Kijuu v Hilcrest Investments Limited (Cause 403 of 2017)
[2022] KEELRC 4156 (KLR) (9 June 2022) (Judgment)

Neutral citation: [2022] KEELRC 4156 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 403 OF 2017

K OCHARO, J

JUNE 9, 2022

BETWEEN

WARUCU NGETHE KIJUU ..... CLAIMANT

AND

HILCREST INVESTMENTS LIMITED ..... RESPONDENT

JUDGMENT

Introduction

1. Through a Memorandum of Claim dated 27th February 2017, the Claimant instituted a Claim against the Respondent seeking the following reliefs;

    a. A declaration that the Claimant's employment services with the Respondent was wrongfully was and or unfair;

    b. 8 months' salary in lieu of proper notice of termination of employment - KShs. 3,532,720.00

    c. Twenty four [24] months' salary premised on the Claimant's fixed term contract- KShs.10,598.160.00

    d. Award of damages equivalent to Twelve [12] months' salary KShs.5, ,299,080.00

    e. Severance pay at the rate of 15 days wages for each completed year of service- Kshs. 883,120.

    f. Costs of the claim.

    g. Any other relief that this honourable court may deem fit and just to grant.

2. The Memorandum of Claimant was filed contemporaneously with the Claimant's witness statement and a bundle of documents that she intended to place reliance on as documentary evidence in support of her claim. Indeed, when this matter came up for hearing, she moved the court to adopt her witness

statement as part of her evidence in chief, and admit the documents as her documentary evidence. There being no objection from the Respondent's side, the witness statement and documents were so adopted and admitted respectively.

3. Upon being served with summons to enter appearance, the Respondent did enter appearance on the 17th day of March 2017, and file a memorandum of response on the 8th June 2018. Side by side with the filing of the response, the Respondent filed a list of documents dated 7th June 2017, under which various documents that it intended to use in fortification of its case were placed on record. Subsequently, the Respondent filed a witness statement dated 11th August 2021, by one Mbesa Karimi [RW1]. Too at the hearing, the witness statement, and the documents were adopted as the witness's evidence in chief and the Respondent's documentary evidence.

4. At the Close of pleadings, the matter got destined for hearing inter-partes on merit. The Claimant's case was consequently, and subsequently taken on the 6th October 2021, and the Respondent's on the 1st December 2021.

The Claimant's Case

5. It was the Claimant's case that by a letter dated 13th July 2012 the Respondent offered her employment as a teacher, employment which took effect on the 28th August 2012.

6. By a subsequent contract of employment that was enveloped under a contract of employment dated 28th February 2014, the Respondent and her entered into an employee-employer relationship. The Claimant got employed under the contract as a Deputy Head [Pastoral], for a period of two years with effect 1st September 2014, at a monthly consolidated gross salary of Kshs. 349,065.

7. She contended that her primary role was to lead and manage the pastoral team to provide a positive, secure and happy environment for the school where each child could thrive and flourish. She played a major role in the development of school policies and practices, with particular emphasis on those connected with pastoral care. Further that in her capacity she was the Senior Designated Person for Child Protection and safeguarding the interests of the students.

8. The Claimant stated that her contract of employment was renewed for a further term of two [2] years effective from 29th January 2016. On the 12th August 2016, she received an email from the Head Teacher Mrs. Gabrielle Maina requesting her for a meeting. Meeting which they slated for the 16th September 2016. On this day she proceeded to the Head Teacher's office, where she met Mr. Edwin Karuru the school's Commercial Director, the Human Resource Manager, Ms. Mbesa Karaimu.

9. In the meeting she was informed that her position was no longer tenable as there were not enough children in the school, that the school in the circumstance required only one Deputy Head Teacher, and the pastoral work could be undertaken by other employees. Her services were therefore not required.

10. Mrs. Maina informed her that the school was giving her six months to look for a job elsewhere and that she was going to be paid six months' salary in lieu of notice. Further that she was not expected back to work when the schools were to reopen in September 2016. She wanted the Claimant to commit herself into the Respondent's decision but the Claimant sought for more time to think about it. She further requested the team that was present in the meeting to formally convey the matter to her. Subsequently, they did it through an email dated 18th August 2016. The email confirmed that she was being terminated on account of redundancy.

11. She contended in her oral evidence in court that prior to the meeting of 16th August 2016, she had no knowledge of the redundancy as there had been no notification of the matter to her. The letter from the Respondent to the Labour Officer was dated 25th August 2016, date after her employment had been terminated. The letter was a redundancy notice.

12. She was subsequently served with a termination letter dated 7th September 2016. As at this date her gross salary was Kshs. 441,590. On 19th September 2016, she received a text message from RW1 notifying her that her final dues had been credited into her account.

13. The Claimant asserted that her renewed contract was to run up to 31st August 2016. She aligned herself to the new contract financially and workwise with no desire of looking for another employment during the period.

14. The Claimant asserted further that the due process for redundancy was not adhered to as by law required. She was the only employee who was affected and the criteria of selection was not explained to her. Further that she was not given any audience before the termination.

15. The Claimant further stated that the termination was without a justifiable reason[s] as there was no intention on the part of the Respondent to abolish her position. The Respondent was using this reason to merely get rid of her.

16. The Claimant asserted that on the 30th September 2016, Hillcrest schools put up an advertisement for various vacancies in the Daily Nation and on the school website, one of those positions was Geography teacher, Deputy Head secondary, a position which she was qualified for.

17. Following the advertisement, the Claimant got constrained to instruct her counsel to issue a demand letter to the Respondent, which he did through a letter dated 17th October 2018. When Respondent received the letter, they wrote back an email on the 18th October 2016 indicating that the advertisement had been withdrawn.

18. Cross examined by Counsel for the Respondent the Claimant stated that she was invited to the meeting of 16th August 2016, an email which she received on the 14th. At the meeting she was only told of the intention to have here declared redundant but the reason why, was not divulged to her.

19. The reason that the redundancy was being attracted by the dwindling number of students was only raised when the Claimant demanded for a formal communication over the intention.

20. The Claimant confirmed that she was the Deputy Head Pastoral, she was teaching both in the primary and secondary sections. In her position she was part of the senior management team of the Respondent. She was aware therefore that they were trying to bring up students' enrolment.

21. The Claimant stated that she was in charge of the entire students' community, a liaison between the parents and the school. She equally was the head of teachers. In the international school, she was the designated child officer.

22. At the center of her claim is the fact that the Respondent unfairly terminated her employment on account of an alleged redundancy, only to advertise for the position shortly thereafter. She asserted that one of those Positions that were advertised, Deputy Head Teacher [Students welfare] was the same position as that which she was holding before the termination.

23. The Claimant stated that she couldn't tell whether the school did abandon the desire to employ the deputy head [students] welfare.

24. It was her testimony in re-examination that her roles under the contract were not limited to Deputy Head Teacher Pastoral, she was also teaching. The recommendation letter by the Head Teacher is testament of that.

25. From the Respondent's own documents, it can be discerned that for the period 2014-2015 and 2015 to 2016, for the preparatory school, the average students' attendance increased.

26. The letter of termination offered her severance pay for a period of two years yet she had worked for four years. The certificate of service exhibited by the Respondent shows her period of service thus, 1st September 2012 to 31st August 2016.

Respondent's Witness Statement.

27. The witness confirmed that on the 28th February 2014 the Respondent and the Claimant entered into an employment relationship. The Claimant was employed as a Deputy Head (Pastoral) for a period of two years commencing 1st September 2014 to 31st August 2016.

28. The witness stated that the contract entered into on the 28th February 2014 was not renewal of the previous contracts but an independent and separate contract from those that had been previously entered into by the parties.

29. The witness stated that by a contract of employment dated 29th January 2016, the Respondent and the Claimant entered into a new contract for a period of two years commencing 1st September 2016 and ending 31st August 2018. However, prior to commencement date of the contract, the Claimant's employment was terminated on account of redundancy.

30. The witness stated in terminating the Claimant's employment the on the said account, the Respondent complied with the law and followed the following procedure;

    (i) convened a meeting and invited the Claimant. At the Meeting, the Claimant's employment status was discussed and the Claimant was informed of the Respondent's intention to declare her position redundant due to serious financial constraints faced by the Respondent due to reduced student enrolment.

    (ii) The Claimant was given an opportunity to raise and discuss any concerns and/ or issues that the she had with the intended redundancy,

    (iii) Subsequently, the Respondent issued the Labour Office with a notice of intention to declare redundancies,

    (iv) The Respondent wrote to the Claimant recapping the discussion that had been held at the aforesaid meeting.

    (v) Thereafter, the Respondent issued a letter terminating the Claimant's employment and the Claimant signified her acceptance of the same by appending her signature on the letter

    (vi) The Claimant subsequently cleared with the Respondent and completed a staff clearance form.

    (vii) In further compliance with the law, the Respondent paid the Claimant Kshs. 2,263,138.00 being her final dues, which sums the Claimant acknowledged receipt of. The dues were made up of:

        a) One month's payment in lieu of notice of intention to declare a redundancy (in line with the requirements of Section 40 of the *Employment Act*).

b) Six month's payment in lieu of notice.

c) Severance pay at the rate of 15 days per year worked for a period of two years.

d) The Claimant had no outstanding leave days.

(viii) The Respondent issued the Claimant with a certificate of service

(ix) The Respondent issued the Claimant with a recommendation letter

31. The witness averred that its within the Respondent's power and prerogative as an employee to restructure its organization and determine when to terminate its employees' contract on an account of redundancy. She further states that the Claimant was not the only employee terminated on an account of redundancy. By a letter dated 25th august 2016 the respondent issued notice to the labour office giving 1 month notice of intention to declare redundancies in the positions of Manager Public Relations and communication, Deputy Head of Pastoral and the selection criteria was explained to the Claimant in the meeting held on 16th August 2016.

32. The witness further confirmed that the Respondent advertised for various positions but stated that the job descriptions specified in regard thereto did not relate to the position which the Claimant had occupied. The position advertised was Deputy Head Secondary and not preparatory school. The advertisement for the vacancy, Deputy Head Teacher Secondary School was subsequently withdrawn.

33. The witness stated that the Respondent acted justly and gave the Claimant a fair opportunity to be heard.

34. Cross examined by counsel for the Claimant the witness stated that she joined the employment of the Respondent in 2016 and was meeting the Claimant for the 1st time in that meeting of 16th August 2016.

35. She testified that there was no notice that was issued to all the employees of the Respondent, on the redundancy.

36. The witness further testified that the meeting of 16th August 2016, was for purposes of looking at the position of the school and the strategies to be put in place to keep it afloat in view of the dwindling numbers of students then.

37. The email that had been written to her was an invitation to the meeting, it wasn't a redundancy notice.

38. The witness testified further that in her email dated 16th August 2016, the Claimant requested that the matter, redundancy be communicated to her formally. She expressed shock over the same. In the email she did not express acceptance of the Respondent's proposal.

39. The witness confirmed from the Respondent's document, Exh.4, that during the period 2014-2014 and 2015-2016, in the preparatory school there was an increased enrolment of students.

40. The witness stated that the termination letter dated 7th September 2016 was a notice. The notice period therein was however back dated. She confirmed that from the date of this letter, a month would have lapsed on the 6th of October 2016.

41. The Witness alleged that the Claimant had requested to be allowed to leave at the end of the month of September. The request was verbal. The Claimant started the clearance process on or about the 18th of August 2016, and completed the process on the 24th of August 2018. By that time, she was no longer an employee of the Respondent.

42. Referred to the Respondent's EXH.3, the witness stated that it was a letter addressed to the Labour officer, notifying him of the intended redundancy.

43. The witness stated that the Claimant was paid severance pay for two years worked not four years. The certificate of service by error indicated the years of work as four. It didn't ignore the two years of the earlier contract which lapsed by effluxion of time.

44. The Respondent didn't pay the Claimant prorated salary for the seven days that the Claimant worked in the month of September, 2016.

45. Three weeks after the dismissal, the Respondent advertised for various vacancies. Among them, geography teacher, and someone for extreme mental needs. The Claimant was not teaching.

46. The recommendation letter by the Head Teacher, indicates that she was teaching both in the preparatory school and the secondary. She was teaching geography and psychology.

47. The witness contended that the Respondent advertised for A geography teacher because in the meeting of 16th September 2016, the Claimant expressed her desire to leave immediately contrary to the former's desire that she would leave after two terms.

48. That though the withdrawal of the advertisement for the Deputy Head Teacher was withdrawn after the demand letter by the Claimant's Counsel was received by her, the withdrawal was not attracted by the letter. In any event, the position was for the secondary school not the preparatory school.

49. The letter of appointment provided that though the Claimant was being appointed as Deputy Head Teacher [Pastoral] the Respondent had the discretion to deploy her any where from time to time.

50. In re-examination, the witness asserted that in her email of 18th August 2016, the Claimant acknowledged that she had received the minutes of the meeting of 16th.

51. The letter to labour officer came after she had left the employment of the Respondent. Her last day of work was 18th August 2016, and she requested to leave immediately, not to report back in the month of September. Had she decided to stay on during the notice period of six months, the notice to the labour officer would have been compliant.

Claimant's Submissions.

52. The Claimant distilled four issues for determination thus;

    a) Whether there were valid reasons to terminate the Claimant's services.

    b) Whether due process was adhered to in terminating the Claimant's employment on account of redundancy.

    c) Whether the Claimant is entitled to remedies sought.

53. On the first issue, Counsel submitted that Sections 43 and 45 of the *Employment Act*, 2007 places a legal burden on the employer to prove reasons for termination of an employee's employment and that the reason[s] was valid and fair, respectively.

54. It was submitted that the circumstances under which the Claimant was dismissed are vague, flimsy and unfathomable, no valid reasons were given and the respondent used the ground of redundancy as an excuse to terminate her employment services.

55. The Claimant submitted that the purported meeting that happened on the 16th August 2016 was to notify the Claimant of her termination and not to discuss the criteria used on the redundancy.

56. It was submitted that the Respondent terminated the Claimant's employment through a letter dated 7th September,2016 purporting it to be a one month's notice of termination of account of redundancy. The notice was back dated to take effect from 18th August 2016.

57. Contrary to the Respondent's case that there was a meeting on the 16th August 2016 wherein the issue of redundancy was discussed, there was not, the Claimant was invited to the meeting only to be told that her services had been be terminated.

58. The Claimant submits that after her dismissal, the Respondent on the 30th of September proceeded to advertise in the Daily nation vacancies in teaching positions at the Respondent's learning institution. Further that the Respondent's own documents indicate that there had been an increase in student enrolment at the Respondent's Preparatory learning facility. All these are indicative that the reason for the termination was not valid, it was a camouflaged reason that was only intended to get rid of the Claimant.

59. To buttress this submission, the English case of *Chapman v Geonvean &Rostowrack China Clay Limited* [1973] 2 All ER 1973, where Lord Denning held;

> "It is not a genuine redundancy, where the requirements of the business for the affected employees continues, just the same as before." Was cited. And *Polkeyv v A.E Dayton Services Limited*,1988 ICR 142 [HL],where Lord Bridge stated;
>
> > ".....in the case of redundancy, the employer will normally not act reasonably unless he warns or consults any employer affected or their representatives, adopts a fair basis on which to select for redundancy, and takes such steps as may be reasonable to avoid or minimize redundancy by redeployment within its own organization."

60. The Claimant further submits that the Respondent notified the labour department vide a letter dated 25th August 2016 of their intention to declare redundancies after Claimant's services had already been terminated which action did not constitute proper notice as envisaged by section 40 of the *Employment Act*.

61. The Claimant further submits that no redundancy notice was issued to her before termination of employment in contravention with the provisions of the law. Reliance was placed on the holding in *Aviation & Allied Worker Union vs Kenya Airways Limited and 3 Others* (2012) eKLR, JA Maraga (as he then was) stated thus: - "There are two broad aspects of this definition. The first one is that the loss of employment in redundancy cases has to be by involuntary means and at the initiative of the employer. It should not be a contrived situation. It has to be non-volitional. I understand this to refer to a situation, in most cases an economic downturn, brought about by factors beyond the control of the employer, which leaves the employer with no option but to take an initiative the consequences of which will be inevitable loss of employment.

The second aspect is that the loss of employment in redundancy has to be at no fault of the employee and the termination of employment arises "where the services of an employee are superfluous" through "the practices commonly known as abolition of office, job or occupation and loss of employment." In this case, what I understand as required to be determined in this aspect of the definition of redundancy is whether the appellant abolished the offices, jobs or occupations of the affected employees resulting

in their services being superfluous hence their loss of employment. Corollary to that that is the justification for that abolition, if the appellant indeed abolished their offices. Determination of these two aspects will, determine the first issue of whether or not the redundancy in this case was necessary".

Absence of the statutory notices issued in adherence to the provisions of section 40 of the *employment Act*, rendered the termination unlawful.

62. The Claimant submits that redundancy becomes a colourable exercise if done for collateral purposes of getting rid of an employee In the Malaysia court of appeal No.28 of 1998 between shaikh Daud, N.HN.H. Chan, Yaakob Bayer [M] Sdn Bhd v. H.P Ng, the Court held that, "It is our view that merely to show evidence of re-organization in the respondent, is not sufficient. There was evidence before the Court that although sales were reduced, the workload of the respondent remained the same."

63. On the 2nd issue the Claimants counsel submitted that procedural fairness in a redundancy exercise is as important as the substantive justification, according to section 40 of the *Employment Act* 2007 fair procedure involves notification to employees, their trade union and the government of their intended redundancy.

64. The Claimant submitted that consultation before and during redundancy is mandatory and employees should be consulted individually and through their trade union and they must be given reasonable opportunity to consider the proposal from the employer, it was submitted that they should be given time to respond to the proposal and relied on the holding in Rycroft and Jordan, 'A Guide to South African Labour Law,' Second Edition, where the writer emphasizes that consultation is not about the employer affording the employee an opportunity, to make a comment about a decision already made by the employer. It is at the consultation stage that proposals of other stakeholders must be likewise considered. There are no quick fixes in a retrenchment exercise.

65. In Industrial Court of Kenya Cause Number 390 of 2010, David Omutelema v. Thomas De La Rue, the Court stated, "Consultations must be held with an open mind. The employee must be encouraged to express his views individually and through his trade union. All feedback from all stakeholders' merit careful consideration before a decision is made. The notice of termination comes only after all other processes have been exhausted, and a decision made."

66. The Court of Appeal in the cases of *Thomas De La Rue v David Opondo Omutelelma* [20131 eKLR and *Kenya Airways Limited v Aviation & Allied Workers Union of Kenya &3others* [2014] eKLR that in every redundancy situation, there are two separate and distinct notices, of not less than a month each.

The first is a general notice to employees within the targeted establishment, the relevant trade union and the Labour Officer; the second notice is a termination notice addressed to each departing employee individually." In the instant suit the Claimant submit that the process was ignored by the Respondent.

67. On the third issue that Claimant's counsel submitted that the Claimant was only paid severance for 2 years worked yet she had been employed by the Respondent for a period of four years which as evidenced by the certificate of service issued. Therefore, she is entitled to a sum of Kshs. 441,590 being the shortfall on the severance pay.

68. It was further submitted that the one month notice of intention to declare redundancy was not served upon her, this consequently entitles her to a notice pay of Kshs. 441,590.

69. The Claimant's Counsel submitted that in the circumstances of the matter, where it is clear that the Respondent failed to discharge its obligations under sections 18,40, 41, and 45 of the *Employment Act*, and there was absence of fairness in the termination of the employment of the Claimant, the Court

should award the Claimant the compensatory relief contemplated in section 49[1] of the *Employment Act*.

Respondent's Submissions.

70. The Respondent identified three issues for determination;

    i. Whether the termination of the Claimants employment on the basis of redundancy was based on fair and valid reasons.

    ii. Whether due process was followed in effecting the termination.

    iii. Whether is entitled to the reliefs sought.

71. On the first issue the Respondents counsel submitted that the reason for declaring the Claimant redundant was reduced enrolment numbers which consequently resulted in diminished financial capacity, necessitating rationalization and redundancy. The reason was valid and fair as was based on the operational requirements of the Respondent.

72. To buttress the submission that the termination of the Claimant's employment was on account of the Respondent's operational requirements and that the reason was valid and fair, reliance was placed on the holding in *Kavutha Ngonzi & 11 others v Kapric apparels* (EPZ) Ltd [2017] eKLR The Court expressed itself as follows: -

> "Redundancy as the reason for termination.
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> 6. There is no dispute that the respondent's business is fully dependent on orders from abroad. There is also no dispute that her major client or buying agent, Shah Safaris gave notice, dated 2.5.2015, to the respondent that she was reducing her order from 763583 pieces to 411523 pieces. There is further no dispute that such reduction in the order reduced the amount of Labour required to make the 411523 pieces ordered. The reduced order also meant that the revenue to the respondent was reduced and therefore it was not economical to continue employing all her staff.
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> 7. In view of the foregoing observations it was proper for the respondent to use her managerial prerogative to lay off some of her workforce. Such prerogative is permitted under section 45(2)(b) of the *employment Act* which provides that, the reason for terminating the services of an employee is fair it relates to the operational requirements of the employer. in this case the employer did not need to retain labour which had become superfluous after her major client reduced the amount of business she was doing with the respondent. Consequently, in view of the letter dated 2.5.2015 from the respondent's major customer reducing the business to be transacted with her, I find and hold that redundancy in this case was a valid and fair reason for terminating the Claimant's employment contracts."

73. It was submitted that the reasons for termination were well explained vide the letter dated 25th August 2016 addressed to the Labour Officer. Further that to prove the decline in student enrolments, the Respondent availed to the Claimant the student enrolment report for the periods 2014-2015 and 2015-2016. According to the report the overall number of enrolled students in the period 2014-2015 was 706 while that of 2015-2016 was 641. A difference of 65 students. The decline was not disputed by the Claimant.

74. It was argued that the Claimant's position that enrolments in the preparatory school increased in the period 2015-2016 is not sound. The preparatory school enrolments would not be looked at in isolation

from the other various school units. That it was acknowledged by the Claimant that the schools were run jointly.

75. In response to the Claimant's concern on the legitimacy of the redundancy considering the Respondent put up an advertisement, with the intention of filling various positions, the Respondent submitted that the positions advertised were distinct from the position previously held by the Claimant.

76. On the second issue the respondent submits that it complied with lawful procedure as prescribed under section 40 of the *employment Act* which states as follows;

> 40. Termination on account of redundancy
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> (1) An employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions—
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> a) where the employee is a member of a trade union, the employer notifies the union to 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 the intended date of termination on account of redundancy;
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> b) where an employee is not a member of a trade union, the employer notifies the employee personally in writing and the labour officer;
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> c) the employer has, in the 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;
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> d) where there is in existence 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;
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> e) the employer has where leave is due to an employee who is declared redundant, paid off the leave in cash;
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> f) the employer has paid an employee declared redundant not less than one month's notice or one month's wages in lieu of notice; and
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> 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.

77. The Resondent's counsel submitted that the Claimant in her statement of claim stated that she was not a member of a trade union consequently section 40(1)(a) and 40(1)(d)(c)

78. The respondent submits that both the Claimant and the labour office were notified on the redundancy and relies in the holding in *Mercy Wangari Muchiri v Total Kenya Limited* [2020] eKLR where it was held that:-

> "From the foregoing, I find that the notification of the intended redundancy did not comply with the requirements of the law. I however do not think this would invalidate the notice to the extent that the redundancy is deemed to constitute an unfair termination of employment under Section 45(2) of the Act as pleaded and submitted by the Claimant. This is because although the notice was short by 8 days, the Claimant had prior to the notice

been informed about the intended redundancy on 18th March 2015. Further she accepted the letter of redundancy, signed it off and accepted the terms thereof which she was paid. She did not protest the redundancy until 29th February 2016, 10 months later.

79. The Respondent further submits that the Claimant had been informed of the redundancy and she accepted the terms and did not protest on the adequacy of the notice that was given, she cannot claim that the notice given was inadequate.

80. The Respondent further submits that the Claimant did not have any outstanding leave days, it submits that that the Claimant was paid six months salary in lieu of notice and was also paid severance pay computed for a period of two years for which she served as the deputy Head, Pastoral at the Respondent organization.

81. It was argued that in the Kenyan system consultation between employees and the employer in redundancy situations is not mandatory. Reliance was placed on the in the case of Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others [2014] eKLR, and to be specific the holding by Justice Githinji JA, thus;

> " [17] The law in Kenya is mainly governed by the EA(*Employment Act*), the IRA(Industrial Relations Act), the terms of individual contracts of service and CBA where applicable. The law is purely statutory and contractual. The IRA and EA are modern legislations. Although they predate *the Constitution*, they essentially embody the constitutional ideals of fair labour relations and industrial justice respectively. The question is essentially one of statutory construction of the two legislations and the CBA where applicable.
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> (...)
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> [19] There are jurisdictions like South Africa where the law provides that the employer must consult before contemplating dismissing employees on the basis of employer's operational requirements. Section 189(1) of *Labour Relations Act* of South Africa provides so. There are also jurisdictions like Philippines as exemplified by the decision of the Supreme Court in Fasap v Philippine Airlines GR No. 178083 where the law provides that the employer's prerogative to bring down labour costs by retrenching must be exercised as a measure of the last resort.

That is not the law of Kenya. There is also the ILO' recommendation No. 166 (supra) which recommends consultation. There was however no evidence that the recommendation has been ratified by Kenya. The CBA does not provide for such consultation nor does Article 10 of *the Constitution* which provide for National Values and Principles of Governance apply to private contracts between employers and employees. The law of Kenya does not provide for pre--redundancy consultation but only post redundancy dispute resolution."

82. The Respondent argues that both the Claimant and the Labour Officer were notified of the redundancy. The Claimant was notified in person during the meeting that was held on the 16th August 2016 and a written official communication followed via email on the 18th August 2016. The email was followed by the termination letter dated 7th September 2016. The labour officer was served with a notification letter dated 25th August 2016, in which a notice period of 30 days was given. The Court is urged to find that there was full adherence to due process in effecting the redundancy.

83. On the third issue the Respondent's counsel submits that the Claimant's termination was on the grounds of redundancy based on valid reasons and with due regard to procedural fairness urging the court to find that the Claimant is not entitled to the reliefs sought.

Analysis and Determination.

84. From the parties' pleadings herein, their evidence and submissions, I consider the following issues as those that emerge for determination in this matter;

    (i) Whether the termination of the Claimant's employment was procedurally fair.

    (ii) Whether the termination of the Claimant's employment was with substantive justification.

    (iii) Whether the Claimant is entitled to the reliefs sought or any of them.

    (iv) Who should bear the costs of this suit.

Whether the termination of the Claimant's employment was procedurally fair.

85. Lack of fault on the part of the employee is the defining characteristic of termination of an employee's employment on account of redundancy. It is for this reason, that the *Employment Act*, 2007 has given a detailed procedure to be adopted in such terminations, whenever an employer contemplates terminating. I am of the view that the statutory procedure at Section 40 of the Act, leaves no residual for the employer to operate outside the that procedure to whatever extent.

86. Section 40 of the Act, contemplates two mandatory separate and distinct notices to be issued in redundancy situations, and as the Court of Appeal held in the cases of Thomas De La Rue v David Opondo Omutelema [2013] and Kenya Airways Limited v Aviation & Allied Workers of Kenya & 3 Others [2014] eKLR, the first is a general notice to employees within the targeted establishment, trade union where relevant, and the Labour Officer, the second notice is a termination addressed to each of the departing employees individually. Imperative to state that the Act provides for a specific period of each of the notices, thirty [30] days.

87. Sight should not be lost of the fact that the burden was on the Respondent as the employer to establish that there was adherence to the statutory procedure that is provided fort under the provision above stated. In a bid to demonstrate that this burden was discharged by the Respondent, its Counsel submitted that both the Claimant and the Labour officer were notified of the redundancy. That the Claimant was notified in person during the meeting held on the 16th August 2016 followed by the email dated 18th August 2016. I am not prepared to agree with Counsel's position on this, the notice contemplated in Section 40 of the Act has to be a written notice. The Respondent didn't place before this Court any material from which it can be discerned that on the 16th of August 2016, there was any notification in the nature of the 1st general notice contemplated under the Act. The Respondent attempted to argue that in the meeting of that day the Claimant was notified of the redundancy, nothing was placed before this court to demonstrate that indeed there was such a notification, understood duly by the Claimant, and with the necessary details concerning a redundancy situation. The tone of the Claimant's email of 16th August 2016 which read in part;

> " Following our meeting this morning, I would like to kindly request that you formalise the discussion through writing. This came as a shock to me and the writeup will help me better comprehend the matter."
>
> Is all indicative that there wasn't.

88. It was agued further that argued that was a notification encompassed in the email by that would be considered on in line with the provision. Considering the termination date, one cannot find it difficult to conclude even if it were to be taken as a notice, the same was not a 30 days' notice.

89. The notice to the Labour officer wasn't a 30 days' notice too. It even came after the termination.

90. Citing the decision in Mercy Wangari Muchiri v Total Kenya Limited [2020] eKLR, it was argued on behalf of the Respondent that inadequacy of a notice under section 40 of the Act, should not be a reason to deem the entire process flawed. Having stated as I did hereinabove, that the procedure under the provision is for a reason, and that it is so detailed, leaving no residual for the employer to bypass it to whatever extend, with due respect, I am not persuaded by the argument based on the decision.

91. The golden thread in the obtaining jurisprudence both within and without the Kenyan situation, as exemplified by the decisions cited by Counsel for the Claimant, which I totally agree with, consultation between the employer and the employee[s] to be affected is a pivotal component in the process leading to a termination of employment on account of redundancy. I do not agree with Counsel for the Respondent's submission that in the Kenyan situation, consultation is not mandatory and worth component. He cited the holding by Justice Githinji JA, in the Kenya Airways [supra] case, without noting that the same was contra to the majority decision in the matter on the issue.

92. In the upshot, I find that the termination of the Claimant's employment on account of redundancy was procedurally unfair, not in adherence with the provisions of section 40 of the Act.

Whether the termination on account of redundancy was substantively justified.

93. The reason that formed basis for the termination of the Claimant's employment was captured in the termination letter dated which led in part;

> " The decline in the student enrolment and the consequent decrease in financial capacity has necessitated the rationalization of staff, where some staff have been declared redundant. Regrettably, your position is among those that have been declared redundant, and therefore unable to effect the new contract that was to become effective on 01 September 2016. The one month's notice is effective from 18th September 2016 to September 2016....."

94. What I understood the Claimant to say in her evidence is that the Respondent didn't have any valid and fair reason to terminate her employment. Bearing in mind the burden placed upon the employer to prove that the reason[s] for termination was valid and fair, and that the termination was justified, under the provisions of Section 45[2], and 47[5] of the *Employment Act*, 2007, respectively, I now turn to consider whether the burden was discharged by the Respondent.

95. The Claimant contended that she was the only employee who was affected by the redundancy, and that the Respondent failed to demonstrate how she was picked for the redundancy. In other words, the Respondent didn't not come out clearly or at all on the selection criteria it employed to choose her for the redundancy. In the termination letter, there is no content from which the extent of the redundancy and the evidence that was placed before this Court by the Respondent's witness, it cannot be discerned as to how many employees were affected, from which department[s], and how they were selected, leading to an inescapable conclusion that the evidence of the Claimant that the declared redundancy only targeted her for removal from employment unchallenged.

96. Where an employer remains opaque on the criteria of selection of those it identifies for or alleges to have been affected by a decision for declaration of, redundancy, inexplicably, as was in this matter, the court cannot be off mark to conclude that the termination was not fair and justified.

97. It is not enough for an employer to assert that a re-organization occurred, leading to a redundancy situation. The employer must satisfactorily demonstrate that the termination was properly and genuinely by operation requirements. In Decision Surveys International[pty]*Ltd v Dlamim [1999]*

5 BLLR 413 [LAC] para.27 the South Africa Labour Appeal Court expounding of the meaning of properly and genuinely justified operational requirements stated;

98. "If the employer resorts to retrenchment when alternatives to retrenchment are available, it cannot be said that the ultimate decision to retrench is necessarily fair. The Court will therefore examine the reasons advanced for retrenchment in order to determine whether the ultimate decision is genuine and not a sham. However, this is not to say courts are to second guess the commercial of business efficacy of the employer's decision. Nor is the inquiry whether the best decision was taken..... The inquiry is whether the retrenchment is properly and genuinely justified by operational requirements in the sense that it was a reasonable option in the circumstances".

99. The Claimant contended that a week after the terminations of her employment on an account of redundancy, the Respondent placed an advertisement in the Daily newspaper of 30th September 2016 inviting applicants to apply for filling of vacancies in teaching at its learning institutions. This the Respondent didn't deny. Asked on how genuine the reason for redundancy was, the Respondent's witness stated that the advertisement was in respect of the secondary section not the preparatory section where the Claimant was serving. Further that the two sections of learning were independent of each other.

100. Taking this position by the Respondent's witness as correct, then I find considerable difficulty in understanding, the existence of the alleged decline in students' enrolment since the Respondent's own document placed before this court and the Respondent's witness's testimony under cross examination, reveal that the enrolment of students in the preparatory school was on the upward trend during the material time.

101. The material placed before this court was vague and unsatisfactory, as regards how then the Claimant would be stated to be redundant in the circumstance.

102. As expressed in the many decisions cited by counsel for the Respondent, one of the purposes for consultation in a redundancy process would be to identify a possibility of everting the redundancy declaration, by for example considering whether there can be an alternative employment for the to be affected employee. In this matter, the Claimant asserted that among those vacancies that were advertised in the secondary section were some for which she would have been suitably allowed to fill, considering that she was a teacher in the secondary school at some point, and that Pastoral position that was advertised was immediately withdrawn after her counsel wrote a letter to the Respondent raising a concern over the good faith in the redundancy, declaration.

103. What I see here is a situation where after the exit of the Claimant business proceeded as before in the learning Respondent institutions. The redundancy was not genuine.

104. It is my considered view that by reason of these premises, the Respondent failed to discharge it burden under section 45[2] and 47[5] of the Act. The termination was not substantively justified.

Of the Reliefs Sought

105. It is important to state from the onset that the Claimant sought for a host of reliefs which in the circumstances of the matter she had no basis to and or whose grant she was not able to justify at the hearing. At the hearing it turned out, the Claimant had been paid severance pay. She didn't dispute this in fact she admitted, one wonders then the sense that informed her claim for it.

106. She Claimed eight months' gross salary for what she termed in lieu of proper notice of termination of employments. 3,532,720. A termination notice is that which is provided for in the contract of employment or statutorily provided for. I have considered the contract of employment between the

parties, I see no provision therein for an eight months' notice or salary in lieu thereof. The statutory notice provided for under section 40 of the *Employment Act*, is 30 days one. The relief sought is therefore unjustified and cannot be granted. In any event, the notice payment was made by the Respondent.

107. As regards salary for the contract period, this Court has stated before that in the Kenyan situation the same is not payable. However, it is time for the position to be relooked to enable compulsion of payment for the reminder of the contract period depending on the circumstances of each case, for instance where an employee wantonly uses his or her authority to determine an employees' employment, on the thought that even if a compensatory award was to be made under section 49[1][c] of the *Employment Act*, still he or she shall stand at a benefit considering the length of the reminder of the contract.

108. Having found that the termination of the Claimant's employment was procedurally and substantively unfair, and considering the substantial deviation of the Respondent from adhering to what the law expected of it, the fact that the termination was a no fault one on the part of the Claimant, the Claimant's legitimate expectation that she was to serve under the contract that she had just entered into for the period of that contract, and key that the contract was terminated before she started rendering her service, and the amount of notice pay that the Respondent made, and come to a conclusion that the Claimant is entitled to a compensatory relief under section 49[1][c] of the *Employment Act*, only to the extent two month's gross salary, 883,180.

109. In the upshot, judgement is hereby entered in favour of the Claimant in the following term;

a) A declaration that the termination of the Claimant's employment on account of redundancy was unfair and wrongful.

b) Compensation pursuant to section 49[1][c] of the *Employment Act*. 2007, Kshs. 883,180.

c) Interest at Court rates from the date of this judgement till full payment.

d) Costs of this suit.

READ, DATED, SIGNED AND DELIVERED THIS 9TH DAY OF JUNE 2022.

OCHARO KEBIRA

JUDGE

In presence of

Mr. Aboge for the Claimant

Mr. Chemtich holding brief for Mr. Nyaburi for the Respondent.

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 **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.

A signed copy will be availed to each party upon payment of Court fees.

OCHARO KEBIRA

JUDGE