



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT BUNGOMA

CAUSE NO.3 OF 2019

DENNIS LEAK OJUOK.....CLAIMANT

VERSUS

POPULATION SERVICES KENYA.....RESPONDENT

JUDGMENT

1. The claim before the court arises from termination of the Claimant's employment contract by the Respondent vide redundancy. The Claimant filed memorandum of claim dated 26th March 2018 and amended on the 1st April 2019 challenging the validity of the redundancy proceedings through the law firm of Messrs Hammerton Maloba and Co. and sought the following reliefs:-

a. A declaration that the redundancy proceedings commenced by the Respondent together with the redundancy notices dated 30th January 2019 and 15th February 2019 respectively is null and void and of no legal consequence.

In the alternative to (a) above

b. A declaration that the termination of Claimant's employment was wrongful and unfair.

c. As a consequence of (b) Kshs 2,754,576/-(12 months x Kshs. 229,548/-) being compensation for wrongful and unfair termination of employment.

d. Kshs. 1,095,570/- being severance pay 15 days pay for every year worked (Kshs. 156,510 x 7 years)

D(a) Kshs. 688,644/- being 3 months pay in lieu of notice

e. General damages

f. Exemplary damages

g. Costs of the suit

h. Interest on (c)(d)(d(a)) and (g)

i. Any other relief this Honourable Court may deem fit to grant.

2. The Claimant filed together with the claim list of witnesses and his witness statement and the Claimants list of documents all dated the 26th March 2019. The Claimant with leave of court filed verifying affidavit to the claim and the amended sworn by the Claimant on the 2nd October 2021 at Boston- Massachusetts where he is based. The claimant also filed the bundle of documents under the list of 26th March 2019. The Claimant filed further list of documents dated 15th April 2019 together with the bundle of documents under the further list.

3. The Claimant filed Reply to Respondent's statement of defence reiterating his claim and denying the contents of the defence and stating it contains mere denials.

4. The Respondent entered appearance and filed statement of defence dated 9th April 2019 together with list of witnesses, witness statement of Allan Ngunze and the Respondent's list of documents all dated 9th April 2019. The Respondent filed and produced documents under the

list.

5. The case was heard inter partes on the 28th September 2021 with the parties being represented by advocates. Mr. Maloba for Claimant and Mr. Ngala for the Respondent.

6. The parties filed written submissions after closure of defence hearing. The Claimant's submissions are dated 13th October 2021 and filed on the 15th October 2021. The submissions of the Respondent are dated 21st October 2021 and filed on the 22nd October 2021.

The Claimant's case

7. The Claimant's case is stated in the memorandum of claim dated 26th March 2016 and the witness statement of the Claimant of same date. The Claimant on oath adopted his statement in court as his evidence in chief. The witness was cross-examined by counsel for the Respondent. In summary the Claimant stated that he was employed by the Respondent in 2010 as a Behavior Change Communication Officer where he served until 2012 when he was promoted to position of Health Communication and Marketing (HCM) coordinator in charge of North Rift. In 2014 the Claimant was promoted to the position of Regional Programmes Coordinator (RPC) and posted to the North Rift region where he served until May 2017 when he was promoted on merit to the position of Regional Manager Lakeside region. The Respondent had divided the country into 5 regions being lakeside, Rift Valley, Mountain, Coast and Nairobi with each one headed by a regional manager or regional programs coordinator who acts like the regional chief executive officer. The Claimant stated that the Lakeside region had the highest number of staff (43) working under the supervision of the Claimant and had in the recent past been rated the best performing regionally. The Claimant stated in his claim that the lakeside region hosts majority of the Respondent's projects and continued to be funded by USAID HCM which allegedly paid 100% of the his salary. That in the last 2 years to termination of his employment, the Claimant earned salary increments and bonuses in recognition of his sterling performance for the period as regional manager for Lakeside region. The Respondent is a non-profit making public benefit organization which runs its activities through donor funding agencies including USAID. That on 1st February 2019 the Claimant together with other employees were summoned to meeting scheduled for 4th February 2019 through skype from Nairobi and at the meeting the Chief Executive Officer of the Respondent through a 5 minute skype call disclosed that the Respondent would face financial challenges since funding from donors namely AHME and CIFF was coming to an end on 31st March 2019 and that some members of staff would be laid off and directed the Human Resources Director and departmental heads to issue redundancy notices by 5th February 2019. On 5th February 2019 the Claimant stated that he received the redundancy notice issued by the Chief Executive Officer through email citing downsizing of Population Services Kenya operations in view of ending AHME and CIFF projects in March 2019 as the reasons for the redundancy. This was followed by another notice dated 15th February 2019. The redundancy notice was to take effect on the 31st March 2019.

8. The Claimant stated that the redundancy proceedings were unlawful and designed to unfairly get rid of him together with other few employees hence a sham on grounds that:

- a. There had been no restructuring, re organization and or abolition of his position as he was asked to hand over to one of his supervisees George Oscar Mutembela who was his peer and had been employed same time.
- b. That out of the 12 employees whose salary was paid by AHME 100% only 5 were declared redundant while the remaining 7 were transferred to USAID HCM which now pays 100% of their salaries,
- c. That in Lakeside region only 6 out of the 43 employees were declared redundant,
- d. That none of the projects in the lakeside region has been discontinued and the region has not merged with another region,
- e. That the Claimant was the only regional manager declared redundant and the employer was in process of recruiting another employee of his stature,
- f. That the Respondent had received fresh funding from DFID which was to fund the Respondent's programmes for the next 3 years to tune of approximately Kshs.3.56 billion which amount can bridge the gap left by AHME and CIFF.

The Claimant stated that from the foregoing, extraneous factors other than contained in the redundancy notice informed the decision of the Respondent to commence redundancy procedure against the Claimant.

9. The Claimant stated that the Respondent failed to take into account the principles that guide redundancy process including the number of years an employee has served and others stated therein.

10. The Claimant stated that the Respondent breached statutory requirements contained in section 40 of the Employment Act which require redundancy process to be transparency, consultative and genuine. The particulars of breach and illegalities are stated in summary to be

- a. Failure to issue statutory initial notice to the employees and a labour officer in the region as contemplated under section 40(1)(b) of Employment Act
- b. As a consequence to (a) failing to invite employees and partners to discuss/ consult on possible redundancy situations and explore alternatives to retrenchment and if inevitable form consensus on how the social impact of the decision may be mitigated.
- c. Failing to take due regard to seniority in time and to the skill and ability and reliability of the claimant in relation of employees not affected by the redundancy process contrary to section 40 (1)(c)of the Employment Act.

d. As a consequence of (c) failing to establish a reasonable , fair and objective selection criteria to be independently applied to determine individual employees to selected for redundancy.

e. Failing to adhere to Respondent's human resources manual which require strict adherence to the Employment Act.

11. The claimants produced as his evidence in support of his case exhibits marked 1-14 in list of documents dated 26th March 2019 and exhibits marked 1-19 in list of documents dated 15th April 2019.

The Respondent case

12. The Respondent filed statement of defence dated 9th April 2019 and a witness statement of Allan Ngunze of same date who testified and adopted the statement at the hearing as his evidence in chief. The witness produced as Respondent's evidence list of documents dated 9th April 2019 exhibits of documents marked as 1- 7. , a further list of documents dated 13th April 2021 being redundancy Notice dated 30th January 2019 to the labour office Nairobi region. The witness was cross examined by counsel for Claimant. The defence in summary is that the Claimant was declared redundant in accordance with the provisions of section 40 of the Employment Act , that the Claimant's position was found not tenable after cut in donor funding to the Respondent and on account of his performance. That in total 44 employees from different cadres were declared redundant. That the Claimant was evaluated in 2018 and his performance found wanting and further the organization had one post of Regional Manager in whole country and after consultations it was found that the job being done by the regional manager could be done by coordinator who earns less. The respondent's witness stated that no person has been appointed to take over the Claimant's position but the Claimant handed over to a junior employee to avoid there being a vacuum in the organization. That the relevant notices were given to the labour office and to the employee as required by law.

DETERMINATION

13. The Claimant in written submissions identified the following as issues for determination: -

- a. Whether the redundancy of the Claimant was valid.
- b. Whether the Claimant is entitled to the prayers sought.

The Respondent did not identify the issues in its written submissions.

After carefully analyzing the Claimant's list of issues and the parties' respective cases it did appear to this court that the issues that had really been placed before it for determination were as follows:-

a. Whether the redundancy of the Claimant was valid

b. Whether the Claimant entitled to relief sought

The Court addressed the issues considering the case by both parties and their written submissions and application of the law as follows :-

Whether the redundancy of Claimant was valid.

The relevant law

2. Section 40 of the Employment Act 2007 provides for the procedure to be complied with in event termination of employee on account of redundancy: -

40 (1) An employer shall not terminate a contract of service on amount of redundancy unless the employer complies with the following conditions:-

- (a) Where the employee is a member of a Trade Union, the employer notifies the Union which the employee is a member and the Labour Officer in charge of the area where the employee is employed of the reasons for and the extent of the intended redundancy not less than a month prior to the date of intended date of termination on amount of redundancy .
- (b) Where an employee is not a member of a trade union the employer notifies the employee personally in writing and the labour officer.
- (c) The employer has in the selection of employees to be declared redundant had due regard to seniority in him and to the still, ability and reliability of each employee of the particular class of employees affected by the redundancy,
- (d) Where there is an existence of a collective agreement between an employer and a trade union setting out terminal benefits payable upon redundancy; the employer has not placed the employee at a disadvantage for being or not being a member of the trade union .
- (e) The employer has where leave dis due to an employee who is declared redundant paid off the leave in cash.

(f) The employer has paid and employee declared redundant not less than one month's notice or one month's wages in lieu of notice and

(g) The employer has paid to an employee declared redundant severance pay at the rate of not less than fifteen days pay for each completed year of service.

3. Definition of redundancy.

Section 2 (i) of the Employment Act and the Labour Relations Act define redundancy as "The loss of employment, occupation, job or career by involuntary means through no fault of the employee, involving termination of employment at the initiative of the employer, where the services of an employee are superfluous and the practices commonly known as abolition of office and loss of employment.

4. Validity of the notice Redundancy

14. The Claimant submits that there is no evidence that the Respondent issued the statutory notice as provided for under section 40 (1) (a) of the Employment Act.

15. That the letter dated 30th January 2019 was addressed to the labour officer Nairobi region and the Claimant work station was in Nyanza region (exhibit 5 of the Claimant's further list of documents). That the notice should be to labour officer in charge of area where the employee is employed and not any labour office. Further, the Claimant submits that the said letter is not the notice envisaged under the law. That the local labour officer ought to have been involved in the process before the decision to render employee redundant was taken. The letter by the Respondent to the labour officer Nairobi reads in part "pursuant to section 40 (1) (b) of the Employment Act, 2007, we write to inform you of the intended termination of the employment of certain employees of population services Kenya (PS Kenya) due to redundancy." Attached to the letter was a list of 44 employees to be laid off. This list it is submitted included the claimant.

16. The Claimant submits that the said letter by the Respondent communicated to the labour office the final decision of the Respondent. The Claimant submits that this was not the intention of the law. The labour officer should have been appraised of the matter to give advice before the decision to terminate is taken and given an opportunity to guide the process of exploring alternatives to termination of re – deployment salary cuts etc. The Claimant submits that this is a requirement of the law. The Claimant submits that DWI was clear that the Respondent did not involve the Claimant in the redundancy process at all. Insisting on the notification and consultations in redundancy the Claimant relies on the decision of the superior court in *Aviation to Allied Workers Union -vs- Kenya Airways limited to 3 others (2012) eKLR* where the Claimant cites in part. " *The initial notification is intended to alert the parties of the situation. It is not the same thing a termination of employment. No decision has been made and the employer is simply inviting the social partners to discuss a possible redundancy situation. The Second phase involves consultation in consultation before and during the retrenchment exercise is mandatory, employees are constituted individually and through their trade union* ".

17. The Respondent on the compliance with notice under Section 40 (b) of the Employment Act submits that the Notice to employee and trade Union and if employee is not a member of trade union, to the employee personally in writing and to labour office was complied with.

18. The dispute by Claimant is that the notice was not given to the local labour office. The Respondent submits that notice was given to the labour office as per document No. 1 of the Respondent's further list of documents. The letter dated 30th January 2019 is addressed to the labour officer Nairobi region and informs of intended redundancy pursuant to Section 40 (1) (b).

19. The Respondent under the said letter head is based in Nairobi but has region offices like the lake side region where the Claimant is based. The court notes that the letter of employment of 14th December 2013 indicates the Claimant was at North Rift at time of Employment. The court interprets the local labour officer to be the one where the company owners or headquarters operates from in the country. The Claimant was deployed to work in the lake side region . The employer has right to transfer employees thus the local labour officer retains jurisdiction over all employees under the employer in his/her jurisdiction.

20. The Claim that Notice ought to have been issued to Nyanza region where the Claimant was deployed has no basis in law.

Section 40(1) (a) requires notice of intended redundancy not less than a month prior to the date of the intended termination on amount of redundancy. In this case the Notice is clear it is intended redundancy. It is dated 30th January 2019 and the Claimant was given notice of redundancy vide letter dated 15th February, 2019 and notified of termination of employment with effect from 31st March 2019.

21. It is the opinion of this court that the Notice of redundancy issued to the labour officer and the Claimant was in compliance within the law and thus valid.

22. The next phase under the law after notice was consultation, the Claimant submits that there was no compliance. The Respondent submits that the Claimant in paragraph 11 of the Memorandum of claim has acknowledged that indeed they were told that the organization was going to face financial challenges and that members of the staff would be laid off and that notices would be issued by 5th February 2019 which notices were issued to the individual employees as acknowledge by the Claimant and also the labour officer as required. Further a meeting of an employee to be declared redundant was held done and the Claimant joined the meeting by skype.

23. During cross – examination DWI told the court he had not produced proceedings of the skype meeting and on the involvement of the retrenches, DWI told the court the only evidence he had is the notice of retrenchment addressed to the Claimant. The said notice dated 15th February 2019 refers to earlier communication during staff meeting on 14th February 2019 on some positions including the Claimant's which have been abolished and or rationalized. The evidence of DWI is inconsistency with averments in the amended memorandum of

claim dated 15th April 2019 paragraph 10 and 11.

24. The court opines there was substantial compliance with section 30 (1) (a) of the Employment Act. On the reasons for the termination. The law states that redundancy is not on any fault of employee. The relevant provisions to guide the process in the instant case is under section 40 (1) (c) which states:- “ The employer has in selection of employees to be declared redundant had due regard to seniority in time and to the skill ability and reliability of each employee of the particular class of employees affected by the redundancy”.

25. The Claimant in his claim paragraph 14 states that the redundancy proceedings were unlawful and designed to unfairly get rid of the claimant together with a few other employees and is therefore a sham:-

“(a) That there has been no restructuring, re-organization or abolition of the Claimant’s position as he was asked to hand over to one of his supervisees one George Oscar Mutembela who joined the Respondent on the same day the Claimant did.

(b) That it is surprising that out of 12 employees whose salary paid by AHME 100% only 5 would be declared redundant while the remaining 7 were transferred to (USAID) HCM which now pay 100% of their salaries.

(c) That in the Lake side region only 6 out of 43 employees are declared redundant .

(d) That none of the projects in the lake side region has been discontinued or suspended and the region has not been merged with another existing region.

(e) That the Claimant is the only Regional Manager who has been declared redundant.

(f) That while the Claimant is undergoing redundancy proceedings the Respondent is recruiting a new employee of the Claimant’s stature.

(g) That the Respondent has received fresh funding from DFID Desip which will fund Respondents programs for the next 3 years to the tune of approximately kshs. 3.56 billion which amount will easily bridge the gap left by AHME and CIFF.”

26. The Claimant states that the Respondent is in breach of the law having failed to take into account the principles to guide redundancy including number of years and employee has served it, seniority in time, skill, ability, and reliability of the employees of the departments affected and last in first out.

27. The Claimant states that the Respondent failed to establish a reasonable, fair, objective selection criterion to be applied in determining employee to be retrenched.

28. Lastly that the Respondent failed to adhere to its Human Resources Policy material which require strict compliance with Employment Act, identification of positions to be abolished to be done by departmental heads and redundancy Notice to be written by the Human Resource Director.

The parties gave evidence on these issues.

29. During cross examination the Claimant admitted that he was not the only one retrenched. It was established that he was not the only Senior Officer retrenched as the Notice to labour officer attached names of Susan Nyambura a senior officer, Kirinya Mbaabu a senior Manager ICT and Akoth Mboya who the Claimant agreed were all senior employees. The Claimant denied that his bonus was reduced because of cut in donor funding in 2018. The Claimant told the court there was a claim of donor cut by employer but he was not provided proof. On being asked of fact that HCM was paying 80% of his salary the Claimant said he had attached time sheets of August 2018 to February 2019 at page 36 of the first list dated 26th March 2018. A look into the said documents indicates a total of 100% for Claimant under various components of HCM.

30. On whether the Claimant had demonstrated that the organization received kshs. 3 billion, the Claimant referred to documents 16-17 in the further list of his documents. On being probed further the Claimant told the court he left before the funds were received.

31. On re examination by his Advocate, the Claimant said the employer was in final stages of receiving funds and he produced communication between the donor and the Respondent. I looked into the correspondence in document and find no concrete proof of the funding as those are proposals.

32. DWI, Allan Ngunze said he was the Human Resource Director. He relied on his statement and list of documents dated 9th April 2019 and 13th April, 2021. DWI further told the court the DFID funding was focused on family planning in North Eastern and Coastal region . That the Claimant had no experience in family planning service delivery and hence not a good fit. That in 2019 when they carried out retrenchment they had a new operation model where the position of regional manager was superfluous. That due to reduced funding the employer decided in place of high profile Manager they could have coordinators of region from April (2018). That 2 projects were coming to an end . In 2019 they lost 35% of HCM funding necessitating lay off of 44 staff in March 2019. That out of the 44 there were 4 managers including the Claimant.

33. That the reason for the redundancy was more of funding constraints and new structure to handle new environment they were facing. That in 2017 the Claimants performance was meritorious and he got a good bonus. That in 2018 , the Claimant’s performance was declining hence the declining bonus indicative of poor performance.

34. During cross examination DWI told the court the Respondent has Human Resources Manual which provides for nonperformance of employees. That redundancy is not one of the remedies for non-performance. That there was performance evaluation done between the supervisor and employee and not in secret. That the Claimant was declared redundant on restructuring. That employees were involved as there was a physical meeting on 4th April, 2019 addressed by the CEO and for persons in the regions there was meeting called on skype at which meeting the CEO gave reasons why employer needed to reduce staff.

35. DWI stated he had not produced proceedings of the meetings. That they called individuals affected and only evidence of involvement of the retrenches was the letters addressed to Claimant on redundancy .

36. On the evidence of the restructured model DWI stated they informed staff at the skype meeting DWI stated that the donors who had reduced funding AAMI and HCM/USAID C. DWI said they had not provided evidence of funds received before the cut. That they responded to the issues raised but no figures attached to the 35% per centage of reduced donor funding was produced. DWI stated that they had not received the alleged kshs.3 billion from the donors. DWI admitted they were hiring employees in particular projects when laying off as it is a continuous process of donor finding .

37. DWI stated that the decision was not apprehension but a reality that donor funding for some positions like the Claimant's were coming to an end. DWI said they did not have payout discussions. He said they had a seminar of 3 days of the persons who were leaving and produced documents No. 5 in list dated 9th April, 2019 and said the Claimant attended the training .

38. Document 5 was the proposal program for training which DWI said happened. DWI did not produce evidence of 3 directors laid off in 2019. He confirmed that the Claimant was the only regional director in the Country and before promotion he was a regional program coordinator and they did not offer him option to perform as coordination before layoff.

39. In re examination DWI told the court that procedure under section 40 of the Employment Act was followed during the redundancy.

40. The Claimant submits that no evidence was produced to show the basis of decision to terminate the employment of the Claimant on account of redundancy when the claimant was the Senior most official in the lake side region with 43 employees and only 6 employees retrenched. The court found the notice under section 40 to labour officer employee was valid. The court finds that the outstanding issue is on the selection criteria objectivity and fairness and doing away position of regional directors in the Respondent employment.

41. The court is guided by case law as follows:

“According to Section 40 of the Employment Act an employer is allowed to terminate employment contracts on account of redundancy. The ILO convention also specifies that the employers can terminate employment for reasons of economic, technological, structural and similar nature. The Claimant cited decision of the industrial court of Kenya Cause No. 231 of 2010 between Kenya Union of Domestic, Hotel Education, Institutions and Allied Workers (KIS DHEIHA) – VS- Rabai Road Primary school, cited in *Jan I Khalechi -vs Oxford University press committee* (2013) eKLR where it was found the employer to have correctly terminated the contract of an employee for economic reasons but concluded the employer failed on fairness and awarded compensation. In the case of *Tobias Onyaya Auma & 5 others -vs Kenya Airways corporation (2007)* eKLR thus the court stated. “ It is not the role of any tribunal to prevent an employer from restructuring or adopting modern technology so long as it observed all relevant regulations.”

In GN Hale & Sons Ltd. – vs Wellington Caterers IUW 4 by New Zealand court of Appeal cited in Kenya Airways Limited - vs Aviation & Allied workers Union Kenya and 3 others eKLR (Maraga JA) held that, “redundancy can be declared if the employer decides to re- organize his business and run it more efficiently and profitability.”

42. Applying case cited above the Respondent had a ground of declaring redundancy for economic reason. I now turn to procedural fairness. Section 40 (1) of the Employment Act provides for the procedure. I have already held the notices were valid as notices were addressed to the labour office and the employee.

Under 40 (i) (c) e,f,& g the burden of compliance is with the employer. In Addition as cited in Kenya Airways -vs Aviation allied workers union paragraph 57 Maraga JA “ Article 15 of the supplementary provisions to the 140 Recommendation No. 119 – Termination of Employment Recommendation 1963 covering reduction of the workforce also prides that:-

“ *The selection of works to be affected by a reduction of the work force should be a warding to precise criteria, which it is desirable should be established wherever possible in advance giving weight to interest of the establishment (employer) as well as the workers.*”

43. The employer gave the employee notice of redundancy dated 30th January 2019. Stated the main reason for redundancy is down sizing of Population Services Kenya (PS /Kenya) operations in view of ending projects in March. The notices to employees and to the Labour office indicated the intention of redundancy and reason for the exercise . I already found redundancy based on economic reasons is valid and that the notices are complied with 40 (1) (a) and (b)

Part C of Section 40 (1) requires the employer to have in place a fair and objective selection criterion . the Employer never provided in court any document on the said criteria. In the opinion of the court the selection criteria was opaque. DWI said the performance of the Claimant had declined in 2018 hence his decreased bonus , that they had done away with position of regional manager as his work would be done by a coordinator earing less. The criteria applying to all the staff to decide on which employee was to be declared redundant was not placed before court hence the finding it was opaque.

44. The Claimant contract of employment is dated 14th December 2013 as a Regional Programs Coordinator . On the 18th May 2017 the employer issued a memorandum to the Claimant being contract modification on two issues:-

“(i) Starting June 1st 2017 your title will be Regional Manager -Lake side cirde D2 and you will be primarily responsible in your duties to the project Director HCMI Deputy Chief of party .

(2) Your basic salary will be kshs.208,206.00 and other terms remain unchanged. The employer in his evidence did not produce any written criteria or even the minutes of the meeting it stated was held on skype to prove there was a fair and objective criteria in terminating employment of Claimant on redundancy basis.

To that extend the court finds though economic reasons are justifiable grounds of declaring redundancy there must be a fair and objective selection criteria disclosed to the affected employees on the redundancy process.

45. The allegation that the Claimant was the only Regional Manager in the entire country and his work could be done by a cheaper person in position of coordinator is not a sound position as the redundancy process should entail all staff and no evidence was placed before the court that the Claimant was earning the highest salary in the entire organization.

46. The court is convinced there was no fair and objective criteria applied in the redundancy process against the Claimant. No evidence was placed before the court that a decision had been made on poor performance of the Claimant and in any case redundancy is not a remedy for poor performance.

47. The Claimant was in service under contract dated 14th December 2013 effective 1st January 2014 hence service of 5 years counted for something. That issue of length of service and principle of last in first out was not demonstrated to have been complied with. The court finds the redundancy was unfair.

48. The court is guided by the Court of Appeal decision in *Kenya Airways Limited -vs- Aviation and Allied workers Union Kenya & 3 others (2014) eKLR* where court upheld that the termination by redundancy was unfair and wrongful for lack of application of a fair selection procedure as required under section 40 (1) (c) of the Act and in so doing terminated the contracts of the 447 affected employees.

Whether the Claimant is entitled to orders sought.

49. I have found the termination by redundancy was unfair and wrongful. On the claim severance pay of 15 days for every year worked I am guided by Court of Appeal decision cited in the *Kenya Airways (supra) Tobias Ongaya Auma & 5 others -vs- Kenya airways* where Court of Appeal held “ However, we would reiterate that in determining the lawfulness or other wise of the termination of employment whose terms and conditions reduced into a contract, the only test is whether the said termination or redundancy was in accordance with contract itself.”

50. The Contract is dated 14th December 2013 effective 1st January 2014. The redundancy was effective 31st March 2019. In total full year served was 5 years. The Claimant was entitled to severance pay of 15 days for the 5 full years of service. The letter of notice of redundancy dated 15th February 2019 indicates Claimant was to be paid for 5 years severance pay for 15 days each year total

kshs. 573,870. The Claimant told the court his salary in 2018 was **kshs. 229,548.** For 15 days per month he was entitled to kshs. **114,774x5= total Kshs.573,870.00/-.** Which figure is the same as calculated in later of 15th February 2019. On that issue the Respondent complied with the law and contract.

Under 40 (1) (d) Claimant was to be paid any accrued leave and the letter of redundancy states payment of accrued leave days not utilized. That requirement of the law was complied with Section 40 (f) provides for payment of one months' notice. The letter of contract provides for 1 month Notice. The notice pay is not reflected under the terminal dues to be paid under letter of redundancy and is awarded at **Kshs. 229,48/-.**

51. The Claimant further seeks damages from the unlawful termination employment. The damages are awardable at maximum of 12 months last salary under section 49 of the Employment Act.

In a similar matter in *Kenya Airways Limited -vs Aviation & Allied Workers Union Kenya & 3 others (2014) eKLR*, having upheld unfair termination by redundancy by the court, the Court of Appeal awarded six months gross monthly salary for unfair termination.

52. I have considered the factors under section 49 and considered the status of the Claimant post termination now in Employment in the USA, and his age.

Consequently just like in the Kenya Airways case (supra) I award damages for six months gross monthly wages that is 229,548x6- Total Kshs.1,377,288/- as damages for the unfair termination.

CONCLUSION AND DISPOSAL

1. I find that the Respondent was justified to declare redundancy on the economic reasons given.

2. I find the Respondent did not apply a fair selection criteria and procedure as set out in section 40 (1) (c) of the Employment

Act and consequently unlawfully terminated the Employment of the Claimant.

3. I consider an award of equivalent of six months gross monthly salary of the Claimant at time of termination of employment adequate and award 229,548x6 total damages awarded

kshs. 1,377,288/-.

4. Notice pay awarded of **kshs.228,548/-.** to be settled if not already paid.

5. In addition the Claimant is entitled to severance pay of

kshs. 573,870/-. To be settled if not already paid.

6. The amounts under 3,4 and 5 to be subject to statutory deductions.

The Claimant is awarded cost and interest in the claim from date of judgment until payment in full.

DATED , SIGNED AND DELIVERED AT BUNGOMA THIS 31ST DAY OF JANUARY, 2022

J. W. KELI

JUDGE

In The Presence:-

Court Assistant : Brenda Wesonga

Claimant: Mr. Maloba Advocate

Respondent: Ngala - absent .