Rop v Unilever Kenya Limited (Cause 1568 of 2017)
[2023] KEELRC 1342 (KLR) (18 May 2023) (Judgment)

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REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 1568 OF 2017

K OCHARO, J

MAY 18, 2023

BETWEEN

JANET MERCY CHEPKORIR ROP ..... CLAIMANT

AND

UNILEVER KENYA LIMITED ..... RESPONDENT

JUDGMENT

Introduction

1. At all material times the Claimant was an employee of the Respondent up to 11th November 2016, when her service came to termination, charging that the termination of her employment was unfair, unprocedural and illegal, she sued the Respondent seeking for the following reliefs against it:

    a. A declaration that the Respondent's action to terminate the Claimant from employment was unfair, illegal and unprocedural.

    b. Kshs. 2,245,413.96 being 12 months' salary in compensation for wrongful termination.

    c. General damages for unfair termination and discrimination.

    d. Interest on (b) and (c) at court rates from the date of termination until payment in full.

    e. Costs of this claim and interest thereon.

2. Contemporaneously with filing of the Memorandum of Claim, the Claimant filed her witness statement dated 29thе June 2017 and a couple of documents, under a list of documents of the even date.

3. Upon being served with summons to enter appearance, the Respondent did file a Memorandum of Appearance on the 17th August 2017, and subsequently filed a Replying Memorandum on the 26th September 2017. The Memorandum was filed side by side with its witness's statement. The Respondent denied the Claimant's claim in toto.

The Claimants case

4. The Claimant adopted the contents of the aforestated witness statement as her evidence in chief, and had the documents admitted as her documentary evidence. She briefly testified in chief, clarifying points that needed to be on the statement and documents.

5. She testified that she first came into the employment of the Respondent on the 15th October 2015 under a letter of appointment of the same date. Her position on appointment was Material Stores Controller Manager. She subsequently scaled up to the position of Warehouse Manager, earning a monthly salary of Kshs. 187,117.83/=

6. Th Claimant stated that in the course of her employment, she worked diligently and was resourceful to her employer, the Respondent.

7. In the year 2014, the Respondent requested those employees who wished to quit employment on a voluntary separation agreement, to so inform the Management. She expressed interest but the Respondent rejected her application. The rejection was expressed through a letter dated 23rd October 2014. This on the basis that she was a valuable and resourceful employee.

8. Consequently, she continued to work for the Respondent diligently and for a long time enjoyed a cordial employee-employer relationship with the Respondent.

9. The Claimant further testified that in the year 2015, she started experiencing some pains on her body and upon seeking medical attention, it was discovered that she had a Spinal problem. In June 2015, she was operated on and put on medication. In September 2016, she was diagnosed with a condition known as hyperthyroidism. Her situation took a toll order on her, she had to undergo several medical procedures. In the process she would visit the Respondent's Medics who could treat her and recommend her for sick off from time to time.

10. The Claimant stated further that in the course of the year 2016 while on sick off, the Respondent's the Human Resource Business Partner, Chris Chege called her asking whether she could consider retiring on medical grounds. In light of this, she got prompted to seek professional advice from the Respondent's doctors. She was referred to Nairobi Arthritis Centre for a second opinion. Doctors from both Institutions opined that her condition was not terminal and was in fact manageable with the right treatment. Following this, she declined to resign as was suggested by the Human Resource Business Partner.

11. On or about the 9th October 2016, the issue of her early retirement was re-raised. She declined to embrace the same as she was eager to continue working. She alleged that this happened when she was on sick off.

12. On 11thNovember 2016, while on sick off, she was called by the Company nurse, Emily Langat for a meeting. In the meeting were the Human Resource Business Partner, and Factory Manager Mr. Paul Arunga. While in the meeting was informed that the Respondent had reached a decision to terminate her employment on account of redundancy. She was asked to pick her termination letter a week later.

13. The Claimant stated that due to her ill-health, on the 15th November 2016, she sent her son to pick the letter. Upon receiving it, she discovered that the same had been backdated to 1st November 2016, yet she was receiving it on the 15th November 2016.

14. Prior to the termination, she had not been notified of the intended redundancy, the reasons stirring the same and the extent thereof.

15. She contended that no redundancy took place at the Respondent's and took a firm position that the Respondent was determined to have her exit employment because of her ill health. At termination of her employment, her role was taken over by one Felix Maingi

16. The actions of the Respondent have visited great loss and mental anguish on her. After the termination, her sickness worsened as she developed high blood pressure. She is currently faced with huge medical bills and expenses as a result.

17. The Claimant asserted that she was a victim of discrimination based on her health condition. Her contract of employment was permanent and pensionable. The Respondent's actions inconvenienced her. She did not foresee a termination before reaching her retirement age. She is currently unemployed yet she has a family to fend for.

18. In her evidence under Cross-examination, the claimant testified that the Respondent's letter dated 23rd October 2014, declining her Application for Voluntary Separation, flowed from a form that she had filled, at the instance of one Mr. David Olang. The issuance of the letter was preceded by a meeting between her, her boss and two other managers. In the meeting Mr. Olang David was constrained to apologize.

19. The Claimant further testified that during the period 2015-2016, she was in and out of hospital. Among the Doctors who could attend to her during this time included the Respondent's own Doctors. At no time did the Respondent decline to accord her sick leave whenever she required it.

20. Referred to the medical report dated 24th October 2016, one of her exhibits by Dr. Fredrick Otieno, the Claimant stated that the doctor opined therein that she was physically well health wise.

21. The Claimant further testified that Dr. Gitua was one of the Company's doctors. Though the doctor's report indicates that she had requested to be retired on medical grounds, the contrary is true, she did not.

22. In the report, Dr. Gitua concluded that her condition could not hamper her work. This notwithstanding, whenever she got back from sick leave, Mr. Chege could urge her to consider retiring. At some stage he called her following up whether she had decided to retire on medical grounds.

23. Though the letter dated 1st November 2016 indicates that there had been a mutual discussion on the restructuring of the Supply Chain function, contrary to it, she took a position that there was none.

24. She further testified that the Supply Chain function had many Departments. There was no out bound Department within the Respondent Company. Its outbound services were being carried out by an outsourced service provider, DHL.

25. The Claimant further testified that she was Managing warehouses that were within the Respondent's premises, and those that were without which had been outsourced.

26. She denied knowledge of the fact that within the Supply Chain function, there were positions that were declared redundant.

27. The letter (Respondent's exhibits 2) dated 1st November 2016, that the Respondent addressed to the District Labour Officer intimated that 5(five) positions within the Supply Chain function were to become redundant effective 30th November 2016.

28. The Claimant contended that to the best of her knowledge, there was no Project Engineer within the Respondent. Engineers who worked for the Respondent worked on a temporary basis.

29. The Claimant further stated that the email dated 29th November 2016, showed that Felix Maingu took over the role of a Warehouse Manager after the alleged restructure. According to her, there was only one Warehouse Inbound Manager. There cannot be any difference between Inbound Warehouse Manager and Warehouse Manager. This was one role and one office.

30. She acknowledged receipt of the termination letter on the 17th November 2016. Four days after the meeting between her and the Human Resource Business Partner.

31. The dues reflected on the termination letter were paid to her.

32. In her evidence in re-examination the Claimant testified that she did not make any request to be retired on medical grounds.

33. The letter to the Labour Office did not put forth the names of the employees who were to be affected by the alleged redundancy. No manager of her level was declared redundant.

The Respondent's case

34. The Respondent's witness was Chris Chege, its Human Resource Business Partner, Supply Chain.

35. The witness urged the court to adopt the contents of his Witness Statement as his evidence in chief. He stated that the Claimant got first employed by the Respondent in the year 2008 as a Stores Controller Manager, which position she held until the year 2012, when she was promoted to the Position of an Inbound Warehouses Manager. She held this position until 30th November 2016, when her contract was terminated on account of redundancy. At the time of termination of her employment she was earning a gross salary of Kshs. 187,117.83/=

36. The witness testified that the Claimant's contention that was discharged from employment on account of ill-health is untrue. It was on account of redundancy, following the Respondent's decision that was made some times in the year 2016, to reduce the number of Managers in the Supply Chain Department and merge some functions. The Claimant's role was among the 4 (Four) that were to be affected by the said restructuring.

37. The witness stated that in the year 2015 the Claimant fell sick and she was away on sick leave over a period of time. During this period the Respondent accorded her an elaborate medical attention and support by way of a well- equipped medical cover and a comprehensive management plan to assist her manage the medical condition. The Respondent's medical doctors closely monitored her.

38. The witness denied that he often urged the Claimant to consider retiring on medical grounds.

39. The witness alleged that he was aware that on various occasions the Claimant had requested for a voluntary separation, requests which the Respondent declined based on its Dactor's advice that the Claimant's medical condition did not affect her ability to perform her duties under the employment Contract. The letter dated 23rd. October 2014 was written under this circumstance.

40. Sometimes in October 2014 the Respondent conducted an evaluation of its processes globally and with particular respect the Supply Chain Department. The Respondent took a decision to restructure its Supply Chain, by reducing the number of Managers in the Department, reorganizing and merging the various roles and responsibilities among managers. The restructuring was aimed at achieving an efficient and effective Supply Chain process for business as well as reducing attendant costs. Owing to the restructuring exercise, there was a reduction of the headcount in the Supply Chain department as some rules were abolished and merged with other functions.

41. The witness contended that as a result of the restructuring, four (4) roles held by non-unionisable employees were affected including the position of Inbound Warehouse Manager that was held by the Claimant. The had functions that were abolished and merged with other functions were:

    i. The Inbound warehouse Manager role was merged with Internal logistics functions to Internal Warehousing and logistics Lead role.

    ii. Project Engineer role was abolished.

    iii. Shift Manager (Home care) head count-reduced

    iv. Spreads Engineer-role merged with Savoury Engineer role to one, Foods Factory Engineer Role.

42. The witness contended that the redundancy process was conducted in accordance with the provisions of the Respondent's Human Resource Policy and stipulation of the *Employment Act*. The selection criteria of the five employees who were declared redundant was based on their suitability and adaptability to the new roles, performance and ability to perform more than one function across the department, skills and capability of individual staff, adaptability to current demands as well as suitability or lack of it for the roles that remained.

43. The expanded role of Internal Warehousing and Logistics Lead, was taken over by one Felix Maingi who was tasked to oversee all Warehouses in the factory as well as all the logistics within the factory premises. The role was an expanded The Claimant was not suitable to serve in it. Her contention that her role was taken up by Felix Maingu, is far from the truth.

44. The witness asserted that prior to the declaration of redundancy of the claimant's position, the Respondent had through its line managers held consultative meetings with the employees to be affected. He personally had a discussion with the Claimant and explained to her the reason for the restructuring, how her role would be affected and confirmed to her that until 30th November 2016 she would continue enjoying employment benefits including medical Cover.

45. He further stated that the Claimant's line Manager invited her together with four other affected employees for a meeting to discuss the intended restructuring. During the meeting the Claimant and her colleagues were informed of the basis for the restructuring and the selection criteria applied. Subsequently each of them was given a redundancy letter dated 1st November 2016, informing him or her of the basis for the intended restructuring exercise, the notice period and the terminal benefits payable. The Labour Officer was equally notified.

46 The Witness stated that following the lapse of thirty days' notice on the 30th November 2016, the Respondent paid the Claimant her terminal dues including Statutory benefits in accordance with Section 40 (f) of the *Employment Act*

47. He further stated that although the Claimant was entitled to severance pay at the rate of fifteen (15) days' pay for each year worked in accordance with section 40(1) (g) of the *Employment Act*, out of good faith, the Respondent paid her 30 days' pay for each year worked which was more than her statutory entitlement. The Respondent made other discretionary payments to her which included annual bonus and relocation allowance.

48. The Claimant's allegation that she was discriminated against is unfounded. She was not the only manager who was affected by the redundancy.

49. Cross-examined by the counsel for the Claimant the witness testified that he worked with the Respondent for seven (7) years. The letter dated 23rd October 2014 was written when he had not joined the Respondent's workforce.

50. The witness stated further that the Claimant asked for a voluntary separation in 2015, though the same was not in writing.

51. The witness reiterated that the reason for the redundancy exercise was the restructure to streamline operation and optimize management headcount, and let go employees who were not required.

52. The roles that were to be affected were five however one of the Managers resigned before the redundancy.

53. Referred to an email dated 29th November 2016, the witness testified that, true the email indicates that Dennis Machuma was being appointed as a Project Engineer. The Respondent had several Project, Engineers. He however admitted that he did not mention this in his witness statement.

54. The Claimant was in charge of Inbound Warehouse. She was in charge of non- managerial staff. There was a separate redundancy for non-managerial staff.

55. The witness stated that definitely, the decision to restructure must have flowed from discussions by the Respondent's Management. Pressed further under Cross examination, he testified that he had no documents to demonstrate the being of the discussions and decision on the restructure. He was not involved at all in the discussions leading to the decision.

56. He testified that though he knew not on how the Respondent's Board arrived at the specific managers who were to be affected by the redundancy, however, her would attest to the fact that factors like capability and suitability of the managers for the new roles were an influence.

57. The Claimant's Performance was also a factor considered. Her performance was rated lower than that of Mr. Maingi. However, the Respondent has not filed any document in court from where a comparison of the Performance of the two can be drawn.

58. The termination letter was received on 17th November 2016.It was witnessed by one James Mbathie.

59. He testified that from 28th October 2016 to 18th November 2016, the Claimant was lawfully on sick off.

60. The witness further stated that the Claimant was not offered any alternative employment.

61. Fred Wafula and Dennis Machuma were appointed after successfully completing the Respondent's Management Training Programme.

62. In his evidence under re-examination, the witness testified that the Respondent had several Project, Engineers.

Analysis And Determination

63. From the pleadings, the evidence and the submissions by the parties, the following issues emerge for determination:

    i. Whether there was a genuine redundancy situation.

    ii. If the answer to (a) above is in the affirmative, whether the termination of the Claimant's employment was fair and lawful.

    iii. Whether the Claimant is entitled to the reliefs sought or any of them.

iv. Who should bear the costs of this suit?

Whether there was a genuine redundancy situation

64. In cause No. ELRC 1332 of 2018 *Showkat Hussein Badat v Oshwal Education & Relief Board*, this Court stated:

> " 50. The defining characteristics of termination on account of redundancy is lack of fault on the employee. It is a species of "no fault termination. One cannot be off mark to state that it is for this reason that the *Employment Act* places particular obligations on the employer most of which are directed towards ensuring that those employees to be dismissed are treated fairly".

65. Both section 2 of the *Employment Act* 2007 and section 2 of the *Labour Relations Act* define redundancy as:

> " The loss of employment occupation, job or career by involuntary means through no fault of an employee, involving termination of employment at the initiative of the employer where services of an employee are superfluous and practices commonly known as abolition of office, job or occupation and loss of employment".

66. The locus classicus on redundancy under Kenyan Law is *Kenya Airways Limited and Aviation and Allied workers Union Kenya & 3 others* (2014) eKLR cited by counsel for the parties herein, where the Court of Appeal stated:

> " There are two broad aspects of this definition. The first one is that the loss of employment in redundancy cases has to be by involuntary means and at the initiative of the employer it should not be a contrived situation. It has to be non- volitional. I understand this to refer to a situation in most cases an economic downturn, brought about by factors beyond the control of the employer, which leaves the employer with no option but to take an initiative the consequences of which will be inevitable loss of employment....."

67. A redundancy situation would arise where major changes in the mode of production, programmes or activities of an employer entity were likely to result or resulted in reduction of the needed Labour force and there was excess Labour.

68. No doubt the law recognizes no right to employment for life, however the social balance struck in context of a constitutional regime in which the right to fair Labour practices is a fundamental right is to afford an employee the right not to be unfairly dismissed and the employer the right to dismiss an employee for a fair reason provided that a fair procedure is followed.

69. The employer (read Respondent) is burdened with the onus of satisfying the court that there was a genuine redundancy situation, and therefore a fair and valid reason to terminate the employee's(claimant's) employment. From the onset of, and throughout, her case, the Claimant asserted that the Respondent terminated her employment not for any genuine reason, it only wanted to let her go due to a recurrent ill health that had troubled her for some time. The Claimant in sum contended that what happened was an unfair termination dressed up as a redundancy. The alleged redundancy was a sham.

70. By reason of the rival positions taken by the parties on the alleged redundancy, it falls on this court to pronounce itself whether there was a genuine redundancy.

71. Counsel for the Respondent submitted that the Respondent managed to demonstrate that there was a genuine redundancy situation, and that therefore the termination of the Claimant's employment was upon a fair and valid reason. The court is not Persuaded by these submissions for the reason(s) as shall emerge shortly hereinafter.

72. In my view it is not enough for an employer to just state that there was restructuring of the organization /entity with a consequence that some positions were rendered redundant. Reasonable details are expected of the employer and the expectation gets heightened when the redundancy is disputed by the employee. Employee who sees the same as camouflaged.

73. Restructuring and declaration of redundancy is a process it is not a thing that just happens. One could in circumstances as are in the instant case, reasonably expect to see evidence by the employer on; when the idea to restructure was conceived; the reasons for the idea; dates when deliberations on the idea were undertaken; the date when a decision was taken on the restructure; and deliberations on the steps to be undertaken through the restructure to the exit of those to be affected.

74. On the above-mentioned matters, the court expected to receive sufficient evidence. However, the Respondent in its pleadings and its witness in his evidence, were too casual or general. For instance, despite their claim that the restructure and resultant redundancy were as a result of a global evaluation of the Respondent's processes, no documentary evidence was placed before the court from which the evaluation and need to restructure could discerned. No record, testament of the Management's deliberations on the matters was placed before me.

75. It has not escaped this court's eyes that both in its pleadings and the evidence that was adduced on its behalf, the silence on specifics regarding when the decision to restructure was taken was too loud. In my view it was not sufficient for them to state that "sometimes in the year 2010, following an evaluation of the Respondents Performance globally....." If indeed there was an evaluation, the pleadings and or evidence couldn't have missed to put forth the specific period of the evaluation and date when the decision was made for undertaking of the redundancy process.

76. The witness testified in his evidence under cross examination that he was not involved in any deliberations concerning the restructure and the resultant redundancy. He further testified that he could not tell how the Respondent arrived at the decision that the Claimant was one of those that were to be affected by the redundancy.

77. By reason of the premises foregoing, I am persuaded by the Claimant that the redundancy alleged by the Respondent was a sham. There was no genuine redundancy situation.

78. In the case of *Kenya Airways Ltd v Aviation and Allied Workers Union Kenya and 3 others* (2014) eKLR the Court of Appeal held and I draw inspiration therefrom, that:

> "Redundancy is a legitimate ground for terminating a contract of employment provided there is a fair reason based on operational requirements of the employer and the termination is in accordance with a fair procedure. As section 43(2) provides, the test of what is a fair reason is subjective ..... what the Phase means, in my view, is that while there may be underlying causes leading to a true redundancy situation, such as reorganization, the employer must nevertheless show that the termination is attributable to the redundancy- that is that the services of the employee has been rendered superfluous or that redundancy has resulted in abolition of office, job or loss of employment."

79. The Claimant contended that immediately after the termination of her employment, one Felix Maingi took over her role. The Respondent on the other hand asserted that the role that Mr. Maingu was

appointed to was an expanded one. One which the Claimant lacked suitability to serve in. There is no contest that Mr. Maingu was appointed to the position of Warehouse Manager. At the termination of her employment the Claimant was serving as Inbound Warehouse Manager. Owing to position that was taken by the Claimant, it was necessary for the Respondent to demonstrate to court that the two roles were actually different. Nothing would have been easier than it presenting as evidence the job descriptions for the two roles. By reason of this premise, I am convinced that the role that Mr. Maingu was appointed to was the same as that the Claimant was serving in, prior to the subject termination.

80. The Respondent's witness made a bald allegation that a comparison was done on Mr. Maingi's suitability and skills and of the Claimant's, and the former emerged more favorable for the role. How the suitability and skills were weighted is a question that the Respondent did not provide an answer for.

81. In deciding whether there was redundancy, the court will look at the employees that were retained and those declared redundant. The test is whether the employee that was affected ought to have been selected compared to other employees in the same Department or level who remained. This is only possible if the employer places material before court to enable the comparison. Where the employer starves the court of the material, an adverse inference cannot be helped.

Whether the termination was fair

82. In the premises hereinabove, this court finds no difficulty in holding that the termination of the Claimant's employment on the alleged redundancy was not substantively justified.

83. Assuming I am wrong on this, still for reasons hereinafter this court will find the termination unfair for want of procedural fairness. Section 40 of the *Employment Act* elaborately provides for what an employee who decides to terminate an employee's employment on account of redundancy must do. The section provides:

> "An employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions –
>
> (a) 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:
>
> b) where an employee is not a member of a trade www.fke-kenya.org/download/employmentact2007.pdf The *Employment Act*, 2007 47 union, the employer notifies the employee personally in writing and the Labour officer;
>
> (c) 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;
>
> (d) 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;
>
> (e) the employer has where leave is due to an employee who is declared redundant, paid off the leave in cash;

(f) 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

(g) 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."

84. There is no doubt that the Claimant's employment was terminated through a letter dated 1st November 2016. Imperative to state that there had been no notice preceding the letter, informing her of the alleged decision for the restructure, restructuring process and the redundancy process that could ensue. The question that this court has to answer is as to whether the letter took the character of the notice(s) envisaged by section 40(1) of the *Employment Act* and whether it was in the nature able to achieve the purpose for which the provisions created notice(s) thereunder.

85. Section 40(1) of the *Act* contemplates two notices to be issued in the process leading to the termination of employment on account of redundancy. This aspect of the provision received judicial attention in the case of *Kenya Airways Ltd v Aviation & Allied Workers Union & 3 others* (2014) eKLR where Maraga JA (as he then was) held;

> " My understanding of this provision is that when an employer contemplates redundancy, he or she should first give a general notice of that intention to the employees likely to be affected or their Union. It is that notice that will elicit consultation between the parties..... The Act requires one month's notice. The period runs from the date of service of that notice. It is after the conclusion of the consultation on all issues of the matter, that notice will be issued to the affected employees of the decision to declare the redundant."

86. In *Barclays bank of Kenya Ltd & Another v Gladys Muthoni & 20 others* (2016) eKLR the court of appeal stated:

> "The trial court was of the view that there ought to have been two notices- a specific notice alerting the redundant and the reasons therefore and another one terminating the services. It reasoned:
>
> > "As noted by the court in *Caroline Wanjiru Luzze v Ne Nestle Equatorial African Regional Ltd*, the employer is supposed to give two (2) distinct notices on account of redundancy, such must be in writing. According to the trial court, there was no redundancy notice issued or served on the Respondents. All they received were termination letters" hence the finding that it was unprocedural.
>
> 28. In holding that view, the trial court was not alone. Maraga JA in *Kenya Airways* (*supra*) opined....."

87. The letter that was served on the Claimant heavily sounds a termination letter. It cannot be seen in any other way. There was no redundancy notice therefore issued and served. The Respondents' witness's evidence was all indicative that this was the only correspondence that was, to the Claimant.

88. A redundancy notice which I have concluded was not issued and served in the instant matter, births the event of consultation before a redundancy is declared. In our law consultation is a must. This was emphasized by the Court of Appeal in the *Barclays Bank of Kenya case* (supra) thus;

> " 37. We have carefully examined that case which unlike this case, involved unionsable employees of a collective bargaining agreement and oral evidence

> tested in cross-examination. In the end, we are persuaded that the dicta of Maraga and Margor JJA regarding consultation prior to declaration of redundancy resonate with our constitution and international laws which have been domesticated by dint of Article 2(6) of the *constitution*"

89. The purpose of consultation in a redundancy process cannot be down played. The purpose was aptly captured by Maraga JJA (as he then was) in the *Kenya Airways case* (supra). The Respondent did not tender any evidence here that there were consultations prior to the termination. The Claimant's evidence that there weren't was not rebutted.

Of the relief grantable

90. The Claimant sought inter alia for compensation for wrongful termination, Kshs.2,245,413.96/= being 12 months' gross salary. I am a live of the fact that 12 months gross wages or salary is the maximum awardable compensation provided for under section 49(1) (c) of the *Employment Act*. Granting the relief is discretionary. Whether the maximum compensation is awardable or a portion thereof or no compensation depends on the circumstances of each case.

91. Counsel for the Respondent submits that this court does consider that the Respondent did take mitigation measures such as the payments it made during the Claimant's sick leave and the severance package and award 1 month's gross salary. The court agrees not with counsel's line of thought here. These benefits were not a favour to the Claimant.

92. Counsel relied on the case of *Ibrahim Haji Ali v Gulf African Bank (k) Ltd and another* (2020) eKLR. The decision can be distinguished from the instant matter. In the cited case, liability was attaching against the employer on account of procedural unfairness, unlike in this matter, where the employer's action suffered from lack of procedural fairness and substantive justification. The conduct of the Respondent passes easily for unfair Labour practice.

93. I am inclined to award the Claimant the compensatory relief. I have considered the fact that the alleged redundancy was a sham, that the termination was discriminatory as shall come out herein after shortly, the extent of the Respondent's deviation from the requirements of the law, the breach of the constitutional duty to embrace fair Labour practice, the fact that the termination was without fault on the part of the Claimant, and consequently award her compensation to an extent of 11 months gross salary. Kshs. 2,058,296.13/=

94. It was the Claimant's case that her employment was terminated on account of her ill health and that she was discriminated against therefore. On the alleged discrimination she has sought for an award of general damages.

95. There is no contest that between 2015 – 2016, the Claimant was under a period of ill health. What is, is whether the termination of her employment was due to her health status and as such amounted to discrimination. The Respondent's case was that the termination was on account of redundancy. This, I have hereinabove found not to be convincing. The net effect being that the Claimant's assertion as regards the reason for the termination of her employment wasn't successfully challenged. The Respondent failed to discharge its legal burden under section 47[5] of the *Employment Act*.

96. Further, the Respondent's witness didn't strike me candid and trustworthy. His testimony on the letter dated 23rd October 2014, attracts this view by the Court. The letter read in part;

> " Re; Decline of Your Voluntary Separation Application.

Following your application for Company Voluntary Separation Program, I regret to inform you that the business has decided not to accept it.

While I understand fully your wish to leave the business, you have a critical role to play and I believe you have the skills, capability and attitude to perform this role to the expected standards.

Your terms and conditions of employment remain unchanged and I take this opportunity to thank you for your hard work, commitment and dedicated contribution to the business....."

97. While this letter was unambiguous in content that the Claimant had made an application to voluntarily separate with the Respondent under a program by the latter, the witness in an attempt to sale the Respondent's story that the former had severally approached it, to be retired on medical grounds, deliberately and misleadingly testified that the letter flowed from one of those occasions when the Respondent was such approached. From whatever angle the letter is looked at, there cannot be even the remotest discernment that it was as a result of an application by the Claimant to be retired on medical grounds.

98. The premises foregoing leads this Court to a conclusion that the Claimant's employment was terminated as a result of her ill health.

99. Having found as I have hereinabove, I now turn to consider whether the termination on this account was discriminatory. Discrimination against any employee is prohibited by dint of the provisions of Article 27 of the *Constitution* as well as section 5 read together with section 47 of the *Employment Act*. Article 27[4] and [5] provide;

> " [4]. The state shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.
>
> [5]. A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause 4.

100. Section 5 of the *Employment Act* [Cap 226] provides that;

> " [3]. No employer shall discriminate directly or indirectly, against an employee or prospective employee or harass an employee or prospective employee-
>
> (a) on grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, pregnancy, mental status or Hiv.

101. In my view, any termination of an employee's employment upon any of the prohibited grounds obtaining on the provisions of the law hereinabove brought forth, shall be automatically an unfair termination. It is flowing from this that the law places an enormous burden to disapprove an allegation that by an employee whose employment has been terminated, that the termination was upon basis of a discriminatory conduct by the former.

102. In the case of *Gicheru v Package Insurance Brokers Ltd* [Petition 36 of 2019] [2021] KESC 12[KLR], the Supreme Court held;

> " [44]. The protection of employees against any form of discrimination at the workplace is therefore a significant matter and the burden placed upon an employer to disapprove the allegations of discrimination is enormous. The employer must prove that the discrimination did not take place as alleged and that where there is discrimination, it was not with regard to any of the grounds sub-section 7 provides;
>
> > "[7]. In any proceedings where a contravention of this section is alleged, the employer shall bear the burden of proving that the discrimination did not take place as alleged, and that the discriminatory act or omission is not based on any of the grounds specified in this section."

103. Imperative to state that neither the *Constitution* nor the *Employment Act* defines discrimination. However, in a galaxy of judicial decisions, court has ascribed a definition to the same. The *ILO Convention 111, concerning Discrimination in respect of Employment and Occupation*; -

> " For the purpose of this convention the term discrimination includes-
>
> Any distinction, exclusion or preference made on basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of treatment in employment or occupation:
>
> > Such other distinction, exclusion, or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation as may be determined by the member concerned after consultation with representative employers' and workers' organizations where such exist, and with other appropriate bodies-
> >
> > Any distinction, exclusion or preference in respect of a particular job based on inherent requirements....."

104. In the case of *Law Society of Kenya v Attorney General &COTU*, Petition No.4 of 2019, the Supreme Court of Kenya defined discrimination, thus;

> " A distinction, whether or not but based on the grounds relating to personal characteristics of individuals or group, which has the effect of imposing burdens, obligations or disadvantages on such individual or group not imposed upon others, or which withhold limits access to opportunities, benefits and advantages available to members of society."

105. A termination on account of the ill health of an employee, no doubt falls under the definition accorded to discrimination, it amounts to a distinction and exclusion on a ground relating to personal characteristic of the employee which has the effect of attracting the burden of unemployment with its attendant disadvantages and limitations. In fact, it is on a prohibited ground.

106. By reason of the premises, this Court comes to a conclusion that the termination of the Claimant's employment was discriminatory and automatically unfair. The Respondent failed to discharge its burden under the provisions of section 5 of the *Employment Act*.

107. Noting that an award of general damages for discrimination is discretionary, discretion which has to be exercised judiciously, and considering the circumstances under which the discrimination occurred and the effect of the discriminatory termination of employment on the Claimant, as expressed by her in evidence, I am inclined to grant her general damages to an extent of Kshs. 800,000 [Eight Hundred Thousand] for the breach of her right against discrimination.

108. In the upshot, judgment is hereby entered in favour of the Claimant in the following terms;

[a]. A declaration that the termination of the Claimant's employment was illegal, unfair and wrongful.

[b]. Compensation pursuant to the provisions of section 49[1][c] of the *Employment Act*, 11[eleven] months' gross salary, Kshs. 2,2,058,296.13.

[c]. General damages for unfair discrimination. Kshs. 800,000[Eight Hundred Thousand].

[d]. Interest on the sum awarded above at court rates, from the date of this judgement till full payment.

[e]. Costs of this suit.

READ, SIGNED AND DELIVERED THIS 18TH DAY OF MAY 2023.

.....

OCHARO KEBIRA

JUDGE.

In presence of

Ms. Were for the Respondent.

Mr. Ligami for the Claimant.

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the *Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the *Constitution* and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of court fees.

.....

OCHARO KEBIRA

JUDGE