

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**  
**CAUSE NO. E1031 OF 2024**

**SANDRA UWERA.....CLAIMANT**

**VERSUS**

**FAIRTRADE LABELLING**

**ORGANISATION INTERNATIONALE e.V.....RESPONDENT**

**JUDGMENT**

1. The Claimant avers that she was employed by the Respondent effective 20<sup>th</sup> April 2022. She asserts that the contract was expressed to be permanent and pensionable, and could only be terminated on the terms specified in the contract or upon her attaining the age of 67 years.
  
2. The Claimant further avers that, by a letter dated 11<sup>th</sup> December 2024, the Respondent purported to terminate her employment. She contends that her termination was not only unfair and invalid but also illegal. On this basis, the Claimant seeks the following reliefs against the Respondent:
  - a) ***A declaration that the letter dated 11<sup>th</sup> November 2024 purporting to terminate the Claimant's employment is in contravention of Section 40 of the Employment Act, thus unlawful and of no effect.***
  
  - b) ***A permanent injunction barring the Respondent from terminating the Claimant's employment based on the letter dated 11<sup>th</sup> November 2024 or***

*in any other way which is in violation of the Claimant's contract and the laws of Kenya.*

- c) Damages for unfair labour practices; or*
- d) In the alternative, compensation for unlawful termination amounting to EUR 210,000.*
- e) Payment in lieu of notice amounting to EUR 64,166.67.*
- f) Costs of this suit and interest thereon.*
- g) Any other relief that this Honourable Court shall deem fit and just to grant in the circumstances.*

3. Putting the Claimant to strict proof, the Respondent denies that it terminated the Claimant's employment illegally or unlawfully. The Respondent asserts that it complied with the provisions of Section 40 of the Employment Act and, therefore, is not in breach of any contractual or legal obligation as alleged. Consequently, the Respondent contends that the Claimant is not entitled to the amounts claimed in the Statement of Claim and prays that the Court dismiss the Claimant's claim with costs.

4. The matter proceeded for hearing on 1<sup>st</sup> October 2025, during which both parties called oral evidence in support of their respective cases.

### **Claimant's Case**

5. The Claimant testified in support of her case as CW1. At the outset, she sought to adopt her witness statement to constitute her evidence in chief. She further tendered the initial, supplementary, and further lists of documents filed on her behalf, as exhibits before the Court.
6. The Claimant testified that during a meeting held on 3<sup>rd</sup> October 2024, followed by a letter dated 4<sup>th</sup> October 2024, the Respondent informed her of a Board Resolution passed on 26<sup>th</sup> August 2024 approving the Organization's future leadership structure under what is referred to as "Project SIMPLE."
7. She was advised that, under the new leadership model, her role would no longer exist, and the Board proposed a settlement agreement to facilitate a mutual separation between her and the Respondent.
8. The Claimant contended that this decision was made contrary to the Resolution of the General Assembly meeting held on 19<sup>th</sup> June 2024, which had agreed that further work and consultations on the proposed governance changes were required. She avers that it had been agreed that any changes would be discussed in an extraordinary General Assembly meeting within 12 months of the 19<sup>th</sup> June 2024 meeting. It was her testimony that the General Assembly had not yet convened to approve Project SIMPLE, upon which the Board based its decision to terminate her employment.

9. The Claimant further averred that, upon requesting time to consider the developments, the Respondent unilaterally directed her to provide a response to the Board by midday on Friday, 11<sup>th</sup> October 2024, without regard to the gravity of the matter.
10. She stated that this deadline was imposed despite a weekend intervening and her scheduled official travel to Colombo, Sri Lanka, on Monday, 7<sup>th</sup> October 2024.
11. That by a letter dated 8<sup>th</sup> October 2024, her Advocates communicated her difficulties in meeting the 11<sup>th</sup> October deadline and requested an extension to 22<sup>nd</sup> October 2024.
12. Instead of responding to the request, the Respondent, on 11<sup>th</sup> October 2024, the day her response was due, accused her of breaching confidentiality concerning the 3<sup>rd</sup> October discussions and the content of the Respondent's 4<sup>th</sup> October letter.
13. The same letter instructed her to proceed on extended leave due to a redundancy exercise and to return the Respondent's assets and equipment. She was also notified that her appointment as Managing Director and Special Representative under Section 30 BGB (German Civil Code) was revoked effective 11<sup>th</sup> October 2024 at 19:00 hrs.
14. She was also asked to respond to the proposed settlement agreement for mutual separation.

15. The Claimant further averred that her Advocates advised her that the German Code referenced in the letter was inapplicable due to Clause 14.2 of her Employment Contract, which provides that the contract is governed and interpreted under Kenyan law.
16. She further stated that, upon receiving the 11<sup>th</sup> October letter, she found herself unable to access emails and had been removed from all central Respondent servers, effectively preventing her from performing her duties or communicating. That further, a staff member was deployed to remove IT equipment from her office, although her employment had not yet been formally terminated.
17. She is advised by her Advocates that these actions amounted to an attempt by the Respondent to constructively dismiss her without due process.
18. She is further advised that placing her on extended leave was done without her request and without a legal or contractual basis.
19. The Claimant further averred that the Respondent issued an ambiguous internal memo notifying staff that she would be away for an extended period, without sharing the content with her beforehand, despite her request for review.

20. According to the Claimant, the Respondent was aware of her recent bereavement and traumatic medical experience. She added that the memo generated numerous sympathy calls from colleagues.
21. Her Advocates advised that the Respondent's actions violated her right to privacy.
22. The Claimant further contended that the internal communications created misleading speculation about her absence, contrary to the actual circumstances, which were related to the Project SIMPLE restructuring.
23. She further stated that instead of engaging in discussions as proposed in her Advocates' letter of 16<sup>th</sup> October 2024, the Respondent unilaterally forwarded a drafted separation agreement by letter dated 26<sup>th</sup> October 2024.
24. That by letter dated 31<sup>st</sup> October 2024, sent via her Advocates, she informed the Respondent of her willingness to negotiate a mutually agreeable separation.
25. According to the Claimant, the Respondent disregarded her request and served her with a notice of intended termination on account of redundancy via a letter dated 11<sup>th</sup> November 2024, indicating termination effective 11<sup>th</sup> December 2024.
26. She is advised by her Advocates that the Respondent's redundancy process failed to meet the requirements of substantive justification and procedural fairness.

27. The Claimant contended that she was treated shabbily, harassed, and bullied, and that the Respondent violated her constitutional, statutory, and contractual rights. That further, she was subjected to international public humiliation and workplace discrimination, in direct violation of the Respondent's Anti-Harassment and Anti-Bullying Policy.

### **Respondent's Case**

28. The Respondent called oral evidence through its Board Vice Chair, **William Thomas Barret**, who testified as RW1. Equally, Mr. Barret adopted his witness statement to constitute his evidence in chief. He proceeded to produce the list and bundle of documents filed on behalf of the Respondent as exhibits before the Court.

29. RW1 testified that the Respondent is governed by a Constitution and overseen by an elected Board, which is mandated with specific responsibilities, including the appointment of directors responsible for the management of the Association, all of whom are accountable to the Board.

30. RW1 further stated that, besides employing the Claimant as Global CEO, the Association appointed an Executive Director of equal rank, based in Bonn, Germany. According to RW1, the positions of Global CEO and Executive Director formed the co-leadership of the Association, both reporting directly to the Board.

31.He averred that, at all material times relevant to this Claim, the Claimant was answerable to the Respondent's Board. The same Board, through the Chair and a Board member, signed her contract on behalf of the Respondent.

32.RW1 further testified that between 2023 and 2024, the Board regularly reviewed the effectiveness of the co-leadership model. It became apparent that the model posed challenges, resulting in inefficiencies, delays in decision-making, and lapses in the administration of the Association.

33.Consequently, in a closed session meeting on 7<sup>th</sup> December 2023, the Board agreed that the Respondent's leadership model should transition from dual leadership to a single leadership model.

34.At a Board meeting on 26<sup>th</sup> August 2024, the Board reviewed the proposed leadership model and associated roles, resolved to commence recruitment for the Fairtrade International CEO, and effectively reverted governance to the single leadership model.

35.RW1 stated that the Board's decision to adopt a single leadership model was separate from the General Assembly Resolution of 19<sup>th</sup> June 2024, referred to as Project SIMPLE.

36. He explained that Project SIMPLE solely related to the governance structure of the Executive Board, including the distribution of authority and duties between the Non-Executive Board and the Executive Management body. It did not concern the Claimant's position as Global CEO.

37. RW1 further averred that following the Board's 26<sup>th</sup> August decision, together with the Board Chair, they requested a meeting with the Claimant on 18<sup>th</sup> September 2024 to brief her on the Board's decision and its implications for the dual-leadership model. They planned to travel to Vienna to meet her in person.

38. The meeting could not take place as the Claimant's personal assistant informed them by email that she had lost her father. The Chair sent condolences and proposed to reschedule once the Claimant was ready. After the Claimant returned to work, the meeting was rescheduled for 3<sup>rd</sup> October 2024.

39. RW1 testified that the meeting took place with the Claimant and the Chair, during which they briefed her on the Board-approved structural changes and their impact on her employment. Out of respect for her seniority, they offered the opportunity to enter into a mutual settlement agreement addressing financial compensation and a mutually agreed exit statement.

40. He averred that, given the Claimant's seniority, it was important to maintain confidentiality over the discussions, and she was requested to keep the deliberations confidential, except with her legal counsel, and to respond by 11<sup>th</sup> October 2024. According to RW1, there was no malice in this request.

41. RW1 stated that on 8<sup>th</sup> October 2024, the Claimant, through her lawyers, requested an extension of the deadline to 22<sup>nd</sup> October 2024 to respond.

42. He testified that, despite being offered the option to attend the Board meetings in Colombo, Sri Lanka, via video conference from 9<sup>th</sup> to 11<sup>th</sup> October 2024, she chose to participate in person and traveled with the executive team.

43. In Colombo, RW1 learned that information from the confidential 3<sup>rd</sup> October discussions had been shared with at least four CEO Members of the Association, who sent the Chair a “without prejudice” email demanding details of the impending separation and questioning the Board’s authority.

44. These developments prompted an urgent closed session meeting of the Board on 11<sup>th</sup> October 2024 in Colombo. The Board concluded that trust between the Claimant and the Board had been compromised and resolved to place her on paid leave pending the completion of the redundancy process.

45. At the same meeting, the Board extended the deadline for the Claimant to respond to the summary note to 22<sup>nd</sup> October 2024, as requested by her lawyers. Given her seniority and access to organizational platforms, the Board deemed the action necessary in the Association's best interest.

46. RW1 further stated that it was essential to communicate to Members and employees regarding the Claimant's extended absence to avoid operational disruption. A statement, developed with compassionate intent, was shared with the Claimant in person on 11<sup>th</sup> October 2024 before dissemination to colleagues.

47. By a letter dated 16<sup>th</sup> October 2024, addressed to RW1, Laurence Tanty, Henda Kassab, and the Claimant, her lawyers responded to the 4<sup>th</sup> and 11<sup>th</sup> October communications, expressing willingness to explore a reasonable separation agreement.

48. The Respondent engaged its Advocates to respond to the Claimant's lawyers. The Advocates denied allegations of ill-treatment, harassment, or bullying and, on a "without prejudice" basis, forwarded a draft Settlement Agreement for consideration.

49. By a letter dated 31<sup>st</sup> October 2024, the Claimant's lawyers did not provide input on the draft, stating that their client would not accept unilateral terms without suggesting amendments.

50. According to RW1, the Claimant did not indicate what changes she would have preferred, preventing meaningful engagement between the parties' lawyers.

51. RW1 stated that the Board held a virtual exchange on 11<sup>th</sup> November 2024 and resolved, pursuant to the 26<sup>th</sup> August 2024 resolution, that the Global CEO position would be rendered redundant by 11<sup>th</sup> December 2024 and that the Claimant be given notice accordingly.

52. Upon expiry of the notice period, the Board formally terminated the Claimant's employment by letter dated 11<sup>th</sup> December 2024, paying her lawful dues of 33,294 EUR, which she acknowledged in writing on the same day.

53. In RW1's view, the Respondent had made reasonable efforts to manage the Claimant's separation lawfully and humanely, but there was consistent resistance on her part.

### **Submissions**

54. Upon the close of the hearing, both parties filed written submissions. On her part, the Claimant submitted that the decision of the Respondent's Board made on 7<sup>th</sup>

December 2023 to move away from the co-leadership model in its future governance structure was reached without her involvement, notwithstanding that the decision would adversely affect her position.

55. The Claimant further contended that the decision referenced in the letter dated 4<sup>th</sup> October 2024 was contrary to the resolution passed at the Respondent's General Assembly meeting held on 19<sup>th</sup> June 2024, at which it was agreed that further work and consultations were required before any changes to the governance structure could be effected.

56. It was the Claimant's position that her employment was terminated on account of Project SIMPLE, in contravention of the said General Assembly resolution, and that the termination was therefore unjustified. Consequently, she maintained that the redundancy failed the test of substantive justification.

57. Relying on the decision in *Coca Cola East & Central Africa Limited v Maria Kagai Ligaga [2015] KECA 394 (KLR)*, the Claimant submitted that the Respondent's actions amounted to a repudiatory and fundamental breach of her contract of employment.

58. The Claimant further submitted that the proposed draft Settlement Agreement would have resulted in a variation of her contract of employment and, pursuant to the doctrine of freedom of contract, she was under no obligation to accept such

variation.

59. In further submission, the Claimant argued that the notice dated 11<sup>th</sup> November 2024 was not of a nature that would trigger consultation. She contended that it was a final notice setting out the exit package and did not invite consultation. According to the Claimant, consultation entails further discussion, whereas seeking clarification merely concerns matters already decided.

60. In support of her submissions, the Claimant placed reliance on the decisions in ***Zachary Otieno Madjweck v Bolllore Transport & Logistics Kenya Limited [2020] eKLR, Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others [2014] eKLR, and Rosilinda Okanda Oluoch & 38 others v Style Industries Limited [2020] eKLR.***

61. The Claimant maintained that there was no attempt by the Respondent, between the issuance of the two notices, to engage her in any form of consultation.

62. In her view, the Respondent therefore failed to meet the threshold of procedural fairness.

63. In her supplementary submissions, the Claimant submitted that a redundancy notice ought to be a notification of an intended redundancy, setting out the reasons for and the extent of the proposed redundancy, and should not amount to a

termination letter. She argued that such notice ought not to present the redundancy as a *fait accompli*.

64. The Claimant further submitted that the one-month notice period prescribed under section 40(1)(f) of the Employment Act constitutes the minimum statutory requirement and does not extinguish an employee's accrued contractual rights.

65. The Respondent, on the other hand, submitted that the Claimant's arguments on constructive dismissal were fundamentally inconsistent with her pleadings and the factual matrix placed before the Court.

66. The Respondent maintained that parties are bound by their pleadings and that the Claimant could not simultaneously accept termination on account of redundancy while advancing a separate and inconsistent claim of constructive dismissal.

67. According to the Respondent, the allegation of constructive dismissal was fundamentally incompatible with the judicial record in this matter.

68. The Respondent further submitted that the Claimant's employment was subject to all lawful modes of termination contemplated under the Employment Act, including termination by way of redundancy, and that no evidence had been

adduced to demonstrate the inapplicability of the relevant statutory provisions to the Claimant's contract.

69. It was the Respondent's position that the Claimant does not contest the reason for rendering the position of Global CEO redundant, but rather challenges the authority of the Respondent to implement the decision, contending that such authority lay with the General Assembly.

70. Citing the decision in *Kenya Union of Domestic, Hotels, Educational Institutions, Hospital and Allied Workers (KUDHEIHA) v Nairobi Hospital [2022] KEELRC 1014 (KLR)*, the Respondent submitted that it had a valid reason and was substantively justified in terminating the Claimant's employment on account of redundancy.

71. The Respondent further submitted that the General Assembly neither deliberated upon nor made any pronouncements concerning the Claimant's position. In that regard, it was also contended that the Claimant was neither a member of the Executive Board nor a voting delegate of the General Assembly.

72. The Respondent submitted that the correspondence and exchanges between the parties and their advocates demonstrate that the Claimant was fully aware of the impending termination by way of redundancy, and that she actively engaged the Respondent on the alternative option of exit through mutual separation.

73. According to the Respondent, although the parties may not have agreed on the terms of the proposed mutual separation, the process culminating in the Claimant's redundancy was consultative, transparent, and undertaken in good faith from 3<sup>rd</sup> October 2024, when the Claimant was first briefed by the Chair and Vice-Chair on the impending changes to the dual leadership model that would abolish her position of Global CEO and that of Executive Director.

74. In support of its submissions, the Respondent relied on the decision in ***Africa Nazarene University v David Mutevu & 103 others [2017] KECA 381 (KLR)***.

75. Further reliance was placed on ***Kisii University v Kenya University Staff Union (Civil Appeal E145 of 2022) [2024] eKLR***, in urging the Court to find that the engagements between the parties from 3<sup>rd</sup> October 2024 to 11<sup>th</sup> November 2024 constituted consultations prior to the Claimant's termination.

76. The Respondent further submitted that termination on account of redundancy is a distinct and *sui generis* mode of termination that applies even to permanent contracts, including the Claimant's, and arises from operational or structural exigencies rather than any fault, misconduct, or inefficiency on the part of the employee.

77. The Respondent maintained that it fully complied with the statutory and procedural requirements governing the objective and fair application of selection criteria.

### **Analysis and Determination**

78. Flowing from the record, the Court has isolated the following issues for determination:

- a) **Whether the termination of the Claimant's employment was substantively justified;**
- b) **Whether the Claimant was accorded procedural fairness before the termination of her employment;**
- c) **Whether the Claimant is entitled to the reliefs sought.**

#### **Substantive justification?**

79. It is discernible from the letter of termination dated 11<sup>th</sup> December 2024 that the Claimant's employment was terminated on the basis that her position as Global CEO had become redundant.

80. Fundamentally, the Respondent attributed the Claimant's termination from employment to its operational requirements.

81. Pursuant to **Sections 43 and 45(2)(b)(ii) of the Employment Act**, the Respondent, as the employer, was required not only to establish the reasons for the termination

but also to demonstrate that such reasons were valid, fair, and based on its operational requirements. In the absence of such proof, the termination is deemed unfair.

82.It is the Respondent's case that the positions of Global CEO, held by the Claimant at the time, and that of the Executive Director, constituted the co-leadership of the Association, with both positions reporting directly to the Board.

83.According to the Respondent, the Board reviewed the effectiveness of the co-leadership model between 2023 and 2024 and observed challenges in its implementation, which resulted in inefficiencies and ineffectiveness in the management of the Association. Consequently, at a meeting held on 7<sup>th</sup> December 2023, the Board resolved that the Respondent's future leadership model should abandon the dual leadership arrangement of a Global CEO and an Executive Director and revert to a single leadership structure.

84.That at a Board meeting held on 26<sup>th</sup> August 2024, the Board reviewed the proposed leadership model and associated roles and resolved to commence the recruitment process for the Fairtrade International CEO, thereby effectively reverting the governance of the Association to a single leadership model.

85.In support of its case, the Respondent exhibited a report from the Board Chair regarding a Board meeting held on 7<sup>th</sup> December 2023, which records that the

Board resolved to move away from the dual leadership structure comprising the Global CEO and Executive Director.

86. The Respondent further exhibited the presentation made at the Board meeting held on 26<sup>th</sup> August 2024, reflecting the Resolution to commence the recruitment process for the Fairtrade International CEO.

87. The Claimant exhibited an article from the Respondent's website, dated 20<sup>th</sup> December 2024, announcing its new governance structure. The announcement states that the Respondent had restructured its governance, adopting a single leadership model in which the roles of Global CEO and Executive Director were replaced by a Managing Director, who reports to the Fairtrade International Board of Directors.

88. In light of the foregoing, the Court finds no reason to doubt that the Respondent undertook a governance restructure, and in doing so, abolished the positions of Global CEO and Executive Director.

89. The Claimant contends that the decision to declare her position redundant, on account of the new leadership model, was taken contrary to the Resolution passed at the General Assembly meeting of 19<sup>th</sup> June 2024, which provided that further work and consultations regarding proposed changes to the Respondent's governance structure were to be undertaken.

90. According to the Claimant, it was agreed that any changes would be considered in an extraordinary meeting of the General Assembly within 12 months of the 19<sup>th</sup> June 2024 meeting. The Claimant's position is that, at the time of her termination, the General Assembly had not yet convened to approve Project SIMPLE.

91. The Respondent disputes the Claimant's assertions, contending that the Board's decision to adopt a single leadership model was entirely independent of Project SIMPLE, which concerned only the governance structure of the Executive Board, including the allocation of authority and duties between the Non-Executive Board and the Executive Management body.

92. In support of its position, the Respondent exhibited the minutes of the General Assembly meeting held on 19<sup>th</sup> June 2024, which recorded the resolutions taken in respect of the deliberations under Project SIMPLE as being; *Establishment of a non-executive Board and an executive management body; the composition of the new non-executive board to correspond to that of the current executive board; the current Executive Board to present constitutional amendments in an extraordinary meeting within 12 months.*

93. Notably, the deliberations on Project SIMPLE on 19<sup>th</sup> June 2024 occurred after the Board meeting held on 7<sup>th</sup> December 2023, at which it was resolved to move from a dual leadership structure to a single leadership model.

94. It is therefore evident that the two deliberations were distinct and that the discussions on Project SIMPLE had no bearing on the resolution concerning the Claimant's position.

95. The reason for termination of the Claimant's employment, when considered alongside the sequence of the Respondent's Board deliberations beginning with the meeting of 7<sup>th</sup> December 2023, leads me to conclude that the Respondent had a valid and fair reason to terminate the employment of the Claimant based on its operational requirements.

96. Accordingly, the Court finds that the Respondent has discharged its evidential burden by establishing that there was a substantive justification for the termination of the Claimant's employment.

#### **Procedural Fairness?**

97. With respect to termination of employment on the grounds of redundancy, Section 40(1) of the Employment Act is explicit that the following conditions must be satisfied prior to declaring a redundancy:

- 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.*

98. In the present case, the Claimant was served with a notice of intention to terminate her employment on account of redundancy, dated 11<sup>th</sup> November 2024. The letter

referenced a meeting held with the Claimant on 3<sup>rd</sup> October 2024, during which she was informed that her role as Global CEO would cease to exist. Accordingly, the Claimant was notified through the same letter that her position would be rendered redundant within 30 days from the date of the notice.

99. In considering this issue, I am guided by the decision in **Kenya Airways vs Aviation & Allied Workers Union Kenya & 3 Others (2014) eKLR**, where Maraga JA (as he then was) observed as follows:

*“My understanding of this provision is that when an employer contemplates redundancy, he should first give a general notice of that intention to the employees likely to be affected or their union. It is that notice that will elicit consultation between the parties, ....”*

100. Further, in **The German School Society & Another vs Ohany & Another [2023] KECA 894 (KLR)**, the Court of Appeal held that a notice to the employee/trade union/labour officer opens up the door for a consultative process with the key stakeholders.

101. Accordingly, the first notice issued, whether to a union or directly to an employee, indicating an intention to declare a redundancy, should not be a conclusive decision to terminate, as doing so would defeat the purpose of the notice envisaged under Section 40(1)(b).

102. In the present case, it is evident that the notice issued to the Claimant dated 11<sup>th</sup> November 2024 was final in nature, leaving no room for consultations.

103. Applying the dicta in the foregoing binding authorities, it is apparent that the Respondent did not substantially comply with the statutory requirement under Section 40(1)(b) of the Employment Act concerning notice, and is therefore at fault in this respect.

104. This finding brings me to the requirement for consultations. In support of its position that it engaged in consultations, the Respondent has referenced a meeting held with the Claimant on 3<sup>rd</sup> October 2024, during which it contends that the Claimant was engaged by RW1 and the Board Chair.

105. It is apparent that, following the meeting, the Claimant was presented with an option for mutual separation, which ultimately did not materialize.

106. Both parties produced a copy of the letter dated 4<sup>th</sup> October 2024, which summarized the deliberations of the meeting held on 3<sup>rd</sup> October 2024.

107. The Court has carefully considered the letter dated 4<sup>th</sup> October 2024 and notes that the deliberations of 3<sup>rd</sup> October 2024 did not constitute consultations as envisaged under **Article 13 of Convention No. 158 and Recommendation No. 166 of the International Labour Organisation (ILO)**. Here is why.

108. It is evident that the deliberations of 3<sup>rd</sup> October 2024 were centered on: *informing the Claimant of the Respondent's decision to restructure and implement a new leadership mode; to communicate that her position would cease to exist; and to note that the future CEO role would require different skills and competencies.*

109. Such discussions cannot be regarded as consultations envisaged under **Article 13 of Convention No. 158 and Recommendation No. 166 of the ILO.**

110. To underscore the importance of holding pre-redundancy consultations, it was observed in **Kenya Airways vs Aviation & Allied Workers Union Kenya & 3 Others (supra)** that consultations are intended to enable the parties to discuss and negotiate alternatives to the proposed redundancy, where possible, or to determine the most appropriate manner of implementing it if it is unavoidable.

111. In light of the foregoing, it is clear that the deliberations held on 3<sup>rd</sup> October 2024 did not meet the consultation requirements set out in **Article 13 of Convention No. 158 and Recommendation No. 166 of the ILO.**

112. Another requirement under **Section 40(1)(c) of the Employment Act** relates to the selection criteria the employer must apply when determining which employees are to be declared redundant. In this regard, the employer is required to demonstrate that, in making such a selection, it has given due regard to seniority

and to the skill, ability, and reliability of each employee within the class affected by the redundancy.

113. In the present case, the Claimant's position was declared redundant, and her role, together with that of her co-leader, was replaced by a single Managing Director. According to the Respondent, the Claimant's co-leader had a longer tenure, and it was practical to retain her as the Executive Director, given that the role was based in Bonn, Germany, where the Respondent's headquarters are located.

114. Despite these assertions, the Respondent did not indicate whether it considered the skill set and competencies of the Claimant's co-leader, **Melissa Duncan**.

115. It is also notable that, in the letter dated 4<sup>th</sup> October 2024, the Respondent advised the Claimant that the CEO role would require different skills and competencies. Notwithstanding this assertion, the Respondent did not provide evidence comparing the qualifications, skills, and competencies required for the CEO position with those possessed by the Claimant against her counterpart, **Melissa**.

116. Further to the foregoing, the Respondent did not indicate, nor suggest, that it objectively weighed the seniority, skill, ability, and reliability of the Claimant and

her co-leader (*Mellisa*), and consequently determined that *Mellisa* was more suitable to be retained. Indeed, there was no evidence, say in the form of a score sheet, demonstrating how the Respondent assessed and weighted the suitability of the Claimant and her co-leader for the CEO role.

117. Accordingly, the Respondent's assertions regarding the application of the selection criteria under **Section 40(1)(c) of the Employment Act** are unsupported by the evidence on record. This gives rise to doubt as to whether the Claimant's selection for redundancy was undertaken objectively.

118. It is worth noting that the selection criteria under Section 40(1)(c) are not a mere procedural formality. They are substantive, as the proper application of these criteria determines which employee is retained and which is declared redundant. Consequently, the criteria must be applied objectively and fairly to all employees affected.

119. All in all, the Court is not satisfied that the selection of the Claimant for redundancy, as compared to her co-leader, *Mellisa*, was carried out objectively. Consequently, the Respondent failed to meet the requirements of **Section 40(1)(c) of the Employment Act**.

120. With respect to the statutory payments under **Sections 40(1)(e), (f), and (g) of the Employment Act**, it is notable that the Claimant was advised, through the

letter of termination dated 11<sup>th</sup> November 2024, that she would receive redundancy dues totaling 23,625 EUR. However, apart from the component relating to leave days, the letter did not provide a breakdown showing the portions attributable to notice pay and severance pay.

121. The Claimant's contention is that she was entitled to three months' notice in accordance with clause 9.1 of her employment contract, whereas the computation of her dues indicates that she was paid only one month's notice.

122. In response, the Respondent asserts that the Claimant served her notice period and was therefore not entitled to payment in lieu of notice.

123. It is instructive to note that compliance with **Section 40(1)(f) of the Employment Act** relates to the payment of one month's salary in lieu of notice, rather than the mere issuance of the notice itself.

124. On this score, the Court is guided by the determination of the Court of Appeal in **Cargill Kenya Limited vs Mwaka & 3 others (Civil Appeal 54 of 2019) [2021] KECA 115 (KLR)**, thus:

*“In this respect, it is notable that a plain and contextual reading of subsection 1(f) shows that its express objective and purpose is the payment required to be made to employees affected by redundancy, and not the issuance of a notice. It is also notable that the legislative*

*intention from the arrangement and content of the enactments in section 40 subsection (1) (d) to (g) was the provision of payments to be made to affected employees in a redundancy, and section 1(f) can only thus be construed within this context, as was done by Maraga JA in Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others Nairobi Civil Appeal No. 46 of 2013 (supra)...” Underlined for emphasis*

125. Accordingly, the Court finds that the Claimant serving one month’s notice does not absolve the Respondent of its obligation to make the payment required under **Section 40(1)(f) of the Employment Act.**

126. In conclusion, the Court finds that the Respondent did not fully comply with the provisions of **Section 40(1) of the Employment Act.** For this reason, the termination of the Claimant on the basis of redundancy was procedurally flawed hence unlawful.

### **Reliefs?**

127. Given that the Court has found that the Respondent did not substantially comply with the procedural requirements under **Section 40(1) of the Employment Act,** the Claimant is awarded compensatory damages equivalent to three months’ gross salary. This award is informed by the Court’s finding that the termination of the

Claimant's employment was valid, fair, and based on the Respondent's operational requirements. Accordingly, the damages awarded are nominal.

128. The Claimant's claim for notice pay succeeds, as the Court has found that the Respondent did not comply with the statutory requirement under **Section 40(1)(f) of the Employment Act**. For the avoidance of doubt, the Claimant is entitled to notice pay equivalent to three months' salary in accordance with Clause 9.1 of her employment contract.

129. Further, it is worth noting that while the Employment Act provides for payment of not less than one month's notice or one month's wages in lieu, this represents a minimum threshold, and parties are at liberty to agree on a longer notice period. In this case, Clause 9.1 of the employment contract stipulates a three-month notice period, and the Respondent is accordingly bound to comply with this contractual provision.

### **Orders**

130. In the final analysis, the Claim succeeds, and judgment is hereby entered in favour of the Claimant as follows:

- a) A declaration that the Claimant's termination from employment was procedurally unfair and, therefore, unlawful.**

- b) **The Claimant is awarded 52,500 EUR, representing three months' salary in lieu of notice.**
- c) **The Claimant is awarded 52,500 EUR as compensatory damages, equivalent to three months' gross salary.**
- d) **The total award is 105,000 EUR.**
- e) **The sum in (d) shall accrue interest at court rates from the date of judgment until it is paid in full.;**
- f) **The Respondent shall also bear the costs of the suit.**

**DATED, SIGNED and DELIVERED at NAIROBI this 23<sup>rd</sup> day of January 2026.**

.....

**STELLA RUTTO**

**JUDGE**

**In the presence of:**

For the Claimant            Ms. Sifunjo instructed by Mr. Odera

For the Respondent        Ms. Ouma

Court Assistant            Catherine

**ORDER**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived

compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**STELLA RUTTO**

**JUDGE**