



**Kainika v Sanlam Life Insurance Limited (Cause 82 of 2020)
[2023] KEELRC 2463 (KLR) (17 October 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2463 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 82 OF 2020
B ONGAYA, J
OCTOBER 17, 2023**

BETWEEN

OLIVER TERESIA NJOKI KAINIKA CLAIMANT

AND

SANLAM LIFE INSURANCE LIMITED RESPONDENT

JUDGMENT

1. The claimant filed the Memorandum of claim on February 10, 2023 through Githumbi Gachaga & Achoki Advocates. The claimant prayed for judgment against the respondent for:
 - a. A declaration and finding that the respondent terminated the claimant's services unlawfully and unfairly.
 - b. A declaration that the claimant's termination was discriminatory.
 - c. A declaration that the purported redundancy was null and void.
 - d. Damages for discrimination on account of pregnancy at 12 months' salary, Kshs 3,186,000/=
 - e. Compensation for unfair and unlawful termination at 12 months' salary, Kshs 3,186,000/=.
 - f. Severance pay for the period between 01.11.2019 to 12.11.2019, Kshs 8,850/=.
 - g. Severance pay for the period between 20.04.2016 to 31.12.2017, Kshs 449,875/=.
 - h. Underpayment for 7 months for reduction of payment for the period between June and December 2017, Kshs 700,000/=.
 - i. Underpayment for reduction of her acting allowance for the period between June and November 2017, Kshs 90,000/=
 - j. Unpaid leave days, Kshs 2,212.50/=.



- k. Unpaid pension benefit, Kshs 13,275/=.
 - l. Interest for b) to k).
 - m. Costs of the suit.
 - n. A certificate of service for the period between April 26, 2016 to November 12, 2019 be issued to the claimant.
 - o. Any other relief that this honourable court deems fit.
2. The response to memorandum of claim dated March 13, 2020 was filed through Coulson Harney LLP. The respondent prayed that the suit be dismissed with costs.
 3. A mediator's report dated September 20, 2022 was filed by Anthony Njeru Thande stating that the parties had failed to arrive at a compromise. Accordingly, the matter was set down for hearing.
 4. The claimant's case was that she was employed by the respondent on April 20, 2016 as a sales manager HQ elite branch, a position she held up to February 1, 2017 when she was promoted to the position of Nairobi Region Sales Manager.
 5. That she was entitled to a monthly pay of Kshs 250,000/= plus commission for the period between April 20, 2016 to February 1, 2017.
 6. The claimant maintains that she executed her duties and obligations with diligence, dedication and commitment, resulting in her promotion to the position of Nairobi Region Sales Manager on February 1, 2017. Her salary increased to Kshs 400,000/= plus commission. It was her case that she had legitimate expectation to earn the new salary up to December, 2017.
 7. That through a letter dated June 29, 2017 the respondent informed her that her salary would be reduced. However, her duties and obligations remained the same. The reduction would run for 3 months from June to August 2017.
 8. That after three months, the respondent in August, 2017 extended the salary reduction through a further letter dated August 22, 2017, stating that the reduction would run for a further 3 months.
 9. That the respondent extended the said reduction in salary by a letter dated December 1, 2017 for another one month.
 10. The respondent offered the claimant a letter of appointment as pay-point relationship coordinator indicating that the claimant would begin her employment on January 2, 2018. Her salary would be a gross pay of Kshs 250,000/= per month. A salary review was undertaken on April 24, 2019.
 11. That the respondent delayed in giving the claimant her job description and confirmation of her appointment. Additionally, the respondent changed the key performance indicators in the claimant's office, and, it is the claimant's case that was an attempt to frustrate her.
 12. That the claimant fell ill and proceeded on sick leave from May 20, 2019 and expected to be back to work in the month of June 2019. While on sick leave, the claimant conceived and proceeded on lawful maternity leave from June 18, 2019 and reported back to work on October 7, 2019. On reporting back to work on October 7, 2019 the claimant found a letter on her desk dated October 4, 2019 titled Notice Of Intended Redundancy.



13. The notice made reference to a staff meeting held on September 26, 2019 which the claimant maintains she was never invited and never attended, since, at the material time she was on maternity leave and that she was never consulted.
14. On November 12, 2019 the claimant was served with a letter titled Termination On Account Of Redundancy. The redundancy notice expressed that the claimant's position and roles had been found fit for elimination and that her services stood terminated immediately.
15. The claimant's case is that both the sick and maternity leaves were approved by the relevant department, and her termination on account of redundancy barely a month after resuming from maternity leave, portrays unfairness and inhumane treatment.
16. The claimant states that the computation in the redundancy notice was erroneous as the respondent failed to pay the following dues:
 - a. The claimant had accumulated 8.25 leave days but 0.25 leave days were not paid.
 - b. The severance pay was also wrongly computed. The claimant offered services to the respondent from April 20, 2016 to November 12, 2019 so that 20.04.2016 to December 2017 remain days that were not paid. That severance pay should be calculated from April 20, 2016 to November 12, 2019.
 - c. Severance pay for the period between November 1, 2019 and November 12, 2019 were not paid.
 - d. 12 days pension (from November 1, 2019 to November 12, 2019 was also not remitted to the claimant. That the claimant was still an employee and entitled to all the benefits as an employee up to November 12, 2019).
17. That the respondent issued the claimant with a faulty certificate of service for the period between January 5, 2018 to November 12, 2019 instead of one for the period between April 26, 2016 to November 12, 2019.
18. It is the claimant's case that the redundancy was a tool manufactured to target the claimant unfairly since the respondent, immediately after the claimant's termination, advertised a vacancy of business relationship manager calling applicants who would be employed to perform almost similar duties as were performed by the claimant during her tenure.
19. That the respondent further breached its own human resource policy and procedure manual. Specifically, the respondent went against clause 12.6 of the manual as the retrenchment guidelines were not followed. Further, the respondent abused the claimant's dignity as sick and maternity leave were not respected.
20. That when the claimant returned from maternity leave on October 7, 2019 the respondent had hired a new employee who was performing the same duties as the claimant, that the respondents' conduct was express and implied that the claimant would no longer be required, whereas the office was still available.
21. On the part of the respondents it is stated that the respondent introduced a new segment and distribution line into its business known as business development affluent to target high-end clientele.
22. That through a letter dated April 20, 2016, the claimant was engaged by the respondent as an independent contractor to supervise financial advisors who were contracted on an agency basis. That the respondent agreed to pay the claimant a working capital limit or subsidy of up to a limit of Kshs



- 250,000 for the term of the contract, which amount would later be recovered from the commissions that the claimant would be paid.
23. That the claimant undertook under clause 9.1 that during the term of the agreement, she was independent contractor and that she would bear the exclusive responsibility of tax liability chargeable on its commission and other contributions payable by law arising out of the commission of services under the agreement, and the respondent deducted withholding taxes against the commission that was paid to the claimant.
 24. That subsequently through a letter dated February 1, 2017 the claimant was engaged as an independent contractor to supervise the business development of all branches in the Nairobi region as a regional sales manager. That as an independent contractor the claimant could not be promoted, and that she did not earn a salary but a working capital that was recoverable from the commission paid to her.
 25. That in June, 2017 the business development affluent line was not profitable. As a result, a meeting was held between the parties wherein the respondent explained to the claimant that it intended to downsize or close down this business line. Following those discussions, the claimant agreed to change her role to business development role manager so as to reduce the working capital to a limit of Kshs 300,000 and to an acting pay of Kshs 45,000 for the next three months. That at no time did the claimant contest the reduction. That the claimant agreed to extend the earning structure for a further three months.
 26. That after the business development affluent line collapsed, the respondent through the letter dated December 19, 2017 offered the claimant employment as a pay point relationship coordinator.
 27. That the claimant's position was not within the respondent's staff structure and had been created to meet the respondent's emerging business needs. As a result, there was a delay in processing the job description.
 28. That the claimant's performance was poor and consequently, the respondent extended her probation by one month, and set out key performance indicators the claimant was supposed to meet. Upon receiving the claimant's feedback, the parties agreed that the commencement date of the probation performance review would be June 19, 2018 and the parties also agreed to revise some of the claimant's key performance indicators. The claimant's performance improved and her appointment was confirmed on July 19, 2018.
 29. That in November, 2018 the claimant did not report to the office. Upon resuming duty, the claimant applied for sick leave but her supervisor declined on the basis that the claimant did not have a sick sheet from a doctor.
 30. The respondent maintains that it did not discriminate against the claimant because she was pregnant. The position was that the claimant failed to produce a sick sheet to entitle her sick leave in accordance with the respondent's human resource policy.
 31. That while the claimant was away on maternity leave the respondent's management through an internal memo dated July 24, 2019 promoted the claimant's previous supervisor to the position of a business development manager.
 32. The respondent states that the role of a business relationship manager pay-point is critical to the business, the respondent recruited another person to perform the functions relating to this role temporarily for six months with a view to subsequently hire a full term resource for that particular role.
 33. That on September 26, 2019 the respondent had a general meeting in which it notified its employees that it intended to carry out an organization restructuring to align the staff complement to the respondent's business operations.



34. The respondent organised various consultative meetings with its employees from October 2, 2019 to October 23, 2019.
35. The respondent also issued a notice of intended redundancy to the County Labour Officer of Nairobi.
36. That the claimant attended a consultative meeting on October 15, 2019 and October 22, 2019.
37. That following the consultative process and one month after the expiry of the period of the notice of intended redundancy, through the letter dated November 12, 2019 the respondent notified the claimant that her position had been eliminated following the restructuring and that the respondent had been compelled to terminate her employment on account of redundancy.
38. That during the clearance process, the respondent explained to the claimant her terminal dues calculation and the final pay-out. The claimant confirmed she was satisfied with it and signed the clearance staff checklist.
39. That the respondent prepared and issued the claimant with a certificate of service for the period the claimant was engaged as an employee. That it is the respondent's case that the termination of the claimant was fair and in compliance with the law and the respondent's policies.
40. The parties filed their respective submissions. The court has considered the parties' respective cases and makes finding as follows.
41. To answer the 1st issue for determination the Court returns that the parties were in a consultancy arrangement and thereafter negotiated a contract of service. The claimant confirmed in her testimony that she had signed the letter dated April 20, 2016 appointing her as a Sales Manager for Unit 3-HQ Branch. She also confirmed to have signed the letter dated February 1, 2017 appointing her to position of Regional Sales Manager. The claimant confirmed that the two letters stated, and she knew the appointment was as an independent contractor. The Court upholds the respondent's case that by those two letters, the claimant was engaged as an independent contractor and not under a contract of service. Both parties' evidence confirmed that under the two contracts, withholding tax as opposed to PAYE was remitted with respect to the money payable to the claimant under the contracts. It is by the letter dated December 19, 2017 that the respondent offered the claimant employment as Pay-point Relationship Co-ordinator effective January 2, 2018. The Court upholds the respondent's case that the claimant was in employment from January 2, 2018 until termination by letter dated November 12, 2019 and effective the same date.
42. To answer the 2nd issue, the Court returns that there is no dispute that the employment was terminated effective November 12, 2019.
43. To answer the 3rd issue, the Court returns that the termination was not unfair. The claimant has confirmed that she resumed duty from maternity leave on October 7, 2019 and found on her desk the notice of redundancy dated October 4, 2019. The letter referred to the NETMA meeting held on September 26, 2019 (at a time when the claimant was on leave). The letter conveyed about restructuring and it was a month's redundancy notice. The claimant received the notice on October 7, 2019 and the redundancy letter was on November 12, 2019. By the respondent's evidence, thereafter the parties held meetings to discuss the redundancy. The Court finds that looking at the flow of events, the respondent had complied with the statutory one-month notice prescribed in section 40 of the *Employment Act*, 2007. The notice of the intended redundancy to the County Labour Officer was dated October 4, 2019 and delivered the same date per the receipt stamp. As to the reasons for redundancy there is no established ground to doubt that the respondent was undertaking restructuring. The claimant testified that she was not the only respondent's employee terminated on November 12, 2019. As for Business



Relationship Manager vacancy which the claimant stated she ought to have been retained upon, the respondent's evidence was clear that she was not qualified and the same had been advertised after the redundancy decision - so that nothing had stopped the claimant from applying if she was indeed interested. By that evidence the Court returns that the reason for the redundancy namely restructuring was genuine as at the time of the termination. The Court therefore returns that the termination on account of redundancy was not unfair both in procedure and substance.

44. To answer the 4th issue, the Court finds that the claimant has failed to establish discrimination on account of pregnancy. The claimant confirmed in her testimony that she was granted the lawful maternity leave which she peacefully enjoyed without interruptions. Her concern was that while on maternity leave the respondent appears to have commenced the restructuring processes without notifying her. It appears to have been a discretionary position for the respondent not to inform the claimant so that she peacefully enjoyed her maternity leave. Be as it may, in the consideration of that failure, the Court will order each party to bear own costs of the suit. In any event, the claimant has not shown the prejudice she suffered on account of her pregnancy and allegations of discrimination in that regard will fail. As relates mistreatment on denial of sick leave, the evidence was that the claimant failed to provide the Doctor's evidence to justify the leave as was requested for. It is that the policies did not require production of such Doctor's evidence prior to proceeding on leave. However, it was not the claimant's case that she requested to avail such Doctor's evidence at a later date. In the circumstances, the respondent's denial of sick leave is found to have been a reasonable exercise of discretion by the respondent as the employer.
45. The 5th issue is on the remedies. In view of the findings already made, the Court returns that the respondent substantially paid the claimant all the fair terminal dues. The contracts were implemented by the parties as had been agreed upon and they are bound accordingly. Each party will bear own costs of the suit.

In conclusion the claimant's suit is hereby dismissed and each party to bear own costs.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS TUESDAY 17TH OCTOBER, 2023.

BYRAM ONGAYA

PRINCIPAL JUDGE

