



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE 1996 OF 2015**

*(Before Hon. Lady Justice Hellen S. Wasilwa on 24<sup>th</sup> September 2019)*

**JECONIAH OPIYO MAKOUDE.....CLAIMANT**

**VERSUS**

**BUILD AFRICA KENYA.....RESPONDENT**

**JUDGMENT**

1. The Claimant herein filed a Memorandum of Claim dated 10<sup>th</sup> November, 2015, where the Claimant states that he was wrongfully, unfairly and unlawfully terminated from the Respondent's employment, a duly registered Non-Governmental Organisation under the Non-Governmental Organisations Co-ordinations Act with its head office in the United Kingdom.
2. The Claimant further avers that he was employed by the Respondent between the months of April, 2011 and August 2015 in the position of Programmes Quality Manager. He further averred that he was later confirmed in the position of Deputy Country Director of the Respondent as from January, 2014 and was placed on an open ended contract as evidenced by "OM1" the letter of confirmation.
3. He further stated that his job description in the position of Deputy Country Director was as provided in annexure "OM 2" to the Memorandum of Claim.
4. The Claimant contends that he performed his duties diligently and to the Respondent's satisfaction as evidenced by the promotions and salary increments from Kshs. 340,000/- in the year 2011 to Kshs. 444,704/- in the year 2015 as evidenced by annexure "ON5" copies of his payslips.
5. The Claimant further contends that unknown to him the International Senior Management agreed that his position be declared redundant despite the position having been maintained in the Organization Organogram.
6. The Claimant confirmed that the Respondent through its Country Director called him to a meeting where he was informed that his position of Deputy Country Director had been declared redundant. He further avers that he was not furnished with any minutes of any meeting where this resolution was arrived at.
7. The Claimant contends that the decision to declare his position redundant was based on malice and that the Respondent proceeded to hire a programme Development Manager whose duties were exactly the same as those carried out by the Deputy Country Director.
8. The Claimant further contends that he was issued with a letter on 19<sup>th</sup> June, 2015 titled 'notice of intention to declare position of Deputy Country Director (Programmes) redundant', which letter he duly responded to on 2<sup>nd</sup> July, 2015 by pointing out to the Respondent factual inaccuracies and fallacies on which the intended redundancy was based on adding that the same was made in bad faith, was unfair, selective and ultimately bias.
9. The Claimant states that the Respondent did issue him another letter on 12<sup>th</sup> August that informed him his position had been declared redundant and further that he had been given only 2 days to clear from the organization.
10. In his Memorandum the Claimant prays for the following:-

***a) A declaration and finding that the Respondent terminated the Claimant unlawfully and unfairly under the guise of redundancy and that the said termination of employment is null and void for all intents and purposes.***

***b) An Order directing the Respondent to reinstate the Claimant to his employment without loss of position, status or benefits or ALTERNATIVELY an order directing the respondent to pay the Claimant 30 month's compensation for loss of employment, status and benefits.***

***c) 15 days' pay for every year worked.***

***d) Kshs. 455,083 underpayment lost in miscalculation of final dues.***

***e) Costs and interest at Court rates from the date of filing this Claim until payment in full.***

***f) Any other further or better relief that this Honourable Court may deem fit.***

11. The Claimant urges the Court to allow his claim as drawn.

12. The Respondent in its Statement of Response/Defence dated 19<sup>th</sup> January, 2016 and filed in Court on 26<sup>th</sup> January, 2016, in which it admits having engaged the Claimant herein.

13. The Respondent further avers that the decision to declare the position of Deputy Country Director redundant was not at any point based on the Claimant's performance. It further avers that it did issue the Claimant with a notice to intent to declare his position redundant vide its letters dated 19<sup>th</sup> July, 2015 and 30<sup>th</sup> July, 2015.

14. The Respondent contends that the Claimant's salary increment was based on Cost of Living Adjustment (COLA) basis and that this benefit was enjoyed by all staff of the Respondent.

15. The Respondent further states that it did undergo major reconstructing in the year 2012 and that further in the year 2015 the United Kingdom, its 100% donor restricted its funding and that BAK had to do away with some positions in its structure including that of the Deputy Country Director held by the Claimant herein among others.

16. The Respondent further contended that it is not a profit making organisation and therefore the Claimant's assertions that the Respondent was doing well does not assist his cause in any way.

17. It is further the Respondent's contention that due regard to the provisions of the Law on Redundancy were duly followed in declaring the Claimant's position redundant. Further that the Claimant was not its only staff that was affected by the exercise of restructure.

18. In conclusion the Respondent urged this Honourable Court to dismiss the instant Claim with costs to the Respondent.

### **Evidence**

19. The matter was thereafter fixed for hearing on 26<sup>th</sup> March 2019 and 30<sup>th</sup> April, 2019. The Claimant, CW1 in his evidence reiterated the averments made in his Memorandum of Claim adding that in his opinion the Country Director was that position that ought to have been declared redundant as he had worked longer in the organisation.

20. CW1 insisted that the Respondent failed to follow due process in declaring his position redundant and that it miscalculated his redundancy package at the time of separation with the Respondent.

21. CW1 further averred that his redundancy was a termination disguised as a redundancy and that the termination in itself was unfair and urged this Honourable Court to allow his Claim as drawn.

22. On cross-examination, CW1 testified that he worked as Acting Country Director and that his services were exemplary. He further insisted that no other staffs of the Respondent were declared redundant at the same time his position was declared redundant.

23. On further cross-examination, CW1 confirmed having received payment at the time of redundancy he however insisted that the amount was miscalculated.

24. RW1, **Rose Kalondu Choya**, former Country Director of the Respondent testified she worked in the capacity of Country Director of the Respondent from January 2014 to November 2016.

25. She further testified that she applied for the position of Country Director with the Respondent and was interviewed and added that she got the position on merit. RW1 further testified that none of the panellists was known to her and that she was qualified to fill the position of Country Director as she met the minimum requirements required by the Respondent for their preferred candidate to fill the position.

26. It was RW1's testimony that during her tenure with the Respondent, she noted that the funding was going down and that in October 2014 some of the senior management of the Respondent were asked to propose how to manage the shortfalls.

27. RW1 further stated she was one of the directors involved in this exercise and that in January 2015 it was agreed that the Respondent proceeds to declare some positions redundant including that of the Claimant herein.

28. RW1 averred that she was tasked with informing the Claimant the position which she did both orally and via the letter dated 19<sup>th</sup> June, 2015. RW1 also confirmed having written a notice to the Machakos Labour Office as well with the notice to declare positions redundant within the Respondent organization.

29. RW1 testified that on 20<sup>th</sup> July 2015 she received a letter dated 16<sup>th</sup> July 2015 from a university based in Uganda enquiring whether the Claimant had been our employee from April, 2011 to June 2015, which information RW1 stated that she did respond in the affirmative. She further stated that she did not give any negative information as alleged by the Claimant and that there were no personal differences between her and the Claimant herein.

30. On cross-examination, RW1 insisted that due process was followed while declaring the Claimant's position redundant. She further stated that the process of redundancy took longer as the Respondent responded to all concerns raised by the Claimant including arranging for a meeting to allow him air all his concerns on the redundancy before the redundancy took effect.

31. On further cross examination RW1 confirmed that the Claimant was paid all his terminal dues at the time of separation and that there was no shortfall. RW1 urged the Court to dismiss the instant Claim with Costs.

32. RW2, **Teresia Wamuyu**, operations coordinator for the Respondent testified that the Claimant did receive Kshs. 1,789,572/- as benefits as calculated at page 180 of the Respondent's documents.

33. The parties were thereafter directed to file written submissions to the Claim.

### **Submissions by the Parties**

34. It is the Claimant's submission that his termination in the guise of redundancy was unfair and that it failed to comply with the mandatory provisions of Section 40 of the Employment Act, 2007.

35. To fortify his argument the Claimant relied on the case of **Fredrick Mulwa Mutiso Vs Kenya Commercial Bank Limited (2017)** where the Court held that "the notices serves the dual purpose of eliciting advice on the modalities to be employed in the redundancy process, while guarding against it from abuse."

36. The Claimant further cited the Court of Appeal decision of **Barclays Bank of Kenya Limited vs Gladys Muthoni & 20 others (2018)** where the Court was of the view that mandatory provisions of Section 40 of the Employment Act have to be complied with in the process of redundancy. The Claimant further cited the Authority of **Thomas De La Rue (K) Limited Vs David Opondo Omutelema (2012) eKLR** for emphasis.

37. The Claimant further contends that his termination was contrary to the provisions of Section 41 as he was condemned unheard having not been accorded an opportunity to defend his position as he was not present in the meeting held in the UK where the Respondent resorted to redundancy to cut its costs.

38. The Claimant avers that his termination was unfair and that the same was done contrary to the provisions of Sections 41, 43 and 45 of the Employment Act. For emphasis, the Claimant cited and relied on the authority of **Cause No. 2525 of 2012 Abisalom Ajusa Magomere Vs Kenya Nut Company Limited.**

39. The Claimant further submitted that the Respondent did discriminate against him contrary to the provisions of Section 5 of the Employment Act, 2007. He contended that he is entitled to compensation as per the reliefs prayed in his Memorandum of Claim.

40. The Claimant urged this Honourable Court to look beyond the 12 months compensation for unlawful termination as the Claimant's life was thrown off balance by his termination and that since he separated from the Respondent's employment he has been unable to secure a job with any employer and that his family has suffered immensely from the unfairness meted upon him by the Respondent. For emphasis, the Claimant relied on the Authority of **Cause No. 1073 of 2012 Abraham Gumba Vs Kenya Medical Supplies Authority.**

### **Respondent's Submissions**

41. The Respondent on the other hand has submitted that the Court ought to dismiss the instant Claim as it fails to comply with the mandatory provision of Rule 4 (1) (d) and (e) of the Employment and Labour Relations Court (Procedure) Rules as it fails to set out the issues which are alleged to have been violated and/or infringed and that the Court can only decide on issues as brought out in a parties pleadings.

42. To fortify this argument the Respondent cited and relied on the Court's finding in the Court of Appeal decision in the case of **Independent Electoral and Boundaries Commission & Another Vs Stephen Mutinda Mule & 3 Others (2014) eKLR.**

43. The Respondent further submitted that it did comply with all the mandatory provisions of Section 40 of the Employment Act, 2007 while declaring the Claimant's position redundant as evidenced by the various communications and that it further has demonstrated good faith on its part.

44. It therefore urged the Court to find that the redundancy was fair and lawful. To fortify this argument the Respondent cited and relied on the Authority of **Africa Nazarene University Vs David Mutevu & 103 Others (2017) eKLR.**

45. The Respondent further submitted that the Claimant was duly paid all his dues at the time of separation from the Respondent's employment a fact that was not disputed by the Claimant herein. The Respondent went on to state that the Claimant was paid in accordance with the law and the tabulation was as annexure "BAK 14 and 15" attached to the Respondent's Memorandum of Response.

46. In conclusion, the Respondent submitted that having shown that due process was followed and that it paid all the terminal dues owed to the Claimant urged this Honourable Court to dismiss the instant Claim with costs to the Respondent.

47. I have considered the evidence and submissions of both Parties. The Claimant's position is that he was unfairly declared redundant because there was no real redundancy situation and that the law was not followed.

48. The Claimant has averred that he had worked with the Respondent for a long time compared to the Country Director and should not have been declared redundant.

49. I wish to state from the premise that it is the employer's prerogative to restructure an organisation and make it perform better. This right is provided under Section 40 of Employment Act so long as the redundancy is done in a legal manner.

50. The legal position is that the employer being the custodian of the company knows best why he would want to restructure his or her organization and where the employee allege that there was no real redundancy situation then the employee should prove this.

51. The Claimant avers that there was no redundancy situation because as an organization, the Respondent was doing well and he believes that the issue was about his personal differences with his boss. He points out that the reason for redundancy given in the notice to the labour office pointed out that the reason was reduced programmes in Gilgil and Machakos which the Claimant aver was not true as the Respondent was even awarded a further grant of 120,000/= sterling pounds for development in Gilgil in April 2015 (page 44) and that the bulk of his work was not in any of the two areas.

52. He also pointed out that he was forcefully edged out in form of a redundancy when infact he was being terminated.

53. On whether there was a redundancy situation or not, I find that the Claimant has not produced evidence to show a contrary situation not warranting redundancy and I will find that there was a redundancy situation.

54. On process before redundancy, I have noted that Section 40(1) of 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 months 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.**

55. The Respondent pointed out that the Claimant was notified of the intended redundancy and invited for discussions on the same. He referred to Appendix BAK 01 and BAK 15. Appendix BAK 1 is a letter to the Labour office and not the Claimant. Appendix BAK 15 is a discharge and release agreement. There is no indication that the Appendix BAK1 was actually served upon the Labour officer Machakos. There is no receipt stamp nor a reply thereto. The fact of issuance of the redundancy notice is therefore not established.

56. On whether there was consultation before the termination of the Claimant, the Claimant has averred that there was no such consultation.

57. The Respondent have not demonstrated there was any such consultation with the Claimant before the redundancy as alluded in the Kenya Airways case where Maraga & Mugo JJA emphasized the issue of consultation. Maraga JA as he then was opined as followed:-

**"Consultation 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'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 1<sup>st</sup> respondent that consultation is an imperative requirement under our law."*

58. I have not seen any indication that the Respondent gave any notice to the Claimant nor did consult with him before the redundancy. In the circumstances, I find that due process was not followed before the redundancy and I therefore find the redundancy unfair.

59. In the circumstances of this case, I therefore award Claimant as follows:-

*1. 8 months salary as compensation for unfair redundancy = 8 x 444,704/- = 3,557,632/=.*

*2. 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 24<sup>th</sup> day of September, 2019.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Gatore for Claimant – Present

Thiongo holding brief Nyaosi for Respondent – Present