



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE 1859 OF 2014**

JOSEPHINE M. NDUNGU.....1<sup>ST</sup> CLAIMANT

JOB IRERI.....2<sup>ND</sup> CLAIMANT

BILLY WELLINGTON KINYUA.....3<sup>RD</sup> CLAIMANT

JANE WAMBUI GITAU AND

MILLICENT NJOKI GITAU

suing as administratrixes of the estate

of MAUREEN WANJIRU KAMENDERI.....4<sup>TH</sup> CLAIMANT

HUDSON LUBANGA KADAGI.....5<sup>TH</sup> CLAIMANT

BWIBO ADIERI.....6<sup>TH</sup> CLAIMANT

MARTIN ANTHONY NJOGU KIMEMIA.....7<sup>TH</sup> CLAIMANT

VERSUS

PLAN INTERNATIONAL INC.....RESPONDENT

**JUDGEMENT**

**Introduction**

1. At all material times to this suit the Claimants herein were all employed by the Respondent. Between the 2013 and 2014, the respondent undertook a restructuring process, which involved out sourced consultants and the staff of the respondent, whose views were sought. On 30<sup>th</sup> June 2014 the respondent's Country Director issued Memo to all staff of the respondent notifying them that the report on the proposed restructuring had been approved by the respondent's Country Management Team (CMT), Regional Management (ROMT) and the Regional Director, and proceeded to give a step-by-step outline of how the restructuring was going to be implemented. The memo also gave notice that about 40 members of staff were to be laid off in order to reduce the cost of operation.

2. Flowing from the foregoing, the claimants were served with notice that either their positions had either been abolished or downsized, and advised to apply for the new or downsized positions in the new organizational structure to avoid redundancy. The claimants never applied for any of the positions advertised and some of them even served resignation letters after receiving the redundancy notice. As a result, the respondent filled all the vacancies, laid off the claimants and paid them their rightful terminal dues. Thereafter the claimants brought this suit alleging that the termination of their employment was unfair and unlawful and prayed for compensatory damages.

3. The respondent filed defence denying the alleged unfair termination and prayed for the suit to be dismissed with costs. She averred that in 2013, her staff raised issues concerning the management and the running of the organization and as such she contracted a consultant to carry out a Rapid Structural Assessment Review specifically focusing on her head office Nairobi where the management personnel was located. She further averred that the assessment showed that the organization's structure was bloated, there were too many reporting lines, and the

operations were generally cost intensive and not correspondingly efficient. As such, she averred that a restructuring of the programme was necessary and she therefore contracted a consultant also to carry out a Programme Review and a Logistics & Administration Review.

4. The respondent further averred that the foregoing review lasted for six months and she made a decision to effect the proposed realignment of its organizational structure, with the aim of achieving sustainable and strategically targeted growth, ensure a safe/reasonable ratio between the organization's programme and salaries and generally reduce costs of operations. She further averred that the planned restructuring was also necessitated by the fact that her funding had substantially reduced, and as such there was need to reduce its costs and ensure operational efficiency. She also averred that the claimants were aware of the foregoing challenges and the process of restructuring.

5. Finally, the respondent averred that the claimants were served with the necessary notices before the said lay off and advised to apply for the new and downsized positions but they failed to apply and some served resignation letters before the termination notice period lapsed. She further contended that she served redundancy notice to the labour office and no objection or other form of response was elicited from the said office. She further contended that she computed and paid the claimants all their rightful terminal dues and denied that the claimants were entitled to reliefs sought herein.

6. The main issues for determination arising from the pleadings are whether the termination of the claimants' employment on account of redundancy was unfair and unlawful, and whether they are entitled to the reliefs sought.

7. To answer the said questions, all the Claimants testified orally except the 7<sup>th</sup> Claimant whose written witness statement was adopted as his evidence by consent of the counsel of both sides. The 7<sup>th</sup> Claimant further withdrew his claims for damages for defamation and discriminatory practices. On the other hand, the Respondent called her Human Resource Manager, Scholastica Wangui Ndirangu who testified as the only defence witness. After the hearing, counsel for each side filed its respective written submissions.

### **Claimants' case**

8. Josephine Muthoni, **Cw1**, testified that she was employed by the Respondent on 1.4.1998 as the Administration Manager and confirmed on 22.7.1998 to permanent and pensionable status like all the other employees of the respondent. She further testified that her role was Head of Administration and as such she was overseeing management of procurement and logistics, management of fixed assets, coordination of risk management processes, management of contracts amongst others roles. She testified that she always met her expectations and exceeded in her performance.

9. She testified that in May 2013 they received a new County Director, Carol Sherman from Australia whom they oriented but after 2 months the County Director started flouting rules and procedures by driving without a licence and hiring consultants without following the procurement rules and procedures. She further testified that when she raised the issue of flouting the rules and procedures, the Country Director became rude to her and started planning for a restructuring of the organization without involving her, and with the aim of terminating her services. That the director went ahead to contract a consultant, Active Engagement Ltd, through single sourcing, yet she was not amongst the Respondent's pre-qualified consultants. According to her the Consultant's report was rejected by the Country Management Team (CMT) on 11.3.2014 because the information therein was not factual and the consultant went outside her Terms of reference (TOR).

10. She testified that on 30<sup>th</sup> June 2014, while preparing to proceed on her annual leave, she went to explain to the Country Director that she had handed over her duties to her junior, but to her shock the Country Director issued her with a redundancy notice which stated that an opportunity would be given for her to apply for the new positions. She testified that while on leave her position was advertised in the Daily Nation of 16.7.2014 under the job title "Country Logistics and Administration Manager". She further testified that the only word added to her job title was logistics but the job description was the same save for one new role, risk management.

11. She testified that a CMT meeting held at Methodist Guest House, it was mentioned that the process of realignment was complete but no further information was given. She maintained that the Country Director was illegally undertaking a Repair Restructuring Program by following a flawed process which had been rejected by the CMT. In her view the alleged restructuring was not genuine but a plot to dismiss the claimants and employ other persons. She contended that the jobs were still in place and that the claimants were just replaced by others according to the newspaper advertisement. She contended the claimants just fell out of favour with the respondent because they questioned the new Country Director's violations of rules and procedures of the organization. She further contended that the 4<sup>th</sup> Claimant died after being served with the redundancy letter.

12. She further testified that, in order for the Country Director to discredit her and destroy her career due to her firm stand on compliance with transport and procurement rules and procedure, she was accused of engaging in corruption with suppliers by the letter dated 22.11.2013 which she dismissed as false. She contended that after a disciplinary hearing she was cleared of the said allegation but placed under performance improvement plan (PIP) without citing the specific areas for improvement.

13. She averred that Joyce Mwakio was appointed to replace while she was on leave and that she was required to take her through orientation for 14 weeks. She maintained that her job was not abolished as alleged by the respondent. She testified that they were discriminated and that the 3<sup>rd</sup> Claimant's position was not advertised but a receptionist was appointed to her position earning a higher salary. She further testified that the 6<sup>th</sup> Claimant's position was divided into 2 positions with one position being held by Mr. Ndungu who worked with the Country Director in Zimbabwe.

14. Finally, she testified that the Labour Office was served with a redundancy notice 2 weeks after she received her redundancy notice. She urged the Court to award the reliefs sought in the claim for reason that the termination was unfair.

15. In cross-examination, she stated that she was conversant with the Human Resource policies and that on 20.12.2013 she did write an email to the Country Director complaining of her conduct. She further testified that the Director of Audit called some staff including herself to explain the complaints they had. However, she did not know what happened after the meeting and because the Director of Audit also left due

to misconduct.

16. She stated that she was called only once when the restructuring exercise by the Active Engagement was starting but she was never involved in the process. She contended that she was qualified in logistics since she holds an MBA and that the job description for the Logistics and Administration Manager was the same job she was carrying out as the Administration Manager as evidenced by her handing over report. She maintained that the Country Director mistreated her.

17. She admitted that her job was taken over by a Kenyan but contended that the other jobs were given to foreigners. She further admitted that no one complained after receiving the redundancy notice and that indeed the 6<sup>th</sup> and 7<sup>th</sup> Claimants resigned after receiving the notice. She however contended that the working environment at the Respondent was not conducive anymore.

18. In re-examination, she testified that the 6<sup>th</sup> and 7<sup>th</sup> Claimants were stressed due to the bad working environment and that their resignation was not voluntary. She testified that they protested against the redundancy at the CMT and that there was no avenue to lodge a complaint. She testified that she was informed that there was a restructuring process but maintained that she was never involved in the process until it was finalized.

19. Bwibo Arieri, **Cw2**, adopted his Witness Statement filed on 26<sup>th</sup> October 2018 as his evidence in chief. In brief he stated that he began working for the Respondent on 1<sup>st</sup> July 2007 as a Regional Program Support Manager and rose to the position of Head of Programs (Strategic Program Support Manager). He testified that he was served with redundancy notice on 1.7.2014 and worked for the Respondent up 31<sup>st</sup> August 2014.

20. He testified that after the appointment of Carol Sherman as the Country Director in May 2013, she carried out some un-procedural consultancies purporting to align the Respondent's structure. He testified that he wrote to the Country Director informing her of the need to follow procedure in procurement of consultants. He testified that the consultancy reports were not shared apart from some extracts and that on 13.3.2014 the CMT rejected the Rapid Programme Support Review – Logistics and Administration because the procurement of the consultant did not follow the right procedure, and also because the country Director never involved him in drafting the TOR for the consultant.

21. He further testified that in the CMT meeting held on 6<sup>th</sup> May 2014 they raised concerns on the credibility and flawed realignment process and questioned why the CMT was receiving recommendations of the process instead of discussing the realignment report first. He contended that the Consultants recommended that the Senior Program Manager Implementation and Quality Consultant position be created and that some of the duties he was doing were assigned to the said position while the rest were assigned to the Deputy Director who was to be in charge of operations. He testified that this position was created with a view of edging him out of employment and that junior positions were created with the aim of locking him out.

22. In cross-examination, he testified that the restructuring and realignment of the Respondent was not necessary. He testified that the consultant who undertook the exercise was not competitively procured and that CMT unanimously rejected the report by the Regional Specialist and the Rapid Organizational Structuring Review Report, that recommended the restructuring. He admitted that the Memo dated 30.6.2014 was sent to all staff and it stated that some members of the CMT accepted the report while others rejected it. He admitted that the CMT Charter was the guiding document in decision making at the Respondent. He further admitted that the charter provided that decisions would be by consensus but should there have been no consensus the Country Director was to overrule his decision.

23. He testified that there was no evidence showing that the international office approved the decision to carry out the restructuring and realignment of the Respondent. He testified that they raised a complaint through the CMT Minutes against the decision to restructure.

24. He maintained that his job title was Strategic Program Support Manager and his role was head programs, however but after the restructuring, his role was transferred to the new position called Consultant Senior Program Manager but some roles were assigned to the Deputy Director. He further contended that although he was qualified for the new position the same was filled before the restructuring process and even before the other jobs were advertised. He contended that the Consultant and Country Director were not interviewed to take up his roles.

25. He further contended that after being served with the redundancy notice, he was discriminated against by the Country Director as he was denied an opportunity to attend the CMT and he was not allowed access to his office. He further testified that staff were not allowed to speak to him. He contended that the work environment was unbearable for him prior to his termination. He further contended that for the period between June and August 2014, he was not allowed to attend senior management meetings. He admitted that he never raised any complaint with the Country Director but contended he raised complaints with the Regional Director verbally. Finally, he resigned by giving one month's notice on 1.8.2014 because the work environment had become hostile to him. He however, admitted that he never raised the issue of discrimination in his resignation letter. He further admitted that he was paid his terminal dues after separation.

26. In re-examination, he testified that he did not agree with the process of restructuring for reasons that the CMT did not agree on the terms of reference for the consultants, and the procurement process was not competitively done, but was carried out by the Country Director alone.

27. Billy Wellington Kinyua, **CW3**, adopted his Witness Statement filed on 26<sup>th</sup> October 2018 as his evidence in chief. He testified that he was employed by the Respondent from 16<sup>th</sup> April 2007 Country Office – office of Administrator to his termination on 30.6.2014 on account of redundancy. He contended that he was one of the employees who were victimized through the purported redundancy for no valid reason. He testified that his redundancy was predetermined even before the restructuring process because he had been hinted of the same by the Respondent's human Resource Director, Felicity Kinoti.

28. He testified that his junior was appointed to replace him under a new job title but similar job description with similar deliverable. He

contended that he had more qualifications and experience than his junior who replaced him.

29. He further testified that the Respondent published defamatory statements in newspapers suggesting that his integrity was wanting and that he was a person of bad moral standing. He further testified that the defamatory statements negatively affected his chance of securing alternative employment.

30. In cross-examination, he maintained that the restructuring process was flawed. He admitted that the Country Director in a Memo dated 24.2.2014 informed all staff that there had been a reduction in donor funding, however this was stated after the redundancy process had begun. He further admitted that the new Country Director issued another Memo dated August 2013 on the complaints from staff regarding reporting structure. He also admitted that several consultants applied for the restructuring and finally one consultant was appointed though the process of appointment was flawed.

31. He further admitted that as at May 2014 he was made aware that his position would be affected by the restructuring but contended that his office was not abolished but changed to Office Coordinator. He contended that the new position of Office Coordinator for country office in Nairobi was not advertised but was given to his junior, Catherine Ndichu. He however admitted that the position was advertised for the programs offices upcountry.

32. He admitted that the notice to the Labour Office states that the position of Country Office Administrator was being abolished but maintained that there is someone who still serves in that position. He further admitted that he was issued with a letter dated 30.6.2014 advising him to apply for the advertised positions but he never applied since his job at the head office was not advertised. He testified that he never complained to the Regional Director since his senior had complained and nothing was done. He testified that he was not consulted on the restructuring process and all he knows is that the report from the consultant was rejected by the CMT. He however admitted that he was paid his terminal dues but he disputes the amount awarded.

33. Hudson Lubanga Kadagi, **Cw4**, also adopted his Witness Statement filed on 26<sup>th</sup> October 2018 as his evidence in chief. In brief he stated that he was employed by the Respondent on 2<sup>nd</sup> May 1994 and held the position of Senior Accountant for Kilifi Program Unit until he was declared redundant on 20.8.2014. He stated that like Cw3, he was discriminated against and removed from being the Respondent's bank signatory which action led further speculation.

34. In cross-examination, he admitted that his position was not abolished but rather downsized. He further admitted that he was advised to apply for the new position but he did not. He contended that he was given a shorter termination notice of two months instead of the required 6 months. He however admitted that was later paid 4 months' salary in lieu of notice.

35. He admitted that the Respondent never published any defamatory material against him. He stated that he was removed from being a bank signatory by the letter dated 1.8.2014 which he received on 13.8.2014. He maintained that he faced hostility at the workplace but he never made a personal complaint for reason that they had made a collective complaint.

36. In re-examination, he clarified that he received the redundancy letter dated 13.8.2014 on 20.8.2014 but its effective date was backdated to 1.8.2014. He further stated that upon receipt of the redundancy letter, he immediately wrote to the Country Director requesting for clarification of the dates and the response given was that the dates remained as indicated in the letter. He maintained that his position at Kilifi was never abolished and it was taken over by his successor, David Shako. He explained that he failed to reapply for the position because his contract was still existing. Finally, he maintained that he was discriminated upon by being paid less performance bonus than the required 3% and as such he was paid kshs. 22,000 instead of Kshs. 44,000.

37. Millicent Njoki Gitau, **Cw5**, testified as the administratrix of the estate of 4<sup>th</sup> Claimant herein. She adopted the Witness Statement of Jane Wanjiku Gitau, fellow administratrix, filed on 26.10.2018. In brief, she stated that the 4<sup>th</sup> Claimant was employed by the Respondent on 26<sup>th</sup> January 2009 and that she held the position of Disaster Preparedness & Response Coordinator until 30.6.2014 when she was declared redundant. She further testified that between the positions of the Disaster Preparedness & Response Manager and the 4<sup>th</sup> Claimant, it was only the deceased (4<sup>th</sup> Claimant) who was declared redundant.

38. In cross-examination, she confirmed that the email dated 12.5.2014 by the deceased acknowledged that the position of Disaster Management Preparedness Coordinator had been phased out. She admitted that she had no publication to prove that the 4<sup>th</sup> claimant herein, had been defamed. She further admitted that during her exit interview, the deceased stated that she had secured alternative employment.

39. Rw5 admitted that the 4<sup>th</sup> Claimant had been ailing for months and as a result she had been away from office. She however testified that when the 4<sup>th</sup> claimant finally reported back to the office, she was served with a redundancy notice and as a result her health deteriorated and she eventually passed on.

40. In re-examination, she denied that the deceased had secured alternative employment after the redundancy notice was served on her. She further contended that the deceased was defamed by the allegations of lack of integrity made against her and which led to sickness.

41. Job Ireri, **Cw6**, also adopted his Witness Statement filed on 26.10. 2018 as his evidence in chief. In brief he stated that he was employed by the Respondent on 22.9.1997 and worked until 30.6.2014 when he was declared redundant while serving as the Procurement Coordinator. He however contended that the functions and role he was performing did not cease to exist but the job titled changed to Senior Logistics and Procurement Coordinator and given to his colleague who he was made to induct. He contended that the redundancy was not genuine and that it was meant to dismiss him for questioning the new Country Director for flouting procurement procedures.

42. In cross-examination, he testified that he was discriminated against and was defamed in respect of monetary issues. He testified that he was issued with a show cause letter dated 26.12.2013 setting out the charges against him but after further investigations he was found to be

innocent. He further stated that as a result of the said disciplinary process, he suffered illnesses and mental torture as evidenced in the medical notes from Meridian Medical Centre dated 2.12.2013. He admitted that the medical notes did not state the illness he suffered.

43. He admitted that he was issued with the redundancy letter dated 30.6.2014 on 21.7.2014 but stated that he never took part in the redundancy process. He however admitted that the email dated 2.5.2014 by the 3<sup>rd</sup> Claimant stated that he had attended brief meeting on staff realignment. He further that the advertisement of the new positions was done after he received the redundancy notice. He testified that he had complained to the 1<sup>st</sup> Claimant who was his supervisor of his discrimination in addition to the collective complaint lodged with the NGO Coordination Bureau.

44. In re-examination, he testified that the subject of his disciplinary proceedings was that he had been bribed by a client, Roto Moulders, Kshs. 500,000 in return of a business with the respondent. He further testified that he did not know who lodged the complaint and contended that Roto Moulders denied the bribery allegations and threatened to sue the Respondent. He further testified that after investigations were completed, he was cleared of the charges.

45. He testified that after restructuring, the roles were not changed but the position of Procurement Coordinator was changed to Logistics Assistant, then Senior Procurement Coordinator and finally Senior Logistics and Procurement Coordinator which is the position that was advertised.

46. The 7<sup>th</sup> claimant stated in his written statement that he was also employed by the respondent as Project Officer- Protection & Inclusion in May 2002 and his salary was kshs.110720. He worked until 30.6.2014 when his services were terminated on account of redundancy. He contended that the redundancy was procedurally and substantively unfair because out of the 7 employees in his Urban Program Unit, he was the only one who was laid off without being told the criteria upon which he was picked. He prayed for compensation of 12 months' salary for unfair redundancy.

### **Respondent's case**

47. Scholastica Wangui Ndirangu, **Rw1**, adopted her written Witness Statement filed on 11<sup>th</sup> December 2018. In brief she stated that in 2013 the Respondent's staff raised issues on the management and running of the organization on structure, reporting lines, level of authority, job designations among others and in an effort to address the said issues the Respondent contracted a consultant, Active Engagement, to carry out rapid structural assessment review focusing on the Head Office/Kenya Country Office. She testified that contrary to the Claimants' allegations, the recruitment of the consultant was as a result of a consideration by the senior management, of all applications tendered by different parties.

48. She further testified that as a result Rapid Organizational Structuring Review carried out by the Respondent's consultants, the Country Management Team (CMT) which included the 1<sup>st</sup> and 6<sup>th</sup> Claimants made a decision to effect a realignment of the organization's structure to achieve growth. She contended that senior managers including the Claimants herein were directly and actively involved in the restructuring program and that all employees were requested to fill in questionnaires provided by the consultants.

49. She testified that the Respondent informed all its employees of the outcome of the realignment consultancy exercise and further furnished the report to the employees. She further testified that the Respondent advised all its employees whose jobs were being affected about the terms of disengagement, the relevant notice period, the amount to be paid out as redundancy package and further gave options for an early exit. She testified that approximately 40 positions were affected including those held by the Claimants and the claimants were advised to apply for the new and the downsized positions.

50. She denied that the restructuring process was a ploy by its Country Director to remove local employees and replace them with her former employees abroad. She further testified that the exercise was not a simple redundancy process but a realignment exercise meant to streamline the Respondent's operations with respect to particular departments. She contended that the said process resulted to abolition, amalgamation and downsizing of some positions.

51. In cross-examination she testified that she joined the Respondent on 15.10.2018 after the claimants' redundancy but contended that her testimony was based on the documents filed, which she had interacted with in the office. She contended that the redundancy was lawful and that the labour office was notified of the redundancy vide the letter dated 7.7.2014. She maintained that there was restructuring that led to the redundancy. She however admitted that she was not very conversant with the procurement process at the Respondent.

52. She testified that at the time of the restructure, there were 300 staff and that in 2013 the Respondent's staff raised several issues related to the organization. However, she did not know who raised the issues. She further testified that the restructuring was also occasioned by substantial reduction in funding and that maintained that each Claimant like all the other staff were notified of the restructuring. She added that the letters to all the Claimants were similar. She further testified that the Respondent's policy on redundancy provides for 3 months' notice, resignation or an application for new vacancies in the organization. She further testified that the skills and length of service were considered because the Claimants were allowed to reapply for the reorganized or downsized jobs but they declined.

53. She admitted that after the restructuring, the job titles changed but the core functions remained the same. That some jobs were enlarged, amalgamated or downsized. She explained that the 1<sup>st</sup> Claimant's position of Administration Manager was changed to Administration and Logistics Manager and the roles were increased; the 2<sup>nd</sup> Claimant's position was changed from Procurement Coordinator to Senior Logistics and Procurement Coordinator and new roles were added; the 3<sup>rd</sup> Claimant's position of Office Administrator was abolished; the 4<sup>th</sup> Claimant's position of Disaster Preparedness and Response Coordinator was abolished; the 5<sup>th</sup> Claimant's position as Senior Accountant was downsized; the 6<sup>th</sup> Claimant's position as Strategic Programme Support Manager was abolished and a new position of Senior Programme Manager- Implementation and Quality Consultant created; and finally, the 7<sup>th</sup> Claimant's position of Project Officer Protection was downsized.

54. She admitted that she was not aware whether the Claimants gave their views on the restructuring of their positions. She further admitted that after the 1<sup>st</sup> and 2<sup>nd</sup> Claimants were cleared of corruption allegations there was no apology given to them. She further testified that appraisals were conducted by line managers but 1<sup>st</sup> claimant was appraised by the Country Director.

#### **Claimants' submissions**

55. They submitted that being senior employees of the Respondent they were entitled to be involved in the formulation process of the intended redundancy and that the said process was to follow the procedure in the Respondent's operational manual.

56. They further submitted that the purported redundancy did not observe the requirements provided under section 40 of the Employment Act. They contended that the labour office was notified of the redundancy after the redundancy process had already commenced; that there was no valid reason to justify declaring them redundancy because the roles they were performing were never abolished. They further submitted that they were discriminated by being treated differently from their colleagues by being declared redundancy. They therefore contended that they were entitled to 12 months' salary compensation.

57. For emphasis they relied on **Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others [2014] eKLR** where the Court held:

*“In considering the quantum of damages in such situation, the relevant factor in that section to be taken into account is the affected employee's chances of securing alternative employment. It is common knowledge that the air transport industry in Kenya is fairly limited. I also take judicial notice of the fact that unemployment is generally a serious problem in this country. So the retrenched employees in this case have little chance, if any, of securing alternative comparative employment. In the circumstances, I think they are entitled to damages equivalent to six months' gross salary in addition to the payments the appellant has made or offered to make to them.”*

58. They further submitted that the Respondent advertised some of the Claimants' positions and recruited existing and new staff for those positions while the Claimants were still in employment. They relied on **Rose Wangui Mambo & 2 Others v Limuru Country Club & 15 Others [2014] eKLR** where the Court followed **Peter K. Waweru v Republic [2006] eKLR**.

59. In respect of various defamatory statements made via emails and letters, the 1<sup>st</sup> to the 6<sup>th</sup> Claimants submitted that the published words injured their reputation and that the statements lowered the Claimants' estimation of the right thinking members of the society. They submitted that this Court has jurisdiction to award damages for defamation. In support of this argument. They relied on **Ezekiel Nyangoya Okemwa v Kenya Maritime & Fisheries Research Institute [2016] eKLR**.

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

60. The Respondent submitted that the redundancy was justified based on her operational needs which resulted in the realignment exercise. She further submitted that contrary to the Claimants averments on the alleged failure to disclose the process, outcome and or realignment exercise, the Memos from 2013 ensured that all employees were well appraised of the process and the changes in her business.

61. She relied on the decision in **Aoraki Corporations Limited v Collin Keih Mc Gavin CA 2 of 1997 [1998] 2 NZLR 278**. She further relied on the decision in **G.N. Hale & So Ltd v Wellington Caretakers IUW 4** which was cited in **Kenya Airways Corporation Ltd v Tobias Oganya Auma & 5 Others** where the Courts held that redundancy can be declared if the employer decides to re-organize his business and run it more effectively and that the Court has no jurisdiction to prevent an employer from restructuring or adopting modern technology so long as it observes the relevant regulations.

62. She further submitted that she complied with the provisions of section 40 (1) (b) of the Employment Act as the Claimants were all issued with the general notice issued vide the Memo dated 30<sup>th</sup> June 2014. Further, the receipt of the Memo was not disputed by the Claimants as it is annexed to their claim. She further submitted that the Memo advised the steps that were to be taken by the respondent in the realignment exercise. She further submitted that the Labour Office was equally informed of the redundancy via the Respondent's letter dated 7<sup>th</sup> July 2014.

63. She also submitted that though consultation was not statutorily provided for under the Employment Act, courts have determined that consultation is an important tenet in redundancy. Accordingly, she submitted that she engaged the employees in the process, and in particular, the 1<sup>st</sup> and 6<sup>th</sup> Claimants who held management positions and sat at the Respondent's CMT which spearheaded the realignment exercise, and that the 2<sup>nd</sup> and 3<sup>rd</sup> Claimants who, as early as May 2014 attended a meeting with the Respondent's Human Resource Manager and Deputy Country Director where they advised of the new organizational structure and the abolishment of their positions. That the 4<sup>th</sup> Claimant was informed of the abolition of her position in a meeting held on 8<sup>th</sup> May 2014.

64. She relied on Section 40 (1) (c) of the Employment Act and Article 23 of the ILO recommendation 166 on Termination of Employment and submitted that the procedural criteria for selection of employees was fully adhered to. She submitted that the save for the 5<sup>th</sup> Claimant's position, all other positions held by the 1<sup>st</sup> to 4<sup>th</sup> and 6<sup>th</sup> and 7<sup>th</sup> Claimants were abolished while the 5<sup>th</sup> claimant's position was downsized. She further submitted that all the claimants chose failed to apply for any position and indeed the 6<sup>th</sup> and 7<sup>th</sup> Claimants tendered resignation lettered on 1<sup>st</sup> August 2014 and 27<sup>th</sup> August 2014 respectively.

65. with respect of discrimination, the respondent submitted that allegations were false and meant malign her reputation. She relied on the definition of defamation under Section 3 of the Defamation Act and submitted that it is not enough that the word or material complained of is defamatory but there must be evidence of publication. She submitted that 1<sup>st</sup> to 6<sup>th</sup> Claimants did not prove the essential elements of

defamation as no evidence was tendered on the publication of defamatory words while the 7<sup>th</sup> Claimant abandoned the claim for defamation.

66. As regards the reliefs sought, the respondent submitted that she fully complied with section 40 of the Employment Act, and the Claimants were paid their redundancy dues. She further submitted that the 1<sup>st</sup> Claimant was rightly subjected to performance improvement plan and prayed that the claim for damages for being subjected to an unfair performance appraisal and denial of 3% salary increment should be dismissed. Finally, she also submitted that the 5<sup>th</sup> Claimant's prayer for an award of Kshs.22,367 as the balance of 2014 performance based pay bonus should be dismissed as it is not supported by any policy provisions.

### **Analysis and determination**

67. The undisputed facts herein are that the Claimants were employed by the Respondent in various positions. It is also common knowledge all the claimants' employment contracts were terminated on account of redundancy in 2014. The issues for determination arising from the pleadings, evidence and submissions are:

- a) Whether the termination was unfair and unlawful.
- b) Whether the claimants were discriminated against.
- c) Whether the claimants were defamed.
- d) Whether the claimants are entitled to reliefs sought.

#### **(a) Whether the termination was unfair and unlawful.**

68. Under section 47(5) of the Employment Act, the burden of proving unfair termination lies with the employee. The said burden is discharged once he establishes a prima facie case that, the termination did not fall within the fall corners of the legal threshold set out by section 45 of the Act. The said provision bars employer from terminating employee's contract of employment except for a valid and fair reason and through a fair procedure. A reason is valid and fair if it relates to the employee's conduct, capacity and compatibility or based on the employer's operational requirements. Fair procedure, on the other hand refers to, but not limited to, affording the employee an opportunity of being heard before the termination. Upon discharge of the said burden on a balance of probability, the employer assumes the burden of proof, under section 43(1), 45(2) and 47(5) of the Act, to justify the reason for the termination and prove that a fair procedure was followed.

#### **Reason for the termination**

69. In this case the reason for the termination for the claimants was redundancy. According to the claimants, the said reason was not valid and as such the redundancy was indeed an unfair termination of their employment. They contended that the Rapid Organizational Structure Review and the Programme Review which was carried out by a consultant, and which led to the restructuring exercise and redundancies was illegal because the consultant was procured by the Country Director alone without complying with the respondent's procedures, and also because the report by the consultant was rejected by the CMT. They further contended that there was no justification for the redundancy and that they were targeted by the new Country Director for termination because their roles in the organization were not abolished.

70. The Respondent, has however contended that the Rapid review of the Organizational structure, programme, and logistics & administration were necessary because in 2013 the staff had raised issues with the management and running of the organization, organizational structure, reporting lines, levels of authority, job designations among others. She further contended that she was also facing reduced funding and there was a need to ensure operational efficiency. She contended that the claimants like all the other staff were fully involved in the review exercise and they filled questionnaires given by the consultant. She further contended that the restructuring report by the consultant was adopted by the CMT, the Regional Director and the ROMT.

71. I have carefully considered the evidence and the submissions presented to the court by both parties. Through the undated Memo to all staff titled "Management Update from the CD" the respondent's new Country Director stated thus:

***"When I arrived at the beginning of July, staff raised a number of issues. Some were related to the structure, reporting lines, levels of authority and understanding who is responsible for what while other issues related directly to programming and sponsorship..."***

***Senior Managers have too many direct line reports***

***Improved results and outcomes would more than likely occur if the strategic programme team was more clearly and systematically integrated into the country office at all levels to ensure quality programme management...Additionally, there are not sufficient funds to support some programs being run in PU's level of investment."***

72. The Country Director wrote another Memo to all the Staff on 7.3.2014 updating them on the progress of review and invited them to participate by giving their views to the consultant. Finally, the Director wrote another Memo dated 30.6.2014 to all the Staff by which she updated them on the organizational Realignment and the way forward. She notified them that the report of the realignment had received approval from the CMT, Regional Director and the ROMT and was due for implementation. She also notified them that the exercise would result to 40 employees being dropped in move to reduce operational cost and increase sustainability.

73. The Respondent's letter to the Cabinet Secretary, Ministry of Labour, Social Security and Services dated 7<sup>th</sup> July 2014, whose subject was "Organization Realignment at Plan International- Kenya Country Office" stated thus:

***"Plan Kenya Since 2013 has undertaken several organizational reviews with aim of increasing efficiency and cost effectiveness while demonstrating the impact of Plan's programs. The change plans are influenced by prepared managed growth, demonstrating reach, and ensuring accountability. Plan Kenya will also work towards addressing greater diversification of resource acquisition and developing a management strategy that adequately supports the Country Strategic Plan aspirations... The findings of these reviews recommended that Plan Kenya must have a new organization structure."***

74. In view of the evidence by the respondent that the staff had raised issues with the management and running of the organization, organizational structure, reporting lines, levels of authority, job designations among others and the fact that there was reduced funding, I find that the respondent was justified to undertake the organizational, programme and logistics & administration review. Cw3 admitted during cross examination that the Country Director notified all the staff by a Memo Dated 24.2.2014 that donor funding had gone down. He further admitted that the Director had issued an earlier Memo in August 2013 about the complaints by staff regarding reporting structure.

75. I further find that the exercise of restructuring and realignment was lawful because Cw3, who was the head of procurement, admitted in evidence that the consultant who was contracted was picked from among several consultants who had applied for job. I further find the exercise lawful because the report was approved by the majority of CMT, the Country Director, the Regional Director and the ROMT. Even if the CMT had rejected the report, the Country Director alone could sanction the report and validate the restructuring/ realignment exercise. The foregoing view is based on the admission by Cw2 during cross examination that under the CMT Charter, the Country Director can overrule the decision of the CMT.

76. Having found that the restructuring exercise that led the redundancies in the respondent's workforce was justified and lawful, the question that begs answer is whether the termination of the claimant's employment on account of the redundancy was justified.

77. It is without dispute from the evidence tendered that the restructuring exercise resulted in abolition, amalgamation, and downsizing of some positions including those previously held by the claimants. It is also common knowledge that all the claimants among the other affected staff were advised to reapply for the new and also the downsized positions upon their advertisement or exit through redundancy. It is also clear that the claimants declined to apply for the said vacancies within the set timelines and they were served with six months' redundancy notice.

78. In this court's view, the employer was justified to lay off the claimants after failing to show any interest in serving in available positions under the new organizational structure. The employer could not continue to employ them in non-existent positions which had been phased out or realigned in an effort to ensure efficient and effective management of the organization. The court cannot interfere with the employer's managerial prerogative which is lawfully done with the aim of achieving strategic business sustainability and efficiency and especially where the employer deems that there is bloated workforce, blurred chain of command and control, and high operational cost.

#### **The procedure followed**

79. Section 40 of the Employment Act provides:

***"(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.***

***(2) Subsection (1) shall not apply where an employee's services are terminated on account of insolvency as defined in Part VIII in which case that Part shall be applicable.***

**(3) The Cabinet Secretary may make rules requiring an employer employing a certain minimum number of employees or any group of employers to insure their employees against the risk of redundancy through an unemployment insurance scheme operated either under an established national insurance scheme established under written law or by any firm underwriting insurance business to be approved by the Cabinet Secretary.”**

**(i) where the required statutory notices duly served?**

80. The Claimants like all the other staff were notified of the intended redundancy the Memo dated 30<sup>th</sup> June 2014. The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Claimants were further individually notified of the redundancy of their respective positions vide the letters dated 30<sup>th</sup> June 2014 while the 5<sup>th</sup> Claimant was informed vide the letter dated 3<sup>rd</sup> July 2014. The letters provided that the redundancy was to be effective on 31<sup>st</sup> December 2014 and 31<sup>st</sup> January 2015 respectively. The Respondent in her letters dated 10<sup>th</sup> September 2014 and 24<sup>th</sup> September 2014 shortened the notice period and informed the Claimants that they would not serve the full redundancy notice period and that they would be redundant on 12<sup>th</sup> September 2014 and 30<sup>th</sup> September 2014.

81. In that respect of the 5<sup>th</sup> Claimant avers that his redundancy letter was backdated and informed that he would be declared redundant from 1<sup>st</sup> August 2014, and the explanations for this was given in the emails sent on 20<sup>th</sup> August 2014 and 11<sup>th</sup> September 2015 stated that the reason for this was that he had not reapplied for a new position.

82. Subject to any longer notice period under the employment contract, under section 40 (1) (b) of the Employment Act an employee is only entitled to at least one months’ notice period prior to being declared redundant. The Court of Appeal in **Thomas De La Rue (K) Ltd v David Opondo Omutelema [2013]eKLR**, upheld the said provision, thus:

**“Where the employee is not a member of the union, the notification must be in writing and to the employee and the local labour officer. Section 40 (b) does not stipulate the notice period as is the case in 40 (a), but in our view, a purposive reading and interpretation of the statute would mean the same notice period is required in both situations. We do not see any rational reason why the employee who is not a member of a union should be entitled to a shorter notice.”**

83. Under the Respondent’s People & Culture Policies and Procedures Manual November 2008 the Claimants were entitled a six months’ notice period before termination on redundancy. However, the employer had a discretion to serve one-month notice and pay salary in lieu of unserved notice period. Clause 110.3 of the Procedure Manual provides that:

**“An employee may be terminated from employment due to reduction or end of program activities or any matter commonly referred to as redundancy. In the event that it becomes necessary to do so, Plan Kenya will:**

**Give an employee six months’ notice provided that Plan may in its discretion require the employee to serve one months’ notice and pay the employee five months’ salary in lieu of notice.”**

84. In this case the claimants were served with six months’ notice and paid salary to those who exited before serving the whole notice period. Consequently, I find that the Respondent complied with Section 40 (1) (b) and (f) of the Employment Act and Clause 110.3 of her Procedure Manual by serving the required redundancy notice to the claimant and thereafter paying them salary in lieu of notice for the unserved notice period.

85. In respect of the notice to the labour officer, the Respondent in her letter dated 7<sup>th</sup> July 2014 and received on 14<sup>th</sup> July 2014, the Respondent informed the Cabinet Secretary, Ministry of Labour, Social Security and Services of the redundancy. She outlined the redundant positions as Strategic Program Manager, Research and Documentation Manager, WASH Advisor, Learning Advisor, Emergency Response Coordinator, Grants Manager, Grants Officer, Administration Manager, Office Administrator, Procurement Coordinator (Nairobi Based) and Project Officer (end project). It further informed the Cabinet Secretary of the downsized positions and that the staff occupying the downsized positions would be given the first priority to apply for the new jobs.

86. Section 40 (1) (a) of the Employment Act provides that an employer ought to notify the labour officer in charge of the area where the employee is employed, the reasons for the redundancy and the extent of the redundancy, a month prior to the redundancy. In this case the employer served the notice on the Cabinet Secretary Nairobi and further failed to serve the labour officer in-charge of Kilifi where the Cw4 and the 5<sup>th</sup> Claimant were working. Despite the fact that the notice was erroneously addressed to the wrong government officer, I find that the error excusable because the notice was in effect served on the correct Government office of Labour and the intended statutory purpose was served. I further find that the notice to Nairobi labour office was sufficient in the circumstances because the redundancy was involving the entire organization and it is not logical in my view for the respondent to deal with the respective local labour officers across the country.

**(i) Were any consultations done?**

87. As indicated by the Respondent, consultation in instances of redundancy is not provided under the Employment Act but it has been held that it is essential for consultations to be conducted prior to declaring employees redundant. In **Kenya Airways Limited Vs. Aviation & Allied Workers Union of Kenya & 3 Others [2014] eKLR** the Court of Appeal held:

**“There is also the ILO’s recommendation No. 166 (supra) which recommends consultation. There was however no evidence that the recommendation has been ratified by Kenya. Article 10 of the Constitution which provide for National Values and Principles of governance apply to private contracts between employers and employees. The law of Kenya does not provide for pre-redundancy consultation but only post redundancy dispute resolution.”**

88. In the Memo to all staff dated 30<sup>th</sup> June 2014 the Country Director whose subject is Organization Realignment: Update stated thus:

***“...I would like to share with you the synopsis of the process since presentation of the proposed pp realignment report dated April 27<sup>th</sup> 2014 which was sent to staff.***

***On June 3 , comments sent by email from staff were opened ;logged and grouped. The team who discussed this were DD,FM,OM,HRM, 2 PUMs and a member of the SPT.A total of 20 emails were received and the group cross referenced these to those comments they had received informally. Some of the responses had been developed by a team while others were from individuals. The team reviewed all suggestions/comments and summarized the observations and recommendations.***

***On June 27<sup>th</sup> an Extraordinary CMT was held between nine members of the CMT...Everyone had a chance to express their views on the revised structure. We didn't have a unanimous agreement on the revised structure among the CMT however a majority of the nine members agreed to go [sic] ahead with the process at the earliest opportunity. The CMT members who had reservations about the structure and the process however indicated that they will not stand in the way of the implementation.”***

89. Prior to this Memo, the Country Director in a Memo dated 7<sup>th</sup> March 2014 had informed the staff that Consultant, Active Engagement had met senior staff and that it had held semi-structured consultations with CMT and other staff in KCO. She further stated thus:

***“Both the consultants and I are eager to ensure that the views, ideas and creativity of the Pan Kenya staff be harnessed to ensure that this alignment is open, transparent and effective as possible. Therefore, I would like to urge you to take advantage of the various opportunities to communicate your comments and ideas to the consultant. All information gathered will be confidential and retained by the consultant's, comments or questions can be sent to via the Acting HR Manager” [Emphasis Added]***

90. Despite there being no requirement for pre-redundancy consultations, the Respondent had commendably kept its staff updated on the progress of the realignment. Cw6 in his testimony stated that he attended a redundancy/re-alignment meeting. Further in the email dated 24<sup>th</sup> June 2014 the 1<sup>st</sup> Claimant (Cw1), forwarded the responses to staff on the realignment. Consequently, I find that the Claimants herein were adequately involved and update on the progress of the re-alignment exercise as they had been requested to give their views. In addition, the confidentiality of their views had been guaranteed as per Memo dated 7<sup>th</sup> March 2014.

**(ii) which criteria were used to lay off the claimants?**

91. Section 40 (1) (c) of the Employment Act provides:

***“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”***

92. In respect of the selection criteria the Respondent does not dispute that the claimants were senior employees of long service including the 1<sup>st</sup> Claimant who served for 16 years, the 2<sup>nd</sup> Claimant for 17 years, 3<sup>rd</sup> Claimant for 7 years, 4<sup>th</sup> Claimant for 5 years, 5<sup>th</sup> Claimant for 20 years and the 7<sup>th</sup> Claimant for 12 years. The Respondent advertised all new and downsized positions after the restructuring exercise and as already observed herein above, the claimant declined to apply despite express advice from the employer. As a result, other people applied including the claimants' juniors in the organization and they were appointed. I agree with the Respondents case that the refusal to apply for the new or downsized positions by the Claimants meant that they had opted to exit through redundancy and as such they could not be considered for the jobs. The employer could also not force appointment on 6<sup>th</sup> and 7<sup>th</sup> claimants who tendered resignation letters dated 1.8.2014 and 27.8.2014 after being served with redundancy notices.

93. It follows that had the claimants expressed interest in the available positions by reapplying as advised, the employer would have been bound to use the criteria set out in the statute to select the best suited candidate including length of service, skill and ability. In my view, were restructuring has been done to ensure operational efficiency, it is in order for the employer to select the people for redundancy by requiring the employees in the affected positions to reapply for the new and downsized positions. In that case, the failure to apply means one has chosen to exit through redundancy. I therefore return that section 40 (c) was complied with.

94. The foregoing view is fortified by **Barclays Bank of Kenya Ltd & another v Gladys Muthoni & 20 others [2018] eKLR** where the Court of Appeal held thus:

***“We respectfully agree with the views expressed by the two learned Judges. The Constitution in Article 41 is fairly loud on the rights to fair labour practices and we think it accords with the Constitution and international best practices that meaningful consultations be held pre-redundancy. We agree with the trial court that redundancy notices are not mechanical so as to satisfy the motions of the law, and that fair labour practice requires the employer to act in good faith. It is not good faith, for example, to subject innocent employees to making fresh job applications to their employer who was not undergoing a redundancy situation, then vilify them for rejecting the manoeuvre.” [Emphasis Added]***

95. The upshot of the foregoing analysis is that the court returns that the claimants have failed to discharge their burden of proving that the termination of their employment on account of redundancy was substantively and procedurally unfair within the meaning of section 45 of the Employment Act.

**(b) Whether the claimants were discriminated against.**

96. In view of the finding that the restructuring and the resulting redundancy was justified and done through a fair procedure and the Employment Act and the respondent's procedure Manual, I return the alleged discrimination by the claimants is without merits. The evidence on record shows that the claimants were treated like all the other staff during the restructuring and redundancy exercise. Their views were sought like for the other staff. They were updated through the same Memos by the Country Director and they were served with redundancy notices like the other staff and paid dues computed the same way as the other staff.

**(c) Whether the claimants were defamed.**

97. The claimants alleged that they were defamed by the respondent either by being taken through disciplinary proceedings for alleged corruption and also for being removed from certain management meeting or the position of bank signatory after being served with redundancy notices. I however do not find anything defamatory about the said action. No evidence was adduced by any third parties to show that the alleged corruption and removal from committees or bank signatory status was published and that the claimants' reputation was lowered in the estimation of right thinking members in the society.

98. In my view sitting in committees and being bank signatory is always at the employer's discretion or by virtue of an office being held. Consequently, if one loses the office, prima facie, he also loses the corresponding status. Likewise, an employer is entitled to investigate and take his employees through disciplinary process for any misconduct he suspects his employee to have committed. The employee cannot therefore sue his employer for defamation just because he was found innocent after investigation and disciplinary hearing.

99. A claimant in a defamation suit ought to establish that there is a defamatory statement; that the defendant has himself published or caused another to publish that statement and that the statement refers to the Claimant - See "Defamation Law, Procedure and Practice" by the authors David Price, Koriech Duodu and Nicola Cain, 4th Edition at paragraph 1 – 02.

100. In **Miguna Miguna v Standard Group Limited & 4 others [2017] eKLR** the Court held:

*"In deciding whether or not a statement is defamatory, the court must first consider what meaning the words would convey to the ordinary man. Having determined the meaning, the test is whether, under the circumstances in which the words were published, a reasonable man to whom the publication was made would be likely to understand them in a defamatory sense".*

**(d) Whether the Claimants are entitled to the reliefs sought.**

101. In view of the finding herein above that the termination of the claimants' employment was justified and done in accordance with the procedure set out by section 40 of the Employment Act and the respondent's Procedure Manual, I find that they are not entitled to 12 months' salary compensation for loss of employment.

102. Likewise, in view of the finding that the claimants did not prove on a balance of probability that they were discriminated against or defamed, I dismiss the claim for compensatory damages for discrimination and defamation.

103. In addition, the claims by the first claimant for being subjected to unfair performance appraisal and being denied 3% salary increase, and also the prayer to compel the employer to withdraw her letters on the alleged biased performance appraisal from the claimant's personal file are without merits and are also dismissed. Salary increase is done at the employer's discretion. Finally, the court has no jurisdiction to compel employers to expunge any employment records because the law requires that they keep the same for a specified period of time.

**Conclusion and disposition**

104. I have found that the termination of the claimants' employment was not unfair and unlawful as alleged. I have also found that the claimants have failed to prove on a balance of probability that they were discriminated against and defamed by the respondent as alleged. Finally, I have found that the claimants are not entitled to the reliefs sought. Consequently, the suit is dismissed. Each party to bear his or her own costs.

**Dated and delivered at Nairobi this 11<sup>th</sup> day of October 2019.**

**ONESMUS N. MAKAU**

**JUDGE**