



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO 1654 OF 2016

OLIVE ANN WAHURA THIONG'O.....CLAIMANT

VERSUS

WORLD WIDE FUND FOR NATURE-

Regional Office for Africa.....RESPONDENT

JUDGMENT

Introduction

1. The genesis of this dispute is the termination of the Claimant's employment on account of redundancy, executed by letter dated 2nd June 2016.
2. The Claimant, Olive Ann Wahura Thiong'o states her claim in a Memorandum of Claim dated 17th August 2016 and filed in court on 18th August 2016. The Respondent responded by a Statement of Response dated 26th August 2016.
3. The matter proceeded to full trial with the Claimant testifying on her own behalf. The Respondent called the Claimant's former supervisor, Rose Josephine Nyambura Thuo. Both parties further filed written submissions.

The Claimant's Case

4. The Claimant pleads that she was employed by the Respondent in the position of Campaigns and Engagement Manager-Africa, effective 1st October 2015. She states that she was entitled to a consolidated monthly salary of Kshs. 575,000.
5. The Claimant claims that she was a diligent employee, who performed her duties to the best of her abilities and knowledge. She further claims that she adhered to her terms of reference as spelt out in her letter of appointment, job description, the Respondent's Employees Code of Conduct and the Employment Act.
6. By letter dated 2nd June 2016, the Claimant's employment was terminated on the stated ground of redundancy.
7. The Claimant contests the termination, which she terms as unlawful and unfair, as it was in breach of the Respondent's Human Resource Policy Manual, the Claimant's contract of employment and the Employment Act.
8. The Claimant maintains that there was no genuine case of redundancy and that her role of Campaigns and Engagement Manager-Africa continued to exist within the Respondent's establishment, even after her exit.
9. The Claimant alleges that barely two months after the termination of her employment, the Respondent advertised for two positions of Communication Manager-Africa, which according to the Claimant, carried the same roles, duties, responsibilities and competencies as those attaching to the position previously held by her.
10. The Claimant further alleges that the re-organisation, which resulted in her position being declared redundant, was unfounded and a fraud meant to frustrate her employment contract.
11. The Claimant points out that at the time of the subject redundancy, she had only done eight (8) months of her contract, that was still

running.

12. The Claimant seeks reinstatement and payment of salary from July 2016 until the date of reinstatement or in the alternative:

- a) 12 months' salary as damages.....Kshs. 6,900,000
- b) Salary for 15 months' balance of contract.....8,625,000
- c) Certificate of Service
- d) Costs plus interest

The Respondent's Case

13. In its Statement of Response dated 26th August 2016, the Respondent gives background information on its institutional form, by stating that it is an extension of the World Wide Fund for Nature (WWF) International Secretariat based in Geneva, Switzerland.

14. The Respondent admits that by a contract of service dated 2nd September 2015, the Claimant was employed as the Respondent's Campaign and Engagement Manager. She was employed on a two-year contract running from 1st October 2015 until 31st September 2017.

15. The Respondent states that WWF International underwent a major reorganizational change in 2016, with focus on delivering conservation through six goal practices. The Respondent adds that the new strategy also impacted ways of organisation and delivery of work.

16. The Respondent goes on to state that the global conservation and secretariat changes, which were approved by the International Board, necessitated a review of the Respondent's structure as a Regional Office for Africa, towards alignment with the global changes.

17. The Respondent points out that another factor that influenced the change of structure was the need to drive efficiency in operations to meet the needs of Country Offices. As part of this change, a number of roles were affected and made redundant, including that of Campaigns and Engagement Manager occupied by the Claimant. The Respondent states that other employees were also affected.

18. The Respondent claims that it had no option but to declare the Claimant's position redundant and adds that the following steps were followed:

- a) A letter was sent to the Ministry of Labour;
- b) A letter was sent to the Claimant giving one month's notice of termination;
- c) After the lapse of the one month's notice, the following benefits were extended to the Claimant:
 - i) Salary, allowances and benefits up to 1st July 2016;
 - ii) Payment of outstanding leave days as at 1st July 2016 (15.5 days);
 - iii) The Claimant was retained on the medical cover under UAP (the last expense incurred was on 22nd July 2016, which was 21 days after she had left the organisation);
 - iv) The Claimant also received her pension as per the Retirement Benefits Regulations, a sum of Kshs. 356,000 (cheque No. 055039) save for the deferred portion which was retained in the Pension Fund until her retirement age;
 - v) The total pay to the Claimant was a gross of Kshs. 1,026,781.71 and a net of Kshs. 674,143 plus pension of Kshs. 356,000;
 - vi) Recommendation letters were issued.

19. The Respondent concludes that there was both substantive and procedural compliance with the law during the declaration and execution of the redundancy.

Findings and Determination

20. There are two (2) 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

21. On 2nd June 2016, the Respondent wrote the following letter to the Claimant:

“Reference: Redundancy

Dear Olive,

Following the announcement of the setup of the new WWF Global Practices and the current re-design of WWF ROA structure, this letter serves to officially inform you the implications of these changes regarding your employment contract.

The reorganization process has inevitably affected the various roles and we regret to inform you that your role of Campaigns and Engagement Manager for WWF ROA has been made redundant.

As stipulated in your Contract of Employment, this letter serves as a one (1) months' notice to terminate your current contract and its terms and conditions. Your current contract will run until 1st July 2016.

In accordance with the terms and conditions of your contract and the labour laws of Kenya, you will be entitled to the following:

- a) Salary, allowances and benefits up to 1st July 2016.
- b) Payment of outstanding leave days as at 1st July 2016.
- c) 15 days' pay for every year of service worked.

WWF will also continue covering you on the medical insurance with UAP for an additional 6 months until 31st December 2016.

You are required to prepare formal hand-over notes which should be submitted to your line manager by 24th June 2016. Please note that payment of your terminal benefits will only be effected upon submission and acceptance of your hand-over report and surrender of WWF ROA property in your possession.

Please contact Esther Wamoto, should you have any questions regarding the contents of this letter and let us know what further support we can provide to you at this time to ensure that this is a smooth transition for you.

We would like to take this opportunity to thank you for your commitment to WWF in your role and to wish you well in your future plans.

Yours sincerely,

(signed)

FRED KWAME KUMAH

DIRECTOR, AFRICA

(signed)

VALERIE KUSHATA

DIRECTOR, PEOPLE & ORGANISATION

DEVELOPMENT, AFRICA

22. The stated reason for termination of the Claimant's employment was redundancy. Section 2 of the Employment Act and the corresponding section in the Labour Relations Act define 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.”

23. The lawful procedure for termination of employment on account redundancy is found in Section 40 of the Employment Act, which provides as follows:

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.

24. Conditions (a) and (b) require the employer to issue a one-month redundancy notice to the employee or their trade union (where one exists) as well as to the local Labour Officer, giving reasons for and extent of the intended redundancy. This notice is distinct from the termination notice under condition (f).

25. Condition (c) deals with the redundancy selection criteria, including seniority in time, skill, ability and reliability of each employee within the affected establishment.

26. The last three conditions being (e), (f) and (g) provide for statutory benefits payable to an employee whose position has been declared redundant.

From the evidence on record, the Claimant was paid her terminal benefits within reasonable time. I will therefore not spend time on these conditions.

27. I will now address the issue of redundancy notice. In its decision in *Thomas De La Rue v David Opondo Omutelema [2013] eKLR*, the Court of Appeal stated authoritatively that Section 40 of the Employment requires an employer declaring redundancy to issue a distinct notice separate from the termination notice. The Appellate Court stated thus:

“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 to the employee and the local labour office. 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.”

28. In discussing the same issue in *Kenya Airways Limited v Aviation & Allied Workers Union of Kenya & 3 Others [2014] eKLR* Maraga JA (as he then was) rendered himself thus:

“.....when an employer contemplates redundancy, he should first give a general notice of the intention to the employees likely to be affected or their union. It is that notice that will elicit consultation between the parties.....the requirement of consultation is implicit in the principle of fair play under Section 40(1) of the Employment Act itself and other labour laws. The notices under this provision are not merely for informationThe purpose of the notice under section 40(1)(a) and (b) of the Employment Act, as is also provided for in the....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 minimise the terminations and measures to mitigate the adverse effects of any terminations on the workers concerned such as finding alternative employment.”

29. The Claimant told the Court that apart from the termination letter issued to her on 2nd June 2016, she had no prior notice of the impending termination of her employment on the ground of redundancy.

30. The Respondent's witness, Rose Josephine Nyambura Thuo alluded to some meetings held with the Claimant but did not provide any evidence to support the occurrence of any such meetings. The Claimant denied attending any such meetings.

31. The Claimant's case is that there was no genuine case of redundancy and that her position was retained even after her exit. She contends that the newly created position of Communication Manager was a replica of that of Campaigns and Engagement Manager, which she held, and that the change in title was a charade.

32. On its part, the Respondent contends that the termination was as a result of reorganisation stemming from the global level. From the evidence on record, it is clear that the restructuring process was on course even before the Claimant joined the Respondent's workforce.

33. The question to ask is this; why did the Respondent employ the Claimant in the midst of a restructuring process, only to declare her

position redundant nine months into her two-year fixed term contract? The Respondent's witness was unable to answer this question.

34. Restructuring as a ground for redundancy though valid, is open to manipulation for collateral reasons. An employer fronting this ground is therefore required to demonstrate the existence of a real case of redundancy and to exercise utmost good faith. This forms the basis for condition (c) under Section 40 of the Employment Act, which requires the employer to establish objective selection criteria for redundancy.

35. Article 15 of the *Supplementary Provisions to the ILO Recommendation No 119* on reduction of workforce provides:

(1) The selection of workers to be affected by a reduction of the workforce should be made according to precise criteria, which it is desirable should be established wherever possible in advance and which give due weight both to the interests of the undertaking, establishment or service and to the interests of the workers.

36. The Respondent did not present the criteria used to select the Claimant for redundancy. This lapse, coupled with the non-defined nature of the restructuring process, plus the failure to issue a redundancy notice to the Claimant, rendered the termination of her employment substantively and procedurally unfair.

Remedies

37. I therefore award the Claimant six (6) months' salary in compensation. In arriving at this award, I have considered the Claimant's length of service accentuated by the fact that her fixed term contract was cut short by the unlawful conduct of the Respondent. I have further taken into account that the Claimant has moved on and is currently gainfully employed elsewhere.

38. The Court found no legal basis for the claim for salary for the unserved period of the employment contract. This claim therefore fails and is dismissed.

39. Finally, I enter judgment in favour of the Claimant in the sum of **Kshs. 3,450,000** being six (6) months' salary in compensation for unlawful and unfair termination of employment.

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

41. The Claimant will have the costs of the case.

42. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 24TH DAY OF FEBRUARY 2022

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JUDGE

Appearance:

Mr. Wangila for the Claimant

Miss Bonyo for the Respondent