



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO 1022 OF 2016

RUTH KANINI.....CLAIMANT

VERSUS

JANE KITONYI T/A MEDIPOINT CHEMIST.....RESPONDENT

JUDGEMENT

INTRODUCTION

1. By a statement of claim dated the 26/5/2016 and filed on the same date, the Claimant seeks the following from the Respondent;-

(a) A declaration that the Claimant's termination from her employment was unfair, wrongful and devoid of procedure.

(b) The Claimant be paid her terminal benefits as set out in paragraph 10 hereinabove totalling to

Kshs.2,069,693.2/=.

(c) The Honourable Court do issue such orders and give directions as it may deem fit to meet the ends of justice.

(d) The Respondent to pay costs of the Claim

Interests on the above at Court rates.

(e) The Respondent be ordered to give the Claimant Certificate of Service in compliance with Section 51 of the Employment Act.

CLAIMANT'S CASE

2. The Claimant avers in the statement of claim that she was offered employment as a Chemist by the Respondent on or about 3rd July, 2002 with a starting salary of Kshs.5,000/=. She was later transferred to West Pharmacy, situated at Kahawa West at a salary of Kshs.8,000. She was thereafter transferred to Janpharm located at Kahawa Wendani at Monthly salary of Ksh 12,000 which was exclusive of house allowance.

3. She says that the employment was oral and was never reduced to writing. The claimant says she worked with due diligence and faithfulness until February, 2016 when the Respondent without any notice sold off the Chemist and immediately terminated her employment.

4. It is stated that the termination was done orally and no termination letter was issued or reasons advanced to the Claimant for the abrupt loss of employment. There was no notice to show cause why she was to be terminated and there was no basis to terminate her as the Respondent had other pharmacies and no valid reason existed for the draconian action of terminating the Claimant's services.

5. The Respondent filed an appearance through the firm of Kang'ahi and Associates but did not file a response. In fact the advocate applied to cease acting for the respondent as he did not have instructions. The claim is therefore undefended.

6. The Claimant raised evidence by way of the affidavit. She has reiterated that she was employed by the Respondent on or about 3rd July, 2002 as a chemist attendant at a starting salary of Kshs.5,000/= which amount was later increased to Kshs.12,000/= exclusive of house allowance.

7. She says that she was terminated upon the Respondent selling off the chemist and immediately terminating her services. She deposes that there was no notice to show cause and the Respondent neglected to pay her terminal dues. The claimant also states that for the 13 years she worked she had neither gone on leave nor did the Respondent compensate her for in lieu of going on annual leave. The Claimant reiterated that the Court do give her an award as laid down in the statement of claim.

SUBMISSIONS

8. The Claimant submits that the employer had no valid reason to terminate her employment. She says that the Respondent simply sold the chemist and terminated her services. The Claimant further contends that procedural fairness and the principles of natural justice in the termination were not adhered to. She was neither issued with one month notice in lieu of termination nor one month notice in lieu of redundancy contrary to section 40 of the Employment Act, 2007. Further she was not issued with any letter to show cause why her services should not be terminated.

9. The Claimant further contends that section 40 (1 b) of the Employment Act 2007 provides that in the event an employer is contemplating termination on account of redundancy, the employer ought not only to notify the employee but also the labour office of intended redundancy. It is said that in the present case, the Respondent did not only fail to notify the claimant but also failed to notify the labour office of the intended redundancy. The Claimant has referred to the authority of **Kenya Airways Limited versus Aviation & Allied Workers Union & 3 Others (2014) eKLR** for the proposition that a notice ought to be issued stating that the employer is contemplating redundancy and once this is settled, individual employees must be given a notice of termination of their employment. Reliance has also been placed on the authority of **Kenya Airways Limited -versus- Aga khan University Hospital Nairobi, Cause No 815 of 2015** that a general as well as a personal notice ought to be issued. The Claimant invites the Court to find that the manner in which the Respondent was terminated was unfair and against the principles of natural justice.

10. On remedies, the Claimant submitted that the claimant's relief sought herein are unchallenged as her testimony is uncontroverted since the Respondent have neither filed any defence nor any statement of response. The Claimant asked for one month salary in lieu of notice, one month salary in lieu of redundancy notice, salary for 29 days worked in February, 2016, leave, House allowance, overtime, severance pay, payment for work done during the holidays and compensation under section 49 as read with section 50 of the Employment Act. I have had the opportunity of going through the submissions thereto.

ISSUES FOR DETERMINATION

11. (i) I have considered the pleadings and

evidence, the submissions of the claimant and the authorities quoted. The issue for determination is whether or not the claimant was employed by the Respondent and if so, whether her termination on basis of redundancy was validly carried out.

ii) Is she entitled to any remedies.

DECISION

12. Redundancy is defined under section 2 of the Employment Act **“redundancy” means 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;**

Section 40 (1) provides for the procedure for termination on account of 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 or employees affected by the redundancy;

(d) where there is in existence of a collective agreement between the 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 a 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 had 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 for each completed year of service.

The Claimant has not annexed letter of employment or payment slips demonstrating that she was employed by the Respondent. She has, however, deposed that she was employed by the Respondent but that there was no formal employment contract as between her and the Respondent. The duty of keeping records of an employee lies on the employer. Section 9 of the employment act provide that the employer is responsible for causing a contract to be drawn up stating particulars of employment. The respondent for reasons known to her refused to participate in the court proceedings even though she even appointed an advocate to represent her but he later applied to withdraw from acting.

14 The Court accordingly holds that she was employed by the Respondent. The Respondent has also not produced evidence to disprove the claim that the claimant was its employee.

15 As pertains as to whether she was validly terminated on the basis of redundancy I will refer to the Court of Appeal case in **Kenya Airways Limited versus Aviation & Allied Workers Union & 3 Others (2014)** where the court did recognise that redundancy is a legitimate means of terminating employment relationship. The redundancy must, however, conform to the requirements laid down under the Act. In the instant case, there was no letter of redundancy or one month notice from the respondent alerting her of eminent redundancy. Actually it is the Claimant who claimed that the Respondent sold the chemist and immediately terminated the employment relationship.

16 There is no material evidence placed before Court that the Respondent took the initiative to notify the trade union if the claimant belonged to one or the Claimant personally in case she did not belong to a trade union of the redundancy. Neither is there notice to the labour officer for the particular area. The Respondent has also not filed any document nor given any evidence relating to the requirements under subsection 1(e) to (g) of the Section 40 of the Act. The redundancy is accordingly unlawful as per the Act.

17 In the case of **JANE KHALECHI VS OXFORE UNIVERSITY PRESS E.A AFRICA (2013) eKLR** the court held that the provisions precedent in section 40 of the employment act in declaring an employee redundant are mandatory and are not left to the choice of the employer. The respondent in failing to follow these laid down seven conditions clearly set out in section 40 of the employment act failed to act lawfully and fairly. The respondent termination of the Claimant's employment is therefore declared unlawful and violation of fair labour practices.

REMEDIES

18 I turn to consider the remedies that the claimant should be awarded. The claimant has prayed for one month salary in lieu of notice. Though no evidence of payment has been provided, the claimant has sworn that she was earning

Kshs.12,000 at the time of termination. I award her

Kshs.12,000 for payment in lieu of notice.

19 I decline to award her one month's salary in lieu of notice of redundancy as there are no basis in law to award the same.

20 I decline to award her the prayer for 29 days in February 2016 as in her pleadings she says she was terminated on 9th February 2016.

I award her Kshs.3,600/= for the days worked.

21 There is no evidence tabled that the claimant during the time she was employed demanded for the payment of leave or house allowance. The same goes for the prayer relating to overtime or work done during the holidays. The above as well as public holiday claim are absolutely not proved and so are declined accordingly.

22. There is no evidence of payment of severance pay by the Respondent and yet the same is provided in law. I award her equivalent to 7 years as follows;

Kshs.12,000 x 7= Kshs.84,000/=

This will attract interest at court rates from date of this judgement till final payment.

23. In the final analysis, the Court awards the Claimant as follows;-

(a) Kshs.12,000 payment in lieu of Notice

(b) Kshs.3,600/= salary for the 9 days worked in February 2016.

(c) Kshs.84,000/=Severance pay

TOTAL Kshs.99,600/= together with interest at court rates from to date of Judgement till full payment.

24. The claimant is also awarded costs having been declared successful.

25. She is also to be issued certificate of service within 30 days therein.

Orders accordingly.

DELIVERED, DATED AND SIGNED IN NAIROBI THIS 10TH DAY OF MARCH, 2022.

ANNA NGIBUINI MWAURE

JUDGE

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 has 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 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.

A signed copy will be availed to each party upon payment of court fees.

ANNA NGIBUINI MWAURE

JUDGE