



**Adis v Style Industries Ltd & another (Petition E036 of 2022)
[2022] KEELRC 13475 (KLR) (7 December 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13475 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E036 OF 2022
AN MWAURE, J
DECEMBER 7, 2022**

BETWEEN

GRADUS OLUOCH ADIS PETITIONER

AND

STYLE INDUSTRIES LTD 1ST RESPONDENT

GODREJ CONSUMER PRODUCTS 2ND RESPONDENT

JUDGMENT

1. The petitioner is expressed in the petition to be the legal manager and advisor of the respondent and its sister companies in East Africa Region covering the East, Central and North African countries of Kenya, Uganda, Tanzania, Ethiopia, Mozambique, Malawi, Zambia, Rwanda, Burundi and Sudan.
2. The respondent company has been sued on its own behalf and on behalf of its sister companies Canon Chemicals Ltd and Charm Industries Ltd together with the parent company Godrej Consumer Products Ltd India which operates in Kenya alongside other African countries.

Petitioner's Case

3. The petitioner avers that he joined the respondent's predecessor Stripes Industries Ltd as a legal advisor before the company changed its name to Strategic Industries Ltd in 2006 and the petitioner continued with his employment as the legal advisor and was later given the portfolio as Human Resource Manager in 2007. The business operations of Strategic Industries Ltd was purchased by Godrej Consumer Products headquartered in India which incorporated a local subsidiary by the name of Style Industries Ltd and acquired two other Companies Canon Chemicals Ltd and Charm Industries Ltd all dealing with Godrej Consumer Products. He says he found the company on July 15, 2000. He worked for the respondent. He says his salary was to be increased to 500,000/- from 306,000/- but was never adjusted.



4. The claimant avers that on the January 27, 2022, the respondent issued him with a redundancy letter that was to take effect on the March 31, 2022. The petitioner is of the view that the letter was issued without following the applicable laws and due procedure for redundancy set out in section 40 of the *Employment Act* 2007 and without giving the petitioner an opportunity of being heard in violation of articles 47 and 50 (1) of the *Constitution* of Kenya 2010 and section 7 of the *Fair Administrative Action Act* thus condemning the petitioner un heard.
5. The redundancy letter was issued without following the laid down mandatory statutory procedures prescribed under section 40 of the *Employment Act* 2007, the decision to lay off the petitioner was procedurally unfair, and actuated by ulterior motives and calculated to prejudice the legal rights of the petitioner, the decision was biased or may reasonably be presumed and suspected to be biased and discriminatory, the respondent did not take into account the relevant considerations of the petitioner's age, expertise, responsibilities and portfolio, the decision was made in bad faith, is unreasonable, irrational, unfair and disproportionate to the interests and rights of the petitioner and the decision violated the petitioner's legitimate expectations.
6. The petitioner states that all these violations are against the provisions of section 7 of the *Fair Administrative Action* and also contravenesthe petitioner's fundamental rights under articles 27, 41, 47 and50 of the *Constitution* and sections 40, 43 and 45 of the *Employment Act* 2007 for which the honourable court has powers and jurisdiction under articles 22 and 23 of the *Constitution*.
7. The petitioner avers that he sought to know whether the labour officer was notified of the intended redundancy and the true reasons for the action through the letter dated January 27, 2022and a demand letter dated the February 2, 2022but the respondent has failed, refused and neglected to respond only choosing to buy more time to the prejudice of the petitioner.
8. The petitioner being involved in the business operations of the respondent as the legal advisor and manager of the respondent and its predecessors together with the sister companies and the parent company is aware of the expansion of the business operations of the respondent in East, Central and Northern African Region under his jurisdiction and the returns, reports, cluster functions, organizational operations and other details of the respondent's activities. The petitioner asserts that the reasons stated in the redundancy letter in relation to the scaling down and restructuring of the business performance of the respondent has no basis whatsoever in law and fact and the decision has been actuated by ulterior motives, bad faith, malice and calculated to prejudice the legal rights of the petitioner.
9. Thepetitioner avers that redundancy notice dated the January 27, 2022is therefore unprocedural, unfair, unconstitutional and is being done in violation of statutory provisions and failed to follow due process and is manifestly unjust to the petitioner and cannot pass the validity test set out in sections 40, 43, 45, and 47 (5) of the *Employment Act* and contravenes the safeguards provided under articles 27, 41, 47 and 50 of the *Constitution* and section 7 of the *Fair Administrative Actions Act*.
10. The petitioner claims that the respondent did not comply with the provisions of section 40 of the *Employment Act* before issuing the redundancy letter and the petitioner further claims that the respondent violated the provisions of article 41 (2) in relation to underpayment of the petitioner on the agreed remuneration from December 2017 to date and the respondent further violated the fundamental rights of the petitioner through discrimination and the right to a fair hearing and fair administrative process.
11. The petitioner says that the redundancy notice should consequently be declared unlawful, unprocedural, irregular, unfair, unconstitutional and the same is therefore null and void and of no



- effect in law and the same should be quashed and or set aside so that the petitioner continues with his services or is paid for the remainder of four (4) years, eight months until he attains the mandatory age of retirement at 60 years.
12. The petitioner further seeks an order for a declaration that the petitioner's constitutional rights have been violated and compensation under article 23 (3) (e) for the underpayment from December 2017 to date at Kshs 84, 585/ per month until retirement or payment in full.
13. The petitioner prays for the following;
- a. A declaration that the redundancy notice issued by the respondent and dated January 27, 2022 to the petitioner is unlawful, unfair, unprocedural, illegal and in violation of the petitioner's statutory and constitutional rights under articles 47 and 50 of the Constitution, section 47 of the Fair Administrative Act and sections 40, 43 and 45 (5) of the Employment Act 2007 and is therefore null and void and of no effect in law.
 - b. A declaration that the respondent has violated the petitioner's right to fair remuneration under article 41 (2) (a) of the Constitution from December 2017 to date.
 - c. An order for the payment of the sum of Kshs 4,229, 250/= being underpayment for 50 months from December 2017 to date (January 2022) at Kshs 84,585/= per month.
 - d. An order of payment of Kshs 34, 619, 480/= being salary allowances to the petitioner for 4 years eight months from April 2022 until the age of retirement at 60 years at Kshs 618,205= per month.
 - e. Full payment of the petitioner's pension and all benefits and allowances due to the petitioner from the respondent upto and including the date of retirement at 60 years.
 - f. Certificate of service from the respondent to the petitioner
 - g. Costs of this petition to be paid by the respondent to the petitioner.
 - h. Interests on all the above awards at court rates from the date of filing this suit till payment in full.
 - i. Any other relief the honourable court deems just, fair and expedient in the circumstances of this case.
14. The petition is supported by the affidavit of the applicant which reiterates and expounds on the grounds on the petition.

Respondent's Case

15. The respondent in the replying affidavit through the Head of Human Resource, Riju Dutta, states that it complied with the steps to be taken in case of redundancy. That it gave notice of redundancy which informed the petitioner of the redundancy and the benefits owed to him. It said that it gave the petitioner 2 months' notice prior to the redundancy, an indication that there is no malicious intent on the part of the 1st respondent.
16. It is deposed that the redundancies declared were informed by the challenging circumstances under which the 1st respondent is operating and the need for the 1st respondent to scale down and restructure its operations to ensure it remains competitive. It is submitted that the 1st respondent did consider its performance, manpower requirements in relation to the future, seniority, ability of each employee



among other relevant facts when deciding to declare certain employees redundant in accordance with the provisions of the applicable laws.

17. It is deposed that the 1st respondent is not in the process of employing any person to replace the petitioner and there are no such intentions over replacement of the petitioner as the position of the legal manager is being made redundant and does not exist anymore. The witness further deposes that the claim that there has been a scheme to replace top managers with Indians is unfounded. It says that the redundancy affected all cadre of employees, and the fact that there have been several employees who have been affected and declared redundant speaks to the current financial challenges being experienced by the 1st respondent but also the need to improve the financial performance of its business in Kenya and the larger East African region which has been impacted over the past several years, a fact the petitioner is aware of.
18. It is deposed that the allegation that the former marketing manager was replaced by an Indian is untrue. The current marketing manager it is said is a Kenyan and all the staff in the marketing department are Kenyans. That the allegation that the contract of the factory manager was terminated and replaced by an Indian is untrue, the correct title is that of the Production Manager, and none has had their contract terminated. The chief accountant and the account receivable manager both of whom are Kenyans are carrying out tasks previously undertaken by the finance controller and the Chief Financial Officer position is headed by a Kenyan.
19. The witness also states that from a reading of the petition the honourable court is being called upon by the petitioner to supervise the actions of the respondent, a position that is completely untenable as the honourable court cannot second guess the commercial or business efficacy of the respondent's ultimate decision in the case. The witness referred to the copy of the financial report for the year 2021 which points to the evidence that the business took a downturn.
20. It is reiterated that the notice of redundancy was lawful, fair, procedural and legal and was not in violation of the petitioner's statutory and constitutional rights as provided under articles 47 and 50, sections 6 of the [Fair Administrative Actions Act](#) and sections 40, 43 and 45 (5) of the [Employment Act](#).

Petitioner's Submissions

21. The petitioner submits that the action of redundancy was in violation of section 40 of the [Employment Act](#) 2007 requiring that before the redundancy is effected a notice be given to the employee and the labour officer outlining the redundancy criteria used and the reasons for the redundancy. The petitioner says that whilst the respondent says that they wrote letter to the labour office on the November 25, 2021, the Act requires that the letter be written personally to the employee and the labour officer at the same time so as to notify the employee of the intention to render his employment redundant. No letter was written to the petitioner on the November 25, 2021 at the same time as the labour officer on November 29, 2021 when the labour officer allegedly replied to the respondent.
22. The petitioner further argues that the employer is also required by the law to set a selection criteria under section 40 (1) (c) of the [Employment Act](#) which is to justify the legal requirements of fairness and [Fair Administrative Action](#) under articles 47 and 50 of the [Constitution](#) and section 7 of the [Fair Administrative Actions Act](#). This according to the petitioner was not done by the respondent and no evidence has been produced by the respondent that it notified the petitioner of the intended action before the letter dated the January 27, 2022.
23. The petitioner was not notified or copied in the letter dated the November 25, 2021 by the respondent to the labour office and the petitioner was not given or notified of the redundancy selection criteria as required under section 40 (1) (c) of the [Employment Act](#) 2007. The petition was only served with the



redundancy letter dated the January 27, 2022 without any hearing or opportunity to be heard on the reasons and procedure used to determine the staff who were to be declared redundant.

24. It is further argued that the petitioner was not given the opportunity of being heard before the redundancy and this was procedurally unfair and in contravention of articles 47 and 50 of the Constitution and the principles of fair hearing and natural justice as enshrined both in the Constitution and article 23 (3) of the Universal Declaration of Human Rights which are not only safeguarded by the international law, the Constitution of Kenya and statutory provisions.
25. It is further contended that by the time the redundancy letter dated the January 27, 2022 was given to the petitioner, the respondent had already made the decision without any notice or notice to show cause and therefore petitioner was not accorded any hearing or opportunity to be heard and was therefore condemned unheard in violation of the petitioner's constitutional, statutory and labour rights.
26. The petitioner had not been afforded the mandatory statutory requirement of being notified of the reasons of the intended redundancy or the selection criteria being used in the selection of the employees to be rendered redundant so as to afford the petitioner an opportunity to challenge the said reasons and criteria used in the selection of the employees to be declared redundant.
27. The petitioner submitted that none of the legal managers in Africa have been affected except the petitioner and this clearly shows bias and discrimination against the petitioner by the respondent especially the CEO Kenya and his team who came from Tanzania have been unhappy with the petitioner due to his exemplary performance as recognised by the head office in India and the letter dated the June 21, 2021 shortly before the redundancy.
28. The respondent company has failed to show criteria used in the selection of the petitioner based on the principles set out by section 40 (1) (c) which includes skill, length of service, ability, reliability, seniority and equal treatment. It is urged that the respondent has not demonstrated that it applied the above criteria in selecting the petitioner for redundancy considering that the petitioner had worked for the respondent and its predecessors for 22 years and was only remaining with 4 years and 8 months to retire.
29. The petitioner submits that it is clear and evident that the respondent violated the petitioner's rights under articles 27, 41(2), 47 and 50 of the Constitution and did not follow the laid down procedures under section 40 of the Employment Act and reasons given were not justified under section 43 of the Employment Act 2007.
30. The petitioner relied on the case of Judicial Services Commission v Beatrice N. Mosira (2020) eKLR where it is said the court held that:-

“The respondent complained that she was not granted a fair hearing and it is indisputable that due process is a fundamental aspect of the rule of law. The right to a fair hearing is encapsulated in the alteram partem rule (no person should be condemned unheard and founded in the well-established principles of natural justice. It is secured under section 41 of the Employment Act 2007.”
31. The petitioner urged the court to follow the above decisions of the Court of Appeal based on the proved and undisputed facts herein and declare the redundancy letter dated the January 27, 2022 unfair, unlawful, unprocedural, illegal and in violation of the petitioner's constitutional rights.
32. The petitioner also referred to the case of Kenya Union of Journalist & Allied Workers v Nation Media Group Ltd 2013 eKLR where it was held that it is the responsibility of the employer to strictly comply with the law which was couched in mandatory terms by involving the employee at every stage before



the declaration of redundancy and avail evidence of the selection criteria which must be compliant with the provisions of the law.

Respondent's Submissions

33. The respondent submits that section 40 (1) of the *Employment Act* 2007 allows the employer to terminate a contract of service on account of redundancy. The employer's right to terminate under this provision must be exercised in a manner that is substantially justified and procedurally fair. The respondent relied on the case of *Kenya Airways Limited v Aviation and Allied Workers Union Kenya & 3 others* 2014 eKLR for the proposition that termination of a contract on redundancy is valid where the reasons for the redundancy arises from the operation requirements of the employer
34. The respondent also cited the Court of Appeal's case in *Kenya Airlines Pilots Association v Kenya Airways Public Limited; Central Organization of Trade Unions (Interested Party)* (2020) eKLR where it was held that the respondent was entitled to make commercial judgment on the best action to take to ensure the commercial viability of the enterprise based on the financial crisis it was undergoing. The commercial decisions the respondent was entitled to take included workforce reduction.
35. The respondent argues that collectively considered, the courts have held that the employers have the prerogative to determine the structure of their business and therefore make some positions redundant. The respondent states that this may be actuated by decrease in business, operational changes and the necessity to reorganize to enhance operations and prevent closure.
36. The respondent says that it experienced financial challenges due to reduced purchase orders and low sales which led to huge inventory affecting the 1st respondent's business. The economic fragility of the business necessitated the 1st respondent to restructure and cut down on its labour force which contributed to a significant portion of the overall expenses
37. That the petitioner's allegations that the 1st respondent was enjoying a period of economic prosperity at the time of the termination is based on the misapprehension of separate legal personality. It is said that the petitioner referred to the report of the Global Chairman of Godrej Consumer Products (International) to allude to the growth of the 1st respondent which is a separate legal personality from the 1st respondent. The respondent says that the report provided by the 1st respondent is the accurate indicator of the 1st respondent's financial health.
38. The respondent also says that it followed the mandatory statutory procedures set out in section 40 of the *Employment Act* in terminating the petitioner and that it gave notice as required. The respondent relied on the case of *Thomas De La Rue (k) Ltd v David Opondo Omutelema* 2013 eKLR where the court expressed itself on the notice required in section 40 (1) (a and b) and held that the two sections provide for two alternative notices which depend on whether the employee to be terminated is a member of trade union or not holding that

‘ It is quite clear to us that sections 40 (a) and 40 (b) provide for two different kinds of redundancy notifications depending on whether the employee is or is not a member of trade union. Where the employee is a member of a union, the notification is to the union and the labour officer at least one month before the effective date of redundancy. Where the employee is not a member of the union, the notification must be in writing to the employee and the labour officer. Section 40 (b) does not stipulate the notice period as is the case in 40 (a) , but in our view, a purposive reading and interpretation of the statutes would mean the same notice period is required in both situations’
39. The respondent says in the present case the petitioner was not unionised, and the notice under section 40 b of the Act is applicable. Therefore, the 1st respondent was under a duty to issue one month notice



- of the intended termination to the petitioner and the local labour officer. It is argued that the 1st respondent discharged this duty by informing the petitioner and the Ministry of Labour and Social Protection, Department of Labour (the ministry) of the intended termination.
40. The 1st respondent also says that it used sound selection criteria to determine the cadre of employees to be declared redundant and followed the selection criteria under section 40 (1) (c) of the Act taking into account the seniority in time and skill, ability, and reliability of the employee to be affected.
 41. The petitioner was the only legal manager in the company. The position of the legal manager was declared redundant and therefore no longer available in the organisation and as it was no longer viable for the company to maintain the position.
 42. The respondents also relied on the Court of Appeal case of *Commercial Bank Limited v Kenya Grange Vehicle Industries Limited* 2017 eKLR where it is said the court upheld the parole evidence rule which dictates that where the intentions of the parties have been reduced to writing, it is generally not permissible to adduce extrinsic evidence, whether oral or written either to show the intention, or to contradict, vary or add to the terms of the document, including implied terms.
 43. The claimant was therefore only entitled to the monthly salary stipulated in the employment agreement which he signed freely. The 1st respondents also relied on case of *Peter Ngunjiri Kariuki v Board of Management Magomano Secondary School* 2022 eKLR where it was held that the issue of underpayment does not arise where the salary was mutually agreed upon between the parties through an agreement and the court was precluded from varying the agreement unless it offends the law.
 44. The 1st respondent argues that the petitioner freely entered and signed the contract of employment wherein the remuneration was clearly stipulated as Kshs 402, 398/= per month and there was subsequent salary review on the June 21, 2021 where the salary was increased to Kshs 477, 727/- per month. The 1st respondent says it is not aware of the salary being increased to Kshs 500,000/- per month as alleged increment is not included anywhere in the agreement.
 45. The respondents on the issue as to whether the petitioner's termination was motivated by racial bias cites the Supreme Court's case of *Samson Gwer & 5 others v Kenya Medical Research Institute and 3 others* 2020 eKLR on the threshold to be discharged before a claim for racial discrimination can succeed. The petitioner is under common law obligation to establish the veracity of their claim of discrimination before the onus of proof shifted to the employer and that there is a higher standard of proof than a civil claim of discrimination on a balance of probability.
 46. It has been argued that overall, the petitioner failed to prove the existence of racial discrimination as there was no similarly situated category of persons that were treated differently based on race. The petitioner therefore failed to offset the standard of proof for racial discrimination as a constitutional claim as set out in *Samson Gwer supra* and the claim according to the respondents is therefore misconceived.

Determination

47. It is common cause that the petitioner was terminated on account of redundancy. The question that falls for consideration is whether there was genuine reason to terminate on the basis of redundancy, whether due process was followed and the remedies, if any, the petitioner is entitled. It is not lost to court that the dispute before court has been initiated through a constitutional petition. Where raised, it must be pleaded with specialty and proved on preponderance of evidence as set out in the case of *Anarita Karim Njeru v Republic* (1979) e KLR.



48. The process of redundancy is regulated by section 40 of the *Employment Act*, 2007. The section has been interpreted by the Court of Appeal in a number of decisions.
49. In *Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others* [2014] eKLR the Court of Appeal held that section 40 (1) (a) stipulates, 1.

“An employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions;- a) Where the employee is a member of a trade union, the employer notifies the union to which the employee is a member and the labour officer in charge of the area where the employee is employed of the reasons for and the extent of the intended redundancy, not less than a month prior to the date of the intended termination’the learned judge of the High Court in the *Kenya Union of Commercial Food and Allied Workers v British American Tobacco* Cause No 143 2008 outlined the manner in which redundancy consultations should be conducted when he stated, “The legal obligation on the parties to consult on the matter is designed to enable the parties to explore ways and means of minimizing the social and economic impact of the loss of jobs. The obligation is primarily imposed on the employer. The union’s duty is to make reasonable counter proposals to the employer’s proposals with a view to giving the affected employees a “soft landing ground”. In our view such consultations must be meaningful and held within the true spirit of collective bargaining. The employer ought to give the union an opportunity to influence its decision. There must be a genuine attempt to resolve the matter through objective consideration of the proposals generated by the parties to mitigate the harsh impact of redundancy.

50. In *Cargill Kenya Ltd v Mwaka & 3 others* [2021] KECA 115, the Court of Appeal discussed at length the import of the notice required by section 40(1)(a) & (b) of the *Employment Act*, 2007 and observed that:

While the requirement of consultation was not expressly provided in section 40 of the *Employment Act*, that requirement was implied, as the main reason and rationale for giving the notices in section 40(1) (a) and (b) to the unions and employees of an impending redundancy. Section 40(1) of the Act did not expressly state the purpose of the notice. Although it also did not expressly provide for consultation between the employer and the employees or their trade unions before the final decision on redundancy was made, the requirement for consultation was provided for in the Kenyan law and implicit in the *Employment Act* itself. By dint of Article 2(6) of the *Constitution*, the treaties and conventions ratified by Kenya were part of the law of Kenya. Kenya was a State party to the International Labour Organization (ILO), which it joined in 1964 and was bound by the ILO conventions. article 13 of Recommendation No 166 of the ILO Convention No. 158-Termination of Employment Convention, 1982-required consultation between the employers on the one hand and the employees or their representatives on the other before termination of employment under redundancy. In interpreting statutes, the courts had the function of filling in the textual detail by implication, which arose either because it was directly suggested by the words expressed, or because they were indirectly suggested by rules or principles of law which were not excluded by the express wording of a statute. Consultations on an intended redundancy between the employer and the relevant unions, labour officials and employees were implied by section 40(1)(a) and (b) of the *Employment Act*. Consultation was also specially required by Article 47 of the *Constitution* and section 4(3) of the *Fair Administrative Action Act*. An administrative action was defined under the *Fair Administrative Action Act* to include any act, omission or decision of any person, body or authority that affected the legal rights or interests of any person to whom such action related. Employers fell within the category of persons whose action, omission or



decision affected the legal rights or interests of employees, and more so the redundancy by the appellant in the instant appeal was not contested. The appellant was therefore also bound by the provisions on consultation required by article 47 and section 4(3) of the *Fair Administrative Action Act*. The purpose of the notice under section 40(1)(a) and (b) of the *Employment Act*, as was to give the partisan opportunity to consider measures to be taken to avert or to minimise the terminations and measures to mitigate the adverse effects of any terminations on the workers concerned such as finding alternative employment. The consultations were 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 was unavoidable. That meant that if parties put their heads together, chances were that they could avert or at least minimize the terminations resulting from the employer's proposed redundancy. Redundancy was inevitable, measures should have been taken to ensure that as little hardship as possible was caused to the affected employees.

51. There is the redundancy notification dated the November 25, 2021 which was served and received by the local labour office on the redundancy of a number of the respondent's workers including the petitioner. There is no evidence the affected employees were informed of such intention to declare them redundant. Clearly section 40 (b) provides that if employee is not a member of a union the employer should notify him personally and the labor officer in tandem with section 40(a) the union is to be given one month notice and so similarly should the employee be given one month notice.
52. In the case of *Kenya Airways Limited v Aviation & Allied Workers union Kenya* supra the court held that an employee shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions (a) where 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 employee is employed reasons for and extent of intended redundancy a month prior to the date of intended termination.
53. It follows if the employee is not a member of a union he should get informed equally a month before termination of the intended termination.
54. The employer should also establish he has considered the ability, skill and reliability of each employee in selecting the employees affected by the redundancy.
55. There is no evidence on record that the respondent issued such a notice to the claimant. In the termination letter dated January 27, 2022 the claimant was just informed his services had been terminated with effect of March 31, 2022. The decision had already been made and there is as well no evidence of what criteria the respondents applied to decide who was to go and who was to remain.
56. The case laws on redundancy also provide that the respondent should consult with the claimant before redundancy is declared in order to allow such a claimant to have a soft landing.
57. In the case of *Kenya Union Of Commercial Food And Allied Workers v British American Tobacco* cause No 143 of 2020 the court held

“in our view such consultation must be meaningful and held within the true spirit of collective bargaining”

in other words parties must be given an opportunity to explore ways and means of minimising the social and economic impact of losing a job.

58. In the case of *Cragill Kenya Ltd v Mwaka & Others* (2021) KECA 115 the court held that even if consultation is not provided in section 40 of the *Employment Act* between the employer and employee however it is implied in article 2(6) *Constitution* of Kenya 2010.



59. The case of *Jane I Khalechi v Oxford University Press E.A Limited* (2013) eKLR the court held that section 40 of *Employment Act* gives conditions precedent before one is declared redundant. These conditions outlined in the laws are mandatory and not left to the choice of the employer. Redundancies affect workers livelihoods and where this must be done by the employer the same must be put into consideration.
60. The petitioner had worked for the respondent from 2000 to 2022 and had been recommended for promotion and increment of salary in severally. He was then declared redundant with effect from March 2022.
61. The respondent needed to comply with the laws set out clearly as per section 40 of the *Employment Act* as well as the authorities on termination of employment by redundancy. In this case they only issued the petitioner with a redundancy letter and gave him two months' notice.
62. On the matter of discrimination and violation of the petitioner's constitutional rights, it is my considered opinion that the issues raised are adequately dealt with by the subject legislation that is section 40 of the *Employment Act* 2007. The petitioner has not shown or provided evidence on the respective managers for the various portfolios who were being replaced with persons of Indian descent. The allegation of discrimination is not established and the court will not dwell on the same.
63. On the question of salary underpayments, the court agrees with the respondents that the salary of the petitioner was never increased to the Kshs 500,000/- The email communications and produced as exhibits hereto on the petitioner's documents shows that the issue of salary increase above the amount stated was to be escalated. It therefore can only be construed as a preliminary contractual negotiation which never matured to fruition and does not therefore form part of the terms of employment contract. The court accordingly rejects the claim for salary underpayments.
64. As for the redundancy notice issued by the respondent dated January 27, 2022 the court finds it fall short of the mandatory provisions of sections 40, 43, 45(5) of *Employment Act* and therefore holds the said constitutes unfair termination of employment and so enters judgment in favour of the petitioner as per the petition dated February 28, 2022.
65. The court gives the following reliefs and prayers to the petitioner.
1. The petitioner is awarded 15 days salary for each year worked (to be up to worked out by the parties).
 2. Salary for March 31, 2022(to be worked out by the parties).
 3. 2 months' salary in lieu of notice (to be worked out by the parties).
 4. Earned but un utilised leave days to be worked by the parties.
66. The court has declined to grant any awards for the four years not served as is not supported in law.
67. Also award for underpayment is not awarded as there was no contract for any increment in salary.
68. The petitioner's pension benefits should be claimed from his pension scheme.
69. The certificate of service to be issued to the petitioner within 30 days from today's date.
70. Costs of this petitioner to be awarded to the claimant.
71. Also interest on the above award is awarded to the claimant from date of award till full payment. Case will be mentioned on February 6, 2023 to record the final award.



Orders accordingly.

DELIVERED, DATED AND SIGNED IN NAIROBI THIS 7TH DECEMBER, 2022.

ANNA NGIBUINI MWAURE

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 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.

ANNA NGIBUINI MWAURE

JUDGE

