



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS**

**COURT OF KENYA AT NAIROBI**

**CAUSE NO. 2223 OF 2017**

**SAMUEL OMARI TINEGA.....CLAIMANT**

**VERSUS**

**KENYA METHODIST UNIVERSITY.....RESPONDENT**

**JUDGMENT**

1. The Claimant herein Samwel Omari Tinega instituted this claim vide a Memorandum of Claim dated 6<sup>th</sup> November 2017 wherein he sued his erstwhile employer the Kenya Methodist University for unfairly and wrongfully terminating his employment on account of alleged redundancy. He avers that he was employed by the Respondent on 18<sup>th</sup> July 2008 as a Senior Internal Auditor and that he diligently worked for the Respondent and was later promoted to the post of Deputy Chief Internal Auditor on 1<sup>st</sup> November 2010. The Claimant averred that apart from the post of Deputy Chief Internal Auditor, he had also been appointed vide a letter dated 21<sup>st</sup> June 2011 to act as the Head of the Internal Audit Department and was thus holding both positions when his services were terminated. The Claimant averred that the Respondent's Vice Chancellor Kirimi H. Kiriamiti had started interfering and unlawfully controlling audit assignments and or duties by limiting audit periods and refusing to approve or pay travel and subsistence allowances, particularly affecting the Head of Internal Audit Department. He further averred that by a letter dated 19<sup>th</sup> December 2016, the said Vice Chancellor wrongfully deployed him to the Business Department on account of "improving services" as teaching staff and misrepresenting that the Claimant had requested to be appointed as a lecturer. The Claimant averred that the said Vice Chancellor failed to issue him with a letter of appointment since he was usurping the powers of the Council to make such an appointment meaning that the deployment was both unprocedural, null and void. The Claimant averred that the University Management and Audit Committee were duped and misled to accept the illegal and wrongful deployment and he averred that his official appointment remained that of Deputy Chief Internal Auditor and Head of Internal Audit Department. The Claimant averred that on or about 19<sup>th</sup> December 2017, the said Vice Chancellor created new posts which overlapped existing positions with the intention of unlawfully removing or declaring the Claimant's position, as the Deputy Chief Internal Auditor, redundant. The Claimant averred that the said Vice Chancellor went on to advertise for the position of Internal Audit Manager even though the said post did not exist in the approved internal audit organization structure and that after recruiting the Internal Audit Manager, the said Vice Chancellor duped and persuaded the Management to include the Claimant's name in the list of employees to be declared redundant and that it was clear the Vice Chancellor was trying to get rid of him. The Claimant averred that his contract of employment was by a letter dated 22<sup>nd</sup> May 2017 illegally and wrongfully/unfairly terminated by the Respondent without prior consultation or notice and was motivated by malice on the part of the Respondent's Vice Chancellor. The Claimant provided particulars of the malice and unlawfulness in the Memorandum of Claim and generally reiterated the afore stated averments. He further averred that he was maliciously moved from the Audit Department because of unearthed corrupt dealings and wrongs involving the Vice Chancellor which he extensively pleads in the Memorandum of Claim.

2. The Claimant averred that the Vice Chancellor did not find good reasons or even follow the right procedure in selecting those to be declared redundant and that the Respondent issued him with the termination letter first to show there was a process of restructuring when there was none and that he only knew of the redundancy a day after receiving a notification letter through email. The Claimant averred that the Respondent has to date flagrantly violated the requirements of Section 40 of the Employment Act and Clause 20.5 of its own Terms and Conditions of Service in declaring an employee redundant and thus rendering the termination null and void. The Claimant averred that the Respondent particularly failed to notify the Ministry of Labour, the Union or the employees of the eminent redundancies or to even allow any discussion of the process at all. The Claimant averred that the Respondent by continuing to employ and fill vacancies in the affected positions proves that the departmental restructuring and retrenchment process was substantively without justification, procedurally wrong and amounted to unfair termination of employment. The Claimant averred that he has consequently suffered loss and damage and it is extremely unlikely that he will be in a position to secure employment with any other employer in the future in view of his age and the malicious declaration of his redundancy. He particularises the damage to further include loss of earnings, allowances and for the unexpired period of the employment contract He further disputes the particularisation and computation of his terminal benefits by the Respondent and avers that he wrote to the Respondent indicating and providing details of the money owed to him by the Respondent but it did not respond or deny existence of the same. He further or in the alternative seeks monetary compensation for the unfair and unlawful termination of his employment contract as particularised under para 47 of the Memorandum of Claim. He prays for judgment against the Respondent for:

- a) A finding that the termination of the Claimant's contract of employment was unfair, unlawful, malicious and ill motivated.

- b) A finding that the procedure employed by the Respondent was flawed as there was no meaningful consultation and the process for selection of the affected employees was flawed reeking of pre-selection and bad faith.
- c) An order compelling the Respondent for immediate reinstatement of the Claimant and payment of salaries for the period that the Claimant has been out of employment; or alternatively
- d) An order for payment for pecuniary loss and maximum compensation of twelve (12) months for loss of employment.
- e) Compensation in the sum of Kshs. 12,695,692/-.
- f) Interest on (e) above at Court rates from 23<sup>rd</sup> June 2017 until payment in full.
- g) Cost of these proceedings and interests thereon at Court rates from the date of judgment until payment in full.

3. In his Supplementary Memorandum of Claim dated 30<sup>th</sup> November 2017, the Claimant averred that the exercise targeted individuals and not roles and that the method used failed to take into account the Last In First Out (LIFO) principle as none of the newly employed were affected or declared redundant. That the Respondent continuously relies on part time teaching staff in areas such as Finance, Accounting and Auditing and who are still in place to date and that there was thus no justification to declare him redundant since he was useful and resourceful in such areas. The Claimant averred that the Respondent did not further conduct performance and productivity assessment or consider employees' work experiences and that it violated Clause 17.2.3.2 of its own Human Resource Policy which provides for the management to fully inform and prepare staff in advance on redundancies. The Claimant averred that with regards to his selection, the Respondent significantly departed from the statutory criteria prescribed by section 40(1)(c) that is; seniority in time, skills, ability and reliability and without considering the multiple outstanding issues or claims he had. He further averred that the subsequent removal of the Vice Chancellor and his entire Management team by the Respondent was a clear indication and confirmation that besides non-performance, they exercised unreasonable managerial prerogative to target their perceived enemies. He revised the monetary compensation for unfair and unlawful termination of his contract of employment at para 18 of the Supplementary Memorandum of Claim to Kshs. 12,661,937/-

4. The Respondent filed a Response to the Claim admitting to have employed the Claimant and deploying him to the Business Department but denies that it wrongfully terminated his employment. It admits that issued the Claimant with a termination letter dated 22<sup>nd</sup> May 2017 on account of redundancy. The Respondent averred that the restructuring was done subject to the University Council Resolution made on 15<sup>th</sup> May 2017 under Min 7/SUC/15/05/2017 due to dynamics affecting the education sector in the Kenyan economy and so that the Respondent could enhance its effectiveness and competence. The Respondent averred that the Claimant's position was validly declared redundant pursuant to Section 40 of the Employment Act following issuance of statutory notices, engagement of affected employees and 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. That as is clear from the termination letter dated 22<sup>nd</sup> May 2017, the Claimant was duly notified of the Respondent's intention to pay him salary in lieu of notice. The Respondent further denied the particulars of malice and allegations of loss and damage as contained in the Memorandum of Claim and avers that the Claimant was by a letter dated 22<sup>nd</sup> May 2017 offered his final dues including payment in lieu of notice as per his employment contract but which offer he declined. It further denies being served with any demand and notice to sue in the matter and avers that the prayers sought by the Claimant in his Claim should be dismissed *in limine* as they are speculative and an abuse of the court process. The Respondent also filed a Witness Statement dated 16<sup>th</sup> September 2019 by its employee in charge of Human Resource, Rael Munjaku Mabonga, who states that the Claimant was an employee of the Respondent with effect from 18<sup>th</sup> July 2008 to 22<sup>nd</sup> May 2017 and that upon termination, the Respondent offered to pay the Claimant his final dues payment including pay in lieu of notice; leave days earned but not taken and severance pay at the rate of 15 days for each year of service, but the Claimant turned down the said offer. The Respondent averred that it involved the affected employees while carrying out the redundancies and also issued all the notices required by the law. She further states that it is only fair that the Court dismissed the Claimant's Claim for being unmerited and to award costs to the Respondent.

5. The case was heard virtually and the Claimant stated in his oral testimony before Court that he relies on his witness statement together with the documents he filed, in support of his case. That he was dismissed in June 2017 and he seeks payment: of unpaid salary for the months he worked until June 2017; for the unlawful termination; unpaid leave due of 156 days; acting allowance as Head of Internal Audit Department (2010-2012); professional training expenses and field work expenses incurred and not refunded. He also seeks for costs of the suit and interest thereon and for any other relief the Court may give. He further stated that he has attached payslips to show that the yearly increments were not implemented as per the terms and conditions of service. The Claimant testified that the Vice Chancellor, who is the CEO of the Respondent purported to transfer him from the Audit department to the Department of Business, an academic position and that the terms and conditions are not the same because the salary of the Deputy Chief Internal Audit is lower than that of the lecturer. He further stated that the transfer was for a selfish motive and done without the input of the Council and that the same was meant to create vacancy in the audit department for the CEO to get in someone who would dance to his tune. He stated that the post was advertised as Internal Audit Manager and the CEO succeeded in employing someone to the position and that position of Deputy Chief Internal Auditor was declared redundant. The Claimant requested for a judgment date in the Cause immediately after giving his testimony.

6. The Respondent did not appear at the hearing of the case. As no submissions were filed, the Court has to determine the case based on the pleadings filed and the law. In the case of an intended redundancy, an employer is required to comply with statutory conditions precedent to terminating an employee's contract of service on account of redundancy. The conditions are provided for under Section 40(1)(a) to 40(1)(g) of the Employment Act. The Claimant confirmed in his Supplementary Affidavit that he was not a member of the Respondent Staff Union and that the Respondent did not initiate any genuine consultations with him or with the Ministry of Labour. With this information, the provisions of Section 40(1) that would apply in this case are as hereunder:

*40.(1)(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 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.

7. The Respondent did not give any evidence in Court to support its case for fair termination of the Claimant's employment on account of redundancy. It is the Claimant's case that he was not issued with a notice of redundancy or paid in lieu of notice; that the Respondent did not follow the criteria in section 40(1)(c); and that he was also not paid severance pay. In my opinion, the Respondent has not discharged the burden of proving that it adhered to the conditions set under section 40(1) of the Act. Without any documents from the Respondent it would be difficult for this Honourable Court to determine whether there was a valid reason by the Respondent to terminate the Claimant's employment as required under section 43(2) of the Employment Act. In addition, by its own admission the Respondent held a governance meeting on 15<sup>th</sup> May 2017 whereat it made the decision to declare vacancies and promptly issued the Claimant with a letter of termination on account of redundancy dated 22<sup>nd</sup> May 2017. The Respondent thought that by offering to pay one month's salary in lieu of notice the default in not issuing the statutory 30 days notice would be cured. Not so. In the case of **Gerrishom Obayo v Dsv Air and Sea Ltd [2018] eKLR Cause No. 2104 of 2017**, the Court held that since redundancy procedure as set out in law is mandatory, where an employer fails to do so, the termination becomes an unfair termination within the meaning of Section 45 of the Employment Act. Further, the Court of Appeal in the case of **Barclays Bank of Kenya Ltd & Another v Gladys Muthoni & 20 Others [2018] eKLR Civil Appeal 296 & 301 of 2016 (Consolidated)** (Waki, Ouko, M'Inoti JJ.A) held that

*It is common ground in this case that the respondents were not members of a union and therefore the notice they were entitled to ought to have been issued in accordance with section 40 (1) (b). The purpose and period of the notice was construed in the case of **Thomas De La Rue (K) Ltd vs David Opondo Omutelema [2013] eKLR** to be the same as provided for in section 40(1)(a), that is, 'the reasons and the extent of the redundancy at least one month before the date when the redundancy is to take effect'. It is mandatory to serve the same notice on the Labour Officer.*

8. No notice was issued in terms of the law by the Respondent and this renders the termination of the Claimant's employment substantively and procedurally unfair and he is entitled to compensation. In addition the Respondent has failed to justify the termination of the Claimant's employment. Having failed to show there was a genuine reason for terminating the Claimant's contract of employment on account of redundancy, the said termination of employment on account of redundancy meted out to the Claimant was therefore procedurally and substantively unfair.

9. What reliefs is the Claimant entitled to? The Claimant produced in Court his Leave Forms from 2010 to 2013 demonstrating the days he went on leave and a Clearance of Liability Certificate at page 82 of the annexures in the Memorandum of Claim. He also produced payslips in support of his case. An employer is bound by Section 77 of the Employment Act to keep employee records such as leave applications and approvals and since none was adduced by the Respondent to rebut this and the other claims by the Claimant, the claim for unpaid leave is payable under Section 28 of the Employment Act. The Claimant is also entitled to damages under Section 49 of the Act by virtue of the unfair and unlawful termination of his employment. The relief of reinstatement cannot issue in this case because the three years statutory period has expired. I am in addition guided by the Court of Appeal decision in the case of **Sotik Highlands Tea Estates Limited v Kenya Plantation and Agricultural Workers Union [2017] eKLR** which stated thus on reinstatement *that Parliament in its wisdom capped the period at three years and there is no provision or proviso qualifying section 12 (3) (vii) of the Employment and Labour Relations Court Act to say that time stops running or is interrupted by an action filed in court.* The Claimant earned Kshs. 175,100/- a month per his payslip (basic, house allowance, responsibility allowance, house to office and telephone allowance). In the final analysis, the Claimant is entitled to the following:

- i. Leave earned and not taken of 156 days – Kshs. 910,520/-
- ii. Severance pay at the rate of 15 days for each completed year of service – Kshs. 175,100/2\*9 = Kshs. 787950/-
- iii. Compensation for unlawful termination through redundancy amounting to 12 months – Kshs. 2,101,200/-
- iv. Interest at court rates on the sums in i), ii) and iii) above from the date of this judgment till payment in full.
- v. Costs of the suit.

It is so ordered.

**Dated and delivered at Nairobi this 20<sup>th</sup> day of April 2021**

**Nzioki wa Makau**

JUDGE