Njuki v Roche Kenya Limited (Cause 311 of 2019)
[2023] KEELRC 1850 (KLR) (27 July 2023) (Judgment)

Neutral citation: [2023] KEELRC 1850 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 311 OF 2019

BOM MANANI, J

JULY 27, 2023

BETWEEN

DR WAIRIMU NJUKI ..... CLAIMANT

AND

ROCHE KENYA LIMITED ..... RESPONDENT

JUDGMENT

Introduction

1. This claim challenges the Respondent's decision to terminate the Claimant's employment on account of redundancy. According to the Claimant, the decision was irregular and therefore unlawful.

2. Conversely, the Respondent avers that the impugneddecision was regular and therefore lawful. According to the Respondent, there was valid reason to declare redundancy. Further, the procedure for declaring redundancy at the workplace was adhered to.

3. Besides the redundancy dispute, the Claimant has mounted various other grievances relating to: discrimination at the workplace; house allowance; bonus; car allowance; and directorship allowance. All these are contested by the Respondent.

Claimant's Case

4. The Claimant avers that on June 11, 2014, the Respondent offered her employment in the position of Regulatory Affairs and Company Responsible Pharmacist. According to the Claimant, this was a statutory position that was required under section 21 of the *Pharmacy and Poisons Act*. She states that her entry base salary was Kshs 430,000.00.

5. The Claimant avers that over time, her salary was revised to Kshs 536,382.00 per month. In addition, she received recognition awards as indicated in the Memorandum of Claim. The Claimant attributes these developments to her exemplary service to the Respondent.

6. The Claimant contends that on employment, the Respondent was required to appoint her onto its Board of Directors in line with the provisions of the *Pharmacy and Poisons Act*. To enable this process, the Claimant asserts that she resigned from her directorship position at Adcock Ingram East Africa Ltd, her previous employer.

7. The Claimant avers that contrary to her expectations, the Respondent did not appoint her as one of its directors. This is notwithstanding the several reminders that she allegedly sent to the Respondent's management over the matter.

8. The Claimant further contends that she was treated differentially at the workplace. It is her case that whilst expatriates engaged by the Respondent were afforded additional benefits such as housing and house allowance, she was denied these benefits. This is notwithstanding that the law entitled her to either physical housing or house allowance.

9. It is the Claimant's case that the Respondent introduced car allowance benefit in 2017. However, she was deprived of the benefit.

10. The Claimant further avers that she was unjustifiably issued with a letter of warning in January 2018 for failing to complete a mandatory staff training activity. It is her contention that the letter was issued without affording her an opportunity to explain why she had been unable to undergo the training within the prescribed timelines.

11. The Claimant also contends that she was unfairly deprived of bonus pay. She questions the decision by the Respondent to score her poorly thereby denying her the bonus pay.

12. The Claimant further avers that on February 23, 2018, the Respondent unfairly issued her with a letter of redundancy. The reason given for the decision was the restructuring of the organization which had allegedly rendered the Claimant's position unnecessary. The notice was expressed to crystallize on March 23, 2018.

13. The Claimant contends that the decision to declare her position redundant was actuated by malice and was pre-determined. It is her case that she was not consulted prior to the taking of the decision.

14. The Claimant further avers that around the same time that her position was declared redundant, the Respondent engaged the services of Surgipharm Ltd to act as its Regulatory Pharmacist. This was followed by the alleged appointment of one Susan Wanjiru Ndung'u, the Claimant's junior at the workplace to take up the Claimant's position.

15. Having regard to these factors, it is the Claimant's case that her position was not rendered superfluous. The Respondent only invoked redundancy as a smokescreen for its decision to unfairly terminate the Claimant's employment.

16. The Claimant has also questioned the procedure that the Respondent adopted in processing the redundancy. It is her case that she was not consulted prior to the redundancy declaration. The Claimant further argues that the redundancy selection procedure prescribed by statute was not followed.

17. As a resultof the impugned decision, the Claimant contends that she has suffered loss and damage as more particularly described in her Memorandum of Claim. Consequently, she prays for the various reliefs as pleaded in the aforesaid Memorandum of Claim.

Respondent's Case

18. The Respondent denies that it unfairly terminated the Claimant's contract of service.According to the Respondent, the decision to terminate the contract was informed by its operational requirements. The

Respondent states that its management considered it appropriate to restructure the organization in order to suit its operational needs.

19. According to the Respondent, the result of the process was that the position held by the Claimant was rendered superfluous as part of her functions were outsourced. The Respondent states that it engaged Surgipharm Ltd as its outsourced Regulatory Pharmacist.The Respondent denies that it elevated Susan Wanjiru Ndung'u to the Claimant's position.

20. It is the Respondent's case that it has a right to restructure its business in response to emerging business trends. Consequently, the restructuring process that led to the loss of the position previously held by the Claimant was within the law.

21. Further, the Respondent contends that it is within its prerogative to decide how to utilize its manpower. As a result, the decision to outsource Surgipharm and register Susan Wanjiru Ndung'u with the Pharmacy and Poisons Board was within its discretion and is not evidence of irregularity in the decision to declare the Claimant's position redundant.

22. The Respondent denies that the Claimant's position was statutory as asserted by the Claimant. It is the Respondent's case that the Claimant's position was purely contractual. Further, the Respondent denies having offered to appoint the Claimant onto its Board of Directors.

23. The Respondent argues that it was not obligated to consult the Claimant on the restructuring process prior to issuing her with the redundancy notice. This obligation only arose after issuing of the redundancy notice. According to the Respondent the obligation was discharged when the Claimant was invited for consultations after she had been served with the redundancy notice.

24. The Respondent states that it adhered to the legal requirements for processing redundancy. It is the Respondent's case that it issued the Claimant with the requisite statutory notices. It also issued the local labour office with the redundancy notice.

25. The Respondent contends that as the position affected by the redundancy was one (1), there was no need to go through the selection process. Further, it is contended that the Claimant was paid all her redundancy terminal dues.

26. The Respondent denies treating the Claimant differentially. According to the Respondent, if any expatriate within its ranks was earning higher remuneration than the Claimant, this was because the applicable policy required that expatriates engaged on short term basis retain their home country salary scales and benefits. This was to ensure equity of treatment for the expatriates with their compatriots at home and facilitate ease of reintegration once they resumed their engagements in their countries of origin.

27. The Respondent contends that the Claimant was not deprived of house allowance. In any event, any such claim would be time barred.

28. In respect of the car allowance, the Respondent states that the Claimant was given the option of purchasing the company car that she had been using for official duty. She accepted the offer at the tail end of her contract just before her exit. Therefore, she was not eligible for the new car allowance benefit.

29. Regarding the letter of warning that was issued to the Claimant in early 2018 the Respondent contends that this was justified. According to the Respondent, the Claimant was notified of the need to undertake the training in late November 2017 some three weeks before she proceeded on her annual leave from December 15, 2017. Therefore, she had the opportunity to clear the training before the year closed.

30. On the claim for bonus pay, the Respondent asserts that this is discretional and pegged on an employee's performance.The Claimant is not entitled to bonus for 2017 since she did not meet her performance targets for the year.

Issues for Determination

31. After analyzing the pleadings and evidence on record, I consider the following as the matters that fall for consideration: -

    a. Whether the Claimant's position was statutory and whether her claim to directorship attracted remuneration.

    b. Whether the Claimant is entitled to the claim for car allowance.

    c. Whether the Claimant was treated differentially at work.

    d. Whether the Claimant is entitled to bonus pay.

    e. Whether the warning letter issued to the Claimant in January 2018 was unfair.

    f. Whether the Claimant's contract of service was validly terminated on account of redundancy.

    g. Whether the Claimant's prayer for house allowance has legitimate basis.

    h. What reliefs should the court issue?

Analysis

32. In this section, the above issueswill be addressed sequentially. This will be followed with the court's final determination.

    Whether the Claimant's position was statutory and whether her claim to directorship attracted remuneration

33. The Claimant contends that her position in the Respondent's organization was statutory. She anchors her argument on the fact that section 21 of the *Pharmacy and Poisons Act* requires the Respondent,if it has to run pharmaceutical business, to have a registered pharmacist as its manager. Further, the Claimant contends that the law requires that such manager be a member of the Board of Directors of the Respondent. As a director of the company, this position allegedly attracts director's compensation which the Claimant was allegedly deprived of.

34. It's true that if the Respondent has to conductpharmaceutical business, it ought to comply with section 21 of the *Pharmacy and Poisons Act* by engaging a registered pharmacist to manage the business. However, this is not the same thing as saying that the Claimant had to be that individual merely because she was in the Respondent's employment holding the position of Regulatory Affairs and Company Responsible Pharmacist.

35. The parties had a contract of employment which was produced in evidence. The contract does not indicate that the Claimant's position was establishedin order to facilitate compliance with section 21 of the *Pharmacy and Poisons Act*.

36. The parties did not provide the Claimant's Job Description to ascertain whether her roles included facilitating compliance with section 21 of the aforesaid Act of Parliament. Absent this evidence, I am unable to rely on the job title of the Claimant to arrive at the conclusion that she was hired specifically to facilitate compliance with section 21 of the *Pharmacy and Poisons Act*.

37. Importantly, there is evidence on record that besides the Claimant, the Respondent had another registered pharmacist (Susan Wanjiru Ndung'u) within its rank and file. Absent evidence that the Claimant was exclusively hired to facilitate compliance with the provisions of section 21 of the *Pharmacy and Poisons Act*, the Respondent had the liberty to decide who among the two pharmacists, would have her license registered with the Pharmacy and Poisons Board. This is part of the employer's managerial prerogative. The mere fact that the Claimant's job title described her as the Regulatory Affairs and Company Responsible Pharmacist did not make her position a statutory one as the function of providing the pharmacy license required under section 21 of the Act has not been shown to have been exclusive to her.

38. However, even if I was wrong on this point, it is doubtful that the Claimant can rely on the fact of directorship to claim the allowance pleaded in the Memorandum of Claim. The general position in law is that directors of a company are not remunerated except where the company's constituting documents have authorized their remuneration or there is a resolution by the company at a general meeting permitting their remuneration. *In re. George Newman & Co* [1895] 1 Ch. 674 at 686, the court observed as follows on the matter: -

> " Directors have no right to be paid for their services, and cannot pay themselves or each other, or make presents to themselves out of the company's assets, unless authorized so to do by the instrument which regulates the company or by the shareholders at a properly convened meeting".

39. The Claimant did not provide evidence to show that the Respondent had authority to pay its directors the allowance claimed. The Respondent's constituting documents were not tendered in evidence to ascertain whether they provide for the power to pay the allowance claimed. Neither was a resolution of the Respondent at a general meeting authorizing payment of the allowance produced before court.

40. Further, the Respondent's witness confirmed that directorship positions in the Respondent organization did not attract any form of remuneration. The witness stated that he had served as one of the directors of the Respondent before he relocated to the Respondent's sister company. He stated that his service as director was without remuneration.

41. As mentioned above, the Claimant did not provide proof that the Respondent's Articles of Associationpermit payment of remuneration of any kind to its directors. She appears to have relied on the assumption that merely because she had been drawing directorship allowance whilst serving her former employer, she would continue drawing such remuneration if she became a director of the Respondent. Undoubtedly, this assumption was inaccurate.

42. Absent evidence that the Claimant's appointment was meant to facilitate compliance with section 21 of the *Pharmacy and Poisons Act*, I am unable for conclude that the Claimant's position was statutory. But even if it was, I am unable to conclude that the Claimant was to be remunerated for the position in the absence of evidence showing that the Respondent's directors were entitled to some form of remuneration.

43. Finally on this point, the Claimant's counsel in his submissions has suggested that the Respondent's witness admitted that the Claimant's position of Regulatory Affairs and Company Responsible Pharmacist was statutory. I have combed through the evidence on record and found no such admission. What the witness stated and is on record was that the position of directorship of the Respondent which the Claimant says she was deprived of was statutory.

Whether the Claimant is entitled to the claim for car allowance

44. From the record, the Respondent had hitherto been providing some of its employees with company vehicles together with fuel allowance for official use. On January 1, 2017, theRespondent introduced car allowance in place of this earlier facility. However and if the content of the Respondent's letter dated October 4, 2017 is anything to go by, this new benefit was to become available to the employees only after they surrendered the company cars in their possessionback to the Respondent or opted to purchase them.

45. By theaforesaid letter, the Respondent notified the Claimant that this allowance was to replace the company vehicle in her possession and was payable once she either opted to purchasethe said vehicle or returned it to the Respondent. The Claimant was to communicate her election in writing.

46. On November 14, 2017, the Claimant appended her signature on the acceptance section of the letter of October 4, 2017 signifying her acceptance of the new arrangement. If she was not going to purchase the company car in her possession, the Claimant was required to indicatethisto the Respondent in writing and return the car together with its keys to the Respondent's management. There is no evidence thatshe wrote to decline the offer to buy the car. As a matter of fact, she ended up buying the car at the tail end of her employment contract.

47. The foregoing implies that the Claimant signified her acceptance to move to the new transport scheme with effect from November 14, 2017. She further and by her conductelected to purchase the company car that was in her possession.

48. In effect and in line with the guidelines in the letter of October 4, 2017, the Claimant became eligible for payment of the new car allowance as from 30thDecember 2017. At an annual rate of Kshs 1,047,624.00, the monthly car allowance works out to be Kshs 87,302.00. Therefore, between 30thDecember 2017 and 23rdMarch 2018 when she left employment, the Claimant's cumulative car allowance would have been Kshs 349,208.00.

49. However, the evidence on record shows that despite the parties having agreed on the new official transport arrangement as at November 14, 2017, the Respondent continued affording the Claimantthe retiredtaxable company car benefit of Kshs 95,898.20. Indeed, the Claimant's pay slips of February 2018 and March 2018 demonstrate that she continued to enjoy the monthly taxable company car benefit of Kshs 95,898.20.

50. The above evidence suggests that despite the parties having agreedto migrate to the new car allowance scheme,they acquiesced to the old official company carscheme until they closed the employment relation between them in March 2018. Instead of paying the Claimanta car allowance of Kshs 87,302.00 every month effective December 30, 2017, the Respondent continued to affordher and the Claimant continued to accept a company car benefit of Kshs 95,898.20.As a matter of fact, the Claimant only purchased the company car that she had been using in March 2018 well outside the three (3) months window that had been provided in the letter of October 4, 2017.

51. The parties having acquiesced to dealing with the official transport benefitbased on the retired transport policy, it will be inequitable for the court to require the Respondent to pay the Claimant the new car allowance in addition to the retired taxable company carbenefit that she continued to enjoy between December 2017 and March 2018.Such order would in effect sanction double payment of the official transport benefitto the Claimant.

52. Finally on this matter I note that in herfinal submissions, counsel for the Respondent indicates that the Respondent's letter of October 4, 2017 had an error. That the letter had erroneously referred to

January 1, 2017 instead of January 1, 2018 as the date when the new car allowance was to come into force.

53. I have looked at the record and found no evidence from the parties to anchor counsel's submission in this respect.It is doubtful that it was open to counsel to suggest (without the benefit of supporting evidence from the parties) that the letter had an error. To do so wouldbe to give evidence from the bar.

54. That said, my understanding of the letter dated October 4, 2017 is that it was communicatingthe fact that the Respondent had commenced phasing out the old transport policy as from January 1, 2017. The letter was making reference to a past event. However, since the Claimant was still enjoying the now retired company car benefit under the old scheme at the time (October 4, 2017), she was still not eligible to claim the new car allowance.

Whether the Claimant was treated differentially at work

55. The Claimant has made some generalized claims about discrimination. She mentions that employees of the Respondent were subjected to differential treatment. To fortify her assertion, the Claimant produced an employee satisfaction survey conducted by the Respondent which shows that there were concerns raised by some local members of staff that expatriates were: receiving higher remuneration than members of staff who were nationals; and enjoying housing and other benefits which were not available to members of staff who were nationals.

56. Despite these allegations and away from the general information in the survey alluded to, the Claimant did not provide actual data to show that there were expatriates who were being treated differentially at the time and that the reason for the differential treatment was on account of negative discriminatory practices. What she presented were mere generalizations.

57. Importantly, the Respondent provided evidence to demonstrate that every time it has had to remunerate expatriates differentially, this has been because they were engaged on short term basis under a policy that required that their remuneration scales in their home countries be maintained. The Respondent relied on the group's International Assignment Policy to support its averments on the subject.

58. I have looked at the aforesaid policy. It provides a reasonableexplanation for what would otherwise appear as differential treatment between expatriates and nationals of the host country.

59. The expatriates, including the Claimant if she were to go on international assignment, are allowed to retain their home country remuneration scales in recognition of the fact that their sojourn in the host country was temporary and that they are expected to resume their positions in their home countries once the assignment comes to a close. In order not to disrupt their compensation scales under the primary contracts, the expatriates were allowed to retain their home country salaries and benefits whilst on temporary international assignments. Having regard to this reality, I reach the conclusion that the Respondent has offered a reasonable explanation to justify its position that the disparities in remuneration between nationals and expatriates on temporary assignment does not constitute negative discrimination that is proscribed under section 5 of the *Employment Act*.

60. In this respect, I draw guidance from the observations by the Court of Appeal in *Mohammed Abduba Dida v Debate Media Limited & another* [2018] eKLR that in order to return a verdict that there has been unfair differential treatment, there ought to be evidence that the treatment complained about

was based on unreasonable or arbitrary or irrational grounds.The court, quoting from the decision in *Kedar Nath vs State of W.B.*(1953) SCR 835 (843),expressed this view in the following terms:-

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

Whether the Claimant is entitled to bonus pay

61. Although the contract of employment between the parties provides for bonus pay, it is clear that this benefit was based on the employee's performance. Indeed, the subheading to clause 3 in the Claimant's letter of appointment dated July 11, 2014 speaks to this fact when it describes the arrangement as a ''performance bonus scheme''.

62. From the record, the Claimant did not receive payment of this bonus for the year 2017. According the Respondent, the reason why the bonus was not paid to the Claimant is that she did not meet her performance targets for the year. Indeed, the Claimant produced a performance compensation statement marked appendix 19 which shows that she was rated as having failed to meet the set performance targets.

63. The Claimant has challenged this finding. According to her, it cannot be that she failed to meet the Respondent's performance targets when the overall results for the group showed attainment of performance of 150% for East Africa and 133% globally.

64. In response to the Claimant's assertion, the Respondent explained that performance measurement is worked out at two levels. First, an employee is evaluated by his or her immediate supervisor who assigns the employee a performance score. This score is then moderated by the individual who serves above the employee's immediate supervisor. The second evaluator has power to adjust the score awarded by the employee's immediate supervisor in order to ensure objectivity and absence of bias in the process.

65. The Respondent's case is that the Claimant's performance evaluation for 2017 was handled in this manner. Whilst the Claimant's immediate supervisor scored her as having partially met the performance expectations, the second evaluator adjusted the score downwards. According to the Respondent, this was not unusual.

66. For the moment, the evidence that has been placed before the court demonstrates that the Claimant was scored as having failed to meet her performance target. There is no evidence that this moderated score was successfully challenged by the Claimant. There is no evidence that the Respondent was actuated by ulterior intent in scoring the Claimant as having failed to meet her performance targets. No such evidence was presented by the Claimant.

67. The mere fact that the Claimant's performance score was adjusted downwards during the second review cannot, of itself be evidence of malice against her. Absent evidence to demonstrate that the Respondent's decision was influenced by ulterior factors or was in breach of the law or an internal regulation agreed on between the parties, I have no power to substitute the final score with my own. I have no right to meddle with the Respondent's managerial prerogative in this respect unless it is demonstrated that it has been exercised contrary to the law or some internal rule or agreement between the parties (*Kariithi v Micro and Small Enterprise Authority* (Petition 87 of 2020) [2021] KEELRC 1819 (KLR)).In the premises, I arrive at the conclusion that the refusal by the Respondent to pay the

Claimant her annual bonus was informed by the Claimant's failure to meet her performance target for the year 2017.

Whether the warning letter issued to the Claimant in January 2018 was unfair

68. The Claimant has challenged the decision by the Respondent to issue her with the letter of 24th January 2018 regarding her failure to undergo a prescribed training within the appointed timelines. The Claimant states that the warning letter was delivered to her immediately she resumed from her annual leave. She contends that the Respondent did not bother to find out from her why she had been prevented from taking the training within the prescribed time before it issued her with the warning letter.

69. The record shows that the Claimant wrote an email to the Respondent dated 26th January 2018 expressing her displeasure about how the issue had been handled. She explained that she was prevented from taking the training due to an eye ailment which had forced her to seek medication in Egypt. That by the time she arrived back in the country, her leave days were running out. That she needed some time to recuperate and also address other pressing work-related matters before she could take the training.

70. The record shows that after the Claimant raised the complaint about not having been given an opportunity to be heard on the matter, the Respondent's management convened a session on January 30, 2018 at which she was allowed to ventilate her case. The Claimant confirms this fact through her email of February 5, 2018.

71. In the email of February 1, 2018, the Respondent's management upheld the warning letter that had been issued to the Claimant. The reason for this was that the request to the Claimant to undergo training was communicated to her on November 27, 2017, some three weeks before she proceeded on her annual leave on December 15, 2017. In the Respondent's view, the three weeks were sufficient forthe Claimant to have undertaken the training. Therefore, the eye ailment that afflicted her later in December 2017 would not have prevented the training had it been taken early. It was also observed that despite her ailment in December 2017, the Claimant did not notify her immediate supervisor that this would delay her training.

72. Having regard to the evidence on record, I find that the Claimant was validly issued with the warning in question. She did not satisfactorily explain why she failed to undertake the training between November 27, 2017 when she was requested to do so and 15th December 2017 when she proceeded on her annual leave despite her appreciation of the fact that the training was critical to her work. Further, there is no indication that the Claimant notified her supervisor about her ailment and the fact that it had prevented her from attending the training within the set timelines.

Whether the Claimant's contract of service was validly terminated on account of redundancy

73. The reason for terminating the Claimant's contract was the alleged restructuring that the Respondent underwent resulting in the loss of the Claimant's position. The Respondent's case is that the decision to restructure was informed by strategic business considerations.

74. According to the Respondent, the restructuring resulted in the decision to outsource the work of regulatory services to Surgipharm Ltd. Indeed, the Claimant has produced in evidence an agreement between F. Hoffmann-La Roche Ltd and Surgipharm Ltd dated February 23, 2018 through which the parties agreed that the latter provides regulatory services to the Respondent on a per diem basis for a period of six months. This contract was indicated as renewable.

75. Although there is evidence that Susan Wanjiru Ndung'u was subsequently registered at the Pharmacy and Poisons Board as a practicing pharmacist at the Respondent institution, there is no evidence that she took up the position of the Regulatory Affairs and Company Responsible Pharmacist that was initially held by the Claimant. Being registered as a pharmacist at Roche Kenya Ltd was not synonymous with taking over a position that was said to have been done away with.Indeed, and contrary to the averments by the Claimant that Susan Wanjiru Ndung'u took up her position of Regulatory Affairs and Company Responsible Pharmacist, the letter from the Pharmacy and Poisons Board dated August 21, 2019 indicates that the said Susan Wanjiru Ndung'u had been registered as the Respondent's superintendent pharmacist.

76. A review of the available evidence shows that the regulatory role that was initially held by the Claimant whilst serving as the Respondent's full time employee was outsourced to Surgipharm Ltd to be executed on per diem basis. Although Susan Ndung'u was subsequently registered as a pharmacist working with the Respondent, there is no evidence that she took up the regulatory portfolio. Indeed, the fact that the function of regulatory services was now being performed by Surgipharm Ltd, an outsourced service provider, only means that it was no longer available internally for Susan Ndung'u to perform. Therefore, it is not possible that she took up the position of the Claimant as claimed.

77. In the premises, I reach the conclusion that there is sufficient evidence to demonstrate that the restructuring process that the Respondent underwent resulted in the Claimant's position disappearing. Consequently, I find that the Respondent had a valid reason to declare the Claimant's position redundant.

78. The Claimant has also challenged the process of redundancy on procedural grounds. First, she argues that the Respondent did not disclose the selection procedure it adopted in order to settle on her as the individual to exit employment on account of redundancy. In response, the Respondent indicates that only the Claimant's position was done away with. The position was held by the Claimant alone. As such, there was no need to undertake the selection process.

79. I agree with the Respondent's position in this respect. The selection procedure usually presupposes a situation where there is more than one employee in the department that is affected by the redundancy process. In such case, it becomes necessary to undertake selection of the employee to be discharged using any of the various parameters that are prescribed under section 40 of the *Employment Act*. Where the position that is affected is held by one individual, there would be not rationale for insisting that the employer demonstrates the selection criteria that was used to isolate the employee for release. Such endavour will be ritualistic without adding value to the ultimate decision.

80. The Claimant has also argued that she was not served with the appropriate redundancy notice. In evidence, it was suggested that because the Respondent issued the Claimant with a letter of termination dated March 19, 2018, the termination of employment happened long before the lapse of the one month redundancy notice.

81. I have looked at the redundancy notices that were issued. The first notice is dated 23rd February 2018. It communicated the Respondent's decision to declare the Claimant's position redundant on March 23, 2018. The notice gave the reason for the proposed redundancy as restructuring of the Respondent organization. The notice also addressed the question of the extent of the redundancy by mentioning that it is the Claimant's position that had been affected by the restructuring. The notice was clearly marked as communicating the decision to declare a redundancy. In my view, this notice met the minimums of a redundancy notice under section 40 (1) (a) & (b) of the *Employment Act*.

82. In his submissions, the Claimant's advocate submits that the notice to the Claimant was a termination notice as opposed to a notice of intention to declare a redundancy. I should perhaps begin by pointing out that this submission is not quite a reflection of the Claimant's case as pleaded and articulated at the trial. This contention appears to have only emerged at the stage of final submissions.

83. Nevertheless, the position expressed by counsel is clearly flawed. First, the heading on the notice dated 23rd February 2018 clearly indicates that it was communicating an intention to terminate a contract of service on account of redundancy. The notice indicated that the termination was to happen at a future date in line with section 40 of the *Employment Act*. The fact that the notice referred toan appointed date for termination of the contract of service does not derogate from the reality that it remained a notice of intended redundancy.

84. The Claimant also contended that the notice was flawed because it was directed at a specific individual as opposed to the requirement that such notice be openand directed at the general employee population in the establishment. According to the Claimant, notice of intention to declare redundancy is not addressed to a specific person because at the time of its issue, the employees to be released from employment have not been identified. Only a subsequent termination notice is to be directed to specific employees that have been identified for release.

85. Finally, the Claimant contended that because the notice required her to proceed on leave pending her release on March 23, 2018, this was evidence that her fate was sealed. That this was evidence of a pre-determined decision.

86. The Claimant appeared to rely on the decision in the Court of Appeal case of *Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others* [2014] eKLR to advance the arguments articulated above. It is noteworthy however that similar matters were raised in a latter decision by the Court of Appeal in the case of *Cargill Kenya Limited v Mwaka & 3 others* (Civil Appeal 54 of 2019) [2021] KECA 115 (KLR). In that case, the employees were issued with similar notices as in this case. The notices were addressed to individual employees communicating the employer's intention to terminate their employment on account of redundancy. Despite the fact that the notices were described as notices of intent to declare redundancies, they communicated the date of termination of the affected employees. The notices also advised the affected employees about their terminal dues and when they were to be paid. Further, the notices directed the employees to proceed on terminal leave pending the date of termination of their various contracts of service.

87. The employees contended that from their content, these were notices for termination of employment and notfor declaration of intended redundancy. The Court of Appeal rejected this argument. The court also clarified that only one notice of intention to declare redundancy is required under section 40(1) (a) and (b) of the *Employment Act*. The purported notice to terminate under section 40(1)(f) of the *Act* was superfluous. In effect, the redundancy notice that issues under section 40(1)(a) and(b) of the *Act* may be directed to specific individuals.

88. There is also evidence of a notice that was addressed to the Ministry of Labour. It was issued on February 23, 2018. It communicated the decision of the Respondent to declare the Claimant's position redundant with effect from March 23, 2018. The notice gave the reasons for the proposed redundancy as restructuring of the Respondent. It also indicated that only the Claimant's position had been lost in the process. In my view, this notice satisfies the requisites of the notice that is required to issue to the Ministry of Labour.

89. The Claimant suggested in cross examination that the notice to the labour office was not delivered because it lacked a receipt stamp. I note that a copy of the notice was served on the Claimant

alongside the Respondent's pleadings long before the matter came for trial. If the Claimant wished to challenge service of the notice on the Ministry, she ought to have called an official from the Ministry to dispute receipt of the notice. The fact that she did not call any such evidence despite having been in possession of the notice all the while suggests that the attempt to dispute that the notice was served is opportunistic. It is not lost to the court that it is not unusual for a document to be received without the recipient stamping on the return copy to signify receipt.

90. In addition to the above two notices, there is evidence on record that the Respondent wrote to the Claimant on March 19, 2018 informing her that her position had been lost and that the consultations that the parties had held did not succeed in obviating the loss. Consequently, the Claimant was reminded that her term of service with the Respondent would come to a close on March 23, 2018.

91. Admittedly, this letter creates the impression that the Respondent jumped the gun and terminated the Claimant's contract before the lapse of the notice of intended redundancy that had been issued on February 23, 2018. In my view and having regard to the decision in the case of *Cargill Kenya Limited v Mwaka & 3 others* (Civil Appeal 54 of 2019) [2021] KECA 115 (KLR),it was unnecessary for the Respondent to have issued the Claimant with the letter of March 19, 2018. The letter only served to mix up issues.

92. That said, the letter of March 19, 2018 did not, in my view, change the fact that the notice of intended redundancy issued to the Claimant on February 23, 2018 was still running and was to close on March 23, 2018. In fact, the letter of March 19, 2018 only restated the fact that the Claimant's employment was to come to a close on March 23, 2018.

93. The Claimant has also disputed the fact that she was granted an opportunity to consult over the redundancy. She argues that she was simply ambushed with the letter of 23rd February 2018 informing her that her position had been rendered unnecessary. According to the Claimant, she ought to have been consulted prior to this decision being reached.

94. On its part, the Respondent takes the view that consultations during redundancy only arise after the employer has issued the employee with a redundancy notice under section 40(1) (a) and (b) of the *Employment Act*. There is no obligation for the employer to consult the employees before the notice issues.

95. I have considered the contrasting position on this point. First, I note that throughthe letter dated 23rd February 2018, the Respondent informed the Claimant that there were going to be ongoing consultations between the parties over the process. Further, the letter encouraged the Claimant to raise any matter regarding the process that was of concern to her. In this respect, I am convinced that the Respondent left the doors for consultation on the process after the issuance of the redundancy notice open.

96. I agree with the Respondent's position that consultations on the process are meant to commence after issuance of the redundancy notice. They are not, strictly speaking, a requirement before the redundancy notice issues. Indeed, this is suggested to be the position in the Court of Appeal decision of Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others [2014] eKLR when the court observed that the purpose of issuing a redundancy notice is to trigger the process of consultations between the parties. Consequently, I disagree with the Claimant's averment that the Respondent's failure to reach out to her on the process prior to issuing the notice of 23rdFebruary 2018 was irregular.

97. The Claimant also suggested that as her position was statutory in nature, it could not be subjected to the redundancy process. However, and as was demonstrated earlier on in this decision, the Claimant's position was not shown to have been statutory. Therefore, it was amenable to the redundancy process.

98. Finally, I note from the record that the Claimant was paid her redundancy terminal dues computed as follows: -

    a. Basic pay for March 2018 Kshs 536,382.00.

    b. Pay in lieu of notice Kshs 536,382.00.

    c. Accrued leave pay Kshs 156,038.00.

    d. Severance pay Kshs 2,145,528.00.

99. From the Respondent's letter addressed to the Claimant dated March 19, 2018, it is indicated that the Claimant's severance pay was calculated at the rate of salary for one (1) month for every year worked. This is significantly higher than what section 40 of the *Employment Act* provides at the rate of salary for fifteen (15) days for every year worked.

100. Having evaluated the evidence regarding whether there was valid reason to declare the Claimant's position redundant and whether due process was observed, I reach the conclusion that the redundancy was processed in line with the applicable law. Accordingly, I decline to declare the process irregular.

Whether the Claimant's prayer for house allowance has legitimate basis

101. The Claimant has asserted that when she was employed, she was given a letter of appointment which showed her monthly salary as Kshs 430,300.00. It is the Claimant's case that the salary was described as her basic pay.

102. The Claimant's case is that despite the law entitling an employee to house allowance or physical housing, she was not afforded this benefit. According to the Claimant, the Respondent made matters worse by appearing to grant expatriates this benefit by providing them with physical housing at a premium whilst ignoring the fact that the Claimant was entitled to similar benefit.

103. On its part, the Respondent has denied depriving the Claimant of the benefit of housing or house allowance. The Respondent suggests that the Claimant's salary was consolidated to include house allowance. Further, the Respondent suggests that since the Claimant was receiving a handsome pay package, she should have been satisfied with it as it was sufficient to enable her get decent housing.

104. I have anxiously considered this aspect of the case. It is true that every employee has a statutory right to be provided with either physical housing or house allowance. Section 31 of the *Employment Act* provides as follows: -

    a. An employer shall at all times, at his own expense, provide reasonable housing accommodation for each of his employees either at or near to the place of employment, or shall pay to the employee such sufficient sum, as rent, in addition to the wages or salary of the employee, as will enable the employee to obtain reasonable accommodation.

    b. This section shall not apply to an employee whose contract of service: -

        i. contains a provision which consolidates as part of the basic wage or salary of the employee, an element intended to be used by the employee as rent or which is otherwise intended to enable the employee to provide himself with housing accommodation; or

        ii. is the subject matter of or is otherwise covered by a collective agreement which provides consolidation of wages as provided in paragraph (a).

105. The above provision clearly makes it the employer's obligation to either provide the employee with physical housing or house allowance. The allowance is payable in addition to the employee's wages or salary.

106. The employer is permitted to pay to the employee a consolidated sum covering both the employee's wage or salary and the house allowance. However, where the employer makes this election, it is his duty to include in the contract of service a statement indicating that the employee's house allowance is consolidated with his basic pay.

107. In the case before me, clause two (2) of the letter of appointment that was issued to the Claimant addresses the issue of her salary. Paragraph one (1) of the clause refers to the Claimant's salary as her basic pay. There is no mention of whether this sum was to include the Claimant's house allowance. Although paragraph two (2) of the clause uses the phrase ''gross package'' this was in the context of excluding the medical aid that was to be provided to the Claimant. It ought to be noted that section 31 of the *Employment Act* is specific that where the employer proposes to include the employee's house allowance in her basic pay, there must be an express statement on this decision in the clause on salary.

108. Further, in the salary slips produced as appendix 2 by the Claimant, there is only mention of basic pay. Outside this, the only allowances that are added to the Claimant's salary are telephone benefit and company car tax. There is no mention of house allowance in the pay slips. The contract of service between the parties read together with the pay slips on record leaves me with little doubt that reference to ''gross package'' in the contract of employment was intended to include basic pay, telephone benefit and company car tax allowance.

109. The Oxford Dictionary defines basic wage to mean the minimum wage earned before additional payments such as overtime. To my mind, basic pay excludes other benefits that are due to an employee unless the contrary is expressly stated.

110. In *Grain Pro Kenya Inc. Ltd v Andrew Waithaka Kiragu* [2019] eKLR, the Court of Appeal expressed the view that parties with a written contract of service should clearly indicate whether the salary package offered to the employee was inclusive of house allowance or whether this and indeed other benefits were standalone items. Absent clarity on this issue and house allowance being a statutory benefit, the court will, in appropriate cases, award the employee house allowance as a separate item from his basic or gross pay.

111. In the case before me, the Respondent failed to indicate, in no uncertain terms whether the basic pay granted to the Claimant included house allowance. There is no evidence that the Claimant was either housed by the Respondent or paid house allowance. Consequently, I find that the Claimant is entitled to pursue this benefit.

112. The Claimant has claimed unpaid house allowance of Kshs 3,620,578.00 spanning over a period of 45 months at the rate of 15% of her monthly salary. The Respondent's position is that the claim is in any event statute barred. According to the Respondent, the claim for house allowance falls in the category of continuing injury claims under section 90 of the *Employment Act*. Such claims must be filed within twelve (12) months of the injury ceasing to happen.

113. The Claimant's employment was terminated on March 23, 2018. Suit to claim the house allowance was filed on May 14, 2019 approximately fourteen (14) months after the date of termination of the Claimant's contract of service.

114. According to the Respondent, the injury of deprivation of house allowance ceased on March 23, 2018 when the Claimant's employment ended. Therefore, she had twelve (12) months from March 23,

2018 to file suit. Coming on May 14, 2019, the claim was statute barred. To advance this position, the Respondent has relied on the decision in *Roba Jillo Galgalo & 4 others v Trocaire* [2019] eKLR.

115. I do not agree with the view that the claim for house allowance is a continuing injury claim. House allowance is an entitlement that accrues periodically during the life of an employment relation between the employer and the employee. As a periodic entitlement, each failure to remit this benefit as and when it accrues constitutes a distinct cause of action for which the employee may sue. This reality removes the benefit from what constitutesa continuing injury claim (see *Vipingo Ridge Limited v Swalehe Ngonge Mpitta* [2022] eKLR).

116. In the Court of Appeal case of *G4S Security Services (K) Limited v Joseph Kamau & 468 others* [2018] eKLR, the court suggests that claims that accrue periodically at the close of every month do not constitute continuing injury claims within the meaning of section 90 of the *Employment Act*. In expressing this view, the court observed as follows:-

> ''In the circumstances of this case we find that such 'unpaid terminal dues' do not constitute a continuing injury as contemplated under the proviso to Section 90 of the *Employment Act*. The respondents assert claims arising from the termination of their employment and dues that accrued to each of them at the end of each month''. Emphasis added through underlining.

117. In the same breadth therefore and by parity of reasoning, a claim for unpaid house allowance is not a continuing injury claim. It is a claim for a periodic benefit that is otherwise than a continuing injury. It is for this reason that I respectfully hold a different view on the subject from that expressed by my brother in the case of *Roba Jillo Galgalo & 4 others v Trocaire* [2019] eKLR.

118. The other challenge in relation to the question of when such claim would be time barred under section 90 of the *Employment Act* relates to when the three (3) year limitation period is deemed to start running. My view has been that time for filing claims that are subject to the three (3) year limitation period under section 90 of the *Employment Act* starts to run from the date of accrual of the cause of action.

119. In respect of house allowance, my view is that the cause of action accrues from the date of each default to pay the allowance as and when it falls due. This suggests that suits for recovery of unpaid house allowance must be filed within three years of every default by the employer to pay the monthly allowance. This would mean that as at May 14, 2019 when she filed suit, the Claimant could only claim house allowance that remained unpaid three years backwards fromthat date.

120. This means that only claims for house allowance up to May 14, 2015 were still valid as at May 14, 2019 when the Claimant filed suit. Ideally, any claim falling behind May 14, 2015 would be time barred.

121. However, the above reasoning appears not to sit well with the Court of Appeal decision in *G4S Security Services (K) Limited v Joseph Kamau & 468 others* [2018] eKLR. From this decision, it appears to me that computation of time for purposes of the three (3) year limitation period starts from the date of termination of the employment contract as opposed to the date of the event or default that gave rise to the grievance. In other words, the decision appears to imply that a cause of action in an employment dispute that follows closure of the contract is deemed to arise from the date of closure of the contract notwithstanding that some of the issues in dispute may relate to benefits that may have accrued much earlier during the life of the contract.

122. I have my reservations about the correctness of this position (*Vipingo Ridge Limited v Swalehe Ngonge Mpitta* [2022] eKLR). However, I am bound by the guidance provided by the court, assuming I understood it correctly.

123. The Claimant was released from employment on March 23, 2018. She filed suit on 14th May 2019 just about fourteen (14) months after her contract of service was closed. Therefore and in accordance with the decision in *G4S Security Services (K) Limited v Joseph Kamau & 468 others* [2018] eKLR, she was within the three (3) year window to pursue recovery of her accrued house allowance benefit.

124. Between June 2014 when she was hired and 23rdMarch 2018 when she lost employment, the Claimant had done approximately 45 months of service. From the evidence on record, she was not paid house allowance all this while. She is therefore entitled to recover the amount for this duration.

125. Apart from the published Wage Orders which are inapplicable to the Claimant's contract, the law does not provide a mechanism for ascertaining the house allowance that is payable to employees that are not covered by these Orders. Helpfully, courts have suggested that a sum that is equivalent to 15% of such employee's monthly salary is a reasonable sum to grant as the monthly house allowance (*Grain Pro Kenya Inc. Ltd v Andrew WaithakaKiragu*[2019] eKLR). Having regard to the foregoing, the Claimant's accrued house allowance works out as follows:-

a. Between June 2014 and March 2015 (basic pay of Kshs 430,000 x 15% x 10 months = Kshs645,000.00).

b. Between April 2015 and March 2016 (basic pay of Kshs 473,000.00 x 15% x 12 months = Kshs 851,400.00).

c. Between April 2016 and March 2017 (basic salary of Kshs 496,650.00 x 15% x 12 months = Kshs 893,970.00).

d. Between April 2017 and March 2018 (basic salary of Kshs 536,382.00 x 15% x 12 months = Kshs 965,488.00)

Total Kshs 3,355,858.00

126. The Respondent has made some interesting observations regarding the attempts by the Claimant to claim the outstanding house allowance. First, it is contended that the Claimant never pursued theclaim during the currency of her employment. In effect, this failure to pursue the right should be held against her. Second, it is suggested that since the Claimant was receiving a generous pay package, the claim for house allowance is perhaps absurd. She should have been happy with her generous pay package.

127. In reaction, I should perhaps state that house allowance or provision of housing by the employer is a statutory right that is granted to every employee. It does not matter how much one is earning. He is still entitled to the right. It does not matter that one has not openly protested the employer's failure to give meaning to the right. The right remains valid and therefore claimable. For this reason, I respectfully elect to consider the matter from a viewpoint that is perhaps different from that expressed by my brother in *Dorcas Kemunto Wainaina v IPAS* [2018] eKLR. Absent unambiguous evidence that a right's holderhas consciously resolved to abandon asserting the right, I am hesitant to construe mere ambivalence about his entitlement to the right as evidence of having abandonedit.

Determination

a. Apart from the claims for accrued house allowance, interest thereon and costs of the suit, the court finds that the rest of the Claimant's claim against the Respondent is devoid of merit. Accordingly, I dismiss the entire of the Claimant's case against the Respondent save for the claims for accrued house allowance, interest thereon and costs of the suit.

b. On house allowance, I award the Claimant the accrued dues there under totaling Kshs 3,355,858.00.

c. I award the Claimant interest on this amount at court rates from the date of this judgment.

d. Since the Claimant has partially succeeded on the claim, I award her costs of the case.

DATED, SIGNED AND DELIVERED ON THE 27TH DAY OF JULY, 2023

B. O. M. MANANI

JUDGE

In the presence of:

..... for the Claimant

.....for the Respondent

ORDER

In light of the directions issued on July 12, 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