Wachira & another v Bamburi Cement Limited (Cause 165 of 2018) [2023] KEELRC 1789 (KLR) (24 July 2023) (Judgment)

Neutral citation: [2023] KEELRC 1789 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 165 OF 2018

JK GAKERI, J

JULY 24, 2023

BETWEEN

PHILIP MUNENE WACHIRA .... 1ST CLAIMANT

BENSON NDUIGA WAICHARI .... 2ND CLAIMANT

AND

BAMBURI CEMENT LIMITED .... RESPONDENT

JUDGMENT

1. The 1st Claimant initiated his claim by a Statement of Claim filed on February 14, 2018 alleging unfair and unlawful termination of employment and violation of Articles 22(1), 23(1), 27, 28, 29d, 41(2)(b) and 47 of the *Constitution of Kenya, 2010*.

The Claimants case is pleaded as follows;

2. The Claimant avers that he joined the Respondent on August 24, 2010 as a Customer Service Advisor Grade 6 at the Mombasa Plant at an annual gross salary of Kshs 825,199.00 and other benefits such as medical and education allowance for children and was confirmed after completion of probation on February 25, 2011 and served diligently.

3. The Claimant further avers that by letter dated May 8, 2014, he was transferred to the position of Retail Sales Representative – Coast Region effective May 1, 2014.

4. That due to his exceptional performance as Retail Sales Representative, he was transferred to the Mt. Kenya Region vide letter dated December 8, 2014 and the region became the best in sales.

5. That on May 1, 2016, he was transferred to Machakos as the Territorial Retail Sales Representative, a position that did not exist in the Respondent's organizational structure and on similar terms as the position of Retail Sales Representative.

6. According to the Claimant, the region he was transferred to had enough personnel as it had a Territory Sales Representative Manager and Route Market Manager.

7. That on July 8, 2016, the Respondent's Head of Human Resource verbally announced that the Respondent would restructure and staff would be re-aligned and the Chief Executive Officer sent an internal memo dated July 8, 2016 on the issue. That subsequently, the 1st Claimant received an email requesting him to apply for the newly created position of Territory Retail Sales Manager before July 14, 2017 and he applied and continued serving as the Territory Retail Sales Representative but in a meeting with the Commercial Director on September 5, 2016, he was given a letter dated 24th August notifying him that he was not qualified for the position of Territory Retail Sales Manager and could apply for other positions matching his skills within 30 days.

8. The 1st Claimant avers that the position of Territory Retail Sales Manager and Territorial Retail Sales Representative were essentially the same in job description and he was not invited for an interview.

9. The 1st Claimant avers that one Peter Mghendi and James Macharia were employed on September 1, 2016 and the Claimant and his colleagues were declared redundant thereafter, an action the Claimant characterises as malicious and unlawful.

10. That he did not apply for any other position as advised by Human Resource as no guidance was provided.

11. That the available options were made known to him by Human Resource on September 27, 2016 though no exit package was given for consideration even after agreeing to do so.

12. The Claimant avers that Human Resource was unaware of the redundancy.

13. That due to financial challenges, he accepted the exit package.

14. It is the Claimant's case that his termination was unlawful as other appointments were made by the Respondent thereafter and the job description was the same as that of the position he held.

15. The Claimant further avers that the provisions of the *Constitution* were violated as he inter alia had a legitimate expectation that he would serve a full term.

16. The Claimant prays for;

    a. A declaration and finding that the Claimant's employment was unfairly and wrongfully terminated and thus null and void.

    b. An order directing the Respondent to pay the Claimants outstanding dues pleaded in paragraph 34 as follows;

        i. 3 months salary in lieu of notice Kshs 310,800.00

        ii. Leave days Kshs 72,520.00

        iii. Unpaid bonus 2016 Kshs 181,300.00

        iv. Severance pay Kshs 310,800.00

        v. One month's salary in lieu of redundancy Kshs 103,600.00

        vi. Remaining period till retirement Kshs 36,052,800.00

        vii. 12 months compensation Kshs 1,243,200.00

Total Kshs 38,275,020.00

c. A declaration that the harassment, intimidation, discriminatory treatment and unlawful termination is unconstitutional, unlawful and a violation of the *Constitution of Kenya, 2010*.

d. A declaration that the Claimant is entitled to compensation for economic loss and hardship unreasonably and unconstitutionally visited upon him by the Respondent.

e. An order to the Respondent to compel the Respondent to compensate the Claimant for damages and loss arising from violations of his constitutional rights.

f. Costs and interest at court rates from date of filing of claim till payment in full.

g. Any other, further or better relief that the court may deem fit.

17. The 2nd Claimant filed a Statement of Claim on February 14, 2018 making allegations similar to those of the 1st Claimant.

18. That he was employed by the Respondent on October 29, 2012 as a Sales Representative, Lake Region at Grade 10 at an annual gross salary of Kshs 1,601,648.00 plus other benefits and was confirmed and vide letter dated March 19, 2014, he was transferred to the position of Territory Sales Manager at an annual gross salary of Kshs 1,682,100.00 and was promoted to the Eastern Region vide letter dated April 21, 2015, worked diligently and had positive performance ratings.

19. That on May 1, 2016, he was transferred from the Eastern Region to Nairobi as the Retail Sales Representative, a position unknown in the Respondent's organizational structure and the Nairobi Region had enough personnel.

20. The rest of the averments are similar to those of the 1st Claimant.

21. The 2nd Claimant further alleges that during his engagement, he was discriminated upon as other employees were paid relocation allowance on transfer yet he was not paid in May 2016 on transfer from Eastern to Nairobi.

22. The Claimant alleges that when he was paid the exit package, the Respondent deducted Kshs 778,965/= leaving Kshs 156,000/=. That the Respondent did not remit HELB loan payments and is unable to obtain a compliance certificate.

23. That as at the date of termination, his gross pay per month was Kshs 204,738.00.

24. The 2nd Claimant prays for reliefs similar to those of 1st Claimant save for the total amount claimed which amounts to Kshs 70,760,856.00 including a relocation allowance of Kshs 204,730.00.

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25. In its response to the Statement of Claim filed on March 12, 2018, the Respondent admits that the Claimants were its employees and worked for the Nairobi, Coast and Mt. Kenya Region and Eastern and Lake Region respectively.

26. The Respondent avers that it was not the 1st Claimant's duty to conceptualize and execute the sales strategy and growth in sale was not attributable to one individual.

27. That the 1st Claimant accepted the transfer to the Machakos region and the Respondent's management reserved the right to deploy and re-deploy staff as it deemed fit.

28. It is the Respondent's case that it operates in a competitive industry and has to innovate and re-align constantly to remain competitive and the Respondent's Chief Executive Officer announced a re-alignment process as the market demanded.

29. That in July 2016, the Respondent sent out an internal email to employees advertising 16 positions in the Commercial Department and the Claimant applied for the position of Territorial Retail Sales Manager and his application was considered but he was unsuccessful and was informed in writing and advised to apply for any other position matching his skills and qualifications but the 1st Claimant ignored the advise.

30. The Respondent avers that the positions of Territory Retail Sales Manager and Territory Retail Sales Representative were different in terms of roles and responsibilities, that while the former is in Grade 12 the latter is Grade 8.

31. The Respondent avers that it was acting in good faith when it advised the Claimant to apply for any other available position within the organization but he did not and was declared redundant on September 27, 2016 and the Ministry of Labour notified by letter dated September 27, 2016.

32. That the redundancy letter contained details of the package as follows;Pay in lieu of notice 90 days.Pay in lieu of accrued leave as at October 1, 2016.Severance pay at 20 days per each completed year of service.Ex gratia payment of 15 days for each completed year of service.Baggage allowance of Kshs 100,000/=.Any earned bonus not declared (payable when declared).

33. That the Claimant accepted the package unconditionally.

34. It is the Respondent's case that it could not have engaged in a re-alignment for the sole purpose of terminating the Claimant's employment and those appointed were carefully evaluated.

35. Finally, the Respondent denies that it violated the Claimant's constitutional rights and avers that the Claimant has no action against it as it paid items (a), (b), (c), (d) and (e) on paragraph 34 of the Statement of Claim and the redundancy was effected procedurally.

36. The Respondent prays for dismissal of the suit.

Respondent's Case No. 166 of 2018

37. By incorporating the necessary modifications such as dates and positions held by the 2nd Claimant, the Respondent has a similar case against the 2nd Claimant.

38. The package offered was similar and the 2nd Claimant accepted the same unconditionally.

39. The Respondent however denies that the 2nd Claimant's salary was Kshs 204,738/= but Kshs 168,377/= amounting to Kshs 2,020,524.48 per annum as evidenced by the letter dated March 31, 2016.

Claimant's Evidence

40. Both Claimants written statements dated February 13, 2018 and February 8, 2018 rehash the contents of the statements of claim.

41. On cross-examination, the 1st Claimant testified that under the contract of employment, he could work in any region in Kenya or East Africa.

42. He admitted that the memo by the Chief Executive Officer of the Respondent dated July 8, 2016 was entitled "Commercial Organization" and involved a re-alignment process where some roles were merged and new jobs created. He also admitted that he was accorded an opportunity to apply for any position he felt qualified but was unsuccessful and was subsequently requested to apply for any other position and if none was suitable contact the Human Resource Organization Director for further guidance.

43. The witness testified he did not apply for any other position and was claiming salary till retirement age.

44. The witness confirmed that the contract of employment was terminable by either party giving the other 3 months' notice.

45. The witness confirmed that he received the letter of redundancy on November 5, 2016 and it was effective on October 1, 2016, itemised the dues to be paid and was copied to the Ministry of Labour.

46. The 1st Claimant testified that he accepted the payments made by the Respondent in December 2016 out of desperation as he had no income in September, October and November.

47. On re-examination, the witness testified that the Respondent's letter dated August 24, 2016 was unclear as to what he was supposed to do.

48. It was his testimony that although the job titles changed, the job descriptions remained the same and no suitable position was advertised for him to apply.

49. In his examination-in-chief, the 2nd Claimant testified that when he was transferred to Nairobi in May 2016, was not paid relocation allowance while CWI who was transferred from Nairobi to Eastern was paid.

50. That he received the redundancy letter on November 3, 2016 and was paid the exit package.

51. That he was coerced to accept the sum of Kshs 972,059/= as take home and no notice of redundancy was issued.

52. On cross-examination, the 2nd Claimant confirmed that he had an employment letter and the Respondent had the prerogative to deploy and transfer him from time to time and the contract was terminable by 3 months' notice of either party.

53. That he received the Chief Executive Officer's memo on the re-alignment and was advised to apply and did so but was unsuccessful though no interviews were conducted.

54. The witness confirmed that the letter dated August 24, 2016 advised him to apply for other positions that matched his skills but he did not as none was shared.

55. The witness admitted that he was paid Kshs 156,414/= as terminal dues and signed for it with no objection.

56. On re-examination, the 2nd Claimant testified that he was not contesting the transfer but the non-payment of relocation allowance and was not given a 3 months' notice.

57. That he applied for the position he held as the job description was the same.

Respondent's evidence

58. RWI, Beatrice Kiruri, the Human Resource Business Partner in charge of Commercial and Supply Chain testified that she was the Human Resource Learning and Development Manager in 2013 but was not involved in the matter before the court.

59. The witness testified that the letter dated March 31, 2016 showed that the 2nd Claimant had a positive rating as was the letter dated December 10, 2013 to the 1st Claimant.

60. RWI confirmed that none of the Claimants had performance or disciplinary issues.

61. The witness testified that the Respondent had no position of Territorial Retail Sales Representative but there was no organizational structure on record and confirmed that the restructuring commenced three (3) months after the transfer.

62. That there were 12 vacancies.

63. The witness confirmed that she had not availed evidence of the alternative positions available for the Claimants to apply or evidence of any interviews having taken place.

64. In relations to the internal memo to all staff dated August 26, 2016, the witness confirmed that she had no evidence to demonstrate that Peter Mgendi and James Macharia appointed as Territory Retail Sales Representatives were indeed insiders.

65. RWI stated that the letter dated September 27, 2016 was not a notice of redundancy and the letter to the Labour Office dated September 26, 2016 was not filed. It was her testimony that the effective date of redundancy was October 1, 2016 and both Claimants signed the letter on December 9, 2016.

66. The witness could not confirm when the Claimants received the letter.

67. On the job descriptions of the Territorial Retail Sales Representative (TRSR) and the Territory Retail Sales (TRS), the witness testified that the latter included distributors while the former did not.

68. RWI confirmed that she had no evidence that the Claimants did not meet the qualifications to be appointed as Territory Retail Sales Managers.

69. On re-examination, RWI testified that the contract of employment permitted the transfer of Claimants from place to place.

70. That while some positions existed in 2015, they did not exist in 2016.

71. That the re-alignment was market driven.

72. That in 2018, the Respondent's work force stood at 450 and was now 370.

73. That the Claimants signed the letters on December 9, 2016 as it was the day they came to clear having been issued earlier.

74. Finally, the witness testified that the Labour Officer was notified as the letters to the Claimants showed that it was copied to the office and other employees were also declared redundant. The witness provided no evidence of other redundancies.

Claimants' submissions

75. Counsel isolated five issues for determination relating to restructuring and staff re-alignment by the Respondent, whether termination of the Claimants employment was unfair, coercion and/or undue influence to accept the exit package, discrimination and entitlement to reliefs.

76. On the purported commercial restructuring and staff re-alignment announced on 8th July, 2016, counsel traced the concatenation of events from the date they were transferred to argue that the purported redundancy was "most foul" and cited the Court of Appeal decision in *Kenya Airways Ltd v Aviation & Allied Workers Union Kenya & 3 others* [2014] eKLR to further submit that termination of the Claimants employment was not attributable to the redundancy.

77. Reliance was made on the provisions of Section 40 of the *Employment Act* on the attributes of redundancy and Section 43(1) and 45(2) of the *Act, 2007* on termination of employment, to urge that the Respondent failed to demonstrate that declaring the Claimants redundant was genuine.

78. Reliance was also made on the Court of Appeal decision in *Cargill Kenya Ltd v Mwaka & 3 others* [2021] KECA.

79. Counsel urged that the Respondent did not avail evidence of performance appraisals of the Claimants and had no selection criteria under Section 40(1)(c) of the *Employment Act, 2007*.

80. Counsel submitted that termination of the Claimant's employment on account of redundancy was not based on a valid reason but a malicious scheme to get rid of them.

81. On whether termination was unfair/unprocedural, counsel cited Section 45(1) and (2) of the *Employment Act* as well as the decision in *Dinah Musindarwezo v African Womens Development & Communication Network (FEMNET)* [2012] eKLR to demonstrate the essence of these provisions and urge that the Respondent adduced no evidence to show that termination of the Claimants' employment was fair as required by the *Evidence Act*, as no witness testified about the occurrences in 2016. The court was invited to make a negative inference as held in *Green Palms Investments Ltd v Kenya Pipelines Co. Ltd* [2006] eKLR.

82. Reliance was also made on the *Kenya Airways* Case (supra) as well as Section 45(4)(b) of the *Employment Act* to urge that the redundancy was not genuine.

83. As to whether the Claimants were coerced to accept the exit package, counsel submitted that the emails communication provided by the Respondent were not a discharge voucher and did not comply with the provisions of Section 106B of the *Evidence Act*.

84. Reliance was made on the Court of Appeal decision in *John Lokitari Lodinyo v I.E.B.C & 2 others* [2018] eKLR on the essence of Section 106B above as well as *Mohamed Kafafa Abduba v Colour Crops Ltd* [2018] eKLR and *Fredrick Odhiambo v Kenya Safari Lodges & Hotels Ltd* [2015] eKLR on discharge vouchers to urge that the Claimants were ambushed with a redundancy exit package without consultations and did not sign the same. That the Respondent's conduct was unfair, inhumane and immoral.

85. On discrimination, counsel relied on Article 23 of the *Constitution of Kenya, 2010* and Section 5 of the *Employment Act, 2007* and the decisions in *Barclays Bank of Kenya Ltd & another v Gladys Muthoni & 20 others* [2018] eKLR and *Keith Wright v Kentegra Biotechnology (EPZ) Ltd* [2021] eKLR.

86. As regards the remedies sought, counsel urged that the Claimants were entitled to the reliefs prayed for and urged the court to award 12 months compensation.

Respondent's Submissions

87. Counsel addressed seven (7) issues relating to what happened after the Claimants applications were unsuccessful, restructuring, whether the Claimants were targeted by the Respondent, differences between the positions held and applied for, work in September to December 2016, estoppel by acceptance of payment unconditionally and entitlement to prayers.

88. On the 1st issue, counsel submitted that the Claimants were advised to apply for any other position but they did not and opted for the exit package.

89. As regards the re-alignment, counsel relied on the sentiments of the court in *Jacqueline Osoro v Unilever Tea Kenya Ltd* (2022) on managerial prerogative of the employer to determine what positions were necessary to urge that the Respondent had the prerogative to commence the re-alignment and the provisions of Section 40(1) of the *Employment Act, 2007* were complied with.

90. The decision in *Thomas Sila Nzivo v Bamburi Cement Ltd [*2014] eKLR was cited to urge that the Respondent had complied with the law.

91. As to whether the Claimants were targeted, counsel urged that the re-alignment was dictated by the market and Claimants had not alleged that there was any bad blood between themselves and the Respondent.

92. Counsel submitted that the Commercial Department of the Respondent was re-aligned and expanded with 16 positions and those appointed were both internal and external and there was no victimization.

93. On the positions held and applied for, counsel urged that the 1st Claimant was in Grade 8 and applied for a position in Grade 12, while the 2nd Claimant was a Territory Sales Manager and applied for the position of Territory Retail Sales Manager Grade 12.

94. That because the Claimants were seeking higher positions, they had to compete with other insiders and outsiders.

95. As to whether the Claimants worked in September – December, 2016, counsel submitted that their last working day was September 30, 2016 and the allegation was an afterthought and no prayer has been made and both admitted that they accepted the exit package as they had no money.

96. Contrary to counsel's submission that RWI was present during the process, she testified that she was not involved in the redundancy process.

97. On estoppel by payment, counsel submitted that since both Claimants signed and accepted the exit package unconditionally and unreservedly, the law was clear on discharge vouchers.

98. Counsel relied on the Court of Appeal decision in *Coastal Bottlers Ltd v Kimathi Mithika* [2018] eKLR to urge that the payment vouchers on pages 5 and 10 of the Respondent's documents were binding and the Claimants were therefore estopped from revisiting the matter.

99. Finally, as regards the reliefs sought, counsel submitted that none was due as the redundancy was procedural and all other prayers sought were made good i.e notice, leave, bonus 2016 and severance pay.

100. On compensation till retirement, counsel relied on the sentiments of the Court in *Engineer Francis N. Gachuri v Energy Regulatory Commission* [2013] eKLR on why such a claim was unsustainable in law.

101. Finally, as regards relocation allowance by the 2nd Claimant, counsel argued that he did not lay any basis for it. Reliance was made on the sentiments of Rika J. in *Abraham Gumba v Kenya Medical Supplies Authority* [2014] eKLR to urge the court not to award the allowance.

102. The decision in *Peter Gachanga Kimuhu v Kenol Kobil Ltd* (supra) was also cited as regards compensation.

Findings and Determination

103. The issues for determination are;

i. Whether termination of Claimant's employment on account of redundancy was fair.

ii. Whether the Respondent violated the constitutional rights of the Claimants.

iii. Whether the Claimants were coerced to sign the exit package and/or are estopped from revisiting the issue.

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

104. It is common ground that the Claimants were employees of the Respondent engaged on August 24, 2010 and October 29, 2012, as Customer Service Advisor and Sales Representative respectively.

105. That while the 1st Claimant was appointed to the position of Retail Sales Representative, Coast Grade 8 and was later transferred as Retail Sales Representative, Mt. Kenya Region, the 2nd Claimant's grade changed to that of the Territory Sales Manager, Grade 12 effective April 1, 2015.

106. The 2nd Claimant received a salary review on March 31, 2016 and was subsequently appointed a Territory Sales Representative on May 27, 2016 reporting to the Territory Sales Manager, a position he held. In effect he was reporting to an officer in his position or grade.

107. Similarly, the 1st Claimant was transferred from the Retail Sales Representative – Mt. Kenya to the position of Territory Retail Sales Representative Machakos.

108. Evidence on record reveal that both Claimants discharged their duties diligently and none had performance challenges and were rated positively and received bonuses.

109. RWI testified that none of the Claimants had a disciplinary issue.

110. As regards redundancy, parties have adopted opposing positions. While the Claimants counsel urged that it was a disguised termination of employment, the Respondent's counsel submitted that it was justifiable by market demands and was conducted procedurally.

111. It requires no emphasis that the *Employment Act, 2007* not only defines redundancy but also provides the statutory framework to be complied with.

112. In a redundancy, the employee looses employment at the instance of the employer either by abolition of office, job or occupation or the services of the employee become superfluous.

113. The employee is free from blame.

114. However, for a redundancy to pass muster, it must be conducted in compliance with the provisions of Section 40(1) of the *Employment Act, 2007*.

115. In *Freight-In Time Ltd v Rosebell Wambui Munene* [2018] eKLR, the Court of Appeal underscored the essence of Section 40(1) of the Act as follows;

> "In addition, Section 40(1) of the *Employment Act* prohibits, in mandatory terms, the termination of a contract of service on account of redundancy, unless the employer complies with the following seven conditions, namely:
>
> a. If the employee to be declared redundant is a member of a union, the employer must notify the union and the Local Labour Officer of the reasons and the extent of the redundancy at least one month before the date when the redundancy is to take effect.
>
> b. If the employee is not a member of the union, the employer must notify the employee personally, in writing together with the Labour Officer;
>
> c. In determining the employees to be declared redundant, the employer must consider seniority in time, skill, ability, reliability of the employees;
>
> d. Where the terminal benefits payable upon redundancy are set under a collective agreement, the employer shall not place an employee at a disadvantage on account of the employee being or not being a member of a trade union;
>
> e. The employer must pay the employee any leave due in cash;
>
> f. The employer must give the employee at least one month's notice or one month's wage in lieu of notice; and
>
> g. The employer must pay the employee severance pay at the rate of not less than 15 days for each completed year of service."

116. The foregoing provisions leave no doubt that the law places an enormous burden of proof on the employer to justify termination of employment on account of redundancy as observed in *Barclays Bank of Kenya Ltd & another v Gladys Muthoni & 2 others* (supra).

117. I will now proceed to apply the foregoing provisions of law to the facts of the instant case.

118. As regards notice, the Respondent prepared a "Letter of Redundancy" dated 2September 7, 2016 to the Claimants. It is unclear as to when the letter was handed over to the Claimants. Both signed on December 9, 2016.

119. The letter stated *inter alia*;

> "In reference to the letter dated August 24, 2016, and the meeting held with the Human Resource and Organization Director on September 27, 2016, this is to inform you that we have unfortunately not found any other opportunities for you within the company and consequently you have been declared redundant effective October 1, 2016.
>
> In accordance with the *Employment Act, 2007* and the company policy on redundancy, you will be paid the following . . ."

120. The letter is copied to the Ministry of East African Community (EAC), Labour Social Protection, Department of Labour in compliance with Section 40(1)(b) of the *Employment Act* as the employees

were not member of the union. The notification to the employee and the Local Labour Officer must be in writing.

121. The critical issue for determination is whether the letter dated September 27, 2016 was the notification contemplated by Section 40(1)(b) of the *Employment Act, 2007*.

122. Although Section 40(1)(b) does not prescribe a duration, in *Thomas De La Rue (K) Ltd v David Opondo Omutelema* [2013] eKLR, the Court of Appeal held that the notice ought to be at least one month before the effective date of the redundancy.

123. In this case, the notice was barely four (4) days before the effective date and was thus irregular and ineffectual for purposes of Section 40(1)(b) of the *Employment Act, 2007*.

124. As regards the contents of the notice, the provisions of Section 40(1)(a) are unambiguous. The notice must set forth the "reasons for, and the extent of the intended redundancy. . ."

125. The letter on record makes no reference to neither the reasons for nor extent of the intended redundancy.

126. The Chief Executive Officer's internal memo dated July 8, 2016 was not a redundancy statement as it only referred to a re-alignment processes to be communicated later. It made no reference to the Departments or persons likely to be affected.

127. Even assuming that it was a redundancy statement, it was reticent on the extent of the intended redundancy and the letter made no suggestion of a redundancy.

128. Finally, the provisions of Section 40(1)(a) and (b) are clear on notification of the Local Labour Officer.

129. Although the Respondent retorted that the letter was copied to the Labour Officer and RWI confirmed on cross-examination that she had a copy of the letter sent to the Labour Officer, no evidence of service was availed.

130. The court is further guided by the sentiments of the Court of Appeal in the *Barclays Bank of Kenya & another* case (supra) as follows;

> ". . . We agree with the trial court that redundancy notices are not mechanical so as to satisfy the motions of the law, and that fair labour practice requires the employer to act in good faith. . ."

131. In the premises and guided by the Court of Appeal decision in *Barclays Bank of Kenya & another V Gladys Muthoni & 20 others* (supra), it is the finding of the court that in the absence of evidence of service, the notice was invalid.

132. Second, the provisions of Section 40(1)(c) of the *Employment Act* provide for a selection criteria based on seniority in time, skill, ability and reliability of employees.

133. It is common ground that the Respondent adduced no evidence of a selection criteria or compliance with any.

134. Although RWI testified that other persons were declared redundant, no evidence was availed to show that indeed other employees were affected.

135. Strangely, the Respondent led no evidence to demonstrate that indeed the positions of the Claimants were abolished or had become superfluous or the number of employees was reduced or fell below the previous level.

136. RWI provided neither the old nor the new organizational structure of the Respondent or the number of staff prior to and after the re-alignment.

137. Puzzlingly, RWI adduced no evidence of any short-listing or interviews having been conducted by the Respondent to demonstrate how the Claimants were unsuccessful having been internal employees.

138. The implication appear to be that their qualification and skills were too inferior to their competitors that they did not qualify for an interview.

139. The witness led no evidence to demonstrate how many persons applied, were shortlisted and engaged.

140. The witness did not avail minutes of the interviewing panel or its membership.

141. Based on the evidence on record, there does not appear to have been any interviews by the Respondent.

142. The 2nd Claimant's case is more perplexing as he was the Territory Sales Manager – Eastern Region from April 1, 2015, demoted to the Territory Sales Representative on similar terms as Manager and did not qualify for the position of Territory Retail Sales Manager even after having served as Territory Sales Manager.

143. From the evidence on record, it is clear that the Respondent's dealing with the Claimants was exceedingly opaque and lacking in good faith.

144. In sum, it is the finding of the court that the Respondent did not comply with the requirements of Section 40(1)(c) of the *Employment Act, 2007*.

145. Similarly, although the provisions of Section 40(1) of the *Employment Act, 2007* have no provision on consultation, it is an integral part of the emerging jurisprudence in Employment law.

146. The *dicta* of Maraga JA (as he then was) and Murgor JA in *Kenya Airways Ltd v Aviation and Allied Workers Union Kenya & 3 others* (supra) on the essence of meaningful consultations as provided by Article 13 of the Recommendation No. 166 of the ILO Convention No. 158. Termination of Employment Convention, 1982 was adopted with approval in Barclays Bank of Kenya Ltd & another v Gladys Muthon & 20 others (Supra) as follows;

> "We have carefully examined that case which, unlike this case, involved unionisable employees, a collective bargaining agreement and oral evidence tested in cross-examination. In the end, we are persuaded that the dicta of Maraga and Murgor JJA regarding consultations prior to declaration of redundancy resonate with our Constitution and international laws which have been domesticated by dint of Article 2(6) of the *Constitution*. . .
>
> Furthermore, consultation was necessary before the redundancy notices were issued . . . We respectfully agree with the views expressed by the two learned judges. the *Constitution* in Article 41 is fairly loud on the rights to fair labour practices and we think it accords with the *Constitution* and international best practices that meaningful consultations be held pre-redundancy . . ."

147. For the foregoing reasons, it is the finding of the court that the Respondent has failed to prove on a balance of probabilities that it had a substantive justification for the staff re-alignment and implemented the same fairly.

148. In the court's view, the purported redundancy transitioned to an unfair termination of employment within the meaning of Section 45 of the *Employment Act, 2007*.

149. As to whether the Respondent breached the constitutional rights of the Claimants, the Claimants allege that the provisions of Articles 28, 29 and 47 were violated. The right to freedom and security, dignity and respect and fair administrative action.

150. The Claimants allege that they were exposed to economic hardship, indignity, discrimination and not accorded fair hearing.

151. As regards economic hardship and indignity, the Claimants adduced no evidence on what they were doing from the date they left employment to the date they signed the redundancy letters and were paid terminal dues.

152. On discrimination, the Claimants did not particularize the alleged acts of discrimination as evidence on record reveals.

153. Noteworthy, the Chief Executive Officer's memo on the re-alignment was sent to all staff as were the positions advertised by the respondent.

154. Equally, on the transfers, both Claimants affirmed that they had agreed to work in any region in Kenya and East Africa and the Respondent had the prerogative to transfer them and none complained about being transfered.

155. According to *Black's Law Dictionary*, 10th Edition, Discrimination is defined as;

> " Failure to treat all persons equally when no reasonable distinction can be found between those favoured and those not favoured."

156. In *Rose Wangui Mambo & 2 others v Limuru Country Club & 15 others* [2014] eKLR, citing Peter K. Waweru v Republic [2006] eKLR, the court stated as follows;

> " Discrimination means affording different treatment to different persons attributable wholly or mainly to their description . . . whereby persons of one such description are subjected to . . . restrictions to which persons of another description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description. Discrimination also means unfair treatment or denial of normal privileges to persons because of their race, age, sex . . . a failure to treat all persons equally . . ."

157. Although Section 5(7) of the *Employment Act* imposes the burden of proof on the employer to show that discrimination did not take place, judicial authority is also consistent that the party alleging discrimination must establish a prima facie case for the burden of proof to shift to the employer.

158. In the instant case, the Claimants have not availed evidence to prove that either the transfer or the redundancy itself was a discriminative act.

159. Puzzlingly, although the Claimants attached print outs of letters of appointment of persons by the Respondent after they had been declared redundant, neither the written statement nor the oral evidence adduced in court made reference to the letters or relied on them as evidence.

160. Equally, the fact that the redundancy notice did not conform with the requirements of Section 40(1)(a) and (b) of the *Employment Act, 2007*, there was no demonstrable selection criteria and no consultations took place does not necessarily mean that the provisions of the *Constitution of Kenya, 2010* were violated.

161. From the foregoing, it is the finding of the court that the Claimants have not placed before the court sufficient material to justify a finding that their constitutional rights were violated.

162. As to whether the Claimants were coerced to execute the exit package and are therefore estopped from revisiting the issue, parties have adopted contrasting positions. While the Respondent's counsel submitted that the Claimant's signed and accepted the same unconditionally, counsel for the Claimants submitted that the computer print outs relied upon by the Respondent were inadmissible as evidence and in any event the Claimants did not sign a discharge voucher as alleged by the Respondent.

163. It is common ground that none of the documents relied upon by the Respondent was a discharge voucher or settlement agreement.

164. Clearly, the Court of Appeal decision in *Coastal Bottlers Ltd V Kimathi Mithika* (supra) cited by the Respondent is inapplicable in the circumstances of this case.

165. Relatedly, the court is guided by the sentiments of the Court of Appeal in *John Lokitare Lodinyo V I.E.B.C & 2 others* (supra) cited by the Claimant's counsel as follows;

> " Section 106B of the *Evidence Act* states that electronic evidence of a computer recording or output is admissible in evidence as an original document. "If the conditions mentioned in this section are satisfied in relation to the information and computer." In our view, this is a mandatory requirement which was enacted for good reason. The court should not admit into evidence or rely on manipulated (and we all know this is possible) electronic evidence or record hence the stringent conditions in sub-section 106 B (2) of that Act to vouch safe the authenticity and integrity of the electronic record sought to be produced."

166. The Respondent did not avail the requisite certificate and the print outs are thus inadmissible as evidence. However, the Claimants admitted having received payment.

167. On the alleged coercion, the Claimants case is that they signed the exit package because they had been without a salary for 2 months and as such had no option.

168. It is trite law that a party relying on duress to vitiate his or her signature must demonstrate that it was exerted by the other party.

169. The Claimants tendered no such evidence or allege that the Respondent's officers coerced them to sign the exit package.

170. The submission by counsel that the Claimants were ambushed with a redundancy and exit package is unsubstantiated as the submission relates to the Claimants acceptance of the exit package on December 9, 2016 and adduced no evidence to show that they were forced to sign the document.

The allegation is unproven.

171. As regards estoppel, none of the counsels explained the requirements of the doctrine of promissory or equitable estoppel and whether they had been fulfilled in this case.

172. As explained in *Central London Property Trust Ltd v High Trees House Ltd* [1947] 1 KB 130 and elaborated by Lord Denning L.J. in *Combe v Combe* [1951] 2 KB 215, the doctrine is only applicable where a party to a legal relationship makes a promise or representation or gives an assurance to the other intended to affect their legal relationship once that other has relied on the promise, representation or assurance, the promisor cannot thereafter be allowed to revert to the previous position and must accept their relationship based on the promises, assurance or representation made.

173. In the instant case, it has not been shown by evidence that the Claimants made a promise or representation to the Respondent, which it relied upon and altered its legal position for the Claimants to be estopped from asserting their rights.

174. Flowing directly from the foregoing, it is the finding of the court that the Claimants have failed to demonstrate that they were coerced to sign the exit package.

Reliefs

175. Having found that termination of the Claimants employment on account of redundancy was unfair, the court proceeds as follows;

a. Having found that the Respondent did not comply with the provisions of Section 40(1) of the *Employment Act, 2007*, a declaration that termination of the Claimants' employment as unfair is merited.

b. As regards violations of Article 22(1), 23(1), 29D, 41(2)(B) and 47 of the *Constitution of Kenya, 2010* on allegations of harassment, intimidation and discriminatory treatment, the Claimants did not place before the court sufficient evidence for a positive finding to be made.

The prayer is declined.

c. On the declaration for compensation for economic loss and hardship, the Claimants tendered no documentary evidence of the alleged hardship or loss to establish the claim.

The prayer is declined.

d. As regards the order of compensation in damages for damages or loss arising from violation of constitutional rights, no violation was proved and the prayer is declined.

e. On payment of outstanding dues, the court proceeds as follows;

176. From the evidence on record, it is common ground that the Respondent itemised the payments due under the redundancy as;Pay in lieu of notice of 90 days.Pay in lieu of accrued leave as at October 1, 2016.Severance pay at 20 days per completed year of service.Ex gratia payment of 15 days per completed year of service to a maximum of 18 months.Baggage allowance of Kshs 100,000/=.Any bonus to be paid as and when declared.

177. The payment was subject to tax and any money owed to the Respondent.

178. Both Claimants admitted in court that they received payment and signed for it without any objection.

179. None of the Claimants alleged or established that any of the items on the letter of redundancy dated September 27, 2016 was not included in the payment or computed improperly.

180. Based on the evidence adduced by the parties, the court is persuaded that the Respondent honoured its promise according to the letter of redundancy and no item on the letter is outstanding as submitted by counsel for the Respondent.

181. Under Section 40(1) of the *Employment Act, 2007*, the Respondent was obligated to pay one (1) month's salary in lieu of notice, it paid three months salary, leave upto October 1, 2016, severance which the Claimants were not entitled to having been members of an employer's pension scheme and NSSF *ex gratia* or gratuitous payment.

182. The 1st Claimant's prayers itemised under paragraph 34 of the statement of claim other than (f) and (g) are unsustainable and are disallowed.

183. In the case of the 2nd Claimant, the prayers itemised under paragraph 40 of the Statement of Claim except (f), (g) and (h) are unsustainable and are declined.

184. The prayer for compensation for the remaining years till retirement is undoubtedly unsustainable in that it has no anchorage in law as held by the Court of Appeal in D.K. Njagi Marete v Teachers Service Commission [2020] eKLR.

185. This is a claim for anticipatory earnings as was the case in *Elizabeth Wakanyi Kibe V Telkom Kenya Ltd* (2014) eKLR where the Court of Appeal dismissed a similar claim and cited the sentiments of Onyango J. in *Engineer Francis N. Gachuri V Energy Regulatory Commission* that there was no permanent employment.

186. Typically, contracts of employment are terminable by either party which renders the notion of permanent employment or till retirement hollow.

The claim is declined.

187. Clause 13 of the Employment letter clearly stated that the Respondent would pay relocation assistance equivalent to one (1) month's salary net of taxes in the event of relation from one work station to another.

188. The Respondent did not challenge the 2nd Claimant's evidence that it paid the allowance to the 1st Claimant when he was last transferred in 2016.

189. The claim for one (1) month's salary by the 2nd Claimant as relocation allowance in May 2016 is in the court's view sustainable as the Respondent adduced no evidence that it indeed paid the sum.

190. Contrary to counsel's submissions that the claim had no legal basis, the claim indeed had a firm legal basis as it was a contractual term agreed upon by the parties on October 29, 2012 when the Claimant signed the offer of employment.

191. In the absence of a rebuttal by the Respondent, the claim for relocation allowance merited and is awarded.

192. Finally, having found that termination of the Claimants' employment on account of redundancy was unfair for non-compliance with the provisions of the *Employment Act, 2007*, the Claimants are entitled to compensation in accordance with the provisions of Section 49(1)(c) of the *Employment Act* subject to taking into consideration the relevant parameters under Section 49(4) of the Act.

193. The court has considered the fact that;

i. The Claimants served the Respondent as follows;1st Claimant about 6 years2nd Claimant about 4 years

ii. The Claimants had no documented disciplinary issues or complaints.

iii. The Claimants did not contribute to the termination of employment.

iv. None of the Claimants expressed his wish to continue in the Respondent's employment as exemplified by the refusal to apply for any other position as advised or appeal the dismissal from employment.

v. Finally, the manner in which the Respondent treated the Claimants as its employees cannot pass as decent. It declared them redundant abruptly on 27th September, 2016, had not

previously consulted them or engaged them on the possibility and did not pay their dues until the December 9, 2016 more than 2 month later.

The Respondent adduced no evidence of communication with the Claimants after September 27, 2016.

194. In the circumstances, the court is persuaded that the equivalent of four (4) months' gross salary as compensation.

195. In the upshot, judgement is entered for the Claimants against the Respondent in the following terms;

a. Relocation allowance equivalent to one (1) month's salary to the 2nd Claimant.

b. Equivalent of 4 months' gross salary to the 1st and 2nd Claimant.

c. Costs of this suit.

d. Interest at court rates from date of judgement till payment in full.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 24TH DAY OF JULY, 2023

DR. JACOB GAKERI

JUDGE

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 March 15, 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 *Civil 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.

DR. JACOB GAKERI

JUDGE