



**Mogoa v Crown Motors Group Limited (Cause 1549 of 2018)
[2023] KEELRC 1793 (KLR) (24 July 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1793 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1549 OF 2018**

**B ONGAYA, J
JULY 24, 2023**

BETWEEN

LOUIZA MORAA MOGOA CLAIMANT

AND

CROWN MOTORS GROUP LIMITED RESPONDENT

JUDGMENT

1. The claimant filed the memorandum of claim on November 23, 2018 through Ongicho Ongicho & Company Advocates. The claimant prayed for judgment against the respondent for:
 - a. A declaration that the respondent’s letter dated August 1, 2017 terminating the claimant from its employment on account of redundancy as unfair and unlawful and hence null and void.
 - b. A declaration that the respondent practised unfair labour practices which were discriminatory and unlawful.
 - c. The respondent be ordered to reinstate the claimant and treat her in all respects as if the claimant’s employment had not been terminated.
 - d. The respondent to re-engage the claimant in work comparable to that in which the claimant was employed prior to her dismissal or other reasonably suitable work, at the same wage.
 - e. A declaration that the respondent discriminated against the claimant based on gender and race.
 - f. A declaration that the respondent’s disregard of the law perpetuated racism and discrimination against the claimant at work place by recruiting an Asian by the name Ms Rupal Seth whose contract was executed and was to report on December 1, 2017 yet in disguise the respondent dismissed the claimant on account of redundancy.



- g. The respondent unfairly but systematically subjected the claimant to serious racial prejudice from March 2017 in disguise of suspending her services for a duration of more than 3 months contrary to law and organisation policy.
 - h. The respondent be ordered to pay the claimant compensation and terminal dues as enumerated in paragraph 43 above together with interest at Court rates from the date of termination until payment in full.
 - i. The Court be pleased to grant any other order as may deem fit in the circumstances.
 - j. The respondent to issue the claimant with a certificate of service.
 - k. The respondent be ordered to pay legal costs in the suit.
2. At paragraph 43 of the memorandum of claim the claimant enumerated claimed withheld salaries, terminal dues and benefits as follows:
- a. One-month notice prior to termination Kshs 439, 858.00.
 - b. Unutilised 28 leave days Kshs 410, 534.13.
 - c. 3-months' notice Kshs 1, 319, 573.00.
 - d. Severance payment Kshs 439, 854 x 3 years Kshs 1, 319, 573.00.
 - e. Compensation for unlawful and unfair termination $12 \times 439, 854.00 =$ Kshs 5, 278, 296.00.
 - f. Discrimination based on gender and race contrary to the Constitution Kshs 10,000, 000.00.
 - g. Compensation for causing mental anguish, not allowing time to breastfeed, and gender or sex prejudice under Employment Act Kshs 10, 000, 000.00.
 - h. Total claim Kshs 28, 767, 836.13.
3. The respondent filed the memorandum of response on July 24, 2019 through Mohammed Muigai LLP. The respondent prayed that the suit be dismissed with costs. The respondent admitted employing the claimant as a Finance Manager per letter of appointment dated August 15, 2014. The probationary period was 3 months terminable by two weeks' notice. Thereafter, the contract was terminable by either party serving three-months' (90 days') written notice or pay of salary in lieu thereof. The respondent's further case was as follows. Sometimes in July 2017 it was decided to re-organise the respondent's internal management structures to rationalise processes. Some positions were to be affected and the claimant and others were informed through a notice dated July 25, 2017 about the retrenchment exercise so that the claimant's termination was not abrupt. The respondent admitted that the termination of the contract of service had been by the letter of termination on redundancy dated August 2, 2017 with immediate effect and on account of respondent's poor performance making losses on monthly basis and after discussions with employees on the status of the business. Further the respondent complied with the law on redundancy process and made a payment of Kshs 1, 596, 683.46 particularised as follows:
- a. July salary Kshs 439, 858.00.
 - b. 3-months' salary in lieu of termination notice Kshs 1, 319, 574.00.
 - c. Severance payment 15 days for each year worked Kshs 624, 600.00.
 - d. Leave payment (16.25 days) Kshs 329, 893.50.



- e. Total amount gross Kshs 2, 274, 067.51.
 - f. Less PAYE Kshs 675, 484.05.
 - g. Less NHIF and NSSF Kshs 1, 900.00.
 - h. Total deductions Kshs 677, 384.05.
 - i. Net paid to claimant Kshs 1, 596, 683.46 (which in his testimony the claimant confirmed to have received).
4. The claimant testified to support her case and the respondent's witness (RW) was Ernest Kinuthia, the Finance Manager. The final submissions were filed for the parties. The Court has considered all the material on record. The Court returns as follows.
 5. To answer the 1st issue the Court returns that there is no dispute that the respondent employed the claimant as the Finance Manager per letter of appointment dated August 15, 2014.
 6. To answer the 2nd issue, there is no dispute that the contract of employment was terminated by the letter of termination on redundancy dated August 2, 2017.
 7. The 3rd issue is whether the termination was unfair. The claimant resumed duty on August 1, 2017 and received an email dated July 27, 2017 from the Managing Director and forwarding a letter being notification on retrenchment exercise dated July 25, 2017. On August 2, 2017 the respondent's Managing Director summoned the claimant and informed her that she had been retrenched. The claimant received the letter of redundancy dated August 2, 2017. It is obvious that the claimant was not prepared for the retrenchment. The termination was abrupt without a due month's notice to the area labour officer and the claimant on the scope and extent of the redundancy per section 40 of the *Employment Act, 2007*. It was procedurally unfair. The respondent has not shown the alleged poor performance as was alleged to be based on monthly losses. Instead there is no reason to doubt the claimant's testimony that after her termination she was immediately replaced by one Ms Rupal Seth who reported on December 1, 2017. The Court finds that the termination on redundancy was fake and unfair and unlawful both in procedure and merits. The Court has considered the respondent's unfair conduct of issuing two show cause letters in succession and the suspension for three months and then compulsory leave prior to the termination and find the same to amount to aggravating factors that made the termination grossly unfair. The allegation for the respondent that the Board reorganised the respondent's structure to avert the undemonstrated monthly losses has not been demonstrated at all. The minutes and decisions on reorganisation have not been established at all. The respondent has not established reorganization and in any event, such was not notified as per section 76, 77, and 78 of the Act. It cannot be found that the reason for termination was valid and fair in terms of sections 43 and 45 of the Act. The Court returns that in the circumstances and stated considerations within the factors in section 49 of the Act, and, further considering the period the claimant had so far served, the respondent shall pay the claimant compensation for the unfair termination at 7 months' salaries making 7 x 439, 853.00 thus Kshs 3, 078, 971.00. The 3-months' pay in lieu of the contractual termination period had been paid and in lieu of the one-month prior to termination per section 40 of the Act and as prayed for is awarded as prayed for Kshs 439, 858.00. Severance pay had already been effected per section 40 of the Act and the prayer is declined. Leave days have been effected and the claimant had not established the claim and prayer as made.
 8. To answer the 4th issue, the Court has considered the employment of Ms Rupal Seth as confirming that the reason for the claimant's employment was not genuine but fake. The claimant pleaded and testified that the employment of the said Ms Rupal Seth who was an Asian amounted to discrimination on



account of race and gender or sex. It is not shown how gender or sex considerations would begin to emerge in the circumstances of the case. The claimant has not also shown that she was being terminated to pave way for employment of an Asian. It would appear that the parties had long running workplace battles but which had nothing to do with the claimant's race. She had been employed despite her race. Allegations of discrimination based on gender or sex and race are found not established. The claimant alleged she worked from 8am to 8pm and was denied an opportunity to breastfeed. However, while urging that allegation to amount to discrimination on account of sex and gender, the claimant has not shown that such a grievance existed while she was in the respondent's service and the claim is found to be an afterthought. Similarly, the Court has considered the suspension and compulsory leave prior to the termination in awarding the compensation. The prayer for general damages on account of mental anguish is found unjustified in the instant case. It appears the claimant correctly abandoned the claim for reinstatement as it would be impossible or impracticable to implement such an order (the vacancy having been filled) and as well, it is time barred as three years have lapsed since the date of the termination.

9. The claimant is entitled to a certificate of service. As the claimant has significantly succeeded in her claims, she is awarded costs of the suit.

In conclusion judgment is hereby entered for the claimant against the respondent for:

- a. The declaration that the termination of the claimant's employment by the respondent was unfair and unlawful.
- b. The respondent to pay the claimant Kshs 3, 518, 829.00 (less PAYE) by October 1, 2023 failing interest to be payable thereon at Court rates from the date of this judgment until full payment.
- c. The respondent to deliver the claimant's certificate of service in 30 days from the date of the judgment.
- d. The respondent to pay the claimant's costs of the suit.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS MONDAY 24TH JULY, 2023.

BYRAM ONGAYA

PRINCIPAL JUDGE

