**Nzavi & another v Transglobal Cargo Centre Limited & another (Petition 56 of 2017) [2022] KEELRC 13104 (KLR) (7 November 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13104 (KLR)

**REPUBLIC OF KENYA**

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

**PETITION 56 OF 2017**

**MA ONYANGO, J**

**NOVEMBER 7, 2022**

**IN THE MATTER OF: THE CONSTITUTION OF KENYA 2010 ARTICLES 10, 19(2), 20(1), (2), (3) & 4, 21(1) & (2), 41(1) & (2), 165(3)(B) & 258 (I)**

**AND**

**IN THE MATTER OF: THE EMPLOYMENT ACT, 2007**

**AND**

**IN THE MATTER OF: UNCONSTITUTIONAL REMOVAL FROM THE EMPLOYMENT OF TRANSGLOBAL CARGO CENTRE LTD AND LUFTHANSA CARGO (OF WINFRED MWONGELI NZAVI AND OBADIAH MULINGE NDAMBUKI)**

**BETWEEN**

**WINFRED MWONGELI NZAVI ..... 1ST PETITIONER**

**OBADIAH MULINGE NDAMBUKI ..... 2ND PETITIONER**

**AND**

**TRANSGLOBAL CARGO CENTRE LIMITED ..... 1ST RESPONDENT**

**LUFTHANSA CARGO AG ..... 2ND RESPONDENT**

## JUDGMENT

1. The Petitioners were employed by the 1st Respondent by letters dated 19th May 2006 for the 1st Petitioner Winfred Mwongeli Nzavi and 9th February 2007 for the 2nd Petitioner, Obadiah Mulinge Ndambuki. On 1st August 2011 both Petitioner were transferred to Transglobal Cargo Centre Limited.

2. The 1st Respondent, Transglobal Cargo Limited is a limited liability company incorporated in Kenya.

3. The 2nd Respondent Lufthansa Cargo AG is an aviation company incorporated in Germany with operations worldwide in international airfreight and logistics with its headquarters at Frankfurt Airport.

4. It is the averment of the Petitioners that on May 16, 2017 they received letters of termination on account of redundancy from the Respondents informing them that their services would be terminated with effect from June 15, 2017.

5. The Petitioners contend that their terminations were illegal as the decision was made without hearing and without valid reason and amounted to violation of the provisions of Section 5 of the *Employment Act* and Article 41 of *the Constitution*. They further aver that the Respondents violated their legitimate expectations. That the redundancies amounted to removal of the Petitioners' emoluments and other benefits to their detriment.

6. The Petitioners avers that declaring them redundant before retirement deprived them of the full benefit of the law as set out under Article 27(1) of *the Constitution*, while failure to accord them the full benefit of the law amounted to unfair labour practices and violated their rights under Article 41(1) of *the Constitution*.

7. The is stated to be anchored on Articles 10, 19(2), 20(1), (2), (3) & 4, 21(1) & (2), 41(1) & (2), 165(3) (b) & 258(i) of *the Constitution*.

8. The Petitioners aver that they had legitimate expectation that after their enlisting as Cargo Handling Agent and Security Officer on the 1st of May, 2006 and 10th of February, 2007 respectively, and having undertaken their assignments with total commitment and dedication to their work over the years, they would continue their services at the Respondents' organizations until their lawful and constitutional removal.

9. It is also the Petitioners averment that the Respondents actions of terminating their employment was arbitrary, discriminatory and against the letter and spirit of the law as expressly provided in *the Constitution* and Section 5 of the *Employment Act*.

10. The Petitioners seek the following remedies against the Respondents:

    a. A declaration that the Petitioners remain and continue to serve in their employment at the Respondents' establishments.

    b. A declaration that the Respondents jointly and severally have no constitutional and or statutory right in terminating and/or removal of the Petitioners illegally from their organizations without following the law.

    c. That the Respondents do jointly and severally to bear the costs of this petition in any event.

    d. In the alternative the Honourable Court do assess the damages payable to the Petitioners for the unlawful and unconstitutional removal from employment.

    e. Damages for discrimination on racial grounds.

    f. Such further orders as this Honourable Court may deem just and expedient.

11. The petition was filed together with a motion under certificate of urgency seeking the following orders:-

    i. Spent.

ii. That an order be issued directed to the Respondents by themselves and/or through their authorized principals, agents or servants to retain the petitioners herein in their employment by staying/putting on hold the intended termination of the Standard Group Handling Agreement effective from 1st August, 2011 between the 1st and 2nd Respondents pending the full hearing and determination of the instant petition.

iii. That the Petitioners/Applicants be at liberty to apply for such further or other orders and/or directions as this Honorable Court may deem fit and just to grant.

iv. That the costs of this application be provided for.

12. Upon hearing the Petitioners' Counsel exparte, the Court granted orders as follows:

i. That in the interim an order is hereby issued directed to the Respondents by themselves and/or through their authorized principals, agents or servants to retain the petitioners herein in their employment by staying/putting on hold the intended termination of the Standard Group Handling Agreement effective from August 1, 2011 between the 1st and 2nd Respondents pending the full hearing and determination of the instant petition.

ii. That the Respondent be served before close of business today noting orders above for attendance and hearing directions on June 23, 2017 at 11.00 am.

13. The 2nd Respondent's application dated July 11, 2017 seeking a stay and setting aside of the said orders was dismissed on April 20, 2018.

14. In response to the petition, the 1st Respondent filed a replying affidavit of Vincent K. Mwaniki, its Chief Financial Officer, sworn on October 23, 2020.

15. Mr. Mwaniki depones that the Petitioners were first employed by the 1st Respondent in 2006 and 2007 respectively but were transferred to the 2nd Respondent in 2011 in the capacities of cargo handling agent and security officer. That subsequently both Petitioners were trained in Germany and locally by the 2nd Respondent to serve the 2nd Respondents' special needs.

16. Mr. Mwaniki depones that in October 2016 the 1st Respondent received notification of intention to terminate the Standard Ground Handling Agreement which the 1st Respondent and the 2nd Respondent entered into in the year 2011. That the e notice was addressed to the 1st Respondent and not the Petitioners.

17. That on May 16, 2007, the 1st Respondent issued to the Petitioners notices of intended redundancy.

18. Mr. Mwaniki denies that the 1st Respondent colluded with the Petitioners to sue the 2nd Respondent. He prays that the petition be disallowed.

19. The 1st Respondent further filed submissions dated September 20, 2022.

20. The 2nd Respondent filed a replying affidavit of Reuben Ngugi sworn on July 12, 2017 in opposition to the petition. It further filed a witness statement of Linda Andere dated on September 5, 2022, written submissions with authorities dated September 5, 2022 and supplementary submissions dated September 20, 2022.

21. The 2nd Resplendent avers that it retained the services of the 1st Respondent as a third party to provide ground handling services through an agreement dated August 2, 2011 which expressly defined the services to be offered by the 1st Respondent.

22. The 2nd Respondent further avers that it entered into two (2) other agreements with the 1st Respondent as follows –

    1. Management Service Agreement dated July 5, 2011 relating to the 1st Respondent's Airfreight Cargo Handling Centre in Nairobi;

    2. An Employee Secondment Agreement to give effect to the Management Service Agreement.

23. Under Clause 9.1 of the Standard Ground Handling Agreement

    ("Handling Agreement"), the Handling Agreement was valid for a period of three (3) years commencing July 1, 2011 up to June 30, 2014. It was contemplated that any extension of this term was to be mutually agreed upon between the parties.

24. The Handling Agreement under Clause 10.1 allowed either party to terminate the Agreement by giving a notice period of not less than ninety (90) days.

25. The 2nd Respondent avers that sometime in October 2016 the 2nd Respondent decided to terminate the Handling Agreement by invoking clause 10.1 and by a letter dated October 19, 2016, notified the 1st Respondent of its intention to terminate the Handling Agreement with effect from June 30, 2017 thus giving the 1st Respondent more than eight (8) months' notice (the Notice Period).

26. That under the Handling Agreement, it was the 1st Respondent's responsibility to employ such number of employees it required for its operations and to provide them with the relevant training requirements necessary for their respective roles as approved by the 2nd Respondent, IATA and Government regulations.

27. It is the 2nd Respondent's case that the Petitioners were employees of the 1st Respondent with no connection whatsoever with the 2nd Respondent.

28. Following the notice of termination by the 2nd Respondent, the 1st Respondent issued notices of redundancy to the Petitioners by letters dated May 16, 2017.

29. It is the receipt of the notices of redundancy that provoked the Petitioners to file the instant petition.

30. It is the 2nd Respondents' case that there is no employer/employee relationship between it and the Petitioners and that it was wrongly enjoined to this suit. It is further the 2nd Respondent's case that it gave notice of termination of the Ground Handling Agreement to the 1st Respondent by letter dated October 19, 2016. The letter notified the 1st Respondent of termination of the Standard Ground Handling Agreement – Nairobi with effect from June 30, 2017.

31. The suit having been fixed for hearing severally where for one reason or another it did not take off, the Court on June 16, 2022 directed the parties to dispose of the suit by way of pleadings, documents on record, witness affidavits and written submissions. The parties subsequently filed and exchanged written submissions.

**Analysis and Determination**

32. I have considered the pleadings and submissions, the issues arising for determination are the following:

    i. Who between the 1st and 2nd Respondents was the employer of the Petitioners;

    ii. Whether the redundancy of the Petitioners was unconstitutional;

    iii. Whether the Petitioners are entitled to the orders sought.

**Who was the employer of the Petitioners?**

33. It is not contested that the Petitioners were initially employed by the 1st Respondent's letter dated May 19, 2006 for Winfred Mwongeli Nzavi, the 1st Petitioner and by letter dated February 9, 2007 for Obadiah Mulinge Ndambuki, the 2nd Petitioner. The employment letters are not filed in Court but are referred to in Appendix WMN1 at pages 4 and 5 of the Petitioners' bundle of documents.

34. On August 1, 2011, the 1st Respondent wrote to both the 1st and 2nd Petitioners transferring them to Transglobal Cargo Centre Limited. The letters are reproduced below –

> " Transglobal Cargo Centre Ltd
>
> 1st August 2011
>
> Winfred Mwongeli Nzavi
>
> P/R No. 125
>
> C/o Ourselves.
>
> Dear Winfred,
>
> Transfer to Transglobal Cargo Centre Ltd
>
> Your letter of employment dated May 19, 2006 refers.
>
> This is to inform you that you have been transferred to Transglobal Cargo Centre Ltd with effect, from 1st August, 2011 under the same employment terms and for the duties that will be assigned to you by Transglobal Cargo Centre Ltd management.
>
> Yours Faithfully
>
> Signed
>
> Peter W. Muthoka, EBS
>
> Chairman"
>
> "Transglobal Cargo Centre Ltd
>
> August 1, 2011
>
> Obadiah. Mulinge Ndambuki
>
> P/R No. 198
>
> C/o Ourselves.
>
> Dear Obadiah,
>
> Transfer To Transglobal Cargo Centre Ltd
>
> Your letter of employment dated February 9, 2007 refers.
>
> This is to inform you that you have been transferred to Transglobal Cargo Centre Ltd with effect from 1st August, 2011 under the same employment terms and for the duties that will be assigned to you by Transglobal Cargo Centre Ltd management.
>
> Yours Faithfully
>
> Signed

Peter W. Muthoka, EBS

Chairman"

35. Both letters are on the letterhead of Transglobal Cargo Centre Limited, the 1st Respondent.

36. As is evident from the letters, the the Petitioners were not transferred to the 2nd Respondent by the 1st Respondent as alleged by them. It would appear from the letters that this was an internal transfer. The letters state that the transfers are to Transglobal Cargo Centre Limited but do not state where the Petitioners were working before the transfer. It is noteworthy that the letters are addressed to the Petitioners at "C/o Ourselves."

37. There is no mention of the 2nd Respondent in the letters of transfer.

38. The letters of redundancy are also on the letterhead of Transglobal Cargo Centre Limited, the 1st Respondent. The reason given for the redundancy is that the company (the 1st Respondent) had lost its contract with the 2nd Respondent.

39. The letters of redundancy are reproduced below –

" Transglobal Cargo Centre Ltd"

May 16, 2017

Winfred Mwongeli Nzavi

P/R No. 125

C/o Ourselves.

Dear Winfred,

Redundancy

This is to inform you that the Company having lost its contract with M/s Lufthansa Cargo has been left with no alternative than to declare you (alongside other employee who have been working under the said contract) redundant with effect from June 15, 2017.

Your lawful dues will be calculated and paid out to you on or before the said date.

Thank you for your service to the Company.

Yours Faithfully

Signed

Peter W. Muthoka, EBS

Chairman"

"Transglobal Cargo Centre Ltd

August 1, 2011

Obadiah. Mulinge Ndambuki

P/R No. 198

C/o Ourselves.

Dear Obadiah,

Redundancy

This is to inform you that the Company having lost its contract with M/s Lufthansa Cargo has been left with no alternative than to declare you (alongside other employees who have been working under the said contract) redundant with effect from June 15, 2017.

Your lawful dues will be calculated and paid out to you on or before the said date.

Thank you for your service to the Company.

Yours Faithfully

Signed

Peter W. Muthoka, EBS

Chairman"

40. The Petitioners also filed a letter dated October 19, 2016 from Lufthansa Cargo, the 2nd Respondent addressed to Africa Flight Service Kenya (formerly Transglobal Cargo Centre Limited). The letter is reproduced below –

" Lufthansa Cargo AG FRA F/MA

Airportring, LH Basis,

Tor 21, Geb 322

D-60546 Frankfurt am Main

October 19, 2016

Africa Flight Services, Kenya

(formerly Transglobal Cargo Centre Ltd.)

Jomo Kenyatta International Airport

Box 11364-00400

Nairobi, Kenya

Dear Sirs.

Re: Termination of Standard Ground Handling Agreement- Nairobi

We refer to the IATA Standard Ground Handling Agreement - Annex B 1.0 dated August 2, 2011 between Lufthansa Cargo AG and Transglobal Cargo Centre Limited - now Africa Flight Services (the "Agreement").

Pursuant to clause 10.1 of the Agreement, we hereby terminate the Agreement with effect from June 30, 2017.

Kindly acknowledge the receipt of this termination letter via email to shaitendra.kothan@XXX.de

Sincerely

Signed

Thomas Sonntag

41. The Petitioners further produced at page 11 and 12 letters dated May 16, 2014 and July 17, 2014 which are reproduced below –

" Transglobal Cargo Centre Ltd

16th May 2014

Advance copy by email

Lufthansa Cargo, Ag

FRA F/G2-C

Flughafen Bcreich Cargo City Sud

Building 508, 3rd Floor

Frankfurt am Main

Germany

Dear Sir

Re: Termination of Management Agreement With Lufthansa

Reference is made to the correspondences we exchanged on the matter and our meetings on the same.

You recall our joint decision to mutually terminate the agreement. You will further recall that the Deputy Managing Director is no longer with us and has relocated to West Africa.

Now that the agreement has been mutually terminated as agreed we thank you for your co-operation and look forward to doing business if an opportunity in the Management Services arises in the future.

Yours faithfully

Signed

Peter W. Muthoka, EBS

Chairman"

"Mr. Peter Muthoka

Chairman

Trnsglobal Cargo Centre

Jomo Kenyatta International Airport

Box 11364-00400, Nairobi, Kenya

Tel.: +254-(020) 827XXX

Re: Termination of Management Agreement With Lufthansa

Dear Peter

We refer to your letter of May 16, 2014 and the follow up of 6th June 2014. It is clear that you do not wish to have a formal termination of the agreement by way of a Deed. We consequently accept the mutual termination of the Management Agreement dated 5th July 2011 in its entirety and confirm that our mutual obligations and responsibilities have come

to an end. Please note that this confirmation shall not be construed as a waiver to invoke and enforce any of Lufthansa Cargo's contractual rights including those discussed in previous drafts of termination agreements or deeds.

Signed

Carsten Wirths

Vice President Europe & Africa, Lufthansa Cargo AG"

42. From the two letters it is evident that the termination of the Management Agreement between the 1st and 2nd Respondents was mutual.

43. The evidence on record does not refer to any transfer of the Petitioners from the employment of the 1st Respondent to the employment of the 2nd Respondent. The letters referred to by the Petitioners do not make any reference to the 2nd Respondent. Further, the letters of termination do not make any reference to the 2nd Respondent as an employer of the Petitioners.

44. The only reference to the 2nd Respondent is in the certificates which show that the Petitioners were trained by the 2nd Respondent. Training cannot raise a presumption of employer-employee relationship.

45. For the foregoing reasons, I find that the Petitioners have not proved that they were transferred to the employment of the 2nd Respondent by the 1st as averred by both the Petitioners and the 1st Respondent. The evidence on record shows that the Petitioners were employed by the 1st Respondent and remained in the employment of the 1st Respondent to the date they received notices of termination of their employment contract by way of redundancy.

**Was the redundancy of the Petitioners Unconstitutional?**

46. Redundancy is provided for under Section 40 of the *Employment Act*. The Act provides that before an employer declares an employee redundant it shall comply with the following –

> 40. Termination on account of redundancy
>
> 1. An employer shall not terminate a contract of service on account 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 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;
>
> 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 time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy;
>
> 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;

e. the employer has where leave is due to an employee who is declared redundant, paid off the leave in cash;

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

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.

47. *The Constitution* does not provide for redundancy. In this case there was absolutely no reason why the Petitioners did not approach the Court through a memorandum or statement of claim as their remedy lies in Section 40 of the *Employment Act*. A violation of Section 40 would only make a redundancy unlawful or unfair. The Petitioners have not demonstrated any violation of a constitutional right to warrant them approaching this Court through a constitutional petition.

48. The foregoing notwithstanding, the notice of redundancy by the 1st Respondent did not comply with the provisions of Section 40 of the *Employment Act*. The redundancy is therefore unprocedural.

49. The fact that the redundancy was unprocedural however is a matter that would only attract compensation for unfair termination. Redundancy is otherwise a valid mode of termination of employment if the employer complies with the provisions of the Act in terms of notification, payment of terminal benefits and selection criteria.

**Are the Petitioners entitled to the remedies sought?**

50. Prayers 1 and 2 of the petition must fail, the Court having found that a redundancy does not amount to a constitutional violation of the Petitioners' rights. The Court thus declines to make a declaration that the Petitioners remain and continue in office subject to the 1st Respondent complying with Section 40 of the *Employment Act*.

51. The Petitioners are not entitled to damages for discrimination on racial grounds as no evidence was adduced to support the prayer. The prayer for damages for discrimination on racial grounds therefore fails and is accordingly dismissed. The prayer for assessment of damages is also declined as no evidence was adduced to support the same in the pleadings and neither did the Petitioners make any reference to the same in their submissions.

52. In in the final analysis I make the following orders –

i. There was no employment relationship between the Petitioners and the 2nd Respondent. The suit against the 2nd Respondent is dismissed with costs.

ii. The redundancy notice did not comply with the procedure set out in the *Employment Act*. The 1st Respondent is at liberty to declare the Petitioners redundant upon compliance with the provisions of Section 40 of the *Employment Act*.

iii. All other prayers in the petition are dismissed.

iv. There shall be no orders for costs as between the Petitioners and the 1st Respondent.

53. Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 7TH DAY OF NOVEMBER 2022**

**MAUREEN ONYANGO**

**JUDGE**