REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 2104 OF 2017

(Before Hon. Lady Justice Maureen Onyango)

GERRISHOM MUKHUTSI OBAYO.....CLAIMANT

VERSUS

DSV AIR AND SEA LIMITED.....RESPONDENT

JUDGMENT

The claimant GERRISHOM MUKHUTSI OBAYO was employed by the respondent, a transport and logistics company registered in Kenya, as a General Manager – Airfreight, from 1st March 2016. His appointment was confirmed by letter dated 21st December 2016 with effect from 1st September 2016.

The claimant was awarded a merit increment on 1st May 2017 based on performance in the previous year.

On 4th September 2017 the claimant received a letter of termination on account of redundancy. The letter stated that he would cease to be an employee of the respondent effective 30th September 2017, explaining that it was due to a critical reduction in business leading to reduced revenues. The letter set out the final dues payable to the claimant as follows –

1. Days worked up to and including 30th September 2017.
2. Outstanding leave as at 30th September 2017 – 66 days
3. Telephone bill for the month of September
4. Outstanding notice days – 3 days
5. Severance pay at 15 days for every complete year of service – 1 year.

The claimant was issued with a certificate of service on 27th September 2017.

By the claimant's statement of claim dated 18th October 2017 and filed on the same day, he avers that he was unfairly declared redundant by the respondent on 4th September 2017. He seeks the following reliefs –

i) A declaration that the Claimant's employment was unfairly terminated by Respondent;

ii) A declaration that the Claimant was discriminated against by the Respondent;

iii) One month's salary in lieu of notice, amounting to Kenya Shillings Three Hundred and Thirty Thousand (Kshs.330,000);

iv) Compensation for unfair termination assessed at twelve (12) months, amounting to Kenya Shillings Three Million, Nine Hundred and Sixty Thousand (Kshs.3,960,000);

v) Interest in (iii) and (iv) above;

vi) Damages for discrimination;

vii) Costs of this suit; and

viii) Any other relief as the Tribunal would deem just and expedient to grant.

The respondent filed a reply to the memorandum of claim on 28th December 2017. In the defence the respondent states that the redundancy of the claimant was in accordance with the provisions of the Employment Act and all applicable laws. It denies that the same was unfair.

When the case came up for directions the court noted that the facts were not contested and directed that parties proceed by way of written submissions.

Claimant's Submissions

In the submissions filed on behalf of the claimant, he urges that the respondent did not comply with the procedure set out under Section 40(1)(b) of the Employment Act. The claimant relies on the case of **HESBON NGARUIYA WAIGI VERSUS EQUITORIAL COMMERCIAL BANK LIMITED (2013) eKLR** held:

> *"These conditions outlined in the law are mandatory and not left to the choice of the employer. Redundancies affect workers livelihoods and where this must be done by an employer must put into consideration the provisions of the law."*

He further relies on the case of **FRANCIS MAINA KAMAU VERSUS LEE CONSTRUCTION (2014) eKLR** held that:

> *"Where an employer declares a redundancy the conditions set out in Section 40 of the Employment Act must be observed and where the employer fails to do so, the termination becomes unfair termination within the meaning of Section 45 of the Employment Act."*

He submits that the procedures to be followed by an employer in effecting a lawful redundancy against an employee who is not a member of a trade union is enshrined under Section 40(1)(b) of the Employment Act which provides–

> **"(b) where an employee *is* not a member of a trade union, the employer notifies the employee personally in writing and the labour officer;"**

That this provision demands that in order for a redundancy to be deemed as lawful by the Court, an employer has a statutory underpinned obligation to issue a written notice to the affected employee at least one month prior to the date of the intended redundancy and also issue a simultaneous notice to the Labour Officer.

The claimant observes that the Respondent in its Bundle of Documents has produced the notice to the

County Labour Office referenced "REDUNDANCY NOTIFICATION" dated 25th August 2017. The last paragraph read:

> ***"****The same shall be communicated to the affected staff on 31st August 2017. Their services shall be terminated on this account effective 30th September 2017."*

That the Respondent had not issued any notice whatsoever to the Claimant of the intended termination of employment at the time it issued the notice to the County Labour Officer. It was submitted that this action by the Respondent is in contravention of the procedure laid down under Section 40(1)(b) of the Employment Act that demands that the affected employees be notified and the same be communicated to the Labour Officer.

The claimant further relies on the decision of the Court of Appeal in **THOMAS DE LA RUE (K) LTD VERSUS DAVID OPONDO ONIUTELENIA (2013) eKLR** where the court held -

> *"Where an employee is a member of a trade union, the law contemplates that the employer will deal with the employee through the union. That is why section 40 (a) requires notification of the union in cases of redundancy of unionisable workers. Under section 56 of the Labour Relations Act, officials or authorized representatives of a trade union are entitled to reasonable access to the employer's premises to; among other things represent its members in dealings with the employer. It is only in cases where the employee is not a member of the union that the employer has to deal directly with the employee.''*

It is submitted that the Respondent admits that on 4th September 2017 it summoned the Claimant to a meeting that was attended by the Respondent's Managing Director and Human Resource Manager where the Claimant was informed of termination of employment on account of redundancy. It is also confirmed by both parties that at the same meeting the Respondent issued the Claimant with the letter referenced "*TERMINATION OF SERVICE ON ACCOUNT OF REDUNDANCY*".

That contrary to the allegation by the Respondent, there was no meaningful consultation that was done prior to the termination on account of redundancy.

That consultation is implicit under Section 40(1) of the Employment Act. However, Kenya is a State party to the International Labour Organization (ILO), which it joined in 1964 and is bound by the ILO conventions.

Article 13 of **Recommendation No. 166** of the **ILO Convention No.** 158- **Termination of Employment Convention,** 1982 requires consultation between the employers on the one hand and the employees or their representatives on the other before termination of employment under redundancy. It reads –

> ***"1. When the employer contemplates terminations for reasons of an economic, technological, structural or similar nature, the employer shall:***
>
> ***(a) provide the workers' representatives concerned in good time with relevant information including the reasons for the terminations contemplated, the number and categories of workers likely to be affected and the period over which the terminations are intended to be carried out;***
>
> ***(b) give, in accordance with national law and practice, the workers' representatives concerned, as early as possible, an opportunity for consultation on measures to be taken to avert or to minimise the terminations and measures to mitigate the adverse effects of any terminations on the workers concerned such as finding alternative employment."***

That as noted by Maraga JA in **KENYA AIRWAYS LIMITED -V- AVIATION & ALLIED WORKERS UNION KENYA & 3 OTHERS [2014] eKLR**

"The purpose of the notice under Section 40(1) (a) and (b) of the Employment Act, as is also provided for in the said ILO Convention No. 158 – Termination of Employment Convention, 1982, is to give the parties an opportunity to consider measures to be taken to avert or to minimise the terminations and measures to mitigate the adverse effects of any terminations on the workers concerned such as finding alternative employment. The consultations are therefore meant to cause the parties to discuss and negotiate a way out of the intended redundancy, if possible, or the best way of implementing it if it is unavoidable. This means that if parties put their heads together, chances are that they could avert or at least minimize the terminations resulting from the employer's proposed redundancy. If redundancy is inevitable, measures should to be taken to ensure that as little hardship as possible is caused to the affected employees."

That the Court in **Hesbon Ngaruiya Waigi Case** while analysing the impact of redundancy on the affected employees held –

"*This is not a one day process as it must be participatory, consultative and informative*."

It is further the claimant's submissions that the selection criteria employed by the respondent was not in conformity with Section 40(c) which provides that –

(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;

It is the claimant's submissions that the respondent had through the statement of DORCAS MUNYI stated that in Airfreight Department where he was General Manager started making losses in 2014 and took a turn for the worse during the electioneering period in 2017 meaning that it was making losses even before his appointment. The claimant stated that no reason was given on the criteria for choosing him specifically.

The claimant submitted that –

Article 15 of the **Supplementary Provisions** to the **ILO Recommendation No. 119 – Termination of Employment Recommendation, 1963,** concerning reduction of the work force also provides that: -

"(1) The selection of workers to be affected by a reduction of the work force should be made according to precise criteria, which it is desirable should be established wherever possible in advance, and which give due weight both to the interests of the undertaking, establishment or service and to the interests of the workers."

The Court of Appeal in **KENYA AIRWAYS LIMITED -V- AVIATION & ALLIED WORKERS UNION KENYA CASE** held that where a redundancy selection criteria is non-existent or opaque the statutory threshold cannot be said to have been met.

That the selection criteria employed by the Respondent in the process of redundancy was neither objective nor open criteria hence it did not meet the statutory threshold as envisaged under Section 40(1) (c) of the Employment Act.

On compensation the claimant submitted that the respondent having failed to comply with the procedure for redundancy under Section 40 of the Act, his termination was unfair within the meaning of Section 45 of the Act and he is entitled to compensation under Section 49(1)(c) of the Act.

He relied on the case of **KENYA AIRWAYS LIMITED V AVIATION & ALLIED WORKERS UNION KENYA** where it was 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."

That the Claimant is entitled to compensation as prayed for in the Statement of Claim owing to the difficulty of him securing an alternative employment following the unfair termination by the Respondent.

Respondent's Submissions

The respondent submitted that the Airfreight Department had been reporting loses over time but took a turn for the worse in the year 2017 as a result of disruption and loss of business due to general elections and political unrest within the country, that it was not able to meet salary costs for its personnel in the department and other departments in the company. It is submitted that is was forced to restructure and harmonise some of its departments to ensure sustainability.

It is submitted that several meetings with top managers were conducted where the financial situation and proposed restructuring were discussed. It is further submitted that several positons including the claimant's were affected by the redundancy. That the claimant was invited for a meeting with the respondent's Managing Director and Human Resource Manager where the impending redundancy and reasons thereof were explained to him at length, that he was advised of his terminal dues which he agreed and appended his signature to.

It is the respondent's submission that the redundancy was both procedurally and substantively fair and justified, that the respondent was within its right to organise and restructure its functions to ensure efficacy both functionally and financially.

The respondent relied on the case of **THOMAS DE LA RUE (K) LIMITED V DAVID OPONDO UMUTELEMA eKLR** the Court said:

"It is quite clear to us that section 40(a) and 40(b) provide for two different kinds of redundancy notifications depending on whether the employee is or is not a member of a trade union. Where the employee is a member of a union, the notification is to the union and the local labour officer at least one month before the effective redundancy date. Where the employee is not a member of the union, the notification must be in writing to the employee and the local labour officer..."

This position was reiterated by the Court of Appeal in **AFRICA NAZARENE UNIVERSITY VS. DAVID MUTEVU AND 103 OTHERS (2017) eKLR** where the court was called on to interpret section 40 of the Act and in particular the requirements as to notice under this section. The Court stated that: -

"We agree that construction as well as observation of section 40 1 (b) says nothing about the length of the notice or the contents. In our view however, the only difference between Section 40 (1) (a) and 40 (1) (b) is whether an employee is a member of a trade union or not A proper construction of both sections would show that the phrase: - 'the reasons for and the extent of intended redundancy not less than a month prior to the date of redundancy' is common to both kinds of employees."

The respondent further relies on the decision of Justice Abuodha in the case of **BANKING INSURANCE AND FINANCE UNION (KENYA) -V- KIRINYAGA DISTRICT CO-OPERATIVE UNION LTD & ANOTHER [2014] eKLR,** where he had this to say about the intent and purpose of the redundancy notification –

"The purpose of the notification is to enable the Union and the Labour Officer to understand and appreciate the purpose of the redundancy. It is aimed at calling into participation, the Union and Labour Official, to ensure the other provisions of Section 40(1) are observed in carrying out the redundancy. It is further meant to ensure that the employees affected are compensated, on the

minimum, as provided in the Employment Act or the CBA and that the exercise is being carried out in a transparent manner and does not amount to unfair labour practice."

The respondent submitted that the sequence of giving notice and the wording of the letter to the employee and Labour Officer are of no consequence.

It is submitted that subsection 1(c) of the conditions in Section 40 requires that the employer has to give due regard to seniority in time and to the skill, ability and reliability of each employee of the particular class of employees affected.

That the Respondent followed the criteria under the Act taking into account the operational requirements of the Company, that the Respondent's Airfreight Department which was the most affected department had suffered the most losses as evidenced by the schedule of losses in the Respondent's Bundle of Documents. It is submitted that the Claimant's department had been suffering perennial losses. Accordingly, the respondent satisfied the requirements of the Act with regards to ability, skill and reliability in the selection of the Claimant.

The respondent further relied on the case of **KENYA PLANTATION AGRICULTURAL WORKERS UNION -V- HARVEST LIMITED [2014] eKLR** where the court opined thus –

"*Section 40(1) (c) of the Act clearly provides that in selecting employees for redundancy, the employer shall have regard to seniority in time and to skill, ability and reliability of each employee of the particular class of employees affected by the redundancy. The court holds that the idea of last in first out satisfies the seniority criterion..."*

It is submitted that the claimant was employed on 1st March, 2016. Compared to the other General Manager, Sea freight Operations Department heads who had been with the Respondent since 01/07/2015 the Claimant had been with the Respondent for a much shorter period. Accordingly, due regard to the seniority in time of the employees was taken into account by the respondent in the selection of staff to be declared redundant.

That the law under Section 40 (1) (e-g) was fully complied with via a letter dated 4th September 2017 to the Claimant, (Produced as document number 6, page 58, of the Respondent's List of Documents) the Respondent tabulated all the dues to be paid to the Claimant, to wit, days worked up to and including 30th September, 2017; Outstanding leave as at 30th September, 2017, 7.66 days; telephone bill for the month of September; outstanding notice days – 3 days and severance pay at 15 days for every complete year of service – 1 year. The Claimant acknowledged receipt of all the dues by appending his signature on the letter.

The respondent submitted that the claimant did not allege lack of consultations and should not be allowed to sneak it not submissions.

It is submitted that it is trite law that there should be no finding on an issue that is not raised in pleadings. The issue of consultation should have been pleaded in the Claimant's Statement of Claim to allow the Respondent an opportunity to address it and adduce evidence. In **HELLEN WANGARE WANGECI VS. CARUMERA MUTHONI CATHUA 2015 eKLR** the court opined thus:-

"For the sake of certainty and finality each party is bound by its own pleadings and cannot be allowed to raise a different case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at trial. The court is as bound by the pleadings of the parties as they themselves."

On remedies the respondent submitted that the claimant was given one month's notice under Section 40(1)(f) and that since it complied with the procedure the claimant is not entitled to compensation.

It prayed that the claim be dismissed with costs.

Determination

Redundancy is defined under Section 2 of the Employment Act as –

> **"redundancy" means the loss of employment, occupation, job or career by involuntary means through no fault of an employee, involving termination of employment at the initiative of the employer, where the services of an employee are superfluous and the practices commonly known as abolition of office, job or occupation and loss of employment;**

Section 40 sets out the procedure for redundancy. Under Section 40(1)(a) and (b) the employer is required to notify the union and the Labour Officer at least one month before the redundancy is effected, of the intention to declare the employee redundant.

Subsection 40(1)(b) required the employee and the Labour Officer to be notified where the employee is not a member of the union.

As was stated by the Court of Appeal in the case of **THOMAS DE LA RUE (K) LTD -V- DAVID OPUNDO OMUTELEMA,** the notification period of one month provided for in Subsection 40(1)(a) applies to the notification under Subsection 40(a)(b) as well when the court stated –

> *"… 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."*

The respondent's argument that the order in which the notice to the employee and the Labour Officer is given is inconsequential is in my opinion, a misapprehension of the requirements of both Section 40(a) and (b). In both sections the provision is that the notice is given to the employee and the Labour Officer, or the union and the Labour Officer. It means that in each case, the Labour Officer must be entitled at least one month's notice before the redundancy is effected, and the employee or union must also be notified at least one month before the redundancy is affected.

The word used is notification. This period of one month is intended for the person receiving the notice to confirm that the preconditions of redundancy have been complied with. These preconditions as set out under Section 40(1) include the communication of reason for, and extent of, the redundancy, and the selection criteria. The period is necessary for any disputes over these issues to be settled before the redundancy is effected. The period also allows for consultations and any negotiations to take place before the redundancy is carried out, and for the Labour Officer to ensure that the redundancy will be carried out in accordance with the Act.

For a redundancy to be valid, the employer must prove that both the Labour *i*Officer and the employee or the employee's union, where there is one, have been notified at least one month before the redundancy takes place.

This notification of intention under Section 40(1)(a) and (b) is different from the notice of termination under Section 40(1)(f).

In the present case, the claimant was not notified of the intention to carry out the redundancy. What the respondent did was to issue notice of termination under Section 40(1)(f). This is evident from the fact that the claimant received only one letter dated 4th September 2017 which is appropriately entitled ***"TERMINATION OF SERVICE ON ACCOUNT OF REDUNDANCY".*** The letter does no mention the notification period which should have come a month earlier.

The other issues contested by the claimant is the selection criteria. The claimant alleges that he was discriminately selected while the respondent avers that the claimant was only one of the employees

declared redundant. In the very elaborate statement of DORCAS MUNYI filed with the claim, she does not state the losses (or profits) by each department to prove that the claimant's department incurred the losses. The notice to the Labour Officer gives the name of the claimant, a General Manager, an Accounts Assistant in Finance Department. As is provided in Section 40(1)(c) comparison or selection criteria is for the same class of employees affected. A General Manager and an Accounts Assistant in a different department do not fall in the same class.

I find that although the claimant questioned the criteria of selection, the respondent failed to satisfactorily demonstrate that the selection was rational.

For the foregoing reasons I find that the respondent failed to comply with the redundancy procedure set out under Section 40(a) of the Employment Act with the result that the redundancy of the claimant was unprocedural and therefore unfair.

Remedies

The claimant prayed for a declaration that his employment was terminated unfairly. I would not quite agree and substitute that for reason set out above with a declaration that the redundancy was unprocedural and therefore unfair.

The claimant further prayed for a declaration that he was discriminated against. Again I do not agree because the claimant has not demonstrated that he was discriminated. All that I have found from the evidence on record is that the respondent did not prove that it complied with the selection criteria which in my opinion does not amount to proof of discrimination.

The claimant further prayed for one month's salary in lieu of notice. I would again rephrase this and state that he was entitled to both notification of the intended redundancy of at least one month and a termination notice of one month. Having only been given one of the two, I award him the other which is an equivalent of one month's salary at Kshs.300,000.

Based on the findings above, I decline to award the claimant either compensation for unfair termination or damages for discrimination.

The claimant will however have costs of the suit.

Orders

I therefore enter judgment for the claimant against the respondent as follows–

1. Kshs.300,000/=

2. Costs

The decretal sum shall attract interest at court rates from the date of judgment.

DATED AND SIGNED AT NAIROBI ON THIS 26TH DAY OF JULY 2018

MAUREEN ONYANGO

JUDGE