Kimathi v Ericsson Kenya Limited (Civil Appeal 601 of 2019)
[2023] KECA 106 (KLR) (3 February 2023) (Judgment)

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REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 601 OF 2019

HM OKWENGU, HA OMONDI & JM MATIVO, JJA

FEBRUARY 3, 2023

BETWEEN

VELLA NJERI KIMATHI ..... APPELLANT

AND

ERICSSON KENYA LIMITED ..... RESPONDENT

(An Appeal from the Judgment of the Employment and Labour Relations Court at Nairobi (Radido, J.) dated 11th October, 2019inNAIROBI ELRC CAUSE NO.1234 OF 2015)

JUDGMENT

1. The genesis of this appeal is a written contract signed between the appellant and the respondent pursuant to which the appellant was employed as the respondent's Service Excellence Manager with effect from 15th June, 2009. She rose through the ranks to the position of Strategy Execution Manager in charge of the Sub Saharan region. However, on 31st August, 2014, her services were terminated on grounds of redundancy/retrenchment.

2. Vide a memorandum of claim dated 14th July, 2015 filed at the Employment and Labour Relations Court (the ELRC), the appellant sued the respondent citing wrongful and unfair termination of her employment with the respondent. Her complaints were that for 5 years, she diligently worked for the respondent with no disciplinary issues. However, when she got pregnant and underwent high risk pregnancy complications endangering her health and that of the baby, the working environment turned hostile. She attributed the hostility to the respondent's Line Manager, one Mr. Andrew Beech.

3. The appellant claimed that she delivered a pre term baby while on sick leave and the baby had to be put on breathing support for a week and cumulatively, she was in hospital for about two months and in compliance with the respondent's policy on sick and maternity leave, she informed the respondent that she needed a 50% basic pay, but the said Mr. Beech instructed the respondent's Human Resource Manager to cancel her sick leave and shorten her maternity leave. Consequently, she was forced to cancel

her leave days and re-applied for maternity leave with effect from 13th November, 2013 which caused her to report to work prematurely on 4th March, 2014 when her baby still needed additional care.

4. The appellant claimed that upon resuming work, she discovered that the two staff members who had been delegated some of her various roles on a temporary basis had been instructed by one Ms. Ramona Naidoo and Mr. Beech not to hand back to her the delegated duties because they considered her a liability to the respondent because she was a new mother.

5. On 12th June, 2014, she receiving a letter notifying her of a proposed restructuring and potential retrenchments, and that incase she would be retrenched, then her notice of termination would be given by 1st July, 2014. Furthermore, clause 7 of the said letter stated that her position (Strategic Execution Manager) would be advertised and the location of the position would be moved to South Africa.

6. Aggrieved by the decision to advertise her position notwithstanding that her contract entitled her to a transfer to any country, she escalated her grievances to the senior management, but her case was ignored and the respondent maintained that she re-applies for her position or she would be retrenched. She questioned the proposed retrenchment vide a letter dated 10th July, 2014, and vide a letter dated 13th July, 2013, the respondent stated that it was undergoing an evolution of its business, that her position would be moved to South Africa and that she had the right of refusal and she was granted until the end of July, 2014 to apply for her job failure to which the position would become vacant.

7. In conclusion, the appellant maintained that her retrenchment was a culmination of an illegal, discriminatory, cruel and unlawful scheme to eradicate her as a young mother from the respondent's payroll, and, that the retrenchment was malicious and calculated to humiliate, embarrass and prejudice her future employment prospects. She therefore prayed for twelve months' compensation for unfair termination; unpaid gym allowance and payment in lieu of 5 leave days.

8. In its response dated 10th August, 2015, the respondent admitted terminating the appellant's services on account of redundancy, but maintained that the appellant was not a diligent employee since numerous concerns had been raised over her poor performance and failure to meet work deadlines.

9. The respondent maintained that the allegations of malice against Mr. Beech were baseless since during the appellant's pregnancy, she was given tremendous support by her line managers including being allowed to work from home on several occasions. Furthermore, her 21 days' sick leave was approved to commence on 29th October, 2013 and to end on 19th November, 2013, but she gave birth on 13th November, 2013, so, her sick leave automatically stood extinguished and her three month's maternity leave commenced immediately followed by the 15 days' annual leave she had applied for. Consequently, she was required to resume duty on 3rd March, 2014 and at no time did she inform the respondent that her baby had been born premature. Further, the appellant never applied for six month leave with 50% pay, instead she only raised a general query with the respondent's Human Resource Manager on the possibility of 6 months leave with 50% pay.

10. It was the respondent's case that it is standard practice for employees proceeding on leave to assign their duties to persons who would undertake them during their absence, that while the appellant was on maternity leave, the respondent underwent various changes including change of strategy, replacement of Mr. Beech by Ms. Ramona Naidoo and changes in the appellant's roles. Consequently, the appellant could not be assigned her tasks immediately because she was not regularly in the office on account of her sick infant and in order to avoid overwhelming her, the Line Manager assigned one of her projects to a one Ms. Pauline Wanyumba, and since all the documents in the respondent's ERIDOC system are auditable, and once any amendments is made then the system automatically changes the custodian of the document to the last person to interact with. Therefore, it was not true that Pauline Wanyumba

was assigned to tract the RSSSA Engagement Practices Communication Plan while the appellant was on maternity leave.

11. It was the respondent's case that the entire department in which the appellant worked was restructured including the line management and the appellant was well aware of her revised roles and raised no objection. That she even indicated her interest in moving to a new role as per previous discussion with the respondent's line manager and consequently, the proposal to look for a new job within the respondent was solely her initiative, and her line manager only assisted her by asking various practice heads, however, she was not successful in changing her career as her interviews were not successful.

12. The respondent also maintains that it has a policy to notify staff of any changes that would affect their roles in the organization and indeed, vide a letter dated 12th June, 2014 the appellant was notified of the proposed changes and the relocation of her then role to South Africa. However, when the appellant refused to take up the new role in South Africa, the respondent was left with no option but to terminate her services on account of redundancy and she was paid her terminal dues including her pay claim for gym allowance.

13. In its judgment, the ELRC found that the appellant failed to prove discrimination on account of pregnancy. The court however, held that the termination was unfair and not in accordance with justice and equity and awarded her Kshs 1,214,960/-as compensation for unlawful termination plus costs of the suit.

14. Aggrieved by the Judgment, the appellant seeks to set it aside and to have it substituted with a finding granting her compensation for unfair termination equivalent to 12 months gross salary at Kshs.3,660,309.60; salary in lieu of 5 days at Kshs. 72,625.20 and exemplary damages for discrimination.

15. In a nutshell, the appellant's grounds of appeal are that the learned Judge erred in law and in fact:

    (a) by failing to find that her retrenchment was a hoax aimed at her alone and that redundancy cannot affect only one employee;

    (b) by holding that the respondent was in compliance with the statutory conditions on retrenchment;

    (c) by awarding compensation equivalent to 4 months gross salary for unfair termination instead of 12 months gross salary;

    (d) by failing to find that the appellant was discriminated against by the respondent;

    (e) by holding that the appellant's sick leave became superfluous upon the appellant giving birth;

    (f) by finding that the appellant was paid her outstanding leave in absence of any evidence to support the same;

    (g) by relying on a letter whose authenticity was questionable and finding that the Labour Officer was notified of the intended termination in the absence of any credible evidence to support such a finding.

16. In his submissions, the appellant's counsel argued that only one employee (that is the appellant, a woman who had just delivered a baby and resumed work from maternity leave) and the only person across the expansive respondent's African presence out of the 216 employees of the respondent in sub Saharan African region was declared redundant. He argued that the foregoing, together with the respondents' actions of denying her the right of transfer, asking her to re-apply for her position in

order to continue being an employee of the company and declining to address her escalation to senior management is a plan by the respondent to justify the appellant's termination. Counsel cited *Andrew Waithaka Kiragu v Grain Pro Kenya Inc Ltd [2017]* eKLR, Cause 2404 of 2012 where the ELRC held that "a redundancy cannot be undertaken to only affect one employee. To do so would be to negate the provisions of section 40 of the *Employment Act* as was held in *Jane Khalechi v Oxford University Press* [2013] eKLR." Counsel submitted that for retrenchment to be lawful, the principles of procedural fairness have been complied with as established under the *Employment Act*, 2007 as was held in *Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 Others* [2014] eKLR.

17. Further, the appellant's counsel argued that despite the overwhelming evidence adduced by the appellant to the effect that her termination was not only unfair but also too harsh in the circumstances, the trial court abused its discretion under Section 49(1) (c) of *Employment Act*, 2007 by failing to award the appellant compensation to a maximum of 12 months' gross salary. Counsel submitted that since her terminal dues were statutorily and contractually provided for, the same should not have been used, by the trial court, as a basis for the refusal to award her the maximum statutory compensation for unfair termination. Counsel relied on *Nzoia Sugar Company Limited v Francis Oyatsi* [2019] eKLR, Civil Appeal 47 of 2012 where this Court held that the grant or refusal by a court to grant the remedies under Section 49 of the Act involves the exercise of judicial discretion, and, this Court can only interfere with the exercise of such discretion if satisfied that the Judge misdirected himself in law or misapprehended the facts or considered extraneous factors or failed to consider relevant factors or the decision is plainly wrong.

18. Regarding the claim for compensation for the 5 sick leave days, counsel maintained that in holding that the 5 days were overtaken by events and thus automatically extinguished, the trial court's reasoning was flawed. He submitted that the trial court's reasoning was fundamentally flawed and bad law since sick leave is a right she is entitled to under Section 30 of the *Employment Act*, 2007 and contractually under clause 10 of her employment.

19. Regarding the court's refusal to award the appellant damages for discrimination, counsel submitted that there is no universally agreed definition of discrimination, the same can simply be understood as the unfair or prejudicial treatment of people based on characteristics such as race, gender, age, sexual orientation, religion, pregnancy etc. Counsel invited this Court to be guided by *Rose Achieng Mihudhi v Jos Hansen and Soehne (EA) Limited* [2015] eKLR. He argued that the appellant adduced sufficient evidence before the trial court to the effect that she had been discriminated against by the respondent on several occasions, such as on June 12, 2014, when she was invited for a cup of coffee by her Line Manager, Ms. Ramona, who made strange personal inquiries about her pregnancy and the possibility of future pregnancies. To him, it was not by coincidence that on the same day, the appellant was invited for meeting by Ms. Ramona and Ms. Margaret Mutisya, the Human Resource Manager, she received a letter dated June 12, 2014 informing her of the proposed restructuring of the respondent, and her potential retrenchment.

20. Counsel relied on the dictum in *VMK v CUEA* [2013] eKLR where the court awarded the claimant exemplary damages of Kshs. 5,000,000 for discrimination and *GMV v Bank of Africa Kenya Limited* [2013] eKLR, where the court awarded the claimant Kshs. 3,000,000 on the grounds that the claimant's termination of service by the respondent was based on her pregnancy and therefore discriminatory, unfair, unlawful and in violation of the *Employment Act*, 2007, the contract of re-employment and *the Constitution*.

21. On behalf of the respondent, it was submitted that the grounds of appeal did not emanate from the ratio decidendi nor do they emanate from the issues framed by the parties before the ELRC, so the appellant is arguing her case a fresh.

22. On redundancy, the respondent submitted that the appellant's basis for alleging that the redundancy process was not followed was be two-fold: one, that a redundancy cannot affect one employee only, and secondly that the respondent's letter dated 12th June, 2014 to the Labour Officer, which is the notification of the intended redundancies was not authentic. The respondent submitted that the appellant's argument is factually and legally flawed since the restructuring of the respondent affected a number of employees, and most of the affected employees were encouraged to apply to other positions within the organization. On the second issue, the respondent maintained that the fact that only one person was declared redundant, as a result of a redundancy process, does not negate the redundancy. The respondent submitted that it would be absurd to suggest that a redundancy process must have a minimum number of persons exited for it to be valid. It argued that this would fly in the face of the position in law, enunciated in *Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 Others* (*supra*).

23. It was the respondent's submission that the respondent's restructuring affected a number of positions as seen from the various newsflashes and communications to its employees, in which the respondent gave detailed explanation on the extent and scope of the intended redundancies.

24. Regarding the authenticity of the letter to the Labour officer, it was submitted that the respondent did not object to the production of the respondent's bundle of documents dated 10th August, 2018, consequently, the onus shifted to the appellant to rebut any evidence or prove any contrary assertion in accordance with sections 107(1) (2) and 112 of the *Evidence Act* (Cap 80) Laws of Kenya.

25. Concerning the compensation, the respondent submitted that the appellant's claim before the ELRC failed on all the grounds save for the Court's finding that the redundancy process was unfair. It cited this Court's decision in *Ol Pejeta Ranching Limited v David Wanjau Muhoro* [2017] eKLR which summarized the factors to be considered as *inter alia*:-

    (a) circumstances in which the termination took place and the extent of the employee's contribution;

    (b) employee's length of service;

    (c) opportunity available to the employee;

    (d) severance payable;

    (e) right to press other claims or unpaid wages;

    (f) conduct of the employee which to any extent caused or contributed to the termination;

    (g) failure by the employee to reasonably mitigate the losses and any other compensation in respect of termination paid by the employer and received by the employee.

26. About the discrimination, the respondent submitted that the appellant did not adduce evidence demonstrating the alleged discrimination on any ground. It argued that the respondent sufficiently demonstrated that the appellant was consulted and offered a first right of refusal; the respondent's line manager tried to assist the appellant to change her career path within the respondent; the respondent reasonably accommodated the appellant during and after her pregnancy; and her 21 days' sick leave was approved because of her pregnancy complications.

27. Regarding the 5 days' sick leave allowance, the respondent maintained that the appellant's sick leave applied for on 28th October, 2013 automatically stood extinguished because her maternity leave

commenced upon giving birth on 13th November, 2013, and it is for this reason that the appellant's sick leave was cancelled to allow the maternity leave to run.

28. We have considered the record, submissions by the parties and the law. This being a first appeal, we are cognizant that our primary role is namely, to re-evaluate the evidence before the ELRC and draw our own conclusions bearing in mind that we, unlike the ELRC, did not have the benefit of hearing the witnesses testify. (See *Kenya Ports Authority v Kuston (Kenya) Limited* [2009] 2EA 212). Our duty is to reconsider the evidence, evaluate it and draw our own conclusions. (See *Selle and Another v Associated Motor Boat Company Limited & 2 Others* [1968] EA 123).

29. The appellant's appeal is majorly premised on whether the retrenchment was a ploy to unfairly and unlawfully terminate her services; whether the trial court erred in failing to award the appellant compensation for unfair termination amounting to a maximum of 12 months' gross salary; and whether the appellant was discriminated against by the respondent. We shall proceed to consider the above issues by re-evaluating the evidence adduced in the trial court and arrive at our own conclusions of fact and law. In this regard we will only depart from the findings by the trial court if they are not based on the evidence on record, or where the learned judge is shown to have acted on wrong principles of law. (See *Jabane v Olenja* [1986] KLR 661).

30. Was the retrenchment a ploy to unfairly and unlawfully terminate the appellant's services? The appellant argued that the restructuring of the respondent across the Sub- Saharan African region only resulted in her being declared redundant, that the purported restructuring was a smoke screen to terminate her employment unfairly as evidenced by the respondent's internal newsflashes and newsletters sent to all employees in the Engagement Practices Organization informing them that the organizational change would be complete by 1st April, 2014.

31. On its part, the respondent argued that the restructuring affected a number of its employees most of whom were encouraged to apply to other positions within the organization. However, the appellant declined to apply for her position that was transferred to South Africa. The respondent argued that courts have appreciated that an employer has the prerogative to determine the structures of its businesses and therefore decide eventually on which position(s) to make redundant as was held in *Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 Others* (*supra*).

32. In the impugned judgment, the ELRC's finding on the alleged unlawful redundancy was:

> "26. The respondent equally did not disclose the existence of any factors or circumstances which prevented it from transferring the Claimant to operate from South Africa, noting that it did not controvert the Claimant's evidence that she was an excellent performer.
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> 27. Further, it is the view of the court that in the globalised business and employment arena, the mere transfer of a role to a different country without more would not suffice as a valid and fair reason to declare a redundancy.
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> 28. The court, therefore, finds that the respondent failed to discharge the burden placed on it by sections 43 and 45 of the *Employment Act*, 2007 that there were valid or fair reason(s) to terminate the claimant's contract on account of redundancy, or that such action was in accord with justice and equity."

33. The term 'redundancy' appears to be the most common term used to describe dismissals based on the operational requirements of the employer. An employer is allowed to retrench workers for 'operational

requirements' based on the employer's 'economic, technological, structural or similar needs'. Section 2 of the *Employment Act*, 2007 defines "redundancy" as follows:

> 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 the services of an employee are superfluous and the practices commonly known as abolition of office, job or occupation and loss of employment;

34. With the above statutory definition in mind, it is important to bear in mind the consequences of redundancy. Guidance can be obtained from South Africa, a jurisdiction with similar labour laws like Kenya. In *SA Breweries (Pty) Ltd v Louw* [2018] 39 ILJ 189 (LAC) at para 19 the Labour Appeal Court of South Africa said the following about the consequences of a redundancy:

> " Axiomatically, an incumbent of a redundant post is not automatically dismissed; that person is merely dislocated and only after the opportunities to relocate that person in another suitable post have been explored and exhausted, may they be fairly dismissed."

35. An employer contemplating retrenchment must comply with the provisions of section 40 of the *Employment Act*, 2007 which provides:

> 40. Termination on account of redundancy
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> 1) An employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions —
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> 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;
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> b) where an employee is not a member of a trade union, the employer notifies the employee personally in writing and the labour officer;
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> 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;
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> 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.

36. The above section gives content and colour to fairness in retrenchment process and its significance as such should not be underrated. However, section 40 only provides a guide for the purpose, and cannot be treated as a set of rules that conclusively disposes the issue of fairness. Other guarantees to a fair process such as the right to a fair administrative action and the principles of natural justice do apply. Markedly, section 40 is couched in mandatory terms, so failure to comply with the conditions stated therein invites the court to scrutinize the fairness of the process.

37. The court must be satisfied that the criterion deployed by an employer culminating with a redundancy is fair and objective. This will involve, firstly, the scrutiny of the criterion itself, that is, form and shape, and secondly its application. The requirement for objectivity and fairness is not one to be compromised. Back to basics. Our understanding of the word fair is free of blemishes or stains, clean and pure, unsullied or equitable. The word objective means uninfluenced by emotions or personal prejudice, existing independently of perceptions or some individual conceptions. Once the word fair is used together with objective, it simply means that the standard is higher than normal. If, for any reason, a criterion is stained, blemished or sullied to even a lesser and negligible degree, then it is not one that is contemplated in section 40 of the act.

38. As a matter of principle, any criterion that does not pass muster, renders a dismissal that follows, using it, substantively unfair. An employer has no option but to employ a selection criterion when selecting employees to be dismissed for operational requirements. Once the Court is satisfied that the criterion is fair and objective, the Court must be told how it was applied on the employees dismissed using such a fair and objective criteria. This entails evidence being led by the employer as to how it applied the criterion. Objectivity and fairness at this stage entails amongst others consistency and transparency. If no satisfactory evidence is led that the criteria was applied consistently and transparently, then the court must conclude that the criterion was not fair and objective on application. Such, equally renders the dismissal that follows to be substantively unfair.

39. Criteria simply means methods. If one or more employees are to be selected for dismissal from a number of employees, the criteria for their selection must be fair and objective. Criteria that infringes a fundamental right can never be fair. Selection criteria that are generally accepted to be fair include length of service, skills and qualifications. Generally, the test for fair and objective criteria may be satisfied by the use of the “last in first out” (LIFO) principle. There may be instances where LIFO principle or other criteria needs to be adapted. LIFO is the criterion associated with the least risk as long as it is fairly applied. However, where LIFO is inappropriate, employers may also use skills retention in the alternative as a criterion for selection provided it is objectively applied. In *National Union of Metalworkers of South Africa and Others v Lectropower (Pty) Ltd* (JS1151/2014) [2018] ZALCJHB 266 (6 July 2018) and *Singh and Others v Mondi Paper* [2000] 4 BLLR 446 (LC) the Labour Court of South Africa accepted that performance could be used as a criterion for selection provided it was

objectively applied. Also, the parties may agree on selection criteria in a collective agreement or during the consultation process. In the absence of such an agreement the employer must apply fair and objective criteria.

40. In unpacking the provisions of the South African *Labour Relations Act*, (the equivalent of section 40 of the *Employment Act*, 2007), the Labour Court in *National Union of Metalworkers of South Africa and Others v Columbus Stainless (Pty) Ltd* (JS529/14) [2016] ZALCJHB 344 (30 March 2016) at paragraphs 10 – 11 held that:

> " This formulation gives primacy to criteria that have been agreed to by the consulting parties. Where no criteria are agreed, it requires the employer party to meet the dual or combined requirements of fairness and objectivity. To the extent that Numsa's position throughout the consultation process and indeed this litigation has been that the respondent ought to have applied LIFO to the exclusion of all other criteria, this court has recognized the objectivity of length of service but never endorsed LIFO as the only fair and objective criterion. On the contrary, there are numerous decisions in which the court has held that an employer is entitled to adopt selection criteria such as experience, competency efficiency and special skills. In *NUM and others v Anglo American Research and Laboratories (Pty) Ltd* [2005) 2 BLLR 148 (LC), Murphy AJ considered an employer's deviation from LIFO and its selection criteria based on key skills retention and continued service delivery to its clients. In that instance, a skills matrix was developed but regard is also had to performance appraisals. The court held that in the circumstances in which the company found itself, the criteria applied within objective as required by s 189 (7)(b). Similarly, in *Van Rooyen and others v Blue Financial Services (SA) (Pty) Ltd* (2010) 31 ILJ 2735 (LC), the court held that an employer was entitled to have regard to competency, qualifications and experience as selection criteria."
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> "Following the influential article by Prof Alan Rycroft 'Corporate restructuring and 'applying for your own Job' [2002] 23 ILJ 678, the courts have held that criteria need to be clear and transparent and selection criteria and the application should ensure that the dismissal does not cross the line between a no-fault dismissal and one based on performance. John Grogan (see Dismissal at 245) has summarized the position as follows;
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> 'In summary, criteria for selection can be divided into those that are potentially fair, and those that are unacceptable in principle. Potentially fair criteria include length of service, balanced by the need to maintain history skills. In addition, criteria such as performance (whether individual or group performance), conduct, experience, skill, adaptability, attitude, potential and the like - or a matrix or 'mix' of such criteria - are acceptable. When these criteria are adopted, however, the employer is required to ensure that a 'rating' system is used which can be applied fairly, consistently and objectively.'"(Emphasis added)

41. It was argued that the appellant was offered an opportunity to apply for a post in South Africa. The question whether making employees to apply for vacant positions is a fair and objective method has bedeviled courts for a long time. As far back as 2001, Professor Rycroft, sitting as an arbitrator in the matter of *Grieg v Afrox Ltd* [2001] 22ILJ 2102 (ARB) had this to say:

> " The declaration that all jobs were redundant avoided the need to decide selection criteria up front for those who would ultimately be retrenched ...The onus was on employees to apply for jobs. Ultimately the selection criteria for retrenchment were that:

(a) an employee's old job as previously defined was declared redundant and the employee either

(b) failed to apply for a job, or

(c) failed to be appointed to a job."

42. We fully agree with the above view. We may add that in such situations, employees are technically dismissed when their positions are made redundant. That is exactly what happened to the appellant before us. Making her to apply for another position could be a means of delaying the eventual effect, which is the dismissal. Once a position of an employee is declared redundant and if he or she is not placed in another position shortly thereafter, such an employee may eventually be dismissed. When that eventuality arises, it would have happened without a fair selection criteria being applied because it means the employees post was first abolished, technically rendering him or her jobless. Therefore, making an employee to apply for a position is not a selection criterion per se.

43. The Labour Court of South Africa commenting on Professor Rycroft statement (supra) in *Wolfaardt and Another v Industrial Development Corporation of South Africa Ltd* (J869/00) [2002] ZALC 61 (1 August 2002) had the following to say on the criterion of not being appointed:

"(25) Two points need to be made. The first is that advanced by Prof Rycroft namely that the employer must not use the restructuring as an exercise to dismiss employees on a no-fault basis where the employer cannot dismiss them by reason of misconduct or incapacity. This does not apply only where the employer uses restructuring as a sham or stratagem but also where the employer cannot show that the non- employment is fair, e.g. where the employees are not afforded an opportunity to deal with perceptions of their incapacity.

(26) The second point which should be made, which Prof Rycroft touches on is that it should be easier to retrench an employee where restructuring is involved. I would add that a retrenchment involving a process of restructuring whereby an employee applies for his or her own job must be closely scrutinized because it ignores, sometimes unconsciously, that an existing employee enjoys job security which will be protected against no-fault terminations. But placing an employee in the position of an applicant for a job, or worse merely on a waiting list, creates a supplicant of the employee."

44. We must add that until dismissed an employee retains job security that calls for protection under the law. To subject such an employee to a stressful process that threatens his or her job security is imminently unfair. This torturous process should not be received with open arms by the courts. The Court should therefore cautiously scrutinize the process deployed by the employer and satisfy itself that it was not a ply to eradicate an unwanted employee.

45. In undertaking this scrutiny, the starting point for this court is the provisions of sections 40 of the *Employment Act*, 2007. While all the conditions stipulated therein are important and none can be ignored, we specifically refer to section 40 (1) (c) which requires the employer in selecting the employees to have 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. The method of selecting employees to be dismissed must be placed high on issues to be consulted upon in compliance with section 40 of the act. The reason is pretty obvious, a proper selection method if properly applied would ensure job security.

In a no-fault dismissal situation job security is key. Therefore, the method of selection is as important as measures to avoid dismissal or minimize the number. This Court must be more vigilant on issues of selection criteria given the potential of abuse and unfairness.

46. We affirm the decision by the trial court declaring the appellant's redundancy unfair but for different reasons not for failing to give valid reasons for terminating the contract as the trial court held. To us, redundancy is a valid reason for termination. Our finding is premised on our finding informed by our analysis of the facts, the law and authorities that the criteria used by the respondent and the process leading to the appellant's redundancy cannot be said to have been potentially fair and objective as contemplated by section 40 of the Act and decided cases. From the evidence adduced, there is nothing to suggest the criteria deployed to identify the affected employees, and the basis upon which the appellant was the only one required to apply to relocate to South Africa and why the only option was termination if she failed to take up the offer for South Africa. The criteria used must be clear and transparent. Other than the letter to the Labour Officer and the mention of a coffee meeting, it's not clear whether there were formal meetings or any formal discussions to address the impending redundancy. The selection criteria and the application of the criteria should ensure that the dismissal does not cross the line between a no-fault dismissal and one based on performance. For this reason, we find and hold that the criteria used to identify the appellant was not transparent.

47. Next, we will address the issue whether the trial court erred in failing to award the appellant compensation for unfair termination, amounting to a maximum of 12 months' gross salary. The appellant was of the view that the trial court abused its discretionary powers under Section 49(1)(c) of *Employment Act*, 2007 by failing to award the appellant compensation for unfair termination, amounting to a maximum of 12 months' gross salary in light of overwhelming evidence that the termination was not only harsh but also unfair.

48. The respondent on the other hand maintained that quantum for an award for unfair termination is at the discretion of the trial court, and such discretion can only be interfered with by the appellate court if it is proven that the trial court took into account an irrelevant factor, or failed to take into account a relevant factor.

49. The trial court held that the appellant served the respondent for about 5 years and in consideration of the length of service and considering that she was paid other terminal/statutory dues, the court was of the view that the equivalent of 4 months' gross salary as compensation was appropriate (pay slip for August, 2014 show a gross pay of Kshs 303,740/-).

50. The mode of assessment of remedies for unlawful and unfair termination was set out by this Court in *Co-operative Bank of Kenya Ltd v Banking Insurance & Finance Union* CA No. 188 of 2014 as follows:

> "Our understanding of the Act is that the prescribed remedies...are discretionary rather than mandatory remedies, to be granted on the basis of the peculiar facts of each case. This is made absolutely clear by the use of the word "may", which in the context of the provision imports a discretionary rather than a mandatory meaning. That the remedies....are not a mandatory remedies, is made even clearer by section 49(4) which sets out some 13 considerations which the court must take into account before determining what remedy is appropriate in each case. Those considerations include the wishes of the employee, the circumstances of the termination and the extent to which the employee caused or contributed to it, the practicability of reinstatement or re- engagement, the common law principle that an order for specific performance of a contract for service should not be made save in exceptional cases, the employee's length of service with the employer, the employee's reasonable expectation of the length of time the employment was to last but

for the termination, the employee's opportunities for securing comparable or suitable employment, any conduct of the employee that may have caused or contributed to the termination, any action on the part of the employee to mitigate his loses, etc. What all the above means, is that before exercising the discretion to determine which remedy to award, the court must be guided by the above comprehensive list of considerations."

51. The remedies for wrongful dismissal and unfair termination are provided for in section 49 as read with section 50 of the Act. Among them is an award of the equivalent of a number of month's wages or salary not exceeding twelve months based on the gross monthly wage or salary of the employee at the time of dismissal. This is what the trial court based its award on. Section 49(4) (a) to (m) sets out 14 considerations which should be taken into account in deciding the appropriate remedy under 49(1).

52. We are being called upon to interfere with the exercise of judicial discretion. We are guided by the principles enunciated in numerous case law from this Court. For example, *Coffee Board of Kenya v Thika Coffee Mills Limited & 2 Others* [2014] eKLR, it was stated that the court ought not to interfere with the exercise of such discretion unless it is satisfied that the judge misdirected himself in some matter and as a result arrived at a wrong decision, or that it be manifest from the case as a whole that the judge was clearly wrong in the exercise of discretion and occasioned injustice.

53. In the instant appeal, the learned judge awarded four-months' salary as compensation and the reasons given were that the appellant had served the respondent for five years and that the appellant had been paid all her terminal and statutory dues. It has not been demonstrated to our satisfaction that the trial court did not take into account any of the considerations as required under section 49(4) (a) to (m). In any event, it should never be forgotten that the remedies are discretionary.

54. On discrimination, the appellant argued that she adduced sufficient evidence before the trial court to the effect that she had been discriminated against by the respondent on several occasions. For instance, she testified that on 12th June, 2014, she was invited for a cup of coffee by her line manager, Ms. Ramona, who made very strange personal inquiries about her pregnancy and the possibility of future pregnancies. Further, during the aforesaid coffee meeting, Ms. Ramona Naidoo informed her that the respondent had concerns on the appellant's ability to endure the exhausting nature of her job, which according to Ms. Ramona Naidoo, involved a lot of travelling.

55. The respondent reiterated that the appellant was never discriminated against as she claimed whether on account of pregnancy, gender and/or motherhood and no evidence was submitted to prove the discrimination. In fact, the respondent maintained that it accommodated the appellant more than reasonably by offering her a first right of refusal for the new role in South Africa; her line manager unsuccessfully tried to help her change her career path within the respondent's organization; she was allowed to work from home before and after birth of her child and 21 days bed rest was approved by the respondent.

56. The learned judge found that the appellant did not prove to the required standard the alleged harassment or that the harassment amounted to discrimination. Article 27(4) of *the Constitution* provides:

> " 27. Equality and freedom from discrimination:
>
> 4. The State shall not discriminate directly or indirectly against any person 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".

57. In order to ensure the full realization of this Constitutional right, section 5 of the *Employment* provides inter alia:

> "(1) (a) ....
>
> (b) ....
>
> (2) An employer shall promote equal opportunity in employment and strive to eliminate discrimination in any employment policy or practice.
>
> (3) No employer shall discriminate directly or indirectly, against an employee or prospective employee or harass an employee or prospective employee –
>
> (a) on grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, pregnancy, marital status or HIV status;
>
> (b) In respect of recruitment, training, promotion, terms and conditions of employment, termination of employment and other matters arising out of employment.
>
> (4) It is not discrimination to –
>
> (a) take affirmative action measurers consistent with the promotion of equality or the elimination of discrimination in the workplace;
>
> (b) distinguish, exclude or prefer any person on the basis of an inherent requirement of a job;
>
> (c) employ a citizen in accordance with the national employment policy; or
>
> (d) restrict access to limited categories of employment where it is necessary in the interest of State security.

58. Section 46 of the *Employment Act* provides for reasons for termination or discipline, it stipulates:

> 46. The following do not constitute fair reasons for dismissal or for the imposition of a disciplinary penalty-
>
> (a) a female employee's pregnancy, or any reason connected with her pregnancy;
>
> (b) ...
>
> (g) an employee's race, colour, tribe, sex, religion, political opinion or affiliation, national extraction, nationality, social origin, marital status, HIV status or disability;

59. It is noteworthy that once an allegation of unfair discrimination based on any of the listed grounds in section 46 of the Act is made, section 47(5) of the Act places the burden of proof on the employee to prove that such discrimination did occur and then the employer is required under section 43 of the Act to prove that such discrimination did not take place or that it is justified. (See the ELRC in *GMV v Bank of Africa Kenya Limited* [2013] eKLR).

60. The appellant argues that the rejection of her application for 6 months maternity leave with half pay, and the demand that the appellant proves that her baby was born with extreme and/or severe condition was a demonstration of the respondent's bad faith since other employees with normal babies were given an option of 6 months leave without any harassment. The appellant also contended that the cancellation of maternity leave was discrimination since her 21 days sick-off commenced on 28th October, 2013 and she gave birth on 13thNovember 2013 before the lapse of the sick off. Therefore, her maternity leave was supposed to run after the lapse of 21 days from 28th October, 2013.

61. On harassment pre-natal and ante-natal, the appellant claimed that she was harassed by two Managers by being instructed to report to work during sick leave, and during and after maternity leave. She went on to assert that despite the sick and maternity leave, she was constantly called on the phone and contacted through e-mails prompting her to report to work prematurely, despite the fact that she had a delicate child and that upon resuming from maternity leave, she found that her roles had been assigned to two of her junior colleagues. In respect of alleged discrimination on account of pregnancy and motherhood the appellant argued that she was terminated after the coffee meeting with Ms. Naidoo who during the coffee meeting had asked whether the appellant had the intention to get pregnant in future and have more babies.

62. We have considered the respondent's answer to the allegations of discrimination as stated earlier in this judgment. We are persuaded that the respondent has proved to the required standard that the alleged discrimination did not in fact exist as required by section 43 of *Employment Act*. We find that the appellant on the other hand failed to discharge the burden of proof placed upon her to the required standard provided under section 47(5) of the *Employment Act*. In the end, we find no case of discrimination against the appellant as alleged.

63. Lastly, on the failure to award the appellant compensation for the five pending sick leave days, the explanation proffered by the respondent was that the appellant's sick leave was extinguished immediately she gave birth on 13th November, 2013. The appellant maintains that since she was forced to begin her maternity leave immediately before her sick leave lapsed, she ought to have been paid for the five days remaining before her sick leave lapsed.

64. We have considered the arguments by the parties. It is noteworthy that the submission by the parties were not in consonance with the ground of appeal on payment of outstanding leave allowance. Be that as it may, we note that the appellant filed a supplementary bundle of documents which was not objected to by the respondent. On the pay slip, we find that it is indicated that the appellant was paid a leave allowance of Kshs.43,391.44. Consequently, we agree with the trial court's finding that the claim for accrued annual leave had been overtaken by events.

65. Regarding the authenticity of the respondent's letter to the Labour Officer, we find that the said issue was never raised before the trial court and the same cannot be gleaned from the facts. In *Warehousing and Forwarding Co v Jafferali* [1963] EA 385, an appeal to the Privy Council from a decision of the Court of Appeal for East Africa allowing an appellant to raise a new point of law for the first time on appeal, Lord Guest delivering the opinion of the Board said that there would have been no objection if the facts had been fully investigated and would have supported the new case, but as the question was never investigated, the new point should not have been allowed to be argued. Lord Guest did however cite an extract from the speech of Lord Watson in *Connecticut Fire Insurance Co v Kavanagh* [1892] AC 473 to the effect that if the question is one of law turning on the construction of a document it may be not only competent but expedient to entertain the plea, but only if the facts, if fully investigated, would have supported the new plea. Similarly, in *Visram & Karsan v Bhatt* [1965] EA 789, the former Court of Appeal for East Africa held that where an issue which has not been pleaded or canvassed is

raised for the first time on appeal, it should not be allowed to be argued unless the evidence establishes beyond doubt that the facts, if fully investigated, would have supported the plea of the party seeking to raise the new issue.

66. In the end, we find this appeal to be devoid of merit and accordingly dismiss it with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 3RD DAY OF FEBRUARY, 2023.

HANNAH OKWENGU

.....

JUDGE OF APPEAL

H. A. OMONDI

.....

JUDGE OF APPEAL

J. MATIVO

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR