



**Kimani & another v Catherine Felistus Wambui t/a Eboss Farm Produce (Employment and Labour Relations Cause E010 of 2023) [2024] KEELRC 13290 (KLR) (29 November 2024) (Judgment)**

Neutral citation: [2024] KEELRC 13290 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI  
EMPLOYMENT AND LABOUR RELATIONS CAUSE E010 OF 2023  
ON MAKAU, J  
NOVEMBER 29, 2024**

**BETWEEN**

**PAUL KIMANI ..... 1<sup>ST</sup> CLAIMANT**

**JOSEPH KIORIA KURIA ..... 2<sup>ND</sup> CLAIMANT**

**AND**

**CATHERINE FELISTUS WAMBUI T/A EBOSS FARM  
PRODUCE ..... RESPONDENT**

**JUDGMENT**

1. The claimants were employed by the respondent until 19<sup>th</sup> December 2022 when their employment was terminated on account of redundancy. Being aggrieved by the termination, they brought this suit accusing the respondent of unfair and unlawful termination of their employment and prayed for the following reliefs:
  - a. A declaration that the Respondent’s action of terminating the Claimant’s contract of service amounts to unfair termination.
  - b. A declaration that the Respondent discriminated and harassed the Claimants.
  - c. A declaration that the Respondent’s actions against the Claimants amounts to unfair labour practices.
  - d. Payment by the Respondent to the Claimants of compensation for unfair termination and entitlements totalling to Kshs. 5,894,838.70 as particularized in paragraph 12 of the claim.
  - e. General damages for discrimination
  - f. General damages for harassment.
  - g. General damages for unfair labour practice.



- h. Costs of the suit and interest.
  - i. Any other relief that this Honourable Court may deem fit and just to grant.
2. The Respondent replied to the Claim vide her Response of Claim dated 30<sup>th</sup> May 2023 whereby she admitted the employment relationship and also that she terminated the claimants' employment on account of redundancy. She averred that the redundancy was justified due to the effects of Covid-19 Pandemic and it was done in accordance with the law. She further averred that she computed the terminal dues for the claimants, and deposited the same at the Labour office. Consequently, she prayed for the suit to be dismissed with costs.

### **Factual background**

3. The Claimants were verbally employed by the Respondent on or about July 2017 as Farm Manager and Technical Farm respectively. The 1<sup>st</sup> claimant's monthly salary was Kshs 71,750 while the 2<sup>nd</sup> claimant's salary was Kshs. 58,500. Vide letters dated 19<sup>th</sup> December 2022, the Respondent terminated their services on account of redundancy.
4. Before the termination the claimant attended a meeting with the Respondent and her Human Resource Consultant, on 16<sup>th</sup> December 2022, to discuss grievances raised by the claimants including: failure to provide written contracts and payslips, failure to remit NSSF, NHIF and their SACCO contributions despite deducting the same from their salaries; reducing their salaries to Kshs. 35,000; and denying them housing allowance while she paid to other employees.
5. At the tail end of the meeting, the Respondent informed them that she was considering their redundancy but would discuss with them further at the end of their leave in January 2023. However, in a quick turn of events, the respondent served the claimants with letters dated 19<sup>th</sup> December 2022 terminating their employment on account of redundancy while they were away on leave.
6. The claimants averred that the alleged redundancy was a summary dismissal in disguise as the Respondent did not provide any evidence of financial challenges and further that she did not follow procedure laid down by the law. She also did not pay them their terminal dues as prescribed by the law.
7. The Respondent averred that due to the Covid-19 pandemic and subsequent drought, her financial performance was on the decline and therefore she opted to restructure and downsize. she further averred that in a meeting of 15<sup>th</sup> May 2020 she notified the employees that they would proceed on unpaid leave for the months of June and July 2020 and would be recalled when income improved; that she also communicated the same information to Murang'a Labour Office on 18<sup>th</sup> May 2020.
8. She averred that, she commenced the redundancy in 2020 and carried it out in two phases. The first on 18<sup>th</sup> August 2020 where 30 employees were fairly and procedurally declared redundant and communication of the same was made to the Labour Office. The terms of employment for the remaining employees were changed and notice of the changes given to them in accordance with section 13 of the Employment Act on 2<sup>nd</sup> July 2020. The Claimants also signed the statement of the changes to their contracts which reduced their consolidated salary to Kshs. 35,000 (inclusive of house allowance).
9. she further averred that in her management meeting held on 30<sup>th</sup> November 2020, the Claimants confirmed that their tasks in the farm had reduced significantly. Again, in a subsequent meeting on 16<sup>th</sup> December 2022, the 1<sup>st</sup> Claimant complained that his tasks had been taken away and thereby made him sit idle, which he wouldn't wish to continue doing. Consequently, the Respondent informed them that their positions together with two others, would be declared redundant.



10. The respondent further averred that, vide a letter dated 7<sup>th</sup> December 2022, she contacted the Labour Officer for advice regarding the redundancies and then she came up with redundancy package as per section 40 of the Act. The claimants disputed the packages and she deposited the same into the ministry of labour account for collection by the Claimants.
11. On 18<sup>th</sup> December 2022, a human resource consultant scheduled a meeting with the Claimants for 21<sup>st</sup> December 2022 in which the Claimants were issued with the redundancy notices consisting of the computation of their dues. Despite the denial of receipt of the notices, the Claimants in their letters dated 9<sup>th</sup> January 2023 admitted receipt of the same. The Respondent averred that she notified the Labour Office of the refusal by the Claimants to accept the notices.
12. Subsequently, the respondent vide a letter dated 15<sup>th</sup> February 2023 enhanced the packages but the claimant rejected same and filed this suit. She contended that the 2<sup>nd</sup> Claimant was allowed 21 days leave in 2022 as evidenced in the leave application form and they were paid all their dues in December 2022.
13. She averred that the claim for housing allowance was time barred as the same ought to have been filed within 12 months. She also denied the Court's jurisdiction on ground that the claimants' gross pay was below Kshs. 80,000. For these reasons, She sought for dismissal of the suit with costs.

### **Evidence**

14. The 1<sup>st</sup> Claimant, Paul Kimani, testified as CW1. He adopted his written statements dated 17/3/2023 and 6/7/2023 as his evidence in chief and produced 26 documents including a certificate of electronic evidence as exhibits. In brief, he testified that prior to 9<sup>th</sup> December 2022, he was not aware of any plans to terminate his job on redundancy. He stated that the company had declared redundancies before but the same procedure was not followed in his case. He confirmed that he signed the change of terms of his contract but averred that there were no prior consultations. He signed the change of terms as he did not want to lose his job.
15. On cross-examination, he stated that he was notified of his termination on 19/12/2022 through a letter issued by a HR Consultant. He confirmed that the change of terms he signed stated that his monthly consolidated salary would be Kshs. 30,000.
16. He confirmed that he attended the meeting of 30/11/2022 where under min1/11/2022 a concern that the farm was not been fully utilized was registered. He also acknowledged that he attended the meeting of 15/5/2020 where it was indicated that there were no enough funds to sustain the farm. He further confirmed that the letter to the conciliator dated 18/5/2020 indicated that closure had caused cash flow strain on the farm.
17. He also confirmed that phase one of redundancy was fair and he remained. He stated that he knew the offer made by the employer but averred that he did not agree with it.
18. The second claimant, Joseph Kioria Kuria, testified as CW2. He also adopted his written statements dated 17/3/2023 and 6/7/2023 which he adopted as his evidence in chief. He also produced the documents in the lists of documents dated 17/3/2023 and 6/7/2023 together with the certificate of electronic evidence as exhibits.
19. His evidence in brief was that he was employed by the respondent as a Technical Manager in July 2017 for a monthly salary of Kshs.58,500.00. He was provided with a house by the employer. In June 2020, the respondent arbitrarily reduced his salary to Kshs.35,000.00 and promised to pay the withheld amount later, but he never did so. He admitted that he signed the change of terms of his contract because it was during covid-19 pandemic and believing that the original terms would be reinstated.



20. On 21<sup>st</sup> December 2022, he received a letter dated 19<sup>th</sup> December 2022 terminating his employment on account of redundancy. The letter was delivered by the respondent's HR Consultant but the claimant averred that he had no prior knowledge of the intended redundancy. He also averred that the procedure applied in the previous redundancy was not applied to his case.
21. On cross examination, he clarified that the change of terms did not include a clause that the original terms would be reverted to. He stated that his salary was Kshs.52,000.00 plus a house before the change of terms. He states that after change of terms, he was to receive a consolidated monthly pay of Kshs.30,000.00. With reference to DMF1-2 (minutes dated 30<sup>th</sup> November 2022), he confirmed that he stated that he felt that he was not fully utilized in the farm.
22. In re-examination, he clarified that he felt underutilized in the farm because his boss started to avoid him and resorted in dealing with his juniors directly.
23. The respondent, Catherine Felistus Wambui, testified as RW1. She adopted her written statement dated 30<sup>th</sup> May 2023 as her evidence and also produced 24 documents in the list dated even date as exhibits.
24. In brief, her evidence was that she employed the claimants as Farm Manager and Technical Farm Manager from July 2017 for consolidated monthly salary of Kshs.71,750.00 and Kshs.58,500.00 respectively. The said salary was inclusive of house allowance.
25. From the year 2020, her financial performance started declining due to covid-19 pandemic followed by drought which forced her to restructure and down-size operations. Accordingly, a meeting of all employees was held on 15<sup>th</sup> May 2020 where they were informed that they would proceed on unpaid leave in June and July 2020, but they would be recalled depending on when sources of income improved. The labour office Murang'a was also notified vide a letter dated 18<sup>th</sup> May 2020.
26. Thereafter, she laid off 30 employees in August 2020 and reduced salary for the claimants to a monthly consolidated sum of Kshs.35,000.00 inclusive of house allowance. On 30<sup>th</sup> November 2022, a management meeting was held in which the claimants confirmed that their tasks in the farm had significantly reduced. In another meeting held on 16<sup>th</sup> December 2022, the 1<sup>st</sup> claimant complained that his tasks had been taken away and that his work in the farm had substantially reduced compared to the earlier years. During the meeting she informed the claimants that their positions would be declared redundant.
27. Subsequently, she terminated claimants' employment on account of redundancy under section 40 of the [Employment Act](#) following advice from the Labour Officer Murang'a. She served the claimants with redundancy notices through her HR Consultant on 21<sup>st</sup> December 2022. Thereafter she computed their terminal dues for the claimants in the sum of Kshs.194,500.00 and Kshs.188, 667.00 respectively, and deposited the same in the Labour Office for the claimants to collect.
28. On cross-examination she maintained that she complied with section 40 of the [Employment Act](#) and the redundancy was fair. She contended that she issued the Claimants with the redundancy letters when they were going on leave. She also contended that she paid them salary in lieu of notice. She admitted that the redundancy notices were dated 7<sup>th</sup> December 2022 but they were delivered to the claimants on 16<sup>th</sup> December 2022. However, she confirmed that she stamped and issued the letters on 16<sup>th</sup> December 2022. She also confirmed that the termination was done while the claimants were on leave.
29. She contended that the effects of the covid-19 pandemic continued until December 2022 and they are still continuing. However, she confirmed that she did not file any financial statements to demonstrate



- the financial status of the company before laying off the claimants. She denied that she allocated claimants' tasks to other people.
30. She stated that salary for June 2020- November 2022 was not withheld but there were negotiated salary cuts. She stated that the Claimants agreed to salary cuts over redundancy like the other employees. She stated that she paid the Claimant's December salary as evidenced by the payroll and her bank statements contained in page 37-38.
  31. She confirmed that the June 2020-June 2021 sacco deductions were not remitted. Further that from July 2017- December 2021, she never remitted any NSSF contributions for the Claimants because they were both above 65 years old. Instead, she deposited the NSSF contributions in the claimants' accounts.
  32. She confirmed that the 1<sup>st</sup> Claimant was not provided with housing but the 2<sup>nd</sup> Claimant was provided with housing. She further confirmed that from October 2022- December 2022, she never paid the Claimant his full house allowance but instead she was giving him loans. She stated that his salary was consolidated and July 2017-2020 the salary was still consolidated and quite high. She admitted to not issuing the Claimants with payslips for July 2017- December 2019.
  33. She stated that she paid the claimants salary in lieu of notice, but they refused it forcing her to have it deposited in the labour office. She also computed the leave balances and deposited the money in the labour office.
  34. She contended that the Claimants did not produce evidence of discrimination and contended that no other employee was given a house except the 2<sup>nd</sup> Claimant whose wife was employed in the respondent's house.
  35. She stated that the Claimants were paid half salary during the pandemic after they opted to remain at work while the rest were declared redundant. She confirmed that she paid the 1<sup>st</sup> Claimant Kshs.21,000.00 for housing from July 2021- September 2022 after which she reduced to Kshs.10,000. She confirmed that she never paid the same in December 2022. She confirmed that she never issued the Claimants with contracts of employment save for the signed change of terms.
  36. In re-exam she stated that the Claimants' dues were deposited in account at the labour office and she was unaware whether or not they went for the same. She clarified that she offered to pay the 1st Claimant house allowance of Kshs.21,000.00 following his threat to leave work because he could not afford rent and after declining to live in a house in the farm. However, there was no written agreement for payment of the house allowance.
  37. She stated that while computing the claimants' terminal dues she topped up the consolidated salary of Kshs.30,000.00 with the statutory deductions and Sacco dues to make it Kshs.35,000.00 per month, as a goodwill gesture to help them go home with something. She confirmed that the change of terms was signed by the Claimants in her absence as they were given the documents by her HR Consultant and they signed.

### **Submissions**

38. It was submitted for the claimants that the Respondent did not comply with conditions set out under section 40(1) of the [Employment Act](#) including notification, the selection criteria and payment of all benefits, leave due, salary in lieu of notice and severance pay. Consequently, it was submitted that the alleged redundancy amounted to unfair termination for want of substantive and procedural fairness as required by the law.



39. It was submitted that the termination was substantively unfair as there were no valid reasons related to the operational requirements of the Respondent. Reliance was placed on *Daniel Mburu Muriu v Hygrotech East Africa Ltd* [2021] eKLR and *Janine Buss v Gems Cambridge International School Limited* [2016] eKLR.
40. It was further submitted that under section 5(2) and (7) of the *Employment Act*, the Respondent bore the duty of proving that the discrimination alleged by the Claimants did not take place. It was submitted that the Respondent did not produce any evidence to disprove the alleged discrimination.
41. It was further submitted that, the different treatment given to the Claimants and their colleagues Alex and Stephen, indicated not only discrimination but also harassment. They added that the harassment also occurred when the Respondent sent them on leave only to dismiss them. Further that the 1<sup>st</sup> claimant had demonstrated discrimination in the reduction of their salary where they contended that the salary was reduced to Kshs. 35,000 but only the 2<sup>nd</sup> Claimant was allocated a house. While relying on the *Janine Buss* case, *supra*, they contended that the Respondent had the burden to disprove discrimination.
42. It was further submitted that under Article 41 of *the Constitution* the reduction of the claimants' salary was an affront to their right to fair labour practices, especially to the 1<sup>st</sup> Claimant who was not able to comfortably pay his rent. It was also submitted that the respondent further violated the said right by deducting and failing to remit NSSF, NHIF and SACCO contributions. To buttress the foregoing arguments, reliance on the case of *Alice Ndaani & 5 others v Mwalimu National Savings and Credit Cooperative Society Limited* [2021] eKLR.
43. Finally, it was submitted that the Claimants were entitled to the reliefs sought since they have satisfactorily proved each claim and therefore prayed that the judgement be entered as prayed.
44. On the other hand, it was submitted for the respondent that the 1<sup>st</sup> Claimant's supplementary witness statement is defective since it introduces new issues that were not in the Claim and which have the effect of altering the substance of the case. It was argued that parties are bound by their pleadings and there was no way the Claimant could adduce evidence for what was not pleaded. It was contended that the introduction of the new matters was prejudicial to the Respondent as she had no chance to respond to the same. Consequently, the Court was urged to strike it out.
45. It was further submitted that the *Employment Act* allowed an employer to terminate employment on account of redundancy provided that the mandatory procedure and conditions set out under section 40 of the Act are complied with. It was further argued that the termination of the Claimants' employment was substantively and procedurally fair, and fully compliant with law.
46. As regards the substantive justification, it was submitted that due to the covid-19 pandemic, the respondent was forced to put in place measures to caution her against closure. Some of the measures included declaring redundancies and changing terms of the Claimants' service to avoid redundancy. However, when the financial decline continued, she declared the claimants' positions redundant. To fortify alleged justification for the redundancy, reliance was placed on the case of *Samuel Kalomit Murkomen v Telkom Kenya Limited* [2017] eKLR and *Masai Mara (SOPA) Limited v Narok County Government* [2016] eKLR.
47. On procedural fairness, it was submitted that the respondent complied with the requirements of section 40 of the *Employment Act* including holding consultative meetings with claimants on 30<sup>th</sup> November 2022 and 16<sup>th</sup> December 2022, serving them and the Labour Officer with notice,



conducting a fair selection process and computing and paying the claimants accrued leave days, severance pay and one-month salary in lieu of notice.

48. As regards the alleged discrimination and harassment, it was submitted that the same was false, baseless and misleading as there were no intentional, direct or indirect targeting of the Claimants. It submitted that the circumstances leading to the termination were beyond the Respondent's control. Reliance was placed on section 5 (4) of the *Employment Act* to submit that where employees enjoyed different terms and conditions, the same was not discriminatory as each employee had varying titles, responsibilities, abilities and job descriptions. It was further submitted that mere differentiation did not amount to arbitrariness and the impairment of the fundamental dignity of a person. In support of the argument, reliance was placed on the case of Masai Mara (SOPA) Limited v Narok County Government [2016] eKLR.
49. Finally, it was submitted that the Respondent had demonstrated that the termination of the claimants' employment was conducted fairly, lawfully and in accordance with the law, and as such, the Claimants were not entitled to the reliefs sought. Consequently, the Court was urged to dismiss the claim with costs.

### **Determination**

50. I have considered the pleadings, evidence, the rival submissions and the law and it is a fact that the claimants' employment was terminated by the respondent on account of redundancy vide the letter dated 19<sup>th</sup> December 2022. The following issues fell for determination:
- a. whether the redundancy contravened section 40 of the *Employment Act*, and amounted to unfair termination;
  - b. whether the Respondent discriminated against the Claimants;
  - c. whether the Claimants are entitled to the reliefs sought.

### **Unfair termination**

51. To begin with, an employer has the liberty to terminate employment of his employee on account of redundancy based on his operational requirements. Section 2 of the *Employment Act* defines redundancy as:

“the loss of employment, occupation, job or career by involuntary means through no fault of an employee, involving termination of employment at the initiative of the employer, where the services of an employee are superfluous and the practice commonly known as abolition of office, job or occupation and loss of employment”.

52. Section 40 of the *Employment Act* then prescribes a mandatory process for terminating employment on account of redundancy in the following terms:

“ 40.

- (1) An employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions –

- a. where the employee is a member of a trade union, the employer notifies the union to which the



employee is a member and the labour officer in charge of the area where the employee is employed of the reasons for, and the extent of, the intended redundancy not less than a month prior to the date of the intended date of termination on account of redundancy:

- b. where an employee is not a member of a trade union, the employer notifies the employee personally in writing and the labour officer;
- c. the employer has, in the selection of employees to be declared redundant had due regard to seniority in time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy;
- d. where there is in existence a collective agreement between an employer and a trade union setting out terminal benefits payable upon redundancy; the employer has not placed the employee at a disadvantage for being or not being a member of the trade union;
- e. the employer has where leave is due to an employee who is declared redundant, paid off the leave in cash;
- f. the employer has paid an employee declared redundant not less than one month's notice or one month's wages in lieu of notice; and
- g. the employer has paid to an employee declared redundant severance pay at the rate of not less than fifteen days pay for each completed year of service."

53. In this case, the claimants were not members of a trade union and therefore the employer was required to serve them personally with one-month notice under subsection (1)(b) above and also serve the area Labour Officer under subsection (1)(a). Both sides produced as evidence, Notification of Redundancy dated 7<sup>th</sup> December 2022 issued to the County Labour Officer, Murang'a pursuant section 40(1)(b) of the *Employment Act*. The Notices were copied to the claimants.
54. A number of issues arise from the said notice. Firstly, it was only addressed to the labour officer and therefore it ought to have been issued under subsection (1)(a). Secondly it falls short of a proper notice to the employee under subsection (1)(b). Thirdly, the notice was allegedly served on the labour officer on 8<sup>th</sup> December 2022, yet RW1 confirmed under oath that she signed and stamped the notice on 16<sup>th</sup> December 2022. Fourthly, there is no evidence that the claimants were served with the said copies of the redundancy notification.
55. Even if the said notices was served upon them, the same would not amount to one month notice since redundancy took effect on 1<sup>st</sup> January 2023 pursuant to the subsequent termination notice dated 19<sup>th</sup> December 2022 which was served on them on 21<sup>st</sup> December 2022.





56. In view of the above circumstances I find that the said redundancy notification dated 7<sup>th</sup> December 2022 did not meet the requirements of section 40(1)(a) and (b) of the Act. Further, the Payment of salary in lieu of notice could not cure that fatal omission. I gather support from *Addah Adhiambo Obiero v Ard Inc* [2014] eKLR where the Court held that:

“The Respondent has however failed to prove that the claimant and the Labour officer were notified of the reasons for and extent of the redundancy at least one month prior to the redundancy. The claimant and the Labour officer were notified on 20<sup>th</sup> January 2012 the very day the redundancy took effect.

To the extent that the claimant was not notified of the redundancy at least one month prior to the date of redundancy, I find that the claimant’s redundancy was not in accordance with the procedure in the law and therefore amounted to unfair termination of her employment contract.”

57. As regards the selection process, the employer is required to take into account seniority in terms of first in last out principle, and then the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy. In this case, the claimants were solely serving their position and therefore selection criteria was not a relevant factor to consider.

58. The other procedural issue was computation and payment of terminal dues which the respondent did and deposited at the Labour Office. However, that factor was only relevant if the employer had complied with the requirement of serving proper notice under section 40(1)(a) and (b) of the *Employment Act* which was not done. The failure to comply with the notification requirement rendered the purported redundancy procedurally unfair.

59. As regards justification of the redundancy, the respondent contended that the decision was necessitated by the effects of the covid-19 and drought. She further averred that the claimants had acknowledged that their work had diminished significantly. However, the claimants contended that the said reason was not valid since the respondent did not produce any evidence to prove its financial status. They further clarified that they never acknowledged that their work had reduced but rather, had complained that their tasks were being given to other persons and thereby making them idle around. They believed that the redundancy was summary dismissal in disguise because they raised grievances against the employer.

60. I agree with the claimants on the two points. The respondent did not adduce any evidence to prove that she was not financially able to continue employing the claimants. The respondent decision to lay off the claimants was provoked by their complaint about the respondent’s conduct of taking away their tasks and assigning the same to other persons, among other grievances. Consequently, I find that the redundancy was not justified since she did not have any financial problems until 30<sup>th</sup> November 2022 when the claimants complained to her. There was also no consultation between the parties under the watch of the labour officer to try to avoid the redundancy. The process was done in a hurry and contrary to the provisions of section 40 of the Act.

61. I gather support from *Kenya Airways Limited v Aviation & Allied Workers Kenya & 3 Others* [2014] eKLR where the Court of Appeal discussed the purpose of the first redundancy notice to the employee/union and the Labour Officer, thus:

“The purpose of the notice under section 40 (1) (a) and (b) of the *Employment Act*, as is also provided for in the said ILO Convention No. 158 – Termination of Employment Convention, 1982, is to give the parties an opportunity to consider “measures to be taken to



minimise the terminations and measures to mitigate the adverse effects of any terminations on the workers concerned such as finding alternative employment.” The consultations are therefore meant to cause the parties to discuss and negotiate a way out of the intended redundancy, if possible, or the best way of implementing it if it is unavoidable. This means that if parties put their heads together, chances are that they could avert or at least minimise the terminations resulting from the employer’s proposed redundancy. If redundancy is inevitable, measures should be taken to ensure as little hardship as possible is caused to the affected employees.”

62. Having found that the redundancy herein was not justified and that it was done without following the procedure set out under section 40(1)(a) and (b) of the *Employment Act*, I am satisfied that the claimants have established that it amounted to unfair termination of their employment. Section 45 (1) and (2) of the Act provides that:

- “(1) No employer shall terminate the employment of an employee unfairly.
- (2) A termination of employment by an employer is unfair if the employer fails to prove:
- (a) that the reason for the termination is valid;
  - (b) that the reason for the termination is a fair reason—
    - i. related to the employee’s conduct, capacity or compatibility; or
    - (ii) based on the operational requirements of the employer; and
  - (c) that the employment was terminated in accordance with fair procedure.”

### **Discrimination**

63. The allegation of discrimination as particularized in the Claim does not seem to me to be well founded. Article 1 of the Discrimination (Employment and Occupation) Convention, 1958 (No. 111) defines discrimination as follows:

“ Article 1

For the purpose of this Convention the term discrimination includes-

- a. any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation;
- b. such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation as may be determined by the Member concerned after consultation with representative employers' and workers' organizations, where such exist, and with other appropriate bodies.”



64. The Supreme Court also defined discrimination in the case of *Gichuru v Package Insurance Brokers Ltd* (Petition 36 of 2019) [2021] KESC 12 (KLR) (22 October 2021) (Judgment) as follows:

“Direct discrimination involved treating someone less favorably because of their possession of an attribute such as race, sex, religion compared to someone without that attribute in the same circumstances. Indirect or subtle discrimination involved setting a condition or requirement which a smaller proportion of those with the attribute were able to comply with, without a reasonable justification.”

65. I am satisfied by the respondent’s explanation that she never treated the claimants differently. She paid the 1<sup>st</sup> claimant house allowance when he declined to take a house like the 2<sup>nd</sup> claimant. All the other employees were not allocated any house since they were paid a consolidated salary like the claimants. The claimants were also spared from redundancy in 2020 and come 2022, they were laid off with two other managers. Consequently, I find that the alleged discrimination was not proved on a balance of probabilities.

### Reliefs

66. Having found that the redundancy was not done in accordance with section 40 of the *Employment Act*, I hold that the claimants are entitled to declaration that the redundancy amounted to unfair termination of their employment. For the same reason, I further hold that the claimants are entitled to compensation for unfair termination and salary in lieu of notice by dint of section 49 of the Act read with section 50 thereof.

67. The claimants did not contribute to the termination through misconduct. They had served the respondent without any warning for five (5) years. At their advanced age of 65 years, they also had no chance of getting new employment. Consequently, I find that a compensation of 3 months gross salary is reasonable. The 1<sup>st</sup> claimant was entitled to Kshs.21,000 house allowance plus basic salary of Kshs.35,000 totalling to Kshs.56,000. The 2<sup>nd</sup> claimant was earning the same salary less the house allowance since he was allocated a house. I will therefore use the same salary for the two claimants in computing the benefits. They will also get one-month salary in lieu of notice being Kshs.56,000.00 each.

68. The 1<sup>st</sup> claimant alleged that he was not paid all his house allowance in October 2022 and November 2022 but only Kshs.10,000 each month and the respondent admitted that claim. Consequently, I award him the balance of Kshs.11,000 x 2 = Kshs.22,000.

69. Each claimant claimed that they were not paid their salary for December 2022 but the respondent contended that she paid basic salary as evidenced by her bank statement for 30<sup>th</sup> December 2022. The claimants did not produce any bank statements to rebut the respondent’s evidence. Consequently, I dismiss the claim for salary for December 2022 save for the house allowance of Kshs.21,000 for the 1<sup>st</sup> claimant.

70. The claim for withheld salary from June 2020 to December 2022 is also dismissed because the claimants admitted that they signed the change of terms of their employment in May 2020. Even if the signing was not voluntary, the claimants acquiesced the same and they are therefore estopped from raising the matter after the separation after the lapse of two years from date of separation.

71. The claim for unremitted Sacco contributions was acknowledged by the respondent and even included in the terminal benefits assessed. Consequently, I award the claimants the same as prayed being Kshs. 65,000 each.



- 72. The claimants are also awarded service pay because the respondent admitted that she never remitted NSSF after deducting from the claimants' salary. They worked for 5 years each and therefore I award each 15 days salary for each year served being Kshs.56,000 x 2/30 x 5 = Kshs.140,000.
- 73. As regards the claim for leave of 20 days, I find that it lacks particulars and therefore, I award the Kshs.7000 acknowledged by the respondent in the computation of terminal dues.

**Conclusion**

74. I have found that the redundancy herein was unlawfully done and as such it amounted to unfair termination within the meaning of section 45 of the *Employment Act*. I have also found that the claimants are entitled to compensation for the unfair termination, salary in lieu of notice plus accrued employment benefits. Consequently, I enter judgment for the claimants as follows:

|                          |                 |
|--------------------------|-----------------|
| 1 <sup>st</sup> claimant |                 |
| Notice.....              | Kshs.56,000.00  |
| Compensation.....        | Kshs.168,000.00 |
| Service pay.....         | Kshs.140,000.00 |
| House allowance.....     | Kshs. 43,000.00 |
| Sacco contributions..... | Kshs.65,000.00  |
| Total                    | Kshs.472,000.00 |
| 2 <sup>nd</sup> claimant |                 |
| Notice.....              | Kshs.56,000.00  |
| Compensation.....        | Kshs.168,000.00 |
| Service pay.....         | Kshs.140,000.00 |
| Sacco contributions..... | Kshs. 65,000.00 |
| Total                    | Kshs.429,000.00 |

75. The awards are subject to statutory deductions but the claimants awarded costs plus interest at court rate from the date of filing the suit.

**DATED, SIGNED AND DELIVERED AT NYERI THIS 29<sup>TH</sup> DAY OF NOVEMBER, 2024.**

**ONESMUS N MAKAU**

**JUDGE**

**Order**

This judgment has been delivered to the parties via Teams video conferencing with their consent, having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

