Olero v Roche Kenya Limited (Cause 427 of 2019)
[2026] KEELRC 279 (KLR) (29 January 2026) (Judgment)

Neutral citation: [2026] KEELRC 279 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 427 OF 2019

JW KELI, J

JANUARY 29, 2026

BETWEEN

LUCY MARY ACHIENG OLERO ..... CLAIMANT

AND

ROCHE KENYA LIMITED ..... RESPONDENT

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. 2,638,620.00 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 dated 22nd August 2019. In support of their response, they filed a list of witnesses dated 22nd August 2019; witness statement of FRANK LOEFFLER dated 22nd August 2019; and index and bundle of documents dated 22nd August 2019.

Hearing and evidence

4. The claimant's case was heard on the 8th May 2025 when the claimant testified under oath as only witness in his case, produced witness statement dated 19th June 2019 and filed in court on 28th June 2019 and produced filed documents 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.

5. The respondent adopted to apply in the instant case, the evidence produced by Frank Loeffer as RW1 in Cause 426 of 2017 on the 15th July 2025 . RW1 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 being exhibits 1-10 and in ELRC cause NO. 429of 2019 exhibits 1-9. RW1 was cross-examined by counsel for the claimants, Ms Tollo and re-examined by their counsel, Ms. Kirimi.

The Claimant's case in summary

6. The Claimant's case is that she was employed on or about 29th March 2011 as a Medical Representative-Strategic Products, earning a monthly salary of Kshs. 140,000/=, with the employment commencing not later than 2nd April 2012. 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. The Claimant entered into another contract of employment on 11th June 2013 for the position of Medical Representative effective 1st July 2013, at a gross monthly salary of Kshs. 156,600.00, which position was changed to Product Access Specialist and held until her termination on 31st May 2018, although her salary at the time of termination was Kshs.219,885.00. The Claimant complains that throughout the course of her employment she was not provided with house allowance or housing accommodation as provided by law.

7. The Claimant states that on 2nd May 2018, the Respondent served her with a notice of intention to terminate his employment on account of redundancy, and the termination took effect on 31st May 2018. 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.

8. To illustrate her 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 Medical Representative position was changed to Product Access Specialist.

9. 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.

10. 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. She 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.

11. 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.

12. 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 of 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.

13. 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

Loefler (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.

14. 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.

15. 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. It is the Claimant's case that her right to fair labour practices as guaranteed by Article 41 of *the Constitution* of Kenya was gravely infringed by the actions of the Respondent. She was also denied an equal opportunity of employment with the respondent on account of her nationality in contravention of Article 27 of *the Constitution*. The respondent's actions and omissions also injured the Claimant's inherent dignity and disrespected her 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

16. The Respondent admits that the Claimant was its employee, having been employed as a Medical Representative with effect from 2nd April 2012, but her 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 Product Access Specialist. 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.

17. 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 Product Access Specialist was abolished, and a new position of Key Account Manager was created.

18. 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 her supervisors during the course of her employment. 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 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.

19. 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.

20. 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.

21. 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 organisational 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.

22. 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.

23. 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.

24. 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. 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 2nd 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 Key Account Management. The claimant declined, of her own volition, to apply for the position and communicated this to the Respondent vide a letter dated 21st 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: four (4) Product Access Specialists were declared redundant, and two (2) chose to apply for the new role of Key Account Management and were 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.

25. It is averred that the Respondent issued the Claimant with a termination letter dated 31st May 2018, confirming that her employment was terminated on account of redundancy, and informing her that she would be issued with a certificate service and paid her terminal benefits as follows: one month's pay in lieu of notice-Kshs. 219,885/-; unpaid salary for days worked up to 31st May 2018-Kshs. 219,885/-; leave days accrued but not taken-Kshs. 131,931.50; severance pay at one (1) month's pay for each complete year of service-Kshs.1,319,310.00, TOTAL (Gross)-Kshs. 1,891,011.00, TOTAL (Net)-Kshs.1,169,788.20. 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.

26. 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.

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

Determination

Issues for determination

28. The claimant outlined the following issues for determination in her claim-

    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.

29. Conversely, the respondent outlined the following issues for determination in her claim-

    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 her 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.

30. The court found consensus among the parties on the issues and picked as stated by the claimant as follows-

    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.

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

31. The court found the redundancy process was the same as in ELRC Cause No. 426 of 2019, Kennedy Kimathi Ngogo v Roche Kenya Limited, and the parties were represented by the same counsel. The court finds it is a waste of judicial time to re-analyse the facts as regards the redundancy process and adopts its decision in said case to apply in the instant case as follows-

32. On 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 cited 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 she exited employment in 2018 on account of redundancy and not disciplinary. The claimant admitted the email at page 65 of her documents communicated redundancy and she was informed of vacant position and invited to apply. On the allegation that the redundancy was premeditated and without reason, the respondent produced a document a 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 reasons were to remain competitive in the East African market, not just Kenya. The document further stated that the new position would be posted on 3rd May 2018, and all redundant employees would 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? The court thought so. 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)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 justification for the redundancy. I find no fault with an employer's 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. I find the reason for declaring the position held by the claimant was justified.

Whether there was procedural compliance in the redundancy

33. On whether the process was 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.

34. 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." 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? 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.

35. The court wishes to state that redundancy is not of the employee but the position. it was the position held by the claimant of sales representative that was declared redundant. The claimant, during cross-examination, was referred to the email of 2nd May 2018 by Makalou to her, which summarized their discussion on the redundancy. The claimant confirmed that an explanation was given to her of the reorganization and new business model, and this, she said, happened in the 2nd meeting. The claimant confirmed that at the meeting she was informed of a new position created for a key account management role and invited to apply. That by email of 21st may 2018(page 66 of the respondent’s bundle) the claimant admitted she communicated to Makalou that she withdrew her application for the said role. Indeed, in the email, she appreciated the kind gesture of the employer in the process and stated that she appreciated. 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 her, accepted and applied, and later withdrew the application. I find that the object of consultation was met when the respondent offered an alternative opportunity of employment and assured the claimant a priority in interviews. The claimant applied and withdrew the application and opted for the redundancy package. 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. The claimant admitted the necessary notices were issued to herself and labour office and she was paid as per section 40. I find no basis to fault the redundancy process.

36. Whether there was a case of discrimination -The submissions of the parties are noted. section 5 of the *Employment Act* outlaws discrimination at the workplace as follows- ‘5Discrimination 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 measurers 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." During cross-examination, the claimant did not explain the discrimination as she had not applied for the expatriate position, and the same were open for her to apply; she could not substantiate the allegation that the expatriate held dubious qualifications. They could find the claim of discrimination was not substantiated and is disallowed.

Claim for housing

37. On the issue of housing, the claimant confirmed to the court during employment that she got a payslip and never complained about housing. During cross-examination of RW1, he told the court the contract of employment of the claimant had a gross salary basis, which he understood to mean included housing. He told the court the expatriates were not paid housing and were housed. That the local employees were paid a consolidated salary. The claimant produced his contract of employment dated 29th March 2011. In the clause of remuneration, it was written that the gross salary was Kshs, 1,680,000per annum and the gross package is exclusive of the company's contribution to medical aid. (page 1 of the claimant's bundle of documents). The claimant was also eligible for performance bonus. In 2013, the salary was increased to Kshs 1,879,200 per annum and stated as basic salary, and again the term gross package term was used to exclude medical aid. (page 9 of the claim). The claimant produced her 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 31(2) can be construed to mean basic pay can be inclusive of housing. This is possible as the applicable provision Is the Regulation of Wages(1982) in the calculation of housing 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 did not apply to her. The conclusion is that the 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.

38. In conclusion, the Court, having held the process of redundancy was lawful for there was evidence of compliance with section 40 of the *Employment Act* and all payments under the section 40 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, I find no merit in the entire claim. The claim is dismissed with costs to the respondent.

39. 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