REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1566 OF 2014

(Before Hon. Lady Justice Maureen Onyango)

WILSON GITHU RUTINU **CLAIMANT**

VERSUS

ORPOWER 4 INC LIMITED **RESPONDENT**

JUDGMENT

The Claimant was employed by the Respondent on 14th January 2013, as a plant technical manager. He worked for the Respondent until his employment was terminated vide the letter of 8th April 2014, on account of redundancy. Aggrieved by this decision, the Claimant instituted this claim on 9th September 2014 and sought the following reliefs-

a. Payment in lieu of notice.

b. Expected income for at least 20 years.

c. Punitive damages for unlawful termination.

d. General damages plus any other earning benefits.

e. Costs of this suit.

The Claimant's Case

The Claimant avers that before working for the Respondent, he was working at Geothermal Investment Company where he had projected to work until retirement at 60 years, were it not for the Respondent's enticement.

He further avers that he performed his duties diligently and without breaching the terms and conditions of his employment. This resulted to his promotion and salary increments. He avers that he was not subjected to disciplinary proceedings, did not receive any disciplinary action, form or a warning letter.

It is the Claimant's case that the reasons for redundancy are false since the Respondent has retained the same position despite the change of name and has recruited for the same. It is his position that the redundancy was actuated by malice and was a ploy to terminate his employment. He avers that the redundancy caused him mental anguish, cost him a means of livelihood and a career since it is difficult to get permanent and pensionable employment at the age of 45 years.

Respondent's Case

In response to the claim, the Respondent filed a defence on 23rd

October 2014. The Respondent contends that the termination of the Claimant's employment was lawful and justified. The Respondent further contends that the Claimant was fully paid his terminal dues which he accepted and is therefore bound by the same.

The Respondent avers that on 3rd March 2014, the respondent notified the Claimant and the labour office of its intention to declare the

Claimant redundant. The Respondent restructured its operations and since it was unable to find the Claimant a suitable position in the new structure, his position was abolished. The Respondent denies retaining the Claimant's position and avers that he was considered for the position of plant manager in the new structure but due to concerns relating to his efficiency, he was found not suitable.

The Respondent denies having knowledge of the Claimant's previous employment record and avers that the Claimant applied for employment after the position of Plant Technical Manager was advertised. That he had indicated that he was unhappy with his previous employer.

The Respondent contends that the Claimant did not receive any

promotion during the subsistence of his employment, that the salary increments he got were not based on performance and were provided for in his contract of employment to be granted upon his confirmation.

The Respondent contends that the redundancy was not actuated by malice and that the Claimant was given adequate notice. That they held discussions with the claimant regarding the structural changes.

The respondent denies the particulars of the claim for damages and contends that the Claimant is not entitled to the reliefs sought. The respondent concludes by urging this Court to dismiss the claim with costs.

The matter was disposed of by way of written submissions with the Claimant filing his submissions on 17th October 2019 and the Respondent filing on 7th November 2019.

Submissions by the Parties

The Claimant submits that there was no likelihood of his employment being rendered redundant as the Respondent had a monthly turnover of 1 billion Kenya shillings.

The Claimant further submits that he was not served with the redundancy notice as required under section 40 of the Employment Act, neither was he consulted as is required under Article 13 of the Recommendation 166 of the ILO Convention No. 158 - Termination of Employment Convention, 1982. Further, the Respondent did not elaborate to this court the circumstances under which the notice was served upon the Claimant. He relies on the cases of **Hesbon Ngaruiya v Equitorial Commercial Bank Limited [2013] eKLR**, **Francis Maina Kamau v Lee Construction [2014] eKLR** and **Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 Others [2014] eKLR**.

The Claimant further submits that since he was never consulted, he did not prepare for the redundancy and as result he could not find alternative means of employment to service the loans which he had taken on the legitimate expectation that he would work until he retired.

It is submitted that the Respondent did not adhere to the selection criteria outlined in **Article 15 of the Supplementary Provisions to the ILO Recommendation No. 119 – Termination of Employment Recommendation, 1963** and Section 40(1)(c) of the Employment Act. He contends that the selection criteria was not objective or transparent.

The Claimant submits that he is entitled to compensation by dint of Section 49(1)(c) of the Employment Act and relies on the case of **Kenya Airways Limited v Aviation & Allied Workers Union Kenya [SUPRA]**.

The Respondent on the other hand submits that it has proved that the redundancy was lawful and justified within the meaning of section 2 of the Employment Act. That the claimant's position was abolished and no alternative position was found for him in the new structure. The Respondent urges this Court to ignore the Claimant's attempt to testify in his submissions. To buttress this assertion, the Respondent relies on the cases of **Aga Khan University Hospital v KUDHEIHA; Civil Appeal 7 of 2016**, **Caroline Atieno Osweta v Kenya Yungheng Plate Making Limited [2013] eKLR** and **Super Group Supply Chain Partners v Arthur Dlamini & Another (JA 77/10)** where the Court of Appeal held that an employer had a right under law to declare an employee redundant.

The Respondent submits that the Claimant was given adequate notice and was consulted on the impending structural changes. It is the respondent's position that the absence of a notice to the labour officer does not mean none was issued hence does not entitle the Claimant to the claim for damages. The Respondent further submits that the Claimant signed a discharge certificate where he discharged the respondent from liability airing from his employment with the respondent.

The Respondent submits that the Claimant is not entitled to the reliefs sought as the breakdown at page 18 of the Respondent's bundle of documents is proof that he was paid all his terminal benefits due upon redundancy.

It is submitted that the Claimant is not entitled to the claim for punitive damages for unlawful termination or expected income for at least 20 years as there is no legal or factual basis; neither was there a guarantee that he would have worked for the Respondent until his retirement. The respondent relies on the Court of Appeal cases of **Patrick Ombati v Credit Bank Limited [2016] eKLR** and **David Nyamu v Insurance Training and Education Registered Trustees [2017] eKLR**.

The Respondent submits that the Claimant has not discharged the burden of proof required of him under Section 47(5) of the Employment Act. The Respondent submits that it has proved that the Claimant's post no longer exists and that the responsibilities he had were reassigned to a more senior level which he was not competent to take over under the new structure.

It is submitted that the Respondent had the right to restructure its operations and it would be punitive to award the Claimant 12 months' salary as compensation on account of such restructuring. It urges the Court to take into consideration the fact that the Claimant only worked for approximately 1 year and 3 months.

Analysis and Determination

I have considered the pleadings filed by the parties, the documents annexed thereto as well as the written submissions. In my considered opinion the following are the issues before this Court for determination –

a. Whether the redundancy undertaken by the Respondent was lawful and justified.

b. Whether the Claimant is entitled to the reliefs sought.

Redundancy

Section 40 of the Employment Act provides as follows-

> **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.**

In the Court of Appeal decision of **Kenya Airways Limited v Aviation & Allied Workers Union Kenya [SUPRA]** Maraga JA (as he then was), observed as follows-

> *"52. The purpose of the notice under section 40 (1) (a) and (b) of the Employment Act, as is also provided for in the said ILO Convention No. 158 – Termination of Employment Convention, 1982, is to give the parties an opportunity to consider "measures to be taken to avert or to minimize the terminations and measures to mitigate the adverse effects of any terminations on the workers concerned such as finding alternative employment." Consultations are therefore meant to cause the parties to discuss and negotiate a way out of the intended redundancy, if possible, or the best way of implementing it if it is unavoidable… If redundancy is inevitable, then measures should be taken to ensure that as little hardship as possible is caused to the affected employees."*

An examination of the Respondent's Bundle of Documents shows that indeed a redundancy notice was issued to the labour office on 3rd March 2014. However, there is no notice on record to show that the same was issued to the Claimant at that particular time, as alleged by the Respondent in its defence. The redundancy letter issued to the Claimant states as follows-

> *"We regret to inform you that following ongoing restructuring of the company, the Management has declared the position of Technical Manager redundant.*
>
> *As the management is unable to offer you any sustainable alternative employment, your employment will be terminated immediately and your last working day will be April 8, 2014…"*

From the letter, it is clear that the Claimant was not issued with any notice. The redundancy procedure as outlined in section 40 of the

Employment Act is mandatory. In the Court of Appeal case of **Thomas De La Rue (K) Ltd v David Opundo Omutelema [2013] eKLR**, the Court was of the following view-

> *"… in our view, a purposive reading and interpretation of the statute would mean the same notice period is required in both situations. We do not see any rational reason why the employee who is not a member of a union should be entitled to a shorter notice."*

Further, the Court in **Gerrishom Mukhutsi Obayo v Dsv Air and Sea Limited [2018] eKLR** was of the following opinion-

> *"The Respondent's argument that the order in which the notice to the employee and the Labour Officer is given is inconsequential is in my opinion, a misapprehension of the requirements of both Section 40(a) and (b). In both sections the provision is that the notice is given to the employee and the Labour Officer, or the union and the Labour Officer. It means that in each case, the Labour Officer must be entitled to at least one month's notice before the redundancy is effected, and the employee or union must also be notified at least one month before the redundancy is affected.*
>
> *The word used is notification. This period of one month is intended for the person receiving the notice to confirm that the preconditions of redundancy have been complied with. These preconditions as set out under Section 40(1) include the communication of reason for, and extent of, the redundancy, and the selection criteria. The period is necessary for any disputes over these issues to be settled before the redundancy is effected. The period also allows for consultations and any negotiations to take place before the redundancy is carried out, and for the Labour Officer to ensure that the redundancy will be carried out in accordance with the Act.*
>
> *This notification of intention under Section 40(1)(a) and (b) is different from the notice of termination under Section 40(1)(f)."*

For a redundancy to be valid, the employer must prove that both the Labour Officer and the employee have been notified at least 1 month before the redundancy takes place. In the present case, the Claimant was not notified of the intention to carry out the redundancy. What the Respondent did was to issue notice of termination under Section 40(1)(f). This is evident from the fact that the claimant received only one letter dated 8th April 2014 which is appropriately entitled *"REDUNDANCY OF TECHNICAL MANAGER'S POSITION – WILSON GITHU RUTINU*".

In light of the foregoing, I find that the Respondent failed to comply with the redundancy procedure set out under Section 40(1)(b) of the Employment Act, as such, the redundancy of the Claimant was to that extent unprocedural and therefore unfair.

I also find that the Claimant has proved the allegations of a redundancy motivated by malice. From the Organograms annexed at pages 8, 9 and 10, it is evident that only the Claimant's position was abolished, the other positions remained materially the same and were occupied by the same individuals save for Electrical who was promoted to Plant Manager and Mechanical who was promoted to Plant Maintenance Manager.

The reason the Claimant could not be placed at the plant manager position as explained by the Respondent in its pleadings was because of concerns relating to his efficiency. Emails of complaints made regarding his work were annexed to buttress this position. It is now trite law that where poor performance of an employee is noted, the shortcomings must be pointed out and the employee given an opportunity to improve on them (See; **Kenya Science Research International Technical and Allied Workers Union v Stanley Kinyanjui and Magnate Ventures Limited; ELRC Cause 273 of 2010)**.

The Respondent did not adduce any evidence to prove these are facts which would have justified the redundancy. Further, I note that the person who was placed in the position of plant manager was previously in electrical and was reporting to the Claimant. The Respondent did not explain the criteria that was used in this instance. As such, I find that there was no justification for the Claimant to be declared redundant and that the explanation given by the respondent leads to the conclusion that the redundancy was a disguised termination.

Reliefs Sought

Having found that the redundancy was unfair and unlawful, the next issue for determination is whether the Claimant is entitled to the reliefs sought.

On the claim for payment in lieu of notice, I find that the Claimant is not entitled to the same as the Respondent has adduced evidence that the same was paid to the Claimant. The claim for punitive damages for unlawful termination fails as it has no basis in law and in contract. The claim for expected income for at least 20 years fails having no legal or contractual basis; as there was no guarantee that the Claimant would have worked for the Respondent until his retirement.

The Claimant is awarded 8 months' compensation for unlawful termination of employment having considered the length of his service to the Respondent and the manner in which his employment was terminated including the fact that the respondent avoided taking him through the disciplinary process by disguising his termination as a redundancy, and singled him out among all the staff for redundancy. I have also taken into account the fact that even the redundancy which the respondent opted for was carried out without full compliance with Section 40(1) of the Employment Act. The compensation is thus in respect of unprocedural and unfair redundancy, for discrimination, for failure to notify the claimant and discuss with him the intended redundancy as provided in Section 40(1)(b) and for disguising what it considered as poor performance as a redundancy. **I thus award him Kshs.3,080,000**

The costs of this suit are awarded to the Claimant.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 13TH DAY OF FEBRUARY 2020

MAUREEN ONYANGO

JUDGE