



**Macharia v Registered Trustees of the Sisters of Mercy (Kenya) Mater Misericordiae Hospital (Cause 650 of 2020) [2025] KEELRC 1454 (KLR) (16 May 2025) (Judgment)**

Neutral citation: [2025] KEELRC 1454 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 650 OF 2020**

**J RIKA, J**

**MAY 16, 2025**

**BETWEEN**

**DR STEPHEN GACHIE MACHARIA ..... CLAIMANT**

**AND**

**THE REGISTERED TRUSTEES OF THE SISTERS OF MERCY (KENYA)  
MATER MISERICORDIAE HOSPITAL ..... RESPONDENT**

**JUDGMENT**

**File History**

1. Hearing in this dispute opened on 12th October 2023, and closed on 10th July 2024 at the E&LRC Nairobi.
2. The Trial Judge was transferred from the station before preparation and delivery of the Judgment.
3. The Claim was last mentioned before the incoming Judge, on 10th December 2024, when the Parties confirmed filing and exchange of their closing submissions.
4. The file was received by the Trial Judge at his new station, Nakuru, sometime in January 2025, alongside other files from Nairobi, for preparation of Judgment.
5. The physical file as forwarded, is rather disorderly. It has a minute sheet, which only captures that a certificate of urgency was filed on 4th October 2020, and summons filed on 23rd October 2020. It does not show when other pleadings were filed. It has a file movement schedule, which does not capture movement from Nairobi to Nakuru.
6. There are pleadings from other disputes placed in the file, compounding the disorder. There is a replying affidavit in Cause Number 56 of 2020, between Siyad Madey Mohamud v. National Bank of Kenya on record. There are submissions in Miscellaneous Application No. 8 of 2018, Githinji Kimano & Company Advocates v. Endmor Steel Millers, placed in the file. There is a contract of



employment between Geoffery Barasa Wamalwa and Sagem Communications in the file, which is completely unrelated to the dispute herein. If Parties need to compile a record of appeal, how will they do so with these strange documents and pleadings in the file?

7. The Deputy-Registrar is hereby directed to oversee a clean-up of the file, as soon as it is reverted to the Court in Nairobi, so as to reflect a true and accurate record of the dispute.

### **Pleadings.**

8. The Claimant's pleads that he was employed by the Respondent, as the Deputy Chief Executive Officer, and Director of Operations and Administrative Services of the Respondent, effective 19th April 2018.
9. He was appointed for a period of 5 years.
10. He was confirmed on 21st November 2018 after serving probation of 6 months.
11. His contract was terminated by the Respondent, on 29th September 2020.
12. He earned a gross monthly salary of Kshs. 1,050,000.
13. He was required to explain by the Pontifical Commissary of the Respondent, in a letter dated 26th March 2020, the handover of Kinetic Building which the Respondent had leased, and later vacated.
14. He responded on 2nd April 2020, explaining that his office, was not directly responsible for the handover process.
15. The Kinetic Building matter was closed, after a meeting was held, involving the Claimant, the CEO Professor Mwenja and Sister Mary Gitau.
16. The Claimant wrote an e-mail on 8th July 2020 to the Respondent, expressing his frustrations about serious issues affecting the hospital. He had raised the issues severally. The issues included: -
  - a. Conflict of interest at the Board level, where a Director attempted to influence tenders.
  - b. Falsified payment of allowances.
  - c. Rampant immorality, where male nursing students, were being sexually abused, by the male Director, school of nursing.
  - d. Tax evasion, which KRA was investigating at the time.
17. On 10th July 2020, he received a letter to show cause, listing 3 accusations against him: that he carelessly, improperly and negligently discharged his duties, with regard to the Kinetic Building transaction; he was condescending and insulting to the Trustees; and copied his complaint to the congregational leadership, outside the Kenyan jurisdiction.
18. He was suspended through the letter to show cause. Suspension period was extended severally.
19. He replied on 15th July 2020, maintaining that his office was not involved in handover of Kinetic Building. He replied to other allegations as well.
20. He received a second letter to show cause, dated 27th July 2020, alleging that he was negligent on Kinetic Building transaction. The letter raised different issues from the first. He was required to attend a show cause meeting, on 30th July 2020.



21. He attended the meeting, which was turned into a fact-finding meeting. He raise preliminary objection on the composition of the committee and underscored his right to a fair hearing.
22. On 7th August 2020, he received e-mail from Sister Mary Gitau, acknowledging the pertinent issues he had raised at the meeting of 30th July 2020. She undertook to respond to the issues.
23. He proceeded on 2 month's unpaid leave, on 1st August 2020, as directed by the Respondent, under Covid-19 workplace policy measures. He was to resume on 1st October 2020.
24. On 29th September 2020, the Respondent notified him that his contract had been terminated on account of redundancy.
25. He was advised that there was duplication of duties, between his office of Director of Operations and Administration, and that of the CEO.
26. There was no genuine redundancy. The management of the hospital changed, and the new management, wanted new leadership to run the hospital. The Claimant was victimized. The Respondent could not find anything on him, to justify dismissal.
27. Redundancy was not in accordance with Section 40 of the *Employment Act*.
28. Termination was not based on a fair procedure and valid reasons.
29. The Claimant prays for: -
  - a. Reinstatement.  
Alternatively,
  - b. Declaration that termination was unconstitutional, illegal, discriminative, unprocedural and contrary to the *Employment Act*.
  - c. Certificate of Service to issue.
  - d. 12 months' salary in compensation for unfair termination, at Kshs. 12,600,000.
  - e. 1-month salary in lieu of notice at Kshs. 1,050,000.
  - f. Severance pay at Kshs. 1,050,000.
  - g. 28 days of annual leave at Kshs. 980,000.
  - h. Gratuity at Kshs. 1,890,000.
  - i. Costs.
  - j. Any other suitable relief.
30. The Respondent does not contest that the Claimant was its Employee. He shifted blame over the transaction relating to Kinetic Building, to other officers. He was condescending and disrespectful to his Employer.
31. He postured as a self-righteous crusader, on a mission to liberate the Respondent. His complaint on governance issues, was copied to persons outside the jurisdiction of the Court, and who had no supervisory mandate over the Respondent.



32. He made atrocious allegations against fellow Managers, and the Trustees, which were not substantiated. He was contemptuous of colleagues and his Employer. He engaged in acts of insubordination.
33. There was nothing irregular, about the letters to show cause issued to him. He referred to the acting Chief Executive Officer as his junior. There were no new issues raised in the second letter to show cause. He was called to explain his role in the matter involving Kinetic Building. The matter was picked from the issues previously communicated in the letter to show cause. He was called to disciplinary hearing. He was given adequate notice.
34. Out of caution, the disciplinary committee agreed to his demand to turn the hearing into a fact-finding exercise.
35. It is true that he was placed on unpaid leave, like other staff, as a measure of countering the challenges of Covid-19. He did not raise any pertinent issues at the meeting as pleaded.
36. The Respondent isolated the existence of a genuine redundancy situation from other issues, culminating in a 1-month notice of redundancy issued to the Claimant. The notice is dated 29th September 2020. It lapsed on 1st November 2020. His contract was terminated on the ground of redundancy.
37. The fact-finding exercise confirmed that his role, and that of the CEO had duplication. The role of Director of Operations and Administration was created when the hospital was being managed by a portfolio of 9 Managers, including the CEO. An unanimous decision was taken by the Board on 21st August 2020, to declare the Claimant's role redundant.
38. The Trustees were appointed in June 2019, and they did not make any change in management of the hospital, as alleged by the Claimant.
39. The Claimant's role required that there is trust and confidence, between the Office-holder and the Employer. Trust and confidence had withered, as a consequence of the Claimant's attitude. The Respondent urges the Court to dismiss the Claim.

### **Hearing.**

40. The Claimant gave evidence on 12th October 2023 and 29th February 2024. Pontifical Commissary, Sister Mary Gitau, gave evidence on 10th July 2024.
41. The Claimant relied on his witness statement and documents [1-33] in his evidence-in-chief. He repeated his employment history and terms and conditions of service in his evidence, as laid out in the Statement of Claim, summarized above.
42. His salary was raised from Kshs. 700,000 at the start, to about Kshs. 1 million by the time he left. His contract, initially for a period of 3 years, was extended to a term of 5 years upon confirmation.
43. He was accused of mishandling Kinetic Building premises, where the Respondent intended to move to, after its premises at Taj Mall in Nairobi, was demolished. He gave a 20-page reply. Sister Mary Gitau understood his reply, took responsibility, and the matter was closed.
44. The Claimant had concerns about governance issues. He raised these concerns as detailed in his pleadings. 2 students had complained about homosexuality. The workplace was toxic. He offered to file an affidavit to support his complaint. He copied his complaint to the Chair, Professor Thairu, and Chair of Finance Kefa Thande. He copied to the Respondent's leadership in Ireland. The leadership in



- Ireland in turn wrote to Sister Mary Gitau, asking her to respond to the issues. The Claimant expected the Respondent to investigate.
45. He was issued the letter to show cause after his complaint, with accusations revolving around the Kinetic Building transaction; copying of his complaint to outsiders; and, disrespect for fellow Managers.
  46. He was suspended for 14 days. He answered all the allegations. Suspension was extended by another week. He had been sworn by God, to uphold good governance. His contract and the Respondent's strategic plan, bound him to uphold good governance.
  47. He received a second letter to show cause dated 27th July 2020. There were new allegations, surrounding the Kinetic Building transaction. He was given 2 days to respond. He was told to attend disciplinary hearing on 30th July 2020. He was surprised, because the Respondent was supposed to first consider, his response to the letter to show cause.
  48. He attended hearing and raised objection on the composition of the committee. His complaint on governance, involved the Board, yet 2 of its members were present. He was not presented with the charges. Committee Chair recommended that the hearing be turned into fact-finding. The Claimant thought that this would lead to improving the administration of the Respondent, and not lead to his punishment.
  49. He asked Sister Mary Gitau after the hearing, if he could proceed on leave. He was to resume in October 2020. He went to his office briefly, when on leave, and found his office locked and his personal assistant, assigned to someone else.
  50. On 29th September 2020, he received the notice of termination on account of redundancy. It referred to fact-finding meeting, involving the parties. It was stated that the Claimant's role conflicted with that of the CEO. He was told that Trustees could no longer sustain his employment. Termination would take effect in November 2020. He was offered terminal dues.
  51. He did not receive redundancy notice. The CEO had resigned, and there was an acting CEO. Duplication of roles was not discussed at the meeting of 30th July 2020. His role augmented that of the CEO.
  52. The Claimant told the Court that he retreated to his village after termination. He subsequently found small-time engagements, supervising students.
  53. He denied that he was a revolutionary. He was not involved in acts of insubordination. He was a team player. He worked well with the CEO and the Pontifical Commissary.
  54. Cross-examined, he told the Court that Directors are senior executives, with oversight over their departments. He was next in rank to the CEO. He complemented the CEO. His role cut across all departments.
  55. His contract had a clause on termination. He received a warning letter dated 26th March 2020. He was required to have the matter relating to Kinetic Building, investigated within 7 days. His duties included asset management. He discharged this duty well. The matter was settled between him and Sister Mary Gitau.
  56. In his e-mail of 8th July 2020, through which he raised various complaints, he mentioned that it was our country's liberation anniversary. He spoke about university protests, in the spirit of liberation. He invoked the spirit of liberation. His e-mail was not a sword of damocles, meant to extinguish the Kinetic Building enquiry. The hospital owners are stakeholders. He copied his e-mail to them.



57. There was conspiracy to force him out. He was ready to swear an affidavit to support his complaint, but no one asked him to do so. Redundancy was a witch-hunt, meant to sanitize a flawed termination process. He was frustrated. He experienced delay on financing of his projects.
58. He suffered prejudice, by having 2 letters to show cause issued upon him. He did not exhibit the audio record of the meeting. It was a fact-finding meeting, not a disciplinary meeting. He did not challenge the minutes of the meeting. 90% of them, are correct.
59. The findings of the meeting, were not to be used for extraneous purposes.
60. Redirected, the Claimant told the Court that he had been asked to attend disciplinary meeting. He objected to composition of the committee. The meeting was turned into a fact finding exercise. 2 of the committee members were council members, and 1 was a Trustee. The Human Resource Director was absent. Those who made redundancy decision, were strangers, in the governance structure. The decision ought to have originated from the Board. He was not the first holder of the position of Director Operations and Administration. His role and that of the CEO, were not in conflict. He was the CEO's principal assistant. The roles were cojoined, like siamese twins. Some roles overlapped. His contract however, specified the reporting lines. There was no consultation on redundancy. There was no redundancy notice addressed to him. The process was malicious.
61. Sister Mary Gitau, Pontifical Commissary, relied on her witness statement, and exhibited documents filed by the Respondent, in order of their listing. She was in charge of day-to-day operations. She was a Trustee. 3 other Sisters were her Co-Trustees. She left the Sisters, and was serving as her province leader, at the time she gave evidence.
62. Cross-examined, she told the Court that the Sisters had many projects in the country. She managed them, including the hospital. She was appointed in 2019. The Sisters have a governing council. It served as the Board. The Board had a Chair and several committees. The Sisters value respect, mercy, compassion, among other principles.
63. The Sisters in Ireland were not strangers to the Respondent. Trustees employed staff. Sister Gitau did not know who interviewed the Claimant. There is an organizational structure, including the Board, CEO and Directors. The Board meets at least 4 times a year. It advises the Trustees. The CEO runs the day-to-day affairs of the hospital with the aid of departmental Directors.
64. Sister Gitau was angered by the Claimant's e-mail of 8th July 2020. She forwarded it to the Board, the Trustees and the Human Resource, Head Office. She was angry about the tone, tenor and contents of the e-mail.
65. The Directors alleged to have had conflict of interest were at the end of their terms. There was no point in having them investigated. A senior Manager was said to have been involved in homosexuality. Sister Gitau did not carry the burden of investigating. The individual left employment. He was dismissed over the same issue - molestation of students.
66. The fight against corruption is a core value in the institution. There was a mechanism for handling of complaints.
67. The CEO resigned on 6th July 2020. The Claimant acted in the role. An acting CEO, Dr. Sister Maria Nguu, was appointed later. The Claimant was issued a first and second letter to show cause. The first concerned his insulting and condescending attitude to colleagues and superiors. The second focused on Kinetic Building.



68. The Respondent locked the Claimant's office while he was away, for security reasons. His assistant was redeployed, to keep her busy. He was asked to attend a disciplinary hearing through the letter to show cause. It might appear like the Respondent prejudged him, Sister Gitau told the Court.
69. The Human Resource Director Christine Kaguiria, did not attend the meeting, because she was at the same level with the Claimant. The Board Chair did not attend. Sister Gitau did not pick those she wanted to hear the Claimant. She brought a consultant to fill the gap. The Human Resource Manual did not provide for disciplining of the CEO. She did not recall exactly why, the Chair of the Board was left out.
70. The Claimant insisted that he was not going to get a fair hearing, and that the meeting should be a fact-finding exercise. The committee agreed with him, stating that it was necessary to first understand the issues. No hearing took place.
71. After the meeting, it was decided that the Claimant had refused to shoulder blame for issues identified on fact-finding. It was found also that there were roles that were duplicated. There were 9 departmental Directors. Sister Gitau did not have the minutes of the August 2020 meeting. It was decided that the Claimant's role is declared redundant. He was at the time, on leave. She did not know if he was to resume, on 2nd October 2020.
72. Sister Mary Gitau testified that, the Respondent found that the Claimant was rude and refused to take responsibility, and therefore, declared his position redundant.
73. The declaration of redundancy was not placed before the Board. There was no consultation on redundancy. The Claimant was not told about redundancy before the meeting. The notice to the Claimant referred to termination of employment, without reference to redundancy. It is not true, that the Respondent wished to get rid of the Claimant. Redundancy was not a cover up for the Respondent's failure, to discipline the Claimant.
74. Sister Gitau confirmed that the Claimant was paid nothing, on termination. She was not sure if the Claimant received his certificate of service. He did not clear with the hospital.
75. Redirected, she told the Court that the hospital is fully operated by the Sisters in Kenya. There are no Trustees from outside. The role of the Governing Council is advisory. The Claimant's complaints were not investigated, because they were not based on an affidavit. The letter of termination gave him notice of redundancy after the fact-finding meeting.
76. The decision of the Trustees was final. They were the final decision-makers. They did not require approval of the Governing Council/ Board.

#### **Issues.**

77. The issues in dispute are: whether termination of the Claimant's contract of employment by the Respondent, was illegal, unconstitutional, unprocedural and contrary to the *Employment Act* 2007; whether he is entitled to the remedy of reinstatement; or entitled to the alternative remedies under paragraph 23 [iii] of the Statement of Claim.

#### **The Court Finds: -**

78. The Claimant was employed by the Respondent, as Director of Administration and Operations. The contract of employment is dated 19th April 2018. He was the principal assistant to the CEO.



79. His contract was for a period of 5 years. It was terminated by the Respondent, before the expiry date, with effect from 1st November 2020.
80. His salary was Kshs.1,050,000 monthly.
81. He was issued various letters to show cause, preceding termination. The letters contained a raft of accusations against the Claimant. They included: carelessly and improperly handling of the handover of Kinetic Building to its owner, after the Respondent vacated the premises; the Claimant was condescending in his response to the accusations; and he wrote an e-mail raising what he considered governance issues, which he copied to persons outside Kenya, who had no supervisory mandate over the Trustees.
82. The letter to show cause also served as a letter of suspension.
83. He was subsequently invited for a disciplinary hearing, held on 30th July 2020. The disciplinary hearing is indicated to have been transformed into a fact-finding exercise, but essentially assumed the character of ordinary disciplinary proceedings, with the accusations against the Claimant presented at the forum, and the Claimant required to respond to all the accusations.
84. The meeting does not appear to have ended in substantive findings and recommendations, on the issues subject matter of the meeting. Whether a disciplinary hearing, or a fact-finding exercise, the result is not clearly captured, in any of the records availed by the parties to the Court.
85. There were 5 conclusions made, as shown below: -
- i. In Dr. Gachie's response to the letter to show cause, he had mentioned the Head of Compliance, implying he was policing other managers. The HR Consultant clarified to Dr. Gachie that she had drafted a portion of what he had responded to and responsibility for that should not lie with anyone in the Respondent's management team, and no predetermined decisions had been made.
  - ii. Members requested for a copy of the recording for the meeting to assist in the thorough recording of the meeting.
  - iii. Dr. Gachie thanked members for the opportunity to share what he had and offered to tackle the Kinetic Building [matter] while on leave in August. Head of Trustees indicated she would write to him on this, in the coming week.
  - iv. The Chair thanked everyone for what was shared and the fairness of the process.
  - v. The Chair ended the process at 4.20 p.m. with a word of prayer, led by Fr. Mathenge.
86. The meeting that was intended to be a disciplinary forum, later turned into a fact-finding exercise, does not appear to have resulted in findings and recommendations. If it was a fact-finding exercise, what facts were found?
87. The Claimant proceeded on unpaid Covid-19 imposed leave, on 1st August 2020. During his leave, the Trustees met on 31st August 2020. The meeting was chaired by Sister Maria Ngui. The agenda was shown to be: fact-finding- Dr. Gachie -Kinetic and other construction projects in Mater; and KPMJ report.
88. It was at this meeting, without the involvement of the Claimant, and straight out of the blues, that the Sisters unanimously decided, that the position of Director of Operations and Administration, is



- redundant. The Sisters resolved to engage the Human Resource and Legal Departments, to effect their decision.
89. When the Claimant visited his office during his 2 -months of leave, he found his office locked. He could not access it. His personal assistant had been assigned alternative duty.
  90. He was supposed to resume duty on 1st October 2020. On 29th September 2020, the Respondent, through the Pontifical Commissary, Sister Mary Gitau, wrote to the Claimant a notice of redundancy.
  91. He was advised that his role, and that of the CEO, were found to have been overlapping, at the fact-finding meeting of 30th July 2020.
  92. The dispute herein, therefore revolves around Section 40 of the *Employment Act*. It is about redundancy, not any disciplinary issues the Respondent had, against the Claimant. His complaint about governance, including his allegations of sodomy against the Respondent's senior Manager; his condescending and revolutionary attitude; and his handling of Kinetic Building transaction, did not lead to termination of his contract. The sole reason justifying termination, was redundancy.
  93. The Court does not therefore agree with the Respondent's submission, that the Claimant's Cause, shall fall or stand with the evaluation of his e-mail of 8th July 2020. The Respondent submitted that the e-mail by the Claimant was a sword of damocles, which he was waving above the heads of the Sisters of Mercy, to cover up for his own failures, such as the failure relating to Kinetic Building transaction. It was a smokescreen, meant to divert attention from himself. The Claimant was scathing in his e-mail, alleging all manner of misgovernance and immorality, including sodomy, against the Respondent and its officers. He appears to have gone overboard, copying what was understood by the Respondent as calumny, to Sisters in Ireland, who had no supervisory role over the Sisters in Kenya. He was however not disciplined on account of his e-mail. He did not leave employment, on account of any of the contents of his e-mail. The e-mail is not significant, in relation to the letter of termination. His Cause does not stand or fall, on the evaluation of the e-mail. The e-mail has no bearing on the reason given, in justifying termination. His contract was terminated on account of redundancy.
  94. The Court's focus is on redundancy - whether there was a genuine redundancy situation; and, whether the Respondent adhered to the procedural demands under Section 40 of the *Employment Act*.
  95. The evidence of Pontifical Commissary, while under cross-examination, betrayed a lack of awareness by the Respondent, about the law on redundancy. She told the Court that, " We decided to declare the position of Director of Operations and Administration redundant. The Claimant was at the time on leave. I do not know when he was to return. I cannot verify if he was to resume on 2nd October 2020. We found he was rude and refused to take responsibility and therefore, declared his position redundant..."
  96. Declaration of redundancy was influenced by the Claimant's rudeness and refusal to take responsibility. Instead of taking the Claimant through a disciplinary process and sanctioning him, for rudeness and refusal to take responsibility, the Respondent declared his position redundant.
  97. Redundancy is described under Section 2 of the *Employment Act* 2007, as the loss of employment, occupation, job or career by involuntary means, through no fault of an Employee.
  98. It is a no-fault mode of termination of employment.
  99. The Respondent faulted the Claimant for being rude and refusing to take responsibility, which would not result in redundancy, as described under Section 2 of the *Employment Act*.



100. The other explanation by Sister Mary Gitau, was that the Claimant's role and that of the CEO, overlapped.
101. This overlap was ingrained in the contract which was authored by the Respondent and executed by the Claimant, when he joined the Respondent, on 19th April 2018.
102. Clause 4 of the contract stated that he would work in collaboration with the CEO, working closely with the CEO, in carrying out the vision and mission of the Registered Trustees of the Sisters of Mercy [Kenya], and in setting out the strategic direction of the hospital.
103. The contract stated that the Claimant was in charge of overall operations, administration, development and custody of all resources of the hospital at all times. He worked closely with the CEO and the departmental Directors.
104. This role was defined in 2018. The duties were deliberately assigned to the Claimant by the Respondent. He was the principal assistant to the CEO. How did his role, become duplicated only in 2020, against the background of multiple disciplinary complaints made by the Respondent against the Claimant?
105. How is it, that there was no duplication of roles, before the Claimant wrote his explosive e-mail dated 8th July 2020, alleging among other ills, sodomy against a senior Manager of this catholic institution?
106. If there was duplication on certain roles, why did not the Sisters of Mercy, go back to the Claimant's contract, consult, and perhaps vary his duties? Were all his duties overlapping the CEO's, warranting terminating his contract altogether, on account of redundancy?
107. Parties furthermore, agree that the Claimant was not the first Director of Operations and Administration. Others preceded him. What made his role, and not his predecessors, overlap with the CEO's?
108. In *Wekesa v. Mount Kenya University* [2024] KEELRC 538 [KLR]; *Kamau v. Cleanshelf Supermarket Limited* [2024] KEELRC 1548 [KLR]; and *Nzioki v. Polytanks & Containers Kenya Limited* [2024] KEELRC 1510 [KLR], the Court found redundancy which was declared without genuine reasons, and for ulterior purposes, such as carried out by the Respondent herein, to have amounted to colourable exercises.
109. In an earlier decision of the Industrial Court of Kenya, *Aviation and Allied Workers Union v. Kenya Airways Limited & 3 Others* [2012] e-KLR, the Court held that redundancy is a colourable exercise, an ornamental falsehood, if done for a collateral purpose of getting rid of an Employee.
110. The Respondent's main objective was to get rid of the Claimant, on the grounds which it alleged against him in the letters to show cause, but which it failed to establish, at the ill-fated disciplinary hearing-cum-fact finding exercise.
111. The evidence of Sister Mary Gitau persuades the Court, that redundancy was a colourable exercise. It was arrived at, against the background of a failed disciplinary process. Letters to show cause had been issued against the Claimant. He responded to these letters. He was suspended. He was called to a disciplinary hearing. Hearing morphed into a fact-finding exercise. The conclusion from this fact-finding, did not disclose any findings. No recommendations are captured in the minutes recording the meeting.
112. The Respondent's Trustees met after the meeting, on 21st August 2020, and without involving the Claimant morphed the disciplinary process, into a redundancy process.



113. There is no record of consultations between the Claimant and the Respondent on redundancy. He went on Covid-19 leave, with the agreement of the Respondent, after the failed disciplinary process. On return date, he was advised that his position had been rendered redundant. He was never consulted, even though highly ranked, as the principal assistant to the CEO in the institution.
114. There was no hint of redundancy in the letters to show cause, and in the disciplinary meeting-cum-fact finding exercise. There was no hint of redundancy at the time the Claimant left for leave.
115. The Court of Appeal in *The German School Society & Another v. Ohany & Another* [2023] KECA 894 [KLR], held that consultation on redundancy, must be a reality, not a charade. The party to be consulted must be told what is proposed, and must be given sufficiently precise information to allow a reasonable opportunity to respond. A reasonable time in which to do so, must be permitted. A person doing the consulting, must keep an open mind and listen to the suggestions, consider them properly and then [and only then] decide what is to be done.
116. The Court further held that consultation is now specifically required, by dint of Article 47 of *the Constitution*, and the *Fair Administrative Action Act*.
117. From comparative jurisdiction the UK Employment Tribunal [E.A.T] held in *Mugford v. Midland Bank* [E.A.T] App. No. 760 of 1996 IRLR 208 [1997], that if an Employer has not consulted with either the Trade Union or the Employee, termination will normally be unfair, unless the Employer can persuade the Court, that such consultation, would have been a futile exercise.
118. Consultation is not about the Employer, affording the Employee an opportunity to comment on a decision already made; consultation must be real, not a charade. Consultations must begin when proposals are at a formative stage, and continue to the close of the process. The Employee must be allowed sufficient time to give his views, alternatives to redundancy considered, and the views by the Employee given adequate consideration.
119. Consultations between the Claimant and the Respondent, would perhaps have involved a review of his job description; a variation of role; restructuring of his position; or objectively finding a way of mutual tolerance, for the remaining 2 ½ years to the end of the Claimant's contract; rather than, sending him home on account of redundancy. Consultations diminish the likelihood of resort to colourable exercises.
120. The redundancy exercise undertaken by the Respondent fell far short of the standards contemplated by Section 40 of the Employment Act.
121. Notice of the intended redundancy, which is intended to pave way for consultations, does not seem to have issued. The Claimant had no idea that the Respondent intended to declare his position redundant, at the time he went on leave. He returned from leave, and was slammed with the notice of termination. He was presented with a fait accompli, a decision already made by the Sisters of Mercy, in his absence, over which he had no say.
122. There were no redundancy benefits paid to the Claimant, before termination, on account of redundancy, in terms of Section 40 of the *Employment Act*.
123. It is declared that termination was unfair, unlawful and unconstitutional.
124. The order of reinstatement is not practicable, reasonable or valid under the law, the Claimant having left employment over 4 years ago.



125. The Respondent offered the Claimant 1-month salary in lieu of notice, in the letter of termination dated 3rd November 2020. It was not paid. He is granted 1-month salary in lieu of notice at Kshs. 1,050,000.
126. He was offered severance pay. It was not paid. He worked from 19th April 2018 to 1st November 2020. This is a period of 2 ½ years. The prayer for severance pay is allowed at equivalent of 15 days' salary, for 2 complete years of service, at Kshs. 1,050,000.
127. The letter of termination also offered him pending annual leave, but did not detail the number of days due. The Respondent merely offered outstanding leave days. The Claimant seeks 28 days of annual leave, at Kshs. 980,000. The prayer is allowed.
128. He prays for gratuity at Kshs. 1,890,00. This prayer was not established by the Claimant. His contract, clause 6[i] stated that he would be entitled to terminal benefits under Sections 35[5] 36 and 40 [1] of the *Employment Act*. He has been awarded terminal benefits under Section 40 [1] of the *Employment Act*, and has not justified a separate award of gratuity, at Kshs. 1,890,000.
129. Termination was unfair and unlawful, under Sections 40, 41, 43 and 45 of the *Employment Act*. He merits the prayer for compensation.
130. He worked for 2 ½ years. He had 2 ½ years left to the end of his contract. He is not shown to have caused, or contributed to the circumstances, leading to termination of his employment. He is a Professor, and told the Court that he has mitigated loss of employment, by securing temporary teaching positions. The Court has awarded him severance, notice and pending leave days.
131. He is granted equivalent of 5 months' salary in compensation for unfair termination, at Kshs. 5,250,000.
132. Certificate of Service to issue.
133. Costs to the Claimant.
134. Interest allowed at court rate, from the date of Judgment, till payment in full.

IT IS ORDERED: -

- a. It is declared that termination of the Claimant's contract by the Respondent, was unfair, unlawful and unconstitutional.
- b. The Respondent shall pay to the Claimant: notice at Kshs. 1,050,000; severance at Kshs. 1,050,000; leave at Kshs. 980,000; and compensation for unfair termination equivalent of 5 months' salary at Kshs. 5,250,000 – total Kshs. 8,330,000.
- c. Certificate of Service to issue.
- d. Costs to the Claimant.
- e. Interest allowed at court rate, from the date of Judgment, till payment is made in full.

**DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY AT NAIROBI, THIS 16TH DAY OF MAY 2025.**

**JAMES RIKA**

**JUDGE**

