



Banking Insurance and Finance Union v KCB Bank Kenya Limited (Cause 1615 of 2018) [2024] KEELRC 814 (KLR) (12 April 2024) (Judgment)

Neutral citation: [2024] KEELRC 814 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1615 OF 2018
MA ONYANGO, J
APRIL 12, 2024

BETWEEN
BANKING INSURANCE AND FINANCE UNION CLAIMANT
AND
KCB BANK KENYA LIMITED RESPONDENT

JUDGMENT

1. The Claimant is a trade union registered in Kenya under the [Labour Relations Act](#) to represent employees in the banking, insurance and finance sectors as set out in the membership clause of its constitution.
2. The Respondent is a commercial bank incorporated as a limited liability company pursuant to the provisions of the [Companies Act](#) and the [Banking Act](#).
3. The Claimant has a recognition agreement and has negotiated several collective bargaining agreements (CBA)s with the Kenya Bankers Association, an umbrella employers' associations for commercial banks. The Respondent is a member of the Association and is therefore bound by the recognition agreement and the CBAs negotiated between the Association and the Claimant.
4. The Claim herein was filed by the Claimant on behalf of its three members employed by the Respondent, hereinafter referred to as the "Grievants".
5. During the pendency of this suit, two of the Grievants reached settlement with the Respondent and withdrew from the case leaving only one Grievant, in respect of whom this judgment relates.
6. The suit herein was filed by the Claimant following a notice of redundancy issued by the Respondent in which it informed the Claimant of its intention to declare 3 subordinate staff redundant. The reason for the redundancies is given in the letter of notification of redundancy dated 27th November 2018 which is reproduced below:



- b. The Respondent be permanently restrained and/or prohibited from declaring the three
 - (3) employees redundant without following the provisions of Clause A7 (e) of the CBA.
 - c. Any other relief the court deems fits to grant.
 - d. The Respondent to pay costs of this suit.
9. Simultaneously with the Claim, the Claimant filed an application seeking orders that:-

PARAGRAPH 1.

Spent.

- 2. That this Honourable court be pleased to issue interim ex-parte orders restraining/prohibiting the Respondent from unfairly, unlawfully and unprocedurally terminating the services of the said Three (3) unionisable employees on the basis of redundancies pending the hearing and determination of this Application and statement of claim.
 - 3. That the Honourable court do issue an order prohibiting the Respondent themselves or by their recognized agents or principals from unlawfully, unfairly and unprocedurally terminating the services of the said three (3) unionisable employees until this Application and statement of claim is heard and determined.
 - 4. That the Honourable court do issue an order compelling the Respondent to stop the already envisaged arbitrary, unfair, unlawful and unprocedural termination of the three (3) unionisable employees until the laid down procedures in the parties Collective Bargaining Agreement (CIBA) and the law are fully adhered to.
 - 5. That the Honourable court do issue an order to stop the Respondent from implementing the unfair, unlawful and unprocedural redundancy.
 - 6. That this honourable court is prayed to declare the intended redundancy of the three (3) unionisable employees by the Respondent null and void as well as untenable for reasons that:
 - a. It is unfair/unlawful/wrongful and unprocedural.
 - b. It is discriminatory in that it targets the unionisable employees for reasons of being found at the wrong place at the wrong time in the department/services that is said to be outsourced.
 - 7. That this Honourable court do award costs of this suit in favour of the Applicant as foresaid.
10. On 21st December, 2018 the Court granted prayer 2 of the application.
11. The parties thereafter attempted out of court settlement and conciliation at the Ministry of Labour but both attempts failed to resolve the dispute.



12. The Respondent filed its response to the claim vide its Memorandum of Reply dated 21st May, 2021 in which it states that on 23rd April 2018, the Executive Committee of the Respondent held a meeting during which the provision of local courier, mail bag and dispatch services were reviewed and it was agreed that the three services would be outsourced to improve efficiency and enhance flexibility of the Respondent's operations to enable the Respondent concentrate on its core operations. Further, that there would be rationalization of messengers in the Respondent's Kencom and Upperhill branches based on the volume of work and the Respondent's permanent messengers would be reviewed in the year 2018.
13. That following the Respondent's decision to fully outsource the provision of its local courier services, mailbag and managerial services and to rationalize messengers in its Kencom and Upperhill Branches, the Respondent notified the Secretary General of the Claimant of its intention to declare the Employees redundant in compliance with section 40(1) of the Employment Act 2007 and Clause A7 of the Collective Bargaining Agreement.
14. The Respondent states that it held a staff meeting on 27th November 2018 during which it informed its employees of the decision to fully outsource the mailing services function. On the same date, notices of termination of employment on account of redundancy were issued to the Employees affected by the redundancy.
15. That the notices detailed the terminal benefits payable to the employees and further informed the employees that they were at liberty to seek available opportunities through any internally advertised positions during the period of one month from the date of the letter failing which their last date of employment would be 31st December 2018.
16. The Respondent averred that it complied with the CBA between Kenya Bankers Association and the Claimant, that it was within its right to declare the employees redundant and that the redundancies were not discriminative either under Article 27 of the Constitution or the provisions of the Employment Act.
17. The Respondent further stated that Cause A7 of the CBA on the principle of last in first out was inapplicable to the redundancies as all the staff in the mail and service functions were declared redundant.
18. The claim was heard on 21st July, 2022. The Claimant opted not to call any witness. The Respondent however called one Robley Ngoje, its Head, Employee Relations and Wellness, who testified as RW1. He adopted his witness statement and the documents filed on behalf of the Respondent. He further reiterated the averments set out in the Memorandum of Reply.
19. Upon cross-examination RW1 stated that there were a total of 13 messengers working for the Respondent. That the 3 Grievants affected by the redundancy were working in one department. That they were not employed for that department alone and they could have worked in other departments. He testified that only mailing department was picked for the redundancy. That the criteria was that the work in the department had completely been outsourced.
20. RW1 stated that the 2 Grievants who withdrew their cases left employment on medical grounds and were paid the same terms as offered by the Respondent for the redundancy.
21. RW1 testified that the other messengers who were retained in employment were not performing any role in mailing and the three selected for the redundancy were in Mailing Department and did not possess the skills that the others had.



22. On re-examination RW1 testified that the 3 messengers in Mailing Department were responsible for receiving and dispatching mail from a central place called Central Mailing Services and were not performing any other duties. That when that work was outsourced there was no other work that they could do.
23. He testified that out of the 10 messengers retained, 7 were working at cash management series which is a very specialised service and that they had been trained for the job and had acquired special skills.
24. That the other 3 were working in the office of the CEO combined with legal office. That because of the sensitivity of the documents their services were not outsourced.

Claimant's Submissions

25. The Claimant submitted that although originally the claim was for 3 Grievants, the submissions touched on only one as the other two had been retired on medical grounds. That the two who were retired were Lucy Njeri Mwangi and Nicholas Oundo Machyo, while the only Grievant on whose benefit the submissions were filed is Tike Emily Asser. The Claimant submitted that the two Grievants who were retired on medical grounds were paid benefits attached to such retirement in addition to the redundancy package offered by the Respondent.
26. It was submitted by the Claimant that the Grievant Tike Emily Asser (herein is referred to as the Grievant) has been enjoying the orders issued on 21st December 2018. That the delay in concluding this case was occasioned by several adjournments by the Respondent to try and settle the claim out of court.
27. The Claimant submitted that the issue for determination is whether the intended termination of the Grievant's employment on account of redundancy was in compliance with Clause A7(e) of the CBA as read together with Section 40(1)(e) of the *Employment Act* and whether the Claimant is entitled to the reliefs sought.
28. The Claimant submitted that the Respondent did not apply the LAST IN FIRST OUT principle as provided in Section 40(1)(c) of the Act and Clause A7(e) of the CBA.
29. It was submitted that the category of employees affected by the redundancy was subordinate staff (messengers) in the employ of the Respondent. That the selection was not done fairly with regard to seniority in time, skills, ability and reliability of the class of employees affected by the redundancy.
30. It was submitted that RW1 testified that there were 10 messengers in the bank. That all the said messengers should have been assessed together with the 3 targeted for redundancy. That the employees working in Mailing Services Department should not have been targeted.
31. It is submitted that the Respondent failed to prove that the employees declared redundant could not have been deployed or re-assigned to other duties within the Bank. That employees have no control over the duties allocated to them or the department they were deployed to.
32. The Claimant relied on the decision in *Jane 1 Khalechi v Oxford University Press E.A. Ltd [2013] eKLR* where the Court stated-

An employer will not be allowed to just cite re-organisation and without any basis identify and single out an individual for termination. Fair procedures demand that an employee who has given their labour to an employer and in this case the claimant record of 15 years should have been a major consideration over and above meeting other procedural requirement in a process like the one the respondent seeks to rely on for her termination.



33. The Claimant further relied on the case of *Javan Were Mbango v H. Young & Co. (E.A) Ltd* [2012] eKLR where the court stated that “Positons and not employees, become redundant.”
34. The Claimant further relied on the case of *Hesbon Ngaruiya Waigi v Equitorial Commercial Bank Limited* (2013) eKLR; where the court held at page 5 that:

‘The employer must undertake a process to rationalize the various positions in their productivity and business line, which exercise affect various positions as held by their employees. Thus the positions become redundant and not the employees who are employed with skills needed by the employer. The process of redundancy does not affect the performance, qualification or conduct of the employees”
35. The Claimant submitted that the selection criteria was well addressed by the Court of Appeal in the case of *Kenya Airways v. Aviation and Allied Workers Union of Kenya and 3 others* [2014] eKLR where the court observed-

“It is evident that section 40(1)(c) requires the employer to apply all the selection criteria specified with due regard to seniority in time, skill, ability and reliability of each employee”.
36. The Claimant concluded that the Respondent having failed to comply with Section 40(1)(c) of the Act and Clause A7(e) of the CBA, the redundancy was null and void and the Grievant is entitled to the prayers sought in the claim.

Respondent’s Submissions

37. The Respondent submitted that on or about 23rd April 2018 the Respondent conducted its periodic review of its internal business functions. The findings of this review were discussed by the Executive Committee (EXCO). During this meeting, the provision of local courier, mail bag and dispatch services were discussed, and it was agreed that these services would be outsourced.
38. The EXCO further agreed that there would be a rationalization of messengers at the Respondent's Kencom and Upperhill branches based on the volume of the work and the Respondent's permanent messengers would be reviewed in the year 2018. That this decision was made to enable the Respondent improve efficiency and ensure the Respondent concentrates on its core operations
39. Following EXCO's decision, the Respondent notified the Secretary General of the Claimant Union and the Provincial Labour Officer of its intention to declare the employees redundant pursuant to Section 40(1)(a) of the *Employment Act* and Clause A7 of the CBA via letters dated 27th November 2018 which also stated that the redundancy process would be completed on 31st December 2018.
40. It was submitted that on 27th November 2018, the Respondent held a staff meeting where it communicated the EXCO's decision to its employees and sent out notices of termination of employment on account of redundancy to the Grievants. This letter served as a one-month notice, as the redundancy process was to be completed on 31st December 2018.
41. In the said letter dated 27th November 2018, the Respondent assured the Employees that their severance pay, salary in lieu of notice and salary in lieu of accrued leave days would be paid pursuant to Clause A7(b) and (c) of the CBA.
42. It is submitted that the Claimant challenged the redundancy process vide a Notice of Motion Application dated 18th December 2018. On 21st December 2018, Honourable Lady Justice Hellen



- Wasilwa granted interim ex parte orders preventing the Respondent from terminating the Claimants' employment on account of redundancy pending the hearing and determination of the Claimants application.
43. It is submitted that on 31st July 2019 it was confirmed that two (2) of the Grievant, Ms. Lucy Njeri Mwangi and Mr. Nicholas Oundo Machyo, settled their claims with the Respondent.
44. The Respondent submitted that the issues for determination were:
- i. Whether the Respondent complied with Section 40(I) of the Employment Act 2007, in conducting the redundancy;
 - ii. Whether the principle of 'last in first out' was applicable in the redundancy carried out by the Respondent; and
 - iii. Whether the Claimant was entitled to the reliefs sought from this Honourable Court.
45. On the first issue the Respondent submitted that it followed the provisions of Section 40(1) of the Act and the CBA in carrying out the Redundancy exercise.
46. The Respondent submitted that it is not in contention that the Respondent sent the requisite notices to the Secretary General of the Claimant and the Provincial Labour Officer all via letters dated 27th November 2018, informing them of the reason for the intended redundancy in line with the provisions of Section 40(1)(a) of the Employment Act. That this action was in line with the redundancy procedure as was set out in the case of *Thomas De La Rue (K) Ltd v David Opondo Omutelema (2013) eKLR*, where the Court held that:
- “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.”
47. It was submitted that the employees were similarly issued with letters dated 27th November 2018, in which the Respondent informed the them of the redundancy and the redundancy package. That the said letter also informed the employees that they could apply for positions in other departments. The Respondent thereafter held meetings with the Grievants to inform them of the process and positions they could apply for at the Respondent Bank.
48. The Respondent submitted that although it is not mandated by statute to issue an individual notice of redundancy to Ms. Tike Emily Asser and her other two (2) colleagues, the Respondent did so, going over and above its legal obligations
49. That the Respondent also complied with the CBA at Clause A7 which provided for the procedure and terminal dues for employees declared redundant in line with Section 40 (1) (d) to (g) of the Employment Act.
50. The Respondent cited and relied on the decision in *Joseph Macharia Warutere & 3 others v Saab Kenya Limited [2017] eKLR*, which in its view, echoes these sentiments.
51. The Respondent further relied on the decision in *Kenya Airways Corporation Ltd v Tobias Ogaya Auma & 5 Others [2007] eKLR*, where the court stated that one cannot prevent an employer from declaring employees redundant where there were genuine reasons to do so.
52. It is submitted that the Minutes of the EXCO meeting clearly set out the reasons for the abolition of the posts held by the Grievants, which was done to improve the efficiency and enhance the flexibility of the Respondent's operations.



53. It is submitted that such reasons met the threshold for reasons for the declaration of an employee redundant as was held in *Kenya Union of Domestic, Hotels, Educational Institutions & Hospitals Workers v Mombasa Sports Club* [2014] eKLR, where the Employment and Labour Relations Court stated that:

“It is clear from the cited statutory provisions that an employer is required to prove that the reasons given for the redundancy are valid and fair, and that the reasons are based on the operational requirements of the employer. It is within these parameters that the discussion must now turn.”

54. The Respondent further submitted that an employer has the right to declare an employee redundant without having to consult with the affected employees before making this decision. That the rationale for this was set out in *Kenya Airways vs. Aviation and Allied Workers Union Kenya and 3 Others* where the Court of Appeal agreed with the New Zealand case of *Aoraki Corporations Limited v Collin Keith McGavin*; CA 2 of 1997 [1998] 2 NZLR 278, where it was observed that:

It cannot be mandatory for the employer to consult with all potential 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.

55. On the second issue the Respondent submitted that the principle of "last in first out" was not applicable in this situation since the whole department under the mailing services function was declared redundant. That the "last in first out" principle is only applicable when the department the employees belong to is still operational, hence necessitating an employer to come up with an objective criterion to determine which employees would be declared redundant, and which employees would remain in employment.

56. It was submitted that similar sentiments were echoed by the Court in *Kenya Union of Commercial Food and Allied Workers v Tusker Mattresses Limited* [2021] eKLR, where it was stated that:

“In view of the fact that the entire branches were to be closed the provision at Section on selection criteria was not applicable as all the employees in the branches were affected.”

57. The Respondent submitted that it is important to clarify that all the three Employees were declared redundant as that function was to be outsourced to a vendor specializing in courier, deliveries, and dispatch services.

58. On the last issue the Respondent submitted that the Grievant is not entitled to any of the reliefs sought under the Claim. That such reliefs can only be issued by the Court where the Claimant has proved on a balance of probability that the redundancy was illegal and unlawful for want of procedure.

That no evidence was adduced by the Claimant to demonstrate that the Respondent did not adhere to the provisions of Section 40(1) of the *Employment Act* in declaring the Employees redundant.

59. The Respondent submitted that it has proved that the redundancy process was lawful, while the Claimant did not adduce evidence to rebut this. That as such the Claimant is not entitled to any of the reliefs sought under the Claim.



60. The Respondent prayed that the Claim be dismissed as the Respondent complied with the requisite procedure set out under Section 40(1) of the Employment Act, 2007 as well as the CBA. Further, the Claimant has not adduced

Analysis and Determination

61. Having considered the pleadings, evidence and submissions on record, the issues of determination are whether the Respondent complied with the Employment Act and the CBA in declaring the Grievants redundant and if the Claimant is entitled to the orders sought.

62. Section 40(1)(c) which the Claimant avers the Respondent did not comply with provides that-

(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

63. Clause A7 (e) of the CBA which the Claimant also avers the Respondent did not comply with provides as follows:

- a. Redundancy is understood to mean the involuntary loss of employment through no fault of the employee caused either by an excess of manpower or by the financial inability on the part of the employer to continue paying salaries.
- b. Where it is necessary to terminate the employment of an employee on the grounds of redundancy. Severance pay shall be granted at the rate of one month's pay for every completed year of service.
- c. In addition to any severance pay that may be granted the redundant employee shall be entitled to one month's notice or one month's salary in lieu thereof.
- d. The union shall be informed of the reasons for and extend of the intended redundancy.
- e. The principle shall be adopted at "last in first out" in the particular category of employees affected subject to all other factors such as skill, relative merit, ability and reliability being equal, provided that it is considered on a Kenya – wide basis
- f. Within 12 months from the date of discharge on the grounds of redundancy the employers shall give preference to such a person in the event of engaging new staff of similar grade.
- g. Where an employee is entitled to other benefits i.e leave, leave pay, etc a pro-rata compensation shall be made at the time of discharge on account of redundancy.
- h. Salary for the purpose of calculating pay shall be the salary of an employee on the date the employee ceases to be in the employment of the bank.

64. The redundancy process by the Respondent was commenced by letter dated 27th November 2018 as already reproduced elsewhere in this judgment.

65. On the same date the Respondent sent a notification of redundancies to the Provincial Labour Officer Nairobi. The letter is reproduced below-



27th November, 2018

The Provincial Labour Officer,
Ministry of East African Community, Labour & Social Protection,
Nairobi County
Nyayo Hous
NAIROBI

Dear Sir/Madam,

RE: NOTIFICATION OF REDUNDANCIES

We refer to the above captioned matter.

Due to the prevailing economic environment in which KCB Bank Kenya Limited (the "Bank") operates, the Bank has reviewed its internal business functions, costs and operational efficiency and decided to fully outsource the Mailing Services function to an external vendor specializing in Courier, Deliveries and Dispatches.

After careful consideration, the Bank's management has decided to terminate the employment of 3 employees on account of redundancy. The staff involved are subordinate staff.

In accordance with the requirement of Section 40 (1)(a) of the [Employment Act](#), 2007 and Clause A7 of the Collective Bargaining Agreement covering Section Heads, Check Clerks, Clerical, Copy Typists, Technical and Subordinate Staff, we hereby give a one month's notice from the date of this letter of the Bank's intention to terminate the services of the said employees on account of redundancy.

It is intended that this process will be completed by 31st December, 2018, and the Bank shall comply with all the requirements as spelt out in the [Employment Act](#), 2007 and the provisions of our Collective Bargaining Agreement,

Yours faithfully,

signed

ROBLEY NGOJE

HEAD, EMPLOYEE RELATIONS AND WELLNESS

Cc: Group Human Resource Director

Group Chief Executive Officer & Managing Director

66. On the same day the Respondent also sent a notice of termination of employment on account of redundancy to the Grievant as reproduced below-

KCB BANK

REF: KEN4903 Date: November 27th, 2018

Miss EMILY TIKE ASSER

KCB BANK KENYA LIMITED - HEAD OFFICE

Dear Emily,

RE: NOTICE OF TERMINATION OF EMPLOYMENT ON ACCOUNT OF REDUNDANCY

I refer to the staff meeting held today November 27th, 2018 in Kencom House, during which the



undersigned advised that after careful consideration and due to the prevailing economic environment in which KCB Bank Kenya Limited (the "Bank") operates, the Bank has reviewed its internal business functions, costs and operational efficiency and decided to fully outsource the Mailing Services function to an external vendor specializing in Courier, Deliveries and Dispatches.

In this connection and in accordance. With the requirement of Section 40 (1 of the [Employment Act, 2007](#) and Clause A7 of the Collective Bargaining Agreement covering Section Heads, Check Clerks, Clerical, Copy Typists, Technical and Subordinate staff, you are hereby given one month's notice from the date of this letter, of the Bank's intention to terminate your employment on account of redundancy. You may seek. available opportunities in the Bank through any internally advertised positions during the next 1 month from the date of this letter. In the event that you do not find a suitable position befitting your skills and competencies, your last day of employment shall be December 31st, 2018 and you shall be paid and provided terminal benefits as follows:

1. SEVERANCE PAY

You shall be paid 1 month's Basic Salary for every completed year of service or part thereof.

2. SALARY IN LIEU OF NOTICE

You shall be paid:

- a. 1 month's gross salary in lieu of notice.
- b. Salary in lieu of leave days which have accrued but not taken.

2. MEDICAL BENEFITS

You and your eligible dependents shall be retained in the KCB Medical Scheme up to December 31st, 2018.

2. LOAN REBATES

Loan rebate(s) shall apply as follows:

- a. 20% rebate will be applied on your outstanding staff loan balances as at December 31st, 2018 and the remainder balances shall continue at staff rates for 6 months with effect from January 1st, 2019 after which commercial rates become applicable.
- b. You are required to provide your proposal on how you intend to service any outstanding loans you have. Your proposal should be Submitted to the Head of Credit Administration within 15 days after your last day of service. The Head of Credit Administration shall revert to you within 7 days of your submitting the proposal.
- c. The application of the loan rebate(s) conditions notwithstanding, the Bank reserves the right to vary the terms of the rebate and loan in accordance with the original letters of offer issued and accepted at the onset of the borrowings. It should be noted that all loans must continue being serviced by way of timely monthly repayments at all times.



2. PENSION

Pension shall be paid to you in accordance with the Trust Deed and Rules of the pension scheme of which you are a member.

2. BANK PROPERTY. EXIT CLEARANCE FORM & SEPARATION INDEMNITY FORM

Please arrange to hand over any Bank property in your possession, including the Bank's Identity Card. Attached herewith is an Exit Clearance Form to help you facilitate the clearance process. The processing of separation dues shall commence once the Exit Form and Bank property have been returned. Once the dues are processed, you will be required to sign the Separation Indemnity Form to facilitate the release of the dues as articulated in this letter.

After your last day of employment, final dues will be paid within 2 weeks of the date you submit your clearance and indemnity forms.

2. EXIT INTERVIEW FORM

The Bank would like you to share your experiences in KCB by completing the attached Exit Interview Form. The completion of the Exit Interview Form is voluntary although encouraged to enable the Bank identify areas of improvement.

2. VOLUNTARY POST SEPARATION WORKSHOP

The Bank shall arrange a post- separation workshop on financial planning, starting a business, job searching and other important areas. The Bank will meet the cost of the workshop and your reasonable travelling expenses by public transport.

Please acknowledge receipt of this letter by signing and returning the duplicate copy of this letter to the office of the undersigned. Upon receipt of the same, your payment shall be made subject to your compliance to Section 6 of this letter.

Yours faithfully

KCB Bank Kenya Limited

Signed

Paul Russo

Group Human Resource Director

67. The Claim herein was filed on 18th December, 2018. There is no evidence that upon receiving its copy of the redundancy notice the Claimant engaged the Respondent to inquire about the selection criteria for the redundancy.

68. The recognition agreement between the Claimant and Kenya Bankers Association provides as follows-
GRIEVANCE PROCEDURE

18.

- (a) Individual and internal grievances which affect only one Bank and which the Union wishes to discuss shall be raised in the first instance by a Union representative with the management of



the particular Branch at the Bank within (7) seven days of the occurrence giving rise to the grievance.

- b) In the event of failure to reach a settlement of the matter at this stage, it shall be referred in writing by the Union representative on the one hand to the Secretary of the Central Staff Committee of the bank concerned and by the local Manager on the other hand to this Control Office in Kenya.
- c. The Central Staff Committee of the Bank concerned and the management of the Control Office shall meet within (7) seven days to consider the matter.
- d. It shall be in order for not more than two officials each of the Association and of the Union to attend any meeting involving a grievance to assist the employer and employee representatives respectively.
- e. In the event of failure to reach a settlement of the matter at this stage (para. 18 (c) above) it shall be referred to a meeting of the Joint Negotiating Council with as little delay as possible and in any event within
(7) days of the date of such failure.

JOINT NEGOTIATING COUNCIL

- 19.
 - a) There shall be set up jointly between the Association and the Union a Joint Negotiating Council, consisting of not more than nine (9) representatives nominated by the Association and not more than nine (9) representatives nominated by the union, which shall sit in Nairobi. These representatives shall consist of management staff of the Banks on the one hand and employees of the Bank on the other, except that not more than two of the representatives on each side may be full time paid officials of the Association and of the Union respectively.
 - b. The Chairman of the Joint Negotiating Councils shall be a person nominated from time to time by the Association and the Union jointly from the staff of the member Banks and there shall be joint Secretaries of the Council, one provided by the Association and one provided by the Union.
 - c. The Chairman shall preside over and enforce order at all meetings. He/she shall in addition perform such other duties as by usage and custom pertain to the office.
 - d. The Council shall meet at such times and places as may be mutually agreed upon from time to time. Extraordinary meetings may be called at the request of either party for which a minimum of fourteen (14) days notice in writing to the Secretaries must be given, except in the case of meetings requisitioned pursuant to Clause 18 of this Agreement, when the period shall be not less than seven (7) working days notice in writing.



All items submitted by either party for discussion and negotiation must be supported by an explanatory memorandum in respect of each such item, which memorandum must be submitted at the same time that the meeting is requested in writing.

- c. Notice of ordinary meetings of the councils showing the business to be transacted shall be given to members by the Secretaries in writing, and such notice shall be not less than thirty (30) days prior to the meeting and must be accompanied by a memorandum on each item of the business to be transacted.
- d. In addition to claims on subject set out in Appendix "A", the Joint Negotiating Council shall consider such unresolved grievances as may be referred to it in accordance with Clause 18 of this Agreement.
- e. All decision of the Joint Negotiating Council on matters of negotiation and discussion shall be unanimous.

The quorum for meetings of the Council shall be five (5) representatives each of the Association and the Union. If within thirty (30) minutes of the time fixed for any meeting a quorum is not present, the meeting shall stand adjourned to the same day in the next week at the same time and place, and if at the adjourned meeting a quorum is not present within thirty minutes from the time appointed for the meeting, the members present shall be a quorum.

- i. At any meeting of the Council, the minutes of the last preceding meeting shall, after confirmation, be signed by the Chairman, and any matters arising from the time minutes shall be dealt with before proceeding with the remainder of the Agenda for the meeting.
- j. No matter concerning a grievance shall be considered at a meeting of the Joint Negotiating Council unless and until the procedure laid down in Clause 18 of this Agreement has been fully complied with.
- k. All memoranda submitted to the Joint Negotiating council and all discussions at meetings of the Joint Negotiating Council shall be in the English language. The Minutes of meetings shall also be recorded in English.
- l. Each side of the Council shall meet its own expenses and items of common expenditure shall be shared.
- m. The objects of the Joint Negotiating Council shall be: -
 - i. To consider and regulate matters of mutual interest to the parties and to prevent and settle disputes;
 - ii. To promote good relationship between Employers and Employees in the Banking Industry, to secure co-operation and a recognition of mutual interest;
- n. To encourage and to regulate the establishment of good conditions in premises in which work is done, in regard to structure ventilation, lighting, sanitation and cleanliness, prevention of accidents, and generally to promote the reasonable interests of all concerned in the industry;
- o. To use its endeavours generally in the direction of maintaining industrial peace in the Industry;



- p. To secure a recognition and observance in the Industry of any agreement negotiated by the parties relating to subjects set out in Appendix
 - q. To administer agreements concluded between the parties;
 - r. To consider and deal with such other lawful matters as may affect the interests of the parties.
20. In the event of failure to reach a settlement at the Joint Negotiating Council on any matter which has been referred to it, the matter shall be referred by either party to the Ministry of Labour in accordance with the Trade Disputes Act (Cap. 234).
69. Section 74 of the *Labour Relations Act* further provides for urgent referral of disputes to this court as follows-

A trade union may refer a dispute to the Industrial Court as a matter of urgency if the dispute concerns——

- (a) the recognition of a trade union in accordance with section 62; or
 - (b) a redundancy where –
 - (i) the trade union has already referred the dispute for conciliation under section 62(4); or
 - (ii) the employer has retrenched employees without giving notice; or
 - (c) employers and employees engaged in an essential service.
70. It is clear from the foregoing that the Claimant filed the instant suit prematurely without even seeking an explanation of the criteria of selection of redundant employees from the Respondent or complying with both their recognition agreement and section 74 of *Labour Relations Act*. It did not even in the least, respond to the letter from the Respondent notifying it of the intention to carry out the redundancies to express the Claimants objection to the redundancy.
71. Further, from the Claim and submissions of the Claimant it is apparent that the Claimant's only issue with the redundancy was the selection criteria. The Claimant's position was that the selection should have applied to all the messengers of the Respondent, and not only the department in which the Grievants worked which the Respondent had decided to be outsourced.
72. The Respondent has explained that this was not possible as the retained messengers worked in different sections and had been specifically trained and gained skills in the areas where they were deployed. That on the contrary the 3 grievants selected for the redundancy were deployed in the mail section which had been outsourced.
73. It was further submitted that the Grievants had not worked in the other departments and were therefore not skilled in the services offered in the said departments.
74. As I have stated above, all these were issues that should have been subjected to discussions or negotiations between the parties, an opportunity that the Claimant opted to completely ignore and rush to court. Its averments that the selection criteria was ignored is therefore not backed by any evidence as it did not demand an explanation of the same from the Respondent.



75. Further, both the CBA and Section 40 recognize that in selecting employees to be declared redundant the employer takes into consideration seniority together with the skill, ability and reliability of employees of the particular class affected by the redundancy.
76. The Claimant did not adduce any evidence to demonstrate that the employees selected for redundancy were discriminated in terms of seniority, skill, ability or reliability.
77. From the evidence on record I find that the Claimant has not proved that the Respondent failed to comply with either section 40(1) of the [Employment Act](#) or the provisions of Clause A7(e) of the CBA. On the contrary, the evidence on record shows that there was valid reason for the redundancy and that the Respondent complied with the procedure in Section 40(1) of the [Employment Act](#) and the CBA.
78. For the forgoing reasons I find no merit in the claim and dismiss the same. Each party shall bear its costs of the claim.

DATED, SIGNED AND DELIVERED VIRTUALLY ON

THIS 12TH DAY OF APRIL 2024

MAUREEN ONYANGO

JUDGE

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NRB ELRC 1615 OF 2018 JUDGMENT

