



**Odhiambo v Agility Logistics Limited (Cause E884 of 2021)
[2023] KEELRC 2888 (KLR) (10 November 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2888 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E884 OF 2021
SC RUTTO, J
NOVEMBER 10, 2023**

BETWEEN

JULIE TOKHO ODHIAMBO CLAIMANT

AND

AGILITY LOGISTICS LIMITED RESPONDENT

JUDGMENT

1. The suit herein was commenced by way of a Memorandum of Claim filed on 28th October 2021, through which the Claimant avers that she was employed by the Respondent with effect from 15th January 2019 on a three year renewable contract which was predicated on the UNSOS contract duration. Her position was that of Coordinator/Local Item Procurement Personnel. The Claimant avers that upon her employment, she performed her duties carefully and competently with due regard to the interests of the Respondent until 27th July 2021, when she was informed of her impending dismissal on account of redundancy. According to the Claimant, the requirement for Coordinator/Local Item Procurement Personnel had not diminished or ceased.
2. The Claimant contends that her wrongful, unlawful and unfair termination of employment was based on a false premise of redundancy.
3. The Claimant further states that during the course of her employment, the Respondent engendered and perpetrated a systematic discrimination against her in respect of her sex, gender, race and nationality.
4. Against this background, the Claimant seeks against the Respondent the sum of Kshs 2,698,320/= being unpaid salary for the month of July 2021, one month pay in lieu of notice of termination, one month notice in lieu of redundancy notice, leave days due, severance pay, unpaid overtime and compensatory damages. She further seeks declaratory orders as well as general damages for breach



of contract and violation of her constitutional rights. In addition, the Claimant seeks to have the Respondent compelled to issue her with a Certificate of Service unconditionally.

5. Opposing the Claim, the Respondent avers that it followed the procedures on redundancy as provided for under the [Employment Act](#). The Respondent has further disputed the Claimant's assertions with respect to discrimination. According to the Respondent, each job group has its own salary graduation based on years of experience. In the Respondent's view, the Claimant does not merit the reliefs sought hence prays that the Claimant's suit be dismissed with costs.
6. During the trial which took place on 22nd June 2023, both parties called oral evidence in support of their respective cases.

Claimant's case

7. For starters, the Claimant adopted her witness statement to constitute her evidence in chief. She further produced the documents filed alongside the Memorandum of Claim, as her exhibits before Court.
8. It was the Claimant's evidence that her duties entailed sourcing for vendors/suppliers, seeking for credit terms from the suppliers, updating the suppliers on the system; providing vendor registration forms, seeking for approvals for purchases; creating of Advance Shipping Note (ASN); following up with the deliveries, ensuring that the items are delivered to the final destination as per request; updating the tracker following up with the payments of the supplies and scanning of invoices.
9. She stated that upon assuming her position, she significantly assisted the Respondent's office in Mogadishu, Somalia, in the aforesaid duties, since the Respondent had not made efforts to recruit someone in a similar role at Mogadishu.
10. She further stated that due to the precarious nature of the mobilization period, at the earlier stages of the UNSOS project work, she was loaded with simultaneous responsibilities of human resource and finance. She was also strenuously overworked during that period. That for almost a year, she performed the aforesaid extra roles thus saving the Respondent in additional salaries it would have expended for recruitment. According to her, they had mutually agreed with her line manager that she would be given an increment but she was not paid any money.
11. It was the Claimant's further evidence that during her employment, the Respondent engendered and perpetrated a systematic discrimination against her. Giving illustrations of what she termed as discrimination on the part of the Respondent, the Claimant stated that:
 - a. The Respondent created binaries of privilege and disadvantages rooted in racism, sexism and employees' nationalities. That there were discrepancies in terms of salaries and fringe benefits between expatriate employees and local employees.
 - b. Being a local employee, she questioned the Project Manager why Mr. Raja was earning six times more than her salary yet they were doing similar work of equal value. That it was through her tutelage and training that Mr. Raja was able to assume his assigned role in Mogadishu.
 - c. Her medical cover was exclusively inpatient cover, whereas the expatriate employees had both inpatient and outpatient medical covers.
 - d. Her position as a Coordinator/Local Item Procurement Personnel gave rise to a higher managerial prerogative, and in direct conflict of interest, Mr. Andrew



Durn appropriated some of her work without consultation. Such actions were intended to undermine, humiliate or denigrate her.

- e. Despite her strong track record of success, Mr. Andrew Durn continuously denied her credibility and respect. Instead, around March 2021, he conducted a sham performance appraisal thus tacitly discounting the work she had been doing.
 - f. She was subjected by the Respondent to a pattern of dismissive, condescending and inaccurate communication on matters concerning her pay increment. The Project Manager continually failed to revisit her compensation in the context of the UNSOS project's improved financial picture. Instead, she was given burdensome duties with promise of promotion, and subsequent pay rise, which never materialised.
 - g. The Respondent's continuing inability to embrace the concept of equality meant that she was confined to low pay in comparison to the Respondent's expatriate employees.
 - h. The overtime hours she worked to augment her earnings were never paid; instead, she was deemed as a source of cheap labour by the Respondent.
12. Revisiting her termination from employment, the Claimant stated that on 27th July 2021, she received an undated letter delivered to her at her residence while off on leave, wherein she was summarily notified of her contract termination. The effective date of termination being on 30th July 2021. She contended that the abrupt tone of the aforementioned letter, coupled with the factual inaccuracies contained therein was part of the systemic discrimination and bias towards her.
 13. The reason given for her termination was restructuring. Being the Coordinator/local Item Procurement Personnel, she knew how the business was operating and according to her, they were buying goods in large quantities at the time.
 14. Contrary to the distorted depictions by the Respondent, its contemplation of her redundancy was not expressly brought to her attention. Moreover, she was not issued with mandatory notices under Section 40(1) of the [Employment Act](#). In addition, she was never made aware that she was a candidate for redundancy and/or informed of the criteria of selection.
 15. On 28th July 2021, she reiterated the aforesaid concerns with the Respondent. However, the Respondent proceeded to terminate her employment on 30th July 2021, without substantive justification and procedural fairness. At that time, she had sufficient understanding of the Respondent's business to recognize that there was no redundancy situation.
 16. Upon her dismissal, she was never paid her salary and terminal dues. The said payments were conditional that she was to sign a liability waiver to exempt the Respondent from any liability arising out of employment. In turn, she was to waive her own rights to demand favourable terms from the Respondent.
 17. Concluding her testimony in chief, the Claimant urged the Court to allow her claim as prayed.

Respondent's case

18. The Respondent called oral evidence through its Human Resources Manager Ms. Joyce Kanuri-Mwangi who testified as RW1. Similarly, she adopted her witness statement to constitute her evidence



in chief. She further produced the list and bundle of documents filed on behalf of the Respondent as exhibits before Court.

19. RW1 testified that the Claimant was designated at the Respondent's Mombasa branch office. That from the year 2020, the Respondent's business volumes reduced due to Covid-19 challenges and restructuring of the Mombasa operations which supports another project in Mogadishu, Somalia with some of the Kenyan operations being moved to Somalia.
20. This necessitated the Respondent to carry out a redundancy which process started in May 2020. That there was also a reduction in the number of troops while others like Mr. Raja were going to Mogadishu. The Respondent didn't know where to fix the inventory controllers like the Claimant.
21. She further averred that the Respondent notified the Ministry of Labour and Social Protection Labour Department on 24th June 2020 and submitted a formal notification that the company will proceed with redundancy.
22. On 26th June 2020, the Project Manager of the Mombasa warehouse operations held a meeting whereby the said letter was explained and shared with all the staff in attendance. The Claimant was in attendance and a memo was sent to all staff on the same day.
23. The Respondent even facilitated for a counselor and a financial management expert to talk to the staff to ensure a smooth transition.
24. The Respondent clearly informed the staff that the process would continue as they reviewed the business operations.
25. The Respondent expressly stated that they are not in the position to offer any suitable alternative to the redundant positions.
26. According to RW1, the redundancy procedure was followed according to Section 40 of the [Employment Act](#).
27. The Claimant declined to pick up her termination letter and the dues disputing the full and final payments. She compared herself to one John Peters who was made redundant the previous year and claimed that they were earning the same but had been paid less.
28. RW1 further denied the claims of discrimination on pay for equal work. She further stated that where expatriates are employed, their pay scale and grades differ from local employees. That with regards to Mr. Raja, he was the Deputy Project Manager and was more experienced compared to the Claimant. That further, he had previously worked for the Respondent and has a Masters in MBA.
29. RW1 further stated that the Claimant spoke to the manager on 28th July 2021 and the Respondent responded by calling her to clear her issues.

Submissions

30. Upon close of the hearing, the Court issued directions on filing of written submissions. However, both parties failed to comply with the Court's directions as their respective submissions were not on the Court's physical record and were missing on the online portal at the time of writing this Judgment. Indeed, when the matter came up for mention on 19th September 2023 to confirm compliance and take a Judgment date, the Court noted as much, and parties were advised to avail their written submissions by close of business that day. Be that as it may, this was not done.



Analysis and Determination

31. Arising from the pleadings and the evidence on record, the following issues stand out for determination:
- i. Whether the Claimant's termination by way of redundancy was fair and lawful.
 - ii. Whether there is a case of discrimination.
 - iii. Whether the Claimant is entitled to the remedies sought.
- Whether the Claimant's termination by way of redundancy is fair and lawful.
32. It is common ground that the Claimant was terminated from the Respondent's employment on account of redundancy. According to the Respondent, the said redundancy was on account of a restructuring exercise stemming from a change in personnel requirements.
33. It is now settled that any termination of employment under redundancy ought to be both substantially justified and procedurally fair. Such was the holding by the Court of Appeal in the case of *Kenya Airways Limited vs Aviation & Allied Workers Union Kenya & 3 Others* (2014) eKLR.
34. Substantive justification refers to the reasons for which the redundancy was effected while procedural fairness has to do with the procedure applied in effecting the redundancy. I will proceed to consider the two limbs under separate heads.

i. Substantive justification

35. As stated herein, the Claimant's termination was attributed to a restructuring exercise stemming from a change in personnel requirements. According to RW1, the Respondent's volume of business reduced in the year 2020 due to Covid-19 challenges and restructuring of the Mombasa operations which support another project in Somalia. That further, some of the Kenyan operations were moved to Somalia.
36. It is therefore evident that the Claimant's termination was based on the operational requirements of the Respondent hence falls within the ambit of Section 45 (2) (b) (ii) of the *Employment Act* (Act).
37. In the case of *Kenya Airways Limited vs Aviation & Allied Workers Union Kenya & 3 others* [supra], the Court of Appeal determined that the phrase "based on operational requirements of the employer" must be construed in the context of the statutory definition of redundancy. The Court went on to hold 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 and that the services of the employee have been rendered superfluous or that redundancy has resulted in the abolition of office, job or loss of employment.
38. Revisiting the provisions of Section 45(2) (b) (ii) of the Act, termination from employment is rendered unfair, where an employer fails to prove that the reason for the termination is valid, fair and based on its operational requirements.
39. Fundamentally, the reasons informing the redundancy ought to be genuine, valid and fair. As it is, the burden rests on the employer to prove such reasons otherwise, the termination is rendered unfair.



40. Therefore, the Respondent was duty bound in this case to prove that there was an ongoing restructuring exercise stemming from a change in personnel requirements and that the Claimant's role was among those affected.
41. Besides the oral testimony of RW1, there was no other evidence to corroborate the Respondent's assertions that there was a restructuring exercise and change in personnel requirements affecting the Claimant's role.
42. Being the reason behind the Claimant's redundancy, at the very least, the Respondent was expected to provide evidence in terms of Sections 43 and 45 of the Act so as to prove its case. Such evidence would have been in the form of a resolution or such other evidence by the Respondent approving the restructuring exercise and indicating the positions to be affected. Better still, it could have provided evidence in the form of its new structure vis a vis the old structure confirming that the position erstwhile held by the Claimant of Coordinator/Local Item Procurement was no longer in existence.
43. Without such evidence, it is not possible to indeed ascertain whether the Claimant's position was really affected by the restructuring exercise, if at all. In this regard, RW1's oral evidence was not sufficient to satiate the Respondent's burden of proof.
44. In so holding I am alive to the employer's right to declare redundancy and reorganize its enterprise as it so desires. Be that as it may, such action ought to be justified in the eyes of the law.
45. At the risk of repeating myself, I wish to echo the determination of the Court of Appeal in Kenya Airways Limited vs Aviation & Allied Workers Union Kenya & 3 others [supra], that in as much as there may be causes resulting in a true redundancy, the employer must nonetheless demonstrate that the termination of the employee is attributable to the redundancy and that the services of such an employee have been rendered superfluous or that the redundancy has resulted in the abolition of office, job or loss of employment.
46. There being no evidence in this case, that the Claimant's position was indeed affected by the restructure, I cannot help but find that the Respondent has failed to prove to the required standard that the Claimant's termination on account of redundancy was justified. Consequently, her termination in that respect was substantively unfair.

ii. Procedural fairness

47. The procedure to be applied in effecting a redundancy is stipulated under Section 40(1) of the Act. Under the said provision, the following conditions must precede a redundancy: -
 - 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.
48. In this case, the Claimant was notified of her termination by way of redundancy through an undated letter in which she was informed that her termination was to be effective 30th July 2021 with the notice period expiring on 29th August 2021. In this regard, the Respondent advised the Claimant that the period of 31st July 2021 through to 29th August 2021 was to cover one month's notice period. She was however informed that she would not be required to serve the notice period and instead, she was to be paid one month's salary in lieu of notice. According to the Respondent, this was in apparent compliance with Section 40(1) (b) of the Act.
49. It is the position of this Court that the notice contemplated under Section 40 (1) (b) is an "intention to declare a redundancy" and hence, it is supposed to be issued prior to the redundancy itself.
50. In this case, the notice issued to the Claimant was a decision that the redundancy had already taken effect and the decision to terminate her employment had been reached. To augment this position, I find it worth quoting Maraga JA, (as he then was) in the case of *Kenya Airways vs Aviation & Allied Workers Union Kenya & 3 others* (supra), where he opined as follows:
- “My understanding of this provision is that when an employer contemplates redundancy, he should first give a general notice of that intention to the employees likely to be affected or their union. It is that notice that will elicit consultation between the parties....”
51. Therefore, the Respondent is at fault in this case for not complying with the spirit of Section 40(1) (b) with regard to the issuance of a notice to the Claimant, communicating its intention to declare a redundancy.
52. On the same note, I wish to point out that payment of one month's salary in lieu of notice does not supplant the notice requirement under Section 40(1) (b). If anything, the same is a separate requirement under Section 40(1) (f) of the Act.
53. My finding on this issue is fortified by the determination of the Court of Appeal in the case of *Cargill Kenya Limited vs Mwaka & 3 others* (Civil Appeal 54 of 2019) [2021] KECA 115 (KLR), where it was held that:
- “In this respect, it is notable that a plain and contextual reading of subsection 1(f) shows that its express objective and purpose is the payment required to be made to employees affected by redundancy, and not the issuance of a notice. It is also notable that the legislative intention from the arrangement and content of the enactments in section 40 subsection (1) (d) to (g) was the provision of payments to be made to affected employees in a redundancy, and section 1(f) can only thus be construed within this context, as was done by Maraga JA



in Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others Nairobi Civil Appeal No. 46 of 2013 (supra)..."

54. Turning to the requirement under Section 40(1) (c), the Respondent was required to prove that in the selection of the employees to be declared redundant, it had paid 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.
55. In this case, the Respondent did not tell the Court what criteria, if any, it had applied in selecting the Claimant for redundancy. As per the testimony of RW1, the Claimant was not the only employee affected by the redundancy exercise.
56. Hence, the question is how did the Respondent determine which employees were to go and which ones were to be retained. I am further led to question whether the Respondent applied the criteria set out under Section 40(1) (c). In the event it did, this was not evident from the record. As a matter of fact, the Respondent did not indicate, let alone suggest that it applied any criteria if at all, in selecting the Claimant for redundancy.
57. I must say that failure by the Respondent to adduce evidence of the manner in which it settled on the Claimant as a candidate for redundancy, leaves room for doubt as to whether the selection of the Claimant for purposes redundancy, was undertaken objectively. To that extent, the Respondent failed the test under Section 40(1) (c) of the Act.
58. It is worth mentioning that application of the selection criteria stipulated under Section 40(1) (c), is not a mere procedural requirement. It is so significant and weighty noting that in the end, it is the application of the selection criteria that determines which employee goes and which employee is retained. It thus follows that the selection criteria ought to be applied objectively and fairly against all employees affected.
59. With respect to the payments under Section 40(1) (e) (f) and (g) of the Act, the Respondent advised the Claimant in her letter of termination that her final settlement would include, her salary for that month, notice pay, accrued leave days, severance pay and bonus. To that extent, the Respondent cannot be faulted as it computed the Claimant's dues taking into account the requirements of Section 40(1) (e) (f) and (g) of the Act.
60. In total sum, it is apparent that the Respondent did not wholly comply with the provisions of Section 40 (1) of the Act, in that it failed to issue the notice of the intended redundancy as envisaged under Section 40(1) (b) and further failed to adduce evidence to prove that it applied an objective selection criteria as stipulated under Section 40(1) (c), in earmarking the Claimant for redundancy. To that extent the Claimant's termination by way of redundancy cannot be said to have been procedurally fair within the meaning of Section 40(1) (b) and (c) of the Act.
61. In view of the foregoing analysis, the Court finds that the Claimant's termination on account of redundancy was unfair and unlawful within the meaning of Sections 40, 43 and 45 of the Act.

Discrimination?

62. The Claimant has alleged that in the course of her employment, the Respondent engendered and perpetrated a systematic discrimination against her in respect of her sex, gender, race and nationality.
63. In this regard, the Claimant gave illustrations of what in her view, amounted to discrimination. These included discrepancies in salaries and fringe benefits between expatriate employees and local employees. She gave an example of Mr. Raja who she said was earning more than six times her salary yet they were



- doing the same work. She further pointed out that her medical cover was exclusively inpatient whereas the expatriate employees had both inpatient and outpatient medical cover.
64. In its defence, the Respondent denied the allegations of discrimination and stated that each job group has its own salary graduation scale based on years of experience. The Respondent however admitted that where expatriates are employed, their pay scale and grades differ from local employees.
65. Article 27 of *the Constitution* guarantees every person equality and freedom from discrimination. Specifically, Article 27(5) provides as follows:
- (5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).
66. The grounds listed under Clause (4) include race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.
67. Turning to the *Employment Act*, Section 5(3) prohibits discrimination of an employee or prospective employee on grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, pregnancy, marital status or HIV status.
68. In terms of clause (b) of Section 5(3), such discrimination is in respect of recruitment, training, promotion, terms and conditions of employment, termination of employment or other matters arising out of the employment.
69. In the case *Barclays Bank of Kenya Ltd & Another vs Gladys Muthoni & 20 Others* [2018] eKLR, the Court of Appeal defined the term discrimination in the following manner;
- “...discrimination means affording different treatment to different persons attributable wholly or mainly to their descriptions... whereby persons of one such description are subjected to ... restrictions to which persons of another description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.... Discrimination also means unfair treatment or denial of normal privileges to persons because of their race, age; sex ... a failure to treat all persons equally where no reasonable distinction can be found between those favoured and those not favoured.”
70. In this case, it is worth noting that upon the Respondent admitting that the expatriate employees had different pay scales and grades compared to those of the local employees, it did not go ahead to provide the justification thereof. It just made the admission and left it at that. At the very least, the Respondent should have provided the grounds for the differentiated pay scales and grades.
71. This is further bearing in mind the provisions of Section 5(7) of the Act, which places the burden of proof on the employer to prove that discrimination did not take place. The said provision is couched as follows: -
- (7) In any proceedings where a contravention of this section is alleged, the employer shall bear the burden of proving that the discrimination did not take place as alleged, and that the discriminatory act or omission is not based on any of the grounds specified in this section.
72. This provision was amplified by the Supreme Court in the case of *Gichuru vs Package Insurance Brokers Ltd* (Petition 36 of 2019) [2021] KESC 12 (KLR) as follows: -
- “The protection of employees against any form of discrimination at the work place is therefore a significant matter and the burden placed upon an employer to disprove the allegations of discrimination is enormous. The employer must prove that discrimination



did not take place as alleged and that where there is discrimination, it was not with regard to any of the specified grounds.”

73. Of further significance is the holding by the Apex Court, where it was determined that: -
- “According to section 5(7) of the Act, an employer alleged to have engaged in a discriminatory practice must give reasons for taking certain actions against the employee. Where such actions are shown not to have any justification against the protected group, then there exists discrimination against such an employee and must therefore be addressed. In this instance, the appellant had discharged the burden as to shift it to the respondent who failed to discharge on their part.”
74. Essentially, an employer alleged to have engaged in a discriminatory practice must give reasons for taking certain actions against the employee. Where such actions are not justified, then there exists discrimination against such an employee.
75. Applying the above determination by the Supreme Court to the case herein and taking into consideration Section 5(7) of the Act, it is my finding that the Respondent did not prove that there was no discrimination as alleged. If anything, the Respondent did not deny the Claimant’s assertions that Mr. Raja was earning a salary that was six times more than hers. This is further noting the Claimant’s assertion that she was the one who had trained Mr. Raja on the job.
76. What’s more, the Respondent did not draw a distinction, and prove the reasons why Mr. Raja was earning more than the Claimant. As I say so, it is worth mentioning that it was only during the hearing that RW1 stated that Mr. Raja was more qualified than the Claimant. However, this was not proved in any form or manner.
77. In the circumstances, I return that the Respondent has failed to prove that the Claimant was not discriminated and treated less favourably than her counterpart. To this extent, the Claimant’s claim with respect to discrimination succeeds.

Remedies available to the Claimant

78. As the Court has found that the Claimant’s termination by way of redundancy was unfair and unlawful, she is entitled to compensatory damages under Section 49(1) (c) of the Act. Taking into account the length of service by the Claimant and the remainder of her contract period, she is awarded compensatory damages equivalent to four (4) months of her gross salary.
79. As the Court has further found that the Claimant was treated differently than her counterpart with no justification for such unfavorable treatment being provided by the Respondent, she is entitled to compensation which the Court assesses at Kshs 2,000,000.00. In assessing the damages payable to the Claimant, the Court has had due consideration to a number of authorities. For instance, in the case of Gichuru vs Package Insurance Brokers Ltd (supra), the Supreme Court reduced the award of damages from Ksh.5,000,000 to Ksh.2,000,000. And in the case of VMK vs CUEA [2013] eKLR the learned Judge awarded the Claimant Kshs. 5,000,000 as exemplary damages for discrimination.
80. Therefore, taking into account the circumstances of this case and drawing parallels with the authorities mentioned above, in my estimation an award of damages in the sum of Kshs 2,000,000.00 is appropriate.
81. The Claimant is further awarded salary for the month of July 2021, one month’s salary in lieu of notice, pay in lieu of leave not taken and severance pay for two completed years of service. This is in accordance



with Sections 40(1) (e), (f) and (g) of the Act. It is also notable that the Respondent had taken into account the foregoing components in tabulating the Claimant's final dues.

82. The claim for overtime pay is declined as the Claimant did not particularize her claim and prove to the requisite standard that she worked beyond normal working hours but was not compensated accordingly. It was her evidence that she always worked beyond normal working hours. Be that as it may, she did not prove this fact. During cross-examination, she testified that she had an email, call logs and WhatsApp messages to prove her claim but admitted that she did not file the same in Court.
83. My position on this issue is fortified by the determination by the Court of Appeal in Patrick Lumumba Kimuyu vs Prime Fuels (K) Limited [2018] eKLR, where the Learned Judges cited with approval the case of Rogoli Ole Manadiegi vs General Cargo Services Limited (2016) eKLR, thus: -

“Addressing a similar issue this Court in its decision in Rogoli Ole Manadiegi vs. General Cargo Services Limited (2016) eKLR expressed as follows;

“It is true the employer is the custodian of employment records. The employee, in claiming overtime pay however, is not deemed to establish the claim for overtime pay by default of the employer bringing to court such employment records. The burden of establishing hours or days served in excess of the legal maximum, rests with the employee. The claimant did not show in the trial court when he put in excess hours, when he served on public holidays or even rest days... he did not justify the global figure claimed in overtime, showing specifically how it was arrived at...”

The Court disallowed that claim. This case is on all fours with the above case and we reiterate the above finding. The finding by the trial court that the appellant had failed to prove his claim with regard to compensation for public holidays and Sundays worked is without fault. That ground of appeal must therefore fail.”

Orders

84. In the final analysis I allow the Claim and enter Judgment in favour of the Claimant against the Respondent as follows:
- a. A declaration that the termination of the Claimant's employment by the Respondent on account of redundancy was unfair and unlawful.
 - b. A declaration that the Respondent breached the Claimant's right to equality and freedom from discrimination as guaranteed under Article 27 (5) of *the Constitution* and Section 5 (3) of the *Employment Act*.
 - c. The Claimant is awarded compensatory damages in the sum of Kshs 320,000.00 which sum is equivalent to four (4) months of her gross salary.
 - d. The Claimant is awarded the sum of Kshs 2,000,000.00 being compensation for breach of her right to equality and freedom from discrimination as guaranteed under Article 27(5) of *the Constitution* and Section 5(3) of the *Employment Act*.
 - e. The Claimant is awarded salary for the month of July 2021 being Kshs 80,000.00.
 - f. The Claimant is awarded one (1) month's salary in lieu of notice being the sum of Kshs 80,000.00.
 - g. The Claimant is awarded payment in lieu of 20.37 leave days being the sum of Kshs 54,320.00.



- h. The Claimant is awarded severance pay for two completed years of service being the sum of Kshs 80,000.00.
 - i. The total award is Kshs 2,614,320.00
 - j. Interest on the amount in (i) at court rates from the date of Judgment until payment in full.
 - k. The Claimant shall have the costs of the suit.
85. The Respondent shall issue the Claimant with a Certificate of Service in accordance with Section 51(1) of the Act.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 10TH DAY OF NOVEMBER, 2023.

STELLA RUTTO

JUDGE

Appearance:

For the Claimant Ms. Bonyo

For the Respondent Mr. Njiru

Court assistant Abdimalik Hussein

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 had been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

STELLA RUTTO

JUDGE

