



**Ooko v Northern Rangelands Company Limited (Cause  
462 of 2017) [2022] KEELRC 1294 (KLR) (9 May 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1294 (KLR)

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

**CAUSE 462 OF 2017**

**K OCHARO, J**

**MAY 9, 2022**

**BETWEEN**

**DOMINIC OTIENO OOKO ..... CLAIMANT**

**AND**

**NORTHERN RANGELANDS COMPANY LIMITED ..... RESPONDENT**

**JUDGMENT**

1. This suit was initiated through a memorandum of claim dated 7<sup>th</sup> March 2017 and amended on 14<sup>th</sup> August 2020, by the Claimant against the Respondent. Alleging that the termination of his employment by the Respondent, was unlawful, unjustified and unprocedural, the Claimant sought against the Respondent the following reliefs and orders;
  - a. A declaration that the termination of employment was unlawful, unjustified and unprocedural.
  - b. Payment of unexpired term of the contract being Thirty-nine months in the sum of Kshs. 25,826,346.00.
  - c. Damages for summary dismissal equivalent to one year's salary in the sum of Kshs 7,946,568.00.
  - d. General damages for violation of the Claimant's fundamental constitutional rights.
  - e. Interest on (b) and (c) from 16<sup>th</sup> December 2016 and the interest on (d) from the date of judgment.
  - f. Cost of this suit; and
  - g. Such other further relief this honourable court may deem fit.



2. The Respondent upon being served with summons to enter appearance, entered appearance on the 11<sup>th</sup> April 2017 and subsequently filed a memorandum of reply to the memorandum of claim on the 20<sup>th</sup> June 2018. To the reply, the Claimant did file a reply on the 26<sup>th</sup> June 2018. Imperative to state that the Respondent didn't file any amended reply to the amended memorandum of claim.
3. At the close of pleadings, the matter got destined for hearing on merit. The matter was heard on the 6<sup>th</sup> October 2021 when both parties presented evidence and closed their respective cases.

### **The Claimant's Case**

4. At the hearing, the Claimant testified and adopted his witness statement dated the 27<sup>th</sup> February 2017 as his evidence in chief. He produced the documents he had filed herein under a list of documents dated 7<sup>th</sup> March 2017 and under a supplementary bundle of documents dated 6<sup>th</sup> August 2012, as his documentary evidence.
5. It was the Claimant's case that following an interview that had been done on him in the month of March 2015, the Respondent offered to employ him as a Chief Operating Officer [COO] an offer which he accepted. Upon the acceptance, the offer was confirmed on the 23<sup>rd</sup> March 2015 in writing by the Chief Executive Officer of the Respondent Organization.
6. It was a term of the offer inter alia that he was to be under probation for a period of six months, and confirmation in employment was subject to a successful completion of the probation. He commenced employment on the 8<sup>th</sup> of April 2015, carrying out his duties with diligence and determination. This culminated to his confirmation in employment for the full period of 5 years. The terms and conditions of his employment were enveloped in the contract of employment dated 10<sup>th</sup> December 2014.
7. The Claimant stated that his duties included managing compliance, administration, human resources, supporting field and office staff, logistics, fleet management and providing oversight over the ICT and procurement functions.
8. The Claimant stated that in accordance with the Respondent's policy, his performance was reviewed in May 2016 by the CEO alongside other senior staff and he was awarded a rating of 4.4 out of a possible 5. This gave him an impression that his performance was excellent and that he was performing his roles as expected by the stakeholders.
9. Suddenly on the 22<sup>nd</sup> November 2016 the CEO, Dr. Mike Harrison appeared and revealed to him that he had made a decision to carry out a restructuring within the senior management team of the Respondent and that the Claimant's job would be affected by it being rendered redundant. The restructure was being influence a deficit in the Respondent's funding from donors to the tune of Kenya Shillings Fifty Million [Kshs. 50,000,000].
10. The Claimant stated that the CEO, indicated to him that he had called for a meeting later that morning with a view of taking the staff through the intended restructure. True, the meeting was convened, the CEO explained to the staff that Regional Managers would be upgraded to Regional Directors, a new Programmes Officer would be appointed to take over from the previous one who was joining politics, and that the position of Chief Operating officer would be advertised.
11. The Claimant contended that on the 23<sup>rd</sup> November 2016, the CEO and him met again, he suggested to him that he was willing to, take a pay cut and, help the Respondent manage the situation through cost cutting, if the situation was being fuelled by financial constraints. The CEO, promised to look into the suggestion and get back to the Claimant.



12. The following day the CEO got to the office of the Claimant and indicated to him that his competences and skills couldn't match the profile of the new position. That he had in mind someone with a profile similar to the Lewa Conservancy CEO, Mr. Mike Watson. That he indicated his gratitude for the great job that the Claimant had done since he joined the Respondent.
13. The Claimant contended that without any communication to him and other staff, the CEO then put out an email to the Respondent's partners on the 30<sup>th</sup> November 2016 attaching an advertisement for the position of the Chief Operating Officer. The advertisement was seeking to fill his position and invited applicants to apply by 30<sup>th</sup> December 2016.
14. The Claimant stated that on the 16<sup>th</sup> of December 2016, he received an email with a letter from the Respondent's CEO communicating of the decision to terminate his employment on the basis of redundancy. The letter stated that his last day of work would be Friday 6<sup>th</sup> January 2017, and offered to pay 3 [three] months' salary in lieu of notice, severance pay for one completed year of service and leave days earned but not taken.
15. He contended that the letter didn't mention the Shillings Fifty Million [50,000,000] deficit. The tone of the letter was that his departure was necessitated by the Respondent's growth.
16. He stated that later after he had handed over and cleared with the Respondent, he came to learn that his position was offered to Mr. Robert McNeil, a white expatriate who had run out of contract with his previous employer.
17. The Claimant avers that the redundancy was hurriedly stage managed to create an opportunity for the white expatriate one Mr. Robert McNeil and the same was discriminatory on the basis of race.
18. The Claimant stated that his assertion that the acts of the Respondent were discriminatory is further fortified by the fact that the Respondent had shortly before his termination created the position of Livestock specialist to accommodate a white British expatriate known as Mr. Kievan at a salary way higher than a local counterpart with greater experience.
19. That the NRT habitually created positions to suit certain individuals, without caring the cost implication thereof on the Respondent Organization, using donor money. For instance, security consultancy was awarded to a company called 51 Degrees, worth Kenya Shillings Four million a month for past three years solely to create a job for MR. Batian Craig a director of the company and a son of Mr. Ian Craig, NRT's Director of conservation. Fuzz Dyer, also a relative of Mr. Craig who runs a lodge in Manda Bay was awarded a long-term consultancy worth Kshs. 30,000.00 a day for two years yet he was always busy running his own business to be available for the Respondent's operations.
20. The Claimant contends that the actions of the Respondent led to the breach of his constitutional rights against;
  - i. Discrimination on the basis of race contrary to Article 27 of *the constitution* of Kenya 2010.
  - ii. Unfair labour practice contrary to the provisions of Article 41(1) of *the constitution* of Kenya, 2010.
21. Cross examined by Counsel for the Respondent, the Claimant testified that his appointment was to the position of Chief Operating Officer, and that one of the factors that contributed to his employment was his Diploma in Human Resource Management and the Masters in Bachelor of Arts in Human Resource and Strategic Management.



22. He further stated that his roles were spelled out in his job description and at no time was he ever entrusted with additional roles. Matters Human Resource fell under his docket and whenever there was an issue in regard thereto, he advised adequately.
23. The Claimant stated that in his email to the Respondent he was advising on his terminal dues. He didn't protest the manner in which the termination occurred, however.
24. He acknowledged that he was part of the senior management team of the Respondent Organization, and that in his capacity as such, he attended several Board meetings. He was present in the meeting of 11<sup>th</sup> August 2016. The Board agreed with the CEO'S restructuring plan for the future of the Organization.
25. He further stated that however, the issue of restructuring was not discussed in his presence. The first time he came to hear of the restructuring was on the 22<sup>nd</sup> November 2016. The email by Mike Harrison of 22<sup>nd</sup> November 2017, spoke to the restructuring. However, in the correspondence there was no mention of the fifty million shillings deficit. Though his name appears as one of those to whom the email by Mike Harrison of 30<sup>th</sup> November 2016 was copied to, he didn't receive the same.
26. The Claimant stated that he heard of one Robert McNeil after he had left the employment of the Respondent. He heard that he was an ex-military officer. He would not tell what the qualifications of the Robert was. He wasn't aware who applied for his position. However, he maintained that Robert replaced him on basis of race.
27. The Claimant reasserted that the Respondent had a habit of favouring whites when it came to benefits. However, he had no document as proof of this. He too didn't have any documents to demonstrate that the contract of for million shillings was given to 51 degrees Ltd.
28. He testified that Respondent discriminated against as his job was given to someone who was not qualified.
29. According to the contract, the notice period was 90 days. He was duly paid for the same.
30. In his evidence under re-examination, the Claimant stated that the function of Human Resource management was a small part of the functions under his docket. His responsibilities as a Chief Operating Officer were wider.

### **Respondent's Case**

31. The Respondent presented one Mike Harrison its former Chief Executive Officer to testify on its behalf and in defence against the Claimant's case. The witness stated that the Respondent is a community conservancy membership organization of 33-member conservancies working across 44,000 square kilometres of northern and coastal parts of Kenya.
32. He asserted that in a bid to achieve its goals, the Respondent has over time employed highly qualified people from within and without Kenya.
33. He stated that by a fixed term employment contract dated 10<sup>th</sup> December, 2014, the Respondent employed the Claimant as a Chief Operating Officer, for a period od 5 years running from the 8<sup>th</sup> March 2015 to 7<sup>th</sup> March 2020.
34. The witness contended that at the time the Respondent engaged the Claimant in employment in the position foretasted, it was intended that he would mainly deal with human resource matters with the other tasks being additional to it. This in line with his experience. His job description reveals it.



35. The witness stated that on the 11<sup>th</sup> August, 2016, the Respondent's Board held a meeting in which it discussed and approved a proposal to review and restructure the Organization with a view of promoting efficiency, respond to continuing growth, respond to the need to devolve more authority to its regional offices and upgrade its relevant staff to the Regional Director positions.
36. He further stated that the Claimant was in the meeting of 11<sup>th</sup> August, 2016 with a few other senior members of staff. Following the approval, the Respondent reviewed its structures and designed a new organizational structure with changes to the roles of various management positions. The restructure was not occasioned by any budgetary deficit as alleged by the Claimant.
37. That the Claimant as head of Human Resources, and a member of the senior management team was involved in the review and subsequent restructuring. On the 18<sup>th</sup> October 2017, the Respondent's Management Team, deliberated on the role of the new COO. The Claimant made his contributions on the restructure and his considerations were taken into account.
38. The witness stated that the new organizational structure was to be rolled out in January 2017. One of the positions that was to be affected was that of the Chief Operating Officer, which at the time was being held by the Claimant. The roles that were to be carried out by the new COO, were different. The existing role of the COO was to be done away with and replaced by a new role. The Respondent had to carry out redundancy.
39. On various occasions he had discussions with the Claimant over the restructure, and at one time he indicated to the latter that he was likely to be affected by the restructure. Then the Claimant got prompted to ask him to consider cutting his salary by half and keep him in employment. The request didn't fall within the restructuring and was not acceptable.
40. The witness asserted that he personally encouraged the Claimant to apply, but he was negative about it as he felt that he didn't have qualifications for the new COO.
41. The witness stated that on the 30<sup>th</sup> November 2017, he sent an email to senior members of the Respondent's staff, including the Claimant, with the advertisement for the position of COO attached. In the email he requested them to circulate the advertisement within their professional circles to enable the Respondent recruit a highly qualified person for the new COO role.
42. He further stated that on the 1<sup>st</sup> November, 2016 the Claimant sent an email to all members of the Respondent's staff under which he forwarded to them the witness's email of 30<sup>th</sup> November, 2016 and the advertisement. The Claimant requested them to circulate the advertisement widely so as to reach a large pool of individuals who had competencies indicated for the new COO.
43. The witness stated that following consultations and in accordance with the law, the Respondent declared the Claimant redundant vide its letter dated 16<sup>th</sup> December 2016.
44. The witness asserted that the Claimant's allegations that the Respondent racially discriminated against him and that the latter orchestrated a plot to kick him out of employment and replace him with a white expatriate, Mr. Robert McNeil, was careless and without foundation.
45. The witness stated that the Respondent's Board and staff is composed of individuals from diverse racial backgrounds, and therefore it cannot be true for one to assert that the Respondent is in the habit of creating jobs for a particular race. Further that any person who was employed or given consultancy work, by the Respondent was so employed or given, on strength of their qualifications and experience. Consultant's fees were often anchored on experience, qualifications and obtaining market



rates. Salaries of staff were pegged on performance and experience and not based on an employees' racial background.

46. It was further stated that all times the Respondent's actions must be approved by its Board, which consists of respectable, eminent persons including Hon. Mohammed Elmi [the Chief Administrative Secretary for the Ministry of Environment], Dr. Hassan Wario [a former Cabinet Secretary for sports], Mr.Kitili Mbathi [the former Director General of Kenya Wildlife Service] and Prof. Judy Wakhungu [the Kenya Ambassador to France and a former Cabinet Secretary in the Ministry of Environment. The Respondent's Board cannot possibly countenance any form of racial discrimination as alleged by the Claimant.
47. Cross examined by Counsel for the Claimant, the witness stated that the role of the Board is to make policy decisions and guide the Chief Executive Officer [CEO] oh how to discharge his duties. One of the roles would be to make a decision on restructure of the organization, and approve the CEO's proposed restructure.
48. The witness stated that though the senior management staff aren't members of the Board, they do attend its meetings, however if one of them is under discussion, he gets excluded. The restructuring issue affected more that the COO. Referred to the minutes of the Board, he acknowledged that the Board allowed him to prepare the restructuring plan.
49. The Claimant performed his role as per the terms of reference, which terms were wider than Human Resource functions. The advertisement of 30<sup>th</sup> November 2016 was circulated by the Human Resource department, as it was their duty to.
50. The witness believed that there was another employee who was affected by the redundancy though he [the witness] didn't have any document to demonstrate this to court.
51. Besides the email of 6<sup>th</sup> December 2016, there are others that touched on the restructure, for instance the one of the 22<sup>nd</sup> Novembers 2016. The email of 6<sup>th</sup> December 2016, scheduled a meeting for 7<sup>th</sup> December 2016, nine [9] days after he had sent the Claimant a termination letter.
52. The witness acknowledged that prior to the termination there was no letter/notice done to the Claimant or the Labour Officer on the redundancy.
53. He stated that Patrick Okodele was earning more than one Kievan. The two were contemporaries. Referred to a letter dated 21<sup>st</sup> June 2016, he acknowledged that the salary of Patrick was Kshs. 265,373 plus Kshs. 9,250 domestic allowance. From the letter of offer to Kievan Avery, her basic salary was Kshs. 330,000. Kievan joined the organization later than Patrick. This salary for Patrick was for the year 2015, however as the letter at page 15 of the Respondent's documents would reveal, there was a salary increment for him in the year 2015.
54. Julliet King and Fuzz are both Kenyan, though white. They were employed by the Respondent through an open and competitive process. For the positions they were appointed to, applications had been invited for suitably qualified people. The two emerged suitable.
55. The witness acknowledged that during the time the Claimant was still in employment of the Respondent, he received an email from McNeil, email to which he responded, he expressed anticipation that he will visit them in January. At this time, he hadn't received an application from McNeil. He asserted that one of their networks gave McNeil, the witness's email address. McNeil had been it touch with one Ian. with whom the witness had discussed the impending redundancy.



56. The restructuring was occasioned by the fact that the Respondent wanted to improve its operations not because it needed a someone who would manage to fundraise for it. McNeil didn't have any qualifications in media relations and communications. McNeil left employment, after the witness had. A south African white in colour, took over his position.
57. Under re-examination by the Respondent's Counsel, the witness stated that the Board gave him the mandate to conceive and actualize the restructure. At the beginning of the restructure, he wasn't known to McNeil.
58. The roles of the new COO as can be seen from the advertisement [page 32 of the Respondent's original bundle of documents], were completely different from the roles that the Claimant was discharging. The restructuring brought on board more roles.
59. As at June 2016, Kievan was earning Kshs. 330,000 whilst Patrick was earning 337, 413, therefore more than the former.
60. After the advertisement for the position of COO, three names got to the shortlist, and after the eventual interviews, McNeil emerged successful.

### **Claimant's Submissions.**

61. The Claimant distilled four issues for determination thus;
  - i. Whether the termination of the Claimant was unfair?
  - ii. Whether the termination of the Claimant was based on racism hence violation of the Claimant's rights under *the Constitution*?
  - iii. Whether the Claimant is entitled to the reliefs prayed for?
  - iv. Who bears the cost of the cause?
62. On the first issue, Counsel submitted that the termination of the Claimant's employment was unfair. Section 2 of the *Employment Act*, 2007 defines redundancy as "the loss of employment, occupation, job or career by involuntary means through no fault of an employee. It involves termination of employment at the initiative of the employer, where the services of an employee are superfluous. Redundancy may arise under various circumstances including but not limited to the practices commonly known as abolition of office, job or occupation and loss of employment."
63. Counsel for the Claimant submitted that section 43 of the Act, places a burden on the employer to prove reason or reasons for termination and where the employer fails to, the termination shall be deemed to have been unfair.
64. It was argued further that the Respondent's position was that the Claimant was terminated on the account of redundancy. However, the Respondent sought to interchangeably use the word restructuring with redundancy. Redundancy and restructuring are different. The *Employment Act* does not recognize restructuring.
65. It was submitted that the Respondent failed to demonstrate that the Claimant wasn't qualified for the new expanded role of the COO. In his evidence under cross examination, the Respondent's witness was unable to show how Robert McNeil was more qualified than the Claimant for instance, to perform the task of communications and media relations and the other roles. The major predominant qualification of Mr. McNeil was army/ soldier which had no correlation whatsoever [in academics and experience] with the alleged new role.



66. Looking at the job description of the Claimant, and the Job description that was for the alleged expanded role of COO as brought out in paragraph 21 of the Respondent's witness's statement, one sees no difference. Nothing changed that would make the Claimant unqualified for the new role. The redundancy was ill-actuated, and only intended to aid a Whitman get the Claimant's job.
67. It was further submitted that whereas the law recognizes redundancy as a legal means for terminating employment, responsibility is imposed on an employer who relies on it as a ground for termination to strictly adhere to the mandatory provisions of Section 40(1). The Claimant relies in the holding in the case of *Hesbon Ngaruiya Waigi -v- Equitorial Commercial Bank Limited* (2013) eKLR on the provisions under mandatory provision of Section 40, the court held:
- “These conditions outlined in the law are mandatory and not left to the choice of the employer. Redundancies affect workers livelihoods and where this must be done by an employer must put into consideration the provisions of the law.”
68. It was further submitted that where an employer fails, neglects and or ignores to strictly follow and adhere to the laid down conditions in Section 40 of the *employment Act* in declaring an employee redundant then such termination is considered unfair within the meaning of section 45 of the *employment Act*.
69. It was further contended that none of the communications to the Claimant constituted the redundancy notices contemplated under the act. Reliance was placed on the Court of Appeal holding in *Thomas De La Rue -v- David Opondo Omutelelma*[2013] eKLR and *Kenya Airways Limited -v- Aviation & Allied Workers Union of Kenya & 3 others* [2014] eKLR that, in every redundancy situation, there are two separate and distinct notices, of not less than a month each. The first is a general notice to employees within the targeted establishment and the Labour Officer; the second notice is a termination notice addressed to each departing employee individually.
- 1.5. The Respondent further relied in the holding in *Agnes Ongadi versus Kenya Electricity Transmission Company Limited* [2016] eKLR the court held;
- “A redundancy must therefore be justified before an employer can commence recruitment of new officers to replace existing employees who have on-going contracts of employment and hold substantive offices in similar capacity as the advertised position. The justification of the redundancy is upon the employer as this cannot be applied as a general term so as to lay off an employee on a whim as held by the Court of Appeal in *Kenya Airways Limited versus Aviation and Allied Workers Union Kenya and Others* [2014] eKLR.”
70. The Claimant submits that he was the only one rendered redundant and the Respondent did not state to court the selection criteria employed.
71. The Claimant further states in reliance on the holding in the case of *Kenya Airways Limited versus Aviation and Allied Workers Union Kenya and Others* [2014] eKLR that consultation was mandatory and in the current case none was held between the Claimant and the Respondent.
72. On the second issue whether the termination of the Claimant was based on racism, the Claimant submits that at no point did the Respondent demonstrate any gap that existed in the Claimant's performance.



73. The Claimant further states that the composition of the board in the minutes dated 11/08/2016 was 50% from white race. The Claimant relies on the observation by Mbaru J. in *Janine Buss -v- Gems Cambridge International School Limited* [2016] eKLR under Section 5(6) of the *Employment Act*, the burden of disproving an allegation of discrimination lies with the employer. The Respondent was therefore under an obligation to prove that the Claimant's termination had nothing to do with him being a black man.
74. The Claimant submitted that there was ample evidence on record that the Respondent Organization had mastered a policy of racism and racial discrimination in the conduct of its business. The court was urged to consider that blacks were treated differentially from their white counterparts in matters related to employee benefits.
75. On the reliefs sought, it was submitted that the Claimant is entitled to the payment of salary equivalent to the unexpired period of his 5-year contract. He had a legitimate expectation to complete the term, but the same was cut short unfairly. To buttress this submission that the award can be made on the unexpired period, the Claimant relied on the holding in *R. vs. the Hon. Chief Justice of Kenya & others* the court stated as follows;
- “It is however also clear that the concept of legitimate expectations like many concepts can be used in more than one way, it does not have to be given a restrictive interpretation thus more recently cases have in principle at least given a broader meaning to that term, utilizing it as the foundation for procedural consultation rights to be given to immigrant workers and local authorities. Thus, if an individual is to be deprived of a benefit which was enjoyed in the past and which he could legitimately expect to continue or he has received assurance from the decision makers that such a benefit will not be withdrawn without giving him some opportunity to argue the contrary then in either instances an opportunity for the individual to make representations will be accorded.”
76. The Claimant submits that the untimely termination of employment without justification robbed him unexpired term of the contract.
77. The Claimant urges the court to find that he was unfairly terminated and therefore entitled to the reliefs sought, he also prays for costs

### **Respondent's Submissions.**

78. The Respondent identified three issues for determination, namely whether the Claimant's termination was valid, fair and procedural, whether the Claimant was racially discriminated and whether he is entitled to the reliefs sought.
79. The Respondents submit that the Claimant was dismissed based on a valid reason and due process followed.
80. The Respondents submit that the Claimant's job of COO ceased to exist and at the time of termination the Respondent required to hire someone else to perform a new role which the Claimant had not been hired for.
81. The Respondent submits that to promote efficiency in its business it undertook restructuring of its organization which led to the redundancy of the Claimant.
82. The Respondents submit that the redundancy was lawful as held in *Kenya Airways -v- Aviation and Allied Workers Union Kenya and 3 Others* [2014] eKLR.



83. The Respondent submits that the Claimant was aware of the process as he was actively involved in the process leading to the redundancy and since his position was the only one declared redundant there was no need to for a selection process as provided for under *employment Act*.
84. The Respondent submitted that it gave the Claimant notice vide a letter dated 16<sup>th</sup> December 2016 and all his terminal dues including his salary for the days earned, leave days earned but not taken, 3 months' salary in lieu of notice and severance pay for every completed year of service.
85. It was further submitted that the Respondent did not discriminate against the Claimant in any manner based on race and that the Claimant did not demonstrate the different treatments he experienced. See *Peterson Guto Ondieki -v- Kisii University* [2020] eKLR.
86. The Respondent submitted that the Claimant had an overriding obligation to lay substantial material before the court in discharge of the evidential burden establishing the treatment at the hands of the Respondent as unconstitutional, which he didn't.
87. The Respondent submitted that hiring Mr. McNeil had nothing to do with the Claimant or races but it was justified based on the recruitment and interview process.
88. The Claimant was fairly terminated therefore he is not entitled to the reliefs sought, the court should dismiss the suit with costs.

#### **Analysis and Determination.**

89. From the material placed before this Court I distil the following issues for determination:
  - a. Whether the termination of the Claimant's employment was procedurally fair.
  - b. Whether the termination of the Claimant's employment was substantively fair.
  - c. Whether the Claimant is entitled to the reliefs sought or any of them.
  - d. Whether the Claimant's fundamental constitutional rights were violated.
  - e. Whether the Claimant is entitled to the reliefs sought or any of them.
  - f. Who should bear the costs of this suit?

#### **Whether the termination was procedurally fair.**

90. It is common cause that the Claimant's employment was terminated on the 16<sup>th</sup> December 2016, through a letter of termination of the same date, and that the termination was as a result of an alleged redundancy. The letter read in part:

“Reference is made to our meeting on 22<sup>nd</sup> November and several subsequent meetings on the need to restructure NRT's senior management. This restructuring is driven by the continuing growth of NRT, the strategic imperative to devolve more authority to the 5 NRT regions and thus upgrade relevant staff to Regional Director positions and the consequent requirement of a greatly expanded role of the Chief Operating Officer - including leadership of the technical teams / governance, peace, livelihoods, security, ecosystems, wildlife and enterprise / and their operational coordination within the Regions.

As a result, I regret to advise you that your narrowly defined current role as Chief Operations Officer [responsible mainly for Human Resource, Procurement, Administration and



Logistics / has become redundant. As discussed, we have advertised for the greatly expanded role of COO with a deadline of 31<sup>st</sup> December 2016.

This letter is to advise you that your services with NRT will be terminated on redundancy grounds. This in no way reflects your performance in the current role, which has been excellent. However, as we discussed, the new role requires a set of operational skills and competences for which your experience is not suited .....

91. Section 43 of the *employment Act* stipulates that whenever there is a dispute regarding termination of an employee's employment the employer is enjoined to prove the reason[s] for the termination. section 45 of the Act imposes a further legal burden on the employer, that burden of proving that the reason[s] was valid and fair, and procedurally fair.
92. In matters where the termination is said to have been as a result of a redundancy situation, the procedure that the employer must demonstrate that he adhered to is that encompassed under section 40 of the *Employment Act*. If the employer fails to establish this, the termination shall be considered unfair under section 45 of the *Employment Act*.
93. I have carefully considered the Respondent's evidence on record, and submissions by its counsel, though they appreciate that the termination was on account of redundancy, and though the Claimant's counsel extensively submitted on the procedural fairness in respect of redundancy claims, they totally ignored to address the issue of procedural fairness in the subject termination.
94. Section 45 [2] [c] required the Respondent as an employer to establish that the procedure was adhered to and therefore there was present procedural fairness. Evidence having not led on this, I am unable to hold otherwise than that the Respondent failed to discharge its burden of proof under section 45 [2] of the Act.
95. In the case of *Hesbon Ngaruiya Waigi vs. Equitorial Commercial Bank Limited* [2013] eKLR, cited by counsel for the Claimant, the court held:

“These conditions outlined in the law are mandatory and not left to the choice of the employer. Redundancies affect workers livelihoods and where this must be done by an employer must be put into consideration the provisions of the law.”
96. And in the case of *Francis Maina Kamau vs. Lee Construction* [2014] eKLR, addressing the mandatory nature of the provisions of section 40 of the Act the Court stated:

“Where an employer declares a redundancy, the conditions set out in section 40 of the *employment Act* must be observed and where the employer fails to do so, the termination becomes unfair termination within the meaning of section 45 of the Act.”
97. On strength of the above stated decisions and a deep consideration of the provisions of section 40 of the Act, I am of the view that the provision is coached in a mandatory manner. Adherence to it is not left to the election of the employer.
98. Section 40 provides procedural fairness in the process leading to termination of an employee's employment, largely. The procedure provided under section 40 was aptly elaborated in the case of *Aviation and Allied Workers Union vs. Kenya Airways* [2012] eKLR thus:

“40.Procedural fairness in a retrenchment exercise is as important, as the substantive justification. How an employer treats its employees really matters to those who exit, and even



those who remain. Fair procedure involves notification of employees, their trade union and the government of the intended redundancy. The initial notification is intended to alert the parties to the situation. It is not the same thing as a notice of termination of employment. No decision has been made and the employer is simply inviting the social partners to discuss a possible redundancy situation. The 2<sup>nd</sup> phase involves consultation. The court was surprised to hear the witness Shiro who is in charge of Human Resource at KQ testify that there is no obligation to consult, but that nonetheless KQ consulted AAWU. Consultation before and after retrenchment exercise, is mandatory.

Employees are consulted individually and through their trade union. They must be given reasonable time to consider the proposal from the employer. Employees must be given time to respond to the proposal and their response given proper consideration by the employer, it is not a decision that is initially communicated by the employer, but a proposal ushers in constructive social dialogue.

Raycroft and Jordan “A Guide to South African Labour Law” Second Edition, emphasizes that consultation is not about the employer affording the employee an opportunity, to comment about a decision already made by the employer .....

99. Addressing the nature of the notices contemplated in section 40 of the Act, the Court of Appeal held in the cases of De La Rue vs. David Opondo Omutelema[2013] eKLR Kenya Airways Limited vs. Aviation & Allied Workers Union of Kenya & 3 others [2014] eKLR that the provision contemplates two notices distinct from each other, of not less than a month each. I have considered the evidence placed before me as a whole and find it not difficult to conclude that the Respondent did issue any of the notices contemplated under the provision.
100. The law requires genuine and structured consultation. The Respondent’s witness did put much effort in demonstrating that the Claimant was aware of the restructure owing to his position as a head of Human Resource. Being aware of a redundancy situation cannot be equated to consultation by the employer with an employee who has been identified for retrenchment. The Claimant was categorical that there were no consultations by the Respondent with him. The Respondent did not place any evidence before the court to dislodge the Claimant’s position.
101. The Respondent’s witness in a bid to demonstrate that there were consultations, testified that the Claimant offered to have his salary reduced but the Respondent’s witness declined the offer upon reason that the role that was to be prayed by the new COO, could not accommodate his qualifications and competencies. From the evidence placed before me I discern that the offer by the Claimant came in after a decision had been made not before. This cannot be stated to be a consultation of the nature that the law envisioned.
102. The Respondent’s witness testified that the retrenchment affected other employees of the Respondent. However, he was not able to state hold many were, and the criteria that was applied in selecting them.
103. In conclusion, the court finds that the termination of the Respondent’s employment was procedurally unfair.

#### **Whether the termination of Claimant’s employment was substantively fair.**

104. Lack of fault on the part of the employee is the defining characteristic a termination of an employee’s employment on account of redundancy. It is upon this that the law places specific and clear obligations that are both procedural and substantive in nature, most of which are directed toward ensuring that



all possible alternatives to termination are explored and those employees affected are treated fairly both prior and after the termination.

105. Counsel for the Respondent submitted that it is a prerogative of every employer to determine structures of its business and redesign its organizational structures to suit its business requirements of profit making. The court agrees with this statement but with a rider. The prerogative cannot be in the new legal dispensation referred to hereinabove, a prerogative at large. The Respondent's counsel is suggesting employment of a differential approach. I am of the view that there needs to be a shift. Courts must play a more assertive role. In this view I am emboldened by the decision of the South African Labour Appeal Court in *BWD Knitting Mills [pty] vs. SACTWU* [2001] 7 BLLR 705 [LAC] where the court held:

“The word “fair” introduces a comparator, that is a reason which must be fair to both parties affected by the decision. The starting point is whether there is a commercial rationale for the decision. But, rather than take such justification at face value, a court is entitled to examine whether the particular decision has been taken in a manner which is also fair to the affected party, namely the employees to be retrenched. To this extent the court is entitled to enquire as to whether a reasonable basis exists on which the decision, including the proposed manner, to dismiss for operational requirements and predicated viewed accordingly, the test becomes loss differential and the court is entitled to examine the content of the reasons given by the employer, albeit that the inquiry is not directed to whether the reason offered is the one which would have been chosen by the court. Fairness, not correctness is the mandated test.”

106. Giving a determination, this kind of approach will attract a balanced dispensation of justice as opposed to the “reasonable employer test” that equates rational conduct by an employer with fairness. The approach considers the employee's perspective too.
107. The Respondent was duly bound to prove rationality and justifiability of the reason for the termination. The termination letter was clear that the performance of the Claimant had been excellent that far. That however his experience would not fit the expanded role of COO. This was the position of the Respondent. On the other hand, the Claimant's position was radically different. The reason was camouflaged, it was not genuine, it was a sham.
108. It has interested this court to interrogate the Claimant's job description, identify what the objective of his position was and the skills, competences, qualifications, education and experience it required, then weigh this against that of the alleged expanded COO position. According to the Claimant's job description, the primary role of the COO was to facilitate improvement of organizational capability by developing and harmonizing systems and processes and involving people to maximize ownership, commitment, and engagement to achieve organizational excellence. The role was facilitative, that was to coordinate and integrate activities across Human Resource, Administration, Information Technology, Procurement, Logistics, Fleet and Aircraft Management and Infrastructure development and maintenance activities, while ensuring that they were delivered to the highest quality, on time and within budget. Deliver value and support operations across all units in NRT core and the conversances.
109. The skills, competencies, qualifications, education and experience required in the discharge of the role were:
- i. Master degree in a Business-related field.
  - ii. Previous experience in high level administration.



- iii. Exposure to IT systems.
  - iv. Demonstrated acumen in managing human resources at both strategic and operational levels.
  - v. Excellent communication skills.
  - vi. Influencing skills.
  - vii. Demonstrated ability to work as part of a team.
  - viii. Demonstrated operational acumen.
  - ix. Demonstrated ability to manage priorities.
  - x. Demonstrated organizational skills.
  - xi. Exposure to fleet management.
  - xii. Awareness of latest trends in cost effective solutions and systems of managing procurement.
110. The Respondent's witness in his written statement at paragraph 21 did put forth the role of the new COO, thus:
- i. Monitoring and evaluation management.
  - ii. Communication and media relations.
  - iii. Oversight on information and technology.
  - iv. Leadership in budgets, annual plans and reports.
  - v. Coordination of partners visits.
  - vi. Oversight of infrastructure development and;
  - vii. Matrix management of technical teams.
111. I have agonized over whether there is a difference between the new and old roles, I am unable to say that there is a really marked difference. The Respondent's witness other than only asserting that the new role was an expanded role, that the Claimant's skills and competences would not fit in, he did not go further to elaborate how and to what extent. The demonstration was imperative, owing to the view that the Claimant had taken from the onset concerning the alleged new role and the recruitment therefore.
112. The court has considered the advertisement that was made for the new role, advertisement that was tendered in evidence by the Respondent. I am surprised that the advertisement did not set any academic qualifications for the applicants. It is not possible therefore to state what academic qualifications were required of the new COO. Was this a deliberate omission? The Respondent did place the new COO's curriculum vitae before this court. The vitae spelled out the academic and vocational qualifications of the COO [Robert McNeil], thus:
- i. Joint services command and staff course. August 2009 to May 2010. MA level course recognized by the Chartered Management Institute to teach high level strategy, management command and leadership.
  - ii. The Royal Military Academy Sandhurst, August 1999 to September 2000. Graduate from UK Premier Leadership Academy. A forty-four-week academic leadership and defence studies course.



- iii. Leads University, September 1996 to July 1999. Honours degree in Management Theory, Communications and Physical Education with Sports Science.
113. The court is left to conclude that in these qualifications, the highest being the Honours degree came below the highest qualification [academic] that had been set for holder of the alleged narrow role that was being undertaken by the Claimant, a master degree in Business related field. One could easily match the academic qualifications of the holder of the old position to the roles. However, I have found immense challenge to match the new COO's above stated academic qualifications with the roles that were put forth, substantially.
114. The Claimant posted that during the restructuring process and immediately at the termination of his employment but before the advertisement for the new position, the Respondent's witness was in communication with Mr. McNeil who eventually was given the job. The Respondent's witness was not clear in his evidence on how he came to know Mr. McNeil, and why he was communicating with a potential applicant and employee for the position. I am prepared to agree with the Claimant that the alleged restructuring was conceived and commenced, with an end in mind, to employ Mr. McNeil to the position the Claimant was serving in. This without caring about the definite consequence on the Claimant, loss of employment.
115. By reason of the premises, I am persuaded to find that the termination of the Claimant's employment was not on a genuine, rational and justifiable operational requirement of the Respondent. It was therefore substantively unfair.

#### **Of violation of the Claimant's fundamental constitutional rights**

116. The Claimant asserted that his constitutional rights against unfair Labour Practices as stipulated in Article 41 [1] of *the Constitution* of Kenya 2010 and discrimination on basis of race contrary to Article 27 were violated. I have carefully considered the Claimant's evidence and submissions and note that much effort in them was directed toward establishing that employees of Kenyan origin were working at lesser favourable conditions and to be specific on matters benefits than their white counter parts. The court is not able to see the relevance of this effort considering that this matter is not to any extent a representative suit. The Kenyan employees that the Claimant picked for comparison purposes, did not testify in this matter. as regards the comparison, I am of the view that the evidence by the Respondent's witness was able to dislodge the Claimant's assertions on differential treatment. The relevance of the evidence that the Claimant tendered was too remote to prove the alleged discrimination against him.
117. The Claimant did not elaborately or in any sufficient manner, bring out a comparison between himself, the person alleging to have been discriminated against and Mr. McNeil [the person who allegedly was favoured on account of race] on any aspect that he alleges he was discriminated against on.
118. The court concludes that the Claimant did not put forth sufficient evidence to prove that he was discriminated against in breach of his constitutional right under Article 27.
119. Article 41 of *the Constitution* of Kenya, 2010 states that every person has a right to fair labour practices. This right has no precise definition. What is fair is dependent on the circumstances peculiar to each case. "Unfair" connotes a failure to meet an objective standard and may be taken to include arbitrary, capricious, biased or inconsistent conduct or conduct based on insubstantial reasons or wrong principles whether negligent or intended.
120. Having held the view that the restructuring process was conceived and undertaken with one end result in mind, to bring Mr. McNeil into employment without caring about the prejudice that was being



occasioned on the Claimant, and going by the definition of “unfair” that the court has brought out herein above, I conclude that this was a conduct amounting to unfair labour practice.

### Of the reliefs

121. The Claimant sought inter alia for payment for the unexpired term of the contract. There is no dispute that the Claimant’s contract was brought to an end prematurely, but what is in dispute is whether he is entitled to the payment sought. The Claimant’s counsel contended that the Claimant’s claim under the head was anchored on his legitimate expectation. The Claimant legitimately expected he would have cleared his five [5] year contract. To buttress this submission, he cited the decision. In the case of R vs. The Hon. Chief Justice of Kenya & others.
122. The Respondent’s counsel submitted that the contract of employment did not provide for a right to claim for unexpired contract if termination occurred before the appointed time. Reliance was placed on the holding in *Gabriel Kariuki Chomba vs. Top image had* [2014] eKLR, where the court held that there is no law that provides for payment of unexpired term of contract. Such payment would amount to unjustified enrichment – *Alfred Yambo Oyie vs. Fatima Mission Hospital*.
123. Jurisprudence is now settled. Compensation for unexpired period of a contract of employment is not awardable and so I find.
124. The Claimant also sought for damages equivalent to one year salary in the sum of Kshs. 7,946,568.00 for the termination. section 49 [1] [c] of the *Employment Act* bestows upon this court authority to award an employee who has successfully challenged a determination of his or her employment on an account that it was unfair, a compensatory relief. The court is cognizant that the award is discretionary dependent on the circumstances of each case. The extent of the award is also discretionary and dependent on the circumstances of each case. I am not persuaded by the Respondent’s counsel’s submissions that in the manner pleadings of the Claimant are coached this court cannot make the award. The converse is true.
125. The court has considered the manner how the termination of the Claimant’s employment occurred, the Respondent’s deviation from what the law required of them in matters termination of an employee’s employment on an account of redundancy, that the contract of employment was a fixed term contract which had 39 [thirty nine] months to expire when it was unfairly terminated, the Claimant’s expectation on working under the contract to completion of the term, the fact that the Claimant did not in any way contribute to the termination, and the conduct of the Respondent that the court has found hereinbefore as passing for unfair labour practice, and came to a conclusion that the Claimant is entitled to the compensatory relief envisioned under section 49 [1] [c] of the *employment Act*, to the extent of 10 [Ten] months gross salary.
126. He further claimed for general damages for breach of his constitutional rights more specifically those against discrimination and unfair labour practices encompassed under Articles 27 and 41 of *the Constitution*, respectively. This court has found hereinabove that the Claimant’s right to fair labour practices was breached, and considered the breach as a factor inter alia in the award of the compensatory relief pursuant to section 49 [1] [1] of the *Employment Act*. It shall not be proper consequently, to make an award of damages for the breach under a separate head.
127. In the upshot Judgment is hereby entered for the Claimant in the following terms:
  - a. A declaration that the termination of the Claimant’s employment was unfair.
  - b. Compensation pursuant to section 49 [1] [c] of the *Employment Act*, 10 [Ten] months’ gross salary, Kshs. 6,317,050.



- c. Interest on [b] above at court rates from the date of filing this suit till full payment.
- d. Costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 9<sup>TH</sup> DAY OF MAY, 2022.**

**OCHARO KEBIRA**

**JUDGE**

Delivered in presence of:

Mr. Ndungu for the Respondent.

Ms Kinyua for Mwalo for the Claimant.

**Order**

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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**

