

REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT
NAIROBI
CAUSE NO.710 OF 2018

CAFERINE EDWINER OLANDO.....
CLAIMANT

VERSUS

MERIDIAN MEDICAL CENTRE LIMITED.....
RESPONDENT

JUDGMENT

Introduction

1. Before Court is the Claimant's Statement of Claim dated 10th May, 2018, wherein, the Claimant seeks the following remedies:
 - a) Payment of a sum of Kshs.975,000/= comprising of lost income, house allowance, annual leave and compensation for unfair termination.
 - b) Costs
 - c) Interest
2. The Respondent entered appearance on 29th May, 20218, and proceeded to file a Response to the Memorandum of Claim and a Counterclaim dated 31st July, 2018. Conversely, the Claimant filed a Reply to Defence and Defence to Counterclaim dated 21st August, 2019.

3. The Claimant's case was heard on 14th March 2024 when the Claimant Ms. Caferine Edwiner(CW1), testified in support of her case. She adopted her Witness Statement dated 10th May, 2018 and produced her list and bundle of documents of even date as Claimant's Exhibits Nos. 1-5.
4. The Respondent's witness was not availed in Court for hearing and the Court declared the Respondent's case closed, paving way to filing of submissions.
5. Written Submissions were filed for both parties.

The Claimant's case

6. The Claimant avers that she was employed by the Respondent as a Marketing Assistant on or about 2nd November, 2015 on a monthly salary of Kshs.50,000/= . She avers that the duration of her contract was one (1) year commencing 16th November, 2015 and ending on 15th November, 2016.
7. It is further averred that the Claimant worked diligently and with loyalty throughout her employment until 4th July, 2016 when she was issued with a termination letter by the Respondent without prior notice or fair hearing.
8. It is the Claimant's case that the Respondent did not pay her dues following her termination, and as a result, she suffered mental anguish, financial embarrassment and emotional trauma. The Claimant has particularized the terminal dues owed to her by the Respondent in the aggregate amount of

Kshs.975,000/= consisting of loss of income for the months of July-November, 2016, House allowance, Annual leave, and compensation for unfair termination.

9. In her defence to the Respondent's counterclaim, the Claimant states that she has been willing and ready to handover, but the Respondent refused to completely make time for her hand over of the Respondent's property, and therefore, seeks that the counterclaim be dismissed.
10. On cross-examination, the Claimant testified that she was in employment for a period of nine (9) months and stated that she was paid a consolidated salary and did not clear with the Respondent which she explained on re-examination that she was not told by the Respondent how and who to handover to when exiting.

The Respondent's case

11. The Respondent's case is that the Claimant was terminated as a result of restructuring where her position became redundant. It states that the Claimant's position was among the posts identified for restructuring and that she was informed of the restructuring process.
12. The Respondent states that upon deliberations, which the Claimant was a party to, it reached a conclusion to render the Claimant's position redundant and a letter was subsequently issued on 4th July, 2016, effectively terminating the Claimant's services on account of redundancy.

13. It avers that the Claimant was requested to clear her desk and hand over company's properties after which she would collect her dues. It is the Respondent's position that the Claimant refused to clear and hand over the Company's property as instructed so that she could collect her dues.
14. The Respondent states that at the time of termination, the Claimant was in possession of Company goods namely; 2 Electronic BP machines, 1 weighing scale, Blood sugar strips, roll up banners, and 2 Glucometers. It is the Respondent's aversion that its demands and requests to the Claimant to return the said goods fell on deaf ears.
15. The Respondent states that it lodged a counterclaim against the Claimant seeking the amount of Kshs.64,420/= being the value of the Respondent's tools of trade in possession of the Claimant together with Interest and costs of the counterclaim.
16. The Respondent avers that the Claimant's claim of 12 months' salary does not hold, considering that her contract at termination was only valid for four months.
17. The Respondent further states that the Claimant was paid a consolidated salary, and hence her claim for house allowance is untenable.
18. The Respondent prays that the claim be dismissed with costs.

The Claimant's Submissions

19. The Claimant submits that under Section 43(1) of the Employment Act, the employer bears the burden of proving that there was a valid reason for termination. The Claimant further submits that the Respondent failed to produce evidence of any misconduct, incompetence or redundancy and failed the redundancy test under Section 43 of the Employment Act.
20. The Claimant further relied on the case of ***Kenfreight (E.A) Limited vs Benson K. Nguti [2016] eKLR*** and submitted that the Claimant was not accorded a fair hearing and due process for termination as she was issued with a termination letter without notice, thus the lack of due process renders the termination unfair.
21. The Claimant submits that the Respondent prematurely terminated her contract on 4th July, 2016 five months before its agreed expiration and without lawful justification or due process.
22. She further submits that it is well settled law that where an employment contract is for a fixed term, unless that is a special termination clause allowing early termination, the employer cannot terminate the contract before its expiry without incurring liability for the balance of the term. She submits that there was no clause in the contract allowing for termination without proper procedure.

23. The Claimant submits that the Respondent's action of terminating her employment before the expiry of the fixed-term contract, without valid reason and without following due process, amounts to unfair and unlawful termination under the Employment Act, and therefore, she is entitled to the remedies sought.

The Respondent's submissions

24. The Respondent submits that the Contract provided the manner in which the contract of employment could be terminated, and that in their letter of employment, the Respondent paid for the salary in lieu of notice and hence the demanded claim is not payable.

25. The Respondent further submits that on the claim for housing allowance, the contract of employment did consolidate the housing allowance with the basic salary and the Claimant is therefore not entitled to the same. It is its submission that Section 28 of the Employment Act entitles every employee to not less than 21 leave days with full pay for every year worked, but that the Claimant had not worked for a year, hence was not entitled to leave payment.

26. It is the Respondent's case that there was no unlawful termination and further submits that in the event the Court finds that the termination was lawful, it would be unfair for the Court to award compensation for unfair termination of the full salary for 12 months as prayed in addition to the unexpired period of her fixed term contract as that would amount to unjust enrichment.

27. The Respondent urges that this Court to dismisses the Claimant's claim as set out in the Memorandum Claim with costs.

Analysis and Determination

28. I have considered the pleadings, the Claimant's testimony and the rival submissions. The issues that present for determination are: -

- i. Whether the Claimant was unfairly terminated
- ii. Whether she is entitled to the orders sought
- iii. Who bears costs?

Whether the Claimant was unfairly terminated

29. The Claimant's case is that she was employed by the Respondent on a one year fixed term contract effective 16th November, 2015, and which was to terminate on 15th November, 2016. She asserts that her services were terminated four months to the end of the contract, precisely on 4th July, 2016. It is her position that the Respondent terminated her services unfairly as she was not issued prior notice or taken through due process before the termination.

30. The Respondent on its part, maintains that the Claimant was declared redundant after a restructuring of the Respondent's company owing to economic challenges. The Respondent states that deliberations on the restructuring were held, and that the Claimant was a party to the deliberations, and a decision reached to render the Claimant's position redundant, and subsequently a letter

was issued on 4th July, 2016, effectively terminating the Claimant's services on account of the redundancy.

31. Section 40(1) of the Employment Act sets out 7 steps that an employer must adhere to in a redundancy situation, as follows: -

“An employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions:

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- ***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:***
- ***where an employee is not a member of a trade union, the employer notifies the employee personally in writing and the labour officer;***
- ***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;***

- ***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;***
- ***the employer has where leave is due to an employee who is declared redundant, paid off the leave in cash;***
- ***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***
- ***the employer has paid to an employee declared redundant severance pay at the rate of not less than fifteen days' pay for each completed year of service.***

32. The general rule is that redundancy is a legitimate ground for terminating an employment relationship, where an employer can show that actual redundancy was the reason for the termination, coupled with the employer's adherence with the redundancy procedure set under Section 40 of the Employment Act, 2007.

33. The Claimant contends that she was not issued with a redundancy notice and there was no mention of the same notice having issued to the Labour Officer. Further, though

the Respondent pleaded having had discussions with the Claimant on the redundancy, it did not lead any evidence to show that the Claimant was at all consulted or given notice prior to issuance of the letter of 4th July, 2016 declaring her redundant.

34. The Respondent has also not attempted to explain the criteria applied in selecting the employees whose positions were declared redundant as required under Section 40(1)(c) of the Employment Act. In the case of **Joseph Macharia Warutere & 3 Others v. Saab Kenya Ltd (2017) eKLR**, the court held thus: -

"The selection criteria must be objective and where questioned; the employer should be able to show that there was a criterion in place."

35. By the foregoing analysis, it is clear that the termination of the Claimant on the ground of redundancy, does not satisfy the mandatory requirements of Section 40(1) of the Employment, 2007, and which renders the termination unlawful and unfair.

36. I thus find and hold that the Claimant's termination on account of redundancy is unlawful and unfair.

Whether the Claimant is entitled to the remedies sought

37. The Claimant's claim against the Respondent, is for payment of a sum of Kshs.975,000/= comprising of lost income, house allowance, annual leave and compensation for unfair termination.

38. On the claim for house allowance, the Claimant admitted on cross-examination that she was paid a consolidated salary that included house allowance. This is also confirmed from by the Claimant's employment contract that clearly provided that her salary would be consolidated. This claim is thus devoid of merit and is dismissed.

39. The finding that the Claimant was unfairly terminated, entitles her to compensation for the unfair termination. Section 49 guides the Court when making an award of compensation. The Claimant was on a one year fixed term contract which was to lapse just four months after her termination. The Claimant's contract having been fixed term, carried no legitimate expectation for renewal, and for this reason, I deem an award of five (5) months' salary sufficient compensation for the unfair termination.

40. On the claim for loss of income for the unexpired term of contract, serving to the end of contract is never guaranteed, and having awarded the Claimant compensation for the unfair termination, granting this prayer will no doubt amount to unjustly enriching the claimant. In ***Elizabeth Kibe Wakanyi vs Telkom Kenya Limited [2014] eKLR***, the Court of Appeal quoted with approval the holding of Ojwang' J (as he then was) in ***Menginya Salim Murgani -vs Kenya Revenue Authority***. The learned Judge stated as follows: -

'It would be injudicious to found an award of damages upon sanguine assessment of

prospects. In that case the plaintiff was 38 years old when his contract of employment was terminated. He asked for remuneration he would have received between the age of 38, and the expected mandatory retirement age of 55 years. The court observed that the plaintiff was able bodied, intellectually and professionally well-endowed man, likely to 'find occupational engagement outside the defendants employ. The court applied the principle, then confined to civil law, that the aggrieved party has the obligation to mitigate his or her losses. An aggrieved employee must move on and not sit back waiting to enjoy anticipatory remuneration.'

41. For reason that the Claimant was under duty to mitigate her losses and her chances of getting comparable employment, the prayer is declined.
42. On the prayer for payment on account of annual leave, the Respondent's contention is that the Claimant had to have served for an entire year to earn leave days is unfounded. The Claimant had as at the time of termination served for 8 months which should by all means have entitled her to leave days. Further, the Respondent ended the Claimant's term earlier than envisaged and cannot therefore blame her for

not serving a full term so as to earn leave days. The claim is merited and is allowed as prayed.

43. In whole, the Claimant's claim succeeds in terms of the following orders:-

- a) Five months' salary as compensation for the unfair termination at Kshs.250,000/-
- b) Leave allowance at Kshs.35,000
- c) Costs of the suit and interest from the date of judgment until payment in full.

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44.It is ordered.

**DATED, SIGNED, AND DELIVERED BY VIDEO-LINK AND IN
COURT AT NAIROBI THIS 16TH DAY OF OCTOBER, 2025.**

**C. N. BAARI
JUDGE**

Appearance:

N/A for the Claimant

Mr. Kofuna present for the Respondent

Ms. Esther S - CA

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