REPUBLIC OF KENYA

EMPLOYMENT & LABOUR RELATIONS COURT

AT NAIROBI

PETITION NO. 12 OF 2012

MONARCH INSURANCE CO. LTD.....PETITIONER

VERSUS

INDUSTRIAL COURT.....1ST RESPONDENT

BANKING INSURANCE & FINANCE UNION..2ND RESPONDENT

JUDGMENT

1. The Petitioner herein sought various orders in its Petition which initially had been preferred at the High Court before the establishment of this Court under Article 162(2) of the Constitution of Kenya. The Petition was subsequently referred back to this Court and the issues that remained for determination were no longer the issue of jurisdictional in light of the decision in **USIU v Attorney General & Another [2012] eKLR**. Parties sought to have the issue of the retrenchment of the employees of the Petitioner and members of the 2nd Respondent union determined.

2. Mr. Mogeni for the Petitioner submitted that the 2nd Respondent had a CBA negotiated with the Petitioner valid for 2 years at the material time. He submitted that pursuant to the terms of the said CBA and to restructure its services, the Petitioner decided on 30th June 2006 to retrench by redundancy 18 workers and issued the respective notices to the workers and Union. The Petitioner drew out the relevant benefits for the affected employees, the members of the 2nd Respondent. The letters of redundancy were issued on the same date for each employee and had a computation of payment due to the employee. The 2nd Respondent wrote on the same date to the Minister for Labour on the existence of a dispute. The employees involved in the retrenchment were both managerial staff and members of the 2nd Respondent. Mr. Mogeni submitted that the Petitioner was not approached by the 2nd Respondent is spite of the 2nd Respondent having been in the picture from the beginning and instead submitted a dispute to the Minister and thereafter moved the Industrial Court under the Trade Disputes Act. He submitted that the Industrial Court Act was given the final say by Section 17 of the Trade Disputes Act and was the appellate court in the process that emanated from the reference to the Minister. The Petitioner submitted that it was entitled to retrench its staff under the redundancy clause and that the redundancy was done in compliance with the standard set up by the CBA. The Petitioner submitted that the redundancy was not discriminative and affected all cadres of staff and in terms of Section 16A of the Employment Act then in force and the CBA, the workers were paid all their terminal dues. Mr. Mogeni submitted that it is at this stage that the that the judge presiding over the matter thought it was necessary, in spite of the provisions of Section 16A having been complied with, instead applied Article 13 of the ILO Termination of Employment Convention 1982. He submitted that the Petitioner felt that it was unfair that in spite of the CBA duly

entered into and the applicable law to enforce the provisions of the treaty which was not in force at the time. He stated that it was alleged that the Union ought to have participated in determining the extent of the redundancy or notified of the extent of the redundancy. He submitted that various items stand out. He stated that unlike a situation where the CBA agreement had not been renewed or agreed upon, the relationship between the Petitioner and the 2nd Respondent was in place and an existing CBA and its terms were set out. The demand for renegotiation could therefore not apply in this case. He submitted that the CBA was duly registered in Court to settle the terms for the period in question to avoid acrimony and uncertainty and gazetted to give it the force of the law. He submitted that the letter of retrenchment dated 30th June 2006 provided the terms of the retrenchment and gave the employees notice pay, payment of leave in cash, severance pay at 24 days instead of the 15 days under Section 16A. The Petitioner submitted that the 2nd Respondent's members were members of a retirement benefit scheme and they were advised of the provisions of the scheme. It was submitted that the importation of the provisions of ILO convention on employment was illegal and unconstitutional and the incorporation of the convention failed to occasion the Petitioner equal treatment before the law. Counsel for the Petitioner submitted that industrial relations should not be looked at to discriminate between the employer and employee and that Section 80(1) of the Constitution of Kenya then in force granted the employees and employer the right to associate and bargain. It had not been shown what qualifications the Court used to restrict those rights and that the Petitioner's right to have those rights respected and enforced. He submitted that the Court was openly biased and there was lack of due process. He stated that the judge failed to adjudicate matters under applicable provisions and instead reliance was placed on an Act not in force at the material time. He submitted that the Industrial Court could not arrogate itself jurisdiction it did not have and punished the Petitioner by imposing damages at 12 months. The Petitioner relied on the case of **Nation Media Group v AG (2001) EA 261** where the Court gave orders of judicial review in a constitutional issue and the case of **Karua v Radio Africa Ltd (2006) 2 EA 117** where the holding was that fundamental rights are subject to the interest of others. He submitted that the award of the Industrial Court took into account Article 13 of ILO Convention on Termination of Employment 1982. He stated that the thrust of the Convention was that the employer is to give in good time the number and reasons for the termination as well as the requirement to give advance notification. He submitted that when imported to Section 16A the Convention imports fresh conditions which were not contemplated either by CBA, Section 16A or procedure. He stated that the constitutional protection under Section 80(1) was that the parties right to negotiate must result in the parties right to enjoy the rights thereof. He urged that once the CBA was registered the duty of the Court was to give it effect. He submitted that in finding the reasons for redundancy valid and justified the Court should not have made reference to Article 13 of ILO Convention instead of Section 16A. He submitted that there cannot be a wrong without a remedy and that the Court mistreated the Petitioner in contravention of Section 82(2) of the Constitution and thus urged the Court to allow the Petition as prayed.

3. Mr. Wandabwa for the 2nd Respondent opposed the application which he stated was unmerited and fit for dismissal. He submitted that under Section 16A the Employment Act then in force provided that the employer shall notify the employee and labour office and union of the extent of the intended redundancy. He stated that the key word is intended redundancy and that what his learned friend calls notice of intended redundancy cannot amount to notice as the redundancy was declared on the same date. He submitted that the Petitioner had attempted to justify the 'notice' by saying that the nature of the Petitioner's industry and the effect of the notice did not permit the Petitioner to give notice. Mr. Wandabwa submitted that that was not an excuse for statutory breach. He stated that contrary to what the Court was being asked to believe, the breach was not in respect of an international convention but a breach of Section 16A of the Act. He submitted that the 2nd Respondent's members were forcefully evicted by force of Police and when the 2nd Respondent contacted the Petitioner, nothing was forthcoming and the union was forced to declare a dispute to the Minister for Labour and subsequently the Minister appointed a investigator to try and have the matter settled. He submitted that after the investigation the Minister recommended the reinstatement of the employees and the Petitioner refused to reinstate the employees and as a result the Respondent had to declare a dispute to the Minister and thereafter the Minister in conformity with the rules then in force, referred the matter to the Industrial Court. He submitted that the Petitioner had cited the provisions of Sections 70, 77(9), 80(1) & (2) of the then Constitution and that none of these sections are of relevance to matters raised. He stated that Section

80 and 82 are not relevant as they relate to administration. Mr. Wandabwa submitted that the tribunal squarely dealt with the issue of jurisdiction. He submitted that the award was not made in excess of jurisdiction as the tribunal had the jurisdiction to hear the matter as it arose out of redundancy and the breach of Section 16 of the then Employment Act. He stated that the Court was thus clothed with jurisdiction. He submitted that the other charge was that the Court wrongly relied on Conventions and in particular Article 13 of the ILO Convention – Termination of Employment 1982. He stated that what the Court relied upon was exactly what is reproduced in Section 16A of the Employment Act then in force and that is what is also what was captured in CBA. He submitted that the Court cited the conventions not as its source of decision but as evidence of what applies as a matter of custom in cases of redundancy not as a matter of law. He submitted that the Petitioner had submitted that the treaty had not been ratified and there was no evidence placed before the Court to support the contention that the Convention was not ratified by Parliament as was the mode then. He submitted that the contention the presiding judge determined the matter in absence of members was misplaced as the judge noted in the award that the members were involved in that decision before he signed. He submitted that the Petitioner has no remedy or appeal. He stated that firstly, the right of appeal is not a right under the then Constitution or this present Constitution as parliament gives the right in legislation. He submitted that in the Act at the time there was no right of appeal and the decision of the Court cannot be faulted because there was no appeal. He stated that arising from what as before the Court it was clear the Petitioner was aggrieved by the decision and was trying to appeal from that decision and that the Petitioner had no constitutional concerns emanating from the decision. He submitted that from the award, the Court found correctly that the redundancy could be embarked on and what the Court faulted was the process undertaken. The Petitioner did not give reasons as per the law and that was the basis for compensation for the unlawful termination. He submitted that may well have been good grounds for appeal but raises no constitutional issue at all. He stated that the decision did not impugn the Petitioner's rights under the then Constitution. Mr. Wandabwa submitted that on the assertion that there cannot be a wrong without a remedy, the sword cuts both ways. Having found the redundancy was wrong the Court had a duty to grant relief. He submitted that the Court considered all options and found reinstatement was not possible or tenable and proceeded to award the relief. He stated that the proceedings of the Court were not biased. He submitted that even if the judge was wrong, and he was not saying the judge was wrong, it did not matter if the decision was right or wrong, it was final. He stated that did not bring any constitutional issues. No law was cited which the Court purportedly applied retrospectively. He submitted that having found a breach and there being no other remedy, an award of damages was appropriate and that was the right thing to do in the circumstances.

4. Mr. Mogeni for the Petitioner in brief reply submitted that the payment of cash in lieu of notice cured the need for notice. he submitted that the Court relied on Article 13 of the ILO Convention on Termination of Employment. He stated that insofar as the provisions were not in the statute they could not be applied in resolution of the trade dispute. He submitted that if there was no due process the challenge by the Petitioner is proper as there was want or excess of jurisdiction. He stated that the Trade Disputes Act provided that the judge sat with two members and if there was disagreement the judge was to act as umpire and the process would be recorded. He submitted that it could not be said that consultations were taken and all members were to sign the award and it was manifestly clear there was no concurrence in the decision. He submitted that decisions are made by persons who append their signatures and that there was no signed copy. He thus urged the Court to allow the Petition.

5. The Petition is one against the former Industrial Court as 1st Respondent and the union as the 2nd Respondent. The award that is impugned is reproduced in the Petition. Section 16A of the repealed Employment Act provided as follows:-

> **16A.** (1) A contract of service shall not be terminated on account of redundancy unless the following conditions have been complied with -
>
> (a) the union of which the employee is a member and the Labour Officer in charge of the area where the employee is employed shall be notified of the reasons for, and the extent of, the intended redundancy;

(b) the employer shall have 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;

(c) no employee shall be placed at a disadvantage for being or not being a member of the trade union;

(d) any leave due to any employee who is declared redundant shall be paid off in cash;

(e) an employee declared redundant shall be entitled to one month's notice or one month's wages in lieu of notice;

(f) an employee declared redundant shall be entitled to severance pay at the rate of not less than 15 days pay for each completed year of service as severance pay.

(2) For purposes of this section -

"trade union" means a trade union registered under the Trade Union Act (Cap 233) and

"redundancy" has the meaning assigned to it in section 2 of the Trade Disputes Act (Cap 234).

6. The learned predecessor of this Court Kosgey J. in an award made in January 2009 held as follows in the material part:-

Once laws are promulgated and Collective Bargaining Agreements concluded and registered, they must be honoured. It is one of the duties of this court to enforce the law and to enforce the Collective Bargaining Agreements concluded by parties and registered by the court. It would therefore amount to dereliction of duty on our part to ignore the respondent's violation of the law governing redundancy and the said Collective Bargaining Agreement provisions on redundancy. The necessity to consult the union and give notice of the impending redundancy is premised on Article 13 of the ILO Termination of Employment Convention, 1982 which provides as follows:-

"When the employer contemplates termination for reasons of an economic, technological, structural or similar nature, the employer shall (a) provide the workers representatives concerned in good time with relevant information including the reason for the terminations contemplated, the number and categories of workers likely to be affected and the period over which 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 minimize the terminations and the measures to mitigate the adverse effects of any terminations on the workers concerned such as finding alternative employment."

In **Cause 143 of 2007 Kenya Union of Commercial Food and Allied Workers V. BAT(K) Ltd.** this court stated as follows regarding the need to observe the terms of section 16A and to carry out consultations prior to undertaking a redundancy exercise. *"The main thrust of section 16A of the Employment Act is that termination of employment on grounds of redundancy **SHALL NOT** be effected unless the conditions set out therein are complied with. The conditions are therefore mandatory and not discretionary. Therefore even if the Respondent's position is accepted that the matter is a redundancy issue, it is incumbent upon the Respondent to prove that it met all the said conditions. The Respondent has failed to convince this court that it complied with the law. It did not notify the relevant labour officer of the impending redundancies and the reasons for the same. It did not notify and consult the union regarding the reasons and the extent of the contemplated redundancy. It merely issued the letters of redundancy quoted above. This was grossly inadequate and a blatant violation of the law. Laws are made to be obeyed in the interest of social peace and stability. A society that is not law abiding is bound to be characterized by chaos through uncoordinated dispute settlement procedures. Corporate citizens such as the Respondent are also bound by the law and there is no excuse for the Respondent to disregard the law. We are astonished that the Respondent who has at it's disposal a formidable team of internal and external*

human resource and legal consultants knowingly decided to turn a blind eye to the law. This court will not condone this adventure into illegal waters as this court is obliged to enforce the law and also uphold the sanctity of Collective Bargaining Agreements negotiated and concluded by employers and their employees' trade unions. This court cannot condone impunity at all. Consequently it would amount to dereliction of duty on our part to ignore the Respondent's violation of the provisions of Section 16(A) of the Employment Act and Clause 31 of the parties Collective Bargaining Agreement.

The requirements of the law of redundancy for prior notice and consultation is rooted on the fact that termination is a very serious matter which must not be handled casually because of the serious consequences to the affected employees. Termination of employment signifies economic strangulation for the affected employees. It means loss of a job and consequent insecurity, loss of daily benefits such as wages and other advantages accruing from one's office, loss of dignity and personality, a certain perception of incompetence and sometimes low sense of personal esteem. The termination affects the employee's standard of living and that of his family and other dependants particularly when redundancy takes place during an economic recession which makes it difficult to secure alternative employment. The targeted employee and his union must be consulted so that the employee may prepare to adapt to the upcoming change in his environment. To merely issue letters of termination without consultation is not only illegal but callous and insensitive to the dictates of positive industrial relations. We have no hesitation in branding it an unfair labour practice.

We, however, recognize that redundancy is a fact of life which cannot be wished away. This is why it is contemplated by the law and all Collective Bargaining Agreements. There comes a time when an enterprise is compelled by adverse economic conditions to resort to redundancy, usually after all other cost-saving measures have proved insufficient to meet the prevailing realities. The conditions that can precipitate redundancies are legion. They include, high cost of money (where one is using borrowed capital), change in state monetary policies, high cost of production, poor infrastructure, poor purchasing power, economic and political instability, loss of markets for finished products, lack of materials, poor profit margins and change in production technologies etc. It is a cardinal rule of business that no enterprise can operate while in a loss-making environment. An insolvent business that cannot meet its objectives ceases to justify its existence and is usually wound up.

But in practice nothing prevents even apparently successful enterprises from embarking on staff rationalization or reduction in total number of employees. For example, technological changes or innovation geared towards productivity improvement may render the continued employment of certain cadres of employees untenable. Indeed business must not only live for today but must plan to survive tomorrow through regular self audit and organizational restructuring. Indeed the Respondent herein avers that the grievants' termination was necessitated by changes in its manufacturing operations. We therefore affirm the Respondent's right to embark on redundancy when circumstances warrant the same. But in doing so it must comply with the law and the Collective Bargaining Agreement with the union.

The legal obligation on the parties to consult on the matter is designed to enable the parties to explore ways and means of minimizing the social and economic impact of the loss of jobs. The obligation is primarily imposed on the employer. The union's duty is to make reasonable counter-proposals to the employer's proposals with a view to giving the affected employees a "soft landing ground". In our view such consultation must be meaningful and held within the true spirit of collective bargaining. The employer ought to give the union an opportunity to influence its decision. There must be a genuine attempt to resolve the matter through objective consideration of all the proposals generated by the parties to mitigate the harsh impact of redundancy. Where the parties are unable to resolve the mater, it should be referred to conciliation urgently and conciliation proceedings ought to be undertaken in good faith by the parties. Under section 73 and 74 of the Labour Relations Act which came into force on 2nd June, 2007 (and therefore not applicable to this dispute), where conciliation fails, either party may refer the dispute to this court

under certificate of urgency."

We find the reasons for the redundancy as advanced by the respondent valid and justified. What we find unacceptable is the procedure adopted by the respondent in implementing the restructuring.

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Pursuant to our findings that the grievants suffered unlawful loss of employment, this court has jurisdiction to order their reinstatement back to their former jobs or grant them monetary compensation. We however do not find reinstatement as an appropriate remedy. We find that the grievants cannot be accommodated in the new job structures in the respondent's establishment. We therefore find that monetary compensation is the best remedy available to them. As we order monetary compensation we are alive to the fact that the respondent's refusal to negotiate the severance pay terms and other terms of redundancy may have denied the grievants the opportunity to obtain enhanced terminal dues. Maximum compensation would in our view serve the ends of justice in the matter.

Keeping in view of the foregoing discussions and analysis, we AWARD and ORDER:-

1. THAT the grievants suffered wrongful loss of employment.

2. THAT the respondent is hereby directed to pay each grievant twelve months salaries as compensation for the unlawful loss of employment.

3. THAT the said payments be effected within 60 days from the date of this award.

The two members of the court have been consulted and they concur with this decision. (underlining mine)

7. The judge of the tribunal then constituting the Industrial Court signed the decision on his own. The members who sat with him namely M. A. Warrakah and J. Kilonzo did not sign the decision. Section 8 of the Trade Disputes Act cap 234 (now repealed) provided that where the members of the Court are unable to agree as to their award or decision in any matter, the matter shall be decided by the Judge acting with the full powers of an umpire.

8. The decision made is impugned as not having been signed by the members and for the grant of 12 months compensation. Section 15 of the Trade Disputes Act (now repealed) provided that in any case where the Industrial Court determines that an employee has been wrongfully dismissed by his employer, the Court may order that employer to reinstate that employee in his former employment, and the Court may in addition to or instead of making an order for reinstatement, award compensation to the employee provided that such compensation shall not exceed - in a case where reinstatement is ordered, the actual pecuniary loss suffered by the employee as the result of the wrongful dismissal; in any other case, twelve months monetary wages. The careful reading of Section 15 of the repealed cap 234 demonstrates award of 12 months compensation could be awarded by the Industrial Court.

9. The decision made was made in the realm of the Trade Disputes Act cap 234. Though since repealed the law was clear. Under Section 17 it provided as follows:-

17. (1) The award or decision of the Industrial Court shall be final.

(2) The award, decision or proceedings of the Industrial Court shall not be questioned or reviewed, and shall not be restrained or removed by prohibition, injunction, certiorari or otherwise, either at the instance of the Government or otherwise.

10. The decision made was attacked for application of the ILO Convention on Termination of Employment 1982 Convention No. 158. This Convention remains unratified but that should never bar a

Court from looking at the provisions and applying international labour standards and the norms that are universal. The rights of employees at the workplace cannot be seen in isolation of the international arena as Kenya is a microcosm of the universe. Our laws are not construed in isolation of the principles of fairness encapsulated in the ILO Conventions some of which have been reproduced in statute. In my view, the judge of the Industrial Court Tribunal did not fall into error in applying the principles of the Convention though it remains on the list of to do things that the Ministry of Labour has yet to complete. The decision of Kosgey J. may have excluded a cardinal precept of the Industrial Court Tribunal as was composed then by failing to clearly specify the concurrence by the Members of the Tribunal by having them append their signature. This Court cannot interfere with the decision even if the Court was of the view that it was erroneous. The Award could be reviewed but not in terms of the execution of the final judgment made by the Tribunal. The decision did not infringe on the constitutional rights of the Petitioner under Sections 70, 77(9), 80(1) and 80(2) of the repealed Constitution. The Constitution cannot be said to be breached if an award of damages is granted. Damages were awardable by the Industrial Court up to a maximum of twelve months. The upshot of the foregoing is that the Petition is unmerited and is dismissed but each party to bear their own costs.

Orders accordingly.

Dated and delivered at Nairobi this **27th** day of **October 2015**

Nzioki wa Makau

Judge