



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 2524 OF 2016

(Before Hon. Justice Ocharo Kebira)

BETTY CHEMURGOR.....CLAIMANT

VERSUS

LAICO REGENCY HOTEL LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant commenced her claim vide a Statement of claim dated 7th November 2016 in which she prays for the following remedies.
 - (a)... A declaration that the termination of the Claimant's employment was unlawful and unfair contrary to the provisions of Sections 19(1) and 40(1) of the Employment Act, 2007.
 - (b)... A declaration that the termination of the Claimant's employment by the Respondent was discriminatory and contrary to Article 27, 41 of the Constitution of Kenya 2010 and section 5(3)(b) of the Employment act.
 - (c)... Kshs.200,000 being refund for the unlawful deduction termed as 'paymaster recovery' from August 2014 to May 2015.
 - (d)... Kshs.1,547,760 being compensation for the unfair and unlawful termination of the Claimant's employment contract as provided for under Section 49(1)(c) of the Employment Act.
 - (e)... General damages or compensation for violation of the Claimant's fundamental rights under Article 27, 41 of the constitution of Kenya 2010 and section 5(3) (b) of the employment Act 2007.
 - (f)... Any such appropriate relief as the court may deem fit.
 - (g)... Costs of this claim and interest thereon at court rates from the date of filling the suit.
2. The Respondent did not file a response to the claim. The facts as pleaded in the memorandum of claim are therefore uncontested. The Court on 12th July 2017 gave directions that the matter proceeds as an undefended cause.
3. The Claimant testified on 18th October 2021, adopting her witness statement dated 6th December 2017, list of documents and bundle of documents all filed on 7th December 2015 as her evidence. She briefly testified orally, clarifying some aspects of her case that she thought imperative to.
4. It was the Claimant's case that she was employed by the Respondent vide a letter dated 9th February 2009 to the position of sales account manager with a monthly gross salary of Kshs.128,980. She worked for the Respondent for a period of six years three months, before her employment was terminated.
5. The Claimant states that vide a letter dated 27th May 2015 the Respondent unlawfully and unfairly terminated her services allegedly for low sales target achievement, unsatisfactory performance and redundancy. She further stated that prior to the termination she was not accorded an opportunity to make any representations. Over the alleged redundancy, she was not consulted. The labour office was not notified either.

6. She states that she was paid terminal dues in the sum of Kshs.391,424 being one-month salary in lieu of notice and 24 untaken leave days, travel allowance, house allowance telephone allowance and her salary up to 27th May 2015.

7. The Claimant states that her employment was unlawfully terminated, citing as the Respondent:

a) Unlawful and unfairly held responsible for failure by beyond Wild Safaris to settle their account as a result of an alleged solicitation of its clients.

b) Targeted and victimized and subjected her to discrimination contrary to the provisions of Article 27 of the Constitution and section 5 of the Employment Act declaring her redundant while retaining the other sales managers

c) Unlawfully declared her position redundant on grounds not provided for under Section 40(1) of the Employment Act.

8. The Claimant avers that the Respondent unlawfully deducted Kshs.20,000 per month from her salary terming it “paymaster recovery”, from August 2014 to May 2015, to recover outstanding amount on the **Beyond the Wild Safari’s** account, deductions not within the ambit of Section 19(1) of the Employment Act.

9. On the genesis of the deductions, the Claimant stated that there had been a long-standing dispute between ‘**Beyond the Wild Safaris**’ [a tourist agency] and the Respondent, the former had refused to pay the latter for services it rendered on an allegation that the Respondent had allowed solicitation of its tourists by another agency. **Beyond Wild Safaris**, alleged that the Respondent’s Front Office in collusion with the Guest Relations officer had encouraged the solicitation by its competitor, **Venture Savannah. Beyond Wild Safaris**, claimed that they had suffered loss as a result, a loss of USD 2655. The Claimant contended that she had nothing to do with the alleged solicitation and or loss.

10. The Claimant tendered as evidence pay slips for the various months to demonstrate the deductions from her salary. According to her the total deductions amounted to Kshs.200,000.

11. The Claimant testified that she was the only accountant manager out of the 7 [seven] who was in the employment of the Respondent at the material time who was declared redundant. According to her, she was discriminated against.

Claimant’s Submissions

12. The Claimant submitted that the Respondent having failed to enter appearance and file any response to the claim it stands uncontroverted and relies in the holding in the case of **Trust Bank Limited v Universal Bank Limited & 2 others. [2009] eKLR, thus;**

“The 2nd and 3rd Defendants closed their cases without calling a witness. It is trite that where a party fails to call evidence in support of its case, that party’s pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. The 2nd Defendant and 3rd Defendant’s defence were unsubstantiated and remained mere statements. In the same vein failure to adduce any evidence meant that the evidence adduced by the plaintiff against the 2nd & 3rd Defendants is uncontroverted and therefore unchallenged.”

13. It was further submitted that the Claimant did discharge her evidentiary burden as her evidence was uncontroverted. Reliance is placed on the case of **Mary Wanjiku & Peninnah Kivivya Kitheka and Another versus Harizon Chemicals Ltd.**

14. The Claimant submits that her termination was unfair as it did not conform to the provision of Section 45(2) of the Employment Act.

15. Counsel submitted on Article 27 of the Constitution of Kenya, stating that it prohibits discrimination on the various grounds put forth therein. He further submitted that the spirit and intent of Article 27 of the constitution are contained in section 5[3][b] of the Employment Act which prohibits discrimination against employees in respect of termination by providing;

“No employer shall discriminate directly or indirectly, against an employee or prospective employee or harass an employee or prospective employee- [a] on grounds of race, colour, sex, language religion, political or other opinion, nationality, ethnic or social origin, disability, pregnancy, mental status or HIV status; [b] in respect of recruitment, training, promotion, terms and conditions of employment, termination of employment or other matters arising out of the employment.”

16. It was submitted that the Claimant’s evidence on the discriminatory act of the Respondent of declaring her employment redundant, was not challenged, the Respondent did not therefore discharge its burden under Section 5[7] of the Act which enjoined it to prove that the discrimination did not occur.

17. It was submitted that the Claimant pleaded and testified that her termination was unfair for the reason that her position was declared redundant whilst the other employees in the same department were retained. Out of the seven who were working with her in the same department, she was the only one terminated. That the same position still existed within the Respondent’s structure.

18. The Claimant submits that her termination on account of redundancy was discriminatory and relies in the holding in the case of **Jonathan Spangler v Centre for Africa Family Studies [2017] eKLR**, where the court held;

“In totality, upon these allegations, the burden shifted upon the Respondent to prove that there was no discrimination against the Claimant...his rationale looked at vies-a-vies the constitutional threshold under article 27 and provisions of section 5 of the

Employment Act, there is confirmation by the respondent's own actions that there was discrimination against the Claimant. Such I find not justified through any law, practice or policy of the respondent. Such discrimination is prohibited and damages due on the finding that the Respondent deliberately and without any due cause engaged in a practice prohibited under the constitution and the Employment Act."

19. The Claimant also submits that the respondent had been deducting her Kshs.20,000 termed as pay master recovery which was meant to offset an outstanding debt by a client who had refused to pay the Respondent. The deduction does not fall within the ambit of the catalogue obtaining in Section 19 of the Employment Act, amounting to an offence created under Section 25 of the Act.

20. The Claimant relies in the holding in the case of **Kennedy Mutua Mwangi v Madison Insurance Company (k) Limited** where the court held;

"Without any work records with regard to how and why the respondent made the decision to effect a salary deduction, there being no witnesses to support the defence filed, the court finds no good cause for the same. The deductions of Kshs.20,000 from the Claimant's salary from February 2014 was unlawful."

21. Counsel for the Claimant submitted that it is the Claimant's case that the termination was unlawful as it breached the provisions of Section 40 of the Employment Act. Contrary to what was required of the Respondent by Section 40[1] of the Act, the letter was not served on the labour officer, the termination was to take effect on the same day of the letter therefore not amounting to the notice contemplated under the provision.

22. There were no consultations or at all regarding the redundancy. Counsel put reliance on the holding in **David Ithau Wambua v Liberty Kenya Holdings Limited [2019]eKLR**, thus;

"From this letter, it is not clear when "recent discussion" on these changes had been made and therefore it can be safely stated that the 1st time the Claimant is informed of this redundancy is on 13th May 2015 and the redundancy was to be effective on 31st May 2015. It is therefore also clear that there was no proper redundancy notice period as provided under Section 40 of Employment Act which states that the notice period is 1 month. The Claimant was given a notice period of about 18 days and therefore this was unfair and unjustified."

23. The Claimant also relies on the case of **Barclays Bank of Kenya Ltd & another v Gladys Muthoni & 20 others [2018] eKLR** where it was held as follows on the need to have pre-redundancy consultations;

"Article 41 is fairly loud on the rights to fair labour practices and we think it accords with the Constitution and international best practices that meaningful consultations be held pre-redundancy. We agree with the trial court that redundancy notices are not mechanical so as to satisfy the notions of the law, and that fair labour practice requires the employer to act in good faith."

24. The Claimant submits that the termination was unfair and she is entitled to the reliefs sought.

25. Counsel submits that the Claimant has proved every aspect of her case and therefore is entitled to all those reliefs she has sought in her statement of Claim.

Analysis and Determination.

26. From the material placed before this Court the following issues emerge as the issues for determination in this matter, thus;

- (a) **What were the reasons given for the termination of the Claimant's employment?**
- (b) **Was the termination procedurally fair?**
- (c) **Was the termination substantively fair?**
- (d) **Was the termination discriminatory?**
- (e) **What reliefs should be availed to the Claimant if any?**
- (f) **Who should bear the costs of this suit?**

27. The Claimant pleaded and testified that her employment was terminated on the 27th day of May, 2015, through a termination letter by the Respondent of same day. It is imperative to put forth here part of the same for clarity purposes on what the reasons for the termination were;

"This refers to the various discussions the management has had with you with regard to your general performance as exemplified by the very low sales target achievement that you have been recording.

Whereas the fundamentals associated with tourism have been erratic, the general perception of your performance has been

wanting. Be that as it may, the whole business trajectory calls for serious realignment to enable the hotel get its fair share of the market.

Therefore, we regret to inform you, as mentioned elsewhere, that in view of the foregoing, we are left with no option but to declare your position redundant and terminate your employment with effect from 27th May 2015.”

The Claimant produced the letter as one of her exhibits before Court. The expressly declared reason for redundancy in the letter appears as redundancy. Whether this reason was valid or simply camouflaged, will come out shortly hereinafter.

Whether the termination was procedurally fair.

28. Section 40 of the Employment Act provides for the procedure to be undertaken by an employer who decides to terminate an employee’s employment on account of redundancy. The procedure is mandatory, any non-adherence thereto would render the termination unfair. The Court of Appeal in **Barclays Bank of Kenya Ltd vs Gladys Muthoni & 20 Others [2018] eKLR**, cited by the Counsel for the Claimant stated;

“Section 40 of the Employment Act prohibits in mandatory tone, the termination of a contract of service on account of redundancy unless the employer complies with the following seven conditions, namely:

- (a) *If the employee to be declared redundant is a member of the 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, ability, reliability of the employees;*
- (d) *Where there are terminal benefits payable upon redundancy as 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.*

29. It is through these lenses that the Court shall move to see whether not the Respondent adhered to the procedural conditions provided by the section. There is no doubt that the Claimant was not a member of a union. Therefore, in compliance with Section 40[1][b] of the Act, the Respondent was under an obligation to issue the Claimant with a one month’s notice of the intended redundancy. In this view I am fortified by the decision in the case of **Thomas De La Rue [k] Ltd vs David Opondo Omutelema [2013] eKLR**.

30. The Claimant contended that the only document she was given that touched on the termination as being on account of her position being declared redundant, was the termination letter dated 27th May 2015. The letter indicated that the termination of her employment was to take effect on the 27th May 2015, the same day of the letter. One cannot find any difficulty to conclude that the letter isn’t in the character of what is envisioned in Section 40[1][b] of the Act. In the upshot, I come to an inescapable conclusion that the redundancy notice contemplated in the stated provision was not issued.

31. The Claimant contended further that no notice was served by the Respondent on the Labour officer, there is no evidence from the Respondent to prove otherwise. I am prepared to agree with the Claimant that there was a further non-adherence to the provisions of the section. A mandatory step was not undertaken here. As regards the mandatory requirement of service of the notice on the labour officer, the Court of Appeal held in the **Barclays Bank of Kenya Ltd case[supra]** that;

“34. It is common ground that the respondents were not members of a union and therefore they were entitled to a notice that 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 is to take effect.’ It is mandatory to serve the notice on the Labour officer.”

[emphasis mine]

32. It was the Claimant’s case that she was not consulted on the redundancy. On a host of cases judicial attention has been given on the purpose and mandatory nature of pre-redundancy consultations. The Judgement of Maraga JA [as he then was] and Murgor JA, in the case of Kenya **Airways Limited vs Aviation and Allied Workers Union & 3 Others [2014]eKLR**, is a classical example. The Claimant asserted that there were no pre-redundancy consultations between her and the Respondent. The Respondent in no manner challenged this, I find that there were no consultations.

33. In sum, by reason of the premises foregoing, I come to a conclusion that the termination was procedurally unfair, the statutory procedure under section 40 of the Employment Act was not followed by the Respondent.

Whether the termination was substantively fair.

34. This Court has before stated that in the capsule of fair termination one must have to see both substantive and procedural fairness. Absence of one or both of them, renders a termination unfair. Having considered the procedural fairness aspect of the case and found as I have hereinabove, I now turn to the substantive fairness. In order for one to weigh whether or not the termination was substantively fair, he or she must get into the reason[s] for the termination and consider whether or not the reason was valid and fair-Section 45[1]and [2], going a step further to consider whether the employer in arriving at the decision to terminate has acted in accord with equity and justice- Section 45[4] and [5]. All these denotes that in the employer's decision, there must be present, good faith, and reasonableness.

35. The termination letter at paragraph 3 thereof, expressly states that the reason for the termination the subject matter herein, was redundancy. However, as I said herein before, the 1st two paragraphs of the letter are coached in away that give one an impression that redundancy was not the main reason why the Claimant was being terminated. The contents thereof accuse the her of poor performance and failure to meet targets. It is trite that to terminate an employee fairly on grounds of poor performance is laborious. An employer might be tempted to cut short cuts to avoid the same. I have a feeling that this is what happened here. The redundancy reason was camouflaged.

36. Section 43 of the Employment Act, 2007, places a heavy burden of proof upon the employer to justify the termination of employment. In terminations on account of redundancy, the burden is even heavier, the termination is not at the conduct of the employee, it is caused by the employer's operational reasons to which an employee has made no contribution. The Respondent was required under section 40 of the Act, to give the reasons for the redundancy and the extent. The Respondent did not give any evidence or place any material before this court to discharge this burden.

37. By reason of the premises, I hereby find that the termination was substantively unfair.

Whether the termination was prompted by discrimination.

38. Article 27[5] of the Constitution, prohibits discrimination against any person on the specified grounds of, race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth. In the place of work, in matters, selection, recruitment, transfer, promotions, demotions, training, development and termination of employment, discrimination on any of these prohibited grounds is considered unlawful. In the case of **OI Pajeta Ranching Limited vs David Wanjau Muhoro [2017]eKLR** the Court of Appeal state;

“Now, although the allegations levelled against the appellant happened before the promulgation of the current constitution, arbitrary discrimination was still prohibited during the material times by section 82 of the former constitution. Moreover, Kenya had also ratified a plethora of international instruments that prohibit racial discrimination among them the United Nations Convention on Elimination of all forms of Racial Discrimination.”

39. Section 5[3] of the Employment Act imports this Constitutional spirit and intent into the Employment Act. It provides;

“No employer shall discriminate directly or indirectly, against an employee or prospective employee or harass an employee or prospective employee-

[a]. on grounds of race, colour, sex, language, political or other opinion, nationality, ethnic or social origin, disability, pregnancy, mental status or HIV status:

[b]. In respect of recruitment, training, promotion terms and conditions of employment, termination of employment or other matters arising out of the employment.”

40. The Claimant asserted that she was discriminated against as she is the only one whose employment was terminated on an account of redundancy in her department. This is all she laid before Court. An allegation of discrimination against an employer is a serious charge, an employee making the allegation must demonstrate that he or she was discriminated against on one or more of those prohibited grounds. It cannot be enough for an employee to make a global allegation that he or she was discriminated against by the employer, leaving it to court to speculate on the grounds. Echoing words of the Court of Appeal, in **Barclays Bank of Kenya ltd [supra.]**, this claim was not given the seriousness it deserved.

41. What the Claimant raises as a ground for the alleged discrimination is only relevant to a consideration on substantive fairness of the termination, for instance questioning the selection criteria and the extent of the redundancy, and the extent of the compensatory award if any.

42. In the upshot, I find that the Claimant has not proved the claim for discrimination.

Of What Reliefs are Available to the Claimant, if any.

43. The Claimant has sought for general damages, alleging that she was discriminated against. Having found that the Claimant didn't prove the alleged discrimination as I have hereinabove, I decline to grant the general damages sought.

44. The Claimant sought for a refund of Kshs. 200,000 being a sum which she states was unlawfully deducted from her salary to settle an

account which she had no responsibility to. I have considered the email correspondences between the Respondent and its Client, **Beyond the World Safaris**, all I see is blame on the front office personnel as the ones who abetted the solicitation. The Claimant is mentioned nowhere, the Client accuses her not. I find it difficult to understand what informed the Respondent's decision to deduct here salary. Part iv of the Employment Act deals with protection of wages. There is detailed protection accorded to an employee's salary. Section 19[1] thereof, sets out a catalogue of deductions that an employer can lawfully effect on an employee's salary. The deductions that the Respondent did do not fall within the ambit.

45. The statutory protection accorded by the Act, cannot be said to be without purpose. The framers of the Act did it in appreciation of the weak position of an employee, in an employee-employer relationship. Salary or wages is an aspect that an employer can easily use to manipulate employee[s]. The expansive protection given on the salaries/wages places employees' right to salary at a higher pedestal that all the other rights. It is a superior right.

46. I have seen email exchanges between officers of the Respondent, there was a divided opinion over the decision to deduct the salary of the Claimant. Others were of the view that the client [Beyond the Wild Safaries] ought to have been sued for recovery of the sums it withheld,

[I find this to be the most reasonable rout to have been followed].

47. The Respondent was in the circumstances of the matter, obliged to place evidence before this court to explain and justify the deduction, which prima facie looks unlawful. An employer cannot make any deductions outside the catalogue under section 19 of the Act without the concurrence of the employee.

48. Consequently, I find that the deductions that were made on the Claimant's salary were unlawful and without justification. The Claimant is entitled to a refund therefore.

49. Section 49[1][c] of the Employment Act bestows upon court, the authority to grant a compensatory relief to an employee, where it finds that the employee has successfully assailed the decision by the employer to terminate his contract of service. The grant and the extent thereof, are matters discretionary dependent on the peculiar circumstances of each case. Having found that the termination was unfair, and considering the manner in which the termination was done as expressed by the termination letter, including the immediate termination of the contract of service as though it was a summary dismissal, the substantial deviation from the law by the Respondent, and the possibility that the reason for termination was camouflaged, I am of the view that the Claimant is entitled to the relief and to the extent of 10 months gross salary.

50. In the upshot judgement is hereby entered in favour of the Claimant in the following terms;

- (a) **A declaration that the termination of the Claimant's employment was unfair and unlawful.**
- (b) **A refund of Kshs. 200,000.**
- (c) **Compensation pursuant to the provisions of Section 49[1][c] of the Employment Act, to an extent of 10 months gross salary, Kshs, 1,289,800.**
- (d) **Interest on [a] and [b] above at court rates from the date of filing suit till full payment.**
- (e) **Costs of this suit.**

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 6TH DAY OF DECEMBER, 2021

OCHARO KEBIRA

JUDGE

IN PRESENCE OF:

MS. MAINA FOR THE CLAIMANT.

NO APPEARANCE FOR THE RESPONDENT.