



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: KOOME, ASIKE-MAKHANDIA & KANTAL, J.J.A.)**

**CIVIL APPEAL NO. 440 OF 2018**

**BETWEEN**

**BARCLAYS BANK OF KENYA.....APPELLANT**

**AND**

**AGNES WACHU WAMAE & 104 OTHERS.....RESPONDENTS**

*(Being an appeal from the Judgment and Decree of the Employment and Labour Relations Court of Kenya at Nairobi (Nduma Nderi, J.) dated 26th October, 2018*

*in*

**ELRC No. 806 of 2011)**

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**JUDGMENT OF THE COURT**

In a goodwill end of year message to all staff of Barclays Bank of Kenya (“**the appellant**” or “**the bank**”) dated 24th December, 2010 its Managing Director for East and West Africa reviewed the bank’s operations for the year but informed staff that there was need for cost cutting. This is how that information was captured:

***“Restructuring***

***You may have noticed, during 2010, increased pressure on margins for us to remain competitive. We must become a much more efficient organization, with smarter processes, increased levels of productivity and reduced overlaps between functions.***

***In order to achieve this, we have embarked on a bank wide cost review exercise, led by Joseph Muremwa, reviewing all key cost items in the bank, including staff costs. This process is ongoing and its early to share its full impact on people at this stage. However, it is aimed to focus on management level jobs and expected headcount reduction is likely to be small in the context of our overall headcount.***

***I know that this exercise has caused some degree of anxiety in the business, but we hope to complete and communicate the outcome and other associated details by the end of January 2011.***

***Thank you again for your efforts and commitment in2010, and I would like to wish you and your families a happy and safe holiday season.”***

This was followed by a document titled “**Some Frequently Asked Questions**” where it was explained that the bank had not embarked on redundancy of staff but had decided to restructure where some roles and positions would be changed or merged; this would affect 200 out of the 3600 employee base; it would involve both permanent and contract employees. On terms of the exit:

***“The offer we are providing is fair and exceeds the minimum legal requirements. Eligible employees also will be entitled to their year end bonus. Moreover, employees will benefit from extensive outplacement support, which includes skills training, and a***

***business plan development course .... should they choose to start a business of their OWN.”***

As promised in his letter of 24th December, 2010 the (bank's) Managing Director by a letter dated 18th January, 2011 informed all staff that the exercise being undertaken would affect approximately 200 management level staff; that those affected would be advised by their line managers by Friday of that week; that union and management staff associations had been briefed on full details of the programme and their input had been taken into account; that the exercise was not an early retirement scheme but rather was a process that would affect employees whose roles were likely to change as a result of realignment – because the exercise had created anxiety within the bank it would be concluded quickly and in the fairest manner possible.

The bank then issued letters titled **“Organization Restructure”** to the 105 respondents in this appeal, amongst other employees. The letters are similar in all respects save the period each respondent had worked for the bank, position held and the final exit package. We will examine the letter issued to **Abush Ahmed Mohamed** (the 12th respondent) which appears at pages 118 - 122 of the record which letter is typical of the letters issued to the respondents. This letter stated *inter alia* that Abush Ahmed Mohamed had accepted to exit the bank under the restructuring program, that the bank would release him from employment with effect from 1st February, 2011 and the exit terms included payment of 1 month consolidated pay in lieu of notice; payment of an exit package (in his case **Kshs.3,845,232**); 25% discount on immediate repayment of personal or house loans or staff preferential rates to continue for fully served personal and house loans; medical entitlement would continue to December 2011 on existing terms and conditions of a medical scheme; accrued leave days would be paid; if eligible bonus for 2010 would be paid; he would be allowed to continue operating a current account in the staff ledger; he would be allowed to withdraw pension benefits as per the rules of the defined contribution scheme – he was bound by the banks confidentiality rules. That letter was signed by the bank's HR Director and was accepted by Abush who signed and dated it. There was attached to the letter a computation of the exit package and the letter ended by **“Release”** signed by the bank and a witness, and Abush, to the following effect:

***“Release***

***Barclays Bank of Kenya Limited***

***Head office***

***P.O. Box 30120***

***Nairobi.***

***Dear Sirs***

***In consideration of the payment to me by Barclays Bank of Kenya Limited (the “Bank”) of the gross sum of kes.1,776,978 pursuant to the terms of the organization restructure. I hereby agree and this letter witnesses that I accept that the payment is in full and final settlement of all amounts, claims, expenses, losses, liabilities, benefits or entitlements that I have against the Bank. I declare that I have no claims against the bank in regard to the payment or my employment at the Bank and will not make in or to any court of law any other or further claims against the Bank, any of its directors, officers or employees arising from my employment with the bank or any other company within the group of companies of which the Bank is a member and the exit from the service of the Bank. I further acknowledge that any pension claims that I may have must be referred to the Trustees of the Bank's pension scheme.***

***In witness whereof this Release has been signed by Ahmed Abush the day and year first above written:***

***Signed by the said***

***In the presence of***

***Witness name Catherine Nganga***

***Address P.O. Box 1806-00100***

***Nairobi***

***Occupation Bank Retiree***

***Signed by***

***For and on behalf of Barclays Bank of Kenya Limited.”***

In a suit filed at the then Industrial Court of Kenya at Nairobi (now called "Employment and Labour Relations Court" – ELRC) the 105 respondents repeated the matters we have adverted to and stated that their termination of employment by the bank was within the provisions of **Section 2** of the **Employment Act** on redundancy; that they had honestly believed that the bank had computed their benefits properly in accordance with the Employment Act and that was why they had accepted the payments offered to them by the bank; that their claim was based on a term of the exit package which stated that they were entitled to:

***"Payment of exit package at one and a half month's pay for each completed year of service – pro rata, up to a maximum of 24 months."***

The respondents further claimed that the bank had computed and paid to them incorrect amounts that were as a result of fraudulent misrepresentation, concealment and/or non-disclosure of material facts resulting in them being paid reduced amounts, an action which they said was illegal. The respondents also claimed that termination of their employment was contrary to **Section 40**

(1) (g) of the **Employment Act**, and at paragraphs 13 and 14 of Memorandum of Claim:

***"13. The Claimants state that the Respondent disregarded the provisions of Section 40 (1) (g) of the Employment Act which provides that; "An employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions; .... (g) the employer has paid to the employee declared redundant severance pay at the rate of not less than fifteen days pay for each completed year of service."***

***14. The Claimants further state that besides, it is now part of the Respondent's contractual obligations to the Claimants. However, as to the number of years of service of Claimants were entitled to, the Act is very clear beyond peradventure. The Claimants were entitled to each completed year of service. The Act does not permit the Respondent who pays for more than the minimum required by law to arbitrarily determine and put a limit to the number of years payable."***

It was further claimed that exit package was not paid on time but was delayed; that they had earned full year 2011 leave days; that the bank had breached the provisions of **Section 40 (1) (a)** of the **Employment Act**; the "Release" clause in the Organizing Structure was challenged. Particulars of each claimants' (respondents) claim run from paragraph 29-446 of Memorandum of Claim (pages 11 – 75 inclusive) of the record of appeal. We will also examine 2 claims as set out in the Memorandum of Claim as all the claims are similar save for the amounts claimed and the period served by each of the respondents.

**Agnes Wachu Wamae** (she is the 11th respondent and was the 1st claimant) stated that she was employed by the bank on 13th July, 1987 and left employment on 31st January, 2011 having worked for the bank for 23 years and 6 months; that the bank had declined to pay her terminal dues for all completed years of service. She stated at paragraphs 29 and 30 of the Memorandum of Claim:

***"29. The 1st Claimant states that based on her final consolidated pay of Kshs.174,638.00 per month, together with the 23 years and 6 months of service at the rate of one and a half month's pay for each year worked adopted by the Respondent should have resulted to an exit package under Section 40 (1) (g) above of Kshs.6,155,989.00 as opposed to the Kshs.4,191,312.00 that the Respondent paid to the 1st Claimant.***

***30. The 1st Claimant states that as result of the Respondent's breaches she has suffered substantial loss and damage which she now claims as follows:***

***Particulars of Special damage suffered by the 1st Claimant***

***a) Balance of exit package payable***

***Under Section 40 (1) (g) ..... Kshs.1,964,677.00***

***b) Untaken Leave days .....Kshs.163,155.00***

***c) Interest owing on (a) & (b) at 20% p.a.***

***From 31st January 2011 to 13th May, 2011.....Kshs.124,123.00***

***TOTAL payable ..... Kshs.2,251,955.00***

***(Attached are copies of the 1st Claimant's Certificate of service, pay slip and Termination letters marked "1")."***

**Ahmed Mohamed Abush** (he is the 12th respondent and the 2nd claimant) stated that he was employed by the bank on 2nd December, 1985 and left employment on 31st January, 2011 having worked for the bank for a period of 25 years and 2 months; similarly, that the bank had declined to pay him terminal dues for all completed years of service. He framed his claim as follows at paragraphs 33 and 34 of the

Statement of Claim:

**“33. The 2nd Claimant states that based on his final consolidated pay of Kshs.160,218.00 per month, together with the 25 years and 2 months of service at the rate of one and a half month’s pay for each year worked adopted by the Respondent should have resulted to an exit package under Section 40 (1) (g) above of kshs.6,048,229.00 as opposed to the Kshs.3,845,232.00 that the Respondent paid to the 2nd Claimant.**

**34. The 2nd Claimant states that as result of the Respondent’s breaches he has suffered substantial loss and damage which he now claims as follows:**

**Particulars of Special damage suffered by the 2nd Claimant**

**a) Balance of exit package payable**

**Under Section 40 (1) (g) ..... Kshs.2,202,997.00**

**b) Untaken Leave days ..... Kshs.154,951.00**

**c) Interest owing on (a) & (b) at 20% p.a.**

**From 31st January 2011 to 13th May, 2011 ..... Kshs.137,546.00**

**TOTAL payable .....Kshs.2,495,494.00**

**(Attached are copies of the 2nd Claimant Certificate of service, payslips and Termination letters marked “2”.)”**

The 105 respondents prayed for Judgment as follows:

**“(a) Special Damages of Kshs.301,855,477.00**

**(b) Cost of the suit**

**(c) Interest on (a) and (b) at court rates from the date of filing suit till payment in full**

**(d) Any other order that this Honourable Court may deem fit to grant in the circumstances.”**

The claim was resisted through a Memorandum of Response drawn for the bank by its lawyers, **Mohammed Muigai Advocates**. It was taken as a defence that, upon termination, the respondents were paid in full an exit package which included their dues as required in law:

**“... and further states that each of the Claimants was in fact paid an amount in excess of that prescribed by the Employment Act, 2007.”**

It was stated that the bank had complied with the Employment Act and had not breached any of the respondents employment or other rights, it being stated further that each of the respondents had received a sum in excess of the fifteen days for every year worked as required by the said Act. Of the release clause signed by each respondent it was taken as a defence at paragraph 8 of the Response:

**“8. As a result of the above, the Respondent avers that the Claimants are by estoppel prevented from bringing this Claim. In the alternative, the Respondent pleads that the Claim is mischievous, in bad faith and amounts to a clear abuse of the courts process and shall crave leave of this Honourable Court to have the Claim struck out.”**

Delay in paying exit package was denied, the bank stating that the respondents delayed in returning a check-list whose return was a condition precedent to paying exit package. The claim for leave for the year 2011 was denied, the bank taking as a defence that an employee was only entitled to leave after serving twelve consecutive months. It was further taken as a defence that the respondents had voluntarily signed release letters; that they had not declined to take the money in the exit package; they had not returned the money. Each of the 105 claims were addressed specifically (paragraphs 19 -123) (inclusive) of the Response) in typical fashion and it is convenient in this Judgment to address the claims by Agnes Wachu Wamae and Ahmed Mohamed Abush, the 1st and 2nd claimants. The bank stated that Agnes Wachu Wamae was only entitled to 15 days pay for 23 years of service and:

**“19. In response to paragraphs 27 – 30 of the Claim, the Respondent avers that the 1st Claimant was only entitled to 15 days pay for 23 completed years of service.**

a. At a salary of Kshs.174,638.00 per month 15 days pay amounts to Kshs.86,122.85.

*The Respondent avers that accordingly, she was entitled to a severance payment under section 40 (1) (g) of the Act of Kshs.1,980,825.53.*

b. She received an exit package of Kshs.4,192,312.00. this was Kshs.2,210,486.47 over and above what was due under section 40 (1) (g).

c. In addition to this, she was also paid one month's salary of Kshs.174,638.00 as well as outstanding leave of Kshs.11,483.05.

*The Respondent therefore denies that there is any balance payable or owing."*

On the claim by Ahmed Mohamed Abush the bank stated that he was only entitled to 15 days pay for 25 completed years of service and:

*"20. In response to paragraphs 31-34, the Respondent avers that the 2nd Claimant was only entitled to 15 days pay for 25 completed years of service.*

a. At a salary of Kshs.160,218.00 per month 15 days pay amounts to Kshs.79,011.62. The respondent avers that accordingly, he was entitled to a severance payment under section 40 (1) (g) of the Act of Kshs.1,975,290.41.

b. He received an exit package of Kshs.3,845,232.00. this was Kshs.1,869,941.59 over and above what was due under section 40 (1) (g).

c. In addition to this, he was also paid one month's salary of Kshs.160,218.00 as well as outstanding leave of kshs.5,267.44.

*The Respondent therefore denies that there is any balance payable or owing."*

It was prayed that the claim be dismissed with costs.

The suit was heard by **Nderi Nduma, J. Godfrey Wafuka Wasike** (he is the 31st respondent and was the 31st claimant) testified on his own behalf and on behalf of the other respondents. They had been retrenched through a circular dated 24th December, 2010 and letters dated 18th and 19th January, 2011 which letters had exit terms. He was a member of the Management Welfare Association Committee and all retrenched employees were management staff. Mr. Wasike further testified that his Committee was consulted by the bank before the decision to restructure was made and that the employees were given enough time to understand and digest the matter. He produced into evidence documents showing similar restructure packages in Gambia and Zambia stating that staff in those countries had received better exit packages. He questioned why the bank had capped the Kenyan package at 16 years when, according to him, many of the respondents had served the bank for much longer than 16 years. In his view capping the exit package of 16 years for all the respondents created discrimination which the Employment Act did not allow. In his case he stated that he had worked for 29 years and it was wrong to treat him like a colleague who had worked for 16 years.

The bank called its Head of Employment Relations, **Mr. Vasilqs Odhiambo** who testified that the process of restructuring the bank had been done in compliance with the law and that the respondents had been paid exit packages in excess of what the law required. He denied that any respondent had lost money stating that capping packages at 16 years was a business decision. According to him Barclays Bank in Gambia and Zambia were different entities unrelated to Barclays of Bank (Kenya) which was an independent entity.

In a judgment dated 12th October, 2018 the Judge found that the respondents had succeeded in the claim. He awarded each of them the claim as set out in the Memorandum of Claim as follows:

*"a) Payment at one and a half (1.5) months salary for each completed year of service by each one of the Claimants, as set out in the statement of claim and annexures thereto within 30 days of this judgment.*

b. The Claims for payment in lieu of leave for the year 2011 are dismissed.

c. The awards in (a) above are payable with interest at court rates from 31st January, 2011, the date of exit to payment in full.

d. The Respondent to pay costs of the suit."

It is those findings that have provoked this appeal. Seven (7) grounds are set out in Memorandum of Appeal where, in sum, the appellant faults the learned Judge on how he construed and applied **Section 40 (1) (g)** of the **Employment Act (the Act)**; the appellant says that the Judge erred in law and fact in failing to find that the exit packages given to the respondents were in excess of what was provided under the said **Section 40 (1) (g)** of the **Act**; the appellant faults the Judge for making an order that was not prayed for in Memorandum of Claim; that the Judge erred in law in construction of **Section 5(3)** of the said **Act** and finally:

***“7. The Learned Judge erred in fact and in law in finding that there had been discrimination contrary to Section 5(3) of the Employment Act in the calculation of the Respondent’s exit packages.”***

We are asked to allow the appeal, set aside the Judgment of the trial court and dismiss the claim that was in that court.

When the appeal came up for virtual hearing before us on 23rd June, 2020 due to the prevailing global COVID-19 pandemic the appellant was represented by Prof. Githu Mungai, SC, assisted by learned counsel Mr. Guto Mogere while the respondents were represented by learned counsel Mr. Koceyo. Both sides had filed written submissions and what was left was a highlight of the same. Prof. Muigai revisited the case where the bank had decided to engage in a restructure exercise by declaring redundancies. Counsel submitted that the bank was entitled to make that decision and was also entitled to cap benefits at 16 years – because, according to counsel, that package exceeded what the law (the Act) required. That, according to counsel, did not amount to discrimination as the overall package received by each of the respondents was better than what they would have received had the bank followed the provisions of the Act on minimum requirement where a redundancy is declared. In further submissions it was Prof Muigai’s case that the Judge erred in awarding damages for discrimination which had not been prayed for. On the “Release” signed by each respondent learned counsel submitted that the respondents had not returned the money paid to them and he faulted the trial Judge for not making a finding on this issue. He also faulted the Judge for awarding special damages which counsel submitted had not been pleaded or proved. In final submissions counsel faulted the Judge for failing to compute what was payable to each of the respondents, a judicial function falling on the shoulders of the Judge.

Then it was Mr. Koceyo’s turn to respond.

Counsel supported the Judgment submitting that the Judge did not err in any way. According to counsel the bank had declared redundancies and each of the respondents were entitled under **Section 40(1) (g)** of the **Act** to a severance pay based on salary and length of service. Counsel went on to state the employer is required to pay to an employee declared redundant 15 days salary for each year served and this, it was submitted, is a basic minimum in law. Counsel further submitted that the trial Judge did not award any general or special damages but ordered that each respondent be paid 45 days salary for each year worked. On whether the Judge had computed each of the respondents’ claim it was Mr. Koceyo’s submission that the claims were particularized in the Memorandum of Claim and the Judge was not required to carry out any further computation.

Prof. Muigai allowed his assistant, Mr. Mogere to give a rejoinder where he submitted that the Judge could not order the bank to pay to the respondents an exit package in excess of what the law required. Further, that each respondent received more than they were entitled to and executed “Release” without duress and the respondents were bound by the document.

We have considered the whole record and the submission made.

One of the principal issues raised in this appeal relates to whether the trial Judge erred in the way he read and construed the provisions of **Section 40 (1) (g)** of the **Act**. That Section provides that:

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

***(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.***

“Redundancy” is defined in **Section 2** of the **Act** as 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. Redundancy under the Act may arise where the employer has ceased or intends to cease continuing business through closure of plant, factory, mine or other workplace, with the total or near-total loss of jobs. It may also arise where there is a reduction in staffing requirements due to efficiency gains or falling demand for the company’s products or services. It may also arise where a company has downsized operations or restructured the workforce following, for instance, privatization or through a merger.

Justification for redundancy is upon the employer – See the case of ***Kenya Airways Limited v Aviation and Allied Workers Union Kenya & Anor [2014] eKLR***.

As we have seen in the case that was before the trial Court the bank in a communication to all staff on 24th December, 2010 informed them that there had been increased pressure on margins and the bank had decided to restructure its operations where some management staff would be affected. In the end the exercise affected 200 employees, including the respondents. One of the exit terms given to each of the respondents declared:

***“Payment of exit package at one and a half month’s pay for each completed year of service – pro rata, up to a maximum 24 months.”***

We did visit the case of the 1st claimant, Agnes Wachu Wamae, who claimed that having served for 23 years and 6 months she was, at the rate of one and a half month’s pay for each year worked she was entitled to a package of **Kshs. 6,155, 989** instead of the package she received **Kshs.4,191,312**.

Ahmed Mohamed Abush (the 2nd claimant) claimed that he was entitled to **Kshs.6,048,229** instead of **Kshs.3,845,232** which he received. All the other 103 respondents made similar claims, the difference only relating to the actual claim made.

Of the fact that the respondents had served the bank for more than 16 years the trial Judge faulted the bank and held at paragraphs 24 and 25 of the Judgment:

***“24. The result of this discretion by the Respondent disadvantaged all the employees who had served more than 16 years in that –***

***a. All employees who had served for less than 16 years got paid severance pay for more years than they had served.***

***b. All employees who had served for 16 years got their full entitlement but***

***c. All employees who had served for more than 16 years did not get severance pay for the years they had served the Respondent above 16 years.***

***25. Upon a careful analysis of the provision of section 40 (g) of the Employment Act, 2007 and the facts of the case, the court has arrived at the following conclusion of law and fact;***

***a. The provisions of section 40 of the Employment Act are couched in mandatory terms.***

***b. An employer is at liberty to pay severance pay at a rate greater than 15 days salary for each completed year of service.***

***c. An employer is not at liberty to arbitrarily cap the number of years of service in respect of which the determined rate of payment is to be applied for the reason that, such a move as happened in this case –***

***i. Benefited unjustly employees who had served for less than 16 years.***

***ii. Employees who had served 16 years got their full dues.***

***iii. Employees who had served more than 16 years were deprived of their lawful entitlement by fact of long service.”***

The bank’s position before the trial court and before us is that it made a business decision and capped the exit package for each employee at 16 years for purposes of calculating an exit package where it had decided to pay each employee 1½ months’ salary for each year worked but capped at the said 16 years.

In respect of Agnes Wachu Wamae it was stated in Memorandum of Response that she had worked for 23 years and would have been entitled to a severance payment of Kshs.1,980,825.53 under **Section 40(1) (g)** of the **Act** but had received an exit package of Kshs.4,191,312 which was Kshs.2,210,486/47 over and above what the Act required.

In respect of Ahmed Mohamed Abush it was stated in the said Response that he had worked for 25 years and was entitled to Kshs.1,975,290/41 but was paid Kshs.3,845,232, Kshs.1,869,941.59 over and above what the Act required.

Particulars of the overpayments for each of the other 103 respondents were given in the Response and those particulars were not challenged by the respondents.

The respondents maintain that having taken a business decision to pay 1½ month’s salary for each year worked the bank was not entitled to cap the years served. We have considered this submission and cannot see any merit in it. What the law required was that the bank, which had decided to declare redundancies, pay to each employee declared redundant 15 days salary for each year of service. The employee declared redundant was thus entitled to be paid 15 days salary for each year of service. It was demonstrated before the trial Judge, and this was common ground, that the bank decided to pay to each of the respondent’s 1½ months’ salary for each year served, capped at 16 years, when the employees were entitled to 15 days salary for each year worked. The bank showed that the practical effect of that business decision it had taken was that each of the respondents received much more than the law required. The respondents did not lose, they gained and it is surprising that they turned around to sue the bank even after receiving the generous package and after executing documents confirming receipt of money (exit package) and that they were satisfied with it. There was no discrimination at all in the way the bank

undertook the restructure exercise and there was no breach of the Act at all. **Section 5** of the **Act** was not flouted in any way at all. The Judge erred in making the findings that he made and those findings should not be allowed to stand. We observe in passing that each of the 105 claims differed on the period each of the respondents had served the bank and the quantum of money each of the respondents was claiming. It is difficult for us to appreciate how Godfrey Wafula Wasike, the only witness called for the respondents, would have proved each of the said claims. We also observe that each claim comprised balance of exit package under **Section 40 (1) (g)** of the **Act**; untaken leave days and interest on both claims at 20% per annum from 31st January, 2011 to 13th May, 2011. The Judge granted the claims as pleaded but nowhere in the proceedings was evidence led to show the period served by each of the respondents. It was not explained why the respondents were entitled to that rate of interest. Also, the whole claim of Kshs.301,855,477 included interest at 20%. The Judge allowed the whole claim which included interest at 20% but also awarded interest at court rates. This was wrong.

In the end we find merit in this appeal which we allow by setting aside the Judgment of the ELRC dated 12th October, 2018. We award costs here and below to the bank.

**Dated and delivered at Nairobi this 6th day of November, 2020.**

**M.K. KOOME**

.....

**JUDGE OF APPEAL**

**ASIKE-MAKHANDIA**

.....

**JUDGE OF APPEAL**

**S. ole KANTAI**

.....

**JUDGE OF APPEAL**

*I certify that this is a true copy of the original.*

*Signed*

**DEPUTY REGISTRAR**