



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO. 1672 OF 2016**

**BEDIE KOUAKOU GUILAUME.....CLAIMANT**

**VERSUS**

**BHARTI AIRTEL INTERNATIONAL [NETHERLANDS].....RESPONDENT**

**JUDGMENT**

1. The suit commenced on 22<sup>nd</sup> August, 2016 in which the claimant prays for the following reliefs:-

- (a) **Reinstatement**
- (b) **Damages for unfair termination**
- (c) **Damages for unlawful redundancy**
- (d) **Damages for unlawful termination.**
- (e) **Cost of this suit.**
- (f) **Interest on (d) and (e) above;**
- (g) **Any other relief this Court may deem fit.**

2. C.W.1, the claimant testified that he was employed by the respondent on 13<sup>th</sup> August, 2009 on an indefinite contract effective 13<sup>th</sup> September, 2009. He was also given a letter of undertaking posting the claimant to Ouagadougou, Burkina Faso, as Marketing Director from 15<sup>th</sup> September, 2009. The letter of understanding had a Clause for termination of the assignment through a notice period of 2 months or two months' salary in lieu of notice. Both letters were produced before Court.

3. The claimant testified that the contract dated 13<sup>th</sup> August, 2009 superseded the letter of undertaking.

4. By a letter dated 26<sup>th</sup> October, 2011, the claimant was posted as marketing Director Airtel, Gabon.

5. By a further letter dated 28<sup>th</sup> January, 2013 the claimant was promoted from Marketing Director to Chief Operations Officer in Gabon.

6. Then by a letter dated 18<sup>th</sup> August, 2014, the claimant was transferred to Kenya as Head of Marketing Executive (**SBU II**) with the letter providing two months' notice termination.

7. That the assignment under the letter of 18<sup>th</sup> August, 2014 was governed by Kenya Laws.

8. C.W.1 testified further that the letter dated 13<sup>th</sup> August, 2009 was the base contract whereas the subsequent letters were mere assignments indicating the deployment.

9. By a letter dated 12<sup>th</sup> June, 2015, the respondent wrote to the claimant stating that his current role would cease to exist with effect from 3<sup>rd</sup> July, 2015 and the claimant was advised to seek vacancies within the Respondent.

10. By a letter dated 1<sup>st</sup> July, 2015, the respondent gave the claimant notice that his contract would be terminated with effect from 31<sup>st</sup> July,

2015 and that the claimant would be entitled to two (2) months' salary in lieu of notice, payment in lieu of leave days not taken; service pay at 15 days salary for each completed year of service, two months car allowance and two (2) months Country premium.

11. C.W.1 testified that on 31<sup>st</sup> July, 2015, the respondent set the claimant on a 3 months assignment to Tanzania from 17<sup>th</sup> August, 2013. C.W.1 stated that the assignment superseded the notice of termination in the letter dated 1<sup>st</sup> July, 2015. That the assignment was to lapse on 17<sup>th</sup> November, 2015.

12. By a letter dated 2<sup>nd</sup> September, 2015, the respondent declared the claimant redundant with effect from 2<sup>nd</sup> September, 2015 and also terminated the 3 months assignment to Tanzania with immediate effect.

13. C.W.1 testified that the letter dated 21<sup>st</sup> September, 2015 was in breach of the contract dated 13<sup>th</sup> August, 2009 and violated Section 40 of the Employment Act, 2007.

14. That the respondent did not notify the Labour Officer of the intended redundancy together with reasons for and the extent of the intended redundancy.

15. That the claimant was not given one month notice of the intended redundancy with reasons and or extent of the redundancy.

16. That the redundancy did not take into account the selection of classes of the employees affected, those who had worked for the longest time, skill ability and reliability. That no criteria was published or applied.

17. In the contract dated 13<sup>th</sup> August, 2009, the respondent requested the claimant not to carry out in any manner work and/or activity within the Industry in competition with the Respondent for a period of one year upon termination. That for this reason, the claimant testified that he was entitled to a reasonable notice period of termination and in any event, a period of notice of at least 12 months.

18. The claimant was cross-examined by Sheik Amin, Advocate for the respondent. The claimant admitted that the notice of intended redundancy was copied to Federation of Kenya Employers (FKE) and Ministry of Labour. The claimant admitted that in June, 2015, he was notified of the intended redundancy. C.W.1 admitted that he was aware of the intended changes in the organization. Claimant said he was informed that he would apply for other vacancies but he did not apply since none was suitable.

19. C.W.1 admitted that the notice of redundancy recognized that claimant had commenced work on 15<sup>th</sup> September, 2009 and the notice took care of all his years of service. C.W.1 stated he was to be paid two months' salary in lieu of notice. C.W.1 stated at the time he held the position of Head of Marketing, Strategic Business III and there was Head of Marketing Strategic Business I.

20. Claimant admitted that he was offered a short term assignment. meanwhile in Tanzania. Claimant admitted that this assignment did not affect the redundancy notice. C.W.1 stated the letter of assignment indicated that it was temporary assignment for 2½ months approximately.

21. The claimant denied this assignment was a mitigation measure stating that there was need for the job. C.W.1 admitted that he was notified of the end of the assignment in Tanzania and was still paid two (2) months in lieu of notice.

22. That he received a redundancy package as of 23<sup>rd</sup> September, 2015. That he got other benefits including rent and training allowance. C.W.1 stated these were terms of his contract but was not ex-gratia payment.

23. C.W.1 stated that in December, 2015, he was employed in Guinea Conakry and is a Director in Ivory Coast since 2008. The claimant prays to be awarded as prayed.

## **Defence**

14. R.W.1 **Alvin Kirui** testified for the Respondent. He adopted a witness statement dated 11<sup>th</sup> March, 2020 as his evidence in Chief and relied on a bundle of documents dated 18<sup>th</sup> October, 2010 marked exhibit B. R.W.1 testified that he was the Human Resource Process and Payroll Lead. He stated that the organization was restructured in the year 2015 for efficiency and transfer of functions to operating Countries. That the claimant was one of those affected by the restructuring and was declared redundant. That the claimant was encouraged to apply for new positions. That the claimant did not apply. That meanwhile the claimant was sent on a temporary assignment in Tanzania to mitigate the effects of the redundancy. R.W.1 stated that effective date of the redundancy was July, 2015. R.W.1 stated that the vacancy in Tanzania was temporary hence was terminated prematurely. That it was meant to be filled by a Tanzanian national even though the claimant had qualification to be Director in Tanzania.

15. That indeed, the claimant was overqualified for the position. It would have been a demotion if the claimant was deployed as Director Tanzania. That the claimant was previously managing 17 countries.

16. R.W.1 stated that the claimant was aware of the intended redundancy and was given proper notice.

17. R.W.1 stated that notice of retrenchment dated 21<sup>st</sup> September, 2015 was copied to the Labour Officer. That the earlier letter of 25<sup>th</sup> May, 2015 was also copied to the Ministry of Labour. R.W.1 stated 50 employees were affected by redundancy.

18. R.W.1 stated that letter of 12<sup>th</sup> June, 2015 sated the company would advertise positons and the claimant was encouraged to apply for

them.

19. R.W.1 stated that the letters of 12<sup>th</sup> June, 2015 and 1<sup>st</sup> July, 2015 were not superseded by the letter of 23<sup>rd</sup> September, 2015. R.W.1 stated that the respondent followed a proper and fair procedure in declaring the claimant redundant. That the reason for the redundancy was valid and that the suit be dismissed with costs.

20. The parties filed written submissions dated 25<sup>th</sup> November, 2021 and 7<sup>th</sup> December, 2021 respectively which the Court has carefully considered. The claimant reiterated his case in the submissions stating that the redundancy exercise was in contravention of the law and in particular Section 40 of the Employment Act, 2007 in that the respondent in the letter dated 25<sup>th</sup> May, 2015 did not notify any Labour Officer of the claimant's redundancy in September, 2015. That the respondent did not provide any Labour Officer the list of employees declared redundant. That the respondent did not follow first in last out rule and the job the claimant did in Tanzania was still available and so the reason for declaring the claimant redundant was not valid.

21. The respondent on the other hand submitted that the notice dated 25<sup>th</sup> May, 2015 was copied to the Labour Officer Nairobi, in compliance with Section 40(1) (a) of the Employment Act, 2007. That the respondent had good reason to declare the redundancies since the respondent began to re-organise early, 2015 with the aim to streamline and strengthen its operations in Africa. That as a consequence operations of the company were moved from Nairobi to 17 operating countries in Africa. As a result, some employees were to be moved from the Nairobi office to those operating countries in Africa as well to the global head office in India. Those who did not fit in the new role were declared redundant.

22. As part of that exercise the claimant's role of Head of Marketing SBU II was eliminated as the role was no longer a head office function.

23. The respondent submits that the claimant contradicted himself on the issue of notice but finally admitted that the respondent indeed issued the redundancy notice to the Labour Officer Nairobi.

24. The respondent asked the Court to note that the claimant in cross-examination admitted that he was aware of the reorganization and that he was involved by the respondent in the discussions leading to the declaration of redundancy. The respondent further submits that the claimant admitted having been paid all terminal benefits according to Section 40 of the Employment Act and more.

25. The Court has carefully considered the facts of the case and is guided by the decision of the Court of Appeal in **Africa Nazarene University –vs- David Muteru & 103 Others [2017] eKLR** on the issue of one-month notice.

26. The Court is satisfied that the respondent did comply with the requirements under Section 40 of the Act, in that not only was the notice issued to the claimant but it was also issued to the Labour Officer timeously. That indeed the claimant was involved in the re-organisation process and was deployed temporarily to Tanzania to mitigate the effects of the impending redundancy. The Court finds that the deployment did not derogate from the two (2) months redundancy notice already issued to the claimant prior.

27. The claimant failed to demonstrate that he was wrongly targeted for redundancy. The claimant was indeed invited to apply for the new created positions but declined to do so.

28. In **Josephine M. Ndung'u and Others –vs- Plan International Inc [2019] eKLR**, the Court held: -

***“The Respondent does not dispute that the claimants were senior employees.....The respondent advertised all new downsized positions after the restructuring exercise and as already observed herein above, the claimant declined to apply despite express advise from the employer. As a result, other people applied including the claimants' juniors in the organization and they were appointed. It follows that had the claimants expressed interest in the available positions by reapplying as advised, the employer would have been bound to use the criteria set out in the statute to select the best suited candidate including length of service, skill and ability. In my view, where restructuring has been done to ensure operational efficiency, it is in order for the employer to select the people for redundancy by requiring the employees in the affected positions to reapply for the new and downsized positions. In that case, the failure to apply means one has chosen to exit through redundancy. I therefore return that Section 40 (c) was complied with.”***

29. The claimant having failed to apply for the new roles meant he had reconciled with the fact that he was due to exit for operational reasons.

30. The exercise by the Respondent was in conformity with Section 2 of the Employment Act, in which redundancy is clearly defined as:-

***“redundancy”.....the loss of employment occupation, job or career by involuntarily means through no fault of an employee, involving termination of employment at the initiative of the employer, where the services of an employee are superfluous and the practice commonly known as abolition of office, job or occupation and loss of employment.“***

31. It is our considered conclusion that the fate of the claimant fitted the aforesaid bill, his office having been validly abolished at the head office and the claimant having failed to apply for other positions created by the reorganization exercise.

32. Accordingly, the termination of the Employment of the Claimant on account of redundancy was for a valid reason and the respondent complied with a fair procedure.

33. The claimant in the main suit sought to be reinstated to his employment. This relief is not feasible in the circumstances of the case since the termination was lawful and fair.

34. It also follows that the claimant is not entitled to an award of damages since the declaration of redundancy was both substantively and procedurally fair.

35. The respondent had paid all the terminal benefits due to the claimant upon termination on grounds of redundancy. Indeed, the claimant admitted this fact and did not claim for payment of any outstanding benefits.

36. Considering the good service the claimant rendered to the respondent at his level and that the termination of employment of the claimant was for no fault of his own, the Court deems this an appropriate case for each party to meet its costs of the case.

37. In the final analysis, the suit is dismissed in its entirety with no order as to costs.

**DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF FEBRUARY, 2022.**

**MATHEWS N. NDUMA**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting court of operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15<sup>th</sup> March 2020, this Judgment has been delivered to the parties online with their consent. 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 18 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.

**MATHEWS N. NDUMA**

**JUDGE**

**APPEARANCES**

**KETHI KILONZO FOR THE CLAIMANT**

**SHEIKH AMIN FOR RESPONDENT**

**EKALE – COURT ASSISTANT**