



**Kassim v National Oil Corporation of Kenya (Cause 887 of 2019)
[2023] KEELRC 484 (KLR) (27 February 2023) (Judgment)**

Neutral citation: [2023] KEELRC 484 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 887 OF 2019
B ONGAYA, J
FEBRUARY 27, 2023**

BETWEEN

MAIMUNA SAID KASSIM CLAIMANT

AND

NATIONAL OIL CORPORATION OF KENYA RESPONDENT

JUDGMENT

1. The claimant filed the statement of claim on 30.12.2019 through Brenda & Brenda Advocates. The claimant pleaded as follows. The respondent, a state corporation, employed the claimant as a Supply Planning Manager on a 3-years' contract effective 20.02.2008 at Kshs. 187, 000.00 per month. By the letter dated 08.06.2012 the contract was renewed and the terms of service translated to Permanent and Pensionable commencing retrospectively on 01.08.2011. The salary rose to Kshs. 450,000.00. The claimant served with due diligence and dedication. He was appointed to serve in various management committees. By letter dated 04.08.2016 the claimant wrote to the respondent's chairperson of the Human Resource Board Committee about remuneration grievance. She stated that HODs who joined the respondent much later than HODs already in the respondent's service (like the claimant) were placed at job group 3 while the claimant and the other earlier HODs were left at job group 4 with a promise that the same would be rectified once the job evaluation that was underway was completed – and the evaluation had long been completed and the rectification not undertaken at all. The claimant wrote requesting for equity in remuneration and attached letters to the former CEO and Board chairperson. She requested to be placed at the middle of pay job group 3 as a minimum and the same to be backdated.
2. The claimant has further pleaded as follows. She received the respondent's undated letter conveying that the Board at the meeting held on 19.12.2017 had resolved that employment terms for all employees on job group NOC 1 TO NOC 3 be translated from permanent to contract basis. The letter forwarded a fresh contract for the claimant to review and execute. She was to sign to signify acceptance or none acceptance of the contract and to return a copy by 09.02.2018. The salary attached to the job in the new



contract was Kshs. 450, 000.00 per month. The claimant wrote the letter dated 07.02.2017 seeking a clarification on the translation of her terms of service from permanent to term contract. She stated that it was a big decision and the time allowed for her to respond was short and, she requested for more time. She further stated that she had served for 10 years and which had not been considered in the proposed 3-years' contract. Finally, she stated thus, "The exit package cited in the letter approved by the board is subject to approval by a tripartite. Who is the tripartite and are they likely to change the proposal in any way? The respondent replied the claimant's letter by the letter dated 12.02.2018 thus, "Kindly note that having considered the clarifications sought in your aforementioned letter, we wish to deliberate on the same and revert back soonest. In the meantime, please note that the contract forwarded to you together with the translation of terms of service letter and the exit package are withdrawn until further notice." The response was signed by MaryJane N. Mwangi, CEO. The claimant continued to work and was appraised but on 07.12.2018 she was shocked to receive a redundancy letter from the respondent. The letter was dated 07.11.2018 and effectively informed the claimant as follows:

- a) As the claimant was aware, the respondent had commenced restructuring in June 2017 to realign the organisational structure with the respondent's corporate strategy.
 - b) The new organisation structure resulted in renaming or merging, creating and abolition of some positions. The letter informed the claimant that the position of Manager, Supply Planning or Head of Supply Planning was one of the positions declared redundant.
 - c) On 19.10.2017 the respondent's Board passed a resolution for a payment of a redundancy package to the employees whose positions had been declared redundant and, a tripartite committee had been formed to approve the positions declared redundant and the exit package. The Committee had considered the redundancy or restructuring plan and exit package per circular Ref. No. OP/13/19A dated 07.11.1995 on the Administration of the Reform Program in the Public Service. The letter further stated that the Head of Public Service on the advice of the Tripartite Committee had approved restructuring or redundancy and exit package as follows:
 - i. One-month salary for each completed year of service.
 - ii. Two-months gross salary in lieu of notice.
 - iii. Transport cost of Kshs. 40,000.00.
 - iv. Golden handshake of Kshs. 100,000.00.
 - v. Outstanding leave days to-date.
3. The letter concluded that following the approval of the restructuring or redundancy, the claimant's contract of employment with the respondent stood terminated on 06.01.2019 under the redundancy plan. The claimant was asked to handover to her supervisor by that date to facilitate processing of redundancy packages.
 4. The claimant pleads that she perused the respondent's human resource manual and board minutes and she found no justification for her termination.
 5. Her further case is as follows. Prior to her termination the respondent advertised for the position of Manager, Inventory and Stock Control with similar job description as the position held by the claimant. The respondent also created the position of Assistant Manager, Supply Planning, and which never existed before.



6. It is the claimant's case that the termination was illegal, unfair and discriminatory upon the following grounds:
 - a. 9-months prior to the termination the respondent had praised the claimant's performance and given her a long service award.
 - b. The respondent attempted to vary the claimant's terms of service without notifying her.
 - c. Recalling the exit package and change of terms of employment upon inquiry. The redundancy reason was invalid as the position held by the claimant still existed and was merely renamed.
 - d. No proper one-month redundancy notice was served upon the labour officer.
 - e. In selecting the claimant for redundancy, the principal of seniority was not invoked as prescribed in law.
 - f. The respondent employed other persons to perform the same job the claimant had been performing prior to the termination.
 - g. A post of Assistant Manager, Supply Planning had been created.
 - h. The respondent failed to follow the contractual and statutory procedure for declaration of redundancy.
 - i. The termination was therefore unfair, wrongful and unlawful.
7. The claimant prayed for judgment against the respondent for:
 1. A declaration that the declaration of redundancy was unlawful and illegal.
 2. A declaration that the termination by the respondent was unfair and contrary to law.
 3. A declaration that the claimant's termination can only take effect when the respondent conforms to all legal requirements stipulated by the *constitution*, statute and employment contract and therefore declare the claimant is entitled to her monthly salary until the respondent terminates her employment in the right way.
 4. Damages for illegal and unlawful declaration of redundancy.
 5. General damages for distress and agony caused by the unfair termination and illegal redundancy.
 6. An order reinstating the claimant to her immediate position prior to the impugned termination with full pay and benefits from 01.01.2019,
In the alternative to (5) above:
 7. An order directing the respondent to issue the claimant with a certificate of service.
 8. Damages for unfair termination in terms of section 49 of the *Employment Act* cap. 226.
 9. Unpaid leave days.
 10. Two-months in lieu of notice.
 11. An order directing the respondent to grant the claimant all her retirement benefits (At the hearing the parties recorded a consent withdrawing the prayer as the claimant acknowledged that she had received her final payments).



12. An order of compensation as directed by article 23(3) of the *Constitution* and section 12 of the *Industrial Court Act* by the respondent to the claimant for the remainder of the 15 years until she attains the retirement age.
 13. Costs and interest.
 14. Any other and further reliefs that the Honourable Court may deem fit to grant.
8. The respondent filed the response to the statement of claim dated 22.09.2020 and through CFL Advocates. The respondent admitted that it employed the claimant as pleaded for the claimant per the correspondence exhibited and referred to by the claimant. The respondent pleaded that the employment was initially on probation effective 07.04.2008 and upon end of 6-months' probation service, the probation period was extended for 2 months from 01.05.2009 upon the ground that the claimant's performance did not meet respondent's expectation. On 12.10.2009 she was confirmed as the Supply Planning Manager. Starting salary was Kshs. 187, 000.00 per the letter dated 20.02.2008.
9. The respondent further pleaded as follows. The claimant was not diligent and professional in service delivery. She did not meet the respondent's expectations per the extension of the probation period. She had disrespected the CEO and warned per memo of 17.11.2017. It was true that she was appointed to various committees but it was not due to her good performance as she alleged. There was no discrimination because the respondent placed employees in different pay groups based on the different job description, qualifications, and experience. She was paid per her salary scale and as agreed between the parties. Further the respondent regularly reviewed salaries based on Costs of Living Adjustment (COLA), performance, market comparative analysis and Government regulation and the claimant's salary was reviewed accordingly throughout her service. The claimant was never excluded in all staff salary reviews. The respondent admitted that in February 2018 it proposed to translate the claimant's permanent terms to term contract but the proposal was withdrawn by the letter dated 12.02.2018 because the claimant's position was being reconsidered for redundancy. In September 2017 the State Corporations Advisory Committee (SCAC) had approved the respondent's organisation structure which had in effect rendered the position of Supply Planning Manager redundant. A redundancy package was approved as pleaded for the claimant and communicated by the letter dated 07.12.2018. She had been awarded a long service award per letter of 18.04.2018. The declaration of redundancy was in accordance with the law. In October 2018 it advertised for Manager, Inventory and Stock Control which was a position not similar to the one held by the claimant. The position of Assistant Manager, Supply Planning was not advertised prior to claimant's redundancy. The respondent stated that her termination on account of redundancy was lawful. The redundancy process had commenced in June 2017 with alignment of the organisation structure to the respondent's corporate structure as was communicated to the claimant in the letter of 07.12.2018 and no one was employed in a position similar to the one held by the claimant after her termination. The redundancy was fair both in procedure and substance. The respondent denied the prayers except as follows:
- a. A certificate of service will issue subject to the claimant clearing with the respondent.
 - b. The respondent is ready to settle unpaid leave days and notice pay as communicated in the letter of 07.12.2018 on condition she hands over and clears.
 - c. The claimant to claim retirement benefits from the Manager of Pension Fund – Zamara by filling the notification of exit form and submitting the same to the respondent for on-ward forwarding to the Pension Managers.
10. The respondent prayed that the statement of claim be dismissed with costs to the respondent.



11. The claimant filed the reply to response to statement of claim, dated 21.02.2022. The claimant stated that all her appraisals were positive and the claimant repeated the pleadings in her statement of claim.
12. The claimant testified to support her case and the respondent's witness (RW1) was Susan Karimi, Assistant Manager, Human Resource and Administration. Final submissions were filed for the parties.
13. The Court has considered all the material on record and returns as follows.
14. To answer the 1st issue, there is no dispute that parties were in a contract of service.
16. To answer the 2nd issue, the Court returns that the contract of service was terminated by the letter of notification of redundancy dated 07.12.2018 and effective 06.01.2019.
17. The 3rd issue is whether the termination of the claimant's employment was unfair. On procedural unfairness, the claimant received the notification dated 07.12.2018 and the redundancy was taking effect on 06.01.2019. It therefore appears that the claimant was given the requisite one-month redundancy notice as envisaged in section 40(1) of the *Employment Act*, 2007 and the respondent's submissions in that regard are upheld. However, as submitted for the claimant, the notice to the County Labour Officer dated 07.12.2018 was received on 14.12.2018. The Court upholds the submission made for the claimant that the one-month notice to the County Labour Officer was deficient in that regard. The evidence was that the claimant was a HOD being a one-person position in the respondent's establishment. Accordingly, the Court finds that it was misconceived for the claimant to allege unfairness in the manner she was identified or targeted for redundancy as being the only holder of the kind of position she held, the issue of consideration of her seniority did not apply at all.
18. On substantive fairness, the Court finds that the respondent has exhibited correspondence showing that indeed it was restructuring. The new organisation structure dated July 2017 is exhibited. The claimant has by her own evidence testified that the respondent indeed advertised the new posts per the new organisation structure. Thus as at the time of termination, the respondent has established that the reason for termination on account of redundancy, namely, abolition of office on account of re-organization and new structure was genuine per section 43 of the Act.
19. The Court has considered the factors in section 49 for award of compensation for unfair termination. The claimant had served for a long period of ten (10) complete years. She desired to continue in employment. However, the court has considered the nature of the procedural unfairness. It is also true that the respondent offered a golden handshake of Kshs.100, 000.00. The belated service of the notification upon the County Labour Officer shows that the claimant was not properly prepared for the redundancy. The claimant had not contributed to the redundancy situation. To balance justice for the parties she is awarded at three months' salaries thus $Kshs. 450, 000.00 \times 3 = Kshs.1, 350, 000.00$. The award is in addition to the offered terminal dues as computed for the respondent at Kshs.4, 006, 785.71 making a sum of Kshs. 5, 356, 785.71 (payable less PAYE).
20. On the other remedies, the Court returns as follows:
 - a) As submitted for the respondent, reinstatement is not available as is impracticable, the position held by the claimant having been abolished. Further, the statutory three years of limitation from the termination date within which an order for reinstatement may be made have since lapsed and the prayer is thereby time barred.
 - b) It has not been shown that the declaration of redundancy by itself was unlawful and a declaration will not issue in that regard as prayed for. The Court has found that it was the procedure that was unfair for want of due notice to the County Labour Officer and which



failure was a manifestation of failure to prepare the claimant adequately for the looming termination.

- c) As pleaded, submitted and urged for the respondent, there is nothing attributable to the respondent that impaired the claimant's ability to engage gainfully after the termination and the claim for 15 years of service prior to the mandatory retirement age is unjustified. That prayer will collapse.
 - d) The respondent has admitted issuance of the certificate of service.
 - e) While alleging discrimination, as submitted for the respondent, the Court returns that discrimination was not established at all. First the claimant was emplaced in a job group per the agreed contractual terms and the contract of service is binding accordingly. Secondly, while she was a HOD, she has not by evidence shown that other HODs were indeed emplaced in a job group more advantageous than the one she held. Third, even if the other HODs were in an advantageous job group than the one held by the claimant, the claimant has not shown that the actual work she was assigned was of equal value to that performed by such other HODs for the principle of equal pay for work of equal value to apply. Thus, allegations for discrimination have not been established and compensation in that regard under article 23(3) of the Constitution and section 12 of the Employment and Labour Relations Court Act as prayed for will collapse. In any event, no specific submissions were made for the claimant towards guiding the Court for award in that respect and the prayer is deemed abandoned.
 - f. The claimant is successful. The Court has considered the margins of that success and all circumstances of the case. The respondent will pay claimant's 50% costs of the suit.
21. In conclusion, judgment is hereby entered for the claimant against the respondent for:
- 1) The declaration that the termination on account of redundancy was procedurally unfair for want of due notice to the County Labour Officer and due preparation of the claimant for the looming redundancy.
 - 2) The respondent to issue and deliver the certificate of service by 01.04.2023.
 - 3) The respondent to pay the claimant a sum of Kshs. 5, 356, 785.71 (less PAYE) by 01.04.2023 failing interest to be payable thereon at Court rates from the date of this judgment till full payment.
 4. The respondent to pay 50% claimant's costs of the suit.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS MONDAY 27TH FEBRUARY, 2023

BYRAM ONGAYA

PRINCIPAL JUDGE

