



**Kilonzo v IPAS Africa Alliance (Cause E424 of 2021)  
[2024] KEELRC 2210 (KLR) (18 September 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2210 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E424 OF 2021  
JK GAKERI, J  
SEPTEMBER 18, 2024**

**BETWEEN**

**MARGARET N KILONZO ..... CLAIMANT**

**AND**

**IPAS AFRICA ALLIANCE ..... RESPONDENT**

**JUDGMENT**

1. The Claimant commenced this suit by a Memorandum of Claim filed on 31<sup>st</sup> May, 2021.
2. It is the Claimant’s case that she was employed by the Respondent effective 4<sup>th</sup> March, 2019 as Alliance Program Manager and the Respondent terminated the contract of employment vide letter dated 11<sup>th</sup> December, 2020 on account of redundancy which the Claimant alleges was unlawful as it had no justification.
3. The Claimant avers that the reason given that donor funding for 2021 would be reduced by 2% was insufficient and the termination was effected before the reduction.
4. According to the Claimant, there is no proof that donor funding was reduced and in any case the Respondent’s operational budget was adjusted accordingly and the Claimant participated in the process, funds for programs was available upto 31<sup>st</sup> June, 2021 and alternative sources of funding were available.
5. That all staff were to undergo a performance assessment starting with self and then by the supervisor to determine suitability for retention and although the Claimant assessed herself, she was not assessed by the supervisor who was based outside Kenya and barely worked with the Claimant.
6. The Claimant further avers that in July 2020, she was called to meetings and false allegations made against her and was thereafter treated with contempt and excluded from vital projects and discussions



- on retrenchment under the main anchor project on Enhancing Access to Comprehensive Abortion Care in 8 counties in Kenya.
7. That on 15<sup>th</sup> November, 2020, the Respondent in disregarded protocols and the Country Director was updated by other staff on three projects side-lining the Claimant.
  8. The allegations were that unnamed staff at the Head Office in North Carolina USA had complained that she had questioned interventions during a donor call with parties, non-attendance to Project Advisory Team Meeting, lack of participation in Big ideas, lack of timely feedback on requests, lack of overall direction and the Claimant responded to the allegations and they were abandoned.
  9. According to the Claimant, the Respondent was looking for a reason to terminate her employment.
  10. It is the Claimant's case that since the redundancy was based on a mere apprehension of reduced funding, termination of the Claimant's employment was predetermined and unlawful.
  11. That other employees of the Respondent affected by the redundancy were given consultancies and were paid for services rendered.
  12. The Claimant avers that the Respondent could rely on the anticipated reduced funding to declare redundancy or rely on the reduced funding and develop a criteria for determining who would be declared redundant.
  13. The Claimant prays for;
    - i. A declaration that termination of employment on account of redundancy was unfair and unlawful.
    - ii. An order of reinstatement or re-engage with back pay computed from the date of termination without loss of benefits.
    - iii. In the alternative, compensation equivalent to 12 months gross pay.
    - iv. Interest on 2 above from the date of termination till payment in full or the sums under 3 above from date of judgement till payment in full.
    - v. Any other relief that the Court may deem fit and appropriate to meet the ends of justice.

### **Respondent's case**

14. The Respondent admits that the Claimant was its employee under a written contract of service but denies that the declaration of redundancy was unlawful.
15. The Respondent avers that it relies extensively on donor funding for its operations and projects in Kenya, Nigeria, Ethiopia, South Africa, Cote d'Ivoire and Zambia and its programs and operations are informed by available donor funding.
16. That in September 2020, the Respondent informed staff that an unnamed donor had intimated that it would end all existing funding by 31<sup>st</sup> December, 2020 and would consolidate funds to a centralized account for all beneficiaries, which affected funding in various countries and was communicated to staff.
17. That the funding previously made available to the Respondent in Kenya scheduled to end in March 2022 was closed halfway and the same was communicated to staff in October 2020.



18. It is the Respondent's case that in the circumstances it was entitled to restructure or re-organize its operations to streamline its operations so as to meet its objectives. That adjustments in staffing was necessary and 16 of the 35 members of staff would be declared redundant.
19. That in the year 2020/2021, the operating budget was USD 5,077,994 and in the 2021/2022 financial year, it was USD 1,289,751.00 and between January 2020 and June 2021, the Respondent had a 35% personnel funding gap.
20. That the Claimant was aware of the reduction in funding.
21. The Respondent denies that it had already decided to terminate the Claimant's employment before the redundancy.
22. That staff were informed in October 2020 that the Acting Africa Alliance Director would be evaluating the organizations staffing needs and self-assessments took place and subsequently, the Respondent analysed staff on the basis of years of experience (related to the position), experience at the Respondent, relative skills to current position, other relevant skills and reliability to the role.
23. That the Claimant was ranked 6<sup>th</sup> out of 7 in the management category and the analysis was not shared with staff.
24. That the employer considered the assessment, analysis, business and programmatic needs in determining who would be declared redundant and the Claimant's role was abolished.
25. The Respondent avers that it did not treat the Claimant contemptuously or exclude her from projects and did not conceive the idea of redundancy to justify termination of the Claimant's employment. In any case, 16 out of 35 employees of the Respondent were declared redundant.
26. The Respondent avers that during a meeting on 1<sup>st</sup> July, 2020 with the Director and the Human Resource Advisor, allegations made against the Claimant were tabled, details of the complainants availed and a way forward determined and there was no nexus between the complaints and the redundancy 5 months later.
27. That the Claimant did not respond to the allegations in writing and the Respondent complied with the law on redundancy.
28. That of the 8 employees declared redundant, 7 were offered 3 months Consultancy Contracts based on organizational needs and tasks to be completed on the available budget.
29. That all employees were offered a generous redundancy package including Medical Cover till the end of the 2021 financial year, Life and Accident Insurance till March 2021, 13<sup>th</sup> month bonus payment and one (1) month's salary for every year worked as it had no alternative employment as it did away with the position of Program Manager whose roles would be implemented by the Program Associate and Program Technical Staff reporting to the Country Director.
30. Finally, the Respondent denies that the Claimant is entitled to the reliefs sought and prays for dismissal of the suit with costs.

### **Claimant's evidence**

31. The Claimant confirmed that she was a Qualified Pharmacist and had a Degree in International Development and had worked in other Non-Governmental Organizations (NGO) prior to joining the Respondent on 4<sup>th</sup> March, 2019 as the Program Manager and had to work closely with the Senior Management Team.



32. It was her testimony that the Respondent relied wholly on donor funds raised through proposal writing and donors determined how the funds would be utilized.
33. That after notification that funding would be reduced by 2%, the Senior Management adjusted the budget and removed restricted funding and other cost cutting measures were put in place including negotiating cost of rent.
34. That her complaint was that the redundancy was effected before the end of the financial year on 30<sup>th</sup> June, 2021.
35. That although writing of proposals was a continuous matter, while some proposals were funded, others were unsuccessful.
36. That by the date the Claimant left employment on 11<sup>th</sup> December, 2020, one donor had reduced funding in a 5 year project (2018 – 2022).
37. According to the Claimant, reduction of funding was an excuse.
38. The witness admitted that copies of emails from the Director, Dr. Ernest Nyamato availed had no date as they were cut pasted.
39. The Claimant admitted a meeting called by Dr. Nyamato on the complaints took place and the concerns were addressed.
40. That the minutes of the meeting were not shared.
41. The witness admitted that while the minutes were dated 1<sup>st</sup> July, 2020 (date of the meeting), redundancy took place in December 2020.
42. The Claimant admitted that she was the only Program Manager in the organization and completed her self-assessment.
43. The Claimant admitted that the Respondent had an organizational structure before December 2020 but could not confirm whether the copy of the structure printed by the Respondent was the one operational after the redundancy.
44. The Claimant further admitted that before she received the notice of intention to declare redundancy, there were many meetings and attended severally and had been appraised of the donors intention to reduce funding by 2% and budget was adjusted.
45. That the meeting held on 29<sup>th</sup> October, 2020 discussed the reduction of funding and its impact on the budget and details were shared and the adjusted budget for the 2020/2021 financial year was USD 3.9 million from USD 5 million and alternative funding had not materialised.
46. That staff were informed that redundancy would be based on assessment and funding.
47. That the redundancy was initiated by the head office of the Respondent, had not been anticipated in the budget and had no provision for severance pay.
48. The Claimant confirmed on cross-examination that she was not the only one who was released, that 2 Managers were retained and given consultancies.
49. That 16 employees were let go and the consultancies were from December 15<sup>th</sup> to March 15<sup>th</sup> 2020 (3 months) and the persons were professionals in their areas.



50. The Claimant admitted having received payments according to the letter of termination dated 11<sup>th</sup> December, 2020.
51. That she had a legitimate expectation of remaining in employment.
52. On re-examination, the Claimant testified that she received an email from Dr. Nyamato on the complaints made against her but the particulars were not provided and they were not substantiated and she attended the meeting on 1<sup>st</sup> July, 2020 on the issue and she was not put on a Performance Improvement Plan although it was part of the way forward.
53. That she was not informed of the assessment results by the Supervisor and only saw it in court and only two (2) Senior Managers were declared redundant.
54. That Kenya was to receive USD 1 million after the budget was adjusted and the budget had no payments on redundancy.
55. That the period of reduction of funding was not communicated but staff were notified.
56. According to the Claimant, the Respondent had no reason to declare redundancy and she was not assessed by the Country Director and faults the reduced funding theory.

### **Respondent's evidence**

57. RWI, Shirley Owino, confirmed on cross-examination, that she joined the Respondent in August 2005 as Program Coordinator for the African Region and became the Regional Director in September 2020.
58. The witness admitted that there was no disciplinary action against the Claimant.
59. The witness further admitted having been aware of complaints against the Claimant and the conversations between the Claimant and the Country Director. It was RWI's testimony that names of accusers of the Claimant were not given as per the minutes of the meeting nor was the Claimant placed on a Performance Improvement Plan (P.I.P).
60. That the assessment of staff encompassed all staff and was intended to determine who would be retained and the Claimant was ranked at 6/7 and her roles were transferred to other persons.
61. The witness confirmed that the Head Office communicated that a Donor would reduce funding by 2% on both restricted and unrestricted votes.
62. That the witness summarised the information from the donor, having intimated as such and the budget availed by the Claimant was the adjusted budget.
63. The witness admitted that the donor gave USD 1 million for a collaborative project and the Respondent had donors other than the anonymous donor 2.
64. RWI could not confirm whether the adjustment of budget was intended to protect jobs.
65. On re-examination, RWI testified that the meeting held on 1<sup>st</sup> July, 2020 was not a disciplinary meeting but could not tell whether the Claimant performed the activities attributable to her.
66. The witness testified that meetings were held from September 2020 and Senior Management was consulted and were aware of the implications of the reduction of funding on the budget and meetings were held on 19<sup>th</sup> October, 2020, 26<sup>th</sup> October, 2020 and 29<sup>th</sup> November, 2020.
67. That the Claimant was not declared redundant on account of her assessment.



68. Finally, the witness confirmed that the Respondent had no position of Program Manager as the Claimant's roles were taken up by other officers.
69. RWII, Evelyn Anyona confirmed, on cross-examination, that she was the Regional Finance Manager and had been for 8 months only but had worked for the Respondent for 6 years and recalled the self-assessment conducted in 2020 and the ranking was not shared by the supervisor.
70. The witness admitted being aware of the notice of reduction of funding by the anonymous donor 2.
71. That the notice was made to the management and communicated to other officers.
72. RWII confirmed that the Claimant was assessed like any other employee and only 2 Managers were retained after redundancy and some got consultancies while other employees were let go.
73. RWI admitted that the Human Resource Manager was given a consultancy for 6 months to support the restructuring process.
74. That the witness had attached an approved budget for the year July 2020 to June 2021 and the Claimant was involved in its preparation and it was prepared prior to the redundancy process.
75. That one Senior Manager is still an employee of the Respondent.
76. The witness clarified that the budget attached by the Claimant was prepared in June 2020 and the news of reduction of funding was received in September 2020 and the donor was the anchor donor but no other donor reduced funding.
77. On re-examination, the witness testified that the Respondent's executive communicated to staff about the reduced funding by the anonymous donor and the donor gave an additional sum of USD 1 million after the reduction to be shared for purposes of concluding projects.
78. Finally, the witness testified that the Respondent's budget cycle involved planning process, budget focused on projects and approved by the board of directors but adjustable as and when changes occurred.

#### **Claimant's submissions**

79. As to whether the Respondent was bound to furnish the Claimant with information on funding reduction, counsel for the Claimant submitted that it was important to show that the donor actually reduced funding and the Claimant had the right to access the information.
80. Counsel urged that the Respondent was obligated to avail the evidence to the court and as it did not, no funding of reduction of funding took place.
81. Counsel submitted that the redundancy was neither lawful nor fair as the 7 Managers on Consultancy were being paid despite the reduction in funding
82. That because only two managers were declared redundant, it was not justifiable as held in *Jane Khalechi V Oxford University Press (EA) Ltd (2013) eKLR*.
83. Reliance was also made on the decision in *Goonvean & Rostowrack China Clay Ltd (1973) 2 All ER, 1973* to urge that a redundancy is not genuine where the requirements of the roles of the affected employees continues and urged that the Claimant's role continued and was given to other employees.
84. Counsel contends that because the 16 employees were paid generous redundancy packages, the Respondent had money to re-engage or employ them.



85. That retention of some employees was discriminatory and the purported redundancy was a sham.
86. Reliance was made on the sentiments of the court in Daniel Mburu V Hygrotech East Africa Ltd (2021) eKLR to argue that the redundancy was mooted to justify the Claimant's termination which was premature as there were alternative sources of funding.
87. According to counsel, since the budget had the salary for all employees, the same was availed even after the donor intimated that it would reduce funding as it was planned for.
88. Counsel submitted that the selection criteria was unfair that after the Claimant conducted self-assessment, the Line Manager did not have a meeting with her to discuss the assessment.
89. According to counsel, the Respondent analysed the assessment unilaterally, did the ranking and only two managers were declared redundant.
90. Reliance was also made on the decision in Onesmus Kinyua Magoiya V Prudential Life Assurance Kenya (2022) eKLR to urge that redundancy grounded on financial constraints must be justified on cogent evidence as opposed to mere assertions.
91. That because only those ranked 6<sup>th</sup> and 7<sup>th</sup> were let go, the termination was based on poor performance and thus unfair.
92. Further, reliance was made on the Court of Appeal decision in National Bank of Kenya v Samuel Nguru Mutonya [2019] eKLR where the Court cited with approval the sentiments of Mbaru J. in Jane Samba Mukala V Ol Tukai Lodge (2016) eKLR to submit that the Respondent had made up its mind to terminate the Claimant's employment and did so unfairly as it had no substantive justification.
93. As regards the reliefs sought, counsel urges that the Claimant deserved 12 months compensation, Kshs.6,497,760/= and costs of the suit.

### **Respondent's submissions**

94. Counsel for the Respondent submitted on whether termination of the Claimant's employment on account of redundancy was lawful and fair and the reliefs sought.
95. On the 1<sup>st</sup> issue, counsel submitted that an employer has the right to restructure or re-organize its operations without the court's interference as held in Kenya Airways Ltd V Tobias Oganya & 5 others (2007) eKLR.
96. Counsel submitted that the budget presented by the Claimant was a draft not approved by the Respondent's board of directors and it is the Claimant who introduced the issue of the budget in its Further List of documents which were initially illegible and the same had to be corrected and the Respondent responded thereafter.
97. Counsel submitted that as the Respondent's programs and operations relied on donor funding, budgeting was undertaken every financial year from 1<sup>st</sup> July to 30<sup>th</sup> June and the relevant budget in this case was for the year 1<sup>st</sup> July, 2020 to 30<sup>th</sup> June, 2021 and the donor communicated its intention to reduce funding by 31<sup>st</sup> December, 2020 and the budget for the year had already been approved.
98. That the budget on record shows that there was a substantial reduction in funding and employees were informed vide memo dated 26<sup>th</sup> October, 2020 and the IPAS Kenya Award was supporting 50% of IPAS Africa.



99. Counsel submitted that the Claimant's argument that the USD 1 million given to Kenya was sufficient to pay her salary was false as it was shared to respective areas including office cost, programs and indirect costs and the funding gap remained and the reason for redundancy existed as the donor had intimated that it would reduce funding effective 1<sup>st</sup> January, 2021 though initially scheduled to end in March 2021 with funding upto December 2021.
100. On sources of funding, counsel submitted that the anonymous donor provided the bulk of the funds and its unavailability to fund the Respondent was impactful.
101. That the donor would only fund activities up to 30<sup>th</sup> December, 2020 and funds from other sources were insufficient to sustain office operations beyond June 2021 and cost saving is a legitimate basis for declaring redundancy as held in *Jane Khalechi V Oxford University Press EA Ltd (Supra)*.
102. Counsel submitted that the Claimant's argument that the Respondent had sufficient funds was false and the reduction of funding from USD 5 million to USD 1.3 million was significant and impactful on employees.
103. On the consultancy contracts, counsel submitted that those hired on consultancy basis had identifiable scope of work for completion on the available budget and the rest 9 had none and there was no discrimination as Mr. Julius Gwadah, a Manager was also let go and was not treated differently.
104. Reliance was made on the decision in *Mohammed Abduba Dida v Debate Media Ltd & another [2018] eKLR* to urge that the reasons for declaring 16 employees redundant was provided.
105. That it was within the Respondent's prerogative to determine the ways in which it could reduce costs in its operational requirements including abolition of the Claimant's position and argued that the decision in *Chapman & others V Goonvean Rostowrack China Clay Ltd (Supra)*, cited by the Claimant's counsel was distinguishable as the employees in that case left when free transportation was withdrawn and the business remained operational.
106. Counsel submitted that both the Respondent and the Claimant admitted that the Respondent had to adjust its budget in anticipation of the reduced funding and could not await until its operation were paralysed.
107. Counsel urged that in the instant suit, the Respondent has provided minutes of meetings on the reduction of funding by the donor.
108. On notice, counsel submitted that the Claimant admitted having received the notice which was preceded by a meeting and urged the Respondent, had complied with the procedure on notice and there was a reason to declare redundancy notwithstanding the fact that 7 employees stayed on as Consultants to close out certain projects and only one (1) was later re-employed.
109. On consultations, reliance was made on the decisionS in *Cargill Kenya Ltd V Mwaka & 3 others (2021) KECA 115 KLR* and *Makokha V Deloitte Ltd (2023) eKLR 723 (KLR* to submit that there were consultations on the redundancy.
110. As regards abolition of the position, counsel urged that the new structure implemented by the Respondent had no position of Program Manager and its roles were to be undertaken by the Program Associate and the Program Technical Staff who would report to the Country Director as shown by the structure on record and it had not been shown that the Respondent appointed another person to the position.
111. That the abolition of the office enhanced efficiency.



112. Reliance was made on the sentiments of the court in *Ronald Kipngeno Bii V Unilever Tea Kenya Ltd (2022) eKLR* to submit that an employer has the prerogative to determine whether or not a position is necessary unless the process is faulted procedurally.
113. On selection criteria, counsel urged that the process was above board as employees undertook self-assessment which was analysed by senior members of staff.
114. Counsel submitted that the Claimant was aware of the parameters and assessed her team and the doctrine of election was inapplicable in this case as the redundancy was on account of reduced funding and the plea of legitimate expectation had no basis and as the Claimant's position was abolished and she was the sole holder of the office, and there was no selection criteria.
115. Counsel submitted that the Claimant received her redundancy dues in full including ex gratia medical cover.
116. On reliefs, counsel submitted that the Claimant is not entitled to any of them as the termination on account of redundancy was lawful.
117. That reinstatement had been overtaken by events by virtue of the provisions of Section 12(3)(vii) of the *Employment and Labour Relations Court Act*.
118. Reliance was made on the decisions in *Joshua Rodney Marimbah v Kenya Revenue Authority (2021) eKLR* and *Kenya Revenue Authority v Kihara [2023] KECA 275 (KLR)* to reinforce the submission.
119. On 12 months compensation, reliance was made on the decision in *Mary Nyawira Karimi v Pure Circle (K) Ltd [2018] eKLR* to urge that the Claimant has already been paid her redundancy dues.
120. On the other hand, decisions in *Keya Hotels & Allied Workers Union V Desert Rose Resort [2022] eKLR*, *Judy Gakii Njeru v Wananchi Group (K) Ltd* and *Adera V Central Organization of Trade Union [2024] KEELRC 1058 (KLR)* were cited to urge the court to award not more than 2 months compensation in the event it found the redundancy unlawful.

### **Analysis and determination**

121. It is common ground that the Claimant was employed by the Respondent as its Program Manager at a monthly consolidated salary of Kshs.483,333/= vide an employment contract dated 19<sup>th</sup> February, 2019 and reported on 4<sup>th</sup> March, 2019 and served in the same capacity until 11<sup>th</sup> December, 2020 when her employment was terminated on account of redundancy.
122. It is also not in contest that the Respondent, Ipas Africa Alliance is a global Non-Government Organization whose programs in different parts of the world including Kenya promote of women health with a focus on reproductive rights.
123. As adverted to above, the Respondent declared the Claimant redundant on 11<sup>th</sup> December, 2020 on the ground of reduced funding by a major donor.
124. The Claimant and 15 others were declared redundant, but 7 Managers were accorded 3 months consultancies and one (1) employee was later re-employed.
125. The Claimant faults the redundancy on various fronts and contends that it was an unfair termination of employment by the Respondent.
126. The Respondent maintains that it had a justification and complied with the relevant provisions of law.



127. After careful consideration of the pleadings, oral and documentary evidence on record and submissions by counsel for the parties, the issues for determination are;
- i. Whether termination of the Claimant's employment on account of redundancy was unfair.
  - ii. Whether the Claimant is entitled to the reliefs sought.
128. As regards the 1<sup>st</sup> issue, parties have adopted contrasting positions with the Claimant maintaining that the redundancy was a sham as the Respondent had no reason to do so, was discriminatory and the decision had already been made prior to the declaration.
129. The Respondent, on the other hand argues that the redundancy had a substantive justification and was procedurally fair.
130. As explained by Maraga JA (as he then was) in *Kenya Airways Ltd V Aviation & Allied Workers Union (K) & 2 others* (2014) eKLR, redundancy is one of the legitimate ways of terminating the employment relationship at the instance of the employer in circumstances in which the employee is free from blame.
131. Redundancy is grounded on commercial or business imperatives and is designed to serve immediate and future interests of the organization in terms of growth and sustainability of the enterprise and may take various forms including re-organization, restructuring, adoption of new technology, downsizing or right sizing the labour force.
132. Section 2 of the *Employment Act*, 2007 defines 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.”
133. Needless to emphasize, a redundancy culminates in a separation between the employer and the employee.
134. As explained in *Ronald Kipngeno Bill V Unilever Tea Kenya Ltd* (Supra), redundancy is not an event but a process that has a beginning and an end, typically characterised by discussions by top organs of the organization in consultation with employees and/or union, if any, until a decision is arrived at.
135. For a redundancy to pass muster, it must be demonstrated that the employer had a substantive justification to undertake the process and conducted it in accordance with the law.
136. Put in the alternative, the provisions of Section 45 of the *Employment Act* apply to redundancies.
137. The employer must have had a valid and fair reason relating to its operational requirements and the process must be fair.
138. Section 40 of the *Employment Act* is the only substantive provision on redundancy and it identifies the seven (7) prerequisites of a redundancy.
139. In *Freight In Time Ltd V Rosebell Wambui Munene* (2018) eKLR, the Court of Appeal underlined the mandatory nature of the conditions set out in Section 40 of the *Employment Act* as follows;
- “In addition, Section 40(1) of the *Employment Act* prohibits in mandatory tone, the termination of a contract of service on account of redundancy unless the employer complies with the following seven conditions, namely; . . .



140. The court expressed similar sentiments in *Barclays Bank of Kenya Ltd & another V Gladys Muthoni & 20 others* (2018) eKLR.
141. The conditions include notice to the Union and the Labour Office where the employees are members of the union, notice to the employee and Labour Office where the employee is not a member of the union, the notice must be given at least one month prior to the effective date of termination on account of redundancy, selection criteria, fairness to all employees affected whether or not an employee is a member of a union where the CBA identifies the entitlement on redundancy, payment of any leave days due in cash, one month's notice of pay in lieu of notice and severance pay of not less than 15 days for each completed day of service.

### **Reason for redundancy**

142. Before delving into the redundancy per se, it is essential to dispose of the question as to whether the Claimant was subjected to any disciplinary proceedings.
143. Communication and documents availed by the Respondent reveal that by an email dated 29<sup>th</sup> June, 2020, Dr. Ernest Nyamato informed the Claimant that he had received calls from people complaining about the Claimant's interaction with the North Carolina Staff and local staff on her role and the Project Management Unit. The email identifies the specific concerns raised.
144. Dr. Nyamato invited the Claimant for a meeting slated for 1<sup>st</sup> July, 2020 and both the Claimant and Beverly of Human Resource attended and minutes were taken though unsigned by any of the participants.
145. It is clear and the Claimant confirmed on cross-examination that she attended the meeting and responded to the allegations at the meeting.
146. Although the Claimant testified that the minutes were not shared or signed and particulars of the complaints were not given, number one was very specific as it related to a particular donor.
147. The fact that Dr. Nyamato found it necessary to itemise the alleged complaints in an email to the Claimant and found it necessary to meet the Claimant in the presence of Human Resource would appear to suggest that indeed there were concerns and the issues were discussed at the meeting and concluded as neither party availed evidence to what befell the "way forward" of the meeting on the Claimant and Dr. Nyamato's deliverables.
148. In the court's view, since no further action was taken, the issue is deemed to have been resolved.
149. This finding would appear to counter the Claimant's assertion that the Respondent had already made a decision to terminate her employment and that the redundancy was a smoke screen on account that the Respondent did not subject her to any P.I.P or appraisal process or require a written response to the complaints. At any rate, the complaints were raised in June 2019 and termination on account of redundancy took place in December 2020, more than one year and six months later.
150. Finally, the Claimant did not provide evidence as to when and by whom the decision was made and why her.
151. Based on the evidence on record, the Claimant's assertion that her termination from employment was pre-meditated lacks supportive evidence and credibility to sustain and is of no consequence in this judgment.



152. The Notice of Intention to declare the Claimant redundant cited staff meetings on 17<sup>th</sup> September, 2020, 28<sup>th</sup> September, 2020, 19<sup>th</sup> October, 2020 and internal memo dated 26<sup>th</sup> October, 2020, all on operations of the Respondent “following reduced funding by a major donor”.
153. The letter informed the Claimant that her position had been impacted “by the downsizing of operations”.
154. The Claimant neither denied nor avail controverting evidence to show that the internal memo and the meetings mentioned did not take place or that the agenda was different.
155. On cross-examination, the Claimant admitted that meetings were held prior to the notice of intention of redundancy in November.
156. The memo dated 26<sup>th</sup> October, 2020 sent to all staff by Shirly Owino, RWI was emphatic that; Anonymous 2 donor would end all existing awards by December 31<sup>st</sup> 2020. Consolidation of funding support to Ipas through one centralized award for total USD 12.5 million from January 1<sup>st</sup> 2021 including USD 7 million for about 10 countries. Anonymous 2 donor was not committing funds beyond 2021. Priority countries were Nigeria, Nepal, Ethiopia and Pakistan. Significant funding reductions to all Ipas Anonymous 2 Countries as a result of the donor’s decision.
157. The Memo further states that the Current Ipas Kenya award would end one year earlier than envisioned, Ipas Kenya award was supporting 50% of the Ipas Africa Alliance budget 2021.
158. The memo was unambiguous that;
- “Circumstances are such that management is obligated to review its operations and structures with a view to mitigating the impact of the loss of funding and in the absence of alternatives, to the implementation of retrenchments . . .
- Kindly note that starting this week October 26<sup>th</sup>, my focus will be on evaluating the Africa Alliance staffing needs starting January 2021 taking into consideration the team’s programmatic and operational needs . . .
- We commit to manage the process with minimal disruption to our program while keeping the communication channels open so that we can continuously update you on the progress.
- Pease feel free to share any feedback on concerns you have directly to me through email”.
159. In the court’s view, this was a redundancy statement to all the sundry by the Respondent as confirmed by the meeting of 29<sup>th</sup> October, 2020 which inter alia demonstrated how the USD 1 million given by Anonymous 2 donor would be utilized and the projected funding gap.
160. On cross-examination, the Claimant admitted that the Respondent relied wholly on donor funding raised by proposals and not all were successful and donor dictated on utilization of the funds provided.
161. The Claimant also confirmed that after the Respondent received information on reduced funding, she participated in the adjustment of the budget.
162. From the meeting held on 29<sup>th</sup> October, 2020, which the Claimant did not deny having attended, it is clear that the Respondent’s budgeting needs had a huge gap of 31% on account of the reduction in funding by Anonymous 2 donor.



163. Contrary to the Claimant's contention that the Respondent's budget had money to keep her in employment, the Respondent looked at it from a planning prism in preparation for the eventuality which, in the court's view is more pragmatic as opposed to waiting for the actual impact.
164. Needless to belabour, sustainable organizations are those that are forward looking in planning and decision making and the Respondent cannot be faulted for doing so.
165. How to re-organize or restructure operations or staff in an organization is a management prerogative and the court as held in *Ronald Kipngeno Bii V Unilever Tea Kenya Ltd (Supra)* and courts ought not interfere unless an impropriety is demonstrated.
166. From the evidence on record, it is discernible that the Respondent was confronted with an uncertain future as it had only two other donors and Anonymous 2 had been its anchor donor and its financial foundation was shaken by the notification of reduced funding and action was imperative.
167. Contrary to the Claimant counsel's submission that Respondent did not avail evidence of actual reduced funding or the notice of reduction of funding from the donor to the Claimant, the Respondent availed sufficient information of the notice it had received from Anonymous 2 donor and was not legally obligated to provide the actual notice which is typically sent to the Chief Executive of the organization.
168. The Respondent communicated to its employees the gist of the notification.
169. Relatedly, and in the court's view, nothing prevented the Respondent from organizing its programs and operations on the basis of the information given by the donor.
170. Noteworthy, although both parties provided a copy of the budget, none of the copies had the signification of approval by the board of directors of the Respondent.
171. From the documents, however, it is decipherable that anonymous 2 donors contribution to the Respondent's total budget was significant and any reduction would have monumental impact on the Respondent's programs and operations.
172. From the evidence on record, it is the finding of the court that the Respondent had reasonable grounds to belief that it had a reason to declare the Claimant and other employees redundant consistent with the provisions of Section 43(2) of the *Employment Act, 2007*.
173. The Claimant, additionally faulted the redundancy on the premise that only he and another manager were declared redundant and others were offered consultancies.
174. From the evidence on record, the Claimant's position of Program Manager was abolished from the Respondent's organizational structure and its role shared between the Program Associate and Program Technical Staff who would report the Claimant's former supervisor thus reducing the levels of reporting to one.
175. To the question why the Program Manager as opposed to Finance Manager is a management prerogative based on factors beyond the court's mandate, one other manager was also declared redundant.
176. Was the Claimant discriminated by the Respondent?
177. The Claimant adduced no evidence to show that she was unfairly and unreasonably treated differently from other Managers or employees as one other manager and 14 other employees were declared redundant on account of the decision by the donor to reduce funding.



178. As affirmed by the Supreme Court in Mohammed Abduba Dida V Debate Media Ltd & another (Supra);

“Mere differentia or inequality of treatment does not per se amount to discrimination within the inhibition of the equal protection clause. To attract the operation of the clause, it is necessary to show that the selection or differentiation is unreasonable or arbitrary; that it does not rest on any rational basis having regard to the object which the legislation has in view”.

179. Regarding the consultancies, RWII confirmed that they were based on the scope of their work in their respective areas for purposes of closing up the projects and only the Human Resource Managers Consultancy was extended by 3 months.

180. Evidently, the Consultancies were entered into to facilitate the programmatic transition to the Respondent’s new reality and only one Senior Manager remains in the Respondent’s employment.

181. Although the Claimant confirmed on cross-examination that the reduction of funding was an excuse, the witness offered no reason to justify why an organization in the stature of the Respondent would concoct and inform its employee about a particular donor having intimated that it would reduce funding by 31<sup>st</sup> December, 2020 and hold meetings and eventually declare 16 employees redundant so as to terminate the Claimant’s employment.

182. In the court’s view, the Respondent acted reasonably by disclosing the information and engaging its staff on the possible scenarios until the redundancy materialised.

183. The Respondent’s management acted proactively in addressing the issue and cannot be faulted.

184. Section 43(2) of the *Employment Act*, 2007 provides that:-

The reason or reasons for termination of a contract are the matters that the employer at the time of the termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.

185. As held by B. O. Manani J. in Galgalo Jarso Jillo v Agricultural Finance Corporation [2021] eKLR, the law requires the employer to have a reasonable basis for genuinely believing that the ground exists. The holding of the learned judge is consistent with the band of reasonable responses test captured by the sentiments of Lord Denning in British Leyland (UK) Ltd v Swift [1981] I.R.L.R 91.

186. Finally, it is also essential to underline the fact that the standard of proof in employment disputes is on a preponderance of probabilities as emphasized by the Court of Appeal in Kenya Revenue Authority v Reuwel Waithaka Gitahi & 2 others [2019] eKLR.

187. For the above stated reasons, it is the finding of the court that the Respondent has demonstrated on a preponderance of probabilities that it had a valid and fair reason to terminate the Claimant’s employment on account of redundancy.

## Procedure

188. This part of the judgment examines whether the Respondent complied with the provisions of Section 40(1) of the *Employment Act*, 2007.

189. As regards the duration of the notice dated 11<sup>th</sup> November, 2020, the court is satisfied that the Respondent met the one (1) month requirement as the Letter of Termination is dated 11<sup>th</sup> December, 2020.



190. In relation to the contents, the notice is required to set out the “reasons for and the extent of the redundancy”.
191. In this case, although the notice specifies the reason for the proposed redundancy, it is reticent on the extent.
192. A cursory reading of the letter reveals that it does not identify the number of employees likely to be affected or the department or units.
193. This information is essential to enable the Labour Officer or the union appreciate the possible impact of the redundancy and determine whether a negotiate settlement was a better option. On this score, the Respondent’s notice is non-compliant.
194. Relatedly, the Respondent adduced no evidence that the notice of the intended redundancy was forwarded and received by the Labour Officer consistent with the provisions of Section 40(1)(b) of the [Employment Act, 2007](#).
195. Under this provision, both the employer and the Labour Officer must be notified in writing.
196. In the absence of a copy of the letter sent to the Labour Officer, it is patently clear that the Respondent did not comply with the requirements of Section 40(1)(b) of the [Employment Act, 2007](#) and the notice of intention to declare redundancy was thus ineffectual.
197. On selection criteria, it is discernible that the Respondent considered the ranking of managers as one of the factors in determining who would be declared redundant.
198. From the tabulation on record, it is evident that the Respondent considered the number of years a manager had served, skills, reliability and related experience elsewhere.
199. The Claimant and Mr. Julius Gwadah had the least experience having served for 1.6 years and 2.5 years respectively and were both the worst performers.
200. The Claimant faulted the selection criteria on the premise that she was not accorded an opportunity to discuss it with her supervisor nor were the results shared.
201. Being one of the parameters the Respondent considered in determining who stays and who is released, it was incumbent upon the Respondent to ensure that the process was not only transparent but fair.
202. The non-involvement of the Claimant in the process other than the self-assessment vitiated the appraisal.
203. Since it was not an ordinary appraisal, the Respondent ought to have involved the Claimant and other managers in appreciating how they were rated in the manner they were rated.
204. In the current state, the situation is analogous to a student who evaluates himself, submits the papers for examination and the candidate fails but the results are not posted until the candidate complains to the Head Master and the results are availed so as to legitimize the process retrospectively.
205. The supervisor should have called the Claimant and shared with her assessment for a discussion.
206. Since the assessment was a determinant whether the Claimant’s career at Ipas would subsist or come to an end, more details on the assessment ought to have been provided by the Respondent and involvement of the Claimant at the next level was imperative.
207. On leave, pay in lieu of notice and severance pay, the letter of termination is clear that all payments were made and the Claimant admitted as much.



208. Additionally, the Respondent paid the Claimant an ex gratia sum of Kshs.32,615.70 and the Medical and Life and Accident Insurance Benefits were extended by 6 months and 3 months respectively.
209. It is clear that the Respondent fulfilled its obligations germane to outstanding leave days, salary in lieu of notice and severance pay.
210. Exit packages are typically not captured in the budget on account that they are for the most part part of the unforeseen expenditure and although provision may be made, it is unlikely to be precise.
211. However, an employer faced with such a scenario is obligated to source for funds as it is a once off affair in respect of the particular employee or employees.
212. The fact that the Respondent paid the Claimant's redundancy dues, cannot avail the Claimant to argue that the Respondent had the requisite funds to pay her a salary.
213. Finally, it is common ground that in addition to the requirements of Section 40(1) of the Employment Act, 2007, consultations are an integral part of the redundancy process as held in *Kenya Airways Ltd v Aviation & Allied Workers Union (Kenya) & 3 others (Supra)* and *Cargill Kenya Ltd v Mwaka & 3 others (Supra)*.
214. In the instant case, the Claimant confirmed on cross-examination that there were meetings before and after the notice of redundancy.
215. Relatedly, from the tenor of RWI's Internal Memo dated 26<sup>th</sup> October, 2020, it is clear that the Respondent was ready and willing to engage its employees and involve them in the process.
216. The Claimant adduced no evidence to prove that there were no meaningful consultations.
217. The court is thus, satisfied that the Respondent consulted and engaged the affected employees in meetings and updates.
218. For the foregoing reasons, it is the finding of the court that although the Respondent made significant efforts to comply with the provisions of the Section 40(1) of the Employment Act, 2007, and complied in certain respects, it was non-compliant in relation to the notice and selection criteria and to that extent the termination on account of redundancy was procedurally wanting and thus unfair.

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

219. As adverted to elsewhere in this judgment, the Claimant prays for various reliefs;

#### **i. Declaration**

220. Having found that termination of the Claimant's employment on account of redundancy was vitiated by procedural improprieties, a declaration to that effect is merited.

#### **ii. Reinstatement**

221. Analogous to the other reliefs under the provisions of Section 49(1) of the Employment Act, 2007, the relief of reinstatement is discretionary as emphasized by Maraga JA (as he then was) in *Kenya Airways Ltd & 2 others V Aviation & Allied Workers Union Kenya & 3 others (Supra)*.
222. As correctly submitted by the Respondent's counsel under the provisions of Section 12(3)(vii) of the Employment and Labour Relations Act, 2011, reinstatement is unavailable after three years from the date of termination of employment or dismissal and as the Claimant's employment was terminated on 11<sup>th</sup> December, 2020, the three years lapsed in December 2023 and the relief is unavailable.



### iii. In the alternative, 12 months compensation

223. Having found that termination of the Claimant's employment was unfair for want of procedural propriety, the Claimant is entitled to the relief under Section 49(1)(c) of the *Employment Act*.
224. The court has taken into consideration the fact that the Claimant did not contribute to the termination of employment and had no recorded incidences of misconduct or other infractions save for the complains raised by the supervisor in late June 2020.
225. The court has also considered the fact that the Claimant was an employee of the Respondent for nine (9) months only which is fairly short and was paid all her redundancy dues including an ex gratia payment of Kshs.32,615.70.
226. Also considered is the fact that the Claimant expressed her wish to continue in the Respondent's employment by seeking the remedy of reinstatement and expected to remain in employment. Finally, the Claimant did not appeal the termination on account of redundancy.
227. In the circumstances, the court is satisfied that the equivalent of 3 months' salary is fair.
228. In conclusion, judgment is entered in favour of the Claimant against the Respondent in the following terms;
- a. Declaration that termination of the Claimant's employment on account for redundancy was unfair.
  - b. Equivalent of 3 months gross salary.
229. In the circumstances of this case, parties shall bear their own costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 18TH DAY OF SEPTEMBER 2024**

**DR. JACOB GAKERI**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1** of the **Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of **Section 1B** of the *Civil Procedure Act (Chapter 21 of the Laws of Kenya)* which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**DR. JACOB GAKERI**

**JUDGE**

**DRAFT**

