Mbatha & another v Jambo Jet Limited (Cause E711 of 2021)
[2024] KEELRC 13391 (KLR) (29 November 2024) (Judgment)

Neutral citation: [2024] KEELRC 13391 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE E711 OF 2021

NJ ABUODHA, J

NOVEMBER 29, 2024

BETWEEN

BETTY MUNANIE MBATHA ..... 1ST CLAIMANT

KENYA AIRLINE PILOTS ASSOCIATION ..... 2ND CLAIMANT

AND

JAMBO JET LIMITED ..... RESPONDENT

JUDGMENT

1. The Claimants through their Memorandum of Claim dated 12th August, 2021 pleaded inter alia as follows: -

    a. That at all material times the Respondent engaged the 1st Claimant in the position of captain under the Respondent's Operations Department wherein she served diligently and faithfully until 1st November,2020 when her contract of employment was arbitrarily, unfairly and unlawfully terminated on account of purported redundancy.

    b. That on or about 30th October,2020 the Respondent issued notices of the purported redundancy wherein the 1st Claimant and other members of he 2nd Claimant were informed of the Respondents intention to declare them redundant on account of the COVID-19 pandemic. That the notice indicated that the employment would be terminated on 1st November,2020 a day after the purported notice was issued.

    c. The Claimants averred that by a letter dated 3rd November, 2020 the 1st Claimant protested against the Respondent's decision to declare her redundant on account that the redundancy did not comply with the legal requirements set out in section 40 of *Employment Act*. That the Respondent responded to the 1st Claimant vide a letter dated 6th November, 2020 asserting that the Respondent developed and applied an objective process for identifying employees who would be affected by the redundancy.

d. The Claimants averred that the redundancy was actuated by bad faith and ulterior motives solely intended to get rid of the services of the 1st Claimant in that it was not substantively justified. That the redundancy did not comply with provisions of section 40 of the *Employment Act* as well as the international Labour Organization Guidelines on conducting of redundancy.

e. The Claimants averred that their redundancy was conducted in degrading and inhumane manner and the actions amounted to unfair labour practice and breach of the 1st Claimant's rights guaranteed by Articles 41 and 47 of *the Constitution*. That having been in an open-ended employment contract the 1st Claimant had a legitimate expectation that their employment would not be terminated in an unlawful and unfair manner by the Respondent.

f. The Claimants averred that the 1st Claimant was paid Kshs 1,816,648 which less statutory deductions was Kshs 1,434,011.29/= as her purported terminal dues without any justification of that amount. That her terminal tabulations should be at least Kshs 2,317,185/=.

2. The 1st and 2nd Claimants in the upshot prayed for the following against the Respondent;

a. A declaration that the termination of the 1st Claimant on account of purported redundancy was unfair, wrongful and unlawful.

b. A declaration that the termination of the 2nd Claimant's members on account of the purported redundancy was unfair, wrongful and unlawful.

c. A declaration that the Respondent violated the 1st Claimants members rights to fair labour practice and fair administrative action guaranteed under Articles 41 and 47 of *the Constitution* respectively.

d. A declaration that the Respondent violated the 2nd Claimants members rights to fair labour practice and fair administrative action guaranteed under Articles 41 and 47 of *the Constitution* respectively.

e. Compensation equivalent to 12 months remuneration, for unfair wrongful and unlawful termination of employment of the 1st Claimant on account of the purported redundancy equivalent to (Kshs 514,930/=) x 12 Months) = 6,179,160/=

f. Payment of terminal dues properly tabulated in accordance with the *Employment Act* and *Civil Aviation Act*.

g. Damages for breach of legitimate and reasonable expectation

h. Costs and Interest on all the damages payable

3. The Respondent filed its statement of Response dated 17th September,2021 and averred inter alia as follows;

i. The Respondent averred that it has not signed any recognition Agreement with the 2nd Claimant within the meaning of the *Labour Relations Act*, 2007 or at all and therefore the 2nd Claimant had no locus standi to institute the suit against it. That the Respondent will at the earliest opportunity file an application to strike out the suit filed by the 2nd Claimant.

ii. The Respondent denied that the 1st Claimant's employment contract was arbitrarily, unfairly and unlawfully terminated. That it was a matter of public knowledge that COVID -19 pandemic impacted all sectors including the aviation sector which the Respondent operates

in. That the Respondent communicated regularly through its online staff forum during the COVID-19 pandemic.

iii. The Respondent averred that it was not meeting its targets from July 2020 all through to September, 2020 and it had to implement costs saving measures such as aircraft lease negotiations, review of all contracts from fixed terms and pay cuts to match the payroll to the operation. That during the 8th October,2020 online staff forum the Respondent informed its employees that rationalization had been minimized as much as possible to retain as many jobs as possible and that the criteria used for selection across the organization was performance, disciplinary record, attendance and individual productivity, qualification and versatility, cultural fit and willingness to uphold client's culture and the same was to be implemented in October,2020.

iv. The Respondent averred that it conducted a webinar on the change of management and preparedness for redundancy for its employees including the 1st Claimant. That the 1st Claimant redundancy was not actuated by bad faith and ulterior motives solely intended to get rid of her as alleged.

v. The Respondent averred that it was allowed under the Employment Contract to terminate the 1st Claimant's services for any reason after issuing one months' notice or paying to the 1st Claimant one months' salary in lieu of such notice. That in addition, clause 15.3 of the Respondent's Human Resource Manual which formed part and parcel of the 1st Claimant's employment contract permitted the Respondent to terminate the 1st Claimant services on account of redundancy.

vi. The Respondent averred that the 1st Claimant was paid her terminal dues in compliance with the law and prayed that the claim be dismissed with costs.

4. The Claimants filed a reply to the Respondents statement of response dated 21st September,2021 and denied that the 2nd Claimant lacked locus standi to be a party to the suit. That the 1st Claimant had a constitutional right to join any union of her choice and the 2nd Claimant being a registered union had the right to participate in safeguarding and protection of the individual interests of its union members whether or not it was recognized by the Respondent.

5. The Claimants further averred that the 1st Claimant and union members of the Respondent agreed to take a pay cut in response to the impact of the COVID-19 pandemic restrictions. That the Respondent immediately decided to fly two of the six aircrafts to Mombasa with pilots, cabin crew, maintenance team and everything that was required to perform its functions which saved the Respondent 15% of the total losses it would have incurred over the period the restrictions were in force. That it was the first time since 2017 the Respondent incurred losses when its costs exceeded revenue by 10%.

6. The Claimants averred that the Respondent was mandated under the relevant law to follow due process and be able to substantially, procedurally and objectively defend its decision to terminate the 1st Claimant which it failed to do.

Evidence

7. The Claimants' case was heard on 27th February, 2024 and the 1st Claimant herein (Betty Munanie) testified. The 1st Claimant adopted her statement and documents filed as her evidence in chief.

8. CW1 testified that she sought justice from the Respondent as she had not been in a position to secure another job since she left the Respondent. That the Respondents refused to sign her exam results hence she could not secure another job.

9. In cross examination CW1 confirmed that she was employed in 21st March,2018 as a captain. That she was a pilot in command and worked for around 2 and half years. That there was no recognition agreement between the 2nd Claimant and the Respondent as it refused to sign one. She did not produce any evidence of her contribution of union dues to the 2nd Claimant.

10. CW1 confirmed that she was aware COVID-19 affected airlines and she was aware of drastic measures undertaken by the Respondent. That she was aware the Respondent's finances were affected by COVID-19. That she received communication from the Respondent on salary reduction due to covid-19.

11. CW1 confirmed that there was gradual increment of salary during the Covid-19 period due to improvements. That she never received some of the email on salary reductions. The letter she responded to was sent to her specifically. That she consented to salary reduction but not through the Jambojet email.

12. CW1 stated that she was not aware of any Respondent's forum during the COVID period as she did not receive communication from the Respondent on the criteria for redundancy. That she was aware some employees were let go during that period but she was the only captain terminated. That at the time of redundancy she had resumed 100% pay as supported by October, pay slip.

13. CW1 could not remember what she was paid in September and that there was basic pay and flight hours. In March she did not fly and the simulation exercise was done on 30th October, 2020 and was done every 6 months hence twice a year but during Covid-19 period it was not regular. That the simulation was like an exam where if you do not pass you could not continue flying. That you had to repeat if you fail.

14. CW1 confirmed that failing more than once would lead to a pilot being downgraded to a 1st officer. There was a certificate issued and recorded on pilot's logbook. She stated that she once exceeded her hours and that one was not supposed to exceed 105 flight hours and 160 duty hours.

15. CW1 confirmed that she once fell sick, followed the process but was harassed about it. That email showed her sick leave was increased but there was nothing to show she applied for sick leave. That she was paid her terminal dues.

16. In reexamination CW1 clarified that the Respondent had recovered from COVID-19 disruption when she left as her full salary had been restored. That her email was not Jambojetters as she had a personal email address. That she did not sign any document and it was against KCAA regulations to exceed flight hours as this could lead to loss of licence. That she exceeded her sick off as she was involved in a dental surgery within the country.

17. CW1 clarified that she did well in her simulation test but the captain refused to sign her results and told her to go to HR who issued her with a redundancy letter. It was her evidence that she ceased being the Respondent's employee on 30th October, 2020, the same day she did her simulation test.

18. The Respondent's case was heard on 14th May, 2024 where the Respondent called one witness Wandera Kweyu (RW1) the Respondent's Head legal and culture who testified and adopted his statement and documents filed in court as his evidence in chief.

19. RW1 testified that the Respondent was a budget airline and COVID-19 stopped its operations in March,2020. That they resumed partial operations in June/July 2020. That the Respondent took measures to cushion itself against the effects of the COVID-19 which included contract review, negotiation with suppliers and negotiations with employees on their pay.

20. RW1 testified that the Respondent continually communicated with staff monthly. That staff were consistently informed about the state of its business during the pandemic. That minutes were taken and shared with staff. That communication was on the staff forum Jambojetters and email subsequently sent to staff.

21. RW1 testified that Labour Office was informed of the redundancy and staff informed on online forums. That the intention affected 50 staff in Kenya and Rwanda.

22. In cross examination RW1 confirmed that there was a 30 day notice of redundancy. That a notice was on 2nd September, 2020 to labour officer. That communication to staff was in the meetings of August 2020 where all staff were issued with the notice to declare redundancy.

23. RW1 confirmed that there was no specific letter addressed to Claimant on redundancy. That the letter of the Claimant ceasing to be an employee from 1st November,2020 was a notice of redundancy and not notice of intention of redundancy. On selection criteria, RW1 confirmed that performance records were not before the court.

24. RW1 confirmed that there were no negotiations over redundancy with labour officer. That the Respondent communicated with employees on the online forum and the Claimant was part of staff. There was a requirement on the email for the staff to acknowledge the email and consent to the email.

25. RW1 confirmed that there was no individual email to the Claimant. That the Claimant responded to the conversation meaning she attended the meetings. That the Jambojetters email contained the Claimants email. The change of management conversation did not talk about redundancy and the minutes of the meeting were not filed.

26. RW1 confirmed that the Respondent's financial statements were not filed. That the criteria was noted in his statement and letter to labour commissioner without any further evidence being provided. That they did present evidence of the Claimant's participation in the process of selection the only letter is on the redundancy.

27. RW1 confirmed that the Claimant was paid in lieu of notice and her terminal dues amounting to Kshs 1,434,011/=

28. In re-examination RW1 clarified that they communicated the Respondent's performance to staff and the Claimant received email communication and attended online forums

Claimants' Submissions

29. The Claimants' Advocates Andrew & Steve Advocates filed written submissions dated 3rd June 2024. On the issue of whether the termination of the 1st Claimant's employment on account of redundancy was lawful and fair, counsel submitted that for any termination to be considered lawful there should be both substantive and procedural fairness. That one should look at definition of redundancy as per section 2 of the *Employment Act* and how it should be carried out. Counsel submitted that for any termination to be considered as redundancy the employee's loss of employment must be involuntary through no fault of the employee and must be at the initiative of the employer.

30. Counsel submitted that this claim satisfies the definition of redundancy as it was initiated by the Respondent due to alleged COVID -19 effects. Counsel however submitted that the redundancy was not substantively justified for the reasons that it was evident that the Respondent had taken cost-cutting measures to aid its survival during the pandemic and at the time the 1st Claimant was being declared redundant, the Respondent was fully operational.

31. Counsel submitted that RW-1 during cross-examination stated that the Respondent did not produce either audited financial statements or expert evidence to show the impact of COVID-19 on the company and the decision to terminate the Claimant's employment on that basis was therefore unfounded.

32. On procedural fairness counsel submitted on requirements set out under section 40 of the *Employment Act*. Counsel relied on among others the case of Hesbon Ngaruiya Waigi -v- Equitorial Commercial Bank Limited (2013) eKLR and that the conditions outlined in Section 40 of the *Employment Act* were mandatory and not left to the choice of the employer.

33. Counsel submitted that the Respondent should notify the union if the employee was a member of a union and labour office a month prior to redundancy. That if the employee was not a member of union to be notified personally in writing. It was counsel's contention that two different kinds of notifications were required. Counsel relied on the case of Thomas De La Rue(K) Ltd versus David Opondo Omutelema(2013) eKLR on this assertion.

34. Counsel further submitted that at the hearing, the Respondent's witness confirmed to the Court that the Respondent failed to issue the Respondent with a letter informing her of the intended redundancy, 30 days before she was declared redundant, contrary to the provisions of Section 40 of the *Employment Act*. That the Claimant was instead sent a notice of redundancy dated 30th October 2020 informing the 1st Claimant that she shall cease being an employee of the Respondent on 1st November 2020.

35. Counsel submitted that Section 40 of the Act was coached in mandatory terms and the employer has to comply with all the steps. Counsel relied on the case of Kenya Union of Journalists and Allied Workers v Nation Media Group (2013) eKLR on this assertion.

36. Counsel submitted that RW-1 further confirmed that the Respondent issued a Notice dated 2nd September 2020 to the Labour Officer. That the contents of the letter of notification was not of an intended redundancy process but of a process that had already commenced on 3rd September to end on 5th October 2020 hence not applicable to the 1st Claimant. No further notice was ever issued to the Labour Office, informing it of an intended redundancy process that was scheduled to begin on 30th October to 1st November 2020 or even December.

37. Counsel submitted that the Notice was not in compliance with Section 40(1)(b) of the *Employment Act* for the reasons that: (a) the said Letter was not employee-specific, a list of the employees the Respondent was considering declaring redundant was not attached, the letter was not copied to the 1st Claimant.

38. Counsel relied on among others the case of Gerrishom Mukhutsi Obayo -versus- Dsv Air and Sea Ltd [2018] eKLR and submitted that there must be notification of the reasons for, and the extent of the intended redundancy not less than a month prior to the date of the intended date of termination on account of redundancy.

39. Counsel submitted that once the Respondent is in compliance with the first step of notification, the second mandatory procedural step is the need for consultations prior to and during the redundancy process which was not done. Counsel relied on among others the case of Kenya Airways Limited

-V- Aviation & Allied Workers Union Kenya & 3 Others [2014] eKLR and submitted that the consultations are therefore meant to cause the parties to discuss and negotiate a way out of the intended redundancy, if possible, or the best way of implementing it if it is unavoidable. That at hearing it was confirmed there were no consultations between the Respondent, 1st Claimant and the labour office before redundancy.

40. Counsel submitted that no specific email was sent to the 1st Claimant on the redundancy as confirmed during hearing that the email was a group email. That the only personal email sent to her was on pay reduction which she consented to. That there were no minutes attached to show if redundancy was discussed in the online forums and if 1st Claimant attended them.

41. Counsel submitted that on selection of the employee to be declared redundant, due regard was to seniority in time and to the skill, ability and reliability of each employee, counsel relied on provisions of 40(1)(c) of the act on the criteria to be used to declare employees redundant. The notice issued by the Respondent undeniably enunciates the criteria used in the selection for rationalization but does not inform the 1st Claimant of the manner the criterion was to be applied during the redundancy process in her selection to be declared redundant.

42. Counsel submitted that the Claimant being a senior member of staff of the Respondent, his employment status was to be given priority as junior staff were retained. Counsel submitted that during the hearing it was confirmed that no evidence was provided to show the criteria used. Counsel further submitted that the Respondent also failed to demonstrate whether it ever considered the 1st Claimant for another position contrary to Paragraph 15.3 of the Respondent's Human Resource Manual.

43. On the issue of whether the actions of the Respondent in terminating the 1st Claimant's employment on account of redundancy violated the 1st Claimant's right to fair labour practice and fair administrative action guaranteed under Articles 41 and 47 of *the Constitution*, Counsel submitted that every person has the right to fair labour practices. Counsel relied on among others the case of Kenya County Government Workers' Union v County Government of Nyeri & Another [2015] eKLR.

44. Counsel submitted that the 1st Claimant was not accorded the forum to be heard or to make representations before the Respondent made the decision to terminate her employment. Additionally, she was not given sufficient reasons for the decision of the Respondent thereby violating her right to fair administrative action as per section 4 of the *Fair Administrative Action Act*.

45. On the issue of whether the 1st Claimant was entitled to compensation for unfair, wrongful and unlawful termination, Counsel relied on section 45 of *Employment Act* on what amounts to unfair termination. That the 1st Claimant confirmed that she has not been able to secure alternative employment since her termination for reasons that her instructor failed to record a Pass or fail in her Logbook after a routine Simulation was conducted.

46. Counsel submitted that having demonstrated that the Respondent had no valid and justifiable reason to terminate the 1st Claimant's employment, counsel submitted that the Claimant was entitled to the remedies set out under section 49 of the *Employment Act* more so the maximum award of 12 months' gross salary as prayed as well as damages for legitimate expectation. Counsel relied on the case of Alice Ndaani & 5 Others v Mwalimu National Savings and Credit Co-operative Society Limited (2021) eKLR where court awarded damages for breach of constitutional rights and/or legitimate expectation. Counsel prayed for Kshs 2,000,000/= as damages under this head.

47. On the issue of Whether the Claimant was paid her terminal dues in accordance with the *Employment Act* and the *Civil Aviation Act*, counsel submitted that the 1st Claimant was entitled to terminal dues

that were however not paid by the Respondent until upon demand by the Claimant whereupon the Respondent indicated that it would settle the Claimant's terminal dues.

48. Counsel submitted that the Claimant received payment of Kshs. 1,434,011.29/- as her purported terminal dues with no clear justification of how this amount was arrived at. That the 1st Claimant did not receive her terminal dues as she was entitled to and should therefore be awarded the difference as prayed for in her pleadings together with the provident funds contributed.

Respondent's Submissions

49. The Respondent's Advocates Triple OK Law, LLP filed written submissions dated 16th August 2024. On the issue of whether the 1st Claimant's termination of employment was fair and lawful Counsel submitted that for termination by way of redundancy to be lawful, it must be substantially justified and procedurally fair and relied on section 43 of the Act and the case of Iyego Farmers' Co-operative Sacco vs Kenya Union of Commercial Food and Allied Workers [2015]EKLR and submitted that a court in considering the fairness and validity of reasons for termination should consider whether a reasonable employer would have made a similar determination.

50. Counsel submitted that that COVID-19 pandemic affected the Respondent's operations and revenue which fact is in the public domain. The Respondent's witness testified before court that the Respondent's employees were apprised of the downturn performance of the Respondent through email and online staff forums. The Respondent required its employees to consent to pay cuts.

51. Counsel submitted that despite the financial constraints that COVID-19 pandemic had on the Respondent's operations, the Respondent sought alternative revenue streams to allow business operations to pick up, which led to it deferring discussions on staffing levels revaluation to September, 2020.

52. Counsel submitted that the reasons for termination were valid and fair. The Respondent had demonstrated the existence of justifiable reasons for the Claimant's termination on account of redundancy, the reasons were valid and that the reasons for termination were based on the operational requirements of the Respondent.

53. On the issue of whether the redundancy was procedurally fair, Counsel relied on requirements set out under section 40 of the Act and submitted that the Respondent held online staff forums in the months of August, September and October, 2020 in which the airlines performance was discussed and the information was shared with the employees through a group email.

54. Counsel submitted that vide letter dated 2nd September, 2020, the Respondent informed the labour officer that it had carried out internal reviews of its operations in July, 2020 and the Respondent was inevitably forced to carry out a wide restructuring which would culminate in reduction of network, the Respondent's assets as well as other staff. The notice further indicated that the redundancy would affect most of the divisions of the company, which included commercial operations, maintenance, finance and that a total of fifty (50) staff would be declared redundant.

55. Counsel submitted that the Respondent indicated in its notice that the company had due regard to seniority in time and to the skill, ability and reliability of each employee to be declared redundant and that the selection was based on incidences recorded and valid disciplinary record, performance and quality of work evaluation on current role, technical skills set core, cross- trained and critical skills and length of service of experience on the current role. Counsel relied on the case of Cargill Kenya Limited v Mwaka & 3 others (Civil Appeal 54 of 2019) [2021] KECA 115 (KLR) (22 October 2021) (Judgment) and submitted that the threshold to be met under section 40(1) (a) and (b) of the *Employment Act*

in that regard was notification of the reasons for, and the extent of, the intended redundancy not less than a month prior.

56. Counsel submitted that the Respondent witness testified that they were working remotely and communication to staff was mostly through emails and online forums and that by the various monthly staff online forums the Respondent gave a warning of the impending redundancies so as to enable the employees who could be affected to take early steps to inform themselves of the relevant facts and consider possible alternative solutions. That a notice for intended redundancy was issued.

57. Counsel submitted that the Respondent advised the 1st Claimant that in the selection of the employees to be declared redundant, the airline had had due regard to seniority in time and to the skill, ability and reliability of each employee, performance, disciplinary record, attendance and individual productivity, qualification and versatility and cultural fit and willingness to uphold the airline's culture.

58. Counsel submitted that the 1st Claimant was informed that upon further review there was no comparable role or vacancy in which she could be redeployed internally and was informed that her terminal package would be computed. Counsel relied on the case of Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others [2014] eKLR and submitted that it cannot be mandatory for the employer to consult with all potentially affected employees in making any redundancy decision. That around 50 employees were affected by the redundancy process both in Kenya and other countries like Uganda and Rwanda. That it would be impracticable to require the Respondent to consult all affected employees since it was mass redundancies as per above case.

59. On the issue of whether the Respondent violated the 1st Claimant's rights to fair labour practice and fair administrative action, Counsel submitted that the Claimant was made aware of the reasons for the redundancy as the employees were continuously informed during the online staff forums, but the Claimant was also informed in the letter issued to her the reasons for the redundancies, the criteria used and there being no comparable position for her.

60. Counsel submitted that the 1st Claimant alleged violation of her rights under Articles 41 on fair labour practice and 47 (fair administrative action) of *the Constitution* of Kenya by the Respondents without specifying in what manner the said articles were violated and that the same does not meet the constitutional threshold as set out in Anarita Karimi Njeru vs Attorney General [1979] KLR 154.

61. On the issue of whether the Claimants are entitled to the reliefs sought, Counsel submitted that damages awardable for unfair termination are governed by the provisions of Section 49 of the *Employment Act* which are awarded to compensate the Claimant not to punish the employer.Counsel relied on among others the case of Transport Workers Union v Glory Driving School [2020] eKLR and submitted that if this court is inclined to award compensation, three months' salary should be awarded as the 1st Claimant worked for about 2 years and 7 months which was not a long period of service.

62. Counsel submitted that section 49 of the *Employment Act* does not have provision for general damages in instances of unfair, wrongful and unlawful termination and the Claim be dismissed.

63. On the issue of whether the Claimant was paid her terminal dues, Counsel submitted that the Claimant was paid all her terminal dues as evidenced by the November payslip being Kshs. 1,434,011.29. Counsel submitted that the Civil Aviation (Operation of Aircraft) Regulations 2013 cannot be used in determining severance pay and cannot supplement the *Employment Act*.

64. Counsel submitted that parties are bound by their pleadings yet the 1st Claimant has introduced the figure of Kshs. 3,218,312.50 as now the terminal dues that she was entitled to.

Counsel submitted that the prayers no. (b) and (d) at paragraph 17 of the Claim were blanket prayers that lack specificity and should not be granted.

Determination

65. The court has reviewed and considered the pleadings, testimonies, submissions and authorities relied on by both parties and has I have come up with three main issues: -Aa. aa.

    a. WhetherWhether the 1st Claimant's termination of employment on account of redundancy was unfair and unlawful

    b. Whether the Respondent violated the 1st Claimant's right to fair labour practices and fair administrative action.

    c. Whether the Claimants are entitled to the reliefs sought.

Whether the 1st Claimant's termination of employment on account of redundancy was unfair and unlawful

66. In this case, the Respondent alleged that it terminated the claimant's service on account of redundancy and that the Claimant was among other 50 employees in Kenya, Uganda and Rwanda who were so terminated due to COVID 19 which hit most of the world, including Kenya at the time. That the Respondent had also taken measures like the salary pay cut which the Claimant acknowledged that she consented to.

67. Termination on account of redundancy is a form of termination of employment and must therefore adhere to the tenets in the *Employment Act*. That is to say the reasons must be justifiable and the process of termination carried out through a fair procedure as provided under section 40 of the Act.

68. The Claimant herein was terminated on account of redundancy. That is to say, as a result of the Covid-19 pandemic the respondent was heavily affected and at some point had to ground most of its aircraft. The Claimant however alleged that at the time of termination the Respondent had fully recovered from the effects of the pandemic and she had resumed her full salary as could be seen from her October payslip which she produced in Court.

69. Redundancy is defined under section 2 of the *Employment Act* to mean:

> " ...the 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.

70. In the New Zealand case of Aoraki Corporation Limited v Collin Keith McGavin; *CA 2 of 1997* (1998) 2 NZLR 278 it was stated that:

> " ...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..."

71. It hence the Court's view that redundancy is not a disciplinary process hence the provisions of the *Employment Act* concerning the disciplinary procedure do not apply. However a termination on account of redundancy which does not conform to section 40 of the Act amounts to unfair termination within the meaning of section 45 of the Act.

72. In Kenya Airways Limited vs. Aviation and Allied Workers Union of Kenya and 3 Others (2014) eKLR, the Court of Appeal pronounced itself as follows:

> " ...redundancy is a legitimate ground for terminating a contract of employment provided there is a valid and fair reason based on operational requirements of the employer and the termination is in accordance with a fair procedure. As Section 43(2) provides, the test of what is fair reason is subjective. The phrase "based on operational requirements of the employer" must be construed in the context of the statutory definition of redundancy.
>
> What the phrase means, in my view, is that while there may be underlying causes leading to a time redundancy situation such as reorganization, the employer must nevertheless show that the termination is attributable to redundancy – that is that the services of the employee has been rendered superfluous or that redundancy has resulted in abolition of office, job or loss of employment."

73. It is therefore clear from above that the reason for declaration of redundancy has to be valid and the procedure set under section 40 adhered to in order for it to be deemed a fair termination of employment.

74. The Court takes judicial notice of the adverse effects of COVID-19. The Court further acknowledges that the respondent was in constant communication with staff, including the claimant updating the staff of the situation as it affects them and also asking for feedback from staff. However by a letter dated 30th October, 2020, the respondent informed the claimant that she was among the staff identified for redundancy. The letter informed her that she would cease to be an employee of the respondent by the following day 1st November, 2020. The claimant disputed this letter and averred that by the time of the this letter, the respondent had almost normalized operations and that her pay which has initially been cut, had been fully restored. From the evidence on record, the respondent did not seem to have rebutted the claimant's assertions. The Respondent's witness further confirmed that they did not produce the company's financial statements or any redacted version thereof, to illustrate that the Respondent had still not made any significant financial turn around to warrant terminating the claimant's service on account of redundancy.

75. If the Court were to take the view that redundancy was necessary, the question that arises is why the respondent chose not to follow that clear provisions of section 40 of the *Employment Act*. The Claimant denied receiving the notice of intention to declare her redundant and that she only received the redundancy notice dated 30th October, 2020. Mbaru J in the case of Hesbon Ngaruya Waigi vs. Equitorial Commercial Bank Limited [2013] eKLR held that:

> " ... these conditions outlined in the law are mandatory and not left to the choice of the employer. Redundancies affect workers livelihood and where this must be done by an employer, the same must put into consideration the provisions of the law. This is not a one day process as it must be participatory...'

76. Further in the case of *KUDHEIHA v the Aga Khan University Hospital Nairobi, Cause No. 815 of 2015* it was held that:

> " The notices envisaged under section 40 of the *Employment Act* are not mechanical or issued for the sake of going through a process... Such notices should be carefully crafted prior to being issued..."

77. The Correct interpretation of section 40 is that where an employee is unionisable the notice is given to their union and the labour officer, at least one month prior to the declaration of redundancy specifying the reasons and extent of the intended redundancy. Where an employee is not a member of a union, the notice shall be to the employee and the labour office. Whilst section 40(3) is silent on the period of notice where an employee is not a member of a union, it would not make sense to give a labour officer and the employee a lesser notice period than the one the labour officer is given when an employee is a member of a union. This period of one month is naturally intended for the person receiving the notice to confirm that the preconditions of redundancy have been complied with and also give room for any discussion that could avert the redundancy. It is all about fair administrative action and the natural justice principle of the right to be heard.

78. It was clear during hearing that the email sent were group email and the only personal email send to the 1st Claimant was on pay cut which she acknowledged and consented to. The Respondent alleged that since it was massive redundancies it would have been impracticable to require it to notify each employee and consult them. This may not be the case since the staff involved were only fifty.

79. It is therefore clear to this court that the Respondent did not provide sufficient evidence to show that the 1st Claimant was notified 30 days prior to redundancy and she was not given a chance to give her views or readjust her life about this abrupt action by the Respondent.

80. In conclusion this court is of the view that the 1st Claimant's termination was unjustified and procedurally flawed hence unfair termination within the meaning of section 45 of the *Employment Act*.

Whether the Respondent violated the 1st Claimant's right to fair labour practices and fair administrative action.

81. The Claimant has claimed violation of article 41 of *the Constitution* on fair labour practice, and section 4 of the *Fair Administrative Action Act*. The court notes that the same violations need not just be pleaded but must be proved with precision. This was so held in the case of Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others (2013) eKLR.

82. This court finds that the 1st Claimant has not illustrated with precision which of her constitutional rights were violated and in what manner. An unfair termination of employment does not per se amount to violation of a constitutional right unless it is sufficiently demonstrated that the employer in carrying out the termination engaged in egregious acts and omissions that no reasonable employer would engage in. That has not been sufficiently demonstrated here. This was a simple case of termination of employment which the claimant disputed in terms reasons for it and the process of carrying it out. The infractions can adequately be dealt with by the *Employment Act* without invoking *the Constitution*.

Whether the Claimants are entitled to reliefs sought.

83. The Court having found that the 1st Claimant service was unlawfully hence unfairly terminated on account of redundancy, the 1st Claimant is entitled to compensation as provided under section 49 of the Act. The Court will however take into account the amounts already paid to the Claimant as her terminal dues being Kshs. 1,434,011.29/=.

84. The Claimant had worked for the Respondent for about two and half years. The Court further notes that the respondent, like most businesses, underwent very difficult operating environment occasioned by the Covid-19 pandemic. The decision to declare redundancy was not unreasonable in the circumstances. The Court merely faults the respondent for not following due process in executing

what was otherwise an acceptable business decision. In the circumstances an award of 3 months' salary would be an adequate compensation to the 1st Claimant for the unfair termination.

85. On the terminal dues payable upon redundancy it is clear from the October 2020 payslip that the 1st Claimant was earning a gross salary of Kshs 514,930/= and her final dues was Kshs. 1,816,648.46/= before deductions. This payment did not specify what was paid in accordance with section 40 of the *Employment Act*. The Respondent agreed to pay the 1st Claimant's final dues including the severance pay and notice pay among others. The court also notes that the 1st Claimant was entitled to three months salary notice pay as per the contract of employment. The dues for severance pay therefore would be 15 days salary for each complete year of service which is two years making a total of Kshs 514,930/= . The 1st Claimant is entitled to three months' notice pay of Kshs 1,544,790/= to equal to Kshs 2,059,720/=. This amount shall be less what was paid to the 1st Claimant.

86. On the damages for breach of legitimate expectation the court is of the view that any employment relationship can end by other factors other than termination and at some point, it must come to an end. The damages payable to the employees is just compensatory not made to punish the employer. The court declines this prayer.

87. In conclusion the Claimants claim succeeds with costs as follows:

    a. 3 months compensation for unlawful dismissal.....Kshs 1,544,790/=

    b. Terminal dues upon termination.....Kshs 2,059,720/=

       TOTAL .....Kshs 3,604,510/=

       Minus terminal dues paid Kshs 1,816,648/=

       =Kshs 1,787,862/=

    c. deductions but shall attract interest at Court rates from the date of this judgment until payment in full.

    d. The 1st Claimant is further entitled to costs of the suit.

88. It is so ordered.

DATED AT NAIROBI THIS 29TH DAY OF NOVEMBER, 2024

DELIVERED VIRTUALLY THIS 29TH DAY OF NOVEMBER, 2024

ABUODHA NELSON JORUM

PRESIDING JUDGE-APPEALS DIVISION