REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 348 OF 2015

DAVID KATANA MBUI...................................1ST CLAIMANT

MOSES MBUGUA...2ND CLAIMANT

DANIEL MJAWASI MNGONDA..................3RD CLAIMANT

WYCLIFFE OCHIENG' ODANGA.............4TH CLAIMANT

VERSUS

PLAN INTERNATIONAL................................RESPONDENT

(Before Hon. Justice Byram Ongaya on Monday, 6th December, 2019)

JUDGMENT

The claimants were employed by the respondent on diverse dates each in the position of Project officer except the 4th claimant who was a Project Coordinator. They filed the statement of claim on 10.03.2015 through Koceyo & Company Advocates. Each prayed for judgment against the respondent on the headings of 12 months' salaries for compensation for loss of employment and for damages each at Kshs.5, 000, 000.00 for being subjected to harsh and discriminatory practices while in employment. They prayed against the respondent for:

a) 1st claimant Kshs.6, 459, 596.00.

b) 2nd claimant Kshs.6, 459, 596.00.

c) 3rd claimant Kshs.6, 570, 008.00.

d) 4th claimant Kshs.7, 015, 640.00.

e) Total Kshs.26, 504, 840.00.

The reply to the statement of claim was filed on 15.04.2015 through Igeria & Ngugi Advocates. The respondent prayed that the memorandum of claim be dismissed with costs.

The claimants' case is that on or about 11.09.2014 the respondent served each with a redundancy letter.

The evidence on record is as follows:

a) By the letter dated 03.07.2014 each claimant was informed about restructuring and how their respective job or role had been affected. The letter stated that the respondent had for several months been working towards realignment of its systems and structures. The aim was to increase efficiency and cost effectiveness while demonstrating the impact of its programs. As a result of the re-alignment, the letter stated that the respondent had revised the organisational structure and the positions of project officer would be reduced in number. Thus, each employee serving as a project manager would reapply for the job to ensure that all affected officers in the position were given a fair and equal chance for reconsideration. Further the respondent would also advertise other positions and the affected officers were encouraged to apply. The letter further stated that if an officer reapplied or applied for advertised position and was successful then such officer would not be entitled to redundancy related payments. The officer was also advised to notify if one was opting not to reapply in which event the officer would be declared redundant and terminated from

employment.

b) The 1st to 3rd claimants participated by reapplying for the post of Project Implementation Officer but they were each not successful. That decision was conveyed to each claimant by the letter dated 11.09.2014 and thus their positions were rendered redundant. The letter stated that as per the respondent's redundancy provisions on separation policy the notice period was 6 months. The claimants were therefore notified that their employment would end on 28.02.2015. The payments on accrued entitlements would include unpaid salary for days worked as at the day of separation; compensation for leave accrued and not taken as at separation date; prorated leave allowance earned for the duration worked in the calendar year January to December 2014; terminal dues per respondent's separation policy being 1 month's salary for every year worked (if served for more than 3 years) or 15 days for every year worked (if served for less than 3 years); two months' salary as redundancy pay; provident fund as per rules and regulations of the constituted Trust and Retirement Benefits Authority Rules.

c) The notice period was ending on 28.02.2015. By the letter dated 23.10.2014 the respondent notified each claimant (1st to 3rd) that the management had decided to release them early effective 31.10.2014 instead of serving the full notice period which was to end on 28.02.2015. The letter stated the claimants would have served 2 months of the 6 notice period so that each would be paid 4 months in lieu of notice.

d) Each claimant (1st to 3rd) signed a separation agreement on 31.10.2014 or thereabouts setting out all the entitlements. Each completed an exit interview form. Each acknowledged the reason for the exit as retrenchment due to realignment process of the respondent.

e) The terminal dues were computed and each claimant was paid accordingly.

f) The evidence shows the 4th claimant who was a project coordinator opted not to reapply and for his case his notice was running from 01.08.2014 and his employment was ending on 31.01.2015. The letter on the notice was dated 24.09.2014. The 4th claimant acknowledged receipt and stated that he had reservations that the notice was to run from the date of the letter and not retroactively from 01.08.2014 and noting that otherwise, an explanation was in order. The effect was that the notice would be reduced to 5 months instead of contractual 6 months. He was subsequently paid the separation dues along the same computation as the other claimants.

The claimants' case is that the offices they held were not abolished and so the reason for redundancy was not genuine. The claimants further urge that they were subsequently replaced so that the redundancy was not genuine. The claimants urge that as senior staff they were not involved in designing the restructuring or realignment program contrary to the respondent's internal policy. Further the procedure on redundancy was unfair by violating the respondent's internal procedures. Prior to letters of 11.09.2014 they had not been individually notified about the redundancy and the labour officer was not notified per section 40 of the Employment Act, 2007. Further it is alleged that the respondent did not follow the criteria under section 40 of the Act on skill, ability and disciplinary history of the claimants.

The claimants' further case is that in May 2013 a new Country Director one Carol Sherman who was an Australian citizen joined the respondent and she developed open bias and dislike against some staff through exhibiting hostility, rudeness, belittling, and humiliating the claimants before other members of staff creating a hostile and non-conducive working environment. Thus section 5 of the Employment Act, 2007 was thereby violated.

The respondent's case is that its core objective is to promote child rights and improving the lives of vulnerable children through a community development approach. For that purpose it established 7 program units in Kenya. Sometimes in 2013 staff raised issues on management and running of the organisation in terms of structure, reporting lines, levels of authority, job designations and other matters. Thus the respondent engaged a consultant to carry out the respondent's structural review focusing on respondent's operational efficiencies or lack of the same. The findings were that the reporting lines were many as the respondent's structure was bloated. Restructuring the respondent became necessary. Further the claimants had knowledge that the respondent's funding had substantially reduced. The respondent notified employees by office memos about the consultancy findings and about redundancy. The employees even completed questionnaires that were prepared by the consultant. The employees were invited to reapply for jobs or to apply for other available jobs. On 14.07.2014 the respondent notified the labour office about the redundancy. The redundancy affected 40 jobs and it was a transparent and corruption free process.

The respondent's further case is that claims of discrimination, unfairness, or unfair targeting of employees were imaginary and unjustified. The Country Director had not handpicked her cronies to sit in, deliberate and draft the restructuring program. The redundancy package was way above the statutory provisions. Further the claimants had not been subjected to ridicule, loss of self-esteem, or defamation and the Court lacked jurisdiction to entertain such claims. In addition:

a) The 1st, 2nd and 3rd claimants were informed, they were holding positions to be downsized, they participated in reapplying, were not successful, they were paid terminal dues and are not entitled to the claims as they are estopped.

b) The 4th claimant opted not to participate in reapplying and he was paid full separation dues. He executed the separation agreement and is bound accordingly.

The **1st issue** for determination is whether the reason for redundancy was genuine. The respondent has filed the detailed exhibits on hiring of a consultant and the consultancy report is filed. It is detailed on whatever was going to happen in the redundancy process and the relevant report is exhibited. The Court has considered the consultancy report and there is no reason to doubt that the respondent was in detailed and genuine redundancy process. The Court finds that the respondent has established that there existed a genuine reason for redundancy as envisaged in sections 43, 45 and 47(5) of the Employment Act, 2007.

The **2nd issue** is whether the respondent complied with the contractual and statutory provisions on redundancy. Section 40 required service of a month's notice. By the letter dated 25.08.2019 the 4th claimant was informed he had opted not to reapply and he had been declared redundant effective 01.08.2014 so that he was being given a 6 months' contractual notice ending on 31.01.2013. The Court finds that notice

was within the contractual notice save if it was shorter than the contractual notice due to retroactive application, parties appear to have negotiated as per the 4th claimant's inquiry and endorsement that an explanation was done. In absence of a claim in that regard, the parties must have compromised that point on retroactivity. The 1st, 2nd and 3rd claimants were each given the letter dated 03.07.2014 to reapply. That was the 1st notice about the redundancy. Next they were notified by letter they had not been successful and given the 6 months' contractual redundancy notice which was beyond the statutory one month. The evidence is that the claimants were notified and the statutory one month was complied with. The extent of the redundancy was notified to the area labour officer by the letter dated 07.07.2014 received on 14.07.2014. The Court returns that the respondent complied with the prescribed statutory notices.

On selection the Court finds that the respondent and the claimants were in agreement that the claimants would reapply or apply for new positions or opt out to direct redundancy. The parties appear to have been in genuine process because the claimants never raised a grievance in the manner all the persons who held the office of project officer were subjected to the interviews. The Court finds that the interviews were such process that qualified for an objective selection criteria. In view that the claimants did not object to that selection criteria, as submitted for the respondent, they are estopped from raising that belated challenge to the selection process.

The material on record shows that the position of Project Officer was redefined in the restructuring to Project Implementation Officer. To that extent, the office held by the 1st, 2nd and 3rd claimants had been abolished – and it was not unfair to give all the employees affected an opportunity to reapply. The 4th respondent opted not to apply or reapply and the Court returns that he removed himself from the selection process and voluntarily so. In any event the Court returns that in a redundancy it is not necessary that an office is abolished. What is crucial is that the employee is terminated from employment for reasons not attributable to the employee within the definition of redundancy in the Employment Act, 2007. Thus a restructuring or reorganisation by an employer to achieve better economy, efficiency, effectiveness, science, art or technology without necessarily abolishing any of the prevailing offices would be a genuine reason to justify redundancy.

The Court further finds that the regime to give employees an opportunity to apply or reapply, the involvement in the consultancy work leading to the redundancy and an opportunity to apply for new vacancies were all demonstrated opportunities by the respondent to consult the claimants and to receive their views on mitigating contributions in view of the looming redundancy. The claimants' witness confirmed that the consultants visited the field officers and offered psychological and family advice in view of the redundancy. The claimants' witness testified that they had room to appeal but never appealed. The Court returns that in absence of the claimants' grievances throughout the process, the claimants were satisfied with the manner they were being involved in the processes and it cannot be said that there was no consultation at all. The claimant's witness testified that up to the reapplying stage, the process was fair and the reapplying and the interviews were fairly conducted. The Court therefore returns that the selection process was not unfair. He also testified that they never complained about the redundancy.

On payment, there was no dispute that the contractual and statutory dues were paid and section 40 of the Act was fully complied with. The claimants' witness testified that the 6 months' notice pay would be one month in normal circumstances and the terminal payment was generous.

Finally, the Court returns that the claimants signed the separation agreement and the agreement is binding. In view of that evidence it cannot be that the termination was unfair and the Court returns that the alleged unfair termination and the claim for compensation are not justified.

To answer the **3rd issue** for determination the Court returns that the claimants have failed to establish discrimination and unfair labour practices or treatment in contravention of section 5 of the Employment Act, 2007. While alleging that the claimants were not involved in identifying the consultant who undertook the structural review of the respondent, the claimants' witness confirmed that he was not part of the management so that he would not be involved in procurement of the consultants. Further there was no evidence that the consultants had been handpicked or instructed to target the claimants. The Claimants' witness confirmed that the process was fair including the chance to reapply and participate in the interviews. Thus the alleged discrimination or unfair treatment was not established at all. The Court has revisited the memorandum of claim, the evidence and the submissions filed for the claimants and find that no discrimination was established and no unfair treatment was shown to exist in the case. The claimants made no submissions to justify the prayer for damages on alleged discrimination and unfair termination as prayed for. The claims and prayer will collapse.

The respondent has succeeded and will get costs of the suit.

In conclusion judgment is hereby entered for the respondent against the claimants for dismissal of the suit with costs.

Signed, dated and delivered in court at Nairobi this Friday, 6th December, 2019.

BYRAM ONGAYA

JUDGE