



(Appeal from the decree of Mrs. Ongeri, Resident Magistrate in Nairobi Civil Case No. 1687 of 2004 dated 18th May, 2007)

WAANDISHI LIMITED..... APPELLANT

VERSUS

ELIZABETH MASILA.....RESPONDENT

CIVIL APPEAL NO. 511 OF 2007

(Appeal from the decree of Mrs. Ongeri, Resident Magistrate in Nairobi Civil Case No. 1689 of 2004 dated 18th May, 2007)

WAANDISHI LIMITEDAPPELLANT

VERSUS

ERNEST MAJANJARESPONDENT

CIVIL APPEAL NO.512 OF 2007

(Appeal from the decree of Mrs. Ongeri, Resident Magistrate in Nairobi Civil Case No. 2757 of 2004 dated 18th May, 2007)

WAANDISHI LIMITED.....APPELLANT

VERSUS

LINDA BLACKBEARD.....RESPONDENT

CIVIL APPEAL NO. 513 OF 2007

(Appeal from the decree of Mrs. Ongeri, Resident Magistrate in Nairobi Civil Case No. 1685 of 2004)

dated 18th May, 2007)

WAANDISHI LTD.....APPELLANT

VERSUS

MARIA KIMANI.....RESPONDENT

CIVIL APPEAL NO.514 OF 07

(Appeal from the decree of Mrs. Ongeri, Resident Magistrate in Nairobi Civil Case No. 1686 of 2004 dated 18th May, 2007)

WAANDISHI LTD.APPELLANT

VERSUS

PATRICK WAKORI.....RESPONDENT

(ALL CONSOLIDATED)

J U D G M E N T

1. This appeal arises from five different suits which were filed in the Chief Magistrate's Court at Nairobi, against Waandishi Limited, hereinafter referred to as the appellant. The suits were filed by five (5) former employees of the appellant, following the termination of their employment. Each of the employees filed a suit individually claiming that his or her termination amounted to a declaration of redundancy and therefore he/she was entitled to severance pay.

2. Elizabeth Masila hereinafter referred to as the 1st respondent, who had worked for the appellant as a copy typist for 29 years, claimed 15 days pay for each completed year of service at the rate of Kshs.700/= a day which amounted to Kshs.304,500/=. Ernest Majanja, hereinafter referred to as the 2nd respondent, who had worked for the appellant as an accounts clerk for a total of 33 years, claimed 15 days pay for each completed year of service at the rate of Kshs.1416.65 per day which amounted to Kshs.701,250/=. Linda Blackbeard, hereinafter referred to as the 3rd respondent, who had worked for the appellant as a secretary for a total of 23 years, claimed 15 days pay for each completed year of service at the rate of Kshs.2,200/= per day which amounted to Kshs.759,000/=. Maria Kimani, hereinafter referred to as the 4th respondent, who had worked for the appellant as a copy typist for a total of 29 years, claimed 15 days pay for each completed year of service at the rate of Kshs.823/= per day which amounted to Kshs.150,500/=. And Patrick Wakori, hereinafter referred to as the 5th respondent, who had worked for the appellant as a clerk for a total of 34 years, claimed 15 days pay for each completed year of service at the rate of Kshs.1033/= per day, which amounted to Kshs.578,000/=.

3. The appellant filed similar defences to each of the respondent's claim. The crux of the defence was that each of the respondent's contract of employment expressly provided that the employment could be

terminated by issuing one month notice. Thus there was no requirement for the appellant to provide any reason for the termination of the employment. Each of the respondents was served with an appropriate notice and offered an appropriate payment in respect of the notice period. None of the respondents was declared redundant, and therefore none was entitled to severance pay. With regard to the 1st respondent, the appellant added without prejudice that it was entitled to summarily dismiss the 1st respondent for refusing to obey a lawful and proper command issued by the appellant, and also for absenting herself from her place of work without leave or any other lawful cause.

4. Although there was no formal order for consolidation of the suits, the five suits were heard together and one judgment delivered. Each of the respondents testified in support of his/her case. They were each employed by the appellant which is a service company formed by the partners of Hamilton Harrison & Mathews, a firm of advocates. All the assets and staff of Hamilton Harrison & Mathews were owned by the appellant. On 27th January, 2004, the respondents and three others were called by Richard Omwela, a senior partner in the firm of Hamilton Harrison & Mathews where the respondents were all assigned to work. They were all informed that their services had been terminated by the appellant with immediate effect. Each was served with a letter of termination in which payment was offered in respect of one month salary in lieu of notice and leave due.

5. The 1st respondent refused to accept the cheque offered to her. She instructed an advocate who wrote a demand letter to the appellant. The appellant responded denying her claim for severance pay but forwarding the cheque for salary in lieu of notice which was accepted on a without prejudice. The 2nd respondent was paid 2 months' salary. He accepted the cheque but later instructed his lawyer who wrote a letter of demand for severance pay.

6. The 3rd respondent was paid one month salary for January, 2004 and one month salary in lieu of notice plus 25 days leave. She accepted the cheque but upon consulting her advocate returned the cheque demanding her severance pay. The appellant responded denying the claim for severance pay and enclosing the cheque earlier issued to the 3rd respondent maintaining that it was salary for days worked and salary in lieu of notice. The 3rd respondent did not however cash the cheque but filed a suit. The 4th respondent accepted the cheque though she instructed her advocate who wrote to the appellant demanding severance pay. The 5th respondent refused to sign the notice but accepted the cheque which he was given. However, on advise of his advocate, he returned the cheque to the appellant and claimed severance pay.

7. In her evidence the 1st respondent denied having disobeyed any lawful orders issued to her or having absented herself from duty. She explained that on the days when she was away, she had been allowed to be away by Mr. Omwela. With regard to the alleged disobedience of lawful instructions, the 1st respondent explained that on the material day she was doing some work for one Mr. Wanjau a partner in the firm. Mrs. Soar a partner in the appellant's firm asked her to go and sit at the reception. She finished what she was doing, then went to relieve Mrs. Okumu who was at the reception. Mrs. Okumu however refused to move from the reception saying that she had a letter from the administration office to sit at the reception. The 1st respondent therefore went back to the office where she was working. The 1st respondent maintained that she explained the incident to the management on the 7th January, 2004, and therefore her services were not terminated because of bad behavior.

8. The 2nd respondent explained that he was not given any reason for termination of his employment, but when he insisted on knowing why he was relieved of his duties, Mr. Omwela informed him that he had worked for 33 years and his salary was high and that the appellant had a right to terminate his services. The 2nd respondent refused to accept the one month's salary and 13 days accrued leave days offered to him, in full and final settlement. Later Mr. Fraser, a senior partner, amended the 2nd respondent's letter of termination and deleted the words "full and final settlement" and also paid the respondent 2 months' salary. The 2nd respondent signed the amended letter and collected the cheque. He later instructed an advocate who wrote a letter of demand to the appellant claiming Kshs.701,250/= as severance pay for his

33 years service.

9. The 3rd respondent testified that when she was informed of her termination and offered Kshs.145,258/= in full and final payment of all dues, she signed the letter and accepted the cheque. Later, the 3rd respondent realized that the payment did not include severance pay. She consulted her advocate, after which the advocate wrote a demand letter to the appellant returning the cheque issued to the 3rd respondent and demanding severance pay. The appellant returned back the cheque to the 3rd respondent but the 3rd respondent did not cash the cheque but instead filed a suit. The 3rd respondent explained that she was working for Mrs. Soar a partner in the firm of Hamilton Harrison & Mathews. Mrs. Soar had given notice of resignation from the firm the same month the 3rd respondent's services were terminated. The 3rd respondent who was earning a monthly salary of Kshs.66,000/= had worked for 23 years. The 3rd respondent maintained that her position was abolished because her immediate boss Mrs. Soar left.

10. The 4th respondent explained that she was offered a cheque for Kshs.30,044/=. She refused to accept the cheque and consulted a lawyer who wrote a demand letter claiming severance pay for her 29 years service. The appellant responded to the demand denying the 4th respondent's claim for severance pay and enclosing a cheque for the sum of Kshs.30,044/= as the 4th respondent's final dues. The 4th respondent decided to encash the cheque but filed suit for recovery of the severance pay. The 4th respondent explained that she was working in the intellectual property section with the 5th respondent. At the time of their termination, there was one Mr. Omondi whom they were training. She explained that there was very little work in the section.

11. The 5th respondent explained that he was offered a cheque for Kshs.56,852/=. He initially refused to sign the letter but upon being persuaded, accepted the cheque. He thereafter instructed an advocate on whose advise the 5th respondent returned the cheque to the appellant. The 4th respondent explained that he signed the letter of termination without carefully reading and understanding the contents. The 5th respondent maintained that his services were terminated because the appellant did not require his services. He explained that his services together with that of his secretary were terminated. He maintained that they were declared redundant.

Under cross-examination the 5th respondent explained that his office and that of his secretary, who is the 4th respondent, were abolished.

12. Two witnesses testified for the appellant. These were: Amritkaur Soar (Soar) who was at the material time a partner in Hamilton Harrison and Mathews and Richard Omwela also a partner in the firm of Hamilton Harrison and Mathews. Soar explained that all employees of the firm of Hamilton Harrison and Mathews, were employed by the appellant. She explained that on the 29th December, 2003 she noted that her secretary, one Damaris Okumu who had a lot of work, was also working at the reception. Therefore Soar needed someone to relieve Damaris at the reception. Soar requested the 1st respondent to relieve Damaris at the reception so that Damaris could continue doing her typing work. The 1st respondent said she had work she was doing and was not prepared to relieve at the reception. The 1st respondent also claimed she had no instructions from the administration manager to relieve at the reception. The witness maintained that the 1st respondent did not follow her instructions.

13. The 1st respondent was later asked to explain her behavior. She explained that she had been given bills to type and that she had no instruction from the administration manager to work at the reception. The witness explained that, that explanation was not acceptable as the administration manager was junior to the witness who had instructed the 1st respondent to relieve at the reception.

14. Mr. Omwela testified that the respondents' contracts of employment were terminated on 27th February 2004. He explained that each contract had a termination clause which made it possible for either party to terminate the contract. Mr. Omwela stated that the appellant exercised that option. He denied

that the 4th and 5th respondents were terminated because there was reduction of work in their department i.e. intellectual property department. He explained that the work had in fact increased. There were other officers in the department such as Moses Omondi, Jennifer Fernandes, Andrew Mugambi and Wambui Gachucha.

15. Mr. Omwela denied that there was any redundancy. He accepted that the respondents had served the firm for many years, but noted that there were still other staff in employment, who had served for an even longer period. Mr. Omwela explained that the respondents were contributing 5% of their gross salary to the provident fund, while the appellant was also contributing a similar amount. Upon termination of their employment, each of the respondents received their contribution together with the appellant's contribution and the accrued benefits, from the fund investment manager. In that regard the 1st respondent was paid Kshs.207,253/=, the 2nd respondent was paid Kshs.417,414/=, the 3rd respondent Kshs.621,286/=, 4th respondent Kshs.285,554/= and 5th respondent Kshs.431,051/=.

16. Mr. Omwela denied that the respondents were laid off because they had worked for a long time with the appellant and were earning high salaries. He denied having allowed the 1st respondent to be away during the month of December. He explained that the 1st respondent had no leave days left as at that time. She was therefore required to work. Mr. Omwela stated that the decision to terminate the respondents' services was arrived at, at a board meeting. It was a decision dictated by the business needs of the company. The need was to terminate the staff and hire others to continue doing their work. In the case of 4th and 5th respondents, the work in their department was highly computerized, whilst both of them were computer illiterate, and it was hard to make them learn.

17. Mr. Omwela insisted that there was no redundancy as the respondents were terminated and replaced by other workers. The 4th respondent was replaced by one Maryann Karanja whilst the 2nd respondent was replaced by Sandra Mwangi and Millicent Wahome. The new employees were earning much less than what the 4th and 2nd respondents were earning. He conceded that the 1st respondent was not replaced.

18. Under cross-examination Mr. Omwela conceded that the appellant saved a total of Kshs.133,000/= monthly by laying off 1st respondent. Mr. Omwela conceded that the 1st respondent was not summarily dismissed but had her services terminated. He further explained that the payments in respect of the respondents in respect of the provident fund were deposited in Court.

19. In re-examination, Mr. Omwela maintained that none of the respondents was declared redundant. He explained that the appellant's wage bill was reviewed every year in January. He maintained that in terminating the respondents' services, the high salaries were not a factor but they were looking at skills and ability with a view to getting a workforce that could do the work in a more efficient manner.

20. Joint written submissions were filed on behalf of the respondents by Mr. Gichachi who appeared for all the respondents. Mr. Gichachi identified the issues for determination as to whether the termination of the respondents' services amounted to redundancy as provided under the Employment Act Cap.226 and the Trade Disputes Act Cap. 234; and whether the respondents were entitled to be paid severance pay as provided for in the Act.

21. Mr. Gichachi drew the Court's attention to section 2 of the Trade Disputes Act, Cap. 234, which defines redundancy to mean:

“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 services of the employees are superfluous, and the practices commonly known as abolition of office, job, or occupation, and loss of employment due to the kenyanization of a business but it does not include any loss of employment by a domestic servant.”

22. Mr. Gichachi submitted that the circumstances surrounding the termination of the respondents' employment by the appellant fell squarely within the above definition for the following reasons: The termination of the respondents' employment was initiated by the appellant following a meeting of the directors. The respondents therefore lost their employment involuntarily due to no fault of their own. The appellant terminated the respondents' services because they were more than was needed or wanted and therefore superfluous.

23. Mr. Gichachi submitted that the appellant's witness had testified that the 4th and 5th respondents were both computer illiterate, and could not match with the firm's advancement of technology. Their services had become obsolete, hence their replacement. Further the work done by some of the respondents such as 1st, 4th and 5th respondents was distributed to other employees in the firm. This was a further indication that the services of the respondents were superfluous. In the case of 3rd respondent, there was clear evidence that her boss who was a partner in the firm, had tendered in a retirement notice. The termination of the contract of service of the 3rd respondent and one Mrs. Okumu who was working in the office of the partner who retired, was a clear indication that their offices were abolished and therefore their termination amounted to redundancy.

24. Mr. Gichachi argued that the termination of the services of the 8 employees at a go was no more than re-organization, the appellant doing away with part of its workforce which it did not require. That was clearly a redundancy. Mr Gichachi maintained that this position was supported by the fact that the new employees who replaced the respondents were all earning much less than the respondents, leading to a saving for the appellant of Kshs.133,500/= per month in salaries. Mr. Gichachi therefore urged the Court to find that the termination of the respondents was in actual fact a declaration of redundancy.

25. With regard to the allegation that the appellant was entitled to summarily dismiss the 1st respondent, it was submitted that the 1st respondent was requested by the management to respond to the allegations made against her and she did so. The appellants did not respond to her explanation a clear indication that her explanation was accepted. Further in her letter of termination, there was no indication that her services were terminated because of the alleged insubordination. It was therefore maintained that the reasons for the 1st respondent's termination was similar to the other respondents, i.e. redundancy.

26. Mr. Gichachi submitted that under Section 16A (1) (f) of the Employment Act:

"An employee declared redundant shall be entitled to severance pay at the rate of not less than 15 days pay for each completed year of service."

Mr. Gichachi argued that the contract of employment between the appellant and the respondents could not supersede the provision of the Employment Act. Therefore the appellant was entitled to terminate the respondents' services, but that termination was subject to the provision set out in section 16A (1)(f) of the Employment Act as hereinabove reproduced. Mr. Gichachi therefore urged the Court to give judgment in respect of each of the respondents for severance pay as claimed in the plaint.

27. Written submissions were also filed on behalf of the appellant. Five issues were identified for determination as follows:

(a) Were the respondents declared redundant by the appellant?

(b) Whether the respondent's contract could only be terminated in accordance with section 16A of the

Employment Act.

- (c) Whether the appellant was obliged to give reasons before terminating the respondents' employment.
- (d) Whether the respondents are entitled to the sums claimed.
- (e) Are the respondents' claims frivolous?

With regard to the 1st respondent, an additional issue was identified as to whether there were sufficient grounds for summary dismissal.

28. It was submitted on behalf of the appellant that where an employer has terminated a contract by way of making payments in lieu of notice, and can show that there indeed were circumstances that could have justified summary dismissal of the employee, the employee cannot sustain any claim for damages for wrongful dismissal. It was submitted that sufficient evidence was adduced by the appellant confirming that the 1st respondent was absent from her place of work, and that the absence was not authorized. The appellant was therefore entitled to summarily dismiss the 1st respondent under section 17A of the Employment Act. It was argued that the fact that the appellant did not dismiss the 1st respondent after receiving her explanation did not mean that her explanation was accepted. It was further submitted that the respondents who executed the release discharging the appellant from liability knew the significance of the document they were signing, and therefore they had no claim as the appellant had been released from liability.

29. With regard to the issue of redundancy, it was submitted that the key words in the definition were: "**where the services of the employees were superfluous.**" In this case the appellant had adduced evidence showing that all the respondents were replaced with other employees. Contrary to the respondents' assertions, the workload had increased necessitating the appellant to hire more persons. The evidence further showed that the appellant was not looking for direct replacement of each of the respondents. It was maintained that it was for the respondents to establish that their termination was a redundancy as their positions were superfluous.

30. Relying on a definition from New Concise Oxford English Dictionary, counsel for the appellant submitted that 'superfluous' means "**exceeding what is sufficient, extravagant, superabundant.**" It was maintained that all the respondents were obliged to do, was to show that the appellant did not need their services, a fact which the respondents failed to prove. It was submitted that the allegation that the appellant was getting rid of long serving employees whose salaries were high, and replacing them with employees earning lower salaries, did not establish any argument in support of redundancy. This was because there were other long serving employees still in employment, who were earning higher salaries than the respondents, and who did not have their contracts terminated.

31. The following authorities were relied upon by the appellant's counsel for the proposition that the respondents' services were terminable by either side giving notice, and therefore payment in lieu of notice by the appellant was in order.

- *Central Bank of Kenya vs. Nkabu [2002] 1E.A. 34.*

- *Dalmas B. Ogoye vs. KNTC Ltd. Civil Appeal 125 of 1996*
- *Carton Manufactures Ltd. vs. Moses Bosire Civil Appeal 376 of 1992*
- *Rift Valley Textiles vs. Edward Onyango Ogunda Civil Appeal 27 of 1992*
- *Githinji vs. Mumias Sugar Company Ltd. [1994] LLR 1373*
- *Ombanya vs. Gilley & Roberts Ltd [1974] E.A. 522*
- *Bernard Gitau vs. East Africa Power & Lighting Co. Ltd. [1986] KLR 365*

32. The Court was therefore urged to find: that there was no redundancy; that the respondents contract could be terminated in other ways and not just by way of redundancy; that there was no requirement to give reasons for termination; that the respondents were not entitled to the sum claimed; and that the respondents' claims are frivolous and should be dismissed with costs to the appellant.

33. In her judgment, the trial Magistrate having considered the definition of redundancy as contained in section 2 of the Trade Disputes Act Cap.234, found that the process of the respondents' termination of employment was instigated by the appellant, with no fault on the part of the respondents. The trial Magistrate further found that the circumstances of the respondents' termination left no doubt that the services of the respondents were superfluous, in the sense that the respondents were no longer needed in the appellant's firm. The 4th and 5th respondents who were computer illiterate were replaced by other persons. The trial Magistrate noted that the needs of the appellant had changed thereby rendering the respondents' services superfluous.

34. The trial Magistrate further found that the appellant carried out some re-organization in which it did away with the respondents and also hired other staff. The fact that 8 employees were terminated was a clear indication that the appellant intended to streamline their workforce to get rid of superfluous staff. She therefore found that the appellant's termination of the respondents' services was done in circumstances that amounted to redundancy, and that the respondents were therefore entitled to severance pay.

35. With regard to the 1st respondent, the trial Magistrate found that her letter was worded in the same way as the other respondents, and therefore she was also discarded by the appellant in similar circumstances as the other respondents. The trial Magistrate found that the 1st respondent was not summarily dismissed, but her services were also terminated in circumstances that amounted to redundancy. The trial Magistrate therefore gave judgment in favour of each of the respondents.

36. Being aggrieved by that judgment, the appellant has appealed against the judgment in favour of each respondent, asserting the following common grounds:

- (i) Reasons need not be given for a termination.
- (ii) The respondent by stating that the appellant wished

to employ cheaper labour in her place showed conclusively that she was not made redundant, since redundancy means the abolition of the position occupied.

(iii) The Magistrate erred in not accepting the evidence

of the appellant that all positions were filled. This was not challenged by the respondent.

(iv) The Magistrate erred in not finding and should

have found that:

(a) Where an employer has terminated a contract by making payment in lieu of notice and has also hired replacement employees, there cannot be any redundancy.

(b) The plaintiff failed to discharge the burden of proof imposed upon her, to show that there was a redundancy.

(c) There was no redundancy.

(d) Both an employer and the employee are entitled to terminate a contract in accordance with its terms including by making payment in lieu of notice.

(v) The Magistrate allowed herself to be influenced by irrelevant considerations such as the length of service of the respondent as well as his salary.

(vi) The Magistrate's conclusions/findings are not

supported by the evidence.

37. In respect of the 1st respondent there was an additional ground that the Magistrate erred in law and in fact, in not accepting the evidence that the respondent deserted, and that the appellant was entitled to, and did dismiss her. The fact that she was not summarily dismissed is irrelevant. There was also an additional ground against the 5th respondent that the 5th respondent accepted a settlement by signing a voucher and no ground was proved allowing him to repudiate this. The appeals were consolidated by consent of the parties and argued together.

38. With regard to the 1st respondent, Mr. Kiragu submitted that the trial Magistrate failed to appreciate the evidence adduced by the appellant which showed that the 1st respondent had absented herself from work without any lawful cause. Since there were good grounds for summary dismissal it was

immaterial that the appellant did not dismiss the 1st respondent but paid her in lieu of notice. The dismissal of the 1st respondent was therefore proper and could not constitute redundancy.

39. With regard to the 5th respondent Mr. Kiragu contended that he had accepted payment in lieu of notice by signing the letter given to him by the appellant. In signing the letter, the 5th respondent confirmed that he had no further claims against the appellant. The appellant was therefore absolutely released, and it was not open to the 5th respondent to subsequently reject the payment or raise another claim.

40. As regards the six grounds common to all the respondents, Mr. Kiragu argued that the conclusions and findings of the trial Magistrate were not supported by the evidence before her. This was because the respondents' contract of employment contained a termination clause which allowed either party to terminate the contract. Therefore the question of the respondents' termination being instigated by the appellant, with no fault of the respondent, was irrelevant. Referring to the case of **Central Bank of Kenya vs. Nkabu** (supra), Mr. Kiragu submitted that the only thing payable as damages was the period of notice. Referring to other authorities which were cited in the lower Court, Mr. Kiragu submitted that the law was that a contract of employment can always be terminated by notice or salary in lieu of notice. He maintained that the trial Magistrate made an erroneous conclusion that there was a redundancy, which called for a reason for the termination of the employment to be given.

41. Secondly, Mr. Kiragu argued that the trial Magistrate concluded that when considering whether an employee's service is superfluous, one looks at an individual and not the organization. Mr. Kiragu maintained that the reference to an "office" in the definition of redundancy as provided under section 2 of the Trade Disputes Act, is the actual position so that for instance, where there were two drivers and only one was replaced, there was redundancy as the second office is rendered superfluous. However, if both drivers are replaced, then there is no redundancy.

42. Counsel for the appellant submitted that contrary to the trial Magistrate's findings that individuals were rendered superfluous, the trial Magistrate ought to have considered the offices or positions. The evidence showed that the positions were actually filled, other employees having been hired to replace the respondents. The issue of redundancy did not therefore arise as the offices remained though the individuals were replaced.

43. Moreover, in the light of the evidence that there were other long serving employees earning higher salaries than the respondents, the trial Magistrate was wrong in concluding that the respondents were replaced with cheaper labour. Mr. Kiragu maintained that the positions were not abolished, but more people were in fact engaged. He argued that the conclusion that the respondents' services were superfluous was not supported by evidence.

44. Finally Mr. Kiragu concluded that the trial Magistrate ought to have come to the following conclusions:

(i) that where an employer has made payment in lieu of notice and has also hired replacement there can be no redundancy;

(ii) the burden was upon the respondents to establish that there was redundancy, and the respondents did not discharge this burden;

(iii) that there was no redundancy as both the employer and the employee were allowed to bring the

employment to an end without assigning any reason.

45. Mr. Gichachi who appeared for the respondents, pointed out that it was not disputed that the appellant was entitled to terminate the respondents' services, or that the termination was in accordance with the terms of service. The only issue was whether the respondents' termination amounted to redundancy, and whether the respondents were entitled to severance pay. Mr. Gichachi submitted that the respondents' termination of employment amounted to redundancy, as 8 employees of the appellant were laid off at the same time, without any reasons.

46. Relying on *Hindle vs. Percival Boats Limited [1969] 1WLR 174*, Mr. Gichachi submitted that where the employer gives no reason as to why he has dismissed the employee, the burden of proof is upon the employer to show that there was no redundancy. Mr. Gichachi maintained that the commercial decision made by the appellants to fire the respondents and hire new staff created a presumption that there was redundancy. The fact that all the employees laid off were junior clerks and secretaries who had worked for the appellant for many years, and whose salaries were higher than normal supported that presumption.

47. Mr. Gichachi maintained that in order to establish redundancy it was sufficient that the services of an employee had become superfluous. Thus it was not necessary that the office or the job the employee was doing is abolished. Mr. Gichachi further argued that if an employer re-organizes the office such that the work can be done by fewer people, those employees who are laid off as a result of that re-organization, are considered to have been declared redundant.

48. Mr. Gichachi submitted that in this case, it was evident that the respondents were laid off because their services were not required. Further there was evidence that some of the respondents were not replaced and that some of the offices were actually abolished. The termination of the respondents' employment was therefore through redundancy.

49. Mr. Gichachi argued that in the case of the 1st respondent, although insubordination was alleged the evidence revealed that the 1st respondent was requested to explain her conduct and she did so. The fact that the 1st respondent's letter of termination was similar to that of the other respondents, and the fact that 1st respondent was also offered her terminal dues, was clear evidence that she was also declared redundant as the other employees. As for the 5th respondent, it was submitted that he explained the circumstances in which he signed and then repudiated the letter. The 5th respondent having returned the cheque offered to him, it was maintained that the appellant was never released from liability. The Court was therefore urged to dismiss the appeal.

50. In response to the submissions made by the respondent's counsel, the appellant's advocate sought to distinguish *Hindle vs. Percival Boats Limited* (supra) maintaining that it was based on the Redundancy Payments Act of England of 1965 which provided for a presumption of redundancy. In this case, there being no similar local legislation, no such presumption could arise. Redundancy had therefore to be confined to the definition contained in section 2 of the Trade Disputes Act which required:

(i) that there must be loss of employment by involuntary means;

(ii) that the loss of employment is through no fault of an employee but involving the act of an employer;

(iii) that the services of an employee are superfluous.

Mr. Kiragu argued that all these factors must be present and that the issue was not about the person but about the services. He therefore urged the Court to allow the appeal.

51. I have carefully reconsidered and evaluated the evidence which was adduced in the lower Court, as I am expected to do in this first appeal. I have also given due consideration to the submissions which were filed in the lower Court, the submissions which were made before me and the authorities cited. It is not disputed that the 5 respondents and 3 others (all employees of the appellant), were each served with letters terminating their employment on 27th January, 2004.

52. Further in final settlement, each respondent was given one month's salary in lieu of notice, in addition to salary for the month of January, 2004 and leave days due. It is also not disputed that each of the affected employees had a letter of employment which provided for either party to terminate the contract of service by giving one month's notice or one month's salary in lieu of notice.

53. The main issue is whether the circumstances of the termination of each of the respondents' employment amounted to redundancy as provided under the Employment Act Cap. 226 as read with the Trade Disputes Act, Cap.234, thereby entitling each respondent to payment of severance pay. This appeal therefore turns on the definition of redundancy as contained in Section 2 of the Trade Disputes Act, (reproduced in paragraph 21, supra). That definition provides for the following factors to be established before redundancy can arise:

(i) That there has been loss of employment which has occurred by involuntary means through no fault of an employee.

(ii) That the loss of employment is at the initiative of the employer.

(iii) That the loss of the employment has been occasioned by either the services of the employee becoming superfluous, or the office being abolished or kenyanized.

54. Except for the 1st respondent, it is not disputed that the termination of the 2nd to 5th respondent was initiated by the appellant, and that the 2nd to 5th respondents had not committed any acts of insubordination or indiscipline such as would justify their termination or summary dismissal. Conditions Nos.(i) & (ii) above have therefore been established. The dispute turns around condition No.(iii) i.e. whether the services of any of the respondents were superfluous or their position or job or occupation abolished. While the parties were agreed on the first and second factors, there was a sharp division in the interpretation of the third factor.

55. The appellant's counsel took the position that the employees' services only became superfluous, where the office or position was abolished or rendered superfluous. Thus the focus is on the office or position and not the employee. For the respondent it was argued that it was sufficient that the services of an employee had become superfluous and it was not necessary that the office or position occupied by the employee be abolished or become superfluous.

56. The definition of redundancy in Section 2 of the Trade Disputes Act, Cap.234, bears repeating here:

“Means the loss of employment, occupation, job or career by involuntary means through no fault of an employee involving termination of employment at the initiative of the employer where services of the employees are superfluous, and the practices commonly known as abolition of office, job, or occupation, and loss of employment due to the kenyanization of a business; but it does not include any such loss of employment by a domestic servant.” (underlining added)

57. In my considered view, in the above definition, the presence of a comma after the word superfluous provides for two ways in which the services of an employee may become superfluous. Firstly, where the services of an employee have become superfluous because the employee’s services are no longer needed or have become more than is required. Secondly, where the services of an employee have become superfluous due to the abolition of his office or position.

58. In this case, the appellant laid off 8 of its employees. Although the contract of employment in respect of each employee gave either party the right to terminate the employment, the appellant’s witness Mr. Omwela explained that the decision to terminate the services of the respondents was a decision dictated by the business needs of the appellant. The witness amplified this position further during cross-examination when he stated that in terminating the respondents’ services and hiring other staff, they were “looking for skills and ability with a view to getting a workforce that could do the work in a more efficient manner.”

59. In effect, what the appellant did was to re-organize its office by terminating the services of 8 employees. Although it was alleged that some other employees were hired, there was no evidence of direct replacement of the respondents through new employees. A few other employees who were already in the appellant’s employment were re-assigned the duties which were being performed by the 8 employees laid off. In the case of 4th and 5th respondents, it was conceded that their services had become obsolete because they were computer illiterate whilst work in their department had become highly computerized. I find that the services of the 4th and 5th respondents were no longer required by the appellant due to the adoption by the appellant of advanced technology in its operation.

60. Although it was contended that the work which was being done by the 4th and 5th respondents was re-allocated to other officers such as Wanoo, Omondi, Joyce Mbuthia, Jennifer and Maryann, no evidence was adduced to show that these officers were employed after the termination of the 4th and 5th respondents. Indeed it was conceded that there was no direct replacement of the 4th and 5th respondents. Thus the services of the 4th and 5th respondents were rendered superfluous because they were no longer needed by the appellant because of the use of advanced technology. As regards the 3rd appellant, it is also evident that she was relieved of her duties because her immediate boss Mrs. Soar left the appellant’s company. The 3rd respondent’s services were therefore no longer required by the appellant. Indeed the 3rd respondent was never replaced.

61. As for the 2nd respondent, he was relieved of his duties as an accounts clerk. It was not disputed that he had worked for the appellant for over 34 years having been employed on 1st October, 1970. The only explanation for the termination of his employment was what Mr. Omwela described as ‘**a decision dictated by the business needs of the company.**’ It is apparent that there was no particular person employed to take the position left by the 2nd respondent, but the appellant re-organized its operations and assigned the duties to other officers who were in the company. Thus the services of the 2nd respondent were also no longer required by the appellant.

62. As for the 1st respondent, it is evident that prior to her termination, there was a disciplinary issue in respect of which her explanation was sought. That issue arose about a month before the 1st respondent’s services were terminated. In her letter of termination, the appellant did not refer to the disciplinary issue nor did the appellant refer to the 1st respondent’s explanation. I find that the reason for the 1st respondent’s termination did not have anything to do with the disciplinary issue, nor was it a

disciplinary action. It was ‘**a decision dictated by the business needs of the company**’ in the same way that the termination of the other seven employees was arrived at.

63. Thus I come to the conclusion that the services of all the five respondents were terminated by the appellant because their services were no longer required. The business needs of the company necessitated re-organizing the work of the company, in order to reduce the wage bill, and utilize skills and abilities of its work force so as to do the work in a more efficient manner. That re-organization resulted in the services of the respondents being rendered superfluous and therefore they were rendered redundant and ought to have been paid their severance pay in accordance with Section 16A (1)(f) of the Employment Act.

64. With regard to the 5th respondent, he did sign his letter of termination and accepted a cheque for Kshs.56,852/= as full and final payment of all moneys due to him from the appellant. The 5th respondent explained that he was persuaded to accept the cheque. That however, does not absolve the 5th respondent. In signing the letter, and accepting the cheque, the 5th respondent entered into a compromise whereby it released the appellant from any further liability. In doing so, the 5th respondent waived any rights that he had to pursue the appellant for his severance pay. This was a binding contract which could only be vitiated upon proof of factors such as fraud, mistake, misrepresentation, etc. none of which has been established herein. On this ground, the 5th respondent’s claim for severance pay ought to have failed. The appeal against him therefore succeeds. Accordingly, I set aside the judgment of the lower Court in respect of the 5th respondent and substitute thereof an order dismissing the 5th respondent’s suit.

65. The upshot of the above is that I dismiss the appeals against the 1st, 2nd, 3rd, and 4th respondents; but allow the appeal against the 5th respondent. I award the 1st, 2nd, 3rd and 4th respondents costs of the appeal. To this extent only does the appeal succeed.

Dated and delivered this 28th day of October, 2009

H. M. OKWENGU

JUDGE

In the presence of: -

Mr. Gitonga for the appellant

Mr. Gichachi for the respondent

Eric, court clerk