REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 2286 OF 2012

DAVID MUTEVU.....1ST CLAIMANT

WILLIAM O. ADEGA.....2ND CLAIMANT

SECILIA K. KARANGI.....3RD CLAIMANT

MICHAEL M. TITIAI.....4TH CLAIMANT

FLORENCE M. KALAYU.....5TH CLAIMANT

BENARD N. NDUATI.....6TH CLAIMANT

BONIFACE K. MBEVO.....7TH CLAIMANT

CHRISTOPHER MAWEU.....8TH CLAIMANT

HENRY K.KIONGO.....9TH CLAIMANT

PETER N. MARETE.....10TH CLAIMANT

EPHAPHRUS N. NJUE.....11TH CLAIMANT

SIMON M. MWEMA.....12TH CLAIMANT

CHARLES H. ASIEBELA.....13TH CLAIMANT

EDWIN K. ROTICH.....14TH CLAIMANT

DAVID O. OKETCH.....15TH CLAIMANT

MOSES L. KASARANI.....16TH CLAIMANT

PETER K. MWITHIGA.....17TH CLAIMANT

RICHARD M. MUTINDA.....18TH CLAIMANT

KENNEDY K. LAGAT.....19TH CLAIMANT

KYONDO MBATHI.....20TH CLAIMANT

JULIUS M. MAILU.....21ST CLAIMANT

REUBEN KAINDI.....22ND CLIAMANT

FORENCE N. MWOLOLO.....23RD CLAIMANT

DAVID I. MANJAU.....24TH CLAIMANT

JOSHUA M. MALOVYA.....25TH CLAIMANT

AUGUSTUS K. MUTUMA.....26TH CLAIMANT

DANIEL M. MWANZI.....27TH CLAIMANT

PETER K. MWINZAI.....28TH CLAIMANT

LEONARD M. BOKE.....29TH CLAIMANT

CHRISTOPHER MBISI.....30TH CLAIMANT

WYCLILFFE A. SHIOMBE.....31ST CLAIMANT

DAVIS W. KANYANYA.....31ND CLAIMANT

PETER M. MUYAI.....33RD CLAIMANT

WAMBUA KIMULI.....34TH CLAIMANT

FREDRICK ALUBISIA.....35TH CLAIMANT

KIPTARUS KIBET.....36TH CLAIMANT

PETER M. WAHINYA.....37TH CLAIMANT

HABEL K. MWANGI.....38TH CLAIMANT

JOSEPH MWANDIKWA.....39TH CLAIMANT

HILLARY KOMBO.....40TH CLAIMANT

ROSEMARY W. GICHUHI.....41ST CLAIMANT

DANIEL K. SADERA.....42ND CLAIMANT

SIMON W. GITUKU.....43RD CLAIMANT

AGNES W. MBARU.....44TH CLAIMANT

ABEL O. OGURI.....45TH CLAIMANT

VIORENZA MWITIABI.....46TH CLAIMANT

LOID M. NABEA.....47TH CLAIMANT

ZEPHANIA KOBAAI.....48TH CLAIMANT

STANLEY MWONGERA.....49TH CLAIMANT

LUCY KARIMI JOHN.....50TH CLAIMANT

BENARD WAHINYA.....51ST CLAIMANT

JAMES M. KIMUHU.....52ND CLAIMANT

MALAVI JOEL.....53RD CLAIMANT

OSBORN BEKU.....54TH CLAIMANT

RUTH NTIRIO.....55TH CLAIMANT

JULIUS KINAMA.....56TH CLAIMANT

DENNIS M. KIRIMI.....57TH CLAIMANT

DOUGLAS K. MUGIRA.....58TH CLAIMANT

KISELU MWANDIKWA.....59TH CLAIMANT

LUCY NDAMERI.....60TH CLALIMANT

DAVID G. MUGUNA.....61ST CLAIMANT

EVANSON K. KOMU.....62TH CLAIMANT

REUBENSON K. MAINA.....63RD CLAIMANT

SAMUEL M. KINOTI.....64TH CLAIMANT

ELIZABETH M. MASIKA.....65TH CLAIMANT

ALEX JAOKO.....66TH CLAIMANT

EMMANUEL MATE.....67TH CLAIMANT

STEPHEN MUTHOMI.....68TH CLAIMANT

JAMES MUGO.....69TH CLAIMANT

JOEL OLANGO.....70TH CLAIMANT

STEPHEN MUTUKU.....71ST CLAIMANT

SIMON NDIKU.....72ND CLAIMANT

MOSES KIMATHI….....73RD CLAIMANT

GLADYS WAMBUI.....74TH CLAIMANT

SAMUEL MUIRURI.....75TH CLAIMANT

FRANCIS GATHENDU.....76TH CLAIMANT

FAITH MUTHONI.....77TH CLAIMANT

HELLEN WANYONYI.....78TH CLAIMANT

KENETH AKUMO.....79TH CLAIMANT

ERIC MATAI.....80TH CLAIMANT

ABRAHAM MWENDA.....81ST CLAILMANT

JANE IMBAGA.....82ND CLAIMANT

NICHOLAS KINOTI.....83RD CLAIMANT

NANCY GITHINJI.....84TH CLAIMANT

STANELY KITHINJI…….....85TH CLAIMANT

BENSON KARIUKI.....86TH CLAIMANT

……87 CLAIMANT

HENRY ANYUKI.....88TH CLAIMANT

PRISCA MAINA.....89TH CLIAMANT

FREDRICK LUKASE.....90TH CLAIMANT

EUNICE NKIROTE.....91st CLAIMANT

LILIAN OGUTU.....92ND CLAIMANT

CHERUIYOT TONUI.....93rd CLAIMANT

HENRY AMAKOVE.....94TH CLAIMANT

JAPHET KIOME.....95TH CLAIMANT

REUBEN MIGAN.....96TH CLAIMANT

JOSEPH MIA.....97TH CLAIMANT

FRANCIS WAMBUGU.....98TH CLAIMANT

WILSON KIAMBI.....99TH CLAIMANT

BEATRICE NJERI.....100th CLAIMANT

GRACE LUMUMBA.....101st CLAIMANT

MARTIN MUTISYA.....102nd CLAIMANT

HARRIET NYAMU.....103rd CLAIMANT

ANDREW GACHAGUA.....104th CLAIMANT

VERSUS

AFRICA NAZARENE UNIVERSITY …… RESPONDENT

JUDGEMENT

Nyabena Nyakundi & Co. Advocates for the Claimants

Kaplan & Stratton Advocates for the Respondent

1. On 13th November 2012 the 104 claimants filed their claims against the respondent Africa Nazarene University. All the claims are for unfair redundancy and failure to pay compensation to the claimants by the respondent. On 4th February 2013, the respondent filed their defence a denied all the claim noting that upon their reorganisation all the claimants were paid their dues and nothing is outstanding as unpaid. Before the hearing commenced parties took directions and agreed to have one (1) claimant to give evidence for and on behalf of all the other 103 claimants, the 1st Claimant David Mutiso Mutevu. The claimant's advocate sought to make amendments with regard to claimant No. 96 stated as David Migan, there were objections and the court directed the advocate to make a formal amendment which was not done until the close of the case, the amendment had not been granted. There is therefore no claimant 96. The respondent called 3 witnesses, Raphael Wanjohi and John Otieno Opiyo the respondent director of finance. At the close of hearing, both parties agreed to file their written submissions dated 4th December 2013 and 30 January 2014 for the claimants and respondent respectively.

2. The respondent offered to have the court and the parties herein watch a video of a meeting held on 22nd August 2011 at the respondent premises. This will be addressed within the findings of the court.

Claimant's case

3. The case for the claimants is that they were all the employees of the respondent having been employed on various dates and working in different departments of the respondent. On 29th August 2011 the claimants were declared redundant by the respondent. they were issued with similar letters save for the 1st claimant who was issued with a different letter stating that he was to be retained in the service but was later declared redundant with effect from 3rd November 2011 without a hearing. The claimants were paid their terminal dues of;

a. Salary up to and including September 2011
b. One month's salary in lieu of notice
c. 15 days basic pay for each completed year of service
d. Any leave days earned but not taken
e. Any off days and overtime earned but not taken
f. Any off days and overtime earned but not taken

4. The termination letters issued to the claimants alluded to a meeting held on 22nd August 2011 between the claimants and the respondent and noting that the respondent was strategically going to restructure the operational management in order to maintain the quality of their services in line with its mission and vision and consequently the services the claimants were offering had been identified for outsourcing and therefore their services would not be required as from 3rd September 2011. The redundancy notice was not served upon the claimants and that there was no genuine redundancy situation in the respondent business as there were new employees employed to take over the positions previously held by the claimants and this was therefore a manifestation of an unfair labour practice. The claimants lodged a complaint with the Labour officer and upon hearing the parties through correspondence and by meeting held on 27th April 2012, wrote a letter dated 17th May 2012 to the respondent noting that they had unfairly terminated the claimants and the procedure for redundancy was not followed as some employees were left in some departments and new employees were employed in place and instead of the claimants. The Labour Officer thus recommended that the claimants be compensated with 12 months' pay.

5. The claimants further stated that the respondent ignored the recommendations of the Labour officer and insisted that there was no unfair termination and the law was followed in declaring the claimant's positions redundant. The claim herein is for the payment of 12 months' salary due to the claimants for unfair termination as recommended by the Labour officer, the same be unpaid with costs and interest and claimants be issued with their Certificates of Service.

6. In evidence the 1st claimant for and on behalf of the other claimants stated that he was employed by the respondent in 2001 as a supervisor where he would welcome all the guests coming to the respondent business. He personally knows all the claimants who are formed employees of the respondent. On 29th August 2011 the claimants were terminated due to redundancy. The 1st group affected was from the transport department when the respondent wrote to them noting that due to restructuring. A week earlier on 22nd August 2011 the respondent called for a meeting between the vice chancellor and staff and there was a guest speaker who addressed organisational services. There was nothing about redundancy. Not all the claimants were at this meeting as some were on their annual leave, off duty or on their duty station and they were not aware of the ongoing at the meeting.

7. The witness was not issued with the same letter as the other claimant; his letter indicated that he would be retained and continues work. After a month there was another letter revoking the continuation where he was to leave employment on 3rd November 2011 as he had also been declared redundant. All benefits were paid and deposited to each claimant's account.

8. Most claimants had loans with their banks that was secured by the salary and their employment with the respondent and when the banks learnt of their terminations, they withheld all these payments to offset the balances due. By the then the pensions had not been paid which the claimant needed paid in cheques to avoid the banks retaining the same like their terminal dues. Pension was however deposited with ICEA. At RBA the claimant were also adviced on their pension funds.

9. The witness further stated that the respondent being a university they are still in operation and have opened branches all over the country and since the claimants had specific job the respondent should have absorbed them. Upon the termination of the claimants a new group was outsourced and took over their duties. The claimants were issued with their termination letters on 29th august 2011 and they were to leave immediately. There were no criteria set as to who and why each claimant was going to be terminated. The claimant thus went to the labour Officer who called for a meeting where the respondent was represented by the Personnel and Finance Director and the Labour Officer was not satisfied that the respondent had followed the legal procedures in declaring the claimants' positions redundant and thus directed the respondent to pay each claimant 12 months' pay in compensation. The respondent has however refused and or failed to pay. In the case of the claimant, he earned Kshs.33, 120.00 and this multiplied by 12 months is Kshs.397, 500.00 which he now demands from the respondent as well as for all the other claimants.

10. With regard to the defence filed by the respondent the witness stated that the claimant listed as David Migan was a typographical error as the claimant is noted as claimant No. 96 and seeks that this change be effected to read DAVID MIGAN as per the employment letter. On the defence that there are two claimants who were not declared redundant, claimant No. 11 Ephaphrus Njue and No. 50 Lucy karimi John the witness stated that the two did not get termination letters but when the case was filed in court they opted to join in the claim and that all the claimants should be paid 12 months salary as compensation all amounting to kshs.29, 919,263.00 together with costs and interest.

11. Upon cross-examination, the witness confirmed that the respondent held a meeting on 27th August 2011 where the issue of reorganisation was discussed with the claimants. There was a guest speaker Mr Ng'ang'a who talked about restructuring.

12. The witness also confirmed that the affected departments were transport, cleaning, estate, security and catering all as service departments of the respondent as a teaching institution. That security is not the main service of the respondent. When the claimants were terminated, those from the security departments

were adviced to submit their applications to KK Security Group where they were to be given a consideration. The respondent had 3 vehicles which were sold after their termination and the witness was able to buy one. Two drivers were left as there was a small Nissan that was bought and they were the drivers. Catering was outsourced and asked some former staff to join the outsourced company and 4 old employees were taken. However the respondent did not do much to negotiate with the new outsourced companies to have the claimant hired.

13. That the witness was in the Institutional services department and was retained to facilitate clearance and be able to counter-check the services were not disrupted. In 2010 the witness benefited from a tuition waiver of kshs.38, 000.00 and his wife used it but upon termination, he is unable to continue with her education. Other claimants were also beneficiaries of the fees waiver. Some have started private businesses and are trading with the resident but others are still out of work. That the respondent was not humane in the termination and when they held a meeting with the Labour officer, the respondent was directed to pay 12 months' salary which they have failed to do. That the claimant had loans with Equity bank and others with an irrevocable undertaking to respondent to make deductions that are payable to the claimants less what was owed to the banks.

14. The witness also confirmed that he was not aware as to why Lucy Karimi and Ephaphrus Njue were terminated and their termination letters were dated 14th October 2011 and 17th July 2011 respectively which do not relate to redundancy.

Respondent's case

15. The respondent's case is that they are a non-profit private university offering education in various fields and admit that they carried out a redundancy process in 4 phases where all affected employees were given one month notice. On 30th September 2011 those declared redundant were given their notices on 29th August 2011 and those declared redundant on 31st October 2011 were issued with notices on 29th September and those declared redundant on 3rd December 2011 were issued with notice on 3rd November 2011 and those affected from 31st January 2011 were issued notices on 20th December 2011. On 29th August 2011 before affecting the redundancy the labour Officer was notified of the respondent's intentions and the reasons thereof as by the law so required. All the statutory payment was made to the claimants together with one month's salary and release meaning the claimants were effectively paid for two months. Certificates of service were issued to all of the claimants together with recommendation letters which would enable them seek new employment.

16. The respondent further stated that before the redundancy commenced, the claimants were invited to various meetings for consultations to discuss the same. That each employee was personally informed of this meeting by way of emails, phone calls as well as memoranda. The meeting was held on 22nd August 2011 at the respondent premises. On 26th November 2011 the chancellor and the vice chancellor held a meeting with the affected employees who had sought audience with the respondent.

17. The respondent further stated that when selecting the employees to be declared redundant, there was consideration to seniority, skills, ability and reliability to perform duties. Those retained had a good rapport with students and were to act as a connecting link between the students and the outsourced staff. Thus the reasons for declaring the claimants redundant were fair and valid noting that in 2011 the respondent noted that they lacked sufficient funds to sustain their business of education which was core to the founding objectives. There was need to invest more in lecturers and university courses in order to attract more students and without this investment the respondent would have fallen into a financial crisis. In 2011, 22 lecturers and senior staff resigned from their employment as the respondent could not afford to pay them competitive salaries offered by their competitors. This adversely affected the operations of the respondent. The respondent was also unable to expand their programmes, purchase equipment to improve its teaching facilities and thus it affected the student enrolments which in turn reduced revenue collection from tuition fees as the primary income for the respondent. Further the respondent was reviewed by the Commission for Higher Education that was unhappy to find that the respondent had only 3 paid members with PhD degree as the policy required that every course that was taught at bachelor's

level should also be expanded to be taught at Masters and PhD level. It was therefore found necessary to restructure to address the core business to reduce overheads in services and give more attention to academic. The respondent therefore took the option of outsourcing the non-technical services like catering and cleaning to third parties and thus reduce this cost. The respondent would engage casual labourers in other areas when this was needed.

18. The respondent further stated that after the redundancy was carried out, they have been able to recruit and retain qualified lecturers and technical staff. 30 academic staffs have been employed with 8 PhD; there is a new curriculum for masters and PhD, new classrooms and student enrolment gone up from 1000 to 2500. There is thus positive development from the redundancy exercise. However the respondent does not require cleaning or catering services as previously provided by the claimants. That when the claimants reported the matter to the Labour Officer the respondent was represented where all issues were substantively addressed. On 9th August 2012 the respondent received further communication from the Labour officer but there was noting that there was nothing outstanding as there was no case for unfair termination of the claimants.

19. With regard to Ephaphrus njue and Lucy karimi the 11th and 50th claimants, these two claimants have been wrongly enjoined in the suit as they were terminated for gross misconduct and had nothing to do with the redundancy process and their claims should be dismissed. That the 96th claimant Reuben Migan has never been an employee of the respondent and this claim should be dismissed. That these are no cause herein and the claim should be dismissed with costs to the respondent.

20. In support of their case the respondent opened their evidence with a view by the court of a DVD of a meeting that was held by the respondent with the claimants noting the history of the respondent and the new strategic plans the respondent wished to take to improve services hence the need to undertake a reorganisation to meet development needs. Part of the DVD was a talk by Mr John Ng'ang'a a consultant who talked about what reorganisation is all about and the need for all organisations to undertake this process every 4 years as a good business model and to help train employees to renew their abilities, improve profits, increase efficiency and have employees enjoy their work. He stressed the need for change but that change does affect human resource noting that reorganisations improve efficiency and embrace technology hence job cuts. This is done through employee's performance appraisals for business re-engineering. In the event of layoff clear systems are to be established with a pre-set criteria applied to all affected departments.

21. The respondent also called two witnesses in support of their case. Mr Raphael Wanjohi gave his testimony that he has worked with the respondent for over 12 years and since its establishment the focus was teaching and research and an institution of higher learning. There was only one campus at Ongata Rongai with 63 students but there was rapid expansion and the physical structures were also expanding that require more staff to be employed thus most of the claimants were hired to address this demand. By 1998 most structures had been constructed and by 2005 the student population had gone up to 1050. Some students were accommodated internally but a few were residing outside and the respondent was running a shuttle from the town centre to Rongai centre and then to the campus as there was no public transport to allow them access to the respondent premises with ease. In 2009, some public transport vehicle started venturing into the route as the road had by then been tarmacked and public transport improved from Ongata Rongai through matatus and boda boda. The students who were relying on the respondent transport dropped and the 3 buses undertaking this service started running at a loss. 2 buses were therefore sold to reduce this cost and the other one left for use by students on academic trips.

22. That when the university was growing, thee was need for all the claimants but with construction complete and a tarmacked road with public transport the claimants offering these services were operating with less work and the respondent could not support them anymore. The Respondent Council therefore made a review of the strategic plan and decided to reorganise the respondent business to focus on the core business so as to attract more student and it was decided that the departments that did not directly support the core business was to be declared redundant. These departments were;

a. Institutional services

b. Security
c. Transport
d. Estate

23. In this regard the instructional services department had other department for catering, housekeeping and grounds maintenance where majority of the claimant were placed. This departments were outsourced. The respondent also realised that their business was very sensitive and dealing with the student population required careful planning and thus decided to retain some old staff based on a criteria of seniority and the formula of last-in-first-out. An email was sent to the staff, some were called through the head of department who were asked to mobilise the staff under their supervision and the meeting held as viewed from the DVD was held.

24. After the meeting of 22nd August 2011 the redundancy was undertaken in 4 phases. Some left on 3rd December 2011, 31st January 2012, September and august 2011. All the claimants were paid their dues together with 1 months' notice and allowed to go home upon payment of salaries for the same period not worked.

25. Once the redundancy process was completed, the respondent noted tremendous change. 30 technical staff have been employed, 8 PhD holders, put up new facilities and classes, expansion to a town campus and satellite campuses in machakos, meru, Eldoret and Kisii. These satellite campuses have recruited casuals from the local community.

26. The second witness for the respondent was John Otieno Opiyo who stated that coming from the finance department of the respondent he is familiar with the case. That the respondent business is support from collecting of tuition fees from student and in 2005 to 2008 the student population went down to 17% and thus a reduction in income affected the delivery of services and this the redundancy was considered by the respondent council. This affected 4 department of transport, catering, institutional service and security. There was a new strategic plan, it was analysed and the problem was noted to be the lack of qualified staff to address the core business of the respondent. To improve, the strategic plan was supported by a budget projection for 2011/2012 AT 540 and 600 million. There was to be focus on the core areas and this was bound to affect employees in departments that were found not core. By 2013 when the witness gave his evidence the respondent business had made tremendous changes. The respondent outsourced catering and thus no income or expense and had the reorganisation not taken place, the respondent would have been in a bad financial crisis.

Submissions

27. The claimant submitted that redundancies are regulated under section 40 of the Employment Act which sets out the conditions precedent before an employee is laid off due to redundancy. In this case the claimants were never issued with notice for redundancy and the letters dated 29th August 2011 are not what are envisaged under section 40. There are two notices contemplated, one to communicate the intention of the employer to declare the redundancy and the second issued to the affected employee. In this case the respondent did not follow the law and thus the redundancy was unfair as the claimants were not prepared for the termination that followed the redundancy. The terminal dues were posted to the claimant's accounts with loans and the banks were instructed to withhold the same which left the claimants with no means to survive on which traumatised them and their families who were dependent on them. To support these submissions, the claimant relied on *David Opondo versus De La Rue (Kenya) Limited, Cause No.390 of 2010* where the could held the redundancy was unfair and paid the claimants 10 months' salary in compensation. The court also found redundancy to be unfair in the case of *Solomon M. Kinzi versus Kukoposha Limited, Cause No.699 (N) of 2009.*

28. The respondent on the other hand submitted that there was a fundamental lapse in the claimants' case in that of the 104 claimants only the 1st claimant gave evidence and no application was made to apply Rule 9 of the industrial Court Rules to have the issue of liability established and have a test case and that this court has no jurisdiction to infer what the claimants' evidence would have been or to make any determination on the issues pleaded without any evidence placed before it. Rule cannot be applied

suo moto and the result of this is that there was no evidence in support of the claims apart from the 1st claimant. If the court were to consider the other cases, this will be unjust as the respondent will be denied its right to cross-examine each of the other claimants should the court accept the 1st claimants as covering that of the other claimants. In *Agnes Wamae & 104 others versus Barclays Bank of Kenya [2013] eKLR* parties entered into consent on the issue of liability. That in this case, all the other claims should be dismissed with costs.

29. The respondent has further submitted that the without prejudice to the above, the main contention by the claimants is that the correct procedure was not followed with regard to the redundancy and hence unfair to them. The reasons for the process were not challenged and were paid their dues. That in *Elizabeth Washeke versus Airtel networks (K) Ltd & Another [2013] eKLR* this court held that an employer has the alternative to declare employee redundant, pay the dues and release them to be contracted by a new employer. That this was a similar process that was approved by the respondent in this case.

30. That the contention that there was no criteria followed in declaring the claimants redundancy was not proper, there was no notice and that they are entitled to a compensation which the respondent deny as they had a criteria, a notice was issued and there was pay and that the claimants are not entitled to a compensation in this case. That due the reorganisation of the respondent the redundancy was necessary and thus some departments were removed in whole and also the principle of last-in-first-out was applied that the 1st claimant had discussed this selection criteria with the respondent. This is supported by the case of *Aviation and Allied Workers union versus Kenya Airways Ltd & 3 Others [2012] eKLR* where the court held that the last-in-fast-out remains an objective selection criterion and considered a golden rule. In this case whole departments were affected.

31. the Respondent further submitted that on the issue of notice issued to the claimants section 40(1) was fully complied with and since the claimants were not unionised there was a written notice issued to the claimants one month prior to the redundancy that was done in 4 phases. There was also a meeting between the claimants and the respondent management where they underwent counselling in preparation to the redundancy process and the claimants were able to ask questions. The notice was not short as claimed it served the purpose of informing the claimants that they would be affected by the redundancy process. When the matter went to the Labour Officer, there was no complaint that was not addressed and the direction to pay compensation to the claimant did not arise and should be dismissed. The claimants have already received all their terminal dues with an extra one month salary and on this basis the entire claim has no basis in law.

In analysing the issues herein there are several questions that I find useful to address;

Whether the redundancy herein complied with the provisions of the law

Whether there are any remedies

32. Both parties admit that terminal dues owed to the claimants were paid in full save for the claim that the redundancy process that resulted in the termination of the claimant was unfair and that there should be a compensation with an award of 12 months' salary together with interest and costs of the case. The matter went before the labour officer who established that all the terminal dues were paid but the claimant now state that the officer also found they were unfairly termination and should be compensated but the respondent has denied this claim.

33. Before delving into the questions outlined above, the respondent in their submissions has raised the question of whether the 2nd to 104th claimants have any case since they did not give evidence in support of their claims and that Rule 9 of the industrial Court Rules was not applied to have the issue of liability addressed to enable the 1st claimant argue the rest of the claims.

Rule 9(1) states that;

1. *In a suit where more than on employee is instituting a claim against ton employer in respect of breach of contract, the judge may permit one employee and one statement of claim to be filed by a labour officer or by one of the claimants in the suit on behalf of all other claimants*
2. *The claim filed under paragraph (1) shall be proved by the labour officer or by the claimant authorised by the court*
3. *The statement of claim shall be accompanied by a schedule of the names of other claimants in the suit, their address and descriptions and the details of wages due to or the particulars of any other breaches and reliefs sought by each claimant*

34. Further to the provisions as under Rule 9 there is Rule 23 on how proceeding before the Court is to be conducted;

1. *The court shall at the beginning of the hearing, explain the order of the proceedings which the court proposes to adopt.*

35. Therefore in this case in pursuance to the Rules governing proceeding s before this court on the 8th May 2013 when the parties first appeared for the hearing, the respondent's advocate applied to file more documents and the claimant's advocate in response applied that there were 104 claimants all whose cases were similar as all related to redundancy and that the 1st claimant was to given evidence in the case and the court gave directions as follows:

1. *The hearing to proceed with the call of the 1st claimant as the sole witness;*
2. *Respondent granted leave to produce more documents in 7 days and to make appropriate arrangements to have the DVD PowerPoint presentations;*
3. *The Industrial Court registrar to facilitate the Court in having/seating at an appropriate court for this purpose;*
4. *The respondent will call 3 witnesses;*
5. *Hearing to proceed on 20/6/13.*

36. There were no objections as to the above directions made by the court noting the large numbers of claimants involved and for expeditious disposal of the claims. In pursuance to section 3 of the Industrial Court Act there were reasonable directions in the circumstances of this case. Where the respondent had any objections this should have been raised at this point before the claimant called their first witness for an on behalf of the other claimants. However, I note the respondent specifically has raised issues with regard to the 11th, 50th and 96th claimants on the one part that the 11th and the 50th claimants were terminated for other reasons other than redundancy, there was no specific evidence in this regard that was submitted by the 1st claimant in his evidence and upon his cross-examination by the respondent he confirmed that indeed he was not sure why these two claimants were part of the claimants and that he only saw them in court. This is telling, there were specific objections in this regard by the respondent. I find no evidence at all to support these two claims and shall dismiss them with regard to the 11th and the 50th claimants.

37. On the other part, there was the 96th claimant. The respondent objected to the claim of the 96th claimant specifically and in cross-examination of the 1st claimant it emerged that indeed there was an error in this regard where the Court directed the claimant's advocate to amend their claim to enable the respondent give their response in that regard. Up to and until the close of the case, this amendment was not done. The claimant's advocate did not take the due and address these errors with regard to the 96th claimant. There was admission of an error yet no steps were taken to address it. This will be dismissed.

38. With regard to the other issues raised on the process of hearing and how the hearings were conducted, there were reasonable steps in the conduct of the case that should not affect the substance of the claims before court. The case will be decided on the merits noting the provisions of section 3 of the Industrial Court Act, Industrial Court Procedure Rules 9 and 23 as read together.

39. On the whether the redundancy process was in compliance with the law; it is important to restate

herein the definition of 'redundancy' which is outlined under section 2 of the Employment Act thus;

> *"redundancy" means the loss of employment, occupation, job or career by involuntary means through no fault of an employee, involving termination of employment at the initiative of the employer, where the services of an employee are superfluous and the practices commonly known as abolition of office, job or occupation and loss of employment;*

40. Redundancy occur as a consequence of the organizational re-design process, where the current organizational structure is no longer functional in accordance with the organisation's operational requirements, the intention being to keep a business afloat and reengineer it for better performance which may require an employer to create a number of new positions and to realign a number of existing positions, while at the same time, identifying positions which have become redundant. This make perfect business sense as employers are not simply in the business of employment, the core purpose is to make a profit that go into salaries, overheads and savings for other investments. However, such processes affect human beings such as the employees thus the separation by the law of what should be specially addressed when such an eventuality befalls an employer as under section 40 as against other termination processes that require attention to section 41, 43 and 45 of the Employment Act.

41. I agree with the submissions of the respondent that employers have the prerogative to determine the structures of their businesses and therefore make positions redundant if they have no place in the new scheme of things as it is these positions that no long exist. However there are employees who still exist and cannot be wished away. Even with this prerogative, there is a duty vested upon the employer to undertake the redundancy process lawfully. The applicable processes are outlined under section 40 of the Employment Act.

42. As submitted by the respondent in the case of *Jane Khalechi versus Oxford university Press E. A. ltd [2012[eKLR* where the court did set out that the provisions outlined under section 40 of the Employment Act are mandatory and not left to the choice of an employer. Redundancies affect workers livelihoods and where this must be done by an employer, the same must put into consideration the following:

1. Give notice to the Union or labour officer a month before the process commences
2. For those not unionised, personal letters copied to the labour Officer;
3. Use a criteria of seniority, abilities and reliability of each employee;
4. Where there is a CBA the same should not disadvantage any employee;
5. Leave days due should be paid in cash;
6. One month notice or one month pay in lieu of notice; and
7. Severance pay not less than 15 days for each year of service.

43. As submitted by the claimants the notices under section 40 is different from the notice as under section 41, the notices envisaged under a redundancy process is that once an employer has reviewed their business situation and realised that there is need to restructure and or reorganise for more productivity, there must be notification to the employees, whether they will be affected or not. This process does not just suddenly happen where an employer open their doors in the morning and realise they have to reorganise for better productivity or be more strategic in running their business at the close of day. In this case the respondent was aware from 2005 to 2008 that there were serious concerns as to their core business where even the Commission for higher Education gave their comment and this prompted action on their part. The respondent went into the formulation of a new strategic plan which was analysed in view of the costs to be involved and therefore cannot be said to have suddenly realised that they were going to lay off some employees. All the signs for the need to reorganise were there but the notice was not issued until one month prior to termination.

44. The law goes further and notes that where the employees are not unionised such as the claimants, they should be given their notice letters personally. Employment is very personal and the loss of it can be traumatic if not handled well. Since a redundancy is not due to the fault of any of the parties to the

employment relationship, parties are encouraged to engage in consultations and thus the need to involve the Labour Officer not as a point of sharing information but as s source or reference to guide on the entire process. This is a public officer, well acquainted with the necessary provisions in labour relations and employers should gladly utilise the Labour Officers expertise to avoid missing out on the practical details that go with the redundancy process.

45. In a redundancy, there is a second notice required. Before the particular employee identified as having been affected by the first notice is terminated, there should be a notice. Where it is not possible to give such notice, then there is provision for pay in lieu of such notice. In this case, the respondent gave a notice on 29th August 2011 to the first phase terminations. This should have been the notice envisaged as under section 40(1) (f) as against the notice under section 40(1) (b) being the first notice. These two section 40(1)(b) and 40(1)(f) have a fundamental difference where the first is to alert all employees there is a reorganisation or restructuring about to commence which process may result in *abolition of office, job or occupation and loss of employment* as this is a redundancy process. With this knowledge in mind, the employees are able to support the process positively as they have no fault while the employer has to address the economic or systems change or collapse. The affected employees still possess their skills but due to the employer reorganisation, their positions may be declared redundant and thus lose their employment. The long stretch of this process allow preparations by the employer to offer counselling, negotiations with possible new employer especially where a whole department is removed and in a case of outsourcing like in case cited by the respondent of *Elizabeth Washeke & others,* the employer may invite potential employers to give the affected new opportunities by possible employment. Once the employer is able to specifically determine the particular employees affected, then a personal termination notice of not less than one month must issue. This is the essence of these two sections of the Employment Act.

46. In this case, the respondent invited a guest speaker to talk to the employees on reorganisation even before giving the prerequisite notice. Indeed this speaker as noted from the DVD view by the Court went to the core of the impact of a reorganisation. It is a stressful process, employees are affected and may resist change and therefore should be handled very well. I totally agree with the assessment as presented by Mr Ng'ang'a as concerns reorganisation. But this was the right information at the wrong time! Talking about a reorganisation that the employees had not been informed about and even in a case where the employees felt it was coming due to the circumstances faced by the respondent; the duty was on the respondent as the employer to formally commence the process with notification. I have perused the entire record from the respondent bundle of documents and do not find such notice. The respondent was equally insistent that the notices envisaged under section 40 was the one they issued.

47. Was this then a fatal mistake on the part of the respondent? Was the consequence of not issuing the notices envisaged under section 40? It is apparent from the evidence of the claimant that once the termination notices were issued they became frantic, they went to seek to withdraw their pension benefits with ICEA and also went for their personal deposits as under the RBA rules as all their terminal dues, through with an extra month pay, were all deposited in the bank account and consumed by their personal loans. They therefore headed to the Labour Officer who gave them some hope with new knowledge that they could claim for 12 months compensation.

48. These frantic withdrawal from the pension funds and the meetings with the Labour officer could have been avoided had the redundancy process been well addressed from the time the respondent realised this was inevitable. Once the respondent Council passed a new strategic plan that required reengineering with new systems and personnel to drive the change, the employees should have been prepared by getting involved through consultations and shared information of the impact of it. In the defence the respondent stated that;

> *[Paragraph 9] … the respondent admits that prior to the redundancy; it invited all of the affected employees to a consultative meeting to discuss the reasons of the intended redundancy. Employees were individually notified of this meeting by way of e-mails, phone calls as well as memoranda. The meeting was held on 22nd August 2011 at the respondent's premises. Further on 26th October 2011, the chancellor and the vice*

chancellor held a meeting with the affected employees who had sought audience with the respondent. The chancellor once against explained to the claimants in attendance the reasons for the redundancy.

49. This is a further confirmation that the respondent was aware all along that they were to remove all the departments that were not core to the business and at the meeting of 22nd August 2011 just less than a week, termination notices were to issue that were to take immediate effect. Whether there was pay for one months' salary for work not done, the affected employees had just lost their jobs within a week from the time they learnt of the respondent reorganisation. It is not stated that the affected claimants were part of the people at the meeting held on 22nd August 2011. Had this been the case, the respondent could have taken a log of the people present since they were aware of the very purpose of that meeting.

50. With the foregoing analysis of the events leading to the termination of the claimant's employment on the basis of the redundancy process, the law applicable in stated in mandatory terms. I cannot bend it otherwise. Where an employer fails to undertake their role with regard to an employee's rights as stipulated by the law, this is tantamount to an unfair labour practice. It is therefore the finding of this court that the claimants were unfairly declared redundant.

Remedies

Where there is an unfair labour practice, section 49 of the Employment Act apply. The claimants are seeking a 12 months' salary compensation. I however note that the respondent paid all the other termination dues immediately without delay, the claimants also received pay for one month not worked and some claimants are still doing business with the respondent. The respondent largely complied with the law same for this very crucial notice that should have reduced the anxiety faced by the claimants in trying to reorganise their finances, financial obligations, loans and family expectations. There was a clear demonstration on the part of the respondent of a good effort to address the situation in the best way possible. The respondent submitted that they are doing very well, the business has picked since the reorganisation but unfortunately there are claimants who are not doing equally well as they lost their source of income. For the lapse in the non-issuance of the mandatory notice I find it fair and just that each claimant be awarded three (3) months' salary.

51. On the claim that Certificates of Service were not issued, there was no mention of this aspect by the claimants. The respondent confirmed that these certificates were issued together with letters of recommendation. There is nothing to negate this assertion.

52. for clarity and coherence, claimant No. 86 is not stated. There will be no orders.

In conclusion therefore, I enter judgement for the claimants as against the respondent in the following terms:

a. **The claims with regard to claimant 11 and 50 are hereby dismissed with costs to the respondent;**
b. **The 96th claimant claim is hereby struck out with costs to the respondent;**
c. **A declaration that the 1st to the 104th (noting (a) and (b) above) claimants redundancy process was unfair;**
d. **Each claimant as (c) above is hereby awarded 3 months' salary as compensation. This will be based on the last salary earned by each of the claimants.**

Delivered at Nairobi and dated this 13th day of February 2012.

M. Mbaru

JUDGE

In the presence of

Lilian Njenga: Court Assistant

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