



REPUBLIC OF KENYA



**Nyagah v Finn Church Aid Kenya (Cause 469 of 2018)
[2023] KEELRC 770 (KLR) (28 March 2023) (Judgment)**

Neutral citation: [2023] KEELRC 770 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 469 OF 2018
B ONGAYA, J
MARCH 28, 2023**

BETWEEN

NELLY WANJIKU NYAGAH CLAIMANT

AND

FINN CHURCH AID KENYA RESPONDENT

(Before Hon. Justice Byram Ongaya on Tuesday 28th March, 2023)

JUDGMENT

1. The claimant filed the statement of claim on 05.04.2018 through P.N. Khisa Advocates. The claimant prayed for judgment against the respondent for:
 - a. A declaration that the redundancy was unjustified, her retrenchment which led to her termination was unlawful, unfair and unprocedural.
 - b. A sum of Kshs.1,879,059.00 as computed.
 - c. Costs of the suit plus interest on amounts claimed.
 - d. Any other further and better relief the Honourable Court may deem just and fit to grant.
2. The claimant pleaded as follows. The respondent is an international non-governmental development co-operation organization with registered offices in the Republic of Kenya dealing with humanitarian assistance within and outside the country. The respondent employed the claimant as an administrative assistant stationed at the Nairobi office. The claimant also served the respondent's regional office known as the East & Southern Africa Regional Office (ESARO) and which was based in Nairobi. The appointment was by the letter of offer of employment dated 03.10.2021 accepted on 06.10.2012 and effective 15.10.2012. The monthly salary was Kshs.80,000.00 plus other benefits in the contract of the terms of employment signed on 17.10.2012. The claimant's salary increased over time with her diligent and good performance. The notice of termination of employment was dated 08.09.2016. The



notice communicated the decision to re-organise roles and responsibilities in country offices entailing reduction of management layers for less complicated processes. Further, the decision by management on 06.11.2016 was to close ESARO Regional office. The notice stated that the respondent could no longer continue its operations in the ESARO Regional office with effect from 01.01.2017. It stated that efforts to place the claimant's services in any commensurate position had been futile since the whole organisation had been adversely affected and no new positions in Kenya were available. The notice stated that as stipulated in the respondent's Human Resource Manual 2015 together with Kenya Labour Laws on termination of employment, the following would apply:

- a. Service of 3-months' notice effective 01.10.2016 with the last working day being 31.12.2016.
 - b. Severance payment at one-month's salary for each completed year of service and any accrued dues.
 - c. The respondent to facilitate the claimant's pension contributions as per the provident fund.
 - d. Delivery of a certificate of service.
3. The claimant worked up to 31.12.2016 and she alleges that the termination was unfair, unprocedural, and unlawful and contravened section 40 of the [Employment Act](#), 2007 on preconditions for redundancy and Part VIII of the [Labour Relations Act](#), 2007 or role of the Minister in even of a trade dispute. The particulars of breach were pleaded as follows:
- a. No proper or adequate notice to the claimant to discuss the intended redundancy.
 - b. No meaningful and adequate consultations between the management team and the retrenched employees including the claimant.
 - c. Assessment and consultation in good faith with the claimant.
 - d. Method used to select the claimant and the selection criteria was opaque and biased failing to meet statutory threshold.
 - e. Failure to give notice to the labour officer.
4. The claimant claimed as follows:
- a. One-month pay in lieu of notice Kshs.144,543.00.
 - b. Compensation for unfair termination under section 49 (c) of the [Employment Act](#), 2007.
 - c. Total claim of Kshs.1,734,516.00.
5. The response to the claim was filed on 14.05.2018 through Odhiambo Oronga & Company Advocates. The respondent admitted that it had employed the claimant as pleaded for the claimant. The respondent denied that the termination was unfair or unlawful as was alleged for the claimant but was in accordance with the provisions of the Acts cited by the claimant. The termination being legal, fair and proper, the claimant was not entitled to the prayers made. The respondent prayed that the suit be dismissed with costs.
6. Final submissions were filed for the parties. The claimant testified to support his case. The respondent's witness (RW) was Kathure Donnah Michael, the Senior Finance Manager. The Court has considered the pleadings, the evidence and the submissions. The Court returns as follows.
7. There is no dispute that the claimant was employed by the respondent from 15.10.2012 to 31.12.2016.



8. The employment contract was terminated by the notice of termination of employment dated 08.09.2016.
9. Was the termination unfair and unlawful as alleged for the claimant? Per contract, the claimant was given the three months' termination notice. The Court finds that the contractual provision was more generous than the one-month notice under section 40 of the *Act* so that the statutory provision on notice to the employee was more than complied with. The e-mails exhibited were sent to all staff including the claimant and the Court finds that they served to prepare staff for the looming redundancy. The claimant confirmed that the e-mail of 22.08.2016 was copied to her. It requested staff to give comments on the on-going process and she knew the respondent was undergoing a re-organisation but she gave no views about it. The Court finds that the claimant had sufficient opportunity to give her views including the time she served for the 3-months' notice but appears not to have issues to raise. The notice to the labour officer was not dated and was received by the county labour office on 14.12.2016 for a termination taking effect on 31.12.2022. The Court returns that to that extent, the one-month notice to the area labour officer under section 40 of the *Act* was not sufficient. The termination was unlawful for want of sufficient notice to the area labour officer as per section 40 (1) (b) of the *Employment Act*, 2007. As for the selection criteria, the claimant has not pleaded the particulars of unfair selection. It appears that she held the one position of Administrative Assistant in the respondent's establishment. It has not been shown that there were other staff holding similar office. Thus the issue of selection criteria does not even start to emerge in the instant case especially that the claimant confirmed that all employees for ESARO were terminated and while she worked for Kenya office, she as well served ESARO. On substantive merits, the claimant has not pleaded that the reasons for termination were not genuine or invalid. In her testimony, she appears to have stated that on 22.09.2016 the respondent issued a memo dated 22.09.2016 about an advertisement for Office Assistant but which the Court finds to have been a different job or the claimant was not denied an opportunity to apply if at all the job was well available. The Court finds that the reason for termination on account of redundancy was valid as at the time of termination per section 43 of the *Employment Act*, 2007 and was fair per section 45 of the *Act*.
10. The Court has considered the factors in section 49 on award of compensation for unfair termination. The respondent paid severance at a month per year served way above the statutory 15 days per year served. A 3 months' contractual notice was issued way above the one-month notice in section 40 of the *Act*. The insufficient notice to the labour officer was in circumstances that the respondent had given the claimant sufficient opportunity to give views on the looming redundancy. In the circumstances the insufficient notice to labour officer is found excusable and no award will be made in the instant case.
11. The Court has considered the nature of infraction and returns each party to bear own costs of the suit.
In conclusion the suit is hereby determined with orders:
 - a. The termination by way of redundancy was unfair in procedure in view of the insufficient notice to the labour officer.
 - b. Each party to bear own costs of the suit.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS TUESDAY 28TH MARCH, 2023.

BYRAM ONGAYA

PRINCIPAL JUDGE

