimant's position and issuing notice of the said abolition, as well as informing the redundant employees that they could apply for the new positions in the meeting of 2nd May 2018; issuing a termination letter dated 31st May 2018 confirming the reasons for termination which included a computation of terminal dues including payment in lieu of notice, unpaid salary, accrued leave days that were not taken, and severance pay; and copying the termination letter to the Labour Officer, Nairobi County.

20. It is stated by the Respondent that the reorganization of the Respondent's structure was not malicious but was intended to ensure improved efficiency. Restructure is a confidential process until the until the new structure is agreed upon at which point those affected are notified. In the present case, the Claimant and other employees were notified that their positions were being declared redundant during the meeting of 2nd May 2018.

The position of Franchise Manager was abolished, and a new position of Key Account Manager was created.

21. On the issue of discrimination, the Respondent takes the position that it has a zero-tolerance policy on discrimination of any kind and cites pages 36 and 6 of its Group Code of Conduct and Employee Code of Conduct respectively. It states that employees are encouraged to speak up about any alleged discrimination, but points out that the Claimant did not raise the issue of discrimination directly with his supervisors during the course of his employment.
22. It is admitted that the Respondent undertook a re-organization in 2016, but the Respondent distinguishes it from the restructure in 2018. In 2016, it replaced the role of Medical Representative position with the roles of Product Access Specialist and Medical Science Liaison. The Product Access Specialist role involved: ensuring access programs developed in the public sector were implemented effectively; meeting health care professionals to discuss the science behind products; and guiding clients to the available access pathways. On the other hand, the Medical Science Liaison role created was more specialised and required a candidate with experience in clinical practice, not people who had a sales background. The role involved: engaging doctors on clinical trials in disease areas; providing medical expertise to customers, and customer insights to internal product teams; serving as a scientific bridge and point of contact for medical practitioners; and responding to product related questions. Indeed, the reorganisation in 2016 did not result in any job losses.

23. The Respondent denies that there was discrimination of local Kenyan employees in the new positions that were filled in 2016, and clarifies that it is part of a global entity and recruits suitable candidates on a global platform. It states that the positions created following the reorganization in 2016 were filled by individuals possessing the requisite skills, experience and qualifications, in accordance with The Roche Employment Policy.

24. The Respondent is categorical that the new positions created following the restructure of May 2018 differed greatly from the positions created following the reorganisation of 2016 as follows: The Product Access Specialist ensured that programs developed in the public sector partnerships were implemented effectively. The focus of the role was on meeting health care professionals to discuss product science and guide them to access pathways. On the other hand, the Key Account Manager was created to develop and implement business plans that will increase the sale and uptake of the respondent's product across a designated group of key accounts within specific regions such as Nairobi, Eldoret and Mombasa. The Franchise Head Role was responsible for a specific portfolio either the Oncology portfolio or the Renal portfolio. The Market Excellence Lead, in line with the respondent's objective of becoming more efficient, created an expanded role to cater for both the Oncology and Renal Portfolio.

25. The respondent argues that it is entitled to reorganise its business to improve efficiency whenever there is a need to do so. The pharmaceutical market dynamics are rapidly changing with increased technology and competition and the respondent has taken steps to adapt. One of the ways to adapt was to identify roles which could either be merged or

abolished. The new position of Key Account Manager required a different set of skills focusing on the need to develop and implement business plans. A consequence of this reorganisation meant that the positions of Product Access and Franchise Head were no longer required and subsequently abolished. The decision to abolish these positions was made with the objective of streamlining the respondent's operations and to align with the respondents' Sub-Saharan Africa (SSA) region structure. The organisation structure of the respondent's East Africa operation has changed significantly in line with the respondent's objectives:

- a) The number of staff has decreased from 30 in 2017 to 24 staff following the 2018 reorganisation;
- b) In 2017, all Product Access Specialists were based in Nairobi and reported directly to the Sales Manager, Franchise Head and Head of Commercial. By contrast, and in line with the respondent's Key Account Manager model to create field focused positions, the 2018 reorganisation created 4 Key Account Manager positions based on region who report to a Territory Manager and the Head of Commercial;
- c) The changes in roles were as follows:
 - i. Two (2) positions of Franchise Manager were abolished and replaced with 1 Market Excellence Lead.
 - ii. Four (4) Product Access Specialist positions were abolished and replaced with 4 Key Account Manager positions focused on specific regions.
 - iii. The Medical Science Liaison role was abolished as the duties could be taken up by the medical team and clinical operations lead.
 - iv. The Project Manager role was no longer needed.

- v. The Facilities Manager role was no longer needed.
 - vi. The Administrative Assistant role was no longer needed.
26. The Respondent denies that it discriminated against its employees on the basis of nationality and states that its decision was based on the operational needs of the respondent, rather than nationality. The positions created were filled on the basis of a given individual possessing the requisite skills, experience and qualifications to fill the position. It emphasizes that there was no discrimination of employees; and the restructuring of a business is not only on account of economic downturn, with the respondent being entitled to reorganise its business to improve efficiency or even to capitalise on a period of growth. Further where a role was no longer required by the business, such role is to be abolished.
27. On the issue of feedback from employees, the Respondent confirms that it regularly engages with its staff to receive feedback and determine what steps it should take to continue providing a good working environment for its employees. It confirms that it held a Global Employee Opinion Survey (GEOS) participation day in October 2017, and received feedback about company management and benefits. The report prepared indicated that 63% of employees felt that the respondent delivers on the promises it makes to employees. Following a review of the feedback and in an active bid to ensure that the respondent continues to provide a good working environment for its employees, the then country manager called for a special discussion on 13th October 2017 and addressed some of the issues raised in the GEOS as follows:

- a) With respect to the remuneration and benefits accorded to expatriates, the Respondent clarified that the salary of the expatriate originates from their home country and the expatriate retains the same salary and benefits structure as peers in their home country. It further clarified that the salary and benefits of an expatriate bears a strategic and development implication based on the needs of the business, in accordance with the Roche Group Long Term International Assignment Policy which is applicable to all international assignees who work outside their home country.
- b) Promotion interviews were based solely on performance, experience and qualifications held by a particular employee.
- c) It is in the best interest of the respondent's business to have the best people in the correct position working for the respondent and no employee has been discriminated against based on nationality.
- d) Training and development courses were awarded based on a particular role and not an individual.
- e) There was no favouritism toward expatriates and all employees were treated fairly and in accordance with the terms of employment set out in their employment contracts.

28. The Respondent denies the allegation that it victimized members of staff who raised concerns regarding the work place, and insists that the positions to be made redundant were only chosen in the interest of achieving the respondent's business goals. The minutes of the GEOS meeting held on 13th October 2017 were placed on a google drive only accessible by employees of the respondent.

29. The Respondent states that at the meeting of 2nd May 2018, the claimant was informed that redundant employees would have the preference to apply for the new positions, and this was reiterated in an email dated 3rd May 2018 which was sent to the claimant by the respondent's Head of Commercial, East Africa, urging the Claimant to apply for the role of Marketing Excellence Lead. The claimant declined, of his own volition, to apply for the position and communicated this to the Respondent vide a letter dated 8th May 2018. Other employees took advantage of this offer, were interviewed and assigned new roles. The respondent did not simply replace Kenyan employees with expatriates. The Respondent breaks down the employees that re-applied as follows: two (2) Franchise Managers were declared redundant, and one (1) chose to apply for the new role of Marketing Excellence Lead and was successful. The assertion that new roles were created in favour of expatriates is therefore false, and so is the allegation that the Respondent acted in a discriminatory manner.
30. It is averred that the Respondent issued the Claimant with a termination letter dated 31st May 2018, confirming that his employment was terminated on account of redundancy, and informing him that he would be issued with a certificate service and paid his terminal benefits as follows: one month's pay in lieu of notice-Kshs. 306,252/-; unpaid salary for days worked up to 31st May 2018-Kshs. 306,252/-; leave days accrued but not taken-Kshs. 183,751.20; severance pay at one (1) month's pay for each complete year of service-Kshs.2,450,016/-, TOTAL (Gross)-Kshs. 3,246,271.20, TOTAL (Net)-Kshs.2,058,013.45. The said amount was remitted to the Claimant's bank account on 8th June 2018. In a show of good faith, the Respondent states that it computed severance pay

at the rate of a full month's pay per year, rather than the statutory 15 days' pay per year. It also provided the Claimant with six (6) months' medical insurance.

31. The Respondent admits that it advertised for the new vacant positions created by the redundancy and points out that the Claimant refused to apply for one such position.

32. On the claim for house allowance, the Respondent states that the Claimant's remuneration per Clause 2 of his employment contract was a gross package, inclusive of house allowance and other allowances. This issue was also not raised during the Claimant's period of service. The Respondent states that in any event, a claim for house allowance amounts to a continuing injury which claim must be made within 12 months of the end of the employment relationship. It avers that this claim is time-barred having been made on 28th June 2019, while the Claimant's employment was terminated on 31st May 2018.

33. The Respondent concludes its defense by stating that the Claimant has not demonstrated how his right to fair labour practices was violated and that there was unfair and differential treatment; has not proved its allegations of discrimination by providing particulars thereof; and has not proved that the redundancy was unlawful.

DETERMINATION

34. The parties filed written submissions on the close of the respondent's case.

Issues for determination

35. The claimant identified the following issues for determination in the suit -

- a. Whether the termination of the Claimant's employment on account of redundancy was unlawful;
- b. Whether the Claimant is entitled to house allowance and whether the claim for house allowance is statute barred;
- c. Whether the Claimant was discriminated contrary to Article 27 of the Constitution of Kenya;
- d. Whether the Claimant is entitled to the reliefs sought

36. Conversely, the respondent outlined the following as the issues for determination namely-

- a. Whether the termination of the claimant's employment on account of redundancy was lawful in substance and process;
- b. Whether the claimant was subjected to any discriminatory practices;
- c. Whether the claimant is entitled to the reliefs sought in his claim (this includes the question of limitation of actions with reference to the claim for house allowance and whether such claim is a contractual claim or a tort of continuing injury).

37. The court found the parties were in agreement on the issues for determination to be-

- a. Whether the termination of the Claimant's employment on account of redundancy was unlawful;
- b. Whether the Claimant was discriminated contrary to Article 27 of the Constitution of Kenya;
- c. Whether the Claimant is entitled to the reliefs sought.

Whether the termination of the Claimant's employment on account of redundancy was unlawful:

The claimant's submissions

38. Redundancy is defined under section 2 of the Employment Act, 2007 as the loss of employment due to the employer's operational requirements and includes the abolition of office, job, or occupation. The substantive and procedural requirements for a lawful redundancy are set out in section 40 of the Employment Act, 2007, which requires, inter alia: 1) Written notice to the employee and the local labour officer at least one month before the effective date, stating the reasons for, and extent of, the redundancy; 2) Fair selection criteria based on seniority, skill, ability, and reliability; 3) Non-discrimination in the selection process; 4) Payment of severance at not less than 15 days' pay for each completed year of service; and 5) Payment of all other dues. Further, Article 41(1) of the Constitution guarantees the right to fair labour practices, while Article 27(4) prohibits discrimination on grounds including race, sex, ethnic or social origin, colour, and nationality. The Court in *Ng'ongah v Mount Kenya University (Cause 1 of 2022) [2023]* KLR stated, "To determine the legality of a redundancy, the court has to examine the integrity of the entire process vis-à-vis the steps laid out under Section 40 of the Employment Act. Further, the Court must also determine whether the redundancy adhered to the strict provisions of Section 43 and 45 of the Act on unfair termination." Section 40 of the Employment Act, 2007 states, "(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 one month prior to the date of the intended 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."

39. While the Respondent asserts that it complied with section 40 by notifying the Labour Officer and the Claimant on 2nd May 2018, the Claimant gave evidence that: 1) The notice did not constitute genuine consultation but was merely a declaration of a predetermined decision; 2) No meaningful engagement occurred to explore alternatives to redundancy; 3) The requirement to reapply for the newly created positions within days of the announcement was an empty formality, especially since the roles mirrored the abolished ones in functions and reporting lines. 26. Your Ladyship, the foregoing

averments are further supported by the following facts: 1) Although the Respondent pleaded at paragraph 8 of its Response that there were “pharmaceutical market dynamics” and “increased technology” necessitating a restructure of its business, DW1, Mr. Frank Loeffler, admitted under cross-examination that the Respondent had not filed any evidence to demonstrate such alleged pharmaceutical market changes or technological advancements. 2) DW1 further admitted that the Respondent did not have minutes of any meeting between the Claimant’s line manager and the Claimant explaining the redundancy. Instead, DW1 relied on an email at page 65 of the Respondent’s bundle. However, that email does not capture any meaningful engagement or discussion to explore alternatives to redundancy. 3) The Respondent claimed that the new position required new skills, yet there was no meaningful engagement to consider alternatives such as training. Clause 12 of the Claimant’s contract of employment expressly provided for training and development flexibility. It stated: “Roche is committed to the development of its employees. Various training schemes, in-house programmes and courses are offered to achieve this objective. External study is also encouraged. To monitor progress and identify further training needs, regular assessments are undertaken. You confirm that you recognise and support the complete flexibility of jobs and duties within the Company, both within sections/departments and between the various divisions/departments of the Company, subject to individual skills and capabilities. You agree to participate in any training and/or retraining aimed at the broadening of skills in new technological developments, as they affect the Company’s efficiencies. Furthermore, you agree to being transferred from one department or section to another, either temporarily or permanently, following consultations with yourself.” Despite the existence

of this clause, which DW1 admitted knowing, the Respondent neither considered nor offered the Claimant any training to acquire the new skills. No report was filed assessing the cost of such training for the Court to determine whether the alleged abolition of roles was based on sound commercial reasons. 4) There was also no credible evidence to show that the abolished roles were materially different from the new roles. In paragraph 19 of DW1's witness statement, he claimed that the Product Specialist role involved meeting healthcare professionals to discuss product science and guide them through the access pathway, whereas the Key Account Manager was created to develop and implement business plans. However, during the hearing, DW1 conceded that he was not aware the Product Specialist also developed business plans, and further admitted that both positions involved field operations. Notably, the Respondent did not specify or produce any certification requirements for the Key Account Manager role that would have distinguished it from the Product Specialist role. Further, a verbatim reading of paragraph 19(b) of DW1's witness statement states: "The Franchise Head Role was responsible for a specific portfolio either the Oncology portfolio or the Renal portfolio. The Market Excellence Lead, in line with the Respondent's objective of becoming more efficient, created an expanded role to cater for both the Oncology and Renal portfolio." It is evident that the Franchise Head role already catered for either Oncology or Renal. Combining the two portfolios into one position does not demonstrate any substantive change in skill or responsibility. In truth, it amounts to nothing more than a change in nomenclature.

40. DW1 also gave contradicting evidence. In paragraph 22(b) of his witness statement, he stated: "In 2017, all Product Access Specialists were based in Nairobi and reported

directly to the Sales Manager, Franchise Head and Head of Commercial. By contrast, and in line with the respondent's Key Account Manager model to create field-focused positions, the 2018 reorganization created four Key Account Manager positions based on region, who reported to a Territory Manager and the Head of Commercial." Contrary to that evidence, during cross-examination he confirmed that both the Product Access Specialist and Key Account Manager roles involved field positions. These contradictions are not trivial; they go to the heart of DW1's credibility with respect to the entire body of evidence placed on the court record. However, they also prove one fact: that the roles of Product Access Specialist and Key Account Manager were not different. The Court of Appeal in *Kenya Airways Limited v Aviation & Allied Workers Union of Kenya & 3 others* [2014] eKLR emphasized that redundancy must not only meet the procedural steps in section 40 but must also be founded on genuine and demonstrable operational requirements, with consultation being a key component. D.K Maraga (as he then was) stated, "Kenya is a State party to the International Labour Organization (ILO), which it joined in 1964 and is bound by the ILO conventions. Article 13 of Recommendation No. 166 of the ILO Convention No. 158 – Termination of Employment Convention, 1982 – requires consultation between the employers on the one hand and the employees or their representatives on the other before termination of employment under redundancy. It reads: "1. When the employer contemplates terminations for reasons of an economic, technological, structural or similar nature, the employer shall: (a) Provide the workers' representatives concerned in good time with relevant information, including the reasons for the terminations contemplated, the number and categories of workers likely to be affected, and the period over which the terminations are intended to be carried out; (b)

Give, in accordance with national law and practice, the workers' representatives concerned, as early as possible, an opportunity for consultation on 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.”

41. 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 there is a 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.” We submit that no consultations were undertaken in this case with a view to minimising the redundancy. The Respondent’s assertion that the persons declared redundant could reapply for the new positions is, with respect, untenable. If indeed the roles required a new skill set, it is illogical to expect the Claimant to apply for a position for which he allegedly lacked the requisite skills. Moreover, if the absence of such skills was the reason advanced for declaring the position redundant, the question arises: why did the Respondent not consider training the Claimant instead?

42. Further, at no point did the Respondent inform the Claimant of the specific skill set required, the differences in job description between the old and new roles, or the possibility that training would be offered to bridge any gaps. The type of consultation envisaged under the law, and as explained by the Court of Appeal in *Kenya Airways Limited v Aviation & Allied Workers Union of Kenya & 3 others* [2014] eKLR, is one that actively explores measures to avert redundancy, not merely the issuance of a general notice. In *Jane I Khalechi v Oxford University Press (EA) Ltd* [2013] eKLR, the Court in finding that the decision to terminate the Claimant was procedurally unfair and not based on reasonable grounds stated, “However, the reasons given by employers for redundancies are open to judicial interpretation. The Court must be satisfied that in all the circumstances of the case the decision made by the employer was reasonable. Re-organisations become a superfluous exercise if done for the sole purpose of getting rid of an employee. In the English case of *Chapman v. Goonvean & Rostowrack China Clay Limited* [1973] 2 All ER, 1973, Lord Denning M.R. held that it is not a genuine redundancy, where the requirements of the business for the affected employees continues,

just the same as before. In this case the employer terminated the contracts of certain employees on the basis of redundancy, but went ahead to recruit new employees to undertake the same roles. The House of Lords in *Polkey v. A.E. Dayton Services Limited*, 1988 ICR 142 [HL] examined the duty of employers to act reasonably in all termination decisions. In Court of Appeal of New Zealand case of *Brighthouse Limited v. Bilderbeck* [1994] 2 ERNZ 243 [CA], the Court explained in detail that the affected employees have done no wrong: neither their conduct, nor their capacity is in issue; it is only that in the circumstances, the employer feels the employees are considered to be surplus to the needs of the business. Courts have held that employers have the prerogative to determine the structures of their businesses and therefore make positions redundant. Fairness in all forms of termination is the staple of Industrial Law. In the Industrial Court of Kenya Cause Number 231 of 2010 between Kenya Union of Domestic, Hotel, Education, Institutions and Allied Workers [KUDHEIHA] v. Rabai Road Primary School, Justice I.E.K Mukunya found the employer to have correctly terminated the contract of an employee for economic reasons, but concluded the employer failed on fairness and awarded compensation. Whether a redundancy decision is made in good faith is a question of fact and degree, depending on the circumstances of the case. So long as the decision is reasonable, and exercised in good faith, the Court is encouraged not to intervene. The Court however, has a duty to investigate facts and circumstances, and determine if the exercise of the managerial prerogative was reasonable and clothed in good faith.” We submit that the reasons advanced by the Respondent were not genuine and were not clothed in good faith. The Claimant has demonstrated that the 2018 restructuring did not lead to the abolition of functions but rather a mere renaming of

roles, relocation of some positions, and retention of identical responsibilities. For instance: 1) Product Access Specialist roles were replaced by Key Account Manager roles with the same accountabilities; 2) Franchise Head positions were replaced with a single Marketing Excellence Lead role, yet the responsibilities overlapped significantly. (See paragraphs 20 and 27 of the Claimant's witness statement) 32. The Claimant's evidence shows that none of the six expatriates were declared redundant, while ten of twenty-four Kenyans lost their jobs. This, coupled with the historical pattern where expatriate roles were created and ring-fenced for foreign nationals despite local talent availability, supports the inference of nationality-based discrimination contrary to Article 27 of the Constitution and section 5 of the Employment Act. (See paragraph 45 of the Claimant's witness statement.) The Claimant had filed an application dated 25th August 2020 seeking an order compelling the Respondent to produce several documents. On 2nd September 2021, Honourable Justice Onesmus Makau allowed the application and ordered as follows: "That the Respondent be and is hereby ordered to furnish the Claimant and this Honourable Court with (i) particulars of the full list of employees it had on 28/02/2018, three months before the redundancy of 31/05/2018, and (ii) another list of employees as at 30/11/2018, six months after the redundancy of 31/05/2018, disclosing their salaries, benefits, allowances, qualifications, work permits where applicable, as well as their nationalities." The Respondent, being dissatisfied with the ruling, appealed to the Court of Appeal but never prosecuted the appeal. The Respondent equally filed an application dated 5th January 2022 seeking a stay of execution of the ruling of 2nd September 2021 pending the intended appeal. Justice Ocharo Kebira dismissed the application, finding it devoid of merit. Thereafter, the Respondent filed an application

dated 9th May 2024 seeking review of the orders of 2nd September 2021. The application was allowed vide a ruling dated 25th November 2024, which deleted the requirement that the Respondent disclose “salaries, benefits, allowances, qualifications, work permits where applicable, as well as their nationalities.” 36. Your Ladyship, as a result, the Claimant was unable to access documents which could have demonstrated the qualifications of employees, information solely within the Respondent’s domain. This made it impossible for the Claimant to directly point out irregularities such as the employment of new staff for similar roles. Nevertheless, the Court can reasonably infer such conduct from the facts before it. The timing of the redundancy less than a year after the 2017 GEOS survey where staff, including the Claimant, raised concerns about discrimination raises a reasonable inference of retaliation. The fact that minutes of the GEOS meeting were pulled from the shared platform immediately after the meeting adds weight to this inference. (See Paragraphs 36 of the Claimant’s witness statement which was not controverted by DW1’s evidence) 38. Article 236(b) of the Constitution protects employees from victimisation for having performed their duties in accordance with the law or for having raised grievances. 39. The redundancy process failed both substantively and procedurally. The reasons advanced were not genuine operational needs but a pretext to remove Kenyan employees and protect expatriate positions. The Respondent failed to consult meaningfully, applied discriminatory selection criteria, and sought to mask an unlawful termination as redundancy. The Court should therefore find that the termination of the Claimant’s employment on account of redundancy was unlawful and unfair within the meaning of sections 43, 45, and 47(5) of the Employment Act, 2007.

Respondent's submissions

43. The Termination on Account of Redundancy. The Business Case and Communication to Staff- The claimant asserts that the redundancy was aimed at removing Kenyan employees while retaining expatriates. No evidence was led to prove this allegation and as stated above, the claimant has resorted to asking the court to draw unfounded inferences. No circumstantial evidence has been laid out on which the Court can be asked to make any adverse inferences. The claimant alleges unfair termination under Section 47(1), the burden of proving that the termination was unfair rests on the employee. The burden on the respondent is to justify the grounds for the termination. The business case was set out at paragraphs 17, 19, 21 and 22 of the witness statement of Frank Loeffler (RW1). The key objective was to have a structure that could drive the sales and usage of drugs produced by the respondent across strategically designated key accounts, increase sales and uptake of products and create an expanded role to cater for multiple Portfolios. The claimant asserts that the restructure was only a change in job titles and relocation of some roles. A close examination of the new roles, as explained by RW1 confirms that this assertion is incorrect (see paragraph 19 and 22 of RW1's witness statement) The claimant also takes contradictory positions on the new roles that were created. On the one hand, he asserts that there was no change in roles; on the other he contends that all the respondent needed to do was to train him for the new role and in still another breath, he says that he declined to apply for the new position because he did not have the training for that role. On 2nd May 2018, the respondent convened a meeting where the decision was communicated to all staff. The announcement was that the scope of the respondent's activities had grown and that there was need to prioritize resources on customer facing

activities within the sub-Saharan Africa (SSA). The employees were further informed that as a result, a new structure would be adopted in the East African region where some of the positions would be declared abolished with others being created (page 1 to 3 of the respondent's bundle). The claimant confirmed in cross-examination that he was informed of the intended restructure and the reasons for it; and that he did not challenge these reasons.

44. On re-examination, the claimant attempted to walk back this acknowledgement by claiming that no clear explanation was given at the meeting and that the employees were only shown the new structure. This position is not borne out by the contents of the email of 3rd May 2018 which was sent to the claimant by the respondent's Head of Commercial after the meeting on 2nd May 2018 (page 65 of the Respondent's Bundle). The email at page 65 summarises the discussions of the previous day and was clear as to what informed the process, which is that a new commercial team was to be created at the sub-Saharan Africa (SSA) leadership and that the company was moving towards a key account management model. The email further confirmed that the claimant was informed that the Marketing Excellence Lead and Key Account Manager roles had been created in East Africa and that he could apply for that. The restructure affected the East African markets and contrary to the claimant's submissions, was not targeted at specific Kenyan employees. The suggestion that the process only affected positions in the Kenya market is incorrect. The respondent has a footprint across Eastern Africa. The respondent also produced the FAQ for the East Africa Re-organisation (pages 2 and 3 of the respondent's bundle). The assertion that the restructure was haphazard and whimsical is therefore

incorrect as the process. With specific reference to the claimant's position, the rationale for moving to the Marketing Manager role was that the new role was to be a dedicated medical support for the larger East Africa markets and that it was a required resource which the respondent did not have before (see page 3). The decision to restructure was a function of management prerogative to organise its business to achieve its objectives. It was not open to the claimant to suggest when or how that could be achieved. The claimant's participation kicked in once the decision was made and related to how to mitigate the effects of any changes. The court in *Jane I Khalechi v Oxford University Press E.A. Ltd* [2013] eKLR held that: "... employers have the prerogative to determine the structures of their businesses and therefore make positions redundant. Positions not employees become redundant. Positions may become redundant because there is a decrease in business, the operations have become mechanized, or there is a necessity to re-organize, to enhance operations and prevent closure." It is settled by Courts that an employer has the right to restructure or reorganize its operations without interference from the court provided the relevant provisions of the law are followed. (see Court of Appeal decision in *Kenya Airways Corporation Ltd v Tobias Oganya Auma & 5 others* [2007] eKLR).

45. Notice for redundancy-On 3rd May 2028, the claimant was issued with a letter dated 2nd May 2018 giving notice of the intention to terminate his employment on account of redundancy. (see page 17 of the claimant's bundle). In addition to the dues payable to the claimant under contract and statute, the letter stated that, subject to obtaining the claimant's unconditional discharge, the respondent would provide the claimant with a

medical insurance cover for up to six (6) months after his last working day. By a letter dated 2nd May 2018, the respondent issued the Nairobi Labour Office a notice of intention to declare redundancy under section 40(1)(a) of the Employment Act, 2007. The letter stated that respondent was undergoing a restructuring due to its operational requirements with the result that ten positions would be abolished. The letter then set out the roles of the employees that would be affected including the claimant's role of Franchise Manager (see page 5 of the respondent's bundle). The claimant admitted during cross examination that he was issued with the notice of intent and that the Labour Office was also issued with a notice. On its part, the respondent has shown that it complied with all the requirements of the law by issuing notices to the claimant and the labour office as required by section 40(1)(a) of the Employment Act.

iii. Consultation. Upon a notice of intention of redundancy being issued, employers are required to consult with the affected employees or their union and try to mitigate against the effects of impending redundancies. The consultations are triggered by the issuance of the first notice. The Court of Appeal in *Cargill Kenya Limited v Mwaka & 3 others* (Civil Appeal 54 of 2019) [2021] KECA 115 (KLR) held that: "The purpose of the notice under section 40(1)(a) and (b) of the Employment Act, was 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 were 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 was unavoidable." The notice of intent informed the claimant that during the notice period, should he have any query regarding the process, he should feel free to reach out to

the former Country Manager, Andre Mendoza or Nike Adediwura (page 4 of the respondent's bundle). We submit that the claimant did not raise any query during the pendency of the notice of intention to declare a redundancy. In addition to the notice, the respondent had issued a general communication to its employees on the redundancy together with Frequently Asked Questions (FAQs) that would guide employees throughout the process which communicated the efforts to mitigate the effect of the redundancy through the invitation to apply for new roles and the priority to existing employees in the recruitment (page 1 to 3 of the respondent's bundle). Further, on 3rd May 2018, the respondent's Head of Commercial sent a personal email to the claimant following up on the meeting held on 2nd May 2018. In the email, the Head of Commercial outlined a discussion that had been held with the claimant including some of the responses to his questions and an invitation was made for him to reach out in case he had any questions (page 65 of the respondent's bundle). This was an invitation to the claimant to explore consultations with the respondent.

46. The Court in *Makokha v Deloitte Limited* (Employment and Labour Relations Cause 91 of 2019) [2023] KEELRC 723 (KLR) when dealing with consultations when the employer had left that window open stated as follows: "I am unable to fault the respondent for the claimant's failure to take up further consultations following the respondent's willingness to undertake the exercise and indicated above. In the premises, I hold the view that there was an opportunity to consult. How it was utilized by the employee should not be used to upset the exercise". Having declined the invitation to apply for consideration in the new structure, the claimant did not prove that it sought to

further engage the respondent and was turned down. The claimant cannot now say that there was no consultation as he claims at paragraph 25 (1) and (2) and part (a) of paragraph of his submissions.

47. Abolition of position- The claimant alleges that his role was not abolished. The claimant further alleges that the respondent merely renamed the roles, relocated some positions and retained identical responsibilities. Contrary to the claimant's claim at paragraph 26 (2) of his submissions, the email of 3rd May 2018 from the Head of Commercial did explore alternatives to the redundancy by informing the claimant about the new positions of Market Excellence Lead and Key Accounts Manager that the claimant could apply for (page 65 of the respondent's bundle). The claimant alleges that the new position of Marketing Excellence Lead that sought to replace his position as Franchise Head Role had overlapping responsibilities. He did not prove this claim. The respondent has shown that whereas the Franchise Head Role was responsible for a specific portfolio either the Oncology portfolio or the Renal portfolio, the Marketing Excellence Lead, in line with the respondent's objective of becoming more efficient, created an expanded role to cater for both the Oncology and Renal portfolio. During cross examination, the claimant admitted that he only handled one portfolio as the Franchise Head Renal portfolio, but the new role was expanded merging the Oncology and Renal portfolio. The claimant's assertion at paragraph 26 (4) of his submissions that this was just a change in nomenclature rather than a substantive change in skill or responsibility is incorrect for the following reasons: a. The claimant having not specialised in the Oncology portfolio, could not perform functions associated with that portfolio without having to be trained on

it; and during cross examination, the claimant was unable to outline any similarities in the responsibilities between his position and the position of the Marketing Excellence Lead position. Further, the claimant's position contradicts his submissions at paragraph 26 (3), wherein he alleges that the new position required new skills. This is an admission by the claimant that his position and the position of Marketing Excellence Lead required different skill sets.³⁹ The decision to abolish the claimant's position and merge functions or create others to ensure efficiency was within the respondent's prerogative and the claimant has no right to challenge the respondent's strategic intent of its business. The Court in *Ronald Kipngeno Bii v Uniliver Tea Kenya Limited* [2022] eKLR affirmed this position holding that:

"An employer is entitled to make independent decision as to whether or not a position is necessary in his enterprise. Such decision is discretionary and amounts to a managerial prerogative which ought not to be interfered with unless, the employee shows that the procedure followed was wrong or unfair."

48. Selection criteria- The claimant alleges that there was something sinister in the manner he was selected for redundancy as only local staff were affected. Section 40 (1) of the Employment Act requires an employer to have in place a fair and objective selection criterion. The respondent ensured this by subjecting all the affected employees to the same criteria. Following the restructure, the respondent invited its employees including the claimant to apply for new positions. According to the FAQs issued to the employees, the respondent confirmed that (page 2 of the respondent's bundle): Employees could apply to roles that they were qualified for and were advised to speak to the hiring

manager of the positions they were interested in to get a better understanding of the requirements. All applicants would be taken through the normal recruitment process to give everyone a fair chance. The open positions would be offered first for internal redundant applicants and no incumbent in other positions or external candidates would be able to apply during the redundancy period. It was only after the selection process was complete and where internal candidates were unsuccessful that the new roles would be open to other employees or external candidates to apply. The Head of Commercial met with the claimant on 8th May 2018 to confirm if he had applied for the Marketing Excellence Lead position which he would be suited for. The claimant confirmed that he would not apply for the Marketing Excellence Lead and indicated that he wished to leave the respondent at the end of the month and would be accepting the severance package. By an email of 8th May 2018, the claimant communicated his rejection of the offer and thanked the respondent for the experience and time he had spent within the respondent (page 66 of the respondent's bundle). The claimant now claims that he was singled out for the redundancy process, was victimized and discriminated against. It is clear that the claimant was driven by bad faith in bringing these proceedings. The court in *Plan International Inc v Josephine Ndungu & others* [2019] KEELRC 663 (KLR) when dealing with an employee who refused to apply for a new position held that: "In this court's view, the employer was justified to lay off the claimants after failing to show any interest in serving in available positions under the new organizational structure. The employer could not continue to employ them in non-existent positions which had been phased out or realigned in an effort to ensure efficient and effective management of the organization. The court cannot interfere with the employer's managerial prerogative

which is lawfully done with the aim of achieving strategic business sustainability and efficiency." Further, in *Mwangani v Standard Chartered Bank Limited* [2024] KEELRC 1787 (KLR), the court at paragraph 174 of its judgment held that the respondent could not be faulted in its selection criteria where the claimant was unwilling to apply for the available positions.

49. Redundancy package- The claimant's redundancy package was computed as follows (see page 13 of the claimant's bundle):

a. Pay in lieu of notice equivalent to one month's pay.

b. Unpaid salary for days worked up to 31st May 2018.

c. Accrued but untaken leave days; and

d. Severance pay at one month's pay for each completed year of service.

50. The claimant's dues were paid out to him in accordance with section 40 (1) (e) (f) and (g) of the Employment Act, 2007 as evidenced by the remittance advice produced at page 69 of the respondent's bundle.

51. Alleged Discriminatory Practices- The claimant asserts that the provision of various benefits for expatriate employees was discriminatory and in violation of the Constitution of Kenya, and the Employment Act. The main legal framework prohibiting unfair discrimination in employment is found in: a. Article 27(4) of the Constitution of Kenya which places an obligation on the State not to discriminate directly or indirectly against

any person or any of the protected characteristics or groups listed therein. The claimant now claims that he was singled out for the redundancy process, was victimized and discriminated against. It is clear that the claimant was driven by bad faith in bringing these proceedings. The court in *Josephine Ndungu & others v Plan International Inc* [2019] KEELRC 663 (KLR) when dealing with an employee who refused to apply for a new position held that: "In this court's view, the employer was justified to lay off the claimants after failing to show any interest in serving in available positions under the new organizational structure. The employer could not continue to employ them in non-existent positions which had been phased out or realigned in an effort to ensure efficient and effective management of the organization. The court cannot interfere with the employer's managerial prerogative which is lawfully done with the aim of achieving strategic business sustainability and efficiency.' Further, in *Mwangani v Standard Chartered Bank Limited* [2024] KEELRC 1787 (KLR), the court at paragraph 174 of its judgment held that the respondent could not be faulted in its selection criteria where the claimant was unwilling to apply for the available positions.

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who are similarly situated." The court cited the case of *Lewis v Media 24 Ltd* in which the court held:".... The first issue concerns the difference in treatment. There must be a difference in treatment in which the employee is less favourably treated than others. In some instances, this may require a comparison between the victim and a comparator the so-called 'similarly situated employee'. In other instances, it may be evident that the employee is treated differently from others precisely because of the targeted nature of the treatment, for example sexual harassment or trade union victimisation." The International Labour Organisation Discrimination (Employment and Occupation) Convention, 1958 (No 111) defines the term discrimination as follows "For the purpose of this convention the term discrimination includes -any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation". In *Gichuru v Package Insurance Brokers Ltd* [2021] KESC 12 (KLR), the Supreme Court held at paragraphs 6 and 54 of its judgment that: a. "Paragraph 6 - Discrimination involved treating someone less favourably because of their possession of an attribute such as race, sex, religion compared to someone without that attribute in the same circumstances. Paragraph 51 - Discrimination can be said to have occurred where a person is treated differently from other persons who are in similar positions on the basis of one of the prohibited grounds like race, sex disability etc or due to unfair practice and without any objective and reasonable justification". In *Peter K Waweru v Republic* [2006] eKLR, the court held that: "Discrimination also means unfair treatment or denial of normal privileges to a failure to treat all persons equally persons

because of their race, age, sex where no reasonable distinction can be found between those favoured and those not favoured".

55. Long-Term International Assignment Policy-The respondent had in place a long-term International Assignment Policy (page 10 to 64 of the respondent's bundle). The policy objectives are set out at Clause 1.1 (page 15 of the respondent's bundle) which includes supporting strategic business objectives, set global standards to ensure consistency within the company both in the treatment of the assignee and in long-term international assignments management and ensure that long-term international assignees conditions are competitive worldwide among others. Expatriate assignments inherently involved unique challenges such as relocation costs, housing adjustments and cultural adaptation. The benefits to expatriates are tailored to offset the dislocation burden of international assignments and ensure equitable compensation across global postings. This was elaborately explained by RW1 who is a German national and has been on assignments to Ethiopia, Kenya and lately, Romania. For a claim of unlawful discrimination to succeed, the differential treatment must be demonstrably linked to one of the protected characteristics on grounds listed in the Constitution or Employment Act. In this case, the claimant must prove that the International Assignment Policy disproportionately harms a protected group and lacks justification. While the claimant claims that he was discriminated against based on nationality, the respondent's provision of benefits to expatriate employees was grounded in objective business necessity, not nationality-based discrimination. There was no evidence to suggest that the benefits are tied to nationality rather than assignment. A review of the list of expatriate employees shows that they are

drawn_from different nationalities and only receive benefits if they are working as expatriates in another country. The claimant could not prove that local employees in comparable international roles did not receive identical benefits in their assignments. There was also no evidence that the policy was not applied consistently. The claimant acknowledged that he would have received similar benefits as an expatriate if he took a long-term assignment in another country. This confirms that the policy differential was based on assignment logistics (local vs international) and not on protection characteristic like nationality origin. It is now settled that not every differentiation amounts to unfair discrimination. The different terms and benefits for expatriates was not based on an unfair preference for their nationality but rather on the objective and legitimate requirement of international employment contracts. The claimant's focus on nationality is misleading and does not support the alleged discrimination. The difference in benefits was not based on unfair discrimination due to nationality but on a legitimate, necessary and objective justification relating to the costs necessary to induce an employee to leave their home country, sever social ties and compensate the inherent burden of foreign assignment. Clause 3.3.1 of the international assignment policy provides that an assignee will remain on the home country employment contract or agreement and clause 5 on remuneration provides that the company adopts a home country remuneration approach to maintain equitable treatment, ease integration and ensure continuity (page 22 of the respondent's bundle). The claimant's allegations conflate lawful differentiation with unlawful discrimination. The claimant did not produce any evidence to prove that benefits were awarded or withheld due to nationality as opposed to legitimate operational needs. On this basis, the claim is legally untenable.

56. Alleged Victimization and Discrimination Arising from Global Employment Opinion Survey (GEOS) The claimant has referred to the Global Employment Opinion Survey for the contention that this is what led to the decision to declare him redundant. It is common knowledge that GEOS is an anonymous and confidential survey aimed at obtaining honest feedback from staff. As stated by RW1 the respondent regularly engages its staff to receive feedback to determine what steps it should take to continue providing a good working environment. It confirms that feedback was received which highlighted certain concerns. He confirmed that the minutes of the GEOs was accessible and openly discussed by all. Confidentiality was at all times maintained, and the claimant did not adduce any evidence to the contrary. The claimant alleges that following the feedback from the survey, the former Country Manager called a meeting to discuss the GEOS and claims that the results were used to victimize local employees in the redundancy. During cross examination, the claimant admitted that he had not provided the particulars of the alleged victimization in the redundancy exercise. The allegations of victimization are serious allegations in respect of which the claimant is required to establish a prima facie case. The claimant has not substantiated the allegations of victimization or provided any particulars of discrimination on the grounds set out in section 5(3) of the Employment Act, 2007. We submit that the claimant's allegations of victimization and discrimination are baseless, speculative, and lack evidentiary support and should be dismissed. In the present case, the claimant alleges that following the GEOS outcome, the respondent targeted the local employees for redundancy. As outlined at paragraph 22 (c) of RW's witness statement, the redundancy affected six (6) positions. The roles of Medical

Science Liaison, Project Manager, Facilities Manager and Administrative. Assistant role were abolished completely. The roles of Franchise Manager were abolished and replaced with that of Market Excellence Lead and the role of Product Access Specialist was abolished and replaced with that of Key Accounts Manager positions. With specific reference to the claimant, the position of Franchise Manager had two office holders being the claimant, Franchise Manager - Renal portfolio and Elizabeth Kamandu - Oncology portfolio. Both the claimant and Ms Kamandu were local staff and were issued with a notice of intent (page 67 of the respondent's bundle). The call to apply for the position of Market Excellence Lead was made to both the claimant and Ms Kamandu. During cross-examination, the claimant confirmed that Ms Kamandu applied and was taken in the position of Market Excellence Lead (page 68 of the respondent's bundle). While claiming that the respondent sought to expel local staff in favour of expatriates, the claimant admitted that no expatriate held the position of Franchise Head. Based on the list of employees produced through the bundle filed by the respondent on 9th October 2023, only 7 of the 34 employees and 4 employees of the 31 employees of the respondent were expatriates as at February 2018 and November 2018 respectively.

57. Further, while the claimant alleged in his pleadings that some of the expatriates were not qualified to take up some of the positions that they held, the claimant confirmed during cross-examination that he did not have any evidence to prove that the said expatriates were unqualified. The respondent submits that these claims are malicious. The claimant discounted his chances of securing the new position of Market Excellence Lead. Further, at paragraph 26 (3) of his submissions, the claimant argues that the new position required

new skills and that there was no meaningful engagement to consider training to equip employees with qualifications for the new position. We submit that, Ms Kamandu's success in securing the new role confirms that the claimant had a fair shot at getting the position. Just like the claimant, Ms Kamandu had no training in respect of the Market Excellence Lead. RW confirmed that the employees would receive full training after they were selected for the new position to enable them fit in better into the roles. The claimant cannot, therefore, argue that he was treated differently from any expatriate since no expatriate held a similar position to him. Further, the claimant cannot argue that he was treated differently from any local staff as both he and Ms Kamandu were offered the opportunity to apply for the Market Excellence Lead position.

Decision

58. Whether the reason for the redundancy was genuine- The Court of Appeal in Kenya Airways Ltd v Aviation & Allied Workers Union Kenya & 3 others [2014] KECA 404 (KLR), a decision relied on by the claimant outlined the jurisprudence of the reason for redundancy . In the decision by Maraga J (as he then was) cited Halsbury's Laws of England,³ which refers to termination of employment attributable wholly or mainly to the fact that:*“3Fourth Edition, Vol. 16 page 460 par. 667(i)the requirements of that business for employees to carry out work of a particular kind have ceased or diminished or are expected to cease or diminish,(ii)the requirements of that business for employees to carry out work in the place where they were employed have*

ceased or diminished or are expected to cease or diminish.” The claimant admitted at cross-examination that he was aware, under the new business model of the respondent, that the position he held as Specialty Care Franchise head had been demolished, and confirmed receipt of an email dated 3rd May 2018, which summarizes his communication on the reason for the redundancy with Ndeye Makalou (email at page 65 of the respondent’s bundle). It was the claimant’s case that the position created of Marketing excellence lead and key account manager in the new business model were similar to the position he held, hence no genuine reason for the redundancy. He was of the position that the employer could just have given him the new job without requiring him to apply. The claimant said he was not consulted on the new business model. During cross -examination the claimant confirmed the termination was not on account of disciplinary but redundancy. On the allegation that the redundancy was premeditated and without reason, the claimant was referred to the respondent’s documents, page 1 of the Respondent’s bundle. The document was titled- ‘ ‘ Roche East Africa Re-organization - material to be used by manager to support communication and engagement with employees.’ ’ The document explained the reason for the reorganization, and the court discerned the main reason was for the respondent to remain competitive in the East African market, not just Kenya. The document further stated new position would be posted on 3rd May and all redundant employees will be given preference in the recruitment. On page 2 of the document, it was noted that the reason for the redundancy was not a cost-cutting measure but to build the right organization to support the future growth they anticipated. Was the foregoing a genuine reason for the redundancy of position held by the claimant ? The reorganization was a managerial prerogative for the

respondent to be competitive. The court concluded that was a genuine reason. In Ronald Kipngeno Bii v Uniliver Tea Kenya Limited [2022] eKLR affirmed this position holding that: "An employer is entitled to make independent decision as to whether or not a position is necessary in his enterprise. Such decision is discretionary and amounts to a managerial prerogative which ought not to be interfered with unless, the employee shows that the procedure followed was wrong or unfair." Justice Maraga (as he then was in the Kenya Airways Case on the reason for redundancy observed –‘The decision to declare redundancy has to be that of the employer. In the above News Zealand case of G.N. Hale & Son Ltd, it was held that 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. In this regard therefore, I agree with counsel for the appellant that the learned Judge erred and took into account extraneous matter when he held that the appellant being a parastatal (which it was not as will be demonstrated shortly), the Government of Kenya should have been roped into the redundancy negotiations and the view of the former Prime Minister taken into to ensure that besides the economic considerations, the social welfare, the issue of unemployment and public interest as a whole were considered. 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.’’ (emphasis given). The reason for redundancy is by the employer, and the input of the employee is not necessary, as it is a business-oriented decision. All that the court needs to establish is the existence of a reason of the redundancy by the employer. I find no fault with an employer quest to modify their business to be more competitive by

eliminating the positions it deems unnecessary and creating others in the interest of the business. The claim that only the name changed was not true as the claimant admitted two roles were combined in the position of marketing lead, for which he was urged by his employer to apply, but he declined. I find the reason for declaring the position held by the claimant redundant was justified.

59. On whether the process was lawful /procedural , the process to be applied was to be according to section 40 of the Employment Act to wit- **‘Termination on account of redundancy**

(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.’’

60. Whether there was meaningful consultation in the redundancy process. The claimant faulted the process on consultation and submitted as follows: 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 there is a 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.” The Claimant told the court that no consultations were undertaken in this case with a view to minimising the redundancy. The Claimant contended that the Respondent’s assertion that the persons declared redundant could reapply for the new positions was untenable. If indeed the roles required a new skill set, it is illogical to expect the Claimant to apply for a position for which he allegedly lacked the requisite skills. Moreover, if the absence of such skills was the reason advanced for declaring the position redundant, the question arises: why did the Respondent not consider training the Claimant instead? Further, at no point did the Respondent inform the Claimant of the specific skill set required, the differences in job description between the old and new roles, or the possibility that training would be offered to bridge any gaps. The type of consultation envisaged under the law, and as explained by the Court of Appeal in *Kenya Airways Limited v Aviation & Allied Workers Union of Kenya & 3 others* [2014] eKLR, is one that actively explores measures to avert redundancy, not merely the issuance of a general notice. In *Jane I Khalechi v Oxford University Press (EA) Ltd* [2013] eKLR, the Court in finding that the decision to terminate the Claimant was procedurally unfair and not based on reasonable grounds stated, “However, the reasons given by employers for redundancies are open to judicial interpretation. The Court must be satisfied that in all the circumstances of the case the decision made by the employer was reasonable. Re-organisations become a superfluous exercise if done for the sole purpose of getting rid of an employee.

61. The court wishes to state that redundancy is not of the employee but the position. Consequently, the argument by the claimant that if it were about the skill, he could be retrained is misplaced. The position he was holding was abolished, so whether he possessed the skills for that position was immaterial. The claimant, during cross-examination, confirmed Makalou was his line manager. The claimant read the email of 3rd May 2018 by Makalou to him, which summarized their discussion on the redundancy. He confirmed that an explanation was given to him of the reorganization and new business model, and this, he said, happened in the 2nd meeting. He confirmed that at the meeting, he was informed of new positions created and invited to apply. That by email of 3rd May 2018 (page 65 of the respondent's bundle), the claimant admitted he was informed of 2 new positions and invited to apply. The claimant agreed he had not detailed in his pleadings what he meant by the premeditated redundancy. On the allegation that the position he held remained the same under the new model, the claimant confirmed that the new position created expanded to cater for both Oncology and renal. The claimant confirmed he had not produced the job description for the franchise lead special position for the court to understand his claim that the positions only changed in name. He confirmed the reorganization was to cater to or expand the group within the country. The court agreed with the observation by Justice Maraga (as he then was) on the essence of the consultation as stated in Kenya Airways case - 'I am of the firm view that there is a 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 .” In the instant case, the claimant was offered an alternative job which the respondent believed suited him. (email of 3rd May 2018.) In response, the claimant wrote to the line manager vide email of 8th may 2018 as follows-

“Dear Ndeye,

Following our discussion early today, I wish to confirm that I will not apply for the above named position advertised internally last week by HR. I will therefore leave Roche Kenya Limited at the end of the month, May 31st, 2018. This therefore means that I will accept the severance package provided in accordance with the redundancy provisions of the Employment Act 2007. I am thankful for my experience and time, learned and spent within Roche.” I find that the object of consultation was met when the respondent offered an alternative opportunity of employment to the claimant and assured priority in interviews. The claimant rejected the offer and opted for the redundancy package. A similar position was taken in Josephine Ndungu & others v Plan International Inc [2019] KEELRC 663 (KLR) when dealing with an employee who refused to apply for a new position held that: "In this court's view, the employer was justified to lay off the claimants after failing to show any interest in serving in available positions under the new organizational structure. The employer could not continue to employ them in non-existent positions which had been phased out or realigned in an effort to ensure efficient and effective management of the organization. The court cannot interfere with the employer's managerial prerogative which is lawfully done with the aim of

achieving strategic business sustainability and efficiency.' In the upshot, I find no basis to fault the consultation in the redundancy process. Indeed, his colleague Elizabeth took the offer and was recruited. The allegation that she was employed later was not applicable as the position both held was demolished. The last in, first out, principle was thus not applicable in the instant case.

62. Whether there was a case of discrimination- The submissions of the parties are noted. Section 5 of the Employment Act outlaws discrimination at the work place as follows- '5.

Discrimination in employment

(1)It shall be the duty of the Cabinet Secretary, labour officers and the Employment and Labour Relations Court—(a)to promote equality of opportunity in employment in order to eliminate discrimination in employment; and(b)to promote and guarantee equality of opportunity for a person who, is a migrant worker or a member of the family of the migrant worker, lawfully within Kenya.(2)An employer shall promote equal opportunity in employment and strive to eliminate discrimination in any employment policy or practice.(3)No employer shall discriminate directly or indirectly, against an employee or prospective employee or harass an employee or prospective employee—(a)on grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, pregnancy, marital status or HIV status;(b)in respect of recruitment, training, promotion, terms and conditions of employment, termination of employment or other matters arising out of the employment.(4)It is not discrimination to—(a)take affirmative action measures consistent with the promotion of equality or the elimination of discrimination in the

workplace;(b)distinguish, exclude or prefer any person on the basis of an inherent requirement of a job;(c)employ a citizen in accordance with the National employment policy; or(d)restrict access to limited categories of employment where it is necessary in the interest of state security.(5)An employer shall pay his employees equal remuneration for work of equal value.(6)An employer who contravenes the provision of the section commits an offence.(7)In any proceedings where a contravention of this section is alleged, the employer shall bear the burden of proving that the discrimination did not take place as alleged, and that the discriminatory act omission is not based on any of the grounds specified in this section.(8)For the purposes of this section—(a)"employee" includes an applicant for employment;(b)"employer" includes an employment agency;(c)an "employment policy or practice" includes any policy or practice relating to recruitment procedures, advertising and selection criteria, appointments and the appointment process, job classification and grading, remuneration, employment benefits and terms and conditions of employment, job assignments, the working environment and facilities, training and development, performance evaluation systems, promotion, transfer, demotion, termination of employment on disciplinary measures.’’

63. During cross-examination the claimant stated he was discriminated against directly by the line manager. The claimant confirmed he had not applied for the positions in paragraph 13 of the claim which paragraph stated - The Positions that were created after the 2016 reorganisation for expatriates supposedly because there was no local talent are: Market Access Managers: 2 positions (Charles Ngoh and Delali Atipoe), Health Economist 1 position (Christina Fang), Commercial Head: 1 position (Ndeye Makalou), Chief

Operating Officer 1 position (Frank Loeffler), Regional Head 1 position (Andre Mendoza), General Manager but in the Sub Saharan Africa, 1 Position (Markus Gemuend) and Communications Manager 1 position (Lisa Slater). The first five positions were Management positions that led to complaints of disenfranchisement and discrimination of the local Kenyan employees in career growth prospects, compensation and benefits and sustainability of the business since the wage bill went up. There was growth of business. (The claimant herein will crave leave of this Honourable Court for the respondent to avail its audited annual financial reports for the years 2015, 2016, 2017, and 2018).” The claimant had pleaded the foregoing positions were spared from the redundancy and the exercise was thus an act of self-preservation of the expatriate community. The claimant further complained of discrimination in housing under paragraph 20 of the claim. The claimant at cross-examination confirmed he had no evidence of alleged dubious qualification by the expatriates, He confirmed he was invited to apply for 2 positions but opted to exit. He confirmed it was open to him to apply for the expatriate positions and that would not be discrimination. He told the court it was the survey done by employer that led to the termination. He told the court the offer of a new job was for optics to appear fair. The court found the claims unfounded because the claimant could not conclude the offer to apply for new positions was for optics when he did not apply and was rejected. The claimant confirmed there was no expatriate holding the franchise position he held, and thus no basis of comparison of his issue with the expatriate.

64. On the issue of housing the claimant confirmed to court that during the 8 years of employment he got a payslip and never complained about housing. The claimant told

the court he had not complained as he had not found out about the housing of expatriates till after the redundancy. During cross-examination of RW1, he told the court the contract of employment had a gross salary basic, which he understood to mean included housing. RW1 told the court the expatriates were not paid housing but housed. That local employees were paid a consolidated salary. The claimant produced his contract of employment dated 7th July 2010. In the clause of remuneration, it was written basic gross salary was Kshs 1.104,000 per annum, and the gross package is exclusive of company's contribution to medical aid. (page 1 of the claimant's bundle of documents). The claimant was also eligible for a performance bonus. In 2013 the salary was increased to Kshs. 1,744,495.56 per annum and stated as basic salary and again term gross package term used to exclude medical aid. (page 8 of the claim). The claimant produced his payslip which had component of basic pay, car allowance and bonus. Housing is a right of employee under section 31 of the Employment Act as follows- '(1)An employer shall at all times, at his own expense, provide reasonable housing accommodation for each of his employees either at or near to the place of employment, or shall pay to the employee such sufficient sum, as rent, in addition to the wages or salary of the employee, as will enable the employee to obtain reasonable accommodation.(2)This section shall not apply to an employee whose contract of service—(a)contains a provision which consolidates as part of the basic wage or salary of the employee, an element intended to be used by the employee as rent or which is otherwise intended to enable the employee to provide himself with housing accommodation; or'. A reading of the Section 31(2) of the Employment Act can mean basic can be inclusive of housing. This is possible as the applicable Wages Order Regulation (1982) in calculation of pay states as follows- '4.

Housing allowance-An employee on a monthly contract who is not provided with free housing accommodation by his employer shall, in addition to the basic minimum wage prescribed in the First or Second Schedule, be paid housing allowance equal to fifteen per cent of his basic minimum wage.’’ The job the claimant held was not regulated under minimum wages, and even the basic pay was way above minimum wages; thus, the provision (Regulation 4) did not apply to him. The conclusion is that the Claimant’s basic pay was inclusive of housing according to section 31(2) of the Employment Act. The court further agreed with the respondent that the claim for housing was a continuing injury and had expired within 12 months of the redundancy of 31st May 2018. The claim filed on 28th June 2019 was time-barred pursuant to Section 89 of the Employment Act, and as held in *German School Society & another* (2023)KECA 894.The court, having evaluated the evidence before the court, found no proof of any form of discrimination against the claimant during employment and in the process of redundancy.

65. In conclusion, the Court, having held the redundancy was lawful for there was evidence of compliance with section 40 of the Employment Act, all payments under the section were not subject of the claim, having been satisfied there was meaningful consultation and having found no prove of discrimination and that the basic pay was inclusive of housing, finds no merit in the entire claim. The claim is dismissed with costs to the respondent.

66. It so Ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 29TH
JANUARY, 2026.

J.W. KELI,

JUDGE.

IN THE PRESENCE OF:

Court Assistant: Otieno

Claimant: Ms. Tolle

Respondent: Mr. Mwendwa