



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

PETITION NO. 93 OF 2020

IN THE MATTER OF: ARTICLE: 2, 3, 10, 19, 20, 23, 25, 27, 28, 35, 41, 47, 48, 50,

165,258,259 AND 260 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: SECTION 4 OF THE FAIR ADMINISTRATIVE ACTIONS ACT OF 2015.

AND

IN THE MATTER: RULES 4,10,11,13 AND 20 OF THE CONSTITUTION OF KENYA

(SUPERVISORY JURISDICTION AND PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL) HIGH COURT PRACTICE AND PROCEDURE RULES 2013.

AND

IN THE MATTER OF: SECTION 5,40 AND 45 FO THE EMPLOYMENT ACT 2007.

BETWEEN

NANCY MBITHE MUTISYA.....APPLICANT/PETITIONER

AND

CORETEC SYSTEMS & SOLUTIONS.....RESPONDENT

JUDGMENT

1. The Petitioner was employed by the Respondent from 1.2.2005 until 6.12.2019 when she was served with a termination citing the reason as redundancy. The letter offered to pay her three months salary in lieu of notice, accrued leave days plus severance pay for 14 years of service.

2. The Claimant was paid Kshs. 137,711.30 as severance pay or 3.3.2020. However, she was aggrieved and brought the petition herein contending that the redundancy was unlawful and discriminatory and prayed for the following reliefs.

(a) A declaration that flowing from the Respondent's letter of appointment dated the 1/2/2015 the applicant is reasonably entitled to a legitimate expectation to serve as an office assistant until the contract of employment expires.

(b) A declaration than the purported redundancy violates the law thus null and void.

(c) An order do issue directing the Respondent's decision communicated vide a letter dated 6/12/2019 declaring the Petitioner as redundant be quashed for being illegal, unconstitutional and in contravention with Article 10,25,27,35 and 47 and of the Constitution ab initio.

(d) An order do issue directing the immediate and unconditional reinstalment of the Petitioner back to her initially occupied position as an office assistant till the expiry of her contract with the Respondent herein.

(e) An order do issue directing the Respondent to compensate the petitioner for the violation of her rights under Article 25,27,41,35,47 and 50 of the Constitution.

(f) An order immediately directing the Respondent to immediately pay to the petitioner all her outstanding salary, allowances and dues for the period following the issuance of the letter of release dated 6/12/2019.

(g) Costs of this petition be provided for

(h) Interest on prayer d, e and f at the current rate until their payment in full.

(i) Any other order that this Honorable court will deem just and fit in the circumstances.

3. The Petition is opposed by the Respondent vide the Replying Affidavit sworn on 3.8.2020 by the Respondent's HR Partner, Ms. Agnes J. Kipsuto in which she denied the alleged unlawful and discriminatory redundancy. In her view, the termination for the Petitioner's services was done due to a redundancy situation in the company and the procedure outlined in section 40 of the Employment Act was strictly followed. Therefore, she prayed for the suit to be dismissed with costs.

4. Both parties filed written witness statements and agreed to dispose of the petition by written submissions.

PETITIONER'S CASE

5. The Petitioner's case is that she served the Respondent with loyalty and diligence and even helped the employer to recruit Jane Nyambura and Phylis Tharua in 2011 and 2017 respectively as her fellow Office Assistants.

6. It is further Petitioner's case that on 6.12.2018 she was laid off without prior notice as required by the law. She contended that the redundancy was contrary to Section 40 and 45 of the Employment Act and consequently it amounted to unfair termination. She maintained that she was not a member of any trade union and no redundancy notice was served on her personally. She further contended that laying her off and leaving newly recruited Office Assistants was discriminatory. She averred that as a result of the said inhuman treatment she has suffered trauma and stripped off the ability to cater for her young family including paying school fees for her children. She [i] further averred that after being removed from office on 6.12.2019, she was not paid her dues until 9.3.2020. She prayed for the reliefs sought. In her submissions she reiterated that the Respondent did not comply with Section 40 of the Employment Act and as such the redundancy violated her labour and constitutional rights. She maintained that the employer laid her off without serving her with prior notice as required by section 40(1) of the Act.

7. It was submitted that no consultation was done and the principle of first in last out (FILO) was not followed. She maintained that being the longest serving Office Assistant, she ought not to have been laid off and left newly employed Office Assistants. Consequently, she reiterated that the whole process of redundancy including the selection process was unfair, in breach of the law, discriminatory against her, and a violation to her right to fair labour practices.

8. For emphasis she relied on **Kenya Airways Limited v Aviation and Allied Workers Union Kenya & 3 Others [2014] eKLR**, **Faiza Mayabi v Frist Community Bank Limited [2019]eKLR** and **Stanley Kengara George v Consolbase Ltd[2017]eKLR** where the courts discussed the requirement of notifications, consultation and selection process under section 40 of the Act before termination on account of redundancy. Therefore, she prayed the reliefs sought to be granted.

DEFENCE CASE

9. The Respondent's case is that due to evolution in ICT Industry some of its products became irrelevant and as a result it not only halted some of its projects but also ceased selling some of its products. It is further defence case that owing to adverse economic condition caused by the slump in its activities and operations, it made a commercial judgment to lay off some of its staff in order to improve efficiency, reliability and positive work environment for all its employees.

10. The Respondent further contended that by 7.10.2019, it notified the labour office of the intended redundancy and further consulted with all the staff including the Petitioner. It averred that the Petitioner was served with notice dated 6.12.219 which was to take effect on 9.3.2020 and thereafter she was duly paid her terminal dues and issued with certificate of Service as provided in the Employment Act. Consequently, it contended that the redundancy was rational and justified and the proper procedure was followed in laying off 95 staff workers including the petitioner.

11. In its submissions, it reiterated that there was a genuine redundancy situation caused by fast-paced evolution in the ICT industry which rendered some of its products obsolete and consequently halted the concerned projects. It further reiterated that as a result of the foregoing matters, there was a slump in its activities and operations which led to a commercial judgment to reduce staff in order to remain afloat. Therefore, the Respondent maintained that the redundancy was rational and justified, necessitated by difficulties and a slump of operations and activities in its businesses.

12. For emphasis it relied on **Communication Workers Union of Kenya(COWU) V Telkom (K) Limited [2016]eKLR** in which the court affirmed the decision in **Monarch Insurance Co. Ltd v Industrial Court and Another[2015]eKLR** that there comes a time when an enterprise is compelled by adverse economic conditions to resort to redundancy after all alternative measures have proved insufficient to meet the prevailing realities. The court further noted that one of the reason for redundancy included technological charges or innovations that improve on productivity and render certain cadre of employees untenable.

13. As regards the procedure followed, the Respondent reiterated that it strictly followed the correct procedure provided under section 40 of the Employment Act, including prior consultations, service of notice and payment of terminal dues. For emphasis it relied on **Kenya Airways Limited v Aviation and Allied workers Union & Others[2014]eKLR** where the court held that the mandate of the court is to consider whether the proper procedure was followed and whether the ultimate decision by the employer to layoff workers was operationally and conveniently justifiable on rational grounds having regard to what emerged from the consultation process.

14. As regards the principal of first in last out (FILO) the Respondent submitted that FILO is one of the several factors to consider under section 40(1) (c) of the Act including skill, ability and reliability which it considered also in selecting the Petitioners for lay off for emphasis it relied on **Stanley Kengara George v Consolbase Ltd[2017]eKLR** where the court held that the employer must do a fair selection process to identify the employees for lay off considering the FILO among other criteria.

15. As regards the reliefs sought, the Respondent submitted that since it strictly complied with the requirements of section 40 of the act, the Petitioner is not entitled to the reliefs sought. It further argued that the prayer for reinstatement is not tenable because the position occupied by the petitioner is no longer required in its operations. It relied on the **Kenya Airways case, supra** where the court held that the remedy of reinstatement is discretionary and the court ought to be guided by the factors set out in section 49(4) of the Act which include practicability of reinstatement or re-engagement and common law principle that specific performance in a contract of employment should not be ordered except in very exceptional circumstances.

16. As regards the claim for constitutional violation, the Respondent maintained that it followed the laid down procedure before terminating the Petitioner's contract on account of redundancy, and as such the Claimant is not entitled to the reliefs sought. Finally, the Respondent reiterated that it paid the petitioner all her terminal dues including severance pay and prayed for the petition to be dismissed with costs.

ISSUES FOR DETERMINATION

17. The issues for determination arising from the pleadings, evidence and submissions are:

(a) *Whether redundancy of the Claimant was justified.*

(b) *Whether the proper procedure was followed before the redundancy.*

(c) *Whether the petitioner is entitled to the reliefs sought.*

WHETHER REDUNDANCY WAS JUSTIFIED

18. Redundancy is defined under section 2 of the Employment Act as:

“the loss of employment, occupation, job or career by involuntary means through no fault of an employee, involving termination of employment at the initiation of the employer, where the services of an employee are superfluous and the practice commonly known as abolition of office, job or occupation and loss of employment.”

19. In view of the foregoing, the burden is upon the employer to show that the position occupied by the Claimant in the company had become superfluous or was abolished due to a genuine redundancy situation. In this case the Respondent explained that due to fast-paced evolution in the ICT industry, some of its products it was selling became obsolete and ceased production. As a result, it could not meet the cost of retaining its 250 workforce and therefore it made a commercial judgment to reduce staff in order to remain afloat.

20. The Claimant has not tendered any evidence to contest the alleged redundancy situation in the Respondent company nor did she deny that 95 out of the Respondent's 250 employees were laid off with her. Consequently, I find that the Respondent has proved on a balance of probability that it faced a redundancy situation that justified the impugned redundancy.

In addition it has proved that the position of Senior Office Assistant was abolished

THE PROCEDURE FOLLOWED

21. Section 40(1) of the Employment Act outlines a mandatory procedure that must be complied with while terminating an employee's contract of service on account of redundancy. First the employer is required to serve a written notice to the Local Labour Officer and the employee or employees trade union if he is a member.

22. In the **Kenya Airways case, Supra**, the Court of Appeal held that:

“It is that notice that will elicit consultation between the parties and I will shortly show that consultation is imperative, on the justifiability of that intention and mode of its implementation where it is found justifiable . . . The purpose of the notice under section 40 (1)(a) and (b) of the Employment Act is also provided in the said ILO Convention No. 158-Termination of Employment Convention, 1982 is to give the parties an opportunity to consider measures to be taken to avert or minimize termination and measures to mitigate the adverse effects of any termination on workers concerned such as finding alternative employment. The consultations are therefore meant to cause the parties to discuss and negotiate a way out of the intended redundancy.”

23. Again, in **Transport & Allied Workers Union V Social Internationale De Telecommunications Aeronautiques [2011] eKLR**, the

court held that:

“The law contemplates two notices that announces to the employee, the trade union and the Labour Office the intended declaration of redundancy and the second notice that relates to termination. The first notice communicates the reason for and the extent of the redundancy. Its purpose is to open the door for the consultation stage. Consultations require parties to engage with an open mind. There is no decision made; redundancy at this stage is only a proposal.”

24. In this case the Respondent served the first notice only to the Labour Office on 7.1.2019 and failed to serve the Claimant. As such no consultation was done between the Claimant, Labour Officer and the employer to try to avert the redundancy or to seek alternative job in order to mitigate the effects of the redundancy on the Claimant.

25. The Claimant was only served with the termination notice of three (3) months which to me was what ought to have been served as the second notice after consultations and the selection process under section 40(1)(c) of the Act. Consequently, I hold that the procedure followed in terminating the Claimant’s employment contract on account of redundancy was not in accordance with the mandatory procedure outlined under section 40(1) of the Act and was therefore unfair and unlawful within the meaning of section 45 of the Act. As regards the principle of FILO, the same did not apply here, because the Claimant was the only Senior Office Assistant.

26. Section 45 provides that termination of employee’s contract of service is unfair if the employer fails to prove that it was grounded on a valid and fair reason and that a fair procedure was followed. Although there was a valid reason for layoff in this case, the employer did not comply with mandatory statutory procedure under section 40 of the Act before declaring the Claimant redundant. The emerging jurisprudence emerging from this court and Court of Appeal show that failure to comply with section 40 of the Act renders the redundancy unfair and unlawful.

RELIEF

27. The Petitioner prays for declaration that she had legitimate expectation to continue serving as Office Assistant under the Letter of Appointment dated 1.2.2008 until the expiry of the contract. However, she admitted in evidence and pleadings that she was elevated to Senior Office Assistant and two other Office Assistants were employed. She cannot therefore insist on any expectation in an office she had ceased serving even before the redundancy. Consequently, I decline to make such declaration.

28. I further decline to declare the redundancy null and void for violating the law but instead I declare that it was unlawful and unfair as indicated in the cited authorities.

29. The Petitioner also seeks for an order to quash the letter dated 6.12.2019, for being unconstitutional and in contravention of Article 10,25,27,35 and 47 of the Constitution. However, the issue in this petition revolves around justification and procedure followed in declaring the Petitioner redundant which in essence is governed by statutory provisions and not interpretation of any Constitutional provision.

30. I am guided by the Supreme Court decision in **Aviation and Allied Workers Union of Kenya v Kenya Airways Ltd & 3 Others [2017]eKLR** where it was held that:

“to answer the question, therefore, whether Article 10 of the Constitution was the subject of the court’s interpretation, we find the the Appellants case at the Industrial Court, as well as the 1st Respondent’s case at the Court of Appeal, squarely entailed the interpretation and application of the terms of the Employment Act and the Labour Relations Act, in so far as their focal point was the issue of redundancy. All reference to the terms of the Constitution were guided only by the object of incorporating this Charter’s spirit, values and principles.”

31. In view of the foregoing, I would hold that a claim grounded on redundancy under section 40 of the Employment Act does not essentially involve interpretation of the Constitution but interpretation of the said statutory provisions. The court does not refer to the Constitution to determine whether or not a redundancy process was justified and procedurally correct. Consequently, I wish to

observe that no value is added to any redundancy dispute by clothing it with a fake constitutional facemask like in this case. It is sufficient for anybody claiming violation of his right under section 40 of the Act to simply file a normal suit by way of a Memorandum of Claim without any reference to provisions of the Constitution. This view should guide the Rules Committee of the court to make specific procedure for redundancy claims.

32. The Claimant prayed for unconditional reinstatement to her position as an Office Assistant. However, as stated above, the Claimant was serving in the position of Senior Office Assistant which was declared redundant. The position is no longer in existence according to the letter dated 5.12.2019. It will therefore not be practicable to order reinstatement. In addition, section 49(4)(d) of the Act bars ordering specific performance except in very exceptional circumstances.

33. The Claimant has not demonstrated any such exceptional circumstances warranting the order of specific performance in the form of reinstatement. Consequently, I decline to order reinstatement of the Claimant to the position she claims now of Office Assistant which she left and took promotion to Senior Office Assistant.

34. However, I award to her the alternative relief under section 49(1) of three months salary in lieu of notice plus 12 months salary as compensation for unfair termination. In awarding the said compensation I have considered that the petitioner served for 15 years and that she was dismissed for no fault on her part. Her salary was not pleaded and therefore I am not able to quantify the award. I therefore direct the Respondent to gratify the award within 30 days.

35. As regards prayer for compensation for violation of Claimant's rights under Article 25,27,35,41 and 47 of the Constitution, I decline to make such award because all what was violated as per the Supreme Court in the **Kenya Airways case** above was statutory provisions which I have already remedied by the award of damages under section 49(1) of the Employment Act.

36. The claimant further prays for salary after her release vide letter dated 6.12.2019. The letter stated that her last working day was 9.3.2020 and consequently, she is entitled to salary upto 9.3.2020. I, therefore award her the same as prayed.

37. In the end I enter judgment for the claimant against the Respondent declaring her redundancy vide the letter dated 6.12.2019 unlawful and unfair and further award her the following damages to be calculated and paid by the employer within 30 days of today:-

(a) Three months gross salary in lieu of notice.

(b) 12 months gross salary as compensation for unlawful and unfair termination.

(c) Salary for 3 months from 9.12.2019 to 9.3.2020.

(d) The Petitioner will also pay costs and interest at court rates from the date hereof.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 17TH DAY OF JUNE, 2021.

ONESMUS N. MAKAU

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 April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE
