Atandi v African Medical and Research Foundation (Amref) Flying Doctors (Cause E900 of 2021) [2025] KEELRC 249 (KLR) (31 January 2025) (Judgment)

Neutral citation: [2025] KEELRC 249 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE E900 OF 2021

SC RUTTO, J

JANUARY 31, 2025

BETWEEN

FRIDAY GWARO ATANDI ..... CLAIMANT

AND

AFRICAN MEDICAL AND RESEARCH FOUNDATION (AMREF) FLYING DOCTORS ..... RESPONDENT

JUDGMENT

1. The Claimant avers that he was employed by the Respondent vide a letter dated 2nd May 2008 as an Office Assistant (Grade 2). He further avers that his employment was permanent and subject to a six months' probation period which he successfully completed.

2. It is the Claimant's case that he worked ardently for the Respondent until 28th September 2017 when he received a letter for renewal of his contract extending it for two years, three months. He avers that the said letter, indicated at paragraphs *1* and *2* that there were envisaged changes in the contract to the effect that; "we are aligning contracts to match the financial year for ease of administration."

3. Thereafter, his immediate supervisor, effected changes with his colleagues and disputed the local working arrangement which allowed him to work on other days except Saturdays.

4. The Claimant contends that all his five colleagues who were employed much later than 2008 were placed in a situation not to accommodate him on any Saturday. That being a Seventh Day Adventist (SDA), his faith does not allow him to work on Saturday. As a result of the changes, he met with his supervisor on various occasions.

5. According to the Claimant, he became a marked person from the meetings and comments thereon. That he felt the full impact of discrimination on 15th January 2019 when all staff went through performance review and he was not appraised by his supervisor.

6. The Claimant avers that the net effect of non-appraisal besides rank stagnation is loss of incentives thus greatly prejudicing his prospects of career growth.

7. It is the Claimant's case that he served the Respondent diligently until 9th July 2019 when his services were unlawfully, unfairly and summarily terminated. Consequently, the Claimant has asked the Court to award him the following reliefs:

    a. A declaration that the Respondent's letter dated 7th July, 2019 terminating the services of the Claimant on account of redundancy from its employment unlawful and hence null and void.

    b. The Respondent be Ordered to reinstate the employee and treat him in all respects as if the Claimant's employment had not been terminated; or

    c. The Respondent re-engage the employee in work comparable to that in which the Claimant was employed prior to his dismissal, or other reasonably suitable work, at the same wage.

    d. In the alternative to the demand for reinstatement, the Claimant demands for payment of terminal dues in the sum of USD 123,664 being notice pay, payment for unutilized 30 leave days, 4 months' remainder of contract term, severance pay, compensatory damages for unfair termination from employment and compensation for discrimination based on religion. The Claimant further prays for interest at court rates plus costs.

8. The Respondent countered the Claim through its Memorandum of Defence dated 18th August 2023 in which it has denied the Claimant's assertions with respect to discrimination and unfair termination of his employment contract.

9. The Respondent avers that at the time of recruitment, the Claimant was aware that the services provided by the Respondent required him to work outside the official hours to enable the Respondent to meet its objectives.

10. It is the Respondent's case that the Claimant's contract of employment was terminated on grounds of redundancy following reorganization of its Operations Department which led to the abolition of the Claimant's position. That further, the ground operations team was suitably staffed and the Claimant had no background in aviation operations. This hindered his ability to be of value in any new role.

11. According to the Respondent, termination of the Claimant's employment was not unlawful as alleged. It is the Respondent's contention that the Claimant's redundancy was in compliance with the applicable law and there was no ulterior motive.

12. On account of the foregoing, the Respondent has asked the Court to dismiss the Claimant's suit with costs.

13. During the hearing which proceeded on 11th November 2024, both parties called oral evidence.

Claimant's Case

14. The Claimant testified in support of his case as CW1 and for starters, he sought to rely on his witness statement to constitute his evidence in chief. He further produced the list and bundle of documents filed alongside the Memorandum of Claim as his exhibits before Court.

15. It was the Claimant's evidence that he had worked for more than 11 years without any blemish and his workstation had five other colleagues who were employed much later than 2008.

16. He further averred that the provisions of Section 40(i) of the *Employment Act*, were not adhered to and the same could not be cured by payment of notice in lieu thereof to cover the unlawful termination disguised as redundancy.

17. The Claimant further stated that his discrimination at the work place was based on religion as his supervisor did not accommodate him thus contravening his right and religious beliefs under Articles 22 and 41 of *the Constitution* and Section 5 of the *Employment Act*.

18. Referring the Court to his email dated 6th November 2018, the Claimant averred that he outlined to the Respondent his difficulty in reconciling his religious beliefs on the work schedule and sought improvement thereof.

19. According to the Claimant, his termination, the procedure followed and the grounds for the aforesaid termination were discriminatory and unfair hence unlawful.

Respondent's Case

20. The Respondent called oral evidence through its Human Resources and Administration Officer, Ms. Esther Wakahia who testified as RW1. Equally, RW1 adopted her witness statement to constitute her evidence in chief. She proceeded to produce the documents filed on behalf of the Respondent as exhibits before Court.

21. It was RW1's testimony that on 6th October 2015, the Respondent wrote to the Claimant and informed him of a Cost of Living Salary Adjustment and internal transfer. In the said letter the Claimant was informed that the Respondent had approved a Cost of Living Salary Adjustment of 7% for all its staff. He was further informed that he had been transferred to the Operations Unit in the position of an Operations Assistant. To this end, the Claimant was given a new Contract of Employment dated 15th September 2015.

22. RW1 further stated that as an Operations Assistant, the Claimant was working directly on day-to-day operations of the Respondent's medical emergency repatriation and his duties and responsibilities included inventory and stock management, procurement, assisting the medical team with all necessary filing and supporting the medical team with all relevant duties during night operations emergency cover.

23. According to RW1, the Claimant's employment was not without blemish. That on 19th September 2016, the Claimant was issued with a Warning Letter after he was found asleep in the rest area located within the crew room while on duty.

24. RW1 further averred that due to the Claimant's unsatisfactory performance of his duties, he was placed on a Performance Improvement Plan from the month of February 2017 to May 2017 and a series of meetings held by the Claimant and his supervisor.

25. RW1 averred that despite the Claimant's shortcomings, his position was still upgraded to Operations Assistant (Grade B1) via a Contract of Employment dated 26th September 2017 with a monthly salary of USD 842/=.

26. RW1 further stated in evidence that by a letter dated 9th July 2019, the Respondent gave notice to the Claimant of its intention to terminate his employment on account of redundancy. On the same date, the Respondent gave Notice to the Labour Office, Nairobi Area.

27. On 31st July 2019, the Claimant cleared with the Respondent and he was paid his full salary for the month of July 2019 plus the days worked up to 9th September 2019.

28. She further averred that the Claimant's final settlement cheque was prepared in his name and issued to his lawyers together with his Certificate of Service and computation of his terminal dues. This was after he had failed to collect the same.

29. In further testimony, RW1 averred that the position of Operations Assistant (Grade B1) which the Claimant was promoted to, effective 1st October 2017 operates on a 24-hour duty roster. That at the time, the Claimant was notified and/or was aware of the shift work arrangement and did not object to working on Saturdays.

30. It was her further evidence that the duty roster set out that each of the employees would be required to work one weekend and then one weekend off duty resulting in them working two weekends each month. The Claimant was rostered with all other operational staff in the same manner and he did not raise any objections or concerns.

31. It was RW1's evidence that it later came to the Respondent's attention that the Claimant did not report to work on two Saturdays this being 14th and 28th July 2018.

32. Following an inquiry with the Claimant on his absence, it emerged that despite his rostering, and without notifying his line manager of the same, the Claimant had been making private arrangements with his colleagues to cover for him on Saturdays.

33. According to RW1, the Claimant did not inform the Respondent of the private arrangements, yet it was an express term in his Contract of Employment that employees could work on flexible time basis with prior approval of the Directorate/Unit head.

34. RW1 further testified that the Respondent was not aware of a "local arrangement" by the Claimant with his colleagues on his working on Saturday which was contrary to the terms of his engagement. RW1 confirmed that various meetings and discussions were had with the Claimant on the same.

35. That on 11th October 2018, the Respondent's Operations & Network Manager and Human Resource and Administration Officer held a meeting with the Claimant where he was given an opportunity to explain the reasons why he was not working as rostered and why he failed to inform his supervisor of his absence.

36. During the said meeting it was explained to the Claimant that the Respondent as an aeromedical service provider offered air ambulance services locally and internationally on a 24-hour basis to deliver effective and efficient services to its clientele.

37. It was RW1's evidence that the Claimant failed, neglected, or declined to provide a response on the 21st of October 2018 and it was only after frequent reminders that on 6th November 2018, 16 days later, the Claimant responded.

38. RW1 averred that despite the Respondent's representatives taking time to meet with the Claimant, to make the operational requirements of the Respondent clear and explaining why the rostering arrangements did not have much flexibility, the Claimant vide a letter dated 6th November 2018 indicated expressly and categorically that he would not work on the two rostered Saturdays.

39. After considering the Claimant's position, the Respondent made arrangements to accommodate him by appointing two operations staff to the position of Aircraft Towing Operators with towing capability bringing the ground operations unit to five people allowing for them to cover the weekend shifts without the Claimant.

40. From 15th November 2018, a decision was made not to roster the Claimant over the weekend. A revised roster was shared with the Operations department on 21st November 2018 implementing the decision.

41. According to RW1, the Claimant was not rostered to work on weekends unless there was a need for extra coverage of shifts and in that case, he would only cover on Sundays in recognition of his region commitments on Saturdays. This was the arrangement with regard to the rostering of the Claimant until his date of termination on account of redundancy.

42. RW1 further stated that as operations continued, the ground operations became suitably staffed and efficient under the new structure so that the Claimant who had no background in aviation operations, hence unqualified was hindered in his ability to be of value to the Respondent in his role.

43. That the role of Operations Assistant held by the Claimant was therefore abolished resulting in his redundancy.

44. It was RW1's evidence that the Claimant did not have the qualifications required to suitably fill the position of Flight Operations Officer.

45. RW1 denied the Claimant's assertions that he was a "marked person" and/or that he was discriminated against. She further denied the Claimant's assertions that other staff members except him were taken through a performance review in January 2019 and/or that he lost incentives due to stagnation in rank.

46. Refuting the allegations of discrimination on grounds of religion and terming them malicious, RW1 averred that despite the Claimant's decision not to work on Saturday, and despite the adverse impact on operations, notwithstanding the Claimant's failure to seek approval for his arrangement with his colleagues, no disciplinary action was taken against him.

47. It was RW1's further testimony that the Claimant continued working for the Respondent until his position was declared redundant on 9th July 2019, almost a year after the issues relating to rostering on Saturday came to light.

48. RW1 further denied the assertions with respect to stagnation in rank. According to her, the Claimant joined the Respondent as an Office Assistant (Grade 2) earning a monthly basic salary of Kshs 23,456/= and at the time of his redundancy, he was an Operations Assistant (Grade B1) earning a monthly basic salary of USD 842/-.

Submissions

49. On his part, the Claimant posited that the redundancy consultations with employees must begin whilst proposals are still at an early or formative stage so that employees can have a real opportunity to influence the final outcome and perhaps avoid dismissal altogether. In support of this argument, the Claimant sought to rely on the case of De Bank Haycocks vs ADP RPO UL Ltd.

50. In the same vein, the Claimant submitted that the aspect of consultations before redundancy is effected following the issuance of the notice is mandatory and cannot be wished away.

51. It was the Claimant's further submission that following the issuance of the purported notice, no consultations were held between him and the Respondent. On this score, the Claimant has argued that there is no evidence that he was ever invited to give his views on the expected redundancy. In his view, this fails to adhere to the procedural requirements in cases of redundancy.

52. In further support of his Claim, the Claimant posited that his services were terminated on a purported redundancy without following any laid down procedure. To this end, he submitted that from the documents on record, he was being targeted on account of his observance of his religion.

53. In the Claimant's view, the Respondent had to find something to flash him out in a manner to appear to be fair while in the real sense, the Respondent could not accommodate him on account of religion, which is a fundamental right under *the Constitution*.

54. According to the Claimant, it was unacceptable for the Respondent to embrace a policy and impose it on him without contractual provisions or relevant consultation. He argued that the Respondent's refusal to exempt him from working on the Sabbath is the main reason for the termination of his services disguised as a redundancy, hence amounting to harassing him on account of his religion and belief.

55. The Respondent on the other hand submitted that it has proved that based on the evidence presented, the allegations of discrimination are false and without any legal or factual basis. According to the Respondent, the Claimant has failed to prove his claims of discrimination on grounds of religion as alleged while it has proved that its employment relationship with the Claimant was at all times fair and balanced and was not discriminatory.

56. The Respondent further submitted that when rising through the ranks, the Claimant was at all times still an SDA hence his religious affiliation as an SDA was never an issue to deny him growth and/or progression through the ranks in so far as it was possible.

57. It was further submitted that the evidence laid bare before the court presents the Respondent as an employer who was fair and did not discriminate against the Claimant in his employment as alleged. In this regard, the Respondent argued that the Claimant has not presented any evidence to prove the contrary.

58. Referencing the case of SWM vs Hardware Trading Store Limited & another [2021] eKLR and GMV vs Bank of Africa Kenya Limited [2013] eKLR, the Respondent posited that in disproving discrimination, the burden of proof always lies on the Claimant.

59. Placing reliance on the case of Jacqueline Okeyo Manani & 5 others vs Attorney General & another [2018] eKLR, with respect to the definition of the term discrimination, the Respondent submitted that it could not have discriminated against the Claimant for insisting that he is rostered in the same way as all the other employees.

60. Still on the same issue, the Respondent submitted that the Claimant has failed to prove discrimination while on its part, it has demonstrated that it treated all employees including the Claimant in the same manner until he asked to be excluded from the Roster which was granted. That further, it had justified the redundancy and did not violate the Claimant's rights under Article 27 of *the Constitution*.

61. The Respondent further submitted that it has proved that without KCAA certification, the Claimant could not transition to the new role and there were no other available positions to accommodate him without the certification.

62. It was the Respondent's view that the Claimant's termination on grounds of redundancy was lawful, fair and justified as provided in Section 2 of the *Employment Act* and as expressed in the Court of Appeal in the case of Kenya Airways vs Aviation & Allied Workers Union Kenya & 3 others (2014) eKLR.

63. The Respondent further submitted that its decision to terminate the Claimant was well anchored in the law as set out in Onesmus Kinyua Magoiva vs Prudential Life Assurance Kenya (2022) eKLR.

64. Citing the case of Galgalo Jarso Jillo vs Agricultural Corporation [2021] eKLR, the Respondent submitted that the Claimant on a balance with reference to the evidence presented, failed to discharge its burden under Section 47(5) of the *Employment Act*. On the same score, the Respondent maintained that it has discharged its burden of proof justifying the rationale for the redundancy as fair and transparent within its business prerogative and that due process was followed.

65. The Respondent further submitted that contrary to the Claimant's claims, it has proved that the process undertaken was procedurally and legally compliant with the applicable legal requirements set out in section 40(1) of the *Employment Act*.

66. According to the Respondent, it has proved compliance with the requirements on consultation and that the same were meaningful with reference to the International Labour Organization Termination of Employment Convention 1982 and case law.

Analysis and Determination

67. Having evaluated the pleadings by both parties, the evidence on record as well as the rival submissions, the following issues stand out for consideration by the Court:

    i. Whether the Claimant's termination from employment by way of redundancy was fair and lawful;

    ii. Whether there is a case of discrimination against the Claimant;

    iii. Whether the Claimant is entitled to the reliefs sought.

Whether the Claimant's termination from employment by way of redundancy was fair and lawful

68. Before I delve into this issue, I find it imperative to address a preliminary issue raised by the Respondent in its submissions pertaining the nature and extent of the Claim before Court.

69. In its submissions, the Respondent has argued that the only issue challenged by the Claimant on process is whether payment in lieu of notice could substitute his serving notice as per Section 40(i) of the *Employment Act*. In this regard, the Respondent contends that the Claimant cannot depart from his claim.

70. In as much as the Claimant did not expressly state the exact procedural requirements under Section 40 which the Respondent failed to comply with in effecting his redundancy, it is notable that paragraph 18 of the Memorandum of Claim, bears an omnibus statement which goes as follows; "the actual termination of the Claimant, the procedure followed and the grounds for the aforesaid termination were discriminatory and unfair and unlawful."

71. Further to the foregoing, the Claimant has pleaded in paragraph 20 of the Memorandum of Claim that "the Respondent's actions offend International Labour Organization Convention No. 158..." Evidently, the said ILO Convention which is in consonance with the provision of Section 45 of the *Employment Act*, prohibits termination of employment unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service.

72. Therefore, and in the interest of justice, the Court takes it that although the Memorandum of Claim may not have not been elegantly drafted, it is evident that the Claimant is fundamentally challenging

the procedure and the grounds for his termination from employment besides citing the Respondent for discrimination.

73. That said, the Court is enjoined to revisit the grounds for termination and the procedure applied by the Respondent in effecting the Claimant's termination from employment in order to determine whether the same was fair substantially and procedurally within the meaning of Sections 40, 43 and 45 of the *Employment Act*.

74. As was held by the Court of Appeal in the case of Kenya Airways Limited vs Aviation & Allied Workers Union Kenya & 3 Others (2014) eKLR, termination of employment on account of redundancy ought to be both substantially justified and procedurally fair.

75. In this regard, substantive justification relates to the reasons attributed to the redundancy while procedural fairness has to do with the procedure applied in effecting the redundancy. I will consider the two elements under separate heads.

Substantive justification

76. As can be discerned from the letter of termination dated 9th July 2019, the main reason advanced by the Respondent for the termination of the Claimant's employment on account of redundancy, was that his position of Operations Assistant was being rendered redundant. Through the same letter, the Claimant was informed that his position had been rendered redundant due to the reorganization of the operations department hence the said position would no longer be relevant in the Respondent organization.

77. In support of its case, the Respondent exhibited two organograms with respect to the Operations Department. Whereas the first organogram shows the Claimant as holding the position of Assistant Operations Clerk, the second organogram does not bear the Claimant's position, and in its place, is the position of Assistant Flight Operations Officer.

78. This demonstrates that there was a reorganization of the Respondent's Operations Department and that the position erstwhile held by the Claimant had been abolished.

79. According to the Respondent, the Claimant had no background in aviation operations and this hindered his ability to be of any value in any new role in the new structure.

80. To this end, the Respondent exhibited a copy of the job description for Flight Operations Officer which has enumerated the qualifications and competencies for the said role. With respect to educational qualifications, the holder of the said position is required to have a Diploma in Flight Operations/ Dispatch, KCAA Fight Operations License and knowledge in radio communication.

81. During cross-examination, the Claimant stated that his highest qualification was the Kenya Certificate of Secondary Education (KCSE) and that he joined the Respondent organization upon completing his secondary education. He further admitted that he did not have any certification from the KCAA.

82. The foregoing confirms the Respondent's assertions that the Claimant did not possess the relevant academic qualifications, skills and competencies to take up the role of Flight Operations Officer in the new structure of the Respondent's Operations Department.

83. Accordingly, the Court finds that the Respondent has discharged its evidential burden by proving that the Claimant's termination from employment on account of redundancy was on grounds that were fair, valid, and based on its operational requirements.

84. Therefore, the Court is persuaded that the Claimant's termination from employment by way of redundancy was substantively justified within the meaning of Section 45(2)(a) & (b) (ii) of the *Employment Act*.

Procedural fairness

85. As to the procedural aspect of the redundancy process, Section 40(1) of the *Employment Act* stipulates the following conditions that an employer must comply with prior to an employee's termination on account of 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.

86. Evidently, the first requirement relates to Notification of the intended redundancy. In this case, the record bears that the Claimant was notified of his redundancy through a letter dated 9th July 2019.

87. Notably, this was the same Notice that communicated the Respondent's decision to terminate the Claimant's employment on account of redundancy.

88. It is this Court's view that the Notice contemplated under Section 40 (1) (a) and (b), is an "intention to declare a redundancy" and is issued before the redundancy takes effect.

89. In this case, the Notice was issued to the Claimant after his position had already been declared redundant. It was a final notice declaring the Claimant redundant as opposed to an "intention" to declare a redundancy as contemplated under Section 40 (1) (a) and (b) of the *Employment Act*. Differently expressed, the Respondent had already made the decision to declare the Claimant redundant.

90. On this issue, I am guided by the decision in Kenya Airways vs Aviation & Allied Workers Union Kenya & 3 Others (supra) in which Maraga JA, (as he then was) stated 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, …."

91. Further, in the case of 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.

92. In this case, it is evident that the notice issued to the Claimant was final in nature hence left no room for consultations.

93. Applying the above binding determinations to the case herein, it becomes apparent that the Respondent did not substantially comply with the statutory requirement under Section 40 (1) (b) of the *Employment Act* with respect to Notice and to that extent, is at fault.

94. On the requirement for consultations, the Respondent has submitted that it duly complied with the said requirement, in that the Claimant was informed on 3rd August 2018 of the implementation of the move to jet operations and that the nature of the jet operations was 24 hours affecting his department. The Respondent further made reference to the meeting held on 11th October 2018 with respect to the Claimant's ongoing training for ground operations.

95. The Court has carefully considered the email dated 3rd August 2018 from Stephen Ombuya to the Claimant as well as the minutes of 11th October 2018 and notably, the same do not constitute consultations as envisaged under Article 13, Convention No. 158 - Recommendation No. 166 of the International Labour Organisation (ILO) convention.

96. To underscore the importance of holding pre-redundancy consultations, it was held in the case of Kenya Airways vs Aviation & Allied Workers Union Kenya & 3 Others (supra), that consultations are 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.

97. In the instant case, the "consultations" referred to by the Respondent did not make any mention of an intended redundancy. Evidently, the said discussions were aimed at addressing the Claimant's attendance to duty on Saturdays as opposed to an intended redundancy.

98. In the circumstances, the Court returns that there were no pre-redundancy consultations as envisaged under Article 13, Convention No. 158 - Recommendation No. 166 of the ILO convention hence the Respondent is at fault for want of compliance on this aspect.

99. The other requirement stipulated under Section 40 (1) (c) of the *Employment Act* is with respect to the selection criteria to be applied by the employer in selecting employees to be declared redundant. With respect to this, the employer is required to prove that in the selection of employees to be declared redundant, it has paid 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.

100. In this case, the Court has already found that the Respondent was able to demonstrate that the position previously held by the Claimant had been abolished following its organizational restructuring.

101. Further to the foregoing, the Court has found that with his academic qualifications and skill set, the Claimant could not take up the new role in the Respondent's new structure. As such, he was automatically eliminated based on his skill and ability.

102. With respect to the requirement for payments under Section 40(1) (e) (f) and (g) of the *Employment Act*, it is notable that the Claimant was advised through the letter of termination dated 9th July 2019 that he would be paid notice pay for two months, salary up to and including 9th September 2019, pension up to and including 9th July 2019 and severance pay at the rate of 15 days for 11.5 years worked.

103. In support of its case, the Respondent exhibited a copy of a cheque dated 30th July 2019 in the sum of Kshs 639,159/= which was transmitted to him by the Respondent through his Advocate. The Claimant did not deny receiving the said cheque and did not dispute the amount as being short of what was due to him under Sections 40(1) (e) (f) and (g) of the *Employment Act*.

104. To that end, it is apparent that the Respondent duly complied and made the payments due to the Claimant following a redundancy exercise.

105. Nonetheless, the Court returns that the Respondent did not substantially comply with the procedural requirements under Section 40 (1) of the *Employment Act* as it failed to prove that it issued the Claimant with the Notice of intention to declare a redundancy under Section 40 (1) (b) and subsequently, engaged in pre redundancy consultations as envisaged under Article 13, Convention No. 158 - Recommendation No. 166 of the ILO Convention. To that extent, the Claimant's termination from employment by way of redundancy was not procedurally fair within the meaning of Section 40(1) of the *Employment Act*.

Discrimination?

106. It is the Claimant's case that he was discriminated on the basis of his religious beliefs. In this regard, the Claimant averred that he was required to work on Saturdays whereas as a Seventh Day Adventist, his faith does not permit him to work on Saturdays.

107. Refuting the Claimant's allegations, the Respondent averred that following his promotion to Operations Assistant, the Claimant was aware that in operations with reference to the emergency requirements of the Respondent's flights, employees worked in shifts and were placed on a roster covering every day of the week including Saturdays. That at the time, the Claimant was notified and/or was aware of the shift work arrangement and did not object to working on Saturdays or raise any concerns until he was caught in an illegal arrangement with his colleagues to cover for him on Saturdays.

108. Clause 5 of the Claimant's contract of employment dated 26th September 2017 provides that all employees were expected to work outside official hours in order to enable the Respondent to meet its objectives.

109. To this end, the Respondent exhibited a duty roster with respect to flight operations. Worthy to note is that the Claimant did not dispute that all his colleagues were required to work on Saturdays.

110. In an email dated 28th July 2018, addressed to the Claimant, Stephen Ombuya, the Operations and Network Manager, alleged that the Claimant had failed to report on duty on 14th and 28th July 2018 as per the duty roster. In response, the Claimant cited his constitutional right to worship.

111. In a meeting held on 11th October 2018 between the Claimant, his line manager (Stephen Ombuya) and RW1, it was noted that since 6th August 2018, the Claimant had never reported to work on any

Saturday that he was rostered. From the minutes of the said meeting, the Claimant stood his ground that he would not work on Saturdays.

112. Following the meeting, the Claimant was given time to consider his decision against the organizational requirements.

113. In his letter dated 6th November 2018, the Claimant stated that his answer remained unchanged and that he could not report to work on Saturdays.

114. According to the Respondent, it made changes to the duty Roster from 15th November 2018 and the Claimant was not rostered for weekends except when coverage was required and he could only cover on Sunday. That in this regard, it appointed two other operations staff to the position of Aircraft Towing Operators with towing capability bringing the ground operations unit to five people who covered the weekend shift without the Claimant.

115. Notably, the Claimant did not controvert this position.

116. The Black's Law Dictionary, (10th Edition), defines the term "discrimination" to mean: "Differential treatment; a failure to treat all persons equally when no reasonable distinction can be found between those favoured and those not favoured."

117. By dint of Section 5(7) of the *Employment Act*, the employer bears the burden of proving the fact that the discrimination did not take place as alleged and that the discriminatory act is not based on any of the grounds specified within that Section. Be that as it may, an employee is first required to establish a prima facie case of discrimination in order for the burden to shift.

118. Having evaluated the facts of this case against the evidentiary material on record, the Court has not discerned the basis for the Claimant's assertion that he was discriminated on the basis of his religious beliefs.

119. If anything, it is evident that when the Claimant maintained that he had a right to worship and that he would not change his mind regarding working on Saturdays, the Respondent took him off the duty roster and had other employees cover for the Saturday shift.

120. What's more, the Claimant's termination from employment on account of redundancy came way later in July 2019 almost a year after he had expressed his intention of not working on any Saturday.

121. Further to the foregoing, the Court has found that the Respondent has proved that the grounds leading to the termination of the Claimant on grounds of redundancy were justified as he lacked the relevant academic qualifications, skills and competence to take up the role of Assistant Flight Operations Officer in the Respondent's new structure.

122. Indeed, it is clear to the Court that in the event the Respondent's action was motivated by malice, it would have taken disciplinary action against the Claimant on account of his failure to report to work on Saturdays way back in July 2018.

123. The total sum of my consideration is that the Claimant has not substantiated his claim that the Respondent discriminated against him on account of his religious beliefs. To this extent, his Claim with respect to discrimination collapses.

Reliefs?

Compensatory damages

124. As the Court has found that the Respondent did not substantially comply with the procedural requirements under Section 40(1) (b) of the *Employment Act* with respect to the Notice of intention to declare a redundancy and consultations under Article 13, Convention No. 158 - Recommendation No. 166 of the ILO Convention, the Claimant is awarded compensatory damages equivalent to two (2) months of his gross salary. This award has taken into account the fact that the Respondent has proved that the reason for the Claimant's redundancy was valid, fair and related to its operational requirements thus the damages awarded are nominal.

125. The claims with respect to notice pay and severance pay are declined as the same were paid to the Claimant as part of his terminal dues. As stated herein, the Claimant did not suggest or indicate that the said dues were short of what was due to him under Section 40(1) of the *Employment Act*.

126. The claim for four months' remainder of the term is declined as the Court has found that there was a justified reason to terminate the Claimant's employment on account of redundancy.

127. Equally, as there has been no finding of discrimination against the Claimant, the claim for general damages fails.

Orders

128. In the end, the court awards the Claimant compensatory damages in the sum of USD 1,856 being equivalent to two (2) months of his gross salary. Interest shall apply at court rates on that award from the date of Judgment until payment in full.

129. The Claimant shall also have the costs of the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 31ST DAY OF JANUARY 2025.

STELLA RUTTO

JUDGE

In the presence of:

For the Claimant Mr. Onsembe

For the Respondent Ms. Wetende

Court assistant Millicent

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 15th March 2020 and subsequent directions of 21st 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.