REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 91 OF 2018

(Before Hon. Lady Justice Hellen S. Wasilwa on 12th June, 2019)

DESMOND MUKOLWE.....CLAIMANT

VERSUS

ECART SERVICES KENYA LIMITED.....RESPONDENT

JUDGEMENT

1. The Claimant, Desmond Mukolwe filed a Statement of Claim dated 23/01/2018 against the Respondent, Ecart Services Kenya Ltd. He avers that on 11/05/2015, he was employed as Head of Human Resource by the Respondent who trades as Jumia Kenya and he used to report to the Managing Director.

2. That the pertinent terms of the employment contract were that he would be on probation for 3 months and would receive a confirmation letter upon completion; he would receive a gross monthly salary of Kshs. 220,000/=; and unless his employment was validly terminated, his retirement age would be 55 years.

3. That his job description included advising and supporting managers on Human Resource impact of business activities; maintaining organizational staff; working towards motivating staff; implementing the code of ethics among staff; ensuring legal compliance; day to day administration of personnel; engaging the employees; ensuring a safe and secure work environment; and accomplishing staff results.

4. He avers that on or about 02/02/2016, he received communication from the Respondent's Group Head of Human Resource that the Respondent was planning to undertake structural changes and specifically merge the Group Human Resource functions into 3 major departments i.e. Human Resource Operations, Administration and Recruitment Development. That these would be headed by the Group Human Resource Manager assisted by 3 Human Resource Business Partners and that he was designated for deployment as HR Manager (Business Partner - Recruiting & Development).

5. That he was asked to act in that position until the same was formalised and so he discharged his duties and obligations under his new designation but never received any formal confirmation of this change from the Respondent. That these changes were also communicated through an email communication sent to him and various persons in the company on 17/02/2017.

6. That on or about May 2017, he received information that the Respondent was recruiting a HR Business Partner and interviews had been conducted in that respect, despite the fact there was no such vacant position within the Group to his knowledge.

7. The Claimant further avers that on 09/06/2017, he was summoned for a meeting by the Respondent's Group Human Resources Manager, Ms. Nancy Dayo who informed him that his position was being abolished due to the restructuring of the Human Resource Department.

8. That he was consequently informed he would be rendered redundant and his employment contract terminated after which Ms. Dayo handed to him a letter dated 09/05/2017 that was titled "Redundancy". That during the said meeting, Ms. Dayo also informed him that he would be invited for an interview in the week of Monday 12/07/2017 to fill a HR Business Partner position but that he responded to an email invitation on 10/06/2017 declining to attend the same.

9. That although the letter was dated May 2017, it referred to a meeting between him and Ms. Dayo said to have taken place on 09/06/2017 during which they supposedly discussed the termination of his employment emanating from the Respondent's structural changes and that it also set out the terminal dues payable to him.

10. That the letter contains misrepresentation because there were no discussions as he was informed of a decision that had already been

made, he was compelled to sign the letter that already had Ms. Dayo's signature and that the letter was issued without following the law relating to redundancies. That he later found out his position was filled by one Caroline Nzioka on 12/07/2017 thus proving that he was unlawfully discriminated against and that his services were unlawfully and unfairly terminated.

11. While listing the Particulars of Unlawful Discrimination, he states that he was victimized without due regard to his seniority in time, skill, ability and reliability vis-à-vis other employees affected by the redundancy as required under **Section 40(1) (c) of the Employment Act**.

12. That he was victimized under a purported redundancy so that a person related to the said Ms. Dayo and the Respondent's senior management could be recruited. He also lists the Particulars of Unlawful termination stating that the Respondent failed to notify him of the reasons for and the extent of the intended redundancy.

13. That it also failed to afford him with an opportunity to make representations prior to terminating his employment and to comply with **Section 10 (5) of the Employment Act** in effecting the changes of his contract in writing. The Claimant prays for judgment against the Respondent for:-

a) A declaration that the Respondent's termination of the Claimant's employment was unlawful and unfair.

b) A declaration that the Claimant was unlawfully discriminated against by the Respondent.

c) Kshs. 2,640,000/= being compensation for unfair and unlawful termination equivalent to the Claimant's 12 months' salary.

d) Kshs. 220,000 being one month's salary for failing to give a notice of intention to declare redundancy.

e) Interest on (c) and (d) above from the date of filing suit to the date of payment in full.

f) General and punitive damages for unlawful discrimination.

g) Costs of the claim.

14. The Respondent filed its Reply to Statement of Claim dated 04/05/2018 confirming it had employed the Claimant and had terminated his contract on account of redundancy. It denies that it unfairly terminated and discriminated the Claimant stating that he was all along aware of the said restructuring and that it needed to downsize so as to maintain profitability in its business and hence the need for a redundancy exercise.

15. That it also wrote to the Labour office informing them of the intention to declare redundancies. That when it implored the Claimant to apply for the position, he refused noting that it would mean he takes a pay cut and that he instead opted for his redundancy benefits which he felt was better pay.

16. That the Claimant cleared with it and was paid his terminal dues and further issued with a certificate of service thus marking his separation from employment with the Respondent. That it openly advertised the position of Business Partners, shortlisted 5 candidates and carried out interviews on 26/05/2017 and that while the position was offered to Caroline Nzioka, she had unfortunately already secured alternative employment. That it only managed to fill the said position in October 2017 and that the occupant has no relations within the organization.

17. The Respondent denies all the averments and particulars of unlawful termination and discrimination stating that it adhered to due redundancy procedure, which also affected different positions held by distinct people. That the claim for compensation for discrimination is unfounded while the claim for one month's salary for notice is untenable and that the suit herein should therefore be dismissed with costs.

18. The Claimant testified in court stating that he would like his Written Statement dated 29/01/2018 to be his testimony in this case and the filed bundle of documents to be his exhibits. On cross-examination, he stated that he worked for the Respondent for 2 years and that he signed the redundancy letter on 12/06/2017.

19. RW1, Josephine Mangoli testified that she signed a Witness Statement dated 25/05/2018 which she would like to adopt as her evidence in chief together with the list of documents dated 04/05/2018.

Claimant's Submissions

20. The Claimant submits that termination must both be substantively and procedurally fair as was stated by the Court of Appeal in **Naima Khamis –v- Oxford University Press (E.A) Ltd [2017] eKLR** and that the termination of his employment did not meet this threshold. Further, that his contract of employment was also breached.

21. He submits that **Section 2 of the Employment Act** defines redundancy as "*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*." That this is further explained by Maraga J as he then was in the Court of Appeal case of **Kenya Airways Limited –v- Aviation & Allied Workers Union Kenya & 3 Others [2014] eKLR**.

22. That consequently the purported redundancy by the Respondent fails to meet the standard set by law in **Section 40(1) of the**

Employment Act and since she was not a member of a union, the applicable procedure is the one provided in **Section 40(1) (b)** requiring notification in writing to him and the labour officer.

23. That the Court of Appeal in **Barclays Bank of Kenya Ltd & another –v- Gladys Muthoni & 20 others [2018] eKLR** cited the case of **Thomas De La Rue (K) Ltd vs. David Opondo Omutelema [2013] eKLR** in explaining the length and scope of the notice required stating that it was similar as that provided for in **Section 40(1) (a)** being one month before the date when the redundancy is to take effect.

24. That him being invited for an interview proved that the Respondent was already seeking other employees to occupy his position which is contrary to what the Court held in **Agnes Ongadi –v- Kenya Electricity Transmission Company Ltd [2016] eKLR** that:-

> ***"A redundancy must therefore be justified before an employer can commence recruitment of new officers to replace existing employees who have on-going contracts of employment and hold substantive offices in similar capacity as the advertised position…"***

25. The Claimant submits that the manner in which he was unfairly terminated was discriminatory which is outlawed under **Article 27 of the Constitution** and **Section 5(2) of the Employment Act** which requires employers to eliminate any form of discrimination in its policies or practice. That **Section 5(3) (b)** further disallows discrimination on matters arising out of employment.

26. As to whether he is entitled to the reliefs sought, he relies on the case of **Kenya Tea Growers Association –v- Kenya Plantation & Agricultural Workers Union [2018] eKLR** where the Court of Appeal emphasised on the right to fair labour practices under **Article 41 of the Constitution**.

27. That since this Court is empowered to make orders including a declaratory order, that this Court should be pleased to declare that the termination of his employment was unfair, unlawful and discriminatory.

28. That he is also entitled to compensation as under **Section 49 (1) of the Employment Act** and invites this court to exercise its discretion and award the maximum compensation on account of the Respondent's transgression of the law.

29. He submits that it is settled law that unlawful discrimination attracts a remedy of damages generally as was held in **VMK –v- C U EA [2013] eKLR** and that as for punitive damages, he relies on the case of **Ol Pejeta Ranching Limited –v- David Wanjau Muhoro [2017] eKLR** and invites this Court to find that punitive damages are justified.

30. That the Court of Appeal in the **Ol Pejeta case** held that **Section 12 (4) of the Employment & Labour Relations Court Act** empowers this Court to award costs as it considers just and since costs follow the event and in view of the unfair termination process, he should be awarded costs.

Respondent's Submissions

31. The Respondent submits that the new created position which the Claimant served in an acting capacity did not automatically as of right belong to him and that he was never confirmed for the position. That this is also buttressed by the fact that he was invited for the initiated interview and recruitment process and invites the court to look at the finding in **Nairobi ELRC Petition No. 41 of 2015: Henry Ochido –v- NGO Co-ordination Board**.

32. That the averments on substantive unfairness as raised by the Claimant should fail as they are unjustified. It submits that the Claimant was notified of the redundancy via email which fact he admits to and that it also issued a valid notice to the labour office on 29/05/2017 and thus fulfilling procedural fairness as required.

33. It is submitted by the Respondent that it has proved there was no preferred candidate for the said advertised position and that the record confirms its witness testified that other persons were also declared redundant. That since it has also presented to court evidence demonstrating legality of the redundancy exercise culminating in the lawful termination of the Claimant's employment, he is not entitled to the reliefs sought.

34. I have examined all the averments of the Parties plus submissions filed herein. The issues for determination are as follows:-

1. ***Whether there were valid reasons to declare the Claimant redundant.***

2. ***Whether due process was followed before Claimant was declared redundant.***

3. ***What remedies to grant in the circumstances.***

35. On the first issue, the Respondent have averred that they declared the Claimant redundant due to the restructuring process they had undertaken.

36. The Claimant's position is that there was no real redundancy situation as the Respondent carried out interviews for a position he occupied in an Acting capacity.

37. This Court may not wish to go into details in determining whether there was a redundancy situation or not because the law is clear that an employer has a prerogative to restructure its operations.

38. There were interviews carried out and the Claimant was invited to attend but he opted not to. In **Kenya Airways Limited vs Aviation and Allied Workkrs Union Kenya and 3 Others (2014) eKLR,** the Court of Appeal opined that:-

> ***"Further, it is not the role of any tribunal to prevent an employer from restructuring or adopting modern technology so long as it observes all relevant regulations".***

39. The Court of Appeal further opined that:-

> ***"It is clear 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.***

40. In the current circumstances, it is my finding that the Respondent had valid reason to carry out the redundancy and merge the departments in issue and there is no contrary reason to find otherwise.

41. On the issue of due process, the Claimant avers he was not given any notice before the redundancy was carried out. The Respondent insist there was prior discussion on this issue.

42. The letter declaring the Claimant redundant is dated 9.5.2017. The redundant letter refers to a discussion on 9.6.2017, which Claimant aver was never there. The redundancy was to take effect immediately.

43. Since the Respondent aver there was previous discussion, the onus of proving this lies upon them. There is no evidence of any previous communication to the Claimant on this redundancy save for the letter dated 9.5.2017 which was served upon the Claimant on 12.6.2017, the day he was declared redundant. Even the letter to the Ministry of Labour was dated 29.6.2017 after the redundancy had taken effect.

44. It is apparent therefore that there was no due notice or discussion with the Claimant before the redundancy and this was contrary to Section 40 of Employment Act 2007 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".***

45. In Kenya Airways case (supra) issue of notice and commutation was discussed by Maraga JA (as he then was) and he opined 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 minimise 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' 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".

46. In case of the Claimant, I note that due process was not followed and therefore the redundancy was unfair and unjustified.

47. In view of the above finding, I find the Claimant is entitled to compensation for the unfair redundancy and I award him:-

1. 9 months' salary as compensation = 9 x 220,000 = 1,980,000/=

2. I also award Claimant 1 month's salary as notice pay = 220,000/=

<u>TOTAL = 2,200,000/= less statutory deductions</u>

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 open Court this **12th day of June, 2019.**

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Mwangi for Claimant – Present

Kiiru for Respondent – Present