Michira v Insteel Limited (Cause 514 of 2019)
[2023] KEELRC 3070 (KLR) (30 November 2023) (Judgment)

Neutral citation: [2023] KEELRC 3070 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 514 OF 2019

L NDOLO, J

NOVEMBER 30, 2023

BETWEEN

JANET NYABOKE MICHIRA ..... CLAIMANT

AND

INSTEEL LIMITED ..... RESPONDENT

JUDGMENT

Introduction

1. The subject of this claim is the termination of the Claimant's employment by way of redundancy. The Claimant states her case in a Memorandum of Claim dated 7th August 2019. The Respondent's defence is contained in a Statement of Response dated 25th September 2019.

2. At the trial, the Claimant testified on her own behalf and the Respondent called its Human Resource Manager, Julius Ochieng. Only the Claimant filed final submissions.

The Claimant's Case

3. By a letter of appointment dated 19th August 2014, the Claimant was employed by the Respondent in the position of Sales Representative, at a monthly salary of Kshs. 95,000, which was increased to Kshs. 98,836 as at the time of separation.

4. On 19th January 2017, the Claimant was issued with a transfer letter to Kisumu. She claims that it was not clear to her in what capacity she was being transferred and that she was not issued with a job description until after three months.

5. In November 2017, the Respondent closed the Kisumu office and the Claimant was transferred back to Nairobi, in the position of Sales Representative in End Users and Projects Department. In January 2018, the Claimant was transferred to Project Sales Department as a Project Sales Assistant and in July 2018 she was assigned to the Exports Department.

6. The Claimant avers that two weeks later she was informed by the Head of Sales and Marketing that the Department was scheduled to close down and that she would be issued with a termination letter. The Claimant claims that her transfers were calculated to lead to the termination of her employment.

7. On 20th December 2018, the Claimant was issued with a notice terminating her employment on account of redundancy. The letter indicated that due to challenges the Respondent was experiencing in the exports and projects business, a decision had been made to discontinue operations in that line.

8. The Claimant's case is that the termination of her employment was unlawful and unfair for want of due notice and consultation. She adds that there was no genuine case of redundancy as the Exports Department was not closed and a new Sales Representative was employed soon after her exit.

9. The Claimant tabulates her claim as follows:

    a. 12 months' salary in compensation.....Kshs. 1,200,000.00

    b. House Allowance.....756,095.40

    c. Certificate of Service

    d. Costs plus interest

The Respondent's Case

10. In its Statement of Response dated 25th September 2019, the Respondent admits having employed the Claimant as pleaded in the Memorandum of Claim. The Respondent also admits that the Claimant's employment came to an end on account of redundancy.

11. The Respondent however denies that the termination of the Claimant's employment was unlawful or unfair, maintaining that there was a genuine case of redundancy and that the required procedure for declaration of redundancy was followed.

12. The Respondent adds that the Claimant's transfers were regular and were not meant to put her at a disadvantage.

Findings and Determination

13. There are two issues for determination in this case:

    a. Whether the termination of the Claimant's employment was lawful and fair;

    b. Whether the Claimant is entitled to the remedies sought.

The Termination

14. The termination of the Claimant's employment was communicated by letter dated 19th December 2018, stating as follows:

    Dear Janet,

    Re: Notice for Redundancy

    Due to the challenges the business has been experiencing in the exports and projects business, a decision has been made to discontinue our operations in this line of business. Consequently, we regret to inform you that your position will be declared redundant.

The purpose of this letter is to give you one month notice in accordance with the law. Consequently, your last working day will be 18th January, 2019.

We will communicate to you on your final dues payment under a separate cover.

We regret that this decision could not be avoided.

Yours faithfully,

For: Insteel Limited

(signed) (signed)

Christine Onyango P.G Kishore

Human Resource Manager Business Head"

15. It is not in contest that the termination of the Claimant's employment was on account of redundancy.

16. Section 2 of the *Employment Act* defines 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 the services of an employee are superfluous and the practices commonly known as abolition of office, job or occupation and loss of employment."

17. The law recognises redundancy as a legitimate mode of termination of employment, subject to the following conditions set out in Section 40 of the *Employment Act*:

40.

(1) 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 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 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 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.

18. The Claimant took the position that there was no genuine case of redundancy and accused the Respondent of forcing her out of employment without a valid cause. In this regard, she took issue with her frequent transfers, culminating with the last one to the Exports Department after which her position was declared redundant.

19. The reason behind the stringent conditions in Section 40 of the *Employment Act* is to guard against the use of redundancy to get rid of employees for collateral reasons.

20. In the final submissions filed on behalf of the Claimant, reference was made to the decision in *Jane I Khalechi v Oxford University Press E.A. Ltd* [2013] eKLR where it was held that all the conditions under Section 40 are mandatory and not at the discretion of the employer.

21. In its decision in *Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others* [2014] eKLR the Court of Appeal held that the conditions under Section 40 of the *Employment Act* are conjunctive, meaning that for a termination of employment on account of redundancy to be lawful, all the conditions must be satisfied.

22. The first 2 conditions under Section 40 require every employer declaring redundancy to issue a one-month notice of intention to the affected employee, their union (where applicable) and the local Labour Officer. By definition, this notice should set out the reasons for and the extent of the intended redundancy.

23. There is now firm jurisprudence to the effect that the redundancy notice is separate and distinct from the termination notice provided under Section 40(1)(f).

24. In *Thomas De La Rue (K) Ltd v David Opondo Omutelema* [2013] eKLR the Court of Appeal stated as follows:

> "It is quite clear to us that sections 40 (a) and 40 (b) provide for two different kinds of redundancy notifications depending on whether the employee is or is not a member of a trade union. Where the employee is a member of a union, the notification is to the union and the local labour officer at least one month before the effective redundancy date. Where the employee is not a member of the union, the notification must be in writing and to the employee and the local labour officer. Section 40 (b) does not stipulate the notice period as is the case in 40 (a), but in our view, a purposive reading and interpretation of the statute would mean the same notice period is required in both situations. We do not see any rational reason why the employee who is not a member of a union should be entitled to a shorter notice."

25. In the subsequent decision in *Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others* [2014] eKLR Maraga JA (as he then was) rendered himself in the following words:

> "The purpose of the notice under Section 40(1) (a) and (b) of the *Employment Act*, as is also provided for in....ILO Convention No. 158-Termination of Employment Convention, 1982, is to give the parties an opportunity to consider 'measures to be taken to avert or to minimize the terminations and measures to mitigate the adverse effects of any terminations on the workers concerned such as finding alternative employment.' The consultations are

therefore meant to cause the parties to discuss and negotiate a way out of the intended redundancy, if possible, or the best way of implementing it if it is unavoidable."

26. In the more recent decision in *The German School Society v Helga Ohany* (Civil Appeal No Nai 325 of 2018 consolidated with No 342 of 2018) the Court of Appeal held that the requirement for consultation is implied in Section 40 of the *Employment Act* and stated that:

> " In essence, consultation is an essential part of the redundancy process and ensures that there is substantive fairness. The employer should ensure that it carries out the process as fair as possible and that all mitigating factors are taken into consideration."

27. In the present case, there was no evidence of a redundancy notice or consultation preceding the termination notice. In addition, the selection criterion was not clearly established.

28. For these reasons, I find and hold and that the termination of the Claimant's employment was unlawful and unfair and she is entitled to compensation.

Remedies

29. I therefore award the Claimant six (6) months' salary in compensation. In arriving at this award, I have taken into account the Claimant's length of service and the Respondent's failure to follow the procedure set out under Section 40 of the *Employment Act*.

30. The claim for house allowance was abandoned during the trial.

31. In the end, I enter judgment in favour of the Claimant in the sum of Kshs. 593,016 being six (6) months' salary in compensation for unlawful and unfair termination of employment.

32. This amount will attract interest at court rates from the date of judgment until payment in full.

33. The Claimant is also entitled to a certificate of service plus costs of the case.

34. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 30TH DAY OF NOVEMBER 2023

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JUDGE

Appearance:

Mr. Muli for the Claimant

Mr. Thuita for the Respondent