IN THE COURT OF APPEAL

AT NYERI

(SITTING AT NAKURU

(CORAM: NAMBUYE, SICHALE & KANTAI, JJ.A)

CIVIL APPEAL NO. 86A OF 2016

BETWEEN

PURE CIRCLE (K) LTD...……...…APPELLANT

AND

PAUL K. KOECH & 12 OTHERS…….. RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Kericho (Marete, J.) dated 19th July, 2016

in

ELRC No. 241 of 2015)

****

JUDGMENT OF THE COURT

In an amended statement of claim dated 30th October 2015, the 1st to the 13th respondents herein namely**:- PAUL KOECH, BERNARD RONO, DAVID BYEGON, PHILEMON LANGAT, PHILEMON CHERUIYOT, VIOLET ROTICH, ROBERT YEGON, BENARD CHEPKWONY, ALFRED RUTO, DAVID KETER, ERICK TOO, DAVID NJIRU** and **RICHARD KYALO** were the 1st to the 13th claimants respectively. **PURE CIRCLE (K) LTD**, the appellant herein was named as the respondent. The appellant cause of action was based on their claim that they were wrongfully and unfairly terminated on account of redundancy. As each of the respondents was employed on diverse dates in the statement of claim, each one of them (save the 13th respondent RICHARD KYALO) tabulated his/her claim based on the date that he/she was employed.

In a reply to the statement of claim, dated 29th September 2015, the appellant denied having unfairly and unlawfully terminated the respondents from employment. It averred that:-

> "***The Respondent admits that the Claimants were its employee*** (sic) ***until 17th September 2015 when their respective positions were rendered redundant through a resolution by its directors as the company was undergoing restructuring process***".

On 15th June 2016 the trial commenced before **MARETE, J. PAUL CHERUIYOT KOECH** (CW1) testified on behalf of the respondents whilst **JAMES MATHEW FAXTON** (DW1) testified on behalf of the appellant. The gist of CW1's evidence was that:

> "***We were not given any particulars of restructuring. We were only given one hour notice. This was oral as we waited for letters of dismissal. The Ministry of Labour was also not aware of the redundancy; other people were employed to take up our positions. These were Juliet Amboso, Kelvin Midland Richard, Wesley Rotich and another foreigner. There was no genuine case of redundancy.***"

On the other hand, the gist of DW1's evidence was that ***"…the redundancy was declared because the respondent was making losses year in year out. This is because production was low. P1 of our bundle is letter of termination on grounds of redundancy for Bernard Rono by myself on 16th September, 2014. The letter was received by the addressee. This was replicated in the cases for all claimants."***

In paragraph 4(vi) of the reply to the statement of claim the appellant averred that it notified the Labour Office in Nakuru on 15th September, 2015 of its intention to have some of its employees declared redundant.

In a judgment dated 19th July 2016 the learned Judge found in favour of the respondents. He concluded that:

> "***The claimants have demonstrated and displayed a case of unlawful and undue redundancy. The respondents in the termination of the employment of the claimants failed to pursue due process in the declaration of redundancy and subsequent termination of the employment of the claimants. I therefore find a case of wrongful, unfair and unlawful termination of the employment of the claimant and hold as such. So far for the 1st issue for termination."***

Having come to the above conclusion, the learned Judge awarded each of the respondent's his/her claim thus arriving at a grand total of Ksh.5, 093,937.00.

The learned Judge further directed that:

> "***The Commissioner for labour be and is hereby ordered to, with the involvement of the parties, compute severance dues payable in respect of the 12 claimants and file a report to court within 120 days of this judgment of court."***

The appellant was aggrieved by the said outcome and in a memorandum of appeal dated 16th November, 2016, raised two grounds of appeal. These are:-

> "**1.** ***That the learned judge erred in fact and in law thereby arriving at an erroneous finding that the respondents' termination was unfair and unlawful when there was evidence on recorded on the contrary.*** (sic)
>
> ***2. That the learned judge erred in fact and in law when he ordered the Labour Commissioner to compute severance dues payable to the Respondents when there is evidence on record that the Respondents were fully paid an issue that the learned judge failed to address himself in his judgment delivered on 19th July, 2016."***

The respondents were also not fully satisfied with the outcome of the trial and filed a notice of cross appeal dated 16th January, 2017 and raised 4 grounds of appeal. These can be summarized as follows:-

i. they were entitled to two months' notice and not one month's notice

ii. they were entitled to one month's salary in lieu of redundancy notice.

iii. the 1st respondent was entitled to mileage claims and refund of unauthorized recoveries.

iv. the 13th respondent was not granted his terminal dues.

On 31st May 2018 the appeal came before us for plenary hearing. The appellant was represented by learned counsel **Miss Nasimiyu** whilst the respondents were represented by learned counsel, **Mr. Nyabena**. Each of the parties highlighted their written submissions, the appellant having filed its written submissions and list of authorities on 24th April, 2018 and the respondents having filed their submissions and list of authorities on 29th May 2018.

According to the appellant, the respondents were served with redundancy notices on 16th September 2015 and the Labour Office was equally notified. The basis for redundancy was stated to be restructuring of the appellant. It was the appellant's contention that the Kenyan law does not provide for pre-redundancy consultations but only post redundancy dispute resolution. The appellant relied on the decision of ***KENYA AIRWAYS LIMITED VS. AVIATION & ALLIED WORKERS UNION OF KENYA & 3 OTHERS [2014] eKLR*** for the latter proposition. Further, the appellant maintained that it followed all necessary procedures in effecting the termination as the respondents who were offered their final dues and statutory payments which they had failed and/or neglected to collect their dues to date.

On the second ground of appeal it was contended that the learned judge erred in ordering the Labour Commissioner to compute severance pay. The appellant maintained that this was unnecessary as it had computed the number of days worked in September 2015, the accrued pro-rated leave days, 2 months' salary in lieu of notice and severance pay, being 15 days salary for every completed year for each of the respondents.

In opposing the appeal, the respondents invited us to find that the appellant failed to comply with **S.40 (1)** of the Employment Act 2007 and ***"… disputed that redundancy was the justified option, notably is the manner with which the claimants' services were being terminated;...***." They complained that the letter dated 16th September, 2015 was served upon them on the very date their services were being terminated; that the notice was too short and ran afoul the provisions of *S.40 (1) (b) of the Employment Act.* They relied on the decision of ***KENYA UNION OF DOMESTIC HOTELS EDUCATIONAL INSTITUTIONS AND HOSPITAL WORKERS (KUDHEIHA) vs AGA KHAN UNIVERSITY HOSPITAL NAIROBI [2015] eKLR*** wherein this Court stated as regards S.40 of the Employment Act:-

> "**24.** ***The Procedures applicable in a redundancy are therefore set out in law and are mandatory. The conditions precedent***

requires;

(a) A notice to the employees or to the union where there are unionized employees and the Labour Officer stating the reasons for and the extent of the intended redundancy;

(b) Non-union employees should receive a personal notice together with the labour officer;

(c) The selection criteria;

(d) Address the terms of the Collective Bargaining Agreement on redundancy on terminal dues without disadvantaging on terminal dues without disadvantaging non-union employees and where there is no collective agreement, such terms as not to disadvantage any employees; and

(e) Issuance of a termination notice…..

26. The notices envisaged under section 40 of the Employment Act are not mechanical or issued for the sake of going through a process. These processes affect employees and their jobs. Such notices should be carefully crafted prior to being issued. Such notices affect the employees behind the redundancy process.”

On severance pay, the respondents defended the learned trial judge's order to the Labour Officer directing that it computes severance pay as ***“the appellant dished out tabulations to the respondent ranging from 15 days to 45 days without justification whereas there were employees who had been employed between the years 2008 – 2010 entitling them to 6 – 8 years of severance pay”***

In respect of the cross appeal, the respondents faulted the trial judge for finding that the respondents are entitled to one month's notice in lieu of termination notice; erred in failing to find that the respondents are entitled to one month salary in lieu of redundancy notice as per section 41(1) (f) of the Employment Act; erred in not granting the 1st respondent mileage claims of Ksh.115,710/- and a refund of unauthorized deductions of Ksh25,000/- which had been pleaded and was not contested by the appellants.

We have considered the record, the rival written and oral submissions made before us, the authorities cited and the law. The appeal before us is a first appeal hence our duty is to re-analyze and re-assess the evidence and the record and reach our own findings and conclusions. In so doing however, we remind ourselves that unlike the trial Judge, we did not have the benefit of seeing and/or hearing the witnesses and we should respect the findings of fact by the trial Judge unless those findings are not backed by the evidence or the findings are perverse - see **SELLE VS. ASSOCIATED MOTOR BOAT COMPANY [1968] E.A 123**.

For a start, it is not disputed that the respondents and the appellants enjoyed the relationship of employer and employee until 16th September 2015 when the services of the respondents were terminated. Each respondent received a letter that stated.

“***RE: TERMINATION ON GROUNDS OF REDUNDANCY***

Currently the company is undergoing a restructuring process and a decision has been made that your position of County coordinator is no longer required and it is being made redundant effective immediately.

In accordance with your contract of employment, and the Employment Act 2007, please note that you will be paid as follows:-

1. Days worked month of September, 2015 (15 days)

2. Accrued prorated leave days to date – 25 days

3. Two (2) months' salary in lieu of notice

4. Severance pay (15 days per every completed year) – 75 days.

Please note that all the above computation will be subject to taxation.

You are expected to complete all clearance procedures and hand over all company property in your possession to the H.R. before receiving your final dues.

The company wishes you all the best in your future endeavours.

On behalf of;

Pure Circle (Kenya) Ltd.

16/9//15

James Foxton

General Manager

Accepted by

Name……..Signature……Date 16/09/15"

Attached to the letter of termination, was a letter indicating terminal dues that comprised of the 15 days worked in September 2015, prorated leave days, 2 months' salary in lieu of notice, less deductions. It will be appreciated that each of the respondent's computations was different, based on the year one was employed. Inevitably, severance pay is pegged on the number of years worked and the balance of leave days which was different for each of the employees. However, the number of days worked i.e. 15 days in September 2015 and the Notice period of 2 months applied to all the respondents. To this extent, it was not disputed that the letters of appointment provided for 2 months' salary in lieu of notice. In their cross-appeal, the respondents faulted the trial Judge for awarding 1 month's salary in lieu of termination notice. As submitted by the respondents, their claim of 2 months' notice was not contested by the appellant who rightfully provided for 2 months' salary in lieu of notice of termination in the computation of the entitlements of each of the respondents. Cleary, the learned Judge erred in providing for one month's salary in lieu of notice of termination as the letters of appointment provided for 2 months' salary in lieu of notice.

Be that as it may, the major bone of contention was the 12 months' salary being claimed by the respondents for unlawful termination and which the appellant contended the respondents were not entitled to. In our view, the law recognizes that an employer has a free-hand to organize its business in a manner that generates profits. In ***AORAKI CORPORATIONS LIMITED VS. COLLIN KEITH MCGAVIN CA 2 OF 1997 [1988***] **2 NZLR** cited with approval in ***KENYA AIRWAYS LIMITED V. AVIATION & ALLIED WORKERS UNION KENYA &3 OTHERS [2014] eKLR*** the court of Appeal of New Zealand, stated:-

> ***"…It is convenient in other termination cases, and essentials in redundancy cases, to consider whether the dismissal was substantively justified. Thus if dismissal is said to be for a cause it may be substantively unjustified in the sense of a cause not being shown or being subject to significant procedural irregularity as to cast doubt upon the outcome...redundancy is a special situation. The employees have done no wrong. It is simply that in the circumstances the employer faces, their jobs have disappeared and they are considered surplus to the needs of the business. Where it is decided as a matter of commercial judgment that there are too many employees in the particular area or overall, it is for the employer as a matter of commercial judgment to decide on the strategy to be adopted in the restructuring exercise and what position or positions should be dispensed with in the implementation of that strategy and whether an employee whose job has disappeared should be offered another position elsewhere in the business.***
>
> ***It cannot be mandatory for the employer to consult with all potentially affected employees in making any redundancy decision. To impose an absolute requirement of that kind would be inconsistent with the employer's prima facie right to organize and run its business operation as it sees fit. And consultation would often be impracticable, particularly where circumstances are seen to require mass redundancies.***
>
> ***However, in some circumstances an absence of consultations where consultation would reasonably be expected may cast doubts on the genuineness of the alleged redundancy or its timing. So, too, may a failure to consider any redeployment possibilities."***

Similar sentiments were expressed in ***G.N. HALE & SON LTD V. WELLINGTON CARETAKERS IUA.4*** cited with approval in ***KENYA AIRWAYS LIMITED V. AVIATION & ALLIED WORKERS UNION KENYA & 3 OTHERS [2014] eKLR*** wherein this Court stated :-

> ***"… a worker does not have the right to continue employment if the business can run more efficiently without him. So long as the employer genuinely believed that there was a redundancy situation, then any dismissal was justified, and it was not for the court, or the union, to substitute their business judgment with that of the employer."***

In our view the appellant cannot be penalized for having made a commercial decision in a bid to restructure its operation for its sustenance. In his judgment the trial Judge held as follows:

> "***In the entirety of this dispute, the claimants are not disputing redundancy per se. Their case is that the implementation of the redundancy in the circumstances fell short of the legal procedural requirements and is therefore unsuitable."***

Further, the Judge stated that respondents ***"… are merely questioning lack of involvement in their redundancy proceedings and the validity and legality if at all arising therefrom."*** Indeed, the learned Judge concluded:-

> "***The claimants have demonstrated and displayed a case of unlawful and undue redundancy. The respondents in the termination of the employment of the claimants failed to pursue due process in the declaration of redundancy and subsequent termination of the employment of the claimants. I therefore find a case of wrongful, unfair and unlawful termination of the employment of the claimant and hold as such. So far for the 1st issue for determination."***

The issue therefore, for our determination is whether the learned Judge was right in coming to the conclusion that the ***"…appellant failed to pursue due process in the declaration of redundancy and subsequent termination…"***

Section 40 of the Employment Act sets out 7 conditions which the employer must comply with in the event of redudancy. These are:-

> ***"40. (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 months' 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."

The above provisions were amplified in this court's decision of ***THOMAS DE LA RUE (K) LTD. VS DAVID OPONDO OMUTELEMA*** **[2013] eKLR** where this Court stated:

"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) …"

In the present appeal there is no evidence that the respondents were members of a union and hence by dint of S.40(b) of the Employment Act, the notification was to the employee and the Labour Officer. D.W. 1 insisted that the Labour Office was notified on 15th September, 2015. This assertion seems to have credence as a letter dated 16th September, 2015 addressed to the Labour Commissioner by the appellant makes reference to an earlier letter of 14th September, 2012. It reads:-

"Date 16th September 2015,

County Labour Commissioner

Ministry of Labour

Kericho Branch.

<u>RE: NOTIFICATION OF REDUNDANCY – MR. PAUL KOECH</u>

Further to our letter dated 14th September 2015 notifying you of redundancy process in this company, we wish to inform you Mr. Paul Koech who is one of the staff affected by the redundancy has declined to acknowledge receipt of redundancy notification.

We would appreciate your direction with regard to the aforesaid. Attached please find a copy of a letter notifying redundancy to Mr. Paul Koech.

Yours faithfully

Sign…….

For and behalf of PureCircle Kenya Limited

General Manager

James Faxton

cc

County Labour Commissioner

Ministry of Labour

Nakuru Branch

As stated in ***THOMAS DE LA RUE (K) LTD. VS DAVID OPONDO OMUTELEMA*** (supra) S.40 (b) unlike S.40 (a) does not specify the period of the notice. Suffice to state in their statement of claim the respondents did make a claim for redundancy notice of 1 month. We note that **Section 40(a)** provides for minimum of 1 month's salary in lieu of notice whilst **S.40(b)** is silent on the duration of the notice. We are however, prepared to find that an employee who is not unionsable is also entitled to minimum of 1 month's salary in lieu of notice just like a unionsable employee as provided in **S.40(a)** of the **Employment Act**.

Further, the appellant contended that the Kenya law does not provide to pre-redundancy consultation. In ***KENYA AIRWAYS LIMITED VS. AVIATION & ALLIED WORKERS UNION OF KENYA & 3 OTHERS*** (supra), this court held:

> ***"There are jurisdictions like South Africa where the law provides that the employer must consult before contemplating dismissing employees on the basis of employer's operational requirements. Section 189(1) of Labour Relations Act of South Africa provides so. There are also jurisdictions like Philippines as exemplified by the decision of the Supreme Court in Fasap v Philippine Airlines GR No. 178083 where the law provides that the employer's prerogative to bring down labour costs by retrenching must be exercised as a measure of the last resort.***
>
> ***That is not the law of Kenya. There is also the ILO's recommendation No. 166 (supra) which recommends consultation. There was however no evidence that the recommendation has been ratified by Kenya. Article 10 of the Constitution which provide for National Values and Principles of governance apply to private contracts between employers and employees. The law of Kenya does not provide for pre-redundancy consultation but only post redundancy dispute resolution."***

We agree. The law in Kenya does not provide for pre-redundancy consultation as it gives the employer a free hand to organize its operations with a view to realizing profit.

Having come to the conclusion that the law recognizes the fact of redundancy, it is our considered view that the learned judge erred in awarding compensation for loss of employment. Suffice to state that the respondents (if they were members of the union) were entitled to a minimum of one month's notice of redundancy, 2 months' notice of termination as per the letters of appointment, 15 days worked in September 2015, severance pay and unpaid leave days. All these were computed by the appellant who provided the number of years worked, unpaid leave days, two months' notice of termination (as opposed to what the Judge found as 1 months' notice). The respondent did not adduce evidence to controvert the number of unpaid leave days and the years of service. Suffice to state that their version (which did not significantly differ with that of the appellant) was merely stated in their statement of claim. The appellant also had its own version. The position of the law is that one who alleges has to prove. In the absence of proof, we have no option but to go by the figures provided by the appellant. Again, although the respondent alleged that other persons were hired to replace them, there was no proof of this.

We also note that the pleadings did not include the 13th respondent's claim and we are in agreement with the learned Judge's finding when he found that Richard Kyalo's claim, the 13th respondent is not pleaded or at all and therefore, it does not lie for consideration by us.

The upshot of the above is that we find that the learned trial judge erred in substituting the computation of the respondent's terminal dues of 2 months' salary in lieu of notice to 1 month's salary in lieu of notice which he awarded. He also erred in referring the matter to a Labour Office to calculate severance pay and yet the respondents had not established that they were owed much more than what was contained in the appellant's computation. Further, in view of what we have stated above the respondents were not entitled to compensation for loss of employment. They were however, entitled to 1 months' notice in lieu of redundancy. In our view the respondents should proceed to collect their terminal dues from the appellant which include 2 months' salary in lieu of notice of termination and 1 month's salary in lieu of redundancy notice. They will also get their 15 days salary, for days worked that month, severance pay and unpaid leave days as computed by the appellant. Accordingly, we set aside the judgment dated 19th July 2016 and substitute the orders therewith with what we have stated above.

As the appellant has partially succeeded in this appeal and as the respondents have partially succeeded in their cross-appeal, the order that commends itself to us is that each should bear its/his/her own costs of appeal.

Dated and delivered at Nakuru this 18th day of July 2018.

R. N. NAMBUYE

JUDGE OF APPEAL

F. SICHALE

JUDGE OF APPEAL

S. ole KANTAI

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR