REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 2295 OF 2015

(Before Hon. Lady Justice Maureen Onyango)

EDGAR MAINGI MWINZI..... CLAIMANT

VERSUS

TOTAL KENYA LIMITED..... RESPONDENT

JUDGMENT

Vide a Memorandum of Claim filed on 23rd December 2015, the Claimant alleges that the Respondent discriminated him and unfairly terminated his employment on account of redundancy in breach of the terms of his contract of service and the provisions of the Employment Act. He seeks the Orders against the Respondent as follows:

a) A declaration that the Respondent is in breach of the provisions of the Employment Act No. 11 of 2007 and the law in the following respect:

i. By discriminating against the Claimant contrary to section 5 of the Employment Act No. 11 of 2007.

ii. By failing to notify the Claimant personally or the labour officer the reasons for and the extent of the intended redundancy of the Claimant at least one month prior to the date of the intended date of termination on account of redundancy contrary to Section 40(1)(a) and (b) of the Employment Act No. 11 of 2007.

iii. By failing to take into account, in the selection of the Claimant as an employee to be declared redundant, 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 contrary to section 40(1)(c) of the Employment Act No. 11 of 2007.

iv. By failing to pay the Claimant the entire accrued leave days in cash contrary to Section 40 (1) (e) of the Employment Act No. 11 of 2007.

v. By failing to pay the Claimant the entire contractual 3 months' salary in lieu of notice contrary to Section 40(1)(f) of the Employment Act No. 11 of 2007.

vi. By unfairly terminating the employment of the Claimant contrary to Section 45(1) of the Employment Act No. 11 of 2007.

vii. By failing to provide to the Claimant with reasonable housing accommodation either at or near the place of employment or pay to the Claimant such sufficient sum as rent as would enable the Claimant to obtain reasonable accommodation contrary to section 31 of the Employment Act.

(b) A declaration that the Respondent is in breach of the contract of service in the following respect

i. By discriminating against the Claimant in mode of selection of employees to be declared redundant contrary to the Respondent's Separation Procedures dated November, 2014.

ii. By threatening to terminate the contract of service without any just or lawful cause.

(c) Kes.1,322,564.40 being damages for unfair termination equivalent to 12 months' gross monthly salary at the time of the unfair termination worked out as follows:-

Kes.110,213.70 (gross monthly salary) x 12 months

(d) Kes.144,207.00 being the Respondent's contribution for 12 months from 1st August 2015 to the Pension Scheme.

(e) Kes.85,837.50 being the Claimant's expected 12 months' from 1st August 2015 bonus payment.

(f) Kes.618,033.60 being the Claimant's unpaid house allowance from 1st July 2011 to 31st July 2015.

(g) Kes.626,000.00 being the existing loan payment paid by the Respondent as offered to other employees.

(h) Costs of the suit.

(i) Interest on c) to h) above.

(j) Any other or further relief that the Court may deem fit to grant.

The Court directed that since the redundancy is admitted, the matter does proceed by way of written submissions.

Claimant's case

The Claimant was employed by the Respondent on 30th June 2011 as an Export Logistics Officer within the Respondent's Planning and Supply Department.

He avers that on 17th June 2015, the Respondent without sufficient notice and consultation issued him a notification of redundancy. He avers that this letter dated 17th June 2015 was a gross misrepresentation of the discussion held between him and the Planning and Supply Manager as there was no discussion on redundancy during the said meeting.

He avers that he had never been informed of the selection criteria that led to him being identified as the employee to be declared redundancy. He avers that the Respondent discriminated against him in the mode of selection of the employees who were declared redundant contrary to the Respondent's Separation Procedures. He further avers that there were no meaningful consultations between the Respondent and himself prior to 17th May 2015 and that the Respondent appeared to have already formed a firm opinion to terminate his employment. It is his case that there existed no need for redundancy as relates to his position because the respondent and its associates or subsidiaries continue to perform the tasks that the claimant was employed to perform in house.

He avers that the Respondent offered other employees Kes.1,000,000 write-off on their then existing loans as part of their redundancy package but the write-off was not extended to him.

He avers that it was a term of his employment contract that he was entitled to a performance bonus payable quarterly in arrears. He further avers that he was entitled to a house allowance of Kes.12,875.70 per month but the respondent refused to pay him this allowance.

Respondent's case

The Respondent filed a Memorandum of Response on 7th April 2016 in which it avers that the position of Exports Logistics Officer, Mombasa was declared redundant as a result of changes in the business environment. It avers that the introduction of a Single Customs Territory and the impact of documentation on Total Uganda Limited exports led to a reduction of the Claimant's responsibilities.

It avers that the Claimant was invited to a career meeting to determine his aspirations based on his skills and expertise but he did not qualify for the position of Dispatcher as he did not possess accounting qualifications. It further avers that after a thorough internal search for an alternative job for the claimant, it informed him that there was no alternative position within the Respondent and its subsidiaries in line with his qualifications, skills and expertise.

It is respondent's case that it followed the separation procedures set down in the Human Resources Operating Procedures together with the provisions of section 40 of the Employment Act.

With respect to bonus, it denies that the claimant was entitled to a bonus and avers that it was not a term of his letter of appointment. It avers that the bonus awarded to the Claimant was in recognition of his and the Respondent's performance in any given year.

It avers that although it was statutorily obligated to provide reasonable housing it provided for rent as part of the Claimant's consolidated salary. Further, that its annual salary reviews and increments constituted a cost of living adjustment. It prays that the Claim be dismissed with costs.

Claimant's Submissions

The Claimant submitted that his entitlement to performance bonus arose from the letter dated 27th April 2015 where the Claimant was entitled to a bonus of Kes.85,837.50 for the year 2015. He submitted that under Section 5(2) of the Employment Act an employer shall promote equal opportunity in employment and strive to eliminate discrimination in any employment policy or practice.

He submitted that his performance was not raised as a reason for the termination of his employment and the Respondent did not prove that the Claimant's performance for the relevant year was poor or undeserving of the bonus payment. He submitted that Respondent's conduct in relation to the payment of bonus to him was unfair and unlawful as the same violates Articles 27 and 41 of the Constitution of Kenya.

He relied on the case of **Kenya Chemical & Allied Workers Union v Bamburi Cement Limited [2013] eKLR** where the Court cited the case of **Communication Workers Union of Kenya v Telkom Kenya Limited [2018] eKLR**, that the payment of bonus was discretionary per policy provisions but once the employer exercised the discretion to pay, the exercise was chained by the relevant statutory provisions against discrimination and furtherance of fair labour practice.

It was his submission that the performance bonus was introduced by the Respondent and it bears the obligation to ensure that it is effected in a fair manner which it failed to do so.

He submitted that he was entitled to house allowance under Section 31(1) of the Employment Act and that the Respondent is out to mislead the Court that his house allowance was included in his salary. He submitted that in consenting to the terms of his contract he did so knowing that his house allowance was a separate item from his basic salary. He relied on the case of **Namwel Nyakundi Gekone v Riley Services Limited [2015] eKLR** where the Court held that the reading of Section 31(1) and (2) of the Employment Act is that payment of house allowance is only excluded if this is expressly provided for in the contract.

He submitted that the termination of his employment was unlawful for noncompliance with Section 40(1)(b), (c), (e), (f) and (g)of the Employment Act. He submitted that the Respondent did not issue any prior notice to him or the Labour Officer. He relied on the case of **Dorcas Kemunto Wainaina v IPAS [2018] eKLR** where the court held that termination was tainted with procedural unfairness as the Claimant and labour officer were not given a written notice.

It was his submission that the Respondent failed to carry out consultation. He submitted that he was only issued with a notice of the purported consultation meetings therefore the notice and meetings were ineffective. He submitted that the law is that the right to consult after the issuance of redundancy notice is an obligatory requirement and in support of this position. He relied on the case of **Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 Others [2014] eKLR**.

He submitted that he qualifies for the term "*seniority in time*" as he had been in employment with the Respondent since 2011 and was prior to that an employee of Chevron Kenya. He submitted that the Respondent did not observe the provisions of section 40 (1) of the Employment Act by failing to apply any selection criteria to identify him as the employee to be declared redundant and the Respondent did not conduct any job evaluation or give him an opportunity to suggest alternative responsibilities within its organisation.

Relying on Sections 43 and 45 of the Employment Act, he submitted that there is no proof of the existence of a redundancy in relation to his position as an Export Logistics Officer. He submitted that he was replaced by the employee he was required to train and the redundancy allegations were meant to mask the Respondent's intentions. He relied on the case of **Julie Topiria Njeru v Kenya Tourist Board Cause 886 of 2010** where the Court held that the termination through redundancy must follow the law on fair termination and in particular Sections 43 and 45 of the Employment Act.

With respect to the remedies sought, he submitted that the Court in **D. K. Njagi Marete v Teachers Service Commission [2017] eKLR** emphasised the need for proportionality and farness in evaluating the suitability of employment remedies. It was his submission that the Respondent failed to prove that any issues warranting termination existed at the time of terminating his employment. He prayed that the suit be allowed with costs.

Respondent's Submissions

The Respondent submitted that though the Claimant pleaded discri-mination under section 5 of the Employment Act, he did not specify the grounds of discrimination as expressly specified under Section 5(3)(a) of the Employment Act. It further submitted that the Claimant has not availed evidence to demonstrate any of the said grounds of discrimination and did not submit on the same. It is therefore its submission that there was no discrimination as alleged.

It submitted that the letters communicating the Claimant's salary review did not have a provision for the entitlement to a performance bonus. It submitted that any bonus awarded to the Claimant was strictly limited to and on the basis of its recognition of the Claimant's satisfactory performance in any given year. It relied on the finding in the **Kenya Chemical & Allied Workers Union Case,** cited by the Claimant.

It submitted that it did not create a legitimate expectation that the Claimant was entitled to a performance bonus. It further submitted that the lack of a performance bonus in the year 2014 was disclosed in its letter dated 27th April 2015. It relied on the case of **Julius Eshitoli Waka v Total Kenya Limited Cause 2298 of 2015** where the Court held that the payment of a bonus was not a term of the Claimant's employment and that he did not justify the figure claimed.

It maintained that it was not entitled to provide house allowance as the claimant's salary was consolidated within the scope of the exception under Section 31(2) of the Employment Act. It submitted that house allowance was never an issue in the course of the Claimant's employment.

It submitted that in accordance with section 40(1)(b) of the Employment Act a Notification of Redundancy was issued on 17th June 2015 addressed to the Claimant and copied to the Respondent's Planning and Supply Manager and the District Labour Officer Nairobi. It submitted that the validity of the said notification is not challenged by the Claimant.

It submitted that Section 40(1)(b) of the Act does not expressly specify any timeline/period which the Notification of Redundancy is to be made to the Labour Officer and that under this provision it is sufficient that the Notice of Redundancy is issued. It further submitted that this

section does not expressly couch in mandatory terms that the Respondent was required to consult the Claimant in the redundancy.

It submitted that the Claimant neither denied his attendance and involvement/participation in meetings, held on 12th March 2015 and 17th March 2015 which were aimed as assessing his career aspirations, nor does he deny the issues discussed in the meetings.

It submitted that pursuant to Section 40(1)(c) of the Employment Act it gave due to regard to the Claimant's seniority, role, qualifications, skills, ability, reliability and experience before he was declared redundant. It submitted that the Claimant was informed of the criteria during the meetings held on 12th March 2015 and 17th June 2015 and in the email dated 17th June 2016.

It submitted that as far as Section 40(1)(e) - (g) of the Employment Act is concerned there was no submission by the Claimant that he was not paid leave in cash, one month's notice or one month's wage in lieu of notice or severance pay.

It submitted that the Claimant's termination was fair under Section 45 (5) of the Employment Act as the reason(s) for redundancy were disclosed and that the Claimant has not demonstrated that the redundancy was effected unfairly contrary to Clause 6.2.4 of the Operation Procedures and under the Employment Act.

It submitted that the redundancy was substantially justified as it genuinely believed that a redundancy situation had arisen as a result of the changes in its business environment. It relied on the **Kenya Airways Case** where the Court of Appeal held that if an employer genuinely believed that there was a redundancy situation then the termination was justified. It denied replacing the claimant with another employee.

It submitted that the Claimant is not entitled to any of the remedies sought in the claim, as the redundancy was fair. With respect to the payment of Kes.144,207 being his 12 months' contribution to the Pension Scheme, it submitted that the Court lacks jurisdiction to make any finding on an issue of benefits and pensions under the Employment Act.

It submitted that there is no basis for the Respondent to make payment of Kes.626,000 being existing loan repayment rom part of the redundancy benefits. It submitted that there was no obligation to make such payment as the Respondent was not privy to the Claimant's loan with National Bank of Kenya. In conclusion, it urged the Court to dismiss the claim with costs as it lack merit.

Determination

The issues for determination are:

a. Whether the Claimant's termination on account of redundancy amounts to unfair termination.

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

Section 40(1) of the Employment Act provides for redundancy 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 Claimant was issued with a Notice of Redundancy dated 17th June 2015 which stated that the intended redundancy was to take effect on 20th July 2015. This notice was indeed compliant with Section 40(1)(b) as it was issued to him 33 days before the date when the Claimant was to be declared redundant.

With respect to the notice to the labour officer, I find that no notice was issued in accordance with Section 40(1)(b) of the Employment Act. From the documents produced by both parties the Labour Officer was only issued with a letter referenced as *"Redundancy"* which was addressed to the Claimant and informing him of his terminal dues. This did not constitute a proper notice to the Labour Officer on the intended redundancy as it was issued on 27th July 2015 which was 7 days after the redundancy took place.

Section 40 is particular that a notice to the labour office is to be issued not less than a month prior to the date of the intended redundancy. Therefore, the Respondent's submission that section 40(1)(b) of the Employment Act does not provide the timeline for issuance of the notice to the labour officer is unfounded. The Court of Appeal in **Thomas De La Rue (K) Ltd v David Opondo Omutelema [2013] eKLR** held:

> *"It is quite clear to us that Sections 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 and to the employee and the local labour officer."*
>
> [Emphasis Added]

With respect to consultations, The Claimant does confirm that a meeting was held on 17th June 2015 but the meeting was not in respect of the redundancy consultation. The Respondent in an email dated 17th July 2015 indicated that the meetings held on 12th March 2015 and 17th June 2015 intended to discuss the Claimant's career and the redundancy. The Employment Act does not provide for consultations prior to redundancy as held by the Court of Appeal in **Pure Circle (K) Ltd v Paul K. Koech & 12 others [2018] eKLR** that:

> *"…In KENYA AIRWAYS LIMITED VS. AVIATION & ALLIED WORKERS UNION OF KENYA & 3 OTHERS (supra), this court held:*
>
> > *"That is not the law of Kenya. There is also the ILO's recommendation No. 166 (supra) which recommends consultation. There was however no evidence that the recommendation has been ratified by Kenya. 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."*
>
> *We agree. The law in Kenya does not provide for pre-redundancy consultation as it gives the employer a free hand to organize its operations with a view to realizing profit…"*

I find that the Claimant has not proved that he was discriminated by the respondent. The claimant did not demonstrate any incident that would prove discrimination. Further, as submitted by the Respondent, no submissions were made in respect of any differential treatment of the claimant.

In respect of Clause 6.2.4 of the Separation Procedures, I find that the Respondent in the email from Irene Muinde stated that based the Claimants aspirations in the company which included his qualifications, skills, experience and availability and after an internal search there was no suitable opening for him.

The Respondent in its Notification for redundancy stated that there was an impending reorganization. In its email dated 17th July 2015 the respondent informed the Claimant that there had been a change in single customs territory and that the impact of documentation in Uganda resulted in a reduction of his duties. I find that there was a justification for the redundancy.

My finding is therefore that the Claimant's termination was contrary to the provisions of Section 40(1)(a) and (b) only with respect to notification of the Labour Officer.

Reliefs

The Claimant prayed for a declaration that his termination was unfair for failing to receive 3 months' salary in lieu of notice and leave days. The prayer fails as the Claimant's pay slip for the period 1st July 2015 to 20th July 2015 and the letter dated 17th June 2015 indicate that the claimant received notice pay and payment for leave days not taken.

Damages 12 months' compensation

The Claimant is not entitled to compensation as he was not unfairly terminated. I have however found that there was no notification to the Labour Officer in the manner provided in the Employment Act and award him one month's salary in lieu thereof.

Pension contribution

While the Claimant was eligible to membership of a Pension Scheme under clause 4 of the Letter of Appointment dated 30th June 2011, this court has no jurisdiction to determine issues arising from the same. The Retirement Benefits Act provides that such claims or complaints be made to the Retirement Benefits Authority which supervises pension schemes.

Bonus payment

The Claimant prayed for Kes.85,837.50 as his expected performance bonus. The letter dated 27th April 2015 stated:

> *"JW/HR/100/2015*
>
> *April 27, 2015*
>
> *Edgar Maingi Mwinzi*
>
> *P & S Department*
>
> *Total Kenya Limited*
>
> *Dear Edgar,*
>
> *RE: ANNUAL SALARY REVIEW FOR 2015*
>
> *We are pleased to inform you that the Management has revised your salary to Kshs.1,030,050.00 per annum with effect from 1st January 2015.*
>
> *The total increment represents 5.0% comprising of a cost of living adjustment of % given to all permanent and pensionable employees and a merit increment of 1%.*
>
> *The arrears for the month of January, February and March 2015 have been paid together with your salary for the month of April, 2015.*
>
> *Please note that the management wishes to remind you to be relentless in the efforts to improve your performance during year 2015 as your performance for the year 2014 was below management's expectations.*
>
> *Please find attached your cost of employment for ease of reference.*
>
> *All your other terms and conditions of service remain the same.*
>
> *Yours sincerely,*
>
> *TOTAL KENYA LIMITED*
>
> *SIGNED*
>
> *Irene Muinde*
>
> *Human Resources and Administration Manager"*

The letter was explicit that the Claimant was expected to improve his performance for the year 2015. The Claimant's argument is that the Respondent created a legitimate expectation that he would receive his quarterly performance bonus as he received the bonus over the years. I find that the Claimant has not proved that his performance for 2015 entitled him to the budgeted performance bonus.

Further, I find that there was no legitimate expectation that he was entitled to quarterly bonus during each quarter of service as the letters informing him of his bonus stated that he was being awarded a bonus as a result of the Company's satisfactory performance in a given year. The claim for this bonus fails.

House allowance

The Claimant sought Kshs.618,033.60 as house allowance. Clause 3(a) of the Claimant's Letter of Appointment provided that he is entitled to a monthly basic salary of Kshs.55,000 per month. The Respondent's argument is that his monthly salary was consolidated to include housing. The Cost of Employment Form issued to the Claimant together with the letter dated 27th April 2015 does not indicate a figure to the amount payable as annual house allowance 2015.

The Claimant had been in the employment of the respondent from 30th June 2011 and his salary had always been expressed as basic. His letter of appointment under paragraph 3 titled "*Remuneration"* reads; -

> *(a) Salary*
>
> *You will be entitled by way of remuneration for your services to a monthly basic salary of Kshs.55,000 per month payable monthly*

in arrears by the last day of each month. This amount will be taxed at the prevailing rates.

(b) You will be entitled to a travel allowance that will be in line with the existing travel policy, which will be subject to review from time to time."

A payslip does not prescribe terms of service. It is the letter of appointment or the document that contains terms and conditions of service that would be the point of reference for such terms. The claimant's letter of appointment is clear that his remuneration constituted what the employer referred to as a basic salary, and a travel allowance. He does not appear to have had any issue with the same as there is no evidence that he ever questioned the reference to basic salary as constituting his entire remuneration throughout the period he was in employment.

The claimant has further not stated how he came up with the figure he claims as house allowance. I find the prayer without merit and dismiss it.

Loan

The Respondent is not under obligation to offset the Claimant's loan on account of privity of contract. This claim therefore fails.

In summary, the claimant is awarded one month's salary in the sum of Kshs.85,000.

The Claimant is awarded costs of the suit and interest shall accrue from date of judgment.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 17TH DAY OF JULY 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, the 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 the 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