



**Kirigo v World Vision International (Cause 1449 of 2016)
[2022] KEELRC 1118 (KLR) (20 June 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1118 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1449 OF 2016**

**JK GAKERI, J
JUNE 20, 2022**

BETWEEN

DORCAS WANGUI KIRIGO CLAIMANT

AND

WORLD VISION INTERNATIONAL RESPONDENT

JUDGMENT

1. By a statement of claim dated 25th July 2016, the Claimant sued the Respondent alleging unlawful declaration of redundancy.
2. The Claimant prays for;
 - i) Compensation for remainder of the contract period 21 months x 153,703.44) Kshs.3,227,772
 - ii) Leave accrued and to be earned up to the end of the contract (21 months x 1 $\frac{1}{3}$ days x 153,703.44) Kshs.188,287
 - iii) Damages equivalent to 12 months' salary as per section 49 of the Employment Act that is (153,703.44 x 12) Kshs.844,441
Total Kshs.5,260,500
 - iv) Certificate of service
 - v) Costs of this suit
 - vi) Interest on the total sum claimed till payment in full.



3. The Claimant's case is pleaded as follows:
4. The Claimant avers that she was employed by the Respondent on 1st June, 2011 as an Executive Assistant for a period of 16 months and the contract was subsequently renewed without interruption.
5. That effective 1st January 2015, her position was reviewed to Program Officer and her job description changed but the Job Grade was never adjusted.
6. Discussions with previous Supervisors had not been successful.
7. It is the Claimant's case that on 6th August 2015 her contract was renewed for a period of 2 years effective 1st October 2015 to 30th September 2017.
8. The Claimant further avers that by a notice dated 30th September, 2015, the Respondent informed the Claimant that her position had become redundant effective 31st December, 2015 but the notice was handed over on 15th October 2015.
9. It is the Claimant's case that the declaration of redundancy was unjustified as there was no redundancy in the organization and the purported redundancy was an artificial situation orchestrated by the Respondent aimed at removing her from employment and the position was retained under a different designation.
10. The Claimant avers that the termination of employment was conducted without regard to the provisions of the *Employment Act*, 2007.
11. The Claimant finally avers that she served the Respondent diligently until she was declared redundant.

Respondent's Case

12. The Respondent denies that the suit arises out of unlawful termination of employment or unjustified redundancy but admits having employed and promoted the Claimant as alleged and her performance and conduct was satisfactory.
13. It is the Respondent's case that in September 2015, the department in which the Claimant worked undertook a restructuring to integrate various departments job groups to down or right size bloated workforce to increase operational efficiency. That the exercise was carried out transparently, fairly and was participative.
14. It is the Respondent's further case that after the restructuring of the Humanitarian and Emergency Affairs Department, the new roles required higher academic qualifications and skills in light of the scope of responsibilities.
15. That the Claimant did not have sufficient experience and skills to manage the new position and had become redundant. She too had to go. That the restructuring did not target the Claimant.
16. That the Respondent had previously engaged the Claimant to understand the reasons for the restructuring and as a sign of appreciation of the Claimant's services, the Respondent proposed to pay at the rate of one month pay for each year as severance pay and two (2) months in lieu of notice which the Claimant rejected.
17. The Respondent contends that it complied with its policies and the labour laws applicable in Kenya and denies having treated the Claimant in an inhuman or demeaning or degrading manner.
18. That the Respondent was ready and willing to pay the Claimant the amount due but the Claimant refused to clear and handover the Respondents assets in her position.



19. The Respondent contends that the Claimant is not entitled to compensation or remainder of the contract of employment and prays for dismissal of the suit with costs.

Claimant's Evidence

20. In the written statement which the Claimant adopted and which generally rehashes the contents of the statement of claim, the Claimant states that a meeting held on 14th September 2015 developed the new job descriptions and the emphasis was to develop desk officers for the nine East African Countries served by the Respondent.
21. That two of her colleagues Maina Kingori and Esther Nyambura were assigned three countries each and the Supervisor, one Christopher Hoffman took up the remaining three, Kenya, Ethiopia and Somalia and indicated that there was no role for the Claimant and purported to consult the Claimant's colleague on how to address her plight which was humiliating.
22. That thereafter, the Supervisor avoided the Claimant and did not assign her meaningful work or involve her in departmental tasks.
23. That at a departmental meeting held on 22nd September 2015, the Supervisor affirmed the Claimant's role in the department to deal with all Children(s) in emergency issues in the nine countries and was tasked to submit the Annual Operation Plan for the 2016 financial year.
24. That on 23rd September 2015, the Supervisor shared the new structure of the Department with national offices and the Claimant's position was reflected. It was also retained in the organization chart shared on 27th October, 2015.
25. That on 29th September 2015, the Supervisor invited the Claimant for a performance review meeting on 30th September 2015 at which meeting the Supervisor was accompanied by the People and Culture Manager. The two informed the Claimant that her position had become redundant, which surprised her and a notice to that effect was handed over on 15th October, 2015.
26. That the Labour Officer was not notified of the impending redundancy.
27. The Claimant testified that he took up the issue with the Regional Leader, one Jean Baptiste Kamate and had a meeting on 22nd October, 2015, who requested the Director, People and Culture to look into the matter and several meetings thereafter discussed the issue but the discussions fell through.
28. That the Supervisor was hostile during the meetings. It is the Claimant's testimony that the meetings turned out to be attempts to sanitise the process of termination and the Claimant withdrew from them on health ground.
29. That on 23rd October, 2015, the Respondent advertised the position of Regional Humanitarian and Emergency Affairs Advisor (RHEAA) with a job description similar to the Claimant's position of Programme Officer.
30. That the Supervisor told her not to apply for the position that the Claimant had no capacity to handle the job.
31. That by the time the Director, People and Culture suggested that the Claimant should apply, the deadline had already passed.



32. It is the Claimant's testimony that the Supervisor Mr. Christopher Hoffman demeaned her by referring her to an Executive Assistant long after she became the Programme Officer.
33. That the organogram dated 27th October 2015 had the Claimant's position but had no position of Regional Humanitarian and Emergency Affairs Advisor (RHEAA).
34. It is the Claimant's testimony that there was no redundancy at all.
35. On cross-examination, the Claimant confirmed that she received the notice of redundancy dated 30th September, 2015 and participated in meetings since she had raised the issue on the process.
36. That although the notice stated that the Claimant could apply for other roles in the organization, the Supervisor told her not to apply when the organization advertised for a position in October 2015.
37. That the Respondent did not advice on the criterion used determine who would be declared redundant.
38. It is the Claimant's testimony that the job description of the Programme Manager and those of the position advertised by the Respondent were similar. However, the Claimant had not revealed her qualifications.
39. The Claimant confirmed that her colleagues Esther Nyambura and Kingori Maina were given other roles. That titles in the new organogram had changed. That Mr. Maina Kingori and Esther Nyambura were now Humanitarian Emergency Advisors (HEA).
40. Finally, the Claimant testified that she cleared with the Respondent, was paid final dues and received a certificate of service.
41. On re-examination, the witness confirmed that she had not been notified of an impending redundancy and the Supervisor at the time joined the organization in July 2015.
42. That no other officer was affected by the redundancy and no corporate or department notice had been issued to staff.
43. That the role of the regional office was to support country offices and that was what the Claimant was doing as the Programme Officer.

Respondent's Evidence

44. RW1, Sylvia Barasa testified that she was the Regional People and Culture Business Partner of the Respondent having joined in 2018.
45. The witness testified that the Claimant's position was reviewed upwards to Programme Officer in January 2015 and her performance was satisfactory.
46. On cross-examination, the witness confirmed that the restructuring involved down and/or right sizing of the department as it was the only one involved.
47. That the ideal situation entailed notifying the people involved in the redundancy and provide support.
48. It was her testimony that in her view, there were consultations about the restructuring and she believed that the Claimant was informed of the possibility of her position becoming redundant. The witness tendered no evidence of the consultations or notification.
49. That the communication happened after the notice had been given.



50. The witness testified that ideally, the employer should reach out to the employee on the redundancy. The witness further confirmed that no one else was affected by the redundancy.
51. The witness testified that the Labour Office was informed on 30th September, 2015 but tendered no evidence of the notice submitted to the Labour Officer.
52. Finally, the witness confirmed that no other person was employed but the vacant position of Regional Humanitarian and Emergency Advisor was filled.
53. In re-examination, the witness testified that there is no requirement to consult the employee but it was good practice.

Claimant's Submissions

54. According to the Claimant the issues for determination are;
 - i. Whether termination of the Claimant's employment by the Respondent on account of redundancy was fair and lawful;
 - ii. Whether the Claimant is entitled to the reliefs sought.
55. As to whether the termination of employment was fair, it is submitted the Claimant was terminated on account of redundancy and reliance is made on Section 2 and 40 of the *Employment Act*, 2007 for the definition of redundancy and the procedural aspects of redundancy respectively.
56. Further reliance is made on the decision in *Daniel Mburu Muriu v Hygrotech East Africa Ltd* [2021] eKLR to urge that although Section 40 permits an employer to declare an employee redundant, the provisions of Sections 43, 45 of the Act were still applicable to the process.
57. That the conditions prescribed by Section 40 of the Act must be met. Sections 43 and 45 are relied upon to urge that there was no redundancy at the Respondent's office but a termination camouflaged as a redundancy.
58. It is submitted that the Respondent provided contradictory evidence.
59. The Claimant submits that it was unclear when the restructuring commenced since the Claimant's contract was renewed on 6th August, 2015 as the new structure was awaiting approval.
60. That the Claimant was terminated even before the contract was renewed.
61. It is submitted that at no point was there an indication that the Claimant would be declared redundant.
62. That promises by three Supervisors to correct the Claimant's grading were not implemented. Mr. Christopher Hoffman's email dated 23rd September, 2015 is a case in point.
63. That although the Claimant's position was affirmed at a departmental meeting on 22nd September, 2015, she was declared redundant 8 days later.
64. It is the Claimant's submission that the meeting of 23rd September 2015, email and copies of minutes show that the proposed charges would have no effect on the Claimant's position and the organizational chart shared by the Senior Director of Operations on 27th October, 2015 had the Claimant's position.
65. The decision in *Agnes Ongadi v Kenya Electricity Transmission Company Limited* [2016] eKLR is relied upon to emphasise that restructuring processes or abolition office do not just happen.



66. It is the Claimant's submission that contrary to the Respondents averments, RW1 confirmed that only one department underwent down/right sizing and only the Claimant was affected. The decision in [Jane I. Khalechi v Oxford University Press E.A. Ltd](#) [2013] eKLR is relied upon to urge that a restructuring is useless if done for the purpose of getting rid of an employee. The decision was cited with approval in [Mary Nyawira Karimi v Pure Circle \(K\) Limited](#) [2018] eKLR.
67. The Claimant further submits that in the new dispensation in September 2015, where departmental employees were assigned different countries, the Supervisor assigned himself Kenya, Ethiopia and Somalia and the Claimant was declared redundant the same month.
68. The Claimant questions the rationale for down or right sizing if the Respondent had vacancies for related jobs. Reliance is also made on the decision in [Chapman v Goonvean & Rostowrack China Clay Limited](#) [1973] 2 All ER, 1973, to urge that the new employee was to perform roles similar to those undertaken by the Claimant.
69. On procedural fairness, the decision in [Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others](#) [2014] eKLR is relied upon to urge that the paragraphs in Section 40 of the Employment must be satisfied if the redundancy is to pass muster.
70. That the Respondent gave no notice of the intended redundancy to employees likely to be affected and provided none.
71. It is submitted that no consultations took place. The decisions in [Bakery, Confectionery, Food Manufacturing & allied Workers Union \(K\) v Bakers Oven Limited](#) [2021] eKLR, [Barclays Bank of Kenya Ltd & another v Gladys Muthoni & 20 others](#) [2018] eKLR and [Hesbon Ngaruiya Waigi v Equatorial Commercial Bank Limited](#) [2013] eKLR are relied upon to urge that the provisions of Section 40 were mandatory with specific reference to consultations before the notice of redundancy is given in.
72. On the criterion relied upon by the Respondent under Section 40(1)(c) of the [Employment Act](#), the decisions in [Dennis Leak Ojuok v Population Services Kenya](#) [2022] eKLR and [Mary Mutanu Mwendwa v Ayuda Ninos De Africa-Kenya \(Anidan K\)](#) [2013] eKLR are relied upon to urge that the Respondent did not demonstrate how it arrived at the conclusion to declare the Claimant redundant. The letter given to the Claimant set out no reason.
73. As regards severance pay, the Claimant urges that the Respondent did not comply with clause 9.3 of the contract Agreement dated 1st June, 2011.
74. The Court is urged to find that the Claimant's dismissal through redundancy was procedural flawed.
75. As to whether the Claimant is entitled to the reliefs sought, it is submitted that the Claimant had a fixed term contract and it was terminated before its duration lapsed. The decision in [Mary Mutanu](#) (supra) is relied upon where Radido J. suggested that the remedies provided by Section 49 of the [Employment Act](#) were not exhaustive, that Section 12(3)(viii) enables the Court to award remedies such as loss of earnings/income.
76. It is the Claimant's submission that loss of income is a remedy contemplated by written law. The Court is urged to rely in the decision in the [Mary Mutanu's](#) case.
77. As regards 12 months' compensation, it is submitted that the circumstances of the case justify the maximum compensation as there was no redundancy in this case. The decision in [Faiza Mayabi v First Community Bank Limited](#) [2019] eKLR is relied upon to reinforce the submission. The Court is urged to award maximum compensation.



78. The submission on severance pay and leave have no effect as neither of the items is pleaded. The leave pleaded is for the unserved portion of the contract of employment. The total amount claimed has also reduced from Kshs.35,260,200/- to Kshs.1,722,184.40.

Respondent's Submissions

79. The Respondent isolates three issues for determination, whether;
- (i) The Respondent terminated the Claimant's employment unfairly or unlawfully;
 - (ii) The Respondent discriminated the Claimant;
 - (iii) The Claimant is entitled to the reliefs sought.
80. As regards termination of employment, it is submitted that the redundancy process was fair, transparency and consistent with the provisions of Section 40 of the *Employment Act*. Reliance is made on Sections 45 and 43(2) of the Act to urge that the reason for termination may be based on conduct, capacity, incompatibility or operational requirements of the employer as long as the employer genuinely believed that the circumstances existed.
81. The decision in *Aoraki Corporations Limited v Collin Keith McGavin* CA 2 of 1997 [1998] 2 NZLR 278 cited with approval in *Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others* (supra) is relied upon to urge that there must be a substantive justification for termination of employment and consultation of individual employee, may be dispensed with as a contrary requirement would be inconsistent with the employers right to organize and run his/her business.
82. The Court is urged to find that an employer has the right to re-organize his/her business for purposes of efficiency and Courts have no jurisdiction to prevent an employer from doing so or adopting technology provided the law is complied with.
83. It is submitted that the Claimant's allegations are fictitious and defamatory to the Respondent. That the role of the Programme Officer did not fit within the Respondent's Department of Humanitarian Emergency.
84. On procedural requirements, reliance is made on the provisions of Section 40 of the *Employment Act* to urge that the Claimant was issued with a redundancy notice dated 30th September 2015 informing her that her position had been declared redundant and was encouraged to apply for other jobs which she did not.
85. It is submitted that the Respondent complied with the requirements of the notice and the labour office was notified of the same. The Respondent does not indicate when the letter was sent to the labour office or furnish evidence.
86. On criteria, the Respondent submits that since the Claimant's position was abolished, the criteria contemplated by Section 40(1)(c) was inapplicable.
87. As regards discrimination, it is submitted that the Claimant attended a meeting on 15th September, 2015 when she was notified that her position would be affected by the new organizational structure and was thus not discriminated.
88. On consultations, it is urged that the *Employment Act* does not require any consultation prior to the notice of redundancy. The decision in *Kenya Airways Limited v Aviation & Allied Workers Union*



Kenya & 3 others (supra) is relied upon to urge that it was not a requirement that every employee be consulted.

89. As to whether the Claimant is entitled to the reliefs sought, it is submitted that the Employment Act envisages 12 months compensation as sufficient damages and the Claimant's claim is unmerited.
90. It is urged that the Claimant admitted having received severance pay and no additional pay is outstanding.
91. Finally, it is submitted that the Claimant has not discharged the burden of proof and is not entitled to the reliefs sought.

Analysis and Determination

92. From the pleadings, evidence on record and submissions by counsel, the issues for determination are;
 - (i) Whether the Claimant's employment was terminated on account of redundancy;
 - (ii) Whether the Claimant is entitled to the reliefs sought.
93. As to whether the redundancy was fair and lawful, the starting point are the provision of the Employment Act, 2007 and relevant judicial pronouncements.
94. While the Claimant contends that the alleged redundancy was a ploy to terminate her employment and cites various reasons, the Respondent on the other that submits that this was a redundancy and was conducted in accordance with the provisions of the Employment Act, 2007.
95. Section 2 of the Employment Act provides

“Redundancy” means the loss of employment, occupation, job or career by involuntary means through no fault of an employee, involving termination of employment at the initiative of the employer, where the services of an employee are superfluous and the practices commonly known as abolition of office, job or occupation and loss of employment.”
96. The Respondent submits that was sometime in September 2015, it undertook a restructuring of the entire organisation and various departments by way of integrating departments and job groups to down/right size for efficiency and as a consequence the Claimant's position in the Department of Humanitarian Emergency became redundant.
97. According to the Respondent the process was conducted in consonance with the law.
98. Section 40 of the Employment Act prescribes the substantive and procedural precepts to be complied with in a redundancy.
99. In Freight In Time Limited v Rosebell Wambui Munene [2018] eKLR the Court of Appeal stated as follows;

“In addition, section 40 (1) of the Employment Act prohibits in mandatory tone the termination of a contract of service on account of redundancy unless the employer complies with the following seven conditions namely;

 - (a) If the employee to be declared redundant is a member of a union, the employer must notify the union and the local labour officer of the reasons and extent of



the redundancy at least one month before the date when the redundancy is to take effect.

- (b) If the employee is not a member of the union, the employer must notify the employee personally in writing together with the labour officer.
- (c) In determining the employees to be declared redundant, the employer must consider seniority in time, skill, ability and reliability of the employee.
- (d) Where the terminal benefits payable upon redundancy are set under a collective agreement, the employer shall not place an employee at a disadvantage on account of the employee being or not being a member of a trade union.
- (e) Where leave is due to an employee who is declared redundant it must be paid off in cash.
- (f) The employer must pay at least one month's notice or one month's wage in lieu of notice.
- (g) The employer must pay the employee severance pay at the rate of not less than 15 days for each completed year of service."

100. Needless to emphasize, analogous to other firms of termination of employment contracts, in a redundancy, the employer must demonstrate that it was conducted fairly as ordained by section 45 of the *Employment Act*.

101. I will now proceed to demonstrate whether the redundancy in the instant case was conducted in accordance with the provisions of Section 40(1) of the Act.

102. First, because the Claimant was not a member of trade union, the notice envisaged by paragraph (b) must have been sent to her. Instructively, under Section 40(1)(a) of the Act, the notice must notify the recipients including the local labour officer "the reasons for, and the extent of the intended redundancy".

103. The Court is in agreement with and there is a catena of judicial authorities for the proposition that a Court of law has no mandate to prevent an employer from restructuring or re-organizing his/her business or adoption of modern technology as long as the law is complied with. See *Monarch Insurance Co. Ltd v Industrial Court & another* [2015] eKLR and *Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others* (supra).

104. Be that as it may, the law also requires the employer to demonstrate the reasons for the redundancy and its extent. In other words, the employer must demonstrate the circumstances which necessitated the redundancy and its impact on employees. There must be a justification for the redundancy.

105. As regard the nature of the notice, the sentiments of Maraga JA (as he then was) in *Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others* (supra) are instructive.

"My understanding of this provision is that when an employer contemplates redundancy, he should first give a general notice of that intention to the employees likely to be affected or their union. It is a notice that will elicit consultations between the parties..."

106. Needless to emphasize the law places a heavy burden on the employer to justify any termination of employment.



107. Regrettably, the Respondent did not file the redundancy notice given the Claimant and/or sent to the labour office. The only letter on record is the one filed by the Claimant dated 30th September 2015 addressed to the Claimant by the Respondent signed by the People and Culture Manager on Joyce Kibathi and approved by the Regional Director, Humanitarian and Emergency Affairs, one Christopher Hoffman, the Claimant's Supervisor. The letter referenced as "End Of Contract" states as follows;

"I write to inform you that as a result of the restructuring in HEA, your role of programme officer- Children in Emergencies has been declared redundant. Your contract will therefore be terminated on December 31st 2015...

There are a number of open positions that exist internally within World vision which you may consider. If you see positions that interest you, please talk to your manager regarding your qualifications for these opportunities.

However, if you are unable to find a new assignment before December 31st 2015, we regret that unfortunately, your last day of employment by World Vision will be on December 31st 2015..."

108. The notice dated 30th September 2015 was handed over to the Claimant on 15th October, 2015. The Respondent did not controvert this piece of evidence by the Claimant.

109. Several things are noticeable from this letter.

110. First, the letter was sent to the Claimant personally and informs her that her position had been declared redundant.

111. Second, the Respondent made no effort to ascertain whether the Claimant could perform other roles in the organization. It did not even suggest a redeployment. This letter depicts a People and Culture Department that pretended to care for staff but did nothing about the Claimant. Informing the Claimant about internal vacancies is grossly inadequate. Being an insider there is a likelihood that she was aware of them.

112. The department was aware of her skills qualifications and competencies for redeployment but did nothing about it.

113. Third, the letter is not a general notice to employees of the organisation or department of an intended restructuring and likely consequences. It was a letter specific to the Claimant communicating a decision made elsewhere. It was definitive. See *Barclays Bank of Kenya Ltd & another v Gladys Muthoni & 20 others* (supra).

114. Fourth, the letter uses the term redundancy once in the opening sentence and makes no reference to any discussion, consultations or meetings. It makes no reference to the organizations policy or the law in general.

115. Fifth, the letter does not set out the reasons for and the extent of the purported redundancy. See *Thomas De La Rue (K) Ltd v David Opondo Omutelema* [2013] eKLR.

116. Finally, the letter is not copied to any person and the Respondent led no documentary evidence that a copy of the letter was sent to the Labour officer as required by the provisions of Section 40(1)(b) of the *Employment Act*.

117. Although RW1 testified that a copy was sent to the Labour Office and the Respondents counsel submitted as much, there is no evidence on record of the letter having been delivered and received by



- the labour officer. The law is clear that the notice must be served on the Labour Officer. In the absence of evidence that the letter was served upon the Labour Officer, the Court is satisfied and finds that the Respondent has failed to discharge the burden of proof that it issued the notice contemplated by Section 40(1)(a) and (b) of the *Employment Act*.
118. The Court further finds that the purported notice was invalid for purposes of a redundancy. Calling it a redundancy notice as suggested in November would not have ameliorated the situation since it was communicating a decision.
 119. As regards the criteria used by the Respondent in arriving at the person(s) to be declared redundant, the Respondent submits that the criteria in Section 40(1)(c) has no application because the Claimant's position had been abolished. This submission would appear to suggest that there was in fact no restructuring of the Department at all as no other officer was affected. See *Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others* (supra).
 120. The Court in agreement with the sentiments of the Court in *Agnes Ongadi v Kenya Electricity Transmission Company Limited* (supra) that restructuring process or abolition of office does not just happen. These are processes that have a beginning, life and end. They have a road map, are elaborate and consultative in nature.
 121. To submit that the criteria prescribed by law does not apply is tantamount to submitting that the Respondent had no criteria in redundancies.
 122. As regards consultation in redundancies, RW1 testified that it was not a requirement but a good practice. In its submissions, the Respondent acknowledges that consultation is an essential component but relies on the decision in the *Kenya Airways* case (supra) to urge that there was no requirement that every employee be consulted before a decision on redundancy may be made.
 123. In as much as the Court is in agreement with the submission, it is not in dispute that the case herein above involved over 400 employees who were union members, the appellant dealt with the union as opposed to individual members.
 124. In the instant case, the alleged restructuring and resultant redundancy affected a single employee as evidenced by the absence of a general notice either to all members or departmental staff.
 125. Other than Mr. Christopher Hoffman's letter dated 23rd September, 2015 to departmental staff, the Respondent tendered no documentary evidence of a restructuring of the organization or any specific department(s). The email states that four (4) departmental officers would now be desk officers and the Claimant's position is among them.
 126. RW1 confirmed on cross-examination that the employer is the one who is supposed to reach out to the employees affected by a redundancy and in this case, it did not reach out to the Claimant prior to the notice dated 30th September, 2015. In fact, all organograms on record including the one circulated in October 2015 had the Claimant's position. On the other hand, the Respondent provided no organogram whereby the Claimant's position had been abolished.
 127. In his dicta, Maraga JA (as he then was) in the *Kenya Airways Ltd* case (supra) stated as follows;

“As I have said, besides this Convention, the requirement of consultation is implicit in the principle of fair play under Section 40(1) of the *Employment Act* itself and our other labour laws. The notices under this provision are not merely for information. Read together with Part VIII of the Labour Relations Act, 2007 which provides for reference to the Minister for Labour of trade disputes, including those related to redundancy (see Section 62(4))



for conciliation, I am of the firm view that the requirement of consultations is implicit in these provisions... 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 is unavoidable... I agree with counsel for the 1st Respondent that consultation is an imperative requirement under our law...”

128. In *Barclays Bank of Kenya Ltd & another v Gladys Muthoni & 20 others* (supra) the Court of Appeal stated as follows:

“In the end, we are persuaded that the dicta of Maraga, JJA regarding consultation prior to declaration of redundancy resonate with our constitution and international laws which have been domesticated by dint of Article 2(6) of the Constitution”.

129. The Court is bound by the sentiments.

130. The Respondent tendered no evidence that it engaged or consulted the Claimant on the possibility that the purported restructuring of the department would lead to a redundancy. This would appear to explain her surprise when the information was broken to her on 30th September, 2015.

131. This is further reinforced by the contents of the letter dated 30th September 2015 which state as follows;

“We understand this is a time of uncertainty. We are therefore also providing confidential counselling via the Salti Programme. You are encouraged to take advantage of this service...”

132. From these two sentences of the letter, it is unclear why the Claimant would require counselling if she had been consulted about the impending redundancy and had been part of the process before the letter was issued. See *BMD Knitting Mills (pty) Ltd v South African Clothing & Textile Workers Union* 1998 (19) ILJ 1451 (LAC).

133. The consultations envisaged by the law are before the redundancy process is actualized, the notice of termination of employment on account of redundancy should be the last step of the process.

134. Puzzlingly, the minutes of meeting held on 16th, 18th and 24th November, 2015, to discuss the redundancy process of Dorcas Wangu, the Claimant, are explicit that there were meetings to discuss a concluded process which affected only one employee. The purported discussions are ex post facto and in the Court’s view ineffectual as consultations.

135. For the foregoing reasons, it is the finding of the Court that the Respondent has on a balance of probabilities failed to establish that there was a restructuring of the organization or the department of Humanitarian Emergency Affairs at any time or that the relevant provisions of the *Employment Act* were complied with.

136. It is finding of the Court that the purported redundancy was conducted in contravention of the provisions of the *Employment Act* and therefore unfair.

137. The Claimant’s evidence on record outweighs that of Respondent and is therefore entitled to the reliefs prescribed by law.

138. As to whether the Claimant is entitled to the reliefs sought, the Court proceeds as follows;



a Compensation for the remainder of the contract period

139. The Claimant relied on *Mary Mutanu's* case (supra) to urge that she is entitled to damages for loss of earnings as held by Radido J. in that case, where the Court restricted itself to 12 months for loss of income or earnings.
140. However, the jurisprudence emerging from this Court and the Court of Appeal is that anticipatory earnings or compensation have no legal justification. This was clearly articulated by the Court of Appeal in *Elizabeth Wakanyi Kibe v Telkom Kenya Ltd* [2014] eKLR as well as in *D. K. Njagi Marete v Teachers Service Commission* [2020] eKLR where the Court cited with approval the sentiments of the Court in *Francis N. Gachuri v Energy Regulatory Commission* [2013] eKLR and subsequently held that:
- “Thus, it is clear to us that the claim for anticipatory benefits was not anchored in law, and we therefore decline to review the judgement of the trial court on these terms.”
141. Relatedly, in numerous decisions, this Court has held that to the extent that a contract has a termination clause other than retirement or effluxion of time, there is no representation that the employee shall serve the entire term of the contract. The contract is terminable as long as the termination is conducted in accordance with the law.
142. In the instant case, paragraph 9.1 of the contract Agreement dated 1st June, 2011 provides for termination by 30 days written notice by either party or one month's salary in lieu of notice.
143. For these reasons the claim for compensation for the remainder of the contract is declined.
- (b) Leave accrued and to be accrued up to the end of the contract
144. This claim is based on the unserved term of the contract and amounts to an anticipatory benefit and it is declined for the same reasons as the claim for compensation. The claim for leave for three (3) months of the terminated contract was neither pleaded nor proved. It is trite law that parties are bound by their pleadings. The claim for severance pay in the submission is neither pleaded nor proved.
- (c) Damages equivalent to 12 months' salary under Section 49 of the *Employment Act*.
145. Having found that the termination of the Claimant's employment on account of redundancy was unfair, the Claimant is entitled to the relief provided by Section 49(1)(c) of the *Employment Act*, 2007 and as ordained by Section 49(4) of the Act, the Court had taken into consideration the following factors.
- (i) The Claimant was an employee of the Respondent for a period of 4½ years and had risen from the position of Executive Assistant to Program Officer.
- (ii) The Claimant wished to continue working for the Respondent. This is evidenced by her attendance at the meeting on 16th, 17th and 18th on redundancy and the emails to the People and Culture, Director dated 2nd November, 2016 and 22nd November 2015 on what had transpired and the humiliation by the Supervisor.
- 9iii) The Claimant's performance was assessed as satisfactory as confirmed by RW1 and had no disciplinary issues.



- (iv) The circumstances in which the Claimant's employment was terminated are unique in certain respect: First the Claimant's contract was renewed on 6th August 2015 for a duration of two years. Second, the Supervisor's emails dated 23rd September, 2015 to the Claimant at 3.31 pm and another to departmental staff at 3.42 pm make no reference to an impending separation. Third, the EAR HEA Managers meeting of 25th September 2015 which the Claimant attended was a ordinary meeting of employees. As are the Supervisors emails of 29th September 2015 at 1.24 pm to the Claimant and 3.16 pm to staff.
146. Finally, the end of contract letter dated 30th September 2015 was handed over to the Claimant on 15th October 2015. The Respondent made no effort to prepare the Claimant for her exit from its employment. The Claimant's Supervisor misrepresented everything as ordinary for the entire month of September 2015 while aware that he had a hidden agenda.
147. In the circumstances, the Court is satisfied that the equivalent of five (5) months' salary is fair Kshs.768,517.20.
- (d) Certificate of service
148. The Claimant confirmed, on cross-examination that she cleared with the Respondent and was paid final dues and was also issued with a certificate of service. The prayer is declined.
149. In conclusion, judgement is entered for the Claimant against the Respondent for the sum of Kshs.768,517.20 with costs.
150. Interest at Court rates from the date of judgement till payment in full.
151. Order accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 20TH DAY OF JUNE 2022

DR. JACOB GAKERI

JUDGE

ORDER

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

DR. JACOB GAKERI

JUDGE

