



**Mbukua v Water Services Trust Fund (Cause 1323 of 2017)
[2022] KEELRC 1209 (KLR) (27 May 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1209 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1323 OF 2017**

J RIKA, J

MAY 27, 2022

BETWEEN

ROSAITA NGINA MBUKUA CLAIMANT

AND

WATER SERVICES TRUST FUND RESPONDENT

JUDGMENT

1. The Claimant filed her Statement of Claim on 13th July 2017.
2. She states, she was employed by the Respondent as a Chief Manager, Resource Mobilization and Corporate Affairs, on or about 7th July 2015.
3. She was employed on a fixed-term contract for a period of 3 years, earning a monthly basic salary of Kshs. 352,000.
4. The Respondent's Board reserved the right to terminate the Claimant's contract prematurely, depending on her performance.
5. She states, she performed her duties as required, until 4th May 2017, when she was advised by the Respondent's Chief Executive Officer, that the Respondent was reorganizing its business, and that her position had been declared redundant.
6. On 5th May 2017, she attended another meeting with the CEO and the Manager Human Resources and Administration. She asked for official communication with regard to the proposed redundancy. None was availed. On 8th May 2017, the Respondent unfairly and unlawfully terminated her contract of employment, on redundancy.
7. She states, termination was unfair and unlawful because: there was no notice; the remainder of her contract period was ignored; no reasons were given; she was not consulted; and there was no approval from the relevant Government agencies.



8. She prays for: -
- a. Payment of 16 months' salary being the remainder of her contract period at Kshs. 5,632,000.
 - b. Gratuity at Kshs. 2,790,000.
 - c. Notice of 1 month at Kshs. 352,000.
 - d. Annual leave for 7.5 days at Kshs. 87,999.
 - e. Severance pay for 1 year completed in service, at Kshs. 175,999.
 - f. 12 months' salary in compensation for unfair termination at Kshs. 4,224,000.
 - g. Leave allowance for the remainder of the contract period at Kshs. 50,000 per month, at Kshs. 800,000.
Total...Kshs. 14,061,998.
 - h. Damages.
 - i. Reinstatement without loss of benefits.
 - j. Costs with interest.
9. The Respondent filed its Statement of Response on 23rd August 2017. It is conceded that the Claimant was employed by the Respondent as pleaded in the Claim. Her contract was terminated fairly and lawfully on account of redundancy. Redundancy followed the implementation of a Report by a Task Force commissioned by the Respondent, to review the Respondent's Organogram. The Task Force recommended the phasing out of the Claimant's position. The decision was not occasioned by poor performance on the part of the Claimant; it was occasioned by operational needs.
10. The Claimant was aware about the process of reorganization and actively participated in the work of the Task Force. She was in the meetings of 4th and 5th of May 2017, which deliberated on the subject. Her exit package was discussed. The Claimant expressed her satisfaction with the process. The Respondent was not actuated by malice. She was advised on her exit package, which she would receive after clearing. She failed to clear, and has not collected her redundancy package. Her position was declared redundant and the order of reinstatement is incapable of being implemented. The Respondent prays for dismissal of the Claim with costs.
11. The Claimant and the Respondent's Head of Human Resource and Administration Paul Atwa, gave evidence for the respective Parties on 7th December 2021, closing the hearing.
12. The Claimant restated that she was not aware about the redundancy process. She was not notified. She had a contract of 3 years. She served 21 months. She had 16 months left. She claims the remainder of her contract period. She was paid notice, annual leave and severance, after filing the Claim. She was not paid compensation and leave allowance. She was the only one targeted by the redundancy exercise. It was her title, not her position that was declared redundant. Her junior was allowed to fill her position. She clarified that she is no longer keen on being reinstated, because her contract ended in 2018. She was not part of the Task Force. She did not know if the Labour Office was notified.
13. Cross-examined, the Claimant told the Court that she was listed among the Employees who were interviewed in the redundancy process. She was not aware of reorganization. She was not a member of the Task Force. She did not agree with the recommendations of the Task Force. There was a letter authored by the Respondent, addressed to the County Labour Office on redundancy. The Claimant



wrote email to staff, bidding them farewell. She was invited for negotiations with the Respondent upon her request, after she had left employment. She did not accept the redundancy benefits offered by the Respondent. She was not hostile to the Respondent. It was only after she filed the Claim, that the Respondent offered her redundancy benefits. She did not have the opportunity to inform the Court about the benefits paid to her by the Respondent.

14. Redirected, the Claimant told the Court out of the 9 Employees who were interviewed, it was only her, who was singled out for redundancy. She bade the staff farewell, but did not accept redundancy. The letter to the Labour Office was not copied to the Claimant. It was delivered on 16th May 2017, after she had left employment. She confirmed in Court what was paid while the trial was ongoing.
15. Paul Atwa told the Court that the Respondent was restructuring its business. It had migrated from the Water Act 2002, to the 2016 Act. This was also necessitated by the promulgation of the Constitution of Kenya 2010 and the Respondent's Strategic Plan. Trustees resolved to restructure. The Claimant's position was remodelled, with roles consolidated and renamed. Due process was followed. The Board approved. The Claimant appreciated. She was not targeted individually.
16. Cross-examined, Atwa told the Court that the Claimant was employed in 2015, while the Constitution of Kenya was still in place. Her position was designated. Her contract was for 3 years. She did not complete 3 years. Her contract stated it could be terminated on performance. It was terminated on redundancy. Atwa did not have a list of affected Employees. The Claimant was not the only Employee targeted. The Task Force Report recommended that existing Employees would be given opportunity to fit in the new organogram. There was no new position suitable to the Claimant. The Claimant's position was not merely renamed. The notice to the Labour Office is dated 4th May 2017, but delivered on 16th May 2017. The Board approved redundancy. Its resolution was not exhibited before the Court. Other Managers whose positions were declared redundant, were reabsorbed. The Claimant did not fit in any new position. She declined receipt of her Certificate of Service. She was paid her dues on demand. Redirected, Atwa told the Court that other Employees were affected.
17. The issues are whether: the Claimant's contract was terminated following a fair procedure; whether termination was based on valid reason; and whether she merits the remedies sought.

The Court finds: -

18. The Claimant was employed by the Respondent, as the Chief Manager, Resource Mobilization and Corporate Affairs, on a 3- year contract.
19. The letter of appointment is dated 7th July 2015. The appointment date was expressed in the contract, to be 1 month from the date of the letter, which would be 7th August 2015.
20. She did not complete the contractual period of 3 years. On 22nd August 2016, the Respondent's Board established a Task Force, to among others, look into the effectiveness of the Respondent's Organogram. The Task Force submitted its Report to the Board, in March 2017.
21. Among the recommendations was that Resource Mobilization be renamed Partnership Development and Resource Mobilization. Corporate Affairs was merged with ICT. On 4th May 2017, the Respondent's CEO wrote to the Claimant advising that her role had become redundant, and that she would be paid redundancy package after discussions and negotiations between the Parties.
22. Discussions were held on 5th May 2017 involving the Claimant, Respondent's Chairman, the CEO and the Manager Human Resource and Administration.
23. The Respondent proposed to pay to the Claimant: -



- a. Severance pay at 15 days' salary for 1 complete year of service, Kshs. 125,000.
 - b. Notice of 1 month as per contract at Kshs. 250,000.
 - c. Gratuity for 21 months at Kshs. 1,627,500.
 - d. Leave days at 7.5 days at Kshs. 62,500.
 - e. Salary for 8 days worked in May 2017 at Kshs. 66,666.
 - f. Redundancy pay of 3 months at Kshs. 1,056,000.
- Total...Kshs. 3,187,666.
24. The Claimant did not agree to this and demanded to be paid: -
- a. 16 months' salary for the remainder of the contract period.
 - b. Full gratuity for 3 years contracted.
 - c. 1-month gross salary in notice.
 - d. Annual leave for the remainder of the contract.
 - e. Severance at 15 days' salary for 1 year completed in service.
 - f. Some measure of compensation for loss of employment.
25. The Parties informed the Court that there was payment of some benefits to the Claimant while the trial was ongoing. These were specified in the Submissions filed by the Claimant to comprise: -
- a. Notice of 1 month at Kshs. 352,000.
 - b. Pending annual leave at Kshs. 87,999.
 - c. Gratuity for 1.5 years at Kshs. 1,627,500.
 - d. Leave pay at Kshs. 62,500.
- Total ... Kshs. 2,129,000.
26. Consequently, the Claimant states she merits the following additional sums: -
- a. Salary for the remained of the contract period of 16 months at Kshs. 5,652,000.
 - b. Gratuity for 1.5 years at Kshs. 1,395,000.
 - c. Severance at Kshs. 175,000.
 - d. 12 months' salary in compensation for unfair termination at Kshs. 4,224,000.
 - e. Leave allowance of 16 months at Kshs. 100,000.
- Total...Kshs. 11,723,000.
- f. Costs and interest.
27. As conceded therefore, in the Evidence and Submissions of the Claimant, a substantial part of her Claim has been satisfied, while the trial was ongoing.
28. The Claimant has expressly discontinued her prayer for reinstatement.



29. The Court does not agree with her that she merits anticipatory salaries for the remainder of her contract. While the remainder of her contract period is relevant in considering if she merits compensation for unfair termination, and the level of that compensation, it does not follow that because she did not serve to the end of her contractual period, that she merits anticipatory salaries. Employees are paid salaries for services actually rendered. It would be unconscionable to pay to the Claimant, from public coffers, salaries claimed at over Kshs. 5 million, for services not rendered. While the remainder of the contract period is relevant in considering if compensation is payable, and the weight of that compensation, the remainder of the contract period is not to be remunerated as though the Claimant rendered services to the end of her contract.
30. The Claimant was paid gratuity commensurate with the period served. The contract entitled her gratuity at 31% of her basic salary over the period worked. She was paid gratuity over the period worked. There is no justification in demanding gratuity based on a full contractual period of 3 years.
31. Severance pay is regulated under Section 40 of the *Employment Act*. It is not captured in the payments made by the Respondent, although it was part of the offer made by the Respondent, at the negotiations. The Claimant served for 21 months, which would guarantee her 1 complete year of service. The Respondent offered her 3 months' redundancy pay, which the Court understands to mean severance pay. Section 40 of the *Employment Act* prescribes severance pay of at least 15 days' salary for every complete year of service. It is a minimum standard, with Parties granted the discretion to improve on the minimum. The Respondent offered severance of 3 months, at Kshs. 1,056,000. The Court does not interfere with a benefit conferred on the Employee by the Employer. The Respondent shall pay to the Claimant severance/ redundancy pay of 3 months as offered, at Kshs. 1,056,000.
32. The prayer for leave allowance of 16 months, at Kshs. 100,000 [Submissions] or Kshs. 800,000 [Statement of Claim] is again faulty, as it is based on unspent period of the contract. The clause 11 of the contract on leave allowance, is specific that leave allowance would be paid for leave taken. How is the Claimant to receive leave allowance for anticipated annual leave? The prayer is declined.
33. Was termination unfair, warranting payment of compensation?
34. Procedure was flawed. It did not conform to the basic standards of fairness under Section 40 and 41 of the *Employment Act*.
35. Restructuring effectively started in 2016 when the Task Force was appointed. Whereas the Claimant was among the Staff interviewed by the Task Force, she was not consulted by the Respondent, once recommendation was made by the Task Force that some roles be consolidated or phased out.
36. The Respondent held consultations with the Claimant, but only on 5th May 2017, after the decision to declare her position redundant had been made.
37. Consultation was not about the actual declaration of redundancy; it was about payment of redundancy package. A decision on redundancy had been made without consulting the Claimant, and the meetings only presented the Claimant with a fait accompli.
38. There was no notice of the intention to declare the Claimant's position redundant, issued to the Claimant. Actual termination notice was not issued, but has been paid. There was no proper notice issued upon the Labour Office. A notice dated 4th May 2017, was only received by the Labour Office on 16th May 2017. The Respondent did not demonstrate the criteria applied to single out the Claimant out of the other staff interviewed for redundancy. Resource Mobilization was renamed Partnership Development and Resource Mobilization. The Respondent alleged, without supplying details to the Court, that the Claimant's skills could not match any of the new roles. But there was no new role



here, just renaming and delinking of part of her old role of Chief Manager, Resource Mobilization and Corporate Affairs. Resource Mobilization was not declared redundant, but was only renamed.

39. Other procedural defects in the eyes of the Court, include the mode adopted by the Respondent in paying the Claimant's redundancy package. Redundancy payments are to be made before the Employee exits, not long after the exit or after the Employee has sought the protection of the Court. Section 40 of the *Employment Act* states that an Employer, " shall not terminate a contract of service on redundancy, unless the Employer complies with the following- [a] up to [g]. " Fair and lawful termination on redundancy, is preceded by fulfilment of the conditions listed from Section 40[1][a] to [g]. An Employer does not terminate, for instance, and pay notice at a later date, because termination is not effective, until notice or notice pay, has been received by the affected Employee. Redundancy exercise where redundancy package is promissory, rather than immediate, is an unfair and unlawful process, falling short of the standards prescribed under Section 40 of the *Employment Act*.
40. The process was not fair and lawful under Section 40 of the *Employment Act*.
41. The validity of the exercise appears not disputed. The Respondent explained it was restructuring against the background of its Strategic Plan; the changes in the Water Act; and the demands of the Constitution of 2010. The exercise was preceded by a Task Force, which gave specific recommendations on restructuring. The Court has no reason to question the genuineness of the reorganization exercise.
42. Termination was not based on fair and lawful procedure. It was based on a valid reason. The Claimant merits compensatory award for unfair and unlawful termination.
43. It is recognized that she had served for 21 months. Her contract was for 36 months, meaning the remainder of her contract was 15 months. It was not her fault that the contract was brought to a halt prematurely. She expected to work to the end of her contract. The Court has concluded that the Respondent did not demonstrate with sufficient conviction, why the Claimant could not have a role in the new organogram, particularly because her old role, was simply renamed rather than phased out. Other Managers, to the exclusion of the Claimant alone, were fitted in the new organogram. The Claimant wished to be reinstated, but concedes that her contractual term, would have lapsed in 2018, and it is not practicable to restore her contract. She deserves and is allowed compensation, equivalent of her 12 months' gross salary, at Kshs. 4,224,000.
44. Costs to the Claimant.
45. Interest allowed at court rates, from the date of Judgment till Judgment is satisfied in full.

In Sumit is Ordered: -

- a. The Respondent shall pay to the Claimant: severance/redundancy equivalent of 3 months' gross salary at Kshs. 1,056,000; and equivalent of 12 months' gross salary in compensation for unfair termination, at Kshs. 4,224,000 – total Kshs. 5,280,000.
- b. Costs to the Claimant.
- c. Interest allowed at court rates, from the date of Judgment till payment is made in full.

DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY, AT NAIROBI, UNDER THE MINISTRY OF HEALTH AND JUDICIARY COVID-19 GUIDELINES, THIS 27TH DAY OF MAY 2022.

JAMES RIKA

JUDGE

