



Ogolla v Ndanyi (Sued as National Chairperson of Young Women’s Christian Association of Kenya on her behalf and on behalf of all members of the Association & another (Cause 48 of 2018) [2022] KEELRC 1368 (KLR) (8 July 2022) (Judgment)

Neutral citation: [2022] KEELRC 1368 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 48 OF 2018
B ONGAYA, J
JULY 8, 2022

BETWEEN

GLADYS ONYANGO OGOLLA CLAIMANT

AND

JANE NDANYI (SUED AS NATIONAL CHAIRPERSON OF YOUNG WOMEN’S CHRISTIAN ASSOCIATION OF KENYA ON HER BEHALF AND ON BEHALF OF ALL MEMBERS OF THE ASSOCIATION 1ST RESPONDENT
BOARD OF TRUSTEES OF YOUNG WOMEN’S CHRISTIAN ASSOCIATION OF KENYA 2ND RESPONDENT

JUDGMENT

1. The claimant filed the memorandum of claim on 24.01.2018 through Chamwada and Company Advocates. The claimant pleaded that she was employed by the respondents on 01.07.1990 and worked until 30.09.2015 when he was terminated from employment without notice and on account of redundancy. At the time of redundancy, she was the house keeper at the respondent’s Mombasa Branch earning Kshs. 24, 000.00 per month. Her case is that her termination on 30.09.2015 was unlawful and without justifiable reason and procedure under section 40 of the *Employment Act*, 2007 was not followed. The pleaded particulars of breach include no written notice; failure to pay regard to the claimant’s seniority in time and skill; failure to pay her leave days due; failure to give the one-month notice; and failing to pay severance pay. Further, as at termination the respondent owed the claimant salary arrears of Kshs. 411, 000.00 and which had not been paid as at the time of filing the suit. She claimed that under Chapter 5 Clause 5.3 (a) (c) and (e) (i) of the Young Women’s Christian Association of Kenya Human Resource Manual 2010 she was entitled to a retirement benefit calculated on the basis of 24 days equivalent consolidated salary for each completed year of service amounting to Kshs. 553, 846.00 which the respondent had unfairly refused to pay. The claimant also claimed provident



fund payment due under clause 7.3.4 of the Manual and Kshs. 279, 231.00 of the money due to the fund had not been remitted. The claimant claimed for:

- a. Salary arrears due Kshs. 411, 000.00.
 - b. Retirement benefits (Kshs. 24, 000 x 24 days x 25 years) / 26 days Kshs. 553, 846.00.
 - c. Unremitted provident fund dues Kshs. 279, 231.00.
 - d. Severance payment Kshs. 279, 231.00.
 - e. Damages for unlawful redundancy.
 - f. One-month payment in lieu of the notice Kshs.24, 000.00.
 - g. Gratuity Kshs. 186, 577.00.
2. The claimant prayed for judgment as claimed plus costs and interest.
3. The respondent filed the memorandum of response on 16.02.2018 through Musinga & Company Advocates. The respondents admitted employing the claimant but denied unlawfully rendering the claimant redundant. It was pleaded that the claimant earned Kshs. 15, 288.00 per month and that she was given sufficient notice prior to the termination on account of redundancy. Further, she was not entitled to retirement benefits as claimed because she did not satisfy the threshold for such award. The respondent admitted outstanding terminal benefits due to the claimant being Kshs. 216, 578.00 in gratuity and Kshs. 249, 314.00 in provident fund making Kshs. 465, 892.00 to be collected by the claimant and the residual claim to be dismissed with costs.
4. The parties compromised the claims substantially and on 08.02.2022 the Court ordered that the issue of provident fund was settled and the issues to go on trial were whether there was unfair termination, whether the claimant is entitled to compensation, whether gratuity is due, and, issue of notice pay and costs. It was ordered that the claimant to rely on documents and witness statement already filed and served and further the respondent to rely on the witness statement and documents on record and may file and serve further documents. Final submissions were filed for the parties. The Court has considered the material on record and the final submissions and makes findings as follows.
5. The 1st issue for determination is whether the termination by way of redundancy was unfair. The letter dated 30.09.2015 referred to an earlier letter dated 31.08.2015 on notice to terminate employment by way of redundancy effective 30.09.2015. The letter dated 31.08.2015 is exhibited for the respondent. It is addressed to the claimant and copied to County Labour Officer, General Secretary Kudheihia, and Federation of Kenya Employers. The letter stated as follows:

“RE: Notice of Intention To Terminate Employment

We refer to our discussions on the financial down turn and constraint that the Branch has been undergoing for a while now.

As you are well aware, the management has not been in a position to pay your salaries in time for a number of months.

In this regard your continued employment cannot be sustained therefore the management serves you with one month’s notice of intention to terminate your services by way of redundancy w.e.f 30th September, 2015.



Take note that YWCA Mombasa Branch has taken into consideration the Collective Bargaining Agreement (2013). The Branch is committed to pay your dues based on a payment plan that will be shared and discussed with you.

During the notice period you are expected to prepare a proper handover of all YWCA Mombasa Branch property in your possession in regards to equipments, keys, documents and any information. You are also expected to complete the clearance form as provided with YWCA policies and procedures.

Yours faithfully,

FOR: Young Women Christian Association

Signed

Irene Randu

Branch Chairperson”

6. Respondent’s witness testified that the claimant never objected to contents of the letter dated 30.09.2015. The claimant on the other hand did not testify. While pleading that the termination was without due notice, the Court returns that by RW’s evidence, on a balance of probability the claimant received the termination notice by the letter dated 31.08.2015 and was subsequently terminated by the letter dated 30.09.2015. The Court further finds that on a balance of probability and in absence of any other material, there is no reason to doubt that the letter was duly received by the county labour officer and the union as copied to them respectively. The Court therefore returns that as submitted for the respondent, the claimant, the labour officer and the union were duly notified as per section 40(1) (a) and (b) of the *Employment Act*, 2007. The Court also finds that the letter also conveyed the reasons for and the extent of the intended redundancy. The claimant has in the submissions alleged that the respondent has not shown compliance with section 40(1) (c) of the Act; that in selecting employees for redundancy, the employer shall have regard to seniority in time and to skill, ability, and reliability of each employee of the particular class of employees affected by the redundancy. The Court has considered the memorandum of claim and it is not pleaded that the claimant was targeted in a group of the respondents’ employees holding the same position as the claimant. The pleading is that she was the Mombasa Branch House Keeper suggesting she was the only such employee engaged by the respondents in that capacity at the Branch so that the issue of selection does not even begin to arise. The Court returns that the alleged procedural failures in the ensuing redundancy have not been established at all.
7. It is submitted for the claimant that as at termination the reason for termination was not valid and genuine as envisaged in sections 40, 43 and 45 of the Act. The reason in the notice and then the termination letter was that the respondents were undergoing financial constraints manifested in the management’s failure to pay the claimant’s salaries for a number of months. By her own pleading and claims the claimant has confirmed that indeed the respondent owed the salary arrears and which have since been paid after the filing of the suit. The Court returns that there is no reason to doubt that as at termination that reason leading to the redundancy decision was valid, genuine and related to the respondent’s operational requirements.
8. The Court therefore returns that the termination was not unfair or unlawful both in procedure and substance. The claim and prayer for compensation in that regard will collapse. The Court has perused the memorandum of claim and it is not clear on what contractual basis and computation the claimant has claimed for Kshs. 186, 577.00 in gratuity. For the respondents, gratuity is admitted at Kshs. 216, 578.00. It is submitted for the claimant that in view of that admission by the respondents, so far Kshs.130, 578.00 has been remitted to the claimant leaving a deficit of Kshs. 86, 000.00 to be granted by



the Court. RW testified that the claimant was paid gratuity on 10.10.2017 Kshs. 30, 000.00 and further on 26.07.2018 Kshs. 100, 000.00 making a total of Kshs. 130, 000.00 as submitted for the claimant, as duly paid. As submitted for the claimant, the Court returns that Kshs. 86, 000.00 is owing to the claimant from the respondents in gratuity and which is hereby awarded. While making the award the Court has considered the submission made for the respondents that as per section 35(5) and (6) of the Act, the gratuity or service pay was not due in view of the provident fund but, the Court has found that the respondents admitted owing the gratuity and RW's testimony shows that the full admitted amount had not been paid to the claimant. In view of that admission, the Court finds that even if gratuity was due at the respondents' discretion per *Bamburi Cement Limited –Versus- Willioam Kilonzi* [2016] eKLR, in the instant case the respondent is deemed to have exercised the discretion in favour of the claimant.

9. On notice pay, it is submitted for the claimant that section 40(f) of the Act provides for notice payment. No submission appears to have been made for the respondents on that point. As prescribed under the cited statutory provision she is awarded Kshs. 24, 000.00 as claimed and prayed for.
10. The claimant has succeeded in her claim and is awarded costs of the suit taking into account all circumstances of the case that she was terminated while she was owed substantial salaries and her redundancy dues were not promptly paid.
11. In conclusion judgment on the residual claim is hereby entered for the claimant against the respondent for:
 1. Payment of Kshs.110, 000.00 by 01.09.2022 failing interest to be payable thereon at Court rates from the date of filing the suit till full payment.
 2. The respondents to pay the claimant's costs of the suit.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 8TH JULY, 2022.

BYRAM ONGAYA

JUDGE

