



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 175 OF 2015**

**(Before Hon. Justice Hellen S. Wasilwa on 7<sup>th</sup> February, 2019)**

**FRANCIS KALAMBA NZUNG’U .....CLAIMANT**

**VERSUS**

**POLLMANS TOURS & SAFARIS LIMITED.....RESPONDENT**

**JUDGEMENT**

1. The Claimant herein filed his Statement of Claim on 12<sup>th</sup> February 2015 alleging unfair termination on account of redundancy. He seeks the following reliefs:

- i) An order for reinstatement of the Claimant to his former employment and position without any loss of benefits and/or seniority and continuity of service.*
- ii) In the alternative to prayer (i) above, an order that the Respondent re-engage the Claimant in the work comparable to the work of Customer Service Coordinator at the same salary, allowances and benefits.*
- iii) In the alternative to prayer (i) and (ii) above, the payment to the Claimant actual pecuniary loss suffered since the date of declaration of redundancy including payment for salary/wages as would have been earned, pension, housing allowance and together with all accruing allowances.*
- iv) A declaration that the Claimant has suffered unfair wrongful redundancy exercise in first instance.*
- v) A declaration that the Respondent intentionally breached section 40 of the Employment Act, 2007 Articles 2,10,20,26,27,28,41,43,47 and 50 of the Constitution, 2010.*
- vi) That this Honourable Court be pleased to make a declaration that the action of the Respondent is inoperative, unlawful, a nullity and or void ab initio.*
- vii) Maximum compensation for loss of employment.*
- viii) General damages.*
- ix) Aggravated and Exemplary damages*
- x) Any other and further relief the Honourable Court may deem fit and grant.*
- xi) Cost of this suit with interest.*

2. The Respondent filed its Memorandum of Reply on 16<sup>th</sup> March 2015 denying having wrongfully and unfairly terminated the Claimant. It avers that it justifiably terminated the Claimant’s employment by way of redundancy after its restructuring process and paid the Claimant his dues in full.

**Claimant’s case**

3. The Claimant avers that he was employed by the Respondent on 1<sup>st</sup> October 1993 until 31<sup>st</sup> December 2014 when he was declared redundant by the Respondent. He avers that on 1<sup>st</sup> December 2014 he received official communication from the Respondent by way of a letter informing him of an impending restructure of the Respondent due to a drastic decline in business and was given one-month notice to exit the employment of the Respondent.

4. During the hearing, the Claimant testified that he was initially employed as Customer Service Representative and later promoted to management level as a Customer Service Co-ordinator and had worked for the Respondent for 21 years. He testified that he earned a basic monthly salary of Kshs. 98,000 at the time of his termination. He testified that he could not join a Union during his employment.

5. He testified that on 4<sup>th</sup> April 2014 he was issued with a letter dated 1<sup>st</sup> December 2014 addressed to him by the Respondent from its Headquarters situated in Mombasa. He testified that he was neither issued with a notice nor was there a communication with the Operations Manager. He testified that his termination was due to tuff wars and directives by the Respondent.

6. In cross-examination, the Claimant testified that he was not issued with any communication of the impending redundancy and was not aware that the company was going through financial difficulties. He further testified that in 2014 and 2013, travel advisories were issued against Kenya which minimally impacted on tourism but business stabilised later in 2014. He testified that there were 14 staff members in their department and only 4 of them were terminated.

7. He testified that the termination letter stated that his Department and Reservation Department were to be consolidated. He testified that he was only paid Kshs. 250,000 as provided for in his payslip and denied sending emails to shareholders.

#### **Respondent's case**

8. The Respondent avers that in 2014 the worsening security situation in the country and the issuance of travel advisories against non-essential travel to Kenya by government authorities in North America and Europe resulted in the sudden collapse of the entire industry. It further avers that the Ebola outbreaks in West Africa also led to a downturn in tourist numbers. It avers that its business and profitability was consequently affected necessitating a re-structure process and the eventual abolishment of positions leading to redundancy.

9. RW1 Gershom Odhiambo, the Respondent's Human Resource Manager testified on behalf of the Respondent. He testified that the redundancy occurred in 2014 and was occasioned by the business downturns following travel advisories.

10. He testified that the Respondent undertook measures to keep afloat with the customer service department being merged with the reservation department leading to the Claimant being declared redundant. He testified that the Claimant was notified of his termination and that he was duly paid his termination dues by cheque of Kshs. 1,513,859. He further testified that after termination the Claimant wrote emails to shareholders who later informed authorities to track persons who were sending emails to the Respondent's clients.

11. In cross-examination, RW1 testified that though he did not deliver the letter to the Claimant it was delivered to him by Mr. Abdi the Operations Manager. He further testified that he was not present in any meeting where termination was discussed.

12. He clarified that the Claimant was issued with a cheque but it was presented to CBA Bank as per the agreement between the Bank and the Respondent since the Respondent had a loan. He further testified that the Claimant was entitled to gratuity and not severance pay.

13. In re-examination, the RW1 testified that the salary paid to the Claimant was consolidated till termination.

#### **Claimant's Submissions**

14. The Claimant submitted that there was absolutely no evidence of any discussion, letter or any other form of communication indicating that he had been informed of the redundancy situation before his termination. He submitted that the termination letter did not outline his entitlements as his gratuity and severance pay, which ought to be calculated on 60 days for each completed year of service.

15. He submitted that these entitlements are well defined and stipulated in the Collective Bargaining Agreement between the Respondent and Transport Workers Union that came into force on 13<sup>th</sup> July 2013 and as provided under Section 40 of the Employment Act. The Claimant also submitted that he was informed that his position was non unionisable and was not availed any negotiating mechanism.

16. The Claimant submitted that the Respondent still requires and provides the services of Customer care which he was offering at the time of his termination. He further submitted that the loan referred to by the Respondent still exists to date and denied having received Kshs. 2.2 million as stated by RW1.

#### **Respondent's submissions**

17. The Respondent submitted that the Claimant's submissions raised issues that were not in his pleadings. It relied on the case of **Chalicha Farmers' Co-operative Society Limited v George Odhiambo & 9 Others [1987] eKLR** where the Court held:-

*“...however sympathetic a judge may be towards the defendants, no order can be made (unless by consent) outside pleadings”.*

18. The Respondent submitted that the Claimant testified that he was aware of the financial challenges and that the Respondent had showed that its business was affected by the issuance of travel advisories. Therefore, its justification was true and founded. It relied on the Court of

19. The Respondent submitted that the selection criteria of the roles that were declared redundant was explained and dues were paid to the Claimant pursuant to the Employment Act.

20. It submitted that the Claimant was aware of the entire process leading to the redundancy as per his email dated 9<sup>th</sup> October 2014 in which he sought an adjustment of the implementation to ensure the Respondent had adequate staff during the transition.

21. It further submitted that the labour officer was notified of the intended redundancy in a letter dated 1<sup>st</sup> October 2014 and that the Claimant was paid all his dues as required under the Employment Act, which included his salary, unutilized leave days and severance pay on the basis for each year of completed service.

22. The Respondent submitted that the Claimant was not only involved in his department's consultation but also met his immediate supervisor to discuss the separation. It submitted that it had followed the procedure required under Section 40 of the Employment Act and relied on the case of **Africa Nazarene University v David Mutevu & 103 others [2017] eKLR.**

23. The Respondent submitted that the Claimant had not provided any evidence to support the allegations that the Respondent had infringed Articles 2, 20, 26, 27, 28, 41, 43, 47 and 50 of the Constitution. It further submitted that the Claimant had not presented to the Court any basis on which he should be issued with reliefs sought and hence the Claim should be dismissed with costs.

24. I have examined all the evidence and submissions of the parties. This being a case of redundancy, the main issues for this Court's determination are as follows:-

*1. Whether the Respondent had a real redundant situation that warranted declaring the Claimant redundant.*

*2. Whether the Respondent adhered to the provisions of the law (sic-Section 40 of Employment Act) in declaring the Claimant redundant.*

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

25. On the first issue, the Respondent submitted that their business went down following travel advisories from USA and Europe and the Ebola outbreak in West Africa which led to diminished number of tourists and which interfered with the Respondents' business.

26. The Respondents aver that these are the reasons which led to their reorganization and which included merging of two departments affecting the Claimant directly hence the redundancy.

27. Due to submissions made by Respondents on the economic down turn experienced and which Claimant admitted, there was indeed a redundancy situation. In **Tobias Ongaya Auma & 5 Others vs. Kenya Airways (supra) and GN Hale & Son Limited vs Wellington Caterers**, the Court of Appeal reiterated the fact that *"an employer has the right to declare redundancies where it is convinced that circumstances requiring redundancies have arisen and the Industrial Court was not entitled to substitute its own decision for that of the company particularly where it has exercised its discretion properly, and in the best interest of the company as well as its stakeholders"*.

28. On the 2<sup>nd</sup> issue, the requisite law on redundancy is Section 40 of Employment Act which 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.*

29. On 1.12.2014, the Claimant was served with a one month redundancy notice which was to take effect on 31.12.2014. In the circumstances, the Respondent gave the Claimant requisite notice of 1 month as per Section 40 of Employment Act.

30. The Claimant has however submitted that there was no consultation before this redundancy notice was issued. He denied he had any meeting with Operating Manager before the redundancy notice as the said Manager had been sacked on 26/11/2014.

31. There is no evidence that indeed, there were consultations between the Claimant and Respondent before the termination was effected. This was in breach of the requirement that before redundancy, there is need for consultation. The CA No. 46 of 2013 Kenya Airways Limited vs Aviation and Allied Workers Union Kenya and 3 Others (2014) eKLR Maraga JA (as he then was considered the position of consultation before redundancy and rendered himself thus:-

*“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 minimize 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 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”.*

32. There is no indication that such consultation was done and the Claimant has explained the abrupt nature in which this redundancy was done.

33. On issue of remedies sought, I find the Claimant was paid some redundancy dues as his payslip. He was paid all dues for leave pending and was given notice. Due to lack of consultation, which I do not consider a grave violation, I will award him 6 months' salary as compensation accordingly =  $6 \times 98,152 = 588,912/=$ .

34. 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 open Court this 7<sup>th</sup> day of February, 2019.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Charles Oguok holding brief Mark Ogada for the Respondent

Claimant in person present