



REPUBLIC OF KENYA



KENYA LAW
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**Gachuhi v Track and Trace Limited (Employment and Labour Relations
Cause 415 of 2021) [2025] KEELRC 1372 (KLR) (9 May 2025) (Judgment)**

Neutral citation: [2025] KEELRC 1372 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 415 OF 2021**

JW KELI, J

MAY 9, 2025

BETWEEN

BEATRICE WAIRIMU GACHUHI CLAIMANT

AND

TRACK AND TRACE LIMITED RESPONDENT

JUDGMENT

1. The Claimant, after termination of employment on basis of redundancy, filed a Memorandum of Claim dated 21st May 2021 seeking the following reliefs :-
 - a) Declaration that the Claimant's right under Article 41 of *the Constitution* to fair labour practices has been breached, the redundancy was procedurally unfair, wrongful and unlawful.
 - b) 12 month's salary as damages for unfair and unlawful termination on account of redundancy.
 - c) An Order for the payment of the Claimant's final dues amounting to Kshs. 606,337 due and unpaid from December 2020.
 - d) An Order for payment of Commission of Kshs. 1,329,000 due to the Claimant for Kenya Power Supply and Installation of and testing of automotive speed governors
 - e) Costs of this suit and interest.
 - f) Any other order that the Honourable Court may deem fit to grant in the circumstances
2. The claimant in support of the claim filed her witness statement dated 8th October 2021 and Claimant's exhibits 1 – 14 contained in pages 14 – 71 of the Claimant's trial bundle. The claimant filed reply dated 8th October 2021 to the memorandum of response. The claimant filed a further a supplementary list of document with respect to Kenya Power tender but withdrew the same on the 25th November 2024.



3. The claim was opposed by the Respondent who entered appearance and filed a memorandum of response dated 27th September 2021, filed witness statement of Dickson Mwaniki of even date and the respondent's list of documents of even date and the bundle. The Respondent filed further witness statement of Jane Dorah Nambewya dated 7th February 2024 and further list of documents dated 24th October 2023 and the bundle. The respondent further filed substituted witness statement of Edward Njoroge dated 19th November 2024.

Hearing and evidence

4. The claimant's case was heard on the 25th November 2024 when the claimant testified on oath, adopted her witness statement dated 8th October 2021 as her evidence in chief and produced documents under the list of documents dated 27th September 2021 as C-exhibits 1-7(at pages 14-71 of the claimant's bundle of documents). The claimant was cross—examined by counsel for the respondent Mr. Onyango and re-examined by her counsel Mr. Gichuhi.
5. The Respondent's case was heard on even date. The respondent called as its witness Edward Njoroge (RW) who adopted his witness statement dated 19th November 2024 as his evidence in chief. RW produced the respondents' documents under list dated 27th September 2021 as R-exhibits 1-8 and a further list dated 24th October 2024 as R-exhibits 9-10. He was cross-examined by counsel for the claimant Mr. Gichuhi and re-examined by his counsel Mr. Onyango

Claimant's case in brief

6. The Claimant was employed in the position of Tracking Consultant in November 2011 (confirmed in March 2012). In January 2020, following a reorganisation of the management structure the Claimant's job description was reviewed from Sales Manager- Dealership to Relationship Manager with effect from 1st January 2020. (Claimant's exhibit 3 – page 39).
7. The terms under the January 2020 appointment were; Basic Salary of KES. 100,000, a monthly target of KES. 600,000 net of Commission which would be earned at 10% on sales above KES. 600,000, 15% on tenders brought by the Claimant subject to meeting the monthly target; and the Claimant would be evaluated on tender conversion rate of 40% on quarterly basis.
8. The Claimant's employment was again reviewed following the reorganization of the management structure and her job description was reviewed from Relationship Manager to Regional Sales Manager with effect from 1st June 2020 via a letter dated 30th July 2020 and terms reviewed. (Claimant's exhibit 5 – page 42).
9. The Claimant contended that she carried out her duties reasonably, faithfully and diligently throughout her employment, a simple testament to this, the Claimant was appointed Acting Managing Director. (Claimant's exhibit 6 – page 44). However, on 3rd December 2020 the Claimant received an email from the Managing Director informing her that the company intended to restructure the leadership team and advised her to be present on the 4th December 2020 for the conversation. (Claimant's exhibit 10 – page 64) During the meeting on 4th December 2020 the Respondent informed the Claimant that her employment had been terminated effective immediately on account of redundancy. (Claimant's exhibit 11 – page 65) The Claimant asserted that she had no prior knowledge of the intended redundancy and was not taken through the lawful process.
10. The claimant stated that following the institution of the present suit, the Respondent had alleged that the selection of the Claimant to be terminated on account of redundancy was her performance. That this was not communicated to the Claimant at the point of termination neither had the



Respondent demonstrated any lawful measures put in place to improve the Claimant's performance, which the Claimant has demonstrated was exemplary. The letter to the Claimant on termination of her employment cited the Company restructuring with the aim of refocusing energies to mitigate emerging challenges. The Respondent did not serve her with a notice in writing (or at all) of the intended termination on account of redundancy at least 1 month prior to the date of termination as required by Section 40 of the Employment Act, the Respondent did not share nor discuss with her any report, selection procedure used nor offer for re-deployment. The process and decision to terminate the Claimant's employment on redundancy grounds was inhumane, unjust, unfair, unlawful and a violation of her right to fair labour practices. During the hearing, the Claimant testified that following filing of the present suit, the Respondent paid her Kshs. 400,000/- towards terminal dues, receipt of which she has acknowledged.

Respondent's case in brief

11. The Respondent agreed that the Claimant was its former employee from 1st December, 2013 and served until 4th December, 2020. Prior to the termination, the Claimant together with the entire senior management team were informed of impending changes within the company's ranks. Two emails were sent out. One on 5th October, 2020 and another on 3rd December, 2020 (Pp 9 to 12 of the Respondent's Trial Bundle.) Furthermore, prior to the termination, the Claimant's performance had been dwindling as evidenced by the performance review done on 6th November, 2020 (page 4 to 8 of the Respondent's List of Documents):
 - i. At page 5 of the Respondent's Trial Bundle, the status of the Claimant's number is designated as offtrack.
 - ii. At page 6, the performance of the team headed by the Claimant has a score card trend designated as Red, and the team's rock status is Offtrack.
 - iii. Still on page 6, the Claimant's individual performance is designated as Red and Offtrack.
 - iv. At page 7, on actual performance (section iii), the Claimant actual revenue is Kshs. 4 million as opposed to Kshs. 7.2 million agreed upon, at the time of signing the employment contract dated 30th July, 2020.

That it was therefore clear that the Claimant's performance prior to termination was wanting.

12. That in line with the provisions of Section 40 of the Employment Act, after notifying the Claimant of their intention to terminate her services, the Respondent wrote to the Director of Labour and Social Services expressing the intention, whereof they received a response dated 21st December, 2020. (The Letters are contained on pp 24 and 25 of the Respondent's Bundle of Documents). Finally, the Parties agreed on an appropriate full compensation pursuant to the mutual agreement for separation which was computed as follows:

4 days worked in December – Kshs. 17,333/-

Termination in lieu of Notice pay – Kshs. 130,000/-

Severance pay for 9 years Kshs. 585,000/-

Leave days Kshs. 42,250/-

Acting GM allowance Kshs. 25,000/-

Less Statutory Deductions - (Kshs. 233,379/-)

Net Pay Kshs. 566. 204/-



An amount of Kshs. 400,000/- was already paid to the Claimant, before coming to court. Receipt of the amount has been acknowledged by the Claimant.

13. In light of the above, it was therefore clear that the Respondent complied with both the procedural and substantive aspects prior to the separation with the Claimant. With respect to the claim for Kshs. 1, 329,000/- for alleged unpaid commissions from KPLC Tender, the Respondent contends that the Claim is baseless as no proof has been presented to court to support the entitlement to this claim. That the Respondent's Executive Director testified that all the commissions due to the Claimant had been fully settled at the point of separation, and which commissions varied from month to month.

Determination

Issues for determination

14. The claimant identified the following issues of determination in the suit :-
- a) Did the Respondent follow due process when terminating the Claimant's employment on grounds of redundancy?
 - b) Was the Claimant's employment termination lawful and fair?
 - c) Is the Claimant entitled to commissions amounting to Kshs. 1,329,000/- for the Kenya Power supply and installation and testing of automotive speed governors tender secured under the January 2020 contract (Claimant's exhibit 3)?
 - d) Is the Claimant entitled to damages for unfair and unlawful termination of employment on account of redundancy?
 - e) Is the Claimant entitled to balance on terminal dues amounting to Kshs. 206,337/- expressed in the clearance form (Claimant's exhibit 13 – page 68).
 - f) Is the Claimant is entitled to interest on the above and costs of the suit.
15. The Respondent identified the following issues of determination in the suit :-
- a. Whether due process was followed during the Claimant's termination?
 - b. Whether the Claimant's termination was justified?
 - c. Is the Claimant entitled to commissions amounting to Kshs. 1329,000/-?
16. The court having heard the case and on perusal of the written submissions was of the considered opinion that the issues before the court for determination of the dispute by the parties were:-Whether the termination of the employment of the claimant on account of redundancy was lawful and fair;Whether the claimant was entitled to reliefs sought.

Whether the termination of the employment of the claimant on account of redundancy was lawful and fair

17. It was not in dispute that the termination of the employment of the claimant was on basis of redundancy. Redundancy is defined under section 2 the [Employment Act](#) to wit : "redundancy" means the loss of employment, occupation, job or career by involuntary means through no fault of an employee, involving termination of employment at the initiative of the employer, where the services of an employee are superfluous and the practices commonly known as abolition of office, job or occupation and loss of employment;"



18. The procedure to be followed in termination of employment on reason of redundancy is as per section 40 of the [Employment Act](#) to wit:-

'40. Termination on account of redundancy

- (1) An employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions—
 - (a) where the employee is a member of a trade union, the employer notifies the union to which the employee is a member and the labour officer in charge of the area where the employee is employed of the reasons for, and the extent of, the intended redundancy not less than a month prior to the date of the intended date of termination on account of redundancy;
 - (b) where an employee is not a member of a trade union, the employer notifies the employee personally in writing and the labour officer;
 - (c) the employer has, in the selection of employees to be declared redundant had due regard to seniority in time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy;
 - (d) where there is in existence a collective agreement between an employer and a trade union setting out terminal benefits payable upon redundancy; the employer has not placed the employee at a disadvantage for being or not being a member of the trade union;
 - (e) the employer has where leave is due to an employee who is declared redundant, paid off the leave in cash;
 - (f) the employer has paid an employee declared redundant not less than one month's notice or one month's wages in lieu of notice; and
 - (g) the employer has paid to an employee declared redundant severance pay at the rate of not less than fifteen days pay for each completed year of service.”

19. The court in determination of the lawfulness and fairness of the termination of the claimant's employment on account of redundancy will apply the forgoing provisions of section 40 and case law. The relevant legal threshold for determination of fairness of termination of employment in claims is according to the provisions of section 45 (2) of the [Employment Act](#) to wit:- ‘45(2) A termination of employment by an employer is unfair if the employer fails to prove—

- (a) that the reason for the termination is valid
- (b) that the reason for the termination is a fair reason—
 - (i) related to the employees conduct, capacity or compatibility; or
 - (ii) based on the operational requirements of the employer; and
- (c) that the employment was terminated in accordance with fair procedure.” To pass the fairness test the termination must pass the substantive (in terms of reasons) fairness and the procedural fairness under section 41 of the [Employment Act](#) (Walter Ogal Anuro v Teachers Service Commission[2013]eKLR.)



Procedural fairness

20. This is per section 40 of the *Employment Act* (supra).

Claimant's submissions

21. In *Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others* [2014] eKLR, the Court in finding procedural unfairness laid down the following grounds;

“The finding of procedural unfairness was based on the grounds, inter alia, that:

- (i) Consultation before and during the retrenchment exercise is mandatory and the Airline should have consulted the Union, the employees individually and the Government in accordance with Article 10 of *the Constitution*.
- (ii) A fair selection criteria such as LIFO which is mandatory under Kenya Law was not applied
- (iii) The notices were not issued in good faith as they were communicating a fait accompli and as there were no genuine consultations with Ministry of Labour, union and individual employees after the notice was issued.
- (iv) The performance and productivity assessment criteria were not fair and work experience criterion should have been applied...” All the above grounds are present in this matter. The Respondent did not consult the Claimant and the Government through the labour office before and during the restructuring process, the selection process used by the Respondent has not been disclosed, the decision to terminate was issued even before the notices were issued and the Respondent failed to consider the Claimant's productivity and performance over the years. It is evident that due process was not followed in declaring the Claimant redundant. The court in *Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others* [2014] eKLR found that “Justification is one important aspect of redundancy. The other equally important aspect is procedural fairness. As I have pointed out, for any termination of employment under redundancy to be lawful, it must be both substantially justified, and procedurally fair”. In this matter, the Respondent has failed to prove that the termination was both justified and that it followed proper procedure.

Respondent's submissions

22. The Respondent submitted that, the Claimant was duly notified and aware of the intended redundancy exercise. The emails of 5th October, 2020 and 3rd December, 2020 served to notify the Claimant of the ongoing internal restructuring within the organisation. As a Senior Official of the Respondent, the Claimant cannot denounce the communication to the entire organization of the impending changes. Mathews N. Nduma (J) in *Mwita v Fep Holdings Limited (Employment and Labour Relations Cause 79 of 2020)* [2023] KEELRC 2044 (KLR) (24 August 2023) (Judgment) observed as follows:

“I disagree with Mr. Mwenesi that the appellant's letter of 1st August 2012 did not constitute the notice envisaged by section 40(1) (a) of the *Employment Act* as it did not have the names of the affected staff and there was no notice addressed to the appellant's individual employees. 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, and I will shortly show that consultation is imperative, on the justiciability of that intention and the mode of its implementation where it is found justiciable. At that initial stage, the employer would not have identified the employee(s) who will be affected. So that notice cannot have the names of the employees as Mr. Mwenesi contended. It does not have to a calendar months' notice as Mr. Mwenesi contended. The Act requires one month's notice. The period runs from the date of service of that notice. It is after the conclusions of the consultations on all issues of the matter that notices will be issued to the affected employees of the decision to declare them redundant.”(emphasis by Respondent).

23. Similarly, the labour office was notified as confirmed vide the letters on pages 24 and 25 of the Respondent's bundle of documents. Secondly, a computation of the terminal dues payable to the Claimant included an amount of compensation for unutilised leave days, part of this amount has been paid and accepted by the Claimant. Thirdly, and similar to the above, the computation of the compensation payable to the Claimant includes an amount of wages equivalent to one month's salary, being compensation in lieu of termination notice. Lastly, the amount of compensation payable includes an amount of Kshs. 585,000/- being ½ of the Claimant's salary computed over 9 years of service.
24. The Respondent asserted that it had in all respects, complied with the provisions of Section 40 of the Employment Act, thus answering the question as to whether the Claimant was properly declared redundant.

Decision

25. The Claimant's position was that Respondent did not consult her and the Government through the labour office before and during the restructuring process, the selection process used by the Respondent has not been disclosed, the decision to terminate was issued even before the notices were issued and the Respondent failed to consider the Claimant's productivity and performance over the years.
26. The Respondent's position was that the Claimant was duly notified and aware of the intended redundancy exercise. The emails of 5th October, 2020 and 3rd December, 2020 served to notify the Claimant of the ongoing internal restructuring within the organisation. As a Senior Official of the Respondent, the Claimant cannot denounce the communication to the entire organization of the impending changes.
27. The email of 5th October 2020 introduced changes for focus and product performance of which the claimant was assigned to drive fuel revenue nationwide. The court found this was not a notice of redundancy to the claimant but re-assignment of duty. The email of 3rd December 2020 stated 'starting tomorrow we shall embark on restructure that will see changes in the leadership team.' The email notified of conversation the next day. The next day was 4th December 2020 when the claimant told the court she was informed that her employment had been terminated effective same date on account of redundancy. The claimant produced undated letter by the respondent which stated that she was terminated effective 4th December 2020 on account of redundancy. She received the letter on the 17th December 2020.
28. Section 40 of the Employment Act required notice of one month to be issued of the intended termination on account of redundancy. This was not the case here as the first notice of intended restructuring which was to bring changes that would affect the leadership was of 3rd December 2020 and on the next day meant for conversation on the intended restructuring, the claimant's employment



was terminated on account of redundancy with the letter being issued to her days later on the 17th December 2020.

29. The Court of Appeal in *Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others* [2014] eKLR, laid down procedural fairness for redundancy as follows:-

“The finding of procedural unfairness was based on the grounds, inter alia, that:

- (i) Consultation before and during the retrenchment exercise is mandatory and the Airline should have consulted the Union, the employees individually and the Government in accordance with Article 10 of *the Constitution*.
- (ii) A fair selection criteria such as LIFO which is mandatory under Kenya Law was not applied
- (iii) The notices were not issued in good faith as they were communicating a fait accompli and as there were no genuine consultations with Ministry of Labour, union and individual employees after the notice was issued.
- (iv) The performance and productivity assessment criteria were not fair and work experience criterion should have been applied...”The court upheld the decision to apply in the instant case.

30. The Court established that the respondent issued the notice to labour office dated 19th December 2020 way after the termination of the claimant’s employment contrary to the provisions of section 40(1) to wit:- ‘(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;’ For the foregoing reason the Court held that there was no compliance with section 40 (1) of the *Employment Act* on notices hence no procedural fairness.

Substantive fairness

31. Despite the employer having the prerogative to terminate employment on grounds of redundancy, such termination must be lawful, justified, and due process followed. Section 43(1) of the *Employment Act* provides that in any claim arising out of termination of a contract, the employer shall be required to prove the reasons or reasons for termination and where he fails to do so, the termination shall be deemed to be unfair termination within the meaning of sections 45. Section 43(2) provides:

“The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.” Section 45(1) of *Employment Act* prohibits an employer from terminating the employment unfairly and Section 45(2) stipulates what is unfair termination. It provides:

- “(2) A termination of employment by an employer is unfair if the employer fails to prove—
 - (a) that the reason for the termination is valid;
 - (b) that the reason for the termination is a fair reason—



- (i) related to the employee’s conduct, capacity or compatibility; or
- (ii) based on the operational requirements of the employer; and
- (c) that the employment was terminated in accordance with fair procedure.”

32. The claimant submitted that that in this case the reason advanced by the Respondent for terminating the Claimant’s employment was “the aim of refocusing our energies to mitigate emerging challenges”. This may be construed to fall under section 45 (2)(b)(ii), that operational requirements of the employer. It is important to note that following filing of the present suit, the Respondent in response has averred the reason for termination was the Claimant’s performance, a ground the Claimant was not given an opportunity to defend against or remedy as provided for under the law. This is a clear indication of the failures by the Respondent to follow the law and accord the Claimant fair labour practices as guaranteed by the law.²⁶ The Respondent has displayed impunity in the manner they handled the termination of the Claimant. It was utterly unfair and unprocedural.

33. The Respondent submitted that the Claimant’s employment was terminated in the year 2020. In his testimony before this Court, RW-1 testified in chief that:

During the year, 2020, the company incurred huge financial losses occasioned by the Covid-19 pandemic and the poor operating business environment.

To cushion itself, the company underwent massive restructuring that entailed the merging of business units which naturally led to the loss of jobs. Units the considered to be loss making were scrapped off to cushion the business operations and sustain the continuity of the business.

One of the poor performing units was the unit headed by the Claimant. She failed to meet her targets over two successive appraisals. The appraisal forms were, as a matter of fact, filled out by the Claimant. The company resolved to scrap off the Claimant’s department and as a result her position was rendered redundant.” That the testimony regarding the huge losses incurred by the Respondent during the pandemic year was not challenged. While, the testimony on the Claimant’s poor performance was challenged, the Respondent has annexed the self-appraisal form, which was filled out by the Claimant herself, and which shows that her performance and that of her team being well-below the expected level. In the Claimant’s final letter of appointment dated 30th July, 2020 (page 1 of the Respondent’s Bundle of Documents), one of the conditions clearly stipulated therein is that:

“You will be evaluated on a monthly target of KES 7.2M Net of Commissions. You will be paid 10% on any value above 90% Hit Rate which is KES 6.9M Net of Commissions”. At pages 5, 6 and 7 (of the Respondent’s Bundle) constituting the self-appraisal form filled out by the Claimant, is replete with self-indictment where the Claimant admits that her and the team’s performance was off-track. We invite the Court to examine the self-appraisal form.



34. The Respondent contended that the above was in line with the holding in *Jane Wairimu Machira v Mugo Waweru and Associates* [2012] eKLR where the Court held that:

“an appraisal of the performance of an employee must of necessity involve the active participation of the employee.”

35. The Respondent asserted that it was entitled to do all within its power, (of course guided by the law), to save itself from crumbling. As a humane and considerate employer, the Respondent offered (and has partly settled) a generous compensation package of Kshs. 799,583.00/- before statutory deductions. In the same vein, the Claimant has not furnished any evidence before this Court to demonstrate the unfairness of the decision taken by the Respondent to terminate her on grounds of redundancy. There was neither witch-hunt nor malice in the process of terminating the Respondent. The termination was purely based on business reasons at the time.

36. The court finds that from the very definition of redundancy, the employee is not at fault. “redundancy” means the loss of employment, occupation, job or career by involuntary means through no fault of an employee, involving termination of employment at the initiative of the employer, where the services of an employee are superfluous and the practices commonly known as abolition of office, job or occupation and loss of employment;(section 2 of the *Employment Act*).The Respondent in undated letter of termination stated the basis of the termination on account of redundancy to wit:-
“Termination of service on account of Redundancy

This is to inform you due to the current restructuring within the company with the ai of focussing our energies to mitigate emerging challenges, we regret to advise that your position will no longer be required with effect from 4th December 2020”.(page 65 of the claimant’s trial bundle)

37. During the hearing the claimant admitted her performance was evaluated on monthly basis for purpose of commission payment. She confirmed to have on the 3rd December 2020 received email of the MD on restructuring and on 4th December 2020 she was informed of termination on basis of redundancy. The claimant further confirmed her self appraisal dated 6th November 2020 was to effect that her Team score card was red, Team Rock status was off track , and individual performance off track. The Claimant confirmed that the words ‘off track’ meant not good performance and the appraisal was in her own hand writing. That she evaluated herself and was assessed by the superiors. That this happened a month before the termination. On re-examination she stated that her commulative score which she evaluated was 92% which she stated was a month later after the red score. The court examined the said evaluation dated 1st December 2020(page 48-52 of the Claimant’s bundle). At page 50 the claimant on Team Rock and individual Status stated the “off track”. This was self-evaluation of performance and no one can speak better about the claimant than herself.

38. Section 43 of the *Employment Act* places the burden to prove reason of termination on the employer. During cross-examination RW told the court that the criteria used to declare the claimant’s employment redundant was her performance and removal of her department of which she was the leader. RW denied the said department was on trial at the time. RW told the court the evaluation of contract performance was on monthly basis and the claimant was selected for redundancy on performance basis. RW told the court the claimant did not meet her target of Kshs. 7.2 Million despite scoring herself at 155%. That the commission paid to the claimant was on collections not necessarily on targets. On re-examination RW told the court the self-evaluation of claimant’s appraisal at 92% was not countersigned by the supervisor. That she evaluated herself and her team as off-track. That the company was struggling post COVID -19 and the claimant had been given a broad area in her



department to mitigate the COVID 19 issue. The department was not working and after discussion it was agreed to declare the department redundant affecting the claimant and her team.

39. The court having evaluated the evidence before the court finds that the Respondent proved on a balance of probability that the redundancy which affected the claimant was justified. The claimant in own self appraisal dated 6th November 2020 and 1st December 2020 respectively indicated that both individual and Team Rocks status was off track which she told the court meant not good performance. She nevertheless in the appraisal of 1st December 2020 rated self at 92. 5% but this was not countersigned by the supervisor. The court finds that for the reason of the department not doing well nor was the claimant individually, the Respondent was justified in making a business decision to declare the redundancy.

Whether the claimant was entitled to reliefs sought

40. The claimant sought the following reliefs:-
- a) Declaration that the Claimant's right under Article 41 of *the Constitution* to fair labour practices has been breached, the redundancy was procedurally unfair, wrongful and unlawful.
 - b) 12 month's salary as damages for unfair and unlawful termination on account of redundancy.
 - c) An Order for the payment of the Claimant's final dues amounting to Kshs. 606,337 due and unpaid from December 2020.
 - d) An Order for payment of Commission of Kshs. 1,329,000 due to the Claimant for Kenya Power Supply and Installation of and testing of automotive speed governors
 - e) Costs of this suit and interest.
 - f) Any other order that the Honourable Court may deem fit to grant in the circumstances
41. On relief of Order of Declaration that the Claimant's right under Article 41 of *the Constitution* to fair labour practices has been breached, the redundancy was procedurally unfair, wrongful and unlawful, the court found the redundant was justified but that there was no procedural fairness.
42. on claim of 12 month's salary as damages for unfair and unlawful termination on account of redundancy. RW told the court they paid one month notice for failure to give notice as required. The court holds that the notice paid was as envisaged under section 40(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 hence did not cover procedural fairness .The court held that the termination was procedurally unfair but the reason of redundancy was justified. The court awards the claimant one month salary for notice payment in lieu of procedural unfairness which is awarded for Kshs. 130,000/- (The court relied on the tabulation by the Respondent on the payable salary).
43. An Order for the payment of the Claimant's final dues amounting to Kshs. 606,337 due and unpaid from December 2020. –the claimant submits that Section 40 (1) (e), (f) and (g) of the *Employment Act*, provides for the entitlements of an employee terminated on grounds of redundancy. It is clear that the amount of Kshs. 606,337/- was an agreed assessment of the entitlements under the law and the Claimant has admitted to receipt of Kshs. 400,000/- following filing of the present suit. That it was imperative that the Respondent be ordered to pay the difference of Kshs, 206337/- .The respondent submitted that a computation of the terminal dues payable to the Claimant included an amount of compensation for unutilised leave days, part of this amount has been paid and accepted by the Claimant. That the computation of the compensation payable to the Claimant includes an amount of wages equivalent to one month's salary, being compensation in lieu of termination notice.Lastly, the



amount of compensation payable includes an amount of Kshs. 585,000/- being ½ of the Claimant's salary computed over 9 years of service. As a humane and considerate employer, the Respondent offered (and has partly settled) a generous compensation package of Kshs. 799,583.00/- before statutory deductions. RW in witness statement computed the total payable amounts to Kshs. 799,583.00/- before statutory deductions.

44. It was not in dispute the claimant post filing of the case had been paid Kshs. 400000. Statutory deduction of PAYE, NHIF and NSSF amounted to Kshs. 233,379.00. The outstanding amount was thus Kshs. 166,204 which is allowed.
45. On claim for An Order for payment of Commission of Kshs. 1,329,000 due to the Claimant for Kenya Power Supply and Installation of and testing of automotive speed governors; The claimant submitted that the Claimant's contract of employment dated 7th January 2020, (Claimant's exhibit 3 – page 39) provides for inter alia, "You will earn 10% commission on any sales above KES 600,000/- net". The Claimant averred that she secured a Kenya Power Supply and Installation tender which entitled her to Kshs. 1,329,000/-. The Claimant had provided payslips and her clearance form (on page 69) which indicated the existence of the Kenya Power tender and a clear understanding that this amount ought to have been paid. The Respondent in response has not provided any documentation to prove that either the tender did not exist or that the commissions were fully paid up. The Claimant is entitled to this commission by virtue of the contract between the parties and the Respondent ought to be ordered to pay the same.
46. The respondent relied on the dictum that "he who asserts must prove" Section 107 of the [Evidence Act](#) provides that:

"whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist." Further, Section 109 further provides that:

"The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person." The Claimant had not submitted before this Honourable Court a copy of the KPLC contract she alleged to have secured on behalf of the Respondent. The Claimant has not even furnished details of when it was secured, the value of the same, the payment structure among other details which would have shed more light. Copies of the same were never furnished to the Respondent to afford them an opportunity to respond to the same. That is no denial by the Respondent that the Claimant earned commissions as stipulated in her letter of employment. As a matter of fact, the same were always paid together with her salary as and when the same became due. This is evidenced by the payslips attached to the Claimant's bundle of documents. However, the claim for commissions worth Kshs. 1,329,000/- is without basis and should be dismissed by this Honourable Court. On the burden of proof, Section 108 of the [Evidence Act](#) provides that:

"The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side." The onus of proving this claim fell squarely on the shoulders of the Claimant. Without tendering any proof in its support, the same must fail.



47. The court had to agree with the respondent that he who asserts proves (section 107-108 of [Evidence Act](#)). The claimant had filed as proof of the claim supplementary list of documents dated 21st November 2024 being Notification of award of tender: KP3/9A/OT/03/19-20 for supply ,installation and testing of automotive speed governors and issuance of compliance certificates. During the hearing the claimant withdrew the document. The employer denied the claim stating it had no basis. The said document having been withdrawn the claimant had no evidence of the said tender having been issued. The prayer is declined for lack of evidence.

Conclusion

48. The court held that the process of termination of the claimant on basis of redundancy was unfair but the redundancy was justified. The court enters judgment for the claimant against the respondent as follows:-

- a. Compensation for lack of procedural fairness of notice payment of Kshs. 130,000 payable with interest from date of judgment.
- b. Outstanding terminal dues of Kshs. Kshs. 166,204 payable with interest at court rates from date of filing suit.
- c. Costs of the suit .

49. It is so Ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 9TH DAY OF MAY , 2025.

J.W. KELI,

JUDGE.

In the Presence of:

Court Assistant: Otieno

Claimant : -Gichuhi

Respondent: Onyango

Further Court Order

Stay of execution of 30 days granted

J.W. KELI,

JUDGE.

