



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA
AT NAIROBI

CAUSE NO. 784 OF 2019

(Before Hon. Mr. Justice Ocharo Kebira on 15th March 2022)

ONESMUS KINYUA MAGOIYA.....CLAIMANT

VERSUS

PRUDENTIAL LIFE ASSURANCE KENYA.....RESPONDENT

JUDGMENT

INTRODUCTION

1. By a letter dated December 8, 2019, the Respondent offered to employ the Claimant as a New Business manager. The Claimant accepted the offer and thereby an employer-employee relationship was birthed. In circumstances as shall come forth hereinafter, the relationship got terminated on the 18th January 2019. The Claimant held that the termination was unfair, unlawful and wrongful. This constrained him to approach the seat of justice through a memorandum of claim dated 21st November 2019.

2. In the stated memorandum, the Claimant sought for the following reliefs and orders against the Respondent.

(i) A declaration that the termination of the Claimant's employment by the Respondent was wrongful, unlawful and unfair for being substantively without justification and being procedurally unfair.

(ii) A declaration that the termination of the Claimant's employment and unlawful conduct by the Respondent through its management infringed his constitutional rights to fair labour practice under Article 41 of the Constitution of Kenya and the right to reasonable working conditions.

(iii) A declaration that the Respondent's conduct towards the Claimant and the purported termination of the Claimant from employment failed to adhere to the threshold of fairness as provided for under section 45 of the employment Act and was therefore wrongful, unlawful and unfair.

(iv) A declaration that the Respondent's conduct towards the Claimant in targeting him as the only employee it purported to declare redundant in the entire company, and then proceed immediately to employ another employee to take up the Claimant's role amounted to discrimination in breach of Article 27 of the Constitution of Kenya.

(v) The Claimant be reinstated back to employment with the Respondent forthwith and without loss of benefits and continuity of service.

(vi) The Respondent do pay the Claimant his full salary and benefits during the period of dismissal.

(vii) In the alternative to [v] only and without prejudice to the above and below the Claimant be paid in full all his terminal dues and benefits made up as follows;

a) Three months' salary in lieu of notice being Kshs. 1,899,000.

b) The Respondent is ordered to compensate the Claimant for unfair, unlawful and wrongful dismissal at the equivalent of twelve months' salary – Kshs. 633,000 x 12 = Kshs. 7,596,000.

- c) Employer's contribution to pension at 10% of the Claimant's salary for the three months' notice period [583,000 x 3 = 1,740,000 x 10% = 174,900] and for the additional 12 months' period [583,000 x 13 = 6,966,000 x 10% = Kshs. 699,600.
- d) Life Insurance cover for 15 months with benefits payable to the Claimant's next of kin/dependants equivalent to three times annual gross salary at the date of termination.
- e) Personal Accident Insurance Cover for 15 months with benefits of five times the Claimant's annual salary at the date of termination in the event of accident death or permanent disablement, with additional provision for permanent partial disability based on the continental scale benefits and temporary total disablement benefits for a maximum of 104 weeks payable to the Claimant and/or next of kin and for dependants.
- f) Medical cover for 15 months with equivalent benefits that the Claimant enjoyed at the date of termination.
- g) Payment of bonus for the year 2018, being 20% of the Claimant's salary in accordance with Prudential Bonus Plan.
- h) A declaration that the Claimant is entitled to the payment of damages and compensation for infringement and contraventions of his fundamental rights and freedoms under the aforementioned provisions of the Constitution.
- i) General damages and aggravated damage on aggravated scale under Article 41 of the Constitution of Kenya for the oppressive, arbitrary and unconstitutional conduct of the Respondent against the Claimant through its management which caused him shock, humiliation, inconvenience, loss of reputation, distress and embarrassment.
- j) Loss of prospective future earnings due to unlawful and unconstitutional termination of the Claimant's employment in contravention of Article 41 of the Constitution and Article 23 of the Universal Declaration of Human Rights being an infringement of the Claimant's right to protection against unemployment, to right to work and legitimate expectation to work until retirement without unlawful termination equivalent to current salary for 8 years from Claimant's current age of 52 years to age of retirement at 60 years, which is Kshs. 60,768,000.
- k) An order directing that the Respondent issues the Claimant with the certificate of service.
- l) That costs of these proceedings be borne by the Respondent.

3. The statement of claim was filed contemporaneously with the Claimant's witness statement and documents under a list of documents dated 21st November 2019.

4. Upon being served with summons to enter appearance, the Respondent did enter appearance on the 25th February 2020 and filed a memorandum of defence on the even date. The Respondent denied the Claimant's cause of actions, and consequently his entitlement to the reliefs he has sought.

5. The Claimant's case was taken on the 9th December 2021, while the Respondent's was on the 15th December 2021. At the close of the parties' respective cases, this court gave directions for the filling of written submissions, directions which the parties complied with.

THE CLAIMANT'S CASE

6. The Claimant at the hearing urged the court to adopt his witness statement as part of his evidence in chief and the documents referred to hereinabove as his documentary evidence. The application was not objected to by the Respondent, the statement and document were adopted as such.

7. The Claimant stated that he was employed by the Respondent on the 18th January 2016 as a New Business Manager on a permanent and pensionable terms. The terms and conditions of employment were enveloped in the letter of appointment dated 8th December 2015.

8. As per the letter of appointment his starting annual gross salary was Ksh. 6,000,000.00 [Six million] which was increased to Kshs. 6,837,000 as at the date of separation. He was further entitled to a monthly allowance of Kshs. 50,000 [Fifty thousand].

9. He further stated that he was entitled to participate in the Prudential Bonus Plan up to a maximum of 20% of his annual salary. He benefited from the plan throughout the time of his employment save for the bonus he was entitled to earn for the year 2018, bonus which the Respondent refused to pay him despite having worked the entire of that year. This notwithstanding that the Respondent paid all other members of staff the said bonus.

10. The Claimant contended that he offered his services to the Respondent diligently and competently over the years without a single warning letter being issued against him nor being a subject of any disciplinary proceedings. The employer-employee relationship was cordial. However, on the 11th January 2019, the cordial relationship suddenly deteriorated, when the Respondent's Human Resource Manager attempted to use undue influence, duress and coercion to force him to sign a purported Mutual Release and Settlement Agreement dated 11th January 2019. The agreement was given to him at 5.01 p.m. with a requirement that he signs the same. The document was already signed by the Human Resource manager.

11. The Claimant further contended that the agreement had not been preceded by any notice or reason at all given to him.

12. The Claimant declined to sign the said Mutual Release and Settlement Agreement and instead, wrote to the Respondent on the 14th January 2019 seeking to know the grounds upon which the Respondent was seeking to terminate his employment, since he had not been informed of any.
13. The Claimant did state that when he declined to sign the agreement, the Human Resource Manager and the Head of Operations issued a threat to him that his action would attract a detrimental consequence. The figures that had been offered therein would be reduced and the termination was to be effected anyway. The threat notwithstanding, he stood his ground.
14. In reaction, through a letter dated 18th January 2019 by its Human Resource Manager, the Respondent intimated that the Respondent was terminating his employment on account of redundancy, notwithstanding that the Respondent had not complied with the provisions of section 40 of the Employment Act, thus rendering the purported termination unjustified, unfair, wrongful and in breach of the law.
15. The Respondent in breach of the mandatory provisions of section 40 of the Employment Act, failed to grant him and the Labour Office a prior one month's notification of the alleged redundancy, and further adhere to the other conditions expressly provided for therein, thereby rendering the Respondent's actions unfair labour practices which affronted his constitutional rights as provided for under Article 41 of the Constitution of Kenya.
16. The Claimant asserted that he was discriminated against by the Respondent, when the latter made him, the only employee terminated on the pretext of redundancy, without adherence to the provisions of the law. Immediately after the termination, the Respondent employed a lady called Lynette Rop to take over his position.
17. The Respondent alleged that the termination had been stirred by a restructure. According to the Claimant it was strange that it was only one position that was affected, that of the New Business Manager.
18. He was hearing of the redundancy issue for the 1st time on the 18th January 2019 when he received the termination letter. There had been no consultations before the date of the termination, on the redundancy issue.
19. He was never invited for interviews for the position that was given to the new person notwithstanding that he had the qualifications and experience to serve in that new position that was born out of the alleged restructure.
20. Under cross-examination by counsel for the Respondent the Claimant stated that the position of New Business manager, for which he was employed had only one manager. Further that during his interviews, he was only interviewed on matters this position.
21. That the termination was effected through the Respondent's termination letter, which at its paragraph 2 showed the date of effect as 11th January 2019. It expressed that his termination was on account of redundancy.
22. The Respondent alleged that the redundancy situation was occasioned by a restructure of the company, leading to abolition of his position.
23. According to him, the position was not abolished. The Respondent only changed the name of the position with an ulterior motive.
24. He stated that on the 11th January 2013, him and the Respondent's officers above-mentioned had a meeting but the issue of redundancy was not canvassed. They only expressed the Respondent's desire to part with him
25. He reiterated that he did not sign the agreement because it was pre-signed by the Human Resource manager.
26. As regards his claim on coercion, the Claimant stated that it was informed by the fact he was warned that a failure to sign the agreement would disentitle him of the generous package that the Respondent had offered him in the agreement. The separation amounts would be reduced. agreement.
27. He asserted that on the 11th January 2019, he could not sign the agreement as he had not read it. Three days later, 14th January 2019, he read it but nonetheless declined to sign it, as it did not have the reason for the separation.
28. That after he declined to sign the separation agreement, the Respondent withdrew the offer and, on the 18th January 2019, he was given a termination letter.
29. He asserted that he wants to be reinstated to the position of New Business Manager. However, he is not sure whether the position exists.
30. He confirmed that he did not apply for the new role.
31. He reiterated that he is the only person who was terminated on the account of redundancy. It was not within his knowledge that a one Osano was equally affected by reason of the restructure.
32. In the mutual separation agreement, the Respondent *inter alia* offered two months' salary ex-gratia pay and a notice pay. However, in the letter of 18th January 2019, the Respondent did not offer these two payments. True, to their threat, they offered a lesser figure than they had offered in the agreement.

33. He asserted that his monthly salary at the time of termination was Kshs. 633,000.00 exclusive of bonuses. The letter of offer provided for entitlement to bonuses.
34. On his claim for Life Insurance, the Claimant stated that the same is futuristic in nature. A certificate of service is a legal entitlement issuance of which must not be preceded by a request for it.
35. On his claim for future earnings, the Claimant stated that the Respondent has not in any manner impeached him from getting another job.
36. Prior to joining the Respondent, he was an operations manager in his previous employment.
37. In his evidence in re-examination, he stated that, from the statement of David Mwangi, the Respondent's witness, the restructure occasioned a merger of two offices into one, Head of Operations. The Respondent did not offer him this position, notwithstanding that it knew that he had previously worked as an operations manager.
38. He reiterated that he declined to sign the mutual separation agreement because it did not have the reason for the separation.
39. His benefits were computed for the period up to 11th January 2019, yet he worked up to 18th January 2019. Therefore, he was not paid for a worked period of 7 days.
40. He contended that in computation of the three months' notice pay, the Respondent excluded the allowance of Kshs. 50,000 per a month, therefore underpaying.
41. He asserted that he worked for the entire year of 2018, entitling him to the bonus. The Respondent did not demonstrate that during the year they did not declare a bonus. He is therefore entitled to the same.

THE RESPONDENT'S CASE

42. One David Mwangi, the Respondent's Chief Human Resource officer testified on behalf of it. The witness sought that the contents of his witness statement dated 25th February 2020, and the bundle of documents that the Respondent filed herein be adopted as his evidence in chief and the Respondent's documentary evidence respectively.
43. The witness stated that the Claimant was employed by the Respondent as a New Business Manager on the 18th January 2016. During his tenure of employment, the Claimant was expected and agreed to comply with the terms of his employment contract and the Respondent's internal policies.
44. That on the 11th January 2019, he as the Head of Human Resources, held a meeting with the Claimant's Line manager, and the Claimant where he explained to him that the Respondent had restructured the Operations Department and that his position was among those impacted.
45. Following the review of the Respondent's structure, the position that the Claimant was holding was scrapped. Despite concerted efforts, the Respondent was left with no recourse but to consider the termination of the Claimant. The Respondent proposed as enhanced final settlement in which the Claimant would receive his terminal dues and an additional and significant ex-gratia payment.
46. the allegation by the Claimant that undue influence duress and/or coercion was being exerted on him to sign the separation agreement is untrue. He was at all material times engaged and in good faith. He had the option to accept or reject the enhanced terms of settlement. Following his rejection, his terminal entitlements got based on what the law provided.
47. He stated that the Claimant's employment was terminated effective 11th January 2019, the Respondent accepted the Claimant's decision not to sign the agreement.
48. The witness alleged that the Claimant's letter dated 14th January 2019 in decline of the mutual agreement was received by the Respondent after the termination of the contract.
49. That the Claimant was fully aware of the grounds leading to his termination. the matter had been discussed with him previously.
50. The termination was not as a result of the Claimant's refusal to take up the mutual settlement. The settlement was an offer made after the decision to terminate his employment had been made and was intended to address the payment package by enhancing the same.
51. The Claimant's allegation of discrimination is false. Following the restructuring of the Operations Department and the merger of positions therein, a more senior position was created that the Claimant did not have the capacity to handle. The role was wider than that of New Business Manager as it cut across New Business underwriting, customer service, benefits payment, and client retention.
52. The Claimant's certificate of service has always been available for his collection, but he has failed and/or refused to collect the same.
53. He stated that those claims relating to pension ought to be directed to the Pension Fund which is a separate legal entity from the Respondent.

54. Cross examined by counsel for the Claimant the witness stated that he has over 20 years' experience as a Human Resource Manager. He affirmed that he is aware of the redundancy procedure.
55. The witness stated that before the termination, the Respondent did not give the Claimant and/or the Labour Officer any notice.
56. He stated that the mutual separation agreement did not have any clause to the effect that the intended separation was on account of redundancy.
57. He stated that the agreement was pre-signed. It was his document, reason why he did so. The other representative of the Respondent had not signed it. The Claimant was given time on the 11th January 2019, to consult his lawyer.
58. Referring to the Claimant's letter dated 14th January 2019, the witness stated that therein the Claimant protested the manner in which the agreement was being presented. The witness did not react to the protest.
59. The reduction of the entitlements was a discretionary decision. It was not malicious. The computation was done as per the provisions of the law. It is the Respondent who came up with the enhanced offer. The termination letter reduced the entitlement by Kshs. 1.5 million.
60. The witness confirmed that he was aware that the previous employment of the Claimant before he joined the Respondent was that of an operations Manager. Head of Operations manager is a role.
61. According to the witness, the Claimant was not interviewed for the new position-Head of Operations. He was not in contention for this position. There was no advertisement for the same.
62. The restructure was conceived in 2018, however, the Claimant was not kept informed by the Respondent.
63. The letter of 17th January 2019 shows that the reason for the separation was the merger of positions. The person who was employed for the new position was previously working as a customer services manager, Jubilee Insurance.
64. The Claimant was earning a total of Kshs. 633,000.00, however, the computation of his entitlement was computed applying the sum of Kshs. 583,000, as the Respondent excluded a discretionary allowance of Kshs. 50,000.00.
65. Prior to the 18th January 2019, the Respondent did not issue any termination letter.
66. He stated that pension sums were under trustees. The Respondent was contributing of 10% for the Claimant. Upon termination he lost the benefit.
67. It was further stated that Claimant was only entitled to a bonus where it was declared in writing. Though he had served for the whole year, 2018, he was not given the bonus, as he did not qualify.
68. He contended that the new role that was created covered five [5] areas whereas the Claimant was only qualified for two [2].
69. The allowance of Kshs. 50,000.00 was discretionary. It was not therefore factored in the computation of the Claimant's entitlement.

Claimant's Submissions

70. The Claimant submitted on the following issues:
- i. Lack of substantive fairness
 - ii. Lack of procedural fairness
 - iii. Infringement of the Claimant's Constitutional rights & Respondent's Malice.
71. The Claimant submitted that that the purported ground that formed a basis for termination of his employment-redundancy as was communicated through the Respondent's letter dated 18th January 2019 are baseless and untenable in law. The Respondent failed to adduce any evidence to prove of a bona fide economic rationale for declaring the Claimant redundant.
72. The Respondent failed to place before the court any evidence on the decision for restructure of the organization. It did not place before court any document to show the restructured organization.
73. He placed reliance on the cases of **Caroline Atieno Osweta-Vs-Kenya Yungheng Plate Making Limited [2013]eKLR** and **Aviation & Allied Workers Union-Vs-Kenya Airways & 3 Others (Industrial Court Cause No.1616 of 2012)** to support his arguments above, that an employer can only lawfully dismiss an employee on grounds of redundancy, if there is a genuine economic reason.
74. It was further submitted that as the Respondent failed to demonstrate the economic reason, it consequently failed to discharge its burden of proof under Section 43 of the Employment Act, rendering the termination unfair under Section 45 thereof.

75. On lack of procedural fairness, the Claimant submitted that by failure to issue a month's notice prior to terminating him on account of redundancy, the Respondent was in breach of the conditions provided for under Section 40 (1) (b) of the Employment Act. That the absence of said notice rendered his termination unlawful and illegal.

76. He relied on the Court of Appeal decision in **Kenya Airways Limited-Vs-Aviation & Allied Workers Union Kenya & 3 Others | 2014]eKLR** where the court held with regard to Section 40 of the Employment Act that;

" 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 effected or their union. It is that notice that will elicit consultation between the parties, and I will shortly show that consultation is imperative, on the justifiability of that intention and the mode of its implementation where it is found justifiable. The Act requires one month notice."

77. The Claimant further argued that the lack of adherence to the statutory procedural requirements on termination on account of redundancy rendered the termination procedurally unfair pursuant to Section 45 of the Employment Act. To buttress this argument, reliance was placed on the case of **Kenya Airways Limited vs Aviation & Allied Workers Union Kenya & 3 others (2014) eKLR**.

78. The Claimant argued that there weren't any consultations between him and the Respondent, notwithstanding that consultations owing to their importance in a true redundancy situation, is a pre-requisite for a declaration of redundancy to be successfully seen as lawful. Consultations are key, *inter alia* as it gives the parties a forum to discuss and negotiate a way out of the intended redundancy. In this he sought support in the provision of **ILO Convention No. 158- Termination of Employment Convention,1982**, thus, "*measures to be taken to avert or minimise the terminations and measures to mitigate the adverse effects of any termination on the workers concerned such as finding alternative employment.*"

79. The Claimant further submitted that his rights under Article 27 of the Constitution and Section 5(3) of the Employment Act were infringed upon as he was targeted and discriminated against leading to him being the only employee who was terminated on pretext of redundancy. He cited to cases of **VMK vs CUEA (2013) eKLR** and **Kenya Airways Limited vs Aviation & Allied Workers Union Kenya & 3 others (supra)** to support this position.

80. He contended that the Respondent's unfair and wrongful termination has irreparably injured his reputation and jeopardized his prospects of new employment.

81. Following the above, the Claimant concluded by urging the court to find in his favour and award him the prayers and orders sought.

Respondent's Submissions

82. The Respondent submitted that the following issues arise for determination.

- i. Whether the redundancy undertaken was lawful and justified; and
- ii. Whether the Claimant is entitled to the orders sought.

83. On the issue of redundancy, the Respondent submitted that it had proved that it was lawful and justified within the meaning provided for in Section 2 of the Employment Act. As was expressed by the Court of Appeal, in the case of **Kenya Airways vs Allied Workers Union (Supra)**, termination of an employee's employment on account redundancy is in character non-volitional and at no fault of the employee.

84. The Respondent submitted that as established by the evidence of its witness, the redundancy situation was as a result of reorganization of the Operations Department, which led to the abolition of the Claimant's position. There was a valid reason therefore for the termination. The Respondent's decision to terminate the Claimant was well anchored in law. To buttress this argument reliance was placed in the holding in **Caroline Atieno Osweta v Kenya Yuncheng Plate Making Ltd [2013]eKLR** thus,

"The right of an employer to declare redundancy is well secured in law" and **Super Group Supply Chain Partners v Arthur Dlamini & Another [JA 77/10]** by the Labour Court of South Africa, thus, "*It is trite that an employer is permitted to dismiss an employee for its operational requirements. However, for the employer to do successfully it is obliged to have a bonafide economic rationale for the dismissal.*"

85. Further reliance was placed on the holding in the case of **Kenya Airways vs Aviation & Allied Workers Union Kenya & 3 others (supra)** where the Court of Appeal state:

"Redundancy is a legitimate ground for terminating a contract of employment provided there is a valid and fair reason based on the operational requirement of the employer and the termination is in accordance with fair procedure. As Section 43[2] provides, the test of what is a fair reason is subjective. The Phrase "based on operational requirement of the employer" must be construed in the context of the 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."

86. The Respondent submitted that the Claimant was fully aware of the grounds leading his termination as they had been discussed with him previously. It added that the Claimant's contention that his employment was terminated on 18th January 2019 and not 11th January 2019 is

without any basis whatsoever as his employment was terminated with effect from 11th January 2019 following his rejection of the enhanced package.

87. The Respondent submits that having demonstrated valid reasons for the termination, and after having followed due process, and making full payment to the Claimant as required by the law, the Claimant is not entitled to any compensation on account of his position being declared redundant.

88. The Respondent further submitted that the burden of proof rests on the Claimant to prove that he was unfairly and unlawfully terminated; a burden that he has not discharged as provided for under Section 47(5) of the Employment Act. It relied on the case of **Kennedy Maina Mirera vs Barclays Bank of Kenya Limited (2018) eKLR**.

89. The Respondent submitted that in the event this court finds that there was a procedural flaw, it should not make the maximum award of 12 months' gross salary as that would in the circumstances be excessive. It urged the court to be guided by the decision in **Phyllis Njeri Kamau & 2 others v Mumias Sugar Company Limited [2017] eKLR**.

90. On the prayer for reinstatement, the Respondent stated that an order for reinstatement cannot be made after lapse of three years from date of dismissal. It also added that the position held by the Claimant no longer exists following the reorganization of its business. It relied on the provisions of Section 12(3) of the Employment Act and the case of **Sotik Highlands Tea Estates Limited v. Kenya Plantation and Agricultural Workers Union [2017] eKLR** to support its arguments.

91. Regarding the prayer for general and aggravated damages, the Respondent submitted that the Claimant's claim not meet the threshold in law to justify a grant of the relief. Threshold as was propounded by the Court of Appeal in **Godfrey Julius Ndumba Mbogori & another V. Nairobi City County [2018] eKLR** ;

“Exemplary damages are essentially different from ordinary damages. The object of damages in the usual sense of the term is to compensate. The object of exemplary damages is to punish and deter. We are guided by the case of Rooks v Benard [1964]AC 1129 where Lord Devlin set out the categories of cases in which exemplary damages may be awarded which are, [i] in cases of oppressive, arbitrary or unconstitutional action by the servants of the Government, [ii] cases in which the defendants' conduct has been calculated to make a profit for himself which may well exceed the compensation payable to the plaintiff and [iii] where exemplary damages are expressly authored by statute.”

92. The Claimant's evidence does not establish any of the ingredients above. In any event the remedy of aggravated damages is not a remedy provided for by the Kenyan labour laws.

93. The Respondent further submitted that an award for general damages is not an available remedy in law in a case for wrongful termination. It quoted the case of **Kenya Broadcasting Corporation v Geoffrey Waldo [2019] eKLR** to augment its position.

94. On the claim of loss of prospective future earnings, the Respondent submitted that there is no legal basis for this claim as there was no guarantee that the Claimant would remain in employment until retirement. It placed reliance on the case of **David Wanjau Muhoro v. O1 Pejeta Ranching Limited [2014] eKLR**.

95. The Respondent also submitted on the claim for bonus payment and stated that the same is discretionary and could only be made to a member of staff for his exceptional performance. As such, it maintained that the Claimant was not entitled to the bonus payment as it was not a right. It relied on the case of **Kenya National Private Security Workers Union v. Kenya Kazi Security Services Limited [2013] eKLR** where the court held;

“Ordinary bonus that is not fixed by law is given through the generosity of the employer. It is variable depending on the performance of the business. It is not grounded on any law, but rests on the discretion of the employer. It is not demandable.”

Determination

96. The following broad issues emerge as the issues for determination in this matter:

(i) *Whether the termination of the Claimant's employment on account of redundancy was procedurally fair.*

(ii) *Whether the termination of the Claimant's employment was substantively fair.*

(iii) *Whether the Claimant is entitled to the reliefs sought in his memorandum of claim.*

Whether the termination was procedurally fair.

97. The defining characteristic of termination on account of redundancy is lack of fault on the part of the employee. It is a species of “no fault” termination. One cannot be off mark to state that it is for this reason that the Employment Act 2007, places particular obligations on an employer, most of which are directed towards ensuring that those employees to be terminated are treated fairly.

98. Section 40(1) of the Employment Act 2007 provides

“An employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following obligations: -

(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 rendered redundant had due regard to the seniority in time and to the skill, ability and reliability of each employee of a 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 wages in lieu of notice; and

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

99. Now I turn to consider whether the procedure contemplated under the provision above stated was complied with by the Respondent. Under the section an employer contemplating to terminate an employee's employment on account of redundancy must give the employee a notice of intention. This notice is expected to be followed by consultations, and after the consultations a second notice is issued to the employee of the decision to declare him or her redundant. In this I find comfort in the holding by Justice Maraga JA, [as he then was] in the case of **Kenya Airways Limited v Aviation & Allied Workers & Others [2014] eKLR** thus;

“My understanding of this provision is that when an employer contemplates redundancy, he should first give a general notice of the intention to the employees likely to be affected or their union. It is that notice that will illicit consultation between the parties..... The Act requires one month's notice. The period runs from the date of service of that notice. It is after the conclusion of the consultation on all issues of the matter that notice will be issued to the affected employee of the decision to declare them redundant.”

100. And in the holding in **Barclays Bank of Kenya Limited & another Vs. Gladys Muthoni & 20 another [2016]eKLR**, the Court of Appeal stated;

“27. The trial Court was of the view that there ought to have been two notices- a specific notice alerting the redundant about the impending redundancy and the reasons therefor, and another one terminating their services. It reasoned.

82. follows:

“As noted by the Court in **Caroline Wanjiru Luzze Vs. Nestle Equitorial African Regional Limited**, the employer is supposed to give two (2) distinct notices on account of redundancy. Such must be in writing.

According to the trial Court, there was no redundancy notice issued or served on the Respondents. All they received were a termination letter, hence the finding that it was unprocedural.

28. In holding that view, the trial Court was not alone. Maraga, JA in the **Kenya Airways case (supra)** opined.....”

101. The Claimant contended that he was not issued with any of these notices by the Respondent, rendering the termination procedurally unfair. The Respondent's witness in his evidence under cross examination, admitted that no notice as contemplated under the provision was issued to the Claimant. I note that Counsel for the Respondent has not in his submissions addressed this crucial issue of notice. I agree with counsel for the Claimant that, in a situation as is here, where there has been non-compliance with Section 40 of the Act, the termination becomes unfair pursuant to the provisions of section 45[2] of the Act.

102. Section 40[1][b] of the Act contemplates issuance of a notice to the Labour Officer, again here the Respondent faulted, it issued none.

103. A redundancy notice, which I have concluded was not issued and served in this matter, births the event of consultation before a redundancy is declared. In our law consultation is a must. This was emphasized by the Court of Appeal in the **Barclays Bank of Kenya case (supra)**, thus;

“37. We have carefully examined that case which unlike this case, involved unionisable employees of a collective bargaining agreement and oral evidence tested in cross examination. In the end, we are persuaded that the dicta of Maraga and Murgor, JJA regarding consultation prior to declaration of redundancy resonate with our constitution and international laws which have been domesticated by dint of Article

2(6) of the Constitution.”

104. The purpose for consultation in a redundancy situation cannot be down played. The purpose was aptly captured by Maraga, JJA (as he then was) in the **Kenya Airways & another** case (supra) thus;

“41. Though contractual, employment relations have some sort of statutory underpinnings. Part VI of the Employment Act 2007 in a nutshell outlaws unreasonable or unjustified termination of employment, in my view, it places a heavier burden of proof upon the employer to justify any termination of employment. Section 40 (1) of the Employment Act, which provides for the implementation of the redundancy decision, provides in mandatory terms that “[a]n employer shall not terminate a contract of service on account of redundancy unless[he] complies with the conditions” therein stipulated. As this is the central provision in the second issue of fair play in redundancy that we need to determine in this appeal, I need to set it out verbatim. It reads:

“(1) An employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions –

- a) Where the employee is a member of a trade union, the employer notifies the union to which the employee is a member and the labour officer in charge of the area where the employee is employed of the reasons for, and the extent of, the intended redundancy not less than a month prior to the date of the intended date of termination on account of redundancy;
- b) Where an employee is not a member of a trade union, the employer notifies the employee personally in writing and the labour officer;
- c) The employer has, in the selection of employees to be declared redundant had due regard to seniority in time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy;
- d) Where there is in existence a collective agreement between an employer and a trade union setting out terminal benefits payable upon redundancy; the employer has not placed the employee at a disadvantage for being or not being a member of the trade union;
- e) The employer has where leave is due to an employee who is declared redundant, paid off the leave in cash;
- f) The employer has paid an employee declared redundant not less than one month’s notice or one month’s wages in lieu of notice; and
- g) The employer has paid an employee declared redundant severance pay at the rate of not less than fifteen days’ pay for each completed year of service”.

105. The Claimant contended that all through he was not notified that declaration of a redundancy was intended, and that there were no consultations as between him and the Respondent on this issue. That his first time to hear about the alleged redundancy was on the 18th of January 2019. The Respondent’s witness in his evidence under cross examination stated that the decision to merge departments by restructure that eventually led to the declaration of the Claimant redundant was conceived in the year 2018. That the Claimant was not at all informed of the restructure. The Claimant was the only manager of a department that was to be affected by a restructure, restructure which could involve abolition of his office, yet clearly, he was not informed, and or his input had, why and how possible, is a question the Respondent did not answer. This only points to the fact that the alleged redundancy was camouflaged, and or that there were no consultations therefore.

106. The Respondent’s witness in his witness statement stated and its Counsel has submitted so, that the Claimant was all through kept aware of the redundancy process. This contradicts what he stated in his evidence under cross examination as stated above. Further, the witness besides making this bald assertion, does not give any specifics, for instance how and when. The burden of proving that there were consultations was on the Respondent, this kind of evidence would not enable an employer discharge the burden, more especially where the issue of lack of consultation was highly contested.

107. The Respondent’s witness contended that he, the head of operations, and the Claimant had a meeting on the 11th January 2019, where the issue of the redundancy was discussed. The Claimant stated that there was no discussion as alleged. One would reasonably expect the Respondent to demonstrate that there was an invite extended to the Claimant for the meeting with a specific agenda- the redundancy, and prove of the deliberations, by way of a document[s]. I am more convinced that the meeting did not discuss the redundancy issue, for if it did, definitely the separation agreement which the Claimant refused to sign, and which is alleged to have flowed from the discussion would reasonably be expected to have an indication that the separation was to be on account of redundancy.

108. It has not escaped my mind that the Respondent’s witness asserted that he as a Human Resource Manager of more than 20 years knew the redundancy process.

109. The inescapable conclusion is that there were no consultations.

110. In the upshot I agree with the Claimant’s counsel’s submissions that the termination was procedurally unfair

(b) Of whether the termination was substantively fair.

111. Both section 2 of the Employment Act and section 2 of the Labour Relations Act define redundancy as: -

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

112. No doubt, our law recognises no right to employment for life, however the social balance struck in a context of constitutional regime in which the right to fair labour practices is a fundamental right is to afford an employee the right not to be unfairly dismissed and the employer the right to dismiss an employee for a fair reason provided that a fair procedure is followed – **John William Strauss & another Vs. Plessey (PTY) Limited [2002] & BLLR 755 (CC)**.

113. The Respondent is burdened with the onus of satisfying this Court that the termination of the Claimant was effected for a valid and fair reason. In this matter not only did the Claimant allege his dismissal was wanting in procedure and an affront of the provision of section 40 of the Employment Act, 2007 but that the termination was simply an excuse employed by the Respondent to terminate his employment summarily and bring on board another person in his position.

114. The Respondent contended that the termination was as a result of the position of the Claimant becoming redundant, as a consequence of a restructure that it undertook. The position of New Business Manager was abolished. His services were no longer required.

115. The Respondent just asserted in the letter dated 18th January, 2019 that the company in 2018 made a business decision to restructure its operations department. Further that following the review, his position as New Business Manager would no longer be required. This was reiterated by its witness without more to discharge its heavy burden mentioned hereinabove, the Respondent was obliged to do more than this. It was obliged to tender evidence and in detail what the “restructure of operations” entailed, what prompted the need for the review, how the affected employees were identified since there was an assertion that more than one department was affected, the selection criteria used, the alternatives that were available and/or proposed to arrest the redundancy, and or mitigate the impact of the same, the employees’ contribution during the consultation process, and the extent of the redundancy.

116. For instance, it was the Respondent’s witness’s evidence as brought forth in paragraph 2 of his witness statement that the Claimant was informed of the restructure of the department and that his position was among those impacted. The impression here is that positions were impacted, what positions, there was silence on them, which officers and how many were impacted, was not disclosed at all, how the affected officers were treated was not disclosed too. I have not lost sight of the fact that the witness did state that it is not only the Claimant who was declared redundant. This makes me take the firm view that it was necessary that evidence in the nature hereinabove mentioned be placed before this court for consideration. The same was not.

117. At paragraph 4, of the Respondent’s witness statement he stated;

“Following the review of the organization’s structure, the position that the Claimant was holding was scrapped, and the Respondent, despite concerted [emphasis mine], was left with no recourse but to consider the termination of the Claimant’s contract of employment.....”

118. From this statement it will be safe for one to conclude that the Respondent is a party who was pretty aware of the purpose of consultations in a redundancy situation and the need to make efforts to avoid declaration of a redundancy. The witness just asserted that concerted efforts were made, which efforts, geared towards what, and why they failed to leave the recourse the only viable thing, are details that were crucial that witness failed to supply, however.

119. If indeed there was an organizational structure, in a highly contested matter like was here, and all through the Respondent knew the position that the Claimant had taken which was diametrically opposite to that which it had, on the manner of the subject termination, it was expected of a reasonable employer to place before Court the organogram that flowed from the alleged restructure, evidence that would be geared towards discharging its burden under section 45 of the Employment Act.

120. Section 40 of the Employment Act cannot be read in isolation from the provisions of section 43 and 45. Section 43 provides: -

“(1) In any claim arising out of the termination of a contract the employer shall be required to prove the reason or reasons for the termination and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.”

Section 45 provides:

(1) No employer shall terminate the employment of an employee unfairly.

(2) A termination of employment by an employer is unfair if the employee fails to prove –

(a) That the reason for termination is valid;

(b) That the reason for the termination is a reason;

(i) Related to the employee’s conduct, capacity or incapability

(ii) Based on the operational requirements of the employer;

(c)

121. The Respondent totally failed to place before this Court evidence related to the items I have mentioned hereinabove, to enable me gauge the validity and fairness of the reason for the termination (redundancy). The provisions of sections 43 and 45 of the Employment Act, set in against the Respondent.

122. Reviewing the evidence by the Respondent, one develops the uncomfortable feeling that the true reason for the termination was not an operational requirement of the Respondent.

123. I have considered the submissions by counsel for the Respondent on Section 40 of the Act on substantive fairness, let me say that it not enough for the employer to say that I relied on this reason or that reason provided for in the Act to terminate the employee's service. Validity of the reason must be demonstrated. In the capsule of validity, one must see, candidness, fairness, forthrightness and good faith. To just state the reason like "organizational restructure" is not enough to court enable gauge the statutory measure of validity, justice and equity.

124. As was held in **Super Group Supply Chain Partners V Arthur Dlamini & Anorther [JA 77/10]** cited by Counsel for the Respondent for an employer to successfully dismiss an employee for its operational requirements, it is obliged to have a *bonafide* economic reason. In my view, this would only be demonstrated by a detailed and or cogent evidence not unsupported assertions.

125. It has troubled my mind, that after the alleged restructure there was no attempt on the part of Respondent to see whether the Claimant would fit as manager of the newly created position, to evert the redundancy. The Respondent just asserted that he was not qualified for the new position, this even in the face of the admission by the Respondent's witness that before the Claimant joined the Respondent's workforce as an employee, he was an operations manager with his previous employer. What were the required qualifications for the new position? What were the qualifications that the Claimant had in comparison with the required ones what, deficiency was sighted in his qualifications? Wouldn't the deficiency if any be eliminated through training? The Respondent did not place any evidence before this court to establish these, yet it was crucial that it be demonstrated that there was a genuine effort undertaken on its part to have the redundancy everted.

126. The recruitment process was done with no information to the Claimant. It was done without any advertisement inviting applications from persons who were qualified and interested for the position. This was confirmed by the Respondent's witness in his evidence under cross examination. He was not even made aware of the decision to recruit a person to the alleged new position. The lady who took the position was previously a manager, customer services, Jubilee Insurance. It is imperative to note that there was no evidence that her docket there, was equal in encompassment of roles to the five departments that the Respondent allegedly merged. Worthy to note that the witness alleged that one of the abolished departments was customer services.

127. The Respondent contended that in the Mutual Separation Agreement that the Claimant declined to sign it had offered an enhanced *ex gratia* separation final dues. That since he declined to enter into the agreement, it decided to terminate his employment in accordance with the law, and pay him what the law required of them in a declared redundancy situation. The offer amount had to come down by a whole Kshs. 1,500,000. The Claimant had taken a position that he had been threatened that if he did not sign the agreement the figures in the offer would be slashed down, and that indeed the threat was actuated. He contended further that this act exhibited malice and bad faith on the part of the Respondent.

128. I have seriously considered the provisions of section 40 of the Employment Act, the stipulations therein regarding separation dues provide for the minimum that an employee can give. The Respondent had way before the date of termination, decided that the termination was going to be on account of redundancy and the pay that was to ensue to the Claimant. The figures were arrived at without consultation with, or any input from, the Claimant. The account for the termination did not change at all. I am unable to see that the Respondent had any genuine reason to reduce the amount, considering this, and more specifically the fact that the provision did not bar them from paying out more than what it stipulates. The Respondent did not act in justice and equity.

129. Enough for the substantive fairness of the termination. I conclude that the termination was not substantively fair.

130. In the upshot I agree with the Claimant what the termination was unfair, wrongful and unlawful.

Of the relief grantable

131. The Claimant has sought for compensation for wrongful termination equivalent to 12 months' salary amounting to Kshs.7,596,000. I am alive of the fact that the 12 months gross wages or salary, is the maximum awardable compensation provided for under section 49(1)(c) of the Employment Act. The granting of compensatory relief is discretionary, where dismissal is found to be unfair it does not automatically mean that compensation should be granted. Whether the maximum compensation is awardable or a portion thereof or none at all, is dependent on the circumstances of each case.

132. Section 49(1)(c) of the Employment Act is clear on what is to be used in the computation. It is either gross salary or wages. In the instant case, what is applicable is gross salary. Section 49(1)(c) provides on how the compensatory amount should be arrived at, thus;

"The equivalent of a number of months wages or salary not exceeding 12 months based on the gross monthly wages or salary of the employee." (Emphasis mine)

133. Gross salary is the term used to describe all the money the employee has made which is without any deduction like income tax. It is however, inclusive of bonuses, overtime pay, holiday pay and other differentials. Some of the components of gross salary would include

basic salary, house allowance, special allowance, medical allowance, car allowance and conveyance allowance.

134. Gross salary is different from basic salary, it is the figure agreed upon between the employer and the employee without factoring in bonus, overtime pay or pay other kind of extra income. The gross salary for the Claimant was Kshs. 633,000, and this is the figure the Court shall use in the computation.

135. Am inclined to award the Claimant the compensatory relief. I have considered the extent of the Respondent's deviation from the requirement of the law, the breach of the constitutional duty to embrace fair labour practice, the uncomfortable feeling that the reason for the termination was disguised, the fact the Claimant has not gotten an alternative job, the fact that the termination was without fault on the part of the Claimant, the reasonable expectation of the Claimant on the length of the employment and the fact that this is a matter where the court would have ordered for reinstatement but for the limitation of time. Consequently, I award him compensation to an extent of an equivalent of 10 months' gross salary. Therefore Kshs.6,330,000 [Six Million Three Hundred and Thirty Thousand].

136. Clause 19 of the letter of employment provided: -

“If your employment is terminated by the Company, for any reason other than gross misconduct or serious breach of the terms of this agreement and before the successful completion of your probationary period, you will be given one [1] month's written notice or paid in lieu of such notice. If you resign before the end of the successful completion of your probationary period, you will be required to give one [1] month's written notice or paid in lieu of such notice.

Thereafter, if you resign from your position, or if your contract is terminated for any reason other than gross misconduct three [3] months written notice must be given by either party or paid in lieu of such notice.”

137. I note that among the entitlements that the termination letter brought forth as payable to the Claimant was a sum of Kshs. 1,749,000 being three months' salary in lieu of notice. The Claimant confirmed that he was paid the amounts reflected on the letter. I am challenged to understand what the basis of the Claimant's claim for three [3] months' salary is. The claim is declined.

138. The Claimant sought for reinstatement, I hereinabove found that the termination of the Claimant's employment was without any fair and valid reason[s]. The termination was camouflaged. Redundancy was used to cover up an otherwise unfair summary dismissal. In the circumstances of this matter, the Court would have ordered a reinstatement, but for the limitation upon it by operation of the law, the provisions of section12[3] of the Employment and Labour Relations Act, which provides;

“3. In the exercise of its jurisdiction under this Act, the Court shall have power to make any of the following orders,

(i)

(ii) An order for reinstatement of any employee within three years of dismissal, subject to such conditions as the Court thinks fit to impose under circumstances contemplated under any written law;

(iii) Any other appropriate relief as the Court may deem fit to grant.”

139. The Court of Appeal had a chance to give judicial attention to the provision in the case of **Sotik Highlands Tea Estates Limited vs Kenya Plantation and Agricultural Workers Union [2017]eKLR** thus;

“The ordinary meaning of the language of Section 12 of Employment and Labour Relations Court Act is that the Labour Court is empowered to reinstate a dismissed employee within three years of dismissal. Parliament in its wisdom capped that period at three years and there is no provision or proviso qualifying that provision to say that time stops running or is interrupted by an action filed in court. We think that this was a misdirection for the learned Judge to make an order for reinstatement when the effect would be to order the appellant to reinstate Siro to employment when the period of three years allowed in law had long lapsed. To that extent the learned Judge acted without jurisdiction. In any event the learned Judge in granting the order of reinstatement which is the same as ordering specific performance ignored factors which are set out in the Employment and Labour Relations Court Act and the Employment Act 2007 which should be considered before such an order is made.”

I agree with Counsel for the Respondent that this is not an order I can make in the circumstance.

140. The Claimant sought from the Respondent a sum of Kshs. 699,600 being what he termed as the employer's contribution to the pension scheme. The Respondent contended that any entitlements by the Claimant regarding his pension would only be followed up from the pension fund, a separate legal entity from the Respondent. The termination letter was clear that the pension dues were to be paid in accordance with the terms and conditions provided under the scheme rules and regulations. There is no evidence or material that was placed before this Court to establish that pension dues were payable by the Respondent. The court declines to award the amounts sought under this head.

141. He further claimed Life Cover for 15 months with benefits payable to his next of kin/dependents equivalent to three times annual gross salary at the date of termination. The basis for this Claim is difficult to comprehend. The Claimant did not bring out any evidence towards establishing justification for the same. I take the view that he didn't because there was none. The way I know it, Insurance covers and to be specific Life covers, are always contingent upon attachment of the insured risk[s] or occurrence of specific events.

142. Clause 27 of the contract of employment did put forth the Claimant's benefit for **Group Cover Insurance and Medical care**, it provided;

“You are covered under the Group Life Insurance Policy which has the following life and medical cover:

“ In the case of natural death, beneficiaries get 3-time annualized gross salary;

“ In the case of disablement, beneficiaries get 3 times annualized gross salary;

“ Lost income due to temporary disablement, a maximum of 104 weeks, weekly gross salary; and

“ Accidental medical to a limit of KES 500,000. You and your family will be covered under the Companies Health Care policy;

“ The Scheme is subject to the terms and conditions of the policy and any associated policy of insurance in place from time to time. The Company will pay the full premiums of family. Membership of this scheme automatically ceases upon leaving on retiring from the Company. This benefit is subject to Clause 33 below.”

None of these events can be said to have occurred to entitle the Claimant and or his family any of the entitlements under the cover.

143. It is upon the foregoing premise that I decline to award the relief and those sought under prayer [vii][e]and[f] that relate to insurance matters under the cover.

144. He further sought for payment of bonus for the year 2018 being 20% of his salary in accordance with the prudential Bonus Plan. The Claimant contended and it was submitted on by his Counsel that, he was entitled to this bonus on strength of the appointment letter. That there was no dispute by the Respondent that he did work for the entire of the year 2018. The benefit accrued therefore. There wouldn't have been any justification for the Respondent to deny him the bonus.

145. It was further contended that the Claimant was treated in a discriminatory manner, as other employees benefited from the declaration of bonus.

146. Counsel for the Respondent submitted that this Claimant was not proved. He asserted that in any event payment of the bonus was discretionary, only made by the Respondent to a member of staff for exceptional contribution. The Respondent's witness testified that payment of the bonus was a prerogative of the Respondent and not a right to the Claimant.

147. True, the bonus arrangement found its basis on a term in regard thereto that obtained on the appointment letter dated December 6, 2015, thus;

“At the Company's discretion, you will [subject to the rules of the plan] be eligible to participate in the Prudential Bonus Plan [the plan] up to a maximum of 20% of your annual base salary. This is a non-contractual short-term plan for company employees that has been designed to encourage high levels of individual performance required to deliver the objective of a focused and effective company. You acknowledge that you have no contractual right to receive a bonus until it is declared in writing in respect of the financial year to which it relates. You will not acquire such right on the basis that during your employment you have received one or more bonus payments.....”

148. True as Counsel for the Respondent submits, the bonus reward appears in nature to have been a discretionary reward. However, I do not agree with him it is a discretion at large. The discretion must be exercised honestly and in good faith, not in an arbitrary, capricious or irrational way, and not in breach of the implied term of trust and confidence in an employment relationship. It is on this point that I respectively differ with the holding in **Kenya National Private Security Workers Union v Kenya Kazi Security Services Limited [2013]** as cited by the Respondent, thus;

“Ordinarily bonus that is not fixed by law is given through the generosity of the employer. It is variable, depending on the performance of the business. It is not grounded on any law, but rests on the discretion of the employer. It is not demandable.....”

149. Whilst an employer may operate a non- contractual discretionary bonus scheme, if an employee is regularly awarded a discretionary bonus and has reasonable expectation that he will receive a bonus, he may seek to argue that it has become contractual through custom and practice. Where an employer has failed to exercise its discretion in good faith an employee can bring a claim for damages, and the damages would be assessed on the level of bonus that would have been awarded had the employer exercised its discretion in good faith. A failure to pay a bonus may lead to discrimination claims in appropriate cases.

150. I note that payment of the bonus was to be upon a written declaration of the same for the relevant year. The Claimant contended that the declaration was made for the year 2018, and that other employees benefited out of the declaration. The Respondent on the other hand contended that the Claimant did not prove that the declaration was made, and therefore his claim should fail. In the circumstances of the matter, I am convinced that upon the evidence of the Claimant on this, the evidential burden shifted to the Respondent. It became incumbent upon it to prove that the declaration was not made, that no other employee benefited for the year 2018, or that there was a declaration but it exercised its discretion not to award him for reason this and that. It did not place any evidence before the Court in that regard. The burden was not discharged.

151. The Court notes that the Clause in the appointment letter regarding the bonus, did not provide for how bonus accrued in the relevant year, but payable at a time when the entitled employee has already exited was to be handled. The Claimant was a good-leaver, whose employment got terminated not on account of his fault, but on an alleged redundancy. He cannot lose that which had accrued to him. I am persuaded that the Claimant is entitled to the bonus computed at 20% of his annual base pay, therefore Kshs. 1,399,200.

152. The Claimant contended that in computing the 3 [three] months' notice pay, the Respondent unlawfully used the basic pay instead of the gross salary. The Respondent admitted that it used the basic pay in the computation as it excluded, Kshs. 50000 which was a discretionary allowance. Why exclude an allowance which was always on the pay slip, at the time of separation, was not explained by the Respondent? I am of the view that the Respondent did not have an y justifiable reason to deduct the total sum of Kshs. 150,000 from the notice pay, however, I am unable to grant the same for it was not been pleaded for.

153. This also applies to the claim for the unpaid salary for the 7 days between 11th -18th February 2019. It was not pleaded for.

154. There is no right for an employee to work for life. There is no guarantee that an employee will work up to his retirement age. I am unable to see the justification for the Claim for the right to work and legitimate expectation to work until retirement. The Court declines to make an award under the head.

155. On the Claimant's claim for damages on account of the alleged breach of his constitutional right not to be discriminated against, it is the Courts view that the material that he placed before me was insufficient to demonstrate that the alleged discrimination occurred. The material is good only to demonstrate, lack of good faith on the part of the Respondent, a factor that the court has considered in determining the extent of the award under section49[1][c], and that the Respondent's action amounted to an unfair labour practice.

156. Lastly, the Claimant sought for general damages for breach of his right to fair labour practices, right guaranteed under Article 41 of the Constitution of Kenya,2010. Under the Article, an employee is guaranteed reasonable working conditions. Reasonable conditions will not include situations where an employer arbitrarily and capriciously decides to terminate an employee's employment under a camouflaged redundancy, reduce separation entitlements which it has represented to be available on the redundancy situation, deduct an allowance at the time of separation, allowance which the employee has all through enjoyed, without any justifiable reason, and blatantly deviate from what the law expects of it. I am prepared to agree with the Claimant that in the circumstances of the matter the action[s] by the Respondent amounted to unfair labour practice. The Claimant's right was violated. I award him general damages of Kshs. 100,000 [One Hundred Thousand].

157. In the upshot, judgment is hereby entered in favour of the Claimant in the following terms;

- a) A declaration that the termination of the Claimant's employment was both procedurally and substantively unfair.
- b) Compensation pursuant to the provisions of section 49[1][c] of the Employment Act, Kshs. 6,330,000.
- c) Prudential plan Bonus, Kshs. 1,399,200.
- d) General damages for breach of the right to fair labour practices, Kshs. 100,000.
- e) Interest on[b] and [c] at Court rates from the date of filling this suit till full payment.
- f) Interest on [d] at Court rates from the date of this judgment till full payment.
- g) Costs of this suit.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 15TH DAY OF MARCH, 2022.

OCHARO KEBIRA

JUDGE

Delivered in presence of:

Mr. Thuo for the Claimant.

Mr. Oyoo for Wetende for the Respondent.

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2) (d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B** of the **Procedure Act (Chapter 21 of the Laws of**

Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

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

OCHARO KEBIRA

JUDGE