Mutuse v Proto Energy Limited (Cause E021 of 2022)
[2025] KEELRC 1712 (KLR) (12 June 2025) (Judgment)

Neutral citation: [2025] KEELRC 1712 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE E021 OF 2022

JW KELI, J

JUNE 12, 2025

BETWEEN

LUCKY MWENDWA MUTUSE ..... CLAIMANT

AND

PROTO ENERGY LIMITED ..... RESPONDENT

JUDGMENT

1. The claimant instituted these proceedings through the law firm of Ahmednasir Abdullahi Advocates LLP, alleging that he was unfairly terminated from employment. He filed a statement of claim dated 13th January 2022 and received in court on the 18th January 2022 seeking the following reliefs:-

    i. A declaration that the Claimant's termination was unfair.

        a. A declaration that the Respondent infringed on the Claimant's constitutional rights to fair hearing and fair labor practices and was discriminated against.

        b. Payment of Kshs. 2,400,000/= being 12 months' salary on account of unfair termination.

        c. Payment of Kshs. 2,400,000/= on account of salary not paid while the Claimant was on study leave;

        d. Payment of Kshs. 120,000 on account of unremitted pension amounts while the Claimant was on study leave.

        e. Payment of Kshs. 420,000 on account of accrued but untaken leave days:

        f. General damages of Kshs. 5,000,000/= on account of breach of the Claimant's fundamental human rights, mental anguish and suffering.

g. Interest on (c), (f) and (g) above above at court rates from the date of filing suit until payment in full.

i. Interest on (d) and (e) above from September 2019 at court rates until payment in full.

j. Costs of this Claim.

k. Any other relief that the Honourable Court may deem fit to grant.

2. The following are the documents filed by the Claimant in support of his Claim:-

i. Claimant's Statement of Claim dated 13 January 2022

ii. Claimant's List of witnesses dated 13 January 2022

iii. Witness statement by Lucky Mwendwa Mutise dated 13th January 2022

iv. Claimant's List and bundle of documents dated 13 January 2022 running from page 1- 42

v. Claimant's supplementary list of documents dated 6th May 2022

vi. Claimant's Reply to Statement of Response dated 6th May 2022

3. The Respondent entered appearance through the law firm of Munyao, Muthama & Kashindi and opposed the claim by filing the following documents:-

a. Memorandum of response dated 14 February 2022

b. List of documents dated 14 February 2022

c. Witness statement by Wambui Maina dated 21 January 2025

Hearing and Evidence

4. The claimant's case was heard on the 11th February 2025 where the claimant testified in oath , adopted as his evidence in chief his witness statement dated 13th January 2022 and produced documents under list of even date and the supplementary list of documents dated 6th May 2022. He was cross-examined by counsel for the respondent , Winnie Songok and re-examined by his counsel.

5. The respondent's case was heard on same dated where RW1 was Wambui Maina who testified on oath, adopted her witness statement dated 21st January 2025 and produced the respondent's documents under list dated 14th February 2022 as the respondent's evidence in chief. She was cross-examined by counsel for the claimant, Ms. Mungai and re-examined by her counsel.

Claimant's case in brief

6. The Claimant herein was employed by the Respondent through a contract of employment dated 9 February 2017, effective 1 March 2017 in the capacity of Site Engineer/Manager with a basic monthly salary of Kshs 110,000. (A copy of the employment contract appears on page 1- 8 of the Claimant's Bundle of documents)

7. By a letter dated 16th June 2017, the Respondent informed the Claimant of his successful completion of probation and confirmed his employment with an adjusted monthly salary of Kshs 130,000 (A copy of the letter confirming his employment appears on page 9A of the Claimant's Bundle of documents)

8. Owing to the Claimant's hard work and dedication, his salary was reviewed upwards to Kshs. 200,000. Among the projects that the Claimant successfully undertook and completed was the delivery of the

first plant in Kenya based in Kabati, Muranga County-This-success greatly contributed to the review of his salary upwards. (A copy of the Claimant's payslip confirming his salary appears on page 98 of his bundle of documents and a letter confirming his salary appears at page 9B of his bundle of documents and a letter confirming this appears on page 10 of the Respondent's List of documents)

9. Prior to starting his employment, the Claimant had expressly informed the Respondent that he had an offer to undertake a master's degree in September 2017 at the University of Sheffield in the United Kingdom. By September 2017, the Kabati plant was not completed and the Respondent pleaded with the Claimant to defer his studies for a year so that he could focus on completing and commissioning the Kabati plant. The Claimant agreed and subsequently deferred his masters studies for a year. (A copy of the Claimant's amended offer letter appears on page 10-13 of his bundle of documents)

10. The period study was now from September 2018 to August 2019. After receiving his admission letter, the Claimant applied for a study leave which was approved by the Respondent vide a letter dated 26th July 2018. In the said letter the Respondent categorically stated inter alia; .....during your leave period, the company has agreed to pay your salary on condition that you will return to work for the company." (A copy of this letter appears on page 14 of the Claimant's bundle of documents)

11. Being bound by the agreement made with the Respondent, the Claimant returned in September 2019 after his master to work for the Respondent. However, it is important to note that the Respondent did not keep its end of the bargain as the Claimant was never paid for the period he was undertaking his masters as agreed.

12. Among the assignments handed to the Claimant upon his resumption was a Nakuru Power plant which had stalled. The Claimant was tasked to lead the same given his success in construction of the Kabati plant.

13. Despite the meagre resources provided to the Claimant by the Respondent and the challenges brought about by the Covid 19 pandemic, the Claimant was able to deliver the Nakuru plant which was inspected by the government and county officials who gave it a clean bill of health. After the required inspections were done, the Nakuru plant was commissioned and has been running from July 2020 to date.

14. On 21st August 2020, the Respondent raised allegations against the Claimant in respect of poor workmanship in the construction of the Nakuru plant. These allegations were surprising because not only had the Nakuru plant been inspected by the Government and County officials, the same had been commissioned and was already running.

15. The Claimant was thereafter asked to fill in the Respondent's offence sheet, he was also required to attend a disciplinary hearing session on 2nd September 2020. (a copy of the offence sheet appears on page 16-18 of the Claimant's bundle of documents)

16. To date, the Claimant has never known the outcome of this disciplinary hearing he was subjected to. This is despite several follow ups by the Claimant. (a copy of a letter following up on the same appears on page 19 of the Claimant's bundle of documents, a further email following up on the same appears on page 26)

17. Sometimes in the years 2020 and 2021, the Respondent unlawfully withheld the Claimant's salary for various months which were later released to him with no explanation as to why they were withheld in the first place. (a copy of the Claimant's emails following up on his salary appear on page 32 and 34 of his bundle of documents)

18. Around the same period, the Claimant was asked by the Respondent not to report to the office unless he was advised to do so. All this while, his roles were being undertaken by other employees in the company who were less qualified than him. (a copy of the Claimant's email following up on this appears on page 23 of his bundle of documents).

19. Through a letter dated 30th September 2021 but sent to the Claimant on 8th October 2021, the Respondent terminated the Claimant's employment alleging that the same was on account of proposed changes in the company structure. (a copy of this letter appears on page 20 of the Claimant's bundle of documents)

20. The entire process leading up to the Claimant's termination was a premeditated, planned and poor scheme by the Respondent's management.

Respondent's case in brief:-

21. The respondent denied the claim for unfair termination and the reliefs sought. The Respondent stated that the claimant's employment was declared redundant under section 40 of the *Employment Act* on account of business exigencies, and the termination was not related to the prior disciplinary proceedings which stalled the position had been identified for redundancy. The claimant denied all the reliefs sought, stating they were not merited. The Respondent's evidence in chief was per statement of response, witness statement of Wambui Maina dated 21st January 2025 and documents under list of documents dated 14th February 2022.

Determination

Issues for determination

22. The claimant identified the following issues for determination :-

    i. Whether the Claimant's termination on account of redundancy was unlawful, illegal and unprocedural.

    ii. Whether the Claimant is entitled to the reliefs sought;

23. The respondent identified the following issues for determination :-

    i. Was the claimant terminated lawfully?

    ii. Is the claimant entitled to the remedies he seeks?

24. The court found the parties were in agreement on the issues for determination in the dispute to be:-

    i. Whether the Claimant's termination of employment on account of redundancy was fair.

    ii. Whether the Claimant is entitled to the reliefs sought;

Whether the Claimant's termination of employment on account of redundancy was fair.

25. Fairness in this case means meeting the threshold of validity of the reason(section 43 of the *Employment Act*) and procedural fairness for termination on reason of redundancy under section 40 of the *Employment Act*.

The claimant's submissions

26. The principles and law on redundancy are well articulated under the laws of Kenya and specifically, Section 2 of the *Employment Act* and Section 2 of the *Labour Relations Act* which define redundancy as;-"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"The Court of Appeal in the case of Thomas De La Rue (K) Ltd v David Opondo Omutelema 2013 eKLR the Court observed thus;"It is quite clear to us that sections 40 (a) and 40 (b) provide for two different kinds of redundancy notifications depending on whether the employee is or is not a member of a trade union. Where the employee is a member of a union, the notification is to the union and the local labour officer at least one month before the effective redundancy date. Where the employee is not a member of the union, the notification must be in writing and to the employee and the local labour officer. Section 40 (b) does not stipulate the notice period as is the case in 40 (a), but in our view, a purposive reading and interpretation of the statute would mean the same notice period is required in both situations. We do not see any rational reason why the employee who is not a member of a union should be entitled to a shorter notice"

27. Similarly, Section 40 of the *Employment Act* sets down the preconditions to be complied with by an employer for redundancy to satisfy the legal litmus test which include (i) Notice to the union and the labour office where an employee is a member of a trade union, (ii) notice to the employee and to the labour officer where the employee is not a member of a trade union, (iii) regard to seniority in time and skill of particular class of employees, (iv) payment of terminal benefits as set out in a Collective agreement, (v) payment of leave, (vi) payable of one months' notice or wages in lieu of notice and (vii) payment of severance pay at a rate of 15 days for each completed year of service.These conditions outlined in the law are mandatory and not left to the choice of an employer. Redundancies affects workers livelihoods and where this must be done by an employer, the same must be put into consideration.

28. Turning to the evidence on record, the Respondent issued termination notice dated 30th September 2021 purporting to terminate the Claimant on account of "proposed changes in the Respondent structure." This letter was sent to the Claimant on 18th October 2021. In the said letter the Claimant is informed that his position would be declared redundant with effect from 19th September 2021. In the same letter, the Claimant is also informed that his last working day would be 19th August 2021. The claimant submitted that the termination letter issued to the Claimant is riddled with contradictory dates that are not only confusing but entirely illogical. This inconsistency alone calls into question the credibility and care with which the termination process was handled. It is evident from the record that the Claimant's termination was a rushed and poorly executed endeavour, lacking the procedural diligence one would expect in such a serious matter. The disjointed timeline speaks for itself and further underscores the Claimant's contention that due process was not observed. Through a letter dated 16th August 2021 and received in the County Labour Office Murang'a on 18th August 2021, the Respondent informed the county labour office of its intention to declare the Claimant's position redundant. This letter sent to the labour office was never shared with the Claimant as statutorily mandated by Section 40 (1) (b) of the *Employment Act* which states that;"where an employee is not a member of a trade union, the employer notifies the employee personally in writing and the labour officer."

29. The claimant further submitted that the court of Appeal in Kenya Airways Limited vs. Aviation & Allied Workers Union Kenya held that loss of employment by redundancy has to be at no fault of the

employee and arises where services of an employee are superfluous through the practice commonly known as abolition of job or occupation and loss of employment. In this particular case, the claimant submitted that his duties had not at any point become superfluous as the Respondent wants this court to believe. Through numerous correspondences that have been adduced before this court, it is clear that the Claimant's role were taken over by other people. The Claimant on numerous occasions sought to know why individuals with lesser qualifications than him were now taking over his role. We invite the court to look at the email correspondence appearing on page 21,23, and 26 of the Claimant's bundle of documents. The redundancy of the claimant was not a genuine organizational necessity but rather a well-orchestrated scheme designed to force him out of employment with the company. Notably, it was only his role within the entire organization that was declared redundant, raising significant concerns about the legitimacy of the redundancy process.

30. It is the Respondent's assertion that the redundancy was critical to ensure the Respondent continued operating as a viable commercial undertaking. The key reason adduced by the Respondent was that the COVID-19 Pandemic had affected its business. The claimant submitted that the Respondent are attempting to hide behind this to justify their actions. Through a document issued by the Kenya Association of Manufacturers on 7th April 2020, the Respondent herein was declared an essential service provider and granted permission to operate during the then curfew period. This document appears on page 3 of the Claimant's Supplementary list of documents. Accordingly, the justification of economic or operational hardship as the basis for declaring the Claimant's position redundant is untenable. The company's sustained operations contradict any claim of diminished need for the claimant's role. Furthermore, the subsequent allocation of the Claimant's duties to other employees unequivocally demonstrates that the position was not genuinely redundant but rather remained materially necessary to the functioning of the business. This sequence of events suggests that the redundancy was neither bona fide nor substantively fair and was instead a disguised termination under the guise of redundancy.

31. It is also crucial to note that Prior to being terminated on the purported grounds of redundancy, the Claimant was summoned to a disciplinary hearing, during which he was asked to respond to certain allegations. The Claimant duly attended and provided comprehensive responses to the issues raised. However, to date, the outcome of that hearing has never been communicated to him. This omission raises serious concerns about the bona fides of the process. It would not be a stretch to conclude that the Respondent, having been unable to substantiate any misconduct or valid grounds for termination through the disciplinary process, ultimately resorted to redundancy as a fallback mechanism. This sequence of events strongly suggests that the redundancy was not genuine, but rather a disguised disciplinary termination devoid of procedural and substantive fairness. These actions strongly suggest that the redundancy was a pretext to remove the Claimant from the company, making the process both unfair and legally questionable. The Respondent equally failed to meet all the other preconditions as set out in Section 40 of the *Employment Act* thus rendering the purported redundancy illegal, unprocedural and unlawful.

32. The claimant submitted that consultations between an employer and employee and the relevant unions on an intended redundancy are not only necessary but also implied by Section 40(1)(a) and (b) of the *Employment Act*. The nature and content of the consultations required to be undertaken in a redundancy process was explained by Maraga JA in Kenya Airways limited and Aviation & Allied Workers Union Kenya & 3 others (supra):The purpose of the notice under section40(1) (a) and (b) of the *Employment Act*. as is also provided for in the said ILO Convention No. 158-Termination of Employment Convention, 1982, is to give the parties an opportunity to consider "measures to be taken to avert or to minimize the terminations and measures to mitigate the adverse effects of any terminations on the workers concerned such as finding alternative employment." The consultations

are therefore meant to cause the parties to discuss and negotiate a way out of the intended redundancy, if possible, or the best way of implementing it if it is unavoidable. This means that if parties put their heads together, chances are that they could avert or at least minimize the terminations resulting from the employer's proposed redundancy. If redundancy is inevitable, measures should be taken to ensure that as little hardship as possible is caused to the affected employees"A perusal of the evidence adduced before this Honourable court will without a doubt demonstrate that no consultations were undertaken after the issuance of the intended redundancy. The Respondent's has not provided any evidence to show that any consultative meetings were held. The same is stated in their response but there is no evidence produced confirming the same. Consultation is a legal requirement as affirmed in Kenya Airways Limited Aviation & Allied Workers Union Others [2014] eKLR. He who alleges, must prove. In Rosilinda Okanda Oluoch & 38 Others Vs. Style Industries Limited [2020] Eklr, the court emphasized real consultation, citing Cammish Vs. Parliamentary Service [1996] 1 ERNZ 404, which held that consultation must involve providing precise information, allowing reasonable response time, and considering suggestions before making final decisions. The Respondent was bound by the provisions on consultation required by Article 47 and section 4(3) of the *Fair Administrative Action Act*. An administrative action is defined under the Act to include any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates. Employers fall within the category of persons whose action, omission or decision affects the legal rights or interests of employees.Article 47 and section 4(3) of the *Fair Administrative Action Act* provide that where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-

(a) prior and adequate notice of the nature and reasons for the proposed administrative action;

(b) an opportunity to be heard and to make representations in that regard;

(c) notice of a right to a review or internal appeal against an administrative decision, where applicable;

(d) a statement of reasons pursuant to section 6;

(e) notice of the right to legal representation, where applicable;

(f) notice of the right to cross-examine or where applicable; or (g)information, materials and evidence to be relied upon in making the decision or taking the administrative action.

33. Kenya is a State party to the International Labour Organization (ILO), which it joined in 1964 and is bound by the ILO conventions. Article 13 of Recommendation No. 166 of the ILO Convention No. 158-Termination of Employment Convention, 1982-requires consultation between the employers on the one hand and the employees or their representatives on the other before termination of employment under redundancy. It reads:

> " When the employer contemplates terminations for reasons of an economic, technological, structural or similar nature, the employer shall:
>
> a. provide the workers' representatives concerned in good time with relevant information including the reasons for the terminations contemplated, the number and categories of workers likely to be affected and the period over which the terminations are intended to be carried out;
>
> b. give, in accordance with national law and practice, the workers' representatives concerned, as early as possible, an opportunity for consultation on measures to be taken to avert or to minimize the terminations and measures to mitigate the

adverse effects of any terminations on the workers concerned such as finding alternative employment."

34. As per the evidence adduced before this Honourable court, the Respondent denied the Claimant all the above mentioned requirements in the process of terminating her employment. The Respondent equally failed to meet all the other preconditions as set out in Section 40 of the *Employment Act* thus rendering the purported redundancy illegal, unprocedural and unlawful.

Respondent's submissions

35. The claimant was employed as a site engineer vide a contract dated 9th February 2017. In 2020, the respondent's business was affected by the downturn in business caused by the Covid-19 pandemic. As a result, the respondent restructured its business which meant that some roles would be declared redundant. The claimant was one of the employees who was affected by the redundancy. Wambui Maina on behalf of the company testified that there were a number of employees affected by the restructuring process and not just the claimant. In declaring the affected employees redundant, the respondent complied with section 40 of the *Employment Act* which requires an employer to give affected employees not less than a month's notice of intended redundancy and inform the area labour officer of the reasons for the redundancy. Once the notice lapses, the affected employees are to be paid their redundancy dues.

36. That the respondent begun the process by informing the area Labour Officer of the claimant's impending redundancy on account of the downturn in business due to the Covid-19 pandemic. A copy of the notice to the Labour Officer is at page 11 of the respondent's bundle. The claimant was notified that his role would be declared redundant in a letter dated 30th September 2021 and also of the reason. The letter informed him that his role would be terminated with effect from 19th October 2021 (the letter erroneously indicated September) and that he would be paid his redundancy dues. The letter unfortunately included clerical errors in the dates; however, the respondent submits that these were purely clerical in nature and do not indicate that the process was conducted carelessly. While the claimant's letter was titled 'Termination on Contract', the contents reveal it was a notice that his role would be declared redundant at a future date. The letter was issued to the claimant on 30th September 2021. See page 20 of the claimant's bundle.

37. In his testimony, the claimant confirmed that his effective date of termination was 6th November 2021. This was also confirmed by the respondent's witness. The period between 30th September and 6th November 2021 is longer than the minimum period set out under section 40 of the *Employment Act*. The claimant therefore suffered no prejudice on this account. The claimant was paid his dues upon termination which he confirmed that he received during testimony. The claimant testified that he received an amount over and above his basic salary when he left the company. He cannot claim that he assumed this was a bonus payment from work he did in the Nakuru plant which - as will be later discussed in these submissions - was the subject of disciplinary proceedings against him. Besides, the claimant has made no claim for terminal dues arising from his redundancy in his statement of claim. The court cannot award the claimant what he has not asked for. The claimant alleges that the redundancy was not lawful because it was related to disciplinary proceedings against him on another issue. This is not true. The disciplinary proceedings were separate and distinct from the redundancy process. Sometime in August 2020, the respondent commenced disciplinary proceedings against the claimant on account of work he performed at a site in Nakuru which he oversaw. Wambui Maina testified that while the plant was approved and begun operations in July 2020, issues on the site started to come to light in August 2020 during the defects liability period. The claimant was notified of this when he was presented with an offence sheet dated 19th August 2020 where he was asked to answer to

the offence of failing to enforce quality workmanship at the Nakuru site. A copy of the offence sheet is at pages 16 to 18 of the claimant's bundle. The claimant responded to theTnotice on 24th August 2018 in the same offence sheet where he took ownership of the poor workmanship at the Nakuru plant. The respondent invited the claimant for a disciplinary hearing on 2nd September 2020 which he attended. After the disciplinary hearing, the claimant continued to work without interruption pending the outcome of the disciplinary process.

38. That due to exigencies of business, the outcome of the disciplinary process had not been communicated to the claimant by the time his role was selected for redundancy. In any event, the claimant had continued to work for more than one year without interruption and he did not suffer any prejudice.The selection of the claimant's role for redundancy was unrelated to the disciplinary proceedings against him. The claimant further alleges that he was declared redundant but the respondent hired 3 persons to take up his role within the company and that these persons were compensated more than he was. He alleges that he was discriminated against on this account. Section 107 of the *Evidence Act* provides that he who asserts a fact must prove it. The claimant has tendered any evidence to show that 3 persons were hired after he was and that these persons were recruited to replace him. There is also no evidence tendered to show that these persons performed work of equal value but compensated more than the claimant. These are merely allegations and no particulars have been provided to enable the respondent reply. In any event, the respondent submits that this is not true.

39. The Respondent concluded that the claimant was terminated lawfully on account of redundancy for a genuine reason and was paid his terminal dues.

Decision

40. The employment of the claimant was terminated vide a letter dated 30th September 2021 titled termination of contract. The letter is reproduced as follows:- 'PEL/HRD/Redundancy/2021

> 30th September, 2021
>
> Name: Lucky Mwendwa Mutuse
>
> Emp No. KABPXX34
>
> Dept:Projects
>
> Dear Lucky,
>
> Re: Termination on Contract
>
> Reference is made to our discussion on the proposed changes in the Company structure and the impact this has on your role within the company.
>
> This is therefore to formally inform you that, your position as a Site Manager is no longer required to be performed and will be declared redundant with effect from 19th September 2021. This is a difficult decision and is regrettable but needs to happen for the current organization structure to remain sustainable in the long term.
>
> In accordance with your contract letter "Clause 10", the company will be giving you a 1 (One) months' notice of the termination of your employment and that your last working day will be 19th August 2021.
>
> Your final dues will be calculated as follows.
>
> i. Payment for the days worked till 6th November 2021
>
> ii. Payment for accrued and unutilized leave days as at 6th November (24 days)

iii. Severance pay for (15) Fifteen days for every complete year of service with the company from the date of joining (4 Years)

iv. One month in lieu of Notice.

v. Less damage or surcharge if any

vi. Any other monies the company may owe you.

vii. Certificate of Service.

The company wishes you all the best in your future endeavors.

Yours faithfully,

For: Proto Energy Limited

Amanda Donahue

Head of Commercial"(page 20 of the Claimant's bundle).

41. The contents of the letter no doubt disclosed the reason for termination to be on account of redundancy. The court discerned the reason for the redundancy as disclosed in the letter to be in the paragraph reading:- 'This is a difficult decision and is regrettable but needs to happen for the current organization structure to remain sustainable in the long term." By the very definition of the term redundancy , the claimant would not have been at fault for termination on account of redundancy:- "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*). Whereas the court will not impose on business decisions of the employer, the court will only interfere when the law is not complied with. In Kenya Airways Limited vs. Aviation & Allied Workers Union Kenya & 3 Others [2014] eKLR, it was observed that :"As long as the employer genuinely believed that there was a redundancy situation, any termination was justified, and it was not for the court to substitute its business decision of what was reasonable. The Court has no supervisory role."

42. Since redundancy takes away the employment of an innocent employee, section 40 of the *Employment Act* safeguards the process from abuse by employers, possibly, to get rid of unwanted employees without a genuine business reason. Section 40 of the *Employment Act* provides for the redundancy process as follows:-

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."

43. On the notice, the Respondent produced a notice of redundancy addressed to the County Labour Officer dated 16th August 2021 where it notified of the intention to declare redundant 1 position of site engineer from 19th September 2021. It was received by Muranga County labour officer on 18th August 2021(page 11 of the respondent's bundle). The letter was not copied to the claimant and indeed there was no evidence of the claimant having been notified earlier of the redundancy. The letter of termination stated :- ''This is therefore to formally inform you that, your position as a Site Manager is no longer required to be performed and will be declared redundant with effect from 19th September 2021." . The date of 19th September 2021 was the date referred to in the letter to labour officer , thus the court rejected the submission that this was an error on dates. The claimant told the court that he did not get the letter of termination before October 2021. There was no evidence to the contrary.

44. Section 40(1) (b) of the Act states: -'where an employee is not a member of a trade union, the employer notifies the employee personally in writing and the labour officer;.." The court interpreted the law to mean that the notification to the labour officer is concurrent with notice to the employee. To that extent, the respondent failed to comply with the law. Indeed at this time, the claimant was awaiting the disciplinary decision.RW1 told the court that the disciplinary proceedings were not related to the redundancy, as the claimant continued to work for almost a year before the redundancy. The court was convinced that the employer had used a card of redundancy under the table to dismiss the claimant unlawfully. This position is informed by the fact of failure to release the disciplinary proceedings outcome, the non –compliance with redundancy process, declaring the redundancy without informing the claimant and/ or consulting him on the same. There was no evidence produced that the claimant was aware of the redundancy process before receipt of the termination letter dated 30th

September 2021 and backdated to take effect on 19th September 2021.RW1, Wambui Maina, told the court there were several staff affected by the redundancy. The court noted only 1 position was notified to labour office of having been declared redundancy hence the testimony of RW1 was untrue.

45. The claimant alleged that the reason for redundancy was because of his position duties having been taken over by other persons who he said were foreigners. The respondent said there was no proof of the allegations. The court did not find any response to the emails by the claimant complaining his work was being done by foreigners. The claimant told the court the said persons(foreigners) had been there all along. The court found no conclusive proof that the alleged foreigners were the reason for the redundancy as the said persons had been there for a substantial period before the termination. In the case of Kenya Airways Limited v Aviation and Allied Workers Union, the Court referred to the decision in Thomas De La Rue (K) Limited v David Opondo Umutelema (2013) eKLR where the Court explained the importance of Section 40(1)(a) and (b) and maintained that it was mandatory to comply with the said sections of the law. They held; "It is quite clear to us that Section 40(a) and 40(b) provide for two different kinds of redundancy notifications depending on whether the employee is or is not a member of a trade union. Where the employee is a member of a union, the notification is to the union and the local labour officer at least one month before the effective redundancy date. Where the employee is not a member of the union, the notification must be in writing to the employee and the local labour officer..."held in Francis Maina Kamau V Lee Construction (2014) eKLR with the court holding:-"where an employer declares a redundancy the conditions set out in Section 40 of the *Employment Act* must be observed and where the employer fails to do so the termination becomes unfair termination within the meaning of Section 45 of the *Employment Act* .''The court concludes that the termination on redundancy was proved on a balance of probabilities as unfair within the meaning of section 45 of the *Employment Act* for non-compliance with the mandatory provisions of section 40 of the *Employment Act* for lack of notice to the claimant of the redundancy and failure to consult him on the same and lack of justification of the selection procedure(objective criteria) of targeting the claimant as candidate for the redundancy (majority decision in Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others [2014] eKLR)). As held in the said case, ‘’Termination of employment on account of redundancy is justified if there is substantive justification for declaring redundancy and there is procedural fairness in the consequent retrenchment.’’(Majority decision In Kenya Airways Ltd case). The court for the foregoing reasons finds the termination of the contract of the claimant on account of redundancy was unfair.

Whether the claimant is entitled to reliefs sought.

46. The claimant sought the following reliefs in the claim:-

    a. A declaration that the Claimant's termination was unfair.

    b. A declaration that the Respondent infringed on the Claimant's constitutional rights to fair hearing and fair labor practices and was discriminated against.

    c. Payment of Kshs. 2,400,000/= being 12 months' salary on account of unfair termination.

    d. Payment of Kshs. 2,400,000/= on account of salary not paid while the Claimant was on study leave;

    e. Payment of Kshs. 120,000 on account of unremitted pension amounts while the Claimant was on study leave.

    f. Payment of Kshs. 420,000 on account of accrued but untaken leave days:

g. General damages of Kshs. 5,000,000/= on account of breach of the Claimant's fundamental human rights, mental anguish and suffering.

h. Interest on (c), (f) and (g) above above at court rates from the date of filing suit until payment in full.

i. Interest on (d) and (e) above from September 2019 at court rates until payment in full.

j. Costs of this Claim.

k. Any other relief that the Honourable Court may deem fit to grant.

Compensation for unfair termination

47. The court held the termination was unfair as stated under section 45 of the *Employment Act*. The court is guided by section 49 of the *Employment Act* on finding unfair termination. On compensation for the unfair termination the court is guided by provisions of section 49(4) of the *employment act* to wit:-

> 4) A labour officer shall, in deciding whether to recommend the remedies specified in subsections (1) and (3), take into account any or all of the following—
>
> (a) the wishes of the employee;
>
> (b) the circumstances in which the termination took place, including the extent, if any, to which the employee caused or contributed to the termination; and
>
> (c) the practicability of recommending reinstatement or re-engagement;
>
> (d) the common law principle that there should be no order for specific performance in a contract for service except in very exceptional circumstances;
>
> (e) the employee's length of service with the employer;
>
> (f) the reasonable expectation of the employee as to the length of time for which his employment with that employer might have continued but for the termination;
>
> (g) the opportunities available to the employee for securing comparable or suitable employment with another employer;
>
> (h) the value of any severance payable by law;
>
> (i) the right to press claims or any unpaid wages, expenses or other claims owing to the employee;
>
> (j) any expenses reasonable incurred by the employee as a consequence of the termination;
>
> (k) any conduct of the employee which to any extent caused or contributed to the termination;
>
> (l) any failure by the employee to reasonably mitigate the losses attributable to the unjustified termination; and
>
> (m) any compensation, including ex-gratia payment, in respect of termination of employment paid by the employer and received by the employee."

48. The court established the claimant had worked for 4 years out of which one, he was away on study leave. His position was declared redundant hence innocent of any contribution towards to the termination.

He was well-educated and a professional engineer hence likely to secure a similar job, he had been paid severance pay for the years worked. Taking the foregoing into account, the court finds an award equivalence of of 6 months' gross salary as fair compensation and it is so awarded. His last salary was Kshs. 200000. Compensation for unfair termination is awarded for the sum of Kshs 1,200,000/=.

A declaration that the Respondent infringed on the Claimant's constitutional rights to fair hearing and fair labor practices and was discriminated against.

Claimant's submissions

49. The manner in which the claimant was treated, including the opaque disciplinary process and the arbitrary declaration of redundancy, reveals a pattern of discriminatory conduct that was not applied uniformly across similarly situated employees. Further, discriminatory conduct is evidenced by the Respondent's actions of getting foreigners, without proper qualifications and authorization to perform the Claimant's duties.

Respondent's submissions

50. The claimant has made a claim for general damages for alleged violation of the rights to fair labour practices and discrimination under *the Constitution*. The claimant has not pleaded with specificity how his constitutional rights were violated as espoused in the case of Anarita Karimi Njeru v Republic (No. 1) [1979] 1 KLR 154. Further, in the case of Francis James Ndegwa v Tetu Dairy Co-operative Society Limited [2016] eKLR, the court reiterated that not all breaches of the law pave way for a constitutional petition. The respondent submits that this claim is an ordinary employment dispute. There are no constitutional questions that have been pleaded that would warrant this court to sit as a Constitutional Court. All the alleged infractions can be sufficiently addressed and remedied under the *Employment Act*. That the wrongs intended to be addressed are based on similar facts and the claimant having made a claim to be compensated for unfair termination under section 49 of the *Employment Act*, there is no basis to introduce a separate prayer for general damages to address similar wrongs and relied on the case of AKO v Abson Motors Limited [2021] KEELRC 2118 (KLR) where the court held that the best course of action in such an instance would be to coalesce the damages. In D.K. Njagi Marete v Teachers Service Commission [2013] KEELRC 575 (KLR) where the court held in paragraph *25*: "What remedies are available to the Claimant? This Court has advanced the view that employment remedies, must be proportionate to the economic injuries suffered by the employees. These remedies are not aimed at facilitating the unjust enrichment of aggrieved employees; they are meant to redress economic injuries in a proportionate way." The respondent relied on its submissions at paragraphs *4* to *24* above to refute the claim that there has been any breach of the claimant's right to fair labour practices. The claim for discrimination is unsubstantiated. The claimant alleges that his job was taken by 3 foreign nationals who were earning higher than he was. The claimant has not tendered any evidence showing the nationalities of the persons claimed or how much they were earning in order to lay a basis for discrimination. In Betty Chemurgor v Laico Regency Hotel Limited [2021] eKLR the court held at paragraph *40*: "An allegation of discrimination against an employer is a serious charge, an employee making the allegation must demonstrate that he or she was discriminated against on one or more of those prohibited grounds. It cannot be enough for an employee to make a global allegation that he or she was discriminated against by the employer, leaving it to court to speculate on the grounds." The Court of Appeal in Ol Pejeta Ranching Limited v David Wanjau Muhoro [2017] eKLR held that a claim for discrimination is proven when an employer does not give equal pay for equal work, or work of equal value for employees in the same class. The claimant has not tendered any evidence to enable this court assess whether he was discriminated against by the respondent. In any event the respondent denies that this was the case. The claims for constitutional violations therefore ought to be dismissed.

51. In the event that the court finds merit in the claim for damages, the Respondent submitted that the prayer for Kshs. 5 million as damages is excessive in the circumstances. In Ol Pejeta Ranching Limited v David Wanjau Muhoro [2017] eKLR, the claimant sought for damages on the basis that he had been underpaid compared to his white counterparts who were in the same class for more than 20 years. In this case, the trial court examined evidence showing the disparity in treatment between the claimant and his white colleagues and held that the claimant had been discriminated against. The Court of Appeal upheld this finding and held the claimant's right not to be discriminated against had been violated and awarded him Kshs. 1,744,542 as damages. The amount of damages was justified due to the protracted nature of the discrimination. In the case of Claudine Wanjiku Mboce v Exon Investments Limited & another [2017] KEELRC 1746 (KLR) the court awarded the claimant Kshs. 660,000 as general damages where it found that she had been discriminated against on the ground of pregnancy. The case of W.J & another v Astarikoh Henry Amkoah & 9 others [2015] eKLR concerned a teacher who had subjected two minors, the petitioners, to sexual assault and psychological abuse. The court found that the petitioners' right to health, education and dignity were violated, and they were awarded Kshs. 2 and 3 million as general damages for these violations. These damages were justified owing to the multiple rights of the minors violated and the serious consequences they faced psychologically due to the abuse they suffered.

Decision

52. The court found there was no evidence of discrimination. It was just a case of unfair termination of which compensation has been awarded.

Salary and pension not paid during study leave

53. The claimant led evidence that his letter of approval for study leave was paid leave and the same was not paid. This was not disputed. Conversely, the respondent submitted that the claim for salary and pension payments that would have been earned during study leave is time-barred under section 90 of the *Employment Act*(amended in 2024 to read 89 . Section 89 provides: 'Notwithstanding the provisions of section 4(1) of the *Limitation of Actions Act* (Cap. 22), no civil action or proceedings based or arising out of this Act or a contract of service in general shall lie or be instituted unless it is commenced within three years next after the act, neglect or default complained or in the case of continuing injury or damage within twelve months next after the cessation thereof.'' The claimant's study leave was approved by letter dated 26th July 2018. His salary during this period would have accrued between this date and 26th July 2019. The claimant admitted in testimony that he did not follow up on the payment of the salary when he returned to work in 2019. It is only until these proceedings commenced that the claimant raised this claim. The Respondent submitted that the claimant ought to have made his claim within 3 years of 26th July 2019 failing which it has become time barred under the *Employment Act*. With respect to the claim for pension, such payment would have been deducted from the claimant's salary and any contributions by the employer would go directly to the appointed pension fund. There is no basis for the claimant to seek this as compensation. The pension, if at all payable, is also subject to the same fate as the salary for this period.

54. The respondent submitted that the claim for unpaid salary while on study leave was a continuing injury and the claim was time-barred 3 years post return from study leave in 2019. The issue of continuing injury is now settled by the Court of Appeal in The German School Society & another v Ohany & another [2023] KECA 894 (KLR) which considered cases of continuing injury and observed citing authorities:- ''There is no contest that a claim premised on a continuing injury must be filed with 12 months after cessation of the injury as provided by section 90. This position was upheld by this Court in G4S Security Services (K) Limited v Joseph Kamau & 468 Others [2018] eKLR. The contestation

before this Court is whether the claims in question fall within the ambit of "a continuing injury" as contemplated by section 90. The essential question for determination before the High Court was the maintainability of the complaint due to the limitation period prescribed by the above section. Central to this question is the meaning of the phrase "a continuing injury" and whether the respondent's claims fell within the said definition. Before the High Court and this Court, the parties did not attempt to define what constitutes "a continuing injury." From the record, we note that the respondent's counsel only cited the definition of 'back pay" in the Black's Law Dictionary 9th Edition at page 159 which defines it as "the wage or salary that an employee should have received but did not because of an employer's unlawful action as setting or paying the wages or salary" to support her claim that back pay was a continuing state of affairs." The Court adopted with approval the elaborate definition of continuing injury claims in M. R. Gupta v Union of India, (1995) (5) SCC 628, in which the appellant approached the High Court in 1989 with a grievance in regard to his initial pay fixation with effect from 1.8.1978. The claim was rejected as it was raised after 11 years. The Supreme Court of India applied the principles of "continuing wrong" and "recurring wrongs" and reversed the decision. It held:"The appellant's grievance that his pay fixation was not in accordance with the rules, was the assertion of a continuing wrong against him which gave rise to a recurring cause of action each time he was paid a salary which was not computed in accordance with the rules. So long as the appellant is in service, a fresh cause of action arises every month when he is paid his monthly salary on the basis of a wrong computation made contrary to rules. It is no doubt true that if the appellant's claim is found correct on merits, he would be entitled to be paid according to the properly fixed pay scale in the future and the question of limitation would arise for recovery of the arrears for the past period. In other words, the appellant's claim, if any, for recovery of arrears calculated on the basis of difference in the pay which has become time barred would not be recoverable, but he would be entitled to proper fixation of his pay in accordance with rules and to cessation of a continuing wrong if on merits his claim is justified. Similarly, any other consequential relief claimed by him, such as, promotion etc., would also be subject to the defence of laches etc. to disentitle him to those reliefs. The pay fixation can be made only on the basis of the situation existing on 1.8.1978 without taking into account any other consequential relief which may be barred by his laches and the bar of limitation. It is to this limited extent of proper pay fixation, the application cannot be treated as time barred...."

55. The claimant's services were terminated on the 30th September 2021. He filed a statement of claim dated 13th January 2022 and received in court on the 18th January 2022 The court reading of the decision was the claim for unpaid salary was a fresh cause monthly as long as the claimant remained in service. The claimant's contract was terminated on 30th September 2021 and that is when time started running. The court found no defence as to why the salary was not paid as per the study leave approval and the same is allowed for the sum of Kshs. 2,400,000/= on account of salary not paid while the Claimant was on study leave.

Untaken leave days

56. The claimant seeks a sum of Ksh. 420,000 for untaken leave days. The claimant has not specified how many leave days are due and when they accrued. A claim for annual leave is a special damage claim that ought to be pleaded with specificity and proven. In testimony, the claimant admitted that he would take leave days as when needed during employment, and the respondent has produced sample leave forms by the claimant at pages 17 to 21 of the respondent's bundle. The respondent has produced records to demonstrate that the claimant utilized his leave days in the course of employment. In Christine Mwigina Akonya v Samuel Kairu Chege [2017] eKLR where the court held at paragraph *24*: - "In regard to special damages the law is quite clear on the head of damages called special damages. Special Damages must be both pleaded and proved, before they can be awarded by the Court. Suffice it to

quote from the decision of our Court of Appeal in Hahn V. Singh, Civil Appeal No. 42 Of 1983 [1985] KLR 716, at P. 717, and 721 where the Learned Judges of Appeal – Kneller, Nyarangi JJA, and Chesoni Ag. J.A. – held: Special damages must not only be specifically claimed (pleaded) but also strictly proved....for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The decree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves." The respondent submitted that during the period when the claimant was on study leave, there was no agreement that he would accrue annual leave pay during that period. That the claim is unreasonable, given that the claimant was already on study leave and it would be illogical for him to accrue annual leave in addition to that. The court agreed with the respondent and found that the claimant was unreasonable to make a claim of annual leave while he was on paid study leave. The basis of the claim was not established. The claim for leave is dismissed.

57. Claim for payment of Kshs. 120,000 on account of unremitted pension amounts while the Claimant was on study leave. The court established the claimant was paid severance pay for the years worked. That is equivalent to social security and it would be a double payment to make the award. The prayer is disallowed.

58. Certificate of service- The court found it was itemised under the letter of termination.

Conclusion

59. The court found the termination of the employment of the claimant on account of redundancy was unfair. Judgment is entered for the claimant against the respondent as follows:-

    a. Compensation for unfair termination equivalent of 6 months' gross salary Kshs 1,200,000/=

    b. Unpaid salary during study leave Kshs. 2,400,000

    c. Interest at court rates from the date of judgment

    d. Costs of the suit

60. Stay of 30 days granted.

61. It so Ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 12TH DAY OF JUNE, 2025.

J.W. KELI,

JUDGE.

In the presence of:

Court Assistant: Otieno

Claimant : -Wangui

Respondent: Ms.