REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

(Before Hon. Lady Justice Maureen Onyango)

CAUSE NO. 185 OF 2015

DIANA WAMBUI IRUNGU.....CLAIMANT

VERSUS

NESTLE KENYA LIMITED..... RESPONDENT

CONSOLIDATED WITH

CAUSE NO. 186 OF 2015

EDWIN NDIRANGU.....CLAIMANT

VERSUS

NESTLE KENYA LIMITED.....RESPONDENT

CONSOLIDATED WITH

CAUSE NO. 187 OF 2015

JOSEPH KAMAU.....CLAIMANT

VERSUS

NESTLE KENYA LIMITED.....RESPONDENT

JUDGMENT

The Claimants herein filed 3 claims being Causes 185, 186 and 187 of 2015 which were consolidated under Cause 185 of 2015. They aver that they were employed by the Respondent on diverse dates and held the positions of Category Development Manager-Culinary, Maintenance Manager which was changed to Project Manager and Factory Planner for the 1st, 2nd and 3rd claimants respectively.

They aver that on 15th January 2015, they received a notice of intended redundancy which was to take effect on 15th February 2015. They aver that the notice indicated that their position may be affected and that a final decision had not been made pending consultations with the concerned employees.

They contend that on the same day the 15th January 2015, they received other letters further affirming the intended redundancy informing them that it would impact their positions. It is their case that the Respondent failed to give proper notice and has refused to give valid reason for the redundancy. They aver that the Respondent also racially discriminated against them in the selection criteria for the redundancy contrary to Article 27(5) of the Constitution and Section 45(4)(a) as read with Section 46(g) of the Employment Act.

The Claimants seek the following reliefs:

Cause 185 of 2015 – 1st Claimant (DIANA WAMBUI IRUNGU)

1. A declaration that the termination of the Claimant's employment on account of redundancy was not procedural and amounts to unfair termination.

2. A declaration that the respondent did not follow fair selection criteria in identifying the claimant's position as redundant.

3. A declaration that the Claimant was discriminated against by the Respondent while having her employment terminated on account of redundancy.

4. A permanent injunction stopping and restraining the taking into effect of the redundancy process on 15th February 2015.

5. An order directing the Respondent to pay the Claimants the calculated sums being particularised in the amended statement of claim amounting to Kshs.6,537,952.50 with interest at court rates from the date of filing the suit.

6. An order directing the Respondent to issue a Certificate of Service to the Claimant in accordance with Section 51 of the Employment Act, 2007.

7. General damages for discrimination.

8. Any other relief the court deems fit.

9. The costs of the suit.

Cause 186 of 2015 – 2nd Claimant (EDWIN NDIRANGU)

1. A declaration that the termination of the Claimant's employment on account of redundancy was not procedural and amounts to unfair termination.

2. A declaration that the respondent did not follow fair selection criteria in identifying the claimant's position as redundant.

3. A declaration that the Claimant was discriminated against by the Respondent while having her employment terminated on account of redundancy.

4. A permanent injunction stopping and restraining the taking into effect of the redundancy process on 15th February 2015.

5. An order directing the Respondent to pay the Claimants the calculated sums being particularised in the statement of claim amounting to Kshs.6,344,867.36 with interest at court rates from the date of filing the suit.

6. An order directing the Respondent to issue a Certificate of Service to the Claimant in accordance with Section 51 of the Employment Act, 2007.

7. General damages for discrimination.

8. Any other relief the court deems fit.

9. The costs of the suit.

Cause 187 of 2015 – 3rd Claimant (JOSEPH KAMAU)

1. A declaration that the termination of the Claimants' employment on account of redundancy was not procedural and amounts to unfair termination.

2. A declaration that the respondent did not follow fair selection criteria in identifying the claimant's position as redundant.

3. A declaration that the Claimant was discriminated against by the Respondent while having her employment terminated on account of redundancy.

4. A permanent injunction stopping and restraining the taking into effect of the redundancy process on 15th February 2015.

5. An order directing the Respondent to pay the Claimants the calculated sums being particularised in the amended statement of claim amounting to Kshs.3,890,125 with interest at court rates from the date of filing the suit.

6. An order directing the Respondent to issue a Certificate of Service to the Claimant in accordance with section 51 of the Employment Act, 2007.

7. General damages for discrimination.

8. Any other relief the court deems fit.

9. The costs of the suit.

The Respondent filed a Memorandum of Defence in each claim on 28th July 2015. It avers the redundancy was as a result of the overall deterioration in growth and profitability of the Respondent's business in various regions.

It avers that it opted for a leaner model by restructuring various roles and deciding which roles could be merged and or had been duplicated. It avers that in a meeting held on 15th January 2015, it informed all employees who would be impacted by the redundancy of the selection criteria. It further avers that it complied with Section 40(1) of the employment Act by issuing all employees with one month's notice on 15th January 2015 and a final redundancy letter on 16th February 2015. It further avers hat it informed he labour officer of the decision in the letter dated 8th January 2015.

It denies there any racial discrimination in respect of the Claimants redundancy.

Claimants' Case

DIANA WAMBUI IRUNGU the 1st Claimant herein testified as CW1. She relied on her Witness Statement dated 26th November 2018. It was her testimony that the Respondent's redundancy process was not right due to racial discrimination. She testified that she was declared redundant while her white colleague who had less experience was retained.

She testified that she was issued with notice in the middle of the month. According to her, she was not given an explanation after enquiring why she had been declared redundant. She testified that though she had seen her Certificate of Service in the file, it was not issued to her.

In cross-examination, she testified that she was issued with the final redundancy notice in August 2015 while the initial redundancy notice was issued on 15th January 2015. She testified that she was asked to sign the notice but she could not do so without reconciling the procedure.

She testified that at the time she was part of the management committee and that her category was doing well in sales. She stated she did not have any evidence to prove that the product category was doing well but had evidence proving that she was a high performer.

She testified that the initial redundancy notice stated that there would be consultation. That she had a meeting with Stella Macharia, of Human Resource to discuss the redundancy package. That she discussed with the Human Resource Manager about the organisation getting her alternative employment. She testified that she did not apply for the position of Nutrition Business Manager that was available because it was technical and she did not have a medical background.

She testified that there was a brand manager and a trade manager who was stationed in Tanzania and was an expatriate. That the brand manager was not in the same category as her as she was a reportee. She testified that there were 3 expatriates and that she knew that one of them, Philipe earned more than her as there was a rumour to that effect. It was her testimony that the reason she believes that there was racial discrimination is because Philipee was paid more than her but had less experience.

She testified that she received her severance pay and after filing suit she received additional dues.

Upon re-examination, she maintained that she received the letter dated 15th January 2015 but there were no further consultations regarding the redundancy. She stated that prior to the notice, there was no indication that there was likely to be a redundancy. She further testified that none of the expatriates was declared redundant. She testified that she received some dues but they were not satisfactory.

EDWIN NDIRAGU the 2nd Claimant herein testified as CW2. He relied on his Witness Statement dated 27th November 2018 as his evidence in chief.

In cross-examination, he testified that there was a meeting on 15th January 2015 with the Human Resource Manager Lynette and that there was also a town hall meeting where poor performance was discussed. He testified that after the letter dated 15th January 2015 the Human Resource Manager issued him with a redundancy letter which he declined. He testified that he did not go into separation packages because he was still Central Maintenance Engineer (CME) but working as the Project Engineer (PE). That it was the position of Project Engineer (PE) that was declared redundant.

He testified that there was intention to move him from CME to PE but that was not formalised. His contention was that when the redundancy began he was the CME and not PE where he was holding brief for 4 months. He testified that the procedure of the Respondent was that any movement was formalised but his was verbal.

He did not recall being issued with the second redundancy notice. He testified that he was paid severally but it was not clear what the amount was for. He further testified that his payslip produced by the respondent was not shown to him at the point of the redundancy notice.

JOSEPH KAHUKU KAMAU the 3rd Claimant testified as CW3. He relied on his Witness Statement dated 27th November 2018.

In cross-examination, he confirmed receiving a notice of intended redundancy on 15th January 2015 and the letter dated 3rd August 2015. He

testified that he met with the Human Resource Representative and raised the issue of having a loan with Standard Chartered Bank. He testified that he was given a breakdown of his dues.

He testified that he had asked for the enhancement of the redundancy package but the Respondent declined his proposal. He confirmed receiving his severance pay.

Upon re-examination, he testified that there were no further consultations on the redundancy.

Respondent's case

STELLA MACHARIA, who was the Head of Human Resource at the time of the redundancy testified as RW1. She stated that her designation was Human Resource Business Partner of the Respondent's East Africa Cluster.

She testified that at the time of the redundancy, performance of the respondent was not good. She testified that prior to issuing the letter dated 15th January 2015, they held a town hall meeting with employees to inform them that the Respondent intended to carry out redundancy. She further testified that there were individual meetings with the affected employees.

She testified that CW1's role was explained by the Line Manager who was clear that performance was good. She testified that they discussed the selection criteria. That CW1 (Diana) enquired why she was being declared redundant and then asked to leave immediately but this request was declined. She further testified that there was a meeting with CW1 on 11th February 2015 and at that time she had already been issued with the redundancy notice. She testified that CW1 was not declared redundant until the date she was issued with a redundancy letter.

She testified that there were several roles which CW1 was able to fit in and that the position of Nutrition Business Manager matched her qualifications. She further testified that the change to this position was from dairy to nutrition and that the duties were not different from what CW1 previously did.

She testified that Philippe had experience in culinary as he had worked in Congo. That he had a dual role of culinary manager and Nestle Continuous Excellence Manager. It was her testimony that there were consultations with CW2 and CW3 and that they signed minutes of the meeting. She further confirmed that she had discussions with CW2 and CW3 on the redundancy package.

She testified that severance dues amounted to one and a half month's salary for each year worked, one month's notice, any due leave and 13th month prorated pay. She further testified there was medical cover for 2 months. She testified that CW2 was not holding brief for anyone and that he did not raise the issue in the 4 months he worked as Project Engineer.

She testified that selection criteria for the redundancy was a combination of role and performance. She testified that they offered counselling and training to affected employees. It was her testimony that the respondent issued 2 redundancy notices in January and August and that affected employees were paid their normal salaries.

In cross-examination, she testified the criteria for selection examined performance and relevance of the position. That CW1 had experience in culinary, that Phillipe was her peer and had worked for the Respondent for 5 years while CW1 had worked for 1 year 9 months. She however agreed that the records in court reflected that CW1 had worked longer than Phillipe.

She testified that the criteria of first in last out was not a consideration. She testified that CW1 was Maintenance Engineer in December and that he was declared redundant in the position of Project Manager but he had not been officially confirmed to this position. She testified that the position of Maintenance Manager was not rendered redundant.

She testified the Claimants received their notices on the same date of the meeting held on 15th January 2018. She testified that the purpose of the meeting was to announce to all employees that they were restructuring.

In re-examination, she testified that severance pay was above what is provided in the Employment Act.

She testified that CW2 acknowledged that he had moved from CME to PE. She testified that the Respondent was considering the market that was making more money.

Claimant's Submissions

The Claimants submitted that the Labour Officer was notified of the

redundancy on 7th January 2015 while the Claimants received their general notices on 15th January 2015 immediately followed by individual letters confirming they were directly affected by the redundancy. They submitted that the notifications did not meet the legally established standard provided under section 40 of the Employment Act.

They submitted that Section 47(5) of the employment Act apportions burden of proof justifying the grounds for termination of employment or wrongful dismissal to the employer. They submitted that the Respondent did not produce any evidence to prove that it has reduced business.

They submitted that the respondent failed to demonstrate the precise formula and/or criteria used to select the Claimants as candidates for

redundancy. They argued that the Court should interrogate the Respondent's actions against the constitutional and internationally settled norms that protect against discrimination for reason that their positions were filled by foreigners. They relied on the case of **Koki Muia v Samsung Electronics East Africa Limited [2015] eKLR** where the Court held that it was discriminatory for the Respondent not to permit the ascension of Kenyans to high offices by having incompetent Koreans supervise the more qualified Kenyans.

They further relied on the case of **Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others [2014] eKLR** and submitted that their positions were not abolished but instead retained and given to foreign nationals.

They submitted that the reliefs sought in their respective Amended Statements of Claim are justified. In conclusion, they submitted that the Respondent failed to meet the statutory threshold of procedural fairness in the implementation of its redundancy decision as if failed to give proper notices and failed to hold consultations.

Respondent's Submissions

The Respondent submitted that the redundancy was justified owing to its poor performance and that the organisational chart illustrates that after the restructuring of the business 3 positions were abolished. It relied on the case of **KUDHEIHA v Agha Khan University Hospital Nairobi [2015] eKLR** where the Court held that an employer has the prerogative to declare a redundancy. It further relied on the case of **Caroline Atieno Osweta v Kenya Yungheng Plate Making Limited [2013] eKLR**.

It submitted that due process was followed in accordance with section 40 of the Employment Act. It submitted that in considering making any position redundant, it tried to find suitable employment within the organisation for the affected employees. Further, consideration was given to employee's skills and experience and the alternative job. It submitted that the vacancies arose due to the fact that some roles were merged.

It submitted that consultative meetings were held with the CW1 on 15, 22nd and 23rd January 2015 while the same meetings were held with the CW2 and CW3 on the same dates and on 11th February 2015.

It submitted that in August 2014, it changed CW2's position from Maintenance Engineer to Project Manager under the same terms and conditions of engagement thus it is not true that at the time of the redundancy he held the position of Maintenance Engineer. In respect of the submission that his position was given to a foreign national, it submitted that there were no project engineers at the time and that there were no expatriates in this role.

It submitted that the Claimants' dues were calculated in accordance with section 40 (e-g) of the Employment Act and the breakdown was set out in the letters dated 16th February 2015. It submitted that its severance package was substantively higher than the statutory minimum.

It submitted that the Claimants relief seeking a declaration that it did not follow fair selection criteria should not be granted for reason that due process was followed and the three individuals were not replaced by other individuals. It further submitted that the Claimants cannot have been selected unfairly because despite being notified of their roles being redundant they did not apply for new roles.

It submitted that the allegation by the Claimants that they were discriminated has no factual basis because the redundancy exercise was applicable to various roles across the organisation and did not target the Claimants specifically. It further submitted that at the time, it only had 2 expatiates.

It submitted that there was no cogent evidence on discrimination thus the claimants are not entitled to a declaration or general damages. They relied on the cases on **Josphat Koli Nanok & another v Ethics and Anti-Corruption Commission [2018] eKLR** and **Jesca Kiplagat v Director of Criminal Investigations & 2 Others [2017] eKLR.**

The respondent submitted that the Claimants did not prove how the redundancy exercise amounted to unlawful termination. It submitted that in the event the Court finds that they were unfairly terminated, they are not entitled to 12 months' compensation for wrongful dismissal or any extra amount as they were paid for 5 months and also received ex-gratis payment. In support of this, they relied on **Kiambaa Dairy Farmers Co-operative Society Limited v Rhoda Njeri & 3 others [2018] eKLR.**

It submitted that the **Koki Muia case** is distinguishable from the present case as the issue herein is not on the ascension of Kenyans to high offices. It further submitted that in the **Kenya Airways case,** notice was given to the labour office and there were no consultations of intended redundancy.

Determination

Upon consideration of the pleadings, evidence and submissions by parties, the issues for determination are whether the redundancy carried out by the Respondent was in accordance with the law and whether the Claimants are entitled to the reliefs sought.

The notice of the intended redundancy on account of restructuring issued to the Claimants on 15th January 2015 stated:

> *"Re: Notice of Intended Redundancy on account of Restructuring*
>
> *We refer to our meeting and discussions of January, 15, 2015.*

As explained, the current business model within our Cluster is not responsive to our current or anticipated business expectations. As such, we are actively reviewing our structure to ensure that we can provide sustainable and profitable growth across the region.

This has led management to rethink how we operate with a view of accelerating growth. We anticipate that several employees and related functions may be impacted by this intended redundancy. We shall be holding further consultative meetings with you within the next few days. Kindly note that the final decision has not been made pending consultation with the concerned employees.

Whilst exploring alternative avenues, we hereby give you notice of intended redundancy as per existing laws, to take effect as from February 15, 2015 if confirmed."

RW1 testified that at the time of the redundancy, the Respondent's performance was not good. The Respondent produced an Independent Auditors reports by KPMG Kenya, which comprise statements of financial positions as at 31st December 2010, 2011, 2012 and 2014 which all indicated that the Respondent incurred losses. I find that the reason for the intended redundancy was valid and was stated in the letter dated 15th January 2015.

Procedure

With respect to procedure, Section 40 (1) of the Employment Act provides as follows:

(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.

The Claimants testified that they were notified of the redundancy vide the letters dated 15th January 2015. The Respondent informed the Labour Officer of the intended redundancy in a letter dated 8th January 2015 stating that 23 positions were to be declared redundant with effect from 15th February 2015.

Under Section 40(1)(b) of the Employment Act, the Respondent is to notify the Labour Officer and the employee of the redundancy, at least a month in advance. In ***Thomas De La Rue (K) Limited v David Opondo Omutelema [2013] eKLR*** the Court stated:

"It is quite clear to us that section 40(a) and 40(b) provide for two different kinds of redundancy notifications depending on whether the employee is or is not a member of a trade union. Where the employee is a member of a union, the notification is to the union and the local labour officer at least one month before the effective redundancy date. Where the employee is not a member of the union, the notification must be in writing to the employee and the local labour officer…"

I find that the notices issued to the Claimants and the Labour Officer were sufficient and in compliance with Section 40(1)(b) of the Employment Act as they were issued a month prior to the date of redundancy.

The Claimants aver that the Respondent racially discriminated against them as a criteria for redundancy. They submitted that the Respondent failed to demonstrate the precise formula or criteria used to declare them redundant. RW1 testified that the policy on first in last out was not a consideration. The Respondent submitted that there are only 2 expatriates in the organisation and that the Claimants' positions were abolished.

With respect to CW1, her position as Category Development Manager-Dairy was abolished as indicated in the current organogram. RW1 testified that CW1 had previous experience in culinary while Phillipe also had experience in culinary however only CW1's position in Diary was restructured. The dairy restructuring criteria for January 2015 produced by the Respondent confirms that CW1 held a different position

from that of Phillipe and her role was to be managed by the then brand manager.

The Respondent submitted that CW2 was not a Maintenance Engineer at the time of his termination. During cross-examination, RW1 testified that as stated in the Performance Evaluation 2014, the Claimant as at December 2014 was a Maintenance Engineer and was declared redundant in the position of Project Manager. However, at the Comments section of the evaluation form, it is indicated that the objective could not be further pursued after the change in roles from CME to PE in September 2014. I find that as at the time of his termination, he held the position of Project Engineer. Further, from the organogram the position of DC Coordinator held by CW3 was abolished.

I do not find proof that the Respondent racially discriminated the Claimants in the selection for redundancy.

None of the claimants applied for the vacant positions available at the time of the redundancy. From the document on the Mapping and Selection for the impacted positions, CW1 and CW3 stated that the positions were not of interest to them.

In respect of consultations, I find that there were consultations with each of the employees as each of them admit that they met RW1 and Lynette to discuss packages and that some did not ask any further questions on the redundancy process.

It is my finding that in its selection criteria, the Respondent did not apply Last-in-first-out" (LIFO) principle or the skills and reliability of the Claimants under Section 40(1)(d) of the Employment Act. In **Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others [2014] eKLR** the Court of Appeal held:

> *"On whether LIFO was the sole criteria to be adopted to the exclusion of the other lawful criteria, I do not agree with the Industrial Court that LIFO is the sole mandatory criteria to be applied in redundancies. It is evident that section 40 (1) (c) requires the employers to apply all the selection criteria specified, with due regard to seniority in time, skill, ability and reliability of each employee. A sole application of LIFO would no doubt, be detrimental to any employer, as continuity and succession planning within the organization could be jeopardized."*

From the rationale set out in its documents, its focus was that the roles in these positions would be carried out by persons holding other positions, the workload had reduced or most projects had been completed but not the impact of the claimant's skills, reliability and LIFO against the remaining roles. For instance, CW1 still managed some of the roles with respect to Milo and CPW. Nevertheless, the respondent considered their skills against the vacant positions which the Claimants declined to apply for.

In all I find that the redundancy exercise was in compliance with the law.

Remedies

The claimants testified that they were paid their dues after filing of the suit. The letters dated 3rd August 2015 indicate that the Claimants were paid the following amounts;

CW1 – Diana Wambui Irungu Kshs.2,021,893.69;

CW2 – Edwin Ndirangu, Kshs. 2,115,007.78 and

CW3 – Joseph Kamau Kshs.698,524.00.

The amount comprised:

1. One month salary in lieu of notice;

2. Accrued leave day to date of redundancy;

3. 1.5 months' severance pay for each completed year of service with effect from date of employment;

4. Pro-rated 13th months' pay

5. Medical benefits continuation up until 30th September 2015 for both CW1 and CW2 and until April 30, 2015 for CW3.

6. Any payments that may have been accrued as at the last date of work.

The Claimants sought to be issued with Certificates of Service under Section 51 of the Employment Act. These certificates were produced by the Respondent as part of its documents. I therefore find that the Certificates were issued and the claimants are free to collect the same.

For the forgoing reasons, I find that the claimants did not prove their claims against the respondent. The result is that the entire claims fail and are accordingly dismissed. There shall be no orders for costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 22ND DAY OF MAY 2020

MAUREEN ONYANGO

JUDGE

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 **Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MAUREEN ONYANGO

JUDGE