



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI

CAUSE NO 2506 OF 2017

CATHERINE KAMAU.....CLAIMANT

VERSUS

FREIGHT IN TIME LIMITED....RESPONDENT

JUDGEMENT

1. The claimant avers vide a statement of claim filed on 22nd December, 2017, that she was employed by the respondent with effect from 1st February, 2013 until 30th September, 2016 when her employment was terminated on account of redundancy. She states that her position was not declared redundant at all since the respondent recruited another person to take up her position. As such, the claimant sought a declaration that her termination from employment by the respondent was unlawful, unfair, inhumane and unjustified hence prayed for compensatory damages in the sum of Kshs 1,608,480/=.

2. The claim was opposed by the respondent's statement of reply filed on 29th May, 2019 and through which it averred that there was a major reorganization in the company structure that saw some positions being created, while others were abolished, a fact the claimant was well aware of. To this end, the respondent asked the court to dismiss the claim with costs.

3. The matter proceeded for hearing on 11th November, 2021 and each side called one witness.

Claimant's case

4. At the commencement of the hearing, the claimant adopted her witness statement to constitute part of her evidence in chief. She also produced the documents filed together with her claim as exhibits before court.

5. She informed court that prior to her termination, she was the Human Resource and Administration Manager hence was in charge of coordinating all the human resource issues within the respondent group of companies. She denied separating mutually from the respondent. It was her testimony that her relationship with the respondent was very cordial and her work was very good.

6. The claimant stated that she was not given the exact reason for her termination despite several follow ups with the respondent's management. This was even after the respondent had hired another person to replace her. It was her evidence that one day out of the blues, the respondent's Managing Director, Mr. Jignesh went to her office and introduced to her a person by the name, Ms. Bernice Getata. That Mr. Jignesh informed her that the said Ms. Bernice would be taking over her duties henceforth.

7. She further stated that Mr. Jignesh directed her to vacate her office for the said Ms. Bernice. That the said Ms. Bernice took over her office space and in the period that followed, she was frustrated to the extent of being asked to handover her official email address together with her computer to the Ms. Bernice. That essentially, they were fighting for the same space. In summing up her testimony, the claimant told court that she was not given any notice prior to her redundancy and that her termination amounted to discrimination as no other employee was dismissed at the time for such reason or the other.

8. During cross examination, she denied leaving the respondent's employment voluntarily as she did not have another job at the time. She further denied that there was any restructuring in the respondent company given that by virtue of her position, she would have been among the first people to know.

Respondent's case

9. The respondent tendered its testimony through Ms. Catherine Kariuki, who testified as RW1 and who identified herself as the respondent's

Human Resources Manager. Ms. Kariuki also adopted her witness statement to constitute part of her evidence in chief. She also produced the documents filed on behalf of the respondent as exhibits before court.

10. RW1 told court that at the material time, she was the Personal Assistant to the Directors of the respondent company. It was her testimony that there was some restructuring within the respondent company and some positions were being created. She stated that for instance, Mr. Jignesh was moved to the level of Director. She denied the claimant's assertion that Ms. Bernice took over her position. It was her evidence that Mrs. Bernice was taking up a role as the group Human Resource and Administration Manager, at the regional level.

11. Ms. Kariuki further stated that sometimes in July, 2016, the claimant took leave and never reported back and that by then Ms. Bernice had already joined the respondent employment. She further told court that the claimant was given a redundancy notice and that she collected her terminal dues.

12. During cross examination, Ms. Kariuki admitted not being privy to the discussions between the claimant and Mr. Jignesh.

Submissions

13. The claimant submitted that her redundancy was not in compliance with the requirements stipulated under section 40(1) (a) of the Employment Act. She further submitted that her position was not scrapped off as Ms. Bernice's job designation was similar to hers. The claimant placed reliance on the following authorities; **Kenya Union of Journalists & Allied Workers vs Nation Media Group Limited (2013) eKLR, Paul Ngeno vs Pyrethrum Board of Kenya limited (2013) eKLR and Banking Insurance and Finance Union vs CFC Stanbic Bank (2014) eKLR.**

14. The respondent did not tender any submission despite being given an opportunity to do so. Therefore, the court did not have the benefit of considering the same.

Analysis and Determination

15. Arising from the issues in the pleadings, the evidence submitted before court and the submissions on record, the court is being called to determine the following questions;

i. Whether the redundancy of the claimant was lawful and procedural?

ii. Whether the claimant is entitled to the reliefs sought?

Whether the redundancy of the claimant was lawful and procedural?

16. The claimant's termination was effected vide a letter dated 28th July, 2016 referenced "**LETTER OF REDUNDANCY NOTICE**" which reads in part as follows;

"We refer to the discussions between the Group Finance director and yourself on Thursday, 30 June, 2016 in regard to the above. As communicated to you, the company regrets to inform you that due to the new strategic direction within the business, which will have an effect on certain operations within the company, a decision has been made to give you notice on redundancy terms with effect from 1st August, 2016. As per the terms of your letter, of employment, the company hereby gives you two (2) months' notice..."

17. In the case of **Kenya Airways Limited vs Aviation & Allied Workers Union Kenya & 3 Others (2014) eKLR**, the Court of Appeal found that "**for any termination of employment under redundancy to be lawful, it must be both substantially justified, and procedurally fair**".

18. In following with the above finding, it is essential to evaluate the circumstances pertaining the claimant's redundancy in order to ascertain whether her redundancy was both substantially justified and procedurally fair.

i. Substantive justification

19. In cases, of redundancy, substantive justification finds its home under **Section 2 of the Employment Act** which defines "**redundancy**" to mean "**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**".

20. Essentially, the circumstances or reasons which leads to an employee being declared redundant must fall within the above definition.

21. In the instant case, the reason given for effecting the redundancy against the claimant was "*new strategic direction within the business*" which would impact operational changes. This is discernable from the letter dated 28th July, 2016 reproduced above.

22. From the tone of the respondent's letter, the reasons for the claimant's termination were due to its operational requirements hence fell within the provisions of **Section 45(2) (b) (ii) of the Employment Act**. It was therefore incumbent for the respondent to prove this reason so as to pass the test of justification. As was held in the case of **Kenya Airways** (supra), "**The phrase "based on operational requirements of**

the employer” must be construed in the context of the statutory definition of redundancy. What the phrase means, in my view, is that while there may be underlying causes leading to a true redundancy situation, such as reorganization, the employer must nevertheless show that the termination is attributable to the redundancy – that is that the services of the employee has been rendered superfluous or that redundancy has resulted in abolition of office, job or loss of employment.”

23. The respondent had to thus prove that the services of the claimant were rendered superfluous and that her office was abolished.

24. The respondent in its defence stated that the claimant’s redundancy was justified as there was a major reorganization in the company structure hence some positions were created while some were abolished. That for instance, the position of the Group Finance and Human Resources Manager, previously held by Mr. Jignesh, was abolished as he assumed the position of Finance Director.

25. Besides this illustration, the respondent did not indicate whether the claimant’s position was abolished. This does not seem to be the case since the respondent contended that the claimant was unhappy with the fact that another employee (Ms. Bernice) had been brought on board as her superior and she was required to report to her. To me, this is an admission by the respondent that indeed, the position of the claimant was not being abolished but rather, a position parallel to hers, was being created.

26. It is not in dispute that at the time of her termination, the claimant was holding the position of **“Human Resource and Administration Manager”**. This is also discernable from her letter of confirmation dated 10th May, 2013. On the other hand, Ms. Bernice Getata, who was alleged to have replaced the claimant, was appointed to the position of **“Human Resource & Administration Manager-Kenya”** vide a letter dated 8th July, 2016, a copy of which was produced as an exhibit before court.

27. Accordingly, it is evident that the position of the claimant was not abolished and there is no evidence that a new position was created for the said Ms. Bernice. It is apparent that she took over the position of the claimant. This was before the claimant had been declared redundant. This therefore lends credence to the claimant’s assertions that she was directed to surrender her office to the said Ms. Bernice and that for the time, they were both fighting for space in that very office.

28. Even if it were true that there was a reorganization of the respondent company structure, no evidence to that end (for instance the organizational structure/chart/organogram before and after the reorganization), was adduced as evidence before court, to prove the same.

29. Besides, the respondent was still bound by the provisions of **Sections 43 (1), 45 (2) and Section 47(5) of Act**. In this regard, the respondent was required to prove the reasons for the claimant’s termination and that the same were fair, valid and related to its operational requirements. By dint of section 47(5), the burden of proof fell squarely on the respondent.

30. My construction of Section 40 of the Employment Act, is that an employer has the right to declare redundancy provided that the same is justified. Indeed, if the respondent’s intention was to reorganize its structure, thus resulting in the claimant’s redundancy, nothing stopped it from so doing as long as such action was justified under the law.

31. In the premises of the foregoing, I find and hold that the respondent has not proved that the claimant’s redundancy was justified.

(ii) Procedural fairness

32. The procedure to be applied in effecting a redundancy is stipulated under section 40(1) of the Act. Under the said provision, the following conditions must precede a redundancy;

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 the 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 to 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.

33. It is noteworthy that all the conditions stipulated above are mandatory and the employer cannot cherry pick and selectively apply the same. From the evidence presented before me through the letter of 28th July, 2016, the respondent referred to “discussions” that apparently

transpired with the claimant on 30th June, 2016.

34. The specific deliberations referred to in the letter were not specified. There was also no evidence of such discussions and or deliberations between the parties. The Court of Appeal in the case of **Kenya Airways** (supra) opined that **“consultation has to be real and not cosmetic.”** RW1 admitted in her testimony before court that she was not privy to the consultation between the claimant and Mr. Jignesh. In this case, and in absence of evidence, the substance of the discussions cannot be truly ascertained.

35. The respondent vide the notice to the claimant offered to pay her 2 months’ salary in lieu of notice, leave balance upto 30th September, 2016 and severance pay for 15 days for every completed year of service. This was in apparent compliance with the requirements under clauses (a) (e) (f) and (g) of section 40(1) of the Act. The claimant did not dispute that she was paid. She only stated that she could not remember how much she was paid. Since the claimant has not prayed for the said payments as part of her reliefs, the court will presume that the same were made in compliance with the law.

36. It is however notable that the respondent did not prove that it complied with the requirement under clause (b) of section 40(1). In this case, it ought to have issued a notice of the claimant’s redundancy to the labour officer. There is no evidence that this was done. In fact, there is not indication or suggestion that the notification was issued and as such, I presume that there was no notification.

37. There was also no evidence presented by the respondent as regards the selection criteria applied prior to the claimant being declared redundant.

38. Granted, the respondent had the right to restructure and reorganize its operations as it pleased. Nonetheless, compliance with the procedure stipulated under section 40(1) of the Act, was mandatory and anything short thereof, rendered the resultant termination of the claimant unfair and unlawful.

39. The court in the case of **Hesbon Ngaruiya Waigi vs Equitorial Commercial Bank Limited (2013) eKLR** held that;

“Where redundancy is declared by an employer, the procedure to follow is as set out under the provisions of Section 40 of the Employment Act and where not followed, any termination as a result will be deemed unprocedural and unfair. Any termination of an employee following a declaration of redundancy must be based on the law otherwise the same becomes wrong and if the grounds used to identify the affected employees are not as per the law, the same becomes unfair.”

40. In the same manner, and having found that the respondent did not fully comply with mandatory requirements stipulated under sections 40(1) of the Employment Act, I find that the claimant’s termination on account of redundancy was unprocedural.

41. The upshot of the foregoing is that the Court finds and hold that the termination of the claimant was unfair and unlawful.

Reliefs

42. The claimant has prayed for compensatory damages in the sum of Kshs 1,608,480/= being equivalent to 12 months of her gross salary. Having found that her termination was both unfair and unlawful, I will award her damages equivalent to 6 months gross salary.

Orders

43. In conclusion, I enter Judgment in favour of the claimant against the respondent as follows;

- a. A declaration that the claimant’s termination was unfair and unlawful.**
- b. The claimant is awarded compensatory damages in the sum of Kshs 809,604/= which sum is equivalent to 6 months gross salary.**
- c. Interest on the amount in (b) at court rates from the date of Judgement till payment in full.**

44. The award shall also be subjected to interest at court rates from the date of judgment untill payment in full.

45. Costs follow the event, hence the respondent shall bear the costs of the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 28TH DAY OF JANUARY, 2022

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STELLA RUTTO

JUDGE

Appearance:

For the Claimant Mr. Wathome

For the Respondent Mr. Arum

Court Assistant Barille Sora

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article 159(2) (d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

STELLA RUTTO

JUDGE