



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 184 OF 2016

GEORGE OTIENO RAMBO.....CLAIMANT

VERSUS

NATION MEDIA GROUP LIMITED.....RESPONDENT

JUDGMENT

INTRODUCTION

1. Through its letter of appointment dated 16th April, 2014, the Respondent company confirmed its offer of employment to the Claimant on the terms and conditions that were put thereon, *inter alia* that the latter was being employed in the position of Brand Manager- Daily Nation, Marketing department, within the Newspaper Division. Following a successful probation, the Claimant was confirmed to the position on the 15th August, 2014.
2. Subsequent to the confirmation of employment, the Respondent transferred the Claimant to work under the Radio Department. His salary was raised from Kshs.108,600.00 to 112,400.00, with a monthly car allowance of Kshs.81,400.00, maintained.
3. The employer-employee relationship that had taken off smoothly, encountered serious headwinds one year and four and half months into the journey. On the 31st August, 2015, the Respondent issued what it termed a redundancy notice to the Claimant, intimating to him that his employment with the Respondent will come into termination with effect from 1st September, 2015 on account of redundancy. His last day of work thereby marked as 31st August, 2015.
4. It is here that the Claimant's case finds origin.

THE CLAIMANT'S CASE

5. The termination did not settle down well with the Claimant. Maintaining that the termination was unlawful, unfair, illegal and disguised as a redundancy, he has approached the seat of justice through his Memorandum of Claim dated 10th February, 2016, seeking the following reliefs;

- [a]. Compensation for wrongful termination equivalent to 12 months' salary amounting to Kshs.2,325,612.00;
- [b]. One month's gross salary for the month of August amounting to Kshs.193,801.00;
- [c]. Payment in lieu of notice of termination amounting to Kshs.193,801.00;
- [d]. Service pay amounting to Kshs.96,900.50;2
- [f]. Compensation for 730 overtime hours worked and not paid;
- [g]. Certificate of service;
- [h]. Interest at court rates on a-f from 7th October, 2015 until full payment; and

[i]. Cost of this suit.

6. The Claimant testified, adopting the contents of his witness statement dated **3.2.2016** as evidence in chief. The documents that he contemporaneously filed with the statement of claim, were by consent produced as his Exhibits 1-5, in the order they are in his bundle of documents.

7. According to the letter of appointment, his basic monthly salary was set at Kshs.108,600.00. He was entitled to a monthly car allowance of Kshs.81,400.00. The car that he was using was purchased by him out of proceeds of a car loan that he was granted by the Respondent.

8. The Claimant contended that he diligently executed his duties and this can be exemplified by the appraisal reports that are in the possession of the Respondent. The Claimant further stated that during the period he was in the employment of the Respondent, he worked even outside the time stipulated by the Employment Act.

9. On the 31st August, 2015, he was issued with a redundancy letter dated 31st August, 2015. He got prompted to seek clarifications from his immediate boss, who informed him that he had not at any time prior to the issuance of the letter, been informed of the redundancy.

10. According to the Claimant, the termination was unlawful, unfair, illegal and disguised in redundancy. The termination was clothed as a redundancy yet the same was a summary dismissal.

11. The termination was without adherence to the provisions of the Employment Act. The Respondent breached the terms of the Employment contract when it failed to issue the Claimant with a one month's notice of termination.

12. The Claimant asserted that the termination gravely inconvenienced him. He had made several commitments anchored on the fact that he was a permanent employee. The actions that he complains of have visited mental anguish on him. This entitles him to general damages.

13. Cross-examined by counsel Weru, the Claimant admitted that under the letter of appointment clause 1[c], the Respondent had a right to deploy him elsewhere. As regards the redundancy letter dated 31st August, 2015, the Claimant testified that it informed there was a move to reorganize the radio Department, hence the redundancy. He maintained that prior to the letter there were no consultations/discussions.

14. The move by the Respondent did not affect him alone but about 37 [thirty-seven] other employees. He asserted that Respondent never created any room for negotiations.

14. The Claimant admitted that at the time he was leaving employment, he had not fully liquidated the facility [car loan]. He owed approximately Kenya shillings one million.

16. The Claimant asked by counsel Weru, why he was claiming Kshs.193,800.00 as one month's salary in lieu of notice instead of Kshs.112,401.00, which he was earning at the time of termination, the Claimant expressed that this figure was inclusive of allowances. However, he was quick to admit that upon leaving employment he was not expecting to continue earning allowances. He asserted that the salary was negotiated in a package.

17. Cross examined on his claim for overtime and referred to the letter of appointment- clause 1[e], the Claimant made an admission that the letter of appointment made a provision that he would work outside the 8 hours due to the nature of his work. He stated there was no provision for overtime payment in the Employment contract.

18. The Claimant stated that he was given the termination letter and told not to be in office the following day. This was too abrupt, it placed him into a situation of family strain.

19. The separation payment offer that the Respondent made, was in accordance with the terms of the contract. On the Respondent's counter claim, he held the view that he was not obliged to settle the sums thereof upon the reason that, but for the Respondent's act of unlawfully terminating his employment, he would have cleared repaying the loan.

DEFENCE CASE

20. The Claimant filed response to the memorandum of claim, and a counterclaim. In the response it denied the Claimant's claim, asserting that the termination of the Claimant's employment was occasioned by valid operational reasons, namely a review of Radio business strategy. A decision was made by the General Manager to do away with the office of Brand Manager.

21. The Respondent pleaded that the Claimant's claim for overtime worked was without basis. That in terminating the Claimant's employment, it did not affront any procedure and or provision of the law.

22. In its counter claim the Respondent claimed against the Claimant for a sum of Kshs. 1,071,650.00 being;

[a]. Car loan balance of Kshs. 1,040,625.00;

[b]. Car insurance balance of Kshs. 26,025.60;

[c]. Travel Advance due of Kshs. 5,000.00.

23. The Respondent presented Mr. Sekou Owino, its Head of Legal Department to testify on the Response and counterclaim. The witness adopted the contents of his witness statement dated 14th December, 2018 as his evidence in chief. The documents that the Respondent filed under the list of documents dated 19th day of May, 2016, were produced as exhibits number 1-4, by consent.

24. The witness testified that he was aware that the letter of appointment dated 16th April, 2014, formed the basis of the employment relationship between the Claimant and the Respondent.

25. Relevant to this matter, the witness pointed out various clauses of the contract agreement stating that: -

i. Pursuant to clause 1(e) of the letter of appointment the Claimant undertook to work outside the normal working hours without being entitled to claim overtime.

ii. The Claimant under clause 1(h) of the letter of appointment, he undertook to serve in any of the Respondent's Divisions, Branches, Departments and Sections and in any of the Respondent's subsidiary or associated companies.

iii. Either of the parties to the contract of employment was entitled to terminate the employment by giving one month's notice of such intention in writing to the other party or forthwith by paying to the other party one month's basic salary.

26. The witness testified that as a consequence of a review of the Radio business strategy, the position that the Claimant was holding was abolished. The Respondent notified the Claimant and the area labour officer of the intention to declare Claimant redundant because his services were no longer required.

27. That after notifying both the labour officer and the Claimant, the Respondent terminated the Claimant's employment by a letter dated 31st August 2015 and offered to pay him all the benefits he was entitled to.

28. According to the witness the Claimant was entitled to:

- a. A prorated basic salary payment up to and including 31st August, 2015;
- b. Prorated car allowance payment up to and including 31st August, 2015;
- c. 1 month's pay in lieu of termination notice amounting to Kshs.112,401.00;
- d. Payment of annual leave days earned and not taken for 25 (twenty-five) days amounting to Kshs.93,668.00;
- e. 1 month's salary for every year of work amounting to Kshs.140,501.00;
- f. 1 month's pay in lieu of redundancy notice amounting to Kshs.112,401.00;
- g. Pension subject to the Claimant completing the clearance certificate issued to him.

29. He stated that the Claimant has never cleared with the Respondent. This witness testified to the loan that the Respondent granted the Claimant. He stated that upon an application by the Claimant, the Respondent granted him a car loan of Kshs.1,350,550.00. The proceeds of this facility were used to purchase that motor vehicle Registration No. KBZ 184 G, that got jointly registered in the names of the combatants herein. The witness tendered as evidence, the loan application form and the log book, as evidence.

30. The witness took a position that it was an express term of the grant of the facility, that should the Claimant cease to be an employee of the Respondent then the Respondent would get entitled to deduct from any dues payable to the Claimant the amount due and owing by the Claimant at the time of separation.

31. The witness testified that at the time of separation the Claimant owed the Respondent a total sum of Kshs.1,071,650.60 on various accounts namely;

- i. Car loan balance of Kshs.1,040,625.00;
- ii. Car insurance balance of Kshs.26,025.60;
- iii. Travel allowance of Kshs.5000.00.

32. Regarding the certificate of service, it was his evidence that the same at all material times was ready for collection but the Claimant never bothered to collect the same.

33. According to this witness the letter to the Ministry was dated 27th August, 2015 and it had an appendix of the list of employees who were to be affected.

34. The offer to the Claimant was arrived at taking into account the fact that car allowance was only payable if the Claimant was in employment.

35. The witness stated that the letter dated 31st August 2015 was a proper notice because it was in writing and it intimated that the Claimant was to be paid. The letter stated that the pension was to be paid independent of the other benefits. The Claimant had to claim the same, he stated.

36. The witness acknowledged the being of the demand letter dated 7th December 2015 and admitted that the same indicated that there was a dispute between the parties.

37. Before the redundancy notice, there was an assessment though the same was not placed before Court.

38. Accordingly, the reason for the redundancy, Mr Sekou stated, was as a result of a review strategy, however he was not aware whether or not the Claimant was consulted.

39. Responding to a question on the car allowance, he stated that the car allowance was based on the fact that he (the Claimant) was working for the company and he had to be facilitated.

40. On the letter of 27th August 2015, he testified that the same was signed by the group HR director. The area labour officer acknowledged receipt of the same by stamping the same. Four days after the receipt, the notice took effect.

41. Asked by Court whether there was any material placed before Court indicative of the selection criteria, on the employees that were to be affected, he answered in the negative.

42. Under re-examination by his counsel, the witness stated that the Respondent has not refused to pay the Claimant. The Claimant might be owing the Respondent, he asserted.

THE CLAIMANT'S SUBMISSIONS

43. In his submissions counsel for the Claimant sees the following issues as the issues that present themselves for determination by this Honourable Court, thus:

- i. Whether the letter dated 31st August 2015 to the Claimant and the letter dated 27th August, 2015 to the Ministry of Labour constitute the notices as envisaged under section 40 of the Employment Act, 2016;
- ii. Whether the termination of the Claimant on redundancy is unfair and unlawful;
- iii. Whether the Claimant is entitled to the prayers sought in his memorandum of claim;
- iv. Whether the Respondent is entitled to its counterclaim as prayed.

44. Counsel for the Claimant submits that the letter dated 31st August 2015 was served upon the Claimant on the same day after lunch. That this was the 1st time he was encountering the fact of termination of his services on grounds of redundancy. The Respondent did not controvert this testimony. He submitted further, the Claimant being not a member of any union, he was to be personally notified by the employer in writing, of the intended redundancy in accordance with section 40 (i) (b) of the Employment Act. Similarly, the section requires that the Labour officer be notified in writing by the Respondent of any intended redundancy.

45. Counsel cites the Fair Administrative Action Act No. 4 of 2015. Section 4 (3) provides that: -

“a person affected by an administrative decision must be given prior and adequate notice of the nature and reasons for administrative action that would adversely affect his rights and fundamental freedoms.”

Article 13(1) of the ILO Convention, 1982, makes it mandatory for the employer to give early and detailed information on the proposed redundancy to the affected employees as well as the Labour officer, which was never done in the instant matter. He submits. According to him the provisions of the Convention are applicable in this matter by dint of the Provisions of Article 2 (6) of the Constitution.

46. He submits that under the provisions of section 40 (1) (2) of the Employment Act, 2007 two notices are contemplated, he relies on the holding of Maraga JA (as he then was) in Kenya Airways Limited Vs Aviation & Allied Workers Union & 3 others [2014] eKLR, thus;

“My understanding of this provision is that when the employer contemplates redundancy, he should first give a general notice of that intention to the employees to be affected or their union. It is that notice that will exhibit consultations between parties, The Act requires one month's notice. The period runs from the date of service of that notice. It is after conclusion of consultations on all issues of the matter that notices will be issued to the affected employees of the decision to declare them redundant.”

47. On issuance of two (2) distinct notices the Claimant further cites the cases of Constitutional Petition No. 25 of 2014 – Gladys Muthoni &

48. Counsel concludes that the question whether the notice issued to the Claimant and the labour officer were in accord with the provisions of section 40 (1) (b) of the Employment Act 2007, should be in the negative.

49. The letters dated 31st August, 2015 and 27th August, 2015 issued to the Claimant and the labour office respectively did not constitute proper notices as envisaged under section 40(1) of the Employment Act.

50. On whether the termination of the Claimant on account of redundancy is unfair and unlawful, counsel submitted that the provisions of section 40 (1) of the Employment Act which is mandatory having been affronted, the termination was clearly unfair and unlawful.

51. The Claimant submits that the Respondent was under duty to prove that there existed a valid reason for the alleged move of redundancy. He submits that the Respondent failed to do this. The Claimant was not involved when the alleged review was being undertaken. The result of the review, and how it was undertaken remain undisclosed to the Claimant and Court. According to the submissions, the Claimant was summarily dismissed without justification.

52. Counsel submitted that consultation between an employer intending to terminate employment of employee(s) on account of redundancy or a trade union (where the employees are members of a trade union is a must). He relies on the Court of Appeal decision in the Barclays Bank of Kenya case (Supra), and more specifically the reference that was made by the Court to Article 13 of the Recommendation No. 166 of the ILO Convention No. 158 – Termination of Employment Convention, 1982, the emphasis by Justice Maraga JA (as he then was) on the importance of consultations envisaged by the Employment Act, in the case for Kenya Airways (supra).

53. The Respondent failed to demonstrate to Court by way of evidence that the Claimant was engaged in, and informed of, the redundancy process in time. Too that the Respondent did not provide any evidence of consultation, and the criteria used to pick the Claimant was not explained.

54.54. The termination was procedurally and substantively unfair, and unlawful.

55. The Claimant seeks compensation pursuant to the provisions of section 49 (1) of the Employment Act 2007 to an extent of 12v [twelve] months' gross salary. Seeking for the 12 [twelve] months' pay which is the maximum provided for in the section, the Claimant cites the unjustifiability of the termination, since the torment the termination which he termed unfair and wrongful caused on the Claimant and his family. The action of the Respondent to refuse to pay the Claimant his salary for August 2015, was meant to demean him. He submits that in computing the compensation, the sum of Kshs.193,801 should be used as the salary.

56. The other reliefs should be awarded as prayed for in the statement of claim, save for prayer F which has been abandoned.

57. The Claimant asserts that the counter-claim by the Respondent is unmerited. He submits that he was given the loan upon basis that he was a permanent and pensionable employee of the Respondent.

58. The failure to fully liquidate the loan was as a result of the Respondent's act of abruptly cutting short his employment, contrary to his legitimate reputation. The Respondent acted in bad faith. He should not be allowed to benefit from the result of his actions.

59. The Claimant submitted through his counsel that the claim for Kshs.26,025.60 and 5,000.00 were not specifically proved by the Respondent as required by law. The same should be dismissed.

THE RESPONDENT'S SUBMISSIONS

60. In the written submissions that were filed by the Respondent's counsel, the Respondent identifies the following issues as issues for determination in this matter, namely:

- a. Whether the termination of the Claimant by way of redundancy was fair and valid.
- b. Whether the Claimant is entitled to the reliefs sought; and
- c. Whether the Respondent is entitled to the reliefs sought in this counterclaim.

61. It was submitted that the termination of the Claimant's employment on account of redundancy was a product of the Respondent's decision made in the year 2015, to review business strategy of its radio department to meet the change in the market demand. Consequently, various positions were declared redundant, including the role of the Claimant. That the notice sent to the labour office on the 27th August 2015, is testament of the fact that besides the Claimant's position, various other positions were abolished.

62. According to the Respondent, section 40 of the Employment Act provides that redundancy is a legitimate ground for terminating a contract of employment. In this submission it found comfort in the decision in Kenya Plantation and Agriculture Workers Union Vs. James Finlys (K) Limited [2013] where the Judge held as follows: -

“The Court considers that the employer is entitled to undertake redundancy just like other human resource functions like recruitment and selection, appointment and promotion, training and development and termination of the contract of service

including dismissal on disciplinary grounds. The general principle is that the Court shall not interfere in the employer's entitlement to undertake these functions and interference by the Court shall be exercised sparingly."

63. Reliance was further placed on the decisions in *Kenya Airways Limited Vs. Aviation & Allied Workers Union Kenya & 3 others [2014] eKLR, Tobias Ongaya Auma & 5 others Vs. Kenya Airways [2007]*.

64. The Respondent concluded that it had justifiable reasons warranting declaration of redundancy.

65. It was further submitted that section 40 (1) (b) of the Employment Act provides that where an employee is not a member of a trade union (as in the current case), the employer should notify the employee and labour officer in writing of the redundancy. That the letter dated 27th August 2015, to the Nairobi County Labour Officer, and the letter dated 31st August 2015, satisfied discharge of the Respondent's obligation under the provision.

66. The letter issued on 31st August 2015, was compliant with the provisions of section 40 (1) (b) and (f) of the Employment Act to the extent that it duly informed the Claimant of the reason and the extent of the redundancy and give the Claimant one month's pay in lieu of notice.

67. Counsel for the Respondent argued that unlike for an employee who is a member of a trade union, an employee who is not, is only entitled to a one month's notice under section 40 (1) (b), not two as the Claimant's counsel submitted. Counsel placed reliance on the decision in the case of *Africa Nazarene University Vs. David Mutevu & 103 others [2017] eKLR*. He submitted further that the Respondent duly complied with provisions of section 40 of the Employment Act and that termination was fair for both substantive reasons and procedural fairness.

68. Counsel for the Respondent submitted on the effect of a discharge letter. He stated that the Claimant received the letter dated 31st August 2015, and voluntarily received the letter, acknowledging that he understood the contents therein, and discharged the Respondent from future claims. That the Claimant is therefore estopped from disputing the circumstances surrounding his separation.

69. In support of this submission, counsel placed reliance on the case of *Steve Mutua Munga Vs. Homegrown (K) Limited & 2 others [2013] eKLR*, where the Court stated:

"The Court has already answered issue No. 3 and found that the disclaimer served as a lawful and binding contract between the parties and as submitted for the Respondent the Claimant was thereby barred from going back against the agreement."

70. Further reliance was placed on the Court of Appeal decision in *Thomas De La Roe (K) Limited Vs. David Opondo Omutelema [2013]*, where the Court held:

"we would agree with the trial Court that a discharge voucher perse cannot absolve an employer from statutory obligation and that it cannot preclude the Industrial Court from enquiring into the fairness of a termination. That however, as far as we are prepared to go. The Court has, in each and every case, to make a determination, if the issue is raised whether the discharge voucher which was freely and willingly executed when the employee was seized of all the relevant information and knowledge"

71. Counsel tied up the submissions on this point by stating that in absence of demonstration of duress, coercion, misrepresentation or undue influence, which was the case in this matter, the discharge signed by the Claimant constituted a binding agreement between the parties and the Claimant is barred from alleging that the termination was unfair.

72. On the reliefs sought by the Claimant, counsel for the Respondent submitted that having failed to prove that the termination was unfair or wrongful, he is not entitled to any compensation under section 49 (c) of the Employment Act.

73. However, should the Court find that the termination was unfair or wrongful, the compensation should not exceed three (3) months' salary. The Court is invited to take into account the fact that the Claimant had only worked for the Respondent for one (1) year and taking into account the fact that the Respondent has always been willing to pay the Claimant one (1) month's pay in lieu of the redundancy notices. He cited the holding in *Bertha Awour Kowido Vs. Speed Capital Limited [2019] eKLR*.

74. On terminal dues, counsel submitted that the Respondent is willing and ready to pay the Claimant his terminal dues subject to the Claimant clearing with the Respondent, which includes payment of the outstanding car loan amount. The Claimant's claim for terminal dues therefore is unfounded. Counsel is fortified in this submission by the holding in *James Mwangi Muigai Vs. Murlosa Movers [2020] eKLR*, where the Court held as follows: -

"15. As it were the Respondent has not refused to pay the Claimant his terminal dues. It has only made clearance a precondition as per the company's procedure. This cannot by any reasonable interpretation be perceived as renegeing on the mutual separation agreement between the parties. The Claimant cannot therefore put forward a claim for unfair termination where he has himself failed or ignored to clear as per the company's standard exit procedure.

16. In conclusion the Court orders that the Respondent pays to the Claimant the agreed terminal dues after the Claimant satisfactorily clears issues at Beni station where he served prior to separating with the Respondent. The claim for unfair termination is therefore found without merit and is dismissed with no order as to costs."

75. On the claim for overtime, it was submitted that the Claimant is not entitled to any payment under the heading. That under cross-examination he admitted that under the contract agreement he had bound himself to work beyond the normal working hours whenever situations demanded. Counsel placed reliance on, Timothy K. Odindo Vs. Bakers Delight Holding Limited [2018] eKLR.

76. On the counterclaim, counsel submitted that the car loan being a binding agreement the Respondent is entitled to a judgment sum of KShs.1,071,650.50 and it should be allowed to offset the same against the terminal dues payable to the Claimant. On this counsel found comfort in the holding in John Kinyanjui Gateru Vs. Family Bank Limited [2016] eKLR, thus;

77. On this he submitted further that termination of the Claimant's employment does not release him from his loan repayment obligations. Upon termination of his employment, the Claimant ought to have approached the Respondent with a view of restructuring the repayment of his loan or sold the motor vehicle and used the proceeds to liquidate the facility.

78. Buttressing this submission, Counsel cited the decision in **Kenya Tea Development Agency Ltd v Lee Kimathi [2015]eKLR** where the Court stated;

“ 30..... The non-payment of such a facility when it became due on the basis that the Respondent was not in gainful employment is not tenable. The measures made by the Claimant to have the balances paid in instalment were reasonable. Where the Respondent opted to retain the vehicle and not offer to dispose the same so as to pay the balances of his loan and knowing that he had no other sources of income at the time cannot justify the long delays. In any case the Claimant had an option of repossessing the vehicle and selling it at the going rate. It has been 9 years since the Respondent has not made efforts to settle this loan balance.”

79. He wound up the submissions by urging the court to allow the counterclaim. He asserted that the outstanding car insurance balance directly flows from the issuance of the car loan to the Claimant and as such, the claim under this head should be allowed.

DETERMINATION

80. The following broad Issues emerge as the issues for determination in this matter.

- i. Whether the termination of the Claimant's employment on account of redundancy was procedurally fair.
- ii. Whether the termination of the Claimant's employment was substantively fair.
- iii. Whether the Claimant is entitled to the prayers sought in his memorandum of claim.
- iv. Whether the Respondent is entitled to the reliefs sought in its counterclaim.
- v. Who should bear the costs of this matter.

Of whether the termination was procedurally fair

81. The defining characteristic of termination on account of redundancy is lack of fault on the part of the employee. it is a species of “*no fault*” termination. One cannot be off mark to state that it is for this reason that the Employment Act 2007, places particular obligations on an employer, most of which are directed towards ensuring that those employees to be dismissed are treated fairly.

82. Section 40(1) of the Employment Act 2007 provides: -

“An employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following obligations: -

- 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 rendered redundant had due regard to the seniority in time and to the skill, ability and reliability of each employee of a 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 wages in leu of notice; and

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

83. Now in turn to the letters dated 27th August, 2015 and 31st August, 2015 by the Respondent to the Claimant and the Ministry of Labour respectively. The question that this Court has to answer is as to whether the two letters took the character of the notice(s) envisaged by section 40(1) of the Employment Act and whether they are in nature, able to achieve the purpose for which the provision created notice(s) thereunder.

84. There seems to be no contestation that the Respondent, authored a letter dated 31st August, 2015, addressed to the Claimant, captioned "redundancy". The Claimant testified and there was no rebuttal on it that the letter was issued to him on same day after lunch.

85. The letter indicated that the Claimant's last day of work was 31st August 2015, as the termination of his employment was to take effect on the 1st September 2015.

86. A notice to be issued under section 40(1) shall be a notice of not less than a month. It is obvious that the letter dated 31st August 2015 was not the notice envisaged under section 40(1) of the Employment Act therefore. In the **Kenya Airways case** [supra] Maraga JA [as he then] was stated and I agree with the statement, thus;

" 49. I agree with Mr. Mwenesi that both the notices themselves and their duration of 30 days under this provision are mandatory. Section 40[1] of our Employment Act does not expressly state the purpose for the notice. Although it also does 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."

The Respondent's evidence and submissions do not bring anything forth that was geared towards establishing satisfaction by it, the requirement under this provision regarding the duration.

87. Sufficient prior notice to the redundancy declaration is required for the union or employee to engage in meaningful consultation and in the event of dismissal(s) for the affected employee(s) to seek alternative employment if one required.

88. Not very difficult to see that the notice issued to the Claimant could not meet the purpose afore-stated.

89. For shortness of the total days (4) between the date of service of the letter dated 27th August 2015 to the Labour officer, and that of the letter dated 31st August 2015 Claimant [1 day], to the date when the termination was to take effect on the account of redundancy, the letters cannot be said to constitute a proper notice issuable to the Labour officer and an employee under the provisions of section 40(1) of the Employment Act, 2007.

90. Section 40(1) of the Employment Act, 2007 contemplates two notices to be issued in the process leading to termination of an employment on an account of redundancy. This aspect of the provision had judicial attention in the case of Kenya Airways Limited Vs. Aviation & allied Workers Union & 3 others [2014] eKLR where Maraga JA (as he then was) held: -

"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..... The Act requires one month's notice. The period runs from the date of service of that notice. It is after the conclusion of the consultation on all issues of the matter that notice will be issued to the affected employees of the decision to declare them redundant."

In Barclays Bank of Kenya Limited & another Vs. Gladys Muthoni & 20 another [2016]eKLR, the Court of Appeal stated;

"27. The trial Court was of the view that there ought to have been two notices- a specific notice alerting the redundants about the impending redundancy and the reasons therefor, and another one terminating their services. It reasoned.

82. follows:

"As noted by the Court in Caroline Wanjiru Luzze Vs. Nestle Equitorial African Regional Limited, the employer is supposed to give two (2) distinct notices on account of redundancy. Such must be in writing.

According to the trial Court, there was no redundancy notice issued or served on the Respondents. All they received were a termination letter", hence the finding that it was unprocedural.

28. In holding that view, the trial Court was not alone. Maraga, JA in the Kenya Airways case (supra) opined....."

91. The letter dated 31st August 2015 that was served on the Claimant heavily sounds a termination letter. It cannot be seen in any other way. There was no redundancy notice therefore issued and served. The Respondent's witness's evidence was all indicative that this was the only correspondence that was to the Claimant.

92. Counsel for the Respondent submitted that since the Claimant was not a member of a union, he was only entitled to one notice under the provisions of the Employment Act. I totally do not agree on this position taken. Article 27 [1] of Our Constitution provides that:

“Every person is equal before the law and has the right to equal protection and benefit of the law.”

To accede to the Respondent’s submission would be tantamount to ignore presence of this constitutional right, and even the right for one not to be discriminated against.

93. Looking at the structure and texture of our current regime of employment and labour relations law, it is inescapable to conclude that it is that was designed to provide equal protection to employees who are members of a union[s] and those who aren’t.

94. A redundancy notice, which I have concluded was not issued and served in this matter, births the event of consultation before a redundancy is declared. In our law consultation is a must. This was emphasized by the Court of Appeal in the Barclays Bank of Kenya case (supra), thus;

“37. We have carefully examined that case which unlike this case, involved unionisable employees of a collective bargaining agreement and oral evidence tested in cross examination. In the end, we are persuaded that the dicta of Maraga and Murgor, JJA regarding consultation prior to declaration of redundancy resonate with our consultation and international laws which have been domesticated by dint of *Article 2(6) of the Constitution*.”

95. The purpose for consultation in a redundancy situation cannot be down played. The purpose was aptly captured by Maraga, JJA (as he then was) in the Kenya Airways & another case (supra) thus;

“41. Though contractual, employment relations have some sort of statutory underpinnings. **Part VI of the Employment Act 2007** in a nutshell outlaws unreasonable or unjustified termination of unlawful, in my view, it places a heavier burden of proof upon the employer to justify any termination of employment. **Section 40 (1) of the Employment Act**, which provides for the implementation of the redundancy decision, provides in mandatory terms that “[a]n employer shall not terminate a contract of service on account of redundancy unless[he] complies with the conditions” therein stipulated. As this is the central provision in the second issue of fair play in redundancy that we need to determine in this appeal, I need to set out it verbatim. It reads:

“(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 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 an advantage 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 an employee declared redundant severance pay at the rate of not less than fifteen days pay for each completed year of service.

96. The Respondent did not tender any evidence before this Court that there were any consultations prior to the termination of the Claimant’s employment on account of redundancy. In fact, the Respondent’s witness on being cross examination on the aspect, frankly stated that he was not aware whether there was consultation or not. This left the Claimant’s evidence that there were no consultations unchallenged. The inescapable conclusion is that there were no consultations.

97. In the upshot I agree with the Claimant’s counsel’s submissions that the termination was procedurally unfair.

98. In the circumstances, I am not satisfied that the termination of the Claimant’s employment was fair.

(b) of whether the termination was substantively fair

99. Both section 2 of the Employment Act and section 2 of the Labour Relations Act define redundancy as: -

“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*”.

100. No doubt, our law recognises no right to employment for life, however the social balance struck in a context of constitutional regime in which the right to fair labour practices is a fundamental right is to afford an employee the right not to be unfairly dismissed and the employer the right to dismiss an employee for a fair reason provided that a fair procedure is followed – *John William Strauss & another Vs. Plessey (PTY) Limited [2002] & BLLR 755 (CC)*.

101. The Respondent is burdened with the onus of satisfying this Court that the termination of the Claimant was effected for a fair reason. In this matter not only did the Claimant allege his dismissal was wanting in procedure and an affront of the provision of section 40 of the Employment Act, 2007 but that the termination was simply an excuse employed by the Respondent to terminate his employment summarily.

102. The Respondent contended that the termination was as a result of the position of the Claimant balancing redundant, as a consequence of the new strategic direction in which Respondent had decided to embark on. The position was abolished. His services were no longer required.

103. The Respondent just asserted in the letter dated 31st August, 2015 that the termination was as a result of a review of the Radio business strategy. This was reiterated by its witness without more to discharge its heavy burden mentioned hereinabove, the Respondent was obliged to do more than this. It was obliged to tender evidence and in detail what the “review of the Radio business strategy” entailed, what prompted the need for the review, how the affected employees were identified, the selection criteria used, the alternatives that were available and/or proposed to arrest the redundancy, and or mitigate the impact of the same, the employees’ contribution during the consultation process, and the extent of the redundancy.

104. Section 40 of the Employment Act cannot be read in isolation from the provisions of section 43 and 45. Section 43 provides: -

“(1) In any claim arising out of the termination of a contract the employer shall be required to prove the reason or reasons for the termination and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.”

Section 45 provides:

1. No employer shall terminate the employment of an employee unfairly.

2. A termination of employment by an employer is unfair if the employee fails to prove –

a. That the reason for termination is valid;

b. That the reason for the termination is a reason

i. Related to the employee’s conduct, capacity or incapability

ii. Based on the operational requirements of the employer;

c.

105. The Respondent totally failed to place before this Court evidence related to the items I have mentioned hereinabove, to enable me gauge the validity and fairness of the reason for the termination (redundancy). The provisions of sections 43 and 45 of the Employment Act, set in against the Respondent.

106. Reviewing the evidence by the Respondent, one develops the uncomfortable feeling that the true reason for termination was not operational requirement of the Respondent.

108. I have considered the submissions by counsel for the Respondent on Section 40 of the Act on substantive fairness, let me say that it not enough for the employer to say that I relied on this reason or that reason provided for in the Act to terminate the employees’ service. Validity of the reason must be demonstrated. In the capsule of validity, one must see, candidness, fairness, forthrightness and good faith. To just state the reason like “strategy review” is not enough to court for it to be able to engage the statutory measure of validity, just and equitable.

108. Enough for the substantive fairness of the termination. I come to a conclusion that the termination was not substantively fair.

109. In the upshot I agree with the Claimant what the termination was unfair, wrongful and unlawful.

Of the relief grantable

110. The Claimant has sought for compensation for wrongful termination equivalent to 12 months' salary amounting to Kshs.2,325,612.00. I am alive of the fact that the 12 months gross wages or salary, is the maximum awardable compensation provided for under section 49(c) of the Employment Act. The granting of compensating relief is discretionary where dismissal is found to be unfair it does not substantively mean compensation should be granted. Whether the maximum compensation is awardable or of portion thereof or no compensation is to be awarded is dependent on the circumstances of each case.

111. Before I make a pronouncement on the amount that this Court shall deem fit to award under this head, it is imperative to state that should there is a dispute as to what figure shall be used in computation of the compensatory award and other reliefs where computation is necessary. The Claimant wants this Court to use Kshs.193,801 citing the figure on the payslip exhibit 4, while the Respondent wants Kshs.112,461.00 as according to them, this is the basic salary. The Kshs.81,400 is an allowance.

112. Section 49(1)(c) of the Employment Act is clear on what is to be used in the computation. It is either gross salary or wages. In the instant case, what is applicable is gross salary. Section 49(1)(c) provides on how the compensatory amount should be arrived at, thus;

“The equivalent of a number of months wages or salary not exceeding 12 months based on the gross monthly wages or salary of the employee.” (Emphasis mine)

113. Gross salary is the term used to describe all the money the employee has made which is without any deduction like income tax. It is however, inclusive of bonuses, overtime pay, holiday pay and other differentials. Some of the components of gross salary would include basic salary, house allowance, special allowance, medical allowance, car allowance and conveyance allowance.

114. Gross salary is different from basic salary, it is the figure agreed upon between the employer and the employee without factoring in bonus, overtime pay or pay other kind of extra income.

115. Clause 3 of the letter of appointment reads: -

“You will be entitled by way of remuneration for your services to a basic salary 108,600 per month plus car allowance of 81,400 per month payable monthly in arrears by the last day of each month.”

116. It is clear therefore that the Respondent wants the court to use basic salary not the gross salary as provided for in section 49 (1) (c). I agree therefore that gross salary for purposes of this matter is Kshs.193,801.00.

117. Am inclined to award the Claimant the compensatory relief. I have considered the extent of the Respondent's deviation from the requirement of the law, the breach of the constitutional duty to embrace fair labour practice, the uncomfortable feeling that the reason for the termination was disguised, the fact the Claimant has not gotten an alternative job, the fact that the termination was without fault on the part of the Claimant, and the reasonable expectation of the Claimant on the length of the employment. Consequently, I award him compensation to an extent of an equivalent of 9 months' gross salary. Therefore Kshs.1,744,209.00.

118. Clause 8(c) of the letter of employment provides:-

“Either party hereof shall be entitled to terminate the employment by giving one month's notice of such termination in writing to the other or forthwith by paying to the other party one month's basic salary provided in clause 3 above.” (Emphasis mine)

119. Upon this, the figure applicable to prayer C, D and E should be Kshs.112,401.00 as proposed by the Claimant. the Respondent from the letter dated 31st August 2015, is clear it is ready to pay the Claimant under these heads at this rate.

120. The Claimant has abandoned the claim under F, i.e. overtime pay.

121. The Respondent submitted that the Claimant's claim on terminal dues is unfounded as at all material times prior to the suit herein, the Respondent was willing to pay the terminal dues. I find this submission ignoring one vital point, that from the onset there was a dispute as regards the rightful figure that was payable to the Claimant. For instance, there was no concurrence as regards the amount usable in the computation of the dues as demonstrated herein above. The Respondent was for employment of basic salary all through, while the Claimant was for gross salary.

Of the Respondent's counterclaim

122. The Claimant admitted that at the time of termination of the employment, he had not fully liquidated the car loan. The Respondent's claim to this extent is admitted. The reasons given as to why the Claimant thinks he should not pay this balance is unconvincing and make little sense. To accede to the line of thinking, would be tantamount to take it that there is a right to employment for life. Consequently, I award the Respondent Kshs.1,040,625.00 being the balance of the car loan.

123. I refuse to award the Kshs.26,025.60 (car insurance balance) and Kshs.5000 travel allowance for they are special damages sought but which were not specifically proved.

124. In the upshot:

a. Judgment is hereby entered in favour of the Claimant in the following terms: -

- i. Compensation for unfair termination - Kshs.1,744,209.00;
- ii. One month's gross salary for the month of August 2015 Kshs.193,801.00;
- iii. Payment in lieu of notice – Kshs.112,401.00;
- iv. Payment for annual leave earned and not taken – 25 (twenty-five) days – Kshs.93,668.00;
- v. Service pay – one month's basic salary for every year of service – Kshs.140,501.00;
- vi. The Respondent to issue a certificate of service to the Claimant within 30 days of this Judgment;
- vii. Interest at Court rates from the date of filing the suit till full payment;
- viii. Costs of the claim (Claimant's).

b. Judgment is hereby entered for the Respondent on its counterclaim as follows: -

- i. Kshs.1,040,625.00
- ii. No order as to costs as the conduct of the Respondent led to the litigation herein.

125. Any amount payable to the Claimant by the Respondent under this Judgment shall be less the amount awarded to the latter under the counterclaim, and statutory taxes.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 17 TH DAY OF SEPTEMBER 2021

.....

KEBIRA OCHARO

JUDGE

Delivered in the presence of

.....FOR THE CLAIMANT

.....FOR THE RESPONDENT