



REPUBLIC OF KENYA



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**Muraguri v Mpala Research Centre & 2 others (Cause E045 of 2022)  
[2024] KEELRC 440 (KLR) (28 February 2024) (Judgment)**

Neutral citation: [2024] KEELRC 440 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI  
CAUSE E045 OF 2022  
ON MAKAU, J  
FEBRUARY 28, 2024**

**BETWEEN**

**ANTHONY NGAINA MURAGURI ..... CLAIMANT**

**AND**

**MPALA RESEARCH CENTRE ..... 1<sup>ST</sup> RESPONDENT**

**MPALA RANCH LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**BOARD OF TRUSTEES REGISTERED PRINCETON UNIVERSITY .... 3<sup>RD</sup>  
RESPONDENT**

**JUDGMENT**

1. By a Statement of Claim dated 25<sup>th</sup> November 2022, the Claimant sued the respondents seeking the following orders that:
  - a. Compensation for unlawful termination or unlawful redundancy by the 1<sup>st</sup> and 3<sup>rd</sup> Respondent as provided under section 49 of the [Employment Act](#).
  - b. Compensation for unlawful termination or unlawful redundancy by the 2<sup>nd</sup> Respondent as provided under section 49 of the [Employment Act](#).
  - c. Severance pay for 10 days not paid by the 1<sup>st</sup> and 3<sup>rd</sup> Respondents totalling to Kshs. 946,227/=.
  - d. Unpaid wages or salary by the 2<sup>nd</sup> Respondent at Kshs. 189,245/= from January 2017 until 2<sup>nd</sup> October 2022 totalling to Kshs. 13,057,905/=.
  - e. Unpaid severance pay at the rate of 30 days for every year served equivalent to 30 days pay or salary of every year worked from January 2017 to 2<sup>nd</sup> October 2022 totalling to Kshs. 1,875,000.
  - f. Unpaid leave days and salary in lieu of notice and unpaid off days by the 2<sup>nd</sup> Respondent.



- g. Compensation and damages for discrimination, unfair termination and deliberate failure to pay the Claimant by the 2<sup>nd</sup> Respondent for the period of 69 months or 5.75 years from January 2022 to 2<sup>nd</sup> October 2022 to be determined by the Court.
  - h. Costs of the claim and interest on (a) and (b) and (c).
2. The Claimant's claim was accompanied by the Claimant's witness statement dated 25<sup>th</sup> November 2022 and a list and bundle of documents in support of the Claim. Thereafter he filed a Statement written by his witness Ms Pauline Wairimu Mwangi dated 1<sup>st</sup> March 2023 and a further Bundle of documents dated 5<sup>th</sup> July 2023.
  3. The Respondents filed Statement of Defence denying liability to pay the Claimant the dues sought and prayed for the suit to be dismissed with costs. They further filed Witness Statements dated 18<sup>th</sup> January 2023 and bundles of documents in the list dated 18<sup>th</sup> January 2023 to support their defence.

### **Factual background**

4. In a nutshell, the Claimant's claim is that he was employed by the Respondents as a Workshop Manager starting with a salary of Kshs 189,245. He averred that he concurrently worked for the Respondents and there was an agreement that 1<sup>st</sup> and 3<sup>rd</sup> respondents were responsible for 60% of his salary while the 2<sup>nd</sup> respondent bore 40%. He averred that the said arrangement started in January 2017 and continued until October 2022 when his employment was unlawfully terminated on account of redundancy. As at the time of the termination, he was earning a gross salary of Kshs. 283,868/=. He served the 1<sup>st</sup> Respondent and 2<sup>nd</sup> Respondents for 10 years and 5.75 years respectively.
5. The Claimant averred that his termination was more like a sacrificial lamb to appease the white man as the death of the 700 heads of cattle, the reason for the termination, was occasioned by the Ranch Manager who was a white man. He averred that his position was advertised and applicants invited to submit applications yet the position was allegedly scraped off. He averred that the redundancy was not in good faith and was only meant to target him.
6. The Claimant averred that the 1<sup>st</sup> and 3<sup>rd</sup> Respondent had no business in declaring him redundant on basis of loss of 700 cattle as they were Research, Education and Conservation Institutions whereas ranching was the preserve of the 2<sup>nd</sup> Respondent. He also averred that the 2<sup>nd</sup> Respondent had a ranch manager mandated with livestock matters, contrary to the role of works management that he was hired to do. Therefore, he contended that the redundancy was unlawful, illegal, discriminatory, wrongful, and racial contrary to Article 27, 41, 47 of *the Constitution*, section 4 of the Fair Administrative Actions Act 2015 and section 40, 41, 43, 45 and 49 of the *Employment Act*.
7. He confirmed in his testimony that he was initially employed by the 1<sup>st</sup> Respondent but from 2017 he was allocated general maintenance duties at the 2<sup>nd</sup> Respondent. He admitted that there was no merger of the three respondents but clarified that the 3<sup>rd</sup> Respondent was the managing partner of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents. He also admitted that he never received any salary from the 2<sup>nd</sup> and 3<sup>rd</sup> respondent and that he had no documentary evidence to prove his employment relationship with the 3<sup>rd</sup> respondent. He further confirmed that the salary apportionment at the ratio of 60:40 was his own computation.
8. He also admitted that he was served with a redundancy notice letter dated 1<sup>st</sup> September 2022 but contended that the same was not copied to the Labour Office. He further admitted that the labour officer addressed his complaints and prepared a report requiring the employer to issue him with a recommendation letter. He also admitted that the death of 700 livestock which had significant effect on the respondents' finances. However, he maintained that he was not blamed for the death of the



- livestock. In his view, he was discriminated for being black contending that only one white man was laid off compared to the 6 blacks.
9. He contended that he was not informed any criteria that was used to select him for redundancy but he admitted that the 1<sup>st</sup> respondent issued him with the recommendation letter. He was also paid for notice, leave and days worked in that month.
  10. He however contended that despite being entitled to severance pay at the rate of 30 days' pay per year of service for the 10 years and six months worked, he was only paid at the rate of 20 days' pay. Therefore, he prayed for the balance of 10 days pay for each year together with the other reliefs sought in his claim. He stated that there was no agreement to convert the gratuity to pension and added that he had a pension account at Britam Insurance Company.
  11. Ms Pauline Wairimu Mwangi testified as CW2. She confirmed that there was a proposal to merge the three respondents but the same did not materialize. She stated that the 3<sup>rd</sup> Respondent participated in the management of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents but it had a different KRA PIN number and owned property separately.
  12. She testified that the 1<sup>st</sup> respondent used to pay exiting employees severance pay at the rate of 30 days' pay per year of service. She stated that as an Accountant in the entity, she used to calculate the dues for exiting employees. She told the Court that the bundle of documents dated 5<sup>th</sup> July 2023 contained the payslips of the former employees and the same indicated that the severance pay was at the rate of 30 days. In that regard, she concluded that the Claimant was also entitled to severance pay at the rate of 30 days per year of service.
  13. She confirmed that her contract of employment was by the 1<sup>st</sup> Respondent and her salary paid by it. She admitted that she was also laid off together with the Claimant and that she had also filed suit which would benefit from the outcome of this suit. She clarified that there was no apportionment of salary to be paid by the 1<sup>st</sup> and 2<sup>nd</sup> Respondent. She also confirmed that in 2020 they moved from gratuity to pension and that the Claimant was entitled to a pension since 2020. She further confirmed that the Claimant was paid 20 days severance pay plus pension at the rate of 30 days' pay per year of service.
  14. On the other hand, the Respondents' case is that the Claimant was an employee by the 1<sup>st</sup> Respondent and the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents were not privy to the relationship. It is further defence case that, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents worked in mutually beneficial manner and their operations were run by a joint board. They shared resources including land, buildings, human resource, motor vehicles and security. In 2021, the 3<sup>rd</sup> Respondent legally acquired the 2<sup>nd</sup> Respondent and henceforth ran its operations as Mpala under one Board. Mpala reared livestock not only for research, but also for sale, and the proceeds donated to the 1<sup>st</sup> Respondent to finance its operations and enhancement of its core mission of interdisciplinary research and training programs. They contended that the 1<sup>st</sup> respondent was by extension affected by the said merger and thus it was also operating as Mpala.
  15. Following the loss of the livestock by the 2<sup>nd</sup> respondent, the Board of Mpala reviewed its strategic objective and resolved that it would only focus on research and abandon commercial ranching operations. Accordingly, the 2<sup>nd</sup> Respondent was to retain a small number of the livestock for research purposes only. In addition, the Board of Mpala approved the implementation of a new structure proposed by the Agricultural Employer's Association, in line with Mpala's reviewed operations, mission and vision. The purpose of the restructuring was to create a lenient and cost-effective management team.



16. As a result, the Claimant's position was abolished and replaced with a lower position of infrastructure manager who would be in charge of the workshop supervisor, maintenance supervisor, and fleet supervisor. The new positions required a minimum of degree certificate while the claimant had a diploma. As a result, the Claimant was then issued with a redundancy notice dated 1<sup>st</sup> September 2022 simultaneously with the labour office. The affected employees were also given the liberty to present their grievances before lapse of notice.
17. It is respondents' case that, despite the Claimant raising his grievances vide a letter and emails, he declined to have a one on one meeting with the respondents to address the grievances. However, the parties met the County Labour Officer- Laikipia on 21<sup>st</sup> September 2022, where the 1<sup>st</sup> Respondent tendered the computation of the terminal dues payable to the claimant, and the labour officer was satisfied.
18. The Claimant together with other grievants lodged a complaint with the labour office seeking clarification as to why their severance pay was at the rate of 20 days per year instead of 30 days pay; how the selection was done; how their terminal dues were taxed; why they were denied compensation for unfair termination; explanation why their jobs were being advertised; why they weren't paid separately for services rendered between the 1<sup>st</sup> and 2<sup>nd</sup> Respondents; and why they were not issued with recommendation letter. As a result, another meeting was held on 2<sup>nd</sup> November 2022 at the labour office to resolve the grievances.
19. The employer explained to the conciliator that the pay of 20 days was in good faith as opposed to the 15 days by the law. It also clarified that it had paid all the affected employees' gratuity through their pension at the rate of 30 days for each complete year. It also denied that there was an agreement to prorate salaries for work done within and for the 1<sup>st</sup> and 2<sup>nd</sup> Respondent. It clarified that all the employees, including the claimant, were paid all their salaries as per their contracts of employment.
20. The labour officer gave his report on 18<sup>th</sup> November 2022 recommending that any taxation errors be fixed; and that the complainants be issued with recommendation letters. The officer clarified that there was no basis for additional payments to the claimants. Thereafter, the employer availed the tax report and issued recommendation letters to the employees. The Claimant accepted the recommendation letter vide an email dated 29<sup>th</sup> November 2022 and the matter was closed. As such, the respondents averred that the Claimant's claim was based on greed and urged the Court to dismiss the same with costs.
21. Ms Beatrice Wanjohi (RW1), the 1<sup>st</sup> respondent's head of Human Resources and Administration confirmed that the Claimant who an employee of the 1<sup>st</sup> Respondent from March 2012 to September 2022 starting with 3 years contract and later under one-year renewable contracts. She clarified that the claimant was the works manager whose duties included workshop and infrastructure maintenance. She further clarified that the 2<sup>nd</sup> Respondent owned the land that the 1<sup>st</sup> Respondent occupied. She confirmed that the claimant never raised any complaint about the alleged salary apportionment until his redundancy.
22. She explained that the 2<sup>nd</sup> Respondent was the business arm of the 3<sup>rd</sup> Respondent whereas the 1<sup>st</sup> Respondent was an NGO that dealt with science and research. People from all over the globe came to the 1<sup>st</sup> Respondent to do research but the 1<sup>st</sup> Respondent had no infrastructure as it all belonged to the 2<sup>nd</sup> Respondent. The two entities were different but were managed by a common board. There was only one workshop that catered for the repairs of all the vehicles owned by the 1<sup>st</sup> and 2<sup>nd</sup> Respondent and also individual scientists.



23. She reiterated that the redundancy was due to death of 2<sup>nd</sup> respondent's livestock which was the business financing the 1<sup>st</sup> Respondent's research. She contended that the 1<sup>st</sup> Respondent's revenue was significantly affected by the death of the said livestock prompting the Board restructure. Consequently, some roles were enhanced and others declared redundant.
24. Rw1 stated that the Claimant was affected due to lack of qualification, and he was served with a redundancy notice. The labour officer was also served with a similar notice. Attempt was made to secure alternative job to avoid the redundancy but none was found. The newly created positions were advertised publicly but the Claimant never applied since the salary was less than the Kshs 283,000 he was earning. Accordingly, the claimant was paid all his terminal dues and all his grievances were resolved through conciliation at the labour Office.
25. Rw1 further stated that the 3<sup>rd</sup> Respondent was involved in the management of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents at governance level and not in the day to day management. She stated that the staff used to be paid gratuity at 30 days pay but transferred the benefits to pension scheme at Britam. She added that the Claimant was paid pension at 30 days pay plus 20 days severance pay.
26. Mr. Aly Remtulla (RW2), the vice provost for the 3<sup>rd</sup> Respondent (RW2) gave his testimony via a Video link from New Jersey, USA. He stated that the 3<sup>rd</sup> Respondent never employed the Claimant as he was employed by the 1<sup>st</sup> Respondent and clarified that the University has no employees in Kenya. He contended that the university only exercises oversight over the 1<sup>st</sup> Respondent who pays all its staff. He further clarified that the university did not involve itself in operations matters of hiring and firing staff in Kenya and contended that the decision to restructure was made by the 1<sup>st</sup> Respondent and the board.
27. Rw2 contended that there were four other partners in Impala Research Centre apart from the 3<sup>rd</sup> respondent. He admitted and clarified that their website indicated that the 3<sup>rd</sup> Respondent was the managing partner of the 1<sup>st</sup> Respondent and Impala Wildlife Foundation but denied having any direct role in the 2<sup>nd</sup> Respondent. He further admitted that there was an MOU between the 1<sup>st</sup> and 3<sup>rd</sup> Respondent but clarified that as the Chair, he provided policy and governance directions like strategic plans while the CEO did the day to day management role.

### **Submissions**

28. The Claimant framed following issues for determination: -
  - a. Was the Claimant's redundancy, lawful and procedural? If not, what is the consequence?
  - b. Was the Claimant rendering services for both or distinctly for each of the 1<sup>st</sup> and 2<sup>nd</sup> Respondent?
  - c. Is the Claimant entitled to severance pay and unpaid wages or salary from the 2<sup>nd</sup> Respondent?
  - d. Is the Claimant entitled to severance pay for 10 days from the 1<sup>st</sup> Respondent as been the practice internally?
  - e. Is the Claimant entitled to payment in lieu of notice from the 2<sup>nd</sup> Respondent?
  - f. Is the Claimant entitled to damages for discrimination on ground of race?
  - g. Is the Claimant entitled to aggravated and punitive damages for discrimination, unfair termination and failure to compensate the Claimant by 2<sup>nd</sup> Respondent for the period served?



29. The claimant submitted that the Respondents did not comply with the provisions of section 40 of the *Employment Act* before terminating his employment on account of redundancy with respect to the selection criteria and the involvement of the labour office in the process. It was contended that the Respondents ought to have considered the Claimant for other positions as they were not insolvent and redundancy should have been a last resort. Consequently, he submitted that the redundancy was unlawful and unprocedural for failure to comply with the statutory provisions.
30. The Claimant further submitted that he worked for both 1<sup>st</sup> and 2<sup>nd</sup> Respondent and as such he ought to be compensated for the same as it was proved that the two entities were different. Consequently, he argued that the 2<sup>nd</sup> Respondent owed him Kshs. 13,057,905 in unpaid salary at the rate of Kshs. 189,245 per month, and severance pay of Kshs. 1,875,000 for period worked. He claimed a further Kshs. 189,245 being salary in lieu of notice. He also submitted that the 1<sup>st</sup> Respondent owes him arrears of his severance pay at the rate of 10 days per year of service equalling to Kshs. 946,227.
31. The Claimant further submitted that he is entitled to damages for discrimination on grounds of race by being made to suffer for the misdeeds of ranch manager, David Hewitt who was in charge of the livestock which died. He relied on the provision of Article 27(5) of *the Constitution*, section 4 of the Fair Administrative Actions Act and section 5 of the *Employment Act* to fortify his claim for compensatory damages for discrimination.
32. He argued that the joinder of the 3<sup>rd</sup> Respondent to the suit was proper since it was the actual owner of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents and therefore it was bound by the doctrine of vicarious liability.
33. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents framed the following issues for determination: -
  - i. Whether the Respondent's redundancy exercise was lawful and whether the Respondent is entitled to compensation for unlawful termination/redundancy.
  - ii. Whether the 1<sup>st</sup> Respondent's tabulation of severance pay was lawful and justified.
  - iii. Whether the Claimant was an employee of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents and whether the Claimant is entitled to any unpaid wages or salary by the 2<sup>nd</sup> Respondent.
  - iv. Whether the Claimant is entitled to any unpaid leave days and salary in lieu of notice and off days by the 2<sup>nd</sup> Respondent.
  - v. Whether the Claimant is entitled to compensation and damages for discrimination on ground of race.
  - vi. Whether the Claimant is entitled to aggravated and punitive damages for discrimination, unfair termination and deliberate failure to pay the Claimant by the 2<sup>nd</sup> Respondent for a period of 69 months or 5.75 years from January 2022 to 2<sup>nd</sup> October 2022.
  - vii. Who should pay the costs of the suit.
34. In answering the first issue, the 1<sup>st</sup> and 2<sup>nd</sup> respondents adopted the meaning of Redundancy as defined under section 2 of the *Employment Act*, thus:
 

“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.”



35. They submitted that the Claimant's redundancy was lawful since it was occasioned by the reduction of the 2<sup>nd</sup> respondent's livestock which was the main source of revenue that financed the 1<sup>st</sup> Respondent. They contended that the redundancy complied with section 40 of the *Employment Act* since the Claimant was given reasons for redundancy, a notice was issued to him and the labour office, and finally, all his terminal dues tabulated and paid to him. They maintained that the conciliation report by the labour office found the redundancy to be compliant with section 40 of the Act and observed that the payment of severance pay at the rate 20 days per year of service was very progressive and fair labour practice. Consequently, the 1<sup>st</sup> and 2<sup>nd</sup> respondent submitted that the redundancy process was fair and lawful and therefore the Claimant is not entitled to any compensation.
36. On the issue on the lawfulness of the tabulation of the Claimant's severance pay, they submitted that the severance pay at 20 days for each year served was over and above the minimum prescribed under section 40 of the Act and thus justified given the financial implication of the loss of livestock. They argued that benchmarking the Claimant's pay with the CBA was an act of good faith since he was not a unionisable employee.
37. As regards the alleged employment relationship between the claimant and of 2<sup>nd</sup> and 3<sup>rd</sup> Respondent, and whether he is entitled to payment of benefits by the two, the Respondents relied on the definition of employee and employer in section 2 of the *Employment Act*, thus:
- “employee” means a person employed for wages or a salary and includes an apprentice and indentured learner;
- “employer” means any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual and includes the agent, foreman, manager or factor of such person, public body, firm, corporation or company.”
38. The Respondents contended that as per the above definitions, there ought to have been a contract of service between the Claimant and them for him to be their employee. They argued that the Claimant's contract employment was only between him and the 1<sup>st</sup> Respondent and thus he was not owed any employment benefits by the 2<sup>nd</sup> Respondent. In support of their submission, they relied on the case of *Everret Aviation Limited –v- Kenya Revenue Authority (2013) eKLR* as relied upon by the Court in the case of *Maurice Oduor Okech –V- Chequered Flag Limited (2013) eKLR* as follows:
- “...in determining whether a relationship between parties is a contract for services between two independent parties or a contract of service giving rise to an employer/employee relationship, the traditional tests of control of the work by the employer and its integration into the employer's care business are no longer conclusive. In my view, the fundamental behaviour of the parties such as the form of documentation evidencing the relationship and the mode of payment is critical.”
39. The 1<sup>st</sup> and 2<sup>nd</sup> Respondent categorized the parameters of an employment relationship as the fundamental behaviour of the parties such as the form of documentation evidencing the relationship and the mode of payment. They contended that only the 1<sup>st</sup> Respondent managed all the Claimant's affairs as was evidenced by the employment contracts and payslips. They submitted that there was no privity of contract between the Claimant and the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents. They submitted that the Claimant's terms of reference dated March 2012 detailed the Claimant's job description to include the maintenance, service and repair of MRC (1<sup>st</sup> Respondent) and MRL (2<sup>nd</sup> Respondent) vehicles and machinery.



40. They argued that by accepting and signing the contracts, the Claimant could not feign ignorance of his responsibilities as he was well aware of the same at the beginning of the employment. They further submitted that the 1<sup>st</sup> and 2<sup>nd</sup> Respondent only shared resources, and worked in a mutually beneficial manner and the Claimant was privy to the operational organization of the Respondents. Therefore, it was submitted that his claim for unpaid wages by the 2<sup>nd</sup> respondent is unsubstantiated and an attempt to unjustly enrich himself.
41. On the issue on compensation for discrimination, they submitted that the claimant failed to produce any evidence of the alleged discrimination and as such the burden of proof was not discharged. For emphasis, they relied on sections 108 and 109 of the *Evidence Act*. They attributed the alleged discrimination to the Claimant's own projection of internal biases as he blamed an unnamed white man for loss of the livestock. They in turn accused the claimant's allegations as racial profiling and contended that the Claimant has approached the Court with unclean hands. They maintained that the impugned redundancy cut across all races and did not affect the Claimant alone. In support of their submission they relied on the case of *Betty Chemurgor v Laico Regency Hotel Limited* [2021] eKLR where the Court held that:
- “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. Echoing words of the Court of Appeal, in *Barclays Bank of Kenya Ltd* [supra.], this claim was not given the seriousness it deserved.”
42. On the issue on aggravated and punitive damages, it was submitted that there had been no employment relationship between the claimant and the 2<sup>nd</sup> respondent giving rise to any obligation to pay him anything. In the end the court was urged to dismiss the entire suit with costs for lack of merits and attempt to get unjust enrichment.
43. The 3<sup>rd</sup> Respondent framed the following the issues for determination: -
- a. Whether the Claimant was employed by the 3<sup>rd</sup> Respondent?
  - b. Whether the 3<sup>rd</sup> Respondent can be held accountable for the actions of the 1<sup>st</sup> Respondent by virtue of their oversight role?
44. It submitted that there was neither employment contract between it and the Claimant nor did have any privity of contract as regards the contract between the 1<sup>st</sup> Respondent and the Claimant. It submitted that the Claimant confirmed during the hearing that, his employment contract was exclusive to the 1<sup>st</sup> Respondent. It further submitted that a contract cannot confer rights or obligations on anyone other than parties to the contract. It contended it was a stranger to the said employment contract and thus not responsible for the alleged unlawful redundancy. In that regard, counsel urged the Court to find that its joinder to the suit was irregular.
45. For emphasis, reliance was placed on the case of *Agricultural Finance Corporation v Lengetia Limited & Jack Mwangi* [1985] eKLR, *Savings and Loan (K) Limited vs Kanyenye Karangaita Gakombo and Another* [2015] eKLR and *Chidhya (Kenya) Limited v Africa Equipment & Engineering Power S.A (AEE Power S.A)* [2020] eKLR
46. On the 2<sup>nd</sup> issue, the 3<sup>rd</sup> respondent submitted that it pleaded and confirmed during the hearing that, the 1<sup>st</sup> Respondent's board is involved in strategic planning, deciding policy issues and overall oversight



of the 1<sup>st</sup> Respondent. It further submitted that the Board was only responsible for the hiring and firing of the CEO and not any other employees which was the role of the 1<sup>st</sup> respondent through its management.

47. It maintained that it did not own the 1<sup>st</sup> and 2<sup>nd</sup> Respondents as alleged and clarified that there was no approval from the Competition Authority for the same. It submitted that there is evidence that the three respondents are distinct and independent entities. It further submitted that the evidence on record shows that although it sat at the Board of the 1<sup>st</sup> respondent, it is not involved in the day-to-day running of the affairs of the 1<sup>st</sup> respondent including employment, supervision and payment of salaries to the 1<sup>st</sup> respondent's employees. It maintained that its role was just to oversee the 1<sup>st</sup> respondent while the 1<sup>st</sup> respondent retained the control of its employees.
48. The 3<sup>rd</sup> Respondent maintained that the claimant was not its employee and as such it was not liable to pay him anything. For emphasis, it also relied on the definitions of employer and employee in section 2 of the Act and on the case of Samuel Wambugu Ndirangu v 2NK Sacco Society Limited [2019] eKLR where the Court held as follows:

“A review of the elements above reveals that in order for a positive determination of the existence of the employer-employee relationship there must be the selection and engagement of the employee (the hire after either a restricted or open interview process), proof of payment of wages, the power of dismissal and finally, the power to control the employee's conduct (this is what gives the test the nom de guerre – control test)”

#### **Issues for analysis and determination**

49. Having considered the parties' pleadings, evidence on record and submissions, the issues that arise for determination by this Court are as follows:
- a. Whether the Claimant was employed by all three Respondents.
  - b. Whether the redundancy of the claimant's employment was unfair and unlawful.
  - c. Whether the Claimant is entitled to the reliefs sought.

#### **Whether the Claimant was an employee by all three Respondents**

50. To answer this question, I will start by adopting the meaning of employee and employer under section 2 of the *Employment Act*, thus: -

“employee” means a person employed for wages or a salary and includes an apprentice and indentured learner;

“employer” means any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual and includes the agent, foreman, manager or factor of such person, public body, firm, corporation or company.”

51. Section 2 further defines a contract of service as follows: -

“contract of service means an agreement, whether oral or in writing, and whether expressed or implied, to employ or to serve as an employee for a period of time, and includes a contract of apprenticeship and indentured learnership but does not include foreign contract of which Part XI of this Act applies.”



52. My understanding of the foregoing definitions is that for an employment relationship to exist between two persons, there must be a contract of service between them. The employee must be willing to render his services to the employer in exchange for payment of salary or wages. Under section 9 (2) of the [Employment Act](#), the employer is responsible for drawing the contract of service. Subsection (2) provides as follows:

“(2) An employer who is a party to a written contract of service shall be responsible for causing the contract to be drawn up stating particulars of employment and that the contract is consented to by the employee in accordance with subsection (3)

(3) For the purpose of signifying his consent to a written contract of service an employee may——

(a) sign his name thereof, or

(b) imprint thereon an impression of his thumb or one of his fingers in the presence of a person other than his employer.”

53. In the instant case, the Claimant claims that he was employed by the three Respondents, but the Respondents are unanimous that the Claimant was employed by the 1<sup>st</sup> Respondent only. Written contracts and detailed Job Description were produced as exhibits by the claimant himself. The contracts named the 1<sup>st</sup> respondent as the employer and created rights and obligations as between him and the 1<sup>st</sup> respondents only. The claimant has also produced payslips showing that his salary was being paid by the 1<sup>st</sup> respondent.

54. The claimant alleged that he was also working for the 2<sup>nd</sup> and 3<sup>rd</sup> respondents and as such he is entitled to salary for the period of service. That claim was raised for the first time after the termination of his employment by the 1<sup>st</sup> respondent. Considering the claimant’s Job Description, it is clear he was performing his work in the land and structures owned by the 2<sup>nd</sup> respondent. However, the mere fact that the claimant was working for the 1<sup>st</sup> respondent within the land and structure owned by the 2<sup>nd</sup> respondent did not render him an employee of the latter. Without the 2<sup>nd</sup> respondent availing its land and infrastructures, the 1<sup>st</sup> respondent would have no place to operate, and ultimately, the claimant would have no job to do. Consequently, I find and hold that the claimant was employed by the 1<sup>st</sup> respondent only, while the 2<sup>nd</sup> and 3<sup>rd</sup> respondents were strangers to his employment contract.

55. The claimant produced documentary evidence to prove that the 3<sup>rd</sup> respondent sit in the Board of the 1<sup>st</sup> respondent. However, my view on that matter is that a member of a Board does not become personally liable for collective decisions of the Board. At all material time to this case, the Board was an organ of the 1<sup>st</sup> respondent with the role of oversighting the management team of the NGO and therefore its decision creates obligations or liabilities for the 1<sup>st</sup> respondent only.

### **Whether the redundancy was unfair and unlawful**

56. The Claimant alleged that the redundancy was unlawful because it did not comply with section 40 of the [Employment Act](#). He contended that the alleged death of the 2<sup>nd</sup> respondent’s livestock was outside his docket and as such the same was not a valid reason for his lay off. He attributed his lay off to racial discrimination since the person who was responsible for the livestock was a white man and he was not laid off.



57. Section 45 (1 & 2) of the [Employment Act](#) prohibits unfair termination of an employee's employment in the following terms: -

- “(1) No employer shall terminate the employment of an employee unfairly.
- (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.”

58. The Respondents maintained that the Claimant's services were terminated through a lawful redundancy following a decision to restructure the 1<sup>st</sup> respondent due to diminished funding occasioned by the death of the 2<sup>nd</sup> respondent's livestock. They contended that effort to get alternative job for the claimant failed due to his lack of qualifications and also by his failure to apply for any of the new positions advertised. They further contended that the redundancy was done in strict compliance with section 40 of the [Employment Act](#).

59. I have considered the rival contentions above. Section 45 (2) (b) (ii) allows for termination of services of an employee based on the operational requirements of the employer. The prerogative to determine the operational needs of an enterprise rests with the managers of the enterprise. In this case there is evidence that the operations of the 1<sup>st</sup> respondent were funded by the 2<sup>nd</sup> respondent through proceeds of sale of its livestock. There is no dispute that most of the 2<sup>nd</sup> respondent's livestock died and it decided not to restock but take a different business trajectory.

60. It is also a fact that due to business decision by the 2<sup>nd</sup> respondent, the 1<sup>st</sup> respondent adopted a new organizational structure which saw some roles abolished or elevated. One of the roles is that of the claimant and that is why he had to exit after he showed no interest in the new positions advertised. The new positions also required higher qualifications than what the claimant had, but with lesser pay than what he was earning. Consequently, I am satisfied that the reason for the termination was Valid and fair as it related to the employer's operational requirements.

61. I gather support from Selwyn's Law of Employment 19<sup>th</sup> Edition at page 477, outlines the attributes of dismissal by redundancy as follows:

- “ 18.12 A dismissal shall be for reason of redundancy if it is wholly or mainly attributed to:
- a. The fact that the employer has ceased, or intends to cease, to carry on that business for the purposes for which the employee was employed: or



- b. The employer has ceased or intends to cease to carry on that business in the place where the employee was employed: or
- c. The fact that the requirements of that business for employees to carry out work of a particular kind, or for them to carry out the work in the place where they were so employed, have ceased or diminished or are expected to cease or diminish.”

62. As regards the procedure of redundancy, section 40 (1) (a) and (b) of the *Employment Act* requires that before the employer terminates employment on account of redundancy, he must serve a prior notice of at least one month. Subsection (1) (c) – (g) then provide for following conditions: -

- “(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.”

63. The Court of Appeal in *Thomas De La Rue (K) Ltd v David Opondo Omutelema* [2013] eKLR held as follows:

“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.”

64. From the documents produced, it is apparent that the Respondents adhered to the notification requirements as there were notices to the Claimant, the Labour Office and additional Termination notice. It is therefore accurate to state that in so far as notices were concerned there was procedural fairness.

65. As regards the issue of selection criteria, I see no challenge because the claimant’s position was entirely abolished and no other person was left in that position. Selection criteria becomes necessary where there is more than one person in continuing role but only a number of the persons are targeted for



redundancy. In such a case the Act requires the employer to have 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.

66. The Claimant claimed that the selection criteria targeted him and was discriminatory towards him. The Act under section 5 (5) creates an offence where an employer contravenes the provisions laid out under this section. The said section also places the burden of proof upon the employer to prove that the discrimination did not take place. Subsection (5) and (6) states that:

“(5) An employer who contravenes the provision of the section commits an offence.

(6) In any proceedings where a contravention of this section is alleged, the employer shall bear the burden of proving that the discrimination did not take place as alleged, and that the discriminatory act or omission is not based on any of the grounds specified in this section.”

67. In this case, the Claimant argued that he was laid off just because he was a ‘black man’, in order to appease the white community for the death of the livestock caused by the ranch manager, who was ‘a white man’. He added that his position was allegedly scraped off yet the same had been advertised for filling. However, the Respondents maintained that the redundancy was a result of restructuring to mitigate operational costs following the death of the 2<sup>nd</sup> respondent’s livestock. They further contended that the redundancy affected many people across all races and not the claimant alone.

68. Having found that the respondents have proved by evidence that the reason for the redundancy was valid and that the 1<sup>st</sup> Respondent complied with the procedure set out by section 40 of the [Employment Act](#), I dismiss the alleged discrimination as baseless.

#### **Whether the Claimant is entitled to the reliefs sought**

69. The Claimant prayed for compensation for unfair termination, unpaid severance pay of ten days for each year of service, unpaid wages and salaries by the 2<sup>nd</sup> Respondent, payment in lieu of notice by the 2<sup>nd</sup> Respondent, compensation for discrimination, and aggravated and punitive damages against the 2<sup>nd</sup> Respondent.

70. I reiterate my finding that the reason for the redundancy was valid and the employer complied with the procedure under section 40 of the [Employment Act](#). Consequently, the redundancy did not amount to unfair termination and the claim for compensation for unfair termination must fail.

71. I have also made a finding of fact that the claimant was never an employee of the 2<sup>nd</sup> respondent and as such the claim for unpaid salary and terminal dues against the 2<sup>nd</sup> Respondent is dismissed for lack merits.

72. As regards the claim for compensation for discrimination, I have also made a finding of fact that the redundancy of the claimant was not through racial discrimination as alleged. He was lawfully laid off in compliance with section 40 of the [Employment Act](#) and as such the claim for compensation is unfounded.

73. The Claimant acknowledged receipt of severance pay for his redundancy calculated at the rate of 20 days per year of service but alleged that severance pay ought to have been at the rate of 30 days per years of service. Therefore, he prayed for the outstanding 10 days severance pay. The Respondents produced copies of cheques dated 6<sup>th</sup> October 2022 and a report of the Labour Officer Laikipia dated 18<sup>th</sup> November 2022 which showed that the employer was magnanimous by paying the claimant severance



pay at the rate of 20 days' pay as opposed to the 15 days' pay provided by the statute. Consequently, I find that the claim for arrears of 10 days' pay uncalled for and devoid of merits considering that he was also entitled to payment of pension.

### **Conclusion**

74. I have found that the claimant was never an employee of the 2<sup>nd</sup> and 3<sup>rd</sup> respondent and as such the claims against the two are without basis. I have further found that the claimant lost his employment due to valid reason and a fair procedure was followed. I have also found that the claimant was paid all that was due under his contract of employment by the 1<sup>st</sup> respondent and nothing more was owing. Consequently, the entire suit stands dismissed. However, I will not condemn the claimant to pay costs because, going by the material presented to this court, the relationship between the respondents and their organizational structure is the reason why this suit was brought.

**DATED, SIGNED AND DELIVERED AT NYERI THIS 28TH DAY OF FEBRUARY, 2024.**

**ONESMUS N MAKAU**

**JUDGE**

Order

This judgment has been delivered to the parties via Teams video conferencing with their consent, having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

**ONESMUS N MAKAU**

**JUDGE**

