



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 406 OF 2014**

**ANNE NJAMBI NGUGI.....CLAIMANT**

**v**

**MEDIAMAX NETWORK LIMITED.....RESPONDENT**

**JUDGMENT**

1. Anne Njambi Ngugi (Claimant) was head-hunted from the Standard Group Ltd where she was a senior anchor at Kenya Television Network by Mediamax Network Ltd (Respondent) and was offered employment through a contract dated 21 January 2013.
2. On or around 8 July 2013, the Claimant's Head of Department conducted a *Performance Appraisal* of the Claimant and graded her D. In the comments section, the Head of Department indicated *wanting performance*.
3. On or around 1 August 2013, the Respondent issued a *Notice of Restructuring and Reorganisation* to all its staff.
4. The Respondent followed the general notice with a specific notice dated 8 August 2013 addressed to the Claimant advising the Claimant that it had been decided to declare her position redundant effective immediately.
5. The notification was copied to the Provincial Labour Officer.
6. On 13 August 2013, the Claimant wrote to the Respondent to express an intention to waive 30 days of the 3 months' notice.
7. In a separate letter of the same day, the Claimant sought to be allowed to continue with the medical cover financed by the Respondent as she was expecting a baby.
8. The Respondent replied to the requests by the Claimant on 22 August 2013, and in the reply set out the terminal benefits the Claimant was entitled to including earned wages for 8 days worked in August 2013.
9. In a letter dated 27 November 2013 to *Resolution Insurance Company Ltd*, the Respondent gave authorisation for the Claimant's medical cover to run until 31 December 2013.
10. The Claimant was aggrieved with the termination of employment on account of redundancy, and on 17 March 2014 instituted these legal proceedings. The Issues in dispute were stated as
  1. Unfair and unlawful termination
  2. Discrimination in the termination exercise on the basis of pregnancy
  3. Underpayment
  4. Redundancy.
11. The Respondent filed a *Reply to Memorandum of Claim* on 14 April 2014, and further documents on 23 April 2018.
12. The Cause was heard on 1 July 2019 and on 5 November 2019. The Claimant and the Respondent's Human Resources Manager testified. They also adopted their witness statements and produced exhibits.

13. The Claimant filed her submissions on 29 November 2019 while the Respondent filed its submissions on 11 December 2019.

14. The Court has considered the pleadings, the evidence and submissions, and adopted the Issues as set out in the Claimant's submissions.

### **Unfair termination of employment**

15. It is not and was not disputed that the separation between the Claimant and the Respondent was on account of operational requirements.

16. Section 40 of the Employment Act, 2007 has set out the conditions an employer intending to terminate an employee's contract on account of redundancy should comply with.

17. In the instant case, the Claimant was not a member of a union, and therefore the conditions applicable to an employee a member of a union are not applicable.

18. Some of the conditions the Respondent was expected to comply with were to issue a month notification of intended redundancy to the Claimant and the local labour office.

19. The Respondent issued a general notice to all staff on restructuring on 1 August 2013. The general notice was not copied to the Labour Office.

20. The Respondent followed up on the general notice with a specific notice to the Claimant on 8 August 2013. The Notice was explicit that the redundancy was to take effect immediately but that the Claimant could waive the 30 day notice and get paid in lieu of notice. This notice was copied to the Provincial Labour Officer.

21. The specific Notice issued to the Claimant and copied to the Labour Officer was vague as it referred to the effective date as 8 August 2013 and in the same vein indicated that the redundancy would be effective 6 September 2013 if the Claimant waived the 30 days' notice.

22. In *Thomas De La Rue (K) Ltd v David Opondo Omutelema* (2013) eKLR, the Court of Appeal rendered itself thus

It is quite clear to us that *sections 40 (a) and 40 (b)* provides for two different kinds of redundancy notifications depending on whether the employee is or is not a member of a trade union. Where the employee is a member of a union, the notification is to the union and the local labour officer at least one month before the effective redundancy date. Where the employee is not a member of the union, the notification must be in writing and to the employee and the local labour officer. *Section 40 (b)* does not stipulate the notice period as is the case in *40 (a)*, but in our view, a purposive reading and interpretation of the statute would mean the same notice period is required in both situations. We do not see any rational reason why the employee who is not a member of a union should be entitled to a shorter notice.

23. The Claimant opted to waive the 30 days' notice and was paid in lieu thereof.

24. In the circumstances, the Court finds that the Respondent was in substantial compliance with the statutory requirements outlined in section 40 of the Employment Act, 2007.

### **Substantive fairness**

25. Apart from procedural requirements, sections 43 and 45(2)(b)(ii) of the Employment Act, 2007 places a burden on the employer to prove the operational reasons leading to a redundancy.

26. The reason given in the notice of 8 August 2013 was

... ongoing restructuring and re-organisation of its business and upon thorough evaluation of the existing employment structures...

27. The Respondent's witness stated during cross-examination that the main reason for the redundancies was to achieve organisational efficiency and to improve competitiveness in the market and that the Claimant was not the only employee affected.

28. In the submissions, the Respondent contended that the redundancy was on account of an economic downturn.

29. To the Court, the grounds of market challenges and economic downturns were general statements which needed some evidential material for back up such a trends in the industry and financial statements. If any studies were conducted by the Respondent to establish that the business model was not efficient, there was no disclosure of such studies.

30. In the view of the Court, where there are genuine and valid redundancy reasons, discussions with the employees should include possibilities of pay cuts and other roles before the ultimate decision to dismiss is taken. The Court was not informed of other possibilities which were discussed with the Claimant.

31. In the circumstances, the Court finds that the Respondent did not discharge to the required standard, the burden of proving the existence of valid operational reasons to declare the Claimant's position redundant.

## **Appropriate remedies**

### **General damages**

32. The Claimant sought general damages for what she termed extreme financial, professional and career embarrassment.

33. However, the Claimant failed to lay any evidential or legal foundation to this head of the claim and the relief.

34. There was even no disclosure as to what species of tort and/or contractual obligation this claim relates to. Relief is declined.

### **Severance pay**

35. The Claimant sought *severance pay* equivalent to 12 months' salary computed as Kshs 6,000,000/-.

36. Section 40(1) (g) of the Employment Act, 2007 has set formula for calculating *severance pay*.

37. The Respondent did not pay the Claimant any *severance pay*, even on a *pro-rata* basis because she had not completed a year in employment. That was a misapprehension of the law, and the Claimant was entitled to *severance pay* on a *pro-rata* basis for the 8 months served.

### **Service pay**

38. The Claimant also sought Kshs 125,000/- on account of *service pay*.

39. The copy of employment contract produced in Court shows that the Claimant was eligible to join a pension scheme. The Claimant admitted during cross-examination that she was contributing towards the National Social Security Fund.

40. In the circumstances, the Claimant is not entitled to *service pay* by dint of section 35(5) & (6) of the Employment Act, 2007.

### **Compensation**

41. The Respondent urged the Court not to grant compensation because there was no pleading for such relief in the *Memorandum of Claim*.

42. The Respondent submitted that this Court should apply the principle set out in the case of Barrack *Odhiambo Ochieng v Elsek & Elsek (K) Ltd* (2014) eKLR.

43. The Court has reached a conclusion that the Respondent did not prove the existence of valid operational reasons to dismiss the Claimant.

44. *Compensation* is a discretionary remedy.

45. The factors the Court ought to consider are set out in section 49(4) of the Employment Act, 2007.

46. The Respondent paid *salary in lieu of notice* to the Claimant beyond what was provided for in the contract among other payments.

47. Considering the foregoing, and despite failure to explicitly plead compensation, a remedy which logically flows from a finding of unfair termination of employment, the Court is of the view that the equivalent of 1-month salary as *compensation* would be a fair award but that the Claimant be denied the 8-month *severance pay* and costs of the action.

### **Certificate of Service**

48. A *certificate of service* is a statutory entitlement. The Respondent exhibited a copy.

49. If the Claimant did not collect the certificate, she should collect the same from the Respondent.

### **Conclusion and Orders**

50. The Court finds and declares that the Respondent did not prove the existence of valid operational reasons to terminate the Claimant's contract and therefore the decision was unfair.

51. The Claimant is awarded

(a) Compensation                      **Kshs 500,000/-**

52. Each party to bear own costs.

**Delivered, dated and signed in Nairobi on this 31<sup>st</sup> day of January 2020.**

**Radido Stephen**

**Judge**

**Appearances**

For Claimant                      Mr. Nyaribo instructed by I.N. Nyaribo & Co. Advocates

For Respondent                      Mr. Njuguna instructed by Wainaina Ileri Advocates LLP

Court Assistant                      Lindsey