



**Omwenga & 8 others v Kcb Bank Kenya Limited (Cause
443 of 2018) [2022] KEELRC 17 (KLR) (26 April 2022) (Judgment)**

Neutral citation: [2022] KEELRC 17 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 443 OF 2018
NZIOKI WA MAKAU, J
APRIL 26, 2022**

BETWEEN

WANSLAOS ORINA OMWENGA & 8 OTHERS CLAIMANT

AND

KCB BANK KENYA LIMITED RESPONDENT

JUDGMENT

1. The nine Claimants instituted this suit vide a Statement of Claim dated 29th March 2018 suing the Respondent bank for their unfair/unlawful/unprocedural redundancies. They aver that they are all former employees of the Respondent who worked as Clerical staff and were unionisable members of Banking Insurance and Finance Union (BIFU) which has a valid Recognition Agreement with the Respondent through Kenya Bankers Association (KBA). That the Union and the Association have negotiated several CBAs containing terms and conditions of employment including redundancy and that the unionisable employees in the banking industry include Section Heads/Supervisors/officers, Checkers, Clerks and Copy typists, Technical and Subordinate staff.
2. The Claimants aver that the Respondent issued them a notice of intention to declare them redundant on the ground that it had decided to fully outsource the Shares Registry services function to an external vendor that specialised in Shares Registry services. That the Respondent also issued each of them with a notice of termination of employment on account of redundancy on 20th July 2017 and the Union then moved to court under Misc Application No. 140 of 2017 to stop the intended redundancies. The Claimants aver that on 19th October 2017 they obtained interim orders restraining/prohibiting the Respondent from declaring them redundant and which orders were extended on 8th November 2017. The Claimants aver that however by a ruling of 16th November 2017 this Hon. Court dismissed the said Application for lack of a substantive claim and the Respondent immediately declared them redundant on the same date. The Claimants aver that they reported the dispute to the Cabinet Secretary Labour and a Conciliator was appointed but when parties met they failed to reach a settlement and that the



Conciliator then issued recommendations to effect that the Claimants be paid 12 months' wages in compensation for wrongful and unlawful loss of employment. They further aver that during the notice period and pendency of Misc. Application No. 140 of 2017, the Respondent had requested them to nominate and agree with fellow employees willing to swap and take up the redundancy offer but that when they presented their list to the Respondent, it did not consider the same. The Claimants aver that the Respondent went on to illegally purchase employees of Sheer Logic Management Consultant firm to carry core functions performed by the Claimants and that it has also engaged Fixed Term Contract Staff who should have been the first to be declared redundant. The Claimants therefore pray that this Court orders that the Respondent terminating their employment on account of redundancy is null and void as well as untenable because it was unfair/unlawful/wrongful, unprocedural and discriminatory. They also seek reinstatement to their previous and/or equivalent position, any other relief the court deems fit to grant and for the Respondent to pay costs of this suit.

3. The Respondent filed a Memorandum of Response dated 3rd May 2018 averring that the provision for redundancy in the CBA cannot override and/or estop statutory provisions with regard to redundancy and severance pay and that it nevertheless complied with the provisions of the CBA when it terminated the Claimants on account of redundancy. It avers that all the Claimants were working in its Shares & Registrars Department at the time of termination of their employment and that when its staff rationalization commenced on 20th April 2017, it incorporated both voluntary and non-voluntary retirement or exits and affected 237 employees in 2017. The Respondent avers that it has over time improved efficiency and invested substantially in technology that has affected the operating model and consequently made it review its staffing requirements in all areas of its business. The Respondent avers that this has reduced its need for human resources and all employees working in its Shares & Registrars unit were consequently affected by the intended redundancy and it further admits engaging a third party to undertake work previously done by the staff in the said unit. The Respondent avers that it even rescinded its decision to declare one other staff redundant after considering his performance and other pertinent facts and that the said employee was retained by the bank and transferred to another department. Further, two other management employees were also affected by the restructuring.
4. The Respondent asserts that it complied with the law and even sent the requisite notices including to the Labour Officer on 19th September 2017. The Respondent avers that all the Claimants were paid their final dues in full after their redundancies and that the Claimants have come to this court with unclean hands as they have failed to disclose material facts arising from the conciliation; being that the Respondent filed an Appeal No. 2 of 2018 at the ELRC against the decision of the Cabinet Secretary Labour dated 21st December 2017 which is still pending in Court. It prays that the Claimants' Claim be dismissed with costs to it.

5. **The Claimants' Submissions**

The Claimants submit that none of them were solely employed to work in the Shares & Registry department. The Claimants submit that according to Section 40(1)(c) of the Employment Act, the employer ought to have regarded in its selection the seniority in time, skill and reliability of each employee of the particular class of employees affected by the redundancy which in this case was Section heads/Supervisors and Clerical Staff. The Claimants submit that the principle of Last-In-First-Out (seniority in time) and the redundancy selection criterion is also well detailed in Clause A7(e) of the CBA but all of which the Respondent did not comply with. Notably, the CBA provisions on Kenya-wide basis overrides the statutory minimum terms under the law and that Section 26 of the Employment Act is clear that better terms in the CBA are to be applicable. The Claimants submit that the Respondent has not produced evidence as to the number of years of employment of those who were still in its employ at the time of the redundancy and neither has it demonstrated that it



complied with seniority (LIFO). The Claimants submit that the Respondent ought to have considered all employees in the entire bank in the positions of supervisors and clerical staff after applying the selection criterion and that it has failed to prove that those it declared redundant could not be redeployed to other duties within the bank. They rely on the case of *Jane I. Khalechi v Oxford University Press EA Ltd* [2013] where the Court emphasised that seniority in terms of years worked is a major consideration over and above meeting other procedural requirements. The Claimants submit that they were simply discriminated based on the office they were holding contrary to the finding of the Court in *Javan Were Mbanggo v H.Young & Co. (EA) Ltd* [2012] eKLR that “position and not employees, become redundant”. The Claimants further submit that since their redundancies was unfair within the meaning of Section 45 of the Employment Act they are entitled to the remedies for unfair termination under Sections 49 and 50 of the Act. They admit that reinstatement is not available to them in light of the statutory limitation of three year but submit that re-engagement and compensation are still alternative remedies and pray that the 12 months gross salary compensation recommended by the Conciliator is justified and tenable.

6. **Respondent’s Submissions**

The Respondent submits that the issue of serving the requisite notices to the necessary parties is not disputed by the Claimants and that it thus complied with Section 40(1)(a) of the Employment Act and with the provisions of the CBA. The Respondent submits that the Claimants further confirmed having been paid 3 months’ salary in lieu of notice (three times more than what is provided in the CBA) and having also received 1 ½ months’ pay for each year worked as severance pay - which was 50% more than what was provided in Clause A7 of the CBA. It further submits that it is well established that the proceedings before a Conciliator do not bind proceedings before Court and that the Claimants did not also plead/lead any evidence to support their allegation of discrimination or violation of the Constitution which issues should thus be abandoned.

7. On the issue of the selection criterion used, the Respondent urges this Court to adopt the dicta by the Court of Appeal in Civil Appeal No. 37 of 2016, *Mukiria Farmers Co-operative Society Limited v Jacob Rukaria & 5 others* [2017] eKLR wherein the Court considered the employer’s explanation on the issue of skill, ability and reliability of the employees. The Respondent submits that in the instant case, it evaluated the Claimants’ capabilities and found they had worked for very many years in a specialised department and thus lacked the skill and ability to work in other departments of the Bank and that there were no opportunities for them save for the one who was accordingly transferred. It also relies on ELRC No. 249 of 2020, *KUCFAW v Tusker Mattresses Limited* [2021] eKLR wherein the Court held that the provision at Section 40(1)(c) and the principle of LIFO on selection criteria were not applicable as all employees in the branches were affected by the redundancy. The Respondent submits that since Clause A7 of the CBA also expressly provided that application of LIFO would be “subject to all other factors such as skill, relative merit, ability and reliability”, the onus was on it as the employer to consider those relevant factors which in this case was that the Claimants had worked in a specialised department. The Respondent submits that evidence on record shows it also acted fairly and humanely at all times and that this Court should thus find that the claim herein is an afterthought to attempt to benefit unjustly and accordingly dismiss it with costs.

8. The Claimants were all employees of the Respondent. They were working at the Shares Registry of the Respondent and were all declared redundant. It is this act of declaration of redundancy that the Claimants take umbrage against. They assert the Respondent did not apply the requirements of the law under Section 40 on declaration of redundancy and that further principles of Last In First Out (LIFO) were not applied nor were the provisions of the CBA that bound the parties applied. The Respondent on its part asserts it placed all matters relevant to the declaration of redundancy



in perspective, considered and applied the requirements of the law in declaration of redundancy, applied LIFO and was even more generous in the terms of disengagement than the parties CBA. The Respondent outsourced the entire shares registry role. That is not disputed as the Respondent moved its shares registry entirely to another entity. The declaration of redundancy by the Respondent took the form of a letter dated 19th September 2017 addressed to the Secretary General of the Banking Insurance and Finance Union (BIFU) and was to the effect that the Respondent intended to declare 11 employees in its Shares Registry being 8 clerks and 2 copy typists and a section head. The Respondent indicated that the redundancies had arisen due to the prevailing economic environment resulting in a review of the internal business functions, costs and operational efficiency of the Bank. The Respondent asserts as a result the Bank decided to fully outsource the Shares Registrar Services function to an external vendor specialising in shares registrar services. It was indicated the redundancy process would be completed by 15th November 2017. Consequent to the letter to the Union the Bank wrote to the affected employees on 20th September 2017 and in the individual letters notified the employees of the intent to terminate their contracts on account of redundancy. The letters contained the offer in the package which was 1.5 months for each completed year of service, 3 months salary in lieu of notice, pay for accrued leave days not taken. In the letter the last day of engagement was indicated as 23rd October 2017 which was at least a month after the date on the letter. The letters indicated there would be a workshop post separation to equip the staff with some skills in financial planning etc. The CBA the Union and the Bank had in place provided for redundancy under Clause A7. It was provided that under redundancy the severance pay would be one month's pay for each year of completed service, one month's notice or salary in lieu thereof and it also provided for the principle of last in first out to applied Kenya wide.

9. The terms of separation of the Claimants herein was generous to say the least. They were duly notified of the intended redundancy in compliance with the Employment Act Section 40 as well as the CBA in place. The Claimants were paid a better package under the redundancy than is provided for in the CBA and because the entire Section was being wound up and the fact that the skills developed in the Shares Registrar office were unique and not offered elsewhere in the Bank, the Claimants had nowhere else to be deployed to. In my considered view having been taken through a lawful termination process the Respondent cannot be held to account for doing that which the law permitted. As such the suit lacks merit and is hereby dismissed with each party bearing their own costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF APRIL 2022

NZIOKI WA MAKAU

JUDGE

