Case Number:	Cause 1332 of 2018
Date Delivered:	19 Apr 2022
Case Class:	Civil
Court:	Employment and Labour Relations Court at Nairobi
Case Action:	Judgment
Judge:	Kebira Ocharo
Citation:	Showkat Hussain Badat v Oshwal Education & another [2022] eKLR
Advocates:	Mr. Mungai for the Claimant. Mr. Kimani for the Respondent.
Case Summary:	-
Court Division:	Employment and Labour Relations
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	-
Case Outcome:	Claimant awarded
History County:	-
Representation By Advocates:	Both Parties Represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 1332 OF 2018

SHOWKAT HUSSAIN BADAT.....CLAIMANT

VERSUS

OSHWAL EDUCATION & RELIEF BOARD.....RESPONDENT

JUDGMENT

Introduction.

1. Through a Memorandum of Claim dated 20th February 2018, the Claimant instituted a Claim against the Respondent seeking the following reliefs;

a. A declaration that the termination of the Claimant's employment was unlawful and unfair;

b. 5 months' salary in lieu of notice - KShs. 5,500,000.00

c. Damages for breach of contract - KShs. 9,900,000.00

d. Damages for unlawful and unfair dismissal - KShs. 13,200,000.00

e. Interest on (b), (c) and (d) above at Court rates from 3rd August, 2017 to the day of payment in full; and

f. Costs of the claim.

2. The Memorandum of Claimant was filed contemporaneously with the Claimant's witness statement and a bundle of documents that he had intended to place reliance on as documentary evidence in support of his claim. Indeed, when this matter came up for hearing, he moved the court to adopt his witness statement as part of his evidence in chief, and admit the documents as his documentary evidence. There being no objection from the Respondent's side, the witness statement and documents were so adopted and admitted, respectively.

3. Upon being served with summons to enter appearance, the Respondent did enter appearance on the 10th day of September 2018, and file a memorandum of response on the 20th December 2018. Side by side with the filing of the response, the Respondent filed a list of documents dated 13th December 2018, under which various documents that it intended to use in fortification of its case were placed on record. On the 15th February 2019, it filed a witness statement by Ronald Ooko, [RW1]. Too at the hearing, the witness statement, and the documents were adopted as the witness's evidence in chief and the Respondent's documentary evidence.

4. At the Close of pleadings, the matter got destined for hearing *inter-partes* on merit. The Claimant's case was consequently, and subsequently taken on the 9th November 2021, and the Respondent's on the 17th November 2021.

The Claimant's Case.

5. The Claimant contends that through a contract of employment dated 10th March, 2016, the Respondent appointed him as Director of Academic Development/Learning Strategy/ and Professional Development. It was a term of the Contract, *inter alia*, that the employment would commence on 1st May 2016 and run for a period of two (2) years, ending on 30th April 2018.

6. He states further that other terms of the Contract were, *inter alia,* that;

a. He would earn a monthly gross salary of KShs. 970,000.00; and

b. Either party could terminate the contract by giving the other six (6) months' notice or the equivalent of six (6) months' salary in lieu of notice;

7. The Claimant contends that he diligently discharged his duties to the Respondent's satisfaction. Through a letter dated 2nd March 2017, the Respondent promoted the him to the position of Director of Education - Designate with effect from 24th April 2017 and he was expected take over as Director of Education from 30th June 2017.

8. As a result of the promotion, the Claimant's salary was reviewed upwards to KShs. 1,100,000.00 from KShs. 970,000.00 with effect from 1st May 2017.

9. The Claimant states that in flagrant breach of the contract and the Employment Act, two months after taking over as the Director of Education, the Respondent sent to him via email whilst he was on leave, a letter dated 3rd August 2017, informing that his employment contract had been terminated on account of redundancy and with immediate effect.

10. The Claimant further avers that he was forbidden and prevented from gaining access to the Respondent's premises. Additionally, his work email accounts were disabled without prior notice.

11. Cross examined by Counsel for the Claimant, he testified that his initial contract was dated 10th March 2016, and the relationship that was created thereunder had a lifespan of two years. His employment under the contract was as a Director Academic Development. He confirmed that later, he was promoted to Director Education.

12. He further stated that on the 3rd August 2017, while out of the Country, the Respondent issued him with a termination letter, citing redundancy as the reason. He stated that no one took up his position after the termination. The letter was copied to the Labour Officer.

13. It was stated that the Respondent offered to pay him one month’s salary, severance pay, and unpaid leave. The amounts were paid.

14. The Claimant stated that he reacted to the termination letter through his email dated 4th August 2017. In his said email, he made a couple of demands, which included payment of severance pay, compensation for the remainder of the contract period, and notice pay equivalent to six months’ pay in accordance with the terms of the contract of employment. Kshs. 1,740,959.10 was paid to him and this is reflected in his last pays lip. At the termination, his contract had eight months to expire.

The Respondent’s Case

15. The Respondent in its part contended that the termination was lawful and in compliance with Section 40 of the Employment Act. The Respondent further denied that the Claimant was entitled to any of the reliefs sought.

16. The Respondent's case was presented by Ronald Ooko, its Human Resource Manager. He relied on his Witness Statement dated 8th February 2018 together with the Respondent's List of Documents dated 13th December 2018. The witness confirmed that the Claimant was appointed by the Respondent to the position of Director of Academic Development/Learning Strategy and professional Development with effect from 1st May 2016, at a salary of Kshs.970,000 payable in arrears at the end of each month. The contract period was fixed at two years.

17. The Board of Governors and the Board of Management of the Respondent in their meeting of 27th February 2017 decided to promote the Claimant to the position of Director of Education as from 30th June 2017. Accordingly, his salary rose up to Kshs. 1,100,000, with effect from 1st May 2017.

18. He contended that through a letter dated 3rd August 2017, the Respondent lawfully terminated the Claimant’s contract of

employment on account of redundancy. The redundancy situation was as a result of the Respondent's operational and organizational structure that found the Claimant's position no longer useful. The position of the Claimant was neither taken by Mrs. Chotai nor any other person.

19. The Claimant was duly paid an amount of Kshs. 1,740,959.70, receipt of which he acknowledged. He was issued with a certificate of service.

20. The witness contended that the Claimant is not entitled to five [5] months' salary as claimed following the reason that the termination was on account of redundancy, and section 40 of the Employment Act, provides for a lesser period, one month's notice.

21. During his cross-examination, the witness testified;

a. That despite the Claimant's promotion and increase of his salary, the contract period remained unchanged.

b. That the Notice period in the Claimant's employment contract was six (6) months but he was only paid one months' salary in lieu of notice following the termination of his employment of contract;

c. There was no prior consultation with the Claimant over any impending restructure or reorganization;

d. The was no prior notice to the Claimant over the termination on account of redundancy;

e. The Claimant was not taken through any consultative process before the termination of the contract;

f. There's no evidence that the labour office was notified of the impending redundancy, the office was only notified of the termination.

g. The deliberations on the restructure of the Respondent's Human Resource might have come after the Claimant's promotion. The witness was not privy to the deliberations. He was not made aware of the restructure. There was no evidence or minutes of the supposed meeting of the Board of Governors and the Board of Management of the OERB that undertook the review and assessment of the existing organizational structure of the Respondent;

h. The Respondent did not produce an organogram of the new organizational structure of the Respondent;

22. In his evidence under re-examination, the witness stated that the position of the Claimant was not refilled after his exist. The payment of one month's salary and not six months' was informed by the reason for the termination, redundancy. The Claimant was not paid for the remainder of his contract period for same reason.

The Claimant's Submissions.

23. Counsel for the Claimant submitted that Section 40 of the Employment Act exhaustively provides for termination on account of redundancy and proclaims that;

(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 of 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 at the rate of not less than fifteen days' pay for each completed year of service

(2) ....

(3) ....

24. It was argued that the Respondent did not adhere to any of the above provisions in terminating the Claimant's employment on the account of redundancy. To further buttress his submissions on the import of section 40 reliance was placed on the finding in ***Caroline Wanjiru Luzze versus Nestle Equatorial Africa Region Limited*** **[2016] eKLR.**

25. According to the above stated judicial decision a failure to comply with the mandatory notice requirements renders the redundancy un-procedural and unlawful

26. It was further submitted that in the case of ***Francis Kamau versus Lee Construction*** **[2014] eKLR** the Court expressed itself that where an employer declares a redundancy without observing the conditions set out under Section 40 of the Employment Act, the redundancy becomes an unfair termination of employment within the meaning of Section 45 of the Act.

27. Counsel further submitted that where there is an alleged declaration of redundancy that has not been preceded by any form of consultation, any termination as a result thereof shall be unfair. To support this point Counsel cited the case of ***Hesbon Ngaruiya Waigi versus Equitorial Commerce Bank Limited*** [2013] eKLR where the Court held that *the conditions outlined in the law are mandatory and not left to the choice of an employer. Redundancies affect workers livelihoods and where this must be done by an employer, the same must put into consideration the provisions of the law. This is not a one-day process as it must be participatory, consultative and informative. The employer must undertake a process to rationalize the various positions in their productivity and business line, which exercise affect various positions as held by their employees. Thus, the positions become redundant and not the employees who are employed with skills needed by the employer. The process of redundancy does not affect the performance, qualification or conduct of the employees.*

28..... Further reliance was placed on the Court of Appeal decision in ***Kenya Airways Limited versus Aviation & Allied Workers Union Kenya & 3 others*** **[2014] eKLR**.

29. Submissions were made on the reliefs sought by the Claimant. As regards notice pay, it was submitted that he is entitled to Six (6) months' notice pay as provided under his contract of employment. He was only paid one month's notice pay. Section 35 of the Employment Act provides that;

Termination Notice

(1) A contract of service not being a contract to perform specific work, without reference to time or to undertake a journey shall, if made to be performed in Kenya, be deemed to be-

a. Where the contract is to pay wages daily, a contract terminable by either party at the close of any day without notice;

b. Where the contract is to pay wages periodically at intervals of less than one month, a contract terminable by either party at the end of the period next following the giving of notice in writing; or

c. Where the contract is to pay wages or salary periodically at intervals of or exceeding one month, a contract terminable by either party at the end of the period of twenty-eight days next following the giving of notice in writing

(2) Subsection (1) shall not apply in the case of a contract of service whose terms provide for the giving of a period of notice of termination in writing greater than the period required by the provision of this subsection which would otherwise be applicable thereto.

30. The Claimant's employment contract on termination provides as follows;

19. Termination

(i) Notice

*Subject to the provisions for summary dismissal contained in clause (ii) below either party may terminate employment without giving reasons for such termination by giving the other a full academic term's notice before the start of the term at least **Six (6) MONTHS** written notice or the party giving the notice paying equivalent of six (6) months' salary in lieu of notice*

(ii) Summary Dismissal

(Hi) staff on work permit is required to complete the full duration of the permit is issued. The Board of Governors will only agree to prematurely terminate the contract of staff on work permit under extenuating circumstances and at their sole discretion. If this contract is terminated by you or you are summarily dismissed, you will have to pay for the remaining duration of the contract at the rate ofKShs. 200,000/-for every incomplete year.

31. The Claimant submitted that he is entitled to the remainder of the five (5) months' notice pay as provided in his employment contract and as read together with Section 35 (2) of the Employment Act. The decision in Brooke ***house Schools Limited versus Dorcas Njeri Gichuhi*** **[2016] eKLR was** cited to fortify these submissions.

32. It was argued that his terms of employment envisaged the completion of the duration provided in the contract of employment. That were it not for the unfair and unlawful termination of his contract, he legitimately expected to complete his term.

33. The Claimant further submits that his contract of employment provided that staff on work permit are required to complete the full duration of the permit issued. Further, the terms impose a sanction should the employee not complete the duration of the contract.

34. The Claimant submits that he had nine (9) months left to the conclusion of the employment period and claims payment for that duration as damages for breach of contract.

35. To buttress this submission, Counsel cited Donas ***Lombom &*** 7 ***others versus Civicon Limited*** **[2016] eKLR where** the Court held on damages for breach of contract held that *"....it is now common knowledge that all the claimants were employed by the Respondent under fixed term contracts, all of which were prematurely and unfairly terminated by the Respondent. The said premature termination for no fault on the Claimants' part also amounts to breach of their fixed term contract. The claimant had the reasonable expectation of continuing to work and earn salary for the remainder of the term of their respective contracts. The court therefore awards each claimant the salary for the unexpired period of their respective fixed term contract."*

36. The Claimant submitted that the termination of his contract of employment under the guise of redundancy was unfair under Section 45 of the Employment Act for failing to meet the requirements under Section 40 of the Employment Act. The Respondent failed to prove that his termination was based on its operational requirements and, that the termination was in accordance with fair procedure.

The Respondent's Submissions.

37. The Respondent's Counsel held a view that the following two issues emerge fore determination by this Court;

a) Whether the Claimant was unlawfully and unfairly dismissed by the Respondent.

b) Whether the Claimant is entitled to the reliefs sought in the Memorandum of Claim dated 20th February 2018.

38. It was submitted that the law relating to redundancy obtains in Section 40 of the Employment Act. There is ample evidence that on the 3rd August 2017, the Respondent wrote a letter of termination on account of redundancy to the Claimant herein. The reason was unambiguously contained in the letter dated 3rd August 2017 thus;" *We would like to inform you that the Board has decided to terminate your employment contract with Oshwal Academy-Nairobi with immediate effect. This has been necessitated by a review and assessment of your current role as Director of Education which is no longer required within our structure based on current operational requirements. Your position is superfluous and longer necessary.".*

39. In addition, the Respondent set out the following terminal payments payable to the Claimant herein;

i) One-month salary in lieu of notice.

ii) Unpaid Leave days if any.

iii) *Severance,* pay at the rate of fifteen days' pay for one (1) year service- May 2016-May 2017.

iv) Certificate of service.

40. It was further submitted that the Claimant and the Respondent's witness, Mr. Ronald Ooko both testified that after the termination of the Claimant's contract on account of redundancy, the position of Director of Education was not filled by the Management. This indeed lends credence to the Respondent's submissions that the position of Director of Education held by the Claimant herein was declared redundant.

41. Further that the Claimant herein received a Cheque of Kshs 1,740,959.70 being the terminal dues, that were brought forth in the termination letter, above stated.

42. The Respondent summed it up by stating that the Claimant's contract of employment was not unlawfully nor unfairly terminated and therefore he is not entitled to the reliefs sought in the Memorandum of Claim dated 20th February 2018.

43. On the second issue, an argument was first made on the 5 months' notice pay claimed by the Claimant, thus, the contract of employment dated 10th March 2016 did not provide for termination on account of redundancy under Clause 19. The relevant provision would therefore flow from Section 40(f) of the Employment Act which provides that;

"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"

The Claimant's compensation claim of five months is an afterthought and is not anchored on any provision of the law. It runs counter the Section 40 of the Employment Act.

44. Reliance was placed on the case of **Stephen Munene Waititu v Kenya Tea Packers Limited & another [2020] eKLR** where the court held:

"Section 40 of the Act is mandatory that the notices due to the employee where there is a redundancy must issue and particularly where the employee is not unionised, the notice(s) must be issued to the subject employee.

In Margaret Mumbi Mwago versus Intrahealth International [2017] eKLR the court held that;

.... in declaring redundancy, an employer is required to issue two separate notices of at least one month each. The first is a general communication to employees generally notifying them of the impending redundancy. The second is a specific notice to the affected employees. The employer is further required to issue a one month notice to the local Labour Officer (see ***Thomas be La Rue v David Omutelema [2013] eKLR).***

In the case of Barclays Bank of Kenya Ltd & another versus Gladys Muthoni & 20 others [2018] eKLR the court relied on the case of Thomas be La Rue (K) Limited versus bavid Opondo Umutelema eKLR and held that;

It is quite clear to us that section 40(a) and 40(b)provide for two different kinds of redundancy notifications depending on whether the employee is or is not a member of a trade union. Where the employee is a member of a union, the notification is to the union and the local labour officer at least one month before the effective redundancy date. Where the employee is not a member of the union, the notification must be in writing to the employee and the local labour officer...."

45. The Court was urged to find that Clause 19 of the Contract of Employment was not applicable in the circumstances of the matter. Too, that the Respondent complied with the provision of Section 40 of the Employment Act by effecting a payment of one-month salary to the Claimant in lieu of notice.

46. On the Claim for compensation for the remainder of the contract period, it was submitted that once the Respondent paid the Claimant one month in lieu of notice, the claim for damages of the remainder of the contract became mute. The Claimant is not entitled to the damages for the unexpired period of the contract therefore. Support for this submission was sought in the case of **Peter Wesonga Opaka v Hilltop Preparatory School & another [2019] eKLR where** the court held as follows;

"I agree with the respondent's submissions that the claimant is not entitled to payment of the unexpired term of the contract as the contract does not provide for the same. Further it would be unproportionate to the injury suffered by the claimant who testified that he got another job three months after he was dismissed from the respondent's employment. This was the finding in the cases cited by the respondent as follows -

Robert Kennedy Moi v Attorney General and Another [2014] eKLR. The Court held as follows-

"The Claimant prayed for payment of salary for the unexpired period of contract.

Payment for Salaries for the unexpired period of contract are not due as the law does not provide for anticipatory income. Section 49(4)(e) requires that employees mitigate their losses. Being able bodied, the Claimant was expected to move on with his life after the termination of his employment. This was the decision of Rika J. in ***b.K. Njagi Marete V Teachers Service Commission [2013] eKLR, High Court Civil Case No. 1139 of 2002 Menqinya Salim Murqani V Kenya Revenue Authority and Industrial Court Cause No 87 of 2011 Olqha Auma Adede V New Kenya Cooperative Creameries Ltd.***

The Claim for payment of salary for the unexpired period of the contract is therefore without merit and is dismissed."

47. On damages for unlawful and unfair termination, it was submitted that since the termination was done in accordance with the provisions of the law, the remedy cannot be availed to the Claimant. In addition, the Respondent made the following payments to the Claimant in compliance with the provisions of Section 40 of the Employment Act;

a) One Month Salary in lieu of notice-Kshs 1,100,000/-.

b) Salary for two days (August 1st and 2"d)-Kshs 73,333/-.

c) Reimbursement of expenses incurred in relocation subject to Clause 16 of the contract of Employment-Kshs 100,000/-.

d) Unpaid Leave days-Kshs 646,176.44.

e) Telephone Allowance-Kshs 5,333.33.

f) Economy Class Flight Ticket from Nairobi to the UK in respect of yourself only as the spouse is not in Kenya.

g) Severance pays at the rate of Fifteen (15) days' pay for one year of service-May 2016 to May 2017 -Kshs 550,000/-,

h) Certificate of service.

48 According to Counsel for the Respondent there is no law that requires that the employer should have pre-redundancy consultation before a termination on account of redundancy.

Analysis and Determination.

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

i. *Whether the termination of the Claimant's employment on account of redundancy was procedurally fair.*

ii. Whether the termination of the Claimant's employment was substantively fair.

iii. Whether the Claimant is entitled to the prayers sought in his memorandum of claim.

vi. Who should bear the costs of this matter.

Of whether the termination was procedurally fair

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

51. Section 40(1) of the Employment Act 2007 elaborately provides for what an employer who decides to terminate an employee's employment must do if the termination were to be considered fair, thus,

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

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

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

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

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

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

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

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

52 There is no doubt that the Claimant's employment was terminated through the letter dated 3rd August, 2017. As regards the termination there had been no document preceding the letter, informing him of the alleged decision to restructure and the restructuring process. The question that this Court has to answer is as to whether the letter took the character of the notice(s) envisaged by section 40(1) of the Employment Act and whether it was in nature, able to achieve the purpose for which the provision created notice(s) thereunder.

53. The letter indicated that the Claimant's last day of work was 3rd August 2017, as the termination of his employment was to take effect immediately.

54. A notice to be issued under section 40(1) shall be a notice of not less than a month. It is obvious that the letter dated 3rd August 2017 was not the notice envisaged under section 40(1) of the Employment Act therefore. In the **Kenya Airways case [**supra] Maraga JA [as he then] was stated and I agree with the statement, thus;

"49. *I agree with Mr. Mwenesi that both the notices themselves and their duration of 30 days under this provision are mandatory. Section 40[1] of our Employment Act does not expressly state the purpose for the notice. Although it also doesn't expressly provide for consultation between the employer and the employees or their trade unions before the final decision on redundancy is made, on my part I find the requirement of consultation provided for in our law and implicit in the Employment Act."*

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

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

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

57 For shortness of period the letters cannot be said to constitute a proper notice issuable to the Labour officer and an employee under the provisions of section 40(1) of the Employment Act, 2007.

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

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

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

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

82. follows:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

63 The Court totally disagrees with the Respondent's Counsel's submissions that in our jurisdiction consultation is not a requirement. With due respect, the submission is in ignorance of the now firm jurisprudence in the area.

In the circumstances, I am not satisfied that the termination of the Claimant's employment was procedurally unfair.

Of whether the termination was substantively fair

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

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

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

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

67 The Respondent contended that the termination was as a result of the Claimant's position becoming redundant, as a consequence of an organizational restructure. His services were no longer required.

68 The Respondent just asserted in the letter dated 3rd August, 2017 that the termination had been necessitated by a review and assessment of the Claimant's then role as Director of Education, and that the role was no longer required within the Respondent's structure based on its operational requirements. This was reiterated by its witness without more to discharge its heavy burden mentioned hereinabove, the Respondent was obliged to do more than this. It was obliged to tender evidence and in detail, what the restructure entailed, what prompted the need for the review considering that the Claimant had been in the position barely a month after his promotion, the alternatives that were available and/or proposed to arrest the redundancy, and or mitigate the impact of the same, the employees' contribution during the consultation process, and the extent of the redundancy.

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

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

Section 45 provides:

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

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

a. That the reason for termination is valid;

b. That the reason for the termination is a reason

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

ii. Based on the operational requirements of the employer;

c. ……

70 The Respondent's witness candidly stated that he was not at all involved in any deliberations concerning the restructure and the decision to declare the Claimant's position superfluous. He was the Head of Human Resource Management, definitely matters separation fell under the Human Resource Management functions. One would wonder how then he wouldn't be involved at all.

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

72 Reviewing the material placed before Court by the Respondent, one develops the uncomfortable feeling that the true reason for termination was not an operational requirement of the Respondent.

73 I have considered the submissions by Counsel for the Respondent on Section 40 of the Act on substantive fairness, let me say that it not enough for the employer to say that I relied on this reason or that reason provided for in the Act to terminate the employees' service. Validity of the reason must be demonstrated. In the capsule of validity, one must see, candidness, fairness, forthrightness and good faith. To just state the reason like "Organizational review" is not enough to enable Court to gauge the statutory measure of validity, justice and equity.

74 Enough for the substantive fairness of the termination. I conclude that the termination was not substantively fair.

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

Of the relief grantable

76 The Claimant has sought for compensation for wrongful termination equivalent to 12 months' salary amounting to Kshs.13,200,000.00. I am alive of the fact that the 12 months gross wages or salary, is the maximum awardable compensation provided for under section 49 [1](c) of the Employment Act. Granting of the compensatory relief is discretionary. Whether the maximum compensation is awardable or a portion thereof or no compensation at all, depends on the circumstances of each case.

77. I am inclined to award the Claimant the compensatory relief. I have considered the extent of the Respondent's deviation from the requirement of the law, the breach of the constitutional duty to embrace fair labour practice, the uncomfortable feeling that the reason for the termination was disguised, the fact that the termination was without fault on the part of the Claimant, and the reasonable expectation of the Claimant on the length of the employment. Consequently, I award him compensation to an extent of an equivalent of 8 months' gross salary. Therefore Kshs.8,800,000.

78 Clause 19 of the contract of employment provided for a termination notice of six months, thus;

"subject to the provisions for summary dismissal contained in clause[ii] below either party may terminate employment without giving any reason for such termination by giving a six [6] months written notice or the party giving the notice paying equivalent of six [6] months' salary in lieu of notice*."*

There is no dispute that the Claimant was not given the notice contemplated under this term or paid in lieu thereof. He was only given one month's salary in lieu of notice. The Respondent contended that this payment which was clearly not in conformity with the contractual term, was informed by the provisions of section 40 of the Employment Act.

79 I have carefully considered the provisions of section 40 [1][f], and I am of the view that what it provides for is the most

minimum notice pay that an employer can pay. The provision cannot be invoked to deny an employee a contractual entitlement [notice pay] which would be higher than the statutory one, at the time of termination. The provision cannot be read in isolation from the provisions of section 35 [2] of the Act, which provides;

"Subsection [1] shall not apply in the case of a contract of service whose terms provide for the giving of a period of notice of termination in writing greater than the period required by the provisions of this subsection which would otherwise be applicable thereto."

80 The provisions of section 35[2], are clear testament of the fact that it wouldn't have been the intention of the legislature, that the provisions of section 40 be applied to the prejudice of the redundant. Consequently, I hold that the Claimant was entitled to a notice pay of six months, and since he was paid for one month, he is owed a five months' pay, Kshs. 5,500,000.

81 The Claimant further sought for general damages for breach of contract. The court is not persuaded that sufficient material was placed before it to justify a grant of general damages which are rarely Further, having granted the compensatory relief pursuant to the provisions of section 49 [1][c] to the extent I have hereinabove, it shall be over -compensation to again award general damages.

82 In the upshot, Judgment is hereby entered in favour of the Claimant in the following terms: -

I. A declaration that the termination of the Claimant's employment was both procedurally and substantively unfair.

II. Compensation for unfair termination - Kshs.8,800,000.00,

III. Unpaid notice pay Kshs. 5,500,000.00

IV. Interest on [II] and [III], above at Court rates with effect, the time of filing this suit till full payment.

V. Costs of this suit.

READ AND DELIVERED VIRTUALLY THIS 19TH DAY OF APRIL, 2022.

OCHARO KEBIRA

JUDGE

IN PRESENCE OF;

MR. MUNGAI FOR THE CLAIMANT.

MR. KIMANI FOR THE RESPONDENT.