REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

PETITION NO. 48 OF 2016

ROSELYN SISIALI WEKESA.....PETITIONER

VERSUS

KONRAD ADENAUER FOUNDATION.....RESPONDENT

BARBARA ISCHEBACK.....INTERESTED PARTY

Mr. Wekesa for petitioner

Ms. Kiremi for respondent and interested party

JUDGMENT

1. The suit is based an Amended Petition filed on 21st August 2015. The petitioner seeks the following relief:

a. A declaration that the termination of employment of the petitioner by the respondent was wrongful and unfair.

b. A declaration that petitioner was racially discriminated against.

c. A declaration that the retention of the interested party by respondent is illegal to the extent that it violates the Agreement between the Kenyan Government and German Foundation.

d. Orders of certiorari to remove to this court and quash the decision of the respondent to terminate the services of petitioner.

2. Petitioner further prays for judgment against the respondent for;

a. Reinstatement or in the alternative –

b. Damages equivalent to 12 months' gross pay.

c. Aggravated damages for racial discrimination.

d. Punitive damages

e. Costs of the suit

f. Interest on (b) and (d) at court rates

3. Petition is based on the grounds set out in the amended petition as follows; -

i. That the claimant was employed by the respondent sometimes in March 2000 (RSW-4)

ii. That the petitioner served the respondent with diligence, dedication, honesty and satisfaction until 31st July 2014 when she was rendered redundant (RSW-5)

iii. That in the period 2006 – 2009, petitioner served two departments of the respondent, namely the Kenya Country Office and the Africa Rule of Law. The latter was opened in Nairobi in 2006.

iv. That in the year 2009, the respondent hired the interested party to perform administrative duties in the department of Africa Rule of Law.

v. That after the changes in 2009, petitioner was left in charge of one department – the Kenya Country Office which she served with distinction.

vi. That the respondent wrote to petitioner on 23rd May 2014 saying that the decision to retrench petitioner was based on results of a test done sometimes in February 2014 (RSW-6)

vii. That the respondent procured a legal opinion on 6th June 2013 in which clear guidelines on retrenchment were outlined (RSW-7)

viii. That on 7th June 2013 and in total disregard to a legal opinion produced by respondent (RSW-7), Dr. Duemmel, the then Head of the Department of Kenya Country Office under whom petitioner worked – wrote a letter to the headquarters asking the Finance department to set aside some finances for severance pay for petitioner (RSW-14).

xi. That the decision to lay off claimant was made much earlier in 2013 and not as indicated in the letter of notice (RSW-6, RSW-14)

x. That the decision to lay off the petitioner was discriminatory contrary to the provisions of Article 27 (5) of the Constitution of Kenya, 2010.

xi. That around June 2013, Dr. Duemmel, without any basis or provocation, cooked up, fabricated and conjured up a potentially defamatory and criminally sounding letter targeting petitioner which letter was circulated to senior members at the headquarters of respondent – the same people who later decided on whom to retrench between petitioner and the interested party (RSW-26).

xii. That prior to this write up, Dr. Duemmel had shown open bias against claimant bordering on racism (RSW-27).

xiii. That petitioner acquired university degrees from the University of Edmonton, Canada (RSW-9) and Kenyatta University (RSW-10) besides attending a German Language course at the University of Cologne Germany (RSW-11) and at the Goethe Institute in Nairobi (RSW-12A, 12B, RSW-28).

xiv. That both petitioner and ‘the interested party’ attended training workshops on the use of ‘PASTIS’- a specialized and customized software for performing administrative duties relevant to their work in Cape Town and Dar es Salaam at the end of which petitioner obtained a better score than ‘the interested party’ (RSW-13).

xv. That petitioner had worked longer for respondent (14 years, six months since March 2000) as compared to the interested party (about 6 years since April 2009).

xvi. That petitioner has six more years to retirement (or 11 years to retire in line with the practice of respondent) as opposed to the interested party who is aged 64 years and well beyond retirement age under Kenyan law (and one year to retire in line with the practice of respondent) (RSW-28)

xvii. That from as early as 2013 – Dr. Karsten Duemmel preferred dealing with the interested party notwithstanding that she belonged to a different department as shown in his letter of 5th June 2013 (RSW-27). The innuendo therein that petitioner was inefficient is not supported by any letter of warning or complaint from respondent – and simply shows racial bias.

xviii. That a communication from the interested party dated 18th December 2013 to headquarters shows that the interested party participated in the planning for retrenchment (a process from which claimant was excluded) (RSW-29) and that the interested party knew she was to be retained. This is notwithstanding the fact that headquarters was to make an 'objective' decision on whom to retrench as between petitioner and the interested party.

xix. That prior to 2014 'the interested party' was made a signatory to the accounts of respondent managed by the petitioner when no such reciprocal arrangement existed (RSW-15)

xx. That the interested party wrote a letter on 21st January 2014 in which she introduced the new Head of Department for the Kenya Country Office – to the bank accounts managed by claimant – when respondent was in office at all material times (RSW-15). This is an indication that the interested party had already been asked to take over the functions of the petitioner long before the valuation test was done (RSW-6). That the interested party was recruited on local terms – and therefore not strictly captured under the agreement (RSW-2) and further that her positon falls under those to be filled by Kenyan nationals.

xxi. That contrary to previous practice in the organization. Petitioner was excluded in the preparation for the 2014 budget.

xxii. That the budget for 2014 of respondent which was made in 2013 shows that the position of petitioner would not exist from 2014 (RSW-23, RSW-24, RSW-25).

xxiii. That petitioner was made to feel inadequate and inferior at the workplace through this discriminatory conduct of respondent thereby violating her right to live in dignity.

xxiv. That the retrenchment of petitioner having been predetermined – the purported process as indicated in the letter of first respondent (RSW-3) was deceitful and a mockery of Kenyan law and a contravention of sections 40, 45 and 49 of the Employment Act, (2007).

xxv. That the budget for 2014 of respondent which was made in 2013 shows that the position of petitioner would not exist from 2014 (RSW-23, RSW-24, RSW-25).

xxvi. That a communication from the interested party dated 18th December 2014 to headquarters shows that the interested party participated in the planning for retrenchment (a process from which petitioner was excluded) (RSW-29) and that the interested party knew she was to be retained. This is notwithstanding the fact that headquarters was to make an 'objective' decision on whom to retrench as between petitioner and the interested party.

xxvii. That on 7th June 2013 and in total disregard to a legal opinion procured by respondent (RSW-7), Dr. Duemmel, the then Head of the Department of Kenya Country Office under whom petitioner worked – wrote a letter to the headquarters asking the finance department to set aside some finances for severance pay for petitioner (RSW-14).

xxviii. That the respondent did not show petitioner any evaluation indicating that the work in petitioner's department was less than that in the department managed by the interested party.

xxix. That the racial undertones that informed the process of laying off petitioner makes the entire exercise wrongful, unfair and discriminatory.

xxx. That through racial discrimination by first respondent, the rights of the petitioner under Articles 10, 27 (1), (5), 28, 41 (1) of the Constitution have been infringed.

xxxi. That the infringement of the rights of petitioner by the respondent has deprived her of a source of livelihood and the right to live in dignity.

xxxii. That respondent did not only discriminate against claimant but also engaged in acts of deceit to perpetuate the discrimination.

xxxiii. That despite demand and notice to sue being issued the respondent neglected and or refused to comply (RSW-30)

xxxiv. That at the time of termination of petitioner, her monthly pay was Kshs.310,000/=.

xxxv. That petitioner's claim against the respondent is for a sum of Kshs.63,720,000/=.

xxxvi. That save for the initial filing of this suit in the Employment and Labour Relations Court under claim No. 2010 of 2014, there is no other suit pending in court and neither has there been one adjudicated upon between the parties herein touching on the issues in question.

xxxvii. That this honourable court has jurisdiction to try and determine this petition.

4. The petition is supported by verifying affidavit of the petitioner sworn on 6th August 2015.

Statement of Response

5. The respondent opposes the petition and responded to the same as follows;

i. For the reasons that will become apparent herein, the respondent and interest party submit that the petitioner has not proven any of other claims and as such cannot succeed in the petition herein. She declined an opportunity to present her case and evidence and must be held to her bargain.

ii. The petitioner herein first filed suit on 1st December 2014, through Industrial Court Case No. 2120 of 2014. In that case, she sued not only the respondent and the interested party herein, but also the Director of Immigration, the Kenya Revenue Authority, Ethics and Anti-Corruption Commission and the Director of Public Prosecutions.

iii. The various respondents filed responses pointing out the obvious fact that there did not exist an employer-employee relationship between them and the petitioner. The interested party filed a notice of preliminary objection on 16th February 2015 also asserting that there was no employment relationship between her and the petitioner. The respondent herein filed an application seeking to strike out the claim for want of jurisdiction.

iv. The application and objections were heard by the honourable Justice Nzioki Wa Makau who delivered a ruling on 14th July 2015. In his ruling, the judge had this to say;

> "***The claimant seems to hide under the guise of the unfair termination to launch an attack on the employer and other parties for infarctions of various other laws. There is no employer-employee relationship between the claimant and the 2nd, 3rd, 4th, 5th or the***

interested party. The suit is a collateral attack on her employer."

"…. The only aspect of the claim reserved for the Employment and Labour Relations Court is the issue of her redundancy which is a microscopic part of the claim before me……"

"... should the claimant wish to pursue claims on the issue of employment she could move the Employment and Labour Relations Court for determination of that dispute"

v. It is immediately evident that the court did make a finding that there was no employer-employee relationship between the claimant and the interested party. This matter was indeed determined and on that finding, the petitioner cannot maintain an action in this court against the interested party.

vi. Following this order, the file was moved to the Constitutional Division of the High Court and allocated **Petition No. 278 'B' of 2015**. In an interesting turn of events, the petitioner amended the petition and removed all the other parties whose joinder in the suit had necessitated the transfer of the matter to the High Court in the first place. She also abandoned the various orders she had sought against the bodies. We invited the court to consider the remaining prayers in the petition as amended.

vii. Following the amendment of the petition, an objection was made on the court's jurisdiction to deal with what now stood as an employment dispute, the petitioner having removed the substratum upon which the matter had been transferred to the Constitutional Division of the High Court.

viii. The petitioner's case is as set out in the amended petition filed on 21st August 2015 and the submission filed on 31st August 2016.

ix. The respondent and interested party's response to the claim are set out in the response filed in court on 19th August 2016. The respondent shall rely on the documents referred to by the petitioner in her pleadings.

x. The interested party was a co-worker of the petitioner. She is a German national. She retained her employment in the redundancy exercise and this would appear to be the basis of the claim of racial discrimination. Save for a prayer for a declaration that the retention of the interested party by the respondent is illegal to the extent that it allegedly violates the agreement between the Kenyan Government and the German Foundation, there is no claim whatsoever made against the interested party. Not a single order is sought against her either.

xi. No particulars of the alleged illegality have been provided and the petitioner has not led any evidence upon which the court can properly determine this issue. The interested party refers to the replying affidavit filed on 19th March 2015 by the Kenya Revenue Authority which confirmed the status of the interested party pursuant to the agreement between the states of Kenya and Germany. The persistent inclusion of the interested party in these proceedings is borne out of bad faith and malice.

xii. In December 2012, June 2013 and March 2014, audits were conducted by both the Ministry's (BMZ) internal audit division and the respondent's Head Office. It was established that certain functions being run separately under the two programs could be undertaken by one person only. Subsequently, the decision was taken to merge some positions. As a result of this rationalization, some of the positions were no longer required with the result that a redundancy had to be declared.

xiii. By letter dated 23rd May 2014 referred to by the petitioner as RSW 6, the petitioner was informed that following the audits undertaken as mentioned above, it had been recommended that the function of Administrator should be carried out by one person. The petitioner was further informed that the respondent had sought legal advice to ensure that all legal provisions were

observed.

xiv. At paragraph 15 of her claim, the petitioner confirms that the decision as to which employee was to be laid off was based on test done in February 2014. She does not deny having undertaken that test. Had she been cross-examined, she would have been able to confirm that the test was administered from the Head Office and that her colleague performed better than she did.

xv. The petitioner would also have been able to confirm that she did receive notice of intention to declare her redundant and received all her redundancy dues. It is very telling that she does not make any claims in this regard.

xvi. The petitioner suggests that because a Head of Department had asked for funds to be set aside for the redundancy exercise in 2013, it meant that a decision had been made to declare her redundant. The petitioner has intentionally avoided the opportunity to inform the court how she accessed her boss confidential mail and to confirm that the redundancy process did not take place in June 2013. She would also have had to explain how a decision to seek legal advice on compliance with the law in the redundancy process constitutes discrimination against her.

xvii. The allegations that the interested party had knowledge of the impending redundancy are allegations that the petitioner ought to prove. To date they remain allegations which have not been proved.

xviii. The petitioner claims that the decision to lay her off was discriminatory. She then makes reference to alleged bias by a former director of one of the programs regarding a report he made in his personal capacity expressing concern over his personal security. The petitioner was required to lead evidence on the allegations and show how the matters she alleges constitute discrimination especially in light of the provisions of the article she relies on.

xix. Racial discrimination refers to the practice of treating individuals differently because of their race or colour. The petitioner for many years worked alongside the interested party. They performed their respective duties and earned their remuneration. There was no suggestion that one was not paid a wage, or was given preferential treatment. Indeed they worked in different programs until it ceased to be feasible to have two employees performing those duties.

xx. A close look at the letters dated 23rd May 2014 (marked as RSW 6, in the petitioner's bundle) and the letter dated 31st July 2014 (marked as RSW 5 in the petitioner's bundle) indicates that the petitioner was well aware that the respondent was scheduled to restructure the organization.

xxi. The letter dated 23rd May 2014 informed the petitioner that an assessment had been carried out for purposes of restructuring the organization and also informed her of her score in an assessment undertaken towards the restructuring.

6. Reasons wherefore the respondent and interested party pray that the claim be dismissed with costs.

Determination

7. The issues for determination in this matter are as follows;

i. Whether the petitioner was wrongfully and unfairly terminated.

ii. Whether rights of petitioner were violated.

iii. Whether respondent acted maliciously, deceitfully and or fraudulently.

iv. Whether the petitioner is entitled to the reliefs sought.

Submissions by the Parties

Issue i

8. As to whether the petitioner was wrongfully and unfairly declared redundant the petitioner submits as follows;

i. It is not in dispute that Kenyan law recognizes the right of an employer to reorganize its enterprise in the best way it knows. However, when it comes to termination of employment, an employer is required to act with both substantive/operational and procedural fairness.

ii. With regard to substantive or operational fairness, an employer is required to fulfil certain statutory requirements. Section 43 (4) provides –

> **43. Proof of reason for termination**
>
> **(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reason for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of Section 45.**
>
> **(2) The reason or reasons for termination of contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.**

iii. Whereas the affidavit sworn on behalf of respondent and interested party dated 6th February 2015 does not touch on substantive fairness, the statement of response 'blows hot and cold air' on this matter. At part 13, there is a mention of projects increasing from 2007 culminating into the employment of a second person – the interested party – in 2009. At page 15 of the same document, it is written in part *"15. Between January 2007 and 2013, the number of project activities in Kenya decreased* […..]" Firstly, this is very confusing. Secondly, respondent has not furnished any evidence by way of statistics showing a downward trend in project activities. Respondent has provided neither absolute figures nor percentages indicating a downward trend in project activities over the alleged period. In **Kenya Airways Ltd –vs- Aviation and Allied Workers Union Kenya and 3 others**, the court of Appeal found that the employer [appellant] had conformed with the requirement for substantive/operational fairness by adducing evidence of its reasons for retrenching employees in the form of audited accounts over a five year period, reports from Treasury and other operational reports. In particular the court observed that –

> *33. I have considered these submissions and perused the record of appeal. Though he opined that the appellant's financial position is healthy and that its viability as a going concern was not threatened at all, the 1st respondent's financial analyst, Mr. Martin Khoya Odipo, conceded that the appellant had, for about five years previously experienced economic difficulties and that although it made some profits except in 2009 when it suffered heavy losses, the analysis of its accounts showed an overall downward trend of profits […] between 2007 and 2012. This situation was confirmed by the Economic Planning Division (EPD) of the Treasury, the Ministry of Transport's auditors and the appellant's unaudited reports as well as by the learned Judge himself who described it as "a cyclic economic downturn" although he was quick to observe that it was "not a downfall." These difficulties, the appellant said, were caused by various factors including a huge wage bill."*

iv. It is noteworthy that petitioner performed the functions of the two department/programs between 2006 and 2009. If indeed a decline in project activities was noticed between 2007 forwards, then respondent should not have hired another person. Clearly the conduct of respondent in this regard does not speak to a need for a merger of functions of administrator in the two departments/programs.

v. Respondent in this petition has failed to prove that "the number of project activities in Kenya decreased."

vi. In addition, at part 16 of the statement of response, reference is made to "audits conducted in December 2012, June 2013 and March 2014" which recommended merger of certain functions that would eventually affect the petitioner. However, there is no evidence that such audits ever took place. Furthermore there is no evidence of the functions that were recommended to be merged. Respondent has not placed anything on record to enable this honourable court assess whether indeed a merger was necessary.

vii. We therefore urge this honourable court to find that respondent has failed to prove its reasons for terminating the petitioner.

viii. On whether fair procedure was used – respondent has averred at paragraph 18 that the selection of whom to retrench or not was based on the results of a professional test taken by both petitioner and the interested party. The said test was conducted on 19th February 2014 (see RSW-6 in memorandum of claim, last paragraph). However, the following facts do not support that positon-

a. On 5th June 2013, the then Director (Dr. Karsten Duemmel) wrote to head office informing them of his desire to retrench petitioner (RSW-27 in memorandum of claim).

b. On 7th June 2013 – the then Dr. Karsten Duemmel wrote to head office asking the finance department to set aside some funds to cater for severance pay for petitioner. For the avoidance of doubt, petitioner is mentioned by name. (See RSW-14 in memorandum of claim)

c. Before the purported professional test – the interested party who belonged to a different department/program wrote a letter introducing an incoming Acting Director for the Country Office Department/Program in which petitioner was the administrator. The Acting Director was to be a signatory to a/m CBA accounts (which accounts were for the Country Office). The necessary inference is that the interested party had already taken over the work of petitioner long before it could be determined on who should be retrenched.

d. In another e-mail dated 17th June 2013 (RSW 26A – in memorandum of claim) the then Director mentions petitioner as earmarked for retrenchment due to performance (bullet no. 4). This leads to the necessary inference that the alleged "performance test" was a smokescreen aimed at sanitizing a wrongful decision that had already been made. With respect to performance, respondent has not furnished any commutation to petitioner complaining about her performance.

e. By letter dated 18th December 2013, the interested party admits at paragraph one that she took an active part in the structural changes (read retrenchment plans) being implemented by the then Director - Dr. Duemmel. The tone of that entire letter is to the effect that the interested party knew she was to be retained as between her and the petitioner. The averment at paragraph 21 (h) of the statement of response is inaccurate and calculated to mislead the court.

f. In this collaboration between the then Director and the interested party, petitioner was excluded from the budgetary process for 2014 which was made in 2013. This was contrary to previous practice in which she always played an active role in the budgeting process. The resultant budget abolished the position of administrator in the department/program of the petitioner. (RSW-23, RSW-24, RSW-25). While the statement of response speaks to audits conducted (at paragraph 16) the results of the audits are not given. It is not clear whether the audits showed that there was less work in the petitioner's department/program to warrant the abolition of this specific position in advance. Respondent has not provided the information

that it purported shared with the petitioner.

g. It is very telling that while a "decision was to be made" as between petitioner and the interested party, the decision to retrench petitioner had already been sealed long before the purported professional test.

ix. We therefore submit that respondent's averment that petitioner was retrenched based on the results of a test taken on 19th February 2014 is deceitful, fraudulent and out rightly wrongful.

x. Consequently, we urge this honourable court to find that the termination of petitioner was both wrongful and unfair.

9. Respondent and interested party submits as follows;

i. In order to discharge the burden of proof, the petitioner must demonstrate that the termination of her employment was unlawful and/or wrongful both substantively and procedurally.

ii. Between January 2007 and 2013, the number of project activities in Kenya decreased, while the number of employees remained high at high salaries, which were reviewed annually but without optimal engagement. The widening gap between running and infrastructure costs in relation to activities had been observed and monitored by the respondent's headquarters over the years.

iii. In December 2012, June 2013 and March 2014, audits were conducted by both the Ministry's (BMZ) internal audit division and the respondent's Head Office. It was established that certain functions being run separately under the two programs could be undertaken by one person only. Subsequently, the decision was taken to merge some positions. As a result of this rationalization, some of the positions were no longer required with the result that a redundancy had to be declared.

iv. By letter dated 23rd May 2014 referred to by the petitioner as RSW 6, the petitioner was informed that following the audits undertaken as mentioned above, it had been recommended that the function of Administrator should be carried out by one person. The petitioner was further informed that the respondent had sought legal advice to ensure that all legal provisions law were observed.

v. At paragraph 15 of her claim, the petitioner confirms that the decision as to which employee was to be laid off was based on test done in February 2014. She does not deny having undertaken that test. Had she been cross-examined, she would have been able to confirm that the test was administered from the Head Office and that her colleague performed better than she did.

vi. The petitioner would also have been able to confirm that she did receive notice of intention to declare her redundant and received all her redundancy dues. It is very telling that she does not make any claims in this regard.

vii. The petitioner suggests that because a Head of Department had asked for funds to be set aside for the redundancy exercise in 2013, it meant that a decision had been made to declare her redundant. The petitioner has intentionally avoided the opportunity to inform the court how she accessed her boss confidential mail and to confirm that the redundancy process did not take place in June 2013. She would also have had to explain how a decision to seek legal advice on compliance with the law in the redundancy process constitutes discrimination against her.

viii. The allegations that the interested party had knowledge of the impending redundancy are allegations that the petitioner ought to prove. To date they remain allegations which have not been proved.

Issue ii

10. As to whether rights of petitioner were violated the petitioner submits;

i. That petitioner was discriminated against contrary to the provisions of Article 27 (5) of the Constitution of Kenya based on race.

ii. In his letter to headquarters dated 5th June 2013, Dr. Duemmel makes negative comments about the petitioner's ability at work even including the use of Pastis software programme (RSW-27 paragraph 6 in memorandum of claim.)

iii. We have stated at paragraph 36A (e) of the petition that the petitioner did better on a Pastis examination than the interested party. This has not been controverted by the respondent and interested party. The results were kept by respondent. If this were not so, nothing would have been easier than for respondent to refute the same with evidence.

iv. The petitioner had worked for 14 years, six months in the organization compared to six years for the interested party. During this period, there was no complaint about petitioner's work, even when she handled work for the two departments/programmes.

v. The petitioner has superior academic qualifications (B.ED – Aberta, MBA – KU) see paragraph 36A (d) of the petition, as contrasted with the interested party who only has A-level qualifications (see RSW-28 in memorandum of claim.)

vi. The petitioner had 11 more years to work for the organization as opposed to the interested party who was aged 64 years at the time of the retrenchment and had just one more year to work. Little wonder, paragraph 3 of the statement of response indicates that the interested party is no longer in such employment.

vii. At paragraph 13 (of statement of response) there is a reference to the interested party as a German national and proficient in the German language. This self-same German national was employed on local terms (see paragraph 9 of the petition and RSW-3 in memorandum of claim). This engagement as in blatant contravention of the agreement referred to at paragraph 2 of the statement of response and marked as RSW-2. The said agreement provides in part –

> Article 1
>
> _ _ _ _ _
>
> i) _ _ _ _
>
> _ _ _ _ _
>
> iv) **Appoint up to three German representatives to head the office/s** and for overall supervision of all projects under this agreement on behalf of the foundations and who may also represent the foundations in other African countries in the execution of regional projects. The foundations will always recruit the majority of its staff from Kenyan citizens [own emphasis].

viii. At paragraphs 10 of the statement of response it is averred that respondent had two programmes and at paragraph 14 of the same document that each programme had a programme director, who headed the programme.

ix. The agreement makes provision for up to three such directors. The interested party was not a director in the meaning of the agreement. Indeed, paragraph 9 of the petition as well as paragraph 15 – 17 of the statement of response attest to the fact that interested party was employed as an administrator.

x. We urge this honourable court to find that the hiring of the interested party was in flagrant violation of the agreement and therefore null and void *ab initio*.

xi. We further urge this honourable court to find that the hiring of the interested party against clear provisions of a binding agreement was motivated by racial considerations rather than a serious attempt to hire more staff in the face of "increasing project activities" in Kenya. Had respondent advertised the position that it eventually filled with the interested party, they would have probably found a suitably qualified local in the spirit of the agreement (employing majority of workers from Kenyan citizens).

xii. The petitioner was very fluent in the German language having studied the language both in German (University of Cologne) and in Kenya (Goethe Institute) as evidence in paragraph 36 A (d) of the petition.

xiii. Petitioner was therefore not only better qualified academically than the interested party, but she was proficient in the German language.

xiv. Objective criteria applied in retrenchment mattes such as "last-in-first-out or LIFO" principle or academic qualifications were not applied in this case. The then director first decided on whom he did not want and went about seeking justifications for such a decision as evidence in a highly biased letter [petition paragraph 36A (a)]

xv. In a brazen show of racial bias, the then Director chose to work with the interested party, who at the time belonged to a different department/programme rather than with the petitioner - petition paragraph 36A (i) and (ii).

xvi. We submit that the manner in which respondent conducted themselves from 2013 to 2014 (when the retrenchment was finally effected) was in total contravention of Article 10 of the Constitution of Kenya, 2010 relating to human dignity, equity, inclusiveness and non-discrimination.

xvii. We further submit that the conduct of respondent was discriminatory contrary to the provisions of Article 27 (1) and 27 (5). More specifically, we hold the view that conduct of the respondent (pre-determining whom to retrench in advance, ignoring the petitioner at the work place, ignoring known objective criteria of retrenchment and even using party who had a stake in the retrenchment exercise to retrench a competitor) was laced with racial discrimination. We urge this honourable court to so find.

xviii. It is our humble submission that the respondent violated the dignity of the petitioner contrary to Article 28 of the Constitution of Kenya, 2010.

xix. The then Director chose to ignore the petitioner preferring to work with a fellow "white" person instead – event of the pointing of going for her from another department/programme.

xx. No doubt, these actions were very demeaning and degrading to the petitioner.

xxi. Respondent created a hostile work environment for petitioner during the said period 2013 to mid-2014.

xxii. Petitioner suffered a lot of anguish and psychological torture. For over a year. Petitioner knew she was the target of retrenchment. The anguish as exacerbated by the knowledge that her would-be competitor – the interested party – was receiving preferential treatment from the boss who was expected to act "fairly in the matter."

xxiii. We urge this court to find that these actions by respondent injured the dignity of the petitioner.

xxiv. We wish to submit further that the right of petitioner to fair labour practices were violated, contrary to Article 41 of the Constitution of Kenya, 2010. The relevant part provides –

41. (1) Every person has the right to fair labour practices

– – – – –

11. The respondent on the contrary submits as follows;

i. The petitioner claims that the decision to lay her off was discriminatory. She then makes reference to alleged bias by a former director of one of the programs regarding a report he made in his personal capacity expressing concern over his personal security. The petitioner was required to lead evidence on the allegations and show how the matters she alleges constitute discrimination especially in light of the provisions of the article she relies on.

ii. Racial discrimination refers to the practice of treating individuals differently because of their race or colour. The petitioner for many years worked alongside the interested party. They performed their respective duties and earned their remuneration. There was no suggestion that one was not paid a wage, or was given preferential treatment. Indeed they worked in different programs until it ceased to be feasible to have two employees performing those duties.

iii. In **Annarita Karimi Njeru –vs– The Attorney General [1979] KLR 54** (page 1 -11) of the bundle of authorities annexed to these submissions) and which was restated in **Mumo Matemu – vs– Trusted Society of Human Rights Alliance and Others Nairobi CA Civil Appeal No. 290 of 2013 [2013] eKLR**, the court set out he well-established principles that a petitioner must state his claim with precision by reference to the provisions of the Constitution violated and how they are violated. It is not enough to generally allege an infringement of a right without providing any specificity to it.

iv. The petitioner alleges racial bias and seeks both aggravated and punitive damages on that account. The matters set out at paragraph 36A do not constitute any particulars of racial bias and are instead a submission as to why the petitioner feels that her contract of employment was unfairly terminated.

v. The petitioner has failed to discharge her obligation in proving that here was racial discrimination against her by the employer and the interested party.

vi. Had the petitioner's contract not come to an end by reason of redundancy, the assertion of discrimination would likely not arise. The respondent has many employees who are Kenyan citizens. The petitioner did not call any one of those employees to testify in her support on the claims of discrimination. This allegation is most distressing to the respondents whose main focus is the promotion of the Rule of Law.

vii. If the assertions of discrimination relate to the fact of the selection for the redundancy, the respondent has already demonstrated that it applied an objective criteria and complied with the law. The selection criterial for purposes of redundancy took into account a diverse number of considerations including the employees' reliability and skill.

viii. Both the petitioner and the interested party were subjected to a professional test administered by the Head Office as part of the selection criteria. The interested party scored 85% in the professional test while the petitioner scored 78%.

ix. Termination of employment is recognized under Kenyan law and cannot be asserted to be a violation of the fundamental rights.

x. The respondent had valid reasons to reorganize and restructure as directed by the funding body.

These were valid reasons for declaring some of the employees redundant. The respondent followed due process in the separation process. The respondent cannot be accused of wrongdoing and does not deserve to be punished as sought by the petitioner.

xi. The respondent submits that it followed due process in separating with the petitioner. There was no oppressive, arbitrary or unconstitutional action by the respondent at the time of separation.

Issue iii

12. With regard as to whether the respondent acted maliciously, deceitfully and fraudulently the petitioner submits as follows;

i. The mere act of contemplating to retain and actually retaining a person hired in violation of the agreement should be seen as a fraudulent activity on the part of respondent.

ii. The act of presenting the results of a test as the basis of retrenching petitioner when the available evidence is to the contrary should be seen as sheer fraud and deceit as against petitioner.

iii. Dr. Duemmel, then Director and Supervisor of petitioner fabricated lies regarding petitioner (see RSW-26A). Petitioner reported the same to authorities and recorded a statement (RSW-26B). It is instructive that the then Director chose to communicate such grave allegations to head office, which was supposed to consider petitioner's chances in a retrenchment exercise, was highly prejudicial to the right of petitioner to fair labor practices. It becomes even the more deceitful considering that the same document was never discussed with petitioner. So grave were the allegations that he should have reported to the police. In retrospect, it would appear that this was one of the schemes devised by this supervisor to convince head office to retrench petitioner. Officials from head office came in that month of June 2013 and had a bite at investigating this matter, in addition to their other duties. However, they never communicated their findings to petitioner. This should also be counted against respondent as an act of deceit.

iv. We therefore urge this honourable court to hold that respondent acted maliciously, deceitfully and fraudulently in the court of retrenching petitioner.

13. The respondent submits to the contrary as follows:

i. The respondent informed the petitioner of the impending redundancy and gave her notice of intention to declare her redundant there was no ill motive, deceit or fraudulent action by the respondent or the interested party.

ii. The petitioner at paragraphs 38 to 62 of her submission justifies her claim for an award of aggravated and punitive damages in stating that the petitioner was racially discriminated over a period of one year wherein she was subjected to mental anguish and degradation. No evidence of what she asserts to be discrimination and the resulting degradation as adduced before the court.

iii. The considerations for aggravated and punitive damages are well laid out. Both take into account the defendant's motives, conduct and manner of committing a wrong. The claimant must show that her respondent acted with malevolence or caprice. No such evidence has been led in this case, nor was the respondent given an opportunity to test that evidence on cross examination.

iv. The petitioner is not entitled to punitive and aggravated damages in the circumstances of this case. We rely on the case of **Margaret Omondi –vs– Kenya Revenue Authority [2013] eKLR**, at page 12 – 20 of the bundle of authorities annexed to the submissions herein, where the court held that;

> "**It is trite law that exemplary damages are not payable in cases of breach of employment contract. Exemplary damages are normally awarded where there is**

oppressive, arbitrary or unconstitutional action by the servants of the government, in cases in which the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff or in any other statue authorized by statute."

v. The respondent also relies on the case of **Abraham Gumba –vs- Kenya Medical Supplies Authority [2014] eKLR**, at page 21 – 34 of the bundle of authorities annexed to this submissions, where the court held that the employment relationship is not a commercial relationship, but a special relationship which must be insulated from the greed associated with the profit making motives, inherent in commercial contracts which has been the historical justification of capping compensatory damages since the era of the Trade Disputes Act to a maximum of 12 months' salary.

vi. The court in the above case was of the further view that the express bar to grant punitive or exemplary cost in Rule 28 (2) of the Industrial Court (procedure) Rules 2010, is intended to evenly apply in the area of damages.

vii. There was no malice whatsoever in taking the decision to separate with the petitioner and the claim for punitive and aggravated damages has no basis whatsoever.

Determination

Proved Facts

14. The petitioner was not consulted at all in determining why, the interested party aged 64 years, well beyond the retirement age in Kenya and from European origin and who was employed much later by the respondent was preferred for retention instead of her, who was much younger and had 11 more years to retirement. It is apparent from the letter by Dr. Duemmel dated 5th June 2013 written to Peter Lieber by himself, that Dr. Duemmel preferred that the interested party be retained even before the test to determine who was more qualified to stay than the other was done. The purported test was done subsequently to confirm a forgone conclusion much later by the respondent.

15. The retrenchment was predetermined and not consultative. The interested party who knew was to replace (see letter by interested party dated 18th December 2013) the claimant participated in planning the exit including, excluding her position from the budget. Dr. Duemmel, openly preferred dealing with the interested party from a different department and overlooking the petitioner for reasons better known to himself. There is no evidence that the preference was on racial discrimination.

16. It is a fact that between 2006 and 2009, the petitioner performed the functions of the two departments/programs in question. In 2007, the respondent employed another person, the interested party and who took over part of the work. This action by the respondent is inconsistent with the respondent's submission that activities of the project were on decline and proceed to use this as a reason to retrench the petitioner.

17. The mandatory requirements for retrenchment under Section 40 of the Employment Act are 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.

18. In terms of (c) thereof, in the selection of employees to be declared redundant, the employer must have regard to "**seniority in time and to the skill ability and reliability of each employee…….."**

19. On this, it is not disputed that the petitioner was the first in and was to be the last out all factors being equal. This is commonly known as LIFO (Last In First Out), a formula commonly applied in retrenchments world over. The other considerations only become relevant where there is demonstrable skills and ability deficiency on the part of the employee who was employed first. It is a fact that the petitioner held a Bachelor of Education and MBA degrees whereas the interested party had "A" level qualifications only. Both were proficient in German. The respondent has not demonstrated such skills or ability deficiency on the part of the petitioner. The onus is on the respondent to show, once the petitioner has made a *prima facie* case as she has done of wrongful selection for retrenchment. It is the court's considered finding that the termination of the employment of the petitioner did not follow a fair procedure as set out under Section 40 (c) as read with Section 45 of the Employment Act, 2007. The court further notes that the respondent is obliged to prefer a qualified Kenyan national as opposed to a foreign national in terms of the relevant Kenyan labour and immigration law. Expatriates are to be retained in exceptional circumstances. This was not one such circumstance.

20. The standard of proof to establish malice, deceit and fraudulent conduct on the part of the respondent is slightly higher than on a balance of probability though is less than beyond reasonable doubt. The petitioner has clearly shown that Dr. Duemmel disliked her and for reasons known to himself preferred to work with the interested party. This conduct by Dr. Duemmel amounted to unfair labour practice.

21. Article 41 of the Constitution reads:

"(1) Every person has the right to fair labour practices."

22. The conduct by the respondent via its officer Dr. Duemmel against the petitioner amounted to unfair labour practice and therefore a violation of her constitutional right in this regard. However as stated earlier, the petitioner has failed to prove that the respondent discriminated against her on grounds of race. The petitioner has also failed to show that the respondent acted maliciously towards her.

Remedies

23. The court has already found that the termination of the employment of petitioner by the respondent

was wrongful and unfair for failure to satisfy the provisions of Section 40 (1) (c) of the Act. The court has further found that the petitioner was subjected to unfair labour practice contrary to Article 41 of the Constitution of Kenya 2010.

24. The court has no sufficient material before it to declare that the retention of the interested party by the respondent is illegal. The court however finds it has jurisdiction to deal with the issue in terms of Section 12 of the ELRC Act, 2014 had it been properly brought before it.

25. The primary prayer for consideration by the court is that of reinstatement to her job in terms of Section 49 (3) (a) as read with Section 50 of the Employment Act, together with the powers given to the court under Section 12 (3) (vii) of the Employment and Labour Relations Court Act, 2014.

26. Section 12 (3) (vii) of the ELRC Act provides:

In exercise of its jurisdiction under the Act, the court shall have power to make any of the following order –

> **(viii) An order for reinstatement of any employee within three years of dismissal, subject to such conditions as the court thinks fit to impose under circumstances contemplated under any written law; or**
>
> **(viii) any other appropriate relief as the court may deem fit to grant**

27. On the other hand, Section 49 (3) of the Employment Act, 2007 as read with Section 50 thereof provide for the remedy of reinstatement as follows-

> **"(a) reinstate the employee and treat the employee in all respects as if the employee's employment had not been terminated:**

28. The claimant had served the respondent diligently since the year 2000 when she was employed. She had served the respondent for more than 13 years with 11 years left to her retirement. The petitioner desires truly to return to her work and has demonstrated that she ought not to have been targeted for retrenchment at all.

29. The termination of her employment was on 23rd May 2014. Three years have elapsed since the termination. The petitioner received substantial terminal benefits upon termination.

30. In terms of Section 49 (4) of the Employment Act, the court is supposed in addition to above to consider the practicability of recommending reinstatement or re-engagement taking into account that this ought to be done in exceptional circumstances. The petitioner had legitimate and reasonable expectation to serve for a further eleven (11) years to retirement but that expectation had been frustrated unlawfully and in circumstances that comprised unfair labour practice.

31. From the evidence before court, the petitioner did not contribute at all to the termination having been a good performer for over 13 years. All the blame rests on the respondent by placing the petitioner in a conflicted situation.

32. That Dr. Duemmel was separated from the respondent almost immediately thereafter is evidence of something untoward in his management of the respondent. There is evidence that the local staff were hostile towards him due to his management style.

33. We do not consider this an appropriate case for reinstatement or re-engagement since the conduct by the respondent towards the petitioner has resulted to an acrimonious relationship between the petitioner and the respondent even though Dr. Duemmel has since been separated from the organization. This conflict has now soured the petitioner's relationship with the organization as a whole.

34. The court therefore considering all the aforesaid factors in terms of Section 49 (4) as read with Section 49 (1) (c) awards the petitioner the equivalent of 12 months gross salary as compensation for the wrongful and unfair termination of employment.

35. The claims for aggravated and punitive damages have not been adequately proved on a preponderance of evidence and the law applicable as set out in the submission by the parties herein.

36. The judgment is entered in favour of the petitioner as against the respondent as follows;

1. Kshs.3,737,380/= being equivalent of 12 months' salary as compensation for the wrongful and unfair termination of employment.

2. Interest at court rates from date of judgment till payment in full.

3. Costs of the suit.

Dated and Delivered at Nairobi this 14th day of July 2017

MATHEWS NDERI NDUMA

PRINCIPAL JUDGE