REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1149 OF 2016

(Before Hon. Lady Justice Maureen Onyango)

MERCY WANGARI MUCHIRI.....CLAIMANT

VERSUS

TOTAL KENYA LIMITED.....RESPONDENT

JUDGMENT

The claimant was employed by the Respondent by letter dated 22nd May 2009. She had originally been employed by Caltex Oil Kenya Limited, which later changed its name to Chevron Kenya on 13th December 2005. Her employment by the Respondent followed the acquisition of Chevron Kenya Limited by Total marketing Kenya Limited (Total Kenya Limited); the Respondent herein.

The Claimant's employment was terminated on 30th April 2015, when she was declared redundant. It is the Claimant's averment that the redundancy did not comply with the Respondent's Human Resources Operating procedures and the Employment Act.

The claimant further avers that she was never informed of the selection criteria that led to her being identified for redundancy and further that there were no meaningful consultations between her and the Respondent as the decision to declare her redundant had already been made and she had no chance to influence change of the decision.

The Claimant avers that she was a top performer and consistently scored 80% and above in her job evaluations, that her position was not declared redundant as she was replaced by one Pauline Maloba as the Administration and Facilities Manager, that Pauline performs the same tasks and functions similar to her job description.

The Claimant further avers that the Respondent offered other employees declared redundant after her far more favourable terms of redundancy as compared to hers.

In the Memorandum of Claim dated 13th June 2016 and filed on 14th June 2016, the Claimant prays for judgment against the Respondent and orders as follows –

a) A declaration that the Respondent is in breach of the provisions of the Employment Act Chapter 226 and the law in the following respect:

(i) By discriminating against the Claimant contrary to Section 5 of the Employment Act Chapter 226.

(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 Chapter 226.

(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 Chapter 226.

(iv) By unfairly terminating the employment of the Claimant contrary to Section 45(1) of the Employment Act Chapter 226.

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 terminating the Contract of Service without any just or lawful cause.

c) A declaration that the notification of redundancy letter dated 8th April 2015 is null void and of no effect.

d) An order for the reinstatement of the Claimant to the employment of the Respondent and die treatment of the Claimant in all respects as if the Claimant's employment had not been terminated.

e) An order for the re-engagement of the Claimant to the employment of the Respondent in work comparable to that in which the Claimant was employed prior to her termination

f) An order for a permanent injunction prohibiting the Respondent, whether by itself, its servants and or agents or otherwise howsoever from declaring the Claimant redundant.

g) General damages from the Respondent for breach of a statutory duty.

h) Costs and interest on costs of the suit.

i) Any other or further relief or compensation that the Court may deem fit to grant.

The Respondent filed a Memorandum of Response dated 25th November and filed on 2nd December 2016. It admits that the claimant was its employee but denies the other averments in the claim

The Respondent avers that as part of a continuous organizational review in line with business requirement, the Respondent undertook a comprehensive review of its organizational structure to ensure that it was adapted to the current business environment and requirements.

That the position of Administration Manager was re-evaluated alongside other positions within the Respondent with the following outcome;

a. Some positions were upgraded due increased responsibilities and dimension, whilst others were rated lower than previously due to changes in the dimensions and impact of their jobs. Those rated lower were to be further assessed for continued relevance to business need and where necessary reassigned or removed;

b. Some jobs being specialized and with no prospect of evolution within the Respondent were considered best handled through service contracts for such specialized services e.g. security services, reception, switchboard etc.

c. Some roles could be combined to increase operational efficiency and improve the customer experience by removing multiple interlocutors form the company facing the same customers.

That the outcome of the Respondent's re-organisation on the position of Administration Manager was as follows;

a. Responsibilities - reviewed in line with the changing business needs, it was established that as a result of the various changes that had taken place within the business over a period of time, the job scope and dimension had substantially been reduced. As such, the job did not attain the threshold of a Manager's role as per the job evaluation criteria;

b. Seniority of the Job - the aforementioned review impacted on the seniority of the position, field status and manager status.

The Respondent avers that this was brought to the Claimant's notice through a formal meeting held on or about 18th March 2015 between her, the Corporate Affairs Manager and the Human Resources and Administration Manager.

The Respondent further avers that at the said meeting, the Claimant was presented with the following options;

a. To continue to serve in the reviewed position but a lower level on the company's organizational structure;

b. Internal career movement based on her qualifications, competencies and experience. The Claimant was free to state any other positions within the Respondent that would be of interest to her;

c. Redundancy option; this was the last option presented to the Claimant of which the terms of the redundancy exit were table to guide her in making a decision.

That the Claimant was afforded ample time to think through the options presented. Having indicated that she opted to leave the services of the Respondent through the redundancy option, the Respondent issued the Claimant with a Notification of Redundancy dated 8th April 2015 copied to the District Labour Officer. That the Respondent confirmed the redundancy vide a letter dated 29th April 2015.

The Respondent further avers that the Claimant had sought a career change on various occasions through her immediate Supervisor as

reflected in the Claimant's 2013 Annual Performance

Review.

Evidence

At the hearing the claimant adopted the averments in the Memorandum of Claim and her witness statement.

She testified that she was called to a meeting in March and informed that her position was no longer going to be there. That her last working day was 31st April 2015 as the Respondent was not doing well. She stated no minutes were taken at the meeting.

She testified that there had been a restructuring and she heard that she may be moved to another positon but not declared redundant. She testified that she was not informed of the criteria used to select her. That her performance was at 80%. That two (2) months after she left, a former Personal Assistant to the Managing Director was appointed to her job.

She testified that she was 50 years old at the time of redundancy and expected to work to retirement age of 60. That she has not been able to secure employment because of her age.

Under cross examination the Claimant testified that her position was managerial and no other person performed the same job.

She testified that the letter of notification of redundancy was a misrepresentation of what transpired at the meeting. That at the meeting she was informed that the role of Administration Manager would be diminished within two weeks of the meeting. That she was also informed that he company was restructuring but she was never informed that her role would be at a lower level.

She testified that she read and understood the terms of the letter dated 8th April at page 10 of the Respondent's bundle the notification of redundancy.

For the Respondent, RW1, VICTORIA TSALWA, a Payroll Supervisor with the Respondent, testified that in 2009, Total Kenya took over Chevron. That in 2015 there was a reorganisation which led to some jobs being merged. That the reason for re-organisation was because the merger required reorganisation of certain operations. That this is what resulted in the redundancy of the Claimant.

Ms. Tsalwa testified that under the new structure there is a similar position as the Claimant's with some similar responsibilities while some roles were outsourced to other departments. That the position was also downgraded.

RW1 testified that the Claimant was informed of the redundancy at a meeting held on 18th March 2015 where she was taken through the ongoing business reorganisation.

Under cross examination she testified that some of the roles of the Administration Manager previously handled by the Claimant were outsourced. That the same position still exists but the roles and responsibilities changed.

Submissions

The Claimant submits that at the meeting of 18th March 2015, she was required to suggest the option by which her employment should be terminated. She submits that the minutes produced by the Respondent were not approved by her. She submits that although according to the minutes the ranking of her position would no longer qualify to be in management, the roles remained constant. That the fact the positon was filled on 1st July 2015 after her redundancy on 30th April 2015 confirms that the positon was not affected by the redundancy.

It was therefore her submission that the redundancy was unfair and unlawful, relying on the decision in **Angela Shiukuru Ilondanga v Airtel Networks Kenya Limited (2018) eKLR** where the Court held as follows: -

> *"… The 2nd issue for determination is whether the reason for redundancy was valid. It was the respondent's case that the respondent reorganized for better efficiency with the consequence that the office held by the claimant was rendered redundant. During cross-examination, the respondent's witness confirmed that the respondent's Parkside Shop where the claimant was deployed as the Express Shop Manager was still in operation. The Court has considered that evidence against the email of 25th February 2016 addressed to one Kennedy Olouch, Shop Manager, Parkside Shop and returns that the claimant has established on a balance of probability that the office held by the claimant in the respondent's establishment was never abolished or rendered redundant. In any event, it has not been shown that the respondent notified the abolition of the office held by the claimant to the Director of Employment as required under Section 77 of the Employment Act, 2007 and that failure should be sufficient evidence that the office was not abolished... Thus, as at the time of termination, the Court returns that the respondent has failed to show that there existed a genuine reason for the termination of the contract of service on account of redundancy..."*

It is further the submission of the Claimant that the Respondent did not comply with the provisions of the Act as she was given notice on 8th April 2015 and her employment terminated on 30th April 2015.

The Claimant also relied on the case of **KUDHEIHA v the Aga Khan University Hospital Nairobi, Cause No. 815 of 2015** as cited in **Bernard Misawo Obora v Coca Cola Juices Kenya Limited (2015) eKLR**, where the court in emphasizing the importance of the procedure under Section 40 of the Employment Act stated;

"The notices envisaged under section 40 of the Employment Act are not mechanical or issued for the sake of going through a process. These processes affect employees and their jobs. Such notices should be carefully crafted prior to being issued. Such notices affect the employees behind the redundancy process. The procedures applicable in a redundancy are therefore set out in law and are mandatory... Such provisions being mandatory, an employer has to meet them and where not met, in their element, by an act of omission or commission, the resulting action that disadvantages the employees is inherently unprocedural and unfair."

The Claimant also relied on the case of **Addah Adhiambo Obiro v Ard Inc (2014) eKLR**, where the Court held the employer to have been in breach of the Employment Act, having failed to notify the Claimant and the Labour Officer in compliance with the statutory provisions. The Court observed as follows:

"The Respondent has however failed to prove that the Claimant and the Labour officer were notified of the reasons for and extent of the redundancy at least one month prior to the redundancy. The Claimant and the Labour officer were notified on 20th January 2012 the very date that the redundancy took effect. To the extent that the Claimant was not notified of the redundancy at least one month prior to the date of redundancy, I find that the Claimant's redundancy was not in accordance with the procedure in the law and therefore amounted to an unfair termination of her employment contract. This however does not make the redundancy null and void. It only makes the Claimant entitled to the remedies provided for in Section 49 of the Employment Act."

The Claimant further cited the decision in **Gerrishom Mukhutsi Obayo v Dsv Air and Sea Limited (2018) eKLR** where the Court held thus:-

"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 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.

For a redundancy to be valid, the employer must prove that both the Labour Officer and the employee or the employee's union, where there is one, have been notified at least one month before the redundancy takes place."

The Claimant also relied on the case of **Margaret Mumbi Mwago v Intrahealth International (2017) eKLR** where the Court clarified the significance of the notices as follows:

"My understanding of the sequence in the issuance of notices under Section 40(a) and (b) is that the first, which is the redundancy notice, goes out simultaneously to the employee or their trade union and to the Labour Officer and the second which is the termination notice, goes out to the employee in accordance with the subsisting employment contract.''

There is no evidence that the Claimant was issued with a notice under Section 40(a) of the Employment Act. What is adduced in evidence is the notice to the Labour Officer as well as the termination notice to the Claimant. 1 therefore opine that the respondent failed to comply with the redundancy procedure set out under Section 40(a) of the Employment Act with the result that the redundancy of the claimant was un-procedural and therefore unfair."

It is further the submission of the claimant that she was never informed of the selection criteria. That having worked for 6 years, her performance was satisfactory. That her ability and reliability was never questioned at any time.

That it is the employer's responsibility to ensure that the selection of employees to be declared redundant is made in accordance with the criteria set out in the Employment Act. That the Respondent failed to demonstrate that it took into account any or all of the statutory requirements. That the simple computation of the seniority in time of the persons holding the position of Administrative Manager has not been produced by the Respondent. That this issue did not arise in the minutes of the meeting held between the Claimant and the Respondent. None of this information was relayed to the Claimant or the District Labour Officer in the Notice or at the meeting held on 18th March, 2015. That this irregularity together with the fact that the Claimant was replaced in her position by Pauline Maloba is enough inference of malice on the part of the Respondent.

That claimant submitted that in the case of **Gerrishom Mukhutsi Obayo v Dsv Air and Sea Limited (supra)** the employer failed to demonstrate the selection criteria applied in determination of the employees to be declared redundant, and the Court on this account held the redundancy to have been unfair.

It is the Claimant's submission that the Respondent has failed to demonstrate to the Court that the procedure applied in selection of the Claimant as an employee to be declared redundant was lawful. That there was an unmistakable lack of compliance with the provisions of the Act, and the conduct of the Respondent was clearly discriminatory.

On remedies, the Claimant submitted that the Respondent having failed to comply with the law her termination was in violation of Section 45(2) of the Employment Act and further that the Respondent failed to justify the grounds for termination as required by Section 47 of the Act. That she is therefore entitled to the remedies under Section 49 as read with Section 50 of the Act. She relied on the case of **Faiza Mayabi v First Community Bank Limited (2019) eKLR**, the Court found in favour of the Claimant as follows: -

"The whole process was done in an irregular manner and I therefore find the termination unfair and unjustified. In terms of remedies, I find for the Claimant and I award her as follows

1. 12 months' salary as compensation for the unlawful redundancy = 12 x 59,60 = 715,560/=

2. Payment of her pension dues.

3. The Respondent will pay costs of this suit plus interest at Court rates on item (a) with effect from the date of this Judgement and on item (2) with effect from the date of filing suit."

In conclusion the Claimant submitted that the Respondent's conduct and procedure in declaring the Claimant's position redundant is filled with glaring irregularities, all of which point to unfair termination. That the loss of employment by the Claimant had an impact on her ability to provide for her family as well as rendering her jobless, and the Claimant has since been unable to secure any other employment. That none of this was necessary as the Claimant was replaced in her position by another employee when her position ought to have ceased to exist.

Respondent's Submissions

The Respondent submitted that to establish a valid defence to a claim for unfair termination based on redundancy, an employer has to prove;

a) The reason(s) for termination;

b) That reason for termination is valid;

c) The reason for termination is a fair reason based on the operational requirements of the employer; and

d) That the employment was terminated in accordance with fair procedure.

That redundancy is a legitimate ground for terminating a contract provided that there is a valid and fair reason on operational requirements of the employer and the termination is in accordance with a fair procedure.

That in the Court of Appeal case of **Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 Others (2014) eKLR**, Githinji JA. in his dissenting opinion held that –

"what constitutes a fair reason is subjective and that the phrase "based on operational requirements of the employer" must be construed in the context of the statutory definition of redundancy. What the phrase means, in my view, is that while there may be underlying causes leading to a true redundancy situation, such as reorganization, the employer must nevertheless show that the termination is attributable to the redundancy - that is that the services of the employee has been rendered superfluous or that redundancy has resulted in abolition of office, job or loss of employment."

That in the present case the Claimant was issued with a Notification of Redundancy notice dated 8th April 2015 with the intended redundancy scheduled to commence on 30th April 2015. That the proposed payment for the redundancy was as follows;

a) Salary up to and including 30th April, 2015;

b) Two (2) months' pay in lieu of notice;

c) Severance pay based on one month's basic salary for every year of service;

d) Outstanding leave days as at 30th April 2015;

e) Kshs. 1 million rebate on your outstanding car loans as at 30th April, 2015

f) Waiver of outstanding balance of Kshs.916,524.50 on housing loan on amortization.

g) You remain in the company's medical schemer as per the existing limits, terms and conditions until 31st December, 2015. However, any medical excess will be borne directly by yourself.

That the Claimant accepted the terms of redundancy on 8th April 2015 by appending her signature to the Notification of Redundancy.

That during the hearing and cross-examination of the Claimant, she confirmed having attended the meeting of 18th March 2015 where the Respondent's reorganization and its effect on her position, and three (3) options available to her were discussed. The Claimant elected the redundancy option.

That in the Court of Appeal case of **Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 Others [2014] eKLR**, Githinji JA in relying on the case of **Aoraki Corporations Limited v Collin Keith McGavin; CA 2 of 1997 (1998) 2 NZLR 278** held that

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> *"It is convenient in other termination cases, and essential in redundancy cases, to consider whether the dismissal was substantively justified. Thus if dismissal is said to be for a cause it may be substantively unjustified in the sense of a cause not being shown or being subject to significant procedural irregularity as to cast doubt upon the outcome.... Redundancy is a special situation. The employees have done no wrong. It is simply that in the circumstances the employer faces, their jobs have disappeared and they are considered surplus to the needs of the business. Where it is decided as a matter of commercial judgment that there are too many employees in the particular are or overall, it is for the employer as a matter of commercial judgment to decide on the strategy to be adopted in the restructuring exercise and what position or positions should be dispensed with in the implementation of that strategy and whether an employee whose job has disappeared should be offered another position elsewhere in the business. It cannot be mandatory for the employer to consult with all potentially affected employees in making any redundancy decision. To impose an absolute requirement of that kind would be inconsistent with the employer's prima facie right to organize and run its business operation as it sees fit. And consultation would often be impracticable, particularly where circumstances are seen to require mass redundancies. However in some circumstances an absence of consultation where consultation would reasonably be expected may cast doubt on the genuineness of the alleged redundancy or its timing. So, too, may a failure to consider any redeployment possibilities."*

That Githinji JA addressed the scope of the term redundancy and held that –

> *"Besides financial distress, redundancy can also arise in relocations of business or in mechanization of the modes of production as well as where technology can be employed to run a business more efficiently and/or profitably, he, however, focused on the threat to the appellant's economic collapse only. Besides economic distress, redundancy can also arise where the employer finds that he can employ modern technology to his business more efficiently and/or profitably. This is the crisp of the International Labour Organization's Recommendation No. 166 Termination of Employment of 1982 and the decision in the case of* ***G. N. Hale & Son Ltd v. Wellington Caretakers IUW****. In the latter, the New Zealand Court of Appeal rejected the lower court decision that redundancy must only be a commercial decision to ensure the ongoing viability of an employer and held that redundancy can be declared if the employer decides to reorganize his business and run it "more efficiently" and profitably. Locally this view was echoed by this Court in the case of* ***Kenya Airways Corporation Ltd versus Tobias Oganya Auma & others*** *where it was held that the court has no jurisdiction to prevent an employer from restructuring or adopting modern technology so long as it observes all relevant regulations. The decision to declare redundancy has to be that of the employer. In the above New Zealand case of* ***G. N. Hale & Sons Ltd,*** *it was held that so long as the employer genuinely believed that there was a redundancy situation, then any dismissal was justified, and it was not for the court, or the union, to substitute their business judgment with at the of the employer."*

That there was substantive justification for the Claimant's redundancy and the Respondent substantially complied with Section 40 of the Employment Act.

The Respondent submits that redundancy was not the only option presented to the Claimant. The Respondent tried to accommodate the Claimant in the new organizational structure. However, the Claimant disregarded the other two (2) options available to her and selected redundancy herself. Consequently, the question as to whether the redundancy was justified does not arise. The Respondent submits that the termination of the Claimant's employment on the account of redundancy does not fall foul of Section 45 (2) of the Employment Act.

In conclusion the Respondent submits that the Claimant's redundancy was fair, lawful and procedurally done. That the Claimant is not entitled to any of the reliefs sought before this Court as the Claimant's claim lacks merit. The Respondent prays that the Claimant's claim be dismissed with costs.

Analysis and Determination

I have considered the pleadings and evidence, the submissions of the parties and the authorities quoted. The issue for determination is whether or not the redundancy of the Claimant was valid, and whether she is entitled to the prayers sought.

Redundancy is defined in Section 2 of the Employment Act as –

> **"redundancy" means the loss of employment, occupation, job or career by involuntary means through no fault of an employee, involving termination of employment at the initiative of the employer, where the services of an employee are superfluous and the practices commonly known as abolition of office, job or occupation and loss of employment;**

Section 40(1) provides for the procedure of redundancy 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 case of **Kenya Airways v Aviation and Allied Workers Union Kenya and 3 Others** which the Respondent has heavily relied on, the Court of Appeal acknowledged that redundancy is a legitimate ground for termination of employment based on operational requirements of an employer.

It is not contested that the Claimant held a meeting with two officers of the Respondent on 18th March 2015 at which the subject of discussion was re-organisation of the Respondent. Although the Claimant denied that the minutes produced by the Respondent reflected the discussions of the meeting, she acknowledged during her examination in chief that "*I was called and informed that my positon was no longer going to be there. The meeting was in March."* She further stated; "*I was informed Total was not doing well and my position was going to be declared redundant. Already there was restructuring and I had heard that I could be moved to another positon but not a redundancy."*

It is clear therefore that the Claimant was aware that there was restructuring because the Company was not doing well.

On the issue of criteria, the Respondent states that the Claimant's positon was downgraded and was not going to be in management. The Claimant state during cross examination that she was told her positon would be diminished. Her letter of redundancy confirms this position as follows –

"*TOTAL KENYA LIMITED*

IM/HR/012//2015

08 April 2015

Ms. Mercy Muchiri

C/o Total Kenya Limited Nairobi

Dear Mercy,

RE: NOTIFICATION OF REDUNDANCY

This is further to the discussions between yourself, the Corporate Affairs Manager and the undersigned regarding the ongoing reorganization in the Company and its impact on the Administrative function. Arising from this, the Administration function has been reorganized and the resultant position will be at a lower level within the Company's structure. This letter therefore serves to notify you of the intended redundancy with effect from 30th April, 2015.

The proposed payment will be as follows, fess any statutory deductions and liabilities: -

a) Salary up to and including 30th April, 2015

b) Two (2) Months' pay in lieu of notice

c) Severance pay based on one month's basic salary for every year of service

d) Outstanding leave days as at 30th April, 2015

e) Kshs.1.0 M rebate on your outstanding car loan balance as at 30th April, 2015

f) Waiver of outstanding balance of Kshs.916,524.50 on housing loan on amortization.

g)You will remain in the company's medical scheme as per the existing limits, terms and conditions until 31" December, 2015.

However, any medical excess will be borne directly by yourself.

Your final dues will be paid upon satisfactory clearance with the company as per procedure. Your retirement benefits will be handled separately as per the rules and regulations governing the schemes.

Kindly acknowledge receipt and acceptance to the terms as set herein by signing and returning one copy of the letter to the undersigned.

Yours Sincerely

TOTAL KENYA LIMITED

SIGNED

Irene K. Muinde

Human Resources & Administration Manager"

[Emphasis added]

The Claimant's letter referred to the meeting at which she was informed of the intention to downgrade her position.

I therefore find that the Claimant was informed of the intention to downgrade her position in the meeting held on 13th April 2015. She further acknowledged the letter of redundancy dated 8th April 2020 to the effect that she had read, understood and accepted the terms and conditions as stated in the letter. I therefore find that there was valid reason to declare the Claimant redundant and that these reasons were discussed with her as was stated in the letter of redundancy.

On the issue of criteria for selection, it is the Claimant's position that she had served for 6 years and her performance, ability and reliability were not in question. This is not contested by the Respondent.

The Claimant further states that her positon was not declared redundant as someone else, one Pauline Maloba who was previously the Personal Assistant to the Managing Director was appointed to the positon the Claimant previously held barely 2 months after she left. The Claimant however failed to demonstrate whether the said Pauline had served for a shorter or longer period than herself and whether her performance was better than that of the said Pauline. The Act provides that the selection criteria of last in first out that is seniority in time, should only apply where the comparison is between persons of a similar grade and the performance is similar. Having not established the seniority and performance of Pauline, it is not possible for the Court to establish that the said Pauline had been in the Company for a shorter period than the Claimant and her performance not better than the Claimant. Further, the Claimant did not establish that the said Pauline was not taking over the role at a diminished level after the positon was downgraded.

I therefore find that the Claimant has not established that the Respondent did not comply with the selection criteria as set out in the Act. On the contrary, I find that it was clearly explained to the Claimant at the meeting held on 18th March 2015 that her positon would be downgraded and would no longer be in management.

The Claimant's argument that her position was not declared redundant is not correct. The definition of redundancy does not mean that a position is wiped out. Downgrading a position without changing the title may make the holder of the office redundant if the positon requires a less qualified person. This is what the Respondent says happened in the Claimant's case.

The other issues raised by the Claimant are that she was not given a full month's notice as provided in the Act and that the Labour Officer was never notified of the redundancy. These issues have been completely ignored or avoided in the Respondent's submissions. However, in the witness statement of Victoria Tsalwa, she stated at paragraph 7 thereof that the notification of 8th April 2018 was copied to the District Labour Officer. The letter does reflect so.

It is however clear that the Claimant and the District Labour Officer were never notified of the intended redundancy not less than a moth prior to the date of the intended redundancy. Further the letter addressed to the Claimant and District Labour Officer did not state the extent of the redundancy. The provision of Section 40(1)(a) is clear that the letter of notification must state the reasons for and extent of the intended redundancy.

In the case of **Kenya Airways Limited v Aviation and Allied Workers Union**, the Court referred to the decision in **Thomas De La Rue (K) Limited v David Opondo Umutelema (2013) eKLR** where the Court explained the importance of Section 40(1)(a) and (b) as follows:

> *"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..."*

From the foregoing, I find that the notification of the intended redundancy did not comply with the requirements of the law. I however do not think this would invalidate the notice to the extent that the redundancy is deemed to constitute an unfair termination of employment

under Section 45(2) of the Act as pleaded and submitted by the Claimant. This is because although the notice was short by 8 days, the claimant had prior to the notice been informed about the intended redundancy on 18th March 2015. Further she accepted the letter of redundancy, signed it off and accepted the terms thereof which she was paid. She did not protest the redundancy until 29th February 2016, 10 months later. This can be remedied by compensation.

In the circumstances which remedies would the claimant be entitled to?

She prayed for a declaration that she was discriminated. As I have pointed out above, the Claimant has not proved discrimination. This prayer therefore fails.

She also prayed for a declaration that the Labour Officer and herself were not given one month's notice as per the law. As observed above, the notice was short by 8 days and I thus declare that the same did not comply with the law.

The Claimant further prayed for declaration that the selection criteria was not complied with as per the law. I have already held above that she did not prove this averment. The prayer thus also fails.

She further prayed for a declaration that the termination of her employment was unfair in terms of Section 45(1) of the Employment Act. This prayer also fails as I have found that the fact only the notice was short by 8 days does not invalidate the redundancy to the extent that it becomes an unfair termination under Section 45 of the Employment Act. The prayer thus likewise fails. So does the prayer for a declaration that there was a breach of the Claimant's contract of service.

Having not found the termination of the Claimant's employment unfair, she is not entitled to the prayer for reinstatement, which would also not have been available even if the termination was unfair due to the fact that the employment was terminated more than 3 years ago and further that she has not demonstrated exceptional circumstances to entitle her to the remedy of reinstatement. She is also not entitled to the remedy of re-engagement for similar reasons.

The prayer for permanent injunction to prohibit the Respondent from declaring the Claimant redundant is not applicable in the Claimant's case, the claim having been filed long after the redundancy.

I have however noted that the termination of the claimant's employment did not comply with the requirements for notice strictly. For this I will award the claimant two months' salary in compensation.

In view of the foregoing, I will award the Claimant 50% of the taxed costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 9TH DAY OF OCTOBER 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