



Kirigo alias Jane Kirigo Waigwa v Mount Kenya Academy Foundation (Cause 12 of 2019) [2022] KEELRC 13084 (KLR) (31 October 2022) (Judgment)

Neutral citation: [2022] KEELRC 13084 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
CAUSE 12 OF 2019
DKN MARETE, J
OCTOBER 31, 2022
(FORMERLY NAIROBI ELRC NO.258 OF 2019)

BETWEEN

JANE KIRIGO GIKUHI ALIAS JANE KIRIGO WAIGWA CLAIMANT

AND

MOUNT KENYA ACADEMY FOUNDATION RESPONDENT

JUDGMENT

1. This matter was brought to court by way of an amended memorandum of claim dated August 9, 2019. It does not display any issue in dispute on its face.
2. The respondent in an amended memorandum of response dated August 21, 2019 denies the claim and prays that this be dismissed with costs.
3. The claimant's case is that by a letter dated April 4, 2019, the respondent purported to terminate the claimant's employment as Deputy Principal. She had been employed through a contract of employment dated January 10, 2010 which provided for her terms of service. She was awarded permanent and pensionable status *vide* a letter dated July 25, 2011.
4. The claimant's case further case is that she performed her duties loyally and diligently to the extent of exceeding the respondent's expectations and this was rewarded with a salary review *vide* a letter dated January 24, 2013.
5. Her other case is that the respondent undertook a purported restructuring of the human resource base and in a letter dated January 21, 2019 and she was assigned the consolidated position of Deputy Principal with effect from January 1, 2019.
6. It is her further case that the purported termination of the claimant on the April 4, 2019 by way or redundancy only 3 months into the mutually agreed restructuring not only came up clandestinely,



- unilaterally, capriciously and arbitrarily from the respondent but the same was planned, decided and executed vindictively without following the due process of the law.
7. She cites the following as particulars of violations of her legitimate rights;
 - a. Unfair labour practice in violation of article 41 of the Constitution, article 13 of International Labour Organisation Convention number 158 and section 40 of the Employment Act.
 - b. Acting in bad faith by unilaterally invoking redundancy only 3 months into an agreed restructuring.
 - c. Failing, neglecting and or outright refusal to carry out the purported redundancy as by law provided.
 - d. Ambushing the claimant with a redundancy letter dated the April 4, 2019 without any prior consultations, notice, warning or signal whatsoever that there was to be any such redundancy.
 - e. Purporting to carry out a targeted redundancy without prior one month notice to the labour officer as required by section 40 of the Employment Act.
 - f. Violating the claimant's constitutional right to legitimate expectation upon signing up for her new responsibility on the January 1, 2019 upon restructuring.
 8. It is her assertion that she attempted to manage this draconian and unlawful decision with a view to reversal but this fell on deaf ears.
 9. She also avers that in purporting to lay off the claimant on redundancy reasons, due process was not followed, for several reasons, including;
 - a. Failure to give the written notice of the intended redundancy prior to the date of the intended date of termination;
 - b. Issuing a termination letter instead of a redundancy notice;
 - c. Failure to consult and give reasons for the redundancy to the claimant prior to the letter of termination.
 - d. Attempting to justify the termination;
 - e. Feigning a redundancy situation when the business of the employer, the respondent herein, still needs the services of the respondent;
 - f. Engaging in unfair labour practice; and
 - g. Failure to adhere to section 40 of the Employment Act, thus ending up with unfair redundancy process.
 10. She further avers that her career as a teacher with an impeccable record is now compromised unless relief is allowed by this court.
 11. Further, she was not notified of intention to carry out the purported redundancy. She was only issued with a letter of termination on grounds of redundancy dated April 4, 2019 without any termination notice as provided for in the law.
 13. Again, the purported reason for terminating the employment of the claimant on account of redundancy and low intake was not a genuine and/or valid reason as the respondent has always intended to be purposefully small. Her further case is as follows;



- 13B. In August 2015, the position of deputy principal was split into Deputy Principal Academics and Deputy Principal Pastoral.
- 13C. The claimant was in charge of pastoral earning Kshs 125,000 while her male counterpart in charge of academics on the same job level was earning Kshs 250,000.
- 13D. In August 2016, Deputy Principal Academics left the job. The claimant was in charge of both positions until April 20-17 when a new Deputy Principal Academics was appointed.
- 13E. The new male Deputy Principal Academics earned a salary of Kshs 320,000 while the claimant was earning a salary of Kshs 160,000.
- 13F. The claimant contends that she was discriminated on account of her gender.
- 13G. at the time of her purported termination, she was earning a gross salary of Kshs 160,000.00
14. She prays as follows;
1. A declaration that the termination of employment of the claimant on account of redundancy was unprocedural, unlawful, unjustified and unfair.
 2. A declaration that the unlawful acts of the respondent in the unprocedural, unlawful and unjustified termination of the claimant's employment amounted to discrimination against the claimant herein.
 - 3a) Kshs 480,000 being 3 months salary in lieu of notice.
 - 3b) Kshs 640,000 being severance pay for 8 years.
 - 3c) Kshs 1,920,000 being 12 months gross salary for unlawful and unfair termination of the claimant.
 - 3d) Kshs 2,125,000 being salary underpayment of Kshs 125,000 from August 2015 to January 2017.
 - 3e) Kshs 3,840,000 being salary underpayment of Kshs 160,000 from January 2017 to December 2018.
 - 3f) Kshs 1,120,000 being salary underpayment of Kshs 160,000 from January 2019 to July 2019.
 4. Damages for discrimination of the claimant on account of her gender.
 - 4a) An order compelling the respondent to produce remuneration records for the holders of Deputy Principal positions from August 2015 to date.
 5. Costs of this claim and interest thereon.
 6. Any other and further relief that this honourable court may deem fit and just to grant in the circumstances.
15. The respondent's case is an averment on being a private company limited by shares and registered in Kenya. She in toto denies the averment on registration at paragraph 2 of the claim and puts the claimant in strict proof thereof.
16. The respondent's further case is that the letter of April 4, 2019 was in compliance with the law and due process. Her further case is that the letter dated January 24, 2013 was only and simply appraising the claimant per the conduct of service and not for any other reasons. She puts it thus;



5. The respondent avers that the letter dated January 24, 2013, was simply appraising the claimant as provided in the contract of employment and not for any other reasons.
17. The respondent's further case is that the claimant was aware that her office would be abolished and she was informed by the director in a letter dated March 10, 2019 and also in a meeting of April 1, 2019. This makes the redundancy legitimate and proper. This is as follows;
7. The respondent avers that the claimant was aware that her office would be abolished and she was informed by the director *vide* an email dated March 30, 2019, and a meeting of April 1, 2019. It cannot be said that redundancy was clandestine, unilateral, capricious and arbitrary. The claimant is put to strict proof of her claim.
18. It is the respondent's further case that upon termination by reasons of redundancy, the claimant was entitled to the following;
- a. April 2019, salary Kshs 160,000.00
- b. 3 months salary *in lieu* of notice Kshs 480,000.00
- c. 5 day's pay for each year worked Kshs 640,000.00
- Sub-total Kshs1,280,000.00
- Less taxes (PAYE), NSSF and NHIF 389,120.00
- Net 890,879.00
- and therefore the instant claim is an abuse of the process of court.
19. Again and in response to paragraph 13B, 13C, 13D, 13E, 13F and 13G, the respondent admits the administrative changes in an effort to make the respondent profitable, but denies that the claimant was in any way discriminated in the process by reason of gender or otherwise. The claimant is put to strict proof of her averments.
20. Her further case comes out as follows;
12. The respondent avers that each staff member negotiated their remuneration, and the claimant enjoyed her negotiated remuneration without a complaint until the dispute on termination arose. The claimant ought to have raised her grievances within the time lines set out in section 90 of The *Employment Act*, which she failed to do. Thus all claims for underpayment and damages for discrimination are misconceived and ought to be dismissed.
13. The law is clear that he who alleges has the legal duty to prove the allegations. The claimant has the burden of proving her allegations that she was underpaid and discriminated upon, without calling for evidence from the respondent, as sought in relief (4a). That the claim is mischievous and misconceived. The same ought to be dismissed with costs.
21. The matter came to court variously until July 27, 2022 when it was heard. Further hearings were on July 7, 2020, July 30, 2020, May 17, 2021 and February 15, 2022. Here, the parties testified in reiteration of their respective cases.
22. The issues for determination therefore are;
1. Whether the termination of employment of the claimant by the respondent was wrongful, unfair and unlawful.
2. Whether the respondent discriminated the claimant on the basis of her gender.



3. Whether the claimant is entitled to the relief sought.
4. Who bears the costs of this cause.
23. The claimant in her written submissions dated March 14, 2022 brings out issues on the ownership of the respondent. However, this court does not deem this as a cardinal issue for determination.
24. Further, the claimant submits in reliance to section 40 of the Employment Act, 2007 which provides as follows;

“An employer shall not terminate a contract of service on account of redundancy unless the employer complied with the following conditions:-

- a.
 - 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.
 - 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 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 15 days pay for each completed year of service.
25. The claimant faults the respondents testimony of poor enrolment as a ground for redundancy and submits that the respondent’s website as provided at page 48 of the claimant’s documents dated August 4, 2019 indicates that it was purposefully small as it valued family and wish to offer personalised attention to all learners. She also in evidence admitted that the redundancy did not affect any other teacher.
 26. In toto, the claimant submits that the respondent did not comply with the law in terminating the employment of the claimant. This is evidenced by lack of notice of termination or even intended redundancy. No notices were issued to the labour officer and he came to learn of the redundancy on the date of termination.
 26. Again, the respondent’s witness admitted in cross-examination that after the termination of claimant’s employment they employed a teacher by the name of Evelyne Agingu at a monthly salary of Kshs 250,000.00. The respondents witness in testimony was evasive on this. This is as follows;

The said witness also admitted that in 2017, the Deputy Principal Academics was Alfred Lumire. When the witness was asked what their salaries were, he said he did not remember. The witness was not being candid considering that he was the Deputy Director in charge of planning, administration and finance. The claimant has indicated in her evidence that the salaries of the two men were Kshs250,000 and 320,000 respectively.



27. The respondent on the other hand denies irregular redundancy. It is her case and evidence that this was occasioned by poor student enrolment from a capacity of 300 to 77 students resulting in low income for learning the institution. The board decided to hold on in 2017, but with a view to restructuring at a future date.
28. The respondent further case and submission is that by a letter dated April 5, 2017 the claimant was informed that the respondent had abolished several positions resulting in her position of Deputy Principal- pastoral had been re-designated to the position of head pastor as there was low student enrolment hence posing financial challenges. The claimant accepted the position without any complaint as she was aware of the difficulty that the institution was undergoing.
29. Again, the respondent submits that by a letter dated January 25, 2019 the director of respondent while issuing a notice of restructuring of the claimant position on grounds of poor enrolment referred to a conversation they had in 2018 on the subject. This is an indicator that she was always aware of the restructuring and had even accepted the same by taking up the merged position. Therefore, the restructuring was done in good faith to keep the institution afloat and not clandestine or in any way unilateral, capricious and arbitral.
30. A determination of this issue dwells upon the interpretation and compliance with section 40 of the *Employment Act*, 2007. The question would be whether the respondent in terminating the employment of the claimant met the threshold of redundancy as enunciated in law. The law is as follows;

Section 40

- 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 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 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 15 days pay for each completed year of service.



31. The opening criterion in a case of redundancy is the issue of notices to the union and labour officer in the circumstances of a unionised employee and where the employee is not unionised, the employer is personally notified in writing and the labour officer too is also notified. In the circumstances of this case, all we have is back and forth between the parties on the issue of notice or notices of redundancy. The claimant case is that no advance notice was issued to herself or the labour officer prior to termination of her employment. She was only issued with a letter of termination dated April 4, 2019 and no more. The labour officer came to know of the redundancy and termination after the event.
32. The respondent's case and submission is otherwise. She justifies the redundancy on grounds of poor enrolment and therefore disability to sustain herself. She dwells largely on previous restructuring overtures where the claimant position was abolished or merged with another one to sustain the prevailing situation. It is her case that all this time, she had had verbal discussion and also written to the claimant various letters informing her of the intended redundancy. Her taking up of the merged position amounts to acquiescence and therefore the claimant cannot be had to disclaim notice.
33. In the midst of all this, we return to the provisions of section 40 (a and b) of the *Employment Act*, 2007 above cited. Did the respondent issue the requisite notices to the claimant and the labour officer as required. My answer is no. The respondent has not controverted the claimant's case of lack of notice of redundancy. Her witnesses in their evidence did not establish this either. In the circumstances, I find that the respondent failed to comply with the law on this aspect and hold as such. Again, any earlier purported discussions and write ups on redundancy with and to the claimant were not demonstrated. They remain mere allegations.
34. It is the claimant's further case and submission that the respondent employed a teacher, one, Evelyne Agingu after the event of redundancy. This is administration of bad faith. It is insincerity and dements the theory of redundancy to the ground. This in toto invalidates and disapproves a case of redundancy.
35. I therefore find that the termination of the employment of the claimant by the respondent was wrongful, unfair and unlawful for want of form.
36. The 2nd issue for determination is whether the respondent discriminated the claimant on the basis of gender. It is the claimant's case and submissions that the respondent has admitted the contents of paragraphs 13B to 13G of the amended memorandum of claim dated August 9, 2019 *vide* paragraph 12 of her amended response dated August 21, 2019.
37. Again, the claimant's witness had admitted that the claimant was Deputy Principal and subject teacher simultaneously. A termination letter indicated that it was only the position of Deputy Principal that was no longer needed and not that of teacher. Further, on cross-examination the witness admitted that in 2015 the Deputy Principal, academics was Benedict Odhiambo.
38. The said witness also admitted that in 2017, the Deputy Principal Academics was Alfred Lumire. When the witness was asked what their salaries were, he said he did not remember. The witness was not being candid considering that he was the Deputy Director in charge of planning, administration and Finance. The claimant has indicated in her evidence that the salaries of the two men were Kshs 250,000 and 320,000 respectively.
39. It is the claimant's further case and submission that from the foregoing, this is clear cut evidence of discrimination on her part and a violation of section 27 of the *Constitution* of Kenya, 2010 that disallows discrimination. She submits thus;

“That men and women have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres. The respondent's



organogram which is at page 17 in red of the claimant's supplementary list of documents dated August 9, 2019 indicates that the positions of Deputy Principal Academics and that of Deputy Principal Pastoral were at par. It was discriminatory for the respondent to pay the claimant a lower salary than the men who were holding the position of Deputy Principal Academics. We urge the court to find that the actions of the respondent were discriminatory of the claimant on the basis of her gender."

40. One of the salient issues for scrutiny is the salary discrepancy between the claimant and her male counterparts on equal and similar office. In as much as it can be argued that the claimant voluntarily executed and agreed to her contract of employment, there is some bitter aspects in so far as the salary difference is concerned. It cannot be explained and the respondent only excuses the same. The claimant's case for discrimination on grounds of gender overwhelms the rebuttal by the respondent. I therefore find an obvious case of discrimination of the claimant on grounds of gender or other unexplained reason and find as such.
41. The 3rd issue for determination is whether the claimant is entitled to the relief sought. She is. Having won her respective cases of unlawful termination of employment and discrimination on account of her gender, she becomes entitled to the relief sought.
42. I am therefore inclined to allow the claim and order relief as follows;
- i. A declaration that the termination of employment of the claimant on account of redundancy was unprocedural, unlawful, unjustified and unfair.
 - ii. A declaration that the unlawful acts of the respondent in the unprocedural, unlawful and unjustified termination of the claimant's employment amounted to discrimination against the claimant herein.
 - iii. One (1) month salary *in lieu* of notice..... Kshs 160,000.00
 - iv. Severance pay for 8 yearsKshs 640,000.00
 - v. Six (6) months salary as compensation for unlawful and unfair termination.....Kshs 960,000.00
 - vi. Damages for discrimination of the claimant on account of her gender.....Kshs 1,500,000.00
Total of claim.....Kshs 3,260,000.00
 - vii. The costs of this cause shall be borne by the respondent.

DATED AND DELIVERED AT NYERI THIS 31ST DAY OF OCTOBER, 2022.

D.K.NJAGI MARETE

JUDGE

Appearances

1. Mr. Waweru Macharia instructed by Waweru Macharia & Co.Advocates for the Claimant.
2. Miss Lucy Mwai instructed by Lucy Mwai & Co.Advocates for the Respondent.

