



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO. 1431 OF 2011**

**JACKLINE A. NG'ONGO NYANDEJE**

**CLAIMANT**

**v**

**BOARD OF TRUSTEES, KCA UNIVERSITY**

**RESPONDENT**

**JUDGMENT**

1. This Cause has been fiercely fought. Delivery of judgment, unfortunately was pushed forward because of an intervening application which was filed by the Claimant after close of hearing.
2. Jackline Nyandeje (Claimant) was offered employment as a Marketing & Placement Officer through a letter dated 29 October 1999 by Kenya College of Accountancy (converted into KCA University – Respondent).
3. On 24 January 2003, the Respondent promoted the Claimant and changed her title to Manager – KBC, Marketing and Placement.
4. The Claimant continued to climb the ladder and on 24 October 2005 she was appointed to act as Director Academic Affairs. The appointment was extended on 27 January 2006. In 2008, the Claimant was appointed as Director of Institute of Capacity Development (ICAD).
5. On 4 October 2010, the Respondent instructed the Claimant to step aside in order to facilitate investigations into alleged financial transactions involving the Respondent and the Government of South Sudan.
6. Upon completion of the investigations, the Respondent issued a show cause letter to the Claimant on 13 October 2010 setting out some 3 allegations and requesting the Claimant to make representations to the allegations before 18 October 2010, and also to appear before the Governing Council on 19 October 2010 to defend herself.
7. On 22 October 2010, the Respondent interdicted the Claimant after considering her written response and presentations made to the Council. The interdiction was to enable further investigations to be conducted.
8. The Claimant and Respondent exchanged letters on the issue culminating in a letter dated 3 May 2011 informing the Claimant that her interdiction was being lifted and that she should proceed on leave and report back on 17 June 2011.
9. On 3 May 2011, while the Claimant was on leave, the Respondent issued a Memo addressed to all members of staff of ICAD (department headed by the Claimant) notifying them that the Management had decided to restructure the department. The restructuring was to commence on 15 June 2011.
10. The Respondent issued another Memo on 31 May 2011 indicating that it was now ready to implement the restructuring (after receiving a report on the same from a consultant).
11. On 8 June 2011, the Claimant raised concerns with the restructuring process on the ground that she had not been involved as the head of the department.
12. Despite the concerns raised by the Claimant, the Vice Chancellor wrote to her on 16 June 2011 to notify her that her contract had been terminated on account of redundancy.
13. The Claimant did not take the turn of events lying down and on 18 July 2011, her legal advisers fired a demand letter to the Respondent asserting that the termination of contract on account of redundancy amounted to unlawful dismissal. The demand sought Kshs 238,326,380/- in terms of dues and breach of contract.

14. On 23 August 2011, the Claimant instituted the instant proceedings alleging breach of contract and unfair termination of employment. The Claimant also alleged defamation.
15. The Respondent, through the Federation of Kenya Employers filed a *Response* sometime in November 2011.
16. On 5 April 2012, the Claimant filed a *Supplementary Statement of Claim*.
17. The Respondent filed a *Supplementary Statement of Response* on 30 May 2013, and this prompted the Claimant to file a *Further Supplementary Statement of Claim* on 5 September 2013.
18. Hearing commenced before Nduma PJ on 3 December 2015 and was adjourned to 8 December 2015, but aborted because the Claimant's advocate did not attend Court (Nduma PJ was transferred before he could take further proceedings).
19. When the Cause came up for hearing on 17 April 2018 during the service week, the Court directed the file to Nduma J and he fixed the hearing for 18 April 2018.
20. For reasons not on record, the file was not placed before Nduma J on the said date, and on 19 April 2018, the Respondent filed an application seeking an order to amend the *Response*.
21. The parties agreed to compromise the application and in this respect, the Court directed the Respondent to file an *Amended Statement of Response* before 27 April 2018, and the Claimant to file a *Reply to the Amended Statement of Response* before 4 May 2018 ahead of the hearing on 9 July 2018.
22. The Respondent filed an *Amended Statement of Response* on 27 April 2018.
23. Instead of filing a *Reply to the Amended Statement of Response*, the Claimant filed an *Amended Statement of Claim* on 7 June 2018.
24. The Court will disregard the *Amended Statement of Claim* for no leave was granted for the filing of such a document, and if the Claimant intended to file a *Reply to Amended Statement of Response*, one should have been filed before 4 May 2018.
25. The hearing resumed on 9 July 2018 (Court declined an adjournment made by parties to allow out of court settlement) and the Claimant continued with her testimony and closed her case.
26. The Respondent's case was taken on 20 November 2018 when it's Director, Human Resources testified.
27. The Claimant filed her submissions on 20 March 2019 while the Respondent did not file submissions.
28. The Court has considered the pleadings, evidence and submissions on record.
29. For clarity, the Court will not consider the *Supplementary Statement of Claim*, *Further Supplementary Statement of Claim* and *Supplementary Statement of Response* for there was no leave to file them and further such documents are unknown in the procedures and practices of this Court.
30. As already stated, the Court will also not consider the *Amended Statement of Claim* filed on 7 June 2018.

### **Unfair termination of employment on account of redundancy**

#### ***Statutory requirements on redundancy***

31. Termination of employment on account of redundancy is restricted and subject to the provisions of section 40 of the Employment Act, 2007.
32. The section outlines the conditions an employer should comply with *ante* declaration of redundancy, and benefits which should be paid to the concerned employee(s).
33. The import of the said section 40 of the Act was the subject of legal opinion by the Court of Appeal in *Thomas De La Rue (K) Ltd v David Opondo Omutelema* (2013) eKLR.
34. The Court of Appeal had this to say

It is quite clear to us that **sections 40 (a) and 40 (b)** provide for two different kinds of redundancy notifications depending on whether the employee is or is not a member of a trade union. Where the employee is a member of a union, the notification is to the union and the local labour officer at least one month before the effective redundancy date. Where the employee is not a member of the union, the notification must be in writing and to the employee and the local labour officer. **Section 40 (b)** does not stipulate the notice period as is the case in **40 (a)**, but in our view, a purposive reading and interpretation of the statute would mean the same notice period is required in both situations. We do not see any rational reason why the employee who is not a member of a union should be entitled to a shorter notice.

35. The Claimant herein was not a member of a trade union, and therefore it is section 40(1)(b) and not 40(1)(a) of the Employment Act, 2007 which is applicable.

36. It cannot be gainsaid that the notification envisaged under the aforesaid provision must be in writing and must be sent to the concerned employee and the local labour officer one month in advance.

37. The Respondent produced copies of notification to the employees of ICAD department on 3 May 2011, 31 May 2011 and a copy of notification dated 3 May 2011 addressed to the District Labour Officer, Nyayo House informing the office of the intended redundancy.

38. The Memo of 3 May 2011 also informed the staff that those affected would be able to reapply for new positions. The new positions were advertised both internally and in a newspaper with wide circulation.

39. The Claimant admitted that she received the Memo but stated that she did not apply for the positions.

40. In the view of the Court, the Respondent has demonstrated that it was in substantial compliance with the requirements of section 40(1)(b) of the Employment Act, 2007.

41. In terms of conditions in section 40 of the Act, the Respondent offered the same in the separation letter.

### ***Contractual requirements on restructuring***

42. The Respondent had a *Human Resources Policies and Procedures Manual*, 2009 which provided for additional safeguards in cases of redundancy. Clause H. 11 of the *Human Resource Policies and Procedures*, 2009 is relevant and material.

43. The Claimant was the head of ICAD department which was the subject of restructuring. Her testimony that she was not involved in the process leading to the restructuring was not controverted.

44. The Claimant was not part of the Finance Committee which deliberated on the process. She was not present during the relevant meetings either as a present or attending member.

45. Apart from the meetings, there was no evidence that the Claimant as head of department was consulted by the consultants who prepared the 3 year business plan which guided the restructuring (other ICAD staff met with the consultants).

46. Clause H. 11.1 of the *Manual* provided that employees likely to be affected by retrenchment should be consulted and be given an opportunity to suggest alternatives and that the Respondent would seriously consider the suggestions.

47. Consultations as envisaged under contractual provision was seriously lacking in the instant case, for how would a restructuring expert or an employer fail to seek the views of the head of a department the subject of restructuring.

48. To the Court, the failure to involve or consult the Claimant as head of department, and as an employee to be affected in the restructuring as required by contract was in bad faith and on that account, the Court finds the termination of the Claimant's employment on account of redundancy, procedurally tainted, contractually.

### **Valid and fair reasons for the redundancy**

49. The Court will now turn its attention to an examination of whether the Respondent discharged the burden expected of it by sections 43 and 45(2)(ii) of the Employment Act, 2007 (that there were operational requirements necessitating the termination of the Claimant's contract).

50. The consultant's report produced in Court by the Respondent noted some strong points on the performance of ICAD department, but at the same time made recommendations on improvement.

51. Paragraph 5.2.2 of the business plan produced by the Respondent recommended that the key jobs (including Centre Director but with changed title of Executive Manager) be retained while support services should be outsourced.

52. On the financial aspects, the report noted that ICAD department which had been in existence for over a decade had made a loss of Kshs 1,600,000/- despite earning revenues of Kshs 110,000,000/- in 2010.

53. Though an employer is free to run its business as it wishes, a loss during one year (as was demonstrated here) over a 10 year period without more, may not be a fair reason to lay off an employee.

54. The Respondent did not adhere to the recommendations of its own consultants on retaining the Centre Director – the Claimant), but that was its managerial prerogative, and the Court may not fault it on that account.

55. Overall, in the view of the Court, and the Court so finds, the Respondent did not comply with its own procedural policies on redundancies.

### **Compensation**

56. Considering that the Claimant served the Respondent for about 12 years and was also offered dues as contemplated by section 40 of the Employment Act, 2007, the Court is of the view that compensation equivalent to 6 months' gross salary would be appropriate (Claimant's gross salary at time of separation was Kshs 347,119/- as per pay slip for May 2011).

### **Defamation**

57. The Claimant did not lead any evidence in regard to the head of claim for defamation and the head of claim will therefore fail.

### **Breach of contract**

#### **Loss of PhD study fees**

58. The Claimant applied for and was granted study leave.

59. The separation occurred before the Claimant had completed the studies and the Claimant contended that she is entitled to 75% of the study fees in terms of clause N. 9 of the *Human Resource Policies and Procedures*.

60. Clause N. 9(c) of the *Manual* provided that the sponsorship would stop in case of separation/the employee leaving employment for *whatever reason*.

61. It is apparent that the sponsorship of the Claimant for the PhD studies was contingent on continued employment relationship, and because the Claimant separated with the Respondent mid-way the scholarship, the Court finds that the Respondent cannot be held responsible for any fees after date of separation.

#### **Loss of air ticket/upkeep in the United States**

62. By dint of clause N.9(c) of the *Manual*, the Court is of the view that the Respondent cannot be responsible for any costs/expenses incurred by the Claimant after the separation.

63. The Claimant did not in any case provide any evidence that she travelled to/from or (incurred costs) in the United States pursuing studies after the termination of her employment.

64. This head of claim was not proved.

#### **Loss of 6 years' service**

65. The Claimant did not lay any contractual or evidential foundation to this head of claim or disclose which part of the contract she anchored the claim on and it is declined.

### **Gratuity**

66. The Claimant sought Kshs 2,500,000/- on account of gratuity for excellent service.

67. The Claimant admitted in cross examination that her contract did not provide for payment of gratuity, and that she was contributing towards the National Social Security Fund.

68. The relief is declined.

#### **30 days leave**

69. The Claimant sought Kshs 324,000/- on account of untaken leave by time of separation. She testified that she had a balance of 30 days while the Respondent testified that the Claimant had a balance of 10 leave days.

70. However, the Respondent's letter of 1 July 2011 indicated that the Claimant had balance of 24 leave days.

71. Pursuant to the provisions of sections 10(3) & (7) and 74 of the Employment Act, 2007, the Court will find in favour of the Claimant.

### **Conclusion and Orders**

72. The Court finds and holds that the termination of the Claimant's employment on account of redundancy was unfair and awards her

(a) Compensation **Kshs 2,082,714/-**

73. The Respondent is also ordered to pay the Claimant the dues indicated in the letter of termination being, 3 months' salary in lieu of notice, 24 days accrued leave, pension and severance pay.

74. Each party to bear own costs.

**Delivered, dated and signed in Nairobi on this 26<sup>th</sup> day of March 2019.**

**Radido Stephen**

**Judge**

**Appearances**

For Claimant in person

For Respondent Ms. Kanyiri, Federation of Kenya Employers

Court Assistants Lindsey