



**Mwangi v Wells Fargo Limited (Cause E696 of 2020)  
[2023] KEELRC 1318 (KLR) (23 May 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1318 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E696 OF 2020**

**JK GAKERI, J  
MAY 23, 2023**

**BETWEEN**

**HENRY NDERITU MWANGI ..... CLAIMANT**

**AND**

**WELLS FARGO LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The Claimant commenced this suit by a Statement of Claim dated 27<sup>th</sup> October, 2020 alleging unfair termination and breach of employment contract.
2. The Claimant states that he was employed by the Respondent under a written contract dated 19<sup>th</sup> September, 2012 as Operations Manager-VIT and served the Respondent diligently for 8 years until his employment was terminated on 30<sup>th</sup> July, 2020 on account of redundancy which it did not meet the requirements of Section 40(1) of the *Employment Act*, 2007.
3. That the Respondent neither issued him nor the Labour Office the requisite notice of redundancy for discussions on how to minimize the effect of redundancy and there were no consultative meetings.
4. That after he was issued with the termination letter, he was asked to leave his office as no work would be required of him, which he construed as termination of employment and no regard was had to job evaluation or a selection criteria.
5. It is the Claimant's case that he was unfairly targeted and discriminated by the Respondent so as to retain an expatriate employee who had served for a shorter duration than him and thus violated his constitutional rights.
6. That when he visited the Respondent's office to collect dues, he was issued with a letter purporting to terminate his already terminated employment and was thus not a termination notice as no consultations took place and he had been instructed to look for alternative employment.



7. As regards breach of the employment contract, the Claimant alleges that Clause 4(a) of the contract of employment provided that;

“ . . . remuneration will be subject to review after completion of each year of service.”
8. That he previously worked as Branch Manager in Embu but resigned at the instigation of the Managing Director to take up the position of Operations Manager-VIT at the Head Office and the contract dated 19<sup>th</sup> September, 2012 was negotiated and agreed upon.
9. That he was confirmed by letter dated 6<sup>th</sup> May, 2013 but no salary view took place except in 2015 when it was increased at the rate of 14% and was thus owed Kshs 12,156,579/= as extra salary had the salary been reviewed at 14% per year from 2014 which he tabulates in paragraph 7.7 of the statement of claim and was thus entitled to the sum.
10. That in addition to the final dues paid on 31<sup>st</sup> August, 2020, he was entitled to the following;
  1. Redundancy Kshs 2,697,292.81
  2. Notice period Kshs 1,021,701.59
  3. Leave Kshs 22,704.48Total Kshs 3,741,698.88
11. The Claimant prays for;
  - i. Declaration that termination of employment was unfair and unlawful.
  - ii. Damages for wrongful/unfair termination at Kshs 7,506,804/= being 12 months salary.
  - iii. The difference between severance pay paid and what ought to have been paid Kshs 2,697,292.81.
  - iv. The difference between the amount paid as notice pay and what ought to have been paid Kshs 1,021,701.59.
  - v. The difference between the amount paid as unused leave days and what ought to have been paid Kshs 22,704.48.
  - vi. Interest on (ii), (iii), (iv) and (v) above at commercial rates.
  - vii. Costs of this suit.
  - viii. Any other relief that the court may deem just and fit to grant.

### **Respondent's Case**

12. The Respondent avers that its management undertook a study of its operations with a view to restructure its operations and optimize efficiency and service delivery and the need to restructure was essential and staff reduction was inevitable and the Claimant's role was affected by the redundancy.
13. It is the Respondent's case that its Human Resource Director and the General Manager-CIT convened a meeting with the Claimant where he was notified of the re-organization and redundancy and a notice was issued to the Claimant dated 30<sup>th</sup> July, 2020.
14. It denies having ordered the Claimant to leave his office or terminating his employment unfairly or unlawfully. The Claimant was simply accorded time to consult and manage the impending change.



15. That the notice dated 30<sup>th</sup> July, 2020 was a redundancy notice which set the process in motion and employment would cease on 31<sup>st</sup> August, 2020.
16. That no meeting with the Labour Officer was necessary and copies of the letter to the Labour Office was availed which was also copied to the union.
17. That the Claimant's role as Operations Manager was abolished in the new structure and there was no suitable position for him to apply and no job evaluation or selection criterion was necessary.
18. That the letter of 31<sup>st</sup> August, 2020 merely notified the Claimant that his contract of employment had come to an end and he was paid as follows;
  - i. Salary for the month of August 2020 Kshs 357,000/=
  - ii. 3 months basic pay in lieu of notice Kshs 855,000/=
  - iii. Severance pay at 18 days per year Kshs 1,353,750/=
  - iv. 2 days unused leave Kshs 19,000/=
19. The Respondent denies that it targeted or discriminated the Claimant and no expatriate held the position of Operations Manager as it was abolished.
20. It also denies having instructed the Claimant to seek alternative employment.
21. It is the Respondent's case that salary reviews are based on performance of the business and there was no automatic pay rise and the Claimant's salary was reviewed in 2015 and 2020 and no staff salary was reviewed when business was not doing well.
22. That the Claimant did not raise the issue of review at any time and thus waived the right and claims before 2018 were extinguished by Section 90 of the Act.
23. The Respondent prays for dismissal of the suit with costs.

### **Claimant's Evidence**

24. The Claimant adopted the written statement which rehashes the contents of the statement of claim.
25. In his oral testimony, the Claimant maintained that he did not attend the meeting alleged to have taken place on 30<sup>th</sup> July, 2020. It was also his testimony that he was entitled to annual salary reviews and was claiming the difference.
26. On cross-examination, the Claimant testified that he was the only Operations Manager VIT of the Respondent holding the position and did not attend a meeting on 30<sup>th</sup> July, 2020 and received the notice of intention of termination on account of redundancy on 1<sup>st</sup> August, 2020 on a Saturday in the Office of the Director Human Resource and no meeting took place.
27. That he did not reach out to anyone as the die had been cast and the letter outlined the payments he would receive.
28. The witness confirmed that the notice addressed to the Labour Office was dated 30<sup>th</sup> July, 2020 and the schedule included his name.
29. It was his testimony that if he had any question, he had the opportunity to raise the same with the Respondent.



30. That a termination letter was issued on 31<sup>st</sup> August, 2020 and he acknowledged receipt and received terminal dues and signed the discharge certificate dated 31<sup>st</sup> August, 2020 and receipt of Kshs 1,920,275/=.
31. The witness confirmed that he read and understood that there would be no further dues or payments due to him.
32. The witness insisted that he was technically terminated from employment.
33. That Mr. Peter Walters was retained as the General Manager as an expatriate but the witness had no evidence to prove that he was a foreigner.
34. That he construed paragraph 4(a) of the contract dated 19<sup>th</sup> September, 2012 to mean salary increment but had no Evidence that he had raised the issue previously.
35. On re-examination, the witness confirmed that the Claimant's salary at exit was Kshs 285,000/= having started at Kshs 250,000/=.

### **Respondent's Evidence**

36. RWI testified that there was a meeting on 30<sup>th</sup> July, 2020 to explain to the Claimant the decision of the Board and that it would affect him but the Claimant stormed out of the meeting and came back on 1<sup>st</sup> August, 2020 and did not sign the minutes.
37. That the witness called the Claimant to collect the letter of intention to terminate his employment on account of redundancy.
38. That the Claimant had not raised the issue of salary review with him or any other person.
39. On cross-examination, the witness confirmed that he joined the Respondent in November 2015 as the Group Human Resource Director.
40. The witness stated that he was aware of the clause on salary review and the word used is "will" as opposed to shall.
41. That he convened the meeting on 30<sup>th</sup> July, 2020 and it had three attendees.
42. The witness stated that the Claimant stated nothing during the meeting and he did not capture what the General Manager stated yet he did.
43. That the General Manager took the minutes, scribbled some notes by hand and returned them to the witness who signed before he left the office.
44. That he already had the letter dated 30<sup>th</sup> July, 2020 as it was ready and there was no other communication from the Respondent and the issue regarding the Claimant's redundancy had been determined.
45. On re-examination, the witness testified that he called the Claimant to attend the meeting on 30<sup>th</sup> July, 2020. It was his testimony that the salary may remain the same after review.
46. That the meeting started at 4.00 pm and ended at 4.30 pm.

### **Claimant's Submissions**

47. Counsel for the Claimant isolated three issues for determination, namely;



- i. Whether the Respondent met the threshold of procedural fairness tests of Section 40 read together with 45(2) of the *Employment Act*, 2007.
  - ii. Whether the Claimant was entitled to annual salary review.
  - iii. Whether the Claimant merits the reliefs sought.
48. As regards the 1<sup>st</sup> issue, counsel submitted that there were no consultations prior to 30<sup>th</sup> July, 2020 and no selection criteria.
  49. Counsel urged that although an employer may declare redundancies, the same must pass the fairness test.
  50. Reliance was made on the sentiments of Maraga JA (as he then was) in *Kenya Airways Ltd V Aviation and Allied Workers Union Kenya & 3 others* (2014) eKLR.
  51. That the Claimant had denied that there was a meeting on 30<sup>th</sup> July, 2020 and received the letter on 1<sup>st</sup> August, 2020.
  52. That although RWI testified that the meeting was “open and candid . . .” the minutes did not reflect the candid and open discussion as they did not capture the sentiments of the General Manager and the Claimant.
  53. Counsel submitted that the witnesses’ statement that the Claimant stated nothing at the meeting was not borne by facts.
  54. The witness could not recall who took the minutes of the meeting and how but made reference to the General Manager scribbling notes by hand.
  55. Counsel further submitted that the Respondent’s evidence that the Claimant stormed out of the meeting was a fabrication.
  56. That the Claimant was not informed of the alleged meeting.
  57. That the decision to declare the Claimant redundant had already been made and the Claimant was merely informed of the impending cessation of employment.
  58. Counsel submitted that the Respondent’s letter dated 30<sup>th</sup> July, 2020 demonstrated that it was merely ticking the boxes having admitted that the letter set in motion the process.
  59. Counsel urged that consultations were part of the legal framework on redundancy and the Respondent had no intention of engaging in consultations as its letter of 30<sup>th</sup> July, 2020 shows and RWI confirmed that none took place.
  60. That the Respondent had no selection criteria to demonstrate that the redundancy was fair or objective.
  61. The decision in *Judy Gakii Njeru V Wananchi Group (K) Ltd* (2021) eKLR was cited in support as was the decision in *Onesmus Kinyua Magoiya V Prudential Life Assurance Kenya* (2022) eKLR.
  62. Counsel submitted that the two organograms on record were undated and had no insignia to show that they were by or from the Respondent and had not even been shared with the Claimant and there was no evidence that the Claimant could not perform any other role.
  63. As regards salary review, counsel submitted that Clause 4(a) of the Claimant’s contract of employment was clear on review after each year of service. That the Respondent breached the contract of employment by reviewing the remuneration once in 8 years.



64. Counsel relied on the Oxford Dictionary for a definition of the term review as to “carefully examine or consider something again especially so that you can decide if it is necessary to make changes” to urge that a review could neither have been negative nor constant.
65. Counsel submitted that the Respondent’s response that review was dependent on business performance was an attempt to rewrite the contract and no evidence was adduced of the company’s performance in 2015.
66. On reliefs, counsel argued that since the Claimant had shown that his termination was unfair both substantively and procedurally, he was entitled to the reliefs under Section 49(1)(c) of the Employment Act, 2007 and relied on the decision in KUDHEIHA V Nairobi Hospital (2022) eKLR.
67. That the Respondent was bound by the terms of the contract to review the Claimant’s salary upwards and was thus liable for breach of contract.

### **Respondent’s submissions**

68. Counsel for the Respondent isolated the discharge certificate as a preliminary issue for determination as it contained the words “I confirm that there are no further dues or payments due to me.”
69. The decisions in Coastal Bottlers Ltd V Kimathi Mithika (2018) eKLR, Joseph Chumba V Wells Fargo Ltd as well Alfred Nzomo Kithusi V Hillcrest Investments Ltd (2021) eKLR among others were cited to urge that the Claimant waived all claims for further compensation and the suit was a non-starter.
70. Relatedly, the Respondent’s counsel submitted on compliance with the provisions of Section 40 of the Employment Act, 2007, whether the Claimant’s employment was terminated on 30<sup>th</sup> July, 2020 and entitlement to reliefs.
71. On the first issue, counsel submitted that in 2020, businesses faced unprecedented hardships which forced them to make adjustments which explained the Respondent’s restructuring of its operations, that roles were consolidated and others abolished.
72. That the issue of selection criteria did not arise since the Claimant was the only Operations Manager and would have no duties after the office was abolished.
73. Counsel invited the court not to consider the Claimant’s submissions with regard to the two organograms on record as the issue was being raised for the first time and did not object to their production.
74. Counsel further submitted that the reasons and details of the redundancy were explained to the Claimant on 30<sup>th</sup> July, 2020.
75. Counsel urged that an employer had the right to restructure/re-organize its operations without the court’s interference.
76. As regards the notice of redundancy, counsel submitted that the Respondent called the Claimant for a meeting on 30<sup>th</sup> July, 2020 and the notice complied with the terms of the contract of employment and the meeting took place and the Claimant did not sign the minutes as he stormed out of the meeting.
77. That the General Manager took the minutes by “scribbling on his computer.”
78. That the notice to the Labour Officer had the Labour Officer’s stamp of acknowledgement dated 30<sup>th</sup> July, 2020.
79. That the Claimant collected the letter on 1<sup>st</sup> August, 2020 after he was called to collect the same.



80. Counsel urged that the requirement of notice was complied with.
81. As regards consultations, counsel urged that there was no requirement for consultations between the parties before the notice was issued citing the sentiments of the court in *Kenya Airways Ltd V Aviation and Allied Workers Union Kenya & 3 others* (*Supra*).
82. That the Claimant was not required to work after 30<sup>th</sup> July, 2020 but was free to consult his managers on the impending redundancy.
83. That the Claimant could not argue that there were no consultations.
84. Counsel urged that the Claimant confirmed the redundancy package and was paid in full the sum of Kshs 1,920,275.00 and termination of the Claimant's employment on account of redundancy was fair.
85. On termination of employment, counsel submitted that the Claimant adduced no evidence that his employment was terminated on 30<sup>th</sup> July, 2020 since he received a notice on redundancy on 1<sup>st</sup> August, 2020 and received the salary for August 2020.
86. As regards the reliefs sought, counsel urged that the declaration sought had no basis as termination was on account of redundancy and no damages were due since the termination of employment was fair.
87. Finally, counsel urged that if the court found the termination of the Claimant's employment unfair, two month's salary would be sufficient as was the case in *Dorcas Kemunto Wainaina V IPAS* (2018) eKLR.

### **Findings and Determination**

88. The issues for determination are;
  - i. Whether the Claimant waived his right to make further claims against the Respondent.
  - ii. Whether termination of the Claimant's employment on account of redundancy was fair.
  - iii. Whether the Claimant is entitled to the reliefs sought.
89. As to whether the Claimant waived his right to pursue further claims against the Respondent on account of the discharge certificate on record, the Respondent's counsel urged that the Claimant's instant case was a non-starter as he had waived his right to claim further dues.
90. Counsel relied heavily on statement that "I confirm that there are no further dues or payments due to me."
91. According to counsel, the Discharge Certificate was a discharge voucher or settlement agreement.
92. The law on the effect or implications of discharge vouchers as settlement agreements is well articulated in judicial decisions.
93. In *Thomas De La Rue (K) Ltd V David Opondo Omutelema* (2013) eKLR, the Court of Appeal stated 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.”

94. Similarly, in *Damondar Jhabhai & Co. Ltd and another v Eustace Sisal Estate Ltd* (1967) EA 153, the Court of Appeal stated;

“The function of courts is to enforce and give effect to the intention of the parties as expressed in their agreement. In the English Court of Appeal case above-*Global Motors Inc & others v TRW Lucas Electrical Steering Ltd & others* (Supra), Lord Beatson stated as follows;

“Absent statutory or common law restrictions, the general principle of the English law of contract is that parties to a contract are free to determine for themselves what obligations they will accept. The parties have the freedom to agree whatever terms they choose to undertake and can do so in a document by word of mouth or by conduct.”

95. Equally, in *Coastal Bottlers Ltd v Kimathi Mithika* (Supra) where the Respondent had executed a discharge voucher to the effect that he had received the amount of Kshs 1,516,281/= as full and final payment due to him from the Respondent and confirmed that he had no further claims against the company “whatsoever”, the Court of Appeal held:

In our minds, it is clear that the parties had agreed that payment of the amount stated in the settlement agreement would absolve the appellant from any further claims under the contract of employment and even in relation to the Respondent’s termination. It is instructive to note that the Respondent never denied signing the said agreement or questioned the veracity of the agreement. Further, from the record, we do not discern any misrepresentation on the import of the said agreement or incapacity on the Respondent’s part at the time he executed the same. . .”

96. Finally, in *Trinity Prime Investment Ltd v Lion of Kenya Insurance Co. Ltd* (2015) eKLR, the Court of Appeal observed as follows;

“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. The appellant was thus fully discharged.”

97. The court is bound by and is in agreement with the foregoing sentiments of the Court of Appeal.

98. In the instant suit, the Claimant signed a Discharge Certificate dated 31<sup>st</sup> August, 2020. The certificate indicated the sum payable as Kshs 1,920,275/= and the cheques numbers 009889/009872/009871 were given and the same was signed by the one Willis Ayieko Onyango, the Respondent’s Human Resource Director.

99. The Claimant accepted the Certificate as follows;

“I Henry Mwangi accept cheque numbers 009889, 009872/009871 being payment for all my dues payable to me following my termination on account of redundancy with the company. I confirm that there are no further dues or payments due to me.”

Signed . . . . .

Date . . . . .



100. The dues referred to were;
  1. August 2020 salary.
  2. Three month's pay in lieu of notice.
  3. Severance pay at 18 days per year.
  4. Leave days earned but not taken up to 31<sup>st</sup> August, 2020.
101. Evidently, the Discharge Certificate made no reference to further or future claims against the Respondent. It restricted itself to the dues payable by the Respondent on account of redundancy.
102. On cross-examination, the Claimant confirmed that the document on record was his Discharge Certificate.
103. That he acknowledged receipt of Kshs 1,920,275/= after having read and agreed that there were no further dues or payment due to him.
104. Arguably, by signing the Discharge Certificate, the Claimant agreed that no further dues were payable to him on account of the redundancy.
105. However, contrary to the Respondent's counsel's submissions that the Respondent was discharged from all liability by the Discharge Certificate, the court is not persuaded that that was the case as the Claimant did not waive his right to pursue other claims against the Respondent such as challenging the fairness of the redundancy.
106. For the foregoing reasons, it is the finding of the court that by executing the Discharge Certificate dated 31<sup>st</sup> August, 2020, the Claimant did not discharge the Respondent from all liability arising from the redundancy.
107. As regards termination on account of redundancy, the parties have adopted contrasting positions. While the Claimant submitted that it was substantively and procedurally unfair, the Respondent maintained that it was fair.
108. Strangely, while the Claimant testified that no meeting took place on 30<sup>th</sup> July, 2020, RWI testified that there was and it discussed the reasons for the redundancy of the Claimant while RWI relied on the minutes on record signed by the General Manager and himself as well as the allegation that he called the Claimant for the meeting, he adduced no evidence of the call.
109. The minutes state that the Claimant stormed out of the meeting.
110. Notably, the meeting had no attendance list where all the participants signed.
111. Secondly, the minutes make no reference to what transpired after the alleged storming out by the Claimant and in particular, the way forward.
112. Third, the minutes have no indication of what the Claimant and the General Manager stated.
113. According to RWI, the Claimant stated nothing while the General Manager spoke but his contribution was not captured.
114. Fourth, the minutes have no record that the Claimant stated nothing thereat.
115. From RWI's evidence that "the meeting was an open and candid discussion" was not captured in the minutes nor was the allegation that the old and new structure were explained.



116. Since the Respondent did not call its then General Manager to confirm that a meeting took place on the alleged date, it was the Respondent's evidence against the Claimant.
117. In the court's view, it would have been relatively easy for the Respondent to establish that the Claimant attended the meeting, the absence of signature on the minutes notwithstanding.
118. If indeed the Claimant was issued with the letter dated 30<sup>th</sup> July, 2020, at the meeting and then stormed out, did he decline the letter or returned it to RWI so that he had to collect the same the following day, on a Saturday. If he declined the letter or returned it to RWI, nothing would have been easier to indicate in the minutes.
119. For the above-mentioned reasons, the court is satisfied and finds that the Respondent has failed to demonstrate that the Claimant was an attendee of the meeting allegedly held on 30<sup>th</sup> July, 2020.
120. As correctly submitted by the Respondent's counsel, redundancy is one of the recognized ways by which an employment contract may come to an end exclusively at the instigation of the employer on account of technological advancements, mechanisation, restructuring or re-organization.
121. The judgements of Maraga JA (as he then was) and Murgor JA in [\*Kenya Airways Ltd V Aviation and Allied Workers Union, Kenya & 3 others\*](#) (*Supra*) are clear on this issue.
122. Needless to belabour, the Respondent's Notice of Intention to terminate employment on account of redundancy dated 30<sup>th</sup> July, 2020 was a redundancy statement.
123. Section 2 of the [\*Employment Act\*](#), 2007 defines redundancy as;
- The loss of employment, occupation, job or career by involuntary means through no fault of the employee involving termination of employment at the initiative of the employer, where the services of an employee are superfluous and the practices commonly known as abolition of office, job or occupation and loss of employment.
124. Analogous to other forms of termination of an employment contract, a redundancy process must be substantively and procedurally fair, in order to pass muster.
125. Section 40(1) of the [\*Employment Act\*](#) prescribes the seven (7) conditions an employer must fulfil for a redundancy to pass the fairness test.
126. In [\*Freight-In Time Ltd v Rosebell Wambui Munene\*](#) (2018) eKLR, the Court of Appeal held that;
- “In addition, Section 40(1) of the *Employment Act* prohibits, in mandatory terms, the termination of a contract of service on account of redundancy, unless the employer complies with the following seven conditions, namely:
- a. If the employee to be declared redundant is a member of a union, the employer must notify the union and the Local Labour Officer of the reasons and the extent of the redundancy at least one month before the date when the redundancy is to take effect.
  - b. If the employee is not a member of the union, the employer must notify the employee personally, in writing together with the Labour Officer;
  - c. In determining the employees to be declared redundant, the employer must consider seniority in time, skill, ability, reliability of the employees.



- d. Where the terminal benefits payable upon redundancy are set under a collective agreement, the employer shall not place an employee at a disadvantage on account of the employee being or not being a member of a trade union.
  - e. The employer must pay the employee any leave due in cash.
  - f. The employer must pay the employee at least one month's notice or one month's wage in lieu of notice; and
  - g. The employer must pay the employee severance pay at the rate of not less than 15 days for each completed year of service.”
127. The foregoing clearly reveals that the law places an enormous burden of proof on the employer to justify termination on account of redundancy as held in *Barclays Bank of Kenya Ltd & another v Gladys Muthoni & 2 others* (2018) eKLR.
128. I will now proceed to determine whether the Respondent adhered to the provisions of Section 40(1) of the *Employment Act, 2007*.
129. As regards notice, Section 40(1)(a) is categorical that the notice to the employee or trade union and the Labour Officer must give “the reasons for and extent of the redundancy.”
130. A copy of the notice sent to the Labour Officer filed by the Respondent states that;
- “Following a review of its operations and structure, the management of the company has determined that it is necessary to rationalize its staff and has in that regard approved a restructuring process. Unfortunately, this will have effect of reducing its staffing levels.”
131. The letter gave no other information on the redundancy. From the letter, there is no indication as to when the Respondent deemed a review of its operations necessary and why. There is no indication as to whether the company's performance was declining or it was facing financial challenges or other reason to justify the review and reduction of staff.
132. The only document the Respondent availed were copies of the “old” and “new” organograms of the Respondent.
133. The copies have neither a date nor authentication and do not appear to have been part of a larger document.
134. In the court's view, the two documents cannot justify the purported redundancy of 34 employees.
135. Regrettably, the Respondent's counsel attempt to explain the Respondent's redundancy that the re-organization culminated in consolidation of several roles and abolishment of others cannot avail the Respondent as submissions are neither part of the pleadings nor evidence.
136. For the foregoing reasons, it is the finding of the court that the Respondent has failed to discharge the burden of proof as to the reasons and extent of redundancy.
137. As regards the notice, since the Claimant was not a member of the union, the notice was issued to him on 1<sup>st</sup> August, 2020 less than the requisite one month before the date when the redundancy was to take effect on 31<sup>st</sup> August, 2020 as was held in *Thomas De La Rue (K) Ltd V David Opondo Omutelema (Supra)*.



138. The notice, in the court’s view was ineffectual.
139. More significantly, consultations were necessary before declaration of redundancy.
140. In *Kenya Airways Ltd V Aviation & Allied Workers Union, Kenya & 3 others* (Supra) both Maraga JA (as he then was) and Murgor JA addressed the issue of consultations.
141. Although the provisions of Section 40(1) of the *Employment Act*, 2007 do not expressly provide for consultations, the Court of Appeal has been unambiguous that consultations are necessary as provided by Article 13 of the Recommendation No 166 of the ILO Convention No 158 Termination of Employment Convention – 1982 which is applicable in Kenya.
142. The consultations envisaged by the Convention must be meaningful and no cosmetic as stated in the New Zealand case in *Cammish V Parliamentary Service* (1966) 1 ERNZ 404 and emphasized by Murgor JA in Kenya Airways Ltd case (*Supra*).
143. In *Barclays Bank of Kenya Ltd V Gladys Muthoni & 20 others* (Supra), the Court of Appeal stated;
- “In the end, we are persuaded that the dicta of Maraga and Murgor JJA regarding consultations prior to declaration of redundancy resonate with our *Constitution* and international laws which have been domesticated by dint of Article 2(6) of the *Constitution*.”
144. The court further stated;
- “We respectfully agree with the views expressed by the two learned judges. The *Constitution* in Article 41 is fairly loud on the rights to fair labour practices and we think it accords the *Constitution* and International best practices that meaningful consultations be held pre-redundancy. We agree with the trial court that redundancy notices are not mechanical so as to satisfy the motions of the law, and that fair labour practice requires the employer to act in good faith . . .”
145. The court is guided accordingly.
146. In the instant suit, the Respondent’s notice of intention to declare the Claimant redundant dated 30<sup>th</sup> July, 2020 was unambiguous that the Claimant would be declared redundant on 31<sup>st</sup> August, 2020 and as he testified the die had been cast.
147. The letter informed the Claimant that he would not be required to work for the month of August 2020.
148. The letter stated in part;
- “. . . We will avail you this time to consult, update your resume and seek alternative employment with potential employer . . .
- We appreciate that this may be difficult time for you and we will make every effort to ensure a smooth transition. Should you have any questions, kindly feel free to contact the undersigned.”
149. Regrettably, although the Respondent purported to be acting in good faith, its letter and conduct after 1<sup>st</sup> August, 2020 demonstrates otherwise.



150. The pith and substance of the letter is in the court's view that the Respondent's relationship had come to an end and if the Claimant wanted to consult the Respondent or ask questions, the Human Resource Manager was available.
151. In other words, it was the Claimant's duty to consult, if desirous to do so and in the end no consultations took place, be they meaningful or otherwise.
152. The Respondent having initiated and executed the purported redundancy made no effort to reach out to the Claimant who was possibly updating his resume.
153. The Respondent adduced no shred of evidence that there were consultations with any of the persons whose name appeared on Schedule A before 31<sup>st</sup> August, 2020.
154. Even assuming, the Claimant attended the meeting allegedly held on 30<sup>th</sup> July, 2020, its tenor, contrary to RWI testimony that there was open and candid discussion is not apparent.
155. The minutes have no agenda items and only one person spoke for the 30 minutes of the meeting which is improbable, if in deed there was a meeting.
156. A cursory reading of the letter creates the impression that the recorder captured what he intended to capture as opposed to what transpired during the alleged meeting.
157. The court found the minutes unreliable as evidence.
158. In the court's view, the absence of consultations, which is a requirement of the law vitiated the purported redundancy, which transitioned to an unfair termination of employment by the Respondent.
159. For the above-stated reasons, it is the finding of the court that the Respondent has failed to establish on a balance of probabilities that the purported redundancy was conducted in accordance with the provisions of the *Employment Act*, 2007 and thus fair.
160. Having found that the purported redundancy was not conducted in compliance with the provisions of the *Employment Act*, 2007, I will now proceed to determine whether the Claimant is entitled to the reliefs sought.
- i. Having found that the redundancy did not meet the threshold prescribed by Section 40(1) of the *Employment Act*, 2007, a declaration is hereby issued that termination of the Claimant's employment was unfair and unlawful.
  - ii. As regards the difference in severance pay, notice period and unused leave days, this is a contested issue and court proceeds as follows;
161. While Claimant's counsel urged that review of remuneration meant salary increment, the Respondent posited that it did not.
162. Paragraph 4(a) of the contract of employment dated 19<sup>th</sup> September, 2012 provided inter alia;
- “ This remuneration will be subject to review after completion of each year of service.”
163. The term review literally means a formal assessment of something with the intention of instituting changes, if necessary, a critical appraisal of something.
164. The definition in *Oxford's Dictionary* relied upon by the Claimant is not dissimilar to the foregoing.



165. *Black's Law Dictionary* defines review as;

“Consideration, inspection, or re-examination of a subject or thing.”

166. Evidently, review does not necessarily signify movement or change or modification.

167. The Claimant admitted that his salary was reviewed upwards in 2015 from Kshs 250,000/= to Kshs 285,000/=.

168. RWI was non-committal on the issue, merely stating that that could as well have been the case.

169. According to the Claimant, his salary ought to have risen by 14% per year and was thus claiming the difference between what he was paid and what he ought to have been paid had the salary been reviewed.

170. Whereas in the public sector the percentage of salary increment is fixed by the contract of employment, in the private sector, the rate is seldom fixed perhaps because increments are based on the business environment and performance of the organization among other considerations.

171. Although RWI tendered no evidence to demonstrate that reviews took place but the Claimant's salary remained unchanged after 2015, the Claimant, on the other hand adduced no evidence to prove that there were annual increments of salary by the company between 2016 and 2020 which would have implicated the Respondent's treatment of its employees.

172. There was no evidence that any member of staff of the Respondent received a salary increment from 2016 to 2020.

173. In a similar vein, the Claimant adduced no evidence to show that he had previously raised the issue with the Respondent and no response was received. Statements to the effect that he had raised the issue during meetings could not avail the Claimant for want of particulars.

174. In sum, the court is satisfied that the Claimant has not placed before the court sufficient material for the court to find that he was entitled to annual salary increments and the Respondent had breached a term of the contract.

175. More significantly, however, and as adverted to elsewhere in this judgment, the Claimant executed a discharge certificate by which he confirmed that he had received all his dues from the Respondent and no further dues were payable to him.

176. Having signed the discharge certificate willingly and voluntarily and aware of its effect, as he testified in court, the Claimant cannot at this late hour recant his signature. The discharge certificate was binding on him, hook, line and sinker and no other dues were due to him from the employment contract irrespective of the amount paid.

177. The prayers for the sum of Kshs 2,697,292.18 as severance pay, Kshs 1,021,701.59 as notice period and Kshs 22,704.48 as unused leave days are unsustainable and are accordingly disallowed.

### **iii.Damages for Wrongful/Unfair Termination**

178. Having found that termination of the Claimant's employment on account of redundancy was unfair, the Claimant is entitled to compensation in accord with the provisions of Section 49(1)(c) of the *Employment Act*, 2007.

179. In determining the quantum of compensation, the court is enjoined to consider the relevant factors enumerated under Section 49(4) of the *Employment Act*, 2007.



180. In this case, the court has taken into consideration the fact that;
- i. The Claimant was an employee of the Respondent as the Operations Manager for a period of about 8 years which is a long time.
  - ii. The Claimant did not contribute to termination of employment.
  - iii. The Claimant did not appeal the Respondent's decision or demonstrate willingness to continue in the employment of the Respondent.
  - iv. The Respondent did not demonstrate the circumstances in which the Claimant's termination from employment took place.
  - v. The Respondent paid the Claimant severance pay at 18 days for every completed year of service, three month's salary in lieu of notice as well as accrued but unused leave days.
181. In the circumstances, the court is satisfied that the equivalent of 3 months salary is fair.
182. In conclusion, judgement is entered for the Claimant against the Respondent as follows;
- a. Declaration that termination of the Claimant's employment on account of redundancy was unfair and unlawful.
  - b. Equivalent of three (3) months gross salary.
  - c. Costs of this suit.
  - d. Interest at court rates from date of judgement till payment in full.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 23RD DAY OF MAY 2023**

**DR. JACOB GAKERI**

**JUDGE**

**ORDER**

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

**DR. JACOB GAKERI**

**JUDGE**

