



**Karanja v KCB Bank Kenya Limited (Cause E020 of 2022)
[2023] KEELRC 2483 (KLR) (4 October 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2483 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE E020 OF 2022
M MBARŪ, J
OCTOBER 4, 2023**

BETWEEN

CAROLINE WANJIKU KARANJA CLAIMANT

AND

KCB BANK KENYA LIMITED RESPONDENT

JUDGMENT

1. The Claimant is a female adult. The Respondent is a limited Liability company registered under the *Companies Act* operating business, including banking services.
2. The Claimant was employed by the Respondent on 1st September, 2008 in the position of senior Relationship Manager under Corporate Institution Banking and later assigned the role of Business Development — Coast Region with effect from June, 2018. Before this role, the Claimant had been appointed Head, Government and International Organization (GIO) through letter dated 3rd January, 2017, job level ME, reporting to Director Corporate Banking.
3. The claim is that on 1st March 2022, the Respondent without cause issued the Claimant with a 30 days' notice of intended termination of her employment on account of redundancy. The notice did not disclose the reasons for the intended termination of employment or the criteria used which was unconstitutional, illegal, unlawful and wrongful.
4. The claim is that during the pendency of her employment, the Claimant spearheaded the blue economy business for the Respondent. From the year 2017 to the date employment terminated, the Respondent allowed unfair practices, discrimination and limited opportunities to the Claimant. Due to the Respondent's unfair practices and discrimination, the Claimant was not given opportunities to compete for jobs within the organization and she was under extreme duress which forced her to consider involuntary resignation in December 2021 but it was subject to the contract settlement for 7 years 5 months, recompense for the last 5 years for salary adjustments freeze, a reasonable retirement



package or of 1% per annum of the total profit of the Corporate bank for the businesses-generated by the Claimant to the Respondent.

5. The management executive failed to deal with the Claimant's proposal, she requested to meet the Board Resource Committee to intervene in her matter for her to be paid a reasonable retirement package or to be seconded to another part of the industry of the Respondent but they failed to respond to her request. Instead, notice of intended termination of employment issued to which the Claimant noted had factual inaccuracies, and the respondent had not taken into account some extenuating circumstances. The issue of redundancy was questionable.
6. The corporate restructure exercise was implemented and advertised on 1st December, 2021 whilst the Claimant was on leave and she had no access to the structure or communication regarding the structure. Upon her assignment completion and without any further guidance on job requirements or expectations, she undertook representation of the Bank regional and international for Africa Regional Strategy (AfCTFA) and global Regional Strategy (UN & Affiliates Organizations) whereby the initiatives were self-initiated but were deemed irrelevant and therefore unsupported by the Respondent's Executive.
7. The Claimant suffered the disadvantage of being considered for a role in the new structure as it required competent knowledge of participation in the Beyond Banking yet from 2019 she was deliberately excluded from trainings of unit Heads on Corporate Business Strategy intent. From 2018, the Respondent failed to reimburse her the travelling expenses she incurred on self-initiated assignments yet the Respondent never failed to reimburse her peers at work. The Claimant thus claims for reimbursement of her travelling expenses from the year 2018 up to time of the termination of the employment.
8. On or about December 2021, the Claimant requested access to the company system and password reset to the person in charge of the IT department, she was not granted access.
9. The Respondent, without cause, conducted itself in a manner that destroyed and seriously damaged the employment relationship. The Respondent denied the Claimant air travel requests to attend office meetings, which demonstrated that the Respondent no longer intended to be bound by the terms of the Contract for employment of the Claimant. This went against the Claimant's rights under the doctrine of legitimate expectation and tarnished her reputation and brought her career to a premature end. The acts of the Respondent have psychologically affected the Claimant and brought her social stigmatization and reputational damage. The Respondent subjected the Claimant to victimization to such extent that it was frustrating the Claimant at work by among other things;
 - i. Denying the Claimant access to the company IT system thus making it impossible for the Claimant to execute her duties.
 - ii. Failure to reimburse the Complainant the travelling expenses for work duties, while reimbursing her peers.
 - iii. Excluding the Claimant from training of Unit Heads on Corporate Business Strategy intent.
 - iv. Rejecting the Claimant's requests to attend official meetings.
 - v. Deleting the Claimant's financial identity from the Respondent's records (Corporate Relationship Manager's Code), effectively rendering her invaluable/ghosted from the due recognition of contribution to the Respondent's business.



- vi. Hacking the Claimant's cellphone and personal Gmail accounts, interfering and deleting records therein in an endeavour to destroy information and records in the Claimant's custody in the matter herein.
 - vii. Hacking the Claimant's cellphone and personal Gmail accounts. — interfering and deleting records therein violation of the Claimant's rights to confidentiality and privacy.
10. In light of the above, the Respondent failed to act in accordance with justice and equity in issuing the Claimant with the Notice of intended termination as there has been no substantive and legal reasons for her intended termination and against of Section 40 of the *Employment Act*.
 11. The Respondent, a signatory to a number of United Nations Agreements and International Conventions, deliberately acted contrary to and in gross breach of the International Conventions, Agreements, Goals and Treaties relation to its workers' rights of non-discrimination, reduced inequality, and gender equality. The Claimant was appointed by the Respondent as the Head of GIO from November, 2016 to 2018 with a Team of Five (5) Members and during the year 2016, the said unit outperformed all the other Units in the Respondent's corporate Institutional Banking structure, despite the fact that some of the claimant's core Accounts (National Government Entities) being deliberately moved and reallocated to the Public Sector. Further, the Respondent's Director, Corporate irregularly demanded the adjustment of the Claimant's scorecard by the end of 2017 which adversely caused a variation in her scorecard in comparison with the other Respondent's units. Despite good performance, when the Claimant presented her performance appraisal to one Moez Mir, he latter forced her to hand over her Accounts to the youngest Member of the Team, and an Assistant Relation Manager, one Jeff Murgor. The said Director also told the Claimant to hand over her personal Identification Number (R. M. Code/DOA) Relationship Manager Code which is utilized for all financial reporting and revenue work to Jeff Murgor.
 12. In December 2017, though the Claimant had performed well and score of 4/5, Moez Mir refused to accept the score and demanded that she should scale it down to 3/5 - basic performance, contrary to what had been agreed upon at the beginning of the year. She was thus given an option, to scale down the performance and get the confirmation to the position of Head of Government failing which she would lose it or go back to the previous position. This action, caused the claimant's salary to stagnate for the next five (5) years, without any increase like all the others. Her salary stagnated and was frozen, her peers were accorded annual salary increments, bonuses, reviews and other opportunities commensurate with Management Level E (Senior Leadership Level) of the Corporate Banking Team for over four (4) years, between Quarter 1, 2018 until year 2022. The Claim is for compensation for the loss of salary/stagnation for the period during which the Respondent deliberately and unfairly rendered her undeserving of perks accorded to her peers.
 13. Under the KCB Terms of Service for Reference Guide for Managers, the claimant was entitled to salary increments of 15% per annum for the said years when her salary was frozen and thus claims the following;

Salary increment for 2018 — Kshs. 740,770.00 x 15% = Kshs. 111, 115.50 x 12 Months = Kshs. 1,333,386.00

Salary increment for 2019 – Kshs. 851,885.50 x 15% =

Kshs. 127.782.80 x 12 Months = Kshs. 1,533,393.60

Salary increment for 2020 — Kshs. 979.668.30 x 15% =

Kshs. 146,950,20 x 12 months = Kshs. 1,763,402.40



Salary increment for 2021 – Kshs. 1,126,618.50 x 15% =
Kshs. 146,950.20 x 12 Months = Kshs. 2,027,913.60
Salary increment for 2022 – Kshs. 1,295,611.30 x 15% =
Kshs. 194,341.70 x 3 months = Kshs. 583,025.10
Sub-total Kshs. 7,241,120.70

14. In the year 2018, the Claimant was transferred to Mombasa in the position of Head of Corporate Business Development, Coast. Though the position was senior, it was however the same level she had been but the Respondent deliberately refused to accord the Claimant a Team, budget and proper positional structure and promotion. The Respondent removed the Claimant from her reporting line to the Respondent's Director, Corporate, and instead required to report to her peers, like Head of Regional Business, which action was an indirect but deliberate demotion. Despite exemplary performance at Mombasa as the Head of Business, Coast and originated several businesses and Project Accounts, having been denied her Relationship Manager Code, (R.M. Code/DOA), she had no way of demonstrating her performance, noting that all financial reporting was through other Respondent's Departments and thus none was credited nor recognized to the Claimant. In the premises, the Respondent's business financial returns evidently did not mention any assignment nor contribution by the claimant, yet the said reporting matter most in the Respondent's Finance Division.
15. By December 2021, the claimant had generated business worth approximately Kshs. 6.2 Billion per year in favour of the Respondent, a clear demonstration of her zeal and unwavering commitment to her employment and dedication to the duties assigned to her. Owing to the unfair, unconstitutional, illegal and wrongful termination of employment, the Claimant avers claims a recompense at the rate of 1% of all the businesses generated by her and to the benefit of the Respondent as follows:
- Respondent's Benefit as at 31st December, 2021 = Kshs. 6,200,000,000.00
Claimant's recompense = Kshs. 6,200,000,000.00
1% per annum x 4 years = Kshs. 248,000,000.00
16. In the year 2019, the Respondent initiated the Beyond Banking initiative, meant to position the Respondent to do business in a new way. During the period, the Corporate Heads were taken for training in Nairobi, and which training was by invitation only. However, the Respondent deliberately discriminated against the Claimant and failed to invite her for the said training. The Claimant later learned that she was the only Corporate Manager in the entirety of the Respondent's Bank set up who was deliberately omitted from the said training.
17. The Respondent knew or ought to have known that Banking is a sensitive profession but deliberately and progressively hedged the Claimant from the said profession, which actions continue to cause the claimant gross loss and damage.
18. The Claimant had a reasonable expectation that she would work for the Respondent and in the Banking sector till retirement at the age of 60 years. Since 2018, the Respondent unfairly, unconstitutionally, unlawfully, illegally and/or wrongfully instituted mechanisms clearly geared towards frustrating her career progression and eventually making it impossible for her to fit in the Banking sector and thereafter illegally, unconstitutionally, unlawfully, illegally and/or wrongfully declared her redundant. Further, due to the sensitive and specialized nature of the Banking profession, the Claimant is unable to get an alternative employment. The claim is for payment for the remaining period of seven years and five months (7 years and 5 Months), at the rate of Kshs. 740,770.00 per



month, for which she would have worked with the Respondent and in the Banking Sector. Had the salary not been withheld she would have been earning a monthly salary of Kshs. 1,489,953.00 by the year 2022 and is thus entitled to have the damages;

Salary for 7 years and five months (89 months) =

Kshs. 740 770.00 x 89 = = Kshs. 65,928,530.00

Salary for 7 years and 5 months (89 months) .

based on the lost portion of the frozen salary =

(1,489,953.00 – 740770.00) = Kshs. 749,183.00

x 89 = Kshs. 66,677,287.00

Sub-total Kshs. 132,605,811.00

19. The Claim is that the respondent's actions were in gross abuse of the claimant's constitutional rights and contravened the very clear and mandatory provisions of *the Constitution* and violated fundamental rights and freedoms, the right to equality before the law and the right to equal protection and equal benefit of the law, right to freedom and security of the person and right to fair labour practices to fair remuneration, and reasonable working conditions.
20. During her employment, the Claimant was accorded mortgage and staff loan facilities. However, through letter dated the 30th March, 2022, the Respondent, after granting the Claimant a rebate of 20% on the balance of the outstanding amount, stated that the balances thereof shall continue at staff rates for a period of only six (6) months from 30th Mach, 2022 and thereafter, commercial rates will become applicable. On the unconstitutional, illegally, unlawfully, wrongfully termination of employment such shall cause claimant loss and damage and the respondent should be restrained from adjusting the loan repayment rates and specifically orders that the interest on the outstanding balances on the mortgage and staff loan facilities due to the Respondent should continue at staff rates.
21. The claim is that respondents action terminating employment on account of alleged redundancy was unjustified but calculated move way back in 2018 and was progressively perfected over the years until March 2022 with termination of employment. The claimant was singled out instead of her worse performing peers who were retained and some promoted and hence claim damages on account unfair termination equivalent to twelve (12) months at Kshs. 740,770.00 per month. Further, the Claim for frozen salary of Kshs. 1,489,953.00 by the year 2022;
 - a. Kshs. 740.770.00 x 12 month Kshs. 8,889,240.00
 - b. Based on the lost portion of the frozen salary = (1,489,953.00 – 740,770.00) = Kshs. 749,183.00 x 12 Kshs. 8,990,196.00The Claimant prays for judgment against the Respondent for; -
 - a. A declaration that the Respondent move to terminate the Claimants employment on the account of alleged redundancy amounts to constructive dismissal.
 - b. A declaration that the intended termination of employment of the Claimant on account of alleged redundancy is/was not justified and unfair, unconstitutional, illegal, unlawful, wrongful and void ab initio.



- c. A declaration that the Claimant should be reinstated back to employment without any loss of benefits and/or seniority.
- d. A declaration that the Claimant is entitled to general and aggravated damages for discrimination and the right to fair administrative action and thereupon this Court does assess the awards thereof.
- e. In the alternative to the sought reinstatement, Claimant be paid by the Respondent the cumulative salary, benefits and allowances for the remaining employment tenure of 7 years 5 months based on the salary of Kshs. 740,770.00 and further based on what the Claimant should have been paid had her salary not been frozen (89 months) = Kshs. 740,770.00 x 89 = Kshs. 65,928,530.00 and (1,489,953.00 – 740,770.00) = Kshs. 749,183.00 x 89 = Kshs. 66,677,287.00
Sub-total Kshs. 132,605,817.00
- f. The Claimant be reimbursed the travelling expenses she incurred during work for the period running from 2018 to March, 2022 (details thereof to be availed at the hearing hereof).
- g. Damages for unfair termination equivalent to twelve (12 months' salary of Kshs. 740,770.00 and further based on what the Claimant should have been paid had her salary not been frozen = Kshs. 740,770.00 x 12 = Kshs. 8,889,240.00 and further based the lost portion of the frozen salary = (1,489,953.00 - 749,183.00) = Kshs. 749,183.00 x 12 = Kshs. 8,990,196.00
Sub-total Kshs. 17,879,436.00
- h. An order that the Respondent do pay the Claimant recompense for the business generated by the Claimant to the Respondent between 2018 and 2021 of = Kshs. 6,200,000,000.00 x at the rate of 1% per annum x 4 years = Kshs. 62,000,000.00 x 4 = Kshs. 248,000,000.00
- i. An order of permanent injunction restraining the Respondent by itself, its servants, employees, agents and/or assigns from converting the mortgage and staff loan facilities accorded to the Claimant from staff to commercial rates and a further order that the Claimant due service the amounts due on the said facilities at staff rates till payment in full.
- j. Costs of and incidental to the suit.
- k. Interest on (d), (e) and (f), (g) and (h) above at courts rates from the date of filing this suit till payment in full.

22. The claimant testified in support of her case and reiterated her pleadings and the fact that on 1st March 2022 the respondent issued her with notice of intended redundancy without giving reasons or any justifiable cause which was a culmination of discriminatory practices from the year 2018. That due to the Respondent's unfair practices and discrimination, she was not given opportunities to compete for jobs within the organization and was under extreme duress which forced her to consider involuntary resignation in December 2021 but it was subject to the contract settlement for 7 years 5 months, recompense for the last 5 years for salary adjustments freeze, a reasonable retirement package or of 1% per annum of the total profit of the Corporate bank for the businesses generated by her for the Respondent on terms she considered very reasonable and fair. However, the respondent failed



- to consider the proposal, hence she requested to meet the Board Human Resource Committee to intervene, that is to be paid a reasonable retirement package or be allowed to try to be seconded to another part of the industry of the Respondent, but they intentionally failed to respond to the request. Eventually, when the Respondent issued the Notice of intended termination in March 2022, the claimant noted that there were factual inaccuracies and that the Respondent had not taken into account some extenuating inaccuracies. She held a meeting with Human Resource Business to address the inaccuracies but they failed to address them and the proposal to be considered for other roles within the organization because the issue of redundancy which was questionable.
23. The claimant testified that once she completed the job she was assigned to do in Mombasa and without any further guidance on job requirements or expectations, she undertook representation of the Bank regional and international forums for example, Africa Regional Strategy (AfCTFA) and Global Regional Strategy (UN & Affiliates Organizations) whereby the initiatives were self-initiated, deemed irrelevant and unsupported by the Respondent.
 24. From the year 2018, the Respondent failed to reimburse the claimant travelling expenses incurred previously on work assignments, the self-initiated assignments yet the Respondent reimbursed her peers at work thus claim reimbursement of unpaid travelling expenses from the year 2018 up to time of the termination of the employment.
 25. The claimant testified that she suffered disadvantage of being considered for a role in the new structure as it required competent knowledge of participation in the Beyond Banking yet from 2019 to the time when her employment was terminated she was deliberately excluded from trainings of Unit Heads on Corporate Business Strategy intent. Further, the Respondent had a corporate restructure exercise which was advertised and implemented on 1st December 2021 whilst she was on leave and had no access to the structure nor any communication regarding work. In December 2021, when she resumed from leave she requested access to the company system and password reset but was not granted access and the requests for password reset was denied by the Director's Corporate Office.
 26. The Respondent, without reasonable of proper cause, conducted itself in a manner that destroyed and damaged the employment relationship. The conduct of the Respondent including denying the claimant of air travel requests to attend official meetings, demonstrated that the Respondent no longer intended to be bound by the terms of my Contract. The decision by the Respondent goes against her rights under the doctrine of legitimate expectation and it has tarnished her reputation, and brought her career to a premature end. The acts of the Respondent have psychologically affected the claimant and have brought upon her social stigmatization and reputational damage.

Response

27. In response, the respondent's case is that the notice of intended redundancy issued but denies the claims made thereof. The claimant requested to be considered for "involuntary resignation", an option unknown to the Respondent.
28. All the Respondent's employees had, or with reasonable diligence, could have, accessed the Respondent's new structure. At any rate, the Claimant was engaged on the details of the new structure on several occasions. The Respondent treated the Claimant fairly and equitably in the circumstances and the particulars of victimization set out are denied. The Claimant was declared redundant after an inevitable reorganization of the Respondent brought about by the Covid-19 pandemic.
29. The events described to have occurred in 2017 and 2018 were never raised until termination in March 2022. The Claimant benefitted from the increased salaries attached to the positions she was promoted



- to. She cannot approbate and reprobate by now trying to go back to the events of 2017 and 2018. Any allegations thereof are time barred by section 90 of the *Employment Act* 2007.
30. The Claimant's performance was lawfully reviewed by the person then entitled to review her performance and she accepted the reviewed performance without any reservation. Trainings, travels and reimbursement of related costs are all guided by the KCB Terms of Service and Reference Guide for Managers. Unless the trainings or travels are in accordance with that policy, they cannot be reimbursed. There is nothing in the Claimant's contract, the KCB Terms of Service and Reference Guide for Managers or the law, that entitles the Claimant to an annual salary increment of 15% or to payment of 1% of the Respondent's business. Training at the Respondent is a continuous exercise and not a one-time event. The allegations of constitutional violations offend doctrine of constitutional avoidance and the principle in *Anarita Karimi Njeru v Republic* [1979] eKLR.
 31. The respondent admitted in so far as the claimant had a mortgage and loans and the conversion of the interest rates from staff to commercial rates.
 32. Employment was terminated lawfully and fairly and the Claimant has already received Kshs. 5,639,728.93 as terminal benefits.
 33. In evidence, the respondent called Robley Ngoje the Head, Employee Relations & Wellness in the Human Resources Division and testified that the claimant was first employed by the Respondent on the terms of the letter of appointment dated 4th August 2008. Sometime in early 2016, the Corporate Banking Division, where the Claimant was, had to be reorganized. Accordingly, the Claimant, as with everyone else within the then existing division, was invited to apply for a role in the new structure. The Claimant applied for and was interviewed for the role of Head, GIO and was issued with a letter of appointment dated 3rd January 2017 and confirmed for such role through letter dated 20th September 2017. It is insincere for her to say she was forced to accept a scaled down performance in order to be confirmed to the position of Head, GIO.
 34. The performance scorecard, which the Claimant alleges was forced to scale down, was signed off on 4th July 2017, It was however not reviewed by the Director Corporate Banking until 2nd October 2017. It is illogical that the Director Corporate Division would hold the Claimant ransom over the BSC which he signed after confirming the claimant to the position on 20th September 2017. A few months after the Claimant's confirmation to the position of Head, GIO she informed the Respondent that her mother, who was in Mombasa, was ailing and therefore would have preferred a role in Mombasa where she could be close to her mother. The Respondent acceded to the Claimant's request. However, since the position of Head, GIO was in Nairobi, the Claimant had to be given a new position and by letter dated 29th May 2018, she was transferred to Mombasa in the position of Head, Business Development - Coast Region. As at 20th September 2017, the consolidated salary was Kshs. 698,840.00, and as at 29th May, 2018 her consolidated salary had increased to Kshs. 740,770.00.
 35. The claim that the claimant was denied promotion in 2017 and an annual salary increase of 15% that she would have otherwise been entitled to, the KCB Terms of Service and Reference Guide for Managers which the Claimant has produced, there is no automatic annual salary increment. Whether or not to grant an increment and the measure of that increment, is at the discretion of the Respondent's Board of Directors. Claimant signed and accepted the changes on 3rd January 2017 and 20th September 2017 and 29th May 2018, without any reservation. She only brings up the issues several years later, and only after her employment has been terminated. As Head, Business Development Coast Region, the claimant was reporting to the Head, Regional Markets but there were given circumstances leading to the Claimant's appointment to this position. The Claimant requested for the transfer and accepted the



- position that the transfer came with. There was no reason to ignore the existing structure just because the Claimant thought the Head, Regional Market was her peer.
36. With time, the Respondent reviewed its business model and prioritized the Coast Region, meaning it would require closer focus and oversight. A decision was made that the Head, Business Development - Coast Region, to report directly to the Director - Corporate Banking Division. This change of reporting line was communicated to the Claimant vide a letter dated 6th March 2019.
 37. With regard to trainings, the Respondent has never failed to invite anyone who was supposed to be invited to a training. with the Claimant's position, it is virtually impossible for a training for Corporate Heads to happen without her knowledge, If the Claimant knew of such a training which excluded her, she should have complained in 2019. She never complained because there was no such exclusion.
 38. Mr. Ngoje testified that in the year 2020 there was covid-19 pandemic which forced a rethink in the Respondent's structure for efficiency and effectiveness. The Respondent was concerned about the growing nonperforming loans and loans categorized as high risk. There was a reorganization of the Respondent's Corporate Banking Division to be in line with the changing circumstances. The resultant structure wholly eliminated the role of Head, Business Development - Coast Region.
 39. With reorganization, the Respondent gave first priority to its employees to apply for roles in the new structure, which they believe best suits them. The Respondent held a meeting with all members of the Corporate Banking Division to advise them of the reorganization. The meeting was followed up with an email dated 1st December 2021. The employees were to apply for new roles by 7th December 2021. The Claimant had not applied by 7th December. Consequently, Ms. Joyce Mwashigadi called her severally in vain. Ms. Mwashigadi ended up sending the Claimant an email on 10th January 2022. The Claimant still never applied for any new role. Instead, during subsequent discussions, she disclosed that she did not feel she had the skills necessary to transition into the new structure. The Claimant requested for a position outside Corporate Banking Division. She however did not apply for that specific position nor did she identify any specific position that could absorb her. There is no position that the Claimant could fit into. Since the Claimant's position in Corporate Banking Division was abolished, and since the Claimant could not fit in any other position, she, inevitably, had to be declared redundant. It was impossible to consider any other factors in the circumstances.
 40. The notice of intention to declare redundancy was issued to the Claimant on 1st March 2022 and employment was terminated on account of redundancy through letter dated 30th March 2022.
 41. The Claimant went to court before the redundancy had taken effect and before her terminal could be paid amounting to Kshs. 5,639,728.93 which were paid on 30th March 2022.
 42. The Claimant was lawfully declared redundant and paid all her rightful terminal dues, Her claim for Kshs. 17,879,436.00 for unlawful termination therefore, should be dismissed.
 43. The Claim that there was travel on work assignments but the costs incurred for flight and accommodation was not reimbursed, the KCB Terms of Service and Reference Guide for Managers deals with reimbursement for work related travel. All travels have to be approved by the relevant person and the claimant had no approvals sought or obtained. The claim for the equivalent of 1% of the revenue the Claimant supposedly generated for the Respondent is without evidence that she generated Kshs. 6.2 billion per year or that the amount was actually the result of her sole effort. The Respondent does not have any policy that entitles employees to a share of the revenue they generated. The bonus policy, which is at page 70 of the KCB Terms of Service and Reference Guide for Managers, is discretionary and takes into account several factors. The claim for Kshs. 248,000,000.00 as the Claimant's share of revenue generated, is without any contractual basis.



44. The Claimant does not show on what basis she concludes that she had seven (7) years and five (5) months to her retirement. Even if she did, she cannot be paid the Kshs. 132,605,817.00 when she has not worked for a single day in that duration.
45. The claim that interest on the Claimant's loan should be retained at staff rates is contrary to the lending contract. The Claimant had staff loans which stood at Kshs. 6,811,753.45 as at 30th March 2022. The Respondent's Staff Loans Policy is that the rate of interest will revert to commercial rates upon termination from employment for whatever reason. The Respondent, gratuitously allowed the Claimant a six (6) month window before reverting the rates to commercial rates. The rates have already reverted to commercial rates.

At the close of the hearing, both parties filed written submissions.

46. On the pleadings, evidence and written submissions analysed, the following issues which emerge for determination can be summarized as follows;

Whether the declaration of redundancy amounted to constructive dismissal;

Whether the declaration of redundancy was justified, unconstitutional and or unfair;

Whether an order of reinstatement should issue;

Whether the alternative reliefs should be considered for payment of general damages for discrimination and right to fair administrative action, payment of terminal dues and compensation for business generated by the claimant and costs.

47. The claim is that, upon employment of the claimant on 1st September 2008 in the position of senior relationship manager she moved through the ranks to the position of GIO through letter dated 3rd January 2017 and the last position held was that of Business Development – Coast Region from June 2018 when her employment was terminated on account of redundancy through notice dated 1st March 2022 and taking effect on 30 March 2022.
48. The response is that the claimant, while in the position of GIO applied to be transferred to Mombasa to be near her ailing mother which was allowed and through letter 29th May 2018 in the position of Head, Business Development - Coast Region. The GIO position was only available in Nairobi. Due to COVID pandemic, the respondent reorganized its business and the role of Head, Business Development - Coast Region removed, the claimant was offered to apply for other positions which she failed to do and hence termination of employment through redundancy and has since been paid her terminal dues.
49. The claimant testified and painted a very grim picture of her workplace within the respondent especially from the year 2017 when she took up the position of GIO. That her life was threatened, she was placed under intolerable circumstances and all these, cumulatively affected her work relations and eventually, leading to termination of employment. At the time she was moved to the position Head, Business Development - Coast Region, she had wanted to exit from her employment but her superiors refused her request for a meeting to discuss the exit terms. The dangers she faced were real. She feared for her child, mother and self.
50. Whereas an employer is allowed to reorganize its business, a redundancy must be given context. Pursuant to Section 40(1) of the [Employment Act, 2007](#) (the Act), the employer has a legal duty to give reasons for, and the extent of, the intended redundancy. In *Cargill Kenya Limited v Mwaka & 3 others*



(Civil Appeal 54 of 2019) [2021] KECA, the Court of Appeal held that a redundancy is invalid where the employer fails to give valid reasons leading to loss of employment;

Thus, redundancy is a legitimate ground for terminating a contract of employment provided there is a valid and fair reason based on operational requirements of the employer and the termination is in accordance with a fair procedure. As section 43(2) provides, the test of what is a fair reason is subjective. The phrase “based on operational requirements of the employer” must be construed in the context of the statutory definition of redundancy. What the phrase means, in my view, is that while there may be underlying causes leading to a true redundancy situation, such as reorganization, the employer must nevertheless show that the termination is attributable to the redundancy – that is that the services of the employee has been rendered superfluous or that redundancy has resulted in abolition of office, job or loss of employment.”

51. The claimant has placed the matter of the redundancy together with constructive dismissal. In constructive dismissal, the employee is allowed to terminate employment due to the employer placing her under intolerable working conditions.

52. In the case of *Milton M Isanya v Aga Khan Hospital Kisumu* (2017) eKLR, the court held that;

In constructive dismissal, the desire to resign is from the employee as a result of a hostile working environment or treatment by the employer. A constructive dismissal occurs where the employer does not express the threat or desire to terminate employment but frustrates the employee to the extent that the employee tender's resignation.

53. The claimant worked in the position of GIO from the year 2017 and then Business Development – Coast Region from 29 May 2018 until notice of 1st March 2022 terminating her employment on account of redundancy.

54. The claimant, through her letter of December 2021 and another dated 11 January 2022 requested for IR (Involuntary Retirement) Settlement & Pending Claim. The claimant requested to be allowed to retire taking into account the hostile work circumstances and proposed a package for salaries for 7 years and 5 months.

There was no response to the request and proposal.

55. Mr. Ngoje for the respondent testified that the respondent had no matter called involuntary retirement. The claimant's letter and request for involuntary retirement is not similar to a resignation from her employment pushed by intolerable working conditions. Even though her work had been frustrated by various circumstances from the year 2017, to claim under constructive dismissal, a resignation with notice or not did not issue on her part. The proposal to voluntary retirement, with knowledge that there exists constructive dismissal, the claimant failed to address accordingly.

56. In the circumstances, to order a reinstatement would not be feasible. The work environment outlined by the claimant was in the nature of being so hostile and unbearable and leading to the notice of 1st March 2022 by the respondent on account of redundancy. Employment terminated at the instance of the respondent and not the claimant. Constructive dismissal cannot be inferred.

57. As to whether the declaration of a redundancy was justified, as outlined above, even though the employer has a right to organize its business for productivity, before terminating the claimant's employment, account should have been given to the reasons for, and the extent of, the intended



redundancy as held in the case of Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others [2014] eKLR where the court gave emphasis that;

Thus, redundancy is a legitimate ground for terminating a contract of employment provided there is a valid and fair reason based on operational requirements of the employer and the termination is in accordance with a fair procedure. As Section 43(2) provides, the test of what is fair reason is subjective. The phrase “based on operational requirements of the employer” must be construed in the context of the statutory definition of redundancy.

The respondent’s case through the evidence of Mr. Ngoje was that;

In the year 2020 there was the covid-19 pandemic which forced a rethink in the Respondent’s structure for efficiency and effectiveness. For instance, the Respondent was concerned about the growing nonperforming loans and loans categorized as high risk.

Consequently, there was a reorganization of the Respondent’s Corporate Banking Division to be in line with the changing circumstances. The resultant structure wholly eliminated the role of Head, Business Development - Coast Region

As with all other of its reorganizations, the Respondent gives first priority to its employees to apply for roles in the new structure, which they believe best suits them. The Respondent held a meeting with all members of the Corporate Banking Division to advise them of the reorganization. The meeting was followed up with an email dated 1st December 2021.

58. Indeed, following COVID pandemic, many businesses suffered and were forced to reorganize. The respondent’s case is that the position of Head, Business Development – Coast Region held by the claimant was removed from the structure. That a meeting was held with all employees in Corporate Banking Division on the matter and through email dated 1st December 2021 the claimant was informed.
59. The claimant testified at length that since taking over the GIO position and eventually moved to Business Development – Coast Region, her work credentials and password and access to the online system were reset and effectively denied access. She made requests to be restored back to the system and followed up with the IT without success. The transfer to Mombasa was said to have been at the request of the claimant but no such request letter was submitted. The trainings offered to reposition other employees into the new structure left out the claimant.
60. In evidence, Mr. Ngoje testified that, upon the reorganization, a meeting was called for all employees in the Corporate Division including the claimant. He produced pages 35 to 37 to his statement, a notice on the New Corporate Banking Structure sent by Joyce Mwashigadi, HR Business Partner – Corporate at KCB Head Office.
61. The email message and notice is sent to various persons. The notice is not to the claimant. The witness, Mr. Ngoje is only copied to the message. The entirety of the listed persons, the claimant is not one of them.

The team meeting in Corporate Banking Division Town hall.

62. The claimant was based in Mombasa. Where the meeting was meant for the claimant, this cannot be discerned and being away from head office, Corporate banking Division Town hall, attendance was not possible.



63. Without access to the online system, with password and credentials reset, the claimant had no way of knowing such meeting had been called for her to appreciate the fullness of changes in the division and to allow her to apply for any other position.
64. This analysis is given credence from the email from Mwashigadi Joyce on 10 January 2022 sent to the claimant through cwkaranja@kcbgroup.com that;
- Dear Carol,
- Reference is made to our discussions in December.
- I reached out to you severally through your cell phone number and landline to no avail.
- We note that you did not express interest in any role even after publishing the structure to all Corporate Banking Staff.
- Please contact me on ...
65. At this point and time, 10 January 2022 the claimant had no access to the respondent's system, credentials and passwords. No access to the letters, notices and communications to ongoing matters.
66. Noteworthy, the claimant continued to communicate work matters through her personal email address at cikuwkaranja@gmail.com. On 29 November 2021 the claimant, through cikuwkaranja@gmail.com wrote to Florence Nguku at FNguku@kcbgroup.com that;
- Thanks Florence.
- Hi Makena. The Intune Company App is not available on this device (greyed out).
- Kindly call me on ...
67. The same email addresses is used on 7 February 2022 when the claimant wrote to Mwashigadi Joyce. The claimant was on her personal Gmail account while others were on work addresses at kcbgroup.com
68. The claimant, as the employee had no control of the internal communications from the employer. Where matters that were likely to affect her employment arose, the legal duty was on the respondent to communicate and allow her to enjoy rights secured under Section 40 of the Act.
69. The general notice to all employees on the intended redundancy must issue in terms of Section 40(1) of the Act. The individual notice to the affected employee must also issue taking into account the claimant was not unionized;
- (b) where an employee is not a member of a trade union, the employer notifies the employee personally in writing and the labour officer;
70. In the case of *The German School Society & another v Ohany & another* (Civil Appeal 325 & 342 of 2018 (Consolidated)) [2023] KECA the Court of Appeal in addressing a similar matter held that;
- ... the employer is supposed to give two (2) distinct notices on account of redundancy, that the notice must be in writing and it is to be given after the conclusion of consultations on all issues arising from the redundancy. Also, the respondent argued that no criteria or reasons were given as to why she was singled out for redundancy, and that the termination process was unfair as she was the only one targeted. She argued that no evidence of restructuring of the Finance Department was tabled before the court, but, the appellant simply wanted to get rid of her without following due process.



71. In *Thomas De La Rue (K) Ltd v David Opondo Omutelema* [2013] eKLR, the Court held that;

It is quite clear to us that sections 40 (a) and 40 (b) provide for two different kinds of redundancy notifications depending on whether the employee is or is not a member of a trade union. Where the employee is a member of a union, the notification is to the union and the local labour officer at least one month before the effective redundancy date. Where the employee is not a member of the union, the notification must be in writing and to the employee and the local labour officer. Section 40 (b) does not stipulate the notice period as is the case in 40 (a), but in our view, a purposive reading and interpretation of the statute would mean the same notice period is required in both situations. We do not see any rational reason why the employee who is not a member of a union should be entitled to a shorter notice.

72. The distinctive features of a redundancy notice is that this must issue to the employees, where any employee is not unionized, a notice must issue to the affected employee and ultimately, the notice must be served upon the local Labour Officer.

73. As outlined above, the claimant being off the respondent's online system, her credentials and passwords inaccessible and which matters had been addressed with the respondent, there was no service on the general notice. Even where the notice issued, the lapse in serving the Labour Officer is not addressed. Such lapse goes to the heart of the entirety of the redundancy notice.

74. The rationale for the various notices and consultations with the employee is given by the Court of Appeal in the cited case above of *The German School Society & another v Ohany & another*, that;

A notice to the employee/trade union/labour officer opens up the door for a consultative process with the key stakeholders. The Court of Appeal in *Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 Others* (2014) eKLR held:

- a) Consultation is implicit in the *Employment Act* under the principle of fair play;
- b) Consultation gives an opportunity for other avenues to be considered to avert or to minimize the adverse effects of terminations;
- c) A 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 for the 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.

In essence, consultation is an essential part of the redundancy process and ensures that there is substantive fairness. The employer should ensure that it carries out the process as fair as possible and that all mitigating factors are taken into consideration. ...

The respondent has not made any effort to address any matter above.



75. Ultimately, a redundancy cannot affect a single employee. In the entirety of the respondent's ranks, with COVID pandemic or not, to single out the claimant from the entire workforce is not only unfair but to engage in unfair labour practices.
76. The court finds the notice terminating the claimant's employment was wrongful, lacked the due process under Section 40 read together with Section 45(2) of the Act and resulted in unfair termination of employment.
77. On whether there was discrimination against the claimant by the respondent, in December 2021, the claimant offered to resign from her employment. Her request followed a series of actions visited against her and frustrations to her work performance. Largely, her salary had been frozen from the year 2018 while the practice for all other employees was an annual review and adjustments based on work assessment and reviews. Indeed, had the claimant been static and a non-performer, a review and assessment should have been done to bring such matters to her attention and justify her salary freeze and maybe, notice issued to give account.

This was not the case. The respondent sat back and watched.

In response, Mr. Ngoje testified that;

It is noteworthy that as at 20th September 2017, the Claimants consolidated salary was Kshs. 698,840.00, However, as at 29th May, 2018 her consolidated salary had increased to Kshs. 740,770.00.

78. Since the year 2008 to the year 2017 the claimant consistently enjoyed an annual salary increase. From the year 2017 to 2022, a period of 5 years, her salary did not change. Mr. Ngoje admitted that there were salary changes for other employees but no accounts were filed. Most employees were appraised and salary reviews and bonus payments.
79. No reason is given why the claimant was not appraised from the year 2018 to the year 2022. Such effectively affected her salary which remained static, frozen and without any change.
80. As the employer, to place the claimant at such position while she witnessed other employees enjoy reviews of terms and benefits in increased salaries and bonuses, this directly and specifically targeted the claimant and cannot be justified. Treatment of an employee different and separate from others similarly situated is discriminatory and specifically prohibited under Article 27 of *the Constitution* and Section 5(3) of the Act. There is no response to such matter as to why the respondent opted for 5 years to treat the claimant in such manner.
81. The position is exacerbated by various other factors, where the claimant's request to resign from her employment, she proposed to the respondent that for 7 years 5 months to retirement, she be compensated for the last 5 years for salary adjustments freeze, a reasonable retirement package or of 1% per annum of the total profit of the Corporate bank for the businesses generated by her for the Respondent on terms she considered very reasonable and fair. There was no response. The claimant went out and asked to meet Board Human Resource. There was no response.
82. From December 2021, the proposal by the claimant on a resignation package, the respondent, instead of allowing her the option decided to issue notice of 1st March 2022 over intended redundancy. Even in a case where the term involuntary resignation was foreign to the respondent, to counter it with a redundancy that was not justified was to engage in unfair labour practice. various letters and communication issued to the claimant. Nothing stopped the respondent from responding on the proposal with a decline so as to put the matter to rest.



83. A redundancy is well defined under Section 2 of the Act as addressed above. The matter of discrimination against the claimant from the redundancy notice is discernible because, a redundancy cannot apply over work that in its nature is not likely to end and or remains available to be undertaken by other employees. A redundancy cannot apply where the affected employee can be allocated alternative duties or redeployed to another position. This was not the first time the claimant was being redeployed. She started at the role of GIO to Mombasa office. Her peers came and were promoted or trained to take up other roles. Her junior took over her roles and was paid due bonuses for work ordinarily the claimant ought to have been assessed, appraised and paid for. The response that the claimant refused and failed to apply for the offered positions are negated by the very conduct of the respondent of advertising for such positions while she was on leave, denied her access to the system and ensured that she had no training from the year 2018 until the notice dated 1st March 2022. Effectively placing her at a disadvantage to frustrate her employment and when she offered to resign, opting to issue a redundancy notice is just but a sham.
84. Such amounts to direct discrimination against the claimant. It is without justification and damages are due.
85. At the end of her employment on 30 March 2022, the respondent paid the claimant the following terminal dues;
- a. Severance pay at 0.5 months from 1st September 2008 at Ksh. 4,815,000;
 - b. One-month notice pay Ksh. 740,770;
 - c. Accrued leave days Ksh. 83,953.93;
 - d. Medical cover up to December 2022; and
 - e. Loan rebate for 6 months and then revert to commercial rates.
86. On the finding that there was unfair termination of employment, the redundancy being without due process and invalid, pursuant to Section 45 and 49 of the Act, compensation is due. The claimant worked for a total of 13 years for the respondent. There is no negative work record filed. She had made a proposal for involuntary retirement to disengage without response. The unfairness visited upon the claimant justify an award of 10 months' gross salary in compensation at Ksh. 740,770 x 10 = 7,407,700.
87. On the finding of discrimination against the claimant, without any form of response or submissions in this regard to justify the differential treatment against the claimant as against other employees and peers placed at her level, the reach out to separate went without any response. To turn around and apply redundancy provisions was to engage in unfair labour practices. Discrimination at work is the worst injury to an employee and its prominence is given under Section 5(3) of the Act and further forbidden under Article 27 of *the Constitution* that there should be no direct or indirect discrimination against any person.
88. Having met the threshold in *AKO v Abson Motors Limited* [2021] eKLR that;
- ... the law is therefore designed in a manner, that encourages Claimants to pursue remedy without fear of reprisal, with dignity, modesty, and unhindered by a choking evidentiary regime. The burden therefore shifts on the Employer, once there is a prima facie case, to show that discrimination did not take place, or that the acts or omissions complained of, are not based on any grounds specified under Section 5 of the *Employment Act*.



89. And in the case of *Nyarangi & Others v Attorney General* [2008] KLR 688 the court held that;
- Direct discrimination involves treating someone less favourably because of their possession of an attribute such as race, sex, religion compared to someone without that attribute in the same circumstances. Indirect or subtle discrimination involves setting a condition or requirement which is a smaller proportion of those with the attribute are able to comply with, without reasonable justification. The US case of *Griggs v Duke Power Company* 1971 401 US 424 91 is a good example of indirect discrimination, where an aptitude test used in a job application was found “to disqualify negroes at a substantially higher rate than white applicants. ...
90. In assessing damages, in *Keith Wright v Kentegra Biotechnology (Epz) Ltd* [2021] eKLR the court awarded the claimant who suffered discriminatory treatment Kshs. 5,000,000 in damages. In *Simon Gitau Gichuru v Package Insurance Brokers Limited* [2021] eKLR the Supreme Court of Kenya awarded the employee who suffered discriminatory treatment at work Kshs. 2,000,000 in damages on a claim going back to the year 2014.
91. A balance thereof in damages would translate to Kshs. 5,000,000 in general damages.
92. On the claim for travelling expenses, the claimant’s case was that she opted to undertake training after the respondent failed to include and involve her in internal trainings or training sponsored by the employer. She sourced and secured own trainings and despite submitting requisitions for payments and travelling expenses, the respondent refused to pay.
93. The response that all expenses for trainings required approval by the employer was not controverted. The claimant was aware of the fact that there was a workplace policy which required her to requisition for any expense before undertaking it. To travel and incur expenses before approval by the employer cannot justify a claim after the fact. Whether the claimant was on leave or noted that the indicated trainings were relevant for her duties and would benefit the respondent, reason demanded that before undertaken such expense, approval was necessary.
94. On the claim for a percentage over income generated by the claimant or business worth up to Ksh.6.2 billion, the basis of this claim is that from the year 2018 to December 2021 the claimant secured business for the respondent and was entitled to bonus pay but her Relationship Manager’s Code (RM Code) was deleted, effectively rendering her invaluable from the due recognition of contribution to the Respondent’s business. Her performance was hampered leading to termination of employment.
95. Award of bonuses by an employer is discretionary. However, the claimant was denied treatment accorded to other employees upon the deletion of her RM Code, without performance appraisal from the year 2018 to 2022 she had no chance of a salary review or her business performance assessment, all cumulatively adding up to discriminatory treatment which is addressed and redressed above with payment of damages. As an employee, the claimant reported to work as required, undertook assigned duties and payment of a salary every month is not contested. Save for the different treatment in allocation of work benefits secured for other employees, for her employment, the due salary was paid.
96. On the claim that the mortgage and loan facilities that were converted to commercial rates after 6 months upon cessation of employment, a redundancy leading to termination of employment is not similar to summary dismissal or termination of employment due to misconduct. Such arises where the role of the employee is abolished. The employee is not at fault. The employment benefit of a mortgage and loan facility would have continued on preferential terms had the position held not been abolished.



97. To demand that the mortgage and loan facilities should convert to commercial rates after 6 months is just but an addition to unfair labour practices visited against the claimant by the respondent. Had the intention been to terminate employment for any other cause other than following a redundancy, the due process of Sections 41 and 44 ought to have applied. To hide behind a redundancy is revealed on the demand to convert mortgage and loan facilities to commercial rates.
98. Majority of businesses such as the respondent secure mortgages under a redundancy insurance to cushion employees whose employment terminate due to no fault of their own. Without any records as to how the respondent cushioned the claimant upon her involuntary loss of employment, the mortgage and loan facilities ought to abide the same terms as secured during employment and a conversion to any other repayment modalities is without justification.
99. The respondent offer of rebate payment of 20% of your outstanding staff loan balances which stand at Kshs. 6,811,753.45 as at March 30, 2022 secured, the claimant shall continue to pay the due balances on her mortgage and loan facilities are staff rates until paid in full.
100. The interruptions in the mortgage and loan repayments cannot be visited against the claimant. She filed this suit to secure her rights in employment and is found with good foundation. The due and unpaid balances, time shall start running from this date and the claimant shall continue to make repayment every other month until payment in full – on staff preferential rates.
101. On the claim for payment for 7 years and 5 months to retirement, employment has since terminated over alleged redundancy which is addressed and redressed above. The claimant has not offered her labours to the respondent since 30 March 2022. The skills acquired while in the employment of the respondent remain sound and for the damage incurred, the court cannot fully restore what is lost save to award reasonable damages as held in *Joseph Mutua Nthia v Fredrick Moses M. Katuva* [2019] eKLR;
- But money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums which must be regarded as giving reasonable compensation. In the process there must be the endeavor to secure some uniformity in the general method of approach. By common consent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said it still must be that amounts which are awarded are to a considerable extent conventional
102. To award the anticipatory salaries until retirement age would effectively negate the awards above for compensation following unfair termination of employment and general damages for discriminatory treatment and result in duplication of award despite the claimant not rendering any duties to the respondent. see *D.K. Njagi Marete v Teachers Service Commission* [2013] eKLR.
- The claim successful, the claimant is entitled to her costs herein.
103. Accordingly, judgment is hereby entered for the claimant against the respondent in the following terms;
- a. The respondent unfairly terminated the claimant in her employment;
 - b. The respondent discriminated against the claimant;
 - c. Compensation awarded at Kshs. 7,407,700;
 - d. General damages awarded at Kshs. 5,000,000;



- e. The claimant shall enjoy mortgage and loan facilities repayment rates on terms subsisting during her employment and repayments with rebates offered on 30 March 2022 which shall commence as of this date, 5 October 2023 and continue to effect monthly repayments until payment in full – on staff rates;
- f. Costs to the claimant.

DELIVERED IN OPEN COURT AT MOMBASA THIS 4TH DAY OF OCTOBER 2023.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet Muthaine

..... and

