



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF

KENYA AT NAIROBI

CAUSE NO 321 OF 2016

ZENA ATITALA.....CLAIMANTS

VERSUS

DIMENSION DATA SOLUTIONS LTD..... RESPONDENT

JUDGMENT

1. The claim herein is for the following reliefs:

- (a) A declaration that she was wrongfully and unfairly dismissed from employment.
- (b) Unpaid dues totaling to Kshs. 2,792,582.03
- (c) 12 months salary as compensation for wrongful and unfair termination Kshs. 1,641,295/-
- (d) Punitive and aggravated damages for breach of the claimants constitutional rights.
- (e) Costs and incidental to this suit.

2. The facts of the case are that the claimant was employed by the respondent as a Systems Engineer on 8.8.2003 and worked as such until 5.8.2014 when her services were terminated on account of redundancy. The termination was without prior written notice but the claimant was offered salary in lieu of notice among other benefits. She however declined to receive the offered benefits and brought this suit contending that the termination was unfair because the reasons cited was not valid and the procedure followed was not in accordance with the procedure laid down by section 40 and 45 of the Employment Act. She therefore prayed for compensation for the unfair termination plus the accrued terminal benefits.

3. The Respondent admitted that she employed the claimant as Software Engineer as pleaded by the claimant until 5.8.2014 when she terminated her services on account of redundancy. She however, denied that the termination was unfair and averred that the termination was justified because the claimant had persistent misconduct and poor performance of her duties which led to difference between her and the line manager. She further averred that after the termination she prepared terminal dues to pay the claimant but she refused to pick the settlement cheques. She therefore prayed for the suit to be dismissed with costs.

Evidence

4. The claimant testified as CW1 and basically adopted the facts pleaded in her statement of claim and her written statement. She produced appointment letter and more important the termination letter dated 4.8.2014 which cited the reasons for the termination as redundancy and offered to pay redundancy pay under Section (g) of the Employment Act among other benefits. She denied the genuineness of the reason cited and maintained that she was never served with any redundancy notices before the said letter of termination. She therefore prayed for compensatory damages plus his accrued benefits.

5. The respondent called her HR Consultant M/s. Euphemia Wambui Muraya who testified as RW1. She also reiterated that the respondents averment's in the statement of defence that the separation with the claimant was on account of redundancy after she was rejected by her Line Manager and efforts to secure another position for her in the company was unsuccessful. She further contended that the claimant was offered her terminal dues but she declined. She therefore prayed for the suit to be dismissed.

6. In cross-examination, RW1 admitted that the claimant was in fact fired without being accorded any disciplinary or being taken through performance appraisal. She further admitted that the claimant's salary was Kshs. 115,955.10 as at the time of the separation.

Issues for determination

7. There is no dispute from the pleadings, evidence, and submissions that the claimant was employed by the respondent between 2003 and 5.8.2014 when she was laid off. The issues for determination are:

- (a) Whether the redundancy was unfair and unlawful
- (b) Whether the claimant is entitled to the reliefs sought.

Unlawful and unfair redundancy

8. The procedure for redundancy is set out under section 40 (1) of the Employment and it includes serving a mandatory prior written notice to the employee and the area Labour Officer. Thereafter the employer is bound by the law to conduct a fair selection process to identifying the employee for separation including the principle of first in last out. Thereafter the employer is required to pay the affected employees all their accrued leave, salary in lieu of notice plus severance pay.

9. In this case the respondent did not rebut the claimants contention that no prior notice was served on him and the area Labour Officer as required under section 40 (1) (a)as read with (b) of the Act. RW1 further admitted that the claimant was fired and her juniors were left doing her soft ware engineering role in breach of section 50(1)(c) of the Act.

10. The foregoing two violations of the mediation provisions of section 40 of the Employment Act rendered the redundancy of the claimant unlawful and to amount to unfair termination of her contract of service within the meaning of section 45 of the Act.

Reliefs

11. In view of the foregoing holding, I make declaration that the claimant was unfairly and unlawfully dismissed by the respondent. Accordingly under section 49 (1) I award her one month salary in lieu of notice plus 12 month salary compensation for the unfair dismissal. In awarding the said compensation, I have considered the fact that the claimant had served the respondent for over 11 years without any warning and her dismissal was from no wrong doing on his part because under section 2 of the Employment Act, redundancy is defined as termination of employees services for no fault but at the initiative of the employer. I have further considered the fact that the claimant will not get severance pay after I award her compensation herein.

12. I further award the claimant 21 leave days as prayed because the respondent did not rebut that claim using leave records. Hence $115,955.17 \times 21/26 = \text{Kshs. } 93656.09$ but I award what is pleaded being Kshs. 92,763.30.

13. However, the claim for Bonus and Medical Cover are dismissed for lack of evidence and merits.

14. In conclusion I enter judgment for the claimant against the respondent under section 49 (1) of the Employment Act as follows:

- (a) Notice**Kshs.115955.17**
- (b) Compensation**Kshs. 1,391,462.94**
- (c) Leave**Kshs. 92763.30**
- TotalKshs. 1,600,180. 51/-**

The said award is subject to statutory deductions but in addition to costs plus interest at court rates from the date hereof.

Dated, signed and delivered in open court at Nairobi this 7th day of February, 2020.

ONESMUS N. MAKAU

JUDGE