REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

ELRC CAUSE NO. 256 OF 2020

WALTER EDWIN OGARA ODHIAMBO.

……..CLAIMANT

VERSUS

SGS KENYA LIMITED……RESPONDENT

JUDGMENT

The Claimant Walter Edwin Ogara Odhiambo, filed suit on 23rd July 2020 against the Respondent, employer seeking the following reliefs:-

(a) A declaration order that the notices of intended redundancy issued by the Respondent dated 17th June 2020 is unfair, unlawful, null and void and of no legal consequences whatsoever.

(b) Termination of the Claimants services on account of redundancy was unlawful and unfair.

(c) An order for reinstatement of the Claimant with no loss of benefits and in the alternative an award of damages

(d) Cost of the suit plus interest.

The Claimant (CW1) testified that he was employed by the Respondent as a Multi Lab Manager in the year 2013 and was based at Mombasa Laboratory.

That the Respondent was a multinational company the world's leading inspection, verification, testing and certification company which prides itself as the global benchmark for quality and integrity.

That the Respondent had over 2,600 offices and laboratories and employs more than 94,000 employees worldwide.

That on or about 17th December 2019, the Respondent issued a notice of intended redundancy with specific reference to its Multi Lab Department of which the Claimant received a copy as the Departmental Manager and same was shared with other staff in the department.

On 20th January 2020, upon expiry of the notice, the Claimant was summoned to the Respondent's Head office and was verbally informed by the managing director that he had been declared redundant on grounds that the Laboratory Management team was bloated.

The email of 20th January 2020 inviting the Claimant to the Head Office to discuss "Multi Lab Re-organization" is attached to the claim.

The Claimant testified that at the time of purported redundancy, the Claimant manned the department of twenty (20) staff assisted by one technical manager and Assistant Lab Manager.

At the time, one of the direct reports to the Claimant Mr. Augustine Owiti contacted the Managing Director and explained that as he was about to

retire he was willing to exit earlier in order to salvage the employment position of the Claimant.

That the Managing Director accepted the proposal by Mr. Augustine Owiti and thereafter informed the Claimant that the redundancy notice in respect to his position had been withdrawn. The same information was subsequently confirmed by the Human Resource Manager.

That Mr. Owiti eventually retired on 31st March 2020 and so no staff member from the Lab department was declared redundant.

On 19th March 2020, the Respondent employed two more staff to be stationed within the Lab department. Letters of employment of staff were produced. From the attached letters, the new staff held the position of Key Account Executive and Laboratory Analyst respectively.

On 15th June 2020, the Claimant wrote to the Human Resource Manager copied to Managing Director requesting deployment of a new staff following death of a staff of the Lab Department in May 2020.

On 16th June 2020, the Claimant received an approval from the Human Resource Department for a contractor to be seconded to the Lab Department.

The Claimant testified that on the same date, 16th June 2020, the Claimant was supposed to receive a notice of intended redundancy for the Multi Lab Department at 8 p.m. in the evening. Approval of new staff was at 10:00

a.m. in the morning the same date. The Claimant was asked to read and review that draft redundancy notice.

The Claimant testified that the alleged draft was word to word with the withdrawn notice issued on 17th December 2019.
The Claimant expressed reservation on the said notice in view of the pending recruited staff and it coming within six months after the earlier notice had been withdrawn. This response was produced before court marked exhibit '9'.

The Respondent issued another notice of intended redundancy on 19th June 2020 on the same grounds with an additional reason "COVID 19"

The Claimant stated that the notice was back dated to 17th June 2020. The Claimant added that only himself in the Multi-lab department received the notice.

The Claimant stated that the notice was pretentious and not genuine and was aimed at unlawfully and unfairly terminating the employment of the Claimant.

That the grounds in the notice was not genuine in view of the evidence adduced above and violated the provision of section 2 and 4 of the Employment Act, 2007. That the Respondent's conduct contrasted its high held values of transparency and integrity.
The Claimant prays the reliefs sought to be granted and he be awarded accordingly.

CW2 Augustine Owiti testified in support of the claim and adopted a witness statement dated 1/1/2020 as his evidence in chief. CW2 corroborated the evidence by CW1 that he had spoken to the Managing Director with a view to have him leave employment instead of the Claimant who was about to be declared redundant because he was about to retire. CW2 said the Managing Director consulted the Head Office in Geneva on the matter and the Managing Director came back to CW2 and told him that he had accepted the request for CW2 to leave in place of CW1 since CW1 was still young.

CW2 said he was given time to hand over to the Claimant. That several emails were exchanged on the matter but CW2 did not have them. CW2 said though he had been promised consultancy work upon retirement none was given to him. CW2 said he had served the Respondent from 1998 to 2020 (22 years) and left in the position of Technical Manager whereas the Claimant was Multi-lab Manager at the time and CW2 reported to the Claimant directly. CW2 said, in the past a few redundancies had been done and same were always in writing. CW1 and CW2 were closely cross-examined by Mr. Rabut Advocate for the Respondent. The two witnesses largely stuck to their narrative in chief. CW2 insisted that he had offered to step down in place of the Claimant verbally. That Managing Director had accepted the request hence the redundancy of the Claimant had been withdrawn and CW2 retired on 31st March 2020.

CW2 said many emails between himself and the Respondent were not available to him after he retired and so could not produce them before

court. CW2 said no one had been declared redundant by the time he left in March 2020. CW2 said he was proceeding on early retirement and his deputy Junny Maganga would take over. CW2 said he left so that the Claimant could not be declared redundant though he did not say so in his letter. CW2 said he reported to Managing Director on technical matters and administratively to the Claimant. That Claimant joined the Respondent in the year 2013. CW2 said he was before court to seek justice for the Claimant.

RW1 Nelly Wanjiku testified for the Respondent and produced witness statement dated 9/10/2022 as her evidence in chief. She also produced a further witness statement dated 10/3/2023 to supplement her evidence in chief.

RW1 also produced exhibits ‘1’ to ‘18’ in support of the Respondent’s case. RW1 said she was the Human Resource Manager – sub region of the Respondent. That she had served the Respondent for a period of 8 years. RW1 stated that sometime in October 2020, the company was going through restructuring and for that reason the company sought to declare certain positions redundant so as to make the company more effective.

That eventually a notice was issued in October 2020 informing the staff of the new changes pursuant to the restructuring. That the Claimant was retrenched in terms of the law and the exercise was not just targeting him. The process was aimed at improving the efficiency of the company.

That the company did not employ any one else in a similar role as the one carried out by the Claimant. RW1 said she was not aware of alleged arrangement between the Claimant and CW2, Mr. Augustine Owiti.

RW1 said further that earlier on or about 17/12/2019 the Respondent had issued a notice of intended redundancy to all staff in the multi-lab department where Claimant worked. At that point the Respondent had commenced structural reorganization of the company. The notice allowed 30 days of consultation. The Claimant was invited to a consultative meeting on 20th January 2020. After that the Respondent opted to withdraw the notice dated 17/12/2019.

The 2nd process that led to that retrenchment of the Claimant commenced on or about 16/6/2020. The Claimant as head of department was required to be involved in that exercise. RW1 therefore sent a draft notice of intended redundancy dated 16/6/2020 to the Claimant to get the Claimant's input before it was officially issued. The Claimant responded by an email dated 17/6/2020 expressing his reservations on the intended redundancy. The Claimant then filed this suit at that point on 22/6/2022 together with an application intended to stop the process. Interim orders were however not granted in a ruling dated 16/10/2020. The court then commenced the exercise afresh and issued a notice dated 26/10/2020 to all staff of Multi-lab department. The Claimant exercised his discretion on the options availed to him by the Respondent to apply to be recruited in a new role of Regional Laboratory Manager, which was a new position that would be replacing the position of Multi-Lab Manager that the Claimant had occupied before.

The Claimant was by a letter dated 17/11/2020 invited to an interview on 18/11/2020 at 9:15 a.m. for the new role. The Claimant attended and was informed by a letter dated 25/11/2020 that he had not been successful in his interview.

That the Respondent complied with the provisions of section 40 of the Employment Act, 2007 by issuing 30 days' notice of intended redundancy to all staff. The reason for intended redundancy was disclosed in the notice. The notice was sent to the county labour office and consultative meetings, were held with all attending staff. The Claimant attended the consultative meeting on 18/11/2020 prior to the issuance of the second notice. The Claimant was paid all his terminal dues.

The termination on grounds of redundancy was lawful and fair. The petition lack merit and it be dismissed.

DETERMINATION

The parties filed written submissions which the court has carefully considered together with the evidence adduced by the parties. The issues for determination are:-

(i) Whether redundancy as the ground of termination of the Claimant's employment was valid?

(ii) If answer to (a) above is in the affirmative, whether the Respondent followed a fair procedure?

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

In answer to issue (a) above, the court first considers the definition of redundancy under section 2 of the Employment Act, which reads as follows:-

> ***"redundancy" means the loss of employment, occupation, job or career by involuntary means through no The Employment Act, 2007 9 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;***

Once an employee adduces evidence to demonstrate that his employment had not become superfluous in that other employees were employed to perform the duties which comprised his job description, as in this case two employees were recruited by the Respondent upon declaration of redundancy of the Claimant by the Respondent, the evidential burden shifts to the employer to prove that indeed there was no work to be performed by the Claimant and that the declaration of redundancy was genuine.

In the present matter, the court has considered and found credible, the evidence by CW2 that he had offered to resign in his position, which reported to the Claimant, who was much younger to him to avoid the Claimant being declared redundant. The court finds that the Managing Director accepted this proposition and caused CW2 to go on early retirement and the notice of termination of the Claimant was withdrawn accordingly. The court finds that upon retirement of CW2, the Respondent proceeded to employ two (2) employees in the same Multi-lab department

heeded by the Claimant and upon the two being inducted into their jobs under the supervision of the Claimants the Respondent issued a new notice of termination of the Claimant on grounds of redundancy.

The court accepts the evidence by CW1 and CW2 that indeed the Respondent had no genuine reason to declare the Claimant redundant. The work in the Multi-lab department had not diminished by fact of COVID-19. The Respondent had a desire to get rid of the Claimant for undisclosed reasons and only postponed that desire briefly upon retirement of CW2 only to recruit two more new employees and proceeded to get rid of the Claimant.

The court relies on the Court of Appeal decision in ***Kenya Airways Ltd versus Aviation and Allied Workers Union Kenya (2014) eKLR***, where the court held:-

> ***"The procedure for redundancy is both substantive and procedural. Substantively there must be a genuine reason for redundancy, while procedurally, the employee must be given sufficient notice and consulted in a meaningful manner."***

The Claimant in this matter got no opportunity for genuine consultations to confirm that the preconditions of redundancy had been complied with as set out under section 40(1) (c) which include the communication of reasons for and extent of the redundancy including an explanation why two new employees were prioritized in the Multi-lab department over his clear and effective service overtime as the head of the department despite voluntary resignation of CW2 to ensure that the Claimant continued to serve.

The court finds that the Respondent had no valid reason to terminate the employment of the Claimant on grounds of redundancy.

As to the procedural fairness, the court finds that though a 30 days' notice was given to the Claimant and to the labour office, no genuine consultation ensured during this period and the selection criteria that prioritized two new employees over the Claimant was not explained to him.

The court finds that the Respondent did not adhere to the provisions of section 40(1) (c) of the Employment Act 2007 which reads ("40(1)(c)

> ***40.(1) An employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions –***
>
> ***(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;***

In sum, the termination of the employment of the Claimant on grounds of redundancy violated provisions of section 40(1)(c), 41, 43 and 45 of the Employment Act, 2007 and was unlawful and unfair.

As was stated in case of Kenya Airways Ltd (Supra) by Maraga JA (as he then was):-

> ***"…when an employer contemplates redundancy, he should first give a general notice of the intention to the employees likely to***

be affected or their union. It is that notice that will elicit consultation between the parties."

"…the requirement of consultation is implicit in the principle of fair play under section 40(1) of the Employment Act itself and other labour laws. The notice under 40(1)(a) and (b) of the Employment Act, as is also provided for in the…ILO Convention No. 158 – Terminaiton of Employment Convention, 1982, to give the parties an opportunity to consider measures to be taken to avert or to minimise the terminations and measures to mitigate the adverse effects of any terminations on the workers concerned such as finding alternative employment. "The consultations are therefore meant to cause the parties to discuss and negotiate a way out of the intended redundancy, if possible or the best way of implementing it if it is unavoidable. This means that if parties put their heads together; chances are that they could avert or at least minimize the terminations resulting from the employer's proposed redundancy. If redundancy is inevitable, measures should be taken to ensure that as little hardship as possible is caused to the affected employees."

This was emphasized in the case of Helga Olany versus Germany School Society [2017] KLR where the court relied on the New Zealand chief Judge decision in commission versus Parliamentary Service as follows:-

"Consultations has to be a reality, not a charade. The party to be consulted must be told what is proposed and must be given sufficiently precise information to allow a reasonable

opportunity to respond. A reasonable time in which to do so must be permitted. The person doing the consulting must keep an open mind and listen to suggestions, consider them properly, and then (and only then) decide what is to be done."

The court finds that the termination was unlawful and unfair and the Claimant is entitled to the reliefs sought in terms of section 49(1) (2) and (3) of the Employment Act, 2007.

The court relies on the provision of subsection 49(4) to determine which is the appropriate relief to be granted to the Claimant given the circumstances of the particular case.

In the present matter, the Claimant lost a high-profile job of head of multi-lab department unlawfully and without any proved contribution to the termination. The Claimant had a good record of service for a period of over 7 years having been employed as Multi-lab Manager in the year 2013 based at the Mombasa Laboratory. The Claimant had over 19 years' experience in laboratory testing and had BSc and MSc in Chemistry. The Respondent being a world leader in inspection, verification, testing and certification with over 2,606 offices and laboratories world wide and more than 94,000 employees spread around the world, did not treat the Claimant with empathy and dignity he deserved as a royal employee for a long time.

The Claimant was unlikely to get equivalent employment in his field of specialization and the unlawful termination caused him immense loss, pain and suffering due to the sudden loss of financial and employment support.

The Claimant in the amended statement of claim dated 28th January 2021, seeks an award for reinstatement to his employment with no loss of benefits and in the alternative damages.

The court has considered the passage of time since the Claimant was separated from the company in the year 2020. The fact is that he works in a specialized area and has been replaced by the Respondent since the termination and would be difficult to fit him in the Kenyan office of the Respondent in the Multi-lab department. That the relationship between the Claimant and Respondent had been broken due to the unfair process the Claimant was subjected to by being separated on grounds that clearly were not genuine and without disclosing to him the true reasons for terminating his employment.

The court further relies on the Kenya Airways Case (supra) to find that this is a case in which the Claimant deserves maximum compensation of the equivalent of twelve (12) months' salary in compensation for the unlawful and unfair termination on the false pretense of redundancy.

In the final analysis judgment is entered in favour of the Claimant against the Respondent as follows:-

(a) An award of Kshs. (472,566.19 x 12) **Kshs. 5,670,794.28** being the equivalent of 12 months salary for unlawful termination of employment.
(b) Interest at court rates from date of judgment till payment in full.
(c) Costs of the suit

Dated at Nairobi this **16th Day of October 2025.**

Mathews Nduma

JUDGE

Appearance:

Mr. Olwade for Claimant

Mr. Rabut for Respondent

Mr. Kemboi – Court Assistant