



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 2060 OF 2016

(Before Hon. Lady Justice Maureen Onyango)

IBRAHIM HAJI ALI.....CLAIMANT

VERSUS

GULF AFRICAN BANK (K) LIMITED.....1ST RESPONDENT

JAMAL AL HAZEEM..... 2ND RESPONDENT

JUDGMENT

The claim herein was instituted vide the claimant's memorandum of claim dated 30th September, 2016 and filed on 6th October, 2016. It is the claimant's averment in the memorandum of claim that he was employed by the 1st Respondent herein while the 2nd Respondent is the Board Chairman of the 1st respondent.

The Claimant avers that he was employed by the 1st Respondent on or about 2nd May 2013 and that during the subsistence of his employment contract he performed his duties diligently and to the Respondents satisfaction until 31st August 2015 when his services were unlawfully and unfairly terminated by the 1st Respondent herein.

The Claimant further avers that at the time of termination he held the Position of Manager New Initiatives (Products and Projects) Business Division and was earning a monthly salary of Kshs.340,000.

The Claimant avers that on 1st August, 2015, the 1st Respondent issued to him a letter informing him of purported redundancy following the restructuring of its Business Division and the subsequent scrapping of the Role of Manager New Initiatives. He further avers that there was no prior notice of the intended layoffs and therefore maintained that the Respondents actions are unlawful and tainted with malice.

The Claimant maintained that the Respondents failed to adhere to the mandatory provisions of Sections 40, 41 and 43 of the Employment Act, 2007 and therefore the termination was unlawful, wrongful and unfair.

He insisted that the termination of his employment was not based on any restructuring but on sustained witch hunt and discrimination against him by the Respondents herein.

He further contended that the 2nd Respondent failed to implement his responsibilities fairly and equitably and it lead to denial of loans, bonuses and salary increments to him during the subsistence of his employment contract with the 1st Respondent.

The Claimant stated that for the 28 months he worked for the 1st Respondent other employees were granted two salary increments but he did not receive any. He further averred that on 7th March 2014 the 1st Respondent granted bonus and salary increments to employees based on its performance for the year 2014 but failed to give him any bonus. It is on this basis that the Claimant maintains that the Respondents are guilty of discriminating him as no explanation was offered by the Respondents on for exclusion from the benefits.

Aggrieved by the termination of his employment, the Claimant filed the instant Claim seeking the following reliefs: -

1. Judgment against the Respondents in the sum of Kshs.40,020,000 comprising of:

i.. Salary in lieu of 3 months' notice.	Kshs.1,020,000
ii. 12 months' compensation for loss of employment (340,000 x 12).....	Kshs.4,080,000
iii. Salary compensation for early retrenchment (Kshs.340,000 x 7 years, 4 months).....	Kshs.29,920,000
iv. Damages for discrimination in employment	Kshs.5,000,000
Total	Kshs.40,020,000

2. Costs of the suit

3. Interest on (1) and (2) above at commercial rates of 20%

4. Any other and/or further relief that this Court may deem just to grant in the circumstances.

The Respondent in its Reply to the Claimant's Memorandum of Claim dated 17th November, 2016 and filed in Court on 28th November, 2016 admitted having engaged the Claimant in the manner alleged in the Memorandum of Claim. It however, maintained that the Claimant's termination was not unlawful and wrongful as alleged by the Claimant.

The Respondent averred that the true position was that the Claimant's role of Manager of New Initiatives was declared redundant as a consequence of restructuring within the 1st Respondent's operations which resulted in re-organization. It further maintained that due process was followed as provided under Section 40 of the Employment Act, 2007.

The respondents further maintained that the 2nd Respondent has been improperly joined as a party to this suit this being a claim that relates to the employment relationship between the Claimant and the 1st Respondent. It was contended that the Claim as against the 2nd Respondent is baseless and unmerited as he is an agent of the 1st Respondent.

It is the Respondents' contention that the entire Claim is void of merit. It therefore urged the Court to dismiss the same with costs to the Respondent.

The suit proceeded for hearing on 15th July 2016 with the Claimant testifying on his own behalf. The Respondent called one (1) witness to testify on its behalf. Both parties thereafter filed written submissions.

Claimant's Case

The claimant adopted his witness statement filed in Court on 6th October, 2016 as his evidence in chief. In his statement he reiterates the averments made in his Memorandum of Claim. In brief the Claimant avers that he was employed by the 1st Respondent on 2nd May 2013 and worked until 31st August 2015 when he was unlawfully and wrongfully terminated allegedly on account of redundancy.

The claimant testified that on 1st July 2015 when the 1st Respondent issued the alleged notice of termination he was on annual leave which he had taken from 23rd June 2015. He was scheduled to report back to work on 10th July 2015.

The claimant testified that he is a victim of discrimination as no other employee was affected by the alleged redundancy. Further, that no notice was issued to the labour office as required under the provisions of Section 40 of the Employment Act, 2007. It is on this basis that the Claimant maintained that his termination was not based on restructuring but on sustained witch hunt and discrimination.

He urged this Court to allow his Claim in terms of the reliefs sought therein.

On cross examination, the claimant confirmed that there were two notifications of redundancy, one dated 14th October 2015 and another dated 29th October 2015. He testified that he received his notice on 4th November 2015 but the same was backdated.

The claimant confirmed that he was paid all dues in terms of accrued salary as well as redundancy dues at the time of his separation with the 1st Respondent.

The claimant stated that he was the only person working in his department and was also the only person affected by the alleged redundancy.

He maintained that the Bank's performance was good and there was no need for restructuring. It is on this basis that he insisted that his redundancy was discriminatory and was as a result of witch hunt. He further testified that he was prematurely declared redundant prior to him attaining the mandatory retirement age of 60 years.

The claimant stated that he was entitled to payment of 3 months' salary in lieu of notice and that his employment contract was defective as it provided for termination with one month's notice or payment in lieu thereof. He insisted that for an officer at his level the notice period was 3 months or payment in lieu thereof.

On re-examination, the claimant stated that his redundancy was to take effect on 1st August 2015 but he worked until 1st September 2015 after handing over. He further stated that his termination was not based on performance as his performance was good. That he was a victim of discrimination as his salary was not increased despite his good performance and increments within the Bank.

Respondent's case

LUL BARRE MUSA, RW1, Head of Human Resource Department of the 1st Respondent adopted her witness statement dated 18th May 2018 and filed in Court on 21st May 2018 as her evidence in chief.

RW1 avers in her statement that the 1st Respondent informed the Claimant through his line manager and Human Resource Department of the impending restructuring and re-organization that was to be implemented over a period of three months between July 2015 to September 2015 and that his position would be affected. That the Claimant was duly notified of the intended redundancy through the Respondent's letter dated 1st July 2015. That on 1st September 2015 he was issued with a notice of actual redundancy that set out his entitlements including severance pay, 1 month's payment in lieu of notice and payment of unutilized leave days up to 31st August 2015.

She further stated that the Respondent, in compliance with Section 40 of the Employment Act, 2007 notified the Labour Officer of the Claimant's redundancy by its letter dated 7th September 2015.

She stated that the Claimant's redundancy was therefore procedural and lawful having complied with the mandatory provisions of Section 40 of the Employment Act, 2007. She confirmed that the Claimant being the only member of staff in the New Initiative Department, was the only person affected by the redundancy.

On the issue of unpaid bonus RW1 stated that the Claimant did not qualify for payment of bonus as his performance for the year 2014 fell short of the 1st Respondent's expectation compared to his performance in the year 2013. She further stated that the Claimant had no contractual entitlement to bonus payment.

RW1 stated that the issue of salary increment was also not a guarantee and that the same is solely based on the 1st Respondent's discretion.

She urged the Court to dismiss the instant Claim in its entirety with costs to the Respondents.

On cross examination RW1 confirmed that at the time of the redundancy the Claimant was on annual leave. She however confirmed having personally discussed the issue of the intended restructuring with the claimant in the month of June 2015.

RW1 further confirmed that according to the redundancy notice that was issued to the Labour Officer the Claimant was to be declared redundant from 1st August 2015. She also confirmed that the Claimant continued working up to 1st September 2015. RW1 testified that the notification to the Labour Officer was not stamped to confirm receipt but insisted that the letter was properly served on the said office.

RW1 testified that at the time of his redundancy the Claimant was not a member of any union and that there were no restrictions on joining unions.

On re-examination RW1 clarified that there was an oversight in the letter to the Labour Officer as the Claimant's redundancy was to take effect on 1st September 2015 and not 1st August 2015. She further confirmed that the Claimant's redundancy took effect on 1st September 2015 and his dues were computed and paid to 31st August 2015.

Submissions by the Parties

The Claimant submitted that his employment was unfairly terminated without notice, justification or compliance with procedure as provided under the mandatory provisions of Section 40 of the Employment Act and therefore the termination was unfair and unlawful. The Claimant relied on the case of **Gladys Muthoni & Others Vs Barclays Bank Group & Another (2016) eKLR** that quoted the case of **Thomas De La Rue (K) Limited Vs David Opondo Omutelema** where the Court emphasised the provisions of Section 40(a) and 40(b) that provides for redundancy notifications to be served prior to an employee being declared redundant.

The Claimant further cited the authority of **Fredrick Mulwa Vs Kenya Commercial Bank Limited (2017) eKLR** to emphasise the need for employers to comply with the mandatory provisions of Section 40 of the Employment Act while declaring its members of staff redundant.

The Claimant further submitted that there was no warning or consultation and that his redundancy was as a result of discrimination and witch hunt as he was the only member of staff affected by the alleged redundancy. He therefore submitted that his termination was wrongful and unfair and contrary to the provisions of Section 41 and 45 of the Employment Act, 2007. For emphasis the Claimant relied on the case of **Walter Ogal Anuro Vs Teachers Service Commission (2013) eKLR** where the Court discussed the need for both substantive and

procedural fairness for a termination to be valid.

On remedies, the Claimant submitted that he is entitled to three months' salary in lieu of notice as pleaded being a senior member of management for 2 years and 8 months and having been subjected to unfair termination. The Claimant relied on the authority of **Wilson Simiyu Vs B.O.G Friends School Bokoli (2016) eKLR** where the Claimant was awarded 3 months' salary in lieu of notice.

He further submitted that he is entitled to compensation for unfair termination as he has proved that his termination was procedurally and substantively unfair. He maintained that he is entitled to maximum compensation of twelve (12) months' salary. For emphasis the Claimant cited the case of **Mary Mwendwa Vs Ayuda Ninos De Africa-Kenya (2013) eKLR** where the Court held that where an employee's dismissal is wrongful he/she is entitled to be compensated fully for the loss suffered as a result of such a dismissal.

The Claimant further maintained that he is entitled to damages for discrimination and cited the cases of **Raticliffe Vs Evans (1982) QB 524** and **Arnacherry Limited Vs The Attorney General (2014) eKLR** where the Courts awarded damages for discrimination.

The Claimant submitted that he is also entitled to compensation for early retrenchment as he still had productive years to offer services to the Respondents.

In conclusion, the Claimant urged the Court to allow his Claim in terms of the reliefs sought therein.

Respondents' Submissions

The Respondents on the other hand submitted that the Claimant's termination by way of redundancy was fair and valid. The Respondents relied on the principles set out in the case of **Kenya Airways Limited Vs Aviation & Allied Workers Union Kenya & 3 Others (2014) eKLR** where the Court held that a redundancy is valid and fair if based on the requirements of the employer.

The Respondent submitted the Claimant's termination on account of redundancy was necessitated by re-organization of its functions which resulted in the abolition of some functions/offices including that held by the Claimant.

The Respondent further maintained that it did comply with the mandatory provisions of Section 40 of the Employment Act as it notified the Claimant of the intended redundancy vide its letter of 1st July 2015. It further issued him with the actual notice of redundancy setting out his entitlements in a letter erroneously dated 1st August 2015. It contended that the error was later rectified to read 1st September 2015. It submitted that the Claimant's dues were computed and paid at the time of separation. It is on this basis that the Respondent maintained that the Claimant's termination on account of redundancy was lawful and justified.

The respondent maintained that the Claimant is not entitled to the reliefs sought in his Claim. On the Claim for compensation for unfair redundancy the Respondent maintained that the Claimant is not entitled to the same, the respondent having complied with the mandatory provisions of Section 40 of the Employment Act, 2007 therefore making the redundancy valid and fair in the circumstances.

The Respondent submitted that the Claimant is not entitled to the relief of three months' salary in lieu of notice as his contract only provided for one month's notice.

On the Claim for compensation for early retrenchment the Respondent submitted that the same ought to be dismissed for lack of justifiable basis as it would be tantamount to unjust enrichment on the part of the Claimant. For emphasis the Respondent cited the case of **D. K Marete Vs Teachers Service Commission (2013) eKLR** where the Court held that a grant of anticipatory salaries and allowances for a period of 11 years left to the expected mandatory retirement age of 60 years would not be a fair and reasonable remedy.

The Respondent further maintained that the claim for damages for discrimination has no basis and urged this Court to dismiss the same.

In conclusion the Respondent urged this Court to dismiss the Claim in its entirety with costs to the Respondents.

Analysis and Determination

Having considered the facts of this cause, evidence adduced by the parties hereto, submissions and authorities cited by both the Claimant and the Respondent respectively, the following are the issues for determination:

1. Whether the termination of the claimant's employment by way of redundancy was lawful and fair.
2. Whether the 2nd Respondent is properly enjoined in this matter.
3. Whether the Claimant is entitled to the reliefs sought.

Redundancy is defined under Section 2 of the Employment Act as–

“redundancy” means the loss of employment, occupation, job or career by involuntary means through no fault of an employee,

involving termination of employment at the initiative of the employer, where the services of an employee are superfluous and the practices commonly known as abolition of office, job or occupation and loss of employment;

Section 40(1) sets out the procedure for redundancy. Section 40(1)(b) requires the employee and the Labour Officer to be notified where the employee is not a member of a union.

The Claimant in his pleadings, evidence and submissions contends that the Respondent's did not follow due process while declaring his position redundant. The Claimant further contends that he was a victim of discrimination and witch hunt as he was the only employee affected by the alleged redundancy despite being a senior manager.

Redundancy is a lawful exercise if undertaken in the manner provided by law. The procedure under Section 40 requires the employer to notify the employee or union and the Labour Officer at least one month before redundancy, of the reasons and extend of redundancy. The employer is further required to justify the selection criteria to ensure no discrimination.

The Respondent sent out notice to the Labour Officer on **7th September 2015** which was 7 days after the redundancy had taken effect. In the case of **Bernard Misawo Obora vs Coca Cola Juices Kenya Limited [2015] eKLR**,

- iii. Accrued salary up to 31st August, 2015; and,
- iv. Accrued but untaken leave days

The Claimant in cross examination admitted having been paid the above.

i. Three Months' Salary in lieu of notice

The Claimant having been paid one (1) month's salary in lieu of notice he is not entitled to the same.

ii. Compensation for unfair termination Kshs.4,080,000

Having found that the Claimant's termination on account of redundancy was flawed, I award him one month's salary to cover the one month's period that the respondents delayed in notifying the Labour Officer of the intended redundancy. I award him the same at **Kshs.340,000**.

iii. Compensation for early retrenchment, Kshs.29,920,000

The Claimant is not entitled the above prayers which is for anticipatory salaries to the date of retirement given that there is no guarantee that the Claimant would have worked with the Respondent until he attained his retirement age. This would amount to unjust enrichment which the Court cannot entertain.

In the case of **D. K Njagi Marete Vs. Teachers Service Commission – Industrial Cause No 379 of 2009** Rika J. held:

“What remedies are available to the Claimant “This Court has advanced the view that employment remedies must be proportionate to the economic injuries suffered by the employees. These remedies are not aimed at facilitating the unjust enrichment of aggrieved employees; they are meant to redress economic injuries in a proportionate way.”

Further reference is made to the case of **Pamela K. Butalanyi Vs University Council for the Kenya Polytechnic University College (2015) eKLR** where it was held that employment remedies must be proportionate to the injury sustained by the Employee. They are not aimed at advancing any parties desire for unjust enrichment.

iv. Damages for discrimination

The Claimant maintained that he was a victim of discrimination and witch hunt by the Respondents. He further maintained that it is due to the discrimination that he is the only member of staff that was affected by the alleged redundancy.

The Respondents on the other hand maintained that the Claimant was the only member of staff working in the department of New Initiatives that was affected by the redundancy. It averred that the Claimant's department was scrapped off following the restructure.

The claimant did not adduce any evidence to prove witch-hunt or discrimination. The fact that he was the only one declared redundant, without further evidence, is not proof of discrimination as this was satisfactorily explained by the respondent. The claimant admitted that he was heading a one man department which was abolished.

I find that the Claimant has failed to prove his case for damages for discrimination. The same is therefore dismissed accordingly.

In the final analysis the claimant is awarded Kshs.340,000 as set out above.

The Claimant is further awarded costs of this suit. Interest shall accrue at Court rates from the date of judgment until payment in full.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 12TH DAY OF MAY 2020

MAUREEN ONYANGO

JUDGE

ORDER

In view of the declaration of measures restricting court of operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020, that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice

guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B** of the **Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MAUREEN ONYANGO

JUDGE