REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 2365 OF 2016

(Before Hon. Lady Justice Maureen Onyango)

AFRED YAMBO OYIE.....CLAIMANT

VERSUS

FATIMA MISISON HOSPITAL.....RESPONDENT

JUDGMENT

Vide a Memorandum of Claim filed on 22nd November, 2016 the Claimant alleges that the termination of his employment was contrary to the Employment Act as the reasons for the termination were unjustified. He further alleges that he was terminated without notice in spite of his contract of employment having a termination clause. He seeks the following prayers:

1. 8 months' salary compensation for unlawful loss of employment and being the salary for the unexpired term of the employment contract. 30,000 x 8 = 240,000/-.

2. Interest on (a) above at court rates until payment in full.

3. Certificate of Service.

4. Compensation for unlawful termination of employment and all other accumulated rights and benefits as the law may grant.

5. Costs and incidental to the suit.

The respondent filed a Statement of Defence on 7th December 2016. It avers that the Claimant impersonated a manager and committed other adverse actions including sabotage, insubordination and destruction of records. It avers that the Claimant accepted its reasons for termination but pleaded with it not to put the same in the letter of termination which was mutually signed.

It confirms that the contract of employment had a specific termination clause that allowed termination but denies the claimant's allegations that his termination was unlawful and unfair. It alleges that it fully settled the Claimant's dues.

The Claimant filed a Reply to the Statement of Defence on 13th December, 2016 in which he denies that he impersonated a manager and that he accepted the reasons for termination. He avers that not only did the Respondent terminate his employment contract but has now embarked on a mission to malign, defame and taint his character.

The matter proceeded by way of written submissions but only the

Claimant filed his submissions.

Claimant's Submissions

The Claimant submitted that the Court directed the parties to narrow down their submissions on redundancy as this was the reason given in the letter of termination. He relied on the case of **Hesbon Ngaruiya Waigi v Equitorial Commercial Bank Limited [2013] eKLR** where the Court held that the procedure under section 40 of the Employment Act if not followed, the termination is deemed unprocedural and unfair.

It submitted that Section 40(1)(b) of the Employment Act provides for notification of redundancy. He submitted that there is no indication that the claimant was informed of the impending redundancy and that all the Respondent did was to issue the letter of termination dated 29th January, 2016.

He referred to his letter of termination which stated that the respondent was facing challenges and thus it was unable to sustain his office as needs of the department did not justify the continuation of his appointment.

He submitted that Clause 6 of his contract of termination provided that a party was to give one month's notice of termination and that the only scenarios that warranted instant termination was on gross misconduct. He submitted that his termination was to take effect the day after meaning that he was issued with the letter of termination with less than 24 hours' notice of termination. He argued that this contravened the rules of natural justice, the Employment Act and the Fair Administrative Action Act.

He submitted that there was no indication that he was informed of the criteria used in the selection of employees declared redundant thus the Respondent did not meet the provisions of Section 40(1)(c) of the Employment Act. He submitted that he was also not issued with a notice as require under Section 40(1)(f) of the Act.

He submitted that though an employer cannot be denied the right to reorganisation or declaring a redundancy, it must follow the law. He relied on the case of **Aviation & Allied Workers Union v Kenya Airways Limited and 3 Others [2012] eKLR** where the court held that redundancy must be by involuntary means and at the initiative of the employer.

He submitted that it is evident that the Respondent failed to consult the Claimant thus the whole process was done in an irregular manner. He submitted that the Respondent has not shown that it abolished his office. According to him, the office is still there and functioning and the Respondent replaced him with a new employee. He further argued that the hospital was not in a financial crisis.

It relied on the case of **Kenya Airways Corporation Limited v Tobias Ogaya Auma & 5 others [2007] eKLR** where the Court held that one cannot prevent an employer from declaring employees redundant where there were genuine reasons to do so. He further relied on the cases of **The Queen v Industrial Commission of South Australia; ex-parte Adelaide Milk Supply Co-operative Limited [1977] 44 SAIR 1202** and **Jones v Department of Energy and Minerals [1995] IRCA 292**.

He submitted that the Respondent did not adduce any evidence to prove that the termination on account of redundancy was lawful. In conclusion, he submitted that he is entitled to the prayers sought.

Determination

The issues for determination are:

1. Whether the Claimant's termination was due to redundancy and if the same amounts to unfair termination.

2. Whether the Claimant is entitled to the reliefs sought.

Termination

The Claimant's case is that the grounds for his termination were baseless, unjustified and untenable. The Respondent's case is was terminated for impersonation and insubordination.

The Claimant's letter of termination dated 29th January, 2016 stated thus:

> "29th January, 2016
>
> Alfred Yambo
>
> P.O. Box 10552-00100
>
> Nairobi
>
> Dear Alfred,
>
> ***RE: TERMINATION OF EMPLOYMENT***
>
> I am writing to you about the termination of your employment with Fatima Maternity Hospital.
>
> I refer to our meeting on 29th January 2016 which was attended by you, employer and the administrator. During the meeting we discussed termination of your employment.
>
> In this meeting we agreed on the following:

- That termination of your employment starts with effect on 1st February 2016.
- Your dismissal is in line with our termination policy. According to this policy, either party may terminate the employee employer relationship without notice and without cause
- Due to challenges currently facing the organisation, the management is unable to sustain your office as the needs or resources of the department do not justify the continuation of your appointment.
- That you will be written a letter confirming everything we discussed during our in person meeting.
- You will be paid any accrued entitlements, outstanding remuneration, including superannuation and one month's pay in lieu of notice.

…"

[Emphasis Added]

Consequently, the reason advanced by the Respondent for the Claimant's termination was that management was not in a position to sustain his office as an administration clerk due to the challenges it was facing. This therefore was a termination occasioned by no fault of the Claimant. The respondent neither adduced evidence to prove that it indeed faced challenges nor filed submissions to justify the redundancy.

The Respondent's Witness Statement recorded by Vincent Kimwele stated that the Claimant did not have experience for the position of administrative clerk and that the Claimant had pleaded with him for a lenient termination letter so as not to ruin his career. None of these allegations were proved.

Section 2 of the Employment Act provides 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;

The Respondent having terminated the Claimant due to operational or financial constraints it had faced, it was required to comply with Section 40 of the Employment Act. Section 40(1) of the Act provides:

1. An employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions—

a. where the employee is a member of a trade union, the employer notifies the union to which the employee is a member and the labour officer in charge of the area where the employee is employed of the reasons for, and the extent of, the intended redundancy not less than a month prior to the date of the intended date of termination on account of redundancy;

b. where an employee is not a member of a trade union, the employer notifies the employee personally in writing and the labour officer;

c. the employer has, in the selection of employees to be declared redundant had due regard to seniority in time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy;

d. where there is in existence a collective agreement between an employer and a trade union setting out terminal benefits payable upon redundancy; the employer has not placed the employee at a disadvantage for being or not being a member of the trade union;

e. the employer has where leave is due to an employee who is declared redundant, paid off the leave in cash;

f. the employer has paid an employee declared redundant not less than one month's notice or one month's wages in lieu of notice; and

g. the employer has paid to an employee declared redundant severance pay at the rate of not less than fifteen days pay for each completed year of service.

The Claimants termination was to take effect on 1st February, 2016 which was 2 days after the date of his termination letter. Evidently, the procedure set out under Section 40(1) of the employment Act was not followed. The Court of Appeal in **Barclays Bank of Kenya Ltd & Another v Gladys Muthoni & 20 others [2018] eKLR** held:

"Section 40 (1) 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:…

There is a heavy burden of proof placed upon the employer to justify any termination of employment. As stated earlier, the appellants here ought to have given the "the reasons and the extent of the redundancy" but there is no evidence on record sufficient to discharge

that burden…"

I therefore find that the Claimant's termination on account of redundancy amounted to unfair termination as the Respondent failed to justify the reasons for such termination and did not comply with statutory requirements.

Compensation

The Claimant sought 8 months' compensation being the unexpired term of his employment contract. His contract of employment commenced on 1st September, 2014 and was for a period of 2 years. His contract would have lapsed on 30th August, 2016 but the termination of his employment took effect on 1st February, 2016. Section 49 the Employment Act and Section 12(3) of the Employment and Labour Relations Court Act provide for the orders that this Court can grant.

No such remedy as compensation for an unexpired term in a fixed contract was contemplated under the law. Additionally, this court has in various decisions held that such payment amount to unjust enrichment. This prayer therefore fails together with the prayer for interest on this claim.

The Claimant is entitled to a Certificate of Service under Section 51 of the Employment Act.

With respect to the claim for compensation for unlawful terminations, I award the Claimant 4 months' salary for unfair termination. I take into account Section 49(4)(e) of the Employment Act as the Claimant had only served the Respondent for one year and a few months and had only 7 months' to the completion date of his fixed term contract. The Claimant is awarded Kshs.39,850 x 4 months = **Kshs.159,400**.

The Claimant is awarded costs of the suit and interest.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 6TH DAY OF NOVEMBER 2020

MAUREEN ONYANGO

JUDGE

ORDER

In view of the declaration of measures restricting court 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, the 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 the 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