



**Ochenge v Amref Health Africa (Cause 211 of 2020)
[2022] KEELRC 3837 (KLR) (5 May 2022) (Judgment)**

Neutral citation: [2022] KEELRC 3837 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 211 OF 2020**

K OCHARO, J

MAY 5, 2022

BETWEEN

PATRICIA KWAMBOKA OCHENGE CLAIMANT

AND

AMREF HEALTH AFRICA RESPONDENT

JUDGMENT

1. Through a memorandum of claim dated March 16, 2020, the claimant herein sued the Respondent seeking for the following reliefs: -
 - a. A declaration that the respondent's action to terminate the claimant's contract under the guise of insufficient funding amounted to unlawful declaration of redundancy.
 - b. A declaration that respondent's action to dismiss the claimant under the guise of lack of funding was illegal, unlawful, unfair, wrongful, inhuman and amounted to wrongful and unfair termination of employment.
 - c. An order for the respondent to pay the claimant her terminal dues and compensatory damages as pleaded in paragraph 17 and 18 herein totalling to USD 122,015.5.
2. Upon being served with summons to enter appearance, the respondent did enter appearance on the June 18, 2020 and subsequently filed a memorandum of response dated July 24, 2020.
3. At the close of pleadings, the matter got destined for hearing on merit. The claimant's case was heard partially on the November 2, 2021, when the court took her evidence in chief, and on the December 16, 2021 when her evidence under cross examination and re-examination was heard.
4. The claimant urged the court to adopt her witness statement as her evidence in chief, and the documents that she filed herein as her documentary evidence. The same was so adopted.



5. On the December 16, 2021, the respondent presented its Human Resource Business Partner [Regional and Kenya] to testify in support of its defence against the claimant's claim. The witness adopted her witness statement dated January 27, 2021 as part of his evidence in chief, and urged the court to adopt the respondent's documents that were herein filed under a list of documents dated January 27, 2021 as the respondent's documentary evidence.

The Claimant's Case

6. It was the claimant's case that she was employed on the May 4, 2000 by the respondent and that thereafter she was a regular contract staff member of the latter for a period of 19 years and 7 months as at December 31, 2019.
7. The claimant stated that during her tenure, she served the respondent in various capacities with progressive growth responsibilities owing to her good performance.
8. She further stated that her last contract with the respondent was that which was entered as between them on the July 19, 2019, under the contract she was appointed to serve as a project manager – Dagarreti Child in Need project [grade C3].
9. The claimant stated that the employment under the contract was for a fixed term of two [2] years commencing on the June 8, 2019 and lapsing on June 7, 2021, with probability of extension by mutual agreement. Her monthly salary was USD 3,089.
10. The claimant stated that on the October 28, 2019 and during the currency of her contract, the respondent through its Human Resource Business Partner Regional & Kenya wrote to her urging her to clear with the office of the Human Resource as her contract had been terminated owing to insufficiency of funds.
11. The claimant contended that her contract of employment was specific on the events occurrence of which would lead to the termination of the contract.
12. The claimant asserted that the respondent's Human Resources Procedure and Policy Manual of 2012, provided inter alia that the stipulations therein became part of the terms and conditions of the contracts of employment with its employees.
13. She further stated that the Human Resource Manual classified the separation of contracts on such accounts as redundancy.
14. The claimant avers that the reason that was given for the termination of her employment as was reflected in the letter of termination of contract dated October 18, 2019, fell under the category of events that would under the manual lead to a separation on account of redundancy.
15. The claimant stated that her employment was terminated through an unlawful undeclared" redundancy. The termination was unlawful and unjustified because; her contract was still on-going with a remaining life of 18 months; that she had secured funding to the GBP 500,000 for the project she was heading: Financial difficulties would not be a ground for termination of her contract under the employment contract: Financial difficulties would only be appropriately characterized under redundancy; prior to termination of her employment, the respondent did not adhere to the provisions of section 40 of the *Employment Act*.
16. The claimant further contended that at the time the respondent was asserting that it was facing financial difficulties, it had under her management and leadership received communication on the



funds award of a GBP 500,000 [equivalent to Kshs 70,000,000] for the furtherance of the projects in Dagoretti, which funding was to commence in January 2020.

17. The claimant asserted that the manner in which her employment was terminated amounted to unfair labour practices, and was in breach of the stipulations of the *Employment Act*. Generally, the termination was unfair.
18. The claimant prayed for judgment for severance pay – USD 29,345.5, 18 months remainder of the contractual period USD 55,602.0, and compensatory damages for wrongful and unlawful dismissal calculated at 12 months gross salary, USD 37,068.10.
19. Cross examined by counsel for the respondent the claimant acknowledged that she was hired for a particular project, under the contract of June 8, 2019. Clause 3.2 of the contract provided for renewal of the contract, the renewal was subject to satisfactory performance, and the respondent raising enough funds for the operation.
20. The claimant maintained that there was funding that she worked on and money came in.
21. The claimant acknowledged that termination of the contract would be by a two months' notice, pursuant to clause 17.1 of the contract. The notice was issued to her.
22. The claimant stated when she left the employment of the respondent there was no disciplinary issue that was pending against her.
23. The claimant asserted that the respondent had earlier on attempted to remove her from office in a similar fashion but it withdrew the letter.
24. In her evidence under re-examination the claimant stated that she only served five [5] months of a contract which was for 2 [two] years.
25. The claimant contended that in 2014, they had a low funding situation. Employees were issued with separation notices, but the notices were withdrawn within the notice period, as funds came in after an application for the same.
26. Regarding the situation that allegedly led to the termination of her contract, the claimant stated that when the funds went down, she and her team applied for funding in February, and donor confirmed that it was willing to fund [¹/₂], 250,000 pounds of the total funds that the respondent had sought subject to the Respondent getting another donor to give the other one-half. The witness referred the court to the correspondences on this, at page 82 of her bundle of documents.
27. The claimant stated that before the notice period would lapse, she was issued with a disciplinary letter, that addressed her to incurring expenses without authority. The Human Resource Manager proposed disciplinary action against her.
28. Funding was secured before the separation. The purported reason for the termination of her employment, cause of funds was therefore a sham.

Respondent's Case

29. Joyce Kibathi [RW1], the respondent's Human Resource Business Partner (Regional & Kenya) testified as its sole witness. She testified that the claimant was first employed by the respondent on 4th May 2000 as an Assistant Project Officer of AMREF Health Africa, and thereafter acted in various capacities on fixed term contracts. Each fixed term contract constituted a fresh period of service. Her last employment contract with the respondent commenced on June 8, 2019. She was engaged under



- this contract as a Project Manager-Dagoretti Child in Need Project [grade C3]. The appointment was confirmed through a Service Agreement of the July 9, 2019.
30. She contended that all contracts between the respondent and its employees are guided by the terms set out in their respective service agreements.
 31. The witness further stated that the service agreement, at clause 3.2., provided that the claimant's employment was dependent on sufficient funding of the respondent's operations. It also provided, at clause 17.1, that either party could terminate the employment by giving two months' notice to the other party. The agreement was signed by the claimant signifying that she understood these terms and accepted them.
 32. The claimant continued in her employment until October 28, 2019 when she was informed that the funding term for the project on which the claimant was engaged in would come to an end as at December 31, 2019. Her engagement was dependent on funding from donors.
 33. The witness asserted that as a result of the lack of funding, the respondent would not be able to sustain her contract of employment. The claimant was, therefore, together with other affected employees issued with the contractual two months' notice of termination of the service agreement.
 34. The respondent paid the claimant and the other affected employees their final dues including salary and pension dues that they were entitled to up to December 31, 2019. In particular, the claimant was paid the following dues: -
 - a. Salary up to and including December 31, 2019 - Kshs 186,741.00.
 - b. Pension dues up to and including December 31, 2019 - Kshs 4,901,542.00.Total - Kshs 5,088,283.00.
 35. The witness stated that the claimant was not declared redundant. Her loss of employment was not due to the abolition of her job or office. The claimant's employment contract was terminated due to lack of funding. All the staff that were working under her project were let go because of the dwindling funds.
 36. As regards the GBP 500,000, the witness stated that the funding came in after the claimant had left. According to the witness, the respondent would only commit itself on funds promised by a donor only once an agreement has been executed as between the donor and it over the donation. She alleged that donor funds are for projects and services.
 37. The witness stated the GBP 500,000, an equivalent of almost Kshs 64 million would only pay 30% of the claimant's salary, according to her level of effort. The money she raised would not sustain the project.
 38. The witness acknowledged that the project is still running, dependent on the income generating activities that have been put in place.
 39. She contended that due process was followed in the termination of the claimant's employment pursuant to the stipulations of clause 17.1 of her service agreement and as provided for at section 35 of the [Employment Act, 2007](#). Additionally, the claimant was paid all her dues at the time of separation, consequently her claim against the respondent is not founded.
 40. Cross examined by counsel for the claimant, the witness reasserted that the project is still ongoing, sustained by some income generating activities that have been put in place.



41. The witness stated that there were other employees who were let go, however she didn't have any record to prove this.
42. She further stated that the level of effort by the claimant related to the GBP 500,000 can be discerned from the budget that the respondent presented to court. However, shown the budget [the respondent's document at pages 3-6], the witness acknowledged that the same doesn't show the claimant's or any manager's level of effort. Indeed, the funds were sourced and secured. She would not tell when the funds were applied for.
43. The witness confirmed that the email [the claimant's document at page 82], confirmed funding. The email is dated November 21, 2019, way before the termination of the claimant's contract in December 2019. The termination letter indicated that if there were to be any changes in funding the claimant was to be contacted, however, she was never contacted.
44. She appreciated that insufficiency of funds would be a ground for separation. Equally that the relationship between the respondent and the claimant was guided by the respondent's HR Manual. clause 9.2.7 of the manual was a redundancy clause. Decline in funding fell under the events contemplated in the clause. Decline in funds can lead to redundancy situations.
45. The stated that the claimant was laid off due to a decline in funding, and therefore under the Manual, on account of redundancy. The respondent didn't initiate any consultations between it and the claimant, for instance on reduction of salary in the circumstances.
46. The witness stated that she was not in a position to state of what fraction of the GBP 500,000 went to salaries. Only a finance officer, from the Respondent's finance team would. She further stated that funding of salaries came from various donors. Her as a person wouldn't give details as to what donor donated what funds for which employees. Only the finance team would.
47. The witness stated that it was the donor's responsibility to determine what amount out of the donation went to salaries. As regards the matter at hand, she would not tell how much was identified by the donor to go to salaries.
48. The claimant was paid her salary up to December 2019, plus her pension. As per the RBA.

Claimant's Submissions

49. In his written submissions, counsel for the claimant submitted that the following issues are uncontested in this matter, thus:-
 - a. The claimant was employed by the respondent on May 4, 2000 and was continuously engaged by the respondent till December 31, 2019.
 - b. The claimant worked for the respondent continuously until the December 31, 2019 being 19 years 7 months of continuous service.
 - c. The claimant's last monthly salary was USD 3,089.
 - d. That the claimant during the period of her engagement with the respondent progressively rose through the ranks to the position of Project Manager which position she was holding prior to the impugned separation with the respondent.
 - e. That indeed the claimant was engaged in a regular two (2) years' renewable contract and that at the time of the separation she had worked for only six (6) months in the contract thus there were 18 months remaining to the end of the contract.



- f. That the Human Resource manual formed part of the contract and was binding between the claimant and the respondent.
 - g. That indeed the claimant secured funding amounting to GBP 500,000 (Equivalent to Kshs 70,000,000/= Kenya shillings seventy million only) for the projects she was in charge of maturing in the years 2019/2020 and expected to run for the proceeding two (2) years succeeding her dismissal.
 - h. That the claimant was dismissed on the grounds of insufficient/lack of funding.
 - i. That as per the Human Resource manual, termination/dismissal on the grounds of insufficient funding is classified as redundancy.
 - j. That at the time of separation, the claimant was only paid the salary she had worked for, pension dues and nothing more.
 - k. That indeed the project is still operational/running on account of the funding secured by the claimant before she was dismissed from her employment.
 - l. That even after the receipt of the funding the claimant was never offered her job back as promised by the respondent in its termination letter dated October 28, 2019.
50. According to the counsel, the following issues are the ones that present themselves for determination, thus;
- a. Whether the claimant was unlawfully dismissed from duty or whether she was declared redundant?
 - b. Was fair procedure followed before disengaging the claimant from employment?
 - c. Whether the termination of the claimant from her employment was indeed wrongful therefore entitling her to the prayers sought in the claim?
51. On the first issue it was submitted that from the material that was placed before court by the parties, it comes out clearly that impugned termination of the claimant's employment/contract was illegal, unfair and unwarranted.
52. Further that, close interrogation of the termination letter reveals that the reason for termination is couched as "end of funding". The letter in part read: -
- "Further to the recent communication regarding end of funding for Dagoretti Child in Need project funded by Amref Italy, we regret to inform you that your contract will be terminated on December, 31, 2019."
53. Flowing from this, it is trite that the claimant's contract was terminated on the grounds of decline in funding. According to clause 9.2.7 of the Human Resources Policy and Procedures Manual (current 2012), a redundancy arises when an employee's contract/employment is terminated on account of decline in funding.
54. It was asserted that the claimant and the respondent's witness were in agreement in their testimonies in court that indeed there was funding that was procured by the claimant before her termination but surprisingly even then the respondent did not consider retaining the claimant or even contacting her afterwards as clearly promised in the termination letter, an act that goes a long way to show the termination of the claimant's contract was at best malicious and a sham. The respondent's witness



confirmed to court that the respondent is still operational indeed inter alia courtesy of the funds that were secured by the claimant before the impugned termination of her contract.

55. Counsel submitted that under section 40 of the [Employment Act, 2007](#), redundancy is recognized as a valid ground of termination but with a rider that the process must be carried out in adherence to the law as stipulated in the section. Section 45 of the [Employment Act, 2007](#) stipulates that the employer must not only prove that the reason for termination is valid and fair but also that the employment was terminated in accordance with fair procedure. There is no proof that the respondent complied with the guidelines set out under section 40 of the [Employment Act](#) thus the termination was ipso facto unlawful within the meaning of section 45 of the [Employment Act](#).

56. Reliance was placed on the holding in [Jane 1 Khalechi v Oxford University Press EA Ltd](#) (Industrial Court Nairobi 924 of 2010) thus:-

“Court is further guided by the provisions of section 40 of the [Employment Act](#); which provision give the conditions precedent before one is declared redundant: these conditions outlined in the law are mandatory and not left to the choice of an employer. Redundancies affect workers' livelihoods and where this must be done by an employer.”

57. The claimant was in the respondent's service for a very long period of time albeit that the engagement was fashioned in fixed contracts renewable after every two years and cannot simply be dismissed on allegations that there is no more funding or work just because an employer wishes to curtail her continuous employment. This if allowed will be contrary to the provisions of article 41 of the [Constitution](#) which guarantees and demands fair labour practice.

58. Counsel submitted that this court is enjoined to consider the evidence placed before it as a whole in determining the substantive fairness of the termination of the claimant's employment. On this suggested approach counsel relied on the decision in [Kenya Petroleum Oil Workers Union v Kenya Shell Limited](#) (Cause No 51 of 2013 Mombasa).

59. Arguing that the material placed before this court has sufficiently established that the claimant was unfairly/unlawfully terminated, counsel submitted that therefore she is entitled to the reliefs sought.

60. The claimant had a legitimate expectation that her contract which had a life of 18 months remaining would run to the end and that pegged on the custom and the past relationship running for 19 years and 7 months and the fact that she had procured more funding for the project for the next two (2) years, her contract would be renewed for the next two years upon expiry as was the norm. That the claimant had legitimate expectation, which was breached and therefore entitled to compensation, counsel sought to rely on the decision in the case of [Dr John Nduba v Africa Medical and Research Foundation \(AMREF Health Africa\)](#) [2020] eKLR where the court while quoting with approval the case of [Teresa Carlo Omondi v Transparency International Kenya](#) [2017] eKLR held thus:

“As correctly contended by the claimant, courts have held that an employee under a fixed term contract can indeed have a legitimate expectation that the contract will be renewed based on certain conditions being met.”

In [Teresa Carlo Omondi v Transparency International Kenya](#) [2017] eKLR this court expressed itself as follows: -

“It must be shown that the employer, through regular practice, or through an express promise, leads the employee to legitimately expect there would be renewal. The expectation becomes legally protected, and ought not to be ignored by the employer, when managerial



prerogative on the subject is exercised. Legitimate expectation is not the same thing as anticipation, desire or hope, it is a principle based on a right, grounded on the larger principles of reasonableness and fair dealing between employers and employees.”

61. This court has held innumerable times that the provisions of the Constitution and the Employment Act, 2007 were not enacted for cosmetic purposes. The claimant has proved her case to the required standards thus entitled to the remedies she seeks.

Respondent's Submissions

62. Counsel for the respondent submitted that the dispute before this court arises from the termination of an employment contract between the claimant and the respondent. It is the claimant's case, on one hand, that the termination of employment was as a result of redundancy while it is the respondent's case on the other that the termination was in accordance with section 35 of the Employment Act, 2007 ("the Act") as read together with the contract of the employment.

63. It was submitted that two issues emerge for determination by this court, thus;

- a. Whether the claimant's service agreement dated July 9, 2019 was unlawfully terminated; and
- b. Whether the claimant is entitled to the reliefs sought?

64. On the first issue counsel submitted that fixed term contracts in employment relations are recognized as a lawful mode of employment under the stipulations of section 10(3) (c) of the Employment Act which states that: -

“where the employment is not intended to be for an indefinite period, the period for which it is expected to continue or, if it is for a fixed term, the date when it is to end”

65. She contended that the claimant was engaged on fixed term contracts lasting two years. Each fixed term contract constituted a fresh period of service and had terms and conditions and the claimant executed the agreement. That the various contracts were independent of each other is exemplified by the contract dated May 4, 2000, under which the claimant was employed as an Assistant Project Officer, which commenced on the day the claimant reported to work and ended on May 3, 2002 at a monthly gross salary of Kshs 391, 560.00; the contract dated July 9, 2019 commenced on June 8, 2019 and the claimant would earn a gross salary of USD 3,089 per month.

66. It was argued that whenever there is a dispute arising out a contract, the court is bound by the agreed terms and conditions contained in the written contract. Reliance was put on the case of Amatsi Water Services Company Limited v Francis Shire Chachi [2018] eKLR held that: -

“Further to being fixed, the contract between the parties in this matter contained a termination clause. In part, the contract would terminate "... in the event of any of the following: - expiry of the contract without renewal, retirement, summary dismissal, protracted illness, permanent disability or death". It could also be terminated by either party giving to the other two months' notice or paying two months' salary in lieu.”

67. Therefore, the terms and conditions of the service agreement dated July 9, 2019, which the claimant entered into voluntarily, bound her. The agreement at clause 3.2., expressly provided that the claimant's employment was dependent on sufficient funding of the respondent's operations. It also provided, at clause 17.1, that either party could terminate the employment by giving two months' notice to the other party. Prior to the termination in issue, the requisite contractual notice was issued.



68. She summed it up by stating that there can be no doubt therefore that the respondent acted within the law when terminating the claimant's employment. The termination was done in accordance with section 35 of the Act and clause 17. 1 of the agreement.
69. Under the second issue, counsel first addressed the issue of legitimate expectation that was raised by the claimant. She cited the decision of *Margaret A Ochieng v National Water Conservation & Pipeline Corporation* [2014] eKLR where the court held as follows on the issue: -
- “ Automatic renewal would undermine the very purpose of the fixed-term contract, and revert to indeterminate contracts of employment She instead embraced the change, applied for the new position and executed a contract for a period of three years. She went on to serve the period, and was at all times aware of the expiry date..... Courts have upheld the principle that fixed-term contracts carry no expectancy of renewal, in a catena of judicial authorities. This court has done so in Industrial Court Petition No 35 of 2012 between George Onyango v The Board of Directors Numerical Machining Complex Limited & Ors, [2014] eKLR and in the Industrial Court Cause No 1541 of 2010 between Bernard Wanjohi Muriuki v Kirinyaga Water and Sanitation Company limited & Ors. The general principle is that fixed-term contracts have no expectation of renewal”
70. Similarly, reliance was put on the case of *Rajab Barasa & 4 others v Kenya Meat Commission* [2016] eKLR, where it was held that a fixed term contract would not be renewed automatically even when there exists a clause allowing for such renewal.
71. In addition to the authorities cited, counsel urged this court to consider that clause 3 of the service agreement specifically provided for the period of employment as two (2) years and that continued employment and renewal of the contract was dependent on satisfactory performance and on the respondent soliciting enough funds for its operation. As this was a fixed term contract, the claimant could not have, therefore, acquired a legitimate expectation that the contract would continue being renewed as there were specific conditions which had to be fulfilled for the contract to be renewed.
72. On the reliefs sought by the claimant, counsel for the respondent first submitted on the claim for severance pay for 19 years. Asserting that the same is not entitled to, it was argued that contract provided for what was payable at termination, payment in lieu of notice and the claimant was paid. The claimant received her dues at the time of separation (salary up to and including December 31, 2019 at Kshs 186,741.00; and pension dues up to and including December 31, 2019 - Kshs 4,901,542.00)7.
73. It was further submitted that should the court, however, find that the claimant is owed severance pay, the same should be computed on the period that was served under the contract that commenced on June 8, 2019, therefore five [5] months. This upon premise that the period served by the claimant since May 4, 2000 was under various independent contracts, served under different terms.
74. The claim for 18 months' salary for the remainder of the contractual term is unwarranted. The claimant could only claim such amounts of money on rendering fair labour. To buttress this submission reliance was put on the case of *Stephen Keyo Ollis v Intrabealth International* [2019] eKLR. The court, in that matter declined to make an award for the remainder of the contract period holding that the same would amount to unjust enrichment by the claimant.
75. On the compensatory relief sought by the claimant, counsel submitted that it is only grantable where an employee assailing a termination on account of unfairness, has successfully done so in a litigation. On the material placed before court, the claimant wasn't able to demonstrate that the termination was unlawful and or wrongful. She is therefore not entitled to any compensation under the head.



76. On costs it was submitted that generally costs follow the event and in view of the fact that the termination was procedurally fair and lawful, the court should award the respondent costs. In the alternative, an order that each party bear their own costs will be just in the circumstances.

Analysis and Determination

77. Considering the parties' pleadings, respective evidence and written submissions, the following issues emerge for determination in this matter, thus:
- a. Whether the claimant's employment was terminated on account of redundancy.
 - b. If the answer to (a) above is in the positive, whether the termination was procedurally fair.
 - c. If the answer to (a) above is in the affirmative, was the termination substantively fair?
 - d. Whether the claimant is entitled to the reliefs sought or any of them.
 - e. Who should bear the costs of this suit?

I now turn to consider each of these issues as I hereunder do.

Whether The Claimant's Employment Was Terminated On Account Of Redundancy

78. The parties herein did not have a common position as regards on what account the termination of the claimant's employment occurred. The respondent contended that the termination was pursuant to the provisions of section 35 of the *Employment Act* and in exercise of its right under clause 14 of the employment contract. The claimant on the other hand contended the termination was as a result of a declared redundancy.
79. Clause 17.1 of the employment agreement provided:
- “This contract may be terminated by either party giving the other party two [2 months' notice in writing to that effect or by either party paying to the other party, the equivalent of two months' salary in lieu of such notice.”
80. The tone of the respondent's pleadings, evidence and submissions are to the effect that the respondent exercised its contractual right to terminate the employment by issuing the requisite notice contemplated in the agreement and section 35 of the *Act*.
81. The respondent placed reliance in the decision in *Amatsi Water Services Company Limited v Francis Shire Chachi* [2018] eKLR and more specifically the holding:
- “Further to being fixed, the contract between the parties in this matter contained a termination clause. In part the contract would terminate” In the event of any of the following - expiry of the contract without renewal, retirement, summary dismissal, protracted illness, permanent disability or death.” It could also be terminated by either party giving to the other two months' notice or paying two months' salary in lieu of notice.”
82. With due respect I do not understand the holding by the court to mean that once an employer exercises his or her contractual right, issues a termination notice and a determination of an employee's employment ensues, the issuance of the notice and the events resultant therefrom cannot be impugned. To view the holding of the court as the respondent wants this court to view, would render the plurality of the remedies and expansive protection, that came in with the enactment of the Employment and Labour Laws of 2007, useless.



83. For instance, the issuance of a contractual notice, can be challenged if the same is issued in a manner that offends the other clauses of the contract, and provisions of the law.

84. The claimant's employment was terminated through a letter dated October 28, 2019 which in part read:

“Further to our recent communication regarding the end of funding for Dagoretti Child In Need project funded by Amref Italy, we regret to inform you that your contract will be terminated on December 31, 2019.” [Ephasis mine].

From this there is no doubt, the termination was occasioned by alleged financial constraints on the part of the respondent. The question which comes up then is, looking at the agreement in its entirety and the provisions of the law where can this reason be categorised?

85. This court has said before that the terms and conditions of a Human Resource Procedure and Procedures Manual, become part and parcel of an employment contract between an employer and an employee once the contract is executed between them. Indeed, the respondents witness did acknowledge in her evidence under cross-examination that the respondent's Human Resource Policy and Procedures Manual [current 2012] applied to the claimant as it did to the other employees of the organization.

86. Having said this, then it is my view that the agreement of employment that was between the parties herein cannot be afforded a reading that is in isolation from the stipulations of the manual.

87. Clause 9.2.7 of the Human resource Policy and Procedures Manual [current 2012] of the respondent postulated:

“Redundancy

Amref assumes responsibility for ensuring that its staff component is at an optimum level at all material times. Redundancies can therefore, occur due to end of project, a decline in funding or activity change in programme direction, organisational change, or any unforeseen circumstances before end of the contract.”

No doubt, dwindling of finances or end of funding as the respondent expressed it, in its termination letter, was under the manual and therefore the agreement of employment, categorized as a redundancy, situation by the parties.

88. Where parties to a contract have accorded a particular description or meaning to a word or situation, in the contract, it won't be the business of court to give the situation or the word a different meaning or description. In so doing shall amount to an overreach of the court's mandate. Accordingly, a different description or meaning can only be if the one accorded by the parties would lead to an absurdity.

89. Section 12 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 circumstance including but not limited to the practices commonly known as abolition of office, job or occupation and loss of employment.”

90. The definition under this provision is wide enough to cover a situation where an employee loses his or her job due to financial constraints alleged on the part of the employer.



91. Section 45 [2] of the *Employment Act*, provides:-

“A termination of employment by an employer is unfair if the employer fails to prove –

- a. That the reason for the termination is valid.
- b. That the reason for the termination is a fair reason –
 - i. Related to the employee’s conduct, capacity or compatibility; or
 - ii. Based on the operational requirements of the employer; and
- c. That the employment was terminated in accordance with fair procedure.”

I have no doubt that subsection 2 [b] of the provision speaks to a redundancy situation. The *Employment Act* does not define “operational requirements,” however, meaning can be gathered from Judicial decisions, and legal literature Darly Dil Toit in his book *Labour Relations Law*, a comprehensive Guide, commenting on section 213 of the *Labour Relations Act* of South Africa, at page 473, states:

“Section 213 defines the term “operational requirements” to mean “requirements based on the economic technological, structural or similar needs of an employer. The code Good Practice [item 1] elaborates as follows:

“As general, economic reasons are those that relate to the financial management of the enterprise. Technological reasons refer to the introduction of new technology that affects work relationships either by making existing jobs redundant or by requiring employees to adapt to the new technology or consequential restructuring of the work place. Structural reasons relate to the redundancy of posts consequent to a restructuring of the employer’s enterprise.”

92. The respondent’s position in this matter is in ignorance of the fact that the financial position it cited was an economic factor that induced loss of job by the claimant. In conclusion, the claimant’s employment was terminated on account of redundancy.

Whether The Termination Was Fair Procedurally

93. Having found that the termination of the claimant’s employment was on account of redundancy, I now turn to consider whether the termination was procedurally fair. Blurred by the position it took, the respondent did not address the court on this issue.

94. The law recognizes redundancy as a legal means of determining an employee’s employment. Termination on account of redundancy can be placed under the category of “no fault” termination, reasons why the *Employment Act* places particular obligations on an employer, most of which are directed towards ensuring that all possible alternatives to termination are explored and that those employees to be affected are treated fairly.

95. Section 40 [1] of the *Employment Act* provides a mandatory procedure that must be adhered to by an employer who intends to terminate an employee’s employment on an account of redundancy.



The court in *Hasbon Ngaruya Waigi v Equitorial Commercial Bank* [2013] eKLR, referring to the conditions outlined under section 40 hold:

“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 an employer must put into consideration the provisions of the law.”

96. There is now firm jurisprudence that an employer who intends to cause termination of an employee’s employment on the ground must issue redundancy notices pursuant to section 40 [1] [b] [where an employee is not a member of a trade union]. The provision states:

“(b) Where an employee is not a member of a trade union, the employer notifies the employee personally in writing and the Labour office.”

The Court of Appeal addressing the issue of notice[s] under the section, in the case of *Thomas De La Rue v David Opondo Omutelema* [2013] eKLR and *Kenya Airways Limited v Aviation and Allied Workers Union of Kenya & 3 others* [2014] eKLR held that in every redundancy situation, there must be two separate and distinct notices of not less than a month each. The first is a general notice to the to be affected employees and Labour officer; the second notice is a termination notice addressed to each of the departing employees individually.

97. No doubt, the notices envisaged in the stated provision were not issued. Where an employer fails, neglects and / or ignores to strictly comply with the conditions laid down in the section in declaring an employee redundant, such a termination of employment becomes unfair within the meaning of section 45 of the *Employment Act*. I find that the termination was procedurally fair.

98. On matters redundancy, consultations must be undertaken between the employer and the employee to discuss a way out of the intended redundancy, if possible explore alternatives to the termination or best way to implement it. Maraga JA [as he then was] in *Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others* [2014] eKLR held:

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

Not difficult to conclude that in this matter there were no consultations at all.

99. In the upshot, I hold that the termination of the claimant’s employment was procedurally unfair.

Whether The Termination Was Substantively Fair

100. Section 43 of the *Employment Act, 2007*, places a duty upon the employer, to whenever there is a dispute regarding termination of an employee’s employment, prove the reason[s] for the termination. The termination shall be deemed unfair in terms of section 45, if the employer fails to discharge the



burden under section 43. The Act places a further burden on the employer under section 45 [2] to prove that the reason[s] for the termination was fair and valid. Therefore, it cannot be sufficient for the employer to just state that it terminated an employee's employment for this or that reason, without going further to discharge the burden under section 45 [2].

101. The two provisions of the law above are among those pillar provisions that the statutory regime that came into place in 2007, in the realm of Employment and Labour Relations came in with to stymie the common law principles that to a larger extent didn't accord employees adequate protection in the workplace. Principles that were not cognizant of the huge bargaining power imbalance between the employer and the employee.
102. It has not lost sight of this court that in terminating an employee's employment an employer is obliged to act with justification. Section 47 [5] of the Act dictates so.
103. In Isidor Rachuonyo v Brava Food Industries Limited, Nairobi ELRC No 907 of 2017, this court expressed itself thus:

“To this court, the provisions of the Employment Act, 2007, on unfair dismissal dispelled the ability of employers at common law to dismiss employees without cause. At common law, an employee would be dismissed without reasons if he or she was given reasonable notice or pay in lieu of notice.

52. One can confidently assert that the unfair dismissal outfit consists of expansive protection to employees.”
104. The Supreme Court of Canada, and I echo, aptly stated in Wilson v Atomic Energy of Canada Limited 2016 SCC 29,

“..... The foundational premise of the common law scheme – that there is a right to dismiss on reasonable notice without cause of reason – has been completely replaced under the code by a regime requiring reasons for dismissal. In addition, the galaxy for discretionary remedies, including most notably, reinstatement, as well as the open-ended equitable reliefs available, is utterly inconsistent with the right to dismiss without cause. If an employer can continue to dismiss without cause under the code without, there is virtually no role for the plurality of remedies available to the adjudicator under the unjust dismissal scheme.”
105. The tone of the respondent's pleadings, evidence and submissions, is that the termination was fair, as the contractual notice was issued and pay under the notice made. This clearly runs in conflict with the new scheme under the 2007 regime that I have mentioned hereinabove.
106. The foregoing premise notwithstanding, I note that the respondent identified “end of financing” as the factor that led to the termination of the claimant's employment, hence my holding that the termination was on an alleged account of operational requirement, economic in nature. Therefore, I have to interrogate whether this reason was fair and valid, justified and equitable.
107. Candidness, forthrightness, good faith justifiability, and reasonableness is what one expects to see when determining presence of validity. As shall come out shortly hereunder, these were lacking totally in the termination of the claimant.
108. How does a court determine the fairness of an operational reason is a question that this court must answer before delving into interrogating whether the reasons by the respondent herein was fair. The



answer to this was aptly captured by the Labour Appeal Court of South Africa in *BMD Knitting Mills [Pty] Limited v SACTWU* [2001] 73 LLR 705 [LAC] and I am impelled to adopt it, thus:

“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 employee 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 requirement is predicated. Viewed accordingly, the test becomes less differential and the court is entitled to examine the context 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.”

109. This approach is broader, and in my view one that ensures a balanced dispensation of justice a far contrast from the “reasonable employer test” that equates rational conduct by the employer with fairness, which in essence takes not into consideration the employee’s perspective.
110. The respondent contended that the termination of the claimant’s employment was as a result of “end of funding.” The claimant on the other hand asserted that prior to the termination of employment she and her colleagues had long initiated the process of acquiring more funding from donor[s] and as at the time of the termination, funding had been secured and a commitment made by a donor, to fund the respondent’s project to the tune of Kshs GBP 500,000 an equivalent of Kshs 70,000,000 [seventy million]. I have keenly considered the evidence of the respondent’s witness, in its totality, therein there is an admission to the claimant’s assertions on this, rather than a denial.
111. It was one of the claimant’s duties to mobilize funds for the project that she was employed under and heading. She sourced for the foretasted funds. Where can fairness be said to be when she is terminated on account of lack of funding, yet there were all indicators that the funding was in the pipe? I am unable to see where, and its presence in the circumstances of the matter.
112. The respondent’s witness attempted to justify the fairness of the reason, by stating that the funds that were secured would only take care of 30% of the claimant’s salary. With due respect this was such a barren assertion. She did not explain how many of months’ salary this 30% was equivalent to. She failed to explain how the percentage was arrived at. She never placed before court any document that would assist it discern the presence and rationale of this percentage. Lastly, assuming that the 30% story was true, one would reasonably and fairly expect the respondent to have allowed the claimant to work until depletion of the 30%. Why this was not allowed, finds no answer in the witness’s evidence.
113. Significantly, the respondent’s witness was unable deliberately or otherwise to answer a couple of questions elaborately or at all under cross examination, expressing that the questions could be answered or best answered by an officer from the respondent’s Finance Department. The consequence thereof being that the respondent failed to explain to the court sufficiently on the budget that the respondent placed before the court; how it was tied with the claimant’s project and the alleged fact that the claimant had only raised a portion of the budget for project; where was the claimant’s salary to be drawn from, and how the alleged 30% was arrived at.
114. The consequence of the above-stated failure is that the respondent totally failed to demonstrate that the financial [economic] reason that it advanced as the reason for termination was genuine and not a sham.
115. The respondent’s witness in an attempt to demonstrate fairness in the reason, and justification for the same too, testified that it was not the claimant only who was let go, on account of the economic factor



referred to hereinabove, but her colleagues too. How many of the respondent's employees were let go, and the criteria that was used to select the affected employees, was a fact on which the respondent was meant to tender evidence on. The provisions of section 40 of the *Employment Act*, required that the respondent places the evidence before the court, not for no good purpose, but to aid demonstrate validity, and justifiability of the reason for the termination. The respondent's silence on this key point, attracts a single conclusion, that the reason was not valid and justified. Procedurally unfair too. I have come to this conclusion, taking into account inter alia that the respondent organization kept on going after the alleged termination of its employees.

116. The claimant asserted that it was not the 1st time that the respondent organization was faced with the situation that allegedly formed the basis for her employment's termination.
117. The claimant contended that under an earlier contract, which she eventually worked through fully, the respondent allegedly faced with a situation- declining finances, issued a termination letter to the claimant and other employees. However, the letters were recalled before the they would serve the notice period fully, as there came in an assurance for funding from a donor, just like it happed in the instant matter.
118. Under the *Employment Act*, in determining the fairness and justification of termination of an employee's contract of employment, the court is enjoined to consider how the employer has previously dealt with situation / matter[s] similar to the one that caused the termination of an employee's employment. The claimant's evidence of the earlier situation and how it was handled with a result that a redundancy was avoided was not challenged. The respondent did not place before the court any material to demonstrate that for good reason[s] the situation the subject matter herein couldn't be handled like the earlier one and that termination couldn't have been avoided therefore.
119. An employer must seek appropriate measures to avoid termination of employment contracts of the employees, keep their numbers to the lowest possible, change their timings and mitigate their adverse effect. Terminations / dismissals should be the last resort not the first resort.
120. In the persuasive decision of *County Fair Foods [pty] Limited v OCGAWU* [2003] 7 BLLR 1005, The Labour Appeal Court of South Africa held that

“to show existence of fair reason to dismiss, must show that the dismissal of the employee could not be avoided.”
121. In this matter the respondent did not assert that the termination would not be avoided. In fact, looking at the material placed before this court, one can safely conclude that it would have.
122. In the upshot, I find that the termination was substantively unfair.

Of the Reliefs

123. The claimant claimed *inter alia* for compensation pursuant to the provisions of section 49 [1] [c] of the *Employment Act*. The court takes cognizance of the fact that an award under this provision of the law is discretionary. The extent of the award of the maximum awardable, ie 12 [twelve] months gross salary is also discretionary and dependant on the circumstances of each case. In this matter I have considered that there was no fair reason for the termination of the claimant's employment, that the claimant had 18 months of her employment contract to serve, her legitimate expectation that she was to work for the entire period of the contract, that she did not contribute in any manner for the termination, and the deviation of the respondent from what the law expected of it, when terminating on redundancy,



and conclude that the claimant is entitled to compensation for unfair termination to an extent of 9 [nine] months gross salary USD 27,801.

124. The claimant further claimed for salary for the unserved period of the contract namely 18 months. The unserved period of the contract is one of those factors that I have considered in arriving at the extent of the compensation relief under section 49 [1][c] as I have hereinabove. I am not prepared to award any figure under this head as that could appear double compensation.

125. In the upshot, I enter judgment in favour of the claimant for:

- a. Compensation pursuant to section 49 [1][c] of the *Employment Act*, 9 [nine] months gross salary, USD 27,801.
- b. Interest at court rates from the date of filing this suit till full payment.
- c. Costs of the suit.
- d. A declaration that the termination of the claimant's employment was both procedurally and substantively unfair.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 5TH DAY OF MAY, 2022.

OCHARO KEBIRA

JUDGE

Delivered in presence of:

Ms Wanjiru appearing together with Ms Aremo for the respondent.

Mr Mungai 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 March 15, 2020 and subsequent directions of April 21, 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 *Civil Procedure Act* (chapter 21 of the laws of Kenya) which impose on this court the duty of the court, *inter alia*, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

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

OCHARO KEBIRA

JUDGE

