Kariri v GE East Africa Services Limited (Cause 139 of 2019)
[2023] KEELRC 2719 (KLR) (1 November 2023) (Judgment)

Neutral citation: [2023] KEELRC 2719 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 139 OF 2019

JK GAKERI, J

NOVEMBER 1, 2023

BETWEEN

DAVID WANYOIKE KARIRI ..... CLAIMANT

AND

GE EAST AFRICA SERVICES LIMITED ..... RESPONDENT

JUDGMENT

1. The Claimant commenced this suit by a Memorandum of Claim filed on 4th March, 2019 alleging unlawful termination of employment and discrimination in wages and violation of fair labour practice and fair administrative action.

2. The Claimant prays for;

   i. A declaration that the purported termination on account of redundancy was unfair and unlawful.

   ii. A declaration that the Claimant's rights to fair labour practices, equal remuneration for equal work done or work of equal value, fair administrative action, equal protection and freedom from discrimination were violated.

   iii. Compensation for unlawful termination equivalent of 12 months gross salary.

   iv. General damages for violation of the Claimant's rights as stated above.

   v. Annual bonus compensation for 2018.

   vi. Costs of this claim.

   vii. Interest on (iii), (iv), (v) and (vi) from date of judgement untill full payment.

   viii. Any other or further relief the court may deem fit to meet the ends of justice.

Claimant's case

3. The Claimant was employed by the Respondent on 5th May, 2014 as Tax Controller for the Sub-Saharan Africa at Kshs.416,667/= per month.

4. The Claimant avers that in July 2018, he was invited for a meeting by the Respondent's Human Resource Manager, EA and was advised that functions under his office would be moved to Egypt from Kenya and he indicated will willingness to move to Egypt to continue rendering services and was advised to await communication but received a letter dated 31st August, 2018 terminating employment on account of redundancy and his verbal and written protests were ignored.

5. The Claimant avers that Respondent did not carry out any restructuring as alleged as no new organogram was shared nor were the reasons provided.

6. That the Respondent had a practice where employees whose roles in a country or region were recognized were often transferred to sister companies or branches in another country or region, thus the Claimant was discriminated.

7. It is the Claimant's case that the Respondent did not comply with the provisions of the *Employment Act* as there were no consultations.

8. That the Respondent collaborates with PWC variously on staff and the Respondent did not explore the possibility for the Claimant having been ready to join PWC as early as 1st April, 2017 and his request for re-engagement was declined.

9. That the Claimant's predecessor was unlawfully awarded higher remuneration contrary to the constitutional right to fair labour practice and equal pay.

10. That he was not paid bonus for 2018 despite exemplary performance.

Respondent's case

11. By a statement of response filed on 2nd July, 2018, the Respondent admits that the Claimant was its employee effective 5th May, 2014 as the Tax Controller in the Global Operations – Finance Business (SSA) Managing and Oversighting direct reporting and compliance.

12. It is the Respondent's case that in November 2017, market conditions necessitated re-alignment and re-integration of reporting structures for cost effectiveness and the Respondent announced a change of strategy which would result in a restructuring of its global operations to eliminate the use of local resources in every jurisdiction and redistribution of various functions to regional centres including Budapest and Cairo and all Global staff were notified in December 2017 and roles would be affected from March 2018.

13. That further explanation was given in June 2018, that various roles undertaken locally would be split to be performed in various regional centres across the globe and would result in redundancies.

14. That the Claimant was notified that his position would be affected in July 2018 and his functions would be split and undertaken in Budapest and Cairo. That other opportunities availed within the Respondent were also discussed.

15. The Respondent denies having discussed the possibility of the Claimant moving to Egypt.

16. That a notice of termination of employment on account of redundancy was issued on 31st August, 2018 effective 30th September, 2018 and the Claimant was paid as follows; one (1) month's salary for

the 3 years worked Kshs.3,074,068.83 and outstanding leave pay Kshs.2,543,586.12 and the family would enjoy medical insurance until 30th November, 2018 and a notice to Labour Officer was issued.

17. It is the Respondent's case that it acted in accordance with the redundancy policy.

18. That the Claimant appealed the redundancy on the ground that there was no genuine redundancy situation and the same was addressed as a grievance and the Human Resource Business Partner, one Lindani Ndlovu had a skype meeting with the Claimant and the outcome was reviewed by the Human Resource Leader – SSA, Susan Gaham Bryce who found it without merit.

19. The Respondent avers that it had an agreement with PWC which handled its corporate tax work to second some of its employees to the Respondent and after the restructuring, PWC agreed to take over the Respondent's Tax department including employees but the Claimant was in a different department of Business Operations.

20. That the redundancy affected Cornelius Kipsoi, Newton Otwori and Andrew Shiels but the three applied for other positions within the Respondent Global and were successful and moved to Budapest, Hungary.

21. That the Claimant did not apply for any position to ameliorate the redundancy.

22. On the alleged discrimination, the Respondent avers that the Claimant's predecessor, Mr. Maurice Mwaniki performed different roles, had different qualification and experience.

23. That the allegations of discrimination were unfounded.

Claimant's evidence

24. On cross-examination, the Claimant confirmed that his role was regional covering 22 countries and was unaware of the impending restructuring in November 2017 but admitted having received the email from Global Operations META dated 11th December, 2017 under which certain appointments were made affecting META, which included Sub-Saharan Africa.

25. The Claimant could not recall having received the email dated 8th November, 2017 or any other on restructuring.

26. The witness confirmed that the email dated 22nd January, 2018 informed him about the transformation of META and specifically the transition from Legal Controllership to Controls and Closing and reporting as evidenced by the organogram on page 87 which showed the positions under each section.

27. The Claimant confirmed that his role covered Tax Controllership and Compliance and more updates were given by Sakalla Ahmed via email dated 27th February, 2018.

28. The witness admitted having seen the Respondent's redundancy policy which identified the grounds for redundancy.

29. The Claimant admitted that he was notified of the impending redundancy in July 2018 in the presence of Baraji and Kendi Mbichi in the meeting and the notice was served on 31st August, 2018.

30. The notice set out the dues payable and the computation on page 31.

31. That letter to the Labour Officer was received on 4th September, 2018.

32. The witness admitted that he filed an appeal through email and was invited for a meeting and the issue was escalated to the Human Resource Global but was unsuccessful.

33. It was his testimony that he was working in the Tax Department of the Respondent.

34. That the Corporate Tax team at the Respondent was taken up by PWC but had no documentary or other evidence that Mr. Mwaniki went to PWC as stated in the witness statement and confirmed receipt of the letter of termination dated 1st March, 2017 as well as the certificate of service.

35. The witness confirmed that Cornelius, Andrew Shiels and Newton applied for different positions and were absorbed.

36. The Claimant was emphatic that he did not apply for any position in the organization.

37. The witness confirmed that he was not claiming the 2018 bonus as indicated in the claim.

38. On re-examination, the witness testified that he was not notified of the available opportunities to apply for and he held qualifications similar to those taken over by PWC.

Respondent's evidence

39. RWI, Mary Mwaniki confirmed on cross-examination that she had been the Human Resource Manager for about 8 years and the Respondent is a subsidiary of a company listed on the New York Stock Exchange, with subsidiaries worldwide.

40. It was her testimony that tax compliance and reporting was mandatory for the Respondent.

41. That employees by the name Cornelius Kipsoi, Newton Otwori and Andrew Shiels did not receive notices of redundancy. The witness was unsure of whether they were affected or not or were employed before or after the Claimant.

42. The witness admitted that the Respondent did not share with the Claimant the positions he could apply for.

43. The witness testified that roles undertaken locally were split not abolished.

44. The witness confirmed that one Mr. Munene was the Claimant's predecessor.

45. That the redundancy was intended to cut costs worldwide but the Respondent had not attached its accounts.

46. It was her testimony that Mr. Munene had different qualifications and experience from the Claimant. That the Claimant's contract had not been terminated by the time the Labour Officer was notified.

47. On re-examination, the witness testified that the Claimant had information on the roles that were open for application as evidenced by the organogram of the Department provided via the email sent to all staff.

48. The witness testified that Mr. Hellaly Ahmed's position was higher than that of the Claimant and the Claimant was still in office by 4th September, 2018 as the redundancy notice would take effect at the end of the month.

Claimant's submissions

49. Counsel for the Claimant addressed the following;

    i. Termination of the Claimant's employment was substantively unfair.

    ii. Discriminatory treatment.

iii. Procedural unfairness and reliefs.

50. On the 1st issue, counsel submitted that since the Respondent was restructuring to eliminate local resources in every jurisdiction and distribute the same to regional centres, the Claimant ought not to have been affected as his role was regional across 22 countries in Sub-Saharan Africa (SSA) as admitted by RWI.

51. That splitting of the Claimant's roles ought not to have led to redundancy as it created more roles.

52. Counsel urged that the statement that the Claimant was the author of his misfortune since he did not apply for any position suggests that there were positions and no redundancy situation existed and the same was never disclosed.

53. That the RWI should have known the positions available and was aware of the Claimant's qualification and skills.

54. Counsel relied on Section 2 of the *Employment Act* and the Court of Appeal decision in Kenya Airways Ltd V Aviation & Allied Workers Union Kenya & 3 others (2014) eKLR to urge that the alleged consultations were cosmetic and a public relations exercise.

55. According to the Claimant's counsel, the Claimant demonstrated his desire to remain in employment variously, for example, his flexibility to relocate from Kenya, appeal against the redundancy and demand letter.

56. As regards the reason(s) for the redundancy, counsel urged that the economic circumstances were never disclosed. No evidence of loss was adduced.

57. Reliance was made on the decision on Onesmus Kinyua Magoiya V Prudential Life Assuarance Kenya (2022) eKLR to buttress the submission.

58. That the Claimant had testified that the Respondent was making huge profits before and during the redundancy.

59. Counsel submitted that if the objective was to create cost effectiveness, the splitting of roles created other positions

60. Counsel urged that since the Respondent's holding company remained listed on the stock exchange, tax obligations were mandatory and the positions could not have been abolished.

61. That the Respondent did not enquire from PWC if there were suitable positions for the Claimant or in any other place yet the qualifications of those who were absorbed by PWC or went to Hungary were the same.

62. That the email from Hellaly Ahmed (GE Global Operations) to Toscano Richard (GE Corporate) dated 4th April, 2018 was clear that the Claimant's role and job were not affected by the redundancy as the email was written 4 months before the notice of termination on account of redundancy and the Claimant was still in office.

63. According to counsel, the email appears to suggest that the writer had information that the Claimant's employment would be terminated but the office and roles would remain intact underscoring the Claimant's testimony that the role was critical.

64. Counsel relied on the holding in Goonvean & Rostowrack China Clay Ltd (1973) 2 ALLR 1973 cited in Jane Khalechi V Oxford Univeristy Press E.A. Ltd (2013) eKLR to urge that since the Respondent's business requirements remained the same, there was no genuine redundancy.

65. On discrimination, counsel submitted that the Claimant was treated differently in that all other employees affected by the redundancy were given alternative jobs.

66. That the Claimant's predecessor, one Mr. Thomas Munene was earning more than the Claimant yet he was holding the same position.

67. According to counsel, while Thomas earned Kshs.796,875.00, the Claimant earned Kshs.629,167.00.

68. That paying the Claimant less than the predecessor was discriminatory and contrary to Section 5(7) of the *Employment Act*, 2007.

69. On procedural aspects of the redundancy, counsel submitted that the redundancy was implemented in an unlawful manner in that there was no selection criteria.

70. That those notified of the redundancy with the Claimant were redeployed. That Mr. Cornelius Kipsoi joined on 28th November, 2017 and was redeployed to Hungary. Counsel submitted that the termination of employment was contrary to Section 40(1)(c) of the *Employment Act*, 2007.

71. That Mr. Newton Otwori and Andrew Shiels were also redeployed to Hungary.

72. Counsel cited Section 45(1) and (2) of the *Employment Act*, 2007 to underline the essence of fairness in termination of employment as were the sentiments of the court in Daniel Mburu Muriu V Hygrotech East Africa Ltd (2021) eKLR to reinforce the submission.

73. On the reliefs sought, counsel relied on Section 49 of the *Employment Act*, 2007 to urge that the Claimant deserved maximum compensation at Kshs.11,022,206.52 as well as compensation for discrimination.

74. The decisions in Ol Pejeta Ranching Ltd V David Wanjau Muhoro (2017) eKLR and Mary Mwaki Masinde V County Government of Vihiga & 2 others (2015) eKLR were also cited to buttress the submission on compensation for discrimination.

Respondent's submissions

75. Counsel isolated four issues for determination touching on whether the termination of employment was unfair, discrimination, procedural unfairness and reliefs.

76. As to whether the redundancy was substantively fair, counsel submitted that it was in that the Claimant was a Tax Controller for the SSA region and the re-alignment and structural changes effected via email dated 27th February, 2018 show that the changes took place at the META level and new reporting lines were put in place.

77. According to counsel, the email dated 11th December, 2017 communicated the restructuring of the Global Operations Finance (GOF) and the changes affected the Claimant as his roles would be taken at the higher level from Hungary and Egypt.

78. Reference was made to clause 3 of the Respondent's Redundancy Policy as were the sentiments of the court in Sheila Kiplangat V Unilever Tea Kenya Ltd (2022) eKLR and Christopher Melly Kipkoech V K-Rep Bank Ltd (2015) eKLR to urge that the Respondent had managerial prerogative to effect structural changes for financial transformation of its Global operations.

79. That one Hellaly Ahmed was given the role of Tax Controller for the META region comprising Middle East, North Africa, Turkey and Sub-Saharan Africa, a total of 72 countries.

80. Counsel further submitted that the Claimant was aware of a platform created by the Respondent for applying for various positions within GE Global but did not yet others affected by the redundancy applied and those successful secured positions.

81. Counsel urged that the contention that the Claimant's position could not be declared redundant as the Respondent was a listed company had no legal basis.

82. On the movement of staff to PWC, counsel submitted that the Claimant could not as PWC took over the entire Corporate Tax Department and the Claimant was not part of that department.

83. Equally, the call made by PWC vide email dated 19th January, 2017 was specific to those in the Corporate Tax team and if the Claimant was in the team, he did not explain why he was left out.

84. On the alleged discrimination, counsel submitted that the Claimant was not discriminated as other employees equally affected applied for other positions and secured employment. The Claimant did not apply.

85. Similarly, the allegation that one Maurice Mwaniki moved to PWC was unsupported by evidence as documents revealed that he was declared redundant on 1st March, 2017 and was given a certificate of service.

86. As regards one Thomas Munene, the Predecessor, the Claimant adduced no evidence that he had similar qualifications and experience as Mr. Thomas Munene.

87. Counsel cited the sentiments of Mbaru J. in SWM V Hardware Trading Store Ltd & another (2021) eKLR on the burden of proof.

88. As to whether the redundancy was procedurally unfair, counsel submitted that it was fair in that the Claimant was notified of the impending organizational and structural changes affecting the Global Operations Finance (GOF) and was subsequently updated and was invited for a consultative meeting on 26th July, 2018.

89. That the Claimant failed to pursue other positions unlike his colleagues, was given a 30 days termination notice and invited for consultations when he expressed his discontent and even appealed the decision and was finally paid and given a certificate of service.

90. As regards the reliefs sought, counsel urged that the Claimant had not established any reasonable basis for compensation and cited the sentiments of the court in George Onyango Akuti V G4S Security Services Ltd (2013) eKLR and the Court of Appeal decision in Kenya Broadcasting Corporation V Geoffrey Wakio (2019) eKLR on why general damages were not awardable for unlawful termination of employment.

91. That the Claimant adduced no evidence to show that he was entitled to bonus for the year 2018.

Determination

92. The issues for determination are;

    i. Whether termination of the Claimant's employment on account of redundancy was unfair and unlawful.

    ii. Whether the Claimant was discriminated.

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

93. On the 1st issue, while counsel for the Claimant submitted that the termination of employment was unfair and unlawful both substantively and procedurally, counsel for the Respondent submitted that the termination of employment was conducted in accordance with the provisions of Section 40 of the *Employment Act*, 2007.

94. Before unpackaging the respective positions and the attendant facts, it is elemental to re-state the law on redundancy as provided by the *Employment Act*, 2007.

95. Section 2 of the Act defines the term redundancy. The essentials of a redundancy are principally loss of employment, job; or career at the instigation of the employer where the employee is not at fault which may be on account of the services of the employee becoming superfluous, or the position or office is abolished.

96. Additionally, Section 40 of the *Employment Act*, 2007 prescribes the principle an employer must comply with for a redundancy to pass muster.

97. In Freight-In Time Ltd V Rosebell Wambui Munene (2018) eKLR, the Court of Appeal stated as follows;

> "In addition, Section 40(1) of the *Employment Act* prohibits, in mandatory tone, 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 pay 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."

98. Significantly, Section 47(5) of the *Employment Act*, 2007 provides that;

> "For any complaint of unfair termination of employment or wrongful dismissal, the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer."

99. Finally, Section 45(1) of the *Employment Act* is emphatic that;

> " No employer shall terminate the employment of an employee unfairly."

100. Section 45(2) of the Act prescribe the prerequisites of a fair termination of employment, namely; a valid and fair reason and fair procedure.

101. For a termination of employment to pass muster, it must be established that there was a substantive justification for the termination and it was effected in accordance with a fair procedure as aptly captured by Ndolo J. in Walter Ogal Anuro V Teachers Service Commission (2013) eKLR and the Court of Appeal decision in Naima Khamis V Oxford University Press (EA) Ltd (2017) eKLR.

102. As held in Barclays Bank of Kenya Ltd & another V Gladys Muthoni & 20 others (2018) eKLR;

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

103. In the instant case, it is common ground that the Respondent's email from Global Operations META dated Monday 11th December, 2017 at 5.12 pm sent to Global Operations All META was a redundancy statement. The email made reference to an earlier one dated 8th November, 2017 which the Claimant denied having received and the Respondent did not avail a copy.

104. The email dated 11th December, 2017 was unambiguous that the Respondent had embarked on a two to three year journey of the Finance Transformation to "deliver streamlined processes of consistent quality, at a competitive cost across GE. In order to reflect this transformation, we are restructuring the Global Operations Finance Organization in META. This will be done in phases, with details of our progress shared with you regularly."

105. The email also communicated the appointment for three individuals, namely; Balaji Ajayi, Ahmed Sakalla META and Adriana Marinaro as Controls Leader, R2R Leader META and Closing and Reporting (C&R) Leader META respectively.

106. Was the Respondent's email the notice contemplated by Section 40(1)(b) of the *Employment Act*, 2007 as the Claimant was not a member of a union or was it the letter dated 31st August, 2018?

107. Under Section 40(1)(a) of the *Employment Act*, the notice to be given by the employer must set out the reasons for and extent of the intended redundancy.

108. Guided by the Court of Appeal decision in Cargill Kenya Ltd V Caroline Mutana Mwaka & 3 others (2021) KECA 115, it is clear that Section 40(1) of the *Employment Act*, 2007 requires one notice only. A second notice would not be justified under the provisions of Section 40(1) of the Act.

109. The letter dated 31st August, 2018 is a notice of termination of employment on account of redundancy.

110. The letter makes no reference to the reasons for the restructuring nor extent of the redundancy as it is communicating a decision not an intention to declare the Claimant redundant as required by the provisions of Section 40(1) of the Act.

111. It is common ground that when the re-organization took place, Global Operations Finance had two Departments of Controls and Closing and Reporting and the two department had vacancies in Egypt and elsewhere.

112. The Departments were headed by Balaji Ajayi and Adriana Marinaro. This is evidenced by the email dated 11th December, 2017.

113. Puzzlingly, an email by one Hellaly Ahmed to one Toscano Richard dated 3rd April, 2018 reveals that the position of Tax Controller was in the process of being taken over by Hellaly Ahmed. The email states as follows;

> "I need full access all responsibilities, I will act as Tax Controller for MENAT and may be SSA."

114. It is unclear to the court as to when and why the decision to effect Financial Transformation was made and the reasons that informed the decision as that is the foundation of the alleged redundancy.

115. In the Cargill Kenya Ltd case (Supra), the court stated as follows;

> "It is thus our finding that the above interpretative factors discount a construction that a notice of termination is required by Section (1)(f) or within the timelines held by a learned judge of the trial court. Whiles such a notice may eventually require to be given in a termination on account of redundancy, it is definitely not one of the conditions to be met under Section 40, Subsection 1(f) of the *Employment Act* before the redundancy . . . and erred in finding that there is a requirement to issue a notice of termination before the redundancy under Section 40(1)(f) of the *Employment Act*."

116. Other than the letter dated 31st August, 2018, the Respondent did not sent any other notice to the Claimant as a possible candidate for redundancy.

117. Similarly, the email dated 11th December, 2017 was sent to all employees of META with no indication as to who among them would be affected.

118. In the courts view, neither the email dated 11th December, 2017 nor the letter dated 31st August, 2017 met the requirements of Section 40(1)(a) and (b) of the *Employment Act*, 2007 with respect to the reasons for and extent of the intended redundancy" and the one month period as held in Thomas De La Rue (K) Ltd V David Opondo Omutelema (2013) eKLR, where the Court of Appeal expressed itself as follows;

> "It is quite clear to us that Sections 40(a) and 40(b) provide for two different kinds of redundancy notifications depending on whether the employee is or is not a member of a trade union . . .
>
> Where the employee is not a member of the union, the notification must be in writing and to the employee and the local Labour Officer. Section 40(b) does not stipulate the notice period as is the case in 40(a), but in our view a purposive reading and interpretation of the statute would mean the same notice period is required in both instances. We do not see any rational reason why the employee who is not a member of a union should be entitled to a shorter notice."

119. Whereas the letter to the Claimant was received at least one month prior to the date of cessation of employment, the letter to the local Labour Officer was forwarded outside the prescribed time frame and was thus irregular.

120. Relatedly, paragraph 2 of the letter which outlines the reasons for the termination of employment is incomplete.

121. Equally, the letter is categorical that the role in question would cease on 30th September, 2018 and only a single employee was affected by the restructuring.

122. Significantly, under the Respondent's Redundancy Policy, 2015, employees affected by a redundancy were entitled to two notices. The Claimant received only one.

123. In the court's view, a more detailed letter setting out the actual reasons for the restructuring and the potential impact on employment would have justified the Respondent's assertion that the restructuring was indeed actuated by prevailing market conditions.

124. The Respondent made no allegation or avail evidence to demonstrate that market conditions necessitated the abolition of the Claimant's position.

125. Although the court is in agreement with the Respondent's counsel's submission that management has the prerogative to restructure and re-organize or realign its structure as held in Kenya Airways Ltd V Aviation & Allied Workers Union Kenya & others (2014) eKLR, the provisions of the *Employment Act* requires the employer to set out the reasons for and extent of the redundancy.

126. To reduce to reasons to terms such as re-alignment, reintegration or restructuring cannot in the court's view avail the Respondent.

127. Reasons would typically relate to the fundamentals of the organization, was the workforce bloated, adoption of a new technological tools and bloated costs among others.

128. Strangely, the Respondent made no reference to its financial performance.

129. As regards a selection criteria, the Respondent's counsel submitted that none was necessary as only one person was affected.

130. This is not entirely correct as other persons were affected, a fact acknowledged by the Respondent.

131. Specifically, paragraph 23 of the witness statement stated that one Cornelius Kipsoi, Newton Otwori and Andrew Shiels were also affected by the Redundancy.

132. Clause 4 of the Respondent's Redundancy Policy, March 2015 provides that;

> " The company shall take into account the skills, ability, seniority and level of reliability of employees before deciding which employee shall be rendered redundant . . ."

133. In sum, the Respondent had no selection criteria as required by the provisions of Section 40(1)(c) of the *Employment Act*, 2007.

134. As regards consultations, counsel for the Claimant appear to acknowledge that some degree of consultation took place before and after the notice was issued in that a meeting was allegedly held sometime in July 2018, though no agenda was circulated and the Claimant queried that fact by an email dated 5th July, 2018.

135. It is unclear as to whether the agenda was given, what it was about or whether the meeting took place as no minutes were provided.

136. Puzzlingly by July 2018, the Claimant had not been formally notified that he was a candidate for redundancy which would appear to explain the protest by the Claimant after the letter dated 31st August, 2018 was served on him.

137. What followed after the letter were not strictly consultations but grievance handling by Human Resource Departments.

138. Needless to emphasize, the consultations envisaged in a redundancy are intended to bring the parties together to explore the possibility of termination of employment and develop mechanisms where possible to mitigate the impact of inevitable termination of employment.

139. The consultations are not supposed to be cosmetic. (See Maraga JA (as he then was) in Kenya Airways Ltd V Aviation & Allied Workers Union Kenya & others (Supra)).

140. See also Barclays Bank of Kenya & another V Gladys Muthoni & 2 others (Supra) and Thomas De La Rue (K) Ltd V David Opondo Omutelema (Supra) on the essence of consultations.

141. In sum, the court is not persuaded that there were meaningful consultations between the Claimant and the Respondent on how to mitigate the Respondent's decision to terminate the Claimant's employment.

142. Having found that the Respondent did not engage the Claimant in meaningful consultations after the notice of termination of employment and the letter dated 31st August, 2018 did not meet the threshold of Section 40(1)(a) and (b) of the *Employment Act*, 2007, the court is satisfied that termination of the Claimant's employment on account of redundancy was unfair.

143. As to whether the Claimant was treated in a discriminatory manner, counsel for the parties have adopted contrasting perspectives with the Claimant maintaining that his client was discriminated on the ground of salary, was not given alternative employment as was customary or practice and finally was not absorbed by PWC when others were.

144. In Peter K. Waweru V Republic (2006) eKLR cited in Rose Wangui Mambo & 2 others V Limuru Country Club & 15 others (2014) eKLR, the court stated as follows;

> "... Discrimination means affording different treatment to different persons attributable wholly or mainly to their descriptions ... Whereby persons of one such description are subjected to .... restriction to which a 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 where no reasonable distinction can be found between those favoured and those not favoured."

145. The Claimant's counsel relied on the provisions of Section 5(7) of the *Employment Act*, 2007 to urge that the burden of proof lay on the Respondent to disprove the alleged discrimination.

146. The issue of burden of proof in cases of discrimination has been addressed in several decisions including by the Supreme Court of Kenya.

147. In Simon Gitahi Gichuru V Package Insurance Brokers Ltd (2021) eKLR, the Court of Appeal stated as follows in relation to Section 5(7) of the *Employment Act*, 2007;

> "This however does not automatically shift the burden of proof in cases of discrimination against an employee to the employer. According to Section 5(7) of the Act, an employer alleged to have engaged in a discriminatory practice must give reasons for taking certain actions against the employee. Where such actions are shown not to have any justification

against the protected group, then there exists discrimination against such an employee and must therefore be addressed."

148. Other definitions may be found in Robert Fullinwider in the Reverse Discrimination Controversy 11 – 12 (1980), International Labour Organization Discrimination (Employment and Occupation) Convention, 1958 as well as Nyarangi & others V Attorney General (2008) eKLR among other sources.

149. In Samson Gwer & 5 others V Kenya Medical Research Institute & 3 others (2020), the Supreme Court applied Section 108 of the *Evidence Act* in requiring the Claimant to establish his claim in a matter involving discrimination.

150. The issue of shifting of the burden of proof was also addressed in Raila Odinga & others V Independent Electoral & Boundaries Commission & others (2013) eKLR.

151. In determining this issue, the court is also guided by the sentiments of the Court of Appeal in Mohammed Abduba Dida V Debate Media Ltd & another (2018) eKLR citing Kedar Nath V State of W B (1953) SCR 835 (843) where the court stated;

> " Mere differentia or inequality of treatment does not per se amount of discrimination within the inhibition of the equal protection clause. To attract the operation of the clause, it is necessary to show that the selection or differentiation is unreasonable or arbitrary; that it does not rest on any rational basis having regard to the object which the legislation has in view."

152. I will now proceed to apply the foregoing principles to the facts of the instant case.

153. First, although the Claimant alleged and submitted that whenever employees of the Respondent were faced with a redundancy, all would be given alternative jobs, he did not provide any documentary or verifiable evidence to support the allegation and the Respondent adduced evidence to show that indeed one Maurice Mwaniki was declared redundant by letter dated 1st March, 2017 and was issued with a certificate of service dated 13th March, 2017 and his dues were paid.

154. Verifiable evidence of the practice or policy or custom or particulars of persons who faced with similar situations, had been offered alternative employment previously would have effortlessly established the Claimant's allegation for a positive finding of discrimination.

155. Closely related to the foregoing is the Claimant's allegation that while other employees were absorbed by PWC, he was not and was thus discriminated as he was ready and willing to do so from as early as April 2017.

156. It is unclear to the court as to how the Claimant manifested his intention to join PWC long before the issue of redundancy had arisen and why he did not do so.

157. Did he apply and the application fell through?

158. Although the Claimant adduced no evidence as to who were absorbed by PWC and/or whether they were affected by the redundancy, it is common ground that the Claimant occupied a regional role and performed regional duties as the Tax Controller for the entire Sub-Saharan Africa region.

159. The Respondent tendered evidence to the effect that PWC and the Respondent entered into an arrangement under which PWC took over the Respondent's Corporate Tax Department as evidenced by an email dated 19th January, 2017 from Gosk Michael to all Corporate Tax employees.

160. The communication was to those employees identified to be part of the PWC Team and each expected a communication from PWC.

161. From the emails, it is unclear to the court as to who was absorbed or not.

162. Significantly, however and as submitted by the Respondent's counsel, the Claimant was not an employee of the Corporate Tax department of the Respondent and could not have been absorbed on that basis and he did not provide evidence that he could also have been absorbed through another mechanism.

163. As the Claimant was not working in the Corporate Tax Department of the Respondent, he did not belong to the class that was favoured in this case and an allegation of discrimination is in the circumstances unsustainable.

164. Equally, the Claimant's allegation that Mr. Maurice Mwaniki had moved to PWC on 1st April, 2017 (paragraph 8) of the Claimant's witness statement had no supportive evidence and the Respondent demonstrated that he was indeed declared redundant.

165. Similarly, the allegation that Cornelius Kipsoi, Newton Otwori and Andrew Shiels were moved in the 4th and 2nd quarter of 2018 to sister companies, was also not borne by facts as the Respondent availed evidence to demonstrate they applied for positions, were interviewed and secured employment through the Respondent's Application Portal or platform.

166. The Claimant's page revealed that he did not apply for any position, and confirmed as much on cross-examination.

167. Worthy of note, the email dated 22nd January, 2018 attached the new organogram for Global Operations showed that there were several open positions in META including one in Egypt where the Claimant alleged to have intended to relocate to but tendered no evidence that the issue was ever discussed and with whom.

168. An email on the issue or inquiry about possibility of relocating to Egypt would have buttressed the Claimant's allegation.

169. Finally, on this aspect, the argument that the Respondent did not provide a list of all the open opportunities it had globally for the Claimant to apply cannot avail the Claimant as he was an insider and must have been aware of available opportunities.

170. Similarly, Human Resource could have been of enormous assistance in availing the same or other advise needed.

171. It is unclear as to how Mr. Cornelius Kipsoi, Mr. Newton Otwori and Andrew Shiels came to learn of the positions they applied for.

172. Puzzlingly, the Claimant did not even apply to join PWC with the Corporate Tax department.

173. The last aspect of the alleged discriminatory treatment is the salary paid to the Claimant.

174. The Claimant alleged that his predecessor, one Thomas Murega was earning more than him for the same work. That Mr. Murega worked until February 2013 and was earning more than the Claimant.

175. Curiously, the Claimant did not allege that Mr. Murega and him had the similar qualifications and experience or that the duties and responsibilities were similar.

176. Similarly, the Claimant availed no documentary evidence to substantiate the allegation.

177. The Respondent on the other hand submitted that Mr. Murega's qualifications and experience were different as were his functions.

178. As adverted to elsewhere in this judgement, Section 5(3) of the *Employment Act*, 2007 outlaws direct and indirect discrimination against an employee or prospective employee in respect of inter alia; recruitment, training, promotion, terms and conditions of employment, termination of employment or other matters arising out of employment.

179. In Ol Pejeta Ranching Co. Ltd V David Wanjau Muhoro (Supra), the Court of Appeal addressed the issue of equal pay for equal work as follows;

> " The principle of equal pay for equal work or work of equal value was succinctly explained by the South African Labour Court in Louw V Golden Arrow Bus Services (Pty) Ltd (1999) ZALC 166 as follows;
>
> > "... It is not an unfair labour practice to pay different wages for equal work or for work of equal value. It is however an unfair labour practice to pay different wages for equal work or work of equal value if the reason or motive being the cause for so doing, is direct or indirect discrimination on arbitrary grounds or the listed grounds e.g race or ethnic origin."
>
> In claims of this nature, where the Claimant invokes the principle of equal pay for equal work, the Claimant must establish that the unequal pay is caused by the employer discriminating on unlawful grounds . . ."

180. According to Dolph A. Randman in the Anatomy of Disputes about equal pay for equal work,

> " The mere existence of disparate treatment of people for example, different race is not discrimination on the ground of race, unless the difference in race is the reason for the desperate treatment. Put differently, it must be shown that the difference in salaries is because of sex, gender, race and so on."

181. The court is further guided by the sentiments of Mbaru J. in SWN V Hardware Trading Store Ltd & another (Supra) as follows;

> " Where discrimination is alleged on an arbitrary ground, the burden is on the complainant, the Claimant in this instance to prove that the conduct complained of is not rational, that it amounts to discrimination and that the discrimination is unfair."

182. The court is in agreement with the foregoing sentiments.

183. In the instant case, the Claimant tendered no basis for the alleged discrimination but more importantly, the Claimant adduced no evidence of his qualifications and experience as well as those his predecessor nor did he file a notice to produce for the relevant particulars to be availed to enable him show that the Respondent's differential salaries were discriminatory.

184. The duration served by the predecessor was also a significant factor as well as the Respondent's grading structures in force.

185. In the absence of relevant material evidence, the court is unable to find that the Respondent treated the Claimant in a discriminatory manner.

Appropriate Reliefs

a. Declaration

186. Having found that termination of the Claimant's employment on account of redundancy was unfair, a declaration to that effect is merited.

b. General damages for violation of the Claimant's right

187. Having found that the Claimant failed to substantiate the allegations germane to discrimination as regards the salary paid, the prayer for general damages is unsubstantiated and it is accordingly dismissed.

c. Annual bonus

188. The Claimant tendered no evidence of entitlement to any bonus for 2018. He adduced no evidence on the circumstances in which it was payable or the applicable criteria and whether he met the same.

189. More significantly, on cross-examination, he disclaimed the claim for bonus.

The prayer is dismissed.

d. 12 months compensation

190. Having found that termination of the Claimant's employment was unfair, the Claimant is entitled to compensation under Section 49(1)(c) of the *Employment Act* subject to due consideration of the circumstances itemised in Section 49(4) of the Act.

191. In this case, the court has taken into consideration the following;

i. The Claimant wished to continue in the Respondent's employment.

ii. The Claimant appealed against the Respondent's decision to declare him redundant.

iii. The Claimant was an employee of the Respondent for a duration of about 4 years, 5 months which is not long.

iv. The Claimant did not contribute to the termination of employment and had no record of misconduct.

v. The Respondent paid the Claimant the sum of Kshs.5,617,654.95 severance pay, one month's notice and unused leave.

192. In the circumstances, the court is satisfied that the equivalent of 4 months gross salary is fair.

193. In conclusion, judgement is entered in favour of the Claimant against the Respondent in the following terms;

a. Declaration that termination of the Claimant's employment on account of redundancy was unfair.

b. Equivalent of 4 months' gross salary.

c. Costs of this suit.

d. Interest at court rates from the date hereof till payment in full.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 1ST DAY OF NOVEMBER 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 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 *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