Makokha v Deloitte Limited (Employment and Labour Relations Cause 91 of 2019) [2023] KEELRC 723 (KLR) (23 March 2023) (Judgment)

Neutral citation: [2023] KEELRC 723 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

EMPLOYMENT AND LABOUR RELATIONS CAUSE 91 OF 2019

BOM MANANI, J

MARCH 23, 2023

BETWEEN

BRIDGID NASIMIYU MAKOKHA .... CLAIMANT

AND

DELOITTE LIMITED .... RESPONDENT

JUDGMENT

Introduction

1. This is a claim that seeks to challenge an alleged unlawful redundancy process. The Claimant, who until March 25, 2019 was an employee of the Respondent, has accused the Respondent of instigating an irregular redundancy exercise at its workplace, a process that resulted in the Claimant losing her employment. In addition to seeking compensation for unlawful termination of her employment, the Claimant seeks several other remedies as more particularly set out in her Amended Memorandum of Claim.

2. The Respondent has resisted the claim. According to the Respondent, the Claimant lost her job fairly and regularly following a lawful redundancy exercise that affected a number of the Respondent's members of staff including the Claimant.

Claimant's Case

3. The Claimant states that the Respondent hired her services as a Regional Security Manager as from November 27, 2014. Her starting salary was Kshs 250,000/- but this had risen to Kshs 301,600/- at the time of separation of the parties.

4. It is the Claimant's case that her work involved overseeing security and safety matters touching on the Respondent's employees, premises and other interests in Kenya, Uganda, Burundi, Tanzania, Rwanda and Ethiopia. In addition, she was charged with coordinating security and safety for the

Respondent's staff in other areas where the Respondent did not have offices including Punt Land, Somalia, Mogadishu, Somaliland, South Sudan, DRC Congo and Liberia.

5. The Claimant alleges that on January 25, 2019, the Respondent served her with a redundancy notice declaring her position as no longer required as from February 17, 2019. The effect of the notice was to communicate the intention to terminate the Claimant's contract of service with effect from February 17, 2019.

6. It is the Claimant's case that the said notice was nullified by the court prompting the Respondent to issue a fresh notice on February 22, 2019. This second notice was to run up to March 25, 2019.

7. The Claimant has challenged the validity of the two notices. She asserts that they did not meet the requirements of the law regulating the redundancy process in Kenya.

8. It is the Claimant's contention that the notices did not give the reasons for the alleged redundancy. In her view, the notices mixed up two distinct processes: redundancy and termination of employment.

9. The Claimant states that even before the duration of the second notice expired, the Respondent recruited an individual to replace her at her place of work. The individual came in to allegedly execute the same mandate as that which the Respondent had purportedly declared obsolete.

10. The Claimant asserts that the recruitment of her replacement followed an advertisement that was run by the Respondent calling for applications for the position of Security Officer. According to the Claimant, the job description and qualifications for the advertised position were the same as those for the position she was holding. The only difference between the two was the job title. According to the Claimant, this led her to believe that her position had not become redundant. In the Claimant's view, the Respondent only resorted to redundancy as an excuse to justify the decision to unfairly terminate her employment.

11. The Claimant also questions the correctness of the decision to declare her redundant on other grounds. For example, she argues that since her contract of employment does not identify redundancy as one of the grounds upon which the contract can be terminated, the Respondent ought not to have invoked it as a reason to close the employment relationship between the parties.

12. She also argues that there was no notice of the intended redundancy to the local labour office as required by law. In addition, the Claimant contends that the Respondent failed to demonstrate the criteria used to determine the group of employees to be declared redundant. Besides, it is the Claimant's case that the Respondent failed to consult her prior to terminating her contract on account of redundancy.

Respondent's Case

13. In response, the Respondent takes the position that the redundancy exercise was carried out in a regular and lawful manner. It is the Respondent's case that after a process of introspection that involved the Respondent and her affiliates, a decision was made to restructure the organizations in order to remain competitive and relevant in the face of a significantly competitive and depressed business environment.

14. According to the Respondent, this decision was partly informed by the closure of operations by these companies in Ethiopia and Burundi and the scaling down of business in Rwanda. Inevitably, this meant that the organizations would have to rationalize both their shared and individual human resource portfolios in order to optimize on this resource.

15. It is the Respondent's case that upon reaching this conclusion, a team was set up and tasked with the process of reviewing what is described as the structure of the Deloitte East Africa 'Internal Client

Services (ICS)'. I understand this to refer to the companies' human resource structures as suggested by the Respondent's witness.

16. Apparently, one of the team's recommendations was that the affiliate companies could do with shared human resource in some areas in order to cut on running costs. In this regard, it was recommended that standalone regional security positions be restructured and overall cross border security issues be factored under Deloitte Security Africa lead.

17. According to the Respondent, this development meant that the individual companies restructure their human resource portfolios to accommodate these changes. For the Respondent, this meant that there would no longer be need to have a standalone regional security portfolio. The position had to be merged with some other department and scaled down accordingly.

18. The Respondent states that it took the decision to do away with the standalone positions of 'Operations' and 'Security' both of which had a regional reach. Instead, the Respondent now established a new overall position of 'Facilities and Operations Manager'. This collapsed both the security and operations portfolios into one position. Below this overall position were created new but lower ranking positions of 'Security Manager' and 'Admin Officer' now reporting to the 'Facilities and Operations Manager'.

19. According to the Respondent, the new position of 'Security Officer' was lesser in rank than the previous one of 'Regional Security Manager' in terms of job qualifications, description and reporting. Whilst the position of Regional Security Manager required applicants to be holders of a university degree and have work experience of 5 to 8 years, the position of Security Officer requires applicants to be diploma holders with work experience of between 4 and 5 years. Similarly, whilst the Regional Security Manager was required to report to the Chief Operating Officer (COO) of the Respondent, the Security Officer now reports to his line manager. Finally, the job description of Regional Security Manager was more expansive than that of Security Officer with the former having an explicit regional mandate.

20. In effect, it is the Respondent's case that the Claimant's position of Regional Securities Manager was done away with. According to the Respondent, it is erroneous to suggest that what happened was a mere change of names as the position of Security Officer was an entirely new and lesser position.

21. The Respondent states that members of staff were notified of the proposed changes and consulted on the matter in various meetings held with the Respondent's management. Further, it is contended that the Respondent issued the requisite notices to all employees affected by the process including the Claimant. Notice of the process was also issued to the labour office as required by the law.

22. The Respondent further states that it complied with the legal requirement on selection of employees to be declared redundant. In respect of the Claimant, it is contended that this procedure did not apply to her since she was the sole holder of the single position of Regional Security Manager in the company. According to the Respondent, the procedure for selection is deployed only in instances where there is more than one individual in a particular cadre of employment where redundancy is proposed.

Analysis

23. It is not in dispute that the parties had an employment relationship at the time the cause of action in the suit arose. The only contested issues are whether the relation was lawfully terminated and whether the parties are entitled to the various reliefs that they seek through their respective pleadings.

24. For the avoidance of doubt, it is perhaps appropriate to restate that redundancy is a lawful mechanism for closing an employment relation as long as it is processed in accordance with the applicable law. It is a

tool that is available to the employer to reorganize his enterprise in order to ensure optimum efficiency in the business that he runs. Indeed, this position has now been made plain through a series of judicial pronouncements. In *Aviation and Allied Workers Union v Kenya Airways Limited & 3 others [2012] eKLR* for instance, the court expressed itself as follows on the matter:-

> 'Employers have the prerogative to determine the structures of their businesses and therefore make positions redundant. Positions may become redundant because there is a decrease in business, the operations have become mechanized, or there is a necessity to re-organize, to enhance operations and prevent closure.'

25. As was expressed in Aviation and Allied Workers Union v Kenya Airways Limited & 3 others(supra), when a redundancy is declared, it is the position that the employee holds that becomes redundant: not the employee. As a consequence, whatever reason that the employer relies on to invoke the process, it must be demonstrated that the prevailing circumstances have rendered the employee's position obsolete or superfluous or unnecessary.

26. The Claimant argues that since her contract of employment does not mention that the contract may be terminated on account of redundancy, it was not open to the Respondent to invoke this ground to terminate the contract between the parties. This argument is unmerited. To the extent that the law recognizes redundancy as a lawful ground for terminating employment, I do not think it is sensible to suggest that an employer would be prevented from relying on the ground to end employment where circumstances permit merely because the parties failed to include it in the list of grounds for possible termination of the contract. The position expressed by the Claimant implies that such employer will be obligated to keep the employee even when the employee's position has become obsolete or superfluous. This would be absurd.

27. Although redundancy is a tool at the disposal of employers to restructure their business, any employer wishing to invoke this procedure must do so in accordance with the law. In the unreported case of *Kenya Union of Commercial Food and Allied Workers v Nerix Pharma Limited ELRC Cause No E 532 of 2021*, the court observed as follows on the law regulating the process:-

> 'The law on redundancy is now well settled. It is set out in sections 40, 43 and 45 of the *Employment Act*. Section 40 of the Act prohibits employers from declaring employees redundant unless they comply with the procedure prescribed there-under. The procedure requires the following:-
>
> a. The employer to issue notice of the intended redundancy to the employee and the local labour office. Where the employee is a member of a Trade Union, the notice should be addressed to the Trade Union. The notice: must issue at least one month before the date of termination; must state the reason for and extent of the proposed redundancy.
>
> b. The employer must then undertake the selection process for the employees to be released from employment. The rule of the thumb is that in undertaking the selection, the employer must adhere to the 'first in last out' principle meaning that the first individuals to be employed would ordinarily be the last to be let go. However, the law permits the employer to depart from this principle and consider other factors such as the skill, ability and reliability of individual employees whilst undertaking the selection process. This is in recognition of the fact that redundancy is a tool available to the employer to re-organize his enterprise in order to optimize his business. And to be able

to achieve this purpose, the employer may require employees with particular skills and abilities but who may have been hired later. To allow the employer to navigate such operational needs, the law permits him to depart from the 'first in last out' principle and consider other factors whilst picking the employees to be released. However, the employer must justify this departure on solid and verifiable grounds. This underscores the need for the selection process to be open and objectively executed.

c. The employer must then pay the employee terminal dues to include: severance pay; accrued leave; one month's salary in lieu of notice; any other benefits agreed on under the prevailing Collective Bargaining Agreement where there is one.

28. The court further to observed as follows on the subject:-

'Under section 43 of the *Employment Act*, the employer has the obligation of proving the reason for terminating an employee's contract of service. Where the employer fails to discharge this burden, the termination shall be deemed unlawful in terms of section 45 of the Act.

It is not lost to the court that section 47 of the *Employment Act* places the burden of proving the unlawfulness of the decision to terminate employment on the employee. However and as has been observed a number of times, the duty on the employee is to place before the court evidence demonstrating, prima facie, that there has been a termination of the contract of service and that the circumstances surrounding the termination point to some form of irregularity in the decision. Once the employee does this, the burden shifts onto the employer to justify the decision.'

29. The Claimant argues that the Respondent failed to observe the law on the selection of employees to be terminated on account of redundancy. She also argues that there was no notice of the proposed redundancy issued to the local labour office. The Claimant also argues that her position was not rendered unnecessary or superfluous as there was an individual hired to replace her even before she left the organization. Further, the Claimant argues that she was never consulted over the process. She appears to have raised part of these concerns in her letter to the Respondent dated January 28, 2019.

30. In my view, these issues go to the root of the validity of the process. They put to question the lawfulness of the decision of the Respondent to terminate the Claimant's contract on account of redundancy. If the Respondent does not rebut matters such as those relating to want of consultation in the process, the Respondent's decision would be impugned. In my view therefore, the Claimant has met the requirements of section 47 of the *Employment Act*.

31. This being the position, the duty shifts onto the Respondent to justify the termination. In order to justify the redundancy, the Respondent has to meet the minimum requirements set out in sections 43 and 45 of the *Employment Act*. I will again refer to the unreported decision in Kenya Union of Commercial Food and Allied Workers v Nerix Pharma Limited ELRC Cause No E 532 of 2021 (supra) where the court stated as follows:-

'Under section 45 of the *Employment Act*, for an employer to prove the reasons for termination of a contract of service on account of redundancy, he is required to provide evidence on the following:-

a. That the reason for the termination is valid;

b. That the reason for the termination is a fair reason based on the operational requirements of the employer;

c. That the employment was terminated in accordance with fair procedure.'

32. It is in this context that I propose to evaluate the dispute before me. First, I will consider whether the Respondent has demonstrated that there was a valid reason to declare a redundancy. Second, I will consider whether the procedure for declaring a redundancy was followed.

33. Regarding the validity of the reason for redundancy, I understand the Respondent as stating that following the restructuring process within the organization, the Claimant's position became unnecessary or obsolete. To be able to ascertain this position, it is necessary to evaluate the position held by the Claimant in the organization against the new position that was established.

34. Both parties agree that the Claimant was engaged as a Regional Security Manager. This position is restated in the employment contract signed between the parties on November 27, 2014. According to the contract, the Claimant was expected to work anywhere in East Africa or in any other country, a statement that augments the position that the position she held was a regional one.

35. In her job description at page 20 of the Respondent's bundle of exhibits, the Claimant was, inter alia, required to formulate and maintain a regional security strategy for the Respondent. She was to facilitate regional security coordination on behalf of the Respondent through networking, collaboration and coordination with internal and external resources among others.

36. In terms of reporting, the Claimant was required to report directly to the COO of the Respondent. She was to oversee the security needs of the Respondent in the entire of the East Africa Region under the direct supervision of the COO.

37. In terms of qualifications, the Claimant was required to have a university degree in criminal justice, security management, business administration or some other related field. In addition, she was required to have gathered work experience in the area of security of between 5 and 8 years.

38. On the other hand, details of the position of Security Officer which was created after abolishing the Claimant's position of Regional Security Manager appear on pages 12 of the Respondent's bundle of exhibits. From the document, it is stated that this position required a holder of a diploma in security management, criminal justice or a similar field. The work experience for the individual was to be between 4 and 5 years.

39. The holder of this office was to report to his line manager. His job description was to support the implementation of policies and procedures designed to minimize the risk of Deloitte's people security, physical security, health and safety, environmental security and physical assets from harm, loss and or compromise. This mandate was to be executed taking into account local laws and regulations. It is noteworthy that there was no regional element expressly attached to this new position.

40. The Respondent has produced two organograms for the organization. The first of these is to be found at page 1 of the Respondent's bundle of exhibits. It is said to be the organogram of the institution before the restructuring under review. This document shows that the Respondent's security department headed by the Claimant was distinct from the operations department although the two departments were horizontally co-equals. Both would report to the COO.

41. The second organogram is at page 2 of the Respondent's bundle of exhibits. It shows two positions of Admin Officer and Security Officer now reporting not to the COO but the Facilities and Operations Manager.

42. The Claimant criticizes this evidence as fabricated. She disputes that the Respondent's organizational structure changed as suggested. She has provided an organogram which she alleges was circulated to members of staff by the Respondent's witness showing her regional security office as a standalone office just below the Chief Finance and Operations Office. She argues that in any event, the organogram produced by the Respondent purporting to evidence the new organizational structure of the Respondent is not signed as a mark of its approval.

43. I am inclined to accept the Respondent's evidence on this issue. First, the Respondent's organogram is consistent with the evidence adduced by the Respondent's witness indicating that the Respondent recruited a person to the position of Security Officer after the restructuring. This new position is shown on the new organogram produced by the Respondent. On the new organogram, the position of Regional Security Manager is evidently missing.

44. Second, evidence of restructuring the Respondent is ordinarily expected to be in possession of the Respondent or its authorized officers. If a third party including the Claimant is in possession of copies of documents purporting to contain such evidence, it is sensible that he gets an official of the Respondent to confirm the authenticity of the evidence. I did not see the Claimant attempt to do this with respect to the organogram she produced. She was not the maker of the document. She did not apply for summons to compel the maker to produce the original of the document. She did not issue a notice to produce to the maker to provide the original of what she held for purposes of inspection and production. Inevitably, the probative value of the document was thereby reduced.

45. Third, the Claimant's belated denial that the Respondent underwent restructuring is actually contradicted by her own letter of January 28, 2019 in reaction to the notice of redundancy that had been served on her. In the letter, the Claimant does not deny that the Respondent was undergoing restructuring. On the contrary, she confirms the process by saying that it was a good move. According to her letter, the only issue she appears to have raised with the process is that it was not consultative and all inclusive. She suggests in the letter that the restructuring of the security department seems to have been driven by financial considerations only without taking into account other equally compelling factors. She even makes reference to the proposed 'new administration structure'. These statements without more are proof that the Claimant was aware that there were ongoing structural changes within the Respondent organization that affected her position at the company.

46. Having regard to the evidence showing that there was a difference in the job qualifications, descriptions, titles and reporting lines for the position of Regional Security Manager held by the Claimant and the new position of Security Officer that was advertised, I am of the view that the two positions were not the same. It is therefore clear to my mind that the position of Regional Security Manager held by the Claimant was rendered obsolete following the reorganization that took place within the Respondent institution.

47. The second issue to be considered relates to whether the Respondent followed the procedure in law in declaring the Claimant redundant. The applicable procedure was outlined earlier on in this decision.

48. The first requirement relates to the redundancy notice. As mentioned, the law requires the employer to serve the employees with a one month redundancy notice. This notice should be copied to the labour officer within the local limits of the Respondent. Alternately, the employer may elect to send separate notices to the employee and the labour office. If there is a Trade Union in the matrix, the notice is to issue to the union and not the employee.

49. On the content of the notice, it is first required to disclose the reason for the proposed redundancy. Second, the notice ought to show the extent of the redundancy.

50. The Claimant asserts that the Respondent did not issue a redundancy notice to the local labour office. However, the Respondent has produced evidence showing that indeed it issued a notice to the Ministry of Labour, Nairobi. The notice is dated January 17, 2019. It communicates the Respondent's intention to terminate contracts of employment for some of its employees on account of redundancy with effect from February 17, 2019, one month down the line.

51. The notice indicates that about 23 positions were to be affected in the process. The reason for the redundancy is disclosed as enhancing business sustainability. The Respondent indicates that because of this reason, it had established that the affected staff positions would not be viable and will cease to exist.

52. After carefully examining this notice, I find no deficiencies in it. It meets the one month requirement stipulated in law. It also meets the requirements of disclosing the reason and extent of the proposed redundancy.

53. The Claimant's suggestion that the notice ought to have been served at the labour office in Westland, Nairobi is of no assistance to her case. It is not denied that the Respondent operates in Nairobi where the notice was served. Further, I was not given evidence to suggest that there is a labour office closer to the Respondent other than where the notice was served.

54. The next matter to be considered relates to the notice that was served on the Claimant. It is conceded that the Respondent first issued a notice dated January 21, 2019 which was deficient on account of the duration required for a valid redundancy notice. Following the court's intervention, the Respondent withdrew the defective notice and issued a second notice dated February 22, 2019. This latter notice was run until March 25, 2019, a period of more than one month.

55. The Claimant asserts that the 2nd notice was defective for a number of reasons. First, the notice is said to be a termination and not a redundancy notice; second, it is said to be lacking information on the reasons for the proposed redundancy. Third, it is indicated that the notice does not disclose the extent of the redundancy.

56. I have looked at the notice. It is headed 'notice of intention to terminate employment on account of redundancy.' Clearly, it is not a notice for termination of employment. It is a notice conveying the intention to terminate employment on account of redundancy.

57. The notice indicates that the Respondent was undergoing reorganization. As a result, certain roles and positions had been abolished and new ones established. This information discloses the reason for the redundancy.

58. The notice further indicates that the position of Regional Security Manager which was held by the Claimant had been abolished. As seen from earlier parts of this decision, the Respondent had only one position of Regional Security Manager within its ranks which was held by the Claimant. There was no other person in the organization holding the same position. In this context, the mention of abolition of the position meant that the sole position of Regional Security Manager had been affected in the process. Therefore, I find that the notice dated February 22, 2019 is valid in terms of section 40 (1) (a) and (b) of the *Employment Act*.

59. The Claimant has challenged the selection procedure adopted by the Respondent. It is indicated that the procedure was not transparent. In response, the Respondent has stated that since the office of Regional Security Manager which was abolished was held by the Claimant as the sole occupant, the issue of selection could not have arisen. This would only have been an issue if the position was held by two or more employees.

60. The position expressed by the Respondent in this respect is the correct one. The fact of selection of the individuals to be released from employment presupposes the presence of more than one individual in the same cadre that is affected by the redundancy. It is only in this context that selection would be required. Indeed, that is the basis of the 'first in last out' principle which requires that individuals who were first to be hired in that cadre would be the last to be released. The same rationale informs the application of the other parameters including the skill and reliability of the employees. In the premises, I agree with the Respondent that in the circumstances of this case, the issue of selection was a non-issue. To hold otherwise would be absurd.

61. The final matter on procedure relates to consultations in the process leading to the eventual release of the affected employees. The Claimant states that she was not consulted over the issue. Indeed, she has raised this concern in her letter to the Respondent dated January 28, 2019.

62. On the other hand, the Respondent states that it consulted not just the Claimant but all the other employees that were affected by the process. The consultations are said to have been through group meetings and face to face discussions with individual employees.

63. The law does not provide for the duty to consult employees on the process of redundancy, at least expressly. The need for consultations is usually inferred from the fact that an employee has a right to fair labour practice. This right, which is entrenched under article 41 of the *Constitution* of Kenya 2010 and implied in the *Employment Act*, 2007 and the *Labour Relations Act*, 2007, is deemed to require the employer to involve the employee in matters that may affect the employee's welfare including redundancy before a decision is taken.

64. This duty may also flow from the right to fair administrative action under article 47 of the *Constitution* of Kenya, 2010 as read with the *Fair Administrative Action Act*. Every person, including an employee, has a right to administrative action that is procedurally fair. This implies a duty on an employer who is processing a redundancy to afford the employee procedural fairness in the process by affording him a hearing on the matter.

65. I am aware that the Court of Appeal in a number of its decision including *Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others [2014] eKLR* has often justified the duty on the employer to consult on redundancies based on, inter alia, Recommendation No 166 to the ILO Termination of Employment Convention No 158, 1982. However, as at the date of writing this decision, there is no indication that Kenya has ratified this particular convention. The available list of country ratifications discloses that so far only 36 countries have ratified the instrument. Kenya is not one of them. As a result, it is doubtful that the duty on employers in Kenya to consult employees during a redundancy process is founded on Recommendation No 166 to ILO convention on termination of employment. That notwithstanding, the need for consultations on the process, as was pointed out by the honourable Judges in the aforesaid decision, can still be justified on other grounds such as those suggested above.

66. As the law is not express on the need for consultations in the process, it inevitably follows that there is no clear indication when the implied consultations between the employer and employee ought to commence. However, in the Court of Appeal decision of Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others [2014] eKLR, it is suggested that the redundancy notice should ordinarily trigger the consultative process. The court expressed itself on the issue as follows:-

> 'My understanding of this provision is that when an employer contemplates redundancy, he should first give a general notice of that intention to the employees likely to be affected or their union. It is that notice that will elicit consultation between the parties'

> The purpose of the notice under Section 40(1) (a) and (b) of the *Employment Act*, as is also provided for in the said ILO Convention No 158-Termination of Employment Convention, 1982, is to give the parties an opportunity to consider 'measures to be taken to avert or to minimize the terminations and measures to mitigate the adverse effects of any terminations on the workers concerned such as finding alternative employment.' 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.'

67. The Respondent states that there were consultations between it and the affected employees. To establish this, the Respondent states that it had meetings with employees in October 2018, on November 2, 2018 and January 17, 2019. In addition, it is indicated that the Respondent's officials held a face to face meeting with the Claimant on January 21, 2019. The Claimant denies these assertions. Were there consultations between the parties?

68. The Respondent's case is that the issue of redundancy did not affect the Claimant alone. It affected other departments as well. The Respondent insists that it held various consultative sessions with all the affected individuals from the various departments, some joint and other individual. To prove this point, the Respondent has produced a number of documents. Of critical significance is the internal discussion document dated January 17, 2019 appearing at page 9 of the Respondent's bundle of exhibits. This document is said to evidence the consultations which the team that was tasked with the process had with members of staff.

69. At page 11 of the Respondent's bundle of exhibits, the Respondent produces an email dated January 17, 2019 from one Mwaura Rose to several other individuals. From the record, the email was generated using an email username that bears the Respondent's details. The email addresses to which the email was sent also bear the Respondent's details. The impression created by this evidence is that this email exchange was between employees of the Respondent using their official email addresses.

70. The Respondent states that this email is an example of an affected employee raising her questions on the process to the task force after the session of January 17, 2019. The questions raised by the said member of staff are all connected to the redundancy exercise. They include questions like: 'Can one leave earlier? When will the affected persons know? What was the selection process? When is the last day for staff to leave?'

71. This correspondence, in my humble view, establishes the fact that the Respondent had a meeting with the affected staff on January 17, 2019 contrary to the Claimant's flat denial of such meeting. It is one thing for one to say that she was not aware of the meeting. It is another to say that no such meeting happened. The denial by the Claimant that the Respondent had meetings with employees regarding the redundancy process in the face of evidence suggesting the contrary paints her as less than candid about the matter.

72. Having regard to the foregoing, I am more inclined to believe the Respondent's position that it held meetings with members of staff, particularly on January 17, 2019. I believe that the affected members of staff had an idea what was going on in this respect.

73. But even if I am wrong on the foregoing, I would still arrive at the conclusion that the Respondent granted the Claimant an opportunity to consult on the process. Whether the Claimant made use of it is a different matter.

74. The record shows that on February 22, 2019 the Respondent issued the Claimant with a fresh redundancy notice. In the notice, the Respondent expressly invited the Claimant for inquiries on the ongoing process. However, there is no evidence that the Claimant reacted to the invite. In my view,

the Respondent's actions were attempts at consultation and negotiations on the way forward in the process.

75. I appreciate that consultations have to be meaningful and not cosmetic. However, the employee must take advantage of a genuine offer to consult. This is suggested in Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others (supra) when the court quoting with approval the decision in Cammish v Parliamentary Service12 stated as follows:-

> ' Consultation has to be a reality, not a charade. The party to be consulted must be told what is proposed and must be given sufficiently precise information to allow a reasonable opportunity to respond. A reasonable time in which to do so must be permitted. The person doing the consulting must keep an open mind and listen to suggestions, consider them properly, and then (and only then) decide what is to be done.'

76. In this case, the Respondent made the offer to consult through its letter of February 22, 2019. This offer remained open for the duration of the notice which lapsed on March 25, 2019. There is no indication that the Claimant took up this offer. This is despite the fact that the Claimant remained at her place of work until March 20, 2019 when she says the Respondent forced her out. There is no evidence of the Claimant having revisited consultations after she obtained an order nullifying the first redundancy notice and being served with the second notice.

77. I think that on the material before me, the Respondent offered to have consultations on the redundancy. The Claimant had the opportunity to pursue these consultations with the Respondent. However, she did not take advantage of it.

78. I am unable to fault the Respondent for the Claimant's failure to take up further consultations following the Respondent's willingness to undertake the exercise as indicated above. In the premises, I hold the view that there was an opportunity to consult. How it was utilized by the employee should not be used to upset the exercise. In Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others (supra),both Murgor and Githinji JJA suggest that the employer should not be condemned for failing to facilitate consultations in processing a redundancy if the employee had the chance to consult on the process but either frustrated it or otherwise failed to utilize it.

Determination

79. Having reached the conclusion that the Respondent had valid reason to declare redundancy and that due process was observed in the process, I decline to declare the process illegitimate. The net effect is that I find no merit in the claim as presented by the Claimant.

80. Consequently, the cause is dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED ON THE 23RD DAY OF MARCH, 2023

B. O. M. MANANI

JUDGE

In the presence of:

.... for the Claimant

..................for the Respondent

ORDER

In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

B. O. M MANANI