Mbage v Hillcrest Investment Limited (Employment and Labour Relations Cause 2007 of 2016) [2023] KEELRC 2096 (KLR) (27 July 2023) (Judgment)

Neutral citation: [2023] KEELRC 2096 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

EMPLOYMENT AND LABOUR RELATIONS CAUSE 2007 OF 2016

K OCHARO, J

JULY 27, 2023

BETWEEN

WATHIRA MBAGE .... CLAIMANT

AND

HILLCREST INVESTMENT LIMITED .... RESPONDENT

JUDGMENT

Introduction

1. Through a Statement of Claim dated the 27th September 2016, the Claimant sued the Respondent seeking the following reliefs:

    a. A declaration that the Respondent is guilty of unfair labour practice in respect of its purported declaration of redundancy/termination of the Claimant's employment.

    b. A declaration that the Claimant's right to fair labour practices has been breached resulting in unfair, irregular and illegal termination of the employment.

    c. The sum of Kshs. 2, 187, 350 payable as salary from October 2016 till the end of the employment contract.

    d. Damages in the sum of Ksh. 2,386, 200 for the unfair and illegal termination of employment calculated at twelve months' pay.

    e. Damages for the breach of the Claimant's fundamental right to fair labour practices and the right to life and livelihood.

    f. Interest on (c), (d), and (e) above at the Court's rate.

    g. Cost of this Claim.

h. Any other relief this Court may deem fit to grant.

2. Contemporaneously with the filing of the Memorandum of the Claim, the Claimant filed her witness statement dated 21st September 2016 and several documents under the list of documents of the even date.

3. Upon being served with the summons to enter an appearance, the Respondent did enter appearance and file a Memorandum of Reply on the 18th of October 2016, The Memorandum of Reply was filed side by side with its witness's witness statement and documents that it intended to place reliance on in support of its defence.

4. The matter was heard inter-partes on merit. The Claimant's case was heard on the 27th of June 2022 while the Respondent's case was heard on the 21st of September 2022.

5. At the hearing, the parties urged the court to adopt the witness statements they had filed as well as the documents on record as their evidence in chief and documentary evidence, respectively. The Claimant and the Respondent's witness briefly gave oral evidence, clarifying matters in their witness statements and documents that required clarification, before proceeding to give testimony under cross-examination and re-examination.

The Claimant's case

6. It was the Claimant's case that she first came into the employment of the Respondent by a letter dated 4th May 2015. she got so employed in the position of Manager, Public Relations and Communication at the Hillcrest International Schools on a two-year contract, effective 1st September 2015 and ending 31st August 2017. Her confirmation into employment flowed from her successful performance during the probationary period of three months.

7. The Claimant stated that her job description entailed being responsible to the CEO and working closely with the headteachers and other stakeholders for the promotion and marketing of the school as well as exploring new opportunities and markets for recruitment and publicity.

8. At the time she was joining the Respondent's workforce, its CEO was Mr. Chris Wheeler with whom she worked so well for the good of the school until he exited the employment of the Respondent. Mr. Wheeler was succeeded by Mr. Alfred Kithusi, the Chief Finance Officer. With the successor, she too worked very well. They ran an East African advertisement for the promotion of Hillcrest International Schools and newly refurbished boarding facilities in Rwanda, Burundi, Uganda, and Sudan. He also thereafter left Hillcrest on or about 31st May 2016. His responsibilities were taken over by Mr. Kuraru, the Commercial Director.

9. She contended that her relationship with Mr. Kuraru commenced on a sour note. He adopted a condescending, and hostile attitude towards her and several other members of administrative staff.

10. On 10th May 2016, Mr. Kuraru summoned her to his office, and informed her that he was not comfortable to work with her. He asked her to tender a resignation. He also stated that he had received negative reports about her. She didn't see any reason to resign as according to her she was diligently working, and enjoying a cordial relationship with parents and children.

11. On the 11th of May 2016, she wrote an email to Mr. Kuraru requesting to know what the negative reports were all about, with a desire of having the same addressed immediately. In response, he slated a meeting for the following day, for a discussion on the matter. They held the meeting as scheduled.

Mr. Kurara disclosed to her that the negative news came from Mr. Hollas, the Chairman of the Board of directors.

12. On the 15th of June 2016, Mr. Kuraru summoned her, and the Academic Registrar, to his office, requiring them to explain why they had participated in a decision to invite the Hillcrest Parent Community to a musical performance by students without requiring the parents to pay for their performance. They explained to him that they had no control over the decision. The Head of Co-Curricular Activities had already written to him taking responsibility for the decision. The activity was being used as a school outreach event to the Community and prospective parents to, promote the Hillcrest Brand and, boost enrolment which was in the decline.

13. She further stated that Mr. Kuraru did not accept their explanation, ordered the out of his office, and warned that they would receive warning letters the following day.

14. The Claimant stated that by an email dated 7th August 2016, Mr. Kuraru summoned her for a meeting with him at the office of the then newly recruited Head of Human Resources and Administration, Mrs Mbesa Karaimu. During the meeting, he accused her of having taken unauthorized leave. She explained to him that applied for the same through the HR Department, who had already confirmed to him that she had eleven outstanding leave days, an explanation which apparently, he didn't accept as he accused her of being dishonest, and asked Mrs. Mbesa to issue her with a Notice to show cause.

15. On the 12th of August 2016 she was served with a show cause letter, requiring her explain why she could not be dismissed summarily for taking unauthorized leave. Considering that the complaint against her had been made by Mr. Kuraru, who was senior to the Head of HR, she didn't expect any fair hearing from he as she had written letter under the instructions of Mr. Kuraru.

16. She stated that by a letter dated 15th August 2016, she wrote to the Chair of the Respondent's Board of Governors responding to the notice to show cause. She explained the circumstances under which she had rightfully taken her annual leave. She expressed her concern that she was being threatened with summary dismissal, simply because she had exercised a statutory right to her annual leave as an employee.

17. In her response to the show cause letter, she also registered a grievance against the continued harassment by Mr. Kuraru. The Respondent's Human Resource Policies & Procedure Manual entitles and encourages employees to register grievances for harassment by their superiors or fellow employees.

18. The Claimant further stated that on the 22nd August 2016, Mrs. Mbesa Karaimu, the Human Resources and Administration Manager, summoned her to a meeting with Mr. Andrew Hollas, for hearing of her response to the notice to show cause and grievance against Mr. Kururu.

19. She further testified that at the meeting, Mr. Hollas announced he had shelved the hearing on the notice to show cause until after the trip that he was taking to the United States. He however informed her that the board had already declared her job position redundant in June 2016. According to him, the decision was final. The HR and Administrative Manager was then instructed to take up the matter with the Ministry of Labour regarding.

20. The Claimant further stated that she felt that Mr. Hollas was terminating her employment because she had registered a grievance against Mr. Kuraru.

21. On the 25th of August 2016, she was again summoned by Mrs. Mbesa to be advised on the way forward regarding the purported redundancy. She was given a letter dated 26th August 2016, being a purported one-month redundancy notice. The notice was to take effect on the 25th of September 2016. She

declined to sign the letter, as she was of the view that the same was in bad faith, it didn't address her terminal dues and was an afterthought.

22. It is the Claimant's case that the Respondent's purported Show Cause Notice and the Notice of the Intention to declare her redundant, ran contrary to the express provisions of the law as well as the Respondent's Human Resource Policies & Procedures Manual, and the same was illegal and discriminatory and unfair for the reasons hereunder:

    i. The contents of the letter markedly differed from the position communicated to the her by the Chairman of the Board of Directors at the meeting on 22nd August 2016. The Chairman had informed her that the decision to declare her position redundant had been made by the Board in a meeting held in June 2016 - a whole two months earlier.

    ii. She was not aware of any staff rationalization at the schools. There was no communication generally sent out to the employees about any such planned staff rationalization on the account of decline in enrolment of students. To the contrary, the Respondent had been hiring staff. In 2016 alone at least thirteen employees were employed.

    iii. Additionally, even if a staff rationalization was being undertaken, pertinent provisions of the *Employment Act* were not observed. For instance, her marketing responsibilities were transferred to Christina Lacey-an expatriate originally on a work permit as a preparatory teacher- with hardly any qualification in the Claimant's role, a wholly discriminatory action.

23. Lastly it was contended that the Claimant's right to fair labour practices was grossly breached. Further that her employment was unfairly terminated. The Respondent's unlawful actions caused her immense psychological, financial, and mental anguish.

24. When cross-examined by Mr. Nyaburi, she told the Court that it was her responsibility to engage the media. She was the spokesperson of the Respondent as that was the role of the public relations specialist. It was not the responsibility of the Chair of the Board or the Principal to engage the media.

25. Clause 16:2:3 of the Respondent's Human Resource Policies and Procedure Manual had a provision that the principal or the Chair of the Board would talk to the media on behalf of the school.

26. She told the court that she did not have authorization to engage the media or the Nairobian. Her duties included public relations, internal communication, enrolment, and marketing. Christina did not take all her duties but some. Her salary and other benefits did not change. She had no document to show that Christina was given the new role on a soft landing.

27. It was her testimony that she was entitled to an annual leave of 25 working days but as per her contract letter, the same was subject to exigencies of service. She was supposed to apply and submit the application to the supervisor for approval and then to the Human resource department for safekeeping.

28. On 3rd July 2016 she applied for leave and submitted it to the Human Resources Manager but not to the supervisor. The supervisor did not approve the application. She proceeded to leave. Subsequently, she received a notice to show cause and was supposed to respond to it by 15th August 2016. She addressed her response to the Chairman of the Board and not the Human Resource Manager.

29. According to the Respondent's grievance procedure, the grievance was supposed to be first raised with her immediate supervisor. However, in situations where the supervisor was involved, the Board. The matters that she complained of, were matters that first arose in May. However, she did not raise any grievance till August when she got the Notice to Show Cause.

30. As regards redundancy, she was invited to attend a meeting with the Chairman of the Board of Directors on 22nd August 2016. In this meeting, she was informed that her position had been declared redundant in June 2016. The reason accorded was the declining student numbers. She was aware that there was a decline in numbers and her position had been created to boost the said numbers. Even as she was serving, the student numbers continued to decline.

31. She further testified that in the meeting, she was told that her terminal dues were to be paid. She was then given a notice of intention to declare her redundant. The redundancy was to take effect on 25th September 2016. There was no communication on how much she was to receive. She was informed that a notice on the redundancy was to be written to the Labour office.

32. She told the court that her last day of work was 22nd August 2016, she did not work up to 25th September 2016. To date, she has not gone back to the school to clear.

33. At pages 29 and 30 of her supplementary bundle of documents, there is an advertisement for 30th September 2016 and her position was not among those advertised. Too, in the 2nd advertisement, the position wasn't at all advertised.

34. On re-exam it was her testimony that the duties which were taken by Christina were those that were part of her role. Christina was neither a teacher nor a public Communications expert.

35. In the advertisement, the Respondent was hiring several teachers and this would not be expected of a school with a dwindling number of students

The Respondents' case

36. The Respondents' case was presented by Mbesa Kairimu, the Head of Human Resource and Administration.RW1 confirmed that indeed by a letter of appointment dated 4th May 2015, the Claimant was employed as a Manager, Public Relations and Communications, for a fixed period of two years, 1st September 2015 to 31st August 2017. The contract provided for a monthly consolidated gross salary of Ksh. 198, 850.

37. The witness stated that the Claimant proceeded for annual leave in the period between 16th July 2016 to 29th July 2016 without adhering to the Respondent's organizational procedures and or obtaining authorization. Upon return, she was requested to attend a meeting with the Commercial Director to address the issue but she failed to attend the meeting. This conduct amounted to a breach of procedure, and insubordination.

38. It was further stated that as a result of the conduct, the Claimant was issued with a show-cause letter dated 12th August 2016. She was asked to show cause why disciplinary action could not be taken against her for proceeding for part of her annual leave without adhering to the Respondent's policies and procedures, and for insubordination.

39. The witness testified that by a letter dated 15th August 2016, the Claimant responded to the Notice to Show Cause. She wrote directly to the Chairman of the Board of Directors, citing hostility of the Commercial Director, against her, as the reason she wrote direct to the Chairman. She further stated that she didn't expect to get a fair hearing.

40. The witness contended that it was a term of the Respondent's policies and procedures that all leave had to be applied for in advance through leave application forms, approved by the immediate supervisor, and the approved forms sent to the HR department. The Claimant failed, neglected, and or refused to obtain approval before proceeding for leave. The show cause letter was therefore justified.

41. It was her testimony that the Claimant's grievance, and the decision to declare her position redundant were discussed in a meeting that was held on 22nd August 2016 between the Claimant and the Chairman, after which the Claimant stopped reporting to work.

42. The witness asserted that the Claimant's position, and that of the Deputy Head of Pastoral, were declared redundant due to declining revenue occasioned by declining student numbers.

43. It was testified that the Claimant was issued with a notice of the intention to declare her redundant. The notice period was spelled out as 26th August 2016 to 25th September 2016. Besides this notice, a notice to the Labour officer was issued and thus the Claimant's claim is unfounded.

44. The witness asserted that the disciplinary process that was commenced against the Claimant for proceeding for leave without approval had no connection whatsoever with the decision to declare her position redundant.

45. She testified that Christina Lacey was a teacher with additional administration roles. The Respondent had the liberty to request her to undertake any other duties from time to time which would include undertaking any activities aimed at improving student enrolment and increased profitability.

46. When cross-examined, the witness testified that she joined the Respondent on 8th August 2016. Her witness statement and evidence flow from the Respondent's institutional records to which by her position, she has access.

47. It was her testimony that the Claimant was issued with a notice to show cause in regard to the proceeding for leave without approval. In applying for leave, one had to state the number of days that she or he wanted to take, then the HR department had to approve the days before the application is transmitted to the applicant's supervisor for final approval. The Claimant didn't adhere to the procedure.

48. The disciplinary process was provided for under clause 9:2:3 of the HR Manual. This process was not concluded because the Claimant did not respond to the notice to show cause letter and instead of responding, she commenced a grievance against her supervisor. Her grievance was not concluded because she did not come back to work.

49. In her further testimony she stated the minutes of 22nd August 2016 referred to a meeting held on 16th June 2016. However, she didn't have the minutes of the meeting. The witness stated further that she didn't have any record from which the Board's reasons for the redundancy can be discerned. She was not able to tell how many teachers were affected by the redundancy or how many exited the employment of the Respondent because of the decline in student numbers. Two administrative positions were declared redundant.

50. She further stated that even though a decision had been made by the Board in June 2018 to declare the Claimant redundant, she continued working between the period June-August 2018. She wouldn't tell why the Board allowed her to so continue working.

51. It was her testimony that the Claimant was hired to help drive up the enrolment of students, but she was not successful as the enrolment continued to decline. The declining student numbers led to a decline in finances.

52. Referred to the profit and loss account document that the Respondent tendered before the Court under its supplementary list of documents, the witness testified that in the first quarter of 2016, the Respondent made a profit of Kshs. 78 million which represented an increase in revenue by 22%.

53. Asked whether in the year 2016, there was any recruitment of new staff, the witness stated that she could not tell. She however confirmed that the Respondent did call for the expression of interest for teaching positions. Recruitment for some of the advertised teacher positions was eventually not done.

54. It was her testimony that Claimant's position- Public Relations was never and has not been taken by anybody. Her roles were distributed to other departments. Christina Lacey never took any of her roles.

55. It was her testimony that she could say that the Claimant was not targeted because of the grievance she had made against her supervisor.

56. On re-exam, she told the court that the notice to show cause was given because of her absenteeism without any permission.

57. She stated that there was no evidence by the Claimant that she had previously applied for leave via email that was approved. Annual leave was provided for in Clause 6.2 of the Human Resource and Policy Manual.

58. The redundancy was on the basis of the declining number of students which affected profitability.

59. Christina Lacey was not performing same roles as the Claimant.

The Claimant's submissions

60. The Claimant filed her submissions on the 17th October 2022 distilling four issues for determination thus:

    i. Whether the termination of the Claimant's employment on account of redundancy was lawful and procedural.

    ii. Whether the Claimant's right to fair labour practices was breached by the Respondent.

    iii. Whether the Claimant is entitled to the reliefs sought.

    iv. Who should bear the costs of the suit?

61. It was submitted that Section 40 of the *Employment Act* sets forth stringent conditions that must be met by an employer before terminating a contract of service on account of redundancy. The effect and scope of this provision was elaborated in the case of Kenya Airways Ltd vs Aviation & Allied Workers Union Kenya & Others (2014) eKLR where Maraga JA [as he then was] stated:

> " 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, and I will shortly show that consultation is imperative, on the justifiability of that intention and the mode of its implementation where it is found justifiable. At that initial stage, the employer would not have identified the employee(s) who will be affected. So that notice cannot have the names of the employees as Mr. Mwenesi contended. It does not have to a calendar months' notice as Mr. Mwenesi contended. The Act requires one month's notice. The period runs from the date of service of that notice. It is after the conclusions of the consultations on all issues of the matter that notices will be issued to the affected employees of the decision to declare them redundant."

62. The Claimant submitted that the section contemplates two notices, first a general notice and second, the termination notice. From the material presented by the parties, there is no doubt that the two notices were not issued. The notice dated 26th August 2016 was also the termination notice.

63. It was also submitted that the Respondent did not undertake consultation with the Claimant. The decision to terminate her employment on account of redundancy was allegedly made in the meeting held on 16th June 2016. The Claimant only got to be informed of the decision on 22nd August 2016. The failure to engage her in consultation over the redundancy was a grave procedural lapse.

64. The Claimant submitted that the declared redundancy was not genuine and justified. The Respondent's position that there was a redundancy situation influenced by declined student enrolment was just taken to sanitize the Respondent's unlawful, unfair, inhuman, and unjustified termination of the Claimant's employment. As a matter of fact, the school made substantial profits as evidenced by the school's Profit and loss account for the first quarter of 2016 ending March 2016, to the tune of KShs. 78,983,000, representing a 22% finance increase. This fact was admitted by the Respondent's witness.

65. It was submitted that in order for any termination of employment on account of redundancy to be considered lawful, it must be both substantially justified and procedurally fair. The Respondent failed to demonstrate the existence of the two aspects in the termination. To buttress this argument reliance was placed on the case of Kenya Airways vs Aviation & Allied Workers (supra).

66. It was further submitted that the onus of proving that the redundancy was justified rested upon the Respondent. Reliance was on the case of Barclays Bank of Kenya Ltd vs Gladys Muthoni & 20 others (2018) eKLR where it was held:

> "There is a heavy burden of proof upon the employer to justify any termination of employment."

67. The Claimant submitted that the termination of her employment had nothing to do with a redundancy situation but all to do with the differences that she had with Mr. Kuraru and Mr. Hollas in the course of her employment. The grievance that she lodged against Mr. Kuraru attracted the termination. The Respondent's action amounted to an unfair labour practice.

68. The Claimant lastly submitted that she is entitled to the reliefs sought as well as the cost of the suit. Reliance was placed on the cases of Moses Warukira Kibochi vs Lotos Property Management Limited (2021) eKLR and the case of County Government Workers Union vs Narok County Government & Another (2021) eKLR in fortification of her submissions.

The Respondent's submissions

69. The Respondent filed its submissions on 9th November 2022 ventilating three issues for determination thus:

    i. Whether the Claimant's termination on account of redundancy was fair and lawful.

    ii. Whether the Claimant's right to fair labour practices was breached.

    iii. Whether the Claimant is entitled to the reliefs sought.

70. The Respondent submitted that redundancy is a valid ground for termination of a contract of service. To buttress this point, reliance was placed on the holding in the case of Kenya Plantation & Agricultural Workers Union vs James Finlays (K) Limited (2013) eKLR thus:

> " The court considers that the employer is entitled to undertake redundancy just like the other human resource functions like recruitment and selection, appointment and promotion, training and development and termination of the contract of service including dismissal on disciplinary grounds. The general principle is that the court shall not interfere in the employer's entitlement to undertake these functions and interference by the court shall be exercised very sparingly."

71. Similarly, reliance was placed on the case of Kenya Airways Limited vs Aviation & Allied Workers Union Kenya & 3 others (2014) eKLR (Supra), in fortification of its submission.

72. The Respondent submitted that Christina Lacey and the Claimant did not hold the same position. The issue of consideration of seniority in terms of time, skills, ability, and reliability could therefore not arise in making the decision to declare the Claimant's position redundant.

73. It was further submitted that contrary to the Claimant's assertion that the Balance sheet showed that the Respondent made a profit in 2016, it did not. In fact, the profit reduced by -6%, owing to increased administrative costs. In the circumstances, the termination on account of redundancy was necessitated by an evaluation of the Respondent's business and its revenue by the Board which led to the decision to declare the two positions redundant for economic reasons.

74. The Respondent submitted that the termination of the Claimant on the ground of redundancy was done in accordance with the fair procedure stipulated under section 40 (1) (b) of the *Employment Act* as the Claimant was first called to a meeting and explained to concerning the intended redundancy. She was later given a notice of the intended redundancy. The Respondent simultaneously issued a notice to the Labour Office.

75. Lastly it was submitted that section 40 of the Act only provides for one notice to be issued to the employee and another to the Labour office, both of which the Respondent issued. The Claimant assertion that two notices were required in a redundancy process, and that consultation with the employee is a requirement does not hold water. The Respondent placed reliance on the case of Kenya Airways Limited vs Aviation & Allied Workers Union Kenya & 3 others (2014) eKLR (Supra).

76. On the second issue, it was submitted that the Claimant's right to fair labour practices was at all times respected and upheld. She was fairly remunerated and had reasonable and fair working conditions. The decision in the case of Peter Wambugu Kariuki & 16 others vs Kenya Agricultural Research Institute (2013) eKLR was cited to support this point and more specifically the holding, that:

> " What is this right to fair labour practices?
>
> First, it is the opinion of the court that the bundle of elements of "fair labour practices" is elaborated in Article 41(2), (3), (4) and (5) of *the Constitution*. Under Article 41(2) every worker has the right to fair remuneration; to reasonable working conditions; to form, join or participate in the activities and programmes of a trade union; and to go on strike. Under Article 41(3) every employer has the right to form and join an employers' organization; and to participate in the activities and programmes of an employers' organization. Under Article 41(4), every trade union and every employers' organization has the right to determine its own administration, programmes and activities; to organize; and to form and join a

federation. Under Article 41(5) every trade union, employers' organization and employer has the right to engage in collective bargaining. These constitutional provisions constitute the foundational contents of the right to fair labour practices.

Secondly, it is the opinion of the court that the right to "fair labour practices" encompasses the constitutional and statutory provisions and the established work place conventions or usages that give effect to the elaborations set out in Article 41 or promote and protect fairness at work. These include provisions for basic fair treatment of employees, procedures for collective representation at work, and of late, policies that enhance family life while making it easier for men, women and persons with disabilities to go to work."

77. The Respondent submitted that the Claimant's allegation that her right to fair Labour practice was violated as her grievance was not duly deliberated upon and determined stands on loose sand. Instead of addressing the grievance to her supervisor in accordance with the Respondent's Human Resource policies and procedure Manual, she went straight to the Chairman of the Board of Directors. The lodging of the grievance came in after she had received a show-cause letter. The timing is a testament of ill faith on her part.

78. The termination was therefore substantively justified and procedurally fair in accordance with the stipulations of the law.

79. On the relief sought for salary payable from October 2016 until the end of the employment contract, the Respondent submitted that this relief/remedy is not available under the *Employment Act*. To buttress this submission, the Respondent sought fortification in the holding in the case of Alphonce Maghanga Mwachanya vs Operation 680 Limited (2013) eKLR, thus:

> " 41. The crucial point is whether a remedy of granting compensation or damages equivalent to the salary an employee would have earned were a fixed term contract of employment be terminated prematurely can be located anywhere in section 49 of the *Employment Act*.
>
> 42. To my mind section 49 of the *Employment Act* is no authority and cannot be the basis for the grant or award of any remedy of damages. Indeed, the phrase "damage(s)" is not mentioned anywhere in the section. In my considered view section 49(4) (f) of the *Employment Act* cannot be the legal basis of making an award of damages where a fixed term contract has been terminated prematurely or not been renewed. It just provides one of the factors to consider in granting any or all of the primary remedies set out in sections 49(1) and (3) of the *Employment Act*."

80. Similarly, the Respondent relied on the case of Sandra M. Waswa vs Article 19: Global Campaign for Free Expression (2022) eKLR in fortification of its submission.

81. Lastly the Respondent submitted that there is no basis upon which the compensatory award of KShs. 2,386,200 can be awarded as the Claimant has failed to demonstrate that the termination of her employment was unfair or wrongful.

Analysis and determination

82. From the pleadings, the evidence, and the submissions by the Parties, the following issues emerge for determination:

    i. Whether the termination of the Claimant's employment was fair and lawful.

ii. Whether the Claimant is entitled to the reliefs sought or any of them.

iii. Who should bear the costs of this suit?

Whether the termination of the Claimant's employment was fair and lawful.

83. In Cause No.ELRC 1332 OF 2018 – Showkat Hussein Badat vs Oshwal Education & Relief Board, this Court stated;

> " 50. The defining characteristic of termination on account of redundancy is lack of fault on the employee. It is a species of 'no fault termination'. One cannot be off the mark to state that it is for this reason that the *Employment Act* places particular obligations on the employer most of which are directed towards ensuring that those employees to be dismissed are treated fairly."

84. Both section 2 of the *Employment Act*, 2007 and section 2 of the *Labour Relations Act* define redundancy as:

> " 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 are commonly known as the abolition of office, job or occupation and loss of employment."

85. In the case of Kenya Airways Limited & Aviation & Allied Workers Union Kenya & 3 others (2014) eKLR cited by the Counsel for the parties herein, the Court of Appeal stated:

> " There are two broad aspects of this definition. The first one is that the loss of employment in redundancy cases has to be by involuntary means and at the initiative of the employer. It should not be a contrived situation. It has to be non-volitional. I understand this to refer to a situation, in most cases, an economic downturn, brought about by factors beyond the control of the employer, which leaves the employer with no option but to take an initiative the consequence of which will be inevitable loss of employment."

86. Undeniably, the law does not recognize employment for life, however, the social balance struck in the context of a constitutional regime in which the right to fair Labour Practices is a fundamental right is to afford an employee the right not to be unfairly dismissed and the employer the right to dismiss an employee for a fair reason provided that a fair procedure is followed.

87. A termination of a contract of service can only be considered fair if substantive justification and procedural fairness, are established in the decision to terminate and the process leading to the termination, respectively. The Court of Appeal in the Kenya Airways Limited vs Aviation & Allied Workers Union [Supra] expressed itself;

> " ...... for any termination of employment under redundancy to be lawful, it must be both substantively justified and procedurally fair........."

Throughout, the Claimant maintained that the termination of her employment lacked substantive and procedural fairness. On the other hand, the Respondent maintained that they were present. At this point, I turn to consider the two aspects separately.

I. Procedural fairness.

88. Lack of fault on the part of the employee is the defining characteristic of termination of an employee's employment on account of redundancy. It is for this reason, that the *Employment Act*, 2007 has given a detailed procedure to be adopted in such terminations whenever an employer contemplates terminating. In my view, the statutory procedure stipulated in section 40 of the Act, leaves no residual for the employer to operate outside the procedure to whatever extent. See, this Court's decision in Warucu Ngethe Kijuu v Hilcrest Limited [2022] KEELRC 4156[KLR].

89. Section 40 of the *Employment Act* section provides:

> " An employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions—
>
> (a) where the employee is a member of a trade union, the employer notifies the union to which the employee is a member and the labour officer in charge of the area where the employee is employed of the reasons for, and the extent of, the intended redundancy not less than a month prior to the date of the intended date of termination on account of redundancy;
>
> (b) where an employee is not a member of a trade union, the employer notifies the employee personally in writing and the labour officer;
>
> (c) the employer has, in the selection of employees to be declared redundant had due regard to seniority in time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy;
>
> (d) where there is in existence a collective agreement between an employer and a trade union setting out terminal benefits payable upon redundancy; the employer has not placed the employee at a disadvantage for being or not being a member of the trade union;
>
> (e) the employer has where leave is due to an employee who is declared redundant, paid off the leave in cash;
>
> (f) the employer has paid an employee declared redundant not less than one month's notice or one month's wages in lieu of notice; and
>
> (g) the employer has paid to an employee declared redundant severance pay at the rate of not less than fifteen days' pay for each completed year of service."

90. There is no dispute that on or about the 26th day of August 2016, the Respondent wrote to the Claimant a letter dated 26th August 2016, which read in part;

> " Re; Notice of intention to declare redundancy
>
> The purpose of this letter is to confirm the communication you received in person from the Chair of the Board of Directors in your meeting with him on 22 August 2016.
>
> The decline in the enrolment of students and the consequent decrease in financial capacity has necessitated the rationalization of staff, where some staff will be declared redundant.

This letter serves as one month's notice of the intended redundancy, effective 26th August 2016 up to 25th September 2016.................." .

91. Parties were in agreement that the letter was not preceded by any other, informing the Claimant of the alleged decision to rationalize. The question that this Court has to answer is as to whether the letter took the character of the notice[s] envisaged by section 40 [1] of the *Employment Act* and whether it was in nature able to achieve the purpose for which the provisions created the notices thereunder.

92. The notice to the employer, trade union, and the Labour Officer contemplated under sub-section [a] and [b] births the event of consultation before a redundancy is declared. In the Kenyan situation, consultation is a must and its essence cannot be downplayed. This was emphasized by the Court of Appeal in Kenya Airways Limited v Aviation & Allied Workers Union & 3 others [2014] eKLR, thus;

> " a] Consultation is implicit in the *Employment Act* under the principle of fair play;
>
> b] Consultation gives an opportunity for the other avenues to be considered to avert or to minimize the adverse effects of terminations;
>
> c] Consultations are meant for the parties to put their heads together and is imperative under Kenyan law;
>
> d] Consultations have to be a reality not a charade
>
> e] Opportunity must be given to stakeholders to consider;
>
> f] Stakeholders must have and keep an open mind to listen to suggestions, consider them properly, and then only then decide what is to be done; and
>
> g] Consultation must not be cosmetic.

93. In Civil Appeal No. Nai. 325 of 2018, The Germany School Society v Helga Ohany Consolidated with Civil Appeal No. 342 of 2018, Helga Ohany v The German School Society, the Court of Appeal Stated;

> " 61. Having regard to the legislative intention of the provisions of section 40 of the *Employment Act*, the International Law, and decided cases, we find that consultation on an intended redundancy between the employer and employee is implied by section 40[1][a] and [b] of the *Employment Act*. Moreover, consultation is now specifically required by Article 47 of *the Constitution* and the *Fair Administrative Action Act*. Article 47 and Section 4[3] of the *Fair Administrative Action Act* provide that where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give notice to the person affected by the decision. [see Cargill Kenya Limited v Mwaka &Others, para 35-37].
>
> 62. The scope of the consultation in a redundancy process was explained in Kenya Airways Limited and Aviation & Allied Workers Union Kenya & Others [supra]:
>
> > 52. The purpose of the notice under section 40[1][a] and [b] of the *Employment Act*, as is also provided for in the ILO Convention No. 158- Termination of Employment Convention, 1982, is to give the parties an opportunity to consider " measure 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, therefore, meant to cause the parties to discuss and negotiate away out of the intended redundancy, if possible, or the best way of implementing it if it is unavoidable. This means that if parties put their heads together, chances are that they could avert or at least minimize the terminations resulting from the employer's proposed redundancy. If redundancy is inevitable, measures should be taken to ensure that as little hardship as possible is caused to the affected employees."

94. Counsel for the Respondent argued that in the Kenyan situation, consultation is not necessary in a redundancy process. Counsel cited Kenya Airways Limited to buttress this position. I must say and with great respect that Counsel is wrong, the position cited is the one that was espoused in the majority decision in the matter.

95. I have carefully considered the tone of the Respondent's letter dated 26th August 2016, it is in nature one that had a predetermined end, the Claimant had to exit, and it didn't provide any room for consultation. The notice was therefore one that could and, didn't achieve the purpose for which it is provided under section 40 of the Act.

96. Section 45 [2] of the *Employment Act* places upon the employer an obligation to prove that the termination of an employee's employment was procedurally fair, otherwise, the termination by operation of the law shall be deemed unfair. No doubt, consultation is an integral part of the aspect of procedural fairness in a redundancy process. The Respondent didn't place before this Court any evidence to demonstrate that there were consultations before the termination. This coupled with the foregoing premises, impels me to conclude that the termination was procedurally unfair.

Substantive justification.

97. The above-stated letter brought out the reason for the termination of the Claimant's employment, the decline in student enrolment, and the consequent decrease in financial capacity that necessitated the rationalization of staff. Throughout, the Claimant maintained that the Respondent didn't have any valid and fair reason[s] to terminate her employment. In sum, she contended that what happened was an unfair termination dressed up as a redundancy. The alleged redundancy was a sham. The Respondent was of a contrary view, the termination on account of redundancy was justified.

98. Considering the rival positions taken by the parties on the alleged redundancy, it falls on this Court to pronounce itself on whether the redundancy was genuine and justified. I'll do this bearing in mind, the burden placed upon the employer to prove that the reason[s] for termination was valid and fair, [section 45[2]] and that the termination was justified [section 47[5]] of the *Employment Act*. I now turn to consider whether the burden was discharged by the Respondent.

99. In my view it is not enough for an employer to just assert that there was rationalization of staff of the organization/entity with a consequence that some positions were rendered redundant. Reasonable details are expected of the employer and the expectation is heightened when the redundancy is disputed by the employee. An employee who sees the same as camouflaged.

100. Rationalization of staff and declaration of redundancy is a process it is not a thing that just happens. One would in the circumstances of the instant case, reasonably expect to see evidence by the employer

on; when the idea for rationalization was conceived; the reasons for the idea; dates when deliberations on the idea were undertaken; the date when a decision was made; and deliberations on the way forward.

101. On the above-mentioned matters, the court expected to receive sufficient evidence. It didn't. The Respondent's witness, in her evidence under cross-examination, acceded to the fact that though the Respondent posits that the decision for staff rationalization, and eventual redundancy declaration was made on 16th June 2016, the Respondent did not place the minutes of the meeting before this Court. She further admitted that she was not able to testify regarding the deliberations of the meeting. From the onset, the Respondent knew that the alleged redundancy was hotly contested and that therefore the deliberations would be central in its defence, yet they failed to present sufficient evidence on the existence of the meeting and the deliberations. This Court cannot avoid making an adverse inference that there was not such a meeting.

102. Following the reason that the Respondent gave for the alleged redundancy, and the legal burden under sections 43 and 45 of the *Employment Act*, it behoved it to demonstrate with sufficient evidence that between this and that period student enrolment declined by this or that margin, then correlate the same with declined financial income. In my view, it is not automatic that declined student enrolment will translate to declined financial income. For instance, to remedy any gap that might be created as a result of declined enrolment, a school may opt to increase school fees or innovate cost-cutting mechanisms. With due respect, the evidence that was adduced by the Respondent on this aspect was just casual.

103. Referred to a document the Respondent tendered before this Court as evidence, the Profit and loss account, its witness admitted that the document does not show declining financial income but a financial increase of 22%, the Respondent made a profit of KShs.78,983,000/- in the 1st Quarter of 2016. I have carefully considered both the profit and loss document, and the Balance sheet-31st March 2016, and fail to garner any impression that the Respondent was at that time suffering any financial decline. To the contrary, the documents strongly show an institution with increased financial income. In fact, the marginal note on the profit and loss document, clearly states that" profitability at pre-tax; The institution has returned to profit; previously all the EBTDA was being eroded by financing costs."

104. Lastly, it has not escaped this court's sight that immediately after the Claimant's termination of employment on account of redundancy, The Respondent proceeded to advertise and invite applications in the Daily Newspaper for filing of various teacher vacancies. This, the Respondent didn't deny. Asked how genuine the redundancy was then, the Respondent's witness stated that some of the advertised positions were not filled. Taking the position by the witness as correct, then I find considerable difficulty in understanding, how an institution that was declaring two employees redundant because of a decline in student enrolment and financial constraints, could immediately embark on the process of recruitment of new staff for various positions.

105. By reason of the foregoing premises, I am not convinced that the termination was properly and genuinely as a result of operation requirements.

106. Whether the Claimant is entitled to the reliefs sought or any of them.

i. Salary payable from October 2016 till the end of the employment contract

107. The Claimant sought inter alia for payment of salary from October, 2016 till the end of the contract of employment totalling Ksh. 2,187,350/-. While I hold the view, that an aggrieved employee can rightfully sue for compensation, in addition to the compensatory relief provided for under Section 49 [1][c] of the *Employment Act*, I am not persuaded to grant the relief sought by the Claimant under this head for two reasons, first, the Claimant did not lead any evidence to demonstrate her entitlement to the relief, and on the legitimate expectation alleged, Second, in his submissions, her Counsel anchored

the claim on alleged violation of her rights. Shortly, hereinafter, I will consider and make an award for the violation of the Claimant's right to fair labour practices. Any award under this head shall amount to a double compensation.

ii. Twelve months compensation for unfair termination.

108. The Claimant also sought for compensation for wrongful termination, Ksh. 2,386,200/- being 12 months' gross salary. This Court is a live of the fact that 12 months gross wages or salary is the maximum awardable compensation provided for under section 49 (1) (c) of the *Employment Act* 2007. Granting the relief is discretionary. Whether maximum compensation is awardable or a portion thereof or no compensation depends on the circumstances of the case.

109. Having noted as I have hereinabove, that; the Claimant's termination on the ground of redundancy was both procedurally and substantively unfair; the alleged redundancy was camouflaged; the Claimant did not contribute to the termination; the length of time that she expected to remain in the employment of the Respondent; and as I shall demonstrate hereunder that the Respondent Committed a breach of the Claimant's right to fair practices, I am convinced that the Claimant is entitled to compensation under the provisions of section 49[1][c], to an extent of 8 (eight) months' gross salary. Ksh. 1,590,800/=.

iii. Damages for the breach of the Claimant's fundamental right to fair labour practices, right to life and livelihood.

110. The Claimant urged this court to award her damages for breach of her constitutional rights to fair labour practices. Article 41 of *the Constitution* of Kenya 2010 elaborately provides the right to fair labour practice, thus:

1. Every person has the right to fair labour practices.

2. Every worker has the right—

   (a) to fair remuneration;

   (b) to reasonable working conditions;

   (c) to form, join or participate in the activities and programmes of a trade union; and

   (d) to go on strike."

111. In the case of Kenya County Government Workers' Union v County Government of Nyeri & another [2015] eKLR, the Court held:

> "It is the opinion of the court that the right to "fair labour practices" encompasses the constitutional and statutory provisions and the established workplace conventions or usages that give effect to the elaborations set out in Article 41 or promote and protect fairness at work. These include provisions for basic fair treatment of employees,"

112. Similarly, in the case of Esther Njeri Maina v Kenyatta University [2020] eKLR the Court held:

> "Indeed, fair Labour practices include adherence to the law through the issuance of an employment contract, confirmation of employment after serving under probationary period or being a casual employee for a period exceeding 3 months. The Respondent failed to adhere to the law and therefore subjected the Petitioner to unfair labour practices."

113. To terminate an employee's employment on account of redundancy yet the reason is, not anchored on genuine and proper operational requirement but, camouflaged, will meet no better description than an affront on the principle of fair labour practices. It has not escaped the mind of this Court that prior to the termination on account of redundancy, the Respondent had issued the Claimant a show cause letter, concerning an alleged misconduct on her part. There is no dispute that she Responded to the same. In circumstances that she alleges depicts bad faith on the part of the Respondent, the latter abandoned without explanation the disciplinary process that had thereby been commenced and terminated her employment on account of redundancy.

114. The Court has considered the explanation given by the Respondent regarding why the disciplinary process that had been commenced was never concluded. With great respect, the explanation is not convincing at all. Assuming the Claimant addressed the response to the Chairman, a person whom it wasn't supposed to be addressed, a reasonable employer could not abandon the process but would advise the employee that the response was misaddressed and require him or her to redirect it to the correct office. That could be a demonstration of good faith on its part.

115. In the upshot, I find that the Respondent violated the Claimant's right to fair Labour Practice. And for the violation, I award her damages of KShs. 400,000/-. I trust that this award will help make the Respondent and other employers learn that there is a price to pay for terminating an employee's employment for reasons that are not genuine. That acting in good faith is a pivotal ingredient in an employer-employee relationship.

Who should bear the costs of this suit?

116. The costs of this suit to be borne by the Respondent.

117. The upshot, judgment is hereby entered for the Claimant against the Respondent in the following terms:

a. A declaration that the termination of the Claimant's employment on the ground of redundancy was procedurally and substantively unfair.

b. Compensation pursuant to the provision of section 49 (1) (c) of the *Employment Act*, 8 (eight) months' gross salary, Ksh. 1, 590, 800.

c. General damages for violation of the right to fair labour practices, KShs.400,000/-.

d. Interest on the sum awarded above at the court rates, from the date of this judgment till full payment.

e. Cost of this suit.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 27TH DAY OF JULY 2023.

………………………………

OCHARO KEBIRA

JUDGE

In the presence of;

Mr. Thiga for the Claimant

Mr. Nyaburi for the Respondent.

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of the Constitution which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

....

OCHARO KEBIRA

JUDGE