Inbukwa v Tentacle Communications Limited (Employment and Labour Relations Cause E6505 of 2020) [2023] KEELRC 2535 (KLR) (19 October 2023) (Judgment)

Neutral citation: [2023] KEELRC 2535 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

EMPLOYMENT AND LABOUR RELATIONS CAUSE E6505 OF 2020

BOM MANANI, J

OCTOBER 19, 2023

BETWEEN

BARBARA KWAYERA INBUKWA ..... CLAIMANT

AND

TENTACLE COMMUNICATIONS LIMITED ..... RESPONDENT

JUDGMENT

1. The claim before me challenges the decision by the Respondent to terminate the Claimant's contract of service. The Claimant asserts that the Respondent's decision was unlawful.

2. On the other hand, the Respondent posits that it had valid reasons to terminate the Claimant's contract. Further, the Respondent argues that it followed the procedure laid down in law in arriving at its decision. In the premises, the Respondent contends that the Claimant's action is without merit.

Claimant's Case

3. The Claimant avers that she was hired by the Respondent in March 2017 to serve as the Respondent's Administrative Assistant. She states that her exit salary was Kshs 49,337.00.

4. The Claimant avers that she became pregnant sometime in 2019. She asserts that on 3rd January 2020, the Respondent's Director uttered words which suggested that he was targeting her on account of her pregnancy. The Claimant alleges that the said Director made a statement suggesting that her services were going to be terminated due to her pregnancy.

5. The Claimant asserts that on 21st January 2020, the Respondent's Director ordered her to hand over her work laptop and leave the work premises. According to the Claimant, the Respondent's actions were without prompting and justification.

6. It is the Claimant's case that her efforts to seek an explanation for the Respondent's Director's action did not yield fruit. The Claimant states that subsequently on 30th January 2020, the Respondent's Director sent her an email forwarding to her a letter dated 28th January 2020 by which it was communicated that her services had been terminated on account of redundancy.

7. The Claimant has poured cold water on the alleged redundancy. It is her case that the real reason why she lost her job was the Director's insistence that he was not going to keep her in service due to her pregnancy. Consequently, the Claimant contends that the Respondent subjected her to discriminatory treatment because of her pregnancy.

8. The Claimant argues that the Respondent had no reason to declare a redundancy at the workplace. She contends that the law on redundancy was not followed in processing the purported redundancy. Further, the Claimant states that immediately after she was let go, the Respondent replaced her with another employee.

Respondent's Case

9. On its part, the Respondent has denied subjecting the Claimant to discriminatory treatment. According to the Respondent, it began experiencing financial challenges due to low business in 2019. As a result, it took a decision to restructure with the result that some members of staff lost their jobs.

10. The Respondent avers that the process did not affect the Claimant alone. Several other members of staff lost their jobs in late 2019.

11. The Respondent states that when it took the decision to declare redundancies at the workplace, it issued a general notice of this intention to all members of staff on 2nd September 2019. Thereafter, it (the Respondent) issued termination notices to several members of staff. According to the Respondent, the Claimant's release from employment was a continuation of the redundancy process it had embarked on in 2019.

12. The Respondent contends that before it released the Claimant from employment, it issued her with a redundancy notice dated 28th January 2020. The notice was to run up to 28th February 2020 when the Claimant was to collect her terminal dues. Therefore, the Respondent believes that it acted within the law.

13. The Respondent denies replacing the Claimant with a new employee. Further, the Respondent contends that even though it processed the Claimant's terminal dues, she did not report back to clear with the company and collect her dues.

Issues for Determination

14. After analyzing the pleadings and evidence on record, I arrive at the conclusion that the following are the issues that fall for determination: -

    a. Whether the Claimant's employment was unlawfully terminated.

    b. Whether the parties are entitled to the respective reliefs that they have sought through their respective pleadings.

15. The Claimant has asserted that she was terminated because of her pregnancy. To fortify her claim, the Claimant availed proof of her pregnancy in the form of medical records. She also called a witness who testified to this fact.

16. The Claimant has alleged that on 3rd January 2020, the Respondent's Director uttered words to her which insinuated that he was intent on victimizing her on account of her pregnancy. The Respondent's Director testified and vehemently denied the Claimant's assertions in this respect.

17. Section 5 of the *Employment Act* as read with article 27 of the *Constitution* prohibits differential treatment of employees on account of negative attributes including pregnancy. Under section 46 of the *Employment Act*, if an employer terminates an employee's contract on account of matters such as pregnancy, such termination of employment will be considered as unlawful.

18. Under section 5 of the *Employment Act*, where an employee asserts that he has been treated differentially at the workplace, the burden lies with the employer to demonstrate that the treatment complained of was not on account of prohibited discrimination. Despite the fact that the law places the burden of disproving discrimination on the employer, the employee must nevertheless establish a prima facie case for discrimination before the burden shifts to the employer to disprove the assertion.

19. In *G M V v Bank of Africa Kenya Limited* [2013] eKLR, the court set out what an employee must allude to in order to set out a prima facie case for discrimination. The court observed as follows: -

    ''All the ladies are required to do, is establish a prima facie case, through direct evidence or statistical proof, that they have been discriminated against at employment, on account of their pregnancies. Courts have stated that the employee needs to: -

    Bullets

    * Establish she belongs to a protected class.

    * Demonstrate she qualified for the job she lost.

    * Show she suffered adverse employment action, directly as a result of her pregnancy. She must provide *prima facie* proof, that other explanations by the employer are pretexual, and the real reason for termination was the pregnancy.

    * Lastly, the employee must as a minimum, establish that there is a nexus between the adverse employment decision, and her pregnancy.''

20. I have considered the evidence presented by the Claimant in this respect. It is true that the Claimant has established that she was expectant at the time her services were terminated. The Claimant alleges that it is because of her condition that she was relieved of her duties.

21. To fortify her aforesaid argument, the Claimant called a former co-employee who spoke to the matter. Unfortunately, the witness was shown to have been at loggerheads with the Respondent's Director. The witness was a co-director in a company with the Respondent's Director over which the two have been having a bitter feud. As a result of this feud, this witness resigned from her employment with the Respondent.

22. The bitter fallout between the Respondent's Director and the Claimant's witness render her (the Claimant's witness) an unreliable witness in this cause. Her evidence against the Respondent may have been motivated by her bitter fallout with the Respondent's Director.

23. Having regard to the fallout between the two, it is very difficult for the witness to have remained balanced in her evidence. Consequently, it is unsafe to rely on her evidence to find that the Claimant was discriminated at the workplace on account of her pregnancy.

24. Importantly, the Respondent tendered evidence to demonstrate that it had commenced redundancy declarations in September 2019 and that several employees had lost employment on this account. I

find this a reasonable explanation why the Claimant may have lost her job. However, whether the redundancy was processed in the manner contemplated in law is a different matter altogether. In effect, I reject the Claimant's assertion that her termination was on account of her pregnancy.

25. The Respondent alleges that it terminated the Claimant's services on account of redundancy. In order for this form of termination of employment to be upheld, the employer must demonstrate that he processed the redundancy in line with the requirements of section 40 of the *Employment Act*.

26. The law requires that before an employer declares a redundancy, he issues a one month's notice to the employees that are likely to be affected by the process indicating the intention to declare the redundancy. This notice must satisfy two requirements. It must speak to the reason for the proposed redundancy. It must also speak to the extent of the redundancy. Where the employee is a member of a Trade Union, the employer is required to direct the notice to the union.

27. In addition to the above notice, the employer must issue a similar notice to the local labour office. The notice to the local labour office must meet the parameters of the notice that was issued to the employee or his Trade Union.

28. In the case before me, there is evidence that the Respondent issued notice of intended redundancy through an Internal Memo dated 2nd September 2019. Although this notice may be said to have set out the reason for the proposed redundancy, it did not address the extent of the process. It did not indicate the number of employees who were likely to be laid off as a result of the process. Therefore, the redundancy notice was defective.

29. It is also evident that although the Respondent issued a general redundancy notice to its employees, it did not issue a similar notice to the local labour office. Consequently, the Respondent failed to satisfy the requirements of section 40 (1) (a) and (b) of the *Employment Act* as to the redundancy notice.

30. There is evidence that in addition to the notice that was issued on 2nd September 2019, the Respondent served the Claimant with a notice dated 28th January 2020 intimating that she had lost her job for reasons of redundancy. However, this notice cannot be said to have cured the malady in the notice of 2nd September 2019.

31. The latter notice was not a redundancy notice. It was a notice of termination of employment. I say so in view of the content of the Respondent's email dated 30th January 2020 by which it sent the notice of 28th January 2020 to the Claimant. In the email, the Respondent is quoted as stating as follows:-

> ''Morning Barbar, after a quick assessment of your portfolio, I have come to the conclusion stated in the attached letter. I do expect you back in the office starting next week to clear with us smoothly so we can finalize your dues as stated in the letter.''

32. The import of this email is plain. It is clear that as at the time the email was dispatched on 30th January 2020, the Respondent had already made a decision to terminate the Claimant's services. All that the Respondent required of the Claimant was for her to report at work the week following the email date to clear with the Respondent in order to ''smoothly'' finalize processing of her dues.

33. This email is evidence that the notice of 28th January 2020 purporting to give the Claimant a 30 days' notice was a sham. It was a smokescreen meant to cover a flawed redundancy process.

34. Importantly, the notice of 28th January 2020 does not meet the parameters of section 40 (1) (a) and (b) of the *Employment Act*. It does not speak to the extent of the purported redundancy. Neither was it copied to the local labour office.

35. The next thing that an employer declaring a redundancy must do is to allow room for consultations with the affected employees over the proposed redundancy. As was indicated in the case of *Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others* [2014] eKLR, the purpose of these consultations is to try and obviate the redundancy process.

36. In the case before me, there is no evidence that the Respondent allowed room for consultation on the redundancy process. The proposed redundancy was a fait accompli.

37. The other matter that the employer must address in a redundancy relates to the selection procedure for the employees to be released. The employer ought to follow the first in last out principle so that the most senior employees are the last to exit. The employer may only depart from this principle for good reason. Where there is justification, the employer may resort to other mechanisms for selection such as the skills and reliability of the affected employees.

38. As was indicated in the case of *Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others* (*supra*), the purpose of following this procedure is to ensure that the process of selection of employees to be released is not abused. The process must be objective.

39. There is no evidence to suggest that the Respondent handled the issue of selection of the employees to be released in the manner suggested in law. Consequently, it is my finding that the Respondent did not meet the selection criteria for selecting employees to be released from duty.

Determination

40. The upshot is that the redundancy process by the Respondent was markedly flawed. It resulted in the unfair termination of the Claimant's contract of service.

41. Having regard to the foregoing, I reach the conclusion that the Claimant is entitled to compensation for unfair termination. Although the Respondent asserts that the Claimant's exit salary was Kshs 40,368.00, the pay slip for January 2020 which was tendered in evidence shows that the amount that the Respondent is alluding to was the Claimant's net pay. Her gross pay according to the said pay slip was Kshs 49,377.00.

42. In terms of section 49 of the *Employment Act*, the court is to consider various factors whilst assessing the quantum of compensation to award an employee who has been wrongfully dismissed from employment. In this case, I take into account the fact that the parties had not been in the employment relation for a long duration. Having regard to this fact, I consider an award of compensation that is equivalent to the Claimant's monthly salary for six (6) months to be fair. Accordingly, I award the Claimant the sum of Kshs 296,262.00 under this head.

43. Under section 35 of the *Employment Act*, the Claimant was entitled to notice prior to her contract being terminated. In the alternate, she was entitled to be paid salary in lieu of such notice under section 36 of the Act. Accordingly, I award her Kshs 49,377.00 under this head.

44. The record shows that the Claimant's contract was terminated on 28th January 2020. There is no evidence that she was paid salary for the month of January 2020. As a matter of fact, the Respondent has acknowledged through its computation of the Claimant's final dues that this sum is outstanding. Consequently, I enter judgment for the Claimant for Kshs 49,377.00 being her salary for January 2020.

45. The above award is subject to the applicable statutory deductions.

46. I award the Claimant interest on the aforesaid award at court rates from the date of this decision.

47. I award the Claimant costs of the case.

48. I order the Respondent to issue the Claimant with a Certificate of Service in terms of section 51 of the *Employment Act*.

49. All other prayers that have not been specifically granted are deemed as having been declined.

DATED, SIGNED AND DELIVERED ON THE 19TH DAY OF OCTOBER, 2023

B. O. M. MANANI

JUDGE

In the presence of:

.....for the Applicant

.....for the Respondent

Order

In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.