Walia v Oshwal Education and Relief Board (Cause 1886 of 2017) [2022] KEELRC 13528 (KLR) (9 December 2022) (Judgment)

Neutral citation: [2022] KEELRC 13528 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 1886 OF 2017

SC RUTTO, J

DECEMBER 9, 2022

BETWEEN

GEETIKA WALIA ..... CLAIMANT

AND

OSHWAL EDUCATION AND RELIEF BOARD ..... RESPONDENT

JUDGMENT

1. The instant suit was instituted by way of a statement of claim dated 20th September, 2017, through which the claimant avers that she was unfairly and unlawfully terminated from employment. The claimant avers that her initial contract commenced on 1st January, 2015 and ran upto 31st December, 2016. That as the term of contract expired, the respondent entered into a successive contract with her. That the second contract was to run from 1st January, 2017 upto 31st December, 2018. This was not to be as the contract was terminated barely six months after the claimant's appointment.

2. The claimant has termed the termination of her contract as unfair, unlawful and discriminatory. It is for this reason that she seeks against the respondent the sum of Kshs 7,277,757.00 being the payment of the amount due for the remainder of her contract, compensatory damages, severance pay and lost pension for the remainder of contract period.

3. In answer to the Claim, the respondent filed a Statement of Response and Counterclaim, dated 14th November, 2017. The respondent states that the claimant was notified of the decision to declare her redundant and that the same was not actuated by malice, discrimination or bad faith as alleged. The respondent further counterclaims against the respondent the sum of Kshs 2,784,234.00 being payment for works and payments for various services without following the proper laid out procedure. Consequently, the respondent has asked the Court to dismiss the claim with costs and allow its counter claim.

4. The claimant filed a Reply to the Statement of Response and Defence to the Counterclaim through which she denied the respondent's averments. The claimant further denied owing the respondent the sum of Kshs 2,784,234.00.

5. The matter proceeded for hearing on 16th June, 2022 and each side presented oral evidence.

Claimant's case

6. At the beginning of her testimony, the claimant sought to rely on her witness statement and documents filed together with her claim, to constitute her evidence in chief. She declared that she is Hindu by faith.

7. That on 17th May, 2017 she wrote to the treasurer of the respondent appealing for a staffing approval. That she put forth a request to have additional members of staff; including a Facility Officer and an Embedded Security Officer and also stated that the Human Resource Committee had already approved her proposed structure.

8. That the next communication she received was a letter dated 2nd June, 2017 from the respondent informing her that her employment contract was being terminated with effect from 2nd June, 2017 and that she was expected to vacate her office on 2nd September, 2017 after serving her 3 months' notice period.

9. It was her testimony that the respondent informed her that the reason for her termination was that her role was no longer required within the organization, based on their current operational requirements.

10. That on 3rd June, 2017, she received an email from one Mr. Dharmesh Shah who acknowledged the fact that the respondent took a decision without any consideration of the opinions of the Board of Governors or the Human Resource Committee.

11. She further stated that the respondent not only failed to give her an opportunity to make representations to them, which was a requirement in the Contract, but also failed to make public the restructuring of the organization which was going to affect her position as the School Business Manager.

Respondent's case

12. The respondent called evidence through Mr. Brian Odhiambo Ojiem who testified as RW1. He identified himself as the respondent's Human Resource Manager. He proceeded to adopt the respondent's response, witness statement as well as the respondent's documents to constitute his evidence in chief.

13. RW1 testified that he was employed by the respondent since January, 2020. That his duties entail coordinating all administrative activities related to the organization's personnel, compiling and maintaining employee records, uploading employee job descriptions, developing recruitment strategies and onboarding new employees. That he is conversant with the facts herein, having been informed as much by his predecessor.

14. He told the Court that on the 31st December 2016, the claimant was issued with another contract of service for a period of two years at an all- inclusive salary of Kshs. 2,882,280/= per year. That in May, 2017 a new Board of Directors was appointed to the respondent. That the said Board changed the school's system including removal of some job positions which affected the claimant.

15. That since the position of School Business Manager was scrapped off from the school's system, the claimant did not have a job description thus was redundant. That the claimant was informed of the

developments and informed that her services would not be needed any more and would be laid off as per the terms of the contract.

16. That on the 2nd June 2017 with reason, claimant's contract was terminated and all dues to be paid laid down. That her last day of work was to be 2nd September 2017.

17. It was RW1's further testimony that the change of structure of the school system was in the best interest of the school not only as a learning institution, but also as a business. That it was not aimed at being malicious or discriminatory to the claimant in any way. That the termination was within the precinct of the contract as the claimant was given a three months written notice and paid all her dues with all the benefits intact. That due process and procedure was followed to ensure just and fair termination.

18. RW1 further testified that during the claimant's employment, she authorized for work and payments in the sum of Kshs. 2,784,234/- to various service providers unilaterally, without following the proper laid out procedure and without getting sanction from the Board. That she further went ahead and issued verbal instructions and failed to adhere to proper procurement procedures. That due to the claimant's action, the respondent lost Kshs. 2,784,234/=.

19. RW1 further told Court that it had prepared a cheque on 21st September, 2017, which was awaiting the claimant's collection.

Submissions

20. Upon close of the hearing, both parties filed written submissions. The claimant submitted that the respondent did not adhere to the provisions under section 40 of the *Employment Act*, in terminating her employment. To this end, reliance was placed on the cases of *Caroline Wanjiru Luzze vs Nestle Equatorial Africa region Limited* (2016), *Kenya Airways Limited vs Aviation & Allied Workers Union of Kenya & 3 others* (2014) eKLR, *Francis Kamau vs Lee Construction* (2014) eKLR and *Hesbon Ngaruiya Waigi vs Equatorial Commerce Bank Limited* (2013) eKLR.

21. The claimant further submitted that the respondent did not provide any justifiable reasons why it preferred applicants from the Oshwal community. That this amounted to discrimination. In support of these submissions, the claimant cited the cases of case of *Ol Pejeta Ranching Limited vs David Wanjau Muhoro* (2017) eKLR, *Janine Buss vs Gems Cambridge International School Limited* (2016) eKLR and Gichuru vs Package Insurance Brokers Ltd (2021) eKLR.

22. It was the claimant's further submission that she expected to complete the duration provided in the contract of her employment. That she is therefore entitled to payment of the remainder of her contract. Citing the case of *James Mulinge vs Freight Wings Limited* (2016) eKLR, the claimant urged that she was entitled to two moths notice.

23. On its part, the respondent submitted that there was no breach of contract in its basic understanding and in line with sections 43 and 45 of the *Employment Act*. That as per the terms and conditions outlined between the parties, the respondent met the said requirements. To buttress its submissions, the respondent invited the Court to consider the determinations in the cases of *Samuel Chacha Mwita vs Kenya Medical Research Institute* (2014) eKLR, *Tobias Onyango Ouma vs Kenya Airways and Robert Kennedy Moi vs Attorney General and another* (2014) eKLR.

24. It was the respondent's further submission that it met the conditions set out under section 40 of the *Employment Act*. That there is no requirement in the section to have prior meetings or notice before redundancy of an individual employee. In this regard, the respondent cited the case of *Africa Nazarene University vs David Mutevu & 103 others* (2017) eKLR, Kenya Airways Limited vs Aviation & Allied Workers Union of Kenya & 3 others (2014) eKLR.

25. The respondent stated in further submission that it was upto it as the employer to make a commercial judgement as it deemed fit for its profitability.

26. With regards to discrimination, the respondent submitted that there was no evidence that the claimant was paid less than her Oshwal colleagues and there is no proof of prior complaint on her discrimination. That she had not brought forth how her faith had an effect of nullifying or impairing equality or opportunity or treatment in her employment or occupation. That the cases cited by the claimant show disparity in missed opportunities, less wages, mistreatment and insults. The respondent further urged that this particular case is nothing like those cases. In further support of its submissions, the respondent cited the case of *Andrew Mutisya Mwanzia vs Hilla Hardware Limited* (2020) eKLR.

Analysis and Determination

27. Arising from the pleadings, the evidence on record and the opposing submissions, the following issues stand out for determination:

    i. Whether the claimant's termination by way of redundancy was fair and lawful.

    ii. Whether there is a case of discrimination.

    iii. Is the counterclaim justified?

    iv. Whether the claimant is entitled to the reliefs sought.

Whether the claimant's termination by way of redundancy was fair and lawful.

28. It is not in doubt that the claimant was terminated by way of redundancy. The question is whether the same was fair and lawful.

29. In the case of Kenya Airways Limited vs Aviation & Allied Workers Union Kenya & 3 Others (2014) eKLR, the Court of Appeal found that "for any termination of employment under redundancy to be lawful, it must be both substantially justified, and procedurally fair".

30. Substantial justification or fairness refers to the reasons for which the redundancy was effected, while procedural fairness has to do with the procedure applied in effecting the redundancy. I will start by considering substantive justification.

i. Substantive justification

31. In regards to redundancy, substantive justification finds its original setting under Section 2 of the *Employment Act* which defines "redundancy" to mean "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".

32. What this means is that, the circumstances or reasons leading to an employee being declared redundant must fall within the above definition.

33. That is not all, regard must also be had to the provisions of section 45(2) (b) (ii) of the *Employment Act* which renders a termination unfair, where an employer fails to prove that the reason for the termination is valid, fair and based on its operational requirements.

34. The claimant's termination was effected vide a letter dated 2nd June, 2017 referenced "Termination of your contract of employment" which reads in part:

> " In reference to the above mentioned subject, we would like to inform you that the office bearers of OERB have decided to terminate your employment contract with Oshwal Academy with effect from 2nd June, 2017 after which you will serve your three months notice period and vacate your office on 2nd September, 2017. This has been necessitated by a review and assessment of your current role which is no longer required within our structure based on our current operational requirements...."

35. Noting the reasons advanced for the claimant's termination, it was incumbent for the respondent to prove the said reasons so as to pass the test of justification. Specifically, the respondent was required to prove that the claimant's role was no longer existing within its structure. That in other words, her office had been abolished.

36. As was held in the case of Kenya Airways (supra), "The phrase "based on operational requirements of the employer" must be construed in the context of the statutory definition of redundancy. What the phrase means, in my view, is that while there may be underlying causes leading to a true redundancy situation, such as reorganization, the employer must nevertheless show that the termination is attributable to the redundancy – that is that the services of the employee has been rendered superfluous or that redundancy has resulted in abolition of office, job or loss of employment."

37. In its defence, the respondent stated it held a meeting with the claimant to discuss the impending restructuring of the organisation. That as such, she was aware that there was going to be a restructure of the respondent institution. Indeed, RW1 testified that the claimant's position was scrapped off the school's system.

38. On her part, the claimant admitted under cross examination that she was doing some restructuring of the respondent from her end. That at the time, the respondent did not have a Board and there was an incoming one. However, she disagreed that the restructuring included the positions falling within her role as School Business Manager. She further stated that she did not know what the new Board was planning.

39. From the record, there is an email of 17th May, 2017 emanating from the claimant in which she addresses one Bhavik as follows:

> " Dear Bhavik,
>
> I am writing to you as a result of an HR BOG Committee meeting last evening. The HR Committee has approved the proposed structure and have attached the presentation made to HR Committee yesterday.
>
> The reason for writing to you Bhavik, is because we are now in a situation that there is approval from the Committee for the restructuring yet I cannot move forward because of what was explained in that final approval will be by OERB office bearers after the OERB AGM.
>
> We are humbly and kindly requesting your good office to please give us your approval (urgent) to the staffing requirement indicated below. I know the word urgent is not liked by all of us, however please do allow me to put forward this request.

1. Facility Officer..... worst case scenario option-if no facility officer then we hire the services of a project manager who would ensure that contractors meet our order obligations in the interim that we wait for the decision after the OERB AGM.

2. Embedded Security Officer.....long term we should recruit our own security officer....please find attached scope for security officer....."

40. Judging from the contents of the email above, it is apparent that the restructuring from the claimant's end was in respect of two positions which she proposed to be created being, that of a facility officer and embedded security officer. There was no mention of other positions within the respondent's structure. Further, there was no proposal from her end to do away with any roles through restructuring. If anything, she was proposing for more roles to be created.

41. It is therefore evident that what she had in mind had nothing to do with the position of a School Business Manager, which position she was holding at the time. Indeed, this was confirmed by RW1 who testified under cross examination, that there was a discussion concerning redundancy but not related to the claimant's position. He further admitted under cross examination that the claimant was informed of the restructuring on 2nd June, 2017, which notably, was the date when she was notified of her termination.

42. What manifests from this is that the claimant and the respondent were at cross purposes in regards to the restructuring exercise. By all indication, she was in the dark as to the plans the respondent had in store for her. It can very well be said that she was blindsided.

43. In the circumstances, it is not true for the respondent to state that the claimant was aware of the restructuring exercise and moreso, that the same was to affect her position as School Business Manager.

44. If it is indeed true that there was a restructuring of roles and offices within the respondent's establishment affecting the claimant's position, then it failed to prove the same by way of evidence, say its organisation structure/chart/organogram, before and after the alleged restructure. Such an organisation structure would have indeed proved that the position of School Business Manager was no longer in existence. Without such evidence, it is hard to tell whether the claimant's position was really affected by the restructure.

45. Revisiting the provisions of Sections 43 (1), 45 (2)(a) and (b) and Section 47(5) of Act, it is clear that the respondent was to prove that the reasons for the claimant's termination were fair, valid and related to its operational requirements. As stated herein, the same has not been proved in any form or manner hence the respondent's burden under the *Employment Act* remains undischarged.

46. I must add that in light of section 40 of the *Employment Act*, an employer has the right to a declare redundancy situation provided the same is justified. Indeed, if the respondent's intention was to restructure and reorganize its institution as it pleased, thus resulting in the claimant's redundancy, nothing stopped it from doing so provided such action was justified under the law.

47. I will reiterate the sentiments of the Court of Appeal in the case of Kenya Airways (supra) thus:

> "Thus, redundancy is a legitimate ground for terminating a contract of employment provided there is a valid and fair reason based on operational requirements of the employer and the termination is in accordance with a fair procedure. As section 43(2) provides, the test of what is a fair reason is subjective."

48. There being no evidence that the claimant's position was indeed scrapped, I am unable to find that the respondent has proved that her termination on account of redundancy was justified. Her termination in that respect was therefore unfair.

(ii) Procedural fairness

49. The procedure to be applied in effecting a redundancy is stipulated under section 40(1) of the Act. Under the said provision, the following conditions must precede a redundancy:

    a. where the employee is a member of a trade union, the employer notifies the union to which the employee is a member and the labour officer in charge of the area where the employee is employed of the reasons for, and the extent of, the intended redundancy not less than a month prior to the date of the intended date of termination on account of redundancy;

    b. where an employee is not a member of a trade union, the employer notifies the employee personally in writing and the labour officer;

    c. the employer has, in the selection of employees to be declared redundant had due regard to seniority in time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy;

    d. where there is in existence a collective agreement between an employer and a trade union setting out terminal benefits payable upon redundancy; the employer has not placed the employee at a disadvantage for being or not being a member of the trade union;

    e. the employer has where leave is due to an employee who is declared redundant, paid off the leave in cash;

    f. the employer has paid an employee declared redundant not less than one month's notice or one month's wages in lieu of notice; and

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

50. I must emphasize at the outset, that all the conditions stipulated above are mandatory and it is not open for the employer to cherry pick and selectively apply the same.

51. For starters, there was no evidence of compliance with the requirement under section 40(1) (a) or (b) from the respondent's end. I choose to go by (b) as there was no suggestion that the claimant was a member of a trade union.

52. The reason I say there was no compliance by the respondent, was that the only notice she was issued with, was the one contained in the letter of termination. The decision to declare her redundant had already been made by the respondent. Prior to this, there is no evidence from the respondent's end with regards to compliance with section 40 (1) (b).

53. In my view the notice contemplated under section 40 (1) (b) is an "intention to declare a redundancy". It is issued before the redundancy itself. What was issued to the claimant was notification that she had

already been declared redundant. On this issue, I find useful guidance in the finding by Maraga JA, (as he then was) where he opined as follows in the case of Kenya Airways case (supra):

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

54. The respondent is therefore at fault for not complying with the requirement under 40(1) (b) with regards to a notice to the claimant of its intention to declare a redundancy.

55. The respondent further failed the test under the second part of 40(1) (b) when it failed to prove that it issued a redundancy notice to the labour office. This position was confirmed by RW1 who testified under cross examination that the county labour office was not notified of the claimant's intended redundancy.

56. With regards to consultations, the respondent stated that it held discussions with the claimant to that effect, prior to her termination. The respondent further contended that there was no need for consultations and that one month notice suffices. With due respect, this is not the true position. In as much as the *Employment Act* does not expressly provide for consultations before a redundancy, Article 13, Convention No. 158 - Recommendation No. 166 of the International Labour Organisation (ILO) convention does.

57. On this issue, I am also guided by the decision of the Court of Appeal Maraga JA (as he then was) in the Kenya Airways case (supra) where he expressed himself thus:

> " Although it also does not expressly provide for consultation between the employer and the employees or their trade unions before the final decision on redundancy is made, on my part I find the requirement of consultation provided for in our law and implicit in the *Employment Act* itself. By dint of Article 2(6) of the *Constitution*, the treaties and conventions ratified by Kenya are now part of the law of Kenya. The Kenya Constitution, 2010 was promulgated on 27th August, 2010…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 implicit in these provisions."

58. This position was maintained by the Court of Appeal in the case of *Barclays Bank of Kenya Ltd & another vs Gladys Muthoni & 20 others* [2018] eKLR and *Cargill Kenya Limited vs Mwaka & 3 others* (Civil Appeal 54 of 2019) [2021] KECA 115 (KLR).

59. I am therefore persuaded that consultation is a key requirement during a redundancy exercise.

60. With regards to the significance of the consultations, it is evident from Article 13 of the ILO Convention No. 158, that the same should be aimed at averting and minimizing the terminations or mitigating the adverse effects of any terminations on the employees concerned. This position was well amplified by Maraga JA (as he then was) in the following manner in the Kenya Airways case (supra): -

> " 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 unavoidable. This means that if parties put their heads together, chances are that they could avert or at least minimize the terminations resulting from the employer's proposed redundancy. If redundancy is inevitable, measures should to be taken to ensure that as little

hardship as possible is caused to the affected employees. In the circumstances, I agree with counsel for the 1st respondent that consultation is an imperative requirement under our law."

61. In a nutshell, the consultations should not be cosmetic but ought to be meaningful and should be geared towards some end. I am fortified by the determination in the case of Barclays Bank of Kenya Ltd & another vs Gladys Muthoni & 20 others [supra] where the learned Judges of the Court of Appeal reckoned thus:

> " 44. We respectfully agree with the views expressed by the two learned Judges. *The Constitution* in Article 41 is fairly loud on the rights to fair labour practices and we think it accords with *the Constitution* and international best practices that meaningful consultations be held pre-redundancy."

62. As I have found that there was no evidence of consultations between the parties in the instant case, I return that the respondent is at fault to that extent.

63. With regards to payment of untaken leave and one month's salary in lieu of notice under section 40(1) (e) and (f) respectively, it was not clear from the respondent's end, that the said payments were made. This is why. First, it did not breakdown the claimant's dues to show what components were incorporated. Was it salary, untaken leave, gratuity? What did it constitute?

64. Second, the claimant's letter of termination did not advise her with regards to her entitlement following her termination. All in all, it is therefore not possible to tell what component of the claimant's dues was constituted in the global sum of Kshs 165,792.00.

65. I further find it worth mentioning, that compliance with section 40(1)(f), is in respect to payment of one month's salary as opposed to issuance of the actual notice. Such was the determination by the Court of Appeal held as follows in Cargill Kenya Limited vs Mwaka & 3 others (Civil Appeal 54 of 2019) [2021] KECA 115 (KLR):

> " In this respect, it is notable that a plain and contextual reading of subsection 1(f) shows that its express objective and purpose is the payment required to be made to employees affected by redundancy, and not the issuance of a notice. It is also notable that the legislative intention from the arrangement and content of the enactments in section 40 subsection (1) (d) to (g) was the provision of payments to be made to affected employees in a redundancy, and section 1(f) can only thus be construed within this context, as was done by Maraga JA in *Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others* Nairobi Civil Appeal No. 46 of 2013 (supra)..."

66. Therefore, it is not enough for the respondent to aver that it issued notice to the claimant and that that sufficed. Did it make payment? If not, then it did not comply.

67. In light of the foregoing, it is apparent that the respondent substantially failed to comply with the provisions of section 40 (1) of the *Employment Act* hence it is at fault.

68. Concluding on this issue, I wish to echo the sentiments of the Court in the case of Hesbon Ngaruiya Waigi vs Equitorial Commercial Bank Limited (2013) eKLR thus:

> " Where redundancy is declared by an employer, the procedure to follow is as set out under the provisions of Section 40 of the *Employment Act* and where not followed, any termination as a result will be deemed unprocedural and unfair. Any termination of an employee following

a declaration of redundancy must be based on the law otherwise the same becomes wrong and if the grounds used to identify the affected employees are not as per the law, the same becomes unfair."

69. In the same fashion, and having found that the respondent did not fully comply with mandatory requirements stipulated under sections 40(1) of the *Employment Act*, I cannot help but find that the claimant's termination on account of redundancy was unprocedural hence unlawful.

70. The total sum of my consideration is that the claimant's termination on account of redundancy was unfair and unlawful within the meaning of section 40, 43 and 45 of the *Employment Act*.

Discrimination

71. The claimant has alleged that her termination on account of redundancy was malicious and discriminatory. That after her termination, the respondent advertised for the position of a General Manager and Academy Manager amongst other positions. That the advertisement was restricted to members of the Oshwal community while she professes the Hindu faith. That this locked her out hence she could not apply.

72. The respondent disputed the claimant's assertion and submitted that she had been initially employed by the respondent, despite not being an Oshwal.

73. Section 5(3) of the *Employment Act* deals with discrimination. It provides thus:

> "(3) No employer shall discriminate directly or indirectly, against an employee or prospective employee or harass an employee or prospective employee—
>
> (a) on grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, pregnancy, marital status or HIV status;
>
> (b) in respect of recruitment, training, promotion, terms and conditions of employment, termination of employment or other matters arising out of the employment." Underlined for emphasis

74. It is not in dispute that shortly after the claimant was terminated on 2nd June, 2017, the respondent placed an advertisement on 7th July, 2017, calling for applicants for various positions namely:

a. General Manager:

b. Academy Manager;

c. Accounts Assistant;

d. Property Maintenance Manager; and

e. Security Manager.

75. There was a rider to the advertisement, being that, the applicants had to be "Oshwal". Did this amount to discrimination against the claimant?

76. In order to resolve this issue, I find it imperative to revisit the roles and duties of the claimant whilst employed by the respondent. The claimant's position at the respondent was that of a School Business

Manager. Her duties can be drawn from her performance evaluation and performance management report which she exhibited before Court. I will sample a few of her roles therefrom:

a. To interpret OA's strategic roadmap and provide direction to the schools;

b. Provide visionary leadership to senior management team;

c. To provide expert advice and guidance to BOG;

d. To support the BOG in performing its role through accurate interpretation and implementation of its decisions by the executive.

e. To support BOG in strategic planning and change management;

f. To review and align the academic structures of the academy;

g. Develop academy ethos;

h. Strategy on academic standards and quality assurance enhancement; and

i. Advice and guide on curriculum concepts and research.

77. Looking at the above roles, it is clear that the same cut across leadership, management, strategy, advice and guidance to the respondent's Board as well as financial planning and manpower planning, amongst others. In my view, these are duties that a person employed as a General Manager would ordinarily perform.

78. Further, as highlighted above, she had duties pertaining the academic aspects within the respondent's institution. Again, I find that these are duties that an Academic Manager would ordinarily perform.

79. Therefore, the claimant was a potential candidate for those two advertised positions and she could have applied for the same. But there was a small hitch, being that there was an express mandatory condition that the applicant had to be Oshwal. That requirement alone, knocked her out at the point of recruitment. Her chances were not even slim, they were nil.

80. Going back to the provisions of section 5(3) the Act, recognizes and acknowledges that discrimination can occur at the point of recruitment and against a potential employee. In this case, this is what happened. Being a prospective employee professing the Hindu faith, the claimant could not apply for the positions advertised. This was discrimination against the claimant on grounds of her religious beliefs.

81. Granted, the respondent may not have directly discriminated the claimant in the course of her employment, but the same cannot be said post her termination.

82. On this score, I will follow the determination by the Supreme Court in the case of Gichuru vs Package Insurance Brokers Ltd(Petition 36 of 2019) [2021] KESC 12 (KLR) where it was held that indirect or subtle discrimination involved setting a condition or requirement which is a smaller proportion of those with the attribute were able to comply with, without a reasonable justification.

83. As a matter of fact, the respondent did not provide any justification as to why it was specifically inclined to hire an Oshwal for the said positions as opposed to someone from another religious background.

84. In terms of section 5(7) of the *Employment Act*, the burden of proof was not met by the respondent as it did not prove that there was no discrimination as alleged. It could have discharged this burden by justifying its preference to only hire an Oshwal, but it failed to do so.

85. On this score, I will follow the determination of the Supreme Court in Gichuru vs Package Insurance Brokers Ltd (supra) where it was determined as follows:

> " The protection of employees against any form of discrimination at the work place is therefore a significant matter and the burden placed upon an employer to disprove the allegations of discrimination is enormous. The employer must prove that discrimination did not take place as alleged and that where there is discrimination, it was not with regard to any of the specified grounds."

86. As further held by the Court:

> " According to section 5(7) of the Act, an employer alleged to have engaged in a discriminatory practice must give reasons for taking certain actions against the employee. Where such actions are shown not to have any justification against the protected group, then there exists discrimination against such an employee and must therefore be addressed. In this instance, the appellant had discharged the burden as to shift it to the respondent who failed to discharge on their part."

87. In the instant case, I reiterate that the respondent did not state or rather give reasons why it preferred persons from the Oshwal community as opposed persons drawn from other religious backgrounds. Indeed, there was no suggestion or inference that the same was based on affirmative action or such other grounds stipulated under section 5(4).

88. In as much as the respondent argued that the claimant was initially employed despite being a Hindu by faith, it cannot be wished away that at the time of her termination, a new Board had taken the reins of leadership at the respondent's institution in May, 2017. Therefore, there was a likelihood that there was a wind of change and reliance cannot be placed in the manner in which things had previously been done at the respondent institution.

89. The bottom line is that the respondent did not discharge its burden by proving that it did not discriminate against the claimant on the basis of her religious beliefs, at the stage it was undertaking recruitment for the advertised positions.

90. I therefore return that the claimant was discriminated on grounds of her religious beliefs when the respondent restricted applications for the positions advertised on 7th July, 2017, to members of the Oshwal community.

Is the counterclaim justified?

91. The respondent has counterclaimed against the claimant the sum of Kshs 2,784,234.00 being payments to various service providers without following the proper laid out procedure. It is notable from the onset, that the said counterclaim was not accompanied by a Verifying Affidavit and none was filed prior to the hearing and Judgment.

92. Order 7 Rule 5 (a) of the *Civil Procedure Rules* states as follows:

> " 5. The defence and counterclaim filed under rule 1 and 2 shall be accompanied by-
>
> .....an affidavit under Order 4 Rule 1(2) where there is a counterclaim."
>
> While Order 4 Rule (1) (2) of the Civil Procedure Rules provides that: -

(2) The plaint shall be accompanied by an affidavit sworn by the plaintiff verifying the correctness of the averments contained in rule 1(1) (f) above.

(3) Where there are several plaintiffs, one of them, with written authority filed with the verifying affidavit on behalf of the others.

(4) Where the plaintiff is a corporation the verifying affidavit shall be sworn by an officer of the company duly authorized under the seal of the company to do so.

(5) The provisions of sub-rule (3) and (4) shall apply mutatis mudandis to counter-claims.

(6) the court may of its own motion or on the application by the plaintiff or the defendant order to be struck out any plaint or counterclaim which does not comply with sub-rule (2) (3), (4) and (5) of this rule"

93. Courts have held that in as much as a counterclaim filed without a verifying affidavit is defective, the said defect is not fatal as it is curable. As I have stated herein, the respondent did not file a Verifying Affidavit at all. Therefore, the defect was sustained and was not cured. In the premises, the counterclaim is struck out.

Remedies available to the claimant

94. Having found that the claimant has demonstrated that she was discriminated on account of her religious beliefs and that she was unfairly and unlawfully terminated, the next issue for determination is what remedy avails to her.

95. In the case of *NEC Corporation vs Samuel Gitau Njenga* [2018] eKLR, the Court of Appeal concurred with the holding in *G M V v Bank of Africa Kenya Limited* [2013] eKLR, to the effect that:

> " The court does not think however that violation of every conceivable contractual statutory and constitutional right deserves a separate award of damages."

96. I fully concur with that determination hence, I will decline to award the claimant general damages in the sum of Kshs 5,500,000 as prayed on account of discrimination. Instead, I will award her compensatory damages equivalent to 8 months gross salary, pursuant to section 49 (1) (c) of the *Employment Act*, taking into account the violation of her right not to be discriminated. This award has further been informed by the nature of the claimant's termination and the manner in which the same was undertaken.

97. With regards to payment for the remainder of her contract period and loss of pension, the Court declines to award the same as the compensatory damages are adequate to make good the claimant's loss.

98. On this issue, I concur entirely with the sentiments of the Court in the case of *Mary Mutanu Mwendwa vs Ayuda Ninos De Africa-Kenya* [2013] eKLR, thus:

> " My answer is that indeed loss of earnings/income is a damage which can be awarded by the Court but such damage is capped at the equivalent of twelve months gross wages irrespective of the duration of a particular contract. I do not see any policy or legislative reason why those on fixed term contracts should be treated any differently from those on definite contracts

with a retirement age being treated differently. It would not be fair to award those on fixed term contracts loss of earnings for balance of unserved contract and deny those in definite or 'permanent' contracts who are unfairly or wrongfully dismissed, say with a balance of thirty years to retirement differently. Of course, parties in exercising their party autonomy can make provision for payment of such agreed sums for wrongful dismissal or unfair termination where fixed term contracts have been agreed on and the Court would be able to enforce such contractual terms." [Emphasis supplied].

99. In the instant case, there was no clause in the contract requiring for payment of any sum of money in the event of termination of contract. Besides, the purpose of compensation is to make good the employee's loss and not to punish the employer. As was held in the case of *David Mwangi Gioko and 51 others vs Nairobi City Water & Sewerage Company Limited*, [2013] eKLR:

> " This court has in the past held that there is need in resolving employment disputes to pay heed to the principle of a fair go all round. This principle requires the court to balance the interest of the employer and that of the employee.

100. With regards to severance pay, the same is declined as the claimant had not completed one year of service in her contract of employment which commenced on 1st January, 2017.

Orders

101. In the final analysis I allow the claim and enter Judgment in favour of the claimant against the respondent as follows:

a. A declaration that the claimant's termination by the respondent was unfair and unlawful.

b. The claimant is awarded compensatory damages in the sum of Kshs 1,968,720.00 which sum is equivalent to 8 months of her gross salary.

c. Interest on the amount in (b) at court rates from the date of Judgement until payment in full.

d. The counterclaim is struck out.

e. The claimant shall have the costs of the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 9TH DAY OF DECEMBER, 2022.

STELLA RUTTO

JUDGE

Appearance:

For the Claimant Mr. Mungai

For the Respondent Ms. Nyakundi

Court assistant Abdimalik Hussein

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article

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

STELLA RUTTO

JUDGE