



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR

RELATIONS COURT AT NAIROBI

CAUSE NO.491 OF 2016

(Before Hon. Lady Justice Hellen S. Wasilwa on 16th September, 2020)

KAREN KARAGANIA NJUGUNACLAIMANT

VERSUS

LONGHORN PUBLISHERS KENYARESPONDENT

JUDGEMENT

1. The Claimant herein filed a Memorandum of Claim dated 17th March, 2016 and filed in Court on 22nd March, 2016 claiming unfair, malicious and unlawful termination of her Contract of employment with the Respondent herein, a limited liability company.
2. The Claimant avers that she was employed by the Respondent from 28th February, 1995 in the position of Personnel Assistant and rose through the ranks to the position of Personnel and Administration Manager in charge of Human Resources, a position she held until 3rd April, 2013 when her position was unlawfully and un-procedurally declared redundant by the Respondent despite her excellent performance. She further avers that at the time of her redundancy she earned a monthly salary of Kshs. 218,968/- .
3. The Claimant further avers that the position of Personnel and Administration Manager that she last held was merely renamed as Chief Human Resource Officer and recruitment for the said position commenced less than a month prior to her position being redundant.
4. The Claimant maintains that the responsibilities of the renamed new position and that which she held remained the same as was evidenced by the Vacancy advertisement and her letter of appointment. She therefore maintained that her redundancy was un-procedural and malicious and offends the provisions of Section 40 of the Employment Act, 2007.
5. The Claimant further maintains that the assertion by the Respondent that the Human Resource functions were merged with those of finance is baseless, as the two functions remain separate.
6. Aggrieved by the decision to unfairly terminate her services on the alleged account of redundancy the Claimant filed the instant Claim seeking the following reliefs:-
 1. *Reinstatement.*
 2. *Maximum Compensation.*
 3. *General damages for unlawful Redundancy.*
 4. *Costs of the suit.*
 5. *Any other remedy the Court deems fit to grant.*
7. The Respondent in its Memorandum of Response dated 16th June, 2016 and filed in Court on 17th June, 2016 admitted having engaged the Claimant in the manner alleged in her Memorandum of Claim.
8. The Respondent maintains that the termination of the Claimant's contract of employment was terminated on account of redundancy and was done in accordance with the provisions of Section 40 of the Employment Act, 2007 and that she was further paid all her dues amounting

to Kshs. 1,849,582.90/- at the time of her separation with it.

9. It therefore contends that the Claimant has no Claim as against it and urged this Honourable Court to dismiss the Claim as filed with costs to the Respondent.

10. The matter thereafter proceeded for hearing on 12/3/2020 with the Claimant testifying and the Respondent calling one witness to testify on its behalf.

Claimant's Case

11. The Claimant, CW1 sought and was allowed to have her witness Statement filed in Court on the 22/3/2016 as her evidence in Chief. She further relied on the List and bundle of documents filed on even date.

12. She further testified that there was no valid reason for her position to be declared redundant and therefore urged this Court to allow her Claim in terms of the reliefs sought therein.

13. On cross-examination, CW1 confirmed having received a redundancy notice that was duly acknowledged having been received by the Labour Officer. She further confirmed that the redundancy notice was to take effect from the 4/5/2013 and that the reasons for redundancy were clearly indicated in the said letter.

14. On further cross-examination, CW1 confirmed having received the sum of Kshs.1,291,047.50/- being terminal dues and was issued with a Certificate of Service at the time of her separation from the Respondent.

15. On re-examination CW1 maintained the reasons advanced by the Respondent for the redundancy was not genuine and that she is therefore entitled to the reliefs sought in her Memorandum of Claim.

Respondent's Case

16. RW1, **Keziah N. Waiganjo**, the Human Resource - Business Partner – Employee Relations with the Respondent herein adopted her witness statement dated 10th March, 2020 and filed in Court on 12th March, 2020 as her evidence in chief.

17. In her statement RW1 confirms that the Claimant was indeed employed by the Respondent herein on 28th February, 1995 until the year 2013 when the Respondent's board made a decision to undertake reconstruction its operations and as a result the Claimant's position at the time being Personnel and Administrative Manager, was abolished and the responsibilities merged with those of Finance and Administration Manager.

18. RW1 further contended that the Claimant's employment was terminated on account of redundancy and was paid all her terminal dues at the time of her separation with the Respondent. RW1 further confirmed the Claimant was paid a sum of Kshs 1,846,528.88/- as terminal dues at the time of separation.

19. RW1 insisted that due process as laid down under the provisions of Section 40 of the Employment Act, 2007 were followed during the Claimant's redundancy and that as a result, her Claim as against it ought to be dismissed with costs to the Respondent.

20. On cross-examination, RW1 insisted that the position she held at the Respondent firm was not merged with those of Finance despite the fact that the letter of redundancy indicated the same.

21. She further testified that both positions remained answerable to the Respondent's Managing Director. RW1 further contended that due process was not followed and therefore urged this Honourable Court to allow her Claim as prayed.

22. Parties thereafter filed and exchanged their written submissions to the Claim.

Submissions by the Parties

Claimant's Submissions

23. The Claimant submitted that from the evidence on record the purported reasons given for redundancy were a sham as her position was not abolished and/or merged with the finance department as contended by the Respondent. She further contended that following her alleged redundancy the Respondent proceeded to recruit and fill the position.

24. She maintained that these actions by the Respondent amounted to unfair labour practices and is contrary to the provisions of Article 41 of the Constitution and Section 40 of the Employment Act, 2007. To buttress this argument the Claimant cited and relied on the case of **Wilson Githu Rutinu Vs Orpower 4 Inc Limited (2020) eKLR.**

25. She further submitted that her termination on account of redundancy was therefore malicious and a ploy by the Respondent to remove her from gainful employment without valid reasons.

26. It is on this basis that the Claimant argues that her termination was unfair, malicious and not genuine and therefore urged this Honourable

Court to allow her Claim in terms of the reliefs sought therein.

Respondent's Submissions

27. It is submitted on behalf of the Respondent herein that the Claimant's termination on account of redundancy was both substantively and procedurally fair and was therefore lawful. To buttress this argument the Respondent cited and relied on the Court of Appeal decision in the case of **Kenya Airways Limited Vs Aviation & Allied Workers Union Kenya & 3 Others (2014) eKLR**.

28. The Respondent further maintained that it did follow the mandatory provisions of Section 40 of the Employment Act, 2007 having served the requisite notice as required under the said section and in the manner prescribed therein.

29. The Respondent maintained that the Claimant is not entitled to the reliefs sought in her Memorandum of Claim as filed herein. On specific prayers, the Respondent maintained that the Claimant is not entitled to the relief of reinstatement by dint of Section 49 (4) of the Employment Act.

30. The Respondent further maintains that there is no basis for the payment of general damages for unlawful redundancy as pleaded by the Claimant herein as the Respondent followed due process in the Claimant's redundancy and that she was duly paid all her dues at the time of her separation a fact that was not disputed by the Claimant.

31. On the issue of costs, the Respondent contended that the same follow event and that in view of the fact that the Claimant's termination process was fair, lawful and procedural she is therefore not entitled to any costs. For emphasis, the Respondent cited and relied on the Court of Appeal decision in the case of **OI Pejeta Ranching Limited Vs David Wanjau Muhoro (2017) eKLR** where the Court held that Section 12 (4) of the Employment and Labour Relations Court Act, 2011 empowers this Court to award costs as it considers just.

32. In conclusion, the Respondent argued that the Claim is baseless and therefore urged this Court to dismiss it in its entirety with costs to the Respondent.

33. I have examined the evidence and submissions of the Parties herein. The issues for this Court's determination are as follows:-

1) Whether there was a redundancy situation to warrant Claimant being terminated.

2) Whether due process was followed.

Redundancy

34. On this issue, the Claimant maintain that there was no redundancy situation. She maintains that the reason given for the redundancy was that her department was being abolished and being merged with finance department but that this never happened.

35. To drive this point home, the Applicant exhibited her letter of appointment, which also contain her job description and key responsibilities. She compares this with the advertised position of Chief Human Resource and Administration Office with its key responsibilities and indicated that those were the duties she carried out.

36. She avers that the duties she carried out were the same ones for the advertised posts, which indicate that there was no redundancy situation. This post was advertised within month from the time the Claimant was declared redundant.

37. The Respondents contend that the recruitment in question was commenced when Claimant was in the Respondent's service and was done procedurally.

38. The Respondents have not denied that the duties of the holder of the new post of Chief Human Resources Officer was similar to the duties previously carried out by the Claimant.

39. The Claimant reported to the Managing Director and so was the holder of the new post. The Respondent had intimated that the new post was merged with finance but there is nothing to indicate that there was such a merger as the duties of the new holder remained Human Resource in nature.

40. Section 2 of the Employment Act 2007 defines redundancy as follows:-

“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”.

41. The law envisages that for there to be a real redundancy situation, there must be a valid reason in which the employer and employee had no part to play. In the case of the instant case herein, the Respondents have not demonstrated the existence of a redundancy situation because they declared the Claimant redundant and employed someone else to fill the same post.

42. It is therefore my finding that there was no redundancy situation that warranted the Respondent declaring the Claimant redundant and so the termination of the Claimant on account of redundancy was unjustified.

Due process

43. Concerning this issue, the Claimant had submitted that due process was not given. She however agreed that she was given due notice and paid her redundancy dues.

44. Despite Claimant's assertion, I find provisions of Section 40 of the Employment Act 2007 were followed and so the process was procedurally proper.

Remedies

45. Having found the termination of the Claimant flawed due to lack of valid reasons, I find that the Claimant is entitled to compensation. She had duly been paid her redundancy dues as admitted and correct procedure followed.

46. Due to the lack of valid reasons, I find compensation to the tune of salary for 9 months reasonable in the circumstances. I therefore find for Claimant accordingly and award her compensation of 9 months' salary = $9 \times 377,955 = 4,401,595/=$ – less statutory deductions

47. The Respondent will pay costs of this suit plus interest at Court rates with effect from the date of this judgement.

Dated and delivered in Chambers via zoom this **16th day of September, 2020.**

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Mutuku holding brief Bosire for Claimant – Present

Arema for Respondent – Present