



- General Manager.
4. Such other order as the Court may deem fit.
  5. Costs.

The Respondent filed a Notice of preliminary objection and replying affidavit of Kumar Dhal to the Claimants application. The objection dated 7<sup>th</sup> March 2012 was filed on 10<sup>th</sup> March 2012. The Respondent also filed a response to the Memorandum of claim.

When the parties appeared before me on 3<sup>rd</sup> June 2013 for hearing of the case they informed me that a substantial part of the claim had been settled through negotiations by the parties which settled the issues raised in the Claimant's notice of motion dated 8<sup>th</sup> February 2012. The only issues left for determination by the court were reinstatement, general damages, costs and interest.

The claimant's evidence was taken on 3<sup>rd</sup> June 2013 and he closed his case. The Respondents case was heard on 26<sup>th</sup> May 2014.

The claimant's case is that he was employed by the Respondent as a Deputy General Manager on 1<sup>st</sup> March 2011 to work at the Ol Tukai Lodge in Amboseli National Park at a salary of KSHS.150,000/= per month. He worked for about 5 months after which he was re-assigned to work as the General Manager. He was thereafter appraised and issued with a letter of appointment as General Manager from 15<sup>th</sup> July, 2011. As General Manager his salary was Kshs.215,000 per month. He was also entitled to airtime allowance of Kshs.5,000/= per month and other benefits as set out in the letter of appointment. The appointment was on probation for the initial 6 months. After about 4 months the Operations Manager of the Respondent came with a gentleman by the name Marrinka who was introduced to the Claimant as the new General Manager. The following day Mr. Marrinka asked the Claimant to take his accumulated off days of about 88 days but the Claimant requested to be allowed to take only 10 days since he had not planned to take leave. His request was allowed and he proceeded for the 10 days leave after signing the leave forms. When he reported back to work after the leave the new General Manager refused to see him. He therefore decided to fill a leave form for the remaining days and proceeded for the leave one day after reporting back.

Around 20 days after taking leave the Claimant called the accountant to ask for his allowances. The accountant informed him that his employment had been terminated. He asked the accountant to send him a copy of the letter of termination through his email address. The Claimant later called the office and was advised to report to the office. When he went to the office the General Manager again refused to see him or take his calls. It is at this point that he got fed up and consulted his lawyers to write a demand letter.

In the response to the demand letter he was informed that his position of Deputy General Manager had been declared redundant. The Claimant denied receiving the undated letter revising his position from General Manager to Deputy General Manager and reducing his salary to Kshs.170,000 per month. The claimant stated that he would have expected to be appraised and informed before being re-designated. The Claimant further denied having any disciplinary issues with the Respondent. He also denied knowledge of any restructuring. He stated that the position of Deputy General Manager was vacant and interviews had been held at the head office to fill the position. The claimant stated that his terminal benefits were calculated on the basis of a salary of Kshs.170,000/= yet his salary was Kshs.215,000/=.

He prayed that the termination of his employment be declared unlawful and for payment of damages for wrongful termination, arrears of salary for October 2011, costs and interest. He further prayed for orders of reinstatement. He also prayed for a certificate of service.

Under cross examination the Claimant stated that he was sent home on 17<sup>th</sup> October 2011. He further stated that he was paid severance pay, leave and off days when the case was already in court.

The Respondent's witness KARAN KUMAR, who was the Respondent's Operations Manager testified that he was responsible for recruitment and appraisal of staff, procurement, sales and marketing. The

General Manager of Ol Tukail Lodge reported to him on day-to-day activities. He testified that the Claimant was employed as Deputy General Manager from 1<sup>st</sup> March 2011 until 15<sup>th</sup> July 2011 when he was employed as General Manager on 6 months probation. The Claimant served as General Manager until 16<sup>th</sup> September when the Respondent felt that he could not handle the responsibilities of that position and decided to bring in another person as General Manager. The Respondent discussed with the Claimant the reasons for bringing in another person and which areas he was lacking in, especially food and beverages department. He further stated that the *sous chef* resigned due to disagreement with the Claimant. The Claimant was re-designated to Deputy General Manager with his full participation and agreed to the re-designation with effect from 16<sup>th</sup> September 2011 at a gross salary of Kshs.170,000. The new General Manager reported on the same date that the claimant was re-designated. The claimant worked with Mr. Marrinka the new General Manager before the Respondent decided to restructure and split the position of Deputy General Manager into two positions, that of Food and Beverages Manager and Front Office Manager. The restructuring was communicated to the Claimant. Although the claimant was suitable for the position of Front Office Manager the Respondent felt that his salary was too high for the position which was set at Kshs.80,000/=. For this reason the Claimant was declared redundant. The redundancy was communicated to the Ministry of Labour by letter dated 19<sup>th</sup> November 2011.

RW1 denied that there was malice in the termination of the claimant's employment. The Claimant was paid salary to 30<sup>th</sup> November 2011, pending off days, 20 days in lieu of notice and leave days at the salary rate of Kshs.170,000/=. He received Kshs.281,303.62 after deductions of loan, PAYE, NSSF and NHIF. RW1 denied that the Claimant was sent on compulsory leave and stated that the Claimant applied for leave because his wife was to undergo an eye operation.

I have considered the pleadings and the evidence on record. I have also considered the written submissions and the authorities cited.

The main facts of the case are not contested. The parties agree that the claimant was employed on 1<sup>st</sup> March 2011 as Deputy General Manager of Ol Tukai Lodge, then as General Manager from 15<sup>th</sup> July 2011, a position he held on probationary terms until 16<sup>th</sup> September, 2011 when he was re-designated to Deputy General Manager at a salary of Kshs.170,000/= per month. By letter dated 21<sup>st</sup> November 2011 his employment was terminated on account of redundancy.

Before the hearing of this case and pursuant to the Claimants application dated 8<sup>th</sup> February 2012 the claimant was paid the following terminal benefits:

Basic pay at	Kshs.170,000
Leave days	Kshs.128,546.54
Off days	Kshs.234,737.15
Notice	Kshs.170,000
	Kshs.703,283.69

**Less**

Staff loan	Kshs.216,602.56
Other deduction	Kshs.204,857.51
NSSF	Kshs.320
NHIF	<u>Kshs.200</u>

**Kshs.421,960.00**

Net pay **Kshs.281,303.62**

The parties agreed that the only issues for determination by the court are:

1. Whether the Claimant was unfairly and maliciously terminated from employment;
2. Whether the claimant is entitled to reinstatement;
3. Whether the Claimant is entitled to compensation or damages.

**1. Whether the Claimant was unfairly and maliciously declared redundant**

The Claimant's letter of termination states that his employment was terminated as a result of restructuring and was therefore a redundancy effective 21<sup>st</sup> November 2011.

The law on redundancy is contained in Section 40 of the Employment Act. Section 40(1) provides as follows:

- a. *Where the employee is a member of a trade union, the employer notifies the union to which the employee is a member and the labour officer in charge of the area where the employee is employed of the reasons for, and the extent of, the intended redundancy not less than a month prior to the date of the intended date of termination on account of redundancy;*
- b. *Where an employee is not a member of a trade union, the employer notifies the employee personally in writing and the labour officer;*
- c. *The employer has, in the selection of employees to be declared redundant had due regard to seniority in time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy;*
- d. *Where there is in existence a collective agreement between an employer and a trade union setting out terminal benefits payable upon redundancy; the employer has not placed the employee at a disadvantage for being or not being a member of the trade union;*
- e. *The employer has where leave is due to an employee who is declared redundant, paid off the leave in cash;*
- f. *The employer has paid an employee declared redundant not less than one month's notice or one month's wages in lieu of notice; and*
- g. *The employer has paid to an employee declared redundant severance pay at the rate of not less than fifteen days pay for each completed year of service.*

The Claimant submitted that there was no redundancy and the redundancy was intended to justify the termination of his employment. The Claimant further submitted that there was no evidence he was served with the letter declaring him redundant personally in writing as provided by law. The Claimant prays for compensation at 12 months salary at the rate of Kshs.215,000 per month.

The Claimant relied on the case of **Thomas De La Rue v David Opondo Omutelema (2013) eKLR** where the court held that:

*“The provisions of section 40 of the Employment Act give selection criteria in determining which employees to be declared redundant, section 40 requires the employer to consider seniority in time, skill, ability, reliability of the employees....”*

The Respondent submitted that the Claimant did not plead unfair termination, that the claimant is bound by its pleadings and the court should on this ground alone dismiss the prayer for unfair termination.

The Respondent further submitted that the Claimant was in employment for less than 13 months and is barred by Section 45(3) of the Employment Act from alleging unfair termination. The Respondent relied on the ruling of Justice Rika in **Samuel G. Momanyi V. SDV Transami Kenya Limited (2013) eKLR** in which he held that:

*“the judgment of the High Court declaring section 45(3) unconstitutional (could) only apply to unfair termination claims, filed after 18<sup>th</sup> May, 2012 . The judgment is not intended to unsettle vested rights and revive unfair termination claims .....Every law of the Legislature, however repugnant to the Constitution, until expressly declared invalid by the Court, had not only appearance and semblance of authority, but the force of law. This was the case with section 45(3) for the employment Act, 2007 prior to 18<sup>th</sup> May, 2012.*

The Respondent further submitted that the Claimant did not discharge his burden to prove his case as provided in Section 47(5) in view of the provisions of section 40 and 45 of the Act. The Respondent further submitted that the Claimant did not prove that his employment was maliciously terminated.

Section 40 of the Employment Act is specific on the procedure of redundancy. The Claimant and the Labour Officer must be notified of the reasons and extent of redundancy at least one month prior to the date of redundancy. This notification must be in writing.

This was not the case in the Claimant’s case. He was terminated effective from the date of the letter. He was at that time on leave and only learnt about his termination from the Accountant when he called the office to inquire about his allowances.

The authority cited by the Respondent that is **Samuel Momanyi v. SDV Transami Kenya Limited** is not applicable to this case as it relates to unfair termination and the application of Section 45(3) and not unfair redundancy which is governed by the procedure set out in Section 40(1) of the Act.

I find the redundancy of the Claimant unfair for failure to comply with the procedure set out in the law.

## **2. Whether the claimant is entitled to reinstatement**

The remedy of reinstatement is provided for in Section 49(3) of the Employment Act and Section 12 (3) (vii) of the Industrial Court Act. Section 49(3) provides that reinstatement is available where termination of employment is unfair while Section 12(3) (vii) provides that reinstatement is available only within 3 years of the date of termination.

The Claimant has not sought reinstatement in the written submissions while the Respondent has referred me to the case of **Dalmas Ogoye v. KNTC Ltd (1996) eKLR** where the Court observed that the courts should not order reinstatement because such an order would be difficult to enforce and it would be plainly wrong to impose an employee who has fallen out of favour on a reluctant employer.

The position in the case of Dalmas Ogoye is no longer applicable as the Employment Act and Industrial Court Act no provide for remedy of reinstatement and employment.

Section 49(4)(d) requires the court to take into account the common law principle that there should be no order for specific performance in a contract for service except in very exceptional circumstances.

In the present case there are no exceptional circumstances pleaded. At the same time it is more than 3 years since the claimant’s employment was terminated.

For these reasons the remedy of reinstatement is not available to the Claimant. I decline to order the same and dismiss the prayer.

## **3. Whether the Claimant is entitled to compensation or damages**

Having found that the Claimant was unfairly declared redundant he is entitled to damages. The claimant has prayed for 12 months salary. I find that this is excessive taking into account the fact that he had worked for less than one year. Taking into account the fact that the Claimant was terminated while on leave without any notification in terms of Section 40(1)(b) and that this followed his demotion and reduction of salary, I award him 4 months salary as damages.

The claimant prayed that the damages be based on Kshs.215,000 being his salary as General Manager. I however have taken note that the Claimant accepted settlement at the salary of Kshs.170,000 per month. I cannot offer him a rate different from the rate at which settlement was made.

I therefore award the Claimant Kshs.680,000/=. The claimant is also entitled to costs based on both the amount payable under the consent agreement and this order as it was paid after commencement of this case as a consequence of the Claimant's application dated 8<sup>th</sup> February 2012. The amount granted herein will attract interest at court rates from the date of judgment to the date of payment in full.

Orders accordingly.

Read in open Court this 13<sup>th</sup> day of November, 2014

**HON. LADY JUSTICE MAUREEN ONYANGO**

**JUDGE**

**In the presence of:**

David Ndavah Kamzee Claimant present in person

Njoroge for Respondent