



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1941 OF 2015

(Before Hon. Justice Hellen S. Wasilwa on 17th January, 2019)

FAIZA MAYABI.....CLAIMANT

-VERSUS-

FIRST COMMUNITY BANK LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant herein filed a Memorandum of Claim dated and filed in Court on 30th October, 2015, seeking damages for the following:-
 - a. **Unlawful, unfair and wrongful summary dismissal by the Respondent.**
 - b. **Violation and breach of Constitutional fundamental right on fair labour relations.**
 - c. **Unlawful, unfair and wrongful declaration of redundancy on the Claimant.**
2. She states that she was employed by the Respondent on a permanent and pensionable basis on 29th April, 2011 as a customer Service Officer and owing to diligence and proper work ethics was promoted to the position of Senior Officer Remedial Grade 2 earning a salary of Kenya Shillings Seven Hundred and Fifteen Thousand Five Hundred and Sixty Shillings Only (Kshs. 715,560/-) per annum.
3. The Claimant further states that without any proper reason the Respondent unlawfully, unfairly, wrongfully and prematurely summarily dismissed her via the letter dated 7th August, 2015.
4. The Claimant avers that the Respondent violated the provisions of Section 40 of the Employment Act, 2007 by summarily dismissing her on account of redundancy without informing her of the same.
5. The Claimant further avers that the Respondent's actions are unconstitutional and greatly violates the provisions of Article 41, 47, 50 and 28 of the Constitution of Kenya, applicable ILO Conventions inter alia, 1982, C111 Discrimination (Employment and Occupation) Convention, 1958, C112 Employment Policy Convention, 1964, ILO Declaration on fundamental principles and Rights at work, Kenyan Labour and Employment Laws notable Sections 5 and 7 of the Employment Act, 2007.
6. The Claimant avers that prior to her termination she was never accorded any hearing as required by law in violation of her natural rights to fair hearing. Further, that she was never issued with any cautionary and/or warning by the Respondent for the four (4) years of her employment with the Respondent and had an exemplary employment record.
7. In her Memorandum of Claim the Claimant prays for the following:-
 - a. **Determination that the Claimant was unfairly, wrongfully and unlawfully summarily dismissed.**
 - b. **Determination that the Claimant was unfairly, wrongfully and unlawfully declared redundant.**
 - c. **An Order for the payment to the Claimant for the actual pecuniary ;loss suffered as a result of the wrongful terminated from the date of such termination to the date of such determination as detailed through paragraph 18.**
 - d. **Constitutional damages.**

e. General damages.

f. An Order for the payment of interest to the Claimant by the Respondent on the Judgment amount.

g. An Order for the payment of legal costs.

h. An Order for the payment of other costs and any other relief this Honourable Court may deem fit to grant.

8. The Respondent in its Memorandum of Response dated 9th December, 2015 and filed in Court on 10th December, 2015 admits having engaged the Claimant herein.

9. The Respondent avers that although the Claimant exhibited diligence and hard work upon being engaged, subsequently, her performance became wanting, a fact that was severally communicated to the Claimant.

10. The Respondent further avers that the termination of the Claimant was lawfully undertaken and in line with the provisions of Section 40 of the Employment Act, Clause 10(d) of the Contract of Service and Paragraph 3.7.4 of the Bank's Human Resources Policy and Procedure Manual.

11. The Respondent states that the termination of the Claimant was pursuant to a process of restructuring and reorganisation undertaken by the Respondent which was necessitated by the Respondent's prevailing strained financial and operational conditions a fact the Claimant was well aware of on account of her assignment.

12. The Respondent further avers that the termination of the Claimant's services was procedurally done with regard to the law. Further, that upon her termination, the Claimant's dues were lawfully computed and paid accordingly.

13. The Respondent further urges the Court to dismiss the Claim with costs.

Evidence

14. The Claimant gave her evidence on 14th February 2018. In her testimony she stated that she was employed by the Respondent on 3rd May, 2011 as an employment trainee (Customer Service).

15. She further stated that the retirement age as per the employment Contract was 55 years. It was CW1's evidence that her contract was confirmed in December 2011.

16. CW1 avers that in January 2013 she was promoted to a Remedial Officer and posted to the Respondent's Head Office. Further, that in October, 2013 she became Acting Manager Remedial Services.

17. CW1 further avers that during her time of service at the Respondent Bank there were Performance Development Reviews carried out, which reviews were done annually and which led to her salary increment over the years of service.

18. It was CW1's testimony that during the subsistence of her employment contract she was never served with any show cause letter or warning or complaint on her performance.

19. CW1 testified that she received a termination letter on 7th August, 2015. She further stated that she received an email on the same day at 10 am informing her of a meeting with the management on the same day at 5 pm. It is at this meeting that CW1 received her termination letter.

20. It was her evidence that the email did not inform her of the purpose of the meeting. Further that the termination letter did not indicate the reason for her termination.

21. CW1 further testified that she was not issued with any notice nor was she invited for any disciplinary hearing prior to her termination. It was her evidence that the Human Resource Policy has a redundancy clause and that the position held was not abolished and that another employee occupies the position.

22. On cross-examination, CW1 stated that she was not aware of any of the issues raised in the minutes of the meeting held between herself and the management. She further stated that she was not aware of the contents of the circular dated 30th June, 2015 however; the same is not particular to her.

23. On further cross-examination CW1 confirmed that a number of people were laid off and that she received her terminal dues including 1 month pay in lieu of notice and was issued with a certificate of service at termination.

24. On re-examination, CW1 stated that the circular dated 30th June, 2015 did not inform her that she would be rendered redundant and that the minutes of the exit meeting held is not a reflection of what happened.

25. On further re-examination CW1 stated that there was no meeting that was in-fact held that when she appeared for the meeting she was

served with her termination letter.

26. On 11th July, 2018, RW1 (Issah Mohamed Sheikh, Human Resource Officer at the Respondent Company) testified on behalf of the Respondent Bank.

27. RW1 confirmed that the Claimant had been employed by the Bank for a period of 4 years with effect from April 2011.

28. RW1 further testified that in the year 2015 the Respondent Bank went through a redundancy exercise and that the Claimant was one of the employees affected as her department had excess staff.

29. RW1 further testified that the Claimant had been issued prior to her termination with a letter of caution for her performance. Further, that prior to the redundancy the Respondent did inform the labour office of the intended exercise as required by law.

30. RW1 avers that all staff were notified of the exercise vide a circular to all staff.

31. Further, that the Claimant accepted her letter of termination together with the terminal dues that were paid soon after.

32. On cross-examination, RW1 stated that the Claimant was not terminated for any other reason other than redundancy. Further, that the caution letter was issued in 2011 and could therefore not form a basis for termination.

33. The Respondent urged the Court to dismiss the instant Claim with Costs.

Submissions

34. The Claimant submitted that the termination of her employment on account of redundancy violated Section 40 of the Employment Act in the following respects:-

a. The Claimant was not personally notified in writing of the intended termination on account of redundancy.

b. The Respondent did not at any time demonstrate by evidence in selecting the Claimant, it had given due regard to her in selection of employees to be declared redundant had due regard to her seniority in time, skills, abilities and reliability.

c. The Respondent failed to pay the Claimant severance pay at the rate of not less than fifteen days' pay for each completed year of service.

35. For emphasis, the Claimant relied on the authority of **Hesbon Ngaruiya Waigi Versus Equitorial Commercial Bank Limited (2013) eKLR** where the Court held that:-

“Where redundancy is declared by an employer, the procedure to follow is as set out under the provisions of Section 40 of the Employment Act and where not followed, any termination as a result will be deemed unprocedural and unfair. Any termination of an employee following a declaration of redundancy must be based on the law otherwise the same becomes wrong and if the grounds used to identify the affected employees are not as per the law the same becomes unfair.”

36. It is further submitted that the purported redundancy also breached the employment contract in that the employment was terminated without a corresponding abolition or elimination of the position of Remedial Officer.

37. The Claimant further submitted that her termination from employment was unfair, wrongful and unlawful as it was contrary to the provision of Section 41 (2), 43, 44 and 45 of the Employment Act.

38. For emphasis, the Claimant has relied on the following Authorities:-

Kenfreight (E.A.) Limited Versus Benson K. Nguti (2016) eKLR where it was held that:-

“...no decision to terminate the services of a worker for reasons relating to the worker's conduct or performance can be taken without providing him with an opportunity to defend himself on the allegations”

George Onyango Akuti Versus Security Services Kenya Limited (2013) eKLR, where Radido J held that:-

“An unfair termination could be because no notice was given as required by Section 35 (1); no reasons were given or because the employee was not afforded a hearing as required by Section 41 of the Employment Act. The reasons can be various based either on failure to comply with the statute or the terms of the actual employment contract...”

39. It is the Claimant's further submission that her rights under Article 41 (Fair Labour Relations), Article 47 (Fair Administrative Action) and Article 50 (Fair Hearing) were grossly infringed upon by the Respondent in purporting to terminate her employment. For emphasis, the Claimant relied on the case of **Shankar Saklani Versus DHL Global Forwarding (K) Ltd (2012) eKLR**.

40. It is further submitted that the Claimant is entitled to the reliefs sought in her Memorandum of Claim. The Claimant relies on the provisions of Section 49 of the Employment Act that empowers the Court to make orders and give reliefs requiring payment by an employer to an employee where summary dismissal or termination of contract of an employee is found to be unjustified. For emphasis, the Claimant relied on the case of **C.P.C Industrial Products Versus Angima, Civil Appeal No. 197 of 1992.**

41. The Claimant further submitted that the claim be allowed as drawn.

Respondent's submissions

42. It is submitted by the Respondent that the Claimant's termination was procedural and was done in accordance with Sections 40, 43 and 45 of the Employment Act, 2007.

43. It is further submitted that the general principle is that all parties are free to enter into contract.

44. The Respondent submits that Clause 3.7.4 of the Respondent's Human Resource Policies and Procedure, outlines that an employee may be rendered redundant or laid off if, as a result of an official structural realignment within the organisation the position he/she is holding ceases to exist. This provision also finds expression in Clause 10 (d) of the Contract of employment entered into between the Bank and the Claimant.

45. For emphasis, the Respondent relied on the authority of **Kenya Airways Limited Versus Aviation & Allied Workers Union Kenya & 3 Others (2014) eKLR.**

46. Further the Respondent relied on the authority of **Kenya Airways Corporation Limited Versus Tobias Ogaya Auma & 5 Others (2007) eKLR** where it was stated that you cannot prevent an employer from declaring employees redundant where there were genuine reasons to do so. Similarly reliance is made to the case of **The Queen Versus Industrial Commission of South Australia; ex-parte Adelaide Milk Supply Co-operative Limited (1977) 44 SAIR 1202** where it is stated:-

“...a job becomes redundant when the employer no longer desires to have it performed by anyone.”

47. The Respondent also relied on the case of **Jones Versus Department of Energy and Minerals (1995) IRCA 292** where it was held that:-

“...What is critical for the purpose of identifying a redundancy is whether the holder of the former position has, after the re-organisation, any duties left to discharge.”

48. The Respondent submitted that the Redundancy was carried out in accordance with Section 40 of the Employment Act, 2007. For emphasis the Respondent relied on the authority of **Lucas O. Ondoya & 43 Others Versus Rift Valley Railways Kenya Limited, HCCC No. 33 of 2009 (UR)** where it was held:-

“The employer under the Employment Act No. 11 of 2007 has the right to terminate the services of an employee by declaring him redundant...the right is not subject to any negotiations...”

49. The Respondent further submitted that it is the prerogative of every employer to determine the structures of its business and to redesign its organisational structures to suit the business requirements of profit making. For emphasis, the Respondent relied on the case of **Nairobi Cause No. 1357 of 2010, Samuel Gachomo Chege Versus Roof Top Owner** where it was held that ***“a finding of unfair termination would be unwarranted where termination is due to a substantive economic reason.”***

50. It is submitted that the law recognises termination on account of redundancy as a lawful way to ease an employer with the burden of operational costs with the condition that due procedure needs to be followed as provided for under Section 40 of the Employment Act. The Respondent for emphasis relied on the case of **Kavutha Ngonzi & 11 Others Versus Kapric Apparels (EPZ) Ltd (2017) eKLR** where it was stated that:-

“It was proper for the Respondent to use her managerial prerogative to lay off some of her workforce. Such prerogative is permitted under Section 45 (2) (b) of the Employment Act which provides that, the reason for terminating the services of an employee is fair if it relates to the operational requirements of the employer.”

51. The Respondent further submitted that the Claimant is not entitled to the Reliefs sought as her Claim is preposterous and unreasonable. It is submitted that the Claimant cannot claim monies until attainment of the legal retirement age. For emphasis the Respondent relied on the authorities of **Rift Valley Textiles Limited Versus Edward Onyango Ogonda, C.A No. 27 of 1992 (UR)** and **Shimba Tourist Services Limited Versus Wilson Mise Kigani C.A No. 135 of 1994 (UR).**

52. The Respondent further submitted that the tabulation of loss, compensation and damages until the Claimant's attainment of legal retirement age is wrong and has no legal or reasonable ground. Further that the Employment Act states that parties are free to enter and terminate a contract as they wish thus are not bound by it till retirement age.

53. The Respondent prays that the Claim be dismissed with costs.

54. I have examined all evidence and submissions of the parties. The issues for determination by the Parties are as follows:-

1. Whether there were valid reasons to terminate the services of the Claimant

2. Whether due process was followed.

3. Whether the Claimant is entitled to remedies sought.

55. The Claimant was terminated vide a letter dated 7.8.2015 terminating her employment with effect from 7.8.2015. The letter did not assign any reason to the termination only indicating that the termination was in accordance with the employment contract.

56. The Respondent on their part indicate that the termination was due to reorganization of their services and that the staff were notified of the same vide a circular dated 30.6.2015 (page 37 of the Respondent's documents).

57. The circular in question is a general circular which the Respondent's General Manager and Assistant General Manager informed staff of an impending closure of 2 branches Masalani and Habaswein by 31.12.2015. There is no indication that the Claimant was aware of this circular as there is no evidence of receipt of the same by the Claimant.

58. Other than this circular, there is no indication that the Claimant was informed that the closure of the two branches would affect her personally leading to termination of her services. If indeed a redundancy situation did exist as the Respondents indicate the law is clear on what the Respondents were expected to do.

59. Section 40(1) of the Employment Act 2007 states as follows:-

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.

60. This Section provides under 1(b) above that an employee should be notified of a redundancy situation personally in writing. The labour office should also be notified. There is however no indication that the Claimant was informed in writing personally of the impending redundancy.

61. There is also no indication that the Respondent informed the Claimant in regard to the criteria used in the selection of employees declared redundant in relation to (c) above.

62. Section 40(f) also envisages that notice should be issued. No notice was ever given to the Claimant before the termination.

63. It is for the above reason that I make a finding in relation to issues No. (1) and (2) above that there was no reason for the Claimant's termination and the Respondent failed to follow due process.

64. The law is clear as submitted by the Respondents that an employer cannot be denied their right to reorganization or declaring a redundancy if the situation arises. The employer must however follow the law.

65. In **Aviation & Allied Worker Union vs Kenya Airways Limited and 3 Others (2012) eKLR, JA Maraga** (as he then was) reduced himself thus:-

“There are two broad aspects of this definition. The first one is that the loss of employment in redundancy cases has to be by involuntary means and at the initiative of the employer. It should not be a contrived situation. It has to be non-volitional. I understand this to refer to a situation, in most cases an economic downturn, brought about by factors beyond the control of the employer, which leaves the employer with no option but to take an initiative the consequences of which will be inevitable loss of employment.

The second aspect is that the loss of employment in redundancy has to be at no fault of the employee and the termination of employment arises "where the services of an employee are superfluous" through "the practices commonly known as abolition of office, job or occupation and loss of employment." In this case, what I understand as required to be determined in this aspect of the definition of redundancy is whether the appellant abolished the offices, jobs or occupations of the affected employees resulting in their services being superfluous hence their loss of employment. Corollary to that that is the justification for that abolition, if the appellant indeed abolished their offices. Determination of these two aspects will, determine the first issue of whether or not the redundancy in this case was necessary”.

66. It is evident that the Respondent even failed to consult with the employees affected and thus the whole process was done in an irregular manner and I therefore find the termination unfair and unjustified.

67. In terms of remedies, I find for the Claimant and I award her as follows:-

1. 12 months' salary as compensation for the unlawful redundancy = 12 x 59,60 = 715,560/=

2. Payment of her pension dues.

3. The Respondent will pay costs of this suit plus interest at Court rates on item (a) with effect from the date of this Judgement and on item (2) with effect from the date of filing suit.

Dated and delivered in open Court this 17th day of January, 2019.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of

Kiluva holding brief Onyony for Claimant – Present

Kareen Maina for Respondent – Present