Cargill Kenya Limited v Mwaka & 3 others (Civil Appeal 54 of 2019) [2021] KECA 115 (KLR) (22 October 2021) (Judgment)

Neutral citation: [2021] KECA 115 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPEAL 54 OF 2019

W KARANJA, M NGUGI & P NYAMWEYA, JJA

OCTOBER 22, 2021

BETWEEN

CARGILL KENYA LIMITED ..... APPELLANT

AND

CAROLINE MUTANA MWAKA ..... 1ST RESPONDENT

ALEX GAVANA YERI ..... 2ND RESPONDENT

JULIUS CHULA KAZUNGU ..... 3RD RESPONDENT

JEDIDAH WAIRIMU GITHERU ..... 4TH RESPONDENT

(An appeal arising from the judgment and decree of the Employment and Labour Relations Court at Mombasa (Rika J.) dated 30th June 2017 in Mombasa ELRC No. 190 of 2015 consolidated with Mombasa ELRC No. 360 of 2015))

It is not a requirement to issue a Notice of Termination before declaring an employee redundant.

Reported by Ribia John

Labour Law *– employment – termination of employment – redundancy – requirements before a declaration of redundancy - whether there was a requirement to issue a notice of termination before the redundancy - whether consultation between an employer and the employee, the relevant unions and labour officials was a requirement before a declaration of redundancy - Employment Act, 2007, section 40(1)(a),(b) and (f); Constitution of Kenya, 2010, article 47; Fair Administrative Action Act, (No. 4 of 2015), section 4(3); Recommendation No. 166 of the International Labour Organization Convention No. 158; Termination of Employment Convention, 1982, article 13.*

Labour Law *– employment – termination of employment – redundancy – selection parameters used to decide who was to be declared redundant - which selection parameters were an employer to consider in deciding which employee to declare redundant – Employment Act, 2007, section 40(1)(c).*

Brief facts

The 1st respondent filed a claim in the Employment and Labour Relations Court (ELRC) No 190 of 2015, while the 2nd to 4th respondents were the claimants in ELRC No. 360 of 2015. The respondent's employment was terminated on the grounds of redundancy. Aggrieved they approached the trial court on grounds that the redundancy was driven by malice, bias and discrimination. They also claimed that their employment was unfairly terminated as the appellant did not follow the proper procedure.

At the trial court, the court held that the respondents' redundancy by the appellant was procedurally unfair, and awarded the respondents various awards as compensation. Aggrieved the appellant filed the instant appeal in which the appellant claimed that the trial court had erred in fact and law in finding that the respondent's redundancy was procedurally unfair.

Issues

i. Whether there was a requirement to issue a notice of termination before terminating employees on grounds of redundancy under section 40(1)(f) of the Employment Act.
ii. Whether consultation between an employer and the employee, the relevant unions and labour officials was a requirement before a declaration of redundancy.
iii. What selection parameters were an employer to consider in deciding which employee to declare redundant?
iv. Under what circumstances would employees whose employment was terminated for reasons related to redundancy be said to have been unfairly dismissed from employment?

Relevant provisions of the Law

Employment Act, Act No. 11 of 2017.

Section 40 - Termination on account of redundancy

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

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

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

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

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

(e) the employer has where leave is due to an employee who is declared redundant, paid 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.

(2) Subsection (1) shall not apply where an employee's services are terminated on account of insolvency as defined in Part VIII in which case that Part shall be applicable.

(3) The Cabinet Secretary may make rules requiring an employer employing a certain minimum number of employees or any group of employers to insure their employees against the risk of redundancy through an

unemployment insurance scheme operated either under an established national insurance scheme established under written law or by any firm underwriting insurance business to be approved by the Cabinet Secretary.

Held

1. An appellate court had to reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it had neither seen nor heard the witnesses and should make due allowance in that respect. An appellate court was not necessarily bound to follow the trial court's findings of fact if it appeared either that the court had failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness was inconsistent with the evidence in the case generally.
2. There have been no definitive findings that a second notice was required to be issued under section 40(1)(f) of the Employment Act before a redundancy, as urged by the respondents. The Court of Appeal did not make any specific finding as regards a second notice being required under section 40(1)(f) of the Employment Act in *Barclays Bank of Kenya, Barclays Africa Group (S.A.) Ltd vs Gladys Muthoni & 2 Others* (2018) eKLR and in *Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others [*2014] eKLR. The findings in those matters were made in relation to section 40(a) and (b), which required notice of the intended redundancy to be given to the employees likely to be affected and the labour officer for the area where the employer's business was situated. The finding was that the notice to be given to employees declaring them redundant was to be given after the conclusion of consultations on all issues arising from the redundancy, and was not pegged to, nor made in the context of section 40(1)(f) of the Employment Act. Therefore, a notice of termination before declaring a redundancy was not a requirement or condition under section 40(1)(f) of the Employment Act.
3. A plain and contextual reading of section 40(1)(f) of the Employment Act showed that its express objective and purpose was the payment required to be made to employees affected by redundancy, and not the issuance of a notice. It was also notable that the legislative intention from the arrangement and content of the enactments in section 40(1)(d) to (g) was the provision of payments to be made to affected employees in redundancy, and subsection 1(f) could only thus be construed within that context.
4. It would be an illogical result to give a literal meaning to section 40(1)(f) of the Employment Act *in lieu* of payment of one month's notice, and it would also be straining it too far to give it a meaning of one month's notice of termination before redundancy in trying to resolve any grammatical ambiguity in section 40(1)(f). The above interpretative factors discounted a construction that a notice of termination was required by section 40(1)(f) or within the timelines held by the trial court. While such a notice could eventually be required, it was definitely not one of the conditions to be met under section 40(1)(f) of the Act before the redundancy. The trial court appeared to have conflated the payment in lieu of notice under section 40 (1)(f) with the final declaration of termination by redundancy and erred in finding that there was a requirement to issue a notice of termination before the redundancy under section 40(1)(f) of the Act.
5. The trial court found that the termination was unlawful for reasons that the appellant used the notices of intended redundancy as notices of termination under section 40(1)(f) of the Employment Act. That finding was in error for two reasons. Firstly, no notice of termination was required to be given before redundancy under section 40(1)(f) of the Act. Secondly, an examination of the letters issued by the appellant led the court to a conclusion that they indeed were notices of intended redundancy required by section 40(1)(a) of the Act.
6. The subject and reference of all the letters were stated to be a notice of the intention to declare certain positions redundant, and the tone of the letters informed of the positions that were proposed to be declared redundant, as well as the date and effect of the redundancy, which was to take effect one month later. The threshold to be met under section 40(1) (a) and (b) of the Employment Act in that regard was notification 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. Those requirements were all present in the letters.

7. A plain reading and literal interpretation of the letters could not lead to a conclusion that the same were letters of termination, and in any event, that was not the standard by which the notices under section 40(1)(a) and (b) of the Employment Act were required to be evaluated. The trial court erred by finding that the appellant did not communicate an intention to declare redundancy.

8. While the requirement of consultation was not expressly provided in section 40 of the Employment Act, that requirement was implied, as the main reason and rationale for giving the notices in section 40(1)(a) and (b) to the unions and employees of an impending redundancy. Section 40(1) of the Act did not expressly state the purpose of the notice. Although it also did not expressly provide for consultation between the employer and the employees or their trade unions before the final decision on redundancy was made, the requirement for consultation was provided for in the Kenyan law and implicit in the Employment Act itself.

9. By dint of article 2(6) of the Constitution, the treaties and conventions ratified by Kenya were part of the laws of Kenya. Kenya was a State party to the International Labour Organization (ILO), which it joined in 1964 and was bound by the ILO conventions. Article 13 of Recommendation No. 166 of the ILO Convention No. 158-Termination of Employment Convention, 1982-required consultation between the employers on the one hand and the employees or their representatives on the other before termination of employment under redundancy.

10. In interpreting statutes, the courts had the function of filling in the textual detail by implication, which arose either because it was directly suggested by the words expressed, or because they were indirectly suggested by rules or principles of law which were not excluded by the express wording of a statute. Consultations on an intended redundancy between the employer and the relevant unions, labour officials and employees was implied by section 40(1)(a) and (b) of the Employment Act.

11. Consultation was also specifically required by article 47 of the Constitution and section 4(3) of the Fair Administrative Action Act. Administrative action was defined under the Fair Administrative Action Act to include any act, omission or decision of any person, body or authority that affected the legal rights or interests of any person to whom such action related. Employers fell within the category of persons whose action, omission or decision affected the legal rights or interests of employees, and more so the redundancy by the appellant in the instant appeal was not contested. The appellant was therefore also bound by the provisions on consultation required by article 47 and section 4(3) of the Fair Administrative Action Act.

12. The purpose of the notice under section 40(1)(a) and (b) of the Employment Act, as was 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 were 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 was unavoidable. That meant that if parties put their heads together, chances were that they could avert or at least minimize the terminations resulting from the employer's proposed redundancy. If redundancy was inevitable, measures should have been taken to ensure that as little hardship as possible was caused to the affected employees.

13. In cases where the employees were represented by an independent union recognised by the employer, reasonable employers would seek to act in accordance with the following principles: -

    1. The employer was to seek to give as much warning as possible of the impending redundancies so as to enable the union and employees who could be affected to take early steps to inform themselves of the relevant facts, consider possible alternative solutions and, if necessary, find alternative employment in the undertaking or elsewhere.

2. The employer was to consult the union as to the best means by which the desired management result could be achieved fairly and with as little hardship to the employees as possible. In particular, the employer was to seek to agree with the union on the criteria to be applied in selecting the employees to be made redundant. When a selection had been made, the employer was to consider with the union whether the selection had been made in accordance with the criteria.
3. Whether or not an agreement as to the criteria to be adopted had been made with the union, the employer was to seek to establish criteria for selection which so far as possible did not depend solely upon the opinion of the person making the selection but could be objectively checked against such things as attendance record, efficiency at the job, experience, or length of service.
4. The employer was to seek to ensure that the selection was made fairly in accordance with that criteria and was to consider any representations the union could have in relation to such selection.
5. The employer was to seek to see whether instead of dismissing an employee he could offer him alternative employment.

14. There was no evidence on record or presented to the trial court of any consultations undertaken in the manner stated above. There was no fault in the finding by the trial court that the termination of the respondents was unfair for want of the consultations envisaged by section 40 of the Employment Act.

15. In regard to selection parameters, section 40(1)(c) of the Employment Act required the employer to have 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 selecting the employees to be declared redundant. The threshold set by section 40(1)(c) of the Employment Act provided that:

a. an employer should include the factors set out in section 40(1)(c) of the Employment Act in the criteria for evaluating and selecting the employees to be declared redundant.
b. The employer was required to prove that the criteria were objectively, uniformly and fairly applied.

16. The reason given for the positions that were identified for redundancy was that they did not fit into the new organisational structure, and the criteria for selecting the positions was informed by the challenges in aligning the positions with the expansion taking place in the organisation. It was notable in that regard that reasons were also given on how and in what manner each of the positions declared redundant did not fit in the new organisational structure, including those of warehouse supervisor, shipping clerk and human resources assistant.

17. The factors that were used to analyse and evaluate the different job positions in order to determine their suitability for the new organisational structure included knowledge, skills and responsibilities, which were to be determined by work experience, qualifications and specialist training. The evaluation criteria were applied to all staff, and ranking done within the same clusters of jobs, which ranking was provided in the report.

18. Annual performance appraisals would have shown if the claimants were, or were not deficient on skill, ability and reliability. There were no records of performance appraisals carried out over the respective periods of employment, which would assist the Court in assessing whether the claimants were skilled, able and reliable. While the appellant did demonstrate that it had in place a selection criterion that incorporated the factors required to be considered in section 40(1)(c) of the Employment Act, it did not bring evidence to demonstrate that it applied the said objectively and fairly. The trial court did not err in its findings in that regard.

19. Section 50 of the Employment Act obliged courts to apply the factors in section 49 of the Act in determining a complaint or suit involving wrongful dismissal or unfair termination of the employment of an employee. The factors that the courts were required to take into account in determining the quantum in this regard were set out in section 49(4).

20. A redundancy by its very nature adversely affected employees without any fault or wrongdoing on their part. The employees, therefore, needed to be cushioned from the adverse effects. The respondents did not

dispute that they were paid one month's salary in lieu of notice, severance pay at the rate of 23 days per every year worked and accrued leave days. The compensation of 8 months' salary for the 1st respondent and 6 months' salary in compensation for unfair termination for the 2nd, 3rd, and 4th respondents in the circumstances was on the excessive side.

21. The trial court made a slightly higher award for compensation to the 1st respondent on account of more acute unfair treatment. The higher award was not justified, for reasons that the unfair treatment was a finding in relation to all the respondents, and the effect of the unfair termination arising from the redundancy was the same for all of them. That was not one of the factors that should have been taken into account under section 49(4) of the Employment Act. An award of 4 months' salary in compensation for unfair termination pay for each of the respondents would be appropriate and reasonable in the circumstances.

Appeal partly allowed.

Orders

i. *Trial court's award of compensation for unfair termination to the 1st, 2nd, 3rd and 4th claimants in the judgment dated July 30, 2017 set aside and substituted with an award of compensation for unfair termination of four months' gross salary as at the date of termination of employment due to redundancy to each of the 1st, 2nd, 3rd and 4th claimants.*

ii. *All the other orders in the judgment of the trial court dated July 30, 2017 affirmed and upheld, save to the extent that they may have been modified or qualified by the findings made in that judgment.*

iii. *Each party was to bear its own costs.*

Citations

Cases

1. Africa Nazarene University v David Mutevu & 103 others [2017] eKLR (Civil Appeal 236 of 2015) — Explained
2. Barclays Bank of Kenya Ltd & another v Gladys Muthoni & 20 others [2018] eKLR (Civil Appeal 296 & 301 of 2016 (Consolidated)) — Explained
3. Ignas Karingo Mghona & 4 others v Star of Hope International Foundation [2016] eKLR (Cause 236 of 2013) — Cited
4. Jabane vs Olenja ([1986] KLR 661) — Cited
5. Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others (Civil Appeal 46 of 2013, [2014] eKLR) — Explained
6. Thomas De La Rue (K) Ltd v David Opondo Omutelema (Civil Appeal 65 of 2012, [2013] eKLR) — Explained
7. Employment Appeals Tribunal in Williams vs Compare Maxam Ltd (1982) IRLR 83
8. Greig v. Sir Alfred McAlpine & Son (Northern) Ltd ([l979] IRLR 372) — Explained
9. Selle & Another v Associated Motor Boat Co. Ltd & Others ([1968] EA 123) — Explained

Statutes

1. Constitution of Kenya, 2010 — article 2(6), 47 — Interpreted
2. Employment Act (No. 11 of 2007) — section 40 (1)(a)(b)(f)(g), 45, 51, 43(5), 47(5), 43(2), 49(m), 50, 49(1)(c) — Explained
3. Fair Administrative Action (No. 4 of 2015) — section 4(3) — Interpreted

Texts

1. F. Bennion, Bennion on Statutory Interpretation, 5th Edition (sections 172 - 174)

International Instruments

1. ILO Convention No. 158-Termination of Employment Convention, 1982
2. International Labour Organization — article 13

Advocates

Mr. Juma for the Appellant
Ms. Mbithe for the Respondents

JUDGMENT

1 This appeal arises from the judgment of Hon. Rika J. delivered on 30th June 2017, in Mombasa ELRC No 190 of 2015 as consolidated with Mombasa ELRC No 360 of 2015. The 1st respondent herein filed the claim in ELRC No 190 of 2015, while the 2nd to 4th respondents herein were the claimants in ELRC No 360 of 2015. A perusal of the pleadings filed in the trial Court sheds light on the following facts. The appellant employed the 1st respondent on 15th May 2009 as a Human Resource Assistant and terminated the employment on 28th February 2015 on account of redundancy. In the course of the said employment, the appellant's Human Resources Manager resigned from employment on 24th January 2012, and the 1st respondent claimed that she took on the full responsibilities of the Human Resources department and functions of the said manager from 25th January 2012.

2 The 2nd and 3rd respondents were also employed by the appellant as warehousing clerks on 1st November 1989 and 1st June 1990 respectively, and subsequently promoted to warehouse supervisors, whereas the 4th respondent was employed as a secretary on 1st July 1993 and was thereafter promoted to the position of a shipping clerk. The employment of the 2nd 3rd, and 4th respondents was also terminated by the appellant on account of redundancy on 5th January 2015.

3 The respondents' claim was that the termination of their employment on account of redundancy was not genuine but driven by malice, bias and discrimination, on account of the fact that the appellantpromoted and recruited other employees to perform the tasks they used to perform, and without regard to the respondents' long service and exemplary performance. In addition, that the Appellant did not comply with section 40 of the *Employment Act* of 2007 while terminating their services on account of redundancy. The respondents therefore sought awards for terminal and contractual dues; damages for discrimination and a declaration that their dismissal from service was unfair and unjust.

4 In response to the claims the appellantin its memorandum of responsein ELRC Case No 190 of 2015 filed on the 6th May 2015, confirmed that the 1st respondent was employed on 15th May 2009 as a Human Resource Assistant. The appellant contended that the 1st respondent did not take full responsibility of the department and only forwarded issues as and when they arose to the Regional Human Resources Manager and the Managing Director of the appellant. Further, that the 1st respondent was not appointed in any acting capacity nor did she perform any duties and responsibilities vested in a Human Resources Manager, which functions were performed by the Regional Human Resources Manager.

5 The appellantin the memorandum of response dated 26th June 2015 filed in ELRC Case No. 360 of 2015, asserted that the 2nd to 4th respondents were aware of the realignment of the appellant's business for improved workflow and efficiencies. Further to that, various vigorous consultations which involved changing the organizational structure and job evaluation by an independent human resource evaluation organisation resulted in some positions being declared redundant. The process was communicated to all the employees and was widely known throughout the company. The appellants asserted that the respondents were paid their terminal benefits and any allegations to the contrary were denied.

6 After hearing the parties, the trial judgedelivered a judgment in which he declared that the respondents' redundancy by the appellantwas procedurally unfair, and awarded the respondentsvarious awards as compensation. The 1st respondent was awarded an acting allowance for a period of 20 months at Kshs. 2,978,220; and the equivalent of 8 months' salary in compensation for unfair termination at Kshs. 674,416/=. The 2nd Respondent was in turn awarded the equivalent of 6 months' salary in compensation for unfair termination at Kshs. 439,290/=, the 3rd respondent the equivalent of 6 months' salary in compensation for unfair termination at Kshs. 438,744/=; and the 4th respondent the equivalent of 6 months' salary in compensation for unfair termination at Kshs. 462,884/=. The learned judge also granted interest at 14% per annum from the date of Judgment till payment is made in full.

The Appeal

7 The appellantis aggrieved by the said decision, and has appealed to this Court vide a notice of appeal dated 4th July 2017 lodged on 10th July 2017, and also lodged a memorandum of appeal dated 3rd April 2019 in which it raised 8 grounds of appeal . The grounds, together with oral highlights, were urged before us by learned counsel Mr. Juma for the Appellant; and Ms. Mbithe for the respondents. During the hearing of the appeal on 28th June 2021, Mr Juma submitted that after filing the appeal, the appellant subsequently acceded to the award of acting allowance for the 1st respondent and had already paid the same. Consequently, that some grounds of the memorandum of appeal had been dispensed with, and the remaining grounds concerned the finding that the termination of the respondents' employment on account of redundancy was unfair.

8 The main contest in this appeal is whether the procedure in section 40 of the *Employment Act*, 2007 was complied with by the appellant in the termination of the respondents' employment on account of redundancy. Section 40 provides for termination on account of redundancy as follows:

> 1) An employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions
>
> a) where the employee is a member of a trade union, the employer notifies the union to which the employee is a member and the labour officer in charge of the area where the employee is employed of the reasons for, and the extent of, the intended redundancy not less than a month prior to the date of the intended date of termination on account of redundancy;
>
> b) where an employee is not a member of a trade union, the employer notifies the employee personally in writing and the labour officer;
>
> c) the employer has, in the selection of employees to be declared redundant had due regard to seniority in time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy;
>
> d) where there is in existence a collective agreement between an employer and a trade union setting out terminal benefits payable upon redundancy; the employer has not placed the employee at a disadvantage for being or not being a member of the trade union;

e) the employer has where leave is due to an employee who is declared redundant, paid 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.

2) Subsection (1) shall not apply where an employee's services are terminated on account of insolvency as defined in Part VIII in which case that Part shall be applicable.

3) The Cabinet Secretary may make rules requiring an employer employing a certain minimum number of employees or any group of employers to insure their employees against the risk of redundancy through an unemployment insurance scheme operated either under an established national insurance scheme established under written law or by any firm underwriting insurance business to be approved by the Cabinet Secretary.

9 The four issues arising in this appeal after considering the parties' pleadings, evidence and arguments are therefore as follows:

1. Whether the appellantissued the notices contemplated under section40 of the *Employment Act*.

2. Whether the proper criteria of selection of employees to be declared redundant was applied by the appellant.

3. Whether there were redundancy consultations required to be held, and if so, whether they were held.

4. Whether the award of compensation for unfair termination to the respondentswas lawful and reasonable.

10 As this is a first appeal from the decision of the trial court, we reiterate this court's role as expressed in *Selle & Another vs Associated Motor Boat Co Ltd & others* [1968] EA 123 where it was stated that;

> "..... this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this courtfrom a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this courtmust reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this courtis not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally"

11 We shall therefore proceed to consider the above issues by re-evaluating the evidence adduced thereon in the trial courtand 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, as held in *Jabane vs Olenja* [1986] KLR 661.

On the Notices Contemplated by Section 40 of the *Employment Act*

12 On the first issue on the notices required to be given, the appellant's arguments were that the finding by the judgein the trial courtthat two notices were contemplated to be issued under section 40 subsection 1 (a), (b) and (f) does not flow from the plain reading of the section. Further, that the subsection requires the employer to pay one month's salary in lieu of notice as a condition before the termination on account of redundancy. According to the appellant, if the learned Judge was correct in his interpretation that the two notices are required to be issued sequentially under the section, a plain reading of the section would require that a termination notice under subsection 1 (f) would have to be issued simultaneously since both notices are required to be given at least one month to the intended date of termination. The appellanttherefore submitted that a plain reading of subsection 1 (f) requires an employer to pay a month's salary in lieu of notice as a condition before termination on account of redundancy, and does not provide for issuance of a notice of termination.

13 The appellantconsequently submitted that it complied with the provisions of section 40 of the *Employment Act*, as both the respondents' union and the respondents were issued with the notices as provided under section 41 1 (a) and (b), and served with letters that clearly communicated its intention to render the positions affected redundant one month before the intended date of termination. Further, that the said letters confirmed that the respondents would be paid one month's pay in lieu of notice. Reliance was placed on the case of *Thomas De La Rue (K) Ltd v David Opondo Omutelema*, Nairobi Civil Appeal No 65 of 2012 (2013) eKLR for the proposition that the notice sent to the union sufficed for purposes of section 40 of the *Employment Act*.

14 The respondentson the other hand submitted that the findings of the learned Judge of the trial court were *in tandem* with this court's findings in the case of *Barclays Bank of Kenya, Barclays Africa Group (SA) Ltd vs Gladys Muthoni & 2 Others*, Nairobi Civil Appeals No 296 & 301 of 2016 (2018) eKLR.

15 During the hearing in the trial court, the appellantrelied on various letters that it claimed were the notices it gave pursuant to section 40 of the *Employment Act* which it also provided in the appeals record. It submitted that the notice of intention to declare redundancy was issued on 29th January 2015 to the 1st respondent in person in compliance with section 40 (1) (b) since she was not a member of a union, while the notice of intention to declare redundancy in respect of the 2nd to 4th respondents was in a letter dated 1st December 2014 which was issued to the County Labour Officer and Kenya Shipping Clearing and Warehousing Workers Union. Further, that the said respondents were issued with termination letters dated 28th February 2015 and 5th January 2015 respectively.

16 The respondentson their part during the hearing relied on a decision by the learned Judge of the trial court in the case of *Ignas Karingo Mghona & 4 others v Star of Hope International Foundation* [2016] eKLR for the proposition that section 40 contemplates 2 notices, one under section 40 (1) (a) of the *Employment Act*, 2007; and the second notice under section 40 (1)(f), which the learned judge held is a notice in the mould of the notice under section 36 of the *Employment Act*, 2007. Further, that the first notice is supposed to open the door for a 3 way dialogue, involving the parties in whose names the notice is issued and addressed, and that the last notice assumes the processes under the previous notice have been undertaken and finalized.

17 The learned judgein the trial court held as follows on the issue of the notices to be issued:

> "75. As stated by the courtin *Ignas Karingo Mghona & 4 others v Star Hope International Foundation* [2016] e-KLR, section 40 of the *Employment Act* 2007, requires an Employer to issue 2 forms of notices before redundancy.
>
> 76. The first is under section40 [1] [a] and [b]. The second is under section40 [1] [f]. The first is an expression of intention to declare redundancy which issues to the Trade Union and the Labour Office. Where, the Employee is not a Member of the Union, notice of intention to declare redundancy issues to the Employee, as well as to the local Labour Office.
>
> 77. The notices issued by the respondentto the Employees and their Union, communicating intention to declare redundancy, are dated 1st December 2014. They do not communicate an intention to declare redundancy; they informed the Employees the respondenthad decided to terminate Employees' contracts on account of redundancy. They were in effect, notices of termination under section 40 [1] [f]. They notified Employees that their contracts had been terminated, and they should return to work on 1st January 2015, the effective date of termination, presumably to clear with the respondentand receive terminal dues. There was no notice issued under section 40 [1] [f], but the respondentpaid 1 month salary in lieu of such notice".

18 It is notable in this respect that there have been no definitive findings by this Court that a second notice is required to be issued under section40 subsection 1(f) of the *Employment Act* before a redundancy, as urged by the respondents. In *Thomas De La Rue (K) Ltd v David Opondo Omutelema* (*supra*), the requirements of section 40 that the trial court found had not been complied are those set out in section 40 (a) and 40 (c), and the specific issue on notices was whether a notice ought to be given to an employee after one has been given to the union under Section 40 subsection 1(a). This Court held as follows:

> "As far as we can deduce, the requirements of section 40 that the court found not to have been complied with by the appellant are those set out in section 40 (a) and 40 (c), leading to the further finding that the termination of the respondent was unfair within the meaning of section 45 of the Act.
>
> It is quite clear to us that sections 40 (a) and 40 (b) provide for two different kinds of redundancy notifications depending on whether the employee is or is not a member of a trade union. Where the employee is a member of a union, the notification is to the union and the local labour officer at least one month before the effective redundancy date. Where the employee is not a member of the union, the notification must be in writing and to the employee and the local labour officer. Section 40 (b) does not stipulate the notice period as is the case in 40 (a), but in our view, a purposive reading and interpretation of the statute would mean the same notice period is required in both situations. We do not see any rational reason why the employee who is not a member of a union should be entitled to a shorter notice."

19 In *Barclays Bank of Kenya, Barclays Africa Group (SA) Ltd vs Gladys Muthoni & 2 Others* (supra), the issue as regards the notices issued therein were that they were not issued by the employer but by a third party, and the trial court also found as it did herein, that the said notices were not redundancy notices but termination notices. In considering this issue, this Court observed as follows:

> "27. The trial court was of the view that there ought to have been two notices - a specific notice alerting the respondents about the impending redundancy and the reasons therefor,

and another one terminating their services. It reasoned as follows: "As noted by the Court in *Caroline Wanjiru Luzze vs Nestle Equatorial African Regional Limited*, the employer is supposed to give two (2) distinct notices on account of redundancy. Such must be in writing.

According to the trial court, there was no redundancy notice issued or served on the respondents. All they received was a 'termination letter', hence the finding that it was unprocedural.

28. In holding that view, the trial court was not alone. Maraga, JA in the *Kenya Airways case* (*supra*) also opined:

> "My understanding of this provision is that when an employer contemplates redundancy, he should first give a general notice of that intention to the employees likely to be affected or their union. It is that notice that will elicit consultation between the parties, and I will shortly show that consultation is imperative, on the justifiability of that intention and the mode of its implementation where it is found justifiable. At that initial stage, the employer would not have identified the employee(s) who will be affected. So that notice cannot have the names of the employees as Mr. Mwenesi contended. It does not have to be a calendar month's notice as Mr Mwenesi contended. The Act requires one month's notice. The period runs from the date of service of that notice. It is after the conclusions of the consultations on all issues of the matter that notices will be issued to the affected employees of the decision to declare them redundant."

20 It is evident that this courtdid not make any specific finding as regards a second notice being required under section 40 subsection 1(f) of the *Employment Act* in the two cases. The court in *Barclays Bank of Kenya, Barclays Africa Group (SA) Ltd vs Gladys Muthoni & 2 Others* (*supra*) in this regard made reference to the findings by Maraga JA (as he then was) in *Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others* Nairobi Civil Appeal No. 46 of 2013 (2014) eKLR. The said findings by Maraga JA (as he then was) were made in relation to paragraphs (a) and (b) of section 40, which require notice of the intended redundancy to be given to the employees likely to be affected and the labour officer for the area where the employer's business is situate.

21 The specific findings by the learned judge were as follows:

> "46. I disagree with Mr. Mwenesi that the appellant's letter of 1st August 2012 did not constitute the notice envisaged by section40(1)(a) of the *Employment Act* as it did not have the names of the affected staff and there was no notice addressed to the appellant's individual employees. My understanding of this provision is that when an employer contemplates redundancy, he should first give a general notice of that intention to the employees likely to be affected or their union. It is that notice that will elicit consultation between the parties, and I will shortly show that consultation is imperative, on the justifiability of that intention and the mode of its implementation where it is found justifiable. At that initial stage, the employer would not have identified the employee(s) who will be affected. So that notice cannot have the names of the employees as Mr. Mwenesi contended. It does not have to a calendar months' notice as Mr. Mwenesi contended. The Act requires one month's notice. The period runs from the date of service of that notice. It is after the conclusions of the consultations on all issues of the matter that notices will be issued to the affected employees of the decision to declare them redundant."

22 Therefore, the finding by the learned judgewas that the notice to be given to employees declaring them redundant is to be given after the conclusion of consultations on all issues arising from the redundancy, and was not pegged to, nor made in the context of section 40 subsection 1(f) of the *Employment Act*. In addition, the learned judge specifically held as follows as regards the application of section 40(1)(f) to the case in paragraph 43 of his judgment:

> " In this case, no issue was raised with regard to paragraphs (e), (f) and (g) regarding payment of salary in lieu of leave and notice of termination of employment on account of redundancy as well as settlement of severance pay. It is agreed that the appellant discharged its obligations on those requirements. I therefore only need to consider the issues of notice, the criteria employed in the selection of the affected staff and compliance with the CBA between the parties raised in respect of paragraphs (a), (b), (c) and (d)."

23 It is thus necessary in this appeal to interrogate and interpret the provisions of subsection 1(f), which provides that an employer shall not terminate a contract of service on account of redundancy, unless the employer has paid an employee declared redundant not less than one month's notice or one month's wages in lieu of notice. In our view, a grammatical constructionaccording to the rules and usages of grammar, syntax and punctuation, and a purposive construction that gives effect to the legislative intention, requires to be employed in giving a legal meaning to the sub-section.

24 In this respect, it is notable that a plain and contextual reading of subsection 1(f) shows that its express objective and purpose is the payment required to be made to employees affected by redundancy, and not the issuance of a notice. It is also notable that the legislative intention from the arrangement and content of the enactments in section 40 subsection (1) (d) to (g) was the provision of payments to be made to affected employees in a redundancy, and section 1(f) can only thus be construed within this context, as was done by Maraga JA in *Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others* Nairobi Civil Appeal No. 46 of 2013 (*supra*) as illustrated in the foregoing, and in *Africa Nazarene University v David Mutevu & 103 others* (2017) eKLR where this Court held as follows:

> " As stated earlier, the trial court was of the view that after the issuance of the notice under sub-section (b), the employer was obligated to issue a second notice under subsection (f).With respect, we differ with that construction and concur with the appellant that the section relates to payment in lieu of notice. Admittedly, the subsection is inelegantly drafted as it talks about "payment of one months notice" or "payment of one months wages in lieu". It is all about payment. If it was about a second notice, it should surely have said so in so many words."

25 Lastly, it would also be an illogical result to give a literal meaning to the sub-section of payment of one month's notice, and it would also be straining it too far to give it a meaning of one month's notice of termination before redundancy, in trying to resolve any grammatical ambiguity in the subsection.

26 It is thus our finding that the above interpretative factors discount a construction that a notice of termination is required by subsection (1)(f), or within the timelines held by the learned judge of the trial court. While such a notice may eventually require to be given in a termination on account of redundancy, it is definitely not one of the conditions to be met under section 40 subsection 1(f) of the *Employment Act* before the redundancy. In our view, the learned judge in the trial court appears to have conflated the payment in lieu of notice under section 40 subsection (1)(f), with the final declaration of termination by redundancy, and erred in finding that there is a requirement to issue a notice of termination before the redundancy under section 40(1)(f) of the *Employment Act*.

27 The trial judgealso held that the termination was unlawful for reasons that the Appellant used the notices of intended redundancy as notices of termination under section 40(1)(f). This finding was in error for two reasons. Firstly, as we have found, no notice of termination is required to be given before redundancy under section 40(1)(f) of the *Employment Act*. Secondly, an examination of the letters issued by the appellant lead us to a conclusion that they indeed were notices of intended redundancy required by section 40(1)(a) of the *Employment Act*.

28 The letter sent to the 1st respondent dated 29th January 2015 read as follows in this regard:

> "As a result of carrying out various vigorous consultations within Cargill which involved changing the Organisational structure, the management of Cargill Kenya Limited has realigned its business and for improved workflow and efficiencies, the position of a Human Resource Assistant within the Company will be declared redundant:
>
> The purpose of this letter is to inform you that on account of the said redundancy, your employment will be terminated on account of redundancy with effect from 28th February 2015 in accordance with section40 (1) of the *Employment Act*, 2007.
>
> Accordingly, you will be paid all your terminal dues as per the attached breakdown which includes one months' pay in lieu of notice, severance pay at the rate of 23 days for each completed year of service and pay on the accrued leave days in cash as provided under Section 40 of the *Employment Act*.
>
> A Certificate of Service will also be issued in accordance with section51 of the *Employment Act*. The aforesaid payment of terminal dues and issuance of the Certificate of Service is subject to your handing over all the Company property in your possession and payment in full of any outstanding debt due to the Company.
>
> Please note that with effect from 30th January 2015, you will proceed on paid leave. Kindly report back to work on the 27th of February 2015 at 8.00am"

29 Similar letters dated 1st December 2014 were also sent to the 2nd, 3rd and 4th Respondents informing them that their employment would be terminated on account of redundancy on 5th January 2015. In addition, the appellant brought evidence of letters dated 1st December 2014 on the notice of intention to declare redundancy sent to the County Labour Office at Mombasa and the Kenya Shipping, Clearing and Warehouse Workers Union which read as follows:

> "...As a result of carrying out various vigorous consultations within Cargill which involved changing the Organisational structure, the management of Cargill Kenya Limited has realigned its business and for improved workflow and efficiencies, the following positions within the Company will be declared redundant:
>
> 1 Stocks Clerk, currently occupied by Lilian Kivindu
>
> 2. Clearing & Forwarding Clerk currently occupied by Margaret Mukekya
>
> 3. Security Guard currently occupied by Caleb Nunda
>
> 4. Security Guard currently occupied by Michael Mathias
>
> 5. Cleaner currently occupied by Elvis Wale

6. Clearing & Forwarding Clerk currently occupied by Rosemary Asiko

7. Clearing & Forwarding Clerk currently occupied by Eunice Barasa

8. Clearing & Forwarding Clerk currently occupied by Henry Munyoki

9. Shipping Clerk currently occupied by Duncan Sigeria

10. Stocks Clerk currently occupied by Charles Ngachi

11. Cashier currently occupied by Fredrick Bosso

12. Port Clerk currently occupied by Charles Seko

The purpose of this letter is to inform you that on account of the said redundancy, the employment of the occupants of the above noted positions will be terminated on account of redundancy with effect from 5 January 2015 in accordance with section40 (1) of the *Employment Act*, 2007.

Accordingly, the above noted individuals will be paid all their terminal dues as per the attached breakdown which includes one months' pay in lieu of notice, severance pay at the rate of 23 days for each completed year of service and pay on the accrued leave days in cash as provided under section40 of the *Employment Act*.

A Certificate of Service will also be issued in accordance with section51 of the *Employment Act*. The Aforesaid payment of terminal dues and issuance of the Certificate of Service is subject to their handing over all the Company property in their possession and payment in full of any outstanding debt due to the Company...."

30 The subject and reference of all the said letters was stated to be a notice of the intention to declare certain positions redundant, and the tone of the letters informed of the positions that were proposed to be declared redundant, as well as the date and effect of the redundancy, which was to take effect one month later. The threshold required to be met under section 40(1) (a) and (b) of the *Employment Act* in this regard is notification 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." These requirements are all present in the said letters.

31 In addition, a plain reading and literal interpretation of the letters cannot lead to a conclusion that the same were letters of termination, and in any event, this is not the standard by which the notices required by section 40(1)(a) and(b) are required to be evaluated. The trial Judge therefore erred by finding that the Appellant did not communicate an intention to declare redundancy.

On Consultations and Dialogue

32 On the second issue as regards consultations and dialogue, the trial judgefound that there was no record of a three-way consultative meeting involving the Respondent, the Trade Union, and the Labour Office, and no consultation as contemplated in a redundancy process. The appellantsubmitted that section 40 of the *Employment Act* does not expressly provide any other means of initiating this dialogue by the employer other than issuance of these notices. To buttress this position, they made reference to

the holding in *Thomas De La Rue (K) Ltd v David Opondo Omutelema* (*supra*), that once notice has been given and in the event of a dispute, it was the responsibility of the union to pursue negotiations under section 62 of the *Labour Relations Act*.

33 The respondentson the other hand submitted that the learnedtrial judge's finding that there was no meaningful pre-redundancy consultation was correct, and placed reliance on the decision in *Barclays Bank of Kenya, Barclays Africa Group (S.A.) Ltd & Gladys Muthoni & 2 Others* (*supra*) which cited with approval the dicta of Murgor J. A and Maraga J. A. (as he then was) in *Kenya Airways limited and Aviation & Allied Workers Union Kenya & 3 others* (supra), for the proposition that consultations prior to declaration of redundancy resonate with our Constitution and international laws which have been domesticated by dint of article 2 (6) of the Constitution. They concluded and urge this court to find that there were no pre-redundancy consultations, but rather mechanical process to satisfy the motions of the law.

34 While the requirement of consultation is not expressly provided in section 40 of the *Employment Act*, this requirement is implied, as the main reason and rationale for giving the notices in section 40(1)(a) and (b) to the unions and employees of an impending redundancy . In this respect we wholly adopt the reasoning of Maraga J.A. (as he then was) in *Kenya Airways limited and Aviation & Allied Workers Union Kenya & 3 others* (*supra*), where the learned judge held as follows:

> " 49...Section 40(1) of our *Employment Act* does not expressly state the purpose of the notice. Although it also does not expressly provide for consultation between the employer and the employees or their trade unions before the final decision on redundancy is made, on my part I find the requirement of consultation provided for in our law and implicit in the *Employment Act* itself.
>
> 50. By dint of article2(6) of the Constitution, the treaties and conventions ratified by Kenya are now part of the law of Kenya. The Kenya Constitution, 2010 was promulgated on 27th August, 2010. Before then Kenya was a dualist state, which, like other dualist states, domesticated the treaties or conventions it ratified by legislation. By virtue of the provisions of this Article, however, the treaties or conventions which Kenya had ratified before that date, whether domesticated or not, automatically became part of the law of Kenya. The process of ratification of the treaties Kenya has entered and those it enters into after the enactment and entry into force of the Ratification of Treaties Act, 2012 is now through legislation.
>
> 51. Kenya is a State party to the *International Labour Organization* (ILO), which it joined in 1964 and is bound by the ILO conventions. Article 13 of Recommendation No. 166 of the ILO Convention No. 158-Termination of Employment Convention, 1982- requires consultation between the employers on the one hand and the employees or their representatives on the other before termination of employment under redundancy. It reads:
>
> > " 1. When the employer contemplates terminations for reasons of an economic, technological, structural or similar nature, the employer shall:
> >
> > a. provide the workers' representatives concerned in good time with relevant information including the reasons for the terminations contemplated, the number and categories of workers likely to be affected

and the period over which the terminations are intended to be carried out;

b. give, in accordance with national law and practice, the workers' representatives concerned, as early as possible, an opportunity for consultation on 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."

35 We can only add that in interpreting statutes, the courtshave the function of filling in the textual detail by implication, which arises either because it is directly suggested by the words expressed, or because they are indirectly suggested by rules or principles of law which are not excluded by the express wording of a statute. See in this regard the text by F. Bennion: *Bennion on Statutory Interpretation, 5th Edition*, at sections 172 to 174. Having regardto the legislative intention of the provisions of section 40 of the *Employment Act*, the international law and decided cases, it is our finding that consultations on an intended redundancy between the employer and the relevant unions, labour officials and employees is implied by section 40(1)(a) and (b) of the *Employment Act*.

36 Furthermore, consultation is also now specifically required by article47 of the Constitution and the *Fair Administrative Action Act*. Article 47 and section 4(3) of the *Fair Administrative Action Act* provide that where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-

(a) prior and adequate notice of the nature and reasons for the proposed administrative action;

(b) an opportunity to be heard and to make representations in that regard;

(c) notice of a right to a review or internal appeal against an administrative decision, where applicable;

(d) a statement of reasons pursuant to section 6;

(e) notice of the right to legal representation, where applicable;

(f) notice of the right to cross-examine or where applicable; or

(g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.

37 An administrative action is defined under the Act to include any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates. Employers fall within the category of persons whose action, omission or decision affects the legal rights or interests of employees, and more so the redundancy by the Appellant in the present appeal is not contested. The Appellant was therefore also bound by the provisions on consultation required by Article 47 and section 4(3) of the *Fair Administrative Action Act*

38 The nature and content of the consultations required to be undertaken in a redundancy process was explained by Maraga JA in *Kenya Airways limited and Aviation & Allied Workers Union Kenya & 3 others* (*supra*):

> " 52. The purpose of the notice under section40(1) (a) and (b) of the *Employment Act*, as is also provided for in the said *ILO Convention No. 158-Termination of Employment Convention, 1982*, is 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 to be taken to ensure that as little hardship as possible is caused to the affected employees"

40 We are likewise persuaded by the decision of the *Employment Appeals Tribunal in Williams vs Compare Maxam Ltd (1982) IRLR 83* as follows:

> " There is a generally accepted view in industrial relations that, in cases where the employees are represented by an independent union recognised by the employer, reasonable employers will seek to act in accordance with the following principles:
>
> 1. The employer will seek to give as much warning as possible of impending redundancies so as to enable the union and employees who may be affected to take early steps to inform themselves of the relevant facts, consider possible alternative solutions and, if necessary, find alternative employment in the undertaking or elsewhere.
>
> 2. The employer will consult the union as to the best means by which the desired management result can be achieved fairly and with as little hardship to the employees as possible. In particular, the employer will seek to agree with the union the criteria to be applied in selecting the employees to be made redundant. When a selection has been made, the employer will consider with the union whether the selection has been made in accordance with those criteria.
>
> 3. Whether or not an agreement as to the criteria to be adopted has been agreed with the union, the employer will seek to establish criteria for selection which so far as possible do not depend solely upon the opinion of the person making the selection but can be objectively checked against such things as attendance record, efficiency at the job, experience, or length of service.
>
> 4. The employer will seek to ensure that the selection is made fairly in accordance with these criteria and will consider any representations the union may make as to such selection.
>
> 5. The employer will seek to see whether instead of dismissing an employee he could offer him alternative employment."

40 A perusal of the record of appealshows that there was no evidence on record or presented to the trial judgeof any consultations undertaken in the manner stated hereinabove. We therefore find no fault in the finding by the trial judgethat the termination of the respondentswas unfair for want of the consultations envisaged by section 40 of the *Employment Act*.

On the Selection Criteria Employed

41 The third issue urged was whether the process and criteria employed by the appellantin selecting who was to be declared redundant was legal. The appellantsubmitted that the process of selection was in strict adherence to section40 (1) (c), and that it enlisted a professional consultant for the purpose of evaluating the appellant's organization and departmental structures with the aim of improving its workflow and efficiency. Further, that the consultant in its report of November 2014 made several recommendations which included declaring certain positions redundant. Therefore, that the criteria for selection of the employees affected was professionally and independently done, and was well explained in the report, as was also found in the case of *Thomas De La Rue (K) Ltd v David Opondo Omutelema* (*supra*).

42 The respondent's position on this issue was that the exercise carried out by Hawkins Associates did not yield an outcome upon which the Claimants' skills, ability and reliability could be judged.

43 The learned trial judgein this respect held that the appellantdid not satisfy the court on the selection parameters, and that the termination did not satisfy the standards relating to selection criteria, prescribed under section 40 (1)(c) of the *Employment Act*. In particular, that there was evidence that the Claimants were senior in time, and that their skills, abilities and reliabilities were not shown to be inferior to those they left in employment.

44 Section 40 (1)(c) in this regard requires the employer to have 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 selecting the employees to be declared redundant. As regards the application of this section, Maraga JA held as follows in *Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others* (*supra*):

> " I do not agree with the learned Judge that the "last-in-first-out" principle in section40(1)(c) must always be employed. The employer can use all or any of the criteria in that paragraph. In the present technological age, if the "last-in-first-out" principle is held to be mandatory, it may defeat the employer's objective of employing modern technology to carry out his business because it may be that the last employees to be employed, who according to this principle should be the first to exit, are the ones with the technological know how that the employer requires. All this notwithstanding, however, in a nutshell, I find that the appellant employed an opaque criteria in the selection of the retrenched employees that did not meet the statutory threshold."

45 Likewise, the selection criteria for redundancy was elaborated on in *Williams vs Compare Maxam Ltd* (*supra*) , while referring to the decision in *Greig v. Sir Alfred McAlpine & Son (Northern) Ltd*. [l979] IRLR 372 as follows:

> " In considering the reasonableness of a redundancy dismissal where a selection has to be made between those who are to be retained and those who are to be dismissed, the most important matter on which the employer has to satisfy the Tribunal is that he acted reasonably in respect of the selection of the particular employee. That normally involves two questions,

namely whether the employer adopted reasonable criteria for selection, and whether those reasonable criteria were reasonably and fairly applied in respect of the individual.

...If an employer adopts criteria other than last in first out for redundancy selection, however, he must be able to show both that the criteria adopted are reasonable and that he has applied those criteria rationally and objectively and, where large numbers are involved, on a reasonably structured and comparative basis. In a situation involving so many employees, it is not sufficient for a single person who makes the selection to say that he has done so on the basis of his management skill and judgment. When so many employees are involved, and a basis of selection is to be used which is open to the possibility of being influenced by over-subjective assessments, or even sheer prejudice, on the part of the person making the choice, it is important that management be able to show that they took sufficient steps to make their decision as objective and unbiased as possible."

46 On the burden of proving that the applicable selection criteria was applied, Githinji JA held as follows in *Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others* (supra):

> " 17....section 40(1) of the EA is merely procedural by its tenor. It has to be read together with sections 43, 45 and section 47(5) of EA. It is implicit from the four sections that to establish a valid defence to a claim for unfair termination based on redundancy, an employer has to prove:
>
> (I) the reason or reasons for termination.
>
> (II) that reason for termination is valid and that
>
> (III the reason for termination is fair reason based on the operational requirements of the employer and
>
> (IV) that the employment was terminated in accordance with fair procedure.
>
> However, as section 43(2) of EA provides the reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist and which caused the employer to terminate the services of the employer.
>
> Further, as section 47(5) of EA provides the burden of proving unfair termination of employment rests with the employee while the burden of justifying the grounds for termination rests with the employer.
>
> Thus, redundancy is a legitimate ground for terminating a contract of employment provided there is a valid and fair reason based on operational requirements of the employer and the termination is in accordance with a fair procedure. As section 43(2) provides, the test of what is a fair reason is subjective. The phrase "based on operational requirements of the employer" must be construed in the context of the statutory definition of redundancy. What the phrase means, in my view, is that while there may be underlying causes leading to a true redundancy situation, such as reorganization, the employer must nevertheless show that the termination is attributable to the redundancy – that is that the services of the employee has been rendered superfluous or that redundancy has resulted in abolition of office, job or loss of employment."

47 From the above provisions and decisions, the requirements in fulfilling the threshold set by section 40(1)(c) of the *Employment Act* can therefore be surmised as follows. First, an employer should include the factors set out in section 40(1)(c) of the *Employment Act* in the criteria for evaluating and selecting

the employees to be declared redundant. Second, the employer is required to prove that the criteria was objectively, uniformly and fairly applied. The Appellant has in this respect relied on a report titled 'Job Evaluation Report' dated November 2014 undertaken by its consultants, who also gave evidence in the trial Court. The Appellant argues that the said report stated the criteria for selection for redundancy.

48 A perusal of the said report shows that the reason given for the positions that were identified for redundancy was that they did not fit into the new organisational structure, and the criteria for selecting the said positions was informed by the challenges in aligning the positions with the expansion taking place in the organisation. It is notable in this regard that reasons were also given on how and in what manner each of the positions declared redundant did not fit in the new organisational structure, including those of warehouse supervisor, shipping clerk and Human Resources Assistant.

49 The factors that were used to analyse and evaluate the different job positions in order to determine their suitability for the new organisational structure included knowledge, skills and responsibilities, which were to be determined by work experience, qualifications and specialist training. These evaluation criteria were applied to all staff, and ranking done within the same clusters of job, which ranking is provided in Appendix IV of the report.

50 The trial judgein this regard analysed the application of this criteria to the Respondents in relation to the appellant's staff who were retained, and brought out inconsistencies and shortcomings in the application of the criteria, particularly in the ranking of the respondentson seniority and qualifications. Particularly as regards the 1st respondent, the trial judge noted as follows:

> " 84. The skewed nature of the evaluation carried out was particularly intense, in the case of the 1st claimantCaroline. She had a Bachelors' Degree in Human Resources Management. Margaret had endorsed her loan application with the Higher Education Loans Board for pursuit of Masters Degree in the same field. She had taken charge of the office of Human Resources Manager, for a period of about 20 months, when the substantive holder Millie Wanjala left. She also held a Higher Diploma in the field. She had worked for Kalu Works from 2004 as a Human Resources Officer. The Consultants downgraded her, preferring to push forward Caroline's understudy Rosemary Manene. The 1st claimantwas the senior most in her department and obviously held superior education and training records, in comparison to Rosemary Manene. Margaret told the Court Rosemary was expected to graduate with a Bachelors Degree in 2016. Consultant Johnson Onyango was not aware the 1st claimantwas the most senior in the department, after Millie Wanjala left. Why was this information not available to the Consultant?"

51 This finding was borne out by the evidence of the 1st respondent, and the evidence of Johnson Onyango Masero, the consultant who undertook the evaluation. The 2nd 3rd and 4th respondents testified that some of the retained staff in their category were junior to them, and some had been their trainees. The appellant did not in this regard provide the evidence or materials used to score and rank the respondents, that would have assisted in informing if their ranking was objective and fair. We are therefore of the view that the following observations and queries made by the trial judge in his judgment in this regard were valid:

> " 85. Annual performance appraisals would have shown if the claimantswere, or were not deficient on skill, ability and reliability. There were no records of performance appraisals carried out over the respective periods of employment, which would assist the courtin assessing whether the claimantswere skilled, abled and reliable. Margaret told the Court Caroline had positive appraisals over the years, except the last evaluation. Why would this be

so? There was a collection of congratulatory letters from the respondentto the 1st claimantin her file. In which way was Rosemary a better fit for the renamed roles of? How were the Employees selected to fill the new or renamed positions, better suited than the claimants?

52 It is thus our finding that while the appellantdid demonstrate that it had in place a selection criterion that incorporated the factors required to be considered in section 40(1)(c) of the *Employment Act*, it did not bring evidence to demonstrate that it applied the said criteria objectively and fairly, and the trial Judge did not err in his findings in this regard.

On the Award

53 The last issue was whether the award of compensation for unfair termination by the trial judgewas lawful and reasonable. The appellantchallenged the same to the extent that it did not take into consideration the fact that the respondentswere paid their terminal dues being one-month's salary in lieu of notice, severance pay at the rate of 23 days per every year worked and accrued leave days. It made reference to section49 (m) of the *Employment Act*, 2007 which listed the factors to consider in respect of compensation for termination of employment. The appellant conclude that the award of 8 months' salary with respect to the 1st respondent and 6 months in respect of the other respondents was therefore excessive.

The respondentson their part submitted that the learned trial judgeused his discretion having made considerations to the length of service and the manner in which the termination decision was arrived at.

54 Section 50 of the *Employment Act* obliges courts to apply the factors in section 49 of the Act in determining a complaint or suit involving wrongful dismissal or unfair termination of the employment of an employee. Section 49(1) provides as follows as regards payments to be made to an employee by an employer in the event of unjustified termination:

a. the wages which the employee would have earned had the employee been given the period of notice to which he was entitled under this Act or his contract of service;

b. where dismissal terminates the contract before the completion of any service upon which the employee's wages became due, the proportion of the wage due for the period of time for which the employee has worked; and any other loss consequent upon the dismissal and arising between the date of dismissal and the date of expiry of the period of notice referred to in paragraph (a) which the employee would have been entitled to by virtue of the contract; or

c. the equivalent of a number of months' wages or salary not exceeding twelve months based on the gross monthly wage or salary of the employee at the time of dismissal.

55 The compensation applicable in the circumstances of the present appeal is the one prescribed in section 49(1)(c). The factors that the Courts are required to take into account in determining the quantum in this regard are set out in section 49(4) as follows:

a. the wishes of the employee;

b. the circumstances in which the termination took place, including the extent, if any, to which the employee caused or contributed to the termination; and

c. the practicability of recommending reinstatement or re-engagement

d. the common law principle that there should be no order for specific performance in a contract for service except in very exceptional circumstances;

e. the employee's length of service with the employer;

f. the reasonable expectation of the employee as to the length of time for which his employment with that employer might have continued but for the termination;

g. the opportunities available to the employee for securing comparable or suitable employment with another employer;

h. the value of any severance payable by law;

i. the right to press claims or any unpaid wages, expenses or other claims owing to the employee;

j. any expenses reasonably incurred by the employee as a consequence of the termination;

k. any conduct of the employee which to any extent caused or contributed to the termination;

l. any failure by the employee to reasonably mitigate the losses attributable to the unjustified termination; and

m. any compensation, including ex gratia payment, in respect of termination of employment paid by the employer and received by the employee

56 A redundancy by its very nature adversely affects employees without any fault or wrongdoing on their part. The employees therefore need to be cushioned from these adverse effects. The respondentsdo not dispute that they were paid one-month's salary in lieu of notice, severance pay at the rate of 23 days per every year worked and accrued leave days. It is our view that the compensation of 8 months' salary for the 1st respondent and 6 months' salary in compensation for unfair termination for the 2nd 3rd and 4th respondents in the circumstances was on the excessive side, after taking into account the relevant factors that are provided in paragraphs (a), (e), (f), (g), (h) and (m) of section 49(4) hereinabove.

57 It is also notable that the trial courtmade a slightly higher award of compensation to the 1st respondent on account of more acute unfair treatment. Our view is that the higher award was not justified, for reasons that the unfair treatment was a finding in relation to all the respondents, and the effect of the unfair termination arising from the redundancy was the same for all them. Lastly, this is not one of the factors required to be taken into account under section 49 (4) of the *Employment Act*. In our view, an award of 4 months' salary in compensation for unfair termination pay for each of the respondents would be appropriate and reasonable in the circumstances.

58 This appeal therefore partially succeeds to the extent of the following orders:

1. We find and order that a notice of termination before declaring a redundancy is not a requirement or condition under section 40(1)(f) of the *Employment Act*.

2. We set aside the trial Judge's award of compensation for unfair termination to the 1st, 2nd, 3rd and 4th claimants in the judgment dated 30th July 2017, and substitute it with an award of compensation for unfair termination of

four months' gross salary as at the date of termination of employment due to redundancy to each of the 1st, 2nd, 3rd and 4th claimants.

3. All the other orders in the judgment of the trial courtdated 30th July 2017 are hereby affirmed and upheld, save to the extent that they may have been modified or qualified by the findings made in this judgment.

4. Each party shall bear its own costs of this appeal.

59 Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF OCTOBER, 2021.

W. KARANJA

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JUDGE OF APPEAL

MUMBI NGUGI

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JUDGE OF APPEAL

P. NYAMWEYA

.....

JUDGE OF APPEAL

I certify that this is a

True copy of the original

DEPUTY REGISTRAR