REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSE NO. 211 OF 2017 CONSOLIDATED WITH CAUSE 221 OF 2017

DORIS KAIRUTHI KAARIA.....1ST CLAIMANT

JOSEPHINE MUGURE MOSES.....2ND CLAIMANT

MICHENI ALFRED MUCHAI.....3RD CLAIMANT

MERCY MINOO MULE.....4TH CLAIMANT

FRIDAH NKIROTE MWORIA.....5TH CLAIMANT

PETER MAINA MOSES.....6TH CLAIMANT

AND

KUBAI JAMES TAITUMU.....7TH CLAIMANT

GITONGA WINFRED NTINYARI.....8TH CLAIMANT

WAIRIRE JOHN NDUNGU.....9TH CLAIMANT

EUNICE KAMENE MWALILI.....10TH CLAIMANT

JOYJANE KARIMI KATHURIMA.....11TH CLAIMANT

NAOMI WANJIRU KARANJA.....12TH CLAIMANT

STEPHEN MWANGI MBATIA.....13TH CLAIMANT

GIKONYE SILAS KAUMBATU.....14TH CLAIMANT

KENNETH MUTUA MWITI.....15TH CLAIMANT

ALEXANDRA MWENDE TITUS.....16TH CLAIMANT

MUGAMBI GILBERT NJAGI.....17TH CLAIMANT

PAUL MWAKI ARIMI.....18TH CLAIMANT

TEMBO SUSAN KARWITHA.....19TH CLAIMANT

PATRICK GITUMA GIKUNDA.....20TH CLAIMANT

MOSES MURANGIRI MUTWIRI.....21ST CLAIMANT

NANCY MARIGA NYANSIABOKA.....22ND CLAIMANT

MERCY GACHERI MURIITHI.....23RD CLAIMANT

WINNIE KATHURE MUTUNGA.....24TH CLAIMANT

KABURU JOHN WAHOME.....25TH CLAIMANT

LYDIA NJERI NYAGA.....26TH CLAIMANT

MUNYI CATHERINE MUTHOMI.....27TH CLAIMANT

RHODA ASIGO ATAGA.....28TH CLAIMANT

FLORENCE KAGWIRIA MBURUGU.....29TH CLAIMANT

JANE KIENDE FESTUS.....30TH CLAIMANT

CAROLYNE NAITORE MUNYUA.....31ST CLAIMANT

MICHAEL KIMATHI MUGAMBI.....32ND CLAIMANT

DUNCAN KINOTI.....33RD CLAIMANT

MUGUU JULIUS KIRIMI.....34TH CLAIMANT

JANE KANGAI GATOBU.....35TH CLAIMANT

JULIUS GICHUNGE WILSON.....36TH CLAIMANT

HELLENA GATABI KAMATHI.....37TH CLAIMANT

WINFRED MWENDWA KINGARU.....38TH CLAIMANT

PENINAH KARWITHA MWONGERA.....39TH CLAIMANT

LINDA KANANA NTEERE.....40TH CLAIMANT

NANCY KAJUJU.....41ST CLAIMANT

ALICE NYOROKA.....42ND CLAIMANT

JULIUS KIMATHI IMATHIU.....43RD CLAIMANT

WOLSEY KIMATHI NYAGA.....44TH CLAIMANT

DORIS KENDI MWEBIA.....45TH CLAIMANT

GAIKUNGI EPHANTUS MWORIA.....46TH CLAIMANT

PETERSON NDEGE ONTUNYA.....47TH CLAIMANT

KUBANIA SAMUEL MUTUA.....48TH CLAIMANT

JAPHETH MWEBIA RINGERA.....49TH CLAIMANT

KIBENGO NANCY NANGEKHE.....50TH CLAIMANT

CAROLINE GAKII.....51ST CLAIMANT

FRIDAH KINYA KIRUJA.....52ND CLAIMANT

LUCY GACHERI KIOGORA.....53RD CLAIMANT

SILAS MURERWA IBIIRI.....54TH CLAIMANT

ALICE KARWIRWA MIKWA.....55TH CLAIMANT

NANCY GACHERI MUGAMBI.....56TH CLAIMANT

JAMES MUGENDI NJAGI.....57TH CLAIMANT

GEORGE KIRIMI MUGWIKA.....58TH CLAIMANT

MARY KAMUNDA KANYARU.....59TH CLAIMANT

CRISPHINE GITHINJI.....60TH CLAIMANT

VERSUS

KENYA METHODIST UNIVERSITY..... RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday, 28th July, 2017)

JUDGMENT

The claimants are 60 employees of the respondent university and their names are as listed in the pleadings filed in court and as reproduced per the claimants listed in this judgment. The claimants' suit is based on the amended memorandum of claim filed on 23.06.2017, dated the same 23.06.2017,and filed in the suits as amended through Lucy Kaaria, Matumbi & Company Advocates. The claimants are employees of the respondent effective diverse dates and serving in various capacities in the respondent's academic, administrative and support establishments.

The claimants prayed for judgment against the respondent for:

a) A declaration that the termination of the claimants' employment by the respondent on account of redundancy is unfair, irregular and unprocedural, and hence null and void.

b) An order directing the respondent to reinstate the claimants to their previous positions of

employment.

c) General damages for wrongful termination.

d) Any other relief that the court may deem fit to grant.

e) Costs of the claims.

The claimants also filed on 12.07.2017 the reply to respondent's response to the amended memorandum of claim.

The respondent's case is based on the statements of response to the amended memorandum of claims filed on 04.07.2017 in both suits through Patricks Law Associates. The respondent prayed that the suits be dismissed with costs to the respondent.

The suits went to full hearing and the parties called their respective witnesses to testify in support of their respective cases.

The respondent issued an internal memo to all its staff dated 22.05.2017 conveying that the respondent was going through a restructuring in order to improve its services to become more competitive. It further stated that those staff to be affected would get communication by email the following day 23.05.2017 and later through the human resource office or campus directors. Further, for those to be affected one way or the other, the respondent had put in place mechanisms through the offices of the chaplains and university counsellors to provide pastoral and psychological support to help cope and adjust to the changes.

Each of the claimants received the letter dated 22.05.2017 titled, **"Termination of Employment on Account of Redundancy".** The letter conveyed that the employment had been terminated on account of redundancy due to dynamics affecting education sector in the entire Kenyan economy so that the respondent was undertaking restructuring process to enhance effectiveness and competitiveness. Thus, notice was being issued per section 40(a) and (b) of the Employment Act being one month effective 23.05.2017 to 23.06.2017. The letter stated that each would be paid in lieu of notice per contract of employment; leave days earned but not taken; and severance pay at 15 days for each year of service. Payments were subject to clearance.

The claimants oppose the redundancy on the ground that the respondent had failed to disclose the criteria used to determine the employees to be rendered redundant. In particular, the claimant's case is that the respondent has not complied with the condition as provided in section 40 (1) (c) of the Employment Act, 2007 thus, **" An employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions – (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;"**

By consent of the parties' advocates prior to commencement of the hearing of the suits on 13.07.2017, the issue for determination was recorded thus, **"By consent the only issue for determination is whether the claimants were selected for redundancy in accordance with section 40 of the Employment Act, 2007 and then, issue of remedies."**

The court has considered the issue for determination and considers that the first inquiry is to establish the scope and understanding of the redundancy selection criteria as set out in section 40 of the Act. The relevant provision as already reproduced in this judgment is section 40 (1) (c) of the Employment Act, 2007 thus, **"An employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions – (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;"**

The courts have had opportunity to set out the scope of that provision.

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

In **Kenya Airways Limited –Versus- Aviation and Allied Workers Union Kenya and 3 Others [2014]eKLR** Murgor JA stated thus, **"When the evidence is considered, it is doubtful whether the appellant's outlined selection process was followed. I say this because, where an employer adopts a selection criteria, they must be able to show that the criteria was applied systematically and uniformly across the board, and where the numbers involved are large, it must be structured and comparatively based.... On whether LIFO was the sole criteria to be adopted to the exclusion of other lawful criteria, I do not agree with the Industrial Court that LIFO is the sole mandatory criteria to be applied in redundancies. It is evident that section 40(1) (c) requires the employers to apply all the selection criteria specified, with due regard to seniority in time, skill, ability and reliability of each employee. A sole application of LIFO would no doubt, be detrimental to any employer, as continuity and succession planning within the organization could be jeopardized. As a consequence, I find that the appellant did not apply a fair selection procedure as required by section 40(1) (c) of the Act, and in so doing unfairly terminated the contracts of the 447 affected employees."**

In the same cited case Maraga JA (presently the CJ), stated thus, **"49. I agree with Mr. Mwenesi that both the notices themselves and their duration of 30 days under this provision are mandatory. Section 40(1) of our Employment Act does not expressly state the purpose of the notice. Although it also does not expressly provide for consultation between the employer and the employees or their trade unions before the final decision on redundancy is made, on my part I find the requirement of consultation provided for in our law and implicit in the Employment Act itself....51. Kenya is a State party to the International Labour Organisation (ILO), which it joined in 1964 and is bound by the ILO convention, 1982 – requires consultation between the employers on the one hand and the employees or their representatives on the other before termination of employment under redundancy. It reads: "1. When the employer contemplates terminations for reasons of an economic, technological, structural or similar nature, the employer shall: (a) provide the workers' representatives concerned in good time with relevant information including the reasons for terminations contemplated, the number and categories of workers likely to be affected and the period over which the terminations are intended to be carried out; (b) give, in accordance with national law and practice, the workers' representatives concerned, as early as possible, an opportunity for consultation on measures to be taken to avert or to minimise the terminations and measures to mitigate the adverse effects of any terminations on the workers concerned such as finding alternative employment."**

The court has considered and followed the opinion in the cited cases. It is clear that in selecting employees for redundancy, it must be demonstrated that there was an objective criteria of invoking or applying the parameters as envisaged in law; that criteria must be shown to have been uniformly applied to all the employees towards identifying those that are to be removed or retained in view of the redundancy; and, the employees or their representatives must be engaged in consultations to avert or

minimise terminations and to ensure measures to mitigate the adverse effects of the terminations on the employees such as possibility of alternative employment are invoked.

The court has considered the evidence and all the material on record and makes the following findings:

1) The respondent has failed to exhibit the tools and procedures of an objective criteria invoking or applying the parameters as envisaged in law and has not established that such objective criteria was uniformly applied to all the employees towards identifying those that are to be removed or retained in view of the redundancy. The respondent's case is that the redundancy followed a report by the Human Resource Committee of the University Council presented to the respondent's Council on 28.10.2016 and an extract enumerating the reasons for identification of the claimants for redundancy. However the court returns that the respondent has not established that there was an objective criterion and uniformly applied to all the employees in a comparative manner. It is the court's view that without an objective comparative analysis with respect to all the employees it was not possible to show that the claimants were fairly identified for redundancy.

2) It is clear from the evidence that the relevant 30 days' statutory notice was issued but the employees were not involved in consultations to minimise terminations and to deal with adverse consequences of the looming redundancy. While the redundancy notices referred to the chaplains and university counsellors providing pastoral and psychological support to help the employees as were affected to cope and adjust to the changes, the respondent has not established that the same was done. Further, the court's opinion is that whereas such spiritual support when implemented would be important, it was a design by the respondent falling short of the legal requirements for consultations to minimise terminations and to deal with adverse consequences of the looming redundancy. For example one of the claimants, Munyi Catherine Muthoni, was identified because she allegedly failed to score 26% in 3 semesters in 2016 and one in 2017. It was obvious that her alleged performance lacked comparative analysis for employees over the same period and who were lecturers like herself. Her evidence that the analysis was misleading because it coincided partly with her maternity leave period was not rebutted. Further her evidence that the respondent had asked her to continue in service despite the redundancy notice was not rebutted. It is the court's view that had there been consultations, the respondent would have arrived at a different decision such as an arrangement for her to continue in employment as requested and upon such terms as parties would have agreed upon. Similarly, Kubai James Taitumu testified that he had helped to streamline the respondent's faculty of education as a senior lecturer and he was qualified to hold the office being a holder of masters' degree in education with long and deep or demonstrated experience of competence. However he was identified for redundancy allegedly for lack of a doctoral degree whereas he held the prescribed qualifications and in any event he was due to complete his doctoral studies. It is the court's view that with consultations, the respondent would have obviously arrived at a different decision such as retaining the said Kubai James Taitumu in service upon such appropriate and agreed re-arrangement. Similarly, Fridah Nkirote Mworia was identified allegedly because her file lacked record about all her qualifications. Her truthful evidence was that she held all the required professional and academic qualifications and if she had been consulted, she would easily have shown that she held the Certified Public Account of Kenya (CPA-K) qualification and the degree in accounting. The court returns that with consultations, it is obvious that the respondent would have arrived at a completely different decision with respect to the said Fridah Nkirote Mworia. Doris Kairuthi Kaaria testified that she possessed the 1st and 2nd degrees in Human Resource Management and that she was at advanced studies for the doctoral degree in Human Resource Management alongside having been registered as an associate member of the relevant institute for human resource practitioners per the Human Resource Management Act. It is the respondent's case that such registration did not qualify the claimant to practice and so an officer employed later in time in 2017 had been retained. Once again, the court considers that the respondent did not demonstrate the weighting or scorecard on the parameters in section 40(1) (c) and further with consultations, it was possible to make less adverse decisions with respect to the said Doris because appropriate mitigating measures would have been explored especially in view of her evidence that she had been in charge of the human resource section for a considerable time. The evidence by the said Doris confirmed that the workers had not been consulted and there were no

objective tools and procedures prepared by the respondent's human resource section to assist in the fair identification of the employees for redundancy. The court returns that the evidence by the said Doris was credible because the respondent did not exhibit such objective tools and procedures prepared by the respondent's human resource section or consultant or other person that guided the selection of the employees for redundancy. The court returns that the evidence on record suggests that the claimants were targeted for redundancy upon this or that ground without the respondent designing and uniformly applying an objective criteria to all the employees.

3) The court has considered the detailed analysis discrediting the selection or identification of each of the claimants for redundancy as set out in the submissions filed for the claimants and which details have not been discredited or rebutted by the respondent in any material fact or submission; and the court returns that the claimants as submitted have showed that the redundancy was not upon an objective criterion uniformly applied to all the respondent's employees. Once again the court returns that the evidence and material on record suggest that the claimants were mysteriously targeted for redundancy upon one or other reason without the respondent designing and uniformly applying objective criteria to all the employees.

4) Accordingly, the court returns that the claimants have established on a balance of probability that the respondent failed to comply with the provisions of law in selecting employees for redundancy and as per the standards upheld by the courts in the cases referred to or cited in this judgment.

The next issue for determination is whether the claimants are entitled to the remedies as prayed for. The respondent's position is that it's Nyeri, Maua, Nakuru and Marimanti campuses have been closed and some of the positions held by the claimants have already been abolished. Thus, reinstatement or continued service should not be granted. The submission is clear that only some of the unidentified offices held by the claimants have been abolished. There was no evidence that the respondent had notified the Director of Employment the abolition of the offices as alleged and as envisaged in sections 76 and 77 of the Employment Act, 2007. The court returns that the respondent has failed to establish and demonstrate that the abolition of offices held by the claimants would therefore constitute a valid ground as a bar to the claimants' continued employment. The respondent did not demonstrate that in fact, some offices as held by the claimants had been abolished. The evidence was that the claimants were to proceed on redundancy due to one or other shortfall inherent in the individual claimant (like alleged lack of professional or academic qualification) or a shortfall inherent in the respondent's operational system (such as allegation of dwindled workloads) but there was no suggestion or demonstration that any of the offices as held by the claimants had been abolished. It is the court's opinion that if the claimant had complied with the legal requirement on consultations to minimise terminations and to deal with adverse consequences of the looming redundancy, the alleged reasons advanced in targeting the claimants for redundancy would not have been found valid or the respondent would have arrived at different decisions with respect to rendering the claimants redundant.

It is submitted for the claimants that the respondent reinstates or allows the claimants to continue in the respondent's employment or the respondent is ordered to pay the maximum 12 months' compensation under section 49(1) (c) of the Employment Act, 2007.

The court has considered the temporary orders staying the redundancy from taking effect pending the hearing and determination of the suit. By reason of that order, the claimants remained at work pending this judgment. The court has considered that the claimants desired to remain in employment and they did not contribute to the respondent's otherwise failings in law in identifying them for redundancy. In the circumstances the court considers that ends of justice will be served if each claimant is paid by the respondent 6 months' gross salaries at the prevailing gross salary as at 31.07. 2017 and to pay together with all the redundancy dues as per section 40 of the Employment Act, 2007 by 01.09.2017 failing interest at court rates to be payable thereon at court rates from the date of this judgment till full payment.

In alternative, the court returns that the claimants are entitled to the declaration that the termination of the claimants' employment by the respondent on account of redundancy was unfair, irregular and unprocedural, and hence null and void, and, each claimant shall continue in the service of the respondent

as the redundancy decision is hereby set aside.

In view of the circumstances of the case, the claimants are deemed to be in the respondent's employment until close of 31.07.2017 by which date the respondent shall file and serve a notice stating the preferred option of the alternate orders and failing the filing and service of the notice, the respondent will be deemed to have opted that the claimants continue in its employment accordingly.

As the claimants have succeeded in their respective suits, the respondent shall pay the claimants' costs of the suit.

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

a) The declaration that the respondent in identifying the claimants did not comply with the provisions of section 40 (1) (c) of the Employment Act, 2007 as the redundancy was unfair, irregular and unprocedural.

b) The respondent to pay each claimant 6 months' gross salaries at the prevailing gross salary as at 31.07. 2017 and to pay together with all the redundancy dues as per section 40 of the Employment Act, 2007 and to pay by 01.09.2017 failing interest at court rates to be payable thereon at court rates from the date of this judgment till full payment.

c) In alternative to (b) above, it is hereby declared that the termination of the claimants' employment by the respondent on account of redundancy was unfair, irregular or unprocedural and hence null and void so that, each claimant shall continue in the service of the respondent in the position held with full prevailing and agreed remuneration and benefits, as the redundancy decision is hereby set aside as was unfair, irregular, unprocedural, null and void *ab initio*.

d) The respondent to exercise option between orders (b) and (c) above by filing and serving a notice of such option by close of 31.07.2017 failing the respondent be deemed to have opted for order (c) and the claimants to continue in employment by reporting on duty on 01.08.2017 in the usual manner.

e) The respondent to pay the claimants' costs of the suit.

Signed, dated and **delivered** in court at **Meru** this **Friday, 28th July, 2017.**

BYRAM ONGAYA

JUDGE