REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 975 OF 2019

(Before Hon. Justice Hellen S. Wasilwa 11th November, 2020)

MUGUMO MUNENE.....CLAIMANT

VERSUS

NATION MEDIA GROUP LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant was initially engaged by the Respondent in December 1999 as a correspondent and rose through the ranks to be a news editor for the Sunday Nation, a position he held until his employment was terminated.

2. The Claimant instituted this claim on 17/5/2016, challenging the fairness, lawfulness and the procedure adopted to declare him redundant. He therefore sought the following prayers:-

i. A declaration that the Respondent's declaration of redundancy amounts to unfair termination.

ii. A declaration that the Respondent underpaid the Claimant.

iii. A finding that the Respondent ought to have used 15 years in calculating the Claimant's terminal dues and not 13 years.

iv. A finding that the Claimant is entitled to salary arrears accrued from the difference in salaries of Reporter and New Editor as paid between October 2007 and February 2009.

v. An award of Kshs. 162,601,945.22 tabulated as follows:-

a. Proper salary as per the last pay slip worked out as follows:–

Basic pay of Kshs. 278,811.00

15% House Allowance of Kshs. 41,821.00

Car allowance of Kshs. 105,600.00

Totaling to Kshs.426,232.65

b. Salary for 4 days worked in March (426,232.65/30 x 4) – (Kshs. 37,125.00 paid) amounting to Kshs. 19,706.02.

c. 3 months' pay in lieu of contractual notice

(426,232.65 x 3) – (Kshs. 836,433.00 paid) amounting to Kshs. 442,264.95.

d. 40 days accrued leave

(426,232.65/30 x 40) – (Kshs. 371,748.00 paid) amounting to Kshs. 196,562.20.

e. Severance pay for 15 years

Kshs. 6,393,489.75 – Kshs. 3,345,732.00 paid, amounting to Kshs. 3,047,757.75

f. One month's redundancy notice of Kshs. 426,232.65.

g. Gratuity for 15 years

Kshs. 6,393,489.75 – Kshs. 305,202.00 paid amounting to Kshs. 6,088,287.75.

h. Ex gratia pay of 15 days per year for 12 years totaling to Kshs. 2,557,395.90.

i. House allowance arrears for 15 years of Kshs. 7,527,897.00.

j. Salary for days to retirement (as a permanent and pensionable officer)

(426,232.65 x [60 – 41]) x 12 amounting to Kshs. 97,181,044.20.

k. 12 month's compensation for unfair termination amounting to Kshs. 5,114,796.80.

l. Damages for mental torture and suffering of Kshs. 40,000,000.00.

vi. Certificate of service

vii. Costs of the suit.

viii. Any other relief that the Court may deem fit to grant.

3. The Respondent filed a Replying Memorandum on 16th August 2016, in response to the claim.

The Claimant's Case

4. The Claimant avers that when he was promoted to a new editor, the Respondent did not pay him the requisite salary between October 2007 and 1/2/2009 with no explanation given for this anomaly.

5. The Claimant avers that he never had any disciplinary issue during the time he served the Respondent, neither did he receive a warning letter. Instead, he avers that his excellent performance propelled him to the position of News Editor.

6. The Claimant avers that on 4th March 2016, he was called to the Editor-in-Chief's office who was in the company of the Human Resources Director. He was then informed that the Respondent was in the process of restructuring which would render his position inexistent.

7. He was then issued with a redundancy letter the same day which he was required to sign before leaving the office despite requesting for some time to appreciate the contents of the letter. He acceded to the demand and signed the same.

8. The Claimant avers that he was never issued with a notice of the Respondent's intention to declare him redundant. Further, he was never issued with any job evaluation or HR audit that would have served as a basis for reorganizing the Respondent's structure.

9. It is his position that the position of the News Editor is pivotal to the production and running a publication like the Sunday Nation. Additionally, the Respondent had 11 reporters at the time of his redundancy whose work needed to be approved by the New Editor before it is published. The Respondent's main shareholder also purchased an ultra-modern printing press worth Kshs. 2.5 billion. The Claimant avers that the Respondent as hired another person who is currently executing the duties of a news editor.

10. It is the Claimant's position that his redundancy did not adhere to the provisions of Section 40 of the Employment Act as he was never given a notice of intention to declare him redundant neither was the Ministry of Labour issued with a notice. Further, the principles relating to redundancies were not followed since he had a senior and pivotal role in the publication.

11. The Claimant avers that his contract had indicated that he would serve the Respondent until attaining the retirement age of 60 or until he voluntarily retired upon attaining the age of 50.

12. The Claimant avers that the Redundancy Policy in the HR Manual provided that an employee declared redundant was entitled to basic pay in lieu of notice, leave pay in accordance with leave entitlement, pension in accordance with scheme rules and one month's salary for every year worked. Further, the management had the discretion of paying 15 days for every year remaining period to retirement subject to a maximum of 12 months and entrepreneurial training at the expense of the company.

13. The Claimant avers that the Respondent stopped paying him allowance after the confirmation of his employment hence he was

underpaid. The Claimant also avers that the terminal dues paid to him were based on incorrect calculations as his house allowance was not taken into consideration. Further, the same was only considered basic pay yet the Respondent was supposed to include all the allowances. However, other employees' dues had been previously been tabulated using the gross pay.

14. It is the Claimant's case that the Respondent refused to pay him ex gratia payment which had been paid to past employees. Further, the Respondent used 13 years as the basis of calculating his dues instead of 15 years. Lastly, the Claimant avers that he was never paid the difference in underpayment of salary between October 2007 and February 2009. He therefore termed his redundancy as unlawful, unprocedural and unfair.

The Respondent's Case

15. The Respondent contends that while serving as a correspondent, the Claimant was an independent contractor. As such, the Claimant was initially employed by the Respondent as a reporter on 22/1/2003.

16. The Respondent contends that the Claimant is not entitled to any amount above that which was paid to him between October 2007 and February 2009 as he had not been promoted to the position of News Editor.

17. The Respondent denies depriving the Claimant the opportunity to study his redundancy letter before signing it. The Respondent contends that Aga Khan is not its main shareholder and avers that the commissioning of an ultra-modern printing press is irrelevant in this matter.

18. The Respondent denies breaching the provisions of Section 40 of the Employment Act and avers that following the re-organization of its editorial department; news gathering operations, the Claimant's position as a reporter and the nation newspaper division among others was rendered redundant thereby necessitating the termination of the Claimant's employment. The Respondent also denies the allegation that the Claimant's employment was terminated unfairly and unprocedurally.

19. It is the Respondent's position that the Claimant's contract of employment provided for termination of the contract by notice of either parties or salary in lieu of notice. It is the Respondent's further position that the Claimant was entitled to a consolidated salary which took into account the allowances. The Respondent contends that the Claimant was paid all his terminal dues and accepted the same and signed a discharge voucher without disputing the computation. According to the Respondent, the Claimant should have disputed the computation if it was erroneous.

20. The Respondent avers that though the Claimant's contract makes no provision for gratuity, he was paid a gratuity of Kshs. 305,202.00 in good faith hence he is not entitled to the same. The Respondent further avers that according to the redundancy policy, it was the management's discretion to grant an employee 15 day's pay for every year worked up to retirement subject to a maximum of 12 months' pay.

21. The Respondent avers that upon been declared redundant, the Claimant was paid a salary of the 4 days worked in March 2016 of Kshs. 37,175, prorated car allowance for 4 days worked in March 2016 of Kshs. 14,080, 3 months' salary in lieu of notice of Kshs. 836,433.00, payment for 40 annual leave days not taken of Kshs. 371,748.00, redundancy pay of one month's salary for each year completed totaling to Kshs. 3,345,732.00, 1 month's salary in lieu of redundancy notice of Kshs. 278,811.00 and gratuity payment of Kshs. 305,202.00.

22. It is the Respondent's case that the Claimant commenced his employment on 22/1/2003 which was terminated on 14/3/2016 on account of redundancy which was a cumulative period of 13 years. Finally, the Respondent avers that the Claimant's certificate of service is ready for collection but the Claimant has failed to collect the same.

23. The Respondent urges this Court to strike out the suit with costs as it is an abuse of this Court's process since the Claimant has no reasonable cause of action against it.

The Claimant's Rejoinder

24. The Claimant filed a reply to defence on 7/9/2016 in response to the Respondent's Replying Memorandum where he reiterated the averments made in his claim. He contends that there was no reason for terminating his contract on account of redundancy and avers that the Respondent did not follow the provisions of Section 45 of the Employment Act.

25. The Claimant further contends that his contract provides for an itemized pay of basic pay and house allowance hence his salary ought to be recomputed to reflect the house allowance.

26. By consent, the suit was disposed of by way of written submissions with both parties filing their submissions.

The Claimant's Submissions

27. The Claimant submits that he discharged his burden as required by Section 47 (5) of the Employment Act having demonstrated that he was not issued with a notice as required by Section 40 of the Act. Further, he has proved that the Respondent was malicious for declaring him redundant as it filled his position. He relies on the cases of **Bamburi Cement Limited vs. William Kilonzi [2016] eKLR** and **Postal Corporation of Kenya vs. Andrew K. Tanui [2019] eKLR** to buttress his position.

28. The Claimant submits that the Respondent has failed to prove that he was an independent contractor as required by Section 107 of the Evidence Act for failing to produce the Independent Contractor Contract. It is his submissions that Section 10 (7) of the Employment Act places the burden of producing documents on the employer.

29. The Claimant submits that he was paid a basic salary exclusive of house allowance. It is his position that where an employee is paid a consolidated salary, the contract of employment must clearly indicate the same as was held in the cases of **Clifford Sosi Nyabuto vs. Board of Governors – Singhsaba Nursery Primary [2016] eKLR** and **Ayanna Yonemura vs. Liwa Kenya Trust [2014] eKLR**. As such, the Respondent is liable to pay the outstanding allowance due to him.

30. The Claimant submits that the Respondent did not follow the procedure set out in Section 40 as it did not carry out any pre-redundancy procedures and only issued him with the termination letter of 4/3/2016. For instance, the Respondent failed to carry out negotiations with the Claimant or issue the mandatory notices as required by Section 40 and relies on the case of **Kenya Airways Limited vs. Aviation & Allied Workers Union Kenya & 3 Others [Infra]**.

31. He also relies on the cases of **Walter Ogal Anuro vs. Teachers Service Commission [2013] eKLR** where it was held that a termination of employment ought to meet the requirements of substantive and procedural fairness. It is the Claimant's position that the burden of proving that the procedure was adhered to in declaring him redundant was not met.

32. It is the Claimant's submissions that he was not paid all his rightful terminal dues since they were grossly miscalculated and were not a true reflection of what was due to him. He also urged to be compensated for the mental torture he suffered upon termination of his employment after serving the Respondent for 15 years.

The Respondent's Submissions

33. The Respondent submits that before the Claimant was contracted in 22/1/2003, he had been an independent contractor serving the Respondent as a correspondent. As such, that period was not taken into consideration when calculating the Claimant's terminal dues.

34. It is submitted that the Claimant has not adduced any evidence to show that he had been the Respondent's employee from November 1999 as alleged contrary to Section 107 (1) of the Evidence Act. The Respondent submits that the burden of proving the existence of an employment relationship lies with the Claimant and relies on the case of **Casmir Nyakuru vs. Mwakikar Agencies Limited [2016] eKLR** and **Victoria Furnitures Limited vs. Zadock Furniture Systems Limited [2017] eKLR**, to fortify its position.

35. The Respondent submits that through his failure to provide evidence that the termination was marred by malice, the Claimant has failed to discharge his burden of proving that the termination of his employment on account of redundancy was unfair, unlawful and unprocedural as required by Section 47 (5) of the Employment Act and Section 108 of the Evidence Act. To buttress this position, the Respondent relies on the cases of **Benjamin Maundu Syanda vs. Telkom Kenya Limited [2020] eKLR** and **Kennedy Maina Mirera vs. Barclays Bank of Kenya Limited [2018] eKLR**.

36. The Respondent submits that it complied with the provisions of Section 40 of the Employment Act by issuing the Claimant a redundancy notice on 4/3/2016 which indicated that he would be paid 3 months' salary in lieu of contractual notice and one months' salary in lieu of redundancy notice. Further, took into account the seniority in time, skills and abilities; reliability of each employee affected by the redundancy and paid all the redundancy dues as required.

37. The Respondent submits that redundancy is a legitimate ground for terminating a contract of employment provided there is a valid reason. The Respondent contends that the Respondent merely exercised its right to make commercial decisions on how its operations are run and cannot be castigated for that. It is submitted that it was necessary to abolish several positions as in order to optimize the Respondent's editorial department and news gathering operations.

38. The Respondent relies on the case of **Kenya Airways Limited vs. Aviation & Allied Workers Union Kenya & 3 Others [2014] eKLR**, **Aoraki Corporations Limited vs. Collin Keith McGavin; CA 2 of 1997 [1998] 2 NZLR 278** and **Pure Circle (K) Limited vs. Paul K. Koech & 12 Others [2018] eKLR** to buttress the above position.

39. It is the Respondent's submissions that the Claimant accepted all his terminal dues without disputing the same hence not entitled to the reliefs sought. Further, the Respondent submits that the Claimant failed to adduce evidence to show that the terminal dues paid to him were not a reflection of what was due to him.

40. The Respondent submits that under the Claimant's contract of employment, he was entitled to a consolidated salary which took into account house allowance as clearly evidenced in his pay slip. As such, the claim for unpaid house allowance is unfounded. The Respondent relies on the case of **Joshua Nyagol Onyango & 4 Others vs. Relief & Missions Logistics Limited [2017] eKLR** where it was held that an employee who was paid a consolidated salary was not entitled to house allowance.

41. The Respondent submits that the Claimant is not entitled to any of the reliefs sought because the termination of his employment was fair, he was paid all his dues as required by law, he had worked for a cumulative period of 13 years and not 15 years, has failed to show that he served as a news editor between October 2017 and February 2009 neither has he provided the justification for payment of gratuity as claimed whose payment was discretionary.

42. The Respondent relies on the cases of **Fredrick Gitau Kimani vs. Attorney General & 2 Others [2012] eKLR**, **Harrison M. Kariuki & 14 Others vs. Kenya Farmers Association [2020] eKLR** and **Transport & Allied Workers Union vs. Societe Internationale De Telecommunications Aeronatiques [2011] eKLR**, to support its position.

43. The Respondent submits that the claim for salary for each year remaining until retirement is not recognized by law hence awarding the same would unjustly enrich the Claimant. Further, this being a special damage, the Claimant did not adduce any evidence to show that he had worked until retirement. The Respondent relies on the case of **D.K. Njagi Marete vs. Teachers Service Commission [2013] eKLR** where the Court observed that the remedies must be proportionate to the economic injuries suffered and are not aimed at facilitating unjust

enrichment. The Court in **Linnet Ndolo vs. Registered Trustees of the National Council of Churches of Kenya [2014] eKLR** had a similar holding.

44. The Respondent relied on the case of **Julimatt Enterprises Limited vs. Vincent Mugadia Kitazi [2018] eKLR** to urge this Court to find that the 3 months' contractual notice and 1 months' redundancy notice was sufficient to cushion the Claimant for the job loss hence the claim for 12 months' salary is unmerited.

45. The Respondent submits that the Claimant has failed to meet the threshold set in the case of **Fredrick Gitau Kimani vs. Attorney General & 2 Others [Supra]** hence the claim for damages for mental torture and suffering should be dismissed with costs. The Respondent urged this court to condemn the Claimant to bear the costs of this suit having failed to prove his case on its merits.

46. I have examined the evidence and submissions of the Parties herein. The issues for this Court's determination are as follows:-

1. Whether the Respondent had valid reasons to termination the Claimant's services.

2. Whether the Respondent followed due process before terminating the Claimant's services.

3. Whether the Claimant is entitled to the remedies sought.

Issue No. 1 and 2nd Reasons and Due Process

47. The Claimant was issued with an appointment letter dated 22/1/2003 indicating that he had been appointed as a Reporter. This employment was subject to a probation period of 3 months and thereafter he was to be confirmed in employment.

48. The employment could be terminated after giving notice or pay in lieu as per the prevailing union terms. The Claimant accepted the terms of employment and signed the appointment on 1/2/2003. Salary payable was indicated plus the house allowance.

49. On 4/3/2016, the Claimant was issued with a redundancy letter indicating that he was declared redundant with effect from 4/3/2016. No prior notice was issued to him. No consultation took place.

50. Section 40 of the Employment Act states 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".

51. There is no indication that the Respondent followed the above procedure before declaring the Claimant redundant.

52. In the case of **Kenya Airways Limited vs Aviation & Allied Workers Union and 3 Others** Maraga JA (as he then was) held as follows:-

"51. Kenya is a State party to the International Labour Organization (ILO), which it joined in 1964 and is bound by the ILO conventions. Article 13 of Recommendation No. 166 of the ILO Convention No. 158-Termination of Employment Convention, 1982-requires consultation between the employers on the one hand and the employees or their representatives on the other before termination of employment under redundancy. It reads:-

"1. When the employer contemplates terminations for reasons of an economic, technological, structural or similar nature, the employer shall:-

(a)provide the workers' representatives concerned in good time with relevant information including the reasons for the terminations contemplated, the number and categories of workers likely to be affected and the period over which the terminations are intended to be carried out;

(b) give, in accordance with national law and practice, the workers' representatives concerned, as early as possible, an opportunity for consultation on measures to be taken to avert or to minimise the terminations and measures to mitigate the adverse effects of any terminations on the workers concerned such as finding alternative employment."

52. As I have said, besides this Convention, the requirement of consultation is implicit in the principle of fair play under Section 40(1) of the Employment Act itself and our other labour laws. The notices under this provision are not merely for information. Read together with Part VIII of the Labour Relations Act, 2007 which provides for reference to the Minister for Labour of trade disputes, including those related to redundancy (see Section 62(4)) for conciliation, I am of the firm view that the requirement of consultations implicit in these provisions. The purpose of the notice under Section 40(1) (a) and (b) of the Employment Act, as is also provided for in the said ILO Convention No. 158-Termination of Employment Convention, 1982, is to give the parties an opportunity to consider "measures to be taken to avert or to minimize the terminations and measures to mitigate the adverse effects of any terminations on the workers concerned such as finding alternative employment." The consultations are therefore meant to cause the parties to discuss and negotiate a way out of the intended redundancy, if possible, or the best way of implementing it if it is unavoidable. This means that if parties put their heads together, chances are that they could avert or at least minimize the terminations resulting from the employer's proposed redundancy. If redundancy is inevitable, measures should to be taken to ensure that as little hardship as possible is caused to the affected employees. In the circumstances, I agree with counsel for the 1st respondent that consultation is an imperative requirement under our law. Mr. Oraro's criticism of the learned trial Judge's reliance on the UK Employment Appeals Tribunal's decision in Mugford v. Midland Bank, UK Employment Appeal Tribunal, 10 and the treatise by Rycroft and Jordan, - "A guide to the South Africa Labour Law" both of which dealt with the requirement of consultation, was therefore unfair. Those were authorities on comparative jurisprudence which the learned Judge was perfectly entitled to make reference to and where appropriate rely on".

53. In this case, although consultation was not provided for in the Collective Bargain Agreement (CBA) of the parties, it was nonetheless contained in the 10 App No. 760 of 1996 IRLR 208 (1997). Recognition agreement between the parties dated 18th December 2008. Even without that provision, the appellant held two consultative meetings with the 1st Respondents on 3rd and 10th August 2012 and a third one would have been held the following week had the 1st respondent not obtained an injunction in Industrial Court Cause No. 1360 of 2012 halting all the appellant's activities in the redundancy programme. I am not bothered by the issue of whether or not the people, who purported to represent the 1st appellant in those meetings, were authorized to negotiate the dispute on behalf of the 1st respondent. The evidence on record shows that there were wrangles in the leadership of the 1st respondent and the appellant cannot therefore be blamed for consulting with the officials it thought represented the 1st Respondent. What concerns me is the fact that both the parties regarded consultation as an important step in the redundancy programme. The issue is whether or not, before the 1st respondent obtained an injunction, proper and effective consultations were held or were possible and this is where the issue of the validity of the notice the appellant gave comes in.

54. Section 40(1) of the Employment Act requires employers contemplating redundancy to give the employees or their trade union notice of at least one month. In addition to providing the parties with an opportunity to try and avert or minimize terminations resulting from redundancy and mitigate the adverse effects of such terminations, the other objective of a reasonable notice, as was stated in the English case of Williams v. Compare Maxam Ltd11 is:

"to enable the union and employees who may be affected to take early steps to inform themselves of the relevant facts, consider possible alternative solutions and, if necessary, find alternative employment in the undertaking or elsewhere."

55. Unless the circumstances are such that it would be an utterly futile exercise to hold any meaningful negotiations, consultation has to be real and not cosmetic. The New Zealand Chief Judge succinctly expressed this point in the case of Cammish v. Parliamentary Service12: "<u>Consultation has to be a reality, not a charade</u>. The party to be consulted must be told what is proposed and must be given sufficiently precise information to allow a reasonable opportunity to respond. A reasonable time in which to do so must be permitted. The person doing the consulting must keep an open mind and listen to suggestions, consider them properly, and then (and only then) decide what is to be done." [Emphasis supplied]

56. In this case, as I have pointed out, the notice of the proposed redundancy was given by appellant's Chief Executive Officer on 1st August 2012 and the negotiations commenced on 3rd August 2012. That is not a notice of at least 30 days. It is therefore obvious that with hardly two days, the 1st respondent cannot have prepared for meaningful negotiations. The 1st respondent's views on whether redundancy would have been avoided by say a freeze on salary increments and how the employees' hardships arising from redundancies could be minimized were never considered. In the circumstances, even without the said injunction that the 1st respondent obtained which halted all activities in pursuance of the proposed redundancy, I do not think that any meaning consultations would have taken place. I therefore agree with the learned Judge and find that the appellant flouted the requirements of notice and consultation".

53. In this case however, no such consultation that ever took place. There is no indication that even the Labour Officer and the Union were informed.

54. Issue of validity of reasons before termination on account of redundancy is important as much as the issue of due process. The Respondents have not demonstrated this issue.

55. It is therefore my finding that the termination of the Claimant on account of redundancy was unfair and unjustified as provided for under Section 45 of the Employment Act 2007 which states as follows:-

> ***(2) "A termination of employment by an employer is unfair if the employer fails to prove:***
>
> ***(a) that the reason for the termination is valid;***
>
> ***(b) that the reason for the termination is a fair reason:-***
>
> ***(i) related to the employee's conduct, capacity or compatibility; or***
>
> ***(ii) based on the operational requirements of the employer; and***
>
> ***(c) that the employment was terminated in accordance with fair procedure".***

Remedies

56. Having found that the Claimant was unfairly terminated without notice on termination, I award him as follows:-

> ***1. 10 months' salary as compensation for unfair termination = 384,411 x 10 = 3,844,110/=.***
>
> ***2. The Claim for payment of other redundancy dues is not proved because as per Appendix 4, the Claimant was paid the dues in the redundancy letter.***
>
> ***3. The Respondent will pay costs of this suit plus interest at Court rates with effect from the date of this judgement.***

Dated and delivered in Chambers via zoom this 11th day of November, 2020.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Miss Mugo holding brief Njeri for Claimant – Present

Kariuki for Respondents – Present