REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

(Coram: Mwilu DCJ & VP, Ibrahim, Wanjala, Njoki, Ouko, SCJJ)

PETITION NO. E023 OF 2023

—BETWEEN—

SYMON WAIROBI GATUMA .... APPELLANT

-AND-

KENYA BREWERIES LTD .... 1ST RESPONDENT

EAST AFRICAN BREWERIES LTD .... 2ND RESPONDENT

KENYA MALTINGS LTD .... 3RD RESPONDENT

EAST AFRICAN MALTINGS LTD .... 4TH RESPONDENT

(*Being an Appeal from the Judgment of the Court of Appeal at Nairobi (Karanja, G.B.M Kariuki & J. Mohammed, JJ.A*) *in Civil Appeal No. 172 of 2013 delivered on 14th July 2017)*

Representation:

Mr. Namada Simoni for the Appellant
(*Namada & Co. Advocates)*

Mr. James Okeyo for the 1st to 4th Respondent
(*Muthoga Gaturu & Co. Advocates*)

JUDGMENT OF THE COURT

A. INTRODUCTION

[1] This appeal is premised on Article 163 (4) (b) of the Constitution, and was filed pursuant to the leave issued by the Court of Appeal by its ruling dated 9th

June 2023 certifying the appeal as one involving a matter of general public importance. The Court of Appeal in singling out the issues for determination did not delineate the questions of law but highlighted that the main issues revolve around the unilateral reduction of salary yet retaining the basic tenets of employment and whether it is fair labour practice to change terms of employment especially as refers to remuneration while retaining basic tenets of said employment.

B. BACKGROUND

[2] The appellant was employed by the 1st respondent as an Artisan Grade F, attached to the engineering department in its malting unit, effective from 3rd November, 1986. On 23rd April 2003, he was informed that the 1st respondent had de-linked its malting operations from its beer business and subsequently, declared all positions in the malting unit redundant. In consequence, the 1st respondent offered the appellant a redundancy package totaling Kshs. 2,083,852/-. After statutory deductions, the take home amount was Kshs. 1,109,363/-. Two days later, the appellant received a letter of employment from the 3rd respondent offering him a permanent position as a Technical Operator in its production department.

[3] The appellant claims to have been taken advantage of due to the absence of his trade union representation, the Kenya Union of Commercial, Food & Allied Workers (KUCFAW), and that he was intimidated into signing the letter on 28th April 2003 which significantly reduced his gross salary from Kshs. 66,064/- to Kshs. 29,665/-. He continued to earn the latter amount until 31st May 2009, when his position was once again declared redundant by 4th respondent. Consequently, he received a redundancy package based on the six years he had worked for the 3rd respondent. After his termination, the appellant felt he was treated unfairly by the respondents, prompting him to institute a suit before the Industrial Court.

C. LITIGATION HISTORY

i. At the Industrial Court (Now ELRC)

[4] The appellant moved the Industrial Court in ***Cause No. 1011 of 2010*** by way of a Memorandum of Claim seeking the following reliefs:

1. *A declaration that the appellant was practically and actually up to his time of retirement on the 30th of June 2009 continuously an employee of the 1st and 2nd respondents working within its specialized Malting Department and that there was no lawful and actual severance of employment between the 1st and 2nd respondents and the appellant in 2003.*
2. *A declaration that the reduction of the appellants salary from May 2003 to his retirement in June 2009 was illegal and unfair and that the appellant is entitled to payment by the respondents severally of the total of the amount unlawfully deducted from his salary totaling Kshs. 3,076,915/- plus interest thereon from the time of retirement 30th June until full payment.*
3. *A declaration that the retention of the appellant's calculated house allowance payment from May 2003 to the 28th July 2010 was illegal and the appellant is entitled to its full interest at court rates from 1st May 2023 until its payment plus the deducted amount above totaling Kshs. 189, 697/-.*
4. *A declaration that the appellant is entitled to a 20 years long service certificate from the 1st and 2nd respondents and payment of the attendants above totaling Kshs. 148,000/-.*
5. *An order for the respondents jointly and severally to pay the claimants costs to this case.*

[5] The appellant posited that the delinking was merely a charade, as in reality, the employer did not change. The 1st and 2nd respondents remained the principal; his work and shift schedules remained the same, along with the production and machines carrying out the operations; not to mention, all communications and actions involving the NSSF and retirement benefits contributions and management were undertaken by and through the 1st and 2nd respondents. Likewise, that throughout his service from 2003 to 2009, he still continued to enjoy and receive medical cover, working uniform, food rations and entertainment provided and managed by the 1st and 2nd respondents. What's more, at the time of his retirement he underwent clearance with the 1st and 2nd respondents and received his Certificate of Employment from the 1st

respondent to the effect that he had served the 1st respondent, from 3rd November 1986 to 31st May 2009.

[6] In response, the respondents argued that the decision to separate the 1st respondent and its barley growing operations, which led to the registration of the 3rd respondent, was a prudent commercial decision aimed at ensuring the survival and prosperity of both entities in a changing commercial environment. In furtherance of the said objectives, the 1st respondent released all its employees who had been seconded to the 3rd respondent. That it followed due process by issuing the requisite redundancy notices to the union and the affected employees, including the appellant, and paid the appellant a redundancy package before he took up employment with the 3rd respondent. On top of that, they urged that the differential payment resulting from the de-linking process, which was the sum due to the appellant upon his retirement, was to be deposited into the appellant's Retirement Benefits Scheme Account and was duly paid out.

[7] The respondents further argued that the appellant was procedurally declared redundant, duly paid a fair redundancy package, and at his own free will subsequently took up the employment offer made by the 3rd respondent. Therefore, in 2003, the appellant ceased to be an employee of the 1st respondent, before completing 20 years of service. On that account, he was not entitled to the 20-year long service award. For those reasons, they alleged that the appellant's claims, which surfaced seven (7) years after he took up employment with the 3rd respondent, was an afterthought.

[8] Upon hearing the parties, the trial court (*Rika J)* held that in regulating labour, courts must be ready to disregard corporate separation between parent and subsidiary entities and allocate responsibility to the ultimate decision maker. Companies create subsidiaries in response to their business requirements. Sometimes subsidiaries are created in the form of façade companies, the learned Judge opined, adding that in labour law, such subsidiaries do not insulate their parents against wrongful or abusive control.

Where façade companies are used to evade or sidestep labour regulatory burdens, the courts must see beyond the façade.

[9] In establishing the *appellant's employment standing with the respondents*, it was the court's opinion that the subsidiaries of the 1st and 2nd respondents appeared to function as divisions within the 2nd respondent; given that, the fundamental business of the 1st and 2nd respondents, which is beer production, is the end user of collateral functions such as the sourcing of barley, sorghum and malt; therefore, the subsidiaries did not run independently and have no real control over their business and legal decisions. Inevitably, they are not traditional subsidiary companies of the 2nd respondent but rather divisions incorporated to perform individual functions within the two main entities, which are the 1st and 2nd respondents, where control and decision-making power reside; and with employees being moved from one entity to the other, without any formalities or legal consequences. Consequently, the court held that the subsidiaries of the 1st and 2nd respondents may in fact be viewed as facade companies.

[10] Being cognizant of the aforementioned, the court held that the appellant, was employed on 3rd November 1986 by the 1st respondent and was a member of the KUCFAW. In effect, his terms and conditions were periodically negotiated and agreed upon between the 1st respondent and KUCFAW. It acknowledged that the de-linking process was indeed discussed between the union and the employer on various occasions. Although the union did not resist the 1st respondent's decision, which seemed irreversible, it requested that the released employees be treated as retrenched rather than termination through redundancy; furthermore, it could not be involved in discussions over the fresh employment of some of the affected employees by the 3rd respondent, as it had not signed a recognition agreement with it; therefore, this was viewed as a legitimate technical reason for its non-involvement in the re-employment process. Subsequently, the union requested that the 1st respondent treat the issuance of fresh employment as a separate matter to be discussed and resolved between the individual employees and the 3rd respondent's management. In

light of this, the court recognized that it is against this backdrop that the appellant lost his right of union representation in his engagement with the 3rd respondent.

[11] Be that as it may, the court specified that where a business is transferred or merged, the rights of an employee under the old business are not affected unless there is insolvency in the previous employer. That a transferee must continue to observe the terms and conditions of employment agreed in the CBA between the transferor and the employee's trade union. Thus, the court found that the 3rd respondent had retained its economic identity after de-linking; the business carried on before and after de-linking did not change, there being no insolvency assuming there was a previous employer; and, the 3rd respondent continued to perform the business of the malting unit, serving the same customers with barley, malt and sorghum. That while the contract was entered into freely, there was no equality of bargaining strength, bearing in mind the absence of the Union. Nevertheless, the CBA should have continued to protect the employees that were retained and transfer of assets and liabilities should have been accompanied by a transfer of the employees. Accordingly, there was no justification to consider the appellant as a new employee and lower his salary since there was continuity in all aspects, expect in the salary.

[12] Further, the learned Judge underscored that all facts that pointed to a continuity of business were evidenced by: the Certificate of Employment given to the appellant upon his exit on 31st May 2009 by the Human Resources Department of the 1st respondent indicating the date of employment as 3rd November 1986 to November 2009 as a Technical Operator employed by the 1st respondent; the respondents lack of cogent explanation on the relationship between the 4th respondent and the appellant, and when the former employed the latter given that no letter of appointment or transfer was availed, as well as its relationship with the 3rd respondent; in addition, while other employees crisscrossed the parent companies and subsidiaries at will, without formal appointments or transfers, this practice raised questions about the necessity of asking the appellant to exit the 1st respondent company due to redundancy only

to then offer him inferior employment under the 3rd respondent; furthermore, on leaving employment the appellant's clearance form was processed by the 2nd respondent's Group's human resources, health services and facilities managers who signed the clearance form.

[13] Accordingly, the court held that the appellant ably demonstrated that he was denied his employment rights through manipulations of the respondents, which involved creating facade companies to exploit labour and avoid providing fair and adequate compensation to the appellant. This was disregarded when the business was transferred to a facade subsidiary, where the appellant's workload was increased and his salary reduced. Besides, interference with his salary enabled the respondents to deny him other employment entitlements.

[14] On the issue of *differential payments,* the court held that there was no justification why the respondents retained the appellant's differential payments assessed in 2003 at Kshs. 162,128/- up to 28th July 2010. Besides, had the monies been deposited into the appellant's Retirement Benefits Schemes account, it would have earned interest at rates of 11.5% and 14.9% on certain dates; and would not have been subjected to deductions. The court deemed the deduction of Kshs. 113,489/- to be unexplained. It recognized that the 12% rate interest pleaded by the appellant as reasonable and allowed the prayer for differential payments and interest amounting to Kshs. 184,826/-.

[15] Regarding *the long service award*, the learned Judge reasoned that although the appellant was awarded the long service award after his 15 years of service, no good explanation was advanced for denying him the 20-year award, being that it was the 2nd respondent's policy to do so. Furthermore, by the 2nd respondent reversing the long-term award it had issued to Catherine, an employee whose contract was terminated in 2003 upon de-linking and who was subsequently re-hired, suggested bad faith and exposed the facade nature of the subsidiaries operating under the 1st and 2nd respondents. It demonstrated the extent to which the respondents would go to prey on the vulnerabilities of labour by recalling an award issued to an employee two years later because another,

who was denied, filed a claim. Accordingly, the court held that the appellant was entitled to and awarded the long service award of Kshs. 130,000/-.

[16] On the *issue of underpayment*, the court determined that the appellant should have transited to the 3rd respondent at a gross salary of Kshs. 66,064/- but was instead paid Kshs. 29,865/- at the beginning of his re-employment. Although the appellant did not earn the latter amount until his retirement on 31st May 2009, the pay slip that formed the basis for his final redundancy payment in 2009 indicated his consolidated monthly pay as Kshs. 49,989/-. There being no evidence of progression in salary, the court found that by taking the appellant's first gross monthly pay at the 3rd respondent and his last consolidated salary, Kshs. 39,927/- was the average gross monthly income earned by the appellant, for the purposes of calculating a fair total underpayment of salary. Therefore, the difference against what the appellant last earned at the maltings unit would be Kshs. 26,137/-. The court noted that the period of service after de-linking amounted to 6 years or 72 months, and not 85 months as pleaded by the appellant. As a matter of course, the correct figure payable in salary underpayment, which the court granted to the appellant was Kshs. 26,137/- over a period of 72 months amounting to Kshs. 1,881,846/-.

[17] Accordingly, the court allowed the appellant's claim on the following terms:

i. *It is hereby declared that the appellant was an employee of all the four respondents up to the date of termination on 31st May 2009.*

ii. *It is hereby declared that there was no lawful severance of the appellant's contract of employment in 2003 and his employment was in continuity up to 31st May 2009.*

iii. *It is declared the reduction of the appellant's salary in between 2003 and 2009 was unlawful. The respondents to pay to the appellant underpayment of salary for seventy-two (72) months, calculated at Kshs. 1,881,846/-.*

iv. *It is declared the retention and deduction of the appellant's house allowance differential payments was unlawful. The respondents to pay the appellant Kshs. 184,826/-.*

v. *It is declared that the appellant is entitled to long service award given after twenty (20) years of employment. The respondents to pay the appellant Kshs. 130,000/- as long service award.*

vi. *The total sum of Kshs. 2,196,672/- be paid to the appellant by the respondents within 30 days of the delivery of this award.*

ii. At the Court of Appeal

[18] Dissatisfied by this outcome, the respondents moved the Court of Appeal in ***Civil Appeal No. 172 of 2013*** citing seventeen (17) grounds which the appellate court condensed to six (6) as follows: that the learned judge erred in law and in fact by:

1. *Holding as he did in lifting the veil of incorporation of the 1st, 3rd and 4th respondents, and declaring them departments and not subsidiary companies of the 2nd respondent;*

2. *Holding as he did that the respondents' companies are facade companies formed to avoid liability or escape the obligation of an employer under the regime of labour law and fair practice;*

3. *Declaring that there was no lawful severance of the appellant's contract of employment in 2003 and that the appellant was an employee of the 1st respondent from 1986 to 2009 and thereby disregarding the contract of employment between the 3rd respondent and the appellant;*

4. *Holding that there was unlawful reduction of the appellant's salary between 2003 and 2009 and ordering the respondents to pay the appellant Kshs. 1,881,846/- as underpayment of salary for seventy-two months;*

5. *Holding that the appellant was entitled to a differential amount of the house rent allowance and ordering the respondents to pay the appellant Kshs. 184,826/-; and*

6. *Holding that the appellant was entitled to and should have been awarded long service award for 20 years upon his termination and ordering the respondents to pay the appellant Kshs. 130,000/- as long service award.*

[19] In a judgment delivered on 14th July 2017, the Court of Appeal (*Karanja, G.B.M. Kariuki & J. Mohammed JJ. A)* allowed the appeal and set aside the judgment and decree of the Industrial Court. On the issue of *separate legal entities*, the appellate court held that a limited liability company has a legal personality and it acquires its own property, rights and liabilities separate from its members upon incorporation. Therefore, the respondent companies being duly registered companies are separate legal entities with their own rights and liabilities.

[20] Concerning *whether the appellant's employment was terminated on account of redundancy upon de-linking*, the appellate court found that the delinking of the 1st and 3rd respondent companies was as a result of a prudent commercial decision whose objective was to ensure survival and preservation of the property of the two entities in a changing commercial environment as a valid ground for declaring some employees redundant. Placing reliance on the Court of Appeal of New Zealand decision of ***Aoraki Corporations Limited v Collin Keith Mc Gavin***; CA 2 of 1997 [1998] 2 NZLR 278 on termination brought about by redundancy, the learned Judges held that the redundancy notice issued by the 1st respondent was valid and procedurally compliant with section 40 (1) of the Employment Act, in light of the evidence that the appellant's Union had been informed, thus providing the requisite two (2) months redundancy notice.

[21] The learned Judges observed that by the appellant accepting the first redundancy severance payment from the 1st respondent in 2003 and further accepting the letter of offer in respect of employment from the 3rd respondent, then proceeding to work under the agreed terms and conditions for a period of 6 years, debunked his argument that the 1st respondent's decision to declare him redundant was unilateral and unprocedural. Accordingly, they held that the

appellant was declared redundant by the 1st respondent in 2003 and was paid his redundancy severance payment in accordance with the employment and labour laws. Similarly, that the appellant acquiesced to the new terms on employment by the 3rd respondent from 2003 and 2009 and was paid his dues during the term of his employment.

[22] On the *long service award*, the Court of Appeal held that the appellant was not employed by the 1st or 3rd respondents for a period exceeding 20 years. Subsequently, he was not entitled to a long service award of 20 years or any payment attached to the award.

(iii) At the Supreme Court

[23] Aggrieved by the aforementioned judgment, the appellant has filed this instant appeal pursuant to the Ruling of the Court of Appeal (*Musinga, (P), Omondi & Laibuta, JJ.A*) dated 9th June 2023 as one involving a matter of general public importance under Article 163 (4) (b) of the Constitution.

[24] The appellate court while recognizing that the main issue concerns the unilateral reduction of salary while retaining the basic tenets of employment, did not precisely define the issues of general public importance that this Court needs to address. In light of this, the appellant asserts that the following are the issues that arise:

i. *The place of an employee in the modern commercial space.*

ii. *The question of fair labour practice under Article 41 of the Constitution.*

iii. *The question of records and documentation and their relevance in the place of Employment. Are they relevant or their import can be ignored as the Court of Appeal found in this case.*

iv. *Is it discrimination in the work place for an employee in one section of a company to have his salary reduced and given new employment terms while employees of a similar grade scale are retained in other sections on superior terms and even have employees in one sector transferred to other Sections or Subsidiary Companies to protect them against inferior changes while others are then given new and inferior terms of employment?*

[25] Consequently, the appellant seeks the following prayers from the Court:

i. *This Petition be allowed.*

ii. *Set aside the judgment and findings of the Court of Appeal issued on the 14th July, 2017*

iii. *That this Apex Court do affirm the reasons and findings of the Employment and Labour Relations Court (Hon. Rika J) as per his judgment of 25th January, 2017.*

iv. *That this Apex Court do make its own and further findings and directions as respects the questions and issues which have been raised in this Petition to set a clear position on the said matters going forward.*

v. *The respondent be ordered to pay the appellant's costs to this Petition and or the appeal.*

[26] In opposition, the respondents have filed grounds of objection dated and filed on 25th August 2023 pursuant to Rule 42 of the Supreme Court Rules 2020. The respondents while echoing the findings of the appellate court contend that respondents are all separate legal entities, duly registered and with vested corporate status. That, yet again, the appellant invites this Court to proceed on a wrong basis by lifting the corporate veil of each of the respondents, creating a non-existent legal controversy despite every action taken having been in line with the existing and elaborate legal framework.

[27] It is their contention that the appellate court determined that the redundancy process was followed in terminating the appellant, his Union was notified by the respondents, and the appellant accepted the redundancy severance payment. Therefore, it defeats the logic for the appellant to speak to any existing links with the 1st respondent as his employer after being subjected to clear traceable redundancy procedures. Furthermore, the appellant duly accepted the subsequent offer of employment from the 3rd respondent

[28] The respondents expressly objected to the appellate court's ruling, which certified that there exist matters of public importance, as it was based on the

appellant's misleading assertions, going against many other cases litigated in the courts on the same subject as the one herein.

[29] It is their further contention that the existence of a business entity in one form or the other is indeed in a different province from that of the employment and labour relations where the clear framework is laid down on what constitutes an employment contract, who the respective parties are and how the same is created and terminated. That the issue raised by the appellant, with respect to fair labour practices under Article 41 of the Constitution are moot as they do not relate in any way, to the facts in issue. Consequently, the Petition lacks merit and ought to be disallowed as there are no sufficient grounds upon which the appellant makes an invitation to this Court.

C.THE PARTIES RESPECTIVE SUBMISSIONS

i. *Appellant's Case*

[30] The appellant's submissions are dated 24th February, 2024 and filed on 22nd March 2024. The appellant raised three issues for this Court's determination; the question of fair labour practice under Article 41 of the Constitution, the question of general public importance/interest, and the power of equality of engagement. On the *question of fair labour practices under Article 41 of the Constitution* the appellant faults the Court of Appeal for finding that respondent companies herein are independent and separate with independent actions, following the precedent set by ***Salomon vs Salomon & Company Limited 1896.*** He urges the court to find that there is a shift in the employment space beyond ***Salomon vs Salomon*** (supra) it cannot be right that an employee moving across the various units of one employer loses his rights as acquired in that employment space simply because he has moved to a subsidiary company

[31] The appellant urges that the sole purpose of the respondent shifting his employment was to reduce, so unfairly, the salaries of some of the continuing employees. Changing the terms of an employee downwards without reference to the employee is an unfair labour practice that goes against the provisions of

Section 10 (5) of the Employment Act. It is the appellant's contention that the appellate court, in rubber stamping the unfair labour practices and treatment of the appellant by the respondents, ignored the salient evidence that clearly showed that he was an employee of the 1st respondent under the holding company, which is the 2nd respondent, but simply was seconded to a specialized malting unit/department of the 3rd and or to 4th respondents. To the appellant, this is evident from the certificate of service issued pursuant to Section 51 of the Employment Act which indicates that the appellant was an employee of the 1st Respondent from 1986 to 2008 and from the employers own records.

[32] Furthermore, that from the evidence tendered, it is evident that there was discrimination against the appellant as unilateral decisions were made not supported by any agreement, even from the Union. In particular, some employees retained their old salaries and terms of service as they transitioned between the respondent companies without resigning or being issued new letters of employment, while he did not receive the same treatment. The appellant asserts that discrimination, as defined under section 5 (3) (b) of the Employment Act, occurs if there are varied terms in recruitment, training, promotion, terms and conditions of employment, termination of employment and other matters arising out of the employment.

[33] The appellant further argues that, at the moment, the place of an employee placed under a similar predicament has come under sharp scrutiny. Since in many instances the employee is never part of the business owners caucus when far reaching decisions affecting their status and place of employment are made, yet the employee is a critical cog in the survival of the same enterprise. Presently, there are four (4) pending cases involving 35 litigants, and he is certain that there are other employees who have suffered the same fate. Hence, there is need for this Court to address this question.

[34] Concurring with the trial Judge's findings, the appellant belabours that in a maze of multiplicity of companies, analysis of the employer's identity should be based on which entity has the decision-making power, given that a place of employment cannot be deemed as an employer. A court should look at who

owns and controls the tools of trade, who takes the credit for profits and bears the risks of losses, and who actually directs the order of employment and the employee in his performance of duties; and should consider the business structure rather than the legal structure to determine if the legal structure claiming to be the employer corresponds with the enterprise decision making structure. This is important, especially as new changes attempt to render labour laws irrelevant to workers who are left with no option but to comply in order to earn a livelihood. As such, he surmises that courts should not always set up tests that are based on the traditional company and employment patterns.

[35] Resultantly, the appellant urges that subsidiaries should not be used to insulate parent companies from wrongful and abusive labour conduct. Even in the strict realism of commerce, the liability of holding companies for actions of its subsidiaries is coming under scrutiny as enunciated by Sam Elson in ***"The Legal Liability of Holting Companies for Acts of Subsidiary Companies"***. Employees' rights and benefits should not be altered to their disadvantage by the simple act of being moved across the various business entities.

[36] On that account, the appellant claims that the aforesaid tests should guide the courts in dealing with cases touching on multinational companies and their employees, holding and subsidiary companies and even in the era of agencies and outsourcing of labour as the new emergent and emerging concepts in labour. This will call for stricter legal relationships between the entities to ensure that labour rights are protected across the board. Consequently, based on the definition of an employer under section 2 of the Employment Act, the appellant urges that the 1st respondent was the employer under the 2nd respondent as the holding company and the others were only their agents or factors.

[37] Regarding *the power and equality of engagement*, the appellant submits that it is unreasonable to claim equality of bargaining power between an employer and employee, especially in our jurisdiction where there is massive unemployment. In view of being exposed due to the absence of his Union, the

appellant argues that the Court of Appeal erred in failing to find that his acceptance of inferior terms was not only an illegality but could not be read as an acquiescence; considering that the Union remained hamstrung in the work place harmonization of the affected employees' terms between the 3rd/4th respondent and 1st respondent. It was wrong for the Court of Appeal to proceed and hold that an employee in that state still had the capacity and ability to negotiate on equal footing with employer and agree or disagree to the terms he was being offered.

[38] Accordingly, the appellant states that the Court of Appeal was wrong in its finding which was escapist and simplistic, and it hastily threw out the appeal without recognizing that the claim for Kshs. 184,000/- was purely on interest and underpayment and not related to the substantive cause. Hence, he prays that this Court finds in his favour.

ii. Respondents' Case

[39] The respondents' submissions are dated on 30th April 2024 and filed on 3rd May 2024. The respondents address this Court on two issues. First, *whether the respondent companies herein are independent and separate legal entities with independent actions and decision*. While affirming the decision of the Court of Appeal, they reiterate that they are all separate legal entities. They maintain that this position cannot be departed from except in instances where the statute or the law provides for lifting or piercing of the corporate veil, and adds that the appellant did not plead or present any evidence to suggest that the respondents were committing fraud or any other criminal activities. They rely on ***K. I Laibuta, A Handbook of Company Law*** and the Court of Appeal decision, ***Standard Chartered Bank Kenya Ltd vs Intercom Services Ltd & 4 others*** [2004] eKLR to buttress their submission.

[40] The respondents further submit that there was no continuity in employment as those were two different entities and the employment of the appellant was predicated on having been lawfully declared redundant by the 1st Respondent, subsequent to the redundancy severance payment being paid and then he took on fresh employment with the 3rd Respondent. Once the

redundancies were lawful and there was no claim that the payment was not in order it cannot be argued that there was unfair labour practice against the appellant in the circumstances of this case revolving around the two redundancies. Considering that he had worked for the sister company in a similar position, there was no need for the appellant to be put on probation.

[41] The second issue the respondent has raised is, *whether the appellant's right to fair labour practices as envisaged under Article 41 of the Constitution was infringed*. The respondents submit that for the Court to determine this issue it has to make a finding on whether or not the 1st and 3rd respondents met both the procedural and substantive justification tests prior to declaring the appellant redundant.

[42] With reference to the first redundancy of April 2003, the respondents propound that due process was followed by the 1st respondent by giving the appellant due notice, terminal dues, and issued a two-month notice to the Union, which was involved in the delinking process. They state that when the 3rd respondent was duly registered and seeking new employees, offering employment to the appellant, who had ceased being an employee of the 1st respondent, was a gesture of good faith and commitment, which he accepted. Upon signing the letter of offer from the 3rd respondent, which he was not coerced into signing, he began receiving pay slips from the 3rd respondent, which managed its own operations and payroll. In that case, he was no longer an employee of the 1st respondent having been declared redundant that was valid and procedurally compliant with section 16A of the Employment Act

[43] As to the second redundancy, the respondents urge this Court to affirm the appellate court's decision that the appellant accepted the severance payment in 2009 in accordance with the employment and labour laws. Relying on the Certificate of Employment issued in 2007, the respondents assert that it clearly indicates that the appellant ceased being an employee of the 1st Respondent in April 2003. Upon termination of employment with the 3rd respondent, he was

also issued with a Certificate of Employment. That being so, the appellant was not entitled to a long service award.

[44] To this end, the respondents affirm that they did not violate the provisions of Article 41 of the Constitution, and that the assertions by the appellant are moot as they do not relate in any way to the facts in issue, since the appellant was fairly treated. Hence, they urge the Court to disallow and dismiss the Petition with costs and affirm the decision of the Court of Appeal.

D. ISSUES FOR DETERMINATION

[45] Having considered the pleadings and the respective submission of the parties it is appropriate to first clearly delineate the issues to be determined by this Court. The Court of Appeal in certifying this matter as one of general public importance held as follows:

> *"16. Having carefully considered the grounds in support of the Motion for certification, we find that the application raises several substantial issues of law, one being whether it is fair labour practice to change terms of employment especially as refers to remuneration while retaining basic tenets of said employment. Prima facie, this issue transcends the circumstances of this case and may have a bearing on public interest.*
>
> *17. Secondly, the applicant has been able to identify and concisely set out the specific elements of 'general public importance' he intends to rely on. He has set out what it terms issues of consideration by the Supreme Court. The main issue revolves around the unilateral reduction of salary yet retaining the basic tenets of employment. In our considered view, this issue is a matter of general public importance."*

[46] In ***Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa*** (Amicus Curiae) (Petition 3 of 2018) [2021] KESC 34 (KLR) (11 January 2021) (Judgment), we held that in the instance that the appellate court did not identify the issues or points of law,this Court ought to pronounce itself and proceed to identify the issues/questions of law meriting its attention. It bears repeating and we must

emphasize that under Article 163(4)(b) of the Constitution it is the responsibility of the appellate court to identify the specific question or questions which in its view constitutes a matter or matters of general public importance. It is the question framed by the appellate court that gives this Court jurisdiction and therefore cannot be vaguely or broadly framed. From our own understanding of the Ruling by the Court of Appeal, we delineate the following issues for this Court's determination;

i. ***Whether it is fair labour practice to change terms of employment especially as refers to remuneration while retaining basic tenets of said employment?***

ii. ***Whether the appellant's right to fair labour practices was infringed.***

iii. ***Whether the appellant is entitled to the reliefs sought***?

E. ANALYSIS

i. ***Whether it is fair labour practice to change terms of employment especially as refers to remuneration while retaining basic tenets of said employment?***

[47] The Respondents herein are sister companies with East Africa Breweries Limited being the parent company. Kenya Malting Limited delinked from Kenya Breweries Limited and took over the operations of the malting unit after malting operations and malt production was specialized. East Africa Maltings Limited is a change of the company name of the Kenya Malting Limited. The appellant was employed by the Kenya Breweries Limited on 29th October 1986 earning a salary of Kshs. 66,064/-. Between the year 1998 to 2003 Kenya Breweries Limited conducted a delinking exercise of its malting business. Due to the delinking exercise the appellant was declared redundant by Kenya Breweries Limited. The appellant would later be absorbed at Kenya Malting with a lesser salary of Kshs. 29,865/-. He worked at Kenya Malting Limited until he was again declared redundant on 30th June 2009. It is worth to note that other employees would interchangeably work between the 1st to 4th

Respondent's with no change in terms of their employment and salary. Upon the attainment of the 20 years' service with the respondents, some employees received long term service awards inclusive receipt of a watch, Kshs. 20,000 and 600 shares.

[48] The trial Court in its analysis of the circumstance of the case held that;

> *"An employee's right is not affected by the transfer of an undertaking. Where a business is transferred or merged, the rights of an employee under the old business are not affected. Labour law seeks to preserve those rights. The salary of the employee remains protected where an undertaking, business, or part of a business is transferred to another employer. Unless there is insolvency in the previous employer's business, the terms and conditions of employment applicable, are not altered to the disadvantage of the employee, by the entry of a new employer. A transferee of business must continue to observe the terms and conditions of employment agrees in the collective bargaining agreement between the transferor and the employee's trade union…"*

[49] The Court of Appeal, for its part held that the respondents being duly registered are separate legal entities with rights and liabilities appropriate to itself. The Court found that the redundancy notice issued by the 1st Respondent was valid and procedural and in compliance with Section 40 (1) of the Employment Act. The Court noted that the appellant accepted the 1st redundancy, severance payment and subsequent letter of offer of employment wherein he worked for 6 years. The appellate Court eventually held as follows;

> *"29. It is instructive that after 6 years, the respondent received and accepted the second redundancy severance payment in 2009. We, therefore, find that the respondent was declared redundant by the 1st appellant in 2003 and paid his redundancy severance payment in accordance with the employment and labour laws. We also find that the respondent acquiesced to the new terms of employment by the*

3rd respondent from 2003 and 2009 and was paid his dues during the term of his employment.

30. Regarding the long service award, we note that the respondent was not employed by the 1st or 3rd appellants for a period exceeding 20 years. Accordingly, the appellant was not entitled to a long service award of 20 years or any payment attached to the award".

[50] The appellant's submission is to the effect that the Court of Appeal completely misapprehended the law of employment, the constitutional principles of fair labour practice and non-discrimination in the place of work. The appellant equally urges that the appellate court misapprehended the changing commercial space, which in employment terms and consideration, the technical and strict adherence and religious follow-up of ***Salomon Vs Salomon*** [1896] UKHL 1, [1987] Ac 22 in determining company decisions cannot stand. Further that, if the same is allowed it will open up and lead to a wide spectrum of mistreatment and prejudice against employees in the sphere of employment and will not guarantee any stability or clarity in the place of work for the employees and there is need for this court of intervene.

[51] Employment is predicated on a written contract between an employee and an employer. Section 10(2) of the Employment Act 2007 provides that a written contract shall contain; (a) the name, age, permanent address and sex of the employee; (b) the name of the employer; (c) the job description of the employment; (d) the date of commencement of the employment; (e) the form and duration of the contract;

[52] Section 10(5) states that any revision and/or changes to the contract by an employer shall be in consultation with the employee, and through notification of the change in writing.

[53] Section 13 of the Employment Act provides the guiding principles for the variation of contracts which mandates the employer to conduct the following if it wishes to vary the terms of employment;

a. issue prior notice to the employee;

b. engages the employee in consultations;

c. after consultation revise the contract to reflect the variation and should again notify the employee of the said changes in writing;

d. the employee must consent to the variation through inference or in writing.

[54] Article 41 of the Constitution is transformative as it provides that every person has the right to fair labour practices including the right to fair remuneration, reasonable working conditions, to form, join or participate in the activities and programs of a trade union, and to go on strike. The Employment Act provides for various rights in relation to fair labour practices. Section 5 (3) (b) of the Act specifically provides that;

> ***"(3) No employer shall discriminate directly or indirectly, against an employee or prospective employee or harass an employee or prospective employee—***
>
> ***(b) in respect of recruitment, training, promotion, terms and conditions of employment, termination of employment or other matters arising out of the employment".***

[55] The Court of Appeal has made various pronouncements in relation to Section 10 as read with Section 13 of the Employment Act and specifically on the unilateral change in employment terms. In ***Board of Governors, Cardinal Otunga High School, Mosocho & 2 others v Elizabeth Kwamboka Khaemba*** [2016] eKLR the Court of Appeal in interpreting the provisions of Section 13 of the Employment Act agreed with the trial Court that the effect of the unilateral decision to change the terms of the contract of employment was tantamount to terminating the existing contract and therefore amounts to an unfair and unjustified termination. In ***Coca Cola East & Central Africa Limited v Maria Kagai Ligaga*** **[2015] eKLR** the Court of Appeal whilst setting out the principles relevant to determining constructive dismissal relied on the case of ***Western Excavating (ECC) Ltd. -v- Sharp*** [1978] ICR 222 or [1978] QB 761, where Lord Denning held as follows:

"If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct.

He is constructively dismissed. The employee is entitled in those circumstances to leave at the instant without giving any notice at all or alternatively, he may give notice and say that he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once (emphasis ours). (See also Nottingham County Council -v- Meikle (2005) ICR 1)."

[56] The decision in ***Ibrahim Kamasi Amoni v Kenital Solar Limited*** [2018] eKLR by ELRC court specifically dealt with an instance in unilateral change of remuneration where it held that;

"…***For a reduction of salary to be valid, an employer ought to obtain the approval of an employee by communicating the reduction to an employee in a letter and causing the letter to be accepted by the employee. This is because salary is a fundamental term of employment whose reduction has negative impact on an employee's livelihood and should not be done arbitrarily or unilaterally by an employer….."***

[57] From the provisions of Section 10 (5) and Section 13 of the Employment Act it is clear that any unilateral variation of the terms of an employment contract may be deemed as a repudiation of the contract and in case the same would lead to termination of employment the same may be deemed as constructive dismissal. The provisions of Section 13 equally apply to remuneration. Any unilateral changes in remuneration and terms of

employment without informing the employee will be tantamount to an unfair labour practice.

[58] Tied to the appellant's submissions is the distinct nature of corporations. The general rule in ***Salomon Vs Salomon*** (supra) is that a company is an artificial person, separate and distinct from its directors and shareholders, and neither the directors nor shareholders are personally liable for the defaults of the company save in special narrowly defined circumstances, which form specific exceptions to the general rule.

[59] In the instance where the companies are in the relationship of holding and subsidiary companies Section 154 of the Companies Act provides the meaning of a "holding Company" and "Subsidiary" as follows;

> ***154. (1) For the purposes of this Act, a company shall, subject to the provisions of subsection (3), be deemed to be a subsidiary of another if, but only if–***
> ***(a) that other either–***
> ***(i) is a member of it and controls the composition of its board of directors; or***
> ***(ii) holds more than half in nominal value of its equity share capital; or***
> ***(b) the first-mentioned company is a subsidiary of any company which is that other's subsidiary.***

[60] Section 165-168 of the Companies Act grants the Court power to order investigation of the company's affairs on the application of its members or in other cases. Section 166 (b) specifically provides that the Court;

> ***(b) may do so, if it appears to the court upon a report from the registrar that there are circumstances suggesting-***
> ***(i) that the company's business is being conducted with intent to defraud its creditors or the creditors of any other person or otherwise for a fraudulent or unlawful purpose or in a manner oppressive of any part of its members or that it was formed for any fraudulent or unlawful purpose; or***

(ii) that persons concerned with its formation or the management of its affairs have in connection therewith been guilty of fraud, misfeasance or other misconduct towards it or towards its members; or
(iii) that its members have not been given all the information with respect to its affairs which they might reasonably expect; or
(iv) that it is desirable so to do.

[61] In ***Kolaba Enterprises Ltd vs. Shamsudin Hussein Varvani & another*** HCCC 627 of 2005 (2014) eKLR the court addressing itself to the principles in ***Salomon v Salomon*** and the capacity of parties to a suit held as follows:

> ***"…separate legal personality of a company can never be departed from except in instances where the statute or the law provides for the lifting or piercing of the corporate veil, say when the directors or members of the company are using the company as a vehicle to commit fraud or other criminal activities. And that development has been informed by the realization by the courts that over time, promoters and members of companies have formulated and executed fraudulent and mischievous schemes using the corporate vehicle. And that has impelled the courts, in the interest of justice or in public interest to identify and punish the persons who misuse the medium of corporate personality".***

[62] In ***Standard Chartered Bank Kenya Limited vs. Intercom Services Limited & 4 Others*** Civil Appeal No. 37 of 2003 [2004] 2 KLR 183, the Court of Appeal citing ***Salomon vs. A. Salomon & Company Ltd*** [1897] AC 22 and ***Adams vs. Cape Industries Plc*** [1990] 1 Ch 433 held that it is a principle of company law of long antiquity that a limited company has a

legal existence independent of its members and that a company is not an agent of its members.

[63] In the case of ***Jiang Nan Xiang v Cok Fas-St Company Limited***; Miscellaneous Application [2018] Eklr, the court held that a corporate veil may be lifted when there is no real formal legal separation of the company and its shareholders or in the instance where the company is a sham;

> ***"I find that the law on lifting the veil of incorporation is now settled. The circumstances under which a veil of incorporation would be lifted are inter alia where there is no real formal legal separation between the Company and its shareholders' personal financial affairs and/or that the Company is just a sham or the Company's actions were wrongful or fraudulent, or if the shareholders and/or directors act recklessly in the management of the business of the Company and/or design a scheme, to perpetrate financial fraud, and/or if the Company's creditors suffer unjust cost, that is, they did business with the Company and they are left with unpaid bills or unpaid Court judgment. In all these circumstances, the Court will pierce the veil of incorporation and hold the shareholders and/or the directors personally liable."***

[64] ***Halsbury's Laws of England*** **(4th Edition)** at Para 90 states that lifting of the corporate veil will be done where;

> *"…**there is fraud or improper conduct but, in all cases, where the character of the company, or the nature of the persons who control it, is a relevant feature. In such case the court will go behind the mere status of the company as a separate legal entity distinct from its shareholders or even as agents, directing and controlling the activities of the company. However, where this is not the position, even though an***

individual's connection with a company may cause a transaction with that company to be subjected to strict scrutiny, the corporate veil will not be lifted"

[65] In ***Re Southard & Co Ltd*** [1979] 1 WLR 1198 (CA) 1208, 1218 explained the distinct liability of a parent Company to its subsidiaries as follows;

> ***"A parent company may spawn a number of subsidiary companies, all controlled directly or indirectly by the shareholders of the parent company. If one of the subsidiary companies, to change the metaphor, turns out to be the runt of the litter and declines into insolvency to the dismay of its creditors, the parent company and the other subsidiary companies may prosper to the joy of the shareholders without any liability for the debts of the insolvent subsidiary."***

[66] In ***CSR Ltd Vs Wren*** (1997) 44 NSWLR 463 and ***Chander vs Cape Plc*** [2012] 1 WLR 3111 it was held that the proximity and relevant control exercised by the parent company, demonstrated by the parent's company's practice of issuing instructions to its subsidiary, and the subsidiary's consideration of parent company and group interests in its decision making are factors which a court ought to consider.

[67] In ***Adams vs Cape Industries Plc*** [1990] Ch 433 Slade LJ found no obligation in respect of a holding company-subsidiary relationship when he held as follow;

> ***"we do not accept as a matter of law that the court is entitled to lift the corporate veil as against a defendant company which is the member of a corporate group merely because the corporate structure has been used so as to ensure that the legal liability (if any) in respect of particular future activities of the group (and correspondingly the risk of enforcement of that liability) will fall on another member of the group rather than the defendant company. Whether or not this is desirable,***

the right to use a corporate structure in this way is inherent in our corporate law…."

[68] The Court in ***Adams vs Cape Industries Plc*** (supra) was considering a claim to pierce the corporate veil of Cape Industries where the Claimant wanted to execute a judgment obtained in United State against Cape Industries wholly owned subsidiary, Capasco Ltd. The Court of Appeal declined to pierce the corporate veil stating that the presence of subsidiary in United States could not be treated as presence of Cape Industries. The Court rejecting the claim and held that the veil could only be pierced if its subsidiaries should be regarded as a single economic unit; the subsidiaries were set up as a façade concealing the true facts; and that an agency relationship existed between Cape and the subsidiaries. The Court held that in aid of interpretation (of statute of contract) the court may have regard to the economic realities in relation to the companies concerned but that is the extent to which the "single economic unit" argument will succeed.

[69] From the above authorities the principles of ***Salomon vs Salomon (supra)*** are applicable in the context where corporates are involved. The prima facie position reached by applying the principle in *Salomon* in corporate groups is that each member company or corporate group is a separate legal entity. Liability will generally fall on the member and the group can structure itself so that liability from its activities will fall on a particular member and that member only.The corporate veil can only be pierced or lifted in exceptional circumstances, such as when the court is construing a statute, contract or other document which requires the veil to be lifted; when it can be shown that the company is being used as a mere façade or sham to perpetrate fraud, avoid legal obligations, or achieve some other improper purpose and, when it can be established that the company is an authorised agent of its controllers or its members, corporate or human .

[70] It is therefore the duty of a claimant to show that the parent and the subsidiary operate in a single economic unit; the actions of the parent control

the subsidiary and further that, the parent and subsidiary are engaged in fraud or improper conduct, or the subsidiary is being used as a mere façade.

[71] In this case the appellant had made allegations to the extent that the Respondent operated as one single economic unit; the transfer of the business between the respondents negatively affected the remuneration of the appellant. The trial court was therefore right to interrogate the relationship of the 2nd Respondent with the 1st to 4th Respondent. As to whether the Kenya Malting Limited acted as a façade; the intention of the Respondents was to delink its operations. Kenya Malting Limited was formed for this purpose. There was correspondence between the Kenya Breweries Limited and the union as pertains the delinking exercise and how it would affect Kenya Breweries Limited employees. The delinking was for economic reasons. Did Kenya Malting Limited act as an agent of Kenya Breweries Limited? The notice issued to the union stated that Kenya Breweries Limited was transferring its assets to Kenya Malting Limited, whereas the Respondents conducted a business that eventually led to beer production, the roles between the Respondents were distinct; no credible evidence was led that Kenya Maltings limited solely acted as an agent of Kenya Breweries Limited or that the actions undertaken by Kenya Maltings Limited were still within the apparent scope and authority of Kenya Breweries Limited. We therefore agree with the Court of Appeal that the trial Court arrived at the wrong determination that Kenya Maltings Limited was a façade.

ii. whether the appellants right to fair labour practices was infringed.

[72] Unlike other Jurisdictions with legislative frameworks in the instance of a business transfer and/or take over, the Employment Act does not provide for such a situation save for instances of insolvency under Section 73 of the Act.

[73] The European Union amended the Acquired Rights Directive 77/187 EEC adopted by the European Commission in 1977 in Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States

relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses. Article 4 of the directive provides that the transfer of the undertaking, business or part of the undertaking or business shall not in itself constitute grounds for dismissal by the transferor or the transferee. This provision shall not stand in the way of dismissals that may take place for economic, technical or organisational reasons entailing changes in the workforce.

[74] The United Kingdom has the Transfer of Undertakings (Protection of Employment) Regulations 2006 (SI 2006/246) (or "TUPE" for short) which protects employees' rights when the part of the business they work in is sold or transferred to another business. Section 4 of the Act provides for the effect of relevant transfer on contracts of employment. It specifically provides that all powers duties and liabilities under the employment contract of one employer transfer to the next employer to, inclusive of trade union recognition. Any change made to the employee's terms will be void if the sole reason for the change is the transfer itself. Any dismissal will automatically be considered unfair dismissal. However, if the transfer is for an economic, technical or organizational reason entailing change in the workforce Section 4 allows for variation of the terms and dismissal. It will be necessary to show that the dismissal was procedurally fair.

[75] The South African Labour Relations Act is also progressive in respect to transfer of contract of employment. Section 197 of the Act contemplates instances where a transfer of business takes place and states that unless otherwise agreed all the rights and obligations between the old employer and an employee at the time of the transfer continue in force as if they had been rights and obligations between the new employer and the employee. In ***National Education Health & Allied Workers Union (NEHAWU) vs University of Cape Town and Others*** (CCT2/02) [2002] ZACC 27 *Ncobo J* recognised that-

> ***'…the focus of section 23(1) is, broadly speaking, the relationship between the worker and the employer and the***

continuation of that relationship on terms that are fair to both. In giving content to that right, it is important to bear in mind the tension between the interests of the workers and the interests of the employers which is inherent in labour relations. Care must therefore be taken to accommodate, where possible, these interests so as to arrive at the balance required by the concept of fair labour practices. It is in this context that the LRA must be construed.....”

[76] Further while expressing his understanding to the provision of Section 197 of the South Africa Labour Relations Act the learned judge stated as follows in paragraph 70;

“…But the purpose of the legislature involves protecting the interests of both the employers and workers. Employers are at risk as far as severance pay is concerned. Workers are at risk in relation to their jobs. Properly construed section 197 is for the benefit of both employers and workers. It facilitates the transfer of businesses while at the same time protecting the workers against unfair job losses. That is a balance consistent with fair labour practices….”

[77] In ***Elizabeth Washeke & 62 Others versus Airtel Networks (K) Limited & Another,*** Cause 1972 of 2012, the ELRC court *(Mbaru J)* considered what an employer should do in a case of business transfer, sale or takeover. The court held that whereas there is no direct legal provision on how the process is to be undertaken, the yard stick applicable is as provided for under Article 41 of the Constitution where there should be fair labour practice. In the case, the employer was found to have undertaken unfair labour practice where there was a transfer of business without an outline as to how employee benefits and or liabilities were to be addressed.

[78] The dispute herein took place prior to the enactment of the 2010 Constitution; the Employment Act 2007 was also not applicable to the appellant

in the first redundancy (2003). The Employment Act then in force did not place an obligation on the employers to accord employees substantive and procedural justice; the employer's duty to grant the employee substantive and procedural justice, could be imposed by the contract of employment or human resource manual. Section 15 of the Trade Disputes Act Cap 234 (now repealed) granted the Industrial Court the mandate to reinstate or grant compensation to Employees who were unfairly dismissed. Section 16 of the Employment Act (now repealed) provided for instances of redundancy;

> ***16A. (1) A contract of service shall not be terminated on account of redundancy unless the following conditions have been complied with –***
> ***(a) the union of which the employee is a member and the Labour Officer in charge of the area where the employee is employed shall be notified of the reasons for, and the extent of, the intended redundancy;***
> ***(b) the employer shall have due regard to seniority in time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy;***
> ***(c) no employee shall be placed at a disadvantage for being or not being a member of the trade union;***
> ***(d) any leave due to any employee who is declared redundant shall be paid off in cash;***
> ***(e) an employee declared redundant shall be entitled to one month's notice or one month's wages in lieu of notice;***
> ***(f) an employee declared redundant shall be entitled to severance pay at the rate of not less than 15 days pay for each completed year of service as severance pay.***
> ***(2) For purposes of this section -***
> ***"trade union" means a trade union registered under the Trade Union Act (Cap 233)and***

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

[79] The Trade Disputes Act Cap 234 (now repealed) defined redundancy as follows;

"redundancy" means the loss of employment, occupation, job or career by involuntary means through no fault of an employee involving termination of employment at the initiative of the employer where the services of an employee are superfluous, and the practices commonly known as abolition of office, job or occupation and loss of employment due to the Kenyanization of a business; but it does not include any such loss of employment by a domestic servant;

[80] The Employment Act 2007 widened the scope of the unfair termination law and introduced more comprehensive provisions regarding unfair termination and requires employers to provide both substantive and procedural justice to employees during termination processes. The same was then applicable in the second redundancy (2009). **Section 40** of the Employment Act 2007 equally dealt with termination of employment on account of redundancy and provides:

"(1) An employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions -

a. Where the employee is a member of a trade union, the employer notifies the union to which the employee is a member and the labour officer in charge of the area where the employee is employed of the reasons for, and the extent of, the intended redundancy not less than a month prior to the date of the intended date of termination on account of redundancy;

b. Where an employee is not a member of a trade union, the employer notifies the employee personally in writing and the labour officer;

c. The employer has, in the selection of employees to be declared redundant had due regard to seniority in time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy;

d. where there is in existence a collective agreement between an employer and a trade union setting out terminal benefits payable upon redundancy; the employer has not placed the employee at a disadvantage for being or not being a member of the trade union;

e. the employer has where leave is due to an employee who is declared redundant, paid off the leave in cash;

f. the employer has paid an employee declared redundant not less than one month's notice or one month's wages in lieu of notice; and

g. the employer has paid an employee declared redundant severance pay at the rate of not less than fifteen days pay for each completed year of service."

[81] We have considered the redundancy of the appellant in the year 2003. There was clear communication by the 1st Respondent to both the appellant and his union. The record shows correspondence between the appellant's union and the 1st Respondent. In a letter dated 27th February 2003 the 1st Respondent issued a two (2) months redundancy notice to the union informing them of the redundancy of its 86 employees. There was a subsequent meeting between the union and the 1st Respondent on 12th March 2003. The union conceded to the redundancy vide a letter dated 16th April 2003; the appellant was equally issued a redundancy notice on 23rd April 2023. The 1st respondent offered the appellant a redundancy package totaling Kshs. 2,083,852/-. After statutory deductions, the take home amount paid to the appellant was Kshs. 1,109,363/-. Two days later, the appellant received a letter of employment from the 3rd respondent

offering him a permanent position as a Technical Operator in its production department. The appellant in part conceded that their capacity reduced during his time at Kenya Maltings.

[82] In ***Phillip Ateng Oguk & 27 others v Westmont Power [Kenya] Limited & another*** Cause Number 281 of 2014 [Formerly Mombasa High Court Civil Suit Number 187 of 2003] [2015] eKLR a case cited by the appellant and predicated around similar circumstance to this case, the Industrial Court (*James Rika J*) found that the claimants were in continuous employment of the Respondent and that they were entitled to damages for unlawful termination. The facts of the case are however distinguishable to this case; in the case certificates of recruitment were issued in the names of the two respondents, the claimants were not informed of the shift in their designation between the Respondents. Pay slips were henceforth generated on occasion in the name of Westmont, and on other occasions in the name of the Management Company.

[83] In this instance, whereas there is indication that the respondents acted as one single economic unit; the de-linking exercise sought to distinguish the respondents in their operations and to ensure they remain distinct. The Respondent's decision was not unilateral. The 1st Respondent issued a notice to the appellant within reasonable time. The process leading to delinking took place from 1999. In a letter dated 10th February 2003 the Respondents cited that Kenya Maltings had plans to reduce barley purchasing by over a half for the next two years. In the redundancy notice to the union dated 25th February 2003 Kenya Breweries Limited noted that the redundancy was in order for the two companies to survive in the changing commercial environment. The letter also stated that the separation of assets and financial structures between the companies was complete. Due procedure was adhered to by the 1st Respondent in the 2003 redundancy.

[84] While, it is not in dispute that the appellant remained at the same station, conducted the same work and was under the same medical scheme there was no indication of ill- motive or fraud on the part of the Respondents during the delinking exercise, the changes were for an economical and organizational

reasons, the appellant was paid his severance pay by Kenya Breweries limited. The subsequent employment of the appellant with Kenya Maltings, a distinct and separate company from Kenya Breweries Limited, was therefore a fresh contract and not subject to the terms and conditions of the initial contract with Kenya Breweries ltd.

[85] We therefore agree with the appellate court that the redundancy notice issued by the 1st respondent was valid and procedurally compliant with the Employment Act, the subsequent employment of the appellant was based on a new contract which the appellant agreed to, and stayed in employment for six (6) years. It is therefore our finding that the right to fair labour practice was not infringed upon by the Respondents.

[86] For this reason, we find no merit in the appeal. It is hereby dismissed and for avoidance of doubt, we affirm the judgement of the Court of Appeal.

iii. Costs

[87] Guided by this Court's holding in the case of ***Jasbir Singh Rai & 3 Others v. Tarlochan Singh Rai & 4 Others*** SC Petition No. 4 of 2014; [2014] eKLR, the general rule is that costs follow the event. However, the Court may in appropriate cases exercise discretion and decide otherwise, to ensure that the ends of justice are met. In this instance, and owing to the nature of the issues in dispute we find that the Order that commends itself to us is to direct each party to bear its own costs.

F. ORDERS

[88] We make the following consequential Orders:

(i) ***The petition of appeal dated 9th August 2023 and lodged on 4th December 2023 is hereby dismissed***

(ii) ***Each party to bear the costs of the Appeal.***

(iii) ***We hereby direct that the sum of Kshs. 6,000/= deposited as security for costs in the appeal be refunded to the appellant.***

Orders accordingly.

DATED and **DELIVERED** at **NAIROBI** this **30th** day of **August,** 2024.

....

P.M. MWILU
DEPUTY CHIEF JUSTICE &
VICE PRESIDENT OF THE
SUPREME COURT

....

M.K. IBRAHIM
JUSTICE OF THE SUPREME COURT

S.C. WANJALA
JUSTICE OF THE SUPREME

....

NJOKI NDUNGU
JUSTICE OF THE SUPREME COURT

W. OUKO
JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR
SUPREME COURT OF KENYA