IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, NAMBUYE & KOOME, JJ.A)

CIVIL APPEAL NO. 236 OF 2015

BETWEEN

AFRICA NAZARENE UNIVERSITY.....APPELLANT

AND

DAVID MUTEVU & 103 OTHERS.....RESPONDENTS

(An appeal from the Judgment and Decree of the Employment

and Labour Relations Court of Kenya at Nairobi (M. Mbaru, J)

dated 13th February, 2012

in

ELRC Cause No. 2286 of 2012)

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JUDGMENT OF THE COURT

The sole issue for determination in this appeal is the true construction of ***Section 40*** of the **Employment Act, 2007 ('the Act'),** relating to redundancy and more specifically, whether the section requires the issuance of two notices by an employer who wishes to declare redundancy. The **Employment & Labour Relations Court** (ELRC) **(M. Mbaru, J.)** found that two notices were necessary, while the appellant thinks otherwise, hence, the appeal.

The background to the appeal is this:

All 104 respondents herein were listed as the claimants in the Cause filed before the Industrial Court at the time in October 2012. The issue laid before the court was "*unfair redundancy and failure to pay compensation"* by their employer, African Nazarene University (hereinafter, '**the University**'). They were all, except four whose claims were dismissed for reasons that are not raised in this appeal, employed by the appellant in its four departments of Transport, Security, Estate and Institutional services of cleaning and catering. They sought the following orders:-

"1. That the termination of the Claimant's employment on account of redundancy was unfair.

2. ***That the Claimant's be paid compensation of twelve (12) months' salary as set out for each individual Claimant in paragraph 18 hereinabove totalling to Kshs.27,919,263/=.***

3. ***That the Honourable Court do issue such orders and give such directions as it may deem fit and just to meet the ends of justice.***

4. ***That each of the Claimants be issued with a certificate of service as per Section 51 of the Employment Act, 2007.***

5. ***The Respondent be condemned to pay the costs of this claim.***

6. ***Interest on 2 and 5 above at Court rates."***

In the year 2011, the University found itself in financial crisis as it was unable to invest more in lecturers, academic courses and research which were its core business. As a result, lecturers started leaving and senior staff resigned since the salaries paid were not competitive. New students kept away too, and without student enrollment there was no income. To make matters worse, the Commission for Higher Education had in the year 2010 reviewed the status of the University and found a low level of Masters and PHD degree holders supervising academic courses and research, and demanded more if the University was to remain operational. The solution was to restructure the University and it proceeded to do so by outsourcing the non technical services in order to reduce overheads. Inevitably, that entailed the declaration of redundancy of the respondents and it is in that process that the dispute arose.

The respondents say the manner of the termination of their employment was sudden and inhumane since the University called them for only one meeting on 22nd August, 2011 to inform them about the restructuring before termination letters were issued one week later and they were asked to leave. They reported to the Labour Officer who agreed with them that the termination was unfair and asked the University to pay them 12 months compensation but it never complied. Only the following payments were made to each of them:

"(a) Salary up to and including September 2011

(b) ***One month's salary in lieu of notice***

(c) ***15 days basic pay for each completed year of service***

(d) ***Any leave days earned but not taken***

(e) ***Any off days and overtime earned but not taken***

(f) ***Any off days and overtime earned but not taken."***

On the other hand, the University contended not only that the redundancy was justified but that it followed the law in terminating the services of the respondents. According to them, they called several meetings with the respondents to consult on the intended restructure; a major meeting was held on 22nd August, 2011 and there was a video recording to show for it; regard was paid to seniority in time, skill, ability and reliability of the affected employees; the principle of last in first out (LIFO) was followed; counseling services were given to the respondents; another meeting was held at the request of some of the respondents on 26th November, 2011; the redundancy was staggered into four phases - 30th September, 2011, 31st October, 2011, 3rd December, 2011 and 31st January, 2012; one month's notices were served on each employee before their dates of termination; the Labour Officer was notified; all statutory payments were made; an extra month's payment was made to each respondent although the law did not require it; and certificates of service as well as letters of recommendation were issued.

After considering the pleadings and the evidence on record, the trial court found that it was the

prerogative of every employer to determine the structures of its business and to redesign its organizational structure to suit the business requirement of profit making. In the process, however, the court emphasized, the employer must undertake the process within the law since there are employees whose livelihoods would be adversely affected. The law applicable was ***Section 40*** of the Act which provided for issuance of two notices to alert the employee: the first notice to all employees when the employer has reviewed its business situation and realized that redundancy was inevitable; the second to non-unionizable employees who must be served personally if they are affected. The court held as follows:-

> ***"45. In a redundancy, there is a second notice required. Before the particular employee identified as having been affected by the first notice is terminated, there should be a notice. Where it is not possible to give such notice, then there is provision for pay in lieu of such notice. In this case, the respondent gave a notice on 29th August 2011 to the first phase termination. This should have been the notice envisaged as under section 40(1) (f) as against the notice under section 40(1) (b) being the first notice. These two, section 40(1) (b) and 40(1)(f), have a fundamental difference where the first is to alert all employees there is a reorganization or restructuring about to commence which process may result in abolition of office, job or occupation and loss of employment as this is a redundancy process. With this knowledge in mind, the employees are able to support the process positively as they have no fault while the employer has to address the economic or systems change or collapse. The affected employees still possess their skills but due to the employer reorganization, their positions may be declared redundant and thus lose their employment. The long stretch of this process allows preparations by the employer to offer counseling, negotiations with possible new employer especially where a whole department is removed and in a case of outsourcing like in case cited by the respondent of Elizabeth Washeke & others, the employer may invite potential employers to give the affected new opportunities by possible employment. Once the employer is able to specifically determine the particular employees affected, then a personal termination notice of not less than one month must issue. This is the essence of these two sections of the Employment Act."***

With that statement of the law, the trial court found that the University knew long before 2011 that it was going to restructure but never issued the crucial first notice to alert its workers. When the redundancy was declared, the court found, the one month notices were issued at short notice thus forcing the respondents to frantically and stressfully go about reorganizing their lives. For those reasons, the court held, the University was guilty of an unfair labour practice and therefore the respondents were unfairly declared redundant. On the facts, the court found that the University had largely complied with the law as there was a clear demonstration of a good effort to address the situation in the best way possible. By the year 2013, positive effects of the restructuring were experienced in the University which became self sustaining and opened new branches elsewhere. The respondents had on the other hand lost their income. The court, in exercise of its discretion, awarded each of them three months' salary as compensation.

Those are the findings challenged before us. Seven grounds are set out in the memorandum of appeal, but, as stated at the opening paragraph of this judgment, the only issue urged by learned counsel for the University, **Mr. Peter Gachuhi,** instructed by M/s Kaplan & Stratton, Advocates, is on the interpretation of ***Section 40*** of the Act. In written submissions and oral highlights, counsel was emphatic that there was no requirement for two different notices under ***Section 40*** besides the one required under ***Section 40 (1) (a)*** where the employees are unionised and ***Section 40 (1) (b)*** where they are not. In his view, the reference made by the trial court to ***Section 40 (1) (f)*** as a provision for notice when in fact it was a provision for payment *in lieu* of notice, was erroneous. He cited the case of ***Thomas De La Rue (K) Ltd vs David Opondo Omutelema [2013] eKLR*** where this Court held that the only applicable redundancy notices are those provided for under ***Sections 40 (1) (a)*** and ***(b)*** of the Act. It also held that the employer was not required to hold direct consultations with the employee and that a notice given to the Trade Union discharged the duty of an employer under the Act. In the case of un-unionised employees, only one notice to the employee was necessary and this, the trial court found, had been given to the respondents. Counsel urged us to find that the court misapplied the law in respect of notices, the sole basis on which the finding of an unfair labour practice was hinged. Counsel further argued that the trial court did not consider the admitted fact that the University paid each respondent one more month's salary *ex gratia*, which payment would satisfy the provisions of ***Section 40 (1) (f)*** even if no notice was served. He urged

us to interfere with the discretion of the trial court due to those misdirections.

Responding to those submissions, learned counsel for the respondents, Mr. Alfred Nyabena, affirmed that ***Section 40*** is the bedrock of redundancy. He conceded that the University was justified in declaring redundancy as the trial court did not find otherwise, but submitted that the lawful procedure was flouted. In his view, the procedure enumerated under ***Section 40 (1)*** has seven sequential and mandatory conditions which must be fulfilled for the redundancy to be considered fair. He agreed with the interpretation of the trial court that ***Section 40 (1) (b)*** caters for the first notice while ***(f)*** caters for the second notice to the same employee, which was different from a notice given under ***Section 41*** of the Act on termination. Counsel cited the case of ***Kenya Union of Domestic Hotels Educational Institutions and Hospital Workers***

(KUDHEIHA) vs Aga Khan University Hospital Nairobi [2015] eKLR, a Ruling made by the same Judge (Mbaru, J.) summarising the provisions of ***Section 40 (1)*** as follows:-

> ***"24. The procedures applicable in a redundancy are therefore set out in law as above. The conditions precedent require;***
>
> *a.* ***A notice to the union 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; and***
>
> *d.* ***Address the terms of the Collective Bargaining Agreement on redundancy on terminal dues without disadvantaging non-union employees.***

Counsel urged us not to disturb the exercise of the discretion of the trial court and to follow the principles established by this Court in ***United India Insurance Co Ltd vs East African Underwriters (K) Ltd [1985] KLR 998.***

We have reappraised the evidential material in the appeal record as we must under ***Rule 29 (1) (a)*** of the Rules of this Court with a view to arriving at our own conclusions in the matter, even as we respect the findings of fact made by the trial court. No factual findings, however, are in issue in this matter. It is common ground, and the trial court so found, that there was justification for the redundancy declared by the University. The court further found that the University largely complied with the law and procedure relating to redundancy except for the crucial omission to issue a second notice which amounted to an unfair labour practice, hence the issue of law before us.

The starting point would be to reproduce ***Section 40*** of the Act and highlight the provisions in issue:

> "***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, abilityand 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.***

No issue arises from provisions **(c), (d), (e)** and **(g)** of the section since the University was found to be compliant. This Court, differently constituted, in the matter of ***Thomas De La Rue (K) Ltd vs David Opondo Omutelema [2013] eKLR*** had occasion to consider the construction of subsections **(a)** and **(b)** to the effect that both required different kinds of notices. It stated as follows:

> ***"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."***

We agree with that construction as well as the observation that ***subsection (b)*** says nothing about the length of the notice or the contents. In our view, however, the only difference in both sub-sections is whether an employee is a member of a trade union or not. A proper construction of both subsections would show that the phrase:

> ***"...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.."***

is common to both kinds of employees. So that, whether an employee belongs to a trade union or not, the reasons and period of notice should be spelt out.

The respondents in this matter were not unionised and therefore ***subsection (b)*** applied to them. 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. The reasoning adopted by the trial court for importing the second notice was that the first notice was for facilitating consultations and the opportunity by employees to internalize the impending loss of employment. But ***Section 40*** says nothing about consultations although it is necessary to infer fair labour practices in every employment and labour relationship. Indeed it is a Constitutional imperative under ***Article 41***.

It is in evidence that the University held meetings with the affected employees to explain the restructuring process and provided counseling services amongst other initiatives to address the respondents' impending plight, before issuance of the notice envisaged under ***subsection (b).*** We may reproduce part of the letter

served on each respondent:-

> ***"RE: RESTRUCTURING OF SERVICES IN THE UNIVERSITY***
>
> ***This is a follow up to the meeting held with the staff on 22nd August 2011. As you were informed, the University has found it necessary to strategically restructure the operational management in order to maintain the quality of services in line with its mission and vision. These changes will entail outsourcing some of the services as needs direct. The service you have been providing is among those that have been outsourced. Therefore, the University will not require your service beginning 3rd September 2011. However, the month of September 2011 will serve as month of notice of intention.***
>
> ***We wish to record our appreciation for the good work you have been doing since you joined this University and wish you well for the future. In accordance with the University terms of service and the Employment Act, the Finance Department is requested to pay you the as follows:."***

The rest of the letter addresses the terminal benefits and pension entitlements. In sum, and we so find, the University not only complied with the statutory requirements but also paid each employee one month's salary in addition to one month's notice when they were not working. That hardly amounts to unfair labour practices.

We are satisfied that the trial court made an error in the construction of the relevant law in this matter and there is sufficient basis for interfering with its finding and discretion. We allow the appeal on that account with the consequence that the Orders given by the Employment and Labour Relations Court on 13th February, 2014 and the Decree issued on 15th September, 2015 are hereby set aside. Considering the circumstances of this matter where the respondents lost their employment for the benefit of the University, we order that each party bears its own costs here and in the court below.

Orders accordingly.

Dated and delivered at Nairobi this 28th day of July, 2017.

P. N. WAKI

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR