



REPUBLIC OF KENYA



KENYA LAW
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**Olwali v Standard Chartered Bank Limited (Cause 237 of 2018)
[2023] KEELRC 3385 (KLR) (20 December 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3385 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 237 OF 2018
B ONGAYA, J
DECEMBER 20, 2023**

BETWEEN

EVANS OLIVER OLWALI CLAIMANT

AND

STANDARD CHARTERED BANK LIMITED RESPONDENT

JUDGMENT

1. The claimant filed the Memorandum of Claim on 28.02.2018 through Muma & Kanjama Advocates. The claimant prayed for judgment against the respondent for:
 - a. A declaration that the termination of the claimant from employment by the respondent was unlawful and therefore null.
 - b. Twelve (12) months compensation for unfair termination at Kshs.650,000 per month.
 - c. General damages for discrimination.
 - d. Staff mortgage home loan to continue at staff rate of 6% until full payment.
 - e. Staff personal loan to continue at staff rate of 6.46% until full payment.
 - f. General and aggravated damages, including exemplary damages for discrimination, distress and mental anguish
 - g. General and aggravated damages, including exemplary damages for loss of future earnings, loss of career and emotional distress.
 - h. The claimant's certificate of service indicating the claimant's correct job title as contracted.
 - i. Costs of the suit and interest thereon at court rates.



2. The respondent's statement of response was filed on 08.05.2018 through Obura Mbeche & Company Advocates. The respondent prayed that the claimant's suit be dismissed with costs.
3. The claimant's case was that he was initially an employee of Cooperative Bank from July 2012 to April 2016 where he was the Corporate Relationship Manager. He had a long and successful career in the said bank before being headhunted by the respondent.
4. The claimant states that he was first contacted by the respondent on 08.01.2016 through the respondent's talent acquisition coordinator, human resource division Ms. Rachel Nsanzugwanko with a proposal for a job. Subsequently he attended an interview on 29.01.2016 at the respondent's offices where he was successful and later accepted the offer for employment on 09.03.2016.
5. He was employed as the Director, Relationship Management, Commercial banking with a remuneration package which included a gross salary of Kshs.650,000 per month, a medical insurance of both outpatient and inpatient for himself, his spouse and up to 4 children. Further, he was subscribed as a member of the respondent's retirement benefit scheme.
6. One of the incentives that came with the position was the respondent's offer to take over his existing loans from his previous employer Co-operative Bank which amounted to Kshs.9,400,000/=.
7. The claimant was positioned at the respondent's commercial banking office where there existed five business units with over 60 staff or thereabouts wherefrom, he was assigned to the Medium Enterprises (hereinafter referred to as ME') unit of commercial banking as a relationship manager on 02.05.2016 - joining other three existing relationship managers. A month after the claimant joined the respondent's employment an additional relationship manager was employed, making in all five relationship managers in the medium enterprise unit before one pre-existing relationship manager resigned in August 2016 to join another bank, leaving the medium enterprise unit with four relationship managers. The claimant was the senior most relationship manager among the four.
8. In early June 2017, the ME unit manager informed all the relationship managers that a redundancy was to be conducted under the management of the regional office of the respondent in Dubai and that one relationship manager had to be let off his employment. The respondent refused to share the minutes of the communication from the regional office over the intended exercise, nor explain to the relationship managers concerning what they were expected to do.
9. On 22.06.2017 the manager medium enterprises held a business progress meeting together with all the relationship managers in the said unit. The said meeting was attended by three relationship managers including the claimant. After the meeting the manager, medium enterprises requested the two who had joined the organization in 2016 including the claimant to remain behind. They were then informed that one of them had to leave the institution based on an impending redundancy in the organization. No reasons were given for the said redundancy.
10. On 11.07.2017 the respondent's manager, governance for east Africa called a meeting for the commercial banking department which the claimant attended. During the meeting the intended redundancy of eight staff members was communicated to the entire department. During the meeting, members of staff sought clarification from the managers on various issues including the reason for the redundancy, the option of a voluntary early retirement, the fact that an exit of eight members of staff would not make a difference in the organization as the department had over 60 staff. Staff members inquired on the criteria that the bank would use in selecting the employees to be declared redundant but the said issues were never addressed. The employees were then informed that other modalities of the redundancy would be communicated by the following day through their unit managers in the respective business unit meetings.



11. During the meeting staff members were informed that out of the five business units in commercial banking department, only the Chinese segment unit would be excluded from the impending redundancy; while out of the 4 support units in commercial banking department, only the credit analysis unit would be impacted by the redundancy while the other three support units would be excluded.
12. Later that day, the medium enterprise unit manager communicated to the claimant and the other three relationship managers that one of their positions was at risk of being declared redundant. They were informed of a planned interview which would be conducted to determine who among them would be declared redundant.
13. On 12.07.2017 the claimant received an email together with some of the relationship managers in the commercial banking department from the human resource partner informing them that their jobs were at potential risk and that they were required to submit fresh applications for similar positions in order to be reemployed as their positions had been flagged as being at risk. The condition as stated was that those persons who received the email were to apply or face an automatic dismissal on the basis of redundancy.
14. The interview invitation was communicated to only a select four other relationship managers in two other units of the same commercial banking department. Two from high value small business unit and two others from middle markets and large corporates unit, making in all 8 relationship managers from a total 22 number relationship managers. No explanation was given as to why 14 other relationship managers' jobs in the same commercial banking department were not declared to be potential risk if at all the respondent was undergoing a redundancy. The condition as stated was that those persons who had received the said email were to apply for the positions and go through the interview process or face an automatic dismissal on the basis of redundancy.
15. On 13.07.2017 the claimant together with three relationship managers, were called for a meeting by the medium enterprises unit manager to discuss the prevailing circumstances and to be informed on the intended interview process. During the meeting he was informed that the 30-minute interview would be conducted by the medium enterprises' unit manager, the human resource business partner and an independent person from another department.
16. On 20.07.2017 the interviews were conducted by the medium enterprises' unit manager and the human resource business partner only and no independent person was present in the panel contrary to the information that had previously been communicated. No explanation was given as to why an independent person had been omitted from the panel, and, the claimant states that the omission denied him fair treatment which goes against the policy statement in the bank's equal opportunities, diversity, inclusion and dignity at work place policy; as well as against the bank's group redundancy policy's minimum standards.
17. On 24.07.2017 the claimant was called by the ME unit manager and the HR business partner and they informed him that his position had been declared redundant.
18. The claimant learnt that he was the only relationship manager who was affected by the restructuring, while the other relationship managers retained their positions. The claimant's case is that there was no redundancy that occurred, but, the respondent unfairly terminated his employment while masking it as a redundancy.
19. Two other relationship managers who were technically rendered redundant from commercial banking department were from the same ethnic community as the claimant with one having opted not to sit for the interview and therefore automatically falling redundant, while the other re-applied for his job and



was rendered redundant after the interview before being re-employed in the retail banking department where he had worked for the respondent before moving to commercial banking department. Out of 22 relationship managers working in the commercial banking department 8 of them had their jobs put at risk, only 7 relationship managers were interviewed and only 3 relationship managers from the same ethnic community were rendered redundant by the respondent.

20. On 24.08.2017 the respondent through a letter terminated the services of the claimant. The redundancy letter was dated 23.08.2017 and was accompanied by an exit package written “resignation”. The claimant states that decision to terminate his employment was a breach of his employment contract and legitimate expectation and that the termination was done maliciously knowing it was false and constituted the torts of deceit, injury to reputation, malicious falsehood and defamation.
21. The claimant states that he was declared redundant alongside two other relationship managers from the commercial banking department in August 2017 all who were from only one region, the Luhya ethnic community, with two being from vihiga county and one from Kakamega county, an indication of discrimination which is against the bank’s equal opportunities, diversity, inclusion and dignity at work place policy.
22. The respondent sent the claimant communication on 12.07.2017 informing him of 9 vacant positions in the commercial banking department and encouraged him together with his colleagues whose positions had been declared redundant to apply. The claimant states that it was odd that the respondent claimed to carry out a redundancy in the commercial department but advertised for positions in the same departments.
23. The claimant did not sign the exit package letters for reasons that the termination of employment was not justified and the severance pay was not in tandem with the respondent’s policy.
24. The claimant maintains that there was a predetermined decision to terminate his employment with the respondent as reasons that were given for the termination were unfounded, false, erroneous and unreasonable and actuated by malice.
25. On the part of the respondent, it is stated that in the course of the employment of the claimant, during the last quarter of 2016 the respondent carried out an efficiency review of the commercial banking operations as a routine operational improvement and cost cutting exercise in three key markets within Africa & Middle East Region and Kenya happened to be a key market.
26. The review showed that in 2016, 25 relation managers were managing an average of six (6) borrowing clients and 21 non-borrowing clients generating annual revenue of approximately US 985,000 per relations manager per annum. In comparison markets such as Nigeria had a ratio of relations managers productivity of US 2.1 million per annum.
27. The exercise revealed that the loading of clients per relations manager was relatively low and indicated that there could be excess relations managers capacity that needed to be reduced or there was need for a clear client growth plan in place to meet a more appropriate loading level. It also showed that the ratio of credit analyst support per relations manager was 0.7. However, the number of borrowing facilities per credit analyst was relatively low at 9 per analyst indicating that there was a likelihood of potential excess capacity in the team that needed to be reviewed further.
28. The client loading data per manager for Kenya in comparison to 5 other markets as benchmark data was shared with the relations manager including the claimant in October 2016 to enable employees plan and prepare their performance objectives for 2017.



29. By mid-2017, business performance was still behind budget by approximately USD 2,000,000. The commercial banking department decided to implement a new target operating model aimed at bringing greater efficiency and opportunities to drive performance of the business. The decision was announced to staff in the commercial banking business in a town hall meeting attended by the claimant among others.
30. The new model was to result in reduction of 5 relations managers and 3 credit analysts in commercial business department. The bank undertook an exercise to review all relations managers by segment against a set criterion. The relations managers in medium enterprises where the claimant worked all scored below the cut-off of 40 points and were invited to re-interview for different relations manager's roles that was available in commercial banking.
31. The claimant was informed of roles available for interview on 12.07.2017 by email and he applied for the medium enterprise relations manager's role.
32. He was interviewed on 20.07.2017 as one of the 7 applicants for the role in Medium enterprise segment and his scoring was lowest amongst the applicants.
33. The respondent states that following the claimant's poor performance he was placed at risk of redundancy (notice of redundancy) and the risk materialized on 23.08.2017.
34. The respondent avers that in the course of his employment, the claimant was enjoying personal loans and credit card and mortgage loans extended to him based on his instruments of contract and the same could be varied where the claimant ceased to be an employee or due to other legal changes as provided in the said instruments.
35. The respondent states that it had no duty to meet the claimant's financial obligations following his redundancy as stipulated in the agreements entered into by the parties.
36. The respondent maintains that the claimant was given sufficient opportunity to enter available alternative positions which efforts were made in good faith and pursuant to the *Employment Act*.
37. The respondent states that the claimant's claim is completely unmerited and ought to be dismissed in its entirety.
38. The parties filed their respective submissions. The Court has considered the parties' respective cases and makes finding as follows.
39. To answer the 1st issue, there is no dispute that parties were in a contract of employment as pleaded for the claimant and admitted for the respondent. The employment was effective 18.04.2018 as per the employment agreement made on 07.03.2016.
40. To answer the 2nd issue the Court returns that the contract of employment was terminated by the letter of redundancy dated 23.08.2017. The termination was effective 23.08.2017 and the claimant was to be paid a month's salary in lieu of contractual notice; pay in lieu of accrued leave; 1.5 months' salary for every completed year served; 25% net discount on outstanding loans; and, staff bank accounts to remain on staff rate for 6-months from separation date.
41. The 3rd issue is whether the termination was unfair. It was submitted for the claimant that the termination was unfair because it was not in accordance with due regard to law and procedure and, the reason was not. It was submitted that the termination was unfair as it disregarded sections 40, 43, and 45 of the *Employment Act*, 2007 in following respects:



- a. The respondent masked the reason for termination as redundancy whereas it had been predetermined to terminate the claimant.
 - b. The respondent provided no criteria for identifying the claimant for the redundancy. The claimant was the senior most in his unit and there was no regard for his skills and ability. The claimant was the only Relationship Manager in the Medium Enterprises Unit whose employment was terminated. The same role was advertised and the claimant subjected to the interview in comparison to other candidates.
 - c. In the circumstances it is submitted that the claimant's services were not superfluous. While alleging redundancy in the commercial department the respondent as well conducted recruitment for a vacancy in the same department.
 - d. Further the alleged redundancy did not meet the respondent's Group Redundancy Policy on meaning of redundancy thus, the Group ceasing to carry on the business in which the employee is employed such as closing of offering of a special product; the Group ceases to carry on the business in the place an employee is employed such as a subsidiary, branch or location that is closed; or, the need for work of a particular kind is diminished.,
 - e. Section 40(1) (b) of the *Employment Act* on notice to the employee and area labour officer was not complied with. Further the selection criteria in section 40(1) (c) of the Act on regard to seniority in time and to the skill, ability and reliability was not adhered to.
 - f. The interview for the advertised role was unfair because for the claimant there was no independent panellist like for other candidates because, only the Medium Enterprises Manager and the Human Resource Business Partner were present.
42. For the respondent it was submitted that the termination was fair and it was urged as follows:
- a. The claimant was notified about the looming redundancy.
 - b. By the interview the claimant was subjected to the criteria of skill, ability and reliability. The claimant scored 18, the lowest score. He submitted to the interview but failed to succeed.
 - c. The claimant was paid all redundancy and other final dues and other terms of separation set out in the letter of redundancy.
 - d. The claimant moved Court after 25% net discount was affected on loans and after enjoying 6-months of the preferential loan interest rates.
 - e. The redundancy was procedural, fair and lawful.
43. The Court has considered the submissions and returns that the termination on account of redundancy was unfair in procedure and substance. As urged for the claimant, it cannot be that for real the position he held was redundant while he was being invited to a recruitment and selection process in the impugned interview. As submitted for the claimant, the purported redundancy did not meet the respondent's Group Redundancy Policy on meaning of redundancy. None of the prescribed criterion was shown to have accrued. The Court finds that the reason for redundancy was not genuine or valid as at the time of redundancy per section 43 and did not relate to the respondent's operational requirements as per section 43 of the Act. As submitted for the claimant it was a feigned reason falling outside the respondent's Group Redundancy Policy and requiring the claimant to attend an interview with respect for a position he already held and was duly performing in the position. The evidence was that the interview was as well unfairly undertaken for want of the independent panellist in the case of



the claimant as it happened for the other candidates. The Court further observes that the interview was in the nature of a recruitment, selection and appointment process rather than identification of the officers holding similar positions to separate on account of redundancy per selection criteria in section 40 of the Act. The claimant's submissions are upheld that the termination was unfair both in substance and in procedure including that the mandatory notice to the area labour officer was not shown to have been served.

44. The 4th issue is on remedies. The Court returns as follows:

- a. The claimant is entitled to the declaration that the termination of the claimant from employment by the respondent was unlawful and unfair.
- b. The claimant prays for twelve (12) months compensation for unfair termination at Kshs.650,000 per month. The Court has considered the mitigating factors in section 49 of the Employment Act that the claimant was paid severance at 1.5 salaries for each year served, 25% discount on loans was granted; and he enjoyed a 6 months' window of preferential staff interest rates on the loans. Those as submitted for the respondent are indeed mitigating factors. However, the Court has reflected upon the loan agreement between the claimant and the bank respondent. The bank was the claimant's employer as well as the lender in circumstances that one of the respondent's core business was to advance credit. Section 17 (11) of the Employment Act provides thus,

"17.

- (11) No employer shall limit or attempt to limit the right of an employee to dispose of his wages in a manner which the employee deems fit, nor by a contract of service or otherwise seek to compel an employee to dispose of his wages or portion thereof in a particular place or for a particular purpose in which the employer has a direct or indirect beneficial interest."

The Court considers that the respondent had a direct beneficial interest in the loan agreements payable by the claimant out of his income by way of salary so that the loan contracts appear to have been unlawful and contrary to public policy. The Court finds so especially that section 17 (9) of the Act provides thus,

"17.

- (9) If an employer advances to an employee a sum in excess of the amount of one month's wages of the employee or, in excess of the amount of two months' wages of that employee, the excess shall not be recoverable in a court of law."

The respondent may urge that it did not advance the loan but took up the loan the claimant had with his previous employer, the Co-operative Bank. However, again, section 17 (4) of the Employment Act provides thus,

"17.

- (4) No person shall give or promise to any person any advance of money or any valuable consideration upon a condition expressed or implied that the person or any dependant of that person shall enter upon any employment."

Thus, it appears to the Court that by that provision it was not open for the respondent to take up the claimant's loans or advance by way of loan to the claimant to pay the loans with his previous employer so that the claimant would conclude employment contract or enter employment of the respondent. It appears to the Court that the loan agreement between the



respondent and the claimant while the claimant was in employment of the respondent as well as the rearrangement of the claimant's loans by the respondent in the agreement prior or at employment so as to enter the respondent's employment were both unlawful agreements or contracts and even if the respondent had no beneficial interest in the loans then the recoverable amount was limited to only a sum not in excess of the amount of two months' salaries of the employee in terms of section 17 (9) of the Employment Act, 2007. The Court holds that the claimant's wages and arrangements while in the respondent's employment were so protected. Thus the 25% discount on the loan facility and the 6 months' staff preferential interest rates appear not to have amounted to operative mitigating factors as they were founded upon loan contracts that the Court has found to have been unlawful and therefore contrary to public policy in terms of the cited provisions of the section 17 of the Employment Act. The operative mitigating factor was that the claimant was given 1.5 monthly salary for every year completed year of service way above 0.5 monthly salary or 15 days prescribed under section 40 for each completed year of service. The Court has also considered that the claimant had only served for slightly a year but in circumstances that he had been head-hunted. In the circumstances he is awarded 6 months' salaries as a balance of justice for parties at Kshs.650,000.00 per month thus Kshs.3,900,000.00 less PAYE.

- c. The claimant prayed for general damages for discrimination. The Court finds that in the instant case discrimination appears not established at all. The same is related to the prayer for General and aggravated damages, including exemplary damages for discrimination, distress and mental anguish. The Court considers that within the contract of service, the permissible award as already awarded under section 49 of the Act sufficiently covers the consequences and suffering the petitioner may have suffered following the termination as the award is within that statutory guiding policy.
- d. It was urged for the claimant that the termination targeted three employees including himself and who came from Western Kenya Region or were of same ethnic group. The Court finds that claimant provided no evidence of his or that of the other affected employees with respect to region or ethnic origin. Further the claimant provided no evidence to show that the redundancy was based on consideration of his region or ethnic origin. The Court upholds the submissions for the respondent that discrimination including general and aggravated damages, including exemplary damages for loss of future earnings have not been established. In any event the claimant confirmed to have mitigated his situation by moving on as he was subsequently employed by the National Bank of Kenya Limited. The reliefs in that regard will be declined.
- e. The claimant prayed that the staff mortgage home loan to continue at staff rate of 6% until full payment and the staff personal loan to continue at staff rate of 6.46% until full payment. The Court has found that the cited provisions of section 17 of the Act apply. In that regard, the declaration will issue that with respect to the staff mortgage home loan to continue at staff rate of 6% until full payment, and, the staff personal loan to continue at staff rate of 6.46% until full payment the relevant provisions of section 17 of the Employment Act as found in this judgment apply as defining parties' positions in that regard. While making the finding the Court has considered the submission for the respondent that the benefit was strictly a staff benefit and the Court holds that the mortgage and staff loan agreement squarely fell within and were fettered by provisions of section 17 of the Act. The Court has considered the submission for the respondent that the parties are bound by the staff mortgage loans and the staff loan agreements but the Court has found their fate as unlawful and against public policy or interest in terms of the relevant provisions of section 17 of the Act. In consideration that parties will



have to realign and reconcile their circumstances in view of the applicable section 17 of the Act, the Court considers that the declaration as found will be sufficient remedy in that regard.

- f. The respondent prayed for general and aggravated damages, including exemplary damages for loss of future earnings, loss of career and emotional distress. As submitted for the respondent nothing attributable to the respondent prevented the claimant from moving on in gainful employment and he had indeed engaged in alternative employment. The prayer is declined as unjustified.
- g. The claimant is entitled to a certificate of service indicating the claimant's correct job title as contracted and per section 51 of the Act.
- h. The claimant has substantially succeeded and the respondent to pay costs of the suit and interest thereon at court rates.

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

1. The declaration that the termination of the claimant from employment by the respondent was unlawful and unfair.
2. The respondent to pay the claimant a sum of Kshs.3,900,000.00 less PAYE by 01.02.2024 failing interest to be payable thereon from the date of this judgment until the date of full payment.
3. The declaration that with respect to the staff mortgage home loan to continue at staff rate of 6% until full payment, and, the staff personal loan to continue at staff rate of 6.46% until full payment, the relevant provisions of section 17 of the *Employment Act* as found in this judgment to apply as defining parties' positions in that regard.
4. The respondent to deliver within 30 days the certificate of service indicating the claimant's correct job title as contracted and per section 51 of the Act.
5. The respondent to pay costs of the suit.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS WEDNESDAY 20TH DECEMBER, 2023.

BYRAM ONGAYA

PRINCIPAL JUDGE

