M'Kungu v Presiding Bishop Methodist Church in Kenya & another (Cause 1560 of 2017) [2023] KEELRC 2251 (KLR) (28 September 2023) (Judgment)

Neutral citation: [2023] KEELRC 2251 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 1560 OF 2017

K OCHARO, J

SEPTEMBER 28, 2023

BETWEEN

DANIEL MUTIRIA M'KUNGU .... CLAIMANT

AND

PRESIDING BISHOP METHODIST CHURCH IN KENYA .... 1ST RESPONDENT

METHODIST CHURCH IN KENYA .... 2ND RESPONDENT

JUDGMENT

1. By a memorandum of claim filed on 4th August 2017, the Claimant sued the Respondents for the following orders and reliefs; a declaration that the termination of his contract was unlawful, wrongful, and premature; a declaration that the contract of employment would have been renewed for another three [3] years after expiry of the 1st three years of the date of commencement i.e. 10th June 2014; an award of Kshs. 2,660,000, being salary for the remainder of the contract period; salary underpayments amounting to Kshs.200,000; a compensatory award of KShs. 780,000 representing 12 [twelve] months' gross salary for the wrongful and unlawful termination; and costs & interest.

2. Upon being served with summons to enter appearance, the Respondents did enter the appearance and filed a response dated 4th April 2019, to the memorandum of claim.

3. At the close of pleadings, the matter got destined for hearing inter partes on merit. The Claimant's case was heard on the 7th of March 2022, while the Respondents' was on the 3rd of October 2022.

4. At the full hearing of the parties' respective cases this Court directed the filing of written submissions within specific timelines, at the time of retiring to write the judgment only the Claimant had filed their submissions.

The Claimant's Case

5. At the hearing of the case, the Claimant urged this Court to adopt his witness statement dated 2nd August 2017, as part of his evidence in chief, and admit the documents that he had filed herein contemporaneously with the memorandum of claim as his documentary evidence. He then briefly testified orally in clarification of matters on the statement and the documents that he deemed necessary to, before being cross-examined by Counsel for the Respondent.

6. The Claimant stated that at all material times, he was an employee of the Respondent Company, having been appointed by the Respondent vide a letter dated 10th June 2014 to the position of Security Manager. In this position, he was charged with the responsibility of handling all security matters of the Methodist Ministries Centre, the headquarters of the 2nd Respondent.

7. The Claimant stated effective 1st June 2014, he was put on a three-year renewable contract, with the following benefits; a monthly basic salary of Kshs 40,000; a medical Kshs 30,294 per annum; a monthly house allowance of Kshs 30,000; monthly responsibility allowance of Kshs 12,000; and a traveling allowance of Kshs 13,630.

8. The Claimant stated further that on or about the 10th of June 2014, when he accepted the offer, he raised the issue that the salary he had been offered [Kshs. 40,000] was way below what he was being paid in his immediate previous employment with Intercity Secure Homes Ltd. There he was earning KShs. 65,000. The 1st Respondent took note of the issue and promised that the basic salary was to be increased to KShs. 65,000, after three months.

9. On the 6th March 2015, he received a letter from the 1st Respondent terminating his contract of service with effect, on 10th March 2015. In the letter, it was expressed that the "position of security manager will be eliminated with effect from 10th March 2015". The Respondents undertook to pay him all his accrued dues up to his last day of employment, 10th of April 2015. It was further stated that the termination of his employment was a result of a restructuring measure by the 2nd Respondent.

10. The Claimant further stated that the Respondents paid his final dues totalling to Kshs 253,822. According to him, his position was not abolished, it still exists and is being occupied by a lady.

11. The Claimant asserted that his agreed monthly salary was Kshs. 65,000. The continued payment of KShs. 40,000, by the Respondents, amounted to an underpayment of his salary. He is entitled to recover the cumulative underpaid amount.

12. The Claimant further claims for gross house allowance of Kshs 30,000 per month from 10th March 2015 to 10th June 2015.

13. The Claimant seeks for allowances and gratuity for the unexpired period of the contract.

14. The Claimant contended that the Respondents' action injured him. They lured him from the employment of his former employer through misrepresentation, only to terminate his employment wrongfully. His career and earning expectations were thereby dashed.

15. The Claimant asserted that he had an expectation that his contract would have been renewed, on account of the fact that through his work, the security situation at the Respondent's improved greatly.

16. Cross-examined by Counsel for the Respondent, the Claimant testified that his employment with the Respondents was under a written contract and that its commencement date was set as 1st June 2014. The appointment letter embodied the terms and conditions of employment. He accepted the

Respondents' offer on the 10th of June 2014. Though in his previous employment, he was earning KShs. 65,000, he accepted to take the lesser pay of KShs. 40,000.

17. Though he remembered having had a discussion with Rev. Joseph Ntumbura around the month of February 2015, the conversation had nothing to do with any intended outsourcing of security services, by the 2nd Respondent.

18. The Claimant testified that through the letter dated 6th March 2015, he was given a one-month termination notice. He handed over all the Respondent's property before he was paid his terminal dues. The demand letter by his Counsel came in after the payment.

19. In his evidence in re-examination, the Claimant stated that his contract was for a fixed term of three years. He was not given any reason why it was prematurely terminated.

20. He asserted that he had a discussion with the Presiding Bishop, who promised that his salary was to be increased after three months.

21. The appointment didn't have a termination clause. It however provided for renewal upon satisfactory performance.

22. He contended that after the termination he kept visiting the Respondent's offices hoping to be reinstated. The hope was dashed when he learnt that someone had taken his position.

The Respondent's Case

23. In Respondent presented three witnesses to testify on its behalf in this matter, Rev. Joseph Ntombura [RW1], Mr. Gatobu Muthamia [RW2], and Dorothy Kinya [RW3].

24. RW1 Reverend Joseph Ntombura Mwanie the presiding bishop of Kenya Methodist Church of Kenyan adopted his witness statement dated 4th April 2019, as part of his evidence in chief. The witness stated that on the 10th of June 2014, the Claimant was appointed as a Security Manager responsible for all security matters pertaining to the Methodist Ministries Centre.

25. According to the letter of employment, the Claimant's contract of service was for a fixed term of three years whose renewability was wholly dependent on his performance. His monthly basic salary was Kshs. 40,000. Besides the basic salary, the Claimant was entitled to other benefits including; Medical Cover of KShs. 30,294 per year; outpatient allowance of Kshs. 35,000 per year; house allowance of KShs. 30,000 per month; Responsibility allowance of KShs. 12000; and a traveling allowance of KShs. 13,630.00

26. The witness stated that in February 2015 he had a lengthy discussion with the Claimant, indicating to him that the 2nd Respondent wished to procure the services of a security firm to handle their security services. Consequently, his services were to be terminated. The Claimant didn't raise any objection to the outsourcing that was intended.

27. The witness further stated that the Claimant was duly paid his terminal dues. Since he had leave days [30] outstanding, he was allowed to proceed for leave between 10th March 2015 to 22nd April 2015.

28. The witness stated that the Claimant cleared with the Respondent without raising any objection. The termination of his employment was lawful, valid, and fair since his terminal dues were duly paid.

29. In his evidence under cross-examination, the witness insisted that prior to the termination of the Claimant's employment, he had had an elaborate meeting with him, whereby he indicated to him that

the 2nd Respondent was to procure services of a Security firm to offer it security services and that as a result, his employment was to be terminated.

30. The witness stated that he didn't give the Claimant any written notice spelling out the reasons for the termination of his employment. He asserted that he conveyed the reasons verbally. In the meeting, it was only him and the Claimant.

31. The witness stated that they promised the Claimant that his salary was to be increased after three months. The increment was subject to the availability of funds. The promise was not fulfilled as funds didn't become available.

32. The outsourced Security firm was to be in charge of all the security matters. The firm did take over the management of the 2nd Respondent's security matters. The lady, Emma didn't run the security firm, she was only acting as the link person between the Respondents and the firm. She had no training in security matters.

33. The Security firm was Intercity Security firm, prior to the termination, it had been offering services to the Respondents. After the termination, it took over the management of security services.

34. The witness further testified that the Claimant was not served with any notice specifically informing that his employment was to be terminated on account of redundancy. He was only served with a termination notice. Prior notice was unnecessary as there had been a gentleman's agreement.

35. In his evidence in re-examination, the witness stated that the discussion between him and the Claimant was on the 25th of February 2015. The reason for the termination was brought out in the termination letter. The 2nd Respondent was entitled to terminate the Claimant's contract of employment at any time as long it gave him notice.

36. The contractual salary was KShs. 40,000. Upon being approached by the Claimant, he agreed to the Claimant's proposal for a salary increment, however, this was subject to availability of funds.

37. RW2 urged the Court to adopt his witness statement filed herein as his evidence in chief. The witness stated that at the material time, he was the 2nd Respondent's property manager. In the process leading to the payment of the Claimant's final dues, he is the one who handled the handover process. The Claimant executed the handing over document.

38. Cross-examined, the witness stated that according to him, by executing the handover document, the Claimant was signifying that he was agreeing to be let off.

39. The witness admitted that he was not in the meeting that he has alluded to in his witness statement.

40. RW3, Dorothy Kinya, the 2nd Respondent's Finance Manager, adopted her witness statement dated 3rd April 2022 as her evidence in chief. She testified that the payslips exhibited by the Respondent emanated from her office. She was in charge of the payroll.

41. In her evidence under cross-examination, the witness acceded to the fact that though she has mentioned of a meeting and deliberations that were allegedly done with regard to the separation, she was not present in the meeting.

The Claimant's Submissions

42. The Claimant's Counsel identified two issues for determination;

    i. Whether the Claimant was wrongfully and unfairly terminated.

ii. Whether the Claimant is entitled to the reliefs sought.

43. It was submitted that in order for the termination of an employee's contract of employment to be considered fair, the employer must prove that there was substantive justification for the same and that procedural fairness was present. To buttress this submission, Counsel placed reliance on the judicial decision in Walter Ogal Anuro vs Teachers Service Commission (2013) eKLR where the court held:

> " For a termination of employment to pass the fairness test there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for termination while procedural fairness addresses the procedure adopted by the employer to effect the termination"

44. Counsel submitted that the Respondent did not give the Claimant reasons for the termination of his employment prematurely, before the appointed date of a fix-term contract.

45. It was the Claimant's argument that the alleged reason, restructuring, was not genuine, as the outsourced service provider was going to provide the same role that he was performing. Reliance was placed on the case of Chapman v Goonvean & Rostowrack China Clay Ltd [1973]2 ALLER, 1973.

46. The evidence on record is ample, there were no consultations before the Claimant was declared redundant. The Respondent's witnesses didn't place forth any evidence to demonstrate that there were any consultations.

47. It was further submitted that Section 40 of the *Employment Act* sets an elaborate procedure that has to be mandatorily adhered to by any employer contemplating terminating an employee's employment on account of redundancy. No notice of intention to declare redundancy was issued. The labour officer was not issued with any notice. All these, in violation of the mandatory procedure.

48. To support the point[s] that consultation and issuance of the notices was a must and that absent of the same the termination was unlawful and unfair, reliance was placed on the decision in Kenya Airways Ltd Vs Aviation & Allied Workers Union & 3 others Civil Appeal No. 46 of 2013(KLR).

49. On the reliefs sought, it was submitted that the Claimant was employed by the Respondent under a fixed-term contract of three years, and he had a legitimate expectation that it would run uninterrupted for the period. However, eleven months into the contract, with no fault on his part, his employment was terminated. Because of the premature, and unfair termination of his employment, this Court should grant him all the reliefs sought.

Analysis and Determination

50. From the pleadings, evidence, and submissions on record, the following issues present themselves for determination, thus;

i. How did the separation in employment between the Claimant and the Respondent occur?

ii. Was the termination of the Claimant's employment lawful and fair?

iii. Is the Claimant entitled to the reliefs sought?

How did the separation in employment between the Claimant and the Respondent occur?

51. There are various ways in which a contract of employment may be terminated by the act of parties. They are termination; by mutual agreement; at the initiative of the employee; and at the initiative of the employer. In a dispute as is herein where the lawfulness and fairness of termination are in dispute,

and where it is not very clear by the employer how it occurred, it becomes imperative for the Court to determine how the termination occurred, considering that the *Employment Act* has to an extent prescribed different; circumstances that can attract a particular manner of termination; conditions that must be demonstrated in order for a termination to be considered justified; and dissimilar remedies for any unlawful and unfair termination.

52. There is no contest that the Claimant was the 1st Respondent's employee at all material times whose employment was terminated through the letter dated 5th March 2015. I have carefully considered the manner in which the letter was couched and find no difficulty in stating that as regards the reason for the termination, it was not very clear. One can only see the Respondent's attempt to bring out the reason in paragraph two thereof. The paragraph read;

> "May I take this opportunity to thank you very much for the good service s rendered to this organization in the short period you served. Your resourcefulness and commitment to security matters is highly appreciated. Unfortunately, we have had to make this decision as a restructuring measure to enable us to become more impactful in the area of mission activities."

53. In order to gain a correct impression of the specific manner in which the separation occurred; the Court got constrained to beyond the termination letter therefore. A clearer version by the Respondent of how and why the Claimant's contract of service was terminated, was brought out by RW1. He stated in his witness statement, thus;

> "6. 6. That sometime in February 2015, I had a lengthy discussion with the Claimant herein in the Conference Office indicating to him that the Re4spondents wished to procure the services of a security firm to handle their security matters. I explained to the Claimant that the procuring of the said services would mean that his services to the Respondents would have to be terminated."

54. This statement by RW1, coupled with the use of the word "restructuring" in the termination letter, leaves an undoubted impression that the termination was on account of redundancy. I so conclude.

55. In Cause No.ELRC 1332 OF 2018 – Showkat Hussein Badat vs Oshwal Education & Relief Board, this Court stated;

> "50. The defining characteristic of termination on account of redundancy is lack of fault on the employee. It is a species of 'no fault termination'. One cannot be off the mark to state that it is for this reason that the *Employment Act* places particular obligations on the employer most of which are directed towards ensuring that those employees to be dismissed are treated fairly."

56. Both section 2 of the *Employment Act*, 2007 and section 2 of the *Labour Relations Act* define redundancy as:

> "The loss of employment, occupation, job or career by involuntary means through no fault of an employee, involving termination of employment at the initiative of the employer, where the services of an employee are superfluous and the practices are commonly known as the abolition of office, job or occupation and loss of employment."

57. In the case of Kenya Airways Limited & Aviation & Allied Workers Union Kenya & 3 others (2014) eKLR cited by the Counsel for the parties herein, the Court of Appeal stated:

> " There are two broad aspects of this definition. The first one is that the loss of employment in redundancy cases has to be by involuntary means and at the initiative of the employer. It should not be a contrived situation. It has to be non-volitional. I understand this to refer to a situation, in most cases, an economic downturn, brought about by factors beyond the control of the employer, which leaves the employer with no option but to take an initiative the consequence of which will be an inevitable loss of employment."

58. Undeniably, the law does not recognize employment for life, however, the social balance struck in the context of a constitutional regime in which the right to fair Labour Practices is a fundamental right is to afford an employee the right not to be unfairly dismissed and the employer the right to dismiss an employee for a fair reason provided that a fair procedure is followed.

59. A termination of a contract of service can only be considered fair if substantive justification and procedural fairness, are established in the decision to terminate and the process leading to the termination, respectively. The Court of Appeal in the Kenya Airways Limited vs Aviation & Allied Workers Union [Supra] expressed itself;

> " ...... for any termination of employment under redundancy to be lawful, it must be both substantively justified and procedurally fair........."

Throughout, the proceedings herein, the Claimant maintained that the termination of his employment lacked substantive and procedural fairness. On the other hand, the Respondent maintained that they were present. At this point, I turn to consider the two aspects separately.

I. Procedural fairness.

60. Lack of fault on the part of the employee is the defining characteristic of termination of an employee's employment on account of redundancy. It is for this reason, that the *Employment Act*, of 2007 has given a detailed procedure to be adopted in such terminations whenever an employer contemplates terminating. In my view, the statutory procedure stipulated in section 40 of the Act, leaves no residual for the employer to operate outside the procedure to whatever extent. See, this Court's decision in Warucu Ngethe Kijuu v Hilcrest Limited [2022] KEELRC 4156[KLR].

61. Section 40 of the *Employment Act* section provides:

> " An employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions—
>
> (a) where the employee is a member of a trade union, the employer notifies the union to which the employee is a member and the labour officer in charge of the area where the employee is employed of the reasons for, and the extent of, the intended redundancy not less than a month prior to the date of the intended date of termination on account of redundancy;
>
> (b) where an employee is not a member of a trade union, the employer notifies the employee personally in writing and the labour officer;

(c) the employer has, in the selection of employees to be declared redundant had due regard to seniority in time and to the skill, ability, and reliability of each employee of the particular class of employees affected by the redundancy;

(d) where there is in existence a collective agreement between an employer and a trade union setting out terminal benefits payable upon redundancy; the employer has not placed the employee at a disadvantage for being or not being a member of the trade union;

(e) the employer has where leave is due to an employee who is declared redundant, paid off the leave in cash;

(f) the employer has paid an employee declared redundant not less than one month's notice or one month's wages in lieu of notice; and

(g) the employer has paid to an employee declared redundant severance pay at the rate of not less than fifteen days' pay for each completed year of service."

62. There is no dispute that on or about the 6th March 2015, the Respondent wrote to the Claimant a letter, indicating that his position was to be "eliminated" with effect 10th March 2015 and that he was being given one month's notice of termination.

63. Parties were in agreement that the letter was not preceded by any other, informing the Claimant of the alleged decision to restructure. The question that this Court has to answer is as to whether the letter took the character of the notice[s] envisaged by section 40 [1] of the *Employment Act* and whether it was in nature able to achieve the purpose for which the provisions created the notices thereunder.

64. The notice to the employer, trade union, and the Labour Officer contemplated under sub-section [a] and [b] births the event of consultation before redundancy is declared. In the Kenyan situation, consultation is a must and its essence cannot be downplayed. This was emphasized by the Court of Appeal in Kenya Airways Limited v Aviation & Allied Workers Union & 3 others [2014] eKLR, thus;

" a] Consultation is implicit in the *Employment Act* under the principle of fair play;

b] Consultation gives an opportunity for the other avenues to be considered to avert or to minimize the adverse effects of terminations;

c] Consultations are meant for the parties to put their heads together and is imperative under Kenyan law;

d] Consultations have to be a reality not a charade

e] Opportunity must be given to stakeholders to consider;

f] Stakeholders must have and keep an open mind to listen to suggestions, consider them properly, and then only then decide what is to be done; and

g] Consultation must not be cosmetic.

65. In Civil Appeal No. Nai. 325 of 2018, The Germany School Society v Helga Ohany Consolidated with Civil Appeal No. 342 of 2018, Helga Ohany v The German School Society, the Court of Appeal Stated;

> " 61. Having regard to the legislative intention of the provisions of section 40 of the *Employment Act*, the International Law, and decided cases, we find that consultation on an intended redundancy between the employer and employee is implied by section 40[1][a] and [b] of the *Employment Act*. Moreover, consultation is now specifically required by Article 47 of *the Constitution* and the *Fair Administrative Action Act*. Article 47 and Section 4[3] of the *Fair Administrative Action Act* provide that where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give notice to the person affected by the decision. [see Cargill Kenya Limited v Mwaka &Others, para 35-37].

66. The scope of the consultation in a redundancy process was explained in Kenya Airways Limited and Aviation & Allied Workers Union Kenya & Others [supra]:

> 52. The purpose of the notice under section 40[1][a] and [b] of the *Employment Act*, as is also provided for in the ILO Convention No. 158- Termination of Employment Convention, 1982, is to give the parties an opportunity to consider "measure to be taken to avert or to minimize the terminations and measures to mitigate the adverse effects of any terminations on the workers concerned such as finding alternative employment". The consultations, therefore, meant to cause the parties to discuss and negotiate a way out of the intended redundancy, if possible, or the best way of implementing it if it is unavoidable. This means that if parties put their heads together, chances are that they could avert or at least minimize the terminations resulting from the employer's proposed redundancy. If redundancy is inevitable, measures should be taken to ensure that as little hardship as possible is caused to the affected employees."

67. The Respondents asserted that before the termination, Rw1 had lengthy deliberations with the Claimant. I am not persuaded and I agree with the Claimant that there were no consultations over the issue of redundancy. This view is attracted by the fact that the Respondents failed to put forth any material from which one can discern how the alleged consultations were initiated, was it by any written notice as contemplated under section 40 of the Act? Certainly not.

68. I have carefully considered the tone of the Respondent's letter certainly it is in nature one that had a predetermined end, the Claimant had to exit, and it didn't provide any room for consultation. The notice was therefore one that could and, didn't achieve the purpose for which it is provided under section 40 of the Act.

69. The law requires an employer contemplating terminating an employee's employment on account of redundancy to besides issuing the requisite notice to the Labour Officer. There is no dispute that in the instant matter, the Respondents didn't assert and prove that the notice was issued. A procedural flaw.

70. Section 45 [2] of the *Employment Act* places upon the employer an obligation to prove that the termination of an employee's employment was procedurally fair, otherwise, the termination shall be deemed unfair by operation of the law. No doubt, consultation is an integral part of the aspect of procedural fairness in a redundancy process. The Respondent didn't place before this Court any evidence to demonstrate that there were consultations before the termination. This coupled with the foregoing premises, impels me to conclude that the termination was procedurally unfair.

Substantive justification.

71. The above-stated letter brought out the reason for the termination of the Claimant's employment, the restructuring. Throughout, the Claimant maintained that the Respondent didn't have any valid and fair reason[s] to terminate his employment. In sum, he contended that what happened was an unfair termination dressed up as a redundancy. The alleged redundancy was a sham. The Respondent was of a contrary view, the termination on account of redundancy was justified.

72. Considering the rival positions taken by the parties on the alleged redundancy, it falls on this Court to pronounce itself on whether the redundancy was genuine and justified. I'll do this bearing in mind, the burden placed upon the employer to prove that the reason[s] for termination was valid and fair, [section 45[2] and that the termination was justified [section 47[5] of the *Employment Act*. I now turn to consider whether the burden was discharged by the Respondent.

73. In my view it is not enough for an employer to just assert that there was a "restructure" with a consequence that some positions were rendered redundant. Reasonable details are expected of the employer and the expectation is heightened when the redundancy is disputed by the employee. An employee who sees the same as camouflaged.

74. In this case, RW1 asserted that the "restructure" was that security services for the 1st Respondent were outsourced from a security firm. I am of the view that procuring of outsourced services must have some form of documentation, more especially of the magnitude alleged by the Respondents. If indeed the Respondents' assertion that the Claimant's position was abolished because of the outsourcing, they could have placed before this Court, an outsourcing agreement, or any document as proof of payment for the procured services. In sum, the Respondents' evidence on the alleged procurement of security services, was too sketchy, depriving it of the ability to be, believed and, the basis for their discharge of the legal burden herein above mentioned.

75. By reason of the foregoing premises, I am not convinced that the termination was properly and genuinely a result of the alleged "restructure" or outsourcing of security services, rendering the position of the Claimant abolished.

Whether the Claimant is entitled to the reliefs sought or any of them.

i. Salary payable from October 2016 till the end of the employment contract

76. The Claimant sought inter alia, a declaration that his employment was most likely to be extended for a further three years after the expiry of the first three years of his fixed contract of employment. In his attempt to convince the Court that this is a relief he is entitled to, he vaguely asserted that the plea for the relief was based on his legitimate expectation. He didn't offer any evidence of what aroused the expectation. Consequently, I am not persuaded that this is a relief, this Court can grant.

77. The further sought for salary for payment of salary for the remainder of his contract period [28 months] totalling Kshs. 2,660,000. I hold the view, that an aggrieved employee can rightfully sue for compensation, in addition to the compensatory relief provided for under Section 49 [1][c] of the *Employment Act*. If the legislature intended to shut out any claim for damages outside that contemplated in the stated provision, it would have expressly stated so. Further, I have not lost sight of the fact that Section 12 of the *Employment and Labour Relations Court Act* bestows upon this Court authority to grant general damages, without limiting them to a specific class.

78. As to whether the compensation outside that contemplated under Section 49[1][c] in my view is highly dependent on what the justice of each case requires. For instance, where the facts of the case

patently show that a constrained approach, the approach of deeming the provisions of section49[1][c] as providing for a ceiling as regards matters of compensation, shall lead to; a travesty of justice; a reward to the offending employer; and diminishment of the purpose for the expansive employee rights and protections that set in with post-2007, labour relations legal regime, the Court will not shackle itself, it will make an award for salary for the remainder of the contract period.

79. The Claimant testified that he was lured by the Respondents to leave his former employment to join the 2nd Respondent's workforce. I got him as saying, therefore, that he was headhunted. Surprisingly, his employment was terminated only eleven months into his new employment. The Respondents didn't dispute this fact. The Claimant contended that his position was taken over by a lady called Emma. While acknowledging that Emma was in their ranks, Rw1 stated that she was only a link between them and the Security services provider. With all due respect, this was too casual an explanation. It left this Court, unable to fathom out what exactly her position was in the 2nd Respondent Organization, and inescapably conclude that indeed she took over the position of the Claimant. The Claimant lost his earlier job by joining the Respondent's employment, only to lose the same unfairly after a very short period. A tragedy indeed.

80. By reason of the premises, I am prompted to find that the circumstances of this matter compel that the Claimant be awarded salary for the remainder of his period, worked out not on the figure 65,000 [shortly hereinafter I will demonstrate that the Claimant's crave for the amount as his basic salary was not founded] but KShs. 40,000, the contractual basic salary. Therefore 40,000x28 = 1,120,000.

81. The Claimant further sought for compensation for unfair and unlawful termination pursuant to the provisions of section 49[1][c] of the *Employment Act*. The Court is cognizant of the fact that an award under this provision is discretionary, and the extent of the award too. The circumstances peculiar to each case influence the award. I have carefully considered the circumstances of this matter including; that the Claimant left his former job to join the 2nd Respondent's, only to lose his new job without a fault on his part, but through a camouflaged redundancy, within a very short period; his legitimate expectation that he was to serve up to the end of his contract period; the fact that the Respondents' action easily passes for an unfair labour practice; and that he didn't contribute to the termination in any manner, and conclude that he is entitled to the compensatory award to an extent of 12 [twelve months gross salary, Kshs. 85,924 x12=1,031,088.

82. This Court is not persuaded that there were any salary underpayments. The Claimant alleged that though his contractual basic salary was set at Kshs. 40,000, the 2nd Respondent promised him a salary increment of Kshs. 25,000 after three months. RW1 admitted that the promise was made, but asserted that effecting the same was made subject to availability of funds. The funds didn't become available, hence the no increment.

83. In my view, the promise just remained such a promise, it was not reduced to a contractual term. To agree to the Claimant's assertion that his basic salary ought to be deemed to have been Kshs. 65,000, shall be tantamount to rewriting a contract for the parties, a transaction this Court is totally unwilling to undertake. I reject the Claimant's claim for the alleged underpayments.

84. The upshot, judgment is hereby entered for the Claimant against the Respondent in the following terms:

    a. A declaration that the termination of the Claimant's employment on the ground of redundancy was procedurally and substantively unfair.

    b. Compensation pursuant to the provision of section 49 (1) (c) of the *Employment Act*, 12 (twelve) months' gross salary, Ksh. 1,031,088.

c. Salary for the period up to the end of his fixed term contract period, 28 months, KShs. 1,120,000.

d. Interest on the sum awarded above at the court rates, from the date of this judgment till full payment.

e. Cost of this suit.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 28TH DAY OF SEPTEMBER, 2023.

……………………

OCHARO KEBIRA

JUDGE

In the presence of;

Ms Wambui holding brief for the Charles Kajama for Respondent

No appearance for Claimant

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 15th March 2020 and subsequent directions of 21st 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 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.

A signed copy will be availed to each party upon payment of Court fees.

……………….

OCHARO KEBIRA

JUDGE