



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 93 OF 2018

JOHN K. OTIENO.....CLAIMANT

VERSUS

G.E. EAST AFRICA SERVICES LIMITED....RESPONDENT

JUDGMENT

1. By a memorandum of claim dated the 30TH January 2018 and filed on the same date, the claimant seeks the following remedies:

- i. One month's salary in lieu of notice – Kshs. 1,395,833.33
- ii. The sum of Kshs 13,500,000/- being twelve (12) months' salary being compensation for unfair termination less the sum of Kshs. 3,250,000/- already received by the Claimant.
- iii. Costs of the suit
- iv. Interest on (i) and (ii) above at Court rates from the date of filing suit until payment in full.

2. The Respondent filed a statement of response to the claim denying the claims made in the memorandum of claim. The Respondent avers that due to certain economic, technological, organizational and/or structural changes in the Respondent's Power Business Unit resulting from market conditions, the Respondent was forced to undertake global restructuring of its operations resulting into abolition of the claimant's position. The Respondent denied that before the redundancy took effect the Respondent deployed more employees to perform the same work which the claimant used to do and reiterated that the restructuring resulted in the elimination of the position of Senior Development Leader in the Respondent's Power Business Unit, and as such the position ceased to exist. The Respondent averred that it carried out the restructuring in accordance with the law and that the Claimant was duly notified. The Respondent averred that there were 18 other positions affected by the restructuring and consultations with the claimant were done as required. The Respondent averred that it in good faith made an offer to the Claimant to take a different but senior role with better remuneration in the Renewable/Hydro Business Unit. The Respondent averred that the Claimant requested time to consider the offer, but eventually indicated that he would only consider accepting the offer on condition he would not be declared redundant in future. The Respondent averred that the said condition imposed by the claimant for accepting the alternative position was neither reasonable nor acceptable and was declined by the Respondent. That the Respondent was left with no choice but to terminate the Claimant. The Respondent averred that it is aware the Claimant took another position as Head of Business Planning & Insights at Southern & East Africa Business Unit of Coca Cola.

3. The Claimant avers that the Respondent terminated his employment allegedly on account of redundancy occasioned by an alleged global restructuring of the Respondent's marketing function in the power business. The Claimant averred that a few days before his alleged redundancy took effect, more employees were deployed by the Respondent to perform the same work that the Claimant used to do and said that this cannot amount to redundancy. The Claimant averred that the Respondent's conduct in terminating his employment under the guise of redundancy when in fact the functions he used to perform as an individual are fragmented so as to be performed by more employees was simply a well-orchestrated plan to get rid of him for reasons best known to the Respondent, and not due to any restructuring as was alleged by the Respondent. The Claimant averred that even if the abolition of his position was to amount to a restructure, the fact that the roles of that position remained relevant to the Respondent and even continued to be performed by other employees removes his termination from the ambit of redundancy, and so amounts to unfair termination.

4. At the trial, the Claimant testified that he is a business strategist and General Management professional. He stated that he was employed by the Respondent herein as a Senior Manager Sub-Sahara Africa Business Development. He adopted the witness statement filed on the 30th January 2018 as part of his evidence in chief and the documents in the list of documents and supplementary list were produced as exhibits. He testified that he was alerted by the Respondent that a restructure was going on and that he was to be laid off. The reason was that the role he was doing was declared redundant. He stated that according to him the functions and roles he was performing were being done and

conducted by someone he was told to hand over to, one Fatima White. He said that she is responsible for developing actionable customer insights and that this is the exact replica of what he used to do. He stated that she was engaged in other work for the Respondent and after that she took over what he was doing which is power work. He testified that the information in the redundancy letter is not accurate because the content and the role he was hired to do was still being done. He said the work remained and only title was changed. He stated that he was offered another role which paid higher salary and he declined as it was a lower profile job and dealt with only renewables. The Claimant stated that it was not in line with his training and that it was also short term. He then explored channels for unfair termination and asked that the court do award him prayers set out in the memorandum of claim. In cross-examination he stated that the contract could be terminated with one month's notice and that the contract provides procedure for redundancy. He said that the Respondent's HR told him his role would become redundant and that the letter of redundancy indicated as much. He stated that he got a proposal for an appointment as the Respondent gave him a position where he could even earn higher salary. He stated that he refused because the position was short term. On further questioning he confirmed the letter does not indicate anywhere that it was short term role. He stated that the position he held was eliminated within 6 months as he was employed in September for a role that was eliminated in February and that is why he sought an undertaking. He confirmed having received the payments which covered redundancy pay. He confirmed that he received Kshs 3.25 million which was more than one month pay and that he also got a sign on bonus of Kshs. 3 million and that he also got another sign on bonus of Kshs. 3 million at exit he confirmed that he got the 13th month pay. He testified that there was no power for GGO and that when he was with the Respondent Fatima White was doing GGO and that he was doing the power business and that when he left she was doing the power business. He confirmed the letter shows GGO was abandoned. In re-examination he testified that he never got a written notification of redundancy and that no one employs 2 people to do the one thing. He stated that Fatima White was doing GGO when he was employed and that restructuring affected GGO and that she took over the roles he was doing which was merged with the one she was doing.

5. The Respondent's witness was its Human Resource Manager Kendi Mbichi. She testified that she has had interactions with the Claimant's case. She adopted the witness statement as part of her evidence in chief and the documents in the bundle of documents filed by the Respondent was marked as exhibits. She stated that there was a change on the global restructuring of the marketing functions in the Respondent and that the Claimant was notified of this in February 2017. She stated that the Claimant was offered an alternative employment to take effect from July in the alternative units. She stated that he was working under GE power and the offer was for GE renewable energy. She said that he was offered fulltime position and was to earn basic of Kshs. 1,126,657/-, house allowance of Kshs. 159,000/-, a car allowance of Kshs. 150,000/-, bonus of 80% of basic pay life cover and medical. She stated that the Claimant did not accept the offer and the reason he offered was that the contract did not cushion him against future impacts. She said that the company did not offer any guarantees. She testified that the Respondent notified the labour office of the redundancy and issued notice of termination. She confirmed that the notice is not before court. She stated that the law as regards redundancy was complied with and redundancy was paid. She stated that the allegation that Fatima was brought to take role of the Claimant is not true as the said Fatima was a staff of the Respondent in South Africa and had role of GGO. In cross-examination she testified that the Claimant was terminated on account of redundancy and that there is indication of prior notification in Paragraph 11. On being referred to the letter dated the 27th June 2017 in Appendix C she stated that this was letter of termination and not notice of intention to terminate. She stated that a notice was issued but was not exhibited to the court. She testified that some functions needed to be performed within the organisation. She stated that she does not agree that redundancy was not a proper basis for termination. She conceded that there are some roles taken over by Fatima. On re-examination she said that to the best of her knowledge the Claimant was on travel that is why he was informed verbally via phone call. She stated that at the point the business considers restructuring one of the key objectives is to do more with less employees and that the full scope was not taken over but there was outsourcing of some roles.

6. The claimant submits that he was unfairly terminated and that the procedure relating to the termination on account of redundancy was not adhered as envisaged by Section 40 of the Employment Act. The Claimant submits that his roles continued to be performed by another employee of the Respondent and that he was able to prove that his job functions correspond with some of the job functions taken over by one Fatima White. The Claimant further submits that the Respondent did not issue notice of intention to declare redundancy to the Claimant. The Claimant submitted that no evidence was ever tendered showing that notice was sent to the Claimant. The Claimant submitted that the Respondent did not issue the Labour Officer with notice of intention to declare the Claimant redundant contrary to the Employment Act. The Claimant relied on the case of **Hesbon Ngaruiya Waigi v Equatorial Commercial Bank Limited [2013] eKLR** and **Kenafric Industries Limited v John Gitonga Njeru [2016] eKLR** to buttress the argument that termination with regard to redundancy has to be procedurally fair and the due process on the notice has to be complied with. The Claimant urged the Court to award Kshs 13,500,000/- being the 12 months maximum compensation on account of unlawful termination. The Claimant also urged the court to award one-month salary in lieu of notice as well as the costs of the claim.

7. The Respondent submitted that it had justifiable reasons for terminating the Claimant's employment due to the structural, organizational and technological changes which resulted in the abolition of the Claimant's role. It submitted that the Respondent's restructuring was not intended to result in the termination of the Claimant's employment and the Respondent engaged the Claimant with a view to deploying him to an alternative position but which was rejected. The Respondent submitted as shown in the Claimant's further list of documents Fatima Harvey was a Strategic Marketing Leader in GE Global Growth and that Fatima Harvey was in the Energy Connections under the GGO, whereas the Claimant would have been under GE Renewables had he accepted the new position. The Respondent submitted that the said new structure and combination would result in savings as the Respondent did not have to pay two people to perform the said functions, thereby making the Company more profitable as was explained by the Respondent's witness. The Respondent submitted that in the circumstances, the Respondent had valid, fair, and justifiable reasons for the termination of the Claimant's employment. As to whether lawful procedure was adhered to in terminating the Claimant, the Respondent submits that the Claimant confirmed during cross-examination that he was informed by the Respondent in February 2017 that his role was going to be declared redundant on account of restructuring and that a perusal of the emails shows that the Claimant knew of the intended redundancy as early as March 2017. The Respondent submits that the Labour Office was notified of the intended redundancy but attempts to introduce the notice before commencement of the Respondent's case was rejected by the Court.

8. The Respondent submits that the purposes of the notices was to allow consultations to take place including for the purposes of ascertaining whether or not the Claimant could be re-deployed to another role. That the said purposes were attained as the Claimant was offered another role. The Respondent relied on the cases of **Peter Muindi & Another v Director of Public Prosecutions [2019] eKLR** and the House of Lords decision in **Pepper versus Hart (1992) 3 WLR** for the proposition that where the literal words create ambiguity, the Court is not to be held captive to such phraseology. The Respondent submitted that the courts now adopt a purposive approach which seeks to give effect to the

true purpose of legislation. The Respondent submits that the Claimant allegations of lack of notices to the Claimant are based on strict interpretation of Section 40(1) (b) of the Employment Act. The Respondent maintained that the Claimant was duly paid his dues, and that the claimant had taken up a new role as head of Business Planning & Insights, Southern and East Africa Business at Coca Cola, and as such did not incur any loss as a result of the termination. The Respondent submitted that the claim lacks merit and ought to be dismissed with costs.

9. The Respondent asserts it terminated the contract by way of redundancy when the Claimant declined to take up another role. The Respondent seems to have undertaken the redundancy of which the Claimant was aware of sometime in February 2017. He declined an offer of another engagement with the Respondent which paid better. The Respondent paid the Claimant various bonuses that amounted to Kshs. 6 million. He also received a redundancy package and cannot now turn around and say the termination was unfair. In the premises the suit is unmerited and is dismissed. However, each party shall bear their own costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF SEPTEMBER 2021

NZIOKI WA MAKAU

JUDGE