Kimaru & 6 others v Nairobi Securities Exchange PLC (Employment and Labour Relations Cause 686 of 2019) [2023] KEELRC 1039 (KLR) (27 April 2023) (Judgment)

Neutral citation: [2023] KEELRC 1039 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

EMPLOYMENT AND LABOUR RELATIONS CAUSE 686 OF 2019

BOM MANANI, J

APRIL 27, 2023

BETWEEN

TOM KIMARU ..... 1ST CLAIMANT

BAHATI MORARA ..... 2ND CLAIMANT

CALEB MUSAU ..... 3RD CLAIMANT

NELLY ORWAYA ..... 4TH CLAIMANT

LILLIAN MBULA ..... 5TH CLAIMANT

WINNIE MBALUKA ..... 6TH CLAIMANT

SAMMY MUTUA ..... 7TH CLAIMANT

AND

NAIROBI SECURITIES EXCHANGE PLC ..... RESPONDENT

JUDGMENT

1. This is a suit challenging a redundancy process that affected the Claimants. Through the process, the Claimants lost their employment with the Respondent. It is their contention that the redundancy was done outside the law and should therefore be declared irregular.

2. The Respondent has opposed the claim. In the Respondent's view, the process was lawfully executed and was based on valid grounds.

Summary of Facts

3. It is not in dispute that all the seven Claimants were employees of the Respondent holding various positions. The parties agree that sometime around the close February 2019, the Respondent issued all the seven Claimants with notices for redundancy dated February 27, 2019. The notices informed the

Claimants that the Respondent had taken a decision to declare their respective positions redundant on account of a restructuring process that it was undertaking.

4. According to the notices, the Claimants' contracts of service were to all close on March 31, 2019. In effect, the Respondent expressed this to be the one month redundancy notice contemplated under section 40 (1) (b) of the *Employment Act*.

5. The Claimants have taken a divergent view about the notices. It is their case that the notices were not redundancy notices. Rather, they were termination notices, the redundancy decision having already been made.

6. The genesis of the dispute between the parties can be traced back to a meeting that is said to have been held by the Respondent's directors on February 18, 2019. On this date, the Respondent states that its Board of Directors met and passed a resolution to revise the Respondent's organizational structure in line with its emerging business needs. According to the Respondent, the proposed reorganization was informed by the need to eliminate functional overlaps and duplications within its structure in order to improve on performance.

7. According to the Respondent, the decision to restructure resulted in the merger of some functions whilst others were eliminated altogether. The process is said to have affected the positions of several employees including the Claimants. In particular, the positions held by the Claimants are said to have been eliminated.

8. The Respondent states that it got approval for this process from its regulator. The Respondent also notified the local labour office about the process and the fact that it was going to lead to job loss.

9. The Respondent avers that on February 25, 2019, its management held individual meetings with all the seven Claimants at which they were notified of the impending redundancy. It is only after these meetings of February 25, 2019 that the Claimants were issued with the redundancy notices dated February 27, 2019.

10. The Respondent posits that it worked out the redundancy dues payable to the Claimants in accordance with the applicable law. That indeed, the Claimants accepted the payments and most of them executed release vouchers shielding the Respondent from further claims on account of the impugned process. Only two of the Claimants did not sign these release vouchers.

11. The Claimants have challenged the fruitfulness of the meetings of February 25, 2019. It is their case that the meetings were merely cosmetic as the decision to terminate their services had already been taken.

12. The Claimants argue that the redundancy process was a sham. The procedure for redundancy provided for under section 40 of the *Employment Act* was not followed. The selection procedure for staff to be send home upon the redundancy declaration was not followed. The redundancy notice required by law was not issued to them. The Claimants also state that their positions were not actually lost following the purported redundancy. Most of them only had their titles changed.

Issues for Determination

13. The parties did not file a joint statement of agreed issues. Each one filed their own version of issues. After scrutinizing the individual sets of issues, I am of the considered view that the questions that fall for determination are as follows:-

    a) Whether the redundancy declaration was valid.

b) Whether the parties are entitled to the prayers in their pleadings.

Analysis

14. On the validity of a redundancy, two things are critical. These are: whether there was valid reason for the decision to declare the redundancy; and whether the redundancy was processed in accordance with fair procedure. These requirements are anchored on sections 40, 43 and 45 of the *Employment Act*.

15. In respect of validity of the reason for the process, the law acknowledges that an employer may make this decision based on his operational requirements. For the court to uphold the reason for redundancy, the employer must: state the operational requirement that necessitated process; and prove that the need was, as a matter of fact, obtaining at the time of the decision.

16. In the case before me, the Respondent pleads the need to reorganize its structure in order to optimize performance as the reason for the redundancy declarations. According to the Respondent, this need resulted in the positions that were held by the Claimants disappearing either as a result of merger of positions or their elimination.

17. In order to establish this fact, the Respondent provides a series of documentary evidence. First is a chart showing the Respondent's new organizational structure. By this the Respondent seeks to demonstrate that the positions the Claimants were hired for are no longer in its structure. Second are a series of correspondence between the Respondent and its regulator seeking approval for the process.

18. Whilst the Respondent has shared its alleged new organizational structure, it has not provided its redundant organizational structure. This would have been necessary to demonstrate which positions existed earlier and which ones have been created in their place. However, nothing much turns on this.

19. In my view, what is more critical is the interrelation between the chart aforesaid and the correspondence between the Respondent and its regulator. The primary letter is that one dated February 19, 2019. Page two of the letter sets out a list of the positions that were in existence at the time of the letter and the new positions that were to be introduced as a result of the restructuring process. It would be expected that all the new positions appearing in this letter would appear in the Respondent's new organizational structure as shown in the chart.

20. One of the positions that the Respondent proposed to establish is that of Chief Manager, Capitals Market. This was to follow the merger of the Business Development and Derivatives departments. However, the chart does not have this new position. Instead, it has a position described as 'Chief Manager, Derivatives Market'. It is not clear whether the two are different or one and the same. No explanation has been offered to explain this apparent discrepancy. This inconsistency in data raises doubts about the veracity of the Respondent's alleged new organizational structure.

21. Importantly, the Claimants are indicated to have been holding the following positions before the restructuring:

    a) Nelly Orwaya Senior Data Analyst.

    b) Tom Kimaru Issuer and Market Regulations Director.

    c) Bahati Morara Business Development and Commercial Director.

    d) Caleb Musau Operations and Technology Director.

    e) Lillian Kimeu Information Systems Auditor.

    f) Winnie Mbaluka IT Service Delivery Manager.

g) Sammy Mutua Surveillance Manager.

22. Of the seven positions, the positions of Senior Data Analyst and Information Systems Auditor are not indicated as some of the positions that were targeted for either merger or elimination in the Respondent's letter of February 19, 2019. It is incomprehensible how the Respondent can justify the elimination of the two positions when there is no evidence that they had been targeted for removal.

23. The letter by the Respondent dated February 20, 2019 does not help matters either. It suggests a form of fusion of functions that fall under these departments without indicating whether the departments had either been done away with or scaled down. It is unclear whether the Respondent's Chief Operating Officer (COO) was to directly assume all the functions under these departments thereby abolishing them or was to merely play a supervisory role over the scaled down departments handling the functions. The use of the terms 'oversight' 'oversee' and 'Housing' simultaneously creates ambivalence regarding whether there was a merger or scaling down of the functions to enable overall supervision by the COO.

24. On the other hand whilst the positions of Issuer and Market Regulations Director and Operations and Technology Director are indicated as transforming into 'Head, Regulatory Affairs' and 'Chief Operating Officer', the Respondent's letter of February 19, 2019 states that the change did not impact on the roles of the holders of the two offices. In effect, the Respondent was only changing the titles of the two positions. The positions were neither merged with others nor eliminated.

25. In effect, only the positions of IT Service Delivery Manager, Business Development and Commercial Director and Surveillance Manager were truly affected by the restructuring. The letter of February 19, 2019 shows that these positions disappeared after they were merged with other positions.

26. The net effect of the foregoing is that the Respondent has only managed to establish that the positions of the 2nd, 6th and 7th Claimants were genuinely affected by the restructuring process. On the material before me, there is no evidence that the positions held by the 1st, 3rd, 4th and 5th Claimants were lost as a result of the restructuring process. I am unable to rely on the Respondent's chart as evidence that these positions were lost because of the questions I have raised about the veracity of the chart which in my view affect its probative value.

27. With regard to the procedure adopted in processing the redundancy, the Claimants challenge the validity of the redundancy notices. I have looked at the notices issued to the parties dated February 27, 2019. Although they communicate the date that the Claimants' contracts were to come to a close and further speak to the terminal benefits that were to be paid to them, the notices are nevertheless redundancy as opposed to termination notices.

28. The notices were all expressed to run for a period of one month from March 1, 2019 to April 1, 2019. The notices are clearly titled 'notice of proposed redundancy'. Further, the notices clearly state that the Claimants were to work up to March 31, 2019. In this sense, the notices only communicated an intention to sever the employment relation on account of redundancy as from March 31, 2019. They were futuristic in nature.

29. In the case of *Cargill Kenya Limited v Mwaka & 3 others (Civil Appeal 54 of 2019) [2021] KECA 115 (KLR)* the employer issued the employees a notice which read as follows:-

'The purpose of this letter is to inform you that on account of the said redundancy, your employment will be terminated on account of redundancy with effect from February 28, 2015 in accordance with section 40 (1) of the *Employment Act*, 2007. Accordingly, you will be paid all your terminal dues as per the attached breakdown which includes one months' pay in lieu of notice, severance pay at the rate of

23 days for each completed year of service and pay on the accrued leave days in cash as provided under Section 40 of the *Employment Act*.'

30. In the case, the employees argued that this was not a redundancy notice. In their view, it was a notice for termination of employment. The Court of Appeal rejected this argument.

31. It is noteworthy that the objection by the Claimants to the redundancy notices dated February 27, 2019 is on all fours with the objection that the Court of Appeal rejected in the Cargill case. In the premises, I find that the notices issued to the Claimants dated February 27, 2019 were redundancy and not termination notices.

32. That said, section 40 (1) (a) of the *Employment Act* is clear on what a redundancy notice must address. It must speak to two things: the reason and extent of the proposed redundancy. The reason for the redundancy is the operational need that has necessitated the move to release employees. And the extent of the redundancy speaks to the number of employees that are likely to be affected in the process.

33. A careful scrutiny of the notices dated February 27, 2019 shows that they speak to the reason for the proposed redundancy. However, they are silent on the extent of the redundancy. The only time the Respondent addresses the question of the extent of the redundancy is perhaps when it was engaging the regulator to grant approval for the process. In the Respondent's letter to the regulator dated February 19, 2019, it is indicated that the redundancy was likely to affect eight (8) members of staff. However, this letter was not copied to the Claimants.

34. To the extent that the redundancy notices to the Claimants were silent on the aspect of the extent of the proposed redundancy, they were defective. In this respect, I agree with the Claimants' plea at paragraphs 15 and 31 of their Memorandum of Claim that the redundancy process did not adhere to the provisions of the law on redundancy.

35. As regards the notice to the local labour officer, there is evidence that this was issued. There is also evidence that it met the requirements with respect to duration of a redundancy notice. There is also evidence that the notice indicated the reasons for and extent of the proposed redundancy. Therefore, these notices to the labour office were valid.

36. The Claimants have also challenged the selection procedure that was adopted to isolate them from the rest of the Respondent's employees as the individuals to be released from employment. To begin with, the Respondent has not offered any evidence on the selection procedure it adopted to pick the Claimants for release. Neither has the Respondent suggested that the issue of selection was unnecessary in the circumstance of its case.

37. Although counsel for the Respondent submit that the factors that guided the selection process are contained in the Respondent's exhibits marked 1 to 9, none of these documents speak to the question of the selection process. None of the documents speak to the selection denominators that are provided for under section 40 (1) (c) of the *Employment Act*.

38. How did the Respondent for instance settle on the Claimants serving in the positions of Senior Data Analyst and Information Systems Auditor for release when their departments and positions were not in the schedule of positions to be scrapped as per the Respondent's letter of February 19, 2019?

39. As seen earlier in the decision, the positions of Issuer and Market Regulations Director and Operations and Technology Director were not scrapped or merged with other positions. Only their titles changed to Head, Regulatory Affairs and Chief Operating Officer. According to the Respondent's letter of February 19, 2019, the functions of these two positions did not change. Therefore, it was expected

that the occupants of these two positions would remain in office unless replaced on account of the parameters under section 40 (1) (c) of the *Employment Act* such as seniority, skill and ability.

40. In the Respondent's letter to the regulator dated February 27, 2019 and the subsequent public notice produced in evidence, it is indicated that these two renamed offices of Head, Regulatory Affairs and Chief Operating Officer somehow got new occupants without clarity on how the transition occurred. From February 27, 2019, the new office holders for the positions were David Wainaina and Loise Wangoi. How did the Respondent come to the conclusion that these already existing but renamed positions would now be held by these two persons as opposed to the previous office holders? Was the decision on account of the seniority of the individuals involved or was it on account of their skill, ability and reliability? The answers to these questioned cannot be located in the documents filed in evidence by the Respondent.

41. The law on selection of employees to be released on account of redundancy is now settled. The general policy is that the employer shall apply the first in last out principle. However and for cogent and objectively verifiable reasons, the employer may depart from this principle and undertake the selection process on the basis of the skill, ability and reliability of the employees involved.

42. In undertaking the selection process, the employer is bound to apply the selection denominators set out under section 40 (1) (c) of the *Employment Act*. I do not think that the law contemplates the employer straying outside of these denominators to create and apply his own denominators that are not recognized under the Act as suggested by the Respondent's counsel.

43. Whichever way the employer elects to go under section 40 (1) (c) of the *Employment Act*, the process must be open and capable of verification by a third party in order to prevent its abuse by the employer. Justice Magara (retired) spoke to this requirement in the case of *Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others [2014] eKLR* when he indicated as follows:-

'I do not agree with the learned Judge that the 'last-in-first-out' principle in Section 40 (1) (c) must always be employed. The employer can use all or any of the criteria in that paragraph. In the present technological age, if the 'last-in-first-out' principle is held to be mandatory, it may defeat the employer's objective of employing modern technology to carry out his business because it may be that the last employees to be employed, who according to this principle should be the first to exit, are the ones with the technological knowhow that the employer requires. All this notwithstanding, however, in a nutshell, I find that the appellant employed an opaque criteria in the selection of the retrenched employees that did not meet the statutory threshold.'

44. In its submissions, the Respondent implies that it was entitled to depart from the selection principles under section 40 (1) (c) of the *Employment Act* in selecting the individuals to be released. This is doubtful.

45. Proceeding on the aforesaid premise, I think that the Respondent's reason for declaring the impugned redundancy was not sound in law, at least in respect of the 1st, 3rd, 4th, 5th Claimants. In respect of the process, the redundancy fails the validity test in its entirety on account of the propriety of the redundancy notice and the selection procedure. The impugned redundancy is thus declared irregular and unlawful.

46. The next question for determination relates to whether the parties are entitled to the prayers in their pleadings. Having found the redundancy to be invalid, the Claimants should ordinarily be granted an order for compensation for unlawful termination of their contracts of employment. However, the Respondent has raised a matter that could disentitle a majority of them from claiming compensation: the matter relating to the discharge vouchers that were signed by some of the Claimants.

47. Apart from Tom Kimaru and Caleb Musau, the other five Claimants signed vouchers releasing the Respondent from further liability in respect of the redundancy process. The release voucher which is common to the five reads as follows:-

> ' I, hereby confirm that all payments due to me arising out of my employment contract and termination thereof with the Nairobi Securities Exchange PLC have been fully and finally settled.
>
> I confirm that I have no further claim against the Nairobi Securities Exchange or its employees arising out of my employment contract.'
>
> Signed..... Date.....'

48. The Respondent argues that once the five Claimants signed this instrument and received their terminal dues, this closed the matter. The court has no right to reopen it.

49. On the other hand, the five Claimants' Advocates have maintained that their clients' signatures on the instruments were procured through undue influence. Therefore, they are not bound by them.

50. In the witness statement filed by the Respondent's witness dated November 7, 2019, the witness stated as follows:-

'Having received their terminal dues, the Claimants successfully cleared with the Respondent save for the 1st and 3rd Claimants who declined to do so despite having committed in writing and having received their terminal dues (see Claimants' clearance forms at page 37-71 of the Respondent's Bundle of Documents). I am also aware that the Respondent issued Certificates of Service to the Claimants. The Claimants are thus not entitled to the orders they seek from this Honourable Court as pleaded in paragraph 4 of the Memorandum of Claim.'

51. Despite this averment, the five Claimants did not seek leave of the court to introduce additional witness statements to explain the circumstances under which they signed the release vouchers. They did not seek to amend the Statement of Claimant to plead that the documents were signed either under duress or undue influence.

52. In their evidence in court on November 9, 2022, the five were questioned on this issue. This is what can be extracted from their testimony on the issue.

53. During her cross examination, Bahati Morara stated that she read the schedule containing computation of her terminal dues and understood it. She confirmed that she was paid her final dues as per the computation. She confirmed that she signed the release voucher for the Respondent. She stated that she was alone when she signed the release voucher. In re-examination she reiterated that she had received her terminal dues.

54. Nelly Orwaya stated that she was given the letter containing the workings of her terminal dues. She confirmed the figure as correct. She then was paid the dues in full. She confirmed that she signed the clearance and discharge form. She confirmed that by signing the form, she discharged the Respondent. She confirmed signing the form before the HR of the Respondent but after she had read it. In re-examination, she said she was told that she will not be paid unless she signed the form.

55. Lillian Mbula confirmed that she also was given the workings of her final dues which she confirmed as correct. She then signed both the sheet showing the computation and the clearance and discharge voucher. She said she was paid her terminal dues one month after she had signed the release voucher.

She however confirmed that she understood that by signing the release voucher, she waived the right to pursue further claims against the Respondent.

56. Winnie Mbaluka confirmed that she was given a schedule of her dues and confirmed it as correct. She signed the document. She confirmed that she also signed the clearance and release voucher for the Respondent. The Claimant stated that she signed the form while outside of the Respondent's premises. After signing it, she gave it to a rider to deliver it to the Respondent on her behalf. She understood the requirement to sign the form as a mandatory one. She however stated that the Respondent paid her the final dues a couple of days before she signed the release voucher.

57. Sammy Mutua indicated that he was also given a schedule of his final dues which he confirmed as correct before signing it. He signed the release voucher before he was paid. He said he does not recall where he signed the documents from but confirmed he had no issue with them.

58. Against this evidence, the Claimant's advocates sought to address the court on the binding nature of the various release vouchers. In their submissions, they argued that the vouchers were executed under undue influence. That the Claimants were made to understand that payment of their final dues was conditional on them signing the vouchers. That by Respondent tying the clearance forms to the vouchers, it became impossible for the Claimants to separate the two processes so that they are paid against executing the clearance forms without at the same time releasing the Respondent from further claims.

59. The legal position on documents executed between parties including discharge vouchers is that they are in the nature of a contract. In, *Saimon Ntasikoi Noonkanas v Resolution Insurance Limited [2021] eKLR* the learned Judge quoting with approval other decisions observed as follows regarding the contractual nature of discharge vouchers:-

'In this case a contract to settle the plaintiff's claim under the policy was clearly made. The sending of a completed discharge voucher to the plaintiff was plainly an offer. His signing and returning the same was clearly an acceptance. The parties had to all outward appearances settled the claim. The contract is good unless and until it is set aside for failure of some condition which the existence of the contract depends or for fraud or on some equitable ground.'

60. My understanding of the law on this matter is that if a party alleges undue influence or fraud as a vitiating element for a contract, he must plead this in his pleadings and specifically prove it. Such claim cannot proceed on the basis of mere evidence that is unsupported by pleadings. The essence of this requirement is so as to give the opponent an opportunity to appropriately give his response to the assertions.

61. In *Patel & another v MJC & another (Suing as the guardians of PJP) (Civil Appeal 182 of 2019) [2022] KECA 364 (KLR)* the Court of Appeal stated that allegations of undue influence must be proved to a higher standard than a balance of probabilities. From the record, I do not understand any of the five Claimants as having complied with these requirements of law in relation to the allegation of undue influence.

62. Importantly, the matter of undue influence appeared to have received prominence from the submissions by the Claimant's counsel as opposed to the evidence by the Claimants. As appears from the previous parts of this decision, most of the five Claimants did not allege undue influence against them at the trial. From the record, only Nelly Orwaya and Winnie Mbaluka testified on this issue at the stage of re-examination.

63. While Winnie Mbaluka indicated that she understood signing of the voucher to have been mandatory, she confirmed that she was paid her terminal dues before she appended her signature on the release

voucher. Therefore, it is farfetched to suggest that she signed the document under undue influence arising from the need to be paid her dues.

64. As for Nelly Orwaya, she asserted that she was told that if she did not sign the form, she would not be paid her terminal dues. Beyond this bare assertion, there was no cogent evidence to establish undue influence to the standard referred to in Patel & another v MJC & another (Suing as the guardians of PJP) (Civil Appeal 182 of 2019) [2022] KECA 364 (KLR). Importantly, this Claimant's evidence must be evaluated in the context of the evidence by the other Claimants on the subject. If indeed it is true that payment of the terminal benefits was conditional upon the Claimants executing the discharge vouchers, how can we account for the fact of Winnie Mbaluka signing the release voucher a couple of days after she had been paid her dues? How can we account for the payments to Tom Kimaru and Caleb Musau even after the two had elected against signing the release vouchers?

65. Clearly, the suggestion that the Claimants were placed under undue influence in order to sign the release vouchers is at cross-purposes with the evidence on record. In the premises, I have to reject the submission that the five Claimants signed the release vouchers under undue influence.

66. What then is the effect of those vouchers on the attempts by the five Claimants to reopen their quest for compensation for wrongful termination? The position in law is that unless successfully assailed, a signed discharge voucher will constitute a bar to the parties bound by it from seeking further redress in respect of the matters covered under the voucher.

67. Whilst existence of the voucher in an employment dispute does not prevent the court from interrogating the lawfulness or otherwise of the decision to terminate the contract of employment, it may, when shown to have been voluntarily executed, oust the court's mandate to reopen the question of compensation in the dispute. This position has been expressed in a plethora of decisions. These include: *Thomas De La Rue (K) Ltd v David Opondo Omutelema [2013] eKLR*, *Costal Bothers Limited v Kimathi Mithika [2018] e KLR*, *Sheila Kiplangat v Unliver Tea Kenya Limited [2022] eKLR* and *Trinity Prime Investment Limited v Lion of Kenya Insurance Company Limited [2015] eKLR*.

68. In Thomas De La Rue (K) Ltd v David Opondo Omutelema [2013] eKLR, the Court of Appeal expressed itself on the matter as follows:-

'We would agree with the trial court that a discharge voucher per se cannot absolve an employer from statutory obligation and that it cannot preclude the Industrial Court from enquiring into the fairness of a termination. That is however, as far as we are prepared to go. The court has, in each and every case, to make a determination, if the issue is raised, whether the discharge voucher was freely and willingly executed when the employee was seized of all the relevant information and knowledge.'

69. InTrinity Prime Investment Limited v Lion of Kenya Insurance Company Limited [2015] eKLR, the court had the following to say on the matter:-

'The execution of the discharge voucher, we agree with the learned judge, constituted a complete contract. Even if payment by it was less than the total loss sum, the appellant accepted it because he wanted payment quickly and execution of the voucher was free of misrepresentation, fraud or other.'

70. In Costal Bothers Limited v Kimathi Mithika [2018] e KLR, the Court of Appeal expressed itself on the matter as follows:-

'Whether or not a settlement agreement or a discharge voucher bars a party thereto from making further claims depends on the circumstances of each case. A court faced with such an issue, in our view, should address its mind firstly, on the import of such a discharge/agreement; and secondly, whether the same was voluntarily executed by the concerned parties.'

71. In the case before me and contrary to the position taken by counsel for the Claimants in his final submissions, there is no evidence that the Claimants were exposed to undue influence whilst signing the discharge vouchers. Whatever Nelly Orwaya alluded to in her evidence, in my view, does not meet the threshold of the evidence required to establish a plea of undue influence. In any event, the five Claimants who were on notice from November 2019 that the Respondent had questioned the competence of their claims on account of their having been paid terminal dues and having released the Respondent from further claims did not amend their pleadings to challenge the circumstances under which they signed the vouchers. As for the other four Claimants (Bahati Morara, Lillian Mbula, Winnie Mbaluka and Sammy Mutua), the evidence on record does not point to coercion against them at the point of signing the vouchers.

72. On the basis of the evidence on record, the court finds that the discharge vouchers executed by the five Claimants (Bahati Morara, Nelly Orwaya, Lillian Mbula, Winnie Mbaluka and Sammy Mutua) were voluntarily signed. Through the vouchers, these Claimants absolved the Respondent of further liability for claims arising from their terminated employment relationship. In the absence of proof of any of the vitiating elements of a contract, I find that I have no power to reopen the question of compensation between the parties. In the premises, I dismiss the prayers for compensation for the five Claimants to wit: Bahati Morara, Nelly Orwaya, Lillian Mbula, Winnie Mbaluka and Sammy Mutua.

73. With respect to Tom Kimaru and Caleb Musau, the two did not execute discharge vouchers. The court, having reached the conclusion that their contracts of service were improperly terminated, is entitled to consider whether they ought to be compensated in accordance with the applicable law.

74. Once a redundancy process is nullified for want of valid reason or for failure to undertake the process in accordance with due procedure, the aggrieved party may seek compensation for unlawful termination in terms of section 49 of the *Employment Act*. In assessing the compensation to the aggrieved employee, the court is obligated to take into account the guidelines under the section. These include:the circumstances in which the termination took place; the employee's length of service with the employer; the reasonable expectation of the employee as to the length of time for which his employment with that employer might have continued but for the termination; the opportunities available to the employee for securing comparable or suitable employment with another employer; and any compensation, including ex gratia payment, in respect of termination of employment paid by the employer and received by the employee.

75. From the evidence presented, the circumstances leading to the separation of the parties cannot be blamed on the Claimants. Yet, the law entitles an employer to reorganize his enterprise in order for it to remain viable. In the premises, I think that absent the flaws in the process that I have mentioned in this judgment, it is not sensible to apportion blame for the unfortunate separation on either of the parties. This reality should impact on my final decision on the compensation to be granted to the two Claimants, if any.

76. I note that at the time of their separation, the two Claimants had served the Respondent for some considerable period of time. Caleb Musau had been with the organization from March 7, 2013, approximately six years. Tom Kimaru had worked for the organization from September 2004, approximately fifteen years.

77. I also take note of the fact that the Respondent made payment of terminal dues to all the Claimants. The payments were computed on scales that were higher than the minimum scales under section 40 of the *Employment Act*. Under section 49 of the Act, I have a duty not to turn a blind eye to this reality.

78. Taking the above factors into consideration and acknowledging that the function of the court is not to enrich parties but grant them reliefs that are just in the circumstances of their case and taking cognizance of paragraph 43 of the Respondent's closing submissions, I am minded to grant the two Claimants (Tom Kimaru and Caleb Musau) compensation for unfair termination that is equivalent to their monthly gross salaries for four months. I reckon that the Respondent having already made substantial payment to the Claimants under the redundancy procedure, it will be inequitable to make any further awards that appear exaggerated. Accordingly, the award is as follows:-

    a. Tom Kimaru Kshs 785,410 x 4 = Kshs 3,141,640

    b. Caleb Musau Kshs 796,920 x 4 = Kshs 3,187,680

79. Having regard to the matters discussed above and in view of the definitive nature of section 49 of the *Employment Act*, I decline to grant any of the other prayers by the two Claimants.

80. I award the 1st and 3rd Claimants interest on the amount awarded from the date of this judgment.

81. I also award the 1st and 3rd Claimants the costs of the case.

82. The award is subject to the applicable statutory deductions.

Summary of the Findings and Determination

a) The Respondent's decision to declare the Claimants redundant is declared irregular and unlawful.

b) Save for the declaration in a) above, the other claims by the 2nd, 4th, 5th, 6th and 7th Claimants for compensation and other forms of damages are dismissed.

c) The 1st and 3rd Claimants are awarded compensation for unlawful dismissal as follows:-

i. Tom Kimaru Kshs 785,410 x 4 = Kshs 3,141,640

ii. Caleb Musau Kshs 796,920 x 4 = Kshs 3,187,680

d) The 1st and 3rd Claimants are awarded interest on the amount awarded from the date of this judgment.

e) The 1st and 3rd Claimants are awarded the costs of the case.

f) The award is subject to the applicable statutory deductions.

Dated, signed and delivered on the 27th day of April, 2023

B. O. M. MANANI

JUDGE

In the presence of:

..... for the Claimants

.....for the Respondent

ORDER

In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

B. O. M MANANI