



REPUBLIC OF KENYA



**Kiratu v Jambojet Limited (Cause E724 of 2021)  
[2023] KEELRC 664 (KLR) (10 March 2023) (Judgment)**

Neutral citation: [2023] KEELRC 664 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E724 OF 2021  
SC RUTTO, J  
MARCH 10, 2023**

**BETWEEN**

**BENSON KURIA KIRATU ..... CLAIMANT**

**AND**

**JAMBOJET LIMITED ..... RESPONDENT**

**JUDGMENT**

1. Through a Statement of Claim dated 26<sup>th</sup> August, 2021, the claimant avers that he was engaged by the respondent as a First Officer with effect from 22<sup>nd</sup> August, 2017 wherein he served diligently and faithfully until 1<sup>st</sup> November, 2020, when his contract of employment was unfairly and unlawfully terminated on account of redundancy. He avers that his redundancy was actuated by bad faith and ulterior motives, solely intended to get rid of him. Consequently, the claimant seeks against the respondent, a declaration that his termination was unfair and unlawful, compensatory damages for unfair and unlawful termination, payment of terminal dues properly tabulated in accordance with the *Employment Act* and the *Civil Aviation Act*, damages for breach of legitimate expectation, interest on the damages payable as well as costs of the suit.
2. The respondent opposed the claim through its Statement of Response dated 17<sup>th</sup> September, 2021. Putting the claimant to strict proof, the respondent has denied terminating his contract of employment unfairly and unlawfully. It further contends that it was allowed under the employment contract to terminate the claimant's services after issuing one months' notice or paying him one month's salary in lieu of notice. That further, it was also allowed to terminate his services on account of redundancy. The respondent further avers that it paid the claimant's terminal dues in compliance with the law. Against this background, the respondent has asked the Court to dismiss the claim with costs.
3. The matter proceeded for hearing on 4<sup>th</sup> October, 2022, with each side calling oral evidence.



## Claimant's case

4. At the outset, the claimant sought to rely on his witness statement to constitute his evidence in chief. He proceeded to produce the documents filed together with his claim as well as his supplementary bundle of documents as exhibits before Court.
5. It was his evidence that the purported redundancy was actuated by bad faith and ulterior motives, solely intended get rid of his services. That in particular, the redundancy was not substantively justified in that:
  - a. The purported justification of the redundancy based on the effects of the COVID 19 was not valid given the circumstances of the case. That the clarion call during the COVID-19 pandemic by all major stakeholders was to preserve jobs such that employees and employers were encouraged to adopt other less-severe measures to combat the negative effects of the pandemic while preserving jobs.
  - b. Flights were stopped in the early stages of the spread of the pandemic in the country but the Government subsequently lifted the ban in July/August 2020 such that both local and international flights resumed.
  - c. The respondent's employees him included, were initially on paycuts but at the time of the redundancy, had resumed 100% pay. That any financial strain as alleged by the respondent is therefore without any factual basis.
  - d. The respondent's redundancy notice lacks transparency hence does not indicate any genuine justification for the redundancy. That for instance, the notice makes reference to unspecified and unparticularised communications.
  - e. There is no evidence that a Notice of the purported redundancy was ever served on the relevant Labour officer.
6. That the purported redundancy did not also procedurally comply with the provisions of Section 40 of the *Employment Act* as well as the International Labour Organization Guidelines.
7. That the redundancy was also conducted in a degrading and inhumane manner in that he was previously intimidated, victimized and harassed by his supervisor, the Director of Flight Operations on many occasions. That as such, selecting him for the purported redundancy was thus actuated by malice and extraneous considerations.
8. It was his further evidence that prior to the declaration of the redundancy, he was maliciously engaged in an unlawful, malicious and unfair procedures ranging from being denied sick leave days and also being sent on unpaid leave as well as being subjected to discrimination. That for instance, some of his colleagues would call in sick like any other human who may fall sick from time to time but nothing would be done to them. That all these indicate bad faith on the respondent's part.
9. That the purported redundancy amounted to a gross breach of his right to legitimate and reasonable expectations in that being in an open-ended contract of employment, he did not expect his employment to end abruptly and unlawfully in the manner it did.
10. That as a result of breach of his rights, his family has continued to be subjected to untold financial hardships and embarrassment arising from his inability to satisfy his short and long-term financial commitments.



11. That through his erstwhile Advocates, he wrote a demand letter to the respondent on 21<sup>st</sup> December 2020 seeking to have his terminal dues paid and also protesting against the unjustified and un-procedural redundancy that had been meted against him. That by a response made by its Advocates on 11<sup>th</sup> January 2021, the respondent refused to accede to his demands and denied liability.
12. That he was later paid a gross sum of Kshs 1,423,143,74.00 which less the statutory deductions, was Kshs. 1,141,711.00 as his purported terminal dues. That however, he was not issued with a justification of this amount. That as advised by his Advocate, the tabulation of his terminal gross dues should have been at least Kshs 1,669,500.00.
13. Concluding his testimony in chief, the claimant asked the Court to allow his claim as prayed.

### **Respondent's case**

14. The respondent called evidence through Ms. Wandera Kweyu who testified as RW1. She identified herself as the respondent's Head of People and Culture. Similarly, she adopted her witness statement to constitute her evidence in chief and produced the respondent's documents and supplementary documents as exhibits before Court.
15. RW1 described the respondent as a subsidiary of the national carrier, Kenya Airways PLC. That its primary business is air transportation of passengers and towards this end, it operates domestic flights.
16. That it is a matter of public knowledge that the COVID-19 pandemic impacted all sectors for the past two years, including the aviation sector which the respondent operates in. That with cessation of movement orders issued by the President at different times since the pandemic was first announced in the country on 12<sup>th</sup> March 2020 and the lockdowns, the respondent's revenue was affected.
17. She told Court that the pandemic negatively impacted the operations and revenue of the respondent which fact the claimant is alive to. That the effect of the pandemic was felt as far as Kigali and Uganda where its offices were closed.
18. That the respondent believes that open communication builds a stronger team and thus throughout the period of the pandemic, the respondent communicated with its employees through various means including online staff forums to update the employees on the general performance of the airline. That it also sent emails to the staff through the group email jambojettters@jambojet.com.
19. That the respondent held an online staff forum in August 2020 during which it discussed the July performance with its employees. That the employees were informed that 3.5 aircraft were in idle capacity and that from the 126-weekly target of the network, the respondent only operated 62 weekly returns. That the respondent further informed its employees that the revenues for July 2020 were only 20% of the budget which low budget had been attributable to low yields, load factor, utilization and the general lack of demand. That the load factor had been budgeted for 82% but only 45% was being realized at the time.
20. That the respondent further informed its employees during the August 2020 online staff forum, that if it was not able to attain 103 frequencies by September 2020, then both the payroll and staffing levels would be re-evaluated to match attainable operations and available funds.
21. That during the September 2020 online staff forum, the August performance was discussed and the respondent informed its employees that it had only achieved 80 flights out of the targeted 104 flights and only flew 47% of the target pax. That the employees were further informed that the respondent had to sell tickets below the budgeted price so as to attract the requisite volumes.



22. That the respondent's management continued to implement costs saving measures such as aircraft lease negotiations, review of all contracts from fixed terms and pay cuts in place, matching the payroll to the operation. That further, despite the financial constraints the COVID-19 pandemic had on its operations, the respondent sought to seek alternative revenue streams and allow business operations to pick up, which led to it deferring discussions on staffing levels reevaluation to October, 2020.
23. That on 8<sup>th</sup> October 2020, the respondent held another online staff forum with its employees where they were informed that despite the increased flight frequencies, tickets were still being sold at Kshs.1,162.00 less than planned, which was below the budgeted yield. That the employees were further informed that ten (10) staff were released from the regional workstations due to staff rationalization. That the respondent informed the employees that rationalization had been minimized as much as possible to retain as many jobs as possible and that the criteria used for selection across the organization was  

performance; disciplinary record; attendance and individual productivity; qualification and versatility; cultural fit and willingness to uphold the airline's culture. That the same was to be implemented in October 2020.
24. That through the online staff forums, the employees were always kept informed of the respondent's position and monthly business performance during the pandemic period.
25. That although flights had been stopped in the initial stages of the pandemic and the ban subsequently lifted in July/August, the respondent has not recovered from the effects of the pandemic.
26. That on 29<sup>th</sup> October, 2020, the respondent carried a companywide training on "Change management, adapting to change". That the training was conducted by Zamara and the discussions included how the pandemic was affecting the organization and the employees and preparedness for retrenchment. That the training also included adapting to the changes.
27. That on 30<sup>th</sup> October 2020, the respondent issued the claimant with a Notice of Redundancy in which he was advised that the pandemic had severely affected the airline and that the Board had approved the decision to carry out redundancy actions across the respondent's network. That he was further advised that in the selection of the employees to be declared redundant, the airline had had due regard to seniority in time and to the skill, ability and reliability of each employee.
28. That the claimant was further informed that the decision was based on performance, disciplinary record, attendance and individual productivity, qualification and versatility and cultural fit and willingness to uphold the airline's culture. That in addition, he was informed that upon further review, there was no comparable role or vacancy in which he could be redeployed internally.
29. That the claimant was paid his terminal dues upon termination.
30. That further, all the employees who were affected by the redundancy were on medical cover until December, 2020 and this included psychosocial support.
31. She further denied the allegation that prior to conducting the redundancy, the claimant was intimidated, victimized and harassed by his supervisor and the Human Resource Officer.
32. That further, the allegation that the redundancy was actuated by bad faith and ulterior motives are untrue. That despite the financial constraints the COVID-19 pandemic had on its operations, the respondent sought to seek alternative revenue streams and allow business operations pick up, which led to it deferring discussions on staffing levels reevaluation to October, 2020 in order to ensure that business operations continued.



33. That the allegations that at the time of redundancy the respondent's employees were on 100% pay is untrue and that they were on pay cuts until November 2020.
34. She further denied the allegations of discrimination and stated that the consideration of his selection for redundancy were clearly stated in the letter of 30<sup>th</sup> October, 2020.
35. RW1 concluded her evidence in chief by asking the Court to dismiss the suit with costs.

### **Submissions**

36. The claimant submitted that the respondent blatantly ignored the provisions of the law when it issued the notice of redundancy to him. That the notification was not an intended redundancy process but of a process that had already been commenced. To buttress this point, the claimant placed reliance on several authorities including the cases of *Hesbon Ngaruiya Waigi vs Equatorial Commerce Bank Limited* (2013) eKLR, *Kenya Airways Limited vs Aviation & Allied Workers Union of Kenya & 3 others* (2014) eKLR, *Thomas De La Rue (K) limited vs David Opondo Omutelema and Francis Kamau vs Lee Construction* (2014) eKLR.
37. It was further argued that the redundancy process must be consultative and informative. That however, the purported redundancy notice did not provide for any avenue or how consultations were to be done prior to the effective date of the redundancy. That the respondent did not adduce evidence to show that the claimant was involved in any forum, discussion, or participatory process where he could discuss and/or negotiate a way out of the intended process. That the evidence of the respondent falls short of the required standard of demonstrating that adequate consultations were undertaken by the affected parties.
38. It was the claimant's further submission that although the notice issued by the respondent enunciates the criteria used in the selection for rationalization, it does not inform him the manner in which the criterion was to be applied during the redundancy process. That he was therefore declared redundant based on an unknown criterion clearly indicating that the respondent failed to meet the statutory threshold. In support of these arguments, the claimant cited the Supplementary Provisions to the ILO Recommendation No. 119-Termination of Employment Recommendation, 1963.
39. Making reference to the cases of *Joseph Gitonga Theuri vs Gitonga Kabugi & 3 others* (2017) eKLR, *Kenya County Government Workers Union vs County Government of Nyeri & another* (2015) eKLR and *VMK vs CUEA* (2013) eKLR, the claimant submitted that his right to fair administrative action was violated as he was not accorded the forum to be heard or to make representations before the respondent made the decision to terminate his employment. That further, he was not given sufficient reasons for the said decision.
40. The respondent did not tender written submissions as at the time of writing this decision, the same were not on the Court's physical record and could not be traced on the online portal. This is despite the respondent being granted 7 days from 22<sup>nd</sup> November, 2022, to file its written submissions.

### **Analysis and Determination**

41. Flowing from the pleadings, the evidentiary material before me and the submissions on record, the following issues can be singled out for determination: -
  - i. Whether the claimant's termination by way of redundancy was fair and lawful.
  - ii. Whether there is a case for discrimination.



iii. Whether the claimant is entitled to the reliefs sought.

Whether the claimant's termination by way of redundancy was fair and lawful.

42. The claimant was terminated on account of redundancy through a letter dated 30<sup>th</sup> October, 2020 which is couched in part:

“Re: Notice Of Redundancy

The global economy is today experiencing a deep downturn as a result of the COVID-19 Pandemic. The travel restrictions placed by various Governments and regions to stem the spread of the Coronavirus has greatly impacted the aviation sector. Many airlines have grounded a significant number of their planes, while others have instituted other measures to survive. As with other airlines, Jambojet has been severely impacted.

As has been communicated severally by the Leadership team, the scale of this challenge requires substantial change. We write to inform you that following a thorough review, the Jambojet Board has approved the decision to carry out redundancy actions across the company network. This, therefore, is a formal notification that said exercise has commenced, across the organization.

In the selection of employees to be declared redundant, the Company has had due regard to seniority in time and to the skill, ability and reliability of each employee to be declare redundant.

In this respect, the selection is based on:

1. Performance & Quality of work evaluation on current role:
2. Disciplinary & Attendance Record
3. Qualifications & Versatility;
4. Length of Service & Experience on current role; and
5. Cultural fit and adherence to Company values.

Following a review of your functional area you have regrettably been identified as one of the staff to be declared redundant. A further review of options available indicates that there is no comparable role or vacancy you can be redeployed to internally.

This letter therefore serves as a formal notification of the Company's intention to declare you redundant. You shall cease to be an employee of the Company from 1<sup>st</sup> November, 2020.

The redundancy terms applicable to you and terminal package will be computed based on the following....”

43. For starters, I wish to refer to the case of Kenya Airways Limited vs Aviation & Allied Workers Union Kenya & 3 Others (2014) eKLR, where it was held that “for any termination of employment under redundancy to be lawful, it must be both substantially justified and procedurally fair”.

44. Substantial justification or fairness refers to the reasons for which the redundancy was effected, while procedural fairness has to do with the procedure applied in effecting the redundancy. I will start by considering substantive justification.

i. Substantive justification



45. The reasons for effecting the redundancy in this case can be drawn from the notice of redundancy dated 30<sup>th</sup> October, 2020. In the said letter, the respondent made reference to the COVID 19 pandemic and the effect it had had on the global economy and specifically, its operations. The notice further cited travel restrictions by various governments and the grounding of many airlines.
46. In support of its case, the respondent exhibited its Performance Review for Week 32-40 which indicates that there was reduction in the number of flights and passengers were paying less for the flights.
47. Further, through an email dated 11<sup>th</sup> August, 2020, the respondent's Head of people and Culture, states as follows:
- “If we are not able to attain 103 frequencies by September, 2020 both payroll and staffing levels will be reevaluated to match attainable operations and available funds. Resources dedicated to projects, short-term contracts and operational areas are under review effective immediately.”
48. Through another email of 17<sup>th</sup> September, 2020, she gives the following update with regards to the performance by the respondent in July, 2020:
- “Utilization: we used 3 aircrafts in August, which is a mere 56% of our capacity. We achieved 77% of our repeatedly shared target of 104 flights (i.e 80 flights). We performed 53% behind budgeted passengers i.e we are only flying 47% targeted pax.
- Yield: we are still having to sell tickets way below the budgeted price, so as to attract the volumes, this puts us way behind budgeted RASK”
49. The costs cutting measures identified in the email of 17<sup>th</sup> September, 2020 were:-Aircraft lease negotiations;MRO agreement renegotiated to utilization based charges;Review of all contracts from fixed terms;Pay cuts in place, matching the payroll to the operation.
50. In addition, it is evident from the said email communication that the respondent's staff were on pay cuts as the communication was accompanied by a consent to reduced pay. I must add that the claimant's assertion that at the time of the redundancy, the respondent's staff were on 100% pay was not backed by evidence. He did not for instance, produce his pay slip for the relevant period to confirm this fact.
51. In light of the foregoing, the Court has no reason to doubt that the respondent was going through financial turbulence occasioned by the COVID 19 Pandemic. Indeed, the Court takes judicial notice of the effect of the pandemic on many sectors of the economy including the aviation industry.Following the outbreak of COVID 19 which was declared a global pandemic by the World Health Organization (WHO) sometimes in March, 2020, drastic measures were taken worldwide to curb its spread. This included travel restrictions and it is not in doubt that the respondent, being an operator in the aviation industry, was significantly affected. As a matter of fact, in some sectors of the economy, full recovery from the effects of the pandemic, is yet to be achieved.
52. Therefore, it is the Court's finding that the reason given by the respondent to declare a redundancy, was fair, valid and based on its operational requirements hence was in line with the requirements of Section 45(2) (b) (ii) of the Employment Act. The termination was therefore substantively justified.
53. That said, was the claimant's redundancy procedurally justified?
- (ii) Procedural fairness



54. The procedure to be applied in effecting a redundancy is stipulated under section 40(1) of the Act. Under the said provision, the following conditions must precede a redundancy: -
- a. where the employee is a member of a trade union, the employer notifies the union to which the employee is a member and the labour officer in charge of the area where the employee is employed of the reasons for, and the extent of, the intended redundancy not less than a month prior to the date of the intended date of termination on account of redundancy;
  - b. where an employee is not a member of a trade union, the employer notifies the employee personally in writing and the labour officer;
  - c. the employer has, in the selection of employees to be declared redundant had due regard to seniority in time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy;
  - d. where there is in existence a collective agreement between an employer and a trade union setting out terminal benefits payable upon redundancy; the employer has not placed the employee at a disadvantage for being or not being a member of the trade union;
  - e. the employer has where leave is due to an employee who is declared redundant, paid off the leave in cash;
  - f. the employer has paid an employee declared redundant not less than one month's notice or one month's wages in lieu of notice; and
  - g. the employer has paid to an employee declared redundant severance pay at the rate of not less than fifteen days' pay for each completed year of service.
55. At the outset, it is worth noting that all the conditions stipulated above are mandatory and it is not open for the employer to cherry pick and apply the same selectively.
56. In this case, the claimant was issued with a notice of redundancy dated 30<sup>th</sup> October, 2020. This was the same notice that was communicating the respondent's decision to terminate the claimant's employment on account of redundancy. It was a final notice and was essentially a days' notice. By that time and judging by the contents of the said notice, the decision to declare the claimant redundant had already been made. Prior to this, there is no evidence from the respondent's end that another notice had been issued in compliance with Section 40 (1) (b) of the *Employment Act*.
57. In my view, the notice contemplated under section 40 (1) (b) is an "intention to declare a redundancy". It is issued before the redundancy itself. As stated herein, the notice issued to the claimant was after he had been declared redundant.
58. In addressing this issue, I find useful guidance in the determination by Maraga JA, (as he then was) where he opined as follows in the case of Kenya Airways case (supra): -
- “My understanding of this provision is that when an employer contemplates redundancy, he should first give a general notice of that intention to the employees likely to be affected or their union. It is that notice that will elicit consultation between the parties, ....”
59. In absence of a notice contemplated under Section 40 (1) (b), it is apparent that the respondent is at fault for not complying with the statutory requirement in that regard.
60. I must also add that the notice envisaged under section 40(1) (b) is explicit that the employer is intending to declare a redundancy. Therefore, the respondent's communication through the online



staff forums in which it gave a projection of the staffing levels cannot be deemed to be such a notice. If anything, the same appear to be monthly updates on the progress of the airline. Therefore, once the respondent had made a negative projection on the staffing levels and resolved to declare a redundancy, then it was bound to give the notice of intention to declare the redundancy as envisaged under section 40(1) (b).

61. With regards to consultations, the respondent stated that it held online staff forums and conducted a training on change management through Zamara. The claimant state that he did not attend the said staff forums. From the emails exhibited by the respondent following the said forums, there was no specific discussions of the intended redundancy. Indeed, there is no evidence that the issue of redundancy was discussed at the said online staff forums.
62. In as much as the *Employment Act* does not expressly provide for consultations before a redundancy, Article 13, Convention No. 158 - Recommendation No. 166 of the International Labour Organisation (ILO) convention does.
63. On this issue, I am also guided by the decision of the Court of Appeal Maraga JA (as he then was) in the Kenya Airways case (supra) where he expressed himself thus: -

“Although it also does not expressly provide for consultation between the employer and the employees or their trade unions before the final decision on redundancy is made, on my part I find the requirement of consultation provided for in our law and implicit in the *Employment Act* itself. By dint of Article 2(6) of *the Constitution*, the treaties and conventions ratified by Kenya are now part of the law of Kenya. The Kenya Constitution, 2010 was promulgated on 27th August, 2010...The notices under this provision are not merely for information. Read together with Part VIII of the *Labour Relations Act*, 2007 which provides for reference to the Minister for Labour of trade disputes, including those related to redundancy (see Section 62(4)) for conciliation, I am of the firm view that the requirement of consultations implicit in these provisions.”

64. This position was maintained by the Court of Appeal in the case of Barclays Bank of Kenya Ltd & another vs Gladys Muthoni & 20 others [2018] eKLR and Cargill Kenya Limited vs Mwaka & 3 others (Civil Appeal 54 of 2019) [2021] KECA 115 (KLR).
65. I am therefore persuaded that consultation is a key requirement during a redundancy exercise. In as much as the respondent may have undertaken a training on change management and adapting to change, it should be noted that as per Article 13 of the ILO Convention No. 158, the consultations should be aimed at averting and minimizing the terminations arising from the redundancies or mitigating the adverse effects of any terminations on the employees concerned. The training in this case was more or less preparing the employees on how to cope with the redundancy and its effects.
66. Once more, I gather support from the determination of Maraga JA (as he then was) in the Kenya Airways case (supra), thus: -

“The consultations are therefore meant to cause the parties to discuss and negotiate a way out of the intended redundancy, if possible, or the best way of implementing it if it is unavoidable. This means that if parties put their heads together, chances are that they could avert or at least minimize the terminations resulting from the employer’s proposed redundancy. If redundancy is inevitable, measures should be taken to ensure that as little hardship as possible is caused to the affected employees. In the circumstances, I agree with



counsel for the 1<sup>st</sup> respondent that consultation is an imperative requirement under our law.”

67. In a nutshell, the consultations should not be cosmetic but ought to be meaningful and should be geared towards some end. On this score, I am further fortified by the determination in the case of Barclays Bank of Kenya Ltd & another vs Gladys Muthoni & 20 others [supra] where the learned Judges of the Court of Appeal reckoned thus: -

“44. The Constitution in Article 41 is fairly loud on the rights to fair labour practices and we think it accords with the Constitution and international best practices that meaningful consultations be held pre-redundancy.”

68. As I have found that there was no evidence of consultations between the parties in the instant case, I return that the respondent is at fault to that extent.

69. Turning to the selection criteria stipulated under section 40(1) (c) of the Act, it was the respondent’s case that it communicated the same to the employees in its online staff forum of 8<sup>th</sup> October, 2020. Be that as it may be, there was no evidence to back up this assertion. What can be discerned in this case is that the same was communicated to the claimant through the notice of 30<sup>th</sup> October, 2020, after he had been declared redundant.

70. It is notable that the respondent did not lead evidence to demonstrate the manner in which it applied the criteria in the redundancy process. For instance, there was no evidence of an evaluation exercise based on the criteria identified. Such evidence would have proved the reasons for the claimant’s redundancy and why he was the staff earmarked and selected to be declared redundant.

71. Indeed, and as per RW1’s clarification to court, the claimant was not the only staff in his category. How then did the respondent apply the selection criteria and in the end, determined that the claimant was the one to go? In this regard, there was no evidence as to how the selection process narrowed down to the claimant as the staff to be declared redundant.

72. In light of the foregoing, the selection process cannot be said to have been fair, reasonable and objective. I am therefore led to conclude that there was no compliance with Section 40(1) (c) of the Employment Act.

73. With respect to the requirements for payments under sections 40(1) (e), (f) and (g), the Court finds that the respondent complied in that respect as the letter issued to the claimant on 30<sup>th</sup> October, 2020, stated that he was to be paid three months’ salary in lieu of notice and accrued leave days and severance pay.

74. The total sum of the foregoing, is that it is apparent that the respondent substantially failed to comply with the provisions of Section 40 (1) of the Employment Act hence is at fault.

75. As I conclude on this issue, I wish to reiterate the sentiments of the Court in the case of Hesbon Ngaruiya Waigi vs Equitorial Commercial Bank Limited (2013) eKLR thus: -

“Where redundancy is declared by an employer, the procedure to follow is as set out under the provisions of Section 40 of the Employment Act and where not followed, any termination as a result will be deemed unprocedural and unfair. Any termination of an employee following a declaration of redundancy must be based on the law otherwise the same becomes wrong and if the grounds used to identify the affected employees are not as per the law, the same becomes unfair.”



76. Having found that the respondent did not fully comply with the mandatory requirements stipulated under Sections 40(1) of the Employment Act, I cannot help but find that the claimant's termination on account of redundancy was unprocedural hence unlawful.
77. The total sum of my consideration is that although the respondent was justified to terminate the claimant's termination on account of redundancy, the same was undertaken in an unprocedural manner hence was unlawful within the meaning of Section 40 (1) of the Employment Act.

### **Discrimination?**

78. The claimant has alleged that his termination on account of redundancy was malicious and discriminatory. That his supervisor, the Director, of flight Operations had on many occasions intimidated, victimized and harassed him. That his colleagues would call in sick and nothing would be done to them. What is notable is that the claimant did not give names and dates hence he did not particularize his claim in that respect. For instance, when was he denied sick leave? who among his colleagues called in sick and was granted sick leave while he was not? How was he treated differently from his counterparts under similar circumstances? As a matter of fact, he did not adduce evidence that he applied for sick leave and the same was denied.
79. In the circumstances, the Court finds that the claim for discrimination was not substantiated hence it collapses.

### **Remedies?**

80. As the Court has found that the claimant's redundancy was procedurally flawed, he is awarded compensatory damages equivalent to 5 months of his gross salary. This award takes into account among other factors, the length of the employment relationship.
81. With regards to payment of the claimant's severance pay, the Court is guided by Section 40 (1) (g) of the Employment Act. From the record, it is apparent that the claimant's severance pay was based on a monthly salary of Kshs 318,000.00 hence in terms of Section 40(1) (g) of the Act, the same translates to Kshs 477,000.00, which sum was paid to the claimant. I am therefore unable to fault the manner in which the respondent calculated the claimant's severance pay. In any event, the claimant has not demonstrated how he arrived at the figure of Kshs 715,000.00, which he claims he is entitled to as severance pay.

### **Orders**

82. In the final analysis I allow the claim and enter Judgment in favour of the claimant against the respondent as follows: -
- a. A declaration that the claimant's termination by the respondent was procedurally unfair hence unlawful.
  - b. The claimant is awarded compensatory damages in the sum of Kshs 1,590,000.00 which sum is equivalent to 5 months of his gross salary.
  - c. Interest on the amount in (b) at court rates from the date of Judgement until payment in full.
  - d. The claimant shall have the costs of the suit.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 10TH DAY OF MARCH, 2023.**

.....



**STELLA RUTTO**

**JUDGE**

**Appearance:**

For the Claimant Mr. Kimathi

For the Respondent Ms. Leyla Ahmed

Court assistant Abdimalik Hussein

**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 had 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.

**STELLA RUTTO**

**JUDGE**

