REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT

AT NAIROBI

CAUSE NO.109 OF 2010

BETWEEN

TRANSPORT & ALLIED WORKERS UNION.....CLAIMANT

VERSUS

SOCIETE INTERNATIONALE DE TELECOMMUNICATIONS AERONATIQUES.....RESPONDENT

ISSUE IN DISPUTE

"Wrongful termination of Mike Odero on grounds of Redundancy"

AWARD

The claimant Union filed its memorandum of claim on 11th February 2010, through the firm of Enonda, Mak'oloo Makori & Company Advocates. The Respondent filed its reply on 25th March 2010 through the firm of Kaplan & Stratton Advocates. The grievant Mike Otieno Odero testified on 9th December 2010, led by his advocate Mr. Enonda. His testimony was supported by three other witnesses, who concluded giving evidence on 1st March 2011, when the claimant's case was closed. On the same date Mr. Makanda for the respondent informed the Court the respondent would not be calling any witness. It would rely on the pleadings and final written submissions. We received the claimant's final submissions on 16th March 2011, and those of the respondent on 7th April 2011.

The claimant's evidence and submissions can be summarized as below:-

1.1. Transport and Allied Workers Union is a registered Trade Union, under the provisions of the Labour Relations Act No.14 of 2007. Societe Internationale De Telecommunications Aeronautiques (SITA), the respondent herein, is an air transport communications global organization operating and registered in Kenya under the Companies Act, Cap 486 the Laws of Kenya. Its Industrial activities are covered under the constitution of the claimant. The two parties have signed a Recognition Agreement and, negotiated and concluded a Collective Bargaining Agreement [CBA]. The respondent employed the grievant Mike Otieno Odero as an engineer on 3rd September 1990. The CBA concluded between the parties states under clause 1.2 that ***"the terms and conditions of service herein shall be applicable to all employees in Kenya".*** There was no line drawn, between Management and Unionisable staff. This was explained by claimant's witness number 2, to be the legal tradition in France, the home country of SITA. Trade Union coverage is much more liberalized there, which influenced the incorporation of clause 1.2 above.

1.2 On 3rd August 2009, Ranaledi Nkhato, Human Resource Manager for SITA Africa wrote to the grievant. He stated there were discussions which started on 17th May 2009, between SITA and the grievant. In the discussions the respondent revealed to the grievant that it would undertake operational business re-organization at SITA Kenya. This would result in the grievant's position being declared redundant. It was the position of the respondent that the grievant had agreed to have the initial consultation on the matter directly with the respondent, without involving the claimant. The respondent had for 2 months, engaged the grievant directly. It had made an "end of service" package proposal but according to the respondent, the grievant was dithering. The letter cautioned him if he did not make a firm commitment, the respondent would proceed under Section 40 [1] [a] and [b] of the Employment Act 2007. At the time of the consultation, the grievant was regional manager, SITA East African Region.

1.3 On 9th October 2009, the respondent issued the grievant with a letter of termination of employment. According to the claimant, no reasons were given for the decision, and the termination was wrongful. The claimant wrote on 13th October 2009 protesting to the respondent on its decision. The claimant reminded the respondent that the parties had a CBA to guide employment relationships; that the grievant was covered under the CBA; and, that CBA and the Law demanded the union be consulted. The claimant union asked the respondent to reinstate the grievant, pay 12 months' gross salary for wrongful termination and comply with clause 24 of the CBA requiring the claimant to be consulted by the respondent on redundancy.

1.4 Ranaledi Nkhato replied on 26th October 2009 to the claimant, and wrote a similar letter directly to the grievant. In both letters, SITA explained that it was not its intention to bypass the claimant; the grievant had himself expressed the desire to engage the respondent directly. SITA withdrew its letter of termination of employment of 9th October 2009, effectively reinstating the grievant as demanded by the claimant. It did so, to enable it comply with the redundancy procedures under the Employment Act 2007 and the CBA. The letter to the claimant served as a notice of termination of employment of the grievant on account of redundancy. The claimant and the grievant were told by Ranaledi Nkhato that the grievant had been reinstated, but would leave on 30th November 2009 on account of redundancy. The respondent quantified the total amount payable to the grievant on the date of termination at Ksh.20,415,771.88 [twenty million, four hundred and fifteen thousand, seven hundred and seventy one and eighty eight cents only] net of tax and other statutory deductions.

1.5 Mr. Dan Mihadi, claimant's witness number 2, replied on 29th October 2009. He stated the demand for reinstatement was to be met without giving conditions. It was not proper to reinstate and issue a notice of termination without prior consultation, as stipulated under CBA Clause 24. The claimant warned the issue could lead to an industrial action. To conclude the dispute amicably, the claimant proposed the total payment to the grievant by the respondent of – Salary up to the date of Termination, Six months Salary in Lieu of Notice, Pro-rata leave, Severance Pay at the rate of 7 weeks' pay, for each

completed year of service and Gratuity of 3 months' salary.

1.6 SITA-African Region, through its Human Resources Manager Ranaledi Nkhato wrote to the claimant on 23rd November 2009. It offered to pay the grievant under the heads proposed by the claimant, save for gratuity of 3 months which the respondent argued was purely discretionary. Having adjusted pro-rata leave by 2.33 days pegged on the termination date of 30th November 2009, the total proposed termination package came to Ksh.20,592,559.16 [twenty million, five hundred and ninety two thousand, five hundred and fifty nine and sixteen cents only]. The respondent emphasized this was subject to tax and other statutory deductions. The claimant's response to this was contained in its letter to the respondent of 25th November 2009. It indicated the termination was wrongful and sought the inclusion of 12 months' salary in compensation in any proposed settlement. It held that the grievant remained an employee of SITA, until the dispute was resolved. SITA replied on the same date stating it had received advice from its lawyers in Kenya. This advice was that the claimant was at liberty to report a trade dispute to the Minister under section 62 [4] of the Labour Relations Act, but that such report did not prevent the notice of termination from taking effect. The termination of Mike Otieno Odero's contract would therefore take effect on 30th November 2009.

1.7 The claimant stated in its statement of claim paragraph 18, that the issue was reported to the Minister for Labour. A conciliator was appointed and convened conciliation meetings. The respondent did not participate in these meetings, which led to a disagreement. The Conciliator issued a certificate of disagreement on 18th December 2009.

1.8 There have been past terminations on account of redundancy at SITA. Inda Sylvester, Dorris Otieno, Joshua K'Odiawo and Peter Muhanda were all previous employees of SITA whose positions had fallen redundant. Over a period of 9 years, the respondent had been restructuring and has always consulted the claimant. There was no reason to justify the treatment of the grievant differently. SITA had paid its former employees in full, calculated the tax due on the employees' packages and paid the tax without any deductions. This was a position supported by the evidence of Edward Mwaura and Joshua K'Odiawo.

1.9. The claimant prayed the Court to Award Mike Otieno Odero the following:-

I] Redundancy payments as outlined in clause 24 of the CBA, without tax deductions taking into account company policy on tax deductions.

Ii] Salary up to the date of termination together with year 2009 cost of living indices compensation, as was the company practice at Ksh.6,285,744 [six million, two hundred and eighty five thousand, seven hundred and forty four only].

Iii] Six months' salary in lieu of notice at Ksh.3,142,872 [three million, one hundred and forty two thousand, eight hundred and seventy two only].

Iv] Gratuity of 3 months' salary at Ksh.1,571,436 [one million, five hundred seventy one thousand, four hundred and thirty six only] as per company policy.

v] Service Award as outlined in clause 30 of the CBA at Ksh.16,292,595 [sixteen million, two hundred and ninety two thousand, five hundred and ninety five only].

Vi] Pro-rata leave at Ksh.6,285,744 [six million, two hundred and eighty five thousand, seven hundred and forty four only].

This brought the total terminal benefits claimed to Ksh.34,859,519.10 [thirty four million, eight hundred and fifty nine thousand, five hundred and nineteen and ten cents only].

2.1 The respondent conceded through its pleadings and submissions filed in Court that it has a Recognition Agreement and a Collective Bargaining Agreement with the claimant. It admitted Mr. Odero

was employed as its Head of Services Operation from 3rd September 1990. The respondent rolled out a restructuring of business early 2009. The grievant's position was affected, and earmarked for redundancy. The respondent considered and found no suitable alternative employment for the grievant. Around 17th May 2009, the respondent notified the grievant personally that his position had become redundant, and it intended to terminate his contract of employment on account of redundancy. The grievant expressly informed the respondent that he wished to negotiate his package directly without the involvement of the claimant.

2.2 The respondent in any event held that the grievant had admitted under cross-examination that he was the respondent's regional Manager for East Africa. He had junior employees under his supervision and was privy to confidential company information. Under the Industrial Relations Charter, he was excluded from trade union representation. It was on this understanding that the grievant and the respondent engaged in consultation to the exclusion of the claimant. Mr. Makanda argued this was a fundamental point of Law that could be raised at any stage in the proceedings.

2.3 The redundancy was genuine and carried out procedurally. The grievant had acknowledged that redundancy was necessary. It was only after the grievant and the respondent failed to agree on the separation package that the grievant called in the claimant. The claimant wrote to the respondent alleging the grievant was its employee, and covered under the CBA. The respondent agreed to reinstate the grievant and negotiate with the claimant afresh, due to the delicate nature of its business and apprehension of an industrial action. Procedural requirements were complied with. The claimant union and the Labour Office were notified. The claimant entered into detailed negotiations with the respondent. The resultant termination of employment was not wrongful, but grounded on valid reason and carried out fairly.

2.4 Clause 24 of the CBA entitled the grievant to 6 months' salary in lieu of notice, pro-rata leave and severance pay for 7 weeks' for each completed year of service. The respective amounts were Ksh.3,142,872 [three million, one hundred and forty two thousand, eight hundred and seventy two only]; Ksh.16,281,443.79 [sixteen million, two hundred and eighty one thousand, four hundred and forty three and seventy nine cents only]; and, 1,168,243.38 [one million, one hundred and sixty eight thousand, two hundred and forty three and thirty eight cents only] In total, the grievant was paid by the respondent Ksh.20,592,559.16 [twenty million, five hundred and ninety two thousand, five hundred and fifty nine and sixteen cents only], less income tax of Ksh.6,177,767.75 [six million, one hundred and seventy seven thousand, seven hundred and sixty seven and seventy five cents only] which was remitted to Kenya Revenue Authority. The difference of Ksh.14,414.791.41 [fourteen million, four hundred and fourteen thousand, seven hundred and ninety one and forty one cents only] was paid to the grievant's account.

2.5 The grievant was not entitled to 3 months' gratuity. This was a discretionary payment, offered as part of the respondent's attempt at out-of-court settlement. The claim for 12 months' compensation in wrongful termination was made in afterthought. The grievant was notified about the redundancy and made aware of the reasons for redundancy. The breaking down of the negotiations between the parties did not make termination wrongful. The grievant was bound to pay income tax. The respondent had no obligation to shoulder this tax burden. None of the witnesses brought by the claimant produced any document in Court showing tax exemption. In any case the employment contracts between the respondent and its previous employees were private and confidential and did not create a precedent. The respondent relied on ***CA case of Kenindia Assurance Company Limited –vs- Otiende [1991] KLR 38*** in support of this position. K'Odiawo like, the grievant was a senior manager. The union was not involved in negotiating his redundancy package. The Income Tax, Cap 490 the Laws of Kenya places an obligation on employees to pay taxes. This is a personal statutory obligation, and no employer has an obligation to pay taxes on behalf of its employees. A contract seeking to exempt a taxpayer from paying taxes would be an illegal contract, and a nullity. Contracts between individuals meant to facilitate tax evasion have been declared illegal, contrary to public policy and unenforceable in the ***High Court case of Republic vs. Commissioner of Lands Ex-Parte Somkem Petroleum Company Limited [2005] eKLR.*** The income tax of Ksh.6,177,767.75 [six million, one hundred and seventy seven thousand, seven hundred and sixty seven and seventy five cents only] was remitted to KRA in accordance

with the Law.

2.6 The respondent submitted the grievant was not a credible witness. He lied on oath. He did not acknowledge in his claim that Kshs.20,592,559.16 [twenty million, five hundred and ninety two thousand, five hundred and fifty nine and sixteen cents only] was paid to him less the income tax. He did not mention this in his evidence-in-chief, only admitting the fact under cross-examination. No attempt was made to amend his pleadings to deduct the payment made by the respondent. The respondent asked the Court to dismiss the claim, with costs.

We have considered the pleadings, the evidence on record and submission of counsel, and come to the following conclusions and Award:-

3.1 The grievant was employed by the respondent on 3rd September 1990 as an engineer. By the year 2009, he had risen through the ranks, becoming the Regional Manager for SITA, East Africa region. He was initially contacted informally by Ranaledi Nkhato and K. Ogunrombi, officers from SITA Africa, based in South Africa. He was informed SITA was reorganizing its business operations, an exercise that would result in the grievant's position falling redundant. These informal discussions were made through telephone conversations. The consultations dated back to 17th May 2009.

3.2 These consultations led to an offer of a redundancy package made by the respondent to the grievant, for the total amount of Ksh.21,987,207.89 [twenty one million, nine hundred and eighty seven thousand, two hundred and seven and eighty nine cents]. This offer included a gratuity pay of 3 months' salary. The respondent communicated the offer to the grievant on 9th October 2009 and also made it clear the grievant's contract of employment stood terminated with effect from 9th October 2009.

3.3 The termination immediately drew in the claimant. In a letter to Ranaledi Nkhato dated 13th October 2009, the claimant protested its exclusion from the consultations. It stated there was a CBA governing the terms and conditions of all SITA employees in Kenya. The grievant was covered under this CBA. The termination of 9th October 2009 was wrongful. The claimant demanded the grievant be reinstated, and compensation paid at 12 months' gross salary. The respondent withdrew its letter of termination, and reinstated the grievant. This reinstatement however, did not require the grievant to physically report back to duty. He was told the withdrawal was to enable SITA follow redundancy procedure under the Employment Act 2007, and the CBA. Termination date was in effect altered, to 30th November 2009. In the same withdrawal letter, the respondent communicated to the claimant the computation of the redundancy package, now less the gratuity offer, amounting to a total of Ksh.20,415,771.81 [twenty million, four hundred and fifteen thousand, seven hundred and seventy one and eighty one cents only].

3.4 The claimant did not accept this offer in its totality. It insisted on the inclusion of gratuity payment and a provision for the respondent to shoulder income tax liability. The respondent was not persuaded to shift its position, and on the advice of its Kenyan lawyers, suggested the claimant reports a trade dispute to the Minister for Labour under the Labour Relations Act. This suggested course of action did not, according to the respondent have any effect on the termination date of 30th November 2009.

3.5 The claimant reported the dispute to the Minister. A conciliator was appointed. On 18th December 2009, the Conciliator issued the Certificate of disagreement. On 20th January 2010, the respondent through its parent organization in Paris, France, transferred Ksh.14,414,791.41 [fourteen million, four hundred and fourteen thousand, seven hundred and ninety one and forty one cents only] in favour of Odero Otieno Mike, Account Number 8391465, Barclays Bank of Kenya Limited, Queensway House. A separate transfer was made in favour of Income Tax PAYE Account, Central Bank of Kenya for Ksh.6,177,767.75 [six million, one hundred and seventy seven thousand, seven hundred and sixty seven and seventy five cents only]. The claimant filed his claim on 11th February 2010, three weeks after these swift transfers.

3.6 We must first answer the question whether a Regional Manager of a Multinational Enterprise

operating in Kenya is unionisable; whether the CBA applied to the grievant; and, whether the claimant had the capacity to bring the proceedings herein, and negotiate the redundancy settlement on behalf of the grievant. The line between Management and Unionisable Staff remains as drawn in the Industrial Relations Charter. Executive Chairpersons, Managing Directors, Deputy Managing Directors, Departmental Heads and Branch Managers are not unionisable. Persons in-charge of operations, having decisional authority and those whose responsibilities are confidential in nature are not unionisable.

Managers perform interpersonal, decisional and informational roles. In the interpersonal role, managers are figure-heads, leaders and liaison officers with social and legal duties. As decision-makers, managers are entrepreneurs, disturbance handlers and allocators of resources. Decision making also involves the negotiation role. The manager represents his organization in all negotiations. In the informational role the manager acts as the nerve centre of internal and external information in the organization. He monitors and disseminates information to subordinates, and is the spokesperson of the organization. Mike Otieno Odero as the Regional Manager SITA East Africa was cast in these roles. It would seem to us managerial functions are not in conformity to unionization.

The role of managers is to oversee industrial relations at interface level. They are endowed with authority to hire, transfer and suspend employees in the interest of the employer. They direct employees, in an exercise of authority that is not merely routine or clerical, but which requires independent judgement. They represent capital, the anti-thesis of labour. The Constitution of Kenya 2010, the Labour Relations Act No.14 of 2007 and the CBA between the parties herein, do not bar management staff from belonging to a trade union. Though not prohibited, unionization of managers, supervisors and confidential employees such as accountants would result in conflict of interest. How shall we assess bargaining units for purposes of recognition, if the likes of Regional Managers are part of the simple majority equation? How will collective bargaining be conducted if managers and trade union officials are on the same side for the bargaining forum? What will become of companies if managers and top executives such as Mike Otieno Odero participate in strikes?

The Constitutional and statutory right to belong or not belong to a trade union should be seen within the reasonable contextualization of the Industrial Relations Charter. Without drawing the line between capital and labour, the exercise of all other labour rights becomes difficult. Trade Unions would in fact be weakened as representatives of a certain social group, by the permeation into their rank and file by management staff.

Collective Bargaining addresses the inequality of bargaining power between workers and employers. The inequality is there because there is insufficiency of alternative opportunities for workers, less access to information, resources and negotiating skills comparative to employers. Collective bargaining rights, enshrined in the United Nations Universal Declaration of Human Rights, the Core International Labour Organization Conventions, the Constitution of Kenya and the Labour Relations Act are based on the collective and common interest of the workers. We do not see a community of interests between managers and the unionisable staff under them. The mandatory bargaining subjects are bound to be different. Interests are likely to be at odds. Managers are not unionisable because they have a negotiating leverage unionisable workers lack. They are not fungible and in need of collective protection. They have skills, knowledge, information and job market wisdom to negotiate individual specific terms and conditions of employment. The grievant was well positioned to negotiate for himself golden handcuffs at employment and a golden parachute at termination. He was in management and in our view, not unionisable. The practice in France, and the fact that SITA is French in origin, did not change the distinction drawn under the Industrial Relations Charter here in Kenya. The socio-economic environment in Kenya has little semblance to that in France.

3.61 We conclude therefore that the grievant was not unionisable. The parties nonetheless adopted the CBA negotiated between them to govern the redundancy process. The exchange of letters between SITA Africa, the claimant and the grievant all agreed the terms and conditions of service under the CBA applied to the grievant. Parties are free to negotiate and adopt any terms and conditions of employment so long as they base their minimum threshold on the provisions of the Employment Act 2007. The

position in our view is that although the CBA did not apply to the grievant's contract as a collectively negotiated and adopted document; although it did not become incorporated in the grievant's contract of employment on execution; it definitely became the applicable contract of employment upon the parties' endorsement in their redundancy negotiations of 2009. The Court is bound to look at the CBA not because the grievant was a member of the union, but because this was the contract adopted by the parties in 2009.

3.62 Collectively, the claimant would not have the right to represent the grievant. We do not see a contradiction or major flaw however, in the engagement of the union to individually act for the grievant in the redundancy negotiations and in coming to Court. Beyond advocating collective rights, trade unions have the broader right to represent individuals. Once the CBA negotiated by the union was adopted as the individual contract of employment, it was logical to engage the agency of one of the authors of the CBA. This was an arrangement that suited the parties. It is not an arrangement that undermined the validity of the negotiation or the litigation. We find that managers are not unionisable; the CBA did not as a collectively negotiated instrument apply to the grievant; it was adopted individually and was relevant to the process. The adoption of the CBA made it logical for the grievant to call in the aid of the claimant in negotiation and litigation. This was within the margin of permissible industrial relations innovations.

3.7 The second question relates to the validity and procedural justice of the redundancy. Employers undertaking redundancy exercise have to satisfy the Court that there was a genuine redundancy situation in the first place; the employee and his union were notified; the employer considered suitable alternative employment; that notices of the redundancy and termination have issued; and, that at every turn the employee was consulted. It is not hard to conclude here that there was a genuine redundancy situation. The grievant, the claimant and the respondent appeared to agree on the existence of a genuine redundancy situation. The respondent stated it considered alternative employment for the grievant. We were not given evidence of what alternatives were considered. This was a bare statement. The notice that issued was on termination. The law contemplates two notices; one that announces to the employee, the trade union and the labour office the intended declaration of redundancy, and a second notice that relates to termination. This first notice communicates the reason for, and extent of the redundancy. Its purpose is to open the door for the consultative stage.

3.71 Consultation requires parties to engage with an open mind. There is no decision made; redundancy at his stage is only a proposal. In this dispute, there was no formal notification of the redundancy, made to the grievant. The respondent referred to conversations made between SITA Africa managers and the grievant from May 2009. There is nothing structured, to show consultations on the reason for and extent of the redundancy. Consultation is not the same thing as negotiation of separation package. What the respondent did in the absence of the union was to negotiate a separation package. Consultation involves the entirety of the redundancy process. When negotiation failed, the respondent issued the grievant a letter of termination on 9th October 2009. The grievant was told he was no longer in employment come 9th October 2009. When the union stepped in, the respondent alleged to reinstate the grievant, but in the same letter give a fresh notice of termination. There were no consultations even after 9th October 2009, on the reasons for and extent of the redundancy. All through, the respondent appeared to have been communicating a decision, not a proposal. The lack of evidence from the respondent demonstrating its consideration of alternative employment; the lack of a proper notification of the intended redundancy and structured consultations lead us to find the process to have been procedurally flawed. It amounted to an unfair termination from employment under section 43 and 45 of the Employment Act 2007.

3.8 The claim for tax exemption had no legal basis. Employers do not exempt anyone from paying taxes. It is not in their mandate. There is an obligation created under the Income Tax Cap 470 the Laws of Kenya for employees to remit PAYE to the Commissioner of Domestic Taxes. We were not persuaded that it was the policy of SITA to shoulder tax obligation for its employees. Even if there existed such a policy in 2002 or 2005, it did not create an enforceable precedent. Individual agreements negotiated over a period of time vary. Under clause 24 of the CBA, nothing was expressly said of tax exemption. We do not think that the insistence by the grievant and the claimant that the employer

shoulders the grievant's personal tax obligation was a reasonable demand. Where employers lay off workers and assume total or partial tax obligations on the termination packages, this is normally done in good faith. It is discretionary and like gratuity pay, is not an item that the Court will order to be paid by the employer. The plea for Service Award under clause 30 of the CBA was baseless. Clause 30 stated this Award was at the discretion of the Company. It is not a demandable item. We do not find any merit in the claims for gratuity and tax exemption. Once the respondent showed it had transferred Ksh.6,177,767.75 [six million, one hundred and seventy seven thousand, seven hundred and sixty seven and seventy five cents only] in favour of KRA, we cannot ask of the respondent for more. We did not think it reflected well on the credibility of the grievant that he opted to leave out the payment made to him in his evidence-in-chief and pleadings. How would he mistake a handsome lump sum figure of Ksh.14 Million [fourteen million only] originating from France for his pension? It would have served his claim well if he was forthright in his testimony.

3.9 In the end, we find the payments made to him reflected a fair package, based on the adopted provisions of the CBA. Tax was properly deducted. The redundancy process was however procedurally flawed. To redress this, we Award:-

1] The grievant's termination of employment on account of redundancy was procedurally flawed and therefore unfair.

2] The grievant be paid by the respondent 3 months' gross salary at the rate applicable on 3oth November 2009, in compensation for unfair termination.

3] The Award be implemented in full within 45 days of its delivery.

4] Parties to cater for their own costs.

The members agree and it is so ordered.

Dated and delivered at Nairobi this 5th day of May 2011

J. LOKWEE D.K. SIELE

MEMBER MEMBER

HON. JUSTICE JAMES RIKA

JUDGE.