



REPUBLIC OF KENYA
EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 2197 OF 2014

(BEFORE HON. LADY JUSTICE HELLEN S. WASILWA ON 17TH JANUARY, 2017)

HELGA OHANY..... CLAIMANT

VERSUS

THE GERMANY SCHOOL SOCIETY.RESPONDENT

JUDGMENT

1. Before the Court is a claim for wrongful and unfair termination where the Claimant prays for judgment against the Respondent for:

- a. A declaration that the Claimant has suffered unfair and wrongful redundancy.*
- b. A declaration that the Claimant was subjected to discriminatory practices to her disadvantage and detriment.*
- c. Lost income from 12th July 2014 to 31st July 2015 in the sum of €57,417.39 or equivalent in Kshs. 6,602,999.85 (at the exchange rate of Kshs. 115 as at December 2014).*
- d. Back pay in the sum of €43,264.55 from 2008 onwards or equivalent in Kshs. 4,975,424.25 at the exchange rate of Kshs. 115 as at December, 2014).*
- e. Unpaid pension contributions in the sum of €37,061.26 plus accrued interest of €35,499.86 or equivalent in the sum of Kshs.4,262,044.90 and accrued interest of Kshs. 4,082,483.90 respectively at the exchange rate of Kshs. 115 as at December 2014).*
- f. Service pay as at 31st July 2015 in the sum of €43,694.50 or equivalent in Kshs 5,024,867.50 at the exchange rate of Kshs 115 as at 10th December 2014).*
- g. Payment of pecuniary loss and maximum compensation for loss of employment.*
- h. Damages for wrongful and/or unlawful termination.*
- i. Damages for discriminatory practices directed to the Claimant.*
- j. Costs.*

k. Interest on (c) (d) and (j) at Court rates.

Facts of the claim

2. The Claimant was employed by the Respondent on an unlimited contract on or about the 28th of March 1995 at a salary of DM2,076.00 per month. She performed her duties diligently and rose through the ranks to the position of Chief Accountant until termination on grounds of redundancy, on the 11th of July 2014.
3. The Claimant avers that upon her employment she sought to be allowed to join the employer's pension scheme but her application was turned down and she was informed that the scheme was only available to employees paid in Kenya Shillings and not those paid in DM.
4. The Claimant avers that following staff changes in 1997, there was a restructuring in the Administration Department and from January 1998 she became a full time Accountant with all the financial responsibilities. She claims that between August 1999 and 2004 several other changes were made in her contract leading to loss of loyalty bonus and compensation for loss of purchasing power, which position was discriminatory as other employees on Euro Contracts' still got their payments.
5. The Claimant avers that in November 2004, there was an additional agreement between her and her employer, and as from December 2007 her duties and responsibilities increased including undertaking the duties for the Administration Manager which she performed until March 2008 when the new Administration Manager took up office.
6. The Claimant avers that she was denied the opportunity to discuss hostile work environment, challenges and difficulties at work contrary to her terms and conditions of employment, and that the changes made to her terms were all to her detriment, leading to loss of income of €43,264.55 as back pay.
7. Further she claims that she discovered that with the knowledge of the Respondent, she was being underpaid as per the TVOED salary scale and her name was missing from the list of employees of the Respondent entitled to such payment, pursuant to a decision made in the Annual General Meeting of the Respondent. Her enquiry into the matter was ignored and went unresolved.
8. She avers that her denial of admission into the pension scheme was discriminatory and the total accrued contributions denied to her by the Respondent was €37,061.26 plus accrued interest of €35,499.86.
9. She avers that she had a discussion over her retirement and entry into the pension scheme and it was duly agreed that the board would be consulted in the matter but no response was forthcoming for almost six months and upon probing, the said board asked for more time. She claims that she took on an understudy, a Mr. Matundura who was to stay on for only three months but is now the head of accounts.
10. The Claimant avers that she had legitimate expectation that her retirement proposal would be approved but she was then presented with a proposal requiring her retirement on the 31st December 2014. She was to be paid in installments running to the end of 2017, and she was to make herself available for 40 hours per year in 2015, 2016, and 2017. No payment would be made in the pension scheme and no further demands, past and present would be entertained.
11. She avers that the claim that she retires by the 31st of December 2014 was unlawful and illegal; and was contrary to ongoing negotiations that would have put her earliest date of retirement at July 2016 as per her unlimited contract.
12. She avers that without notice or justifiable cause, the Respondent declared the Claimant redundant in a capricious and arbitrary manner which was unfairly and unlawfully and irregularly terminating the employment of the Claimant, and directed that she vacates the premises.

13. The termination did not heed any International Labour Organization provisions, the Employment Act section 40 as read together with Section 43, 45 and Section 47 (5) of the employment act as well as the employers Terms and Conditions of Service.

14. The Claimant acknowledges receipts of Kshs. 3,580,901.00 being the net payment as per pay slip of July 2014.

15. The Claimant lists the following as the particulars of malice:

- a. Failing to give lawful notice of the intended redundancy;*
- b. Giving the Claimant an invalid and/or inadequate notice of the redundancy;*
- c. Unlawfully and unfairly implementing the redundancy decision;*
- d. Failing to accord the Claimant an opportunity for consultation on the intended redundancy;*
- e. Humiliating the Claimant;*
- f. Proceeding with redundancy of the Claimant without any basis or justification;*
- g. Failing to give the Claimant a fair hearing;*
- h. Acting in breach of statutory provisions of the law;*
- i. Having no valid grounds upon which to proceed with the redundancy;*
- j. Carrying out the process of redundancy unlawfully, irregularly, unfairly and contrary to the law governing the relationship of the parties;*
- k. Failing to undertake consultation before and during retrenchment exercise in accordance with the provisions of the Employment Act;*
- l. Failing to have any or any due regard to a fair selection criteria;*
- m. Issuing notice of redundancy in bad faith;*
- n. Failing to have any criteria to single out the Claimant for redundancy in the alleged restructuring of the organization;*
- o. Failing to have due regard to the performance and productivity assessment criteria;*
- p. Failing to have any or any due regard to work experience criterion.*
- q. Failing to consider redeployment possibilities within the organization of the Respondent;*
- r. Using redundancy to get rid of the Claimant;*
- s. Targeting the Claimant alone for redundancy;*
- t. Failing to have any or any due regard to the Claimant's seniority in time, ability, experience, skill and occupational qualifications, length of service, age and family situation;*
- u. Lacking objectivity and an open criteria to inform the redundancy of the Claimant;*
- v. Unfairly leading on the Claimant to believe that the end of her services would be a negotiated*

process;

w. Intentionally causing hardship to the Claimant;

x. Unfairly and irregularly terminating the employment of the Claimant by redundancy;

y. Destroying the Legitimate expectation of the Claimant arising from her contract of employment;

z. Breaching the code of conduct of the German School, Nairobi.

16. The Claimant avers that she has lost service pay which would have accrued as a result of normal retirement to the sum of € 43,694.50, as well as income between 12th July 2014 and 31st July 2015 to the sum of €57,417.39.

17. She further states that the Respondent advertised for a post which they merged her duties with one of Human Resources and if the declaration of redundancy was genuine and without bad faith she ought to have been reabsorbed in the Respondent's employment as per requirements of the Employment Act 2007.

18. She further avers that in an ordinary General Meeting held on the 28th October 2014, the Respondent claimed that restructuring was yet to be concluded and therefore the assertion that her post had been declared redundant was false, fraudulent, a misrepresentation and made in bad faith.

19. She prays that her claim be allowed as prayed.

20. In response, the Respondent has filed a Memorandum of Reply via the firm of Hamilton Harrison and Mathews where save for what is admitted, denies every allegation contained in the Memorandum of Claim as if the same were set out herein verbatim and traversed seriatim.

21. In it they aver that the claim is time barred under the provision of Section 90 of the Employment Act 2007, in as far as any cause of action is said to have accrued before the 10th December 2011.

22. They submit that the Court lacks jurisdiction in statue barred claims and they will move the Court to strike out such claims.

23. The Respondent admits that the Claimant was their employee in the stated period and that the contract of employment was on several occasions changed during the duration of contract period with the last alteration dated 26th August 2013.

24. They aver that the Claimant never applied to join the pension scheme and was therefore not denied an opportunity to join as alleged, further, that it was voluntary for any employee to join the scheme with the rules fully outlined in the following documents:

“Pension deed and Rules dated 1st July 1993, Brochure explaining the Rules of the Pension Scheme dated 24th December 1991 and the Deed of Amendment dated 6th of February 2009”.

25. The Respondent avers that the employees were eligible for membership within a maximum of two years of service with the employer except where the scheme is non-contributory; membership becomes automatic after the period is attained.

26. The Respondent avers that the only submission made by the Claimant was via a letter dated 12th May 2014 which could not be acted upon because it was not in the prescribed form amounting to a non-application; the age of the Applicant was above the 55 years cap, the Claimant had seemingly waived her right to join the scheme 2 years after employment in line with the rules; no record was available to show that she was granted special permission of the trustees and the Insurance Company to join the scheme,

and finally in her capacity as one of the trustees of the scheme, she was in position to know all the regulations as set out but did not join.

27. They aver that the Court does not have jurisdiction to determine the issues arising from the pension scheme as these ought to be determined in accordance with the Appeals procedure set out under PART IV of the Retirement Benefits Act, No 3 of 1997.

28. They deny that she was not given an opportunity to discuss the challenges she faced in the office, but was asked to make an appointment with the headmaster and the personal committee for discussion which she did not do.

29. The Respondent avers that the Claimant was issued with a warning letter dated 21st January 2010 for poor performance and lack of efficiency in the discharge of her duties. Further deny any allegations of underpayments.

30. The Respondent denies that an agreement was reached between themselves and the Claimant as regards retirement, the discussions were in good faith without prejudice and obligations as indicated in a letter dated 9th June 2014.

31. The Respondent avers that the documents produced by the Claimant cannot be authenticated as they are not dated or signed. They aver that the restructuring process is long term and still ongoing. They deny that the hiring of Mr. Matundura was to understudy the Claimant but that it was part of the ongoing restructuring.

32. The Respondent denies that the Claimant's proposal to consider the calculations as presented to them by CFC Life Assurance was without prejudice and in good faith without any liability against the Respondents there being no responsibility on its part to make payment.

33. Further, the Claimant was not a member of the Scheme as at the date of the calculations which included an assumption that the Claimant would have contributed to the Scheme which she did not. In view of the foregoing, there is no basis for the claim of €37,061.26 or that of interest of €35,499.86 or any part thereof.

34. The Respondent avers that the fee note produced as exhibit 41 is a legally privileged document between the Respondent and its lawyers and the Respondent will at an appropriate time apply for this document to be expunged from the record for having been obtained and produced without authorization as well as documents produced as exhibits 43 (a) and 43 (b) which were not prior to the filing of this suit shared with the Respondent, and should be disregarded by this court. They are also admittedly based on the Claimant's memory.

35. The Respondent states that the declaration of the Claimant's redundancy was fair and was done in accordance with all the relevant laws. The Respondent denies that the only sum of money paid to the Claimant was Kshs. 3,550,901.00/- and states that the Claimant was paid all her lawfully owed dues which in particular were broken down as follows:

a. Payment for remaining leave days (for 9 days) as required under section 40(e) of the Employment Act€ 1,717.65;

b. One month's pay in lieu of notice (Salary for the month of June 2014) in compliance with section 40(1)(f) of the Employment Act.(4,198.69 Euros);

c. Severance pay being 15 days per each year worked (35,716.65 Euros);

d. Salary for 11 days' work in the month of July 2014 (1,489.86 Euros).

36. The Respondent avers that service pay is not payable as Section 35(5) of the Act does not apply, as

the Claimant was lawfully declared redundant.

37. Further the Claimant is a member of the National Social Security Fund as is shown in the pay slip produced by the Claimant as exhibit 52, and service pay would not have been payable in any event.

38. The Respondent avers that the Claimant's position no longer exists, and indication of its existence on the website was but an error which has since been rectified. The Claimant is not qualified for the new position in the restructured administration as it requires a person with academic and professional qualifications which the Claimant does not have.

39. The Respondent avers that the bulk of the Claimant's claim arose outside the period of limitation, and the Respondent is prejudiced in responding to the Claimant's claim, most of the employees who worked for the Respondent at the material times having left employment and will crave the leave of this Court to file any further documents and/or to amend this reply should further information be obtained.

40. The Respondent has filed a Notice of Preliminary Objection dated 11th March 2015 where they state their intention to raise an objection to the claim on the following grounds:

1. The claim herein is time barred under the provisions of section 90 of the Employment Act, 2007 (the Act) in as far as any cause of action is said to have accrued before 10th December 2011.

2. This court lacks jurisdiction to determine the statute-barred claims which are for striking out.

3. In addition and without prejudice to the foregoing, this court lacks jurisdiction to determine the issues arising from the alleged denial of the Claimant to join the pension scheme as these ought to be determined in accordance with the Appeals procedure set out under Part VI of the Retirement Benefits Act, Act No 3 of 1997.

4. The fee note exhibited by the Claimant as exhibit 41 is a legally privileged document between the Respondent and its lawyers and has been annexed to the pleadings in breach of this privilege. The document ought to be expunged from the record.

5. The translated documents from the German to English language exhibited herein by the Claimant should be expunged from the record in that:

a. They have not been duly certified.

b. No accreditations and/or qualifications have been given of the person who is shown to have done the translations.

Submissions on Preliminary Objection

41. The Respondents submit that the allegations contained in the statement of claim filed on 11th December 2014 particularly at paragraphs 3 to 12 relate to causes of action that accrued long beyond the prescribed 3 year limit under Section 90 of the Employment Act.

42. To this end they submit that the Courts have pronounced themselves clearly with regard to the question of claims brought outside of the timelines prescribed by statute particularly in relation to claims arising out of contracts for service.

43. They rely on the case of **Kenya Union of Sugar Plantation & Allied Workers v Sony Sugar Company Ltd [2015] Onyango J** in striking out a suit, where it was held that the Industrial Court had no jurisdiction to hear the case for the reason that it was filed out of time thereby barred by statute. Onyango J in arriving at the decision followed the Court of Appeal decision of **Divecon Ltd vs. Samani [1995-1998] 1 EA 48** where it was held that:

"...No one shall have the right or power to bring an action after the end of six (6) years from the date on which a cause of action accrued, an action founded on contract. The corollary to this is that no court may or shall have the right or power to entertain what cannot be done namely, an action that is brought in contract six (6) years after the cause of action arose or any application to extend such time for the bringing of the action....A perusal of Part III shows that its provisions do not apply to actions based on contract. In the light of these clear statutory provisions, it would be unacceptable to imply as the learned Judge of the Superior Court did, that 'the wording of Section 4(1) of the Limitation of Actions Act (Chapter 22) suggests a discretion that can be invoked..."

44. The Respondent submits that by virtue of the court's interpretation of section 4 (1) of the Limitation of Actions Act in the "***Divecon vs. Samani case***" (*supra*) the same applies to section 90 of the Employment Act which is mandatory and leaves no room for discretion. Any claim brought out of time must be struck out.

45. The Respondents submit that there is no provision for extension of the three year time limitation as this court has clearly stated in the case of ***Maria Machocho vs. Total Kenya Limited [2013] eKLR***. The court in this case also followed the classic Court of Appeal decision in ***Divecon Ltd vs. Samani [1995-1998]*** in dismissing an application to file suit out of time. Radido J held that the Court had: "***...neither the statutory jurisdiction nor discretion to grant leave or extend time in causes of action based on breach of contract of service or actions arising out of the Employment Act 2007...***"

46. The Respondent further submits that objects to paragraph 4 of the Statement of Claim on the additional ground that questions relating to pension ought to be raised before the Retirement Benefits Authority established under the Retirement Benefits Act.

47. There is recourse for a party aggrieved by the decision of any scheme, to appeal to the Chief Executive Officer of the Authority under section 46 of the Retirement Benefits Act, moreover, the Environment and Labor Relations Court's jurisdiction is specifically provided under Article 162 of the Constitution and Section 12 of the Industrial Court Act.

48. The Respondent submits that the claim with regard to the Respondent's alleged refusal to register the Claimant to its pension scheme cannot therefore form a subject of a dispute before this Court as there is no jurisdiction to deal with it.

49. As to privileged documents, the Respondent objects to the production of Exhibit number 41 which is at page 143 of the Claimant's Index of Documents accompanying the Statement of Claim.

50. They submit that Exhibit number 41 is a fee note issued by the firm of Hamilton Harrison & Mathews, Advocates in connection with advice for professional services rendered. It is a document that was issued on occasion of an advocate-client relationship and for this reason, it is subject to advocate-client privilege.

51. The Respondent further object to the following documents, all of which were prepared by one Dr. James Meja Ikobwa on 26th September 2014 who appended his signature to the purported English-translated documents:

a. At page 72 is a letter written in German language while at page 71 is the written English translation of the document.

b. At pages 74 and 75 is a letter written in German language while at page 73 is a written English translation of the document.

c. At page 77 is an e-mail written in German language while at page 76 is a written English translation of the e-mail.

d. At page 80 is a letter dated 21st November 2009 written in German language by the Claimant

while at page 79 is a written English translation of the letter.

e. At page 87 is a letter dated 2nd October 2009 written in German language while at page 86 is a written English translation of the letter.

f. At page 89 is a document written in German language while at page 88 is a written English translation of the document.

52. They submit that as a matter of practice and to ensure authenticity of translated documents, the translations are usually certified by Embassies or High Commissions, which was not done in this instance.

53. They submit that translated documents are secondary documents and do not fall within the exceptions specified in Section 68 of the Evidence Act. The purported translations of the above documents are therefore not admissible as evidence and ought to be expunged from the Court record.

54. For the reasons stated above, the Respondent urges this Court to uphold the Preliminary Objection dated 11th March 2015.

55. In response, the Claimants have file submissions dated 12th June 2015.

Claimant's submissions of the PO

56. The Claimant is opposed to the Preliminary Objection and deems misconceived, misconstrued, premature, without merit and not supported by the pleadings filed.

57. The Preliminary Objection has raised the issue of limitation of time. To this end, the Claimant submits that the claim is a continuing injury. They rely on Black's Law Dictionary which defines it as:

“ ..an injury that is still in the process of being committed. An example is the constant smoke or noise of a factory.”

58. They submit that the claims set out in paragraphs 3 to 12 of the Statement of Claim refer to a continuing state of affairs. The claim for back pay, underpayments and loss of purchasing power are a continuing claim that was not resolved during the pendency of the Claimant's contract and the several amendments/ alterations/ additions made to the said contract, it was upon the unlawful termination of her contract, the claim crystallized and institution of the suit for recovery of the amounts claimed is within time as set out in Section 90 of the Employment Act, 2007. They then submit that that the dispute involves a continuing injury or damage.

59. They submit that the failure to streamline its operations and pay the rightful dues was a continuing injury within the meaning of Section 90 of the Act and the claim having been brought within a period of less than 12 months is well within time. Every unequal pay received by the Claimant reset the date of the accrual of action.

60. To support their case they rely on in the **Industrial Court Cause No. 1813 of 2011 of David Wanjau Muhoro vs. Ol Pejeta Ranching Limited (2014) eKLR** , the Respondent therein raised the issue of limitation of time with regard to some of the back salaries and benefits sought by the Claimant stretching back to 2004. Relying on Section 90 of the Employment Act, 2007 the Respondent sought outright rejection of claims arising outside the 3-year time limit.

61. The Court upheld the decision set out in the ruling of the **Industrial Court of Kenya Cause No. 849 of 2011 between Justus Atulo Ashioya vs. Akshar Team Security Ltd. (UR)** in which the Court held:

“The period in employment was a continuous period, with employment benefits vesting in the employee, and obligations on the part of the employer attaching over time. There are accrued benefits which cannot be isolated and subjected to a different date of accrual. At the date of

termination, the employee should be accorded all benefits arising under the contract of employment. The event that triggered this Claim happened on or about 26th January, 2011, and the Claim to enforce the full range of benefits was filed on 11th August, 2011, well within the period created under Section 90 (of the Employment Act, 2007).”

62. The Honourable Justice Rika went on to state about David Wanjau Muhoro that:

“The Claimant filed this claim within the stipulated 3 year period. The underpayment of salaries and benefits, the violation of the right of equal pay for equal work, or work of equal value, happened incrementally. The Respondent in that case acknowledged the presence of historical disparities. These could not be adequately redressed by the application of the law of limitation to any part of the claim while upholding the temporal validity of other parts. Historical injustices cannot be corrected if the Court interprets the law of limitation rigidly. Employees with long years of service could for instance, be denied creditable years of service at the end of employment, because part of their years of service, fall outside statutory time-limits. There is only one Claim, filed within time. All benefits accruing to the Claimant should be paid in full, on termination. Employment law looks back, and frequently, there are rights and obligations which accrue over time, and must be enforced when the relationship comes to an end. The different claims, making up the Claim, would only suffer limitation of time, if the Claim itself is statutory barred.”

63. As to the Jurisdiction of this Honourable Court in regard to Claims relating to refusal to joining a pension scheme, the Respondent submits that the claim does not fall within the scope of the Retirement Benefits Act as the Act is applicable to parties who are already members of a Pension Scheme. It has no application to parties excluded from membership of any Pension Scheme.

64. The preamble of the Retirement Benefits Act states as follows:

“An Act of Parliament to establish a Retirement Benefits Authority for the regulation, supervision and promotion of retirement benefits schemes, the development of the retirement benefits sector and for connected purposes”.

61. Further, Section 5 of the Retirement Benefits Act sets out as follows:

5. Objects and Functions of the Authority

The object and functions of the Authority shall be to:

a. regulate and supervise the establishment and management of retirement benefit schemes;

b. protect the interests of members and sponsors of retirement benefits sector;

c. promote the development of the retirement benefits sector;

d. advise the Minister on the National Policy to be followed with regard to retirement benefits schemes and to implement all government policies relating thereto and

e. perform such other functions as are conferred on it by this Act or by any other written law.

65. Section 46 of the Retirement Benefits Act upon which the Respondent relies to deny this Court’s jurisdiction states:

“46. Appeals to the Chief Executive Officer:

(1) Any member of a scheme who is dissatisfied with a decision of the manager, administrator, custodian, or trustee of the scheme may request, in writing that such decision be

reviewed by the Chief Executive Officer with a view to ensuring that such decision is made in accordance with the provisions of the relevant scheme rules or the Act under which the Scheme is established. (Emphasis added).

66. The Claimant submits that that refusal by the Management of the German School to allow and process her request to join a pension scheme denied her legitimate retirement pension earnings and interest tantamount to an unfair labour practice under the meaning of Section 45 of the Employment Act. It is a matter for decision by this Court whether that claim has basis or not. It would be unjustified and an injustice for this Court to divest itself of jurisdiction without hearing the matter.

67. The Claimant relies on the case of **Hesbon Ngaruiya Waigi vs Equatorial Commercial Bank Ltd. Industrial Court Cause No. 60 of 2013 (Nairobi)**, where the Court found that a Claimant who had been left on probation for 16 months and was not allowed to enjoy loan facilities like other employees nor was he put on the pension scheme as other employees thus diminishing his pension benefits was discriminated against and the failure to put him on the pension scheme amounted to an unfair labour practice. The Court awarded damages for unfair labour practices to the extent of 12 months pay.

68. As to the matter of privileged documents, the Claimant submits that it has not been shown that the Claimant obtained the document illegally. Given the nature of the Claimant's tasks, duties and responsibilities it can be discerned from the pleadings that the Claimant came upon the document in the regular course of business, and does not violated their right to privacy or fair trial. They rely in the case of **LELAND 1. SALANO VS. INTERCONTINENTAL HOTEL CAUSE NUMBER 805 OF 2012.** The Court set out the following questions for determination:

a. What are confidential documents in an employment relationship?

b. Should an employee who has been summarily dismissed, and who has instituted a claim for unfair termination against his former employer, be permitted to use documents to support his claim, where those documents are held to be confidential by the employer, and to have been illegally obtained?

c. Would the admission by the Industrial Court of such documents violate the employer's right to privacy, and compromise the employer's right to a fair trial?

69. The Court set out some of the guidelines on how to resolve issues of confidentiality and privacy developed through case law as follows:

1. Whether the employee came upon the documents in the regular course of business, as opposed to rummaging through the files;

2. Whether the employee shared the documents with other employees or persons, or simply with his Advocates;

3. Nature and content of the particular document, in order to weigh the employer's interest, in keeping the documents confidential;

4. Whether the employer kept in place a clear, uniformly applied confidentiality policy;

5. Balancing of the relevance of the documents, against the consideration whether their use or disclosure, unduly disrupts the employer's business; and

6. Consider the right of the Employer to conduct business legally and efficiently, weighed against the employee's right to be free from unfair labour practices.

70. They submit that the Claimant legitimately came across the documents in the course of her duties. She did not rummage through the files. She did not share the document with any employees, but only

with her Advocate. The document should be allowed to stand as the Respondent shall suffer no prejudice if the document exhibit number 41 is allowed to remain part and parcel of the documents validly before the Court.

71. As to the requirement to certify the documents, the Claimant submits that the translation on the file causes no prejudice to the Respondent and in fact aids this Court to understand the documents/contracts issued to the Claimant and fairly and justly to determine this case. They ask that the Court should not deny the Claimant a hearing based on a procedural issue that can be rectified with appropriate directions as regards authenticating the qualifications of the translator of the documents.

72. They deem the objection premature as no directions have yet been given as to how the Claim and supporting documents not in the English Language are to be handled for hearing.

73. The Claimant urges the Court to disallow the Preliminary Objection with costs and allow the case to be heard on merit.

Submissions on the main claim

74. The Claimant has filed submissions in support of the claim dated 25th July 2015 and filed on the same day.

75. In them, she submits that the decision to declare the claimant redundant was unfair and wrongful. She submits that it was not done in accordance to the procedure provided under Section 41(1) of the Employment Act 2007. The Claimant was not notified of the intention to declare her redundant nor was she given reasons for such action.

76. She submits that the Claimant first found out about the intention to declare her redundant from the termination letter itself. This letter was copied to the labour officer. It was not sent a month prior to the date of effecting the redundancy, and further the Claimant was notified of her redundancy on the very day she was required to leave employment and await her dues. The labour officer was also notified on the same day that the Claimant had been asked to leave office.

77. She submits that this one day process of redundancy is not one anticipated by the law under Section 40 (a) to (g), it has to be inclusive, participatory, consultative and informative, which was denied to the Claimant.

78. To this end, she relies on the case of **Thomas de La Rue (K) LTD. vs. David Opondo Omutelema** where it was stated:

“..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 trade 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 reasons why the employee who is not a member of a union should be entitled to a shorter notice.”

79. Further, they submit that Kenya being party to the International Labour Organization (ILO), is bound by its conventions Article 13 of Recommendation No 166 of the ILO Convention 158 – Termination of Employment Convention 1982 – which requires consultation between the employers on the one hand and the employees or their representative on the other before termination of employment under redundancy. The convention reads that:

1. ...” When the employer contemplates termination 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 termination contemplated, the number and categories of workers likely to be affected and the period over which the termination are intended to be carried out;

b. give in accordance with the national law and practice, the workers representative concerned, as early as possible an opportunity for consultation on measures to be taken to avert or minimize the termination and measure to mitigate the adverse effects of any terminations on the workers concerned such as finding alternative employment.”

80. The Claimant submits that the selection criteria to determine redundancy as stipulated in Section 40 (c) requiring the employer to consider seniority, time, skill, ability, reliability of the employees was not followed. They submit that no evidence to that effect has been presented, and further no other employee other than herself was targeted.

81. They submit that this is a principle of fair play that is also contemplated under Section 40(1) of the Employment Act as well as our other labour laws whose main purpose is to give the parties an opportunity to consider ***“measure to be taken to avert or to minimize the termination and measures to mitigate the adverse effects of any termination on the workers concerned such as finding alternative employment.”***

82. Further they rely on the case of **Cammis vs. Parliamentary Service** where it was stated that:

“Consultation has to be reality, not a charade. The party to be consulted must be told what is proposed and must be given sufficient precise information to allow a reasonable opportunity to respond. A reasonable time in which to do so must be permitted. The person doing the consulting must keep an open mind and listen to suggestions, consider them properly and then (and only then) decide what is to be done.”

83. They submit that the proper compensation for lack of procedural fairness in declaration of her redundancy is to award the Claimant 12 months compensation as contemplated by Section 49(1) of the Employment Act. To this end they rely on the case of **Linnet Ndolo vs. The Registered Trustees of the National Council of Churches of Kenya Cause No 203 of 2012 Industrial Court of Kenya at Nairobi** where it was found that the Claimant's contract was terminated unfairly as the Respondent did not comply with the procedure provided in the Employment Act. This case which was for termination on account of redundancy was found to be indeed unfairly done and the Claimant was awarded 12 months' salary as compensation.

84. As to the claim for back wages, the Claimant relies on the case of **Kenya Union of Domestic Hotels, Educational Institutions, Hospitals & Allied Workers (KUDHEIHA) versus Nairobi Club Industrial Court Kenya Cause Number 77(n) of 2009 (Nairobi)** the Hon. Lady Justice Mbaru had the following to say about pay back:

“the term “back wages” has been interchangeably been used with term “back pay” which involves a process designed to prevent as well as remedy the commission of unfair labour practices especially where an employer marked an unfair labour practice determination and issues an order that may mean a layoff, demotion, transfers, pay reduction, or other changes in employment statues involving financial loss. A pay back order generally provides that employees shall be made whole for any loss of pay resulting from the unlawful action of the employer, who is required to pay each individual sum of money equal to the amount which that individual would normally have earned between the date of discrimination or that unlawful and unfair practice, and in an appropriate case, to the date of the employer's offer of reinstatement, less the individual earnings during that period.”

85. They submit that back pay is a remedy for wage violations, and an order for back pay requires that the employer make up the difference between what the employee was paid and the amount he or she should

have been paid.

86. They submit that alterations to the Claimant's contract resulted in loss of income and such sums were unlawfully deducted as such the claim for back pay of €4,975,424.25 at the exchange rate of Kshs 115 should be awarded.

87. They submit that while the Respondent has raised the issue of limitation of time as regards back salaries, they rely on **Cause No. 849 of 2011 between Justus Atulo Ashioya vs. Akshar Team Security LTD (UR)** where the Court stated;

“The period in employment was a continuous period, with employment benefits vesting in the employee and obligations on the part of the employer attaching over time. There are accrued benefits which cannot be isolated and subjected to a different date of accrual. At the date of determination, the employee should be accorded all benefits arising under the contract of employment.”

88. Referring to the case he was handling the learned Hon. Judge Rika proceeded to state:

“The underpayment of salaries and benefits, the violations of the right to equal work, or work of equal value happened incrementally. The Respondent acknowledged the presence of historical disparities. This could not be adequately redressed by the application of the law of limitation to any party of the claim, while upholding the temporal validity of other parts. Historical injustices cannot be corrected if the court interprets the law of limitation rigidly. Employees with long years of service could for instance be denied creditable years of service at the end of employment because part of their years of service fall outside statutory time limits. There is only one claim filed within time. All benefits accruing to the claimant should be paid in full on termination. Employment law looks back, and frequently there are rights and obligations which accrue over time, and must be enforced when the relationship comes to an end. The different claims making up a claim would only suffer limitation of time if the claim itself is statute barred”.

89. Further they submit that the Claimant is entitled to basic standards of employment in Kenya. That is under the Employment Act 2007 section 5 (2) which promotes equal opportunity in employment and elimination of discrimination as well as remuneration for equal work of equal value.

90. Further they submit that the Claimant is entitled to rights and protection in Constitution. This they submit includes the right to fair labour practices, fair remuneration, and to reasonable working conditions, which have all been grossly violated by the employer.

91. The Claimant submits that they are entitled to compensation for discrimination in the form of exemplary damages which should also take into consideration the anxiety she has suffered. To this end they rely on **Daniel Musinga T/A Musinga & Co Advocates vs Nation Newspapers Limited (2006) EKLR:**

“the court has to look at the whole conduct of the parties before action, after action and in compensatory damages such sum as will compensate him for the wrong he has suffered. An award of damages must cover injured feelings, the anxiety and uncertainty undergone during the court trial.”

92. They submit that the claimant had to endure a long time in under payment with no substantial explanations, therefore, the environment she was working in was not conducive, and she should be awarded KShs 5,000,000.00 as exemplary damages.

93. As to unpaid pension contributions the Claimant reiterates that she was informed that the pension scheme was only for those who are paid in Kenyan salary scale and not those under Deutsche Mark.

94. She submits that she was not even allowed to register her own contributions. She continues by stating

that going by the provisions provided, the eligibility criteria creating categories of employees that would be eligible to join the Respondents Scheme did not include her.

95. They rely on the case of **Hesbon Ngaruiya Waigi vs. Equatorial commercial Bank Limited** Industrial Court Kenya at Nairobi Cause No 60 of 2013 where it was stated that:

“Where a person is treated differently from others similarly situated like him, then this amounts to discrimination. If this treatment in differentiation is on a specified ground, then whether there is discrimination will depend upon whether, objectively, the ground is based on reasons which have the potential to impair the fundamental rights of a person or to affect them adversely in a comparably serious manner. If there is a specified ground, unfairness focuses primarily on the impact of the discrimination on the Claimant and others in his situation. Where differentiation is found to be unjustified, the same is discriminatory and unfair and not justified.... He was not allowed to enjoy loan facilities like other employees nor was he put on the pension scheme as other employee thus diminishing his pension benefits. This is an act contrary to the law and the court will award damages.”

96. The Court awarded 100,000.00 as 12 months compensation for discrimination and in view of this, the Claimant submits that they have established a basis for finding in her favor that she was denied entry into the pension scheme, a fundamental right, and should therefore be paid unpaid contributions in the sum of €37,061.26 plus accrued interest at €35,499.86, calculated at the exchange rate of KShs.115 to be equivalent to Kshs.4,262,044.90 and Kshs. 4,082,483.90 respectively.

97. As to severance pay, they submit that it is claimed based on the 20 years of service had the Claimant’s contract run its course. She acknowledges receipt of KShs. 3,580,901.00 and claims the balance.

98. They pray that the Court awards as prayed.

99. The Respondent has filed submissions dated 7th October 2016 and filed on the 10th of October 2016. In them they state that the Claimant’s argument falls flat on its face when considering the definition of members under Section 2 of the Retirement Benefits Act, Chapter 197 of the Laws of Kenya “Member” is defined as a member of a retirement scheme and includes a person entitled to or receiving a benefit under a retirement benefits scheme”.

100. Further, Section 46 Retirement Benefits Act should therefore be read together with the definition of member as set out above.

101. They submit that the Claimant claims that she is entitled to payment under the scheme or payment equivalent to what is payable under the scheme. She therefore falls within the definition of a member. This means that any grievances ought to have been lodged before the Chief Executive Officer of the Retirement Benefits Scheme in line with the provisions of Section 46 of the Retirement Benefits Act.

102. They rely on **Anne Wangui Ngugi & 2,222 Other v Edward Odundo, C.E.O Retirement Benefits Authority [2015] eKLR (page 113 to 128 of the bundle of authorities)** where the Court declined to have a dispute arising from the decision of the Trustees of a Pension Scheme determine by the Employment and Labour Relations Court. The Court stated that this would be tantamount to expanding the jurisdiction of the Court. The Court held as follows:-

“A plain reading of the RBA Act manifests the legislators’ intention to put in place mechanisms to deal with matters arising from retirement benefits as such and disputes arising there under. This Court cannot therefore oust the jurisdiction of the dispute resolution mechanism under the RBA Act by taking away their powers, functions and duties and purporting to direct, as the petitioners demand, that the petitioners’ complaints should be heard by the Employment and Labour Relations Court. Indeed, this Court would be arrogating to itself power to expand the jurisdiction of the Employment and Labour Relations Court, which is, under the Constitution, a Court of the same status as this Court, were it to purport to do as the petitioners demand.”

103. As to privileged documents, the Respondent reiterates that that no consent was given to disclose the alleged to Court, and should be struck out.

104. The Respondent submits that the Claimant did not at any time apply to join the Pension Scheme and was therefore not denied an opportunity to join as alleged or at all. No evidence has been availed by the Claimant to prove the allegation. The option to join the scheme was at all material times voluntary and any employee of the Respondent who wished to join was free to do so subject to the applicable rules.

105. They submit that the Claimant admitted in her oral evidence that she did not at any point in time submit an application form to join the Pension Scheme. The only written request to join the Scheme available in the Claimant records is the letter dated 12th May, 2014.

106. They restate that this request was not acted upon as it was not in the prescribed form and therefore did not amount to an application to join the scheme. More importantly the request could not be acted upon as the Claimant's age was above the capping of 55 years as set out in the rules for joining the Scheme referred to above and after the Claimant's eligibility had lapsed.

107. It was expected that the Claimant in her capacity as one of the Trustees of the Scheme knew of the applicable rules for joining the scheme and it was therefore deemed that she had waived her right to join the Scheme during the application window as provided in the rules as set out above. This is in addition to the fact that the Respondent informed all employees including the Claimant of the option of joining the Scheme at the start of their employment.

108. The claim on the pension benefits is therefore unsustainable and must fail.

109. The Respondent submits that as part of retirement discussions, the Respondent made a proposal to consider paying the Claimant a retirement package. The Respondent sought guidance from CFC Life Assurance Limited CFC (who were the administrators of the pension scheme) on what would be payable to the Claimant upon retirement.

110. This was done on a without prejudice basis and in good faith without any liability upon the Respondent there being no responsibility on its part to make such payment. The Claimant was not a member of the Scheme as at the date of the calculations given by CFC. The calculations included an assumption that the Claimant would have contributed to the Scheme which she did not. The Respondent was under no obligation to make any contributions for her benefit.

111. In view of the foregoing, there is no basis for the claim of €37,061.26 or any part thereof. There is also no basis for the claim of interest of € 35,499.86 or any part thereof. No agreement on the Claimant's retirement was reached and there was nothing to stop the Respondent from restructuring its administration.

112. As to the restructuring, the Respondent submits that the Respondent lawfully declared the Claimant redundant. Following the completion of the restructuring, the position of Chief Accountant which was previously held by the Claimant was done away with.

113. This meant that the Claimant's position was obsolete and there was no place for her effectively resulting in a redundancy as defined under section 2 of the Labour Relations Act.

114. They go on to submit that it was the English translation of the organogram on the Respondent's website that had an error which indicated that the Claimant's former position still exists. (Pages 138 to 139 of the Respondent's Bundle). The German translation of the organogram was always correct and the correct English translation (duly certified by the German Embassy) was produced by the Respondent's witness. (Pages 95 to 97 of the Respondent's Bundle). The corrected English version has subsequently been posted on the Respondent's website. The error was committed by a newly employed marketing personnel.

115. Further, the Claimant was not qualified to hold the new position in the restructured administration structure of the Respondent. She does not have the skill set or required to perform any of the functions of the new Finance and Human Resources Manager.

116. They rely on the case of **James Mwathi Nguri vs. Egerton University [2013] eKLR (page 129 to 134 of the bundle of authorities)** where the court held that where the new qualifications renders the employee not suitable to continue in employment, the resulting situation is essentially a redundancy to be governed by the provisions of section 40 of the Employment Act, 2007 as part of the consequences of reorganization and restructuring for better economy in productivity.

117. Further in the case of **Geoffrey Mworira versus Water Recourses Management Authority & 2 others [2015] eKLR (page 135 to 142 of the bundle of authorities)** recognized that the Court's role should not include the interference of an employer's internal human resources functions. We submit that this Court should not interfere with the Respondent's decision to restructure its organization as it did.

118. The Respondent submits that the redundancy of the Claimant's position followed all the prescribed steps under Section 40 of the Employment Act 2007. It was fair and was done in accordance with all the relevant laws.

119. The Respondent issued the letter dated 12th June, 2014 notifying the Claimant and the Labour Officer of the intention to declare her position redundant. No notice was required prior to issuing this letter which itself constituted the notice for the declaration of redundancy under Section 40 (1) (b) of the Employment Act. The termination on account of redundancy took effect on 11th July, 2014. (Page 159 of the Claimant's Bundle.) They state it was delivered. The Claimant should have tendered evidence to disapprove this. None was tendered.

120. There was no notification of redundancy issued by the Respondent to the union since the Claimant was not a member of the union. The Claimant is misguided in the submissions filed on 25th July, 2016 when she asserts that no notice was issued to her.

121. The Claimant was issued with a one month's notice as required by the law. See page 159 of the Claimant's bundle of documents annexed to the Statement of Claim). This notice was issued before the employment was terminated on 11th July, 2014. The averment at page 3 of the Claimant's submissions that she first learnt of the redundancy through the letter of termination is false. As such, the Claimant reliance on the case of **Thomas de La Rue (K) Ltd versus David Opondo Omutelema** is misguided since a one month notice was issued to the Claimant in person.

122. They submit that the law does not prohibit an employer from requiring an employee to take leave during the currency of the notice of declaration of redundancy.

123. They submit that the rationale of the notice issued to employees under section 40 (a) of the Employment Act has been addressed in many cases including the case of **Gladys Muthoni Mwangi & 20 others v Barclays Bank of Kenya Limited & another [2016] eKLR (page 143 to 148 of the bundle of authorities)**in which the court addressed this issue as follows:-

“The notice in general is meant to alert all employees of the business reorganization and restructuring whereas the notice to the Labour officer is meant to involve a representative of the Minister responsible for Labour. The time set of not less than one month is to ensure that all the agencies responsible are engaged appropriately and particularly the Minister Representative is able to advice the employer on all requirements that go with a redundancy and how best to implement the requirements set out under section 40 of the Employment Act. Such requirements are not at the option of an employer. The requirements are mandatory. Where not followed, any notice issued by the employer negate the entire purpose of redundancy”.

124. The above objective can be met in cases where an employee is requested to be on leave while the

notice runs. The objective was met herein. Further, they submit that Section 40(c) of the Act envisages a redundancy that affects a class of employees. This was not the case herein. The restructuring herein was such that **only** the Claimant's role was extinguished while other roles were created. It would be absurd to find the criteria of considering skill, reliability, and seniority in time when there is no class in place.

125. They submit that in the notice giving the intention to declare the Claimant's position redundant, the Respondent offered to pay the Claimant € 19,000 over and above the statutory redundancy package. **This offer was made in good faith and in recognition of the Claimant's long service** but the Claimant refused to accept this offer as is set out in the letter dated 2nd July, 2014.(page 165 of the Claimant's Bundle). Any allegations of malice and bad faith are therefore unfounded.

126. The Respondent therefore considered measures to mitigate any harsh and negative effects of the redundancy within the meaning of Maraga J's decision in the **Kenya Airways** case (supra). The Respondent therefore met the requirement of consultation but the offer was not accepted by the Claimant.

127. To further understand the place of consultation in the redundancy process, they refer to the case of **Kenya Plantation & Agricultural Workers Union vs. Oserian Development Company Limited [2016] eKLR (page 149 to 156 of the bundle of authorities)** in which this issue was addressed in the following manner;

"The Applicants have also alluded to lack of consultation in the entire process. Though not mandatory, the law envisages some form of consultation between the respondent and the Union and this has yet to be done. This issue was discussed in the CA No. 46 of 2013 – **Kenya Airways vs. Aviation and Allied Workers Union Kenya and Others** where the learned JA observed that:

"...It cannot be mandatory for the employer to consult with all potentially affected employees in making any redundancy decision. To impose an absolute requirement of that kind would be inconsistent with the employer's prima facie right to organize and run its business operation as it sees fit. And consultation would often be impracticable, particularly where circumstances are seen to require mass redundancies. However in some circumstances an absence of consultation where consultation would reasonably be expected may cast doubt on the genuineness of the alleged redundancy or its timing. So, too, may a failure to consider any redeployment possibilities".

128. They urge this Court to find the redundancy justified, valid and fair as provided for under Section 40 of the Employment Act.

129. They submit that there was no discrimination but simply that the Claimant does not have the requirement and skill required for the new position.

130. They submit that the Claimant was paid all her lawful dues (page 174 of the Claimant's Bundle) which were broken down as follows:

a. Payment for accrued leave days (for 9 days) as required under Section 40(e) of the Employment Act € 1,717.65;

b. One month's pay in lieu of notice (Salary for the month of June 2014) in compliance with section 40(1)(f) of the Employment Act.(4,198.69 Euros);

c. Severance pay being 15 days per each year worked (35,716.65 Euros);

d. Salary for 11 days' work in the month of July 2014 (1,489.86 Euros).

131. The Respondent was not malicious or unfair and neither did it act in bad faith during the course of the Claimant's employment and at her declaration of redundancy.

132. In view of their submissions the Respondents submit that the Claimant is therefore not entitled to any of the reliefs sought.

133. Having considered all the submissions and evidence of the parties, I set out issues for determination as follows:

- 1. Whether the claim in relation to the cause of action accruing before 10th December 2011 on back pay is time barred.**
- 2. Whether this Court lacks jurisdiction to deal with matters of the Pension Scheme in view of Section 46 of Retirement Benefits Act.**
- 3. Whether some documents submitted by the Claimant Exhibit 41 are privileged documents which should be expunged from the file.**
- 4. Whether documents produced by the Claimant translated from Germany to English should be expunged from the records for being translated by an unqualified person.**
- 5. Whether the redundancy of the Claimant was fair and justified.**
- 6. Whether Claimant is entitled to payment of service and severance pay.**
- 7. What remedies to grant in the circumstances.**

134. On the 1st issue, the Respondent has submitted as part of the Preliminary Objection that the claim by Claimant particularly paragraph 3 to 12 relate to a cause of action for a claim accruing before the 3 year limitation period provided under Section 90 of Employment Act.

135. Paragraph 3 to 12 of the Claimant's claim relate to prayers for back pay which the Claimant avers she missed due to the Respondent's decision to vary terms and conditions of her contract to her disadvantage and detriment. The changes according to Claimant led to her lose on pension scheme increment in her remuneration following her becoming a full time accountant from January 1998, loyalty bonus and compensation and other payments accruing to other employees causing her to be underpaid.

136. The Claimant on their part submitted that their claim is not time barred in terms of Section 90 of Employment Act. Back pay according to Black Law Dictionary 9th Edition at page 159 is defined as:

“The wages or salary that an employee should have received but did not because of an employer's unlawful action as setting or paying the wages or salary”.

137. The Claimant submits that the claim cannot be time barred because the back pay envisaged was to a continuing state of affairs and could not be resolved during the pendency of the Claimant's contract and the several amendments/alterations and additions made to the said contract.

138. They cited **Justus Atulo Ashioya vs. Akshar Team Security Ltd (UR Supra)** where Hon. J. Rika stated that the claim for all benefits accruing to the Claimant should be paid in full on termination as the law looks back and forth to award rights and obligations which accrue one time.

139. I do agree with my Learned Colleague that the Claimant would not have had to move Court from time to time during the pendency of her employment relationship as her hope was that the Respondent would make good what she was entitled to upon the contract coming to term. In this case I would term all the benefits not paid as continuing injury which according to Section 90 of Employment Act should be claimed for within 12 months next after the cessation thereof.

140. The contract ceased on 11th July 2014 and this claim was filed on 11/12/2014 which was within the

time allowed. It is therefore my finding that this claim is not time barred.

141. On the 2nd issue, the Respondent has argued that this Court lacks jurisdiction to entertain the matter of whether the Claimant could or could not join the pension scheme. They cited **Anne Wangui Ngugi & 2222 Others vs. Edward Odiwalo CEO Retirement Benefits Authority (2015) eKLR** – (supra) where the Court held that deciding on a dispute arising from the decision of the Trustees of a Pension Scheme is tantamount to expanding the jurisdiction of the (ELRC) Employment Labour Relations Court.

142. On this, the Claimant submitted that the Retirement Benefits Act is an act to deal with regulations supervision and protection of retirement benefits schemes. The objects and functions of the Retirement Benefits Act are set out and include regulating and supervising the establishment and management of Retirement Benefits Schemes and protecting the interest of members and sponsors of retirement benefits sectors.

143. On jurisdiction, they submit that the CEO of the Scheme can review any decision of the manager and administrator of the scheme on appeal.

144. To this, the Claimant aver that the refusal of the Respondents to allow the Claimant to join a pension scheme denied her legitimate retirement pension earnings and interest which is an unfair labour practice.

145. Under the meaning of Section 45 of Employment Act considering that a retirement benefit is a right to an employee and arising out of an employment relationship, failure to allow an employee to join such a scheme would be tantamount to an unfair labour practice for which issue this Court has jurisdiction to determine.

146. Moreover, the jurisdiction in this Court is drawn from Article 162(2) of the Constitution which provision gives Court jurisdiction to handle all matters relating to employment and labour relations and so the provision of the Retirement Benefits Act cannot override the provisions of the Constitution nor fetter the Courts jurisdiction to handle any matter arising out of an employment relationship.

147. On the 3rd issue, the Respondent has averred that the Claimant submitted some documents under Exhibit 41 which should be expunged from the file and being privileged documents. Exhibit 41 is a letter from Respondent's Counsel to the Respondent which is a fee note dated 12.2.2014.

148. The Claimant points to this letter which also advised the Respondent on her retrenchment as evidence that a decision to retrench her was made earlier on. The Respondents argue that this is a privilege document between a client and an Advocate and so the Claimant could not use it in evidence.

149. I do agree with the Respondents position that Exhibit 41 is a privileged document and could not be relied upon by her being a document between an Advocate and her client as provided for under Section 134 of Evidence Act which states as follows:

“(1) No advocate shall at any time be permitted unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such advocate, by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment: Provided that nothing in this section shall protect from disclosure:

a. any communication made in furtherance of any illegal purpose;

b. any fact observed by any advocate in the course of his employment as such, showing that any crime or fraud has been committed since the commencement of his employment, whether the attention of such advocate was or was not directed to the fact by or on behalf of his client.

2) The protection given by subsection (1) of this section shall continue after the employment of the advocate has ceased.

150. On the 4th issue, the issue is that the documents produced by the Claimant which were translated into English from Germany.

151. The Respondents submitted that the documents were translated by an unqualified person one Dr. James Meya Ikobwa on 26.9.2014. They state that as a matter of practice and to ensure authenticity of translated documents, the translations are usually certified by Embassies or High Commissions which was not done in this case.

152. The Claimants on the other hand have submitted that the translation on the file causes no prejudice to the Respondents but asks the Court to understand the documents.

153. Under Section 64 of Evidence Act, contents of documents may be proved either by primary or secondary evidence. Secondary evidence is allowed under Section 64 of Evidence Act after conditions set out in Section 68(1) of Evidence are met. Under Section 68 (f) such evidence can be allowed where the original is a document of which a certified copy is permitted by this Act or by any written law to be given in evidence.

154. The Respondents submission that the documents must be certified by Embassies to be authentic is not a mandatory provision in law. The Respondent have had evidence to examine the translated documents and had no complain that the translation was flawed.

155. It is this Court's position that the documents as translated have not prejudiced the Respondents in any way and even the Respondents sought more time to file her submissions on the understanding that she was dealing with bulky documents which needed to be translated and she was given more time to do so. I will therefore not have the documents complained of expunged from the record.

156. The 5th issue concerns the redundancy of the Claimant Appendix 47 at page 159 of Claimant's documents is the notice of redundancy issued to the Claimant dated 12th June 2014. The notice also sets out the benefits the Claimant will be entitled to and states that her employment will come to an end on July 11th 2014, a month after this notice. The letter is copied to the Labour Officer Nyayo House at Nairobi. This letter indicated that the Claimant will receive payment in lieu of notice as well as final dues payable upon termination on account of redundancy. She was also expected to proceed on paid leave during the period of the notice which was to lapse on 11.7.2014.

157. Section 40(1) of Employment states as follows:

1. "An employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions—

a. Where the employee is a member of a trade union, the employer notifies the union to which the employee is a member and the labour officer in charge of the area where the employee is employed of the reasons for, and the extent of, the intended redundancy not less than a month prior to the date of the intended date of termination on account of redundancy;

b. Where an employee is not a member of a trade union, the employer notifies the employee personally in writing and the labour officer;

c. The employer has, in the selection of employees to be declared redundant had due regard to seniority in time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy;

d. Where there is in existence a collective agreement between an employer and a trade union

setting out terminal benefits payable upon redundancy; the employer has not placed the employee at a disadvantage for being or not being a member of the trade union;

e. The employer has where leave is due to an employee who is declared redundant, paid off the leave in cash;

f. The employer has paid an employee declared redundant not less than one month's notice or one 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.

158. The condition which applies to the Claimant is as per Section 40(1) (b) above as well as (c), (e), (f) and (g).

159. The Respondents have submitted that the above provisions of law were adhered to.

160. The Claimant on their part aver that the Respondent failed for the reason that they forced the Claimant to go on leave for the leave owing which leave was to be paid off in cash as per subsection (e) above.

161. The Claimant also submits that the purpose of the redundancy was not met as envisaged in addressing issues of consultation. They cited **Gladys Muthoni Mwangi & 20 others vs. Barclays Bank of Kenya Limited and another (2016) eKLR** (page 143 to 148 of bundle of documents (supra).

162. They also referred to the Kenya Airways case (Court of Appeal No. 46 of 2013) where the Court noted that the notice is given to allow consultations on all issues of the matter.

163. The Claimant also cited the **New Zealand Chief Judge in Cammish vs. Parliamentary Service** where he stated thus:-

“Consultation has to be a reality, not a charade. The party to be consulted must be told what is proposed and must be given sufficiently precise information to allow a reasonable opportunity to respond. A reasonable time in which to do so must be permitted. The person doing the consulting must keep an open mind and listen to suggestions, consider them properly, and then (and only then) decide what is to be done”.

164. Considering that the Claimant was served with a redundancy notice and asked to leave her office for a one month leave, the purpose for which the notice was given could not be adhered. It is apparent that no consultation took place and that instead of being paid for her leave, the leave was used as a notice period which was irregular.

165. On the issue of considering the criteria used to choose the Claimant and not any other employee as envisaged under Section 40(1)(c), the Respondent have not been able to prove the same, since consultations also didn't occur before the notice was given. Given the above scenario, I find the redundancy unfair and irregular for failure to give adequate notice and thereby not giving consultation a chance.

166. The 6th issue concerns whether the Claimant is entitled to payment of severance pay. Payment of severance pay is provided under Section 40(1) (g) of the Employment Act 2007. In the letter declaring the Claimant redundant, the Claimant was offered severance pay equivalent to 15 days' pay for each year worked which conform to Section 40(1) (g) of the Employment Act.

167. When it comes to service pay, it is apparent from the Claimant's employment contract coupled with the Code of Conduct of German School Nairobi:-

“Each employee with a local employment contract is automatically a member of NSSF. Registration is by application and personal appearance-----“.

168. The Claimant’s payslip show that she was a member of NSSF and so by virtue of Section 35(6) of the employment Act, she is not entitled to payment of service pay.

169. What remedies then is the Claimant entitled to?

170. I have already indicated that she is entitled to payment of any back pay she should have been paid had the Respondent acted transparently with her.

171. She had submitted that the Respondent failed to advise her to join the pension scheme which caused her to lose out of her pension. She says she asked her Administration Manager if she could join the pension scheme and was informed that it was only for staff being paid on Kenyan scale. She claims that had she joined the scheme, she would have earned 37061 Euros pension contribution by her employer.

172. The Respondent indicated that the pension scheme was a voluntary payment of the school and that the Claimant had not applied to join the scheme to which the Claimant indicated that she had asked for it severally.

173. The Respondent referred to the pension scheme which states as follows at Clause 3:-

“Eligible employee shall mean a person in the fulltime permanent employment of the employer as at any Entry Date who has attached the age of eighteen but not age 55 and shall be deemed to include a Managing or Salaried Director, provided however that the Employer may at their absolute discretion waive or add to any of these requirements for any particular employee where special circumstances may apply”.

174. Under Clause 2

“who is eligible to join the scheme

A present full time employee shall have the option of joining the scheme on the 1st January 1992 or on the first day of January following completion of any probationary period of service provided that the employee is over 18 and under 59 years of age.

For a person who enters the service of the German School after January, 1st 1992 it will be a condition of employment to join the scheme on the first day of January or July, coincident with or next following the date on which the above conditions have been fulfilled”.

175. Joining instructions were also attached:

“to join the scheme, you must sign the attached application form. In addition, you must supply evidence of age as required by the Insurance Company by showing your passport, birth certificate or identity card (kipande).

Membership to NSSF scheme was no way to affect ones membership to the scheme”.

176. The Claimant joined the employment of the Respondent in 1995 when the scheme was already in place and upon completion of her probationary period, she was eligible to join the requisite joining forms.

177. My reading of the scheme doesn’t show that there was nothing that would have prevented the Claimant from joining the scheme had she filled in the requisite application forms. The Claimant’s service contract was also silent on the existence of a pension scheme but stated that the agreement shall be construed in accordance with the laws of Kenya.

178. It is therefore true as submitted by the Claimant that at the time of her employment, the existence of a pension scheme to which she could join was never brought to her attention and so she lost out on the pension contribution from her employer.

179. She has submitted that the contributions as per the scheme were Euros 37,061.26 plus interest of Euros 35,499.86 equivalent to Kshs.4,262,044.90 and 4,082,483.90 respectively at the exchange rate of 115/= as at 10th December 2014.

180. The Respondent had denied that they discriminated against the Claimant but this Court finds that they deliberately excluded her from the pension scheme and which I find she is entitled to damages for discriminatory practice and I award her an equivalent of 12 months salary which is = **12 x 177,144 = 2,125,728/=**.

181. I also award the Claimant 12 months salary as damages for unlawful redundancy = **12 x 177,144 = 2,125,728/=**.

182. On back pay the Claimant submitted that she lost Kshs.1,322,255 being the difference she earned, as compared to her counterparts between May 2003 and 22nd September 2007.

183. The Respondents didn't address this issue adequately in their defence, but also denied having discriminated against the Claimant. The defence was just a mere denial but Claimant was able to show the discrepancies in the pay between herself and other employees amounting to Kshs.1,422,255 which I also award her.

184. Having found as above I tabulate the total the Claimant is entitled to as being Kshs.5,673,711/= plus what was paid to her in redundancy, costs and issuance of a Certificate of Service.

Read in open Court this 17th day of January, 2017.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Ameka for Claimant - Present

Kashindi for Respondent- Present