



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT MOMBASA
CAUSE NUMBER 190 OF 2015
(Consolidated with Cause Number 360 of 2015)

BETWEEN

- 1. CAROLINE MUTANA MWAKA [CAUSE 190]**
- 2. ALEX GAVANA YERI**
- 3. JULIUS CHULA KAZUNGU**
- 4. JEDIDAH WAIRIMU GITHERU [ALL CAUSE 360]CLAIMANTS**

VERSUS

CARGILL KENYA LIMITED RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Otieno Asewe & Company Advocates for the Claimants

Njoroge Regeru & Company Advocates for the Respondent

JUDGMENT

1. There were 3 separate Claims filed by Employees against their former Employer, Cargill Kenya Limited. The Claims relate to redundancy. Parties agreed on 12th October 2015 to have 2 of the Claims [190 & 360 of 2015] consolidated and heard under Cause 190. A 3rd Claim, Cause 356 of 2015 involves a 3rd Party [the Shipping Union], and it was agreed that Cause be heard separately.

2. **The 1st Claimant Caroline Mutana Mwaka** filed her Statement of Claim on 7th April 2015. She was employed on 15th May 2009 as Human Resources Assistant. She later acted as the Human Resources Manager. She was not compensated for her extra responsibilities. Her contract was terminated on 28th February 2015. Her last salary was Kshs. 82,302. She holds termination was unfair and unlawful and prays for Judgment against the Respondent for:-

a) Kshs. 3,989,844 comprising: acting allowance for the period between January 2012 and December 2012 at Kshs. 1,816,764; acting allowance for the period between January 2012 and December 2013 at Kshs. 1,161,456; and 12 months' salary in compensation for unfair termination at Kshs. 1,011,624.

b) Damages for discrimination.

c) Costs and interest.

d) A declaration that termination was unfair and unlawful.

3. The Respondent filed Response to the 1st Claim on 8th May 2015. Its position is that the 1st Claimant did not take full responsibility of the acting role. The Respondent reorganized its business after adequate consultations, resulting in some positions falling redundant. The law was fully complied with. The 1st Claimant is not entitled to any of the prayers.

4. 2nd, 3rd and 4th Claimants filed their Claim on 28th May 2015. **2nd Claimant Alex Gavana Yeri** was employed on 1st November 1989 as a Warehouse Clerk. He was promoted to Warehouse Supervisor. His contract was terminated on 5th January 2015. He earned a monthly salary of Kshs. 73,215 as of the date of termination. **3rd Claimant Julius Chula Kazungu** was employed on 1st June 1990 as a Warehouse Clerk. He too was promoted to Warehouse Supervisor earning the same amount as the 2nd Claimant, and left employment on the same date as the 2nd Claimant. **4th Claimant Jedidah Wairimu Githere** was employed on 1st July 1993 as Secretary to the Managing Director. She rose to the position of Shipping Clerk, earning a monthly salary of Kshs. 77,139 as of the date of termination, 5th January 2015. The 3 Claimants seek gratuity and compensation from the Respondent, totaled Kshs. 5,685,034; costs; interest; declaration that termination was unfair and unlawful; and any other relief.

5. The Respondent filed its Response to 2nd, 3rd and 4th Claim, on 29th June 2015. Its position again, is that termination was prompted by business reorganization aimed at improvement of workflow and efficiencies. The process was fair and justified. Job evaluation was carried out independently. Employees were fully aware of the process, and were paid all their terminal dues. The Respondent urges the Court to reject respective claims with costs to the Respondent.

6. It had been agreed by the Parties in Court, on 12th October 2015, that 1st Claimant would represent all the other Claimants. However, the record shows 1st Claimant gave evidence on 12th October 2015; while 2nd, 3rd and 4th Claimants all gave evidence on 4th March 2016 when hearing closed. The agreement by the Parties that the 1st Claimant represents the others was, without it being brought to the attention of Court, rendered useless. It is all well nonetheless, that all the Claimants were given a chance to state their grievances individually. The Respondent gave evidence through its Human Resources Administrator Rosemary Mwihuri, Evaluators Johnson Onyango Masero and Ernest Matho Nzovu, and Human Resources Manager Margaret Wachira. All gave evidence on 25th October 2016, when hearing closed. The dispute was last mentioned in Court on 8th December 2016 when Parties confirmed the filing of their Submissions, and Judgment scheduled for delivery.

1st Claimant's evidence:

7. She told the Court she was employed by the Respondent between 15th May 2009 and 28th February 2015. She was a Human Resources Assistant, working under Human Resources Manager, and earned a monthly salary of Kshs. 32,000 on recruitment, and Kshs. 82,302 as of the date of termination. Her salary was reviewed upwards in the course of employment due to her good performance.

8. When her boss left the Respondent on 24th January 2012, the 1st Claimant was handed the role of Human Resources Manager, in an acting capacity. Regional Human Resources Manager Madam Susan

was based in South Africa, and instructed the 1st Claimant in discharging her acting role, from South Africa. The 1st Claimant acted for almost 20 months, to 12th August 2013, when a new Human Resources Manager was appointed. The 1st Claimant was not given a letter of appointment to the acting position.

9. As of January 2013, the 1st Claimant earned a monthly salary of Kshs. 57,959. The substantive Human Resources Manager earned Kshs. 203,141 monthly on the date she left employment. The 1st Claimant enquired about her acting allowance. It was not paid to her.

10. By the time the 1st Claimant left, there were 6 Employees in her department. There was a new Human Resources Assistant, Kelvin. The Claimant worked with a Clerk, Rosemary Manene. Manene was trained by the 1st Claimant on recruitment, from the year 2011. Upon training she was promoted to Human Resources Assistant in July 2014, the same position the 1st Claimant held. 2 other Assistants were employed from outside the Respondent Company, and performed the same role the 1st Claimant performed.

11. The 1st Claimant had Higher National Diploma in Human Resources Management from Kenya National Examination Council [KNEC]. She had obtained Bachelors Degree in Business Administration and Master of Science in Human Resources Management, by the time she left employment. Manene had a Diploma in Human Resources Management by the time she was recruited in 2011, and was undertaking a Bachelors Degree in the same field, by the time the 1st Claimant left employment. The 1st Claimant did not know what qualifications the others in the department held.

12. She was issued a notice of redundancy dated 28th February 2015. The notice stated that the Company was reorganizing. Employees were not aware about this prior to the notice. They were told change would be positive to the Employees. By the time the 1st Claimant left, her colleagues Kelvin and Rosemary were still in employment. The 1st Claimant was the only one from her department, affected by the process.

13. The Company was expanding. It had just acquired a new Company in Nakuru. The 1st Claimant was not offered an alternative job. Co-Claimants received notice of redundancy on 1st December 2014. The 1st Claimant received hers later. The 1st Claimant wrote the notices of redundancy to the Co-Claimants. She did not, to use her own words, know she was on the chopping board.

14. The 1st Claimant had upgraded her skills and served as Human Resources Manager. She was appraised and her performance was very good. In 2014, she was sidelined and not evaluated. In 2015, the new Human Resources Manager Margaret Wachira just went to the computer system, and made negative comments about the 1st Claimant. There was job evaluation carried out by an independent consultant. Employees were told the exercise was aimed at enhancing Employee benefits.

15. Page 111 of Respondent's documents contains an evaluation form, which looks like the same form Employees filled. It however is not the same form the 1st Claimant filled. She filled the one at page 112. Rating is at page 112. Page 113 is the same form for Manene. It is cooked up. Manene was rated higher, and given more roles, than the 1st Claimant. The 1st Claimant was given a score of 13, Maneno 28. The results were not shared with the Employees. 1st Claimant saw these documents for the first time in her Advocate's office.

16. Evaluation process ended towards the end of November 2014. Notices of termination issued from December 2014. Evaluation was a mere formality. Co-Claimants' names were singled out before evaluation. The process was predetermined. The Claimants had a wealth of experience. New Employees were recruited to take their positions.

17. Ruth was employed on 2nd December 2014 as a Trade Executive in the department. Kinyajui was employed the same time. The 1st Claimant was advised to remove some of the selected Employees from

the original list. Co-Claimants inducted the new arrivals. The Respondent engaged in warehousing of tea, with offices in Nakuru and Nairobi. The 1st Claimant was paid Kshs. 402,467 on termination.

18. The 1st Claimant told the Court she was never compensated for her acting role. She made demand. There was no response. Margaret Wachira begrudged the 1st Claimant, to create positions for her friends.

19. The 1st Claimant explained she used the difference between what she earned, and what salary the substantive holder earned, in computing her claim for acting allowance.

20. The Respondent stated it was expanding and needed better qualified Employees. The 1st Claimant had experience. She was qualified. Kelvin was brought in from Voyager Hotel, where he worked with Margaret Wachira.

21. There were no consultations as alleged. The Union and the Ministry were not involved. Respondent had a policy of sponsoring Employees in their studies. Manene was sponsored by the Respondent, while the 1st Claimant met her own fees. She claims damages for discrimination.

22. Cross-examined, the 1st Claimant testified she did not have documents showing the Respondent sponsored Manene. Page 94, 95, 96 and 97 of Respondent's Documents related to school fees subsidy for Employees' Children, not for Employees themselves.

23. Page 38 contains a letter copied to County Labour Office and the Federation of Kenya Employers, giving notice of redundancy. The notice indicates the Union was informed.

24. The 1st Claimant had not completed the Bachelors Degree at the time she acted as Human Resources Manager. The minimum requirement for the position was a Masters Degree. This was the position at the time Margaret came in. The 1st Claimant did not know what qualifications the previous Human Resources Manager held.

25. Caroline was requested to act by Susan, on phone. This was after the Human Resources Manager Millie Wanjala, left in January 2012. The 1st Claimant acted until August 2013.

26. The Consultant's Report indicates 1st Claimant's role, had been taken over by a Human Resources Generalist. Kelvin was Human Resources Assistant. The document hiring him states he was Human Resources Coordinator. At page 115 of Respondent's Bundle, Manene is described as a Human Resources Administrator. She was an Assistant at the time 1st Claimant left. It is not true that positions were merged at the time the Claimant left. Organogram exhibited by the Respondent does not contain the position of a Human Resources Assistant.

27. Employees were notified they would meet the Consultant for evaluation. This was done. They did not sit down, review and sign the forms with the Consultant. The form Caroline filled was not the form which was used. It is the standard procedure to sit down with Employees and review evaluation. There was no feedback from the Respondent. Names were predetermined.

28. Caroline had worked for a Manufacturing Firm before she joined the Respondent. She was the first in, at the Respondent's Human Resource Department. New persons were recruited in the same department on her exit. About 21 Employees were affected by redundancy.

29. She signed documents for the Human Resources Manager. She was involved in recruitment of candidates. Letters of appointment were signed by the CEO Ivan Fernandez. The 1st Claimant was part of the local leadership of the Respondent. Her duties could not have been performed by Susan who was based in South Africa. Delegation was to the 1st Claimant as she was the most senior. She kept asking for acting allowance from Susan. It is true the Claimant acted. Susan could not act, being resident in South Africa. The 1st Claimant explained she was given access to password reserved for Human Resources

Manager.

30. The Respondent could not operate without an acting or substantive Human Resources Manager, Caroline told the Court on redirection. She conceded school fees subsidy was for Employees' Children. She issued notices of redundancy to the Ministry and the Federation of Kenya Employers. Employees had not been informed about the exercise. The 1st Claimant did not crave to be Human Resources Manager; her argument is that she was qualified for the new positions which were created, such as Human Resources Generalist. She would have served in any position in the Human Resources Department. She was the senior most. At the time Millie Wanjala left, the Human Resources Manager was required to have Higher Diploma. Other requirements were added at the time Margaret Wachira entered employment.

2nd Claimant's Evidence:-

31. He restated his employment history, and terms and conditions of service, as outlined in his Statement of Claim. There were 5 Warehouse Supervisors. 3 were affected. Alex Gavana Yeri was not told why he was selected. He was asked to take leave in October 2014. He returned in November 2014. He was slammed with a notice of redundancy dated 1st December 2014. He was told to return on 5th December 2014. He was met with a letter of termination upon reporting on this date. He was paid terminal dues on this date. Unlike his Colleagues in the Union, he was denied gratuity. He was the most Senior Warehouse Supervisor.

32. He testified on cross-examination that he was not in the Union. He was told he was in skeleton Management. He was paid terminal dues in accordance with page 182 of Respondent's Bundle. It was not made clear to him why termination decision was made. He attended a consultative meeting where Employees were told there would be changes. He was taken through job evaluation. He filled evaluation form at page 187 of Respondent's bundle. The Respondent wrote to the Labour Office on 1st December 2014 notifying of its intention to declare redundancies. He agreed he was paid terminal dues, but was quick to add, not all terminal dues. He clarified on redirection he was not told about the outcome of evaluation, and did not understand the reasons for redundancy.

3rd Claimant's Evidence:-

33. Like the 2nd Claimant, the 3rd Claimant told the Court he was not told the reason why he was selected. One of the Warehouse Supervisors who remained was junior to Julius Chula Kazungu. He confirmed on cross-examination that he received notice of redundancy and the letter of termination. He received terminal dues. Employees were taken through a crash programme. There was no time to ask questions. The position of warehouse supervisor is still in place. He stressed on redirection that the Company was expanding. Terminal dues were made on the day of termination, 1st January 2015.

4th Claimant's Evidence:-

34. Jedidah Wairimu Githere testified she worked for the Respondent between 1st July 1993 and 5th January 2015. She in general restated the contents of her Statement of Claim.

35. She added that out of 15 Shipping Clerks, 5 left on redundancy. The ones who remained were the new Clerks. She had trained them. The position of shipping clerk was not abolished. Her Colleagues Alex and Julius were paid gratuity of 1 year as shown in Claimant's annexure 2 [b] and [c]. She was discriminated against. She was not a Member of the Union, but the Respondent paid gratuity to some Employees who were not in the Union.

36. She confirmed on cross-examination that she was not a Member of the Union. She was paid a net sum of Kshs. 1,087,969 as shown at Respondent's page 204. Payment was witnessed by Shipping Union Representative. The Respondent invited him. There was evaluation before termination. The position of shipping clerk was there before redundancy. It is not shown to be there in the new structure. Gratuity is not discretionary; it is payable in law. Fair procedure was not followed. Her job description had not

changed by the time she left.

Respondent's Evidence:-

37. Rosemary adopted her Witness statement in her main evidence. On cross-examination, she explained that Millie Wanjala was the Human Resources Manager, when Rosemary joined the Respondent as Human Resources Clerk, in 2011. The 1st Claimant was on maternity leave. Millie left in February 2012. Caroline was the most senior after Wanjala left. Susan would visit Kenya after 6 months in the absence of a substantive Human Resources Manager. Human Resources duties were being carried out by the staff at Mombasa. Caroline oversaw payroll administration. Redirected, she stated that Susan was responsible after Millie left. Susan discharged her role through video conferencing.

38. Masero similarly adopted his Witness Statement on record. He carried out evaluation using evaluation matrix. He had a one on one with the Claimants. Cross-examined, he told the Court he carried out job evaluation in November 2014. He did the report end of November 2014. It did not take time to prepare the report.

39. Rosemary Manene did not fill the questionnaire on training. Masero gave her a score of 4 on training, and 10 on education. It was indicated the 1st Claimant was undertaking Bachelors Degree. Masero gave Caroline a score of 9 on education. Manene was about to graduate. She had a Diploma in Human Resources Management.

40. On description of work done, he scored the 1st Claimant at 13 and Manene at 28. Manene was senior to Caroline because she was the Administrator. Masero did not have information that after Millie left, Caroline was the most senior in the department.

41. Ernest Matho Nzovu worked with Masero on evaluation. Evaluators gave a draft report, it was approved by Management, and the final report followed. Their work was done. He did not have the exact date the exercise ended. The report did not have a date or month when it was prepared.

42. The last Witness Margaret Wachira adopted her Witness Statement filed on 27th June 2016. Cross-examined she testified she joined the Respondent in August 2013. Millie who preceded her, left in January 2012.

43. Caroline worked hand in hand with Susan before Margaret arrived. The 1st Claimant was a Human Resources Assistant. She processed payroll. It is not correct that she assisted Millie.

44. Payroll processing was an extra responsibility. She was paid an allowance of it. For her to act, she needed to be given a letter. Regional Human Resources Manager would prepare the letter. Compensation for acting would be guided by the CBA. The 1st Claimant should have asked for a letter appointing her to act.

45. It is not true that Caroline handed over docket to Margaret when the latter joined Cargill. Margaret was oriented by Susan, not Caroline.

46. The Respondent created the positions of Human Resources Administrator and Human Resources Generalist. Manene became Human Resources Administrator. She was Assistant Clerk before then. She was due to graduate in the year 2016. Andrew joined the Respondent in the year 2010. He was not Margaret's colleague at Voyager Hotel.

47. Margaret's view was that Manene was a better fit, in comparison to Caroline. Caroline had worked from 2004 for another Company called Kalu Works. The 1st Claimant graduated with a Human Resources Management Bachelors Degree. Margaret signed her University loan application forms. The 1st Claimant was to pursue a Masters Degree.

48. It is true Caroline administered the payroll for 20 months. Her appraisals, except the last one, were positive. The last one has not been exhibited before the Court. There are various letters on record to the Claimant from the Respondent, congratulating her on good performance.

49. Evaluation took place for 6 months. It started in November 2014. At the end of November 2014, the Respondent received preliminary report. Employees were given scores. The Respondent shared these with the Employees. There was no sharing with regard to those who left.

50. The Respondent wrote to Employees indicating its intention to meet with them, on 1st December 2014. The Employees would have 1 month to dispute Respondent's decision. Termination letters were issued on 6th December 2014. Evaluation ended in November 2014. The report was received by the Respondent 6 months after this.

51. The Respondent applied a selection method. It was based on performance, duplication of duty, business volume and business records.

52. The Respondent expanded. It has outlets in Nairobi and Nakuru. New Human Resources Persons were employed.

53. There was no option for the 1st Claimant to take any of these positions. All the Claimants herein did not meet required qualifications. Restructuring did not mean Employees had to go home. Positions were not merely renamed. Some Claimants had worked for up to 30 years. It is not true new arrivals were inducted by the Claimants.

54. The Respondent engaged fully with the Union, Labour Office and the Employees. Alex and Julius were paid gratuity. This was not paid to Jedidah. She was on pension scheme, therefore ineligible. Benefits were paid after termination in accordance with the law.

55. Margaret closed her evidence on redirection, with an opinion that gratuity payment is not mandatory. Jedidah received pension. Nothing is owed to the Claimants. Business volume was going down. Consultative meetings took place involving all the Parties. Evaluation report took 6 months to reach the Respondent. Susan was running the docket of Human Resources Manager, before Margaret arrived. The 1st Claimant is not entitled to acting allowance. Roles were enlarged; it was not just about renaming of positions.

56. The issues in dispute, as understood by the Court are:-

a) Whether redundancy was justified and carried out fairly.

b) Whether the Claimants are entitled to the prayers sought.

The Court Finds:-

57. The dates when the 4 Claimants joined and left the Respondent Company, are not disputed. Their terms and conditions and employment are not disputed. It is not disputed they left employment after their positions were declared redundant by the Respondent. It is agreed the Claimants were paid certain amounts of money as terminal benefits.

58. Section 45 [2] [b] of the Employment Act 2007 states termination is fair, if based on the operational requirements of the Employer. Under Section 45 [2] [c], termination should be carried out in accordance with fair procedure.

59. In its job evaluation report dated November 2014, an attempt at justifying redundancy is made. The Respondent engaged Hawkins Associates, to review Respondent's organizational and departmental structures, to enable the Respondent improve workflow, departmental efficiencies and overall quality

service delivery.

60. The Respondent felt there was need to review its existing business against its mission and vision in Kenya, in anticipation of the incorporation of the newly acquired business, Lesiolo Grain Handlers Limited. Review would include review of the organization structure and job descriptions.

61. There is a general consensus in recent Kenya Case Law that Courts will not interfere with Employers' prerogative in declaring redundancy. ***These decisions include Kenya Airways Limited v. Aviation & Allied Workers Union of Kenya & 3 Others [2014] e-KLR; Kenya Plantation and Agricultural Workers Union v. James Finlays [K] Limited [2013] e-KLR; and Kenya Plantation & Agricultural Workers Union v. Bamburi Cement Limited & La Farge Ecosystems Limited [Employment & Labour Relations Court at Mombasa, Cause No. 90 of 2015].***

62. These decisions hold that Courts should not limit or police Employers, in determining what strategic decisions Employers make, and implement, within their enterprises.

63. From the material on record, the Court does not see any reason to fault the decision made by the Respondent, in restructuring its business, in anticipation of acquisition of Lesiolo Grain Handlers Limited. It could not be said that the decision was a colorable exercise, aimed at attainment of other ulterior objectives, other than improvement of Respondent's business.

64. In implementing its business decision, however, the Respondent was bound to observe the law by fairly treating Employees whose positions were affected by Respondent's business decision. Employers as observed above have wide latitude in managing their businesses; the exercise of that prerogative must be exercised fairly, and in conformity with the applicable law.

65. There are certain aspects in the implementation of the redundancy decision, which are be open to question.

66. It was not made clear to the Court, when the exercise commenced; when relevant significant decisions were made; and even when the process concluded.

67. Human Resources Manager Margaret Wachira was at pains to explain to the Court when Consultants Hawkins Associates were engaged, when they consulted, and gave their final report.

68. She suggested that the process went on, for about 6 months. There is a letter dispersed to Employees by Margaret dated 18th November 2014, informing Employees the Respondent had decided to restructure, and Employee would have individual meetings with the Consultants to discuss their jobs. Ernest Matho Nzovu testified the Consultants' report did not have an exact date. The exercise according to him, ended in November 2014. Johnson Onyango testified evaluation was carried out in the 2nd week of November 2014, up to the end of November 2014.

69. What was presented to the Management at the end of November 2014 was a draft report, the final report coming much later, 6 months later, according to the evidence of the Human Resources Manager.

70. Should the Claimant's contracts have been terminated based on a draft report? The Court does not think so. The draft report could only have been useful to the Respondent, in the consultative process involving the Employees, their Union, the Respondent and the Labour Office.

71. The Claimants would have reason to feel a decision was already made to terminate their services, and the Respondent was merely going through the motions, in writing notices to various offices and to the Claimants, and in generating reports to back up a predetermined position.

72. Margaret confirmed this feeling, testifying on cross-examination that the Respondent had informed the Employees it would meet them, on 1st December 2014. The Respondent would give Employees 1 month to dispute the decision. There is no evidence that the Claimants were called upon to dispute the

decision during the given month. Notices of termination are dated 1st December 2014 asking the Claimants to proceed on terminal leave, to return on 5th January 2015. On return they were issued letters of termination.

73. Throughout the process, there is no record of a three-way consultative meeting involving the Respondent, the Trade Union, and the Labour Office. In particular, the Labour Office was not engaged in any form of a recorded discussion with the Respondent. There are just letters written to certain offices, including an irrelevant notice issued to the Federation of Kenya Employers, informing them of a predetermined decision. Where did the Federation of Kenya Employers come in? This was not consultation contemplated in a redundancy process.

74. In her e-mail to the top Management of the Respondent dated 27th November 2014, Margaret writes, “ *as you are aware we will be releasing the Employees we are declaring redundant...*” The Town Hall meeting with the Employees was merely to announce to them that their jobs had been declared redundant. What sort of consultation with the Employees, their Union and the Labour Office was this? A meeting merely to make an announcement, cannot amount to constructive engagement with Employees.

75. As stated by the Court in ***Ignas Karingo Mghona & 4 others v. Star Hope International Foundation [2016] e-KLR***, Section 40 of the Employment Act 2007, requires an Employer to issue 2 forms of notices before redundancy.

76. The first is under Section 40 [1] [a] and [b]. The second is under Section 40 [1] [f]. The first is an expression of intention to declare redundancy which issues to the Trade Union and the Labour Office. Where, the Employee is not a Member of the Union, notice of intention to declare redundancy issues to the Employee, as well as to the local Labour Office.

77. The notices issued by the Respondent to the Employees and their Union, communicating intention to declare redundancy, are dated 1st December 2014. They do not communicate an intention to declare redundancy; they informed the Employees the Respondent had decided to terminate Employees’ contracts on account of redundancy. They were in effect, notices of termination under Section 40 [1] [f]. They notified Employees that their contracts had been terminated, and they should return to work on 1st January 2015, the effective date of termination, presumably to clear with the Respondent and receive terminal dues. There was no notice issued under Section 40 [1] [f], but the Respondent paid 1 month salary in lieu of such notice.

78. The first notice is meant to pave way for dialogue on the intended redundancy, involving the Employer, the Trade Union, Employees and the Labour Office. This is why the law requires the Employer to give reasons for, and extent of the intended redundancy. Giving of reasons for, and extent of redundancy, opens the way for social dialogue. Genuine consultations must involve the relevant government agency, and the social effect of the proposed decision, and possible mitigation, all discussed at the consultative forum. If law intended there are no genuine consultations, it would not be necessary to issue a notice of intended redundancy giving reasons for, and extent of the intended redundancy. Notice of termination or pay in lieu thereof would suffice.

79. Redundancy was faulty in relation to the notices of redundancy and termination. The Respondent used the notices of intended redundancy as notices of termination. There were no consultations after the notices of intended redundancy issued. The Labour Office in particular was not involved. The Employees were merely given an announcement, at what Margaret terms a Town Hall meeting, that their contracts had been terminated.

80. This is not the only fault with the process. Section 40 [1] [c] requires the Employer to demonstrate, in selecting Employees whose positions are to be declared redundant, that the Employer has taken into account Employees’ seniority in time, skill ability and reliability.

81. The 1st Claimant Caroline, was first in, in the Human Resources Department at the time the exercise

took place, having been employed on 15th May 2009. Seniority in time would be in her favour. This test on the basis of first in last out is not problematic, as it involves the simple task of looking at the date of employment. The same can be said in the cases of the Co-Claimants. Jedidah testified 5 out of 15 Shipping Clerks, had their contracts terminated. The remaining Clerks were employed after Jedidah. She trained them. The Warehouse Clerks who lost their jobs were also the most senior.

82. With regard to skill, ability and reliability, these are elements which the Employer would have to demonstrate through an objective assessment of the Employees, based on clearly defined standards. The exercise carried out by Hawkins Associates did not yield an outcome upon which Claimants' skill, ability and reliability could be judged.

83. The report as stated elsewhere does not have exact dates when the exercise started and ended. Consultants Masero and Nzovu did not justify their prematurely implemented report, or in any way convince the Court that their report objectively captured Claimants' skill, ability and reliability.

84. The skewed nature of the evaluation carried out was particularly intense, in the case of the 1st Claimant Caroline. She had a Bachelors' Degree in Human Resources Management. Margaret had endorsed her loan application with the Higher Education Loans Board for pursuit of Masters Degree in the same field. She had taken charge of the office of Human Resources Manager, for a period of about 20 months, when the substantive holder Millie Wanjala left. She also held a Higher Diploma in the field. She had worked for Kalu Works from 2004 as a Human Resources Officer. The Consultants downgraded her, preferring to push forward Caroline's understudy Rosemary Manene. The 1st Claimant was the senior most in her department and obviously held superior education and training records, in comparison to Rosemary Manene. Margaret told the Court Rosemary was expected to graduate with a Bachelors Degree in 2016. Consultant Johnson Onyango was not aware the 1st Claimant was the most senior in the department, after Millie Wanjala left. Why was this information not available to the Consultant?

85. Annual performance appraisals would have shown if the Claimants were, or were not deficient on skill, ability and reliability. There were no records of performance appraisals carried out over the respective periods of employment, which would assist the Court in assessing whether the Claimants were skilled, abled and reliable. Margaret told the Court Caroline had positive appraisals over the years, except the last evaluation. Why would this be so? There was a collection of congratulatory letters from the Respondent to the 1st Claimant in her file. In which way was Rosemary a better fit for the renamed roles of? How were the Employees selected to fill the new or renamed positions, better suited than the Claimants?

86. The Respondent did not satisfy the Court, on the selection parametres. There is evidence that the Claimants were senior in time. Their skills, abilities and reliabilities were not shown to be inferior to those they left in employment. They had trained or inducted junior Employees who they left behind. Termination did not satisfy the standards relating to selection criteria, prescribed under Section 40 [1] [c] of the Employment Act 2007.

87. A lot of time was spent in arguing whether the 1st Claimant acted as Human Resources Manager, for a period of 20 months, after Millie Wanjala left. The Respondent made an incredible assertion that the role of Human Resources Manager, after Millie left, was exercised by Group Human Resources Manager Susan based in South Africa. According to Margaret there was no letter appointing Caroline to act.

88. The Court is persuaded the 1st Claimant was asked to act as Human Resources Manager, and did act as such, for 20 months. It is not convincing that Susan discharged the role via Skype. It is not persuasive that Susan discharged the role through her visits to Kenya every 6 months. It is similarly not believable that Margaret was handed over the docket by Susan, rather than by the 1st Claimant. The most probable scenario is that Caroline received Margaret, handed over office and later on found herself, to use her own words, on the chopping board. Rosemary Manene told the Court that Human Resources work was being carried out by staff at Mombasa. How would a multiplicity of staff, act as the Human Resources Manager? The role of Human Resources Manager was central to Respondent's work to be discharged

through video conferencing by an Officer sitting in South Africa. The Claimant acted for a period of 20 months, and although she does not demand it, should have been confirmed as the substantive office holder. It is most unusual to subject an Employee to discharge an acting role, carry out the same duties of the substantive office holder, without receiving equal pay for work of equal value for a period of 20 months. Most Collective Bargaining Agreements the Court has had the privilege of reading require confirmation into substantive office, after a period of no more than 3 months acting.

89. The mode of computing acting allowance is not disputed. Margaret told the Court Parties would adopt the mode prescribed under the CBA. Adopting that mode and the amount of Kshs. 203,141 payable to Millie at the time she exited, and Kshs. 51,744 and Kshs. 57,959 paid to the 1st Claimant for the period she acted, the Claimant seeks a total of Kshs. 2,978,220. The Parties do not seem to have filed the relevant CBA and drawn the mind of the Court to the clause on acting allowance. Nonetheless it was the position of Margaret that Parties would be guided by the CBA, and as the Respondent does not contest that the computation by the 1st Claimant derives guidance from the CBA, ***the Court approves, and grants, the sum of Kshs. 2,978,220 as acting allowance to the 1st Claimant.***

90. 2nd, 3rd and 4th Claimants pray for unpaid gratuity. The Respondent's position is that gratuity was paid for 1 year covering the period before introduction of pension scheme. The Court does not think pursuit of gratuity is merited. It is not a statutory benefit under Section 40 of the Employment Act. The Claimants were paid handsome severance pay and 23 days' salary for every year of service. They were all enlisted under the National Social Security Fund. Additional social security payment would only be justifiable through a contractual clause. The Claimants as stated above did not draw the mind of the Court to a clause either in their individual contracts or CBA, entitling them to additional social security payment. The Respondent met the minimum statutory standard on social security obligations to the Claimants. The prayer for unpaid gratuity is declined.

91. Termination was based on operational requirements of the Respondent, and was therefore founded on fair substantive ground. It was not based on fair procedure as discussed above. ***The 2nd, 3rd and 4th Claimants are granted the equivalent of 6 months' salary each, in compensation for unfair termination.***

92. The 1st Claimant prays for compensation for unfair termination and general damages for discrimination. The Court agrees with the submission made by the Respondent that employment remedies must be proportionate to the economic injury sustained by the Employee, and not be aimed at unjust enrichment as held in the case of ***Pamela K. Butalanyi v. University Council of the Kenya Polytechnic University College [2015] e-KLR.*** She was discriminated against by the Respondent, but discrimination was in the process of unfair termination, over which compensation has been awarded. It cannot be lost on any reasonable person exercising his mind fairly, that the element of unfair treatment was more acute in the case of the 1st Claimant, in comparison to the other Employees. Facts in favour of retaining her in employment were profound. While not entitled to a separate grant of damages for discrimination, she merits a slightly higher award of compensation for unfair termination, than granted to her Co-Claimants. ***She is granted the equivalent of 8 months' salary in compensation for unfair termination.***

IN SUM, IT IS ORDERED:-

a) It is declared redundancy was procedurally unfair.

b) The Respondent shall pay-

1st Claimant: acting allowance for a period of 20 months at Kshs. 2,978,220; and the equivalent of 8 months' salary in compensation for unfair termination at Kshs. 674,416, total Kshs. 3,652,636.

2nd Claimant: equivalent of 6 months' salary in compensation for unfair termination at Kshs. 439,290.

3rd Claimant: the equivalent of 6 months' salary in compensation for unfair termination at Kshs. 438,744.

4th Claimant: the equivalent of 6 months' salary in compensation for unfair termination at Kshs. 462,884.

Total... Kshs. 4,993,504

c) No order on the costs.

d) Interest granted at 14% per annum from the date of Judgment till payment is made in full.

Dated and delivered at Mombasa this 30th day of June 2017

James Rika

Judge