



**Nzioki v Polytanks & Containers Kenya Limited (Cause E793 of 2022)
[2024] KEELRC 1510 (KLR) (14 June 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1510 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E793 OF 2022**

**J RIKA, J
JUNE 14, 2024**

BETWEEN

JUDITH NZIOKI CLAIMANT

AND

POLYTANKS & CONTAINERS KENYA LIMITED RESPONDENT

JUDGMENT

1. The Claimant filed her Statement of Claim dated 3rd November 2022.
2. She states that she was employed by the Respondent on 1st November 2018, as a Human Resource Manager. Her first monthly gross salary was Kshs 120,000. It was gradually increased, to Kshs 148,500.
3. The Respondent terminated her contract on 22nd September 2021, in circumstances she considered unfair and unlawful. She states that termination occasioned her miscarriage of her pregnancy. She contracted Covid-19 during employment, leading to prolonged sick leave. She was threatened variously with termination of her contract, before it was terminated on account of redundancy. Termination was not based on valid reason.
4. She claims: -
 - a. 12 months' salary for unlawful redundancy at Kshs 1,782,000.
 - b. September 2021 salary at Kshs 148,000.
 - c. Severance pay at Kshs 222,825.
 - d. Notice at Kshs 148,500.
 - e. Annual leave at Kshs 37,142.
 - f. Salary for the remainder period of the contract at Kshs 28,512,000.



Total ... Kshs 30,850,000.

- g. Certificate of Service to issue.
 - h. Costs.
 - i. Interest.
5. The Respondent filed a Statement of Response, dated 28th November 2022. It is conceded that the Claimant was employed by the Respondent in the position, and on a gross monthly salary pleaded by the Claimant. Her contract was terminated fairly and lawfully, on account of redundancy. She was paid all her terminal benefits. The Respondent denies any further liability on terminal benefits and compensation for unfair termination. The Claim is baseless. The Respondent prays the Court that it is dismissed with costs.
 6. The Claimant gave evidence on 21st September 2023. Her Witness, former Credit Controller Charles Kaberere, and the Respondent's Witness, Finance Controller Jitendra Makwana, both gave evidence on 1st February 2024, closing the hearing.
 7. The Claimant relied on her Witness Statement and 6 Documents [1-6], in her evidence-in-chief. She restated her employment history, and terms and conditions of service with the Respondent. In 2018-2019, the work environment was good. She received salary increment of 12%, above other Employees. She was rated above 90% in performance appraisal.
 8. Abjeet, Head of Group Human Resources, was based in India. The Respondent in Kenya is a subsidiary. He called the Claimant in Kenya, and told her that the General Manager would issue her a letter of redundancy. The General Manager came immediately, and handed the Claimant a letter of redundancy. There was no other reason cited in terminating the Claimant's contract. There was no other correspondence, consultation or meeting. The Respondent was doing very well financially, because the Government had directed all public and private entities to install handwashing facilities in containment of Covid-19 pandemic. The Respondent made water tanks, and enjoyed a windfall from the pandemic. The Claimant handed over office, and was almost frogmarched out. She was blamed for all manner of things. The work environment had turned toxic, leading to declaration of redundancy.
 9. Cross-examined, she told the Court that the environment was good, until the year 2020. She had received annual salary increments. She was paid Kshs 389,000 in terminal benefits. She was not given a breakdown. She conceded that computation was contained in an e-mail to her, from the Respondent. Terminal benefits included September 2021 salary, notice, severance, and annual leave. The gross sum was Kshs 550,959, and net sum was Kshs 389,945.
 10. She told the Court that she claims Kshs 37,000 in annual leave. She did not recall what was her annual leave balance. Redundancy notification took effect the same day she was required to leave. She was asked to surrender her office keys and vacate the premises immediately. The letter of redundancy did not state that she vacates immediately. She did not know if notice issued to the Labour Office.
 11. Kaberere told the Court that he resigned from the Respondent in 2021, having been employed in May 2020. The Claimant was the Human Resource Manager of the Respondent, and 3 sister companies. He relied on his Witness Statement on record, in his evidence-in-chief.
 12. Cross-examined, he told the Court that he worked for 14 months. He was still on probation by the time he left employment. He was not confirmed. He resigned. He did not file any Claim against the Respondent. He did not have any issues against Jitendra. He thanked him upon resignation. His grievance was against other senior managers. The Claimant left abruptly. She was not given a chance



to say goodbye to her colleagues. Kaberere left before her. His evidence was not hearsay. Redirected, he confirmed that Covid-19 season, was financially a bountiful period for the water-tank making Respondent.

13. Jitendra Makwana relied on his Witness Statement dated 5th December 2022, and Documents [1-6] filed by the Respondent, in his evidence-in-chief. The Respondent made financial losses, warranting declaration of redundancy. The Claimant was notified, as was the Labour Office. She was paid terminal dues at Kshs 383,458. Details were given. Jitendra never received any grievances from the Claimant, or any of her colleagues, about hostile work environment.
14. Cross-examined, he told the Court that the Claimant was supervised by Deepak. Deepak also left employment. The notice issued to the Labour Office is dated 22nd September 2021. It refers to 3 Employees, including the Claimant. She was in charge of human resources, in 3 companies associated with the Respondent. In total, the business had about 140 Employees. Only 3 were affected by redundancy. The Labour Office did not respond to the notice. The notice did not have names of the affected Employees.
15. There was evaluation of roles before redundancy. Jitendra did not have the evaluation reports. The Respondent manufactured and sold water tanks. Tanks were in demand during Covid-19. Abjeet told the Claimant that the Respondent had made a decision, concerning redundancy. Abjeet mentioned that the Respondent does not harass any Employee. Jitendra was not able to say why it was necessary to mention this. Vanice the Assistant Human Resource Manager continued to discharge the human resource function. The Human Resource Department and the Claimant's role, remained.
16. Redirected, Jitendra told the Court that the 3 sister companies were not in the same business. The Respondent had problems with raw materials. 3 Employees left on redundancy. They were notified.
17. The issues are, whether the Claimant's contract was terminated fairly and lawfully on account of redundancy; and whether she merits the prayers sought.

The Court Finds

18. The Claimant's employment history and details of her contract of employment, are not disputed. The Respondent does not dispute it terminated her contract, on account of redundancy. The relevant dates are not disputed.
19. Procedure. The procedure was fundamentally flawed and contrary to the legal standards prescribed under Section 40 of the *Employment Act*.
20. There were no notices issued to the Claimant and the Labour Office in accordance with Section 40 of the *Employment Act*.
21. The notices were issued upon the instructions of Head of the Group Human Resources, from India.
22. Specifically, no notices of the intended redundancy issued to the Claimant and the Labour Office, in terms of Sections 40[1] [a] and [b].
23. The Claimant was paid salary in lieu of notice, which redressed the infringement on notice of termination, under Section 40[1][f]. Notice pay did not however address the default, on notices of the intended redundancy.
24. The notices of the intended redundancy, issued to the Claimant, on the date of termination, the date she states she was frogmarched out of employment, on 22nd September 2021.



25. The notices were issued upon the instructions of Head of Group Human Resources, Abjeet, from the comfort of his Head Office, in his native India.
26. Abjeet simply called the Claimant, and told her to expect a letter of redundancy. Immediately after the call, Jitendra showed up at the Claimant's desk, with a letter titled 'notification of redundancy.' She was advised in the letter that the Respondent had restructured its business, and that her position, was one among others affected. The notice of intention, also served as a letter of immediate termination.
27. There was no consultation on the reasons for, and extent of the proposed redundancy. There was no consultation on selection of the Claimant, with regard to seniority, skills, ability and reliability. The Claimant was not consulted on alternatives to other possible assignments, within the Respondent or any of its 3 sister companies, all of which the Claimant served wholeheartedly, as the Head of Human Resource & Administration.
28. The so-called notice to the Labour Office was as cosmetic, as the one issued to the Claimant. It did not open the door to tripartite consultations, involving the Claimant, the Respondent and the Labour Office. The Claimant and the Labour Office were presented with a decision already made by the Respondent to terminate the Claimant's contract at will. It was never intended by the Respondent to hold a three-way conversation with the Claimant and the Labour Office, on the proposed redundancy. The Respondent sidestepped the procedural law, under Section 40 of the *Employment Act*, presenting the Claimant and the Labour Office, with a *fait accompli*. Procedure did not meet the legal standards of fairness as prescribed under Section 40 of the *Employment Act*, and most recently elaborated authoritatively, by the Court of Appeal in *The German School Society v Helga Ohany* [2023] eKLR.
29. Procedure was unfair and unlawful.
30. Validity. The Respondent did not establish through financial statements, that it experienced financial downturn, warranting the declaration of the Claimant's position redundant. There was not a single document exhibited by the Respondent, to support its theory that its business was low, on account of scarce raw material. All indications are that the business was blooming.
31. It is common evidence of the Parties that the Respondent manufactures and sells, water tanks. At the time of the Claimant's termination, the global economy was disrupted by Covid-19 pandemic. The Government decreed that all public and private entities should install water tanks in their businesses, to enable all persons under their roofs, wash their hands and protect themselves from Covi-19 contagion. The Respondent, as a manufacturer and merchant of water tanks, would logically have been expected to reap from the troubled economic times. It was one among other industries, such as manufacturers and merchants of Protective Personal Equipment, and Covid-19 biopharmaceutical companies, who would logically make a killing, fishing in troubled waters.
32. There is hardly any reason to disbelieve the Claimant, when she says that there was no genuine redundancy. There is no reason to believe the Respondent, when it alleges without financial statements, that it was adversely affected by Covid-19 pandemic, warranting termination of the Claimant's contract on account of redundancy.
33. Jitendra told the Court that the Claimant served 3 companies. In total, there about 140 Employees. Only the Claimant and two other Employees were affected. The Respondent paid bonuses each December. The Human Resource Department headed by the Claimant still exists in the Respondent. Vanice Olan, the Claimant's Assistant assumed the Claimant's role. This was not by any stretch of the imagination, a genuine redundancy, imposed on the Parties by Covid-19 pandemic or any other economic trigger. Redundancy was a colourable exercise.



34. The Claimant's evidence concerning pregnancy miscarriage and toxicity at the workplace, was not well articulated, and contextualized in the Claim. It was not shown to be related to the reason why the Claimant left employment. This evidence bordered on irrelevancy.
35. There was nonetheless, no valid redundancy situation, to justify termination.
36. Termination was unfair and unlawful.
37. Remedies. There is evidence that the Claimant received notice, salary for days worked in September 2021, and severance pay. She received a net sum of Kshs 383,548. Her prayers for these benefits under paragraph 6 [b], [c], [d] and [e] have no merit, and are declined.
38. There is similarly no justification for the astronomical figure of Kshs 28 million sought, in anticipatory salary, for the remainder of the contractual period. There was no service rendered by the Claimant to warrant this salary. The contract did not guarantee service by the Claimant until retirement. Clause 17 contemplated termination through notice, or summary dismissal. If termination or dismissal is adjudged by the Court to be unfair and unlawful, the Claimant would be entitled to compensation, which incorporates compensation for the period remaining in her contract of employment.
39. The Claim for anticipated salary at Kshs 28 million falls in the category of claims for unjust enrichment, which this Court in Petition No. 138 of 2016, Prof. Dr. Dr. Moni Wekesa v Mt. Kenya University, characterized as a cash-grab industry, which is rapidly gaining a foothold in claims for unfair termination, before this Court. Employment remedies must remain within the band of reasonable compensation for economic injury sustained by an Employee, and not be transformed into a conduit for unjust enrichment.
40. The prayer for Kshs 28 million is disproportionate to the infringement occasioned to the Claimant by the Respondent, and the economic harm suffered. It is extortionate, and without foundation. It is rejected.
41. The Claimant was employed on 1st November 2018. She left on 22nd September 2021, after a period of 2 years, 10 months. Clause 2.2. set the mandatory age of retirement at 60 years. Her records indicate she was born in 1977, and was 44 years at the time of termination, 16 years away from the expected age of retirement. She did not cause or contribute to the circumstances leading to termination. She is granted 8 months' gross salary in compensation for unfair termination, at Kshs 1,188,000.
42. Certificate of Service to issue.
43. Costs to the Claimant.
44. Interest granted to the Claimant at court rate, from the date of Judgment, till payment is made in full.

In Sum, It Is Ordered:

- a. It is declared that termination of the Claimant's contract was unfair and unlawful.
- b. The Respondent shall pay to the Claimant compensation equivalent of 8 months' salary for unfair termination, at Kshs 1,188,000.
- c. Certificate of Service to issue.
- d. Costs to the Claimant.
- e. Interest granted at court rate, from the date of Judgment till payment is made in full.



DATED, SIGNED AND DELIVERED ELECTRONICALLY AT NAIROBI, UNDER PRACTICE DIRECTION 6[2] OF THE ELECTRONIC CASE MANAGEMENT PRACTICE DIRECTIONS, 2020, THIS 14TH DAY OF JUNE 2024.

JAMES RIKA

JUDGE

