REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 502 OF 2016

ANGELA SHIUKURU ILONDANGA.....CLAIMANT

- VERSUS -

AIRTEL NETWORKS KENYA LIMITED....RESPONDENT

(Before Hon. Justice Byram Ongaya on Thursday 12th July, 2018)

JUDGMENT

The claimant filed the statement of claim on 31.03.2015 through Prof. Albert Mumma & Company Advocates. The claimant prayed for judgment against the respondent for:

a. Compensation for damages for wrongful dismissal and unfair termination equivalent to 12 months' salaries being Kshs.133, 088 x 12 making Kshs.1, 596, 096.00.

b. Payment in lieu of notice Kshs.266, 016 being 2 months' salaries.

c. Annual bonus compensation for 2015 – 2016 being Kshs.178, 456.00.

d. Kshs.711, 637.05 being balance of the loan as at January 2016.

e. Costs of the suits to be provided for.

f. Such further or other relief the Honourable Court may deem fit.

The respondent filed the statement of response on 13.07.2016 through Hamilton Harrison & Mathews Advocates. The respondent prayed that the claimant's claim should be dismissed with costs.

It is not disputed that the respondent employed the claimant on 01.04.2007 and confirmed in permanent service. She served at the respondent's Mombasa offices and was transferred to Nairobi. By the letter dated 01.09.2014 the claimant was appointed to the position of Shop Manager and reporting to Manager Express Shop. The claimant was assessed and be the letter dated 10.02.2015 he was confirmed in the position of Manager Express Shop effective 01.02.2015.

By the letter dated 15.01.2016, the respondent terminated the claimant's employment effective 15.01.2016 on account of redundancy occasioned by re-organisation which rendered the office (Express Shop Manager) held by the claimant redundant.

The claimant's case is that the termination was unfair because the reason for termination was not genuine and the statutory procedure under section 40 of the Employment Act was not followed. In particular, the claimant's case was that after the termination another person was employed to replace the claimant in the same position. Further the claimant's case was that he was not served with the 30 day's notice; the area labour officer was not served the 30 days' notice; and selection criteria with regard to seniority in time, skill, performance, ability and reliability as against employees holding similar position was not complied with.

The respondent's case was that in the re-organisation process 63 positions were rendered redundant and one of the offices was that held by the claimant; the position of Express Shop Manager, which was completely done away with. Further the respondent was entitled to reorganise its business towards greatest efficiencies of its human resource and operational costs. One Kennedy Oluoch whom the claimant alleged to have been employed in the claimant's position about a year after the claimant left employment was not the respondent's employee

and that he may have been employed in the outsourcing arrangement that the respondent opted for. Further, the Ministry of Labour, Social Security and Services had been served a notice dated 07.12.2015 and received by the Ministry on 09.12.2015. By that letter, the respondent notified the Ministry that 63 offices would be rendered redundant.

The court has considered the pleadings, the evidence and the submissions filed for the parties. The issues in dispute are determined as follows.

The **1st issue** for determination is whether the respondent complied with the procedure for redundancy as provided for in section 40 of the Employment Act, 2007. Section 40(1) (a) as read with section 40(1) (b) has been construed to mean that an individual employee is entitled to similar notice as a trade union being a notice of the reasons and extent of the intended redundancy not less than a month prior to the date of the intended date of termination on account of redundancy. Thus, in **Thomas De La Rue (K) Ltd –Versus- David Opondo Omutelema [2013]eKLR**, the Court of Appeal stated thus, "**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 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.**"

Again in **Africa Nazarene University –Versus- David Mutevu & 103 Others [2017]eKLR**, the Court of Appeal, (Waki, Nambuye, & Koome JJ.A) held, agreeing with **Thomas De La Rue (K) Ltd –Versus- David Opondo Omutelema [2013]eKLR,** thus, " **We agree with that construction as well as the observation that subsection (b) says nothing about the length of the notice or the contents. In our view, however, the only difference in both sub-sections is whether an employee is a member of a trade union or not. A proper construction of both subsections would show that the phrase, "...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..." is common to both kinds of employees. So that, whether an employee belongs to a trade union or not, the reasons and period of notice should be spelt out.**"

In the present case the purported notice to the labour officer was dated 07.12.2015 and delivered on 09.12.2015 as addressed to the Ministry of Labour, Social Security and Services – rather than the area labour officer as required in the section and therefore defective. Further, the claimant received the letter of termination on 15.01.2016 without any prior notice. Even if the general letter to the Ministry was a month prior to the claimant's termination, it is clear that the claimant never received the termination notice as prescribed in section 40 (1) (a) as read with 40 (1) (b) of the Act. Further the Court finds that the notice to the Ministry did not indicate the intended effective date of the redundancy.

Further the selection criterion was not disclosed to the claimant. The court finds that it was not clear whether all offices of Express Shop Manager in the respondent's establishment were being abolished and in which event, the claimant was entitled to be informed as much. If some of the offices were being retained then the claimant was entitled to be shown the selection criteria with regard to seniority in time, skill, performance, ability and reliability as against employees holding similar position and the Court returns that the requirement was not complied with as per section 40 (1) (c) of the Act. The Court follows its opinion in **Paul Ngeno –Versus- Pyrethrum Board of Kenya Ltd [2013]eKLR**, where it was held that a termination on account of redundancy would be unfair where the claimant was not accorded the redundancy procedure as provided for in section 40 of the Employment Act, 2007 or he was not given any notice or prepared for the redundancy and the selection criterion was not disclosed to the claimant. Where an employee is one of several employees holding a similar office or position, the Court holds that the employee is entitled to be informed the criteria used to select him for the redundancy or the fact that all offices similar to the one held by the claimant have been rendered redundant.

The Court follows its opinion on the requisite selection criteria and as submitted for the claimant in **Kenya Plantation and Agricultural Workers Union –Versus- Harvest Limited [2014]eKLR**, 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. As far as skill, ability and reliability are concerned, it is the opinion of the court that the employer must have, prior to the redundancy exercise, instituted objective qualifications for skill, ability and reliability attached to the office held by the workers against which the skills, ability and reliability possessed by the individual workers targeted in the redundancy will be scored or measured against. The employer, in the court's opinion, must demonstrate the objective score sheet and the ranking of the targeted employees against that score sheet with respect to the selection factors set out in section 40(1) (c) of the Act failing which, it is difficult to establish compliance with the section. The court also holds that the selection parameters in section 40(1) (c) are not in alternative so that in a redundancy process, the employer must establish that all the parameters have been taken into account and in an objective manner. It is the opinion of the court that the employer enjoys the discretion to place given weights on each of the parameters but none can be applied in exclusion of the others.**"

Thus, the Court returns that the respondent's decision to terminate the claimant's employment on account of redundancy was procedurally unfair. In any event, it was submitted for the respondent that indeed, notice period under section 40(1) (b) had not been served.

The **2nd issue** for determination is whether the reason for redundancy was valid. It was the respondent's case that the respondent reorganized for better efficiency with the consequence that the office held by the claimant was rendered redundant. During cross-examination, the respondent's witness confirmed that the respondent's Parkside Shop where the claimant was deployed as the Express Shop Manager was still in operation. The Court has considered that evidence against the email of 25.02.2016 addressed to one Kennedy Olouch, Shop Manager, Parkside Shop and returns that the claimant has established on a balance of probability that the office held by the claimant in the respondent's establishment was never abolished or rendered redundant. In any event, it has not been shown that the respondent notified the abolition of the office held by the claimant to the Director of Employment as required under section 77 of the Employment Act, 2007 and that failure should be sufficient evidence that the office was not abolished.

Thus, as at the time of termination, the Court returns that the respondent has failed to show that there existed a genuine reason for the termination of the contract of service on account of redundancy.

To answer the **3rd issue** for determination, the Court returns that the termination of the claimant's employment on account of redundancy was procedurally and substantively unfair.

The **4th issue** for determination is whether the claimant is entitled to the remedies as prayed for. The Court makes findings as follows:

a. The claimant prayed for compensation for damages for wrongful dismissal and unfair termination equivalent to 12 months' salaries being Kshs.133, 088 x 12 making **Kshs.1, 596, 096.00**. The Court has considered that the claimant never contributed to her predicament; she desired to continue in employment; she had a clean record of service that earned her promotions; she had been emplaced on permanent and indefinite service in view of her good performance; and, the Court has considered the aggravating factors that she was terminated abruptly and at a time she had an outstanding loan of Kshs.711, 637.05. In view of those factors, the Court returns that the claimant is entitled to the amount claimed for compensation under section 49 of the Act. While allowing the award, the Court has considered the ex-gratia payment made in favour of the claimant of Kshs. 133, 008.00 against the annual bonus which was due for half year served but not paid at all and finds that the ex-gratia payment, in the circumstances, will not mitigate towards reducing the maximum statutory compensation.

b. The claimant prayed for payment in lieu of notice Kshs.266, 016 being 2 months' salaries. There is no dispute that the parties agreed upon the 2 months' pay in lieu of the termination notice. The claimant admits that the pay was made and applied to settle the outstanding bank loan. The prayer will fail because otherwise it will amount to double payment.

c. The claimant prayed for annual bonus compensation for 2015 – 2016 being Kshs.178, 456.00. The claimant's evidence was that she was due for bonus pay in June 2016 which was based on her performance and the annual targeted maximum bonus being Kshs. 178, 456.00. Having been terminated on 15.01.2016, it was submitted that she was entitled to at least half of the bonus. It is clear that the pay was based on performance and profits assessed at the end of the respondent's financial year being next at end of June 2016. Such assessment did not take place and the Court reckons that the failure not to compute and award the pro-rate half year bonus has been taken into account in awarding the maximum compensation under section 49 of the Act. Accordingly the prayer for bonus will be declined.

d. The claimant prayed for Kshs.711, 637.05 being balance of the loan as at January 2016. It was clear that the same was a credit facility in favour of the claimant payable out of her employment dues. The final redundancy package was applied to pay the loan. It was clear that the respondent was not the guarantor of such loan but as the employer had undertaken to ensure repay of the loan out of the claimant's employment dues or benefits. In such circumstances, the prayer will fail.

In conclusion, judgment is hereby entered for the claimant against the respondent for:

a.The respondent to pay the claimant a sum of **Kshs.1, 596, 096.00** by 01.09.2018 failing interest to be payable thereon at Court rates from the date of this judgment till full payment.

b.The respondent to pay the claimant's costs of the suit.

Signed, dated and **delivered** in court at **Nairobi** this **Thursday 12th July, 2018.**

BYRAM ONGAYA

JUDGE