



**Malingi v International Justice Mission (Petition E035 of 2022)
[2023] KEELRC 649 (KLR) (9 March 2023) (Judgment)**

Neutral citation: [2023] KEELRC 649 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E035 OF 2022**

**MN NDUMA, J
MARCH 9, 2023**

BETWEEN

UMAZI RUNYA MALINGI PETITIONER

AND

INTERNATIONAL JUSTICE MISSION RESPONDENT

JUDGMENT

1. The petition was filed on 7th March, 2022 by the petitioner seeking an Order in the following terms:-
 - (a) That this Honourable Court be pleased to issue a Declaration that the Respondent's actions of reviewing and or re-assigning the petitioner from the role of the Director of Investigation and Law Enforcement Development (DILED) to Lead law enforcement Development Officer (LLED) without following due process of the law amounted to a violation of the Claimant's rights to fair labour practices under Article 41 of *the Constitution*.
 - (b) That this Honourable Court do issue a Declaration that the Respondent's actions were intended to make the work environment of the Petitioner intolerable thereby forcing her to resign and this amounted to constructive and unlawful dismissal of the Petitioner contrary to Section 43 of the *Employment Act*.
 - (c) That this Honourable Court do issue a declaration that the new role of Lead Law enforcement Development Officer (LLED) created by the Respondent was created wrongly in contravention of the Law thereby infringing on the Petitioner's right to fair Labour practices.
 - (d) That this honourable Court do issue a declaration that the constructive termination of the Claimants employment by the respondent without payment of her terminal benefits is unlawful and amounts to discrimination contrary to the provisions of Section 49 of the *Employment Act* and Article 27(1) of *the Constitution*.



- (e) An Order for the payment to the Claimant for the actual pecuniary loss suffered as a result of the wrongful termination from the date of such termination to the date of such determination.
- (f) That this Honourable Court be pleased to issue an Order directing the Respondent to pay the petitioner her full terminal dues and damages tabulated as follows:-

Particulars	Amount Payable In Kshs.
i. Damages for unfair termination (Constructive dismissal) - 409,238/= X 12 months	4,910,856.00
ii. Salary Compensation for the year 2019 3 months X 409,238/=	1,227,714.00
iii. Gratuity pay (At pay out rate) Annual salary/260 days) 10 years X 15 X 18,257,17/=	2,738,575.50
iv. Accrued annual leave days 14.5 days X 18,257.17/=	264,729.00
Grand Total	9,141,874.50

- (g) An Order of exemplary damages.
- (h) Any other relief that this Honourable Court may deem just and expedient in the circumstances.
- (i) Costs of this petition be borne by the Respondent.

Facts

- The facts of the petition are set out in paragraphs 1 to 31 of the petition.
- The factual issues raised are that the petitioner was employed by the respondent by a letter dated 23rd June, 2009 in the position of Director of Investigation.
- The petitioner rose to the position of Director of Investigation and Law Enforcement Development (DILED) in the year 2015. That the petitioner worked well until 17th September, 2019 when she was forced to resign and states that this amounted to constructive dismissal owing to frustration and unfair treatment she received from the respondent, which rendered her position redundant.
- That the department had only one investigator when she joined but had recruited and trained interns, operatives and informers with whom she worked.
- That in the years 2014, 2016 and 2018, the petitioner had received relentless service Award due to her good work.
- In the year 2019, Senior Leadership of the respondent announced that there was an intended re-organization of the organization titled “Transform 2030; preparing to catalyse a Global revolution” which was announced by the respondent’s President based at Washington D.C. Headquarters.



8. That as a result of the re-organization, some employees of the organization across all its branches across the Globe lost their jobs, for others, their previous titles were done away with and new titles created and new roles assigned. Other positions were rendered redundant.
9. On 11th June, 2019, the respondent summoned the petitioner vide one Benson Shamala, the Country Director and in the presence of James Kironji and Charles Thiong'o. The Petitioner was verbally informed that the Investigations Department which she was heading would be affected by the ongoing restructuring. The meeting was followed by a letter dated 12th June, 2019, from Benson Shamala, informing the petitioner that there was a proposal to transform her position of Director of Investigations and Law Enforcement (DILED) to a subject matter Expert (SME) relating to the area of capacity building.
10. The petitioner replied to the email of 12th June, 2019 expressing her excitement with regards to the proposal and promised to consult with the County Director for ideas on how the new role would look like since the new role had not been named nor the new job description revealed yet.
11. On the same date, the petitioner received further email from the Country Director informing her that her new position would be effective 24th June, 2019 when the new structure would be announced. The petitioner was called upon to make her input and proposals on her new role.
12. On 15th July, 2019, the petitioner received a letter from the Country Director informing her of her new revised role as the Lead Law Enforcement Development (LLED), which position fell under the rank of "Credit." The petitioner was expected to acknowledge acceptance of the said new role by signing on a copy of the said letter and returning it to the Country Director. The Petitioner however had concerns about the roles that had been assigned under the new position which she needed to first discuss with the respondent and did not sign the said letter as required.
13. On 17th July, 2019, the Director of Administration and Human Resource met the petitioner in her office and attempted to explain her new roles as the Lead Law Enforcement Development (LLED).
14. The petitioner states that she was dismayed that the new roles and responsibilities were a clear demotion or at the very least eventually rendered her new position redundant to the extent that she would be of no use to the organization.
15. The petitioner's concerns included that:-
 - (i) The position had no supervisory mandate over any personnel who had been moved to the department of the Associate Justice Systems Interventions a department headed by a different person. These are staff the petitioner had worked hard to train and formerly worked under her.
 - (ii) The petitioner was expected to work with these staff from that other department. This would lead to conflict.
 - (iii) It would be difficult to implement any decision plus resources or even give any direction since she was not in charge of the people that she was expected to work with and train. This was a clear set up for failure.
 - (iv) The petitioner's role was shifted from giving expert advice to external partners, but was now being made to work directly with the investigators. The role was confusing, not clear and Petitioner was maliciously being set up for failure.



- (v) The petitioner was unable to understand nor appreciate her new role despite the attempted explanation.
16. The petitioner raised her concerns immediately with the Director of Administration and Human Resource, Charles Thiong'o who promised to ask the drafter of the job description one M/s Wamaitha Kimani, the Director of System Reform to make adjustments and to make the roles workable for her. However, the said Wamaitha did not act on the instructions that were given to her by Mr. Charles Thiong'o.
 17. On 24th July, 2019, the Petitioner wrote an email to Wamaitha requesting her to act on the instructions from the Director Human Resource.
 18. On 26th July, 2019, the Petitioner received a letter from James Kironji, the Director of Justice System Interventions which letter requested her to continue reviewing the cash expense reports from the LLED team as that amounted to determination on how the finance procedure would be carried out. The petitioner responded to the said email on the same date stating that she was awaiting clear direction on her roles and responsibilities and therefore did not have authority to supervise the investigation team or sign any documents on their behalf.
 19. Various meetings were thereafter held between the petitioner and the Country Director and other senior leadership members individually and not as a team. Petitioner stated her concerns. No adjustments were made.
 20. On 6th August, 2019, the Petitioner received a further email from Wamaitha Kimani who promised to meet County Director; Human Resource Manager Thiong'o and Mr. Kironji to discuss the matters raised.
 21. On 8th August, 2019, Wamaitha wrote to the Petitioner stating that the meeting took place and it was agreed to make adjustments to the proposed job description. This did not happen. The respondent refused to meet the petitioner as a team.
 22. The petitioner wrote a letter dated 9th August, 2019 in which she was forced to decline the new job offer of Lead Law Enforcement Development (LLED) for the stated reasons especially since it was a demotion and had rendered her employment redundant. During the restructuring process all the employees of the respondent who were working as heads of different departments remained at Grade 8 upwards but the petitioner was placed at Grade 7 thereby ranking her lower than her former fellow heads of departments. Example was Director Aftercare and Security Manager. The petitioner states that she was discriminated against by that demotion.
 23. The petitioner states that she was a good performer and there was no justification to demote her. The petitioner restated her concerns at a meeting with the County Director on 15th August, 2019. Her concerns were still ignored.
 24. A few months prior to the taking effect of restructuring of the organization, some employees resigned from employment and others were laid off while others declined to take up the new roles that had been created and they were all paid their benefits and dues which included Gratuity; Pension; Leave accrued and salary, in lieu of notice. Those who claimed their roles had been rendered redundant, were paid their terminal dues. The petitioner was however not paid her benefits upon being constructively dismissed and forced to tender a resignation letter.
 25. That the constructive dismissal was unlawful and unfair and the petitioner prays to be awarded as prayed.



Legal Foundation

26. The petition is premised on alleged violation of Articles 27(1); 28(c), 41(1) and (2), 47, 50(1) and 258(1) of *the Constitution* of Kenya, 2010 particulars of which are fully set out on the body of the petition.
27. The petitioner also relies on Section 4(1), (2) and (3) (a) of Fair Administrative Actions Act.
28. Furthermore, reliance is made on alleged violation of Section 45 of the *Employment Act*, 2007.
29. The petitioner further relies on the case of Henry Ochidu –vs- NGO Co-ordination Board [2015] eKLR in which the case of Nathan Ogada Atiagaga –vs- Davis Engineering Limited, Case No. 419 of 2014 was cited with approval as follows:-

“Constructive dismissal occurs when an employee resigns because their employer’s behavior has become so intolerable or made life so difficult that the employee has no choice but to resign. Since their resignation was not truly voluntary, it is in effect termination. For example when an employer makes life extremely difficult for an employee to force the employee to resign rather than outright firing of the employee, the employer is trying to effect a Constructive discharge.”
30. The petitioner prays that the petition be allowed and the reliefs sought be granted.

Defence

31. In the replying affidavit of Charles Thiong’o, Senior Manager in Charge of Administration and Human Resource, the respondent deposes that on 27th February, 2019, the respondent’s Global President communicated the respondent’s new global strategy dubbed “Transformation 2030” which was aimed at catalyzing a global revolution that rescues millions, protects half a billion and makes justice for the poor unstoppable.
32. On 11th June, 2019, before unveiling the proposed new structure for Kenya Country Office to the rest of the staff, the respondent’s Country Director convened a meeting with the petitioner in the presence of the petitioner’s then supervisor, the Director of case work, Kenya and the deponent to highlight the impact that the restructuring would have on the petitioner’s position.
33. In the meeting, the petitioner was informed that her position of Director of Investigations and Law Enforcement (DILED) was going to transform so that the title holder would function as a subject matter Expert (SME) to the Investigations and Law Enforcement Department (ILED) and mainly focus on engaging external partners on law enforcement development including strengthening communities engagement with their local police stations.
34. That the (ILED) (Investigations and Law Enforcement Department) administrative and supervisory responsibilities carried out under the position of Director of Investigations and Law Enforcement (DILED) would be directed to another position to enable the holder of the position of Investigations and Law Enforcement Department (ILED) focus on their core responsibilities.
35. On the intended reporting relationships, the petitioner was invited to make a choice of the supervisor she preferred between her then supervisor and the Director of System Reform, Kenya since the new role, without ILED (Investigations and Law Enforcement Department) supervision impacted on outcomes 2 and 3 of the project concept Notice headed by the two officers. That the petitioner chose



- her then supervisor, but later approached the Country Director and asked to be supervised by the Director of Systems Reform, Kenya, which request was granted.
36. That the meeting with the petitioner was held ahead of all - office Communication in order to mitigate the impact of changes. Staff in positions that had proposed changes such as reporting or loss of supervisory responsibilities were briefed in advance. They were all allowed to engage and ask questions.
 37. That on 12th June, 2019, the Country Director announced to all staff of the new structure a new Regional Matrix Operating Model and the commencement of designing a new operating model for Kenya which would see the reduction of the layers with the respondent from 11 to a maximum of 6.
 38. This meant that the levels from the top most Chief Executive Officer to the lowest level, would only be 6; de-layering in order to achieve a flat structure. This meant that some positions lost supervisory responsibilities including the petitioner's position.
 39. Two tracks were developed; a manager's track and non-managers track. Only employees with people manager responsibility would have Manager in their title in the new structure, that would only be the County Director and the Senior Managers (previously called Directors.)
 40. That the change to the petitioner's job description was the removal of Supervisory responsibilities due to the respondent's global guidance to reduce levels. However the level of responsibility in terms of delivery and seniority, remained the same. Even though there existed no grades prior to the restructuring, if the position would have remained a manager position, reporting to Senior Leaders in office, the grade level would have been the same, which is Grade 7.
 41. That the petitioner was not the only member of staff who was impacted in this manner. Many other positions as demonstrated in annexure CT4, were similarly affected globally.
 42. That the minor adjustments to the petitioner's position were made known to her at the meeting on 11th June, 2019. The respondent intended that the petitioner's employment with the respondent would continue, subject to a consultation process on her revised job description.
 43. The petitioner initially responded with excitement on her new role in engaging partners and further stated that she would add value to the organization by understanding the respondent's partners and look forward to it. The petitioner also committed to consult more on how the role would look like as contained in the email exchanges marked "CJ5."
 44. Pursuant to the announcement and design approach, every department leader was requested to draft job description for the positions in their department. The petitioner drafted her job description and those of the positions in her department forwarded vide petitioner's email dated 6th June, 2019 marked "CT6." Vide a letter dated 15th July, 2019, the County Director forwarded the revised job description for the petitioner's position whose title had changed to Lead Law Enforcement Development and which position fell in Grade 7.
 45. The petitioner was advised to liaise with the Country Director to deal with any concerns and to enable a smooth transition. That respondent had provided staff care through peer supporters and external counsellors to assist in the transition which the petitioner was at liberty to reach out to.
 46. That on 17th July, 2019, the deponent met with the petitioner to discuss the revised job description in which the petitioner raised concerns about her involvement with the day to day operations and actual role of the Lead Law Enforcement Development (LLED) team on the Training and Development responsibility. The deponent clarified that the new role was to contribute to and not be 'responsible' for.



47. The deponent states further that he initiated consultative process to address the concerns of the petitioner under email dated 17th July, 2019 to the petitioner's intended supervisor (the Director of System Reference, Kenya) outlining the petitioner's concerns.
48. That finalization of consultations with the petitioner's intended supervisor on the Petitioner's suggested changes was delayed as the intended supervisor was out of the Country on official business. Her intended supervisor had however committed to look at the job description as a priority once she reported back to the office.
49. Meanwhile the petitioner met the Country Director and raised her concerns that she was being asked to supervise the Lead Law Enforcement Development team yet her understanding was that she was to be a Subject Matter Expert (SME). This was noted and she was informed that her concern would be addressed and emails were exchanged on 2nd August, 2019 between the Country Director, the Petitioner and her intended supervisor. This is marked 'CT9.
50. On 5th August, 2018, the petitioner met her intended supervisor to discuss and understand her job description. The petitioner raised concerns on the wordings and responsibilities captured in the new job description marked annexure "CT10"
51. On 8th August, 2019, the intended supervisor after considering the input by the petitioner, shared an amended job description with the petitioner. Copies of emails of 5th, 6th and 8th August, 2019 between the petitioner, her intended supervisor and copies of the job descriptions one containing the petitioner's comments and the other containing her intended supervisor's comment are marked "CT11"
52. These are summed under paragraphs 28 of the replying affidavit.
53. On 9th August, 2019, Human Resource officer received the petitioner's letter stating that she had declined the revised duties and responsibilities. The letter is marked "CT 12."
54. On 15th August,, 2019, the Country Director convened a meeting to understand why the petitioner had taken that decision. The petitioner's response was that the position did not meet her career aspirations whereupon the Country Director requested her to take three weeks to consider her decision but she stated that she had made up her mind.
55. The Country Director responded to the petition vide a letter dated 16th August, 2019 in which the Country Director summarized the events leading to the letter dated 9th August, 2019. The Director stated that the respondent valued the contribution the petitioner had made over the course of her employment.
56. That there was a position available for the petitioner with marginal changes when compared with the responsibilities she had been doing; that her position had not become redundant and continued to exist and the Country Director was available for any further consultations, or discussions on the matter. This wrap up by the Country Directors is marked "CT 13."
57. Three days later on 19th August, 2019, the petitioner submitted a resignation letter giving notice of 30 days. The petitioner requested for a waiver of the notice period and flexibility so that she could leave early. The petitioner thanked the County Director for his support and affirmed that her experience working for the Respondent had been beneficial and positive. The letter of resignation is marked "CT14."
58. On 22nd August, 2019, the letter of resignation was acknowledged and the petitioner's request for a waiver was granted. The response is marked "CT15."



59. On 26th August, 2019, a farewell party was held for the petitioner where she received gifts. Vide a letter dated 3rd September, 2019 marked “CT 16,” the petitioner was advised of her final dues which included, salary for August, 2019; salary up to 17th September, 2019, when would be the last day of employment of the petitioner and petitioner’s Pension Scheme contributions subject to the rules of the Scheme. Payment was subject to clearance by the petitioner with the respondent.
60. The final cheque was for Kshs 159,245.33. The claimant had served the respondent for a period of 10 years and her monthly pay as at the time of termination of employment was Kshs 395,442. There were no accrued leave days to the petitioner. The amount was paid to the petitioner’s account on 10th September, 2019.
61. The respondent attached “CT20.” which illustrates terminal benefits paid to persons whose positions had been abolished vide the organization - restructuring who had opted not to apply for new roles within the position. For example, one Samwel Kariuki Karanja who had a basic pay of Kshs 216,141 and had served the respondent for a period of 8 years was paid terminal benefits as follows:-
- (i) Gratuity calculated at 15 days salary for 8 years completed year of service. – (134.2) days, Kshs 1,339,242.89.
 - (ii) One month ex-gratia payment Kshs 216,141.00
 - (iii) One month notice pay –Kshs 216,141.00
- Taxable total: Kshs 1,771,524
- Final pay Kshs 1,246,003.09
62. The respondent denies that the petitioner was forced to resign and or that she was constructively and unlawfully dismissed from employment. That the petitioner’s reason for resignation was not based on the marginal changes to the responsibilities but personal aspirations. That the respondent took reasonable and logical steps to engage the petitioner on her grievance and proposals regarding her revised job description.
64. That the petition lacks merit and it be dismissed with costs.

Determination

65. The petitioner filed supplementary affidavit dated 29th September, 2022 in which she joined issues with the respondent and reiterated her case against the respondent. The petitioner prays that she be paid terminal benefits equivalent to that paid to fellow employees whose roles were abolished and declined to apply for new roles with the respondent including.
- (i) Gratuity calculated at 15 days salary for every completed year of service (10 year x 15 days x 18,257.17) Kshs 2,738,575.50.
 - (ii) Accrued annual leave days numbering 14.5 X 18,257.17, Kshs 264,729.
 - (iii) Three months’ salary compensation for the year 2019 Kshs 1,227,714.00.
 - (v) Damages for unfair termination (equivalent of 12 months’ salary) Kshs 4,910,856



66. The issues arising in this matter are:-

- (i) Whether the petitioner's termination of employment amounted to unlawful and unfair constructive dismissal.
- (ii) Whether the position formerly held by the petitioner was rendered redundant and was therefore at liberty not to accept newly created role and be treated equally with other colleagues who opted that route
- (iii) What remedies if any, is the petitioner entitled to.

67. In answer to issue (i) and (ii) above, the Court at the outset deems the following facts to have been proved by the petitioner:-

- (i) The petitioner was employed by the respondent on 20th July, 2009. The petitioner served the respondent continuously and progressively for a period of 10 years until 2nd August, 2019 when she tendered a letter of resignation.
- (ii) That at all material times, the petitioner held the position of Director of Investigations and Law Enforcement Development (DILED) which position she assumed upon promotion in the year 2015.
- (iii) It is not in dispute that the position of Director of Investigations and Law Enforcement Development (DILED) had professional, administrative and supervisory roles.
- (iv) The petitioner has proved on a balance of probabilities that the position of Director of Investigations and Law Enforcement Development (DILED) was abolished following a global restructuring exercise of the respondent which exercise affected the organogram of the respondent and staff. In this exercise all the organizations' administrative and operation levels were reduced resulting in abolition of some positions; designing of new positions; declaration of redundancies and re-employment of some staff in newly created positions and roles.
- (v) The Court finds that the position of Director of Investigations and Law Enforcement Development (DILED) was abolished as a result of the restructuring exercise and the petitioner was offered to take up new position titled Investigations and Law Enforcement Department (ILED).
- (vi) In the words of Charles Thiong'o, the Respondent's Senior Manager in charge of Administration and Human Resource at paragraph 8 of the replying affidavit.

“Her position of Director of Investigations and Law Enforcement Development (DILED) was going to transform so that the title holder (the petitioner) would function as a Subject Matter Expert (SME) to the Investigations and Law Enforcement Department (ILED)”



v. At paragraph 8(b), Mr. Thiong'o deponed as follows:-

“The Investigation and Law Enforcement Development (ILED) administrative and Supervisory responsibilities carried out under the position of Director of Investigations and Law Enforcement Development (DILED) would be redirected to another position to enable the holder of the position of Investigations and Law Enforcement Department (ILED) focus on their core responsibilities.”

The petitioner deemed the exclusion of all administrative and supervisory roles and the grading of Investigation and Law Enforcement Department (ILED) to be re-employment to a lower position than that she had held since the year 2015.

The petitioner, therefore asserted her right to be reinstated to her rightful position and the roles she had before realigned to her or else, she had the option to assume that her position had been abolished and that she had a right just like other staff to either accept or reject the new appointment.

- (viii) It is common cause that protracted engagement between the petitioner, the Country Director; the Human Resource and Administrative Manager and the petitioner's intended new supervisor – Director System Reform, Kenya, did not bear fruit leading the petitioner to tender her resignation.
- (ix) The Court finds that the petitioner desired to continue serving the respondent at the same level of seniority as she had served before and bearing equal administrative and supervisory roles as she had before, but a position with the roles she hitherto held had been abolished and was no longer available to her.
- (x) The Court finds that the contract of employment between the petitioner and the respondent had been frustrated by the abolition of the position of Director of Investigations and Law Enforcement Department (DILED) the petitioner held prior to the restructuring.
- (xi) The Court finds that the exercise carried out by the respondent was within the meaning of “redundancy” under Section 2 of the *Employment Act*, 2007 as read with Section 40 of the Act as follows:-

‘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 occupation and loss of employment.”

68. A careful consideration of the facts of this case leads the Court to the conclusion that the abolition of Director of Investigations and Law Enforcement Department (DILED) and creation of a new role of Lead Law Enforcement Development (LLED) constituted a significant job content and role hitherto held by the petitioner change to constitute a repudiation of the contract of employment between the two parties for operational reasons, at the instance of the employer and for no fault of the employee.



69. The Court further finds that the respondent is bound by the provisions of Section 40 of the *Employment Act*, 2007 in the circumstances of this case to:-
- a. Notify the petitioner and the Ministry of Labour of the intended abolition of her position within one month.
 - b. To discuss possibilities of retention of the petitioner in the newly created role to diminish the consequences of the abolition of office as happened in this case.
 - c. To pay the petitioner one month salary in lieu of notice and not for the petitioner to beg for waiver of the notice period.
 - d. To pay the petitioner in lieu of leave days not taken.
 - e. To pay the petitioner as happened in respect of days worked and
 - f. To pay severance pay to the petitioner equivalent to at least 15 days salary for each completed year of service. This is a right of the petitioner in the circumstances of this case just as it was the right of her colleagues who decided to take new roles and were declared redundant.
70. The petitioner was not bound to accept a new contract of employment with new terms.
71. In this regard, considering the definition of Constructive Dismissal as was set out in the case of Henry Ochido –vs- NGO Co-ordination Board [2015] supra
- “Constructive dismissal, occurs when an employee resigns because their employer's behaviour has become so intolerable or made life so difficult that the employee has no choice but to resign. Since the resignation was not truly voluntary, it is in effect a termination. For example, when an employer makes life extremely difficult for an employee to force the employee to resign rather than outright firing the employee, the employer is trying to effect a constructive discharge...”
72. The Court of Appeal decision in Coca Cola East and Central Africa Limited -vs- Maria Kagai Ligaga [2015] eKLR fits the circumstances of this case and the Court finds:-
- a. the fundamental and material terms of the contract of employment between the petitioner and the respondent were repudiated by the respondent for operational reasons.
 - b. The petitioner was entitled to regard her contract of employment to have been fundamentally breached by the respondent, however for operational reasons, and decline to take any other new job offer as she did.
 - c. The letter of resignation in the circumstances of this case was immaterial. The Contract of employment between the petitioner and the respondent had ceased to exist once her substantive position was abolished by the respondent for operational reasons.
73. Having found that the respondent had in fact caused the employment of the petitioner to be redundant, there is no evidence at all that the respondent followed the mandatory procedure under Section 40 of the *Employment Act*, in respect of the petitioner and her colleagues. The respondent did not adduce any evidence that it had notified the Ministry of Labour of the intended restructuring and possible laying off of staff and abolition of office.



74. The respondent rendered the entire process procedurally unlawful by its omission and in the case of Petitioner, the abolition of her office was substantially unlawful because no service pay was paid nor was she paid in lieu of notice of abolition of her position which rendered her employment redundant.
75. Accordingly, the conduct by the respondent violated Section 36, 40 and 45 of the Employment Act, 2007, rendering the separation with the petitioner unlawful and unfair.
76. The Court finds that in addition to payment of mandatory terminal benefits under Section 40 of the Act, the petitioner is also entitled to compensation in terms of Section 49(1) (c) and (4) of the Act.
77. In this respect, the petitioner had rendered excellent service to the respondent for a period of 10 years. The petitioner held a very senior position which she lost unprocedurally for no fault of her own. The petitioner suffered loss and damage due to the failure by the respondent to comply with the law in the abolition of her office rendering the termination of the employment of the petitioner unlawful and unfair.
78. The respondent had a valid reason to abolish the office held by the petitioner. The respondent mitigated the loss suffered by the petitioner by offering the petitioner alternative employment which the petitioner lawfully opted not to take. It was wrong for the respondent to command the petitioner to take up the new role which she regarded unsuitable and therefore did not take. The respondent was equally wrong in treating the petitioner differently from colleagues who had opted to leave immediately after their positions were abolished and their employment became redundant. There was nothing different with the case of the petitioner except that the respondent made a genuine effort to offer the petitioner a new contract of employment with different terms and conditions which the petitioner was not bound to accept.
79. The conduct by the respondent however was a genuine mitigation effect which should be considered favourably.
80. In the final analysis, the Court finds that the petitioner is entitled to the equivalent of three (3) months' salary in compensation for the unprocedural, unlawful, and unfair termination of her employment in the sum of Kshs 1,227,714,000.
81. Accordingly, judgment is entered in favour of the petitioner against the respondent as follows:-
- a. Kshs 1,227,714 in compensation.
 - b. One month salary in lieu of notice – Kshs 409,238
 - c. Severance pay in the sum of Kshs 2,738,575.50
 - d. 14.5 days accrued annual leave Kshs 264,729,000.
Total award Kshs 4,635,265.50
 - e. Interest at Court rates from date of judgment till payment in full.
 - f. Costs of the suit.

DATED AND DELIVERED AT NAIROBI (VIRTUALLY) THIS 9TH DAY OF MARCH, 2023.

MATHEWS N. NDUMA

JUDGE

Appearance



Mr. Kithi for Petitioner

Weru for Respondent

Ekale: Court Assistant

