REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT MOMBASA

(BIMA TOWERS)

CAUSE NO. 271 OF 2013

1. **JOSEPH TAMA NDUA**
2. **ELIJAH HOYA MASHA**
3. **SAMUEL MWANGI KIAMBATI**
4. **DAVID KIMONDU**
5. **CATHERINE K. MUNGATAN**
6. **GETRUDE ANGWENYI NYANTARO**
7. **RONGOMA BENARD JAMBO**
8. **CONSTANCE ODHIAMBO BALA**
9. **CAROLINE WAMBUI NJURUBA**
10. **PETER KIARII**
11. **ALBERT ABEDI MAGOMERE**
12. **FRANCIS TUMUTI** **CLAIMANTS**

v

JACARANDA HOTELS (MSA) LIMITED t/a

JACARANDA INDIAN OCEAN BEACH RESORT **RESPONDENT**

JUDGMENT

1. The Claimants were all employees of the Respondent hotel. Some of them were members of the Kenya Union of Domestic, Hotels, Educational Institutions, Hospitals and Allied Workers (KUDHEIHA) which had entered into a Memorandum of Agreement (Collective Bargaining Agreement) on 22 June 2012 with the Union of Kenya Hotelkeepers and Caterers Association (an employers association of which the Respondent was a member).
2. The Respondent issued the Claimants (and other employees) with a redundancy notice dated 4 July 2013. This was after a meeting held with the employees earlier on the same day.
3. The Claimants were not satisfied with the procedures adopted by the Respondent and on 26 August 2013 they lodged a Statement of Claim against the Respondent wherein they pleaded that the redundancy was unfair and wrongful.
4. Together with the Statement of Claim was a motion under certificate of urgency seeking orders to prohibit/injunct the Respondent from proceeding with the redundancy.
5. The Court granted the prohibitory/injunctive relief sought at the *ex parte* stage. When the motion came up for *inter partes* hearing on 16 September 2013 the parties informed the Court that they wished to attempt out of court settlement and the Court granted them time.
6. However, the attempts did not succeed and on 4 December 2013 the hearing of the main cause started. In the course of taking the evidence of the first witness on behalf of the Claimants, the Respondent sought more time to continue with negotiations to settle the matter. The Court granted

the request.

7. On 3 April 2014 the parties filed a consent in respect of the terminal dues payable to the Claimants. The dues included severance pay, pay in lieu of notice, salary up to 30 September 2013, gratuity, pay in lieu of accrued leave/off days and travel.
8. The consent settled all the issues arising for determination except the question of whether the redundancy was unfair and if so appropriate compensation.
9. As a result, the Claimants witness finished examination in chief and was cross examined after which the Claimants closed their case.
10. The Respondent opted not to call any oral evidence.
11. The parties agreed to file written submissions on the question of fairness of the redundancy and the Claimants submissions were filed on 3 February 2014 while the Respondent filed its submissions on 17 March 2014.

Whether the redundancy was unfair

Claimants' position

12. The Claimants pleaded that a meeting was held with the employees on 4 July 2013 and redundancy notices issued the same day. During the meeting the employees were informed the reason for redundancy was because of losses and also to allow for extensive renovations.
13. According to the Claimants, the process adopted by the Respondent contravened the Employment Act because the Claimants, were not personally explained to the reasons for the redundancy; notices given were insufficient/defective/not served; were not given opportunity to consider and respond; consultations were not made; alternatives not provided and reasons for redundancy were not valid.
14. In their submissions, the Claimants stated that 1st,2nd,10th and 12th Claimants were not present in the meeting while the 1st Claimant has never been served with a notice.
15. The Claimants case is that on 10 July 2013 they wrote to the Respondent stating that the intended date of closure/effective date of redundancy was not indicated in the letters of 4 July 2013 and that the notices violated the provisions of law and the collective agreement and was not clear on privileges and benefits due to each employee and when these would be paid. A reminder was sent on 24 July 2013.
16. The Claimants further submitted that the redundancy was in bad faith because immediately after termination new employees were rehired in the same positions such as Ernest Ogutu (chef) to replace Albert Abedi Magomere and a new security firm was contracted to provide security services while security guards had been declared redundant.
17. As regards the 6th Claimant, it was submitted the redundancy was in bad faith and not genuine because she had been given an assurance that her department (accounts) would not be affected.
18. Further it was submitted that failure to consider other alternatives made the redundancy unfair and in bad faith.
19. On the ground that the redundancy notice was defective/insufficient, the Claimants submitted that the notices did not meet the requirements of section 40(1)(a) and (b) of the Employment Act because no reasons were given and the extent of redundancy were not stated and further because the Claimants, Union and the local labour officer were not informed personally in writing, and in light of the fact that the 1st, 2nd, 10th and 12th Claimants were not present in the meeting of 4 July 2013.
20. It was also submitted that the notices were deficient for not stating the intended date of termination, an express requirement of law and this failure could not be cured by the Respondent's letter of 29 July 2013.
21. On the ground that no consultations were made, the Claimants submitted that no consultations were made and it took the Claimants to seek clarification in writing before the Respondent replied.
22. The Claimants also challenged the reasons for redundancy.
23. On renovations, the Claimants contended that the hotel could have been renovated in parts/phases. Email correspondences suggesting that the hotel would be partially open and was taking bookings were exhibited in the documents filed by the Claimants on 17 October 2013.
24. On complaints from guests and travel agents, it was submitted no evidence was presented while

on losses it was submitted that all hotels owned by Jacaranda Hotels (K) were affected and the losses could have been spread to save the employees.

25. In conclusion, it was submitted that the Respondent had failed to prove the reasons for redundancy.

Respondent's position

Process

26. It is in good order to state from the outset that the Respondent opted not to call any oral evidence but relied on the pleadings, documents filed and cross-examination of the Claimants' witness.
27. According to the Respondent a meeting was held with all the employees including the Claimants on 4 July 2013 where they were informed of the intended redundancy though this was not a requirement of the law.
28. Further, the Respondent issued the Claimants and all staff with notices of intended redundancy on 4 July 2013 and that the same was copied to the County Labour Officer and that KUDHEIHA was informed through a letter dated 2 July 2013 while Union of Kenya Hotel Keepers & Caterers Association was notified through letter dated 3 July 2013.
29. For the Respondent, because 3rd, 4th, 7th, 8th, 9th and 11th Claimants were union members, the notification was made to the Union and this was in compliance with the law and the case of *Thomas de la Rue (K) Ltd v David Opondo Omutelema* (2013) eKLR was cited.
30. The Respondent also made reference to the letters exchanged between the Claimants, Claimants Advocate and the Respondent and submitted that it clarified to the employees that the last working day would be 30 September 2013.

Consultations

31. On consultations, the Respondent in paragraph 20 of the Memorandum of Reply pleaded that it diligently followed all the laid down guidelines and met with the employees on 4 July 2013, exchanged correspondence with the Union and the Claimants' Advocate and that parties agreed on items to be paid. The plea was mirrored in the submissions.

Substantive reasons for redundancy

32. The Respondent referred to its appendix 1 to demonstrate that it had incurred losses of Kshs 38,000,000/- for year ending June 2013, appendix 2 to show loss of Kshs 11,200,000/- for year 2012, appendix 3 to show loss of Kshs 15,000,000/- for year 2010 and appendix 4 to show loss of Kshs 32,500,000/- for year 2009.
33. As far as the Respondent was concerned, the 6th Claimant who testified on behalf of the Claimants confirmed the losses and that the Respondent relied on overdraft facilities to pay staff salaries.
34. On the need for renovations, the Respondent submitted that the 6th Claimant equally admitted this reason.

Bad faith

35. In response to the bad faith claim, the Respondent contended that employees who had been rehired were on temporary terms to clean the hotel, maintain the lawns, electrical systems, look after the bottling plant and that it had to engage an external security firm to guard its premises and that Mr. Ernest Ogutu was reengaged to take charge of the other staff hence the increased remuneration.
36. In sum, the Respondent submitted that the evidence of the 6th Claimant showed it had good/valid reasons for the redundancy. The case of *Alice Wambuku Kago v EA Women's League*, Nairobi Cause no. 1274 of 2011 was referred to.

Evaluation

Process

Parties to be notified

37. Section 40 of the Employment Act has set out the basics of termination through redundancy. The procedures are clear cut and they were the subject of discussion by the Court of Appeal in *Thomas de la Rue (K) Ltd v David Opondo Omutelema* (2013) eKLR.
38. As observed by the Court of Appeal, the section has set some 7 conditions to be complied with by the employer. It needs to be mentioned that the section provides for two kinds of redundancy notification.
39. The first condition is notification to the Union and local labour officer if the affected employees are members of a Union and personally to the employee if not a member of a union. The notification should be in writing and indicate the reasons and extent of the intended redundancy, one month in advance.
40. It was pleaded that 1st, 3rd,4th,7th,8th,9th and 11th Claimants were members of KUDHEIHA.
41. The Claimants annexed appendix D which were notification letters written to each Claimant personally and copied to the Acting CEO and General Manager. The same were not directed or copied to the union and local Labour Officer.
42. Further clause 11(i) of the Collective Bargaining Agreement between the Union and the Respondent provided for a notification one month in advance to the Union of intended redundancy.
43. It is clear that the Respondent did not comply with both the law and Collective Bargaining Agreement as to the parties to be notified of the intended redundancy. In so far as the notification was not sent to the Union and local labour officer, the notification dated 4 July 2013 was not in compliance with the letter and spirit of section 40(1)(a) of the Employment Act.
44. For the non-union members, the local Labour officer should have been notified, but this was not done.

Content of notification

45. The Court has also looked at the content of the notices sent to the Claimants and other employees. The notices did not cite the reasons and extent of the intended redundancy but rather made reference to the fact that the reasons and extent had been explained to the employees at a meeting held earlier.
46. Further, the notices did not expressly indicate the date of intended redundancy.
47. The Court has had occasion to discuss the question of the content of a redundancy notice in *Kenya Union of Domestic, Hotels, Educational Institutions and Hospital Workers v Mombasa Sports Club* (2014) eKLR wherein I observed that

> In the humble view of the Court, on a proper and correct construction of the *extent, of intended redundancy*, a notice under section 40(1)(a) of the Employment Act to the Union must set out the names and other particulars of the employees who have been targeted for redundancy to be in substantial compliance.
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> In the instant case, the notice to the Union did not set out the names and other particulars of the affected employees such as designation and this coupled with the fact that the Respondent did not give out the individual notices referred to in clause 23(g) of the Collective Bargaining Agreement leave no doubt that the Respondent was not in compliance with both legal and contractual requirements on procedural fairness. This failure cannot, in the view of the Court be cured by or because of the meeting held in the boardroom or meetings with the Union.

48. In the view of the Court, the date of intended redundancy and the reasons and extent of the intended redundancy should have been stated in the notification letters, and in this regard the notifications fell short of what the statute and Collective Bargaining Agreement required.
49. In my view, a general announcement by an employer such as at the meeting held between the

Respondent with staff on 4 July 2013 cannot be the notification envisaged by section 40(1) of the Employment Act. Neither could it substitute for a formal notification to the requisite parties.

50. The Respondent was ignoring/sidestepping the Union with which its employers association had entered into a Collective Bargaining Agreement. This is not desirable at all.
51. One of the main objectives of notification is to enable consultations. During consultations, the parties discuss issues such as other options to redundancy. Consultations should be proper and fair.
52. And for consultations to be proper and fair, the consultations should be at the initial stages of considering redundancy, sufficient information should be given to the Union and or employee to enable a response, sufficient time should be given for a response and the responses should be considered by the employer.
53. The Respondent sought to take umbrage in the fact that some correspondence was exchanged with the employees and Claimants' advocates. But the employees' letters of 10 July 2013 and 24 July 2013 only go to demonstrate that the Respondent had not given reasons for the intended redundancy and the extent of the redundancy. The meeting of 4 July 2013 fell far short and that is the reason the Claimants and other employees were seeking further information.

Selection of employees for redundancy

54. The parties did not address adequately the condition on selection of employees to be affected by the redundancy but because this ground will not be decisive the Court will not discuss it. It is also not clear whether all employees or only a majority were affected.

Other conditions

55. Other conditions relate to payment of outstanding leave in cash, pay in lieu of notice and severance pay. Because the parties agreed on these and filed consent, the Court need not delve into a discussion on the same.

Non-unionised Claimants

56. Claimants 2, 5,6,10 and 12 were stated were not members of the Union. The Respondent should have notified them personally in writing. This was done.
57. But these notifications were not copied to the local labour officer and did not state the date of intended redundancy and the reasons and extent of the redundancy. Equally therefore in respect of these Claimants there was non-compliance with section 40(1) of the Employment Act and the terms of the Collective Bargaining Agreement.

Reasons for redundancy

58. As already stated the notification of redundancy letter dated 4 July 2013 did not give the reasons for the redundancy. The notification simply made reference to the fact that the reasons had been given during the meeting held with the employees.
59. In the view of the Court it is a statutory imperative that the reasons are set out in writing. Reasons given in a non formal setting will not and cannot suffice.
60. Be that as it may, the Memorandum of Reply set out what the Respondent had as the reasons for redundancy. These are set out in paragraphs 3 to 8 and are mainly that the Respondent had consistently made losses over 5 years, relied on an overdraft facility which had become overdrawn and that bed occupancy had deteriorated.
61. To support these reasons, financial/Income statements from 2009 to 2013 were exhibited. Renovations as a reason were mentioned by Claimants' witness.
62. In cross-examination, the Claimants' witness, Getrude Angwenyi, an Accountant working with the Respondent then admitted that the Respondent had been incurring losses and that in 2008 a restructuring plan had been developed but instead stated that because the Respondent was part of a group of hotel chains, the expenditure/losses could have been shared. The Respondent had pleaded it had to turn to overdraft to meet staff salaries.

63. The Respondent produced audited financial statements for the years ending 30 June 2009 and 30 June 2010. For 2011, 2012 and 2013 no audited financial statements were produced. For these years Income Statements/unsigned/draft statements were produced.
64. In the view of the Court, unaudited and or unsigned Income Statements may not suffice for an employer to discharge the burden placed upon it by section 45 of the Employment Act and more so where the documents are filed but no explanation through witnesses or otherwise is offered. As regards the Overdraft facilities, these are used even by businesses which are not making losses.
65. The other reason proffered was renovations. The parties did not sufficiently interrogate the renovation reason. The obligation was upon the Respondent to prove the reasons it proffered as being both valid and fair. Renovations, as suggested by the pleadings would require huge sums of money. The sources of these funds were not disclosed.
66. All that was disclosed was that the Respondent had been incurring huge losses. In light of the fact that the Respondent had the funds for 'renovations' and the email correspondences from the Respondent suggesting that it was ready to accept bookings during the 'renovation' period, the Court cannot but reach the conclusion the renovation as a reason for declaration of redundancy was a fiction or sham and not genuine. The reason was not valid or fair.
67. In this connection the Court reaches the conclusion that the Respondent has failed to prove losses and renovations as valid and fair reason(s) for redundancies of the Claimants.
68. The redundancy(ies) carried out by the Respondent was unfair for lack of compliance with a fair procedures and for failure by the Respondent to prove the reasons as valid and fair.

Appropriate relief

69. The Claimants sought damages equivalent to 12 months gross wages. The parties entered into a consent order in regard to the terminal/severance pay due to the Claimants.
70. Had the Respondent carried out the redundancy in accordance with the requirements of section 40 of the Employment Act and the Collective Bargaining Agreement, it would not have been necessary for the Claimants to move to Court.
71. Considering that the Claimants were paid severance pay and other final dues, the Court is of the opinion that an award equivalent to 3 months gross wages for each Claimant would be just compensation.

Conclusion and Orders

72. From the foregoing the Court finds and holds that the termination of the services of the Claimant through redundancy was unfair and awards and orders the Respondent to pay each Claimant the equivalent of three (3) months gross wages as compensation.
73. The parties are directed to compute the equivalent of such wages and file the figures in court within 7 days for adoption by the Court.
74. The Claimants to have costs of the Cause.
75. This Cause therefore will be mentioned on 17 June 2014.

Delivered, dated and signed in open Court in Mombasa on this 6th day of June 2014.

Radido Stephen

Judge

Appearances

for Claimants — Ms. Ngige instructed Mwangi Njenga & Co. Advocates

for Respondent — Mr. Macharia instructed by Kagwe, Kamau & Karanja Advocates

and

Mr. Molenje, Senior Legal Officer, Federation of Kenya Employers.