



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**  
**AT NAIROBI**  
**CAUSE NO.108 OF 2015**  
**JONATHAN SPANGLER.....CLAIMANT**  
**VERSUS**  
**CENTRE FOR AFRICAN FAMILY STUDIES (CAFS).....RESPONDENT**  
**JUDGEMENT**

**BACKGROUND**

1. Both parties filed extensive pleadings and documents and summarised. During the course of hearing, the parties were able to record various consents in settlement of the claims not in dispute. Such have been put into accounts in the outline of the documents filed. The pleadings as follows;
2. The Claimant filed the following documents;
  - a. The Claimant's Original Memorandum of Claim and the documents annexed to it dated 26<sup>th</sup> January, 2015 filed herein on 30<sup>th</sup> January, 2014.
  - b. Claimant's Amended Memorandum of Claim dated and filed herein on 27<sup>th</sup> May, 2015;
  - c. Amended Amended Memorandum of Claim dated and filed herein on 5<sup>th</sup> February, 2016;
  - d. The Claimant's Principal Witness Statement dated 23<sup>rd</sup> May, 2016 and filed in court on 24<sup>th</sup> May, 2016;
  - e. The Claimant's Supplementary Witness Statement dated 1<sup>st</sup> August, 2016 and filed in court on the same day;
  - f. The Claimant's Supplementary List and Bundle of Documents dated 17<sup>th</sup> December, 2015 and filed herein on 18<sup>th</sup> December, 2015
  - g. Volume 1 of the Claimant's further Supplementary List and Bundle of Documents dated 19<sup>th</sup> April, 2016 and filed herein on 21<sup>st</sup> April, 2016;
  - h. Volume 2 of the Claimant's further Supplementary List and Bundle of Documents dated 19<sup>th</sup> April, 2016 and filed herein on 21<sup>st</sup> April, 2016;

i. Claimant's Supplementary Bundle of Documents dated 23<sup>rd</sup> May, 2016.

The Respondent in defence filed;

a. Memorandum of Reply dated 23<sup>rd</sup> March, 2015 and filed herein on 24<sup>th</sup> March, 2015;

b. Amended Memorandum of Reply and Counterclaim dated 9<sup>th</sup> June, 2015 and filed herein on 10<sup>th</sup> June, 2015;

c. Second Further Amended Memorandum of Reply dated 22<sup>nd</sup> February, 2016 and filed on 23<sup>rd</sup> February, 2016;

d. Respondent's Witness Statement of Victor Barasa dated 7<sup>th</sup> June, 2016 and filed herein on 30<sup>th</sup> June, 2016;

e. Annexures in Support of Respondent's Witness Statement;

f. Supplementary List and Bundle of Documents dated 18<sup>th</sup> July, 2016 and filed in court on the same day.

## THE CLAIM

3. In the Amended amended Memorandum of Claim dated 5<sup>th</sup> February, 2016 the Claimant is seeking the following orders;

a. i) *A declaration that the Respondent is in breach of the Claimant's Contract of Employment and that his termination of employment was unfair and wrongful.*

ii) *A declaration that the Respondent contravened the Claimant's constitutional rights under Articles 27, 28, 29, 30, 41 and 47 of the Constitution of Kenya, 2010.*

iii) *A declaration that Respondent violated the terms and conditions expressed under Article 8 of the Respondent's International Headquarters Agreement with the Government of Kenya.*

b. *In alternative to prayer a) i) above, A declaration that the Claimant was declared redundant in April, 2014.*

(c) i) *That the Respondent pays to the Claimant the sum of USD 261, 539.47 as particularized under paragraph 23, 27 together with interest thereon from 1<sup>st</sup> January, 2011 to 31<sup>st</sup> July, 2014 until payment in full.*

ii) *In alternative to prayer for un-remitted pension contributions, the Respondent pays the Claimant service pay for six years worked at USD 20, 700.*

iii) *The Respondent pays the Claimant:*

a. *damages for its contravention of the Claimant's constitutional rights provided under Articles 27, 28, 28, 30, 41 and 47 of the Constitution of Kenya, 2010.*

b. *compensation of \$59,657.00 (that being 12 months of the Claimant's basic salary) for unfair and wrongful termination.*

c. *in the alternative to prayer c) ii) b. above, compensation of 29, 828.50 (that being 6 months of the Claimant's basic salary) as his contractual redundancy benefit.*

d. The Respondent issues a Certificate of Service to the Claimant

e. The Respondent bears the Costs of this Claim

f. Any other or further relief this Honourable Court may deem fit to grant.

4. The Claimant outlined his claims at paragraph 27 of his *amended amended* Memorandum of Claim, some of which he subsequently amended and others were admitted by the Respondent as follows;

ITEM	PARTICULARS	AMOUNT CLAIMED	AMOUNT ADMITTED BY RESPONDENT	TOTAL AMOUNT CLAIMED WITH AMENDMENTS
1	Balance of Salary for March, April, May, June, and July 2014	\$14, 568.00	\$14, 568.00	\$14, 568.00
2	Retained portion of Claimants salary from 2009 to 2014	\$9, 166.87	0	\$9, 166.87
3	2010, 2012 and 2014 home leave flight reimbursement as per clause 11.2 of the Respondent's PPPM	\$7, 689.40	0	\$7, 689.40
4	New repatriation flights – 2014	\$2, 000.00	\$2, 000	\$2, 000.00
5	11 Remaining vacation days	\$2, 523.11	\$2, 523.11	\$2, 523.11
6	Relocation expenses as provided for under Clause 9.2 of the PPPM	\$11, 097.41	0	\$11, 097.41
7	Accommodation expenses as provided for under Clause 9.3 of the PPPM  5 days x \$468 = 2,340.00	\$2, 340.00	0	\$2, 340.00
8	Reimbursement of relocation flights for 2008	\$2, 858.06	0	\$2, 858.06
9	Overseas Relocation accommodation expenses as provided for under Clause 9.3 of the PPPM to Nairobi for Claimant and one dependent. (\$312 + \$156) = \$468; \$468 x 31 days = \$14,508.00	\$14, 508.00	0	\$14, 508.00
10	<b>Home leave gratis entitlements for 2008 to 2014; 6 days x \$230 = 1, 380.00.</b>	<b>\$1, 380.00</b>	<b>0</b>	<b>\$10, 580</b>

	<b><u>*46 days x \$ 230 = US\$ 10, 580</u></b>			
11.	Employment Termination Benefit of 15 days per year for every year worked  15 days x 6 years x 230 = 20,700	\$20,700.00	0	\$20,700.00
12.	7.5% CAFS un-remitted pension contributions for 61 months from January 1 <sup>st</sup> 2009 to September 2010 (20 Months), December 2010 to May 2012 (18 months), and September 2012 to July 2014 (23 months).  Amounting to:  A. 358.00 x 19 months = (\$6,802.00), 372.85 x 42 = (\$15,659.70); plus  B. service pays for 8 months (July 2008 to Dec 2008, June 2012 to August 2012) 10 days x 229.36 = (\$2293.6). \$6802.00 + \$15,659.70 + \$2,293.6 = \$24,775.30	\$24,775.30	0	\$24,775.30
13.	Housing allowance 15% of basic salary (The Claimant prays for 15% of his gross salary for the 6 years of his contract service: \$57281 x 2 years = (\$114,562) plus \$59657 x 4 = (\$238,628) = \$353,190.00 x 15% = \$52,978.50)	\$52,978.50	0	\$52,978.50
14.	Acting Director Allowance for 12 months from June 2011 until July 2012. 1125 x 12 months = 13,500.00	\$13,500.00	0	\$13,500.00
15	Annual basic salary increase of 4.2% denial of appraisal for contract period from August 2nd 2012 to September 1st 2014. 5,011.84 x 3 years = 15,035.52	\$15,035.52	0	\$15,035.52
<b>16</b>	<b>Reasonable remuneration for</b>	<b>\$24,600.00</b>	<b>0</b>	<b>\$9,792*</b>

	<p><b>work done as Team Leader from March, 2010 to August, 2012 a period of 30 months x \$820 = 24,600.00</b></p> <p><b><u>*March 2010 to May, 2011 (15 months) and August, 2012 (1 month) = US\$ 612 x 16 months</u></b></p>			
17	Reasonable remuneration for work done as D1 level Director from 1 <sup>st</sup> September, 2012 until 31 <sup>st</sup> July, 2014. \$1028.48 x 23 months = 23,655.10	\$23, 655.10	0	\$23, 655.10
18	Daily Transport Allowance to and from work. 100 USD per month for 702 months. \$100 x 70 = \$7,000	\$7, 000.00	0	\$7, 000.00
19	Compensatory Leave Days Accrued 2008 to 2013. 30 days x 230 USD = 6,900 USD	\$6, 900.00	0	\$6, 900.00
20	Reimbursement of relocation costs; three round-trip flights from 2014 to 2015: August 2014 (\$1668) + December 2014 (1222.20) + June 2015 (1374.00) = 4264.20	\$4, 264.20		\$4, 264.20
	<b>TOTAL</b>	<b>\$261, 539.47</b>	<b>\$19, 091.11</b>	<b>\$255, 930.47</b> <b>Amended Claim</b>

5. In the Memorandum of Claim, The Claimant avers that he is presently residing at 128 Crandell Court, Schaumburg, IL USA. The Respondent is an international Governmental Organization registered as such in Kenya.

6. The Claimant was offered the position of Knowledge Management Specialist at the Respondents organization vide letter dated 22<sup>nd</sup> May, 2008 with the contract coming into effect on the 1<sup>st</sup> of July, 2008 an offer that he accepted.

7. The terms of employment of the contract dated 22<sup>nd</sup> May 2008 were that he was entitled to several benefits including but not limited to the following:

- i. An annual salary of United States Dollar \$57,281.00.
- ii. A contribution by the Respondent equal to 7.5% of his basic salary to a provident fund, in addition to the Claimants own contribution of 5% from his basic salary.

iii. Relocation expenses upon hiring and termination of his employment.

iv. Expenses relating to the relocation of the Claimant's household goods and personal effect upon termination of the Claimant contract.

v. If he so wished, exercised the right to renew his 2 year contract of employment with the Respondent at the expiration of each contract.

8. The Claimant avers that he exercised the right to renew his contract in 2010 and 2012 and obtained the renewals of his contract of employment. He further avers that in his 2010 and 2012 contracts of employment contained similar terms.

9. The appointment was confirmed on the 1<sup>st</sup> January 2009 through the Respondent's letter dated 26<sup>th</sup> July, 2009. Towards the end of January and early February, 2009, he was told that a process had been initiated to declare certain positions redundant and his position would be selected for termination unless he agreed to a reduction of his salary temporarily, he agreed to such reduction under economic duress.

10. The Claimant states that in January, 2009 in addition to his duties as the Knowledge Management Specialist, he performed the duties of the Communications Advisor, the Kenya Country Team Leader and the Business Development Manager as well as the additional duties of the Training and Technical Assistance (TTA) Team Leader between March, 2010 to August, 2012 on behalf of the then "Acting Director", Prof Eliwo Akoto.

11. In July of 2010 vide letter dated 7<sup>th</sup> July, 2010 the Claimant was offered the position of Knowledge Management Specialist which employment contract was to be effective from 2<sup>nd</sup> August, 2010 a position which he accepted. Under the new terms of contract, the Claimant was entitled to a salary of USD 59,657.00.

2. Vide letter dated 1<sup>st</sup> September, 2012 the Claimant's contract with the Respondent was renewed and his position was confirmed as the Director of Operations and Business Development with effect from 1<sup>st</sup> September, 2012 for a period of 2(two) years. The Claimant states that the contract was not reduced into formal writing but was confirmed due to the following:

i. The new title of the Claimant was changed to Director of Operation and Business Development.

ii. The Respondent through its conduct referred to the Claimant in his new title and for all intents and purposes, the terms contained in the letter of 1<sup>st</sup> September 2012 were mutually agreed on by both the Claimant and the Respondent.

iii. Through their conduct, both parties conducted themselves as though they were bound by the terms contained in the letter dated 1<sup>st</sup> September 2012.

iv. The basic salary, remuneration and benefits paid to the Claimant during the said period are the same as specified in the contract terms.

v. The Respondent indicated to Dr. John Batten as the Claimant's Executive Director and not Prof. Eliwo Akoto.

vi. The contract was correctly addressed to the Claimant as "Jonathan Spangler" – Director of Operations and Business Development" with his current mailing address, indicating that the Claimant had already assumed duty in that capacity.

vii. The Claimant accepted the terms of the contract after approving the changes to the draft.

viii. The Claimant appended his signature.

13. The Claimant states that he made multiple requests to be given a contract as he was the only employee without one, but his efforts were futile. that the Respondents actions went against the Employment Act 2007 and the Respondents Personnel, Policies and Procedures Manual which expressly state in Section 5.1 that each employee shall have a letter of employment and contract of employment.

14. The Claimant further states that between 2010 and 2014, he was not appraised in contravention of the Respondents' Personnel, Policies and Procedures Manual which in Section 8.3 provides that salaries must be reviewed annually based on staff performance as reflected in the Performance Review and Evaluation.

15. The Claimant received a letter from the Respondent dated 25<sup>th</sup> April 2014, where he was notified that his contract as the Director of Operations & Business Development / Knowledge Management Specialist would not be renewed after its expiration on the 30<sup>th</sup> of June 2014; the premature termination of the Claimant's contract was occasioned by severe financial constraints of the Respondent. The Claimant states that he had in effect been declared redundant.

16. The Claimant avers that his contract was to end on the 25<sup>th</sup> of April 2014 and as such the letter was unwarranted. Further the Claimant states that as per the Respondents Personnel, Policies and Procedures Manual Section 21.4 he had been in fact declared redundant. The Section states:

*“Redundancies can arise due to a decline in activity, funding, change in programme direction, or organizational change.”*

17. The Claimant states that his salary was not paid for the Months of March, April, May, June and July 2014 contrary to the express terms of his contract, nor was he paid acting allowance and benefits to reflect his new duties. Further, the Respondent failed to remit the contributions to the provident fund and pay his repatriation and relocation expenses.

18. The Claimant states that his goods were not shipped back to USA as requested by him on the 26<sup>th</sup> of June 2014 and has been stored in CAFS office since the 28<sup>th</sup> of June 2014 to date.

18. The Claimant avers that his contract was at all material times governed by:

a. Article 27 of the Constitution which guarantees enjoyment of the right to equality which includes the right not to be subjected to an arbitrary and capricious exercise of power by the Respondent.

b. Article 28 guarantees the Claimant enjoyment of the right to inherent dignity and the right to have dignity respected and protected at his place of employment.

c. Article 29 (d) and (f) guarantees that the Claimant's rights to security which includes the right not to be subjected to torture in any cruel manner whether physically or psychologically and not treated in a cruel, inhuman or degrading manner at his workplace.

d. Article 30 of the Constitution guarantees the Claimant of the enjoyment of the right not to be held in slavery or servitude.

e. Article 41 of the Constitution guarantees the Claimant enjoyment of the right to fair labor relations which include the right to fair remuneration and reasonable working conditions. It also includes the right to have his rights to his contract of employment respected and adhered to. The Claimant also avers that the right to fair labor relations forbids an employer from so varying a contract of employment as to constructively dismiss an employee. It also includes a fair opportunity to correct or contradict any prejudicial statement.

f. Article 47 of the Constitution guarantees that the Claimant had the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

g. Article 8 of the Respondent's International Headquarters Agreement (Herein referred to as IHA ) with the Kenyan Government demands that the Respondent establish employment policies and terms and conditions of employment that do not discriminate on the basis of nationality, gender, merit, performance or experience and do not contravene existing employment laws of the republic of Kenya.

h. Section 84 – 86 of the Employment Act (Cap 26) which ensure the provision of basic minimum standards of employment for international staff including but not limited to the requirement of foreign contract of service form, attestation and security.

i. The Respondent's Personnel, Policies and Procedural Manual (PPPM or the Policy)

j. The Claimant contends that the Respondent breached his constitutional rights under Article 27, 28, 29, (d) and (f), 30 and 41 of the Constitution.

19. To outline the contraventions, the Claimant states that his right to equality and freedom from discrimination, right not to be held in slavery and servitude, and right to fair labour practices were violated when he was denied benefits and allowances, was paid late or not in full, while other staff members were provided with all their benefits, allowances and salary. The Claimant was asked to seek help from his parents or seek alternative employment at the US Embassy in Nairobi when he pointed out the dire financial position he was in due to the incompetence of the Respondent. Failure to provide the Claimant with a contract of service and a complete breakdown of the payment made to him despite the same being provided to other employees contributed to the violation of those rights as well as when the Respondents neglected to pay his redundancy benefits on account of his being a foreigner.

20. These rights were also violated when the Claimant was told that the Respondent terminated him on the basis of his nationality by alleging that the Immigration Act barred the Respondent from hiring the Claimant, despite the Respondent having privileges and immunities in foreign recruitment and by reduction of the Claimant's salary by 30% while other employees' salaries were reduced by either 10% or not at all.

21. That the Respondent failed to provide the basic minimum standards of employment for international staff under Kenya employment law, including but not limited to, the requirements of Foreign Contracts of Service from, attestation and security under sections 84-86 of the Kenya Employment Act (Cap 226) which went against his right to fair labor practices.

22. Further, the Claimant states that the Respondent breached his right to reasonable working conditions by failing to pay his salary , threatening to withdraw his terminal benefits if he did not return from his leave in the United States, denied the Claimant his salary and notice period in a bid to induce the Claimant to breach his contract thereby giving the Respondent an opportunity to terminate his contract and denying him his termination or redundancy benefits, leave notice period and accrued leave days.

23. Further that the Claimant was denied a fair opportunity to negotiate or arbitrate on his terminal benefits and/or redundancy packages with the CAFS director as had been done in 2009 and further, it was contrary to his contract of employment and the Respondent's PPPM (Policy). Finally there was failure of the Respondent to comply with sections 43 and 45 of the Employment Act when purporting to terminate the Claimant's employment.

24. The Claimant also states that there was a contravention of Article 47 on Administrative Action where the Respondent unilaterally/illegally varied the terms of the Claimant's contract of employment by nullifying his three-month terminal notice period between April and June, 2014 and extending his employment from 30<sup>th</sup> June, 2014 to 31<sup>st</sup> July, 2014. The Respondent did not give the Claimant his benefits and allowances as given to other employees and when paid such were continuously delayed; part paid or did not paid at all.

25. The Claimant particularises the violation of the right to human dignity as nonpayment of the salary

and other allowances when they became due or part payment of salary owed to him monthly causing him financial hardship and emotional distress as he was unable to meet his monthly obligations such as his rent, daughter's school fees and daily maintenance, payment of his staff's salaries, rent, utilities and other living expenses.

26. Contravention of the right to freedom and security of the person particularly not to be subjected to torture, physical and psychologically or to be treated in a cruel, inhuman and degrading manner has been particularised as denial of the Claimant's salary and terminal benefits, which resulted in frequent displacement of him and his daughter from residence to residence of well-wishers. Respondent's failure to provide the Claimant housing or his housing allowance resulted in the Claimant not being able to pay his rent and evicted from his apartment. The refusal to ship the Claimant and his family's personal effects since June, 2014; The refusal to remunerate him for acting in the capacity of Executive Director between June, 2011 and July, 2012; the shutting down of respondent's websites, disconnection of its phone lines; and denial of Certificate of Service making it difficult for the Claimant to use the Respondent as a suitable employment reference thus hampering the ability to find suitable employment following termination for no reason.

## **Defence**

27. The Respondent has filed a second further Amended Memorandum of Reply dated 22<sup>nd</sup> February 2016 on 23<sup>rd</sup> of February 2016. The defence is that the Claimant had the right to renew his 2 year contract of employment upon expiry if he so wished. The contract that the Claimant alludes to dated 1<sup>st</sup> September 2012 was a draft for negotiation purposes and was never finalized.

28. The Respondent states that the actions alluded to by the Claimant were not in validation of a contract as the Respondent's board of Directors considered and ratified the proposal to review the organization's organogram at its 47<sup>th</sup> Board meeting on the 3<sup>rd</sup> of November where the Senior Management team was redefined to be composed of the Executive Director, (previously Director), Finance Director (previously Finance and Support Services Manager), Technical Director (Previously Technical Assistance Manager) and Director of Operations and Business Development (Previously Knowledge Management Specialist). The changes were therefore only in title and not limited to the Claimant alone. There were no remuneration changes for any other staff as a result of the redefinition. Further, the Claimant was asked to fill in the appraisal forms and forward to his supervisor for discussion which he did not.

29. The Respondent also states that as part of the Senior Management team, the Claimant was at all times part of the decision making and was aware that there were other contracts that had lapsed and were yet to be renewed, so there was no discrimination as to issuance of contracts to others and not him, and they also deny that there were repeated requests by the Claimant to renew contract. That the right to equality and freedom from discrimination were not violated as all senior managers were subjected to the same treatment, including the claimants agreement to partial discharge of funds due to him at the rate of 50% per month as part payment of outstanding dues be made to them as and when the Respondent had funds, the benefits alluded to have yet to be specified. That at all material time the Claimant was aware of the financial situation with options that were under consideration which included liquidation of assets to honor debts.

30. The Respondent denies that the right not to be held in slavery or servitude was violated, that foreign contract service for attestation and security provisions were not met, and they state that it was the Claimants primary responsibility to initiate the process of annual appraisal but he neglected to do so. Further, the Respondent denies that there was a contravention of this right not to be held in slavery and servitude, as the Claimant was aware of the financial circumstance that led to the non-payment of funds, further only subordinate staff received full salaries. Additionally, he was not threatened with non-payment of terminal benefits should he have chosen not to return from his leave in July 2014.

31. The Respondent denies that the financial situation resulted in the Claimant being put up by well-wishers on the frequent trips to Kenya to follow up on his benefits hinders his settlement as he was given flexibility to work in his preferred residence further he has not since his departure at the end of July

followed up with the Respondent on his dues and goods for payment or shipping. The Respondent denies that they refused to ship the Claimants goods as he requested but that the shipment had been hindered by lack of funds.

32. The Respondent denies that the shutting down of their website and phone connection and non-issuance of certificate of service has been a hindrance to his finding new employment, the communication lines are down due to lack of funds and email addresses are still open and functional for purposes of references. They state that before a certificate of service is issued, the Claimant has to clear with the organization which he is yet to do.

33. The Respondent denies that there was failure to acknowledge his written contract despite acknowledging the written contracts of other employees, and puts him to strict proof thereof, they also deny that he was denied the fair opportunity to discuss the terms upon which he would be declared redundant and reiterate that his contract came to an end due to effluxion of time and the question of redundancy should therefore not arise.

34. The Respondent deny the fact that the Claimants salary was reduced by 30 % while those of his colleagues were reduced by 10 % as the Claimant with the staff then willingly agreed to a pay cut as cost reduction measure for the period of May to July 2009.

35. Further defence is that the Claimant was never asked to take over responsibilities of staff declared redundant as those who had been declared redundant were the receptionist, tea girl and a communication adviser who conducted duties that the Claimant could not possibly carry out. The duties that the Claimant was asked to take up were incidental to his role as acting director and it is not in ordinary employment practice that the incidental duties matched with a salary increase unless the same had been agreed beforehand.

36. The Respondent denies that the Claimant was entitled to Housing as only the interim director had such entitlement as well as the entitlement to the use of the office vehicle between his home and work place as well as when he was conducting official duty.

37. The Respondent maintains that the Claimant was aware of the financial circumstances of the Respondent and they did not deny his right of human dignity by part payment of salary or any action that resulted in financial distress, further they deny the fact that they asked the Claimant to seek employment in the US embassy of seek help from his parents and that there is no evidence.

38. The Respondent denies that there was a contravention of the right to freedom and security of the person particularly not to be subjected to torture, physical and psychological or to be treated in a cruel and inhumane manner as the Claimant was aware when he relocated to Kenya of his terms and conditions of service, the acceptance thereof was on his own merit, he was at all times aware of the financial position of the Respondent and further he was allowed to work from home in the USA and Gilgil where he owned a home, his salary was a consolidated sum and was sufficient to afford housing.

39. The Respondents deny the that the right to fair labor practices was violated, again restating that the pay cuts were willingly agreed to as he was aware of the financial circumstances of the employer, moreover, he continued his work under the same terms and conditions of the contract which lapsed on 31<sup>st</sup> July, 2012 and cannot feign ignorance as to the position.

40. As to the allegation that the right to administrative action was contravened that Respondent states that the Claimant was given a fair hearing, was not terminated but his contract ran out, was given a breakdown of assets as he requested and finally reiterates that he was in the know of the financial position of the organization and all action was a reflection of that position.

41. The Respondent denies that the Claimant in addition to his duties as the Knowledge Management Specialist, performed the duties of the Communications Advisor, the Kenya Country Team Leader and the Business Development Manager as well as the additional duties of the Training and Technical

Assistance (TTA) Team Leader between March, 2010 to August, 2012 on behalf of the then “Acting Director”, Prof Eliwo Akoto, they reiterate that the redefinition of the Senior Management with a change in title did not necessitate either a review of the job description or the terms of reference. The Respondent further avers that the position of Kenya Country Team Leader and Business Development Manager has never existed and hence the Claimant could not discharge the duties of non-existent offices. The Respondent further denies that the Claimant took on additional duties of Training and Technical Assistance Team Leader between March, 2010 and August, 2012 and puts the Claimant to strict proof thereof.

42. Further, as to appraisals, the defence is that The PPPM is clear that:

*In preparation for the APRE, each employee should review his/her own performance against the work objectives and performance indicators/competencies agreed for the evaluation period. The employee should identify objectives for the following period and his/her training and development needs. It also continues to say that by conducting self-appraisal, the employee takes the initial responsibility for representing his/her achievements to his/her supervisor; is required to consider his/her performance, training and development needs and career path; has a stake in his/her evaluation and progress within the organisation; is provided with a communication channel to his/her supervisor. During the appraisal interview, the supervisor will discuss the self-appraisal and make his/her evaluation. The Claimant is therefore put to strict proof of having taken initiative and initiated the Appraisal process as is stipulated in the PPPM.*

43. In addition, the Respondent state that the Claimant was requested vide email dated 27th May, 2013 to perform his appraisal which he failed to do. Salary reviews which were done annually were based on the staff performance as reflected in the Review and Evaluation only if funds permitted, and as the organization was in dire financial situation, this was not possible.

44. The Respondents deny that vide letter dated 25<sup>th</sup> April, 2014 they wrote to the Claimant notifying him that due to financial constraints, his contract would not be renewed after it expired on 30<sup>th</sup> June, 2014 they reiterate that the contract was lapsing on that date and not 14<sup>th</sup> August, 2014 as claimed.

45. The Respondents deny that the Claimant was refused his salary that all partial payments and non-payments were with the agreement of all parties. The Respondent admit that they owe the Claimant his salary for March, April, May June and July totaling USD 14,568.00 as well as 11 remaining vacation days totaling USD 2,523.11.

46. As to delivery of benefits, the Respondents states that the parties herein agreed as follows:

That the Claimant and the Finance Director’s 50% of monthly dues with outstanding dues be settled on availability of funds;

The Executive Director and the Programs Director’s of monthly dues with all benefits to be settled on availability of funds;

As of the date of the Claimant’s departure, the Respondent had neither delivered benefits to the Programs Director or the Executive Director and 50% dues to the Finance Director had not been delivered from April 2014;

The averment that the Director of Finance was paid is therefore, unfounded;

The Claimant is aware that the Director of Finance has been funding some operations of the organization as and when required and such funds to be refunded to him in better times;

The Claimant is also aware that the Director of Finance funded the trips of the Senior Management Team including himself to a conference in Ethiopia and subsequently to Togo and Nigeria in 2012 due to shortage of funds in the organization;

The Claimant through an email dated 30th July, 2014 sought explanations for payments to the Director of Finance for which reimbursement explanations were given;

The Claimant is also a direct beneficiary of the Director of Finance's goodwill having been advanced KES 30,000 on the 17th March, 2014 to sort out urgent personal matters including purchase of fuel for his car; and

That between February and March, 2014 the Director of Finance disposed of his assets and paid off the respondent's liabilities amounting to KES 800,000.

47. The Defence is also that any claim of payment other than by way of reimbursed costs is therefore an unfounded claim.

48. The Respondent denies that it failed, declined and/or refused to remit to the contributions to the provident fund, NSSF and NHIF. The Respondent asserts that the employee contribution for NSSF and NHIF were never deducted from the Claimant hence could not have been remitted under the respective schemes. The employee was provided with full medical cover for himself and his dependent. The failure by the Respondent to remit the Claimants pension contributions into the Claimants investment account led to loss of investment of USD 11,044.07 is denied.

49. The Respondent does not admit the acting allowance of USD 13,500.00 as this was neither included in the letter appointing him to the acting position nor was it implied. If such Acting Allowance is due to the Claimant, which is denied, then the said amount is statute barred. The Respondent further denies that the Claimant was appointed Acting Director from June, 2011 and asserts that the period of appointment as Acting Director was for the period 20th February, 2012 to 30th June, 2012 when a substantive Executive Director was appointed.

50. The Respondent does not admit the Claimant's claim of USD 23, 395.38 and or USD 24,775.50 being unremitted pension contributions. The claim for the period January 2009 to December 2011 is time barred by statute. The claim from September 2012 to July 2014 is denied as the Respondent stopped the operation of the pension scheme effective June 2012 and the Respondent confirms that no deduction in lieu of pension was made subsequent to that date from the Claimant's monthly salary hence the claim of employer contribution is erroneous. The Respondent further asserts that the Claimant is not eligible to service pay.

51. The Respondent denies the claim for the home leave flight and asserts that the Claimant was only entitled to one way repatriation flight at the end of his 2 year contract, further; his relocation flights in 2008 were discharged when he joined the employment of the Respondent.

52. The claim for accommodation expenses, are denied as Section 9.3 of the PPPM was not complied with. The Respondent denies the Claimant's claim for Home leave gratis entitlement for 2008 to 2014, and compensatory leave days are not admitted as they partly time barred by statute and further asserts that the Claimant was aware that he was entitled to both Travel and Compensatory days off for this purpose as per Section 6.4 of the PPPM which days he neither applied for nor utilized. The Claimant is put to strict proof of the contrary. The Claimant's Claim for compensatory leave days accrued 2008 to 2013, is denied and that only the Interim Director was entitled to full time use of office vehicle between home and his place of work and to transact official business as per contract and the Vehicle Policy. There is no other employee of the Respondent who was accorded similar privileges that the Claimant is seeking.

53. The Respondent admits the claim for new repatriation flights for USD 2,000.00, and also admits that his annual salary was USD 59,657.

More specifically the Respondent summarizes the claim as:

ITEM NUMBER PER AMENDED	PARTICULARS	AMOUNT	AMOUNT	AMOUNT NOT	REFERENCE
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AMENDED MEMO CLAIM	OF	CLAIMED	ADMITTED	ADMITTED	
1	Balance of Salary for March, April May, June and July 2014	14,568.00	14,568.00	0.00	Paragraph 22
2	Retained portion of Claimant's salary from 2009 to 2014	9,166.87	0.00	9,166.87	Paragraph 27
3	2010 and 2014 home leave flights reimbursements as per clause 11.2 of the PPPM	7,689.40	0.00	7,689.40	Paragraph 33
4	Repatriation flights	2,000.00	2,000.00	0.00	Paragraph 33
5	11 remaining vacation days	2,523.11	2,523.11	0.00	Paragraph 22
6	Relocation expenses as provided for under clause 9.2 of the PPPM	11,097.41	0.00	11,097.41	Paragraph 33
7	Accommodation expenses as provided for under Clause 9.3 of the PPPM	2,340.00	0.00	2,340.00	Paragraph 33
8	Reimbursement of Relocation flights for 2008	2,858.06	0.00	2858.06	Paragraph 33
9	Overseas Relocation accommodation expenses as provided under clause 9.3 of the PPPM to Nairobi for Claimant and one dependent  312+156 = 468  468*31 = 14,508	14,508.00	0.00	14,508.00	Paragraph 33
10	Home leave gratis entitlement for 2008 to 2014  6*230 = 1,376.00	1,376.00	0.00	1,376.00	Paragraph 33
11	Employment Termination Benefit of 15 days per year	20,700.00	0.00	20,700.00	Paragraph 32

	for every year worked $15*6*239 = 20,700.00$				
12	7.5% CAFS unremitted pension contributions for:  20 months – 01.2009 to 09.2010 ( $358*19$ )  18 months 12.2010 to 09.2012  23 months 09.2012 to 08.2012 ( $372.85*42$ )  Plus  Service pay for 8 months (07.2008 to 12.2008 AND 06.2012 to 08.2012)  $10*229.36 = 2,293.64$	24,775.30	0.00	24,775.30	Paragraph 30
13	Housing Allowance 15% of basic pay for 6 years of his contract service  $=15%*(57,281*2)+(59,657*4)$	52,978.50	0.00	52,978.50	Paragraph 28
14	Acting Director allowance for 12 months from June 2011 until July 2012  $1,125*12 = 13,500$	13,500.00	0.00	13,500.00	Paragraph 29
15	Acting Director allowance for 12 months June 2011 until July 2012  $5,011.84 * 3 = 15,035.52$	15,035.52	0.00	15,035.52	Paragraph 18
16	Reasonable remuneration for work done as team leader form march 2010 to August 2012.  $30*820 = 24,600.00$	24,600.00	0.00	24,600	Paragraph 18
17	Reasonable Remuneration for work done as D! level	23,655.10	0.00	23,655.10	Paragraph 18

	Director from 01.09.2012 until 31.07.2014  1,028*23 = 23,655.10				
18	Daily Transport Allowance to and from work  100 pm * 72 months  7,000.00	7,000	0.00	7,000	Paragraph 33
19	Accrued Compensatory Leave Days 2008 – 2013  30 days * 230 = 6,900.00	6,900.00	0.00	6,900.00	Paragraph 33
20	Reimbursement of relocation costs:  3 round trips  August 2014 – 1,668  Dec 2014 – 1,222.2  June 2015 - 1,374	4,264.20	0.00	4,262.20	Paragraph 26
	Total	261,539.47	19,091.11	242,103.36	

54. The Respondent only admits liability to the Respondent Claimant to the extent of USD 19,091.11, with no interest, and not USD 261,539.47.

55. The Respondent prays for Orders against the Claimant as follows:

*I. That the Claimant's claims and orders sought by him in his Amended Amended Memorandum of Claim be and is hereby dismissed in its entirety with costs plus interest except for the USD 19,091.11 which is admitted by the Respondent;*

*II. The Respondent further claims the following against the Claimant;*

*a) Cost of Defence to the Claimant's suit*

*b) Interest on cost*

*c) Any other suitable orders/reliefs deemed appropriate by this honorable court*

56. In response to the Respondents' Second Further Amended Memorandum of Reply Dated 22<sup>nd</sup> February, 2016, the Claimant filed a reply. The Claimant denies each and every material allegation of fact contained in the Respondent's second further amended Memorandum of Reply dated 22<sup>nd</sup> February, 2016.

57. The right to contract renewal vests in its absolute form with the respondent's management and a

contract of employment is entered into between an employer and employee and its renewal is agreed upon between the employer and employee and cannot be unilateral. The documents presented by the Respondent as his last contract are a draft for negotiation purposes and that the said negotiations were never finalized, the contract was valid as both parties accepted and acted on its terms despite the fact that it was not signed. The draft contract contained the agreement made between the Claimant and the Respondent in relation to the Claimant's employment. Contrary to section 10(7) of the Employment Act, 2007, the Respondent is shifting the burden of proving or disproving any alleged term of employment stipulated in the contract yet it has not produced any written contract or written particulars of a contract of employment that purportedly expired on 31<sup>st</sup> July, 2014.

58. The Claimant deny the allegation by the Respondent that Senior Management team met and agreed on a new organogram where changes to just the job titles were made for all staff. The Respondent has in sub paragraph (i) where they state;

***The Senior Management Team has been reformed and a new organogram prepared for rolling out in the New Year. All Job Descriptions (JDs) and Performance Specifications will be reviewed in line with these.***

59. Thus has admitted to a change of role and title to mean that the parties were entering into a new contract of employment, between August and September, 2012, he was the Director of Operations and Business Development and is, and was at all material times, entitled to have his salary adjusted to D1 level thus a salary increase of US\$ 5, 011.84; further they state the salary increase was part of the agenda of the SMT meetings between May and June, 2013; there was a valid contract between him and the Respondent and both parties acted on the terms and conditions set out in the contract dated 1<sup>st</sup> September, 2012; and that under section 10(7) of the Employment Act, the Respondent, who has failed to produce a written contract or written particulars of the contract of employment, ought to discharge the burden of proving or disproving an alleged term of employment stipulated in the contract of employment.

60. The Claimant denies that he continued to work under the same terms as those of the contract for the period of between August 2010 to August 2012 and states that he neither accepted an automatic renewal of his contract nor did he sign any employment contract with an expiration date before 31<sup>st</sup> August, 2014. That by conduct, the Claimant and the Respondent accepted the terms of the contract dated 1<sup>st</sup> September, 2012 and he continued to work on those terms and conditions.

61. The Claimant denies knowledge that at the lapse of his contract as intimated in the letter dated 24th April 2014, there were other contracts for HRAM, the Driver and the FD that had lapsed and were yet to be renewed, further the Claimant avers that the Respondent has impliedly admitted to failing to issue the Claimant with a written contract beginning on 1<sup>st</sup> September, 2012 by making reference to the contracts of employment not being renewed in 2014. The Claimant further avers that the Respondent extended his medical insurance cover and that of his daughter to 31<sup>st</sup> August, 2014 thereby admitting the existence of the contract of 1<sup>st</sup> September, 2012. Set out in **JS-37** in the Claimant's list and bundle of documents.

62. The Claimant reiterates that his constitutional rights under Article 27, 28, 29 (d) and (f) 30, and 41 of the Constitution, he reiterates that the Respondent was under a duty to pay his full salary on time as agreed in the contract of employment, and further that he agreed to be paid half his salary for three months to save the institution and guarantee his continued employment by the Respondent. Moreover, the Respondent has admitted to failing to pay the Claimant for work done; the Claimant further avers that he did not waive his right to be paid the moneys due on time. He did not agree to the unilateral reduction of his salary for an indefinite time. He therefore, contends that he is, and was, at all material times entitled to his full salary under his contracts of employment and he did not expect the pay cut to be for an indefinite time frame and expected to be reimbursed in due course.

Only two staff of the senior staff who were subjected to the same treatment and not all staff, Victor Barasa agreed to partial discharge but did not waive his right to be paid the money due on time. The Claimant avers that the Finance Director agreed to the part payment of his salary but went on to pay

himself the remaining part of his salary contrary to the agreement made with the Respondent as seen in Annexure **JS-46** and **JS-47** of the Claimant's bundle of documents. The Claimant further avers that the Respondent has admitted the extent of its indebtedness not only to the Claimant but to other staff and therefore, it can be said to have wrongfully and unfairly terminated the Claimant or in the alternative, declared the Claimant redundant but failed to invoke the necessary measures under section 40 of the Employment Act. The Claimant avers that he is entitled to all the claims he has sought.

63. The Claimant also states that his contract was unfairly and wrongfully terminated or in the alternative he was declared redundant on the 31<sup>st</sup> July 2014. Further he states he was not given a breakdown nor an official pays lip upon his termination contrary to section 20 of the Employment Act; further, his purported letter of closure of contract does not disclose how he was to be paid his dues and what his terminal dues would be contrary to the letters which are **JS-11, JS-12, JS-14 and JS-16** in the Claimant's list and bundle of documents.

64. As to the issue of appraisals, the Claimants avers that his initial appraisal was to be done by the Executive Director, Prof Akoto, who later absconded from his employment with the Respondent; his second appraisal was to be done by the Respondent's Board of Directors when the Claimant was acting Executive Director but it failed to do so and on 5<sup>th</sup> November, 2013, the minutes of the meeting show that his appraisal was to be done by the Executive Director and the Board but this was never completed; the Claimant, therefore fulfilled his requirements of generating his self-appraisal but the appraisal interview was never done by the Respondent thereby denying him a promotion and a salary increase; set out in **JS-44** in the Claimant's list and bundle of documents. The Claimant avers that the appraisal of two staff members demonstrates that other members of staff were appraised, promoted and given salary increases whilst he was not; this was discriminatory and the Respondent has, in essence, admitted to contravening his right to equality.

65. The Claimant avers that the Respondent admits that the Respondent did not have sufficient funds to pay its staff and contradicts itself by claiming that the contract lapsed by effluxion of time instead of redundancy; further that that the Respondent has not denied that it was discriminatory for his salary to be reduced by 30% whilst that of other staff was reduced by 10%.

66. The Claimant avers that his salary was not consolidated, he was entitled to a housing allowance and use of an official car or transport allowance and further that the Respondent has admitted to the fact that it denied the Claimant a housing allowance and use of an official vehicle during the period he was the acting Director; set out in **JS-46 and JS-47** in which Mr. Victor Barasa paid himself a transport allowance.

67. The Claimant denies that as a member of the Senior Management Team, was part and parcel of the Respondent's decision making and hence cannot feign ignorance on the Respondent's financial position, further the Respondent has admitted that it failed to pay the Claimant monies owed to him leaving him dire financial hardship therefore, contravening his right to human dignity; set out in **JS-19, JS-30, JS-31 and JS-32** of the Claimant's list and bundle of documents.

68. The Claimant denies the aversion that he was to work on implied terms and conditions and that there was no new contract he states that he was employed as a Director of Operations and Business Development and the Respondent is put to strict proof thereof under section 10 of the Employment Act, 2007; and that the Respondent has admitted that it had cash flow problems and is estopped from claiming that the Claimant's contract of employment expired by effluxion of time.

69. the Claimant avers that he was entitled to reasonable value for work done together with an acting allowance for the work done as Acting Team Leader 2010 to 2012 and the Acting Director between June, 2011 to July, 2012 and the Respondent is put to strict proof thereof; he further avers that the Respondent has admitted that the Claimant was appointed as Acting Director of the Respondent and is estopped from denying that fact.

70. The Claimant avers that the Respondent had admitted that it internationally recruited; it is clear that

the Respondent failed to disclose the financial problems it had prior to, during and after his recruitment and failed to pay the Claimant causing him psychologically torture on how he was to maintain himself and his dependents thereby contravening his right to freedom and security, further that he was not allowed to work from his hometown and Gilgil as the Respondent failed to reply to his request.

71. The Claimant maintains that he was threatened with constructive dismissal of his employment and forfeiture of his vacation days if he failed to return to Kenya from the United States. He further avers that since the institution of this suit, he has had to fly back to Nairobi to follow up on his entitlements and terminal benefits and he has attached airfare tickets to that effect.

72. As to the shipment of his good, the Claimant states that under section 9.2 of the PPPM, the Respondent was expected to ship the Claimant's personal effects from his apartment in Nairobi back to USA, the shipment of his and his daughter's personal effects was neither subject to termination of his employment nor redundancy and the Respondent is estopped from denying that fact. The Respondent has admitted that it has failed in this responsibility. The said section states as follows:

*CAFS will pay or reimburse the expenses of international relocation for household goods and personal effects of contract employees*

- *On initial appointment provided is for a period of one year or more;*
- *Following completion by a staff member of not less than one year of continuous service;*
- *Upon repatriation, provided the staff member had an appointment from a period of one year or longer or had completed not less than one year of continuous service.*

73. The Claimant avers that the Respondent has impliedly admitted that only the email addresses and personal mobile numbers of remaining staff of the Respondent are available and those members of staff have neither been named nor are they known.

74. The change of titles necessitated a review of his job descriptions and terms of employment as the new titles incorporated various duties and responsibilities which were not previously expected of him and the Respondent is put to strict thereof; his **first** appraisal interview was to be conducted by Prof Akoto, who later absconded from his duties and therefore, his appraisal interview was not done.

75. Following the termination of Prof Akoto, the **second** appraisal interview was to be conducted by the Board as the Claimant was the acting Director and the Board never appraised him; the **third** appraisal interview was to be conducted by the Board and the Executive Director in 2013 and was never done; set out in **JS-44** in the Claimant's list and bundle of documents;

76. The Respondent has admitted to the fact that it did not uphold its part of the bargain by failing to conduct the appraisal interview of the Claimant and alleging that the salary increase was subject to the availability of funds. The Respondent has further admitted that the last appraisal it conducted on the Claimant was in 2010 and it was on that basis that he was offered another contract of employment; it further admits that it failed to appraise the Claimant in order to neither have to pay him a higher salary nor ensure his personal career advancement and development in the Respondent.

77. The Claimant reiterates that by appointing him the Director of Operations and Business Development, the Respondent, in essence, promoted him to D1 level position but refused, failed and/or neglected to adjust his salary or level of effort as it did to other staff which was not only unfair but discriminatory.

78. The Claimant testified that the Respondent was obliged to remit its share of contributions under the provident fund and in the event that it was not able to remit its contributions under the provident fund, it was statutorily obliged to enroll the Claimant and other members of staff for NSSF. The Claimant further avers that the Respondent has admitted that it neither remitted contributions to the staff's provident fund nor did it enroll its staff for NSSF contrary to sections 19 – 22 and clause 4 of the Second Schedule of the

National Social Security Fund Act, 2013.

79. The Claimant also avers that his claim is not statute barred as his claim constitutes a continuing injury or damage within the meaning of section 90 of the Employment Act and he filed this suit within the time limit required after the cessation of the contract of employment and the respondent's closure of the grievance procedures.

80. The Claimant states that he is, and was at all material times, entitled to have his pension submitted to his pension scheme for the 64 months he was employed by the Respondent pursuant to the terms of his contract of employment; the Respondent has admitted that those amounts are due to the Claimant via its pension scheme and it is estopped from claiming that they are now statute barred; those claims are part of a continuing injury and/or damage which ceased on 31<sup>st</sup> July, 2014 when the Respondent unlawfully and unfairly dismissed him from his contract of employment; the purported stoppage of paying of employee's pension was neither intended to be permanent nor was it not to be reimbursed; the Respondent has admitted that it failed to remit contributions to the Claimant's pension as obliged to under his contract of employment and further, failed in its statutory obligation to enroll the Claimant and other members of staff for NSSF in lieu of its pension scheme contrary to sections 19 – 22 and clause 4 of the Second Schedule of the National Social Security Fund Act, 2013, he is entitled to service pay.

81. The Claimant further avers that his entire claim as outlined in paragraph 27 of his amended amended Memorandum of Claim is a result of services rendered, a fact which has not been denied by the Respondent, and the Claimant is therefore entitled to each and every claim outlined in that paragraph whether or not his contract was terminated, he was declared redundant or his contract of employment purportedly lapsed by effluxion of time as the Respondent closed the grievance process in May, 2014.

82. In view of the foregoing, the Claimant avers that the Respondent is not entitled to any of the prayers which it has sought in its second further amended Memorandum of Reply dated 22<sup>nd</sup> February, 2016.

83. The Claimant prays that the Respondent's amended Memorandum of Reply be dismissed and judgment be entered for the Claimant as prayed in his amended amended Memorandum of Claim dated 5<sup>th</sup> February, 2016.

### **Submissions**

85. Both parties filed their detailed written submissions. I have put all these into account in the analysis herein.

### **Determination**

Several issues arise from the dispute herein which I highlight in summary as follows;

**Question of the court jurisdiction;**

**What form of contract governed the Claimant's employment at the time of termination;**

**Whether termination was due to redundancy or termination of contract;**

**Whether there are constitutional rights violations;**

**Whether service pay is due; and**

**Whether the remedies sought are due.**

88. Before delving into the above issues, the parties have over time recorded several consents and several claims been admitted. Such are herein confirmed as follows;

- a. Balance of salary for March to July, 2014 admitted at \$14,568.00;
- b. New repatriation flight – 2014 admitted at \$2,000.00;
- c. 11 remaining vacation days admitted at \$2,523.11;

**Total admitted \$19,091.11**

89. Upon such admissions, the Denied claims are;

1. Retained salary 2009 to 2014 \$9,166.87;
2. 2010, 2012, and 2014 home leave flight reimbursement \$7,689.40;
3. Relocation expenses \$11,097.41;
4. Accommodation expenses for 5 days \$2,340.00;
5. Relocation flights for 2008 \$2,858.06;
6. Overseas relocation accommodation \$14,508.00;
7. Home leave gratis for 2008 \$10,580.00;
8. Employment termination benefit of 15 days for each year worked \$20,700.00;
9. 7.5% CAFS unremitted pension contributions for 61 months from 1<sup>st</sup> January, 2009 to September, 2010 (20 months), December, 2010 to May, 2012 (18 Months) and September, 2012 to July, 2014 (23 Months) \$24,775.30;
10. House allowance at 15% for 6 years 52,978.50;
11. Acting director allowance for 12 months – June, 2011 to July, 2012 – 12 months \$13,500.00;
12. Annual basic salary increase of 4.2% - August, 2012 to September, 2014 - \$15,035.52;
13. Reasonable remuneration for work done as team leader – March, 2010 to August, 2012 – 30 months at \$9,792.00;
14. Reasonable remuneration for work done as D1 level Director – September, 2012 to July, 2014 – 23 months at \$23,655.10;
15. Daily transport allowance \$7,000.00;
16. Compensatory leave for days accrued 2008 to 2013 – 30 days at \$6,900.00; and
17. Travel costs, 3 round trips to follow up on this case \$4,264.20.

**Total claims \$255,930.00.**

90. The question of the court jurisdiction has been raised by the Respondent with regard to the amendment to the claims and some going back to 2008 when the Claimant was employed. As the same arise out of the issues set out above, jurisdiction will be addressed together with the second question as to what form of contract that governed the Claimant at the time of termination.

91. It is not in dispute that the Claimant was under two written contracts of employment - one going back

to 2008 and covering 2 years starting 1<sup>st</sup> July, 2008 to June, 2010. The second contract commencing July, 2010 and covering two years thus lapsing on **31<sup>st</sup> July, 2012**. The last part of the Claimant's employment with the Respondent has been contested. However, from 1<sup>st</sup> August, 2012 the Claimant remained at work with the respondent. The Claimant submitted his signed contract but there was no response by the respondent.

92. Thus each written contract of employment issued for the period 1<sup>st</sup> July, 2008 and 1<sup>st</sup> July, 2010 were for a fixed term and each lapse came with new terms. Upon the lapse of each contract, the Claimant was engaged afresh on his employment. This was until the lapse of the 2<sup>nd</sup> written contract on 31<sup>st</sup> July, 2012. Onwards, the Claimant had no written terms of employment. He however continued to work with the respondent. This was until his employment was terminated vide notice of 25<sup>th</sup> April, 2014.

93. As such, each written contract came with its own terms and term. Fixed term contracts are well appreciated by the law and this court has held that written contracts are to be recognized and taken within the terms and term agreed upon the parties. See **Chacha Mwita versus KEMRI & Others, Cause No.1901 of 2013** and **Rajab Barasa versus Kenya Meat Commission, Cause No.2262 of 2015** the court held that;

*... fixed term employment contract is, for example, entered into for a period of six months with a contractual stipulation that the contract will automatically terminate on the expiry date, the fixed term employment contract will naturally terminate on such expiry date, and the termination thereof will not (necessarily) constitute a dismissal, as the termination thereof has not been occasioned by an act of the employer. In other words, the proximate cause of the termination of employment is not an act by the employer. There is a definite start and a definite end. Thus, the contract terminates automatically when the termination date arrives; otherwise, it is no longer a fixed term contract.*

94. Upon the lapse of each written contract, whatever claims that arise from each contract such are subject to the provisions of section 90 of the Employment Act thus;

*90. Notwithstanding the provisions of section 4 (1) of the Limitation of Actions Act, no civil action or proceedings based or arising out of this Act or a contract of service in general shall lie or be instituted unless it is commenced within three years next after the act, neglect or default complained or in the case of continuing injury or damage within twelve months next after the cessation thereof.*

95. The exception to the provisions of section 90 and the 3 years rule is that there must be *continuing injury or damage* and or that the Respondent has admitted the claims or by their action indicated willingness to pay. As such, where the Claimant continued in the employment of the Respondent and his first two terms were regulated under a written contract, each contract and the violations therein and the claims that arise must be looked at in the context of section 90 of the Employment Act.

96. The Memorandum of Claim was filed on 26<sup>th</sup> January, 2015. Subsequently, various amendments were allowed. The application of section 90 of the Employment Act would thus require that all due claims be addressed as from **25<sup>th</sup> January, 2012**. This date is crucial as the provisions of section 90 of the Act are mandatory unless in the assessment of the court the act(s) complained of speak to continuing injury or damage that the Claimant suffered and was not able to address the same within the 3 years rule.

97. However, the first contract of 1<sup>st</sup> July, 2008 to 31<sup>st</sup> July, 2010 went with its terms as no claim was filed by the Claimant to assert his rights within the stipulated time period. However, with regard to the second contract running from 1<sup>st</sup> August, 2010 to 31<sup>st</sup> July, 2012, where the contract was ongoing and violations complained of and claims herein therefore arise, such are acts that cannot be separated and put aside as such form in the same series and shall each be placed in their context herein.

98. The above set out, the last phase of the Claimant's employment with the respondent despite submitting a signed contract, the Respondent did not issue him with a signed copy on their part. As

submitted by the claimant, in the case of **Benson Odhiambo Onyango versus Instarect Company Limited, Cause No.229 of 2012**; the court held that;

*A fixed term contract which expires and continues without a renewal becomes a month to month contract and is therefore governed by the provisions of the Employment Act. The termination of such contract must therefore comply with both sections 35 and 41 of the Employment Act.*

99. In this case, what the Claimant got was a termination notice dated 25<sup>th</sup> April, 2014 stating that his employment contract would terminate on the due date as at 31<sup>st</sup> July, 2014. However there was no such contract that had a fixed term limit for the Respondent to make such inference. As such, the Claimant remained under a month to month contract of employment and a protected employee in terms of section 37 of the Employment Act.

100. As noted above, each claim shall be assessed on their merits taking into account the provisions of section 90, 37, 41 and 35 of the Employment Act.

101. With regard to claims as to whether there was a redundancy or a termination of a contract that was expiring on 31<sup>st</sup> July, 2014, partly this is resolved by the analysis above. Where the Claimant was on a month to month employment contract, to terminate his employment without putting into account the subsisting challenges and financial constraints facing the Respondent was to apply and unfair labour practice so as to avoid meeting the due obligation of paying him a redundancy package. The termination of the Claimant only arose as the Respondent could not pay and has not been able to pay as these proceedings were ongoing.

102. On the question as to whether there was a redundancy situation or a termination of employment due to the expiry of contract comes as given. Several facts and features are apparent;

In May to July, 2009 the Claimant was made to give up 30% of his salary all amounting to \$4,222;

Employees were directed to choose to resign or be declared redundant;

- George Kahuthia and Esther Gikonyo resigned;
- Christine McWest was declared redundant; and
- The Claimant opted to have his salary reduced

More employees were laid off and paid a redundancy package;

The Respondent has admitted that in 2012 there was reorganization;

The Claimant was added more duties;

By April, 2014 the Respondent was not able to pay due salaries;

With the termination of the Claimant vide notice of April, 2014 only two employees remain – Mary Ogutha and Victor Barasa; and

The Respondent has to sell the only asset it owns, LR No.209/14721, Mara Road, Upper Hill, Nairobi.

103. A redundancy has been defined in law under section 2 of the Employment Act as;

*“redundancy” means the loss of employment, occupation, job or career by involuntary means through no fault of an employee, involving termination of employment at the initiative of the*

employer, where the services of an employee are superfluous and the practices commonly known as abolition of office, job or occupation and loss of employment;

104. In this regard, the Court of Appeal in the Case of **Kenya Airways Limited versus Aviation & Allied Workers Union & Others, Civil Appeal No.46 of 2013**, Githinji, and JA held that;

*... 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. ... 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.*

105. What then led to the Claimant being terminated from his employment despite all efforts made by the Claimant to keep the employer afloat was a redundancy situation. His month to month employment would have subsisted had there been no financial constraints. The Claimant had been acting director for several months, the directors before him left and even with the appointment of Dr Batten to take over from the claimant; things do not seem to have changed for the better.

106. The Claimant testified that;

*The Respondent entered into a re-affiliation agreement with International Planned Parenthood Federation, Africa Regional Office so as to receive \$150,000 to keep the operations of the Respondent afloat pending the finalisation of the re-affiliation process.*

107. The Respondent witness Mr. Victor Barasa testified that;

*... The Claimant signed his letter for a salary drop by 30% due to cost cutting ... the Respondent Administrative Assistant had a salary drop. These cost measures were by agreement of employee by 20% to 30% and the Claimant was not alone to agree on a percentage cut. ... I contributed to the Respondent staff salary payment and such were done late ... I paid 90,000.00 to Catherine Okeno on 11<sup>th</sup> June, 2014 for May, 2014. I paid Olum on 10<sup>th</sup> June, 2014 for April, 2014 salary. On 26<sup>th</sup> May, 2014 I paid Machira Charles salary due for April 2014. On 5<sup>th</sup> May, 2014 I paid Oneko part of his salary. I paid Rhoda Lewa Kshs.266, 772.00 on 6<sup>th</sup> March, 2014 for salary due in February, 2014.*

*The Claimant is not the only one paid late. The Respondent circumstances are that there were no funds. I used my own funds to pay for Respondent staff salaries. When one is at management you have to suffer the pain. The position I held had rights and responsibilities. I had to take care of junior staff... I borrowed money from board members to pay junior staff so as not to suffer the impact of low finances...*

*I went out of my way to avoid pain on junior employees going without a salary. All the SMT [senior management team] including the Claimant have unpaid dues owed by the respondent. Personal circumstances of SMT members may be worse than the Claimant's but we had to take such measures with the hope that one day we can settle all these arrears ...*

*To date I have borne the burden of the Respondent knowing the financial status. One day I will enjoy... the Respondent board agreed to redevelop its property to pay liabilities and this board decision was due to its indebtedness up to Kshs.120 million. ... It became a challenge to the Respondent as no lender was willing to bail the Respondent due to huge credit and fear of attachment of its only property. The Respondent put the property on sale in March, 2015 there is a*

*court order stopping the sale.*

108. These extracts demonstrate an entity unable to meet its financial obligations to its employees and liabilities that even banks were not willing to give credit facility. Whether the employee had written contracts of employment or not, the Respondent simply did not have the finances or a financial base to pay the due wages or salaries. Victor Barasa had to borrow from board members, sell his own property to pay junior employees, but still this was not keeping the Respondent financially afloat.

109. Such could only arise as the Respondent was as at 2010 unable to meet its financial obligations. This cannot be given any other explanation or definition other than a redundancy.

110. This is aptly captured in **Aviation and Allied Workers Union v Kenya Airways Limited & 3 others [2012] eKLR**;

*... The terms redundancy, retrenchment and restructuring are related, but can be separable. There are other terms used in different jurisdictions, to denote this form of employment termination. These include downsizing, rightsizing, and de-layering. Whatever term is used, the decision results in the dissolution of an employment agreement. In Court of Appeal of New Zealand case of **Brighthouse Limited v. Bilderbeck [1994] 2 ERNZ 243 [CA]**, the Court explained in detail that the affected employees have done no wrong: neither their conduct, nor their capacity is in issue; it is only that in the circumstances, the employer feels the employees are considered to be surplus to the needs of the business. Courts have held that employers have the prerogative to determine the structures of their businesses and therefore make positions redundant. Positions may become redundant because there is a decrease in business, the operations have become mechanized, or there is a necessity to re-organize, to enhance operations and prevent closure. The employer has the prerogative to change job descriptions, duties and responsibilities. There may also be situations, where positions become redundant for technical reasons, such as the sale of a business, or relocation to a different geographical place.*

111. In this case, I find that the Claimant was by operation of section 37 of the Employment Act in full time employment of the Respondent and during such time a redundancy situation arose which the Respondent failed to address within the confines of the law. The dues payable in law are due and by purporting to issue a termination letter to the Claimant so as to avoid meeting the legal requirements of a redundancy, the Respondent was acting in clear contravention of the applicable law and engaging in an unfair labour practices.

112. There is something that a salary does to a man. It gives him job satisfaction. Payment of a salary comes with that spring and gait towards the office to accomplish tasks. The job therefore gives one a dignified self and a purpose to return each day to accomplish more.

113. When then a salary is not paid for work done, the opposite takes place. An employee becomes anxious; demoralized; each day comes with bills and distress; and eventually, with delays and no pay at all, panic comes in and an employee is reduced to begging, scavenging from fellow workers, friends and well-wishers.

114. Each day the employee continues to report to work with the hope and prayer that the employer will pay and pay all arrears so as to reduce the suffering. The reporting to work then becomes a moment of anxiety and with hope that the pain of yesterday will reduce with receipt of pay. When then such pay does not come for days, weeks, and months, ye the employee faithfully continues to attend to work, such continued work performance is no long voluntary. It is forced upon the employee with the hope of a pay and the arrears due. The context of article 31 of the constitution then sets in;

**30. (1) A person shall not be held in slavery or servitude.**

**(2) A person shall not be required to perform forced labour.**

115. Such vassalage is not by a simple work that an employee is held by force and made to work; that an employee is placed in bondage and forced to perform his duties; no, circumstances putting an employee in a position that work stops being dignified but a means to get arrears and due wage, such I find to be in a series of what is servitude. The continuation of work without pay and continued allocation of work and additional duties so as to evade and avoid a redundancy even when one is glaringly present is forced labour.

116. Such is degrading, inhuman and tortuous. Such should not be visited upon any employee who has offered their labours and instead of receiving a salary is instead reduced to inhuman conditions. Such cannot be defined in any other words as the context within which slavery and servitude were conceptualized such were the circumstances envisaged. That no employee should be subjected to slavery and servitude as conditions specifically prohibited under our constitution and conditions that there should be no derogation. Such prohibition is what should happen to all civilized societies which are governed by the rule of law and are democratic such as ours.

117. In this case there is evidence that the Claimant was not paid his salaries for several months. Despite such dues for April to July, 2015 being admitted as due and the Respondent being willing to pay, the damage for non-payment is severe and evident on its impact on the claimant. Further, even before the non-payment of the admitted dues, several months were not paid in time, others there was less payment, and the Claimant had his salary reduced for several months.

118. Within all these lapses and non-payment of due salaries, the Claimant was allocated new duties, key officers were absent and he had to double up into these vacant positions. Other employees were laid off and paid redundancy dues, the Claimant took over some roles. The Respondent board met and failed to do the necessary – declare a redundancy and or dispose of the key asset so as to offset the owing dues and pay a redundancy package to the claimant. The Claimant was retained and made to believe that the Respondent was doing its best to address his situation. Victor Barasa was hired and took over key decision-making duties which affected the employment of the claimant. It was not until 25<sup>th</sup> April, 2014 when the Respondent took the decision to terminate the Claimant over a contract that did not exist. Cumulatively, the Respondent enjoyed he labours of the Claimant until it was drained and only then was a decision made to issue a termination letter. Such letter is issued by victor Barasa and for all intents and purposes, a junior employee to the claimant. The board was still not able to face the obvious, call the Claimant and agree on the redundancy situation and address the modalities of his redundancy dues.

119. Such I find to be inhuman, degrading and placing the Claimant under servitude and slavery. This was an Exploitation his labours, good will and commitment to the job. The efforts to give the Respondent a chance for a better day by ensuring that all due tasks were accomplished in good time and even offering advice to the Respondent board to sell the assets and property they owned before it got late I find to have been made in good faith by the claimant. There was no heed to this advice. But the Respondent ignored all these efforts and opted to seat on the key asset and property in their possession hoping to get a better deal with time. Indeed the sale of the Respondent property was stalled and has now attracted a better price that was not available 3 years ago. Such has however been done at the expense of the claimant. Had the property been sold early enough when it was apparent the Respondent was not able to pay due salaries, the litigation before court could have been avoided. The profits now made out of the expected sale and valuation of the property and asset of the Respondent arise from the labours and tears of the claimant.

120. These factors can be discerned from the evidence that in January/February 2009 the claimant was informed that a process had been initiated to declare certain positions redundant and he would be terminated unless he agreed to a reduction of his salary temporarily which he agreed to under economic duress. Where the Respondent was faced with redundancy in 2009 and failed to address the same, which situation went on and finalized resulted in the current suit. I find that was the instant time – January/February 2009 – where the Respondent should have laid off all employees, paid the redundancy package and let go the Claimant instead of engaging in practices that were not productive for the sustainability of their employment. The failure to address the finance challenge that was apparent as early as January/February 2009 was escalated to the termination of the Claimant in 2014, a record 5 years of procrastination.

121. Section 40 of the Employment Act contemplates a situation such as the one the Respondent faced in January/February 2009. To declare all positions redundant and pay off the employees and then plan a reorganisation. Otherwise to keep the Claimant and have his salary reduced so as to keep him longer, such I find to be an unfair labour practice. The Respondent board comprise of very high standing personalities with different professional backgrounds and I take it they were appointed to such board due to their expertise in various filed and had the capacity to appreciate and implement the provisions of section 40 of the Act when faced with a redundancy as the case was in January/February 2009. To move on and act as if no such case was subsisting was to encourage the Claimant on and by making him take less terms in his remuneration than agreed under his contract, even with the best application of the Employment Act, such must be lawful and not to the disadvantage of the employee.

Section 10(5);

*(5) Where any matter stipulated in subsection (1) changes, the employer shall, in consultation with the employee, revise the contract to reflect the change and notify the employee of the change in writing.*

122. The matters set out under section 10(1) of the Act include matters of remuneration, intervals of payment and the applicable dates. For this case I cite section 10(1) (h), (i) and (j);

*(h) The remuneration, scale or rate of remuneration, the method of calculating that remuneration and details of any other benefits;*

*(i) The intervals at which remuneration is paid; and*

*(j) The date on which the employee's period of continuous employment began, taking into account any employment with a previous employer which counts towards that period;*

123. The alleged consent to the review of the Claimant's salary in 2009 is challenged as having been obtained by duress. As noted above, it is apparent that the Respondent was faced with a redundancy situation in 2009 but failed to address the same in accordance with the law and opted to engage employees in salary reduction. The 'consent' thus obtained from the claimant, all factors put into account were premised on an illegality. Even where the law properly covered the respondent, the Respondent chose the alternative route of addressing the redundancy, through illegal means. Such cannot find sanction by the court. The wages due to the Claimant based on the illegality under which the salary reduction was obtained is due.

124. The implications of the inaction, omission and commissions of the Respondent in failing to address the redundancy situation arising as at January/February 2009 are severe. With the cutting down of staff, laying off several employees, this meant that those who remained particularly the Claimant had to double up in work positions and or undertake crucial duties and tasks previously being done and undertaken by several employees. Hence I find the claim by the Claimant that as he held the position of Knowledge Management Specialist, he also became the Kenya Country Team Leader and the Business Development Manager and the Training Technical Assistant but was never remunerated for holding these positions. It is also apparent that the Claimant was acting Director in the absence of Prof Eliwo Akoto. The substantive office holder was physically absent from the office and even where there was no formal communication, the Claimant as the most senior officer had to step in for this position. The respondent's witness Mr. Barasa does not challenge all these material facts save that he holds the position that the Claimant had no formal letter allocating to him these additional duties. However, with the finding that there was a redundancy, such a position was within the knowledge of the Respondent and indeed some employees were laid off and further that the Claimant's salary had to be reduced, to keep the Claimant in the scenario of the Respondent as at January/February 2009 was to engage in unfair labour practice.

125. Termination notice dated 25<sup>th</sup> April, 2014 was with regard to an employment contract that was allegedly to end on 25<sup>th</sup> June, 2014. There was no such contract of employment. The Respondent has not produced such a written contract referenced here in the notice of termination. This was challenged by the

Claimant that when he sent out his signed copy, there was no response. To terminate a contract that does not exist was simply to make effort to circumvent a redundancy situation that could now not be avoided.

126. The fact that the Claimant was not immediately paid for his notice period from March to July, 2014 is evidence that the notice of 25<sup>th</sup> April, 2014 was just a sham. Such compounds the unfair labour practices by the Respondent against the Claimant and to Subject him to the condition of *clearance* so that the Claimant can be paid his dues is unreasonable and unfair. Such cannot justify the non-payment of owing dues. The Respondent is aware that they cannot pay and have not paid even the owing dues due to financial challenge. The requirements being put to the Claimant are therefore meant to prolong his pain, suffering and such is distressful and amounts to torture which is a prohibited ground under the constitution.

127. The question is non-issuance of a Certificate of Service arose. A Certificate of Service is regulated by section 51 of the Employment Act. The certificate due should be issued together with the termination letter. This Certificate is not the equivalent of Certificate of Clearance. Each has its set purpose and not synonymous to each other. Where Certificate of Service is not issued and this renders the finding of new employment by a former employee, and the same has been requested for and not issued with the termination of employment, the law has set a sanction. The damage arising from the non-employability of an employee due to lack of a Certificate of Service has also to be put into account. In this case, the Claimant upon his exit from the Respondent has sought and requested for his Certificate of Service but Mr. Barasa testified that they could not issue the certificate as the Claimant was required to clear with them before it could be issued.

128. The circumstances leading to the termination of the Claimant's employment come back to bear in this regard, there was no money to pay him. His work had to end. The Respondent was aware of such circumstances. A notice of termination was issued on 25<sup>th</sup> April, 2014 but no Certificate of Service was issued at the end of the Notice. The defence that the Claimant refused to clear even where the Respondent was well aware that other than pushing the paper work there was nothing tangible to hand over or declare is to engage in procrastination and failure to abide by mandatory provisions of section 51 of the Employment Act. The non-issuance of a Certificate of Service is a penalty set out under section 51(3) of the Act;

*(3) An employer who willfully or by neglect fails to give an employee a certificate of service in accordance with subsection (1), or who in a certificate of service includes a statement which he knows to be false, commits an offence and shall on conviction be liable to a fine not exceeding one hundred thousand shillings or to imprisonment for a term not exceeding six months or to both.*

129. In **Angela Wokabi Muoki versus Tribe Hotel Limited, Cause No.1712 of 2014**; (3) An employer who willfully or by neglect fails to give an employee a certificate of service in accordance with subsection (1), or who in a certificate of service includes a statement which he knows to be false, commits an offence and shall on conviction be liable to a fine not exceeding one hundred thousand shillings or to imprisonment for a term not exceeding six months or to both. The court in dealing with a similar case held that;

*For the purpose of the non-issuance of the Certificate of Service, the penalty due is payment of a fine not exceeding Kshs.100, 000.00 or imprisonment of 6 months or both. Upon the admissions by the Respondent witnesses that the Certificate of Service as required under section 51(1) was not issued, recognizing the good work conduct of the Claimant while with the Respondent and the mandate of this Court to ensure fair labour practice, the sanction herein shall be an award of kshs.100, 000.00 to the claimant. Where such monies are not paid within 7 days, the Claimant shall be at liberty to move the Court for application of the full force of section 51(3) of the Employment Act.*

130. The rationale for the penalty set out under section 51(3) is that when the court is addressing the question as to whether the termination of employment is fair or unfair under section 45 of the Employment Act, section 45(5)(c) of the Employment Act has to be put into Account;

(c) The extent to which the employer has complied with any statutory requirements connected with the termination, including the issuing of a certificate under section 51 and the procedural requirements set out in section 41; [emphasis added].

131. Section 51(1) thus being mandatory and the Respondent has not complied, the reasons for non-compliance I find to be unreasonable and unwarranted in this case. Such only compounded the unfair termination of the claimant. A sanction of payment of Kshs.100, 000.00 is therefore due but such a fine shall be paid to the claimant. The conversion of the sum into the Claimant's contract currency is \$971.80.

132. On the question as to whether the Claimant was discriminated against, I make reference to the provisions of the Employment Act. Section 5 of the Act specifically prohibits discrimination against any employee, directly or indirectly. Section 5(3) and (7) provides;

*(3) No employer shall discriminate directly or indirectly, against an employee or prospective employee or harass an employee or prospective employee—*

*(a) ...*

*(b) in respect of recruitment, training, promotion, terms and conditions of employment, termination of employment or other matters arising out of the employment.*

...

***(7) In any proceedings where a contravention of this section is alleged, the employer shall bear the burden of proving that the discrimination did not take place as alleged, and that the discriminatory act or omission is not based on any of the grounds specified in this section. [Emphasis added].***

133. The question of discrimination against an employee is therefore a matter addressed in law and specifically prohibited. The Employment Act, 2007 provisions are also given further meaning by article 27 of the Constitution which makes it unconstitutional for anybody to discriminate against another on the outlined grounds and on any other grounds. Article 27(5) provides that;

*(5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4)*

134. In **Catherine Munguti and 21 others versus National Bank of Kenya Ltd, Cause No.1301 of 2014** the court in addressing a case of discrimination against employees held that;

*Once the Employee has established a prima facie case, the burden shifts to the Employer to show articulate, specific, and non-discriminatory reasons for the disparity that is set out. In **G M V versus Bank of Africa Kenya Limited [2013] eKLR** the court held;*

*Once the employee has established a prima facie case, the burden shifts to the employer, to show a legitimate explanation for termination. Where the employee has demonstrated a prima facie case, a presumption that the employer discriminated against the employee is raised. The employer must then articulate clear, specific, and non-discriminatory reason for termination. The employee's duty is to provide evidence, which would permit the Court to conclude the explanation proffered by the employer, is pretextual. Pretext can be established by showing that the asserted neutral basis for termination was so riddled with error, that the employer would not honestly have relied on it. The obligation of the employee is not to establish that she has been discriminated against, on strict proof, as demanded by the Respondent in this case; the employee needs only to show that she has a prima facie case, and that the reasons advanced by the Respondent, are unworthy of credence. Under our law, specifically Section 5(6) of the Employment Act 2007, the burden rests on the shoulders of the Respondent, to show that discrimination did not take place.*

135. In **Frederick Kariuki versus Bank of India, Cause No.2424 of 2012**, the court held that where differentiation of an employee against another employee if found to be unjustified, the same is discriminatory and unfair. Section 5 of the Employment Act therefore requires an employer to give the reason(s) and the justification for setting out an employee aside and separate from other employees so as to deny them a legal right. Section 5(7) provides;

*(7) In any proceedings where a contravention of this section is alleged, the employer shall bear the burden of proving that the discrimination did not take place as alleged, and that the discriminatory act or omission is not based on any of the grounds specified in this section.*

136. In this case, the claim is that there was discrimination against the Claimant on the basis of his senior management status, nationality and race. The Claimant gave the instances of discrimination against him in that in the case of **Chebii versus CAFS**, the employee was given a fair hearing before termination which the Claimant was not; other employees were paid one month's compassionate pay upon redundancy which the Claimant was not; the Claimant was denied benefits and allowances provided to other employees such as transport allowance, housing allowances, impact pay and annual salary increments; his salary was not paid in full and not on time unlike other employees which led to the Claimant being evicted from his rented apartment for nonpayment of rent; the Respondent failed to pay due salaries and asked the Claimant to seek financial assistance from his parents or seek alternative employment at the US Embassy; the Claimant was terminated from his employment on the basis of his nationality on allegations that the Immigration Act barred it from hiring him despite providing him with work permits on 3 previous occasions; and failure to issue the Claimant with an employment contract like other employees as demonstrated by Victor Barasa who submitted his contract in court. Other grounds for discrimination are that the Claimant was not paid redundancy dues like other employees; he was not appraised for purposes of a salary increase; allocation of duties for terminated employees upon redundancy without paying him or the same; failure to give due allowances; the intimation that junior employees welfare was more important than the Claimant who had a higher salary and should not complain; and failing to pay the Claimant salaries in arrears on the basis that they are time barred.

137. In totality, upon these allegations, the burden shifted upon the Respondent to prove that there was no discrimination against the claimant. Barasa testified in justification of the salary reduction by 30% and on the reasons that the Claimant gave consent to the reduction and thus cannot be found to claim discrimination against him on this basis. The defence is that all employees in 2009 agreed to a salary reduction as a cost cutting measure. That Barasa personally contributed to junior staff salaries from borrowing and own funds and even lent the Claimant Kshs.30, 000.00 for his own needs to demonstrate that all Respondent employees were suffering for lack of funds. That his salary was less than that of the Claimant by half yet he was able to organise his life, pay other employees and carry the burden of hard times for the benefit of the respondent. Other SMT members had unpaid salaries and were able to bear with the situation and the Claimant as part of SMT should have understood and not made the demands that he made. That being in senior management came with responsibility, part of which was to hope one day things would be fine and arrears settled. That the complaint by the Claimant that junior employees were paid before him was not justified as they earned less than him.

138. Barasa also testified that;

*... Payment of impact benefit at 15 days for each year worked was for redundancy for all employees declared redundant the employees whose contracts were cut short. All employees declared redundant in 2014, their profiles show they were subordinates and earning way below the SMT employees' salaries. To cushion these employees. One such employee earned Kshs.24, 000.00 and upon redundancy was paid at the rate of one (1) month salary each year. The Claimant earned half (½) a million. For junior employees to earn such an amount compared to the claimant, they deserved several years at work. The board therefore made a decision on a compassionate pay. The Claimant was not part of the compassionate pay and was also not present at the board meeting when this decision was made. No SMT member got a compassionate pay.*

139. The effort by the Respondent witness to justify discrimination against the Claimant only adds to

confirm that indeed there was unjustified discrimination on the basis that he was earning more and that a decision was therefore made not to pay him a redundancy package. The explanation given by Barasa make a bad situation worse to say the least – in a redundancy situation, the Respondent board held a meeting and for no reason other than the fact that the Claimant earned more in his position, which position was legitimately held, he was set aside and others paid a redundancy package including one month salary for each year worked.

140. It is not the amount or the figures here that should justify the separate and different treatment against the Claimant but the principle applied in this regard. This rationale looked at vis-a-vis the constitutional threshold under article 27 and provisions of section 5 of the Employment Act, there is confirmation by the respondent's own actions that there was discrimination against the Claimant. Such I find not justified through any law, practice or policy of the respondent. Such discrimination is prohibited and damages due on the finding that the Respondent deliberately and without any due cause engaged in a practice prohibited under the constitution and the Employment Act.

141. Before conclusion of the analysis on this aspect of discrimination against the Claimant, during the proceedings and evidence it emerged that the Respondent asked the Claimant at the height of the non-payment of his salaries to go and seek help from his parents or seek alternative employment at the US Embassy in Nairobi when he pointed out the dire financial position he was in due to failures by the respondent to pay due salaries; inability to pay rent and meet basic need; pay for his daughter's school fees; pay for own transport and that of his daughter; and the impact consequences that arose for lack of cash. First, the Claimant was in Kenya upon employment by the respondent following a lawful contract entered into by the consent of both parties. The Claimant was therefore on a specific work permit to work for the respondent and not the US Embassy in Nairobi. Secondly, the Claimant as an adult was giving his labours to the respondent for a salary that was due each month and the idea that he should seek help from his parents is demeaning, insensitive, culturally outrageous, and meant to dehumanize him. In this regard Barasa testified that when he noted the serious financial difficulties the Claimant was going through he gave him Kshs.30, 000.00 and for Barasa, he was able to sell his own assets so as to lend the respondent money to pay staff particularly junior staff. Barasa is in his home country, culturally different from where the Claimant is domiciled and where it may be possible for Barasa go borrowing cash from friends and relative, this may not be possible for the claimant. Even where the Claimant was able to borrow from his family this should be a personal option only at his discretion and should not or should never have come from the respondent upon failing to pay the lawfully owing salaries. Thirdly, to suggest that the Claimant should go and seek alternative employment with the US Embassy in Nairobi is supercilious, highhandedness, partonising, condescending, and ultimately inhuman and degrading and contrary to articles 28 of the constitution for being contrary to human dignity.

141. The evidence and defence that the claimant was aware of efforts being made by the respondent which included liquidation of assets to honor debts is a matter that was absolutely at the hands of the respondent to control. On his part, the claimant as at 2011 proposed that the sole asset and land belonging to the respondent be sold. This was not heeded until 2015 when the value had gone up and by this time the claimant had been terminated and his dues owing. The respondent board continued with procrastination with the hope that property prices would escalate and be able to make huge profits. Indeed Barasa has remained at the respondent *awaiting better days to come*. This is not a luxury the Claimant could afford by August, 2014. He was terminated from his employment; he had no place to live; he had a work permit that was due to expire and at the end he had to return to his home country worse off than he arrived 6 years earlier in 2008 to work for the Respondent but return home empty handed; without his personal good; with his daughter destabilized and his self-esteem at its lowest as he had been reduced to a life of begging and seeking accommodation with friends all the way in Gilgil.

142. In **David Wanjau Muhoro versus Ol Pajeta Ranching Limited, Cause No.1813 of 2011** the court held that;

*... the Industrial Court [Employment and Labour Relations Court] retains wide latitude in addressing employment disputes legal and equitably. Nowhere in the substantive and procedural laws relating to enforcement of employment rights are employees required to specifically plead,*

*particularise and prove wage or salary claims. ...*

143. At paragraph 151 the court above in quoting Dave Pager & Bruce Western in ‘*identifying Discrimination at Work: The Use of Field Experiments*’<sup>[1]</sup>the court held;

*... given the subtlety of contemporary forms of discrimination, it is often difficult to identify discrimination when it has taken place. Employees who confront such issues at work during employment have the risk of retaliatory actions from their employers. They have the challenge of gathering evidence from the employer and co-employees. ...*

*The acts of discrimination against the claimant, and other black managers, were not isolated cases, but rather a practice that had gained foothold at ... the Claimant raised more than a prima facie case of discrimination; the respondent did not discharge the burden of showing disparity was based on legitimate reasons; and in the end the evidence marshaled by the Claimant rebutted the pretextual reasons given by the respondent in justifying salary disparity. ... Discrimination against the Claimant occurred in small increments over a period of 5 years. The adjustment of September 2004 may have looked insignificant, but morphed over time not a devastating disadvantage. ...*

144. The court above made an award of Kshs.18,256,497.00 for cumulative pay disparity and damages for discrimination against the employee. In the case of **Major-General (Rtd) Enoch Sasia and Lieutenant-Colonel (Rtd) Barnabs Rono versus the Attorney General and Others, Cause No.430 and 431 (consolidated) of 2013**, the court awarded Kshs.60 million in damages to both claimants for unfair termination of employment for constitution violations against the officers. Discrimination is prohibited in employment whether it is taking place directly or indirectly. Equally, putting an employer into servitude is a grave constitutional violation and a matter prohibited in employment and labour relations and where such occurs should be dealt with firmly and in no uncertain terms. Servitude is a matter so grave that where it occurs, the government should enter and seize the employer operations and redress the same with sanctions. In this case, noting the financial constraints facing the respondent, such is not a justification for violating the constitution or the law. The human person is not a chattel to be tossed from side to side as the respondent board seat and deliberate on what to do with the sole asset that should have been used to pay off the claimant. At the end the Claimant was stripped of his dignity and subjected to serious human rights violations as addressed above. For such damages are due. The Claimant is hereby awarded Kshs.15 million in damages. Such is compounded to \$145,773 at current exchange rates.

## **Remedies**

145. As set out above, several claims have been resolved by consent. Such are hereby confirmed;

1. Balance of salary for March to July, 2014 \$14,568;
2. Repatriation flights \$2,000;
3. Remaining vacation pay \$2,523.11;

146. On the contested claims, the three phases of employment set out above – first contract period running 2008 to 2009, 2<sup>nd</sup> contract running 2010 to 2012; and 3<sup>rd</sup> phase running 2012 to 2014 without a written contract and regulated in law – the claims shall each be addressed on their merits. However, I note several claims have been challenged as being time barred but the Respondent witness admitted to his last sentence in evidence that there are claims that the Claimant was not able to put in his claim applications/forms and if he submits these, such dues are owing and the Respondent shall be paid. With such a bold admission, the claims will be each addressed and put into context.

## **The Claim for retained portion of salary from 2009 to 2014 at \$9,166.87.**

147. The claim is made for \$4,222 on the basis that the Claimant was made to accept a pay reduction of

30% in 2009 to avoid termination of his employment due to a redundancy. That there was duress when the Claimant accepted to give up 30% of his salary while others were paid their redundancy package, he held back for 2 months before he could hand in his consent noting he was given little options to resign or be terminated and based on his circumstances and having just left this home country to come to Kenya for work, his daughter having moved into Kenya and attending school, he was thus coerced to give consent. This was not voluntary.

148. This is a claim that arose within the first contract which lapsed on 1st July, 2010. Though redundancy situation was continuing the claim is specific as covering the period of 2009. By application of section 90 of the Employment Act, such a claim should have been lodged before the lapse of 3 years. I find this claim time barred.

149. However, the sum of \$4,866, Barasa testified that;

*... \$4,866 has never been subject of a problem between the Claimant and the respondent. If he wishes to follow up on this claim we can address. The Respondent asked the Claimant for the basis of this claim and we do not have the details. The Claimant has to submit evidence. The Respondent is keeping the claimants records and the Claimant has not requested for them.*

150. Where the sum of \$4,222 comprises 30% of reduced salary and is time barred, the claim for \$4,866 thus stated and noted by the Respondent is due. Termination of employment was at the instance of the Respondent and to hold and keep these monies from the Claimant with the knowledge of involuntary termination of employment on his part would be to punish him unfairly. Such pay is due at \$4,866 by application of section 17 of the Employment Act.

#### **Claim for home leave flights between 2010 and 2014 \$7,689.40.**

151. These claims for flights to home country by the Claimant were on the basis that he was entitled under each contract to the same but was not paid. The Respondent witness asserted that the Claimant never submitted a claim for the same. This was an entitlement provided for under the contract of employment and under the Respondent work policy. Barasa admitted in his evidence that this was an entitlement due to the Claimant but he had to submit an application or spend and get a reimbursement for use of the most direct and economic flight. That the Claimant as an expatriate employee earned such benefit under each contract but he had to comply with the policy guidelines.

152. There is an admission to the claim subject to a condition that the Claimant should submit an application form or seek a reimbursement upon submission of his flight tickets. With the admission, the claims for home leave flights owing became renewed and owing.

153. As noted above, termination of employment was at the instance of the respondent. A letter of demand for owing dues has been made and to subject the Claimant to making an application or seek a reimbursement over an entitlement that is contractual and regulated under policy of the Respondent is to engage in unfair labour practice and I find such is not justified. From 2010 to date the Respondent has not been able to meet its financial obligations, it then that the Claimant never applied for his flight reimbursements or that the Respondent could not pay?

154. The Respondent cannot hide behind the veil and assert that no application was submitted by the Claimant knowing well even where such application was made; payment for such flights was not possible at the time until termination of the claimant. I find such monies are due and ought to have been paid with the termination notice. The duty was upon the Respondent to pay such dues before effecting termination of the employment contract.

155. The Claimant is awarded \$7,689.40 for home leave flights under his contract and regulated under the policy of the respondent. Such shall be paid without requiring the Claimant to apply or submit any documents for reimbursement.

**Claim for new repatriation flight two one-way tickets never paid \$2,000 are admitted.**

**Claim for remaining vacation days at \$2,523.11 is admitted.**

**Claim for relocation expenses (Shipping Expenses) at \$11,097.41.**

156. The claim for relocation expenses is made on the basis of the contract and policy of the Respondent that the Claimant was entitled to have his personal goods shipped back to his home country upon termination of employment. The Respondent has admitted this claim save that the amounts for shipping should be paid to a third party and not the Claimant as per the policy.

157. This became a very emotive issue in court causing the Claimant great distress and sadness noting that his personal goods have remained with the Respondent for the last two (2) years and have not been shipped to his home address as required under his employment contract and in terms of the policy; part of these personal goods included personal effect belonging to his daughter and as a father he has been unable to explain to her why she cannot have her personal effects with her; the Claimant has had to travel from his home country to come and follow up on the non-shipment of his personal effects and efforts to find out the storage status at the Respondent premises have not borne much fruits and eventually when he had a snap shot access such goods were kept in a haphazard manner causing him great distress and there is fear that such goods are damaged beyond repair. To ameliorate the situation, the Claimant went out of his way to look for a shipping company and sent to the Respondent the details and costs at \$11,097.41 but there was no shipment. The Claimant asked the Respondent for such monies so that he could personally ship his goods for his use but such amounts have not been paid to him.

158. Barasa testified that it was the duty of the Respondent to source for the best shipping company and not the Claimant to do so. That the policy required that due amounts for shipping be paid to a third party but not the ex-employee. However, it has been over two years, the Claimant's personal goods have remained in the custody of the respondent; there is no shipment through a third party or payment of the due costs to the Claimant for him to do shipping through the sourced company.

159. The Respondent has therefore denied the Claimant the enjoyment of his personal goods and gone further to subject him to degrading treatment and torture resulting in holding such goods without putting into account that personal effects unless put in the custody of the Claimant will not be of any value to the Respondent in storage and that his daughter has been made to suffer directly due to the termination of her father's employment and the no shipment of such goods which include her personal effects. These matters have been brought to the attention of the Respondent but I find no effort at all to meet the Claimant in the middle and either ship the goods or pay him to ship the same. The insistence that a third party should be paid so as to ship such goods is simply to engage in unfair labour practice.

I find the shipping sum of \$11,097.41 should be paid directly to the claimant. Such amounts assessed two years go must have escalated and should be paid with due interest to cover for any added costs.

**Claim for Accommodation expenses at \$2,340.**

160. The claim is premised on the provisions of the Respondent policy at clause 9.3 where the Respondent was to pay actual full board accommodation expenses for a departing staff member including dependents after his last working day and for 5 days. This was to benefit an employee whose goods were due for shipment and had to vacate rented premises prior to departure. That the Claimant incurred costs in this respect and the Respondent should pay for the same.

161. The Respondent dispute this claim but state that under clause 9.2 of the policy the Claimant was entitled to relocation expenses, shipping of his goods and the costs of moving the employee together with his family under clause 9.3 of the policy. That the Claimant made a claim for this benefit in June, 2014 but he ought to have confirmed that he had vacated his rented premises. The Respondent enjoyed credit facilities with hotels and would have put the Claimant in a full board facility. The Claimant should have also submitted his actual expenses. Barasa admitted that the Claimant's goods were put in the custody of

the Respondent for shipping from 28<sup>th</sup> June, 2014. The Claimant started working from Gilgil staying with a friend but he never submitted his expenses for payment.

162. A right spelt out in an employment contract cannot be negated against the employee upon termination. The Respondent has admitted that the Claimant was entitled to accommodation expense upon submitting his goods for shipping to home country which was done on 28<sup>th</sup> June, 2014. At this time the Claimant was still serving the supposed notice period. He had not been paid his salaries for several months. The claim for accommodation during this period I find to be reasonable and justified. In any event, to require the Claimant stay in a hotel facility on the basis that the Respondent enjoyed credit facilities with hotels, such is to require the Claimant remain under unreasonable restrictions and control whereas the Respondent had already breached the contract of employment by failing to pay the due salaries. Had such monthly wages been paid on time and as and when they were due, it would not have been necessary for the Claimant to move to Gilgil with friends for accommodation. The costs claimed for accommodation expenses are due at \$2,340.

**Claim for relocation flights for 2008 \$2,858.**

163. The claim is based on the provisions of clause 9.1 of the policy. That in 2008 when the Claimant attended interviews with the respondent, his one-way flight expenses were not paid and are due. In defence, the Respondent has challenged this claim on the basis that in 2008 the Claimant came for interviews and his daughter followed later upon employment. The relocation costs are not owed where such related to attending at the interview and the Claimant was paid for job relocation. The travel claims for the daughter were never submitted for payment. The Claimant's travel tickets at \$1,841 were paid by the Respondent but the travel costs for the daughter once submitted should be paid.

164. This I find to be in a series of admissions made by the Respondent that even where the claim would have otherwise been time barred, the condition that such are due upon submission of evidence, has renewed the claim. As noted above, demand for these expenses have been done, termination of employment was not voluntary and to require the Claimant to submit the travel expenses when such right existed for his travel and this of his daughter at this point is to engage in an unfair labour practice. It is not denied that the Claimant had to move his daughter into the country and where the Claimant's specific costs of \$1,841 were paid; the balance due for the daughter at \$499 is due and payable. The Claimant is awarded \$499 for relocation flights claimed and not paid at \$499. Such is payable with interests.

**Overseas relocation accommodation expenses per clause 9.3 of the policy.**

165. The claim for overseas relocation accommodation expenses is made on the basis that under the policy the Claimant was entitled to a lump sum of one month's per diem to cover accommodation, meals and incidentals. That such per diem was to be paid based on the UN rate and in accordance with the manual. The Respondent failed to pay such amounts on the basis that the Claimant was residing with a friend. The per diem was an entitlement that ought to be paid.

166. The respondent's evidence is that the Claimant was offered accommodation but he declined and opted to reside with a friend. Had he taken the offered accommodation, such a matter should have been resolved and the claim unnecessary.

167. This claim arose in 2008 with the movement of the Claimant from home country to take up employment in Kenya. Part of the entitlements for flight costs; per Diems; installations were paid and the Respondent has submitted the records in this regard. The claim for one month per diem at UN staff rate is denied and not admitted at any instance. Such is a claim I find to fall way outside the limitation period and with the denial by the Respondent throughout the hearing and even before upon demand, such cannot be confirmed. It offends section 90 of the Employment Act provisions for having been claimed after over 3 year's period.

**Home leaves gratis entitlement for 2008 to 2014 at 46 days at \$10,580.**

168. This claim was amended in terms of Order 8 rule 5 of the Civil Procedure Rules as initially the Claimant had made a claim for 6 days instead of 46 days in error. The Employment and Labour Relations Court (Procedure) Rules, 2016 and their predecessor the Industrial Court (Procedure) Rules, 2011 allow parties to amend pleadings before close of pleading and with leave of the court after the close of pleadings.

169. Rule 14(6) provides;

*(6) A party may amend pleadings before service or before the close of pleadings:*

*Provided that after the close of pleadings, the party may only amend pleadings with the leave of the Court on oral or formal application, and the other party shall have a corresponding right to amend its pleadings.*

170. Section 20 of the Employment and Labour Relations Court Act requires the court to proceed without undue regard to technicalities. Parties herein exchanged huge volumes of documents, the amendment to the claim herein was accepted as part of the pleadings herein and the Respondent had a fair chance to give their defence and make written submissions on the same. The amendment is therefore reasonable and within the knowledge of the Respondent and was gone into by the witness in defence.

171. The claim for home leave gratis is based on clause 11.2 of the policy and on the basis that an employee was entitled to home leave to enable him maintain cultural and family tie and to attend to any personal commitments at home country. Such leave accrued after every 2 years. The Respondent was to pay for round-trip for the same.

172. The Claimant worked for 3 two-year contracts and was thus entitled to home leave of 3 round-trip tickets for him and his daughter and he days in transit which should not have been made part of annual leave, which was to be treated separately. The claims relates to;

December, 2011 to January, 2012 for 18 days;

December, 2013 to January, 2014 for 15 days; and

June, 2014 to July, 2014 for 13 days.

Total number of days is 46 days

173. It is the duty of an employer to clearly and categorically set out all the work benefits due to an employee. Where such details, benefits and entitlements are not in the letter of employment or in the policy, the employer has a duty to issue the employee with appropriate communication over the same. Section 10(3) (a) of the Employment Act provides;

*(3) The statement required under this section shall also contain particulars, as at a specified date not more than seven days before the statement, or the installment containing them, is given of—*

*(a) Any terms and conditions relating to any of the following—*

*(i) entitlement to annual leave, including public holidays, and holiday pay (the particulars given being sufficient to enable the employee's entitlement, including any entitlement to accrued holiday pay on the termination of employment, to be precisely calculated);*  
[emphasis added].

174. Section 11 (2) and (4) go further to provide as follows;

*(2) A statement under section 10 may refer the employee for particulars of any of the matters specified in section 10 (3) (a) (ii) and (iii) to the provisions of any other document which is*

*reasonably accessible to the employee.*

(3) ...

(4) *The particulars required by section 10(2) and (3) shall be included in a single document.*

175. The Respondent as the employer therefore had a duty to clearly set out the benefit of home leave gratis and the annual leave due to the claimant. Such were to be set out in the contract of employment or where provide for under the policy to be supplanted in the same.

176. The claim is denied by the Respondent on the grounds that under clause 11.2 of the policy the Claimant earned home leave to claim for *home leave gratis* is to mean that the Claimant earned annual leave as well as *home leave gratis*. However Barasa testified that;

*... a claim for home leave gratis can be enjoyed subject to the Claimant submitting an application. It is an entitlement but must be applied for. The Respondent is not evading its obligations under the Claimant's contract of employment.*

177. The Claimant's employment contracts were quite generous. This can be deduced from the fact that the Respondent wanted to be appealing to attract a person of the Claimant's caliber, knowledge, abilities and skills and for him to move from his home country to work in Kenya, the package of employment was very good. Also, the Respondent being an entity that served regional and international mandate with stakeholders spread across countries, to keep good and skilled employees there was a policy setting out work benefits for local and foreign nationals such as the claimant. I find clause 11.2 of the policy was to take care of such foreign nationals and employees of the Respondent to ensure that they enjoyed both their annual leave and a home leave paid for by the employer. The annual leave being regulated under section 28 of the Employment Act is a right due for all employees while home leave gratis was specific to foreign nationals.

178. The Claimant therefore earned both annual leave and home leave gratis. Barasa conceded this much save that the Claimant ought to have made an application for the same and explain the use of 6 transit days. To such an admission of the benefit being due, the same being regulated under the policy, to require the Claimant to make an application after the fact of his termination is unreasonable. The Claimant is hereby awarded \$10,580 for home leave gratis covering 2008 to 2014.

#### **Claim for employment termination benefit of 15 days per year for every year worked.**

179. The claim is made on the basis that while the Claimant remained employed by the respondent, several other employees received benefits of terminal dues outside their contracts. In undertaking the redundancy process there was no criteria used and to fail to pay the Claimant 15 days for each year worked was discriminatory. The claim is challenged on the grounds that the Claimant was under an employment contract that lapsed in July 2014 and unlike other employees such as Douglas Obwocha who left 3 months before the Claimant on 25<sup>th</sup> April, 2014 due to termination that related to financial constraints, he was paid for 15 days for each year worked. Under the policy, obwocha was paid for 15 days for each year worked but for the claimant, his contract came to an end.

180. As outlined above in assessing as to whether there was a lawful redundancy process, the Claimant was under a fixed term contract from 2008 to 2012. For this period, the Claimant remained in employment and due salaries were paid. Section 40 of the Employment Act is only available to an employee who loses work due to no fault of their own but for the reason of operational requirements or where the position is no longer available in the organization due to reasons that do not relate to the skills of the employee. For The open period of 2012 to 2014 where the Claimant was not under a written contract of employment, and was faced with redundancy, a severance pay is due for the 2 full years worked.

181. Under the policy, the Claimant is entitled to 15 days for each year all being 30 days. Such severance

pay should have been paid upon termination of employment as the sole reason for the issuance of termination letter is the financial situation of the respondent. There was no written contract that was lapsing at July, 2014 that was capable of a lapse. The Claimant is hereby awarded \$6,900 severance pay.

**Claim for 7.5% unremitted pension contribution for 61 months from 1<sup>st</sup> January, 2009 to July, 2014.**

182. The claim is for service pay under section 35(3) of the Employment Act on the basis that for 61 months the Respondent failed to remit pension contributions for the claimant. That between July, 2008 to December, 2008 and June, 2012 to August, 2012 the Claimant was not enrolled under any retirement, pension scheme or NSSF and thus entitled to a service pay. Under the contract of employment upon confirmation into employment the Claimant was entitled to be enrolled in a pension scheme where the Respondent was to make a contribution of 7.5% of basic salary which was not done from 1<sup>st</sup> January, 2009 and September, 2010 December, 2010 to May, 2012 and September, 2012 to July, 2014.

Period not enrolled under any scheme;

July, 2008 to December, 2008; and

June, 2012 to August, 2012.

Period pension of 7.5% not remitted;

January, 2009 to September, 2010;

December, 2010 to May, 2012; and

September, 2012 to July, 2014.

183. At the time of termination, the Claimant was not under a written contract of employment. Section 35(5) of the Employment Act provides;

*(5) An employee whose contract of service has been terminated under subsection (1)(c) shall be entitled to service pay for every year worked, the terms of which shall be fixed.*

184. The above section must also be read together with section 13 of the Employment Act. Where the Claimant was entitled to a work benefit, such being registration for a pension scheme to secure his retirement or termination benefits and the Respondent was to contribute 7.5% of his basic pay therein, when a change arose and the Respondent for whatever reason(s) was unable to pay, a change with regard to the same should have been communicated to the Claimant in writing. Section 13(1) and (3) Provides that;

*1. If, after the material date there is a change in any of the particulars required under sections 10 and 12, the employer shall give to the employee a written statement containing particulars of the change.*

*2. ...*

*3. A statement under subsection (1) may refer the employee to the provision of a document which is accessible to the employee for a change in any of the matters specified in section 10(3)(ii) and (iii) and section 12(1)(a) and (c).*

*4.*

185. The defence is that the Respondent opened an account with NIC bank where the Claimant's pension dues were remitted and upon from January, 2009 to September, 2009 when the account was closed and he

Claimant was compensated. That in October, 2010 a new provider, Jubilee Insurance was sourced and there were remittances until April, 2012 when remittances stopped due to lack of funds.

January to September, 2009 addressed;

October, 2010 to April, 2012 addressed;

186. Barasa testified that;

*... The Respondent remittances to Jubilee were not regular but the Respondent eventually paid. The payments made to Jubilee Insurance are not submitted in court.*

187. Based on the provisions of section 35 and 13 of the Employment Act, where the Claimant was not subjected to statutory deductions due to NSSF or NHIF due to the nature of his employment contract, a pension scheme or gratuity pay ought to have been put into account. The policy of the Respondent had adequately addressed this fact but there was no compliance. For the months there were no remittances of any pension benefit, service pay is due. However, such computation is premised on each full year of service as this is not meant to enrich the employee but rather to ensure that the employer has complied with their statutory mandate of putting a savings into the pension of the employee that is reasonable.

188. The periods not covered are;

October, 2009 to September, 2010 a period of one(1) full year. The service pay due herein is 15 days' pay all at \$3,450;

May, 2012 to July, 2014 a period of two (2) full years. The service pay due is 30 days' pay all being \$6,900..

Total service pay due is \$10,350.

**Claim for house allowance at 15% basic salary at \$52,978.50.**

189. The claim is made on the basis that under section 31 of the Employment Act the Claimant was entitled to accommodation of a house allowance. The Respondent challenged this claim as not due on the ground that the Claimant had a consolidated salary which was inclusive of his house allowance.

190. Under the 3 phases of the Claimant's employment with the Respondent – 1<sup>st</sup> and 2<sup>nd</sup> contract and the last phase when he was not under a written contract, of the two first phases, there were written terms of employment that regulated what conditions prevailed between the parties. The Claimant cannot claim for a house allowance outside of such agreed terms. To do so would negate the purpose of having an employment contract in the first instance spelling out the applicable terms of employment.

191. With the end of the first contract in 2010, the any claims made and not admitted by the Respondent abate with time. Similarly under the second contract ending in 2012, with the written terms of contract clear and the claim for house allowance not admitted, the contract went with it.

192. However, under the last phase where the Claimant was under an unwritten contract of employment, such opened up the Respondent to claims such as this one. Noting the finding above that the Claimant's employment converted under section 37 to full time employee of the respondent, failure to issue an employment contract came with due statutory benefits such as can be found under section 31 of the Employment Act.

193. For the 24 months from 1<sup>st</sup> August, 2012 to 31<sup>st</sup> July, 2014 the Claimant is entitled to a 15% allowance as house provision. The computation is based on the last paid wage of \$59,657 per annum and all due allowances herein being 17,897.10.

### **Claim for acting director allowance for 12 months.**

194. This claim was the most contested by the respondent. The Claimant asserted that upon the declaration of redundancy and several employees being forced to leave and were paid a severance package and others opted to resign, he was made to take up duties of several other employees as well as the position of acting director until Dr Batten was brought on board. That even before the taking of the acting director position, several directors of the Respondent were away on duty or absent forcing the Claimant to take up their roles.

195. On the one hand the Respondent notes that the Claimant took over duties of acting director but that he was never paid for it. This happened after employees were declared redundant. This is not in dispute and it is a fact that indeed the Claimant took over various duties and kept the office running up and until a new director, Dr Batten was appointed and even then the Claimant had to bring him to speed with his duties.

196. These aspects of the Claimant holding an acting position is to be discerned from various communications and documents. Barasa testified that from June, 2011 to February, 2012 the position of director was held on a rotational basis and there were no written communications to the Claimant to hold such a position alone.

197. On such contested facts, the role and commitment to the job clear on the part of the claimant, such circumstances and leading to the claim for an acting allowance for the position of director shall be put into account when assessing the compensation due to the claimant.

198. To quantify the time and work put by the Claimant on the job for the benefit of the Respondent using what previous directors such as Akoto or Batten earned would be to diminish the value addition and time dedication given by the claimant. It was apparent from the Claimant's evidence that he passionately went into his work, went out of his way and overtime to ensure pending tasks in various departments were finished in good time; he travelled to other countries to represent the Respondent at key meetings with the hope that the Respondent would remain relevant and afloat; but he was never appreciated or adequately compensated for his time and effort. Eventually, the Claimant was accused of having failed to undertake his own assessment and appraisal for a salary increase which ought to have been initiated by the employer. There was no salary increase for this single fact. To therefore award the Claimant on the basis of what other directors earned would be to justify and inherent injustice. Damages are due.

### **Claim for annual basic salary increase of 4.2% covering 2011 to 2014.**

199. The claim is made on the basis that in 2010 the Claimant was given a 4.2% salary increase following his appraisal but subsequent appraisals were not done due to changes in organizational structure or due to dereliction by his supervisors. Other senior management staffs such as Angeline Siparo, Ben Ngoye, Rhoda Lewa, Catherine Oneko and Kiplagat Chebii were given salary increases upon appraisal but this did not happen to the claimant.

200. Barasa testified that the Claimant excelled in his duties from 2009 to 2014 and his salaries were increased. In 2014 some employees got their salaries increased as they were project personnel and the Claimant's salary was not increased during the period of 2011 to 2014. His salary under the implied contract was \$59,657 per annum and at this time the Respondent had a financial crisis and could not pay. All SMT members who included the Claimant were assisting the Respondent turnaround but there were no good results. That there was no entitlement to an increase in salary.

201. It is therefore not in dispute that the Respondent project staff had a pay increase and the Claimant was not considered because he had an implied contract; he was a member of the SMT working for the turnaround of the organization which did not bear fruits; and that he was not entitled to a pay increase.

202. Where the Claimant's salary was due for increase upon an appraisal, the duty was on the employer to ensure that such an appraisal as a work requirement was undertaken. Where the Claimant was directed

to commence the process of appraisal by his supervisor and he failed to do so, such is a matter that ought to have been addressed by application of policy and be issued with sanction, warning or reprimand for failure to abide lawful directions. This is not the case here. But it cannot be more buttressed that the Claimant continued to undertake his duties diligently; he was never appraised nor said to have failed to abide lawful directions in this regard; other employees got a salary increase yet he was omitted from the same. Such I find to compound the discriminatory practices undertaken against the Claimant by the Respondent as the same denied him a substantial benefit at work and is not justified. The assessment above shall apply in assessing damages due.

**Reasonable remuneration for work done as team leader from March, 2010 to May, 2011 for 15 months and August, 2012 at \$612 x 16 months.**

203. This claim was abandoned by the Claimant noting the claims made under the claim for an acting allowance or the acting position of executive Director. As this is addressed above, such is resolved.

**Claim for reasonable work done as D1 Level Director from 2012 to 2014 \$23,655.10.**

204. The claim is on the basis that the Claimant was promoted to the position of Director of Operations and Business Development where he had to supervise additional employee and got more responsibilities. Employees who were promoted had a salary increase due to additional duties but the Claimant was not considered for such salary increase and the workload added to him.

There was evidence that Dr Ngoye received a salary increase of 20% with a daily rise from \$269 to \$355 per day while the Claimant remained at \$230 pay rate per day.

205. Barasa for the Respondent challenged this evidence on the grounds that after the restructuring due to lack of financial capacity, the Respondent was forced to reduce its employees. The remaining employees had to take additional duties but such were *incidental duties*. That the Claimant had such *incidental duties* and is not eligible to additional pay as the scale of work reduced with abolition of offices for several employees.

206. The circumstances of this claim and the one set out above that has since been abandoned and the claim for acting Director allowances, though couched differently, and as separate, these claims are intertwined and inseparable. From the evidence of both parties, it is apparent to the court that from 2009 when the Respondent was faced with a financial crisis, several employees were laid off and others resigned. They were paid their terminal dues or redundancy package and left. Things did not improve despite the Claimant putting so much effort into the Respondent for the turnaround. In 2012 when the 2<sup>nd</sup> contract came to an end, the Respondent was on a downward fall and several key employees were laid off or they left. The acting Director, Akoto abandoned the job and the Claimant was forced to take over core duties in running and managing that position despite not having a written contract with the due benefits. In early 2014, several other employees left the Respondent as the financial crisis could not be salvaged. The Claimant did remain and continued in agitated efforts to turnaround the organization. Even with the entry of Dr Batten as the director, things did not improve.

207. All along, the Claimant remained faithful to the job, took more and additional roles and despite what the Respondent witness, Barasa tries to trivialize as *incidental duties*, the additional duties taken over by the Claimant over time and since 2009 to 2014 kept the organization afloat and some activities here and abroad were undertaken. The Claimant maintained the face of the organization with other partners and even where the financial situation did not improve, such cannot be the fault of the claimant. The position he was employed for together with additional roles were undertaken to a fault. The role of steering the organisation out of its financial crisis as at 2012 was at the board level but key decisions were not made to salvage the situation, the board and on the advice of experts maintained a 'seat-back-and-wait' position until the termination of the claimant. The only assets of the Respondent that remained were not sold as advised in 2011/2012 until 2016 when a decision to sell was made.

208. Ultimately, the claim for remuneration for additional roles undertaken by the Claimant was never

addressed. When other employees were appraised and got a salary increase, he was left out. I find no justification for such separate and different treatment against the claimant. Such compounds the unfair labour practices and discrimination against the claimant. As noted above, these are key factors to be put into account in assessing the damages and compensation due to the claimant.

**Transport allowance \$7,000.**

209. Transport claim is made on the basis that such was due and in 2008 when the Claimant was employed he was given transport for 2 months but subsequently withdrawn on the grounds of lack of funds. When the Claimant was acting director he was not given any transport or an allowance and this exposed him more when he had no salaries and had to take his daughter to school which ended up in a very embarrassing situation due to inability to support his daughter.

210. The Respondent witness denied this claim on the basis that upon the employment of the Claimant in 2008 he had a transport per diem, accommodation and such were set out under his contract of employment. When Mark Okumu was director, his contract had a condition for transport provision which was not the case for Prof. Akoto whose contract did not have transport provision. The Claimant would get transport provided while on a special mission or spent on a taxi/cab and get a refund.

211. From the evidence of both parties, the Claimant was provided with local transport upon arrival in the country in 2008. Such was for two months. This was discontinued. It is not a matter set out under his contract or implied as available under the period served without a written contract. From 2008 when the provided transport was discontinued, there is no claim. Such abate with time.

212. A look at prof. Akoto contract, the same does not have provision for transport even though he was respondent's director. This was different for Mark Okumu. He was able to negotiate his contract differently from the Claimant and \prof. Akoto and he got transport as part of his package.

213. Transport to and from work unless specially provided for as a benefit or is the practice of the employer or has been bargained for is not a right at work. On the terms under which the Claimant last served, transport allowance is not due.

**Claim for compensatory leave days accrued from 2008 to 2013 \$6,900.**

214. The claim is made on the basis that under the policy, where an employee worked outside normal; working hours there was compensation with additional days off. Clause 6.6 of the policy the director was to exercise discretion and award compensatory time off for all staff.

215. The Respondent has admitted that the Claimant worked for days he was supposed to be on his rest day and noted on 16<sup>th</sup> March, 2013 he was in South Africa on a weekend; on 30<sup>th</sup> August, 2009 he was in Ghana for work on a weekend; and on a different occasion he was in North Carolina for holiday and work. However, that the Claimant was required to make an application for compensatory days off as the director had the discretion to grant and in this case the Claimant was not keen on taking time off but to be paid. The Claimant failed to apply for time off for the director to approve and to exercise his discretion to grant or not to grant such time off.

216. As noted above, termination of employment was at the instance of the respondent. Where there is a record of the Claimant working on his rest days and such time was within the knowledge of the respondent, such time off should have been taken on or before termination or the same paid for with the termination. The Respondent benefited from the labours of the Claimant while he was supposed to be on rest days, a right due in law under section 27(2) of the Employment Act, and the duty was upon the Respondent to ensure that the rest day(s) was/were taken as and when they arose. This cannot be left at the option of the employee or at the discretion of the employer to approve. A rest day is a right in law and where due, similar to annual leave, such must be taken or compensated for with a payment.

217. To require the Claimant to fill forms for clearance so as to be paid the due amounts, noting the

Respondent has not been able to pay other dues due to financial constraints is to engage in unfair labour practice. Such is not justified.

218. In volume No.2 pages 273 to 275 are a list of days amounting to 31. The Claimant's daily wage was \$230 and on this claim he is awarded \$7,130.

**Claim for reimbursement of relocation costs – 3 round trips between 2014 and 2015. At \$4,264.**

219. Following the termination of the Claimant by the Respondent he has been forced to fly back into the country on 3 occasions to follow up on his payment; to follow up on the shipping of his goods and those of his daughter; and to file this suit. To this date the personal goods have not been shipped and the bulk of terminal dues have not been paid. The costs incurred for travel back and forth have been necessitated by the Respondent and should pay the 3 round-trips for the same.

220. The Respondent admitted the terminal dues owed to the Claimant were not paid and remained due even at the hearing of the claim was ongoing. The Claimant left the country as his work permit expired. He had to vacate his rented apartment due to inability to pay rent and the Respondent is still keeping his personal goods in storage and its offices. However the Claimant for \$4,264 is not a reasonable amount. There is no evidence that the Claimant travelled for the purpose of following up on his dues and goods. He did not contact the Respondent for this purpose. Had he made contact, the Respondent staff would have been happy to advise the Claimant on the current financial status and therefore travel was unnecessary. The Respondent has not acted unfairly as they are inability to pay and once funds are available, the dues owed to the Claimant shall be paid.

221. Mr. Barasa also testified that although the Respondent had a plot worth Kshs.150 million, the board has a fiduciary duty to secure the future and could not sell such property to pay the claimant as by doing so would be in breach of the duty of board. Sale of the property has been made as the last resort.

222. During the hearing, it emerged that due to the financial constraints upon the respondent, the website; phones and office address are not available. For this reason the Claimant was not able to contact the Respondent remaining employees. The Claimant travelled to home country upon termination of his employment, he has been at great pains waiting for the shipping of his personal goods that those of his daughter to no avail. The Claimant was forced to travel back to the Respondent offices where he met Mary but she had no key to where the Claimant personal goods were stored forcing him to go without ascertaining their condition but he had a peep at the garage and saw some of his good haphazardly placed. These series of events have caused great anguish to the claimant. Every time the Claimant testified in this regard and the impact the keeping of his goods and especially those belonging to his daughter, he broke down or had to stop in his evidence to contain his emotions. As a father, having to face his daughter and having no answer as to why he could not do basic things such as secure her toys, personal effect, support her while in Kenya or back at home and had to move her from place to place due to inability to either pay bills or have her personal effects with her, this cannot be gain-said in enough words. It is inhumane. It is degrading. It is punishment of the worst kind. It should not happen to any employee. Such should be avoided at all costs even if it meant the Respondent selling its only property at a loss so as to meet the basic needs of its employee – to pay their earned wages.

223. I find the acts of the Claimant travelling to Kenya to follow up on his dues, particularly the shipping of his goods are reasonable and justified. When the Claimant found out that his personal goods were going into waste, he did not seat back. He made effort to source for a shipping company and submitted to the Respondent to consider using such an agency to have his personal goods moved from their storage to his home country. The Respondent did not oblige. They engaged in contesting the costs, contesting the fact that this was not the lowest bidder. In the end, such goods remain in storage. The wasting of such goods not used for over 2 years is obvious and the damage may be permanent.

224. The Claimant did not stop at that. He offered to have the Respondent pay him for the shipping of his goods for him to organize on what to do. Mr. Barasa was emphatic to this end. The costs due per the policy are not to be paid to the employee but to a third party to ship such goods. It seems that Barasa had

already made up his mind. To ensure that the Claimant did not receive any coin whatsoever out of the Respondent even where the offer by the Claimant to be allowed to have his own goods for shipping or to deal as appropriate was made in good faith and in acknowledgement that the Respondent was faced with financial problems. Such insistence by Barasa as the man at the helm of decision-making at the Respondent and now tasked to make decision of what to paid to the Claimant or not to be paid, came out when he testified that;

*... The Claimant did not take his leave. He did not take compensatory days off. He wanted to be paid for such day.*

225. I find nothing wrong with an employee being paid for work done. Where this was a problem to barasa, he ought to have advised the Claimant before termination that he was to take all due leave days; all due compensatory days off; and indeed all other benefits due so as to avoid making a payment in lieu thereof.

226. In any case, the justification as to why the payment for the 3 round-trips made by the Claimant to follow up on his terminal dues which have not been paid to date and thus necessitating this suit has not been challenged in any material way. Such costs are made at a reasonable rate for travel from the United States of America to Kenya. The Claimant has been fair enough not to claim accommodation costs while on such attendance. The due costs for the 3 trips made are therefore due. The Claimant is awarded \$4,264 being costs for 3 round-trips.

227. The findings above on the Claimant's constitutional rights were violated and abused. Such violations and abuse being specifically prohibited, damages are payable.

228. There are also statutory omissions and commissions against the Claimant as set out above. The rights at work that was not protected, guaranteed or respected. The totality of it was to engage in unfair labour practices against the Claimant contrary to section 45 of the Employment Act read together with article 41 of the constitution. The compensation due for breaches under the provisions of the Employment Act and the remedies due under section 49 is that the Claimant is entitled to compensation. Noting the nature of multiple violations, maximum compensation at 12 months gross salary is hereby appropriate to award. Compensation is awarded at \$29,828.50

229. The contract currency was United States Dollars (USD). The due amounts and awards herein shall thus be computed in such currency.

230. before final orders, I would like to acknowledge both parties and Particularly the lead Counsels – Dr Kuria (SC) and Mr Onyata Advocates – for the Claimant and Respondent respectively for the diligence in addressing the matters before court. The concessions and filing of various consents when parties were able to agree was done with a lot of respect to each party.

**Accordingly, the judgement is hereby entered for the Claimant against the Respondent with the following orders;**

**1. It is declared the Claimant was unfairly terminated from his employment by the respondent;**

**2. It is declared the respondent is in breach of constitutional rights by discrimination against the claimant; by engaging in unfair labour practices; and by inhuman and degrading treatment of the claimant;**

**a. Compensation for unfair termination of employment at 12 months' salary \$29,828.50;**

**b. Damages for constitutional breaches, violation and abuse all at \$145,773.00;**

- c. Unremitted salary of \$4,866.00;
- d. Cost for home leave flights \$7,689.40;
- e. Relocation/shipping costs \$11,097.41 with due interests from June, 2014 until paid in full;
- f. accommodation expenses are due at \$2,340.00;
- g. Relocation flights awarded at \$499.00 with interest.
- h. Home leave gratis awarded at \$10,580;
- i. Severance pay \$6,700.00;
- j. Service pay \$10,350.00;
- k. House allowance \$17,897.10;
- l. Compensatory leave \$7,130.00;
- m. 3 round-trips costs awarded at \$4,264.00;

3. The Claimant shall be issued with a Certificate of Service unconditionally;

- a. The Respondent shall pay the Claimant \$971.80 for breach of section 51 of the Employment Act.

4. The above amounts shall be paid with interests from 30<sup>th</sup> July, 2014 until payment in full save for damages and compensation due under (2)(a) and (b); and

5. Costs awarded to the Claimant.

**It is so ordered.**

**Dated, signed and read in open court at Nairobi this 23<sup>rd</sup> March, 2017.**

**M. MBARU**

**JUDGE**

In the presence of:

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