

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT
NAIROBI
CAUSE NO. E598 OF 2022

TOM ODUOR OGILA.....CLAIMANT

VERSUS

DAWA LIFE SCIENCES LIMITED.....RESPONDENT

JUDGMENT

1. It is common cause that the Claimant was employed by the Respondent in the position of Production Development Manager with effect from 1st December 2015 at a monthly salary of Kshs 180,554/=.
2. The Claimant avers that on or about February 2016, when the Respondent's Production Manager left the Respondent company, he was, in addition to his usual duties and job description, appointed in the position of Production Manager in an acting position, for which he was not remunerated for 22 months. He contends that he was subsequently confirmed in the said position without any change to his salary.

3. According to the Claimant, he continued working for the Respondent diligently as a Production Manager to the extent that he was recognized as the best manager in 2018 but the Respondent refused to review his salary to match that of his equals or even his predecessor who earned a monthly salary of Kshs 509,829/=.
4. The Claimant has further averred that he raised the issue of discriminatory salary but the same was never addressed despite him being paid a salary and benefits lower than the starting remuneration of other colleagues of equal status appointed to the same office.
5. The Claimant further avers that consequent to his complaints and requests for proper salary review, his salary was reviewed to Kshs 350,000/= in September 2020, which was still lower than that of his colleagues of equal status and that of his predecessor.
6. It is the Claimant's case that he performed his duties diligently and to the satisfaction of the Respondent until he was unfairly terminated on account of redundancy on 27th January 2022.
7. According to the Claimant, the process of redundancy was arbitrary, hasty, unlawful and without justification. He further contends that the Respondent's

action has flouted the Constitution, the Employment Act, the tenets of good labour practice, and the principles of natural justice.

8. On account of the foregoing, the Claimant seeks the following reliefs against the Respondent:

a) A declaration that the purported redundancy amounted to unfair termination of the Claimant's contract of employment.

b) Compensation for unlawful termination equivalent to 12 month's proper salary as Production Manager;

Kshs: $509,829 \times 12(\text{months}) = \text{Kshs.}6,117,948.00$

c) A declaration that payment of lower salary and benefits to the Claimant than those paid to his Indian predecessors for doing the same work or equal value was discrimination on the ground of race and nationality and violated the Claimant's right to equality and freedom from discrimination.

d) A declaration that the Claimant was entitled to the same pay and benefits as Production Manager commensurate with his predecessor hence the Claimant is entitled to the difference arising from all the underpayments;

(i) January 2018- August 2020: Kshs 509,829-Kshs

253,000=Kshs.256,829 x 32(months)=Kshs 8,218,528/=

(ii) September 2020- January 2022: Ksh.509,829 -

Ksh.350,0000=Ksh.159,829×17(months)=Kshs.2,717,093/

Total Claim for underpayment of salary asKshs 10,935,621/=

e) A declaration that the Claimant was entitled to pay and benefits as the Acting Production Manager from February 2016 - December 2017 and hence entitled to compensation amounting to; (Salary of Production Manager) - (Claimant's salary as at then) X 22 Months

Kshs.509,829-Kshs.180,554.03=(329,274.97×22)=Kshs.7,244,049,34/=

f) That the Respondent herein be ordered to pay the Claimant all dues for his accrued leave days that were not accorded to him in the whole period calculated as hereunder;-

Leave days arbitrarily deducted from him: 31.9 days-7days=24.9 days.

4 leave days per year never granted to him as per contract: 4×6=24 days.

Total Accrued Leave days: 48.9 days.

509.829/30=Kshs.16,994.30/= x 48.9 days = Kshs.831.021.27/=

- g) General damages for discrimination, unfair labour practice, distress, frustration and witch hunt by the Respondent at the workplace.**
- h) That the Respondent be ordered to pay interest on all claims;**
- i) That the Claimant be awarded costs of this Suit.**
- j) That the court may grant any other relief as it may deem necessary to grant.**

9. Opposing the Claim, the Respondent has denied that the Claimant's employment was unlawfully terminated. The Respondent has further denied that the Claimant's salary stood at Kshs. 350,0000/= at the time his employment was terminated.
10. The Respondent has further averred that the Claimant accepted employment as a Product and Development Manager and marked the acceptance of the offer by signing and entering into a binding contract.
11. The Respondent avers that upon completion of the probationary period, the Claimant was confirmed in the position of Product Development Manager, vide a letter dated 4th May 2016.
12. It is the Respondent's contention that on or about February 2016, the Claimant was still under probation and not serving in an acting capacity as Production

Manager. The Claimant accepted to become a Production Manager, as per a letter dated 2nd January 2018, on the same terms and conditions as those in his employment contract dated 7th December 2021.

13. The Respondent has further contended that the allegation by the Claimant that he was not remunerated for 22 months from February 2016 to January 2018 is time-barred and cannot be entertained at this point.
14. The Respondent has further averred that the Claimant's predecessor was designated a Senior Production Manager whose roles and responsibilities were different from the Claimant's.
15. The Respondent has further denied the Claimant's assertions of discrimination and has maintained that the parties were bound by the terms of the employment contract on the terms of remuneration. That the Claimant never raised any grievance of discrimination with it before and after review of his salary.
16. The Respondent has further denied that the Claimant was unfairly terminated on account of redundancy. Consequently, the Respondent has asked the Court to dismiss the claim with costs.

17. The matter proceeded for hearing on 23rd October 2024 and 25th November 2024, during which both parties called oral evidence.

Claimant's Case

18. The Claimant testified in support of his case, and at the outset, he sought to adopt his witness statement as well as the list and bundle of documents filed alongside the Memorandum of Claim to constitute his evidence in chief.

19. It was the Claimant's evidence that the Respondent declared him redundant with effect from 27th January 2022, the even date the redundancy was supposed to take effect.

20. He has further averred that the notice declaring him redundant made reference to a written notice dated 28th December 2021, which was never served upon him. It was the Claimant's contention that on the alleged date, he was on Christmas break. He learnt of the alleged notice on 27th January 2022, when one Marline Nafula sent him the termination notice on grounds of redundancy dated 27th January 2022.

21. The Claimant has further averred that the Respondent's letter to the County Labour Office was back-dated 28th December 2021 and received by the Labour Office on 5th January 2022, which action was in contravention with the provisions

of Section 40 of the Employment Act. In the Claimant's view, the notice to the labour office was an afterthought.

22.The Claimant further contended that the purported Board of Directors' decision to terminate his services because of alleged cost structure was not justified because the Respondent only renamed his position and commenced recruitment of a new staff to replace him at a monthly salary of over Kshs.1,200,000/=.

23.In the Claimant's view, the Respondent had planned his termination without consulting with him.

24.He further averred that the Respondent did not show any effort to retain or deploy him since the Respondent went ahead to recruit a person with similar skills or abilities without giving him consideration internally.

25.The Claimant further contended that the Respondent did not give him an opportunity to question the validity of the reasons given for redundancy or the criteria for selection.

26.That further, he was not allowed to raise pertinent issues that ought to be cleared before the Respondent could declare him redundant. According to the Claimant, there was no meaningful consultation between him and the Respondent before

the termination of employment under redundancy. The Respondent did not consult with him and inform him that a decision to terminate his services had been made.

27. The Claimant has further averred that the Respondent did not grant him all his due leave days as per his contract of employment and neither was he compensated in lieu thereof, despite demanding the same.

28. In this regard, he has contended that the Respondent only granted him 21 days leave per year, contrary to his contract of employment that provided for 25 days per year. That further, on 18th March 2021, when he requested for a day's leave, the Respondent insisted that he had only 7 leave days left, yet he had 24.9 unutilized leave days.

Respondent's Case

29. The Respondent called oral evidence through **Ms. Martha Muthee**, who identified herself as the Respondent's HCM Team Lead and Occupational Health and Safety Officer. Equally, RW1 adopted her witness statement as well as the list and bundle of documents filed on behalf of the Respondent to constitute her evidence in chief.

30. In her evidence, RW1 stated that she was aware that the Company had been facing financial losses in the year 2021. She averred that this situation necessitated the review of its business operations and structure. She is also aware that as a result, the company considered several positions for redundancy, including the Claimant's.

31. RW1 further averred that the Respondent issued a notice of redundancy dated 28th December 2021 to the County Labour Officer, which expressly stated that the company would be declaring certain positions within the company redundant.

32. She is further aware that a notice of intended redundancy was sent to the Claimant's email on 28th December 2021. That the notice informed the Claimant that following the period of financial losses faced by the company over the 2021 period, the company was considering the position of Production Manager for redundancy. The notice further stated that the Respondent would be holding consultative meetings with all employees affected by the organizational restructuring.

33. RW1 further stated in her testimony that the service of the notice of intended redundancy was done through the work emails of the employees. That after the thirty-day period, the Respondent could not find alternative employment for the

Claimant and therefore declared his position redundant and terminated his services. The Respondent issued a termination letter through the Claimant's work email dated 27th January 2022.

34. RW1 further stated that the Claimant was paid his terminal dues as indicated in the termination letter.

35. With respect to leave, RW1 averred that the Respondent's leave policy is that all employees under the management category are entitled to 21 annual working days leave accruing on a prorated basis of 1.75 days a month.

36. That on 14th September 2020, vide an internal memo from the Group CEO Pharma and Group Head of Human Resource to all employees, the Respondent communicated that all employees should take their leave days by 30th November 2020 to avoid losing their leave days. It reiterated company policy that if leave days remained in a calendar year, only seven (7) of these days would be carried forward into the new year to be used within the first three (3) months of the new year.

37. She was aware that on or about 18th March 2021, the Respondent issued a further Memorandum reiterating the leave policy as stated on 14th September 2020 and

the Respondent consistently reminded its employees to take their leave days and schedule a leave plan for the year 2021.

38. That all carried over leave days for employees expired on 31st March 2021 and only leave days accrued from 1st January 2021 would be computed.

39. She is aware that the Claimant applied for leave days several times in 2021 and cumulatively took fourteen (14) leave days in 2021. That as per company policy, only the seven (7) remaining leave days were to be carried forward to the first three (3) months of 2022.

40. That for the month worked in January 2022, the Claimant did not take any leave days. The remaining leave days from 2021 and the resultant January leave days resulted in the Respondent paying leave encashment on termination of his employment contract.

41. RW1 further averred that the Respondent undertook restructuring of the Organization in early 2022 and a new structure was adopted to reflect the new and more streamlined organizational structure. That the role of Production Manager or Manager- Production is not present in the new structure.

42. She is also aware that other senior positions were declared redundant during the same period.

Submissions

43. On the part of the Claimant, it was submitted that the purported Board of Directors' decision to terminate his service was not justified because the Respondent only renamed his position and commenced recruitment of new staff to replace him at a monthly salary of over Kshs.1,200,000/=.

44. It was the Claimant's contention that the Respondent did not prove the requisite standard that it had a valid and fair reason to declare him redundant.

45. It was further submitted that the notice to the County Labour Office did not indicate the category of the employees affected by the redundancy or the positions to be declared redundant. In the Claimant's view, the notice was fundamentally mischievous, illegal and procedurally flawed since it was submitted on 5th January 2022, 22 days before the purported redundancy took place.

46. The Claimant further submitted that there were no extensive consultations since the redundancy was only communicated to him after the Respondent's proposal had been formulated.
47. In further support of the Claimant's submissions, reliance was placed on **Appeals Tribunal in Williams vs Compare Maxam Ltd (1982) IRLR83** and **Kenya Airways Limited vs Aviation & Allied Workers Union (2014) eKLR**.
48. On the other hand, the Respondent submitted that the burden of proof rests on the Claimant to prove that he was unfairly and unlawfully terminated; a burden that he has not discharged as provided for under Section 47(5) of the Act. To this end, the Respondent sought to rely on the case of **Kennedy Maina Mirera vs Barclays Bank of Kenya Limited (2018) eKLR**.
49. The Respondent further urged the Court to hold that it has a prerogative to declare redundancies and to undergo the process in accordance with the relevant laws.
50. Referencing the case of **Super Group Supply Chain Partners vs Arthur Dlamini & Another [JA 77/10]**, the Respondent submitted that the redundancy was a legitimate and operationally necessary decision. The Respondent buttressed its submissions with the cases of **Kenya Airways Limited vs Aviation & Allied Workers Union Kenya & 3 others [2014] eKLR**, **Lebo &**

**331 others vs Kenya Power & Lighting Co Ltd [2023] and Caroline Atieno
Osweta vs Kenya Yuncheng Plate Making Ltd [2013] eKLR.**

51.The Respondent further submitted that since the Claimant was the only person occupying the redundant position of Production Manager, there was no need for a comparative selection process.

52.In the further submission, the Respondent stated that the Claimant's redundancy was not discriminatory or unfair but rather a direct consequence of the abolition of the position.

53.It was further submitted that the Respondent fully complied with the procedural requirements of Section 40 of the Employment Act, 2007, before terminating the Claimant's employment contract on account of redundancy. In support of this position, reliance was placed on the case of **Kenya Plantation & Agricultural Workers Union vs James Finlays (K) Limited (2013) eKLR.**

54.It was the Respondent's further submission that the Claimant's alleged predecessor was designated a Senior Production Manager whose roles and responsibilities were different from the Claimant's. That the two never had similar roles within the structure of the company and were therefore not

performing equal work for equal remuneration. According to the Respondent, this was the basis for the difference in salaries.

55. The Respondent stated in further submission that the negotiation of a contract is done individually, and salary awarded in accordance with individual value additions, qualifications, experience and responsibilities. That the Claimant signaled his acceptance of the whole of the contract by affixing his signature on 24th October 2015.

56. The Respondent urged the court to find that the Claimant was not discriminated upon during the course of his employment and to note that he accepted the terms of the contract as offered and that his salary benefits steadily increased over time.

Analysis and Determination

57. Arising from the pleadings by both parties, the evidentiary material on record as well as the rival submissions, the following issues arise for consideration by the Court:

- i. Whether the Claimant's termination from employment was unfair and unlawful;**
- ii. Whether the Respondent breached the Claimant's right to equality and freedom from discrimination;**

iii. Whether the Claimant is entitled to the reliefs sought.

Whether the Claimant's termination from employment was unfair and unlawful

58. As can be discerned from the record, the Claimant's employment was terminated on grounds that his role as Production Manager had become redundant with effect from 27th January 2022.

59. It is now settled that any termination of employment under redundancy ought to be both substantially justified and procedurally fair. Such was the holding by the Court of Appeal in the case of **Kenya Airways Limited vs Aviation & Allied Workers Union Kenya & 3 Others (2014) eKLR**.

60. With respect to substantive justification, an employer is duty-bound to prove that the reasons ascribed for the redundancy were valid, fair and related to its operational requirements. In default, the termination is unfair in light of the provisions of **Section 45(2) (b) (ii) of the Employment Act**.

61. In the present case, the Respondent exhibited a copy of its organizational structure after the restructuring, to support its position that the Claimant's role of Production Manager had been declared redundant. Notably, the Claimant also

exhibited the same organizational structure, which was shared with all staff of the Respondent vide an email dated 11th January 2022.

62. It is evident from the new organizational structure that the position of Production Manager that was erstwhile held by the Claimant is non-existent. In essence, the position of Production Manager had fallen off the Respondent's organization structure.

63. According to the Claimant, the Respondent recruited another person with similar skills or abilities to take over his responsibilities. However, this assertion was not supported by way of evidence hence was not substantiated.

64. It is also apparent that in total, the Respondent declared 14 positions redundant. These included the positions of the Chief Executive Officer, Chief Financial Officer, Marketing Senior Manager, Regulatory Affairs Manager, Group Head HCM, Chief Operations Manager, Customer Service Manager and ICT Manager.

65. To this end, the Court does not have any reason to doubt that the Respondent undertook an organizational restructure, thereby resulting in the role being held by the Claimant redundant.

66. In light of the foregoing, the Court finds that the Respondent has proved on a balance of probabilities that there was a valid and fair reason for termination of the Claimant's employment on account of redundancy.

67. As to the procedural aspect of the redundancy process, Section 40(1) stipulates the following conditions that an employer must comply with prior to an employee's termination on account of redundancy:

- 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.**

68. With respect to the notice requirement under Section 40(1) (a) and (b), the record bears that the Claimant was issued with a notice of intended redundancy dated 28th December 2021, which was sent to his email on 28th December 2021.

69. The Claimant has disputed receiving the said notice of intended redundancy on the basis that he was away from the office on Christmas break. Be that as it may, the Claimant did not disown the email account through which the notice in question was sent. Indeed, his only contention was that he was away on Christmas break. Therefore, in as much as the Claimant may not have been aware that the

notice had been sent via his work email address, this did not take away the fact that the Respondent had issued the notice as required under the law.

70. The other issue raised by the Claimant is with respect to the notice issued to the County Labour Office. The record bears that the said notice to the County Labour Office was issued on 28th December 2021 and received on 5th January 2022. Evidently, this was short of the 30-day period prescribed under Section 40(1) (a) and (b) aforementioned.

71. The other problematic aspect with respect to the notice issued to the Labour Office is that it did not indicate the extent of the redundancies as contemplated under Section 40(1)(a) of the Employment Act. In this regard, the notice merely stated that it would be declaring certain positions in the company redundant. Aside from that, the notice did not indicate the category of the employees affected by the redundancy or the positions to be declared redundant. Simply put, the notice issued was not as envisaged under Section 40(1) of the Employment Act.

72. On this issue, it is this Court's considered view that the notices to be issued to the labour office under Section 40(1) contemplates that the employer will provide sufficient details with regards to the redundancy exercise hence the term "*the extent of the intended redundancy*". These include the number of the positions

to be declared redundant and the category of employees to be affected by the redundancy. As I see it, the issuance of the notice to the labour office is not just a routine requirement.

73. All in all, the Court finds that the notice issued by the Respondent to the labour office was not substantially in compliance with the provisions of Section 40(1) (a) and (b) of the Employment Act.

74. On the requirement for a selection criteria, an employer is required to prove that in the selection of the employees to be declared redundant, it has paid 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.

75. In this case, the Claimant did not indicate, let alone suggest, that there were other employees besides him that were serving in the position of Production Manager.

76. My understanding of the requirement under Section 40(1) (c) is that it only applies in a scenario where the redundancy affects a number of employees in a particular class or category. With that being said, the Court holds the view that the said requirement with respect to selection criteria was not applicable in this case.

77. With respect to the requirement for consultations, the Respondent notified the Claimant in the notice of intended redundancy dated 28th December 2021 that it would hold consultations over the next 30 days with all employees who were likely to be affected by the redundancy. The Respondent further committed to discussing alternatives to the proposed redundancy with the Claimant.

78. Despite the Respondent's express commitment, there is no evidence that the Respondent lived up to its promise and held consultations with the Claimant as decreed under **Article 13, Convention No. 158 - Recommendation No. 166** of the **International Labour Organisation (ILO) convention**.

79. In underscoring the importance of holding pre-redundancy consultations, the Court in **Kenya Airways vs Aviation & Allied Workers Union Kenya & 3 Others (supra)**, held that consultations are 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.

80. As it is evident in this case that there were no pre-redundancy consultations, the Court returns that the Respondent is at fault to that extent.

81.Regarding the statutory payments under Section 40(1) (e) (f) and (g) of the Employment Act, it is noteworthy that the Claimant was advised through the letter of termination dated 27th January 2022 that he would be paid salary up to and including 27th January 202, two (2) months' notice pay, severance pay of fifteen (15) days for each completed year of service, and payment of accrued leave days as at January 2022.

82.It is therefore apparent that the payments made to the Claimant upon being declared redundant complied with Sections 40(1) (e) (f) and (g) of the Employment Act. In principle, the Respondent complied with the requirement for payment of the statutory terminal dues following a redundancy. On that score, the Respondent cannot be faulted.

83.It is worth noting that the Claimant has raised an issue with respect to the computation of his leave days. I will address this issue under the Reliefs.

84.All things considered, the Court finds that in as much as the Respondent has proved on a balance of probabilities that there was a valid and fair reason to terminate the Claimant's employment on grounds of redundancy, it did not substantially comply with the provisions of Section 40 (1) of the Employment Act and for that reason, the Claimant's termination was procedurally unfair.

85. In so finding, I am fortified by the holding in the case of **Hesbon Ngaruiya Waigi v Equitorial Commercial Bank Limited (2013) eKLR**, that where redundancy is declared by an employer, the procedure to follow is as set out under the provisions of Section 40 of the Employment Act and where not followed, any termination, as a result, will be deemed unprocedural and unfair.

Discrimination?

86. The Claimant has cited the Respondent for discrimination on the basis that he was paid less salary than his counterparts. In this regard, the Claimant contended that the Respondent refused to review his salary to match that of his equals or even his predecessor, who earned a monthly salary of Kshs 509,829/=. In support of his assertions, the Claimant exhibited a copy of his predecessor's pay slip.

87. Disputing the Claimant's assertions, the Respondent has averred that the Claimant accepted the terms of his employment contract. The Respondent has further averred that the Claimant's predecessor was designated a Senior Production Manager whose roles and responsibilities were different from the Claimant's.

88. A look at the pay slip exhibited by the Claimant reveals that his predecessor Narendah Kumar Mandave was designated as the Senior Production Manager,

whereas the Claimant's designation was Production Manager. Fundamentally, these two positions are different.

89. The **Black's Law Dictionary, (10th Edition)**, defines the term **"discrimination"** to mean: **"Differential treatment; a failure to treat all persons equally when no reasonable distinction can be found between those favoured and those not favoured."**

90. In the present case, the positions of Production Manager and Senior Production Manager were quite distinct and not comparable. As such, it is not uncommon that the salaries for the two positions were different. In my respectful view, this aspect alone does not amount to discrimination.

91. What the Court finds to be discriminatory is the fact that prior to September 2020, the Claimant was the lowest paid senior manager in the team under which he was serving. This position was confirmed by Mr. Rushabh to Mr. Pedro Filipe in his email dated 18th September 2020, in which he stated that the Claimant was the lowest-paid senior manager in all his teams. He further added that the average salary was sitting at Kshs 350,000/=. Indeed, it was subsequent to Mr. Rushabh's email that the Claimant's salary was increased to Kshs 350,000/=.

92. In essence, Mr. Rushabh was acknowledging that with respect to salary, the Claimant was being accorded differential treatment compared to his counterparts.

93. The Respondent has contended that the Claimant accepted the terms of his employment contract. Respectfully, this argument does not hold. Pursuant to Section 5(2) of the Employment Act, an employer is duty-bound to promote equal opportunity in employment and strive to eliminate discrimination in any employment policy or practice.

94. Therefore, in as much as the Claimant may have accepted contractual terms that were less favourable compared to his counterparts, there was a statutory duty on the part of the Respondent to ensure fairness across the board and to strive to eliminate any discriminatory policy or practice in the workplace.

95. Further, Article 27(5) of the Constitution prohibits direct or indirect discrimination on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

96. Similarly, Section 5(3) of the Employment Act, 2007 prohibits direct or indirect discrimination on grounds of race, colour, sex, language, religion, political or

other opinion, nationality, ethnic or social origin, disability, pregnancy, marital status or HIV status; in respect of recruitment, training, promotion, terms and conditions of employment, termination of employment or other matters arising out of the employment.

97. On case law, the Court of Appeal held in the case of **Barclays Bank of Kenya Ltd & Another vs Gladys Muthoni & 20 Others [2018] eKLR**, that arbitrary discrimination in the workplace is outlawed at the highest level of the Constitution and has always been.

98. By dint of Section 5(7) of the Employment Act, the employer bears the burden of proving the fact that the discrimination did not take place as alleged and that the discriminatory act is not based on any of the grounds specified within that section.

99. In the instant case, the Respondent did not advance any valid reason as to why the Claimant's salary was lower than that of his counterparts serving in comparable positions.

100. In the Supreme Court case of **Gichuru vs Package Insurance Brokers Ltd (Petition 36 of 2019) [2021] KESC 12 (KLR)**, it was held that:

“According to section 5(7) of the Act, an employer alleged to have engaged in a discriminatory practice must give reasons for taking certain actions against the employee. Where such actions are shown not to have any justification against the protected group, then there exists discrimination against such an employee and must therefore be addressed.”

101. Applying the above decision by the Apex Court to the case herein and bearing in mind the provisions of Section 5(7) of the Act, the Court arrives at the inescapable conclusion that the Respondent did not prove the reason as to why the Claimant was treated differently and less favourably than his counterparts with respect to salary.

102. For the above reasons, the Claimant’s claim with respect to discrimination succeeds.

Reliefs?

Compensatory damages for unlawful termination

103. As the Court has found that the termination of the Claimant’s employment on grounds of redundancy despite being based on a valid and fair reason was procedurally unfair within the meaning of Section 40(1) of the Employment Act,

he is awarded compensatory damages equivalent to four (4) months of his last salary. This award takes into account the length of the employment relationship and the finding of the Court that the Respondent has proved that there was a valid and fair reason to terminate the Claimant's employment on account of redundancy.

Accrued leave days

104. The Claimant has sought to be compensated for 48.9 leave days. In this regard, he claims that 24.9 days were arbitrarily deducted from him while his leave days were not granted.

105. On this issue, the Respondent exhibited an internal memo dated 14th September 2020, in which the Group CEO Pharma and Group Head of Human Resource notified all employees that they should take their leave days by 30th November 2020. As per the said internal memo, the employees would only be allowed to carry forward seven (7) days to the following year to be utilized within the first three (3) months of the subsequent year.

106. Consequent to the above communication, on 18th March 2021, when the Claimant applied for leave, his leave days balance was reduced from 31.9 to seven (7).

107. Evidently, the Respondent's internal memo dated 14th September 2020 is in direct conflict with the provisions of Section 28 (4) of the Employment Act, which provides as follows:

[28] (4) The uninterrupted part of the annual leave with pay referred to in subsection (3) shall be granted and taken during the twelve consecutive months of service referred to in subsection (1)(a) and the remainder of the annual leave with pay shall be taken not later than eighteen months from the end of the leave earning period referred to in subsection (1)(a) being the period in respect of which the leave entitlement arose.

108. Therefore, forfeiture of leave days does not arise subject to the same being taken within the 18 months period prescribed under Section 28(4) of the Employment Act.

109. Accordingly, the Court finds that the Claimant is entitled to 24.9 leave days that were reduced from 31.9 having been deemed as forfeited by the Respondent.

110. The Claimant has further contended that the Respondent only granted him 21 days of leave per year, contrary to his contract of Employment that provided for 25 days per year.

111. As per the Claimant's letter of employment, he was entitled to 25 leave days annually. By an internal memo dated 3rd April 2017, the Respondent's Human Capital Manager notified the staff that all employees under the management will be entitled to 21 annual working days leave. Effectively, this reduced the Claimant's leave days by four (4) per year.

112. There is no evidence on record that the Claimant was consulted prior to the reduction of his leave days from 25 to 21 and that he accepted the terms of the reduction.

113. Essentially, the Respondent did not act in accordance with the provisions of Section 10(5) of the Employment Act, which provides as follows:

[10] (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.

114. In light of the above, the Claimant is entitled to compensation equivalent to 16 extra leave days (four (4) leave days for four (4) years), which were unlawfully denied from 3rd April 2017 up to the point of separation.

Compensation for discrimination

115. As the Court has further found that the Claimant was treated differently than his counterparts with no justification for such unfavorable treatment being provided by the Respondent, he is entitled to compensation which the Court assesses at **Kshs 2,000,000.00**. In assessing the damages payable to the Claimant, the Court has paid due consideration to a number of authorities. For instance, in the case of **Gichuru vs Package Insurance Brokers Ltd (supra)**, the Supreme Court reduced the award of damages from **Ksh.5,000,000.00** to **Ksh.2,000,000.00** And in the case of **VMK vs CUEA [2013] eKLR** the learned Judge awarded the Claimant **Kshs. 5,000,000.00** as exemplary damages for discrimination.

116. Therefore, taking into account the circumstances of this case and drawing parallels with the authorities mentioned above, in my estimation an award of damages in the sum of **Kshs 2,000,000.00** is appropriate.

Orders

117. In the final analysis, the Claim is allowed and Judgment is entered in favour of the Claimant against the Respondent in the following manner: -

- (a) A declaration that the termination of the Claimant from employment was unfair and unlawful.
- (b) The Claimant is awarded Kshs. 1,400,000.00 as compensatory damages for unfair termination being equivalent to four (4) months of his last salary.
- (c) The Claimant is awarded unpaid leave (40.9 days) in the sum of Kshs. 477,166.00.
- (d) The Claimant is awarded the sum of Kshs 2,000,000.00 being compensation for breach of his right to equality and freedom from discrimination as guaranteed under Article 27(5) of the Constitution and Section 5(3) of the Employment Act not to be discriminated.
- (e) The total award is Kshs. 3,877,166.00.
- (f) Interest on the amount in (e) at court rates from the date of Judgment until payment in full.
- (g) The Claimant shall have the costs of the suit.

DATED, SIGNED and DELIVERED at NAIROBI this 9th day of April 2025.

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STELLA RUTTO

JUDGE

In the presence of:

For the Claimant	Ms. Nganga
For the Respondent	Mr. Ochieng
Court assistant	Millicent

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

STELLA RUTTO

JUDGE

ORIGINAL