



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO 423 OF 2017

PAULINE WAIGUMO MUTHIGA.....CLAIMANT

VERSUS

DIAMOND TRUST BANK LTD.....RESPONDENT

JUDGMENT

1. The claim against the Respondent is for unfair termination. The Claimant's case is that the Respondent who had engaged her as an employee unfairly terminated her services through an unlawful redundancy process. As a result, she prays to be compensated.
2. The Respondent has denied the claim. In the Respondent's view, it relieved the Claimant of her duties lawfully. Consequently, it is the Respondent's case that the claim is misconceived and ought to be dismissed with costs.
3. The Claimant filed a Statement of Claim. She asserts that she was first employed by the Respondent on 7th November 2008 as a front desk officer. She then rose through the ranks to the position of branch manager when she was terminated.
4. The Claimant asserts that she was terminated on 15th November 2016 allegedly for reasons of redundancy. This was through a letter by the Respondent to her dated the same day.
5. The Respondent believes that the purported redundancy was unjustified and irregular for a number of reasons. These include the following:-
 - a) That she does not believe that her position as branch manager ceased to exist just two months after she had been promoted to the position. In fact, she asserts that the Ngong' branch where she had allegedly been posted as branch manager remained active and a new manager was posted to it. Therefore and in her view, it was untrue for the Respondent to suggest that the position of branch manager Ngong' branch had become superfluous.
 - b) That the assistant branch manager and head of cash, Ngong' branch retained their jobs yet they were her juniors. Essentially, the Claimant suggests by this that the selection procedure adopted by the Respondent for those who were terminated on account of redundancy was unfair and contrary to legal guidelines.
 - c) That the Respondent did not try to avoid the alleged redundancy as would be expected as the Respondent did not even offer to relocate the Claimant back to head office or another branch.
 - d) The Respondent failed to provide the Claimant with notice of the termination.
 - e) The Respondent disregarded the Claimant's experience while making the redundancy decision.
 - f) The Respondent failed to provide the Claimant with adequate compensation in lieu of notice and did not pay the Claimant severance pay among other terminal dues.
 - g) The Respondent acted contrary to the provisions of sections 40, 43, 45 among others of the Employment Act in terminating the Claimant.
 - h) The Respondent was highhanded in handling the termination of the Claimant.

i) The Claimant therefore claims for several reliefs as set out in the Statement of Claim.

6. In its response the Respondent disputes most of the assertions set out above. Apart from admitting that the Claimant was its employee, the Respondent does not admit that she was the branch manager Ngong' branch when she was declared redundant. According to the Respondent, the Claimant had only been seconded to the branch from the Branch Management Unit (BMU) the Respondent's department where she was hired to work.

7. That when the Respondent realized that there was overlap of functions between some departments it took a decision to collapse some of these departments into single units. That one such department was the BMU where the Claimant and several other members of staff were working. According to RW1, the roles of the officers in this unit were also being executed by officers in other departments.

8. As a result, a decision was taken to declare the department superfluous. All employees in the department were removed. Most of them were placed in other sections of the Respondent. However, as the Claimant could not fit anywhere in the Respondent's structure, she was declared redundant.

9. The Respondent asserts that it followed the law in declaring the Claimant redundant. In this regard, it asserts that on 7th October 2016, it issued the Claimant and the local labour office with a notice of intended redundancy. This was followed with a termination of the Claimant on 15th November 2016.

10. It also indicates that it considered the suitability of every of the affected members of staff before selecting the Claimant for termination. After its evaluation of the target group, the Claimant was found not to fit in any docket in the Respondent institution. And hence her termination.

11. The Respondent also asserts that it paid the Claimant her terminal dues only that a substantial portion of these dues were applied to settle the Claimant's staff loans in line with the Respondent's staff loan policy then in force.

12. According to the Respondent, the Claimant was processed in line with the law on redundancy. Therefore, she has no valid claim against the bank and the claim should be dismissed with costs.

13. On the trial date, the parties adopted their witness statements before giving oral testimony to complement them. They also produced copies of the documents attached to their respective lists of documents as exhibits.

14. At the close of the case, the Claimant filed written submissions. I will evaluate the evidence and submissions as I draw towards making a decision in the matter.

15. The following are the broad issues that in my view present for determination:-

- a) In what position was the Claimant when her contract of service was terminated?
- b) Was the Claimant's contract of service with the Respondent lawfully terminated on account of redundancy?
- c) Is the Claimant is entitled to the reliefs sought in the claim?

16. On issue number one, the point of disagreement between the parties appears to be the import of the letter dated 17th August 2016 appearing as document 4 on the Respondent's supplementary bundle of documents. By this letter, the Claimant was transferred from BMU to Ngong' branch. While the Claimant saw this as a promotion to branch manager position, the Respondent understood it to be a temporary deployment of the Claimant to the Ngong' branch to help start it off. According to RW1, this was indeed part of the mandate of staff at BMU. And this is also confirmed by the Claimant when in her evidence during cross examination she said the mandate of BMU was to open new branches and check on their welfare.

17. I have carefully evaluated the letter in issue. First, it is headed as "*transfer*" and not "*promotion*" or "*transfer and promotion*". Second, paragraph 3 of the letter says that this was a "*lateral transfer*". This basically meant and indeed the letter says as much that the Claimant was moving on the same terms.

18. Even though the letter describes the posting as a new role and says a comprehensive new job description was to follow shortly, it is emphatic that the Claimant's terms and conditions remained the same. There was no change of position for her. And there was no evidence that the Claimant, in fact, later got any letter giving her a new job title. In cross examination, she confirmed that she was never issued with a letter appointing her as a branch manager.

19. Consequently, I am inclined to hold that despite the contradictions in the letter, it is more probable than not that it was intended to merely communicate a decision to transfer the Claimant to Ngong' branch to assist in seeing the new branch take off under her guidance as a BMU department staff.

20. This is especially when this transition is understood in the context of the evidence that part of the mandate of the BMU staff was to oversee the setting up of new branches. Further, the Claimant in cross examination said that as a BMU member, she would go to new branches and stay there for some time to ensure officers at the new station settled in. As a result, it is my holding that at the time of her termination, the Claimant was under the BMU department but seconded to the Ngong' branch of the Respondent.

21. For avoidance of doubt, I have considered that this department was at the time the Claimant was declared redundant being closed. However, this closure and transition cannot have been a one off event. It was a process. Therefore, the Claimant's suggestion that by the time the redundancy notice of 7th October 2016 and the letter of 15th November 2016 terminating her services issued the BMU department was nonexistent cannot be correct.

22. The law on redundancy, I believe is well stated in *Thomas De La Rue (K) Ltd v David Opondo Omutelema [2013] eKLR*. Before an employer can declare a redundancy, he/she must consider the following checklist to ensure the minimum conditions for the process are met. These are:-

a. if the employee to be declared redundant is a member of a union, the employer must notify the union and the local labour officer of the reasons and the extent of the redundancy at least one month before the date when the redundancy is to take effect;

b. if the employee is not a member of the union, the employer must notify the employee personally in writing together with the labour officer;

c. in determining the employees to be declared redundant, the employer must consider seniority in time, skill, ability, reliability of the employees;

d. where the terminal benefits payable upon redundancy are set under a collective agreement, the employer shall not place an employee at a disadvantage on account of the employee being or not being a member of a trade union;

e. the employer must pay the employee any leave due in cash;

f. the employer must pay the employee at least one month's notice or one month's wages in lieu of notice; and

g. the employer must pay the employee severance pay at the rate of not less than 15 days for each completed year of service.

23. While the Respondent says it religiously adhered to these requirements, the Claimant denies it. To resolve this standoff, an analysis of the evidence on record will be necessary.

24. According to the Claimant: she was not served with the notice of intention to declare the redundancy; the Respondent disregarded the rules on selection of employees to be let go; and the Respondent did not pay the Claimant her terminal dues including severance pay. On the Respondent's part it is asserted that all these requirements were met.

25. I have considered the evidence on record. It appears to me that the redundancy was triggered by the decision at a management meeting in the Respondent institution on 25th August 2016. Document number DTB 3 on the Respondent's bundle of documents contains minutes of this meeting. Apparently, the main agenda of the meeting was to collapse the BMU as it was considered to be overlapping with other departments in the bank. This meant that personnel in BMU had to either be redeployed or terminated as their services in the department would no longer be needed.

26. From the proceedings in the minutes, although the decision to close BMU was taken then, it appears that a decision on the impending redundancy had already been taken. The meeting was merely to ratify it. I say this because it can be discerned from the minutes that as at 25th August 2016, the employees who were to be declared redundant had already been identified and reassigned to other departments of the Respondent. Out of the six affected employees, five had already been relocated to other sections. Only one, apparently the Claimant, had not.

27. Further, the Respondent says that it issued the Claimant with a notice of possible redundancy on 7th October 2016. The notice is dated 7th October 2016 and appears as document DTB 4 on the Respondent's bundle of documents.

28. This notice, to my mind, was communicating to the Claimant the fact of her having been declared redundant awaiting her exit 30 days down the line. It does not appear to me to be a notice communicating an intended redundancy as the law intends.

29. Be that as it may, the other issue of concern is whether the notice was served on the Claimant. In her evidence, the Claimant asserts that she was never given this letter. However, RW1 stated that when the correspondence was handed to the Claimant, she declined to receive it. This, to my mind, explains why the Claimant allegedly never got the letter.

30. In my view, the Respondent had done all that it could reasonably do in respect of delivery of the notice when it handed it over to the Claimant who is said to have declined to take it. In the premises, I hold that the Respondent served the Claimant with the notice under section 40 of the Act only that the notice was defective to the extent that it communicated a redundancy as opposed to an intended redundancy.

31. The Claimant has also contested the Respondent's assertion that it undertook an objective selection process leading to her being identified for termination. The law does not seem to state how the selection process should be undertaken save to require that the employer pays regard to indicators such as seniority in time, skill, reliability and ability of each of the employees likely to be affected.

32. The Claimant states that the first in last out principle was disregarded in the process as persons who were late entrants remained as she was pushed out of the bank. Indeed, document number DTB 3 shows that there was a Mr. Benson Musembi who had been with the bank for 7 years while the Claimant had clocked 8 years. They both are described as managers. While Musembi was redeployed to another section of the bank, the Claimant was terminated.

33. In response to the foregoing, the RW1 states that the Claimant's skills and ability did not justify her redeployment to a new department. This led to her termination.

34. What is of concern is that the process of selection appears to have been undertaken behind closed doors without the involvement of the affected employees. This undoubtedly casts doubts on the objectivity and fairness of the whole process. Underscoring the significance of openness in the selection process Maraga J in *Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others [2014] eKLR* had this to say:-

“All this notwithstanding, however, in a nutshell, I find that the appellant employed an opaque criteria in the selection of the retrenched employees that did not meet the statutory threshold.”

In view of the foregoing, I think that the selection criteria fell short of what would constitute a fair labour practice.

35. The Claimant asserts that she was not paid her terminal dues. However, there is ample evidence to the contrary.

36. Document number DTB 7 is a schedule of what was paid to the Claimant upon her exit from the Respondent institution. The document has provision for: salary for 15 days of November 2016; house allowance up to 15th November 2016; transport allowance up to 15th November 2016; leave pay for 3.5 days; basic salary in lieu of notice; house allowance in lieu of notice; severance pay (15 days worked for each year for 8 years); and transport allowance arrears.

37. Document DTB 6 is a voucher by which the Claimant acknowledged receipt of Ksh. 636,265/= towards her pension dues. Although she initially denied knowledge of these payments, the Claimant conceded in cross examination that indeed she received the pension funds and the other benefits went towards lowering her financial liabilities with the Respondent. This, the Respondent said was in line with clause 6 of the Respondent's staff loan policy, a common practice in many finance institutions. I therefore find that the Claimant was paid her terminal dues. The fact that some of them were applied to settle part of her loan accounts with the Respondent does not render them any less of payments towards the Claimant.

38. In addition to the procedural requirements set out in section 40 of the Employment Act, sections 43 and 45 of the Employment Act read together require an employer to justify a redundancy by proving that there existed grounds for it. In this case, the main reason for declaring the redundancy was apparently that the BMU had become superfluous for duplicity of roles with other departments of the Respondent.

39. However, the Respondent did not isolate and prove the roles that were duplicitous. The Respondent did not provide clear evidence on which other departments were executing similar roles as the BMU department. Further, the Respondent did not provide evidence on its organogram before and after the purported merger to demonstrate that indeed some departments were collapsed with the result that some staff had to be laid off. It was necessary for the Respondent to lay bare these facts in order to rule out any insinuation that its decision was not a normal termination disguised as a redundancy.

40. In the ordinary course of things, this evidence ought to be in the exclusive control of the Respondent. By virtue of section 112 of the Evidence Act and in view of the requirements of sections 43 and 45 of the Employment Act, I think it fell on the Respondent to justify the assertion that there was a merger of departments. As such process will ordinarily be documented I think that to merely state orally without more that there was a merger of departments is not good enough. This is particularly so when the Claimant's position was that there was no such merger and or closing of any of the bank's branches. I am therefore inclined to hold that the Respondent did not provide sufficient evidence to prove the reason for the redundancy.

41. For the reasons stated above, I find that the Claimant's termination on account of redundancy was flawed. As a result, the termination is declared unfair.

42. The third issue relates to whether the Claimant is entitled to the reliefs sought in the claim. As relief number a) has already been addressed, what remain outstanding are reliefs b) to f). All of them relate to monetary compensation under distinct heads of damages.

43. In this case, it has been pleaded and evidence has been tendered suggesting that the Claimant was in fact paid some compensation pursuant to a pretrial settlement between the parties. On the basis of the purported settlement, the Respondent denies liability to make further payments to the Claimant. Is the court entitled to make a fresh award to the Claimant as pleaded despite the existence of an alleged pretrial settlement of the matter?

44. The pretrial settlement appears in documents DTB 6 and DTB 7. The latter gives details of what appears to be redundancy dues. Its total is Ksh. 779,766.64. The former is a discharge in respect of pension. It totals Ksh. 636,265/=. DTB 8 contains a series of documents relating to payment of the above amounts of money to the Claimant. It would appear from the evidence of RW1 that the Respondent deposited a cheque for DTB 7 into the Claimant's account but as it said, debited the account to pay the Claimant's indebtedness to it. As for DTB 6, the Claimant conceded in her evidence that she had indeed received the money.

45. During the hearing, the Claimant was walked through the alleged payments under DTB 7. Although she remained inconsistent on the question of whether or not she was paid, she conceded that most of the items were apparently paid only that she was not notified by the Respondent that it had diverted the cash to settle her loan accounts.

46. The Claimant was less than candid on the issue of these payments. While in her oral testimony she sometimes tried to deny knowledge of the payments, at paragraph 36 of her Statement of Claim she alludes to having rejected the settlement suggesting that she was aware of it. These contradictions were drawn to her attention during cross examination.

47. I believe that the Claimant was paid the amounts in the voucher and DTB 7 but part of it went towards her liabilities.

48. What then is the effect of these settlements on the current attempt by the Claimant to recover compensation? In the settlement voucher the Claimant stated as follows:-

“I Pauline Waigumo Muthiga of P.O Box 59481-00200 acknowledge receipt of in full and final settlement and discharge of all sums due to me and also acknowledge that I have no further claim against the company or to further claim for compensation arising out of my termination of employment contract or any claim for reinstatement thereof.”

The voucher was apparently signed by the Claimant on 28th November 2016 in the presence of a witness referred to as Yvonne.

49. Not so long ago in *Nairobi Cause No 1822 of 2016 Christine Juma Were v Kenafic Industries Ltd* (unreported), I was confronted with a similar scenario in which I was to consider the import of pretrial settlements on future claims by the same parties litigating under the same title. I observed that the Court of Appeal has provided guidelines on determining the effect of such settlements on future litigation on the same question in several of its decisions. I then looked at a number of the decision as here below:-

50. In *Thomas De La Rue (K) Ltd v David Opondo Omutelema [2013] eKLR* the court observed as follows regarding the effect of pre-trial settlements on further demands for payments through litigation:-

“We would agree with the trial court that a discharge voucher per se cannot absolve an employer from statutory obligation and that it cannot preclude the Industrial Court from enquiring into the fairness of a termination. That is however, as far as we are prepared to go. The court has, in each and every case, to make a determination, if the issue is raised, whether the discharge voucher was freely and willingly executed when the employee was seized of all the relevant information and knowledge”.

51. In *Coastal Bottlers Limited v Kimathi Mithika [2018] eKLR*, the court said as follows regarding these agreements:-

“Whether or not a settlement agreement or a discharge voucher bars a party thereto from making further claims depends on the circumstances of each case. A court faced with such an issue, in our view, should address its mind firstly, on the import of such a discharge/agreement; and secondly, whether the same was voluntarily executed by the concerned parties”.

52. In, *Trinity Prime Investment Limited v Lion of Kenya Insurance Company Limited [2015] eKLR*, the court said this of pretrial settlements:-

“The execution of the discharge voucher, we agree with the learned judge, constituted a complete contract. Even if payment by it was less than the total loss sum....”.

53. I then attempted to set out what in my view were general guidelines that are necessary in dealing with questions relating to the effect of pre-trial settlements on further claims by the parties affected by such settlements through future litigation. I mentioned the following as some of the guidelines:-

a) *As a general principle a pretrial settlement operates as a contract between the parties.*

b) *It is to be considered as generally binding on the parties unless it is assailed on the usual grounds that will vitiate a contract.*

c) *Such settlements may, although not always, constitute a full settlement of the issues under consideration with the consequence that parties to them may not pursue further settlements on the same subject either in court or otherwise.*

d) *There is no general principle that such settlements will inevitably discharge an employer from his/her statutory obligations under a contract of service.*

e) *In order to determine whether the pretrial settlement operates as a bar to further claims by the parties to it, a trial court or other arbiter must consider: the import of the settlement; whether the parties executed the agreement freely; and whether they had relevant information and knowledge regarding the settlement.*

f) *The mere existence of a pretrial settlement should not be construed as taking away the court's jurisdiction to inquire into the lawfulness of a termination of a contract of service.*

54. I hold the view that these guidelines have application to this cause to the extent that I am called upon as I was in the previous matter to address the same question whether the Claimant, having executed the voucher dated 28th November 2016, is precluded from making further claims for compensation.

55. In this cause, the Claimant signed the settlement voucher. There is no suggestion that her signature on the instrument was procured through fraud, mistake or undue influence. It has also not been alleged that the Claimant did not appreciate the import of her decision,

56. Rule 13 of the Employment and Labour Relations Court (Procedure) Rules, 2016 entitles a Respondent who wishes to controvert a matter raised in the reply to the statement of claim to file a reply within seven days of service of the defense. The Claimant did not file any

further pleadings to suggest that she contested the alleged pretrial settlement. In effect, she admitted this fact.

57. For this reason, I think that it is not open to me to reopen the question of monetary compensation between the parties. Accordingly, I decline to award the Claimant any compensatory award.

58. But even if I were wrong on this matter, I note that the Claimant conceded in evidence that the figures in DTB 6 and DTB 7 were actually paid out only that some of the cash went towards partial settlement of her outstanding loans with the bank. The Claimant had claimed for bonus pay but later conceded that this was at the bank's discretion and did not constitute an entitlement under her letter of appointment. The Claimant also conceded that Life Insurance and Medical Cover were benefits that would accrue while one is in actual employment. They do not remain after termination.

59. Consequently, having regard to all this, I would still have arrived at the conclusion that the sums which were paid to the Claimant under the pretrial settlement were sufficient compensation for her loss and that some of the claims as set out above were not payable.

60. Determination

In the premises, although I have found that the Claimant was irregularly declared redundant and was therefore unfairly terminated, I dismiss the claims for compensation. Each party shall bear their costs of the cause.

DATED, SIGNED AND DELIVERED ON THE 10TH DAY OF SEPTEMBER 2021

B O M MANANI

JUDGE

In the presence of:

.....for the Claimant

.....for the Respondent

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.

B O M MANANI

JUDGE