



**REPUBLIC OF KENYA**  
**Industrial Court of Kenya**  
**Cause 1972 of 2012**

**ELIZABETH WASHEKE and 62 Others .....CLAIMANTS**

**VERSUS**

**AIRTEL NETWORKS (K) LTD ..... 1ST RESPONDENT**

**SPANCO RAPS (K) LTD ..... 2ND RESPONDENT**

**JUDGMENT**

This is a claim dated 23rd August 2012, filed by 63 claimants against the 2 respondent seeking their terminal due and benefits and further that they were unfairly terminated by the 1st respondent and or unfairly declared redundant without due process or payment of severance pay. A Supplementary Claim was filed dated 5th November 2012 to reaffirm the claim as filed for the 50th to 63rd Claimants. Parties exchanged comprehensive responses with the 1st Respondent defence dated 14th of November 2012 and the 2nd Respondent defence dated 15th October 2012. The 2nd Respondent also filed a Supplementary response to the Claim dated 27th November 2012.

**Claimant's case**

The Claimants case was supported by the evidence of two witnesses Mr. Eric Ntembea and Oscar Ojole. They represented all the claimants herein. The first Respondent called two witnesses Mr. Anthony Mwema and Job Njiru while the 2nd Respondent called Mr. Donald Nyakwemba.

It was the claimant's case that they were all employees of the 1st respondent having been employed on diver's dates from 2000 and deployed as customer care service executives based on their individual contracts with the 1st respondent. That on 19th January 2011, they were informed that a decision had been taken to terminate their services and to transfer them to another employer on terms comparable to those under which they were servicing the 1st respondent. They were to be transferred to the 2nd respondent who issued letters offering them employment.

The claimants stated that the negotiations giving rise to their termination with the 1st respondent were done without their consultations and that they never had chance to seek legal advice to the letters of offer for employment with the 2nd resident and the transition was without notice as against their individual contracts of employment which contemplated a termination notice of two months or payment in lieu of notice. That the 1st respondent in a newspaper communication promised the claimants that their terms of employment and benefits accruing to their obligations would not be interfered with while working for the 2nd respondent and that there would be a window period of two years within which time any dissatisfied employee would be free to return to the 1st respondent.

The claimant also stated that they were convinced to move to 2nd respondent by the 1st respondent on the basis that their accrued benefits particularly service pay would be taken over and settled by the 2nd respondent. That despite this promise the claimant since moving to the employ of the 2nd respondent lost

most of the benefits they enjoyed while working for the 1st respondent, such as medical cover, the 2nd respondent declined to honour service pay payments, the 2nd respondent did not take over any statutory obligations that the 1st respondent owed the claimants particularly the terminal benefits, their attempts to go back and work for the 1st respondent following their dissatisfaction with the conditions of service at the 2nd respondent as promised by the 1st respondent was met with hostility with the 1st respondent declaring that their jobs were no longer available, and that the claimants have become redundant.

On these grounds the claimant claims the following;

- i. Notice pay of two months' salary;
- ii. Compensation for unfair termination equivalent to twelve month's salary;
- iii. Service pay equivalent to one months' salary for each year worked based on the salary as at 19th January 2011;
- iv. Severance pay/redundancy compensation equivalent to 15 days salary for each year worked based on the salary as at 19th January 2011;
- v. Payment in lieu of leave; and
- vi. Costs of the suit.

In evidence Eric Natembea stated that as the 36th claimant giving evidence on behalf of all the claimants he joined 1st respondent on 6th December 2000<sup>5</sup>at Customer service and was terminated on 31st January 2011 upon being outsourced to the 2nd respondent, Spanco Raps Kenya Limited. That when they moved from 1st respondent they demanded to have their terminal benefit and a meeting was held on 20th January 2011 at Panari hotel where staff at Customer Care met 1st respondent management and the issue of outsourcing was discussed. That in their minds they thought the service of customer care was being outsourced but were surprised that the staff in that department was to be moved as well. There were two lists, List "A" and List "B" with those in list "A" being taken back to 1st respondent while the rest were to be outsourced to 2nd respondent. That the basis of this outsourcing was that the 1st respondent wanted to concentrate on their core business and wished to ensure staff to be outsourced were in a win-all benefit by moving them with all their benefits, salary and terms of service quarantined.

That all the affected staff was from Customer Care Service. This department was being closed by the 1st respondent. That 2nd respondent was to take over this function.

The witness however stated that the affected staff were not involved into eh negotiations of the outsourcing and transfer of staff. That their jobs were no longer available at 1st respondent was not communicated and were thus released and told to sign new contracts. That the claimants were under indirect pressure to sign these new agreements as they had obligations to meet like outstanding bank loans and other family need.

That following the meeting at Panari hotel on 20th January 2011 they went back to the office and the witness went back to his duties but on 25th January 2011 he got two letters dated 19th and 20th January 2011. That the letter dated 19th indicated that he had been outsourced to 2nd respondent and he was to accept and sign and return the response to eh 1st respondent. That he was not given time to look at the letter and had only 10 minutes and he had no chance to go to the legal department to seek their assistance in interpreting this letter. That the people he met in the room where he was called were in a hurry to open his file, have him sing his letter and close the matter. That the only issue he noted was that the 1st respondent had negotiated with the 2nd respondent and agreed to offer him employment. He however stated that he was not jobless at the time this offer was made and had not applied for a new job, 2nd respondent had not advertised a position that met his qualifications and was already working for the 1st respondent and the offer appeared as if he was going to work for two different companies.

That in his understanding, the 1st respondent was terminating his employment and the 2nd respondent was offering him a new job on similar terms as the 1st respondent. That at 1st respondent he had a salary and benefits which could not be negotiated downwards and could only be negotiated upwards. He stated that the 1st respondent offered an outpatient scheme amounting to Kshs.150, 000.00 while 2nd respondent offered Kshs 50,000.00 and the inpatient limit was 50 million while the 2nd respondent was lower and those with pre-existing conditions were not covered under the 2nd respondent medical cover. That 1st respondent had a telephone allowance based on job limits and would be reimbursed by the Human Resource but this was not available at 2nd respondents'.

That there were other benefits that were lost including

- Accident cover not there at 2nd respondent
- Bonus was not issued
- Christmas vouchers not given
- End of year parties were no more
- Family fun day were no more
- Steady expected growth was not guaranteed
- Training opportunities were no more

All these were well catered for by the 1st respondent but the 2nd respondent did not offer these benefit and to compound the problem and lack of these benefits, there were late remittances of salaries and the claimants with bank Standing Orders suffered penalties for late remittances and in late repayment of their loans which were charged a penalty noting the already high rate loans that was no longer conducive as was the case while at 1st respondent employ.

The witness further stated that when the claimants were issued with their offer letters it said that the 2nd respondent would provide terms the same as the 1st respondent and they understood the same to mean that all terms applied by 1st respondent were to follow. Therefore when they applied for loans with Barclays bank the rate was high and previously the 1st respondent had a negotiated rate but this was not applicable in the case of 2nd respondent and this cause a lot of embarrassment to the claimants who took these loans.

That since the meeting held at Panari Hotel on 20th January 2011, the 2nd respondent employment was to commence on 1st February and within this time the claimants had to accept the terms of employment and move. That they had few days to think through the offer, accept and move. That there were no options offered one had to take the job with the 2nd respondent or lose their job with the 1st respondent altogether. Therefore the new employment was taken under duress. There was no notice prior to the meeting and the issuance of the offer letter and thus having been rendered jobless, there was no available work at 1st respondent and had to take what was offered at 2nd respondent.

That the claimants were not privy to the terms of outsourcing between the respondents and if the claimants had known these terms, they would have negotiated and willingly move to the new employer. That the termination was never expected and signed the new contracts in good faith and by month end in January 2011, the 1st respondent only paid the salary due was without any other benefits. That according to the claimants they had not known they were being terminated. Their pension was paid later and even though during the meeting at Panari the issue of terminal dues arose, but these were not paid during the outsourcing.

Also that notice pay was not made or service pay due for years worked and the claimants did not request for these terminal dues as everything was rushed. That only service pay was to be transferred to the new

employer. That in an email from the 2nd respondent, it was general and only talked of a transfer without indicating the affected employees. That once at 2nd respondents employ, they demanded to know if their service pay had been transferred but this was denied and the Managing Director indicated that this was supposed to have been paid before the transfer.

That the claimants are not happy at 2nd respondents employ and the two years window period promised by 1st respondent management was not honored as they were advised their jobs ceased and no longer available and if any opportunity arose the same would be advertised to them to apply and be hired afresh. That this was a breach of the promise made by the 1st respondents CEO for Africa at the Planar Hotel meeting. That they were issued with Certificates of Service backdated to 28th January 2011 meaning the claimants were no longer employees of the 1st respondent.

The witness gave his case example and indicated that his salary was kshs.136, 949.00 and not Kshs.122, 291.00 the difference being due to an appraisal done for 2010 and the subsequent salary increment following another appraisal by the 2nd respondent done in July 2011. That before the outsourcing he had been appraised and in April his former colleagues at 1st respondent got an increment but the 2nd respondent did not review their salaries upward and this has never been factored by the 2nd respondents and claims the same as due and owing to them. That if he had remained at 1st respondent employ, his salary would have been kshs.136, 949.00.

That in his letter of contract as well as for all the claimants termination notice was two months of payment for two months in lieu of notice. This was not paid and claims the same.

There is also a claim for unfair termination and compensation for twelve months for reasons that the Certificate of Service was given two months after the termination and no justification was made for the termination. The claimants took a job that they had not applied for or negotiated for and had no choice of the job and the termination by the 1st respondent was unfair.

The witness had served for six (6) years and based on the monthly salary, service pay to factor each claimants number of years worked.

On redundancy compensation, the witness stated that severance pay was due at 15 days salary for each year worked. That the reasons were that they were sent to another employer and they were not part of the transfer agreement. This was also not part of their contract signed with the 1st respondent. They were compelled to work with a new employer.

That most of them did not take leave or get paid for it and the travel allowance at kshs.10, 000.00. That this was the applicable figure for the claimants.

The claimants therefore seek to be reinstated to the employment of 1st respondent as they are with an employer they did not choose. That due to taking this matter to court their relationship will be strained and the need for the court to protect their benefits by having them paid to them. That if the process had been transparent there would be no need to come to court and the claimant came to court out of necessity and therefore the 1st respondent should pay costs of the case.

The second witness for the claimants was Oscar Ojole. He joined the 1st respondent as service as Customer Service Executive but was stated that he was unfairly terminated in January 2011. He had been promoted over the ranks up to operations on a higher ranking job. That on 20th January 2011 there was a meeting at Panari hotel for all Customer Service staff where they were addressed by 1strespondnet CEO for Africa about outsourcing to 2nd respondent and highlighted four (4) main items

1. There were staff to be outsourced with two years and if not happy with the new partner staff would come back to 1st respondent
2. The work was to be under the same terms

3. There was need for staff to support the concept as it was new in Kenya
4. That nobody was going to regret the offer.

That after this address the Human Resource (HR) was left to address any questions that affected staff had with HR officer Pius Wokabi indicating that they were to sign new contracts. That the HR officer clarified to the staff that there was a two year window period for staff to reconsider the offer, that there pension would not be affected and their bank loans that 1st respondent had negotiated rates would still be accessible as well as the bonuses which would be issued to all in both companies. That the staff thought the two years window period was generous and reasonable and so they accepted the transfer.

The witness however noted that in selecting the persons to be affected by the outsourcing there was no set criteria. It lacked clarity. That in the 4 units at the 1st respondent company some team leaders were moved while others were left with their team members transferred. It was not clear how the decision on any particular staff members to be outsourced was arrived at. That for the witness, he was not involved about these changes at any time. That there was a general email about the changes but it did not indicate that he was going to be affected. He was moved to the 2nd respondent since his job had ceased to exist at the 1st respondent company and since they had no time to recruit and needed his expertise, the 1st respondent seconded him to them. He was therefore issued with the letter dated 19th January 2011. This was despite the fact that he had not been consulted during the negotiations of the two companies, he had not applied for a job as he already had a good job with the 1st respondent.

This notwithstanding when he was given the letter of offer by the 2nd respondent, terms appeared to be similar to what he had with the 1st respondent and this was one of the reasons as to why he accepted the offer. He was then called to a meeting at the Call Centre where he found two officers from the 2nd respondent, and Mr. James Muiruri who gave him a contract to read and sign since they wanted to file it. There were 8 pages of the contract and he had only 10 minutes to read, understand, sign and return it. He read and signed as he had already been outsourced by the 1st respondent. Since he had a lot of work to attend to, he did not ask any questions and in any case his employer had already communicated to him that he had already been outsourced. He had no job at the 1st respondent company.

That prior to this outsourcing, he had been earmarked for a salary increase and since this had been communicated to him by the 1st respondent in 2010, he was waiting for it to be effected and thus his salary went from Kshs.70,600.00 to Kshs.84,000.00 which was the salary the 2nd respondent also offered him after the transfer. He also earned bonus. This therefore confirmed to him that indeed he had been transferred with comparable terms from his previous employer. However things did not improve with time as former colleagues at the 1st respondent kept earning bonuses but not for them at 2nd respondent.

That due to the various challenges they faced at 2nd respondent due to their reduced benefits, they had a meeting with HR who indicated the criteria that had been used in paying the bonus. Some employees had extraordinary performance while others had ordinary performance. At this point they reverted to the promise of the two year window period and indicated their wish to return to the 1st respondent who had better terms and benefit compared to their experience with the 2nd respondent. This was particularly because by the end of 2011 banks increased their lending rates and while at 1st respondent, the employer would intervene and have their staff have negotiated rates but now they had to pay the high rates.

That at some point there was an advertisement at the 1st respondent that suited his qualifications, but when he applied, he never got a response. Another advert arose, he applied but again there was no feedback. He decided to talk to a friend at 1st respondent who advised him that any applicant from the 2nd respondent were being treated differently and therefore he decided to talk to Job Njiru who told him that those at the 2nd respondent could not be recruited back to 1st respondent until after some time at that would amount to undercutting them.

He wanted to resign but decided to first talk to the HR officer and he was advised that he would lose his years of service if he did so. At this time he had anticipated an appraisal which was done, and his increase was only Kshs.2, 800.00 which demoralized him. He realised that his years of service were being used to

hold him back and by resigning he would lose his dues.

He realised he had been terminated by the 1st respondent once he received his Certificate of Service which was issued in March 2011 and with a letter from Alexander Forbes he was to access his pension dues. He thus realised he had been fired by the 1st respondent. At the meeting held at Panari Hotel, he had asked if his pension would be accessible but had been advised they needed two years to access it and thus with the new information from Alexander Forbes that they could access their pension they realised they had been terminated. The witness got his pension and in the application forms for the pension he was required to indicate the reasons for exit and was told by 1st respondent to leave it blank and the claimants got their cheques. That the HR officer at 1st respondent had advised them to indicate the reasons for exit to be retrenchment/redundancy. Since there are various reasons that an applicant for pension can tick on the form none of those noted were applicable to the claimants. Those available were;

- Resignation
- Dismissal
- Death
- Retirement
- Voluntary early retirement
- Ill-health
- At employer request

The witness was advised to give his reason as 'redundancy'.

He again tried to get a job at 1st respondent but completely failed. There was an appraisal done by the 2nd respondent that did not result in a good pay increase. The claimant therefore decided to hold a meeting with management on 31st March 2012 where they indicated to the HR manager that they wanted to use the two year window period and go back to the 1st respondent but the HR indicated that they could not do that and instead were going to invite the 1st respondent to come and address that issue. On 19th June 2012 a meeting was held with 1st respondent management present and confirmed that despite there being the two year window period, they needed reasons as to why the claimants were dissatisfied with the 1st respondent and promised to engage each other to arrive at a solution.

On 27th June 2012 another meeting was held with 1st respondent management where they indicated that it was not possible to go back as the two year window period promise was a public relations statement and could not use it. The claimants therefore asked to be allowed to apply for any new job advertised at the 1st respondent to which the 1st respondent indicated was possible but as a new engagement with loss of service for previous years. The claimants therefore decided to demand for their terminal dues from 1st respondent as the 2nd respondent indicated that when the outsourcing was done, the terminal benefits of the claimants were not transferred as this was to be paid in future with interest, on condition the claimants did not leave the 2nd respondent. That is what was agreed between the two respondents.

The witness was later called to join the 1st respondents team, was supervised by them but his salary was paid by the 2nd respondent. He had only been sourced to support the team there due to his expertise but his employer did not change. Since he was serving several African countries including francophone, he had to take French classes to cope with emerging issues from these countries. But his terms remained the same as under the 2nd respondent. He felt exploited, was not happy with his supervision and again contemplated tendering his resignation. However, in September 2012, 2nd respondent staff went on strike and paralyzed 1st respondents operations.

From the strike, the 2nd respondent's staff was allowed to join a trade union and the witness also joined

and his deductions were to be made but he was told he could not join the union as his job was sensitive at the level of management and was privy to key information. He could therefore not join the union but was under a lateral agreement. He felt this was unfair to him and therefore tendered his resignation. The 1st respondent CEO wrote an email to him indicating that they had a 5 years agreement with 2nd respondent to outsource customer care services and years of service for outsourced staff were to go 2nd respondents under their agreement. This was to be paid when a staff member left the employ of 2nd respondent. Those years of service cannot be paid while one was still an employee. It was not clear to the claimants as to who held their benefits.

The witness therefore seek to be paid his terminal benefits for years served, his notice pay as he had been retrenched by the 1st respondent and under his contract with 1st respondent he had two months of notice or payment in lieu of notice. He also claims compensation for unfair termination as no reasons were given to him by the 1st respondent for his transfer to 2nd respondent following closure of his role at 1st respondent. He had served for 5 years at 1st respondent and his years of service should be paid. He also stated that he was unfairly declared redundant without proper criteria being applied. He was issued with his Certificate of Service two months after termination which was backdated and if this had been issued immediately, it would have helped him understand he had been terminated and would have claimed his dues from the 1st respondent.

That the claimants took the partnership of the respondents in good faith but unfortunately they were exploited and their termination with the 1st respondent was done without due process. That at the 2nd respondent, he resigned out of frustrations and came to court to avoid more exploitation.

### **Defence case**

The 1<sup>st</sup> respondent case was based on the facts that in October 2010 they took a business decision to outsource some aspects of its customer service functions in Arica to 3 strategic partners being the International Business machines Corporation (IBM), Tech Mahindra and Spanco BPO Services Limited, the 2<sup>nd</sup> respondent in the case of Kenya. These customer service functions were to be outsourced to Spanco the 2<sup>nd</sup> respondent. That affected employees were notified through emails dated 25<sup>th</sup> and 26<sup>th</sup> October 201 and on subsequent dates from November 2010 to January 2011 meetings were held with the employees to discuss the effect of outsourcing and the various contracts of employment. That the affected employees were made aware that those to be transitioned to the 2<sup>nd</sup> respondent would be picked based on their specific function at the customer service department, they would be employed by the 2<sup>nd</sup> respondent on the same terms as their current terms and their years of service would be recognized by the new employer.

That on 20<sup>th</sup> January 2011 a final meeting was held where both the management of respondents were present and all the claimants were at this meeting. All claimants were notified of the transition, all 62 in numbers and were assured of their terms and conditions of employment with the second respondent. Soon after this meeting the 2<sup>nd</sup> respondent offered the claimants new employment and the 1<sup>st</sup> respondent agreed to release them to their new employer.

However one employee supposed to be transitioned, Anthony Mwema, informed the 1<sup>st</sup> respondent that he did not wish to be transitioned and requested to be retained which was accepted and he is still at the employ of the 1<sup>st</sup> respondent. Those claimants 23 and 25 requested the 1<sup>st</sup> respondent to be moved to the 2<sup>nd</sup> respondent despite the fact that they had not been identified for transition. That all the other claimants accepted the offer for new contracts and were effectively employees of the 2<sup>nd</sup> respondent from 1<sup>st</sup> February 2011.

That in this case the claimants accepted an offer for new employment and therefore into entitled to two months notice pay and that the condition on their terms and conditions of service were to be on comparable terms with those of the 1<sup>st</sup> respondent and not identical. That they are not entitled to compensation or severance pay or service pay as they are still employees of the 2<sup>nd</sup> respondent and their

case as filed should be dismissed with costs.

In evidence Mr. Anthony Mwema stated that he was employed by the 1st respondent on 1st April 2007 and placed at the call centre. He heard about SPANCO in 2010 while he was on his night shift and he also attended a meeting where Job Njiru informed him together with others that there were certain functions that were to be transferred. That some people would be 'spanked' but never gave the details.

That on 20th January 2011 there was a meeting at Panari Hotel where the management of both respondents were present and a presentation was done followed by a question and answer session. The participants at this meeting were divided into two lists and were informed that there would be letters of transfer and contracts of offer for new employment.

Mwema noted that during the questions and answers session he opted not to ask any questions but recall Oscar Ojole asked questions on terminal dues and Mr. Wokabi responded and indicated that the claimant's pension was secured. Mwema could not recall anything about an offer by the 1st respondent that the claimants could come back after two years rather their roles were to be transferred to the new partner as they were experts dealing with the call centre.

That on 21st January 2011, he got his letter and contract with 2nd respondent who were in a meeting room within the 1st respondent premises. He was to return the contract by 27th January 2011 even though the person who had given it to him had asked him to sign and return it immediately but Mwema decided to hold, read it before returning it. He consulted with various senior officers, and he talked to James Muiruri his supervisor, he had a feeling that he was not honest with him and opted to consult with his seniors. He therefore went to Patience Gachimbi the HR Manager who insisted that there were no options and he had to transition, he met Pius Wokabi who told him he was helping those to be transitioned and eventually went to Head of HR Mr. Job Njiru. He was retained but on a different department since his previous job was now outsourced to the 2<sup>nd</sup> respondent.

The second witness was Job Njiru, the Customer Service Director. That when he joined the 1<sup>st</sup> respondent on 11 October 2010 he found the outsourcing discussions ongoing from 2 emails by Rene Meza and Manoj as the managing Director and CEO Africa respectively. He was briefed on the partnership and the outsourcing and since this was his department, he got involved and he therefore organised morning team hurdles to help his team understand the new partner. There were questions and answers and since this was done at different time, different staff on shifts were given the opportunity to engage,

That the witness was at the Panari Hotel meeting on 20<sup>th</sup> January 2011 where management of the respondents were present and did a question and answer session and responded to all questions from the employees to be transitioned. They addressed pension and terms and conditions of their new employment. There was no promise that the affected staff would be at liberty to return to the 1<sup>st</sup> respondents after two years.

That later new contracts were issued, the offer was to be accepted or rejected. Only Anthony Mwema rejected and he was retained and still working with the 1<sup>st</sup> respondent. The rest took the offer by the 2<sup>nd</sup> respondent and have no claim as against the 1<sup>st</sup> respondent as all their dues were paid by 31<sup>st</sup> January 2011 and Certificates of Service issued. That Elizabeth Muigai and Lillian Mbombua requested to be transitioned and this was immediately effected.

## **Second respondent**

The 2nd respondent stated that they offered the claimants contracts of employment with terms comparable to those that they enjoyed with the 1st respondent upon which they executed different contracts effective 1st February 2011. This was pursuant to discussions that the respondents had with regard to commercial arrangements that were to allow the 2nd respondent carry out the call centre services for the 1st respondent and the need for the 2nd respondent to have experienced staff to start the business. The new contracts were therefore entered into voluntarily.

The 2nd respondent further stated that part of the discussions between them and the claimants was that they were to take into consideration the number of years of service with the 1st respondent into account in the new employment. This would be carried forward and recognized by the 2nd respondent. That the salary paid to the claimants was comparable to what they had with 1st respondent as well as benefits similar to those that they enjoyed before and had salary increments in accordance with the 2nd respondent's scheme. That there is no responsibility to pay terminal dues as none of the claimants have been terminated by the 2nd respondent.

In evidence the 2nd respondent called Mr. Ronald Nyakwemba the Human Resource Manager since 20th June 2011. That since he joined the 2nd respondent several of the claimants have since left their employment. He confirmed that there was a meeting held in 2012 arising from the need of the claimants to understand the transition clause and as the responsible Manager organised a meeting where the 1st respondent was invited and was in attendance. The discussion was about the claimant seeking to go back to the 1st respondent and the issue of their bonus with the 2nd respondent. That the bonuses were not similar to what claimants got with the 1st respondent, the medical scheme was inferior but the witness took the claimant through all the issues raised and agreed to have a follow up meeting.

The witness further stated that from his understanding of the agreements between the respondents, the 2nd respondent had a contract obligation to the transferred claimants and on secondment to recognize their years of service. When Tom Ojole was moved and deployed back with the 1st respondent he retained his functions and was paid by the 2nd respondent as the employer and not the place where he was placed. He had only been deployed there.

The witness confirmed to the court that as the human resource manager, he was not aware of any transfer of assets and liabilities to the 2nd respondent when the claimants became their employees.

### **Assessment**

1. What then was the relationship between the Claimants and the respondents?
2. What was the relationship between the respondents?
3. Did that affect the rights of the claimants?
4. Was this a termination of employment or a redundancy?
5. What should happen in cases of outsourcings/transfers of business?
6. Do the claimants have a remedy?

These are useful questions for the court to address before delving into the claims placed for court arbitration.

Under Kenyan law, an employee has been defined under Section 2 of the Employment Act as;

***“Employee” means a person employed for wages or a salary and includes an apprentice and indentured learner;***

An employer has also been defined under the same section to mean;

***“employer” means any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual and includes the agent, foreman, manager or factor of such person, public body, firm, corporation or company;***

Therefore, an employee and an employer may enter into a contract of service as;

**... an agreement, whether oral or in writing, and whether expressed or implied, to employ or to serve as an employee for a period of time, and includes a contract of apprenticeship and indentured learnership but does not include a foreign contract of service to which Part XI of this Act applies;**

This is how an employer/employee relationship is defined under Kenyan law. Once these parties get into such a relationship and in a written contract like the parties herein, this contract help outline the terms and conditions of such employment, which binds the Court to rely on in the event of a dispute or the need for the parties to such a contract wishing to review the terms and conditions, terminate or in any other way deal with their relationship. To this contract, most employers and employees also have work place policies that may be attached to the contract or issued to employees for good management or for good administration of their affairs. These particulars must however comply with Section 10 of the Employment Act, they can be enhanced but not to the detriment of the employee.

In this case I note the claimant had individual contracts with the 1st respondent that outlined their particulars, dates of employment and the terms and conditions to govern their relationship. This is a key document under Kenyan law as it guides this Court when there is a conflict. The Court must go back to this document to understand what the intentions of the parties were as at the time of commencement of their relationship. This is the document as outlined in the Claimants attachments No. 67, 135, 144, 155, just to list similar documents, but unfortunately most of the claimants who attached these document had only the 1 page and not the rest. Even the two witnesses who appeared for the claimants did not have this contract document attached in full to help the Court appreciate the outlined terms of their relationship with the 1st respondent. That notwithstanding, in the event of a dispute the duty rests with the employer to produce the contracts of employment as they must keep a record;

**Section 10(7) if in any legal proceedings an employer fails to produce a written contract or the written particulars prescribed in subsection (1) the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer.**

From the evidence of the claimants the contract as between them and the 1st respondent could be terminated upon notice of two months or payment in lieu of this notice. Even though the claimants had sought to have three months pay in lieu of notice, this was contested in cross-examination and they confirmed that indeed two months was what had been agreed upon and in their contracts.

That as it may, when parties have a contract spelling out their terms and conditions of engagement, they can terminate their relationship as agreed in the contract or by operation of the law depending on the circumstances of each case. If the termination clause is ambiguous, Courts have been called in some cases to arbitrate and make a decision. These are rare cases as the law is very clear on termination.

First, termination may occur as agreed by the parties to a contract and defined under Sections 10 (3) (b) of the Employment Act;

**(b) The length of notice which the employee is obliged to give and entitled to receive to terminate his contract of employment;**

Even where a contract spells out a termination clause, for the same to take effect, the employer in giving such notice must give reasons for such termination and follow due process. This is an important provision as any employee who is terminated without following due process is at law allowed to dispute the lawfulness or fairness of the termination. This termination must therefore be in writing. And as contemplated under Section 35 of the Employment Act, any employee who receives this written notice and does not understand it, the employer shall orally explain it to the employee in a language that the employee understands.

These provisions are set out in mandatory terms. They must be met otherwise any termination that does not comply will not only be found to be unlawful but also unfair;

Secondly, termination can also be at the instance of an employer who finds an employee to have

committed gross acts of misconduct. This will result in summary dismissal;

Thirdly, termination can also occur due to redundancy. The procedure applicable in such an occurrence is well outlined in Section 40 of the Employment Act;

Fourthly, another termination contemplated under the Act is that as under Section 38 Where an employee gives notice of termination of employment and the employer waives the whole or any part of the notice, the employer shall pay to the employee remuneration equivalent to the period of notice not served by the employee as the case may be, unless the employer and the employee agree otherwise. And

Termination can occur due to insolvency.

In all these cases of termination, the law envisage that an employee must be notified in writing and with reasons for the same where termination is at the instance of the employer, the same must be explained to the employee orally and in a language they understand. This is the applicable law in Kenya.

The issuance of a Certificate of Service is indicative of the end of employment for the noted duration in the certificate as the date when an employee ceased being in the employ of an employer must be noted in this certificate. It creates a closure of the relationship. Any other engagement will open a new relationship. As contemplated under Section 51 of the Act,<sup>[1]</sup> failure to issue this certificate, an employer faces criminal sanctions as failure to comply one commits an offence and shall on conviction be liable to a fine not exceeding one hundred thousand shillings or to imprisonment for a term not exceeding six months or to both. In this case, the 1st respondent in compliance to these requirements issued this Certificate to the claimants on 31st January 2011 indicating that the claimants had ceased being their employees. To go back, they had to be on a new contract of service/employment. I believe the claimants witnesses when they indicated that the 1st respondent CEO for Africa was only doing a public relations job when he promised them of a window period of two years within which they could come back to the 1st respondent. With the Certificates of service issued, they ceased being employees of the 1st respondent and could only be engaged on a different arrangement. Their new employer was the 2nd respondent.

In this case, the claimants stated that despite reading the email from Manoj Kohli dated 25th October 2010 and the one dated 26th October 2010, and the town hall meetings held for Customer Services on diverse dates with the last one being on 20th January 2011, they were never issued with any written notices of termination from the 1st respondent. It was admitted by both parties that indeed their relationship terminated after the 1st respondent communicated about outsourcing their customer services to the 2nd respondent. The 2nd respondent proceeded to issue letters of offer to the claimants and upon acceptance and signing; new contracts were drawn and signed. This process was facilitated by the 1st respondent. I note the submissions of the 1st respondent, particularly as regards to the termination of the claimants that they agreed, accepted and received their respective letters of appointment with the 2nd respondent by signing their respective letters of appointment. That this effectively terminated their employment relationship.

What then became of the individual contracts as between the claimants and the 1st respondent? What became of the individual as against the collective?

I disagree with the claimants submission that this case can be compared to **Industrial Cause No. 1616 of 2012, Aviation and Allied Workers Union versus Kenya Airways Limited and 3 others** ( KQ case) in that, unlike the KQ case where the employees were taken through a voluntary retirement plan and then a redundancy process, in this case, the respondents decided on outsourcing, an agreement seems to have been drawn between the respondents in exclusion of the claimants and in utter disregard of their individual contracts as between the claimants and the 1st respondent proceeded to issue the letters dated 19th January 2011 and soon thereafter the 2nd respondent issued letters of offer and contracts of employment were signed. I however agree with the 2nd respondent, in their submission that outsourcing is good and an effective cost saving strategy when used properly as the tool allows employer to focus on the core areas of business.

However, even in a good case of outsourcing the same should not go against the provisions of Article 41 of the Constitution on ensuring fair labour practices. As much as majority of citizens are looking for better employment opportunities, the same should not be used by employers who come together to defeat the ends of justice by having arrangements that strip employees off benefits that they would have otherwise continued to enjoy had the employers not interfered with that relationship based on agreements as between themselves in exclusion of the affected employees. This is not what is envisaged in a society that is open and democratic where transparency and accountability must be guaranteed.

The 1st respondent was not precluded from terminating the claimants on good grounds where they found that they could not sustain the customer service department. Since they still needed this service as provided by the 2nd respondent, the reasonable thing to do in the circumstance was to ensure the affected employees gave their individual consent to the new arrangement. This is what claimant's No. 23 and 25 did.

The 23rd and 25th Claimants requested to be moved to the 2nd respondent even though they had not been identified to be moved from the 1st respondent as they were to be retained. This therefore means this could have been possible to the other claimants if upon good individual assessment, they had the chance to make a decision to move to the new employer and individually request thus to be moved. By moving them as a group was tantamount to forcing them to work for an employer they had not asked to work for however good the terms of their employment were outlined.

The case of Anthony Mwema seem to be unique, he stood out alone, went to the various officers to insist that he did not wish to be moved to the 2nd respondent. Noting that his job function had been outsourced, the 1st respondent found him another task to do within other departments. If there had been a transparent process indicating that those who did not wish to be transitioned had a choice to remain and get 'fixed' in another department like Mwema was, then they would have had this choice to make. This was the alternative that was not offered to the other claimants apart from the 23rd and 25th claimants who out of their own will decided they wished to be transferred.

My reading of the Employment Act, 2007 is that it is anchored on the Constitution which sets the preamble within which labour rights are to be enjoyed in Kenya. The need to ensure employers and employees are guaranteed fair labour practices.

It is important to appreciate that for a long time in Kenya, employees have not had the necessary legal protection and a well laid down procedure that outline the unique circumstances of the labour relations until the enactment of the Employment Act, 2007 and the Labour Institutions Act with the former setting out the legal framework that is rights-based and the latter outlining key institutions that are to govern labour relations. These institutions include the Industrial Court as set out in the Industrial Court Act that give the Court a wide Jurisdiction to positively and proactively interpret various statutes vis-à-vis labour relations in Kenya. Of paramount importance is the place where protection of labour is situate under the Constitution, as a fundamental right and freedom under Article 41, which set out the labour regime and position the protection of fair labour practices under the Bill of Rights making fair labour relations a condition fundamental to freedom of every human being.

By having Article 41 of the Constitution, 2010 protecting labour relations/practices, it was a constitutional declaration with the purpose of ensuring that the legislative framework governing labour relations in Kenya was in accordance with the Bill of Rights. This sets the right to fair labour practices in the equity jurisdiction of the Industrial Court, in a changed constitutional dispensation.

Previously the legal regime operative for labour relations was bound with constraints especially for individuals who were not unionized and had no muscle to fight for fair labour practices. It is not possible under the Employment Act, 2007.

The Employment Act, 2007 has now created a framework for the regulation of labour relations in a changed political dispensation. Since 2007 the Industrial Court has used its equity jurisdiction to judicialise labour relations by setting out in its decisions in what acceptable labour practices are. These

pronouncements effectively are revolutionalising labour relations in Kenya, and have led to the fleshing out of the concept of the fair labour practices. Unfair labour practices have traversed the entire terrain of individual dismissal law and collective bargaining law.

By constitutionalising an entitlement to fair conduct is somewhat problematic as traditionally Bill of Rights were intended to regulate legislation and government power, not the conduct of employers.<sup>[2]</sup> Indeed such a right as fair labour practice is unique to the Kenyan constitutional regime.

To determine the ambit of this open-ended right, regard must be had, first, to what is meant by a *labour practice*, and, thereafter, to what is meant by a *fair labour practice*. In both issues, reference must be made to the unfair labour practice jurisprudence by the Industrial Court. The Employment Act, 2007 once enacted allowed the court to declare their view on labour relations policy.<sup>[3]</sup> This power to give meaning to the concept of fair and unfair labour practices results in the court being used by employers and employees as an arena of struggle. The fruit of this struggle is a body of jurisprudence regulating both individual employment relations and collective labour relations.

With regard to individual labour relations, the Court has handed down decisions dealing with virtually all aspects of the employment relationship, ranging from unfair dismissals,<sup>[4]</sup> employment opportunities,<sup>[5]</sup> appointment<sup>[6]</sup> and selective criteria to promotions.<sup>[7]</sup> These pronouncements of the Industrial Court relating to labour practices within the realm of the individual employment relationship indicate something of what conduct constitutes a labour practice. As far as the issue of fairness of a labour practice, regard must be had to the Employment Act, 2007. For the vast majority of employees, whether in the public or private sectors, the provisions of this legislation, rather than the Bill of Rights, provides the principle guarantees of fair labour practices. It is only for those persons not covered by the respective employment legislations (members of the disciplined forces) that afford a degree of protection that would otherwise be denied.<sup>[8]</sup>

The Act or the Court has not defined what *fairness* is but we can borrow from other jurisdictions with similar results. In the South African Case of **Council of Mining Unions vs. Chamber of Mines of SA (1985) 6 ILJ 293 (IC)** held;

***When granted the its ‘unfair labour practice’ jurisdiction, the Court decided not to define precisely what it understood by the concept of ‘fairness’ or its acronym, ‘equity’. What it did say, however was that fairness was something more than lawful. This meant that even though conduct was lawful, it was not necessarily fair.***

Whether conduct is fair or not necessarily involves a degree of subjective judgement. However, this is not to suggest that the assessment of fairness is unfettered or a matter of whim. Rather, regard must be had to the residual unfair labour practice; the employment relationship would still exist. But due to the unfair labour practice the employee is left unprotected. The unfair conduct of the employer relating to a particular employee or employees can then be termed as unfair labour practice. Thus, any understanding of fairness must involve weighing up the respective interests of the parties – as well as the interests of the public.

With this background on the Kenya law, the parties made extensive submissions with the 2nd respondent going out of their way to share a detailed comparative jurisprudence from other jurisdictions. This was very informative to the assessment of this case. It was contended that the claimants had notice of the partnership between the respondents and that it had been made clear that the 1st respondent Call Centre was to be taken over by the 2nd respondent who specialised in these services. That there were emails sent that were received and read by the claimants as confirmed by the claimants witnesses that upon receipt of these emails they went further and searched to know what ‘outsourcing’ meant, an indication that they were aware of what was going to happen to them. Subsequent to these emails, there were morning hurdles with their manager at work. A follow up meeting held at Panari hotel with a session of questions and answers meaning they were aware and had ample notice. They then went ahead to sign new contracts and hence became employees of the 2nd respondent who was to recognise their years of service for time served with 1st respondent. They were not required to change work stations only the employer changed.

The 2nd respondent outlined that the law in Kenya relating to redundancies is well developed but it does not regulate outsourcing. That in the case of **Aviation and Allied Workers Union versus Kenya Airways Limited and 3 Others**[9] is distinguishable from this case where the court found the concept of ‘outsourcing’ as an unfair labour practice. That unlike in that case, according to the 2nd respondent, outsourcing where well utilised like in this case is a good practice which allows business to thrive and supports the Kenya Vision 2030.[10] That In the case of **Kenya Hotel and Allied Workers union versus Travellers (TIWI) Beach Hotel (owned by Dhanjal Investment Limited), 2006**, the Court held that the jurisdiction of the court to pass orders in relation to industrial matters is not so much from considerations as to the existence of contractual rights and obligations, as on considerations of equity, security of the employees, promotion of industrial peace and thereby of the larger interests of the community. That the court should look at continuity. That in this case there was no redundancy rather the respondent ensured there was continuity and certainty of the claimants employees and should not be punished for it.

That unlike Kenya in countries where there was a law that allowed outsourcing, there was clear provisions that can be of persuasive authority in this case. In the United Kingdom, applicable is the **Transfer of Undertakings (Protection of Employment) Regulations, 2006 (TUPE)**, which are modelled around the EU Directive on acquired rights, Directive 2001/23/EC. They do not prohibit outsourcing as a business model and have a clear regulatory framework on the procedures applicable and the employees are protected as they can refuse to have their employment transferred and cannot be treated as having been dismissed by the employer. In refusing a transfer, an employee is deemed to have resigned their positions and not entitled to claim under redundancy. In the case of South Africa, there is a legal framework under the **Basic Conditions of Employment Act**, which under Section 41(4) provides that an employee who refuses to accept the employer’s offer of alternative employment is not entitled to severance pay.

That in comparison to these jurisdictions, the respondents faced with similar situation acted in the best interests of the claimants. That the reliefs sought by the claimants should be dismissed.

The 1st respondent on the other hand strongly submitted that there was ample notice since October 2010 when outsourcing of Customer Services was communicated to all the claimants. There were emails, management morning hurdles to brief employees and a meeting on 19th January 2011. That after the meeting on 19th January 2011, letters were issued to all the claimants save claimant number 23rd and 25th. That there was an offer of new employment which the claimants accepted and signed new contracts to start work at the 2nd respondent on 1st February 2011. That each claimant had time to read and accept the new contract. That the effect of this was that the claimants were fully informed of the decision to terminate their services and their transfer to 2nd respondent on comparable terms comparable to those under which the claimants served while at the 1st respondent employment. That the claimants accepted the new offer without any compulsion or unilateral transfer and that the 2nd respondent had agreed to recognise all years of service as accumulated under the 1st respondent employment. That the condition that was given by the 1st respondent was by accepting the employment offered by the 2nd respondents, the claimants ceased being employees of the 1st respondent.

That the letter of 20th January 2011 to the claimants noting the changes and offer of employment in seven (7) days was sufficient time for them to decide and accept the offer or reject it. They were excited with the new offer and thought the future would be brighter. That by virtue of the acceptance of the offer from 2nd respondent, the claimants effectively terminated their employment with the 1st respondent. That the claimants are therefore not entitled to notice pay as by mutual agreement, their contracts with 1st respondent were terminated. The claimants were not made redundant. That the respondents did not breach any contract as the offer made to the claimants was to be employed by the 2nd respondent on *comparable* terms as with the 1st respondents and not on *identical* terms and therefore cannot claim for any breach thereof.

It is important to revisit the letter dated 19th January 2011 issued to all the claimants herein save for 23rd and 25th claimants. The letter from 1st respondent was loaded with issues that I wish to breakdown;

**Question of outsourcing** – the letter was outlined as follows:

**RE: Outsourcing to SPANCO**

***We have in the last few months engaged you in discussions regarding the outsourcing of some aspects of the Airtel Kenya Customer Services functions to SPANCO.***

***We are pleased to inform you that we have concluded our negotiations with SPANCO and that as part of the deal, SPANCO has agreed to offer you employment on terms and conditions that are comparable to those under your current contract of employment with Airtel Kenya. The effective date with SPANCO is 1st February 2011. ...***

The 'we' in this communication imply that there are several parties to these negotiations. And the third party being SPANCO who was to offer new employment to the claimants. The indicated discussions regarding the outsourcing in the various emails and 'morning hurdles' that the claimants were said to have received.

What therefore is outsourcing? As indicated in the submissions of the 2nd respondent

***... Is a tool that, from an employer's perspective, is used to reduce costs by transferring portions of work to outside suppliers who have expertise in the specific portions of work rather than undertaking the task in its entirety. It is said to be an effective cost saving strategy when used properly and the tool allows employer to focus on the core areas of business. Outsourcing can, but does not have to, involve the transfer of employees from one firm to another.***

If this is the employers' perspective, there must be an employee's perspective. These interpretations should be so as to protect the work security of employees and employers affected by a business outsourcing, transfer or on new employment where employers are at risk as far as severance pay is concerned. Employees are at risk in relation to their jobs. Properly addressed the benefit is for both employers and employees to facilitate the transfer of businesses while at the same time protecting the employees against unfair job losses with a balance consistent with fair labour practices.

Without a specific law in Kenya that outline what should go into an outsourcing in a business, the possibility for abuse and circumvention of the statutory protections by unscrupulous employers is easy to imagine but this is not the case here as in the absence of a specific legislative provision, Article 41 of the Constitution becomes applicable with the standard being the use of fair labour practices.

In this assessment I wish to note the words of my Brother Judge in the KQ case where in finding that the process taken by the employer in declaring employees redundant was unfair went on to hold;

***... Under section 43 and 45 of the Employment Act 2007, the employer must establish valid reason or reasons for termination, and demonstrate that it followed fair procedure. Fairness in all forms of employment termination is the staple of Industrial Law. There is no doubt in the mind of the Court that the reason or reasons advanced by the 1<sup>st</sup> respondent in the mass retrenchment are objectively, not valid reasons. KQ is merely using a financial downturn to justify its replacement of unionized employees with outsourced and foreign workers. It is a company that is expanding and as stated by its CEO, requires more, not fewer employees. The procedure was fundamentally flawed, and the claimant is entitled to the remedies sought.***

Even where there are good reasons for an employer to terminate an employee, the employer must demonstrate that it followed fair procedure. What is 'fairness' is that which would apply to both the employer and the employee based on the facts before court. This finding was similar as in the case of *National Union of Metalworkers of SA v Vetsak Co-operative Ltd and Others, 1996 (4) SA 577 (A)*, where the court held;

***... Fairness comprehends that regard must be given not only to the position and interests of the workers, but also those of the employer, in order to make a balanced and equitable assessment. ... The fairness required in the determination of an unfair labour practice must be fairness towards both***

***employer and employee. Fairness to both means the absence of bias in favour of either. ... There are no underdogs.***

Therefore, without a definition of what ‘outsourcing’ is under any law in Kenya I am persuaded by the ‘fairness’ criteria, the labour practices and fair labour practices as outlined under Article 41 of the Constitution. Similarly, my reading of what outsourcing has been articulated from other jurisdictions is persuasive.

‘Outsourcing’ has been said to occur where the managers of a business prefer to concentrate on the core work of the business and to enter into a contract with another entity to perform services that are peripheral. The transfer must therefore have a transfer of a business as a going concern and the transfer must be by the old employer to the new employer. A ‘going concern’ means a business in operation and whether transfer has occurred is a factual matter, to be determined objectively by reference to all relevant factors considered cumulatively, the list not being exhaustive and none of the factors individually decisive, as held in the South Africa Case of **South African Airways (PTY) Limited versus Aviation Union of South Africa and Others**, supreme Court of Appeal of south Africa, Case No. 123 of 2010. The court held;

***Where parties wish to enter into an outsourcing agreement, and then for the business to revert to the outsourcer, or to be transferred to another provider, there must be a clear re-transfer, demonstrated through written contracts or conduct, of all assets and obligations of the business, including the transfer of the workforce rights and obligations so that no difficulty arises in invoking the protection afforded by s. 197 to affected employees who have been involved in carrying out the services provided for in the outsourcing agreement.***

This assertion was also held in a previous case in 2008 in **Crossroads Distribution (pty) Ltd t/a Jowells Transport versus Clover SA (pty) Ltd**, 20 [2008] 6 BLLR 565. The Court then was of the opinion that;

***The entity which provided the service in this case was not transferred at any stage. There was no transfer of any kind, only the conclusion of separate transactions starting with the termination of open contract of one contract and ending in one contract. A transferring party (the “old employer”) and a transferee (“new employer”) as envisaged by s. 197 are also not identifiable in this case. This is a case where an institution on termination of a contract which it has concluded as principal for the provision of services, contracts with another provider for the same service. Section 197 as it stands does not apply to such a situation [outsourcing or transfer]. This can be demonstrated with an example ... a municipality has a contract with a certain car hire company (“company A”) to meet the travel needs of its employees. If it then terminates that contract and concludes a contract with “company B”, must all the employees of company A be employed by company B? Surely not.***

Therefore, outsourcing does not mean the rights of employees in whichever entity abet. Quit to the contrary, employees either move as part of a going concern in the outsourcing or remain with the employer with their rights unaffected. On the other hand, if such employees wish to terminate their employment and get new employment with the new entity, this is equally regulated. The employee protection both ways is guaranteed.

What then is a transfer?

A ‘transfer’ on the other hand means the transfer of a business by one employer (“the old employer”) to another employer (“the new employer”) as a going concern.

Under United Kingdom law that Kenya heavily borrowed from with regard to the old labour laws regime, what is applicable is the 2006 No. 246 Terms and Conditions of Employment, the Transfer of Undertakings (Protections of Employment) Regulations 2006. These regulations refer to ‘transfer’ rather than ‘outsourcing’ and define a transfer as;

***... ‘relevant transfer’ means the transfer or a service provision change to which these regulations***

***apply in accordance with regulation 3 and ‘transferor’ and ‘transferee’ shall be construed accordingly and in the case of a service provision change falling within regulation 3(1) (b), the ‘transferor’ means the person who carried out the activities prior to the service provision change and ‘transferee’ means the person who carries out the activities as a result of the service provision change.***

Under Section 3 of the regulations:

***3 (1) these regulations apply to –***

***(a) A transfer of an undertaking, business or part of an undertaking or business situated immediately before the transfer in the United Kingdom to another person where there is a transfer of an economic entity which retains its identity;***

***(b) A service provision change, that is a situation in which-***

***(i) Activities cease to be carried out by a person (“a client”) on his own behalf and are carried out instead by another person on the client’s behalf (“a contractor”);***

***(ii) Activities cease to be carried out by the contractor on a client’s behalf (whether or not those activities had previously been carried out by the client on his own behalf) and are carried out instead by another person (a “subsequent contractor”) on the client’s behalf; or***

***(iii) Activities cease to be carried out by a contractor or a subsequent contractor on a client’s behalf (whether or not those activities had previously been carried out by the client on his own behalf) and are carried out instead by the client on his own behalf.***

... ..

The regulations continue to outline the conditions that apply in such a case.

For outsourcing or transfer to take effect as held above, the same must involve one employer to another and the affected employees in any outsourcing agreement or a transfer must give their individual consent or where unionised, with the representation of the Union. This is *unless* the entire or any part of a business is being transferred as a going concern where the employee’s employment continues without interruption as if they had not stopped their employment relationship. The employer entity changes and not the employees’ terms and condition of service. These remain unchanged in such a scenario of outsourcing or transfer.

Similarly where a whole or a part of a business or trade is outsourced or transferred, unless there is a consent from the affected employees, all the rights and obligations between the old employer and each individual employee as at the time of the outsourcing or transfer continue in force as if they had been rights and obligations between the new employer and each employee. Consequently anything done before the outsourcing or transfer by or in relation to the old employer is to be considered to have been done in relation to the new employer.

Outsourcing and transfer of business in whole or any part is between an old employer and a new employer, the new business owner. Since there is no privity of contract between the two employers, any affected employee must give their individual consent and continuity of their employment is not interrupted. The employee contract of employment remains protected in law and the same cannot be altered at the instance of one party even if for the benefit of the other without their consent. An agreement must be concluded with the appropriate persons or Union.

Equally, an employee who upon due process being followed moves with the whole or part of a business outsourced or transferred, also takes the subsisting liabilities with him or her. Personal liabilities move with the person. Any loans, money advanced or overdrafts move with the individual employee to the new employer in the outsourced or transferred business in whole or in part.

In the context of the Kenyan Constitution Article 41 on the protection of fair labour practices and the particular placement of the subject of termination under the Employment Act being under Part VI that deal with *Termination and Dismissal*, the core of these provisions lie in between ensuring a balance in seeking to protect employees against the loss of their jobs in the event of an outsourcing or business transfer. This protection entails ensuring that the employees are treated fairly.

In comparative jurisdiction where the subject of outsourcing and transfer has been extensively gone into, I note the context of the United Kingdom as outlined by the 2nd respondent. TUPE Directive provides that;

***Upon a transfer of an undertaking, business or part thereof to another employer by reason of a measure or legal transfer, the rights and obligations arising from a contract of employment shall be transferred to the new employer.*** [\[11\]](#)

In the Constitutional Court of South Africa, in the case of **National Education health and Allied Workers Union versus University of Cape Town and Four Others, Case CCT 2/02**, Ngcobo J: in quoting the applicable Directives of the Council of European Communities stated that;

***The purpose of the Directive was to protect the workers against the loss of employment in the event of the transfer of business as held In the case of Landsorganisation I Denmark for Tjnerbudet I Denmark v Ny Molle Kro, [1987] ECR 5465.***

In South Africa, apart from the Constitutional Court pronouncements as above, there is a legislative framework that governs outsourcing as under section 197 of the Labour Relations Act, 1999. In this law the balance that is seeks to ensure is the employer's interest in profitability, efficiency or survival of the business or disposal of it whereas the employee's interest is job security and the right to freely choose an employer on the other hand.

These are good practices of persuasive authority in this case. They form a basis under which an outsourcing or a transfer of a business can be effectively undertaken. This would prevent the loss of employment by employees or the employer burden of paying severance benefits in a case of mass retrenchment that would negatively affect the economy and labour peace. Outsourcing and transfers protect the employment of workers and facilitate the sale of businesses as going concerns by enabling the new employer to take over the workers as well as other assets.

However, as outlined above, the 1st respondent concept of outsourcing is fundamentally different from the general practice elsewhere and in terms of fair labour practices as under the Constitution and Part VI of the Employment Act. as outlined in their letter to the claimants dated 19th January 2011, the 1st claimant in an 'outsourcing' arrangement with the 2nd respondent agreed to have the claimants an '... offer you employment on terms and conditions that are comparable to those under your current contract of employment...' this is not by consent of individual employees or as going concern where the offer from the pre-agreements between the respondents was not negotiated to enable the claimants make choices and where these choices were not possible have them move to the new employer on an arrangement that was to ensure, as far as possible, that their rights were safeguarded in the change of employer by enabling them to remain in employment with the new employer on the terms and conditions agreed with the transferor the 1st respondent.

Without these safeguards where the 1st respondent was keen to close the deal upon '... we have concluded our negotiations with SPANCO and that as *part of the deal*, SPANCO has agreed to offer you employment ...' [emphasis mine], the claimants were left with limited choices. Whether the 'deal' was for better or for worse, in an outsourcing arrangement, the rules require individual consent to move with the business to the new employer or to be moved as a going concern. In the claimants case however, there was termination by the 1st respondent without securing the terms and conditions agreed in their individual contracts. Whatever deal had been arrived at as between the respondents, the claimant was not privy to it. They could not enforce it in law or under their new contracts as issued by the 2nd respondent. In the court reading of the new contract issued to the claimants, their terminal benefits as with the 1st respondents were not outlined and binding on the 2nd respondent.

Noting that there was a ready employer on site, taking over the Customer Services department of the 1st respondent, there was no shortage of work or shortage of people to be employed. The 1st respondent had the option to give notice as outlined under Kenyan law to affected staff in that department that they needed to outsource, terminate them and let them engage with the 2nd respondent on a willing employee-willing employer basis. The act of outsourcing without securing the claimant's terms and conditions as agreed with the 1st respondent was tantamount to a termination. The other alternative available to the 1st respondent was to declare the claimants redundant, pay severance pay and let them engage with the 2nd respondent on new terms just like it happened under their new contracts on new terms and conditions less payment of their severance pay by the 1st respondent. This was a labour practice was an unfair labour practice.

To demonstrate this, the respondent did not submit any evidence that indeed there was an agreement as between them to have the terminal service years transferred as between themselves. The fact that even after the claimants moved to the 2nd respondent employ they kept calling for meetings to address this fact is indicative that all was not well. They were issued with Certificates of Service effectively severing their employment relationship with the 1st respondent. Whatever agreement was between the respondents '*... SPANCO has agreed to recognize all years of service you have accumulated as an Airtel Kenya employee up to and including the 31st of January 2011.*' This is not what an outsourcing or transfer of business entails, this must be clearly spelt out in the contract of employment between the concerned employee and the new employer failure to which the former employer must complete their end of the bargain as between themselves and their employee before conferring a responsibility unsecured with a third party.

The mood for the meeting on 20th January 2011 seems to have been well prepared by the emails from Manoj Kohli and Rene Meza that did show cases the benefits of supporting the new initiative. These emails set out parts of the agreement the respondents had gone into but just parts and portions of it. It outlined that;

***For Africa:***

- o ***A kick start to the BPO industry across Africa***
- o ***Create more skilled jobs as we build our customer base and transfer knowledge to parties***
- o ***Development of local talent to develop an onshore BPO industry in Africa that has the capacity to grow into a major centre for global off-shoring***
- o ***New benchmarks of excellence in the African telecom sectors.***

Confronted with these high marketing strategies and with high chances of career enhancement opportunities for the employees who will transition to the partners, the claimants must have been keen to support these ideas. But not everything was as transparent as it appeared from these emails. There was no full indication of the considerations that the claimants had to make. They were effectively being led to termination.

Indeed what the 1st respondent CEO for Africa is alleged to have said to the claimant at the meeting held on 20th January 2011 at Panari Hotel is what would have been a good basis for an outsourcing agreement. A transfer to another entity and if that new entity was not working then in a period of two years the employees could consider and come back to the principal employer. Unfortunately, as important as this meeting was supposed to have been none of the parties herein documented it or the outcomes of it. The promises from the CEO Africa were contested by the 1st respondent and the fact that the claimants were taken through what was to happen to them with the outsourcing contested and hence of no effect. I take it; this was a lost chance for the parties herein to have set the record correct.

In the assessment of this case, I find that the claimants were effectively terminated by the 1st respondent. This termination was procedurally flawed as the letter dated 19th January 2011 and issued to the affected claimants was not an outsourcing or a transfer it was a termination without taking into account the

terminal dues of the claimants. Where an employee is not fairly treated and an employer undertakes processes to defeat the ends of justice this amounts to a labour practice that is fundamentally an unfair labour practice in the meaning of Article 41 of the Constitution and therefore unfair termination as under section 45 of the Employment Act. I find the 1st respondent liable for the unfair termination of the claimants.

With regard to the 23rd and 25th claimants, as outlined above, in an outsourcing or transfer of business, an employee can give their individual consent or as a going concern where their rights and benefits are protected. This consent is obtained from the free will of an employee who upon good and reasonable assessment of the offer before them is able to make an informed choice. These two claimants were not issued with the letter dated 19th January 2011. I take it all employees of the 1st respondent received the various emails from management from October 2010 with a notification that a decision had been taken to outsource customer service to SPANCO. As noted by the claimant witnesses, they saw this email, read them and even went out of their way to search and understand what 'outsourcing' meant and entailed. I take it then, some employee took this email seriously and others did not as some did not imagine they would be affected by its message.

These two claimants out of their own free will requested to be moved to the 2nd respondent. This request was immediately accepted. I will not disturb that which is freely given and freely taken. The two claimants cannot therefore claim any unfairness on the part of the 1st respondent or the 2nd respondent in taking them on board as their new employer. If at the 2nd respondent employ they have any other cause of action, this can still be pursued separately. As regards the claim herein, nothing arises.

Equally the case of Anthony Mwema is worth noting. He was part of the 62 employees identified to be transitioned to the 2nd respondent as stated by the 1st respondent. He expressed his wish not to be transitioned and sought to be retained by the 1st respondent. This was accepted upon request and he is still working with the 1st respondent. He stated in his evidence that for him to be retained, he went through a process and had to seek the intervention of several senior officers, Job Njiru and others who found an alternative job for him as his department had been outsourced.

This evidence was a confirmation that given the chance, all the other 61 claimants would have taken time to see the four (4) senior officers to argue their individual cases. This does not seem to have been an option offered in the issues as outlined in the letter dated 19th January 2011. If anything to cause the claimants to go round all these offices looking for the 4 officers would have added tension and added no meaningful engagement for the 1st respondent who should have been open and candid at the meeting held on 20th January at Panari Hotel. This was unreasonable expectation on the part of the respondent that whichever claimant wished to re-negotiate their transition ought to have done and gone through what Anthony Mwema went through. This is tantamount to a labour practice that is unfair. It was reasonably expected that the transition was well intended; otherwise the 1st respondent should not have gone through it with the 2nd respondent and hence put the claimants through a process that they knew was flawed and meant to fail. The claimants must have taken the offer in good faith only to realise that this was a good business deal for the respondents and a huge loss to them. They got terminated by their old employer without possible access to their years of service which Anthony Mwema has secured.

## **Remedies**

On the remedies sought, on notice pay, I find that the letters circulated to the employees of the 1st respondent were general and not directed to any particular claimant herein by Manoj Kohli and Rene Meza were information sharing but not notices to the claimants on their transfer or outsourcing. Equally the notice in the letter dated 19th January 2011 is not the notice as envisaged under section 35 of the Act. Far from it. I will therefore give each claimant notice pay as under the contract outlined for **two months pay based on the last salary from the 1st respondent on 31st January 2011. This is per the attached schedule marked "A"**.

Service pay is due as under section 35(5) but with conditions that an employee who is on a registered

pension scheme, registered with NSSF or a scheme as under the Retirement Benefits Act I note from the attachments of the claimants, their pay slips indicate there was a pension scheme, NSSF and NHIF. The claimants do not fall under the category of employees due for service pay. This is declined.

Severance pay is due as under section 40 of the Act. This is in a case for redundancy. This did not stand out as one such case. This is declined.

Leave due was not outlined. I will not grant under this head.

Having established there was unfair termination, I will award compensation to each claimants based on the number of years they had served the 1st respondent. The maximum allowable is 12 months as under section 49 of the Act. In computing the compensation, I will base the same on the basis that for each year served one month pay will be a reasonable compensation. I have attached a schedule marked " B"

In will award costs of the suit to the claimant as against the 1st respondent. The 2nd respondent to bear their own costs.

For the above reasons, the claim of the 23rd and 25th claimants is hereby dismissed and enters judgement for the other claimants as against the 1st respondent as follows:

Read in open court on the 17<sup>th</sup> May 2013 in the presence of all the parties.

I note the computation of the compensation payable to the claimants require more information from both the 1<sup>st</sup> respondent and the claimants, the employment records to be submitted within 7 days and the court to confirm the compensations payable to the claimants on 24<sup>th</sup> may 2013.

- 1. A declaration that the 1st respondent unfairly terminated the claimant\'s contract of employment;**
- 2. The 1st respondent shall pay the claimant the following**
  - a) Compensation for unfair termination at Kshs. 17,500,254.00 as outlined under schedule marked "B";**
  - b) Notice pay at Kshs. 8,931,272,00 as outlined in the schedule marked "A"; and**

**Total amount due Kshs.26,431,526.00**

- 3. The 1st respondent to pay the costs of the case.**
- 4. The 2nd respondent to meet their own costs.**

**Dated this 24th day of May 2013.**

**M. MBARU**

**JUDGE**

**In the presence of:**

**Court Clerk: Jacob Kipkirui**

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**LIST A**

<b>CLAIMANT</b>	<b>DATE EMPLOYED</b>	<b>NO. OF YEARS SERVED</b>	<b>SALARY AS AT 31/1/11</b>	<b>NOTICE PAY</b>
1. ELIZABETH WASHEKE	01/04/2007	3	61,050	122,100
2. CATHERIN MUTHUI	08/11/2003	7	82,709	165,418
3. MARY WACUKA WANJIKU	01/10/2006	4	134,940	269,880
4. JUDITH RUTO	01/04/2007	3	61,050	122,100
5. JUNE ODERO	14/01/2010	1	58,678	117,356
6. SHEM MUTEGI	24/09/2007	3	84,610	169,220
7. DIANA MAINA	01/02/2008	2	61,050	122,100
8. PAUL MUREITHI	15/03/2005	5	67,075	134,150
9. GRACE ODIEMBO	01/04/2007	3	58,678	117,356
10. EVELYNE MAINA	01/04/2007	3	61,050	122,100
11. MILDRED ELEGA	01/04/2007	3	80,861	161,722
12. PURITY MUKURIA	08/07/2000	10	124,181	248,362
13. ANN KINYANJUI	09/05/2005	5	64,305	128,610
14. TABITHA KIMANI	01/04/2007	3	61,050	122,100
15. GLADYS ONYANGO	01/04/2007	3	58,678	117,356
16. VIVIAN ANDERA	01/02/2006	4	85,039	170,078
17. NICHOLAS CHEGE	01/02/2006	4	63,282	126,564
18. JACKSON MACHOGU	01/04/2005	5	132,607	265,214
19. LEVY MUTHOMI	14/01/2010	1	58,678	117,356
20. DOREEN MURUNGA	01/04/2007	3	80,861	161,722
21. SAUMU JUMA	02/06/2006	4	87,819	175,638
22. LINDA NJAGI	16/12/2005	5	66,055	132,110
23. ELIZABETH MIGAYI	114667	NIL	NIL	NIL
24. JAMES KIRAGU	01/04/2007	3	58,678	117,356
25. LILIAN MBOBUA	07/07/2000	NIL	NIL	NIL
26. KABERIA KANGAI	01/10/2006	4	63,282	126,564
27. STELLA WANGAI	01/04/2007	3	61,050	122,100
28. JULIUS MUGANE	01/04/2007	3	64,997	129,994
29. JULIA OWINO	01/04/2007	3	61,050	122,100
30. FAITH GIKUNDA	06/02/2008	2	58,678	117,356
31. PATRICIA MUNYAO	01/04/2007	3	58,678	117,356
32. VINCENT NGILA	14/09/2004	6	63,282	126,564
33. GERALD MUTUA	01/02/2008	2	61,050	122,100
34. EUNICE KHIRU	01/04/2007	3	61,050	122,100
35. SUE MWAURA	01/04/2007	3	61,050	122,100
36. ERIC NATEMBEYA	01/04/2005	5	122,291	244,582
37. MATHEW MUTISO	01/04/2005	5	126,266	252,532
38. TOM OJOLE	01/04/2007	3	70,600	141,200
39. EDWIN KIAMBO	01/03/2007	3	78,547	157,094
40. SHEILA IMBOGO	05/04/2004	6	63,282	126,564
41. KANJAGUA NGARI	01/03/2010	1	58,678	117,356
42. CURTIS MALELI	01/04/2007	3	61,050	122,100
43. BANICE WARUI	01/10/2006	4	66,055	132,110
44. APOPHIA MWENDE	01/02/2008	2	58,678	117,356
45. CAROL ONYARI	01/04/2007	3	61,050	122,100
46. ENOCK OBWAKA	01/10/2006	4	70,600	141,200
47. ALEX MACHARIA	01/01/2005	5	64,305	128,610
48. NELLY AWINO	01/02/2008	2	103,625	207,250
49. MARY WACUKA	01/10/2006	4	132,607	265,214
50. JULIUS ASMAN	01/04/2007	3	58,678	117,356
51. VERA KEMUNTO	07/07/2000	10	76,465	152,930
52. ANNE MAKAU	01/07/2007	3	64,305	128,610

53. FELIX OCHOLA	08/11/2003	7	63,282	126,564
54. SAMIR ABDULKADIR	01/04/2007	3	75,658	151,316
55. JACKLINE CHEBET	01/09/2005	5	80,861	161,722
56. MICHAEL OKUTOYI	01/04/2007	3	64,997	129,994
57. MOLLY KARIUKI	06/02/2008	2	61,050	122,100
58. VICTOR OSIMBO	01/10/2006	4	86,885	173,770
59. CATHERINE MUTIE	21/08/2003	7	63,282	126,564
60. LUCIA OKUMU	01/04/2007	3	58,678	117,356
61. LEWIS NJERU	01/06/2007	3	61,050	122,100
62. LAWRENCE WAMUKHUMA	01/04/2007	3	84,610	169,220
63. JARED NYAMWARO	01/04/2007	3	61,050	122,100
<b>TOTAL</b>				<b>8,931,272</b>

LIST B

CLAIMANT	DATE EMPLOYED	NO. OF YEARS SERVED	SALARY AS AT 31/1/11	Compensation due
1. ELIZABETH WASHEKE	01/04/2007	3	61,050	183,150
2. CATHERIN MUTHUI	08/11/2003	7	82,709	578,963
3. MARY WACUKA WANJIKU	01/10/2006	4	134,940	539,960
4. JUDITH RUTO	01/04/2007	3	61,050	183,150
5. JUNE ODERO	14/01/2010	1	58,678	58,678
6. SHEM MUTEGI	24/09/2007	3	84,610	253,830
7. DIANA MAINA	01/02/2008	2	61,050	122,100
8. PAUL MUREITHI	15/03/2005	5	67,075	335,375
9. GRACE ODIEMBO	01/04/2007	3	58,678	176,034
10. EVELYNE MAINA	01/04/2007	3	61,050	183,150
11. MILDRED ELEGA	01/04/2007	3	80,861	242,583
12. PURITY MUKURIA	08/07/2000	10	124,181	1,241,810
13. ANN KINYANJUI	09/05/2005	5	64,305	321,525
14. TABITHA KIMANI	01/04/2007	3	61,050	183,150
15. GLADYS ONYANGO	01/04/2007	3	58,678	176,034
16. VIVIAN ANDERA	01/02/2006	4	85,039	340,156
17. NICHOLAS CHEGE	01/02/2006	4	63,282	253,128
18. JACKSON MACHOGU	01/04/2005	5	132,607	663,035
19. LEVY MUTHOMI	14/01/2010	1	58,678	58,678
20. DOREEN MURUNGA	01/04/2007	3	80,861	242,583
21. SAUMU JUMA	02/06/2006	4	87,819	351,276
22. LINDA NJAGI	16/12/2005	5	66,055	330,275
23. ELIZABETH MIGAYI	114667	NIL	NIL	NIL
24. JAMES KIRAGU	01/04/2007	3	58,678	176,034
25. LILIAN MBOBUA	07/07/2000	NIL	NIL	NIL
26. KABERIA KANGAI	01/10/2006	4	63,282	253,128
27. STELLA WANGAI	01/04/2007	3	61,050	183,150
28. JULIUS MUGANE	01/04/2007	3	64,997	194,991
29. JULIA OWINO	01/04/2007	3	61,050	183,150
30. FAITH GIKUNDA	06/02/2008	2	58,678	117,356
31. PATRICIA MUNYAO	01/04/2007	3	58,678	176,034
32. VINCENT NGILA	14/09/2004	6	63,282	379,692
33. GERALD MUTUA	01/02/2008	2	61,050	122,100

34. EUNICE KIIRU	01/04/2007	3	61,050	183,150
35. SUE MWAURA	01/04/2007	3	61,050	183,150
36. ERIC NATEMBEYA	01/04/2005	5	122,291	611,455
37. MATHEW MUTISO	01/04/2005	5	126,266	631,330
38. TOM OJOLE	01/04/2007	3	70,600	211,800
39. EDWIN KIAMBO	01/03/2007	3	78,547	235,641
40. SHEILA IMBOGO	05/04/2004	6	63,282	379,692
41. KANJAGUA NGARI	01/03/2010	1	58,678	58,678
42. CURTIS MALELI	01/04/2007	3	61,050	183,150
43. BANICE WARUI	01/10/2006	4	66,055	264,220
44. APOPHIA MWENDE	01/02/2008	2	58,678	117,356
45. CAROL ONYARI	01/04/2007	3	61,050	183,150
46. ENOCK OBWAKA	01/10/2006	4	70,600	282,400
47. ALEX MACHARIA	01/01/2005	5	64,305	321,525
48. NELLY AWINO	01/02/2008	2	103,625	207,250
49. MARY WACUKA	01/10/2006	4	132,607	530,428
50. JULIUS ASMAN	01/04/2007	3	58,678	176,034
51. VERA KEMUNTO	07/07/2000	10	76,465	764,650
52. ANNE MAKAU	01/07/2007	3	64,305	192,915
53. FELIX OCHOLA	08/11/2003	7	63,282	442,974
54. SAMIR ABDULKADIR	01/04/2007	3	75,658	226,974
55. JACKLINE CHEBET	01/09/2005	5	80,861	404,305
56. MICHAEL OKUTOYI	01/04/2007	3	64,997	194,991
57. MOLLY KARIUKI	06/02/2008	2	61,050	122,100
58. VICTOR OSIMBO	01/10/2006	4	86,885	347,540
59. CATHERINE MUTIE	21/08/2003	7	63,282	442,974
60. LUCIA OKUMU	01/04/2007	3	58,678	176,034
61. LEWIS NJERU	01/06/2007	3	61,050	183,150
62. LAWRENCE WAMUKHUMA	01/04/2007	3	84,610	253,830
63. JARED NYAMWARO	01/04/2007	3	61,050	183,150
<b>TOTAL</b>				<b>17,500,254</b>

[1] 51. (1) An employer shall issue to an employee a certificate of service upon termination of his employment, unless the employment has continued for a period of less than four consecutive weeks.

[2] See D Davis, H Cheadle & N Haysom (eds) *Fundamental Rights in the Constitution* (1997) 208.

[3] Section 43. (1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.

(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.

[4] **Industrial Cause No. 1616 of 2012, Aviation and Allied Workers Union versus Kenya Airways Limited et al**

[5] **Industrial Cause No. 567 of 2012, Silas Rukungu Karanja vs. Teachers Service Commission.**

[6] See **Industrial Cause No. 1065 of 2012, Dr. Anne Kinyua vs. Kenya Tea Development Authority and Others.**

[7] See **In the Industrial Court, Petition No. 41 of 2012 in Robert Muriithi Ndegwa vs. Ministry of Tourism**

[8] See Johan De Waal, Iain Currie, G. Erasmus *The Bill of Rights Handbook* (4th ed. 2001) Juta, 391.

[9] Industrial Cause No. 1616 of 2012

[10] Vision 2030 - a government project geared towards the successful implementation of the 'Economic Recovery Strategy for Wealth Creation and Employment Creation' – to be implemented in successive five year medium-term plans (MTP).

[11] See, the Preamble to the Directive provides that:

“Whereas economic trends are bringing in their wake, at both national and Community level, changes in the structure of undertakings, through transfers of undertakings, businesses or parts of businesses to other employers as a result of legal transfers or mergers;

Whereas it is necessary to provide for the protection of employees in the event of a change of employer, in particular, to ensure that their rights are safeguarded;”