



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

ELRC CAUSE NO. 404 OF 2016

ANTONINA CHEBET.....CLAIMANT

VERSUS

PURE CIRCLE KENYA LIMITED.....RESPONDENT

JUDGMENT

1. The claimant sued the Respondent for unlawful and unfair termination on account of redundancy of the Claimant and refusal by the Respondent to pay the Claimant her terminal dues and compensation for loss of employment.

2. The claimant states that, she was employed by the Respondent on 14th September, 2010 on contract as an administrative assistant which contract was renewed from time with the last renewal being 14th September, 2012 and her last salary being Kshs. 42,000/-.

3. She averred that she worked faithfully for the Respondent till 15th April, 2016 when she took her maternity leave and delivered her baby on 25th April, 2016.

4. That on 18th July, 2016 while still on her maternity leave she received a letter from the Respondent asking her to explain some issue concerning her maternity leave which she did and then the Respondent declared her position redundant.

5. She contends that the redundancy was not conducted in accordance with section 40 of the Employment Act. Further that she was not accorded fair administrative hearing and that she was not paid her full terminal dues.

6. That despite the Respondent receiving a demand notice, the Respondent failed to make good her claim. She therefore prays for the following reliefs;-

i. A declaration that the Respondent act of declaring the claimant redundant and termination from her employment was unfair, wrongful and devoid of procedure.

ii. The claimant be paid her terminal benefits as set out in paragraph 9 of the claim totaling to Kshs. 775,874/-.

iii. The Honourable Court do issue such orders and give such directions as it may deem fit to meet the ends of justice.

iv. The Respondent to pay the costs of this Claim.

v. Interest on the above at Court Rates.

vi. The Respondent be ordered to give the claimant a certificate of service in compliance with section 51 of the Employment Act, 2007.

7. The Respondent entered appearance and filed a response to the claim on the 3rd November, 2016 denying the averments in the claim and putting the Claimant to strict proof thereof.

8. The Respondent stated that it followed due redundancy procedure by issuing a Notice of redundancy dated 18th July, 2016 one to the claimant another notice of the same date to the Labour Officer. That the redundancy was informed by its financial plummeting position a fact which was well known to the claimant.

9. It is stated that the Respondent issued the claimant with a certificate of service after clearing with the Respondent and that the claimant was paid all her terminal dues of Kshs. 95,287/- after all lawful deductions.

10. The Respondent stated that the redundancy procedure was followed and therefore the claimant was not terminated illegally as alleged and prayed that the claim be dismissed.

11. The claim herein proceeded for hearing on the 25th October, 2018 with the claimant, **Antonina Chebet(CW-1)** testifying that she was employed by the Respondent on 14th September, 2010 as an administrative assistant at monthly salary of Kshs, 22,000/- which amount was increased to Kshs. 42,000/- per month in February, 2016.

12. She testified that she was pregnant with due date of 15th April, 2016 however on visiting the hospital, the doctor at Valley Hospital advised her to take bed rest till her delivery which she took and on 25th April, 2016 she gave birth at Home Nursing Hospital in Kericho and took her maternity leave. she testified that according to the Respondent one had to submit notification of birth and discharge summary before the maternity leave was approved.

13. That on 18th July, 2016 while still on her maternity leave she received a call from the Respondent's Human Resource manager summoning her to the office and since she didn't have any one to leave the baby with and considering her leave had not lapsed, she opted to go to the office with the baby, however on arrival she was served with redundancy notice and tabulation of her terminal dues.

14. She contends that she was unfairly terminated from employment and paid part terminal dues which she is now seeking the remainder.

15. On cross examination, she affirmed that she was due on 15th April, 2016 however she did not give birth till 25th April, 2016 but took sick off for the two weeks before giving birth as advised by the doctor at valley Hospital. That she was paid till 18th July, 2016 and issued with redundancy notice while still on maternity leave which was to end on 25th July, 2016.

16. The Respondent called one witness, **Wesley Kiplangat Rotich(RW-1)** the head of finance and compliance department at the Respondent who testified that the claimant was not terminated from employment while on maternity leave, rather that the claimant proceeded for maternity leave on 15th April, 2016 which leave was to end on 15th July, 2016 and when she failed to resume on 16th July, 2016 he called her and instructed her to report to work on 18th July, 2016. That the issue of the two weeks sick off was not brought to the attention of the Respondent.

17. Further that the claimant was declared redundant after the company experienced financial difficulties.

18. On cross examination, the witness maintained that the claimant proceeded for her leave on 14th April, 2016 and that the issue of redundancy was discussed before the Claimant went for her maternity leave and the Respondent resolved to allow her finish her maternity leave then issue her with the redundancy notice and pay her terminal dues. He testified that they wrote a letter to her inquiring on the leave taken and reason for not reporting on time since they knew her leave lapsed on 15th July, 2016.

Claimant's submissions.

19. It was submitted on behalf of the claimant that the claimant's employment was terminated unfairly on the basis that the Respondent failed to adhere to the requirements of section 43(1) of the Employment Act which requires that the Notice of redundancy shall give reasons for the termination as per section 40 of the employment Act. He reinforced his arguments by citing the case of **BIFU versus Sacco Society Limited [2010]** which the court held that the employer before declaring an employee redundant must justify the said redundancy.

20. It was submitted that the notice of redundancy must be issued to the employees giving reasons and extend of the said redundancy, and that the Respondent should not pick on an employee and issue a redundancy notice. In this he cited the case of **Agnes Ongadi -v- Kenya Electricity Company limited [2016] eKlr.**

21. It was submitted further that the Respondent acted in unfair manner in the way it summoned the claimant who was still in maternity leave and questioned her on the maternity leave taken and the sick off days which the claimant after explaining herself was issued with a redundancy notice instead of being subjected to disciplinary hearing. He therefore submitted that the circumstances leading to the claimant dismissal were unfair and prayed that the claim be allowed as prayed.

Respondent's submissions.

22. The respondent on the other hand maintains that it followed due procedure required in terminations occasioned by redundancy. He argued that the law recognized redundancy as a means in which termination of employment can occur and cited the case of **Mercy Gakii Nabeba -v- Malindi Management strategy Limited[2019] eKlr.**

23. It is submitted that redundancy notices were served upon the claimant in person and upon the Labour officer. Subsequently that the claimant was paid all her terminal dues of Kshs. 95,287/- a fact which was affirmed by the claimant during hearing.

24. He submitted further that the reason for the redundancy was given in that the Respondent was undergoing financial difficulties and had to cut some position in order to safe costs of operation and to remain afloat and cited the case of **Kenya Airways Limited -v- Aviation and Allied workers Union Kenya & 3 others [2014] eKlr.** Where the Court justified dismissal of employees in order for the company to stay afloat.

25. The Respondent submitted that Kenyan law does not envision pre-redundancy consultations but only post redundancy dispute resolution, therefore the argument by the claimant that she was not consulted is without basis and cited **Kenya Airways Limited (Supra)**.

26. The Respondent argued that it paid the claimant all her dues being days worked in July, 2016, notice pay in lieu of notice, severance pay for one year of completed service and accrued prorated leave days to date therefore all her terminal dues were paid to the claimant and the claim herein is without any merit and prayed that the same be dismissed with costs.

27. I have examined the evidence and submissions of the parties herein.

28. The respondents produced APP PC 1 dated 18th July, 2016 indicating that the claimant had been declared redundant under Section 40 of the Employment Act. This letter also served as the notification of redundancy but the effective date of redundancy has not been indicated.

29. From the documents produced by the claimant on 15/4/2016, the claimant was given a sick off for 2 weeks on 25/4/2016. She got her baby delivered effectively. Maternity leave being 3 months, the same was to lapse on 24/7/2016.

30. It is therefore apparent that the claimant was issued with a redundancy notice and terminated accordingly on 18/7/2016.

31. No notice of redundancy was issued to the claimant as expected under Section 40 of the Employment Act which states as follows;

“40. Termination on account of redundancy

(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 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.

32. As per the notice of redundancy, there was no indication that she was given notice before the redundancy. The letter did not indicate what compensation the claimant was to be paid.

33. In essence, the claimant was declared redundant without the respondents following due process.

34. I therefore find that the claimant was unfairly and illegally terminated as provided for under Section 45 (2) of the Employment Act 2007 which states as follows;

“45. (1).....

(2) A termination of employment is unfair if the employer fails to prove-

(a) that the reason for the termination is valid;

(b) that the reason for the termination is a fair reason-

(i) related to the employee’s conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer; and

(c) that the employment was terminated in accordance with fair procedure”.

35. Given the unfair termination the claimant is entitled to compensation and payment of her terminal dues, I therefore find for the claimant and I award her as follows;

1. 18 days salary for July 2016

= $18/30 \times 42,000/=$ = 25,200/=

2. One month salary in lieu of notice = 42,000/=

3. 10 days maternity leave dues $10/30 \times 42,000 = 14,000/=$

4. 10 month compensation for the unfair termination

= $10 \times 42,000 = 420,000/=$

5. Severance pay for 6 years equivalent to 15 days salary for each year served

= $15/30 \times 42,000 \times 6 = 126,000/=$

TOTAL = 627200/=

Less statutory deductions

6. The respondent will pay cost of this suit plus interest at court rates with effect from the date of this Judgment.

DATED AND DELIVERED VIRTUALLY THIS 30TH DAY OF SEPTEMBER, 2021.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Imbwaga for claimant – present

Opondo holding brief Getenga for respondent – present

Court Assistant - Fred