



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 694 OF 2013

CLARICE ODHIAMBO.....CLAIMANT

-VERSUS-

THE COCA COLA COMPANY.....1ST RESPONDENT

COCA COLA EURASIA & AFRICA GROUP.....2ND RESPONDENT

(Successor in Title to Coca-Cola Africa Group)

COCA-COLA CENTRAL, EAST & WEST AFRICA

BUSINESS UNIT LTD.....3RD RESPONDENT

(Successor in Title to Coca-Cola East and Central Africa Division Ltd)

JUDGMENT

Introduction

1. The Claimant's suit is contained in the Amended Memorandum of Claim filed by the firm of Kilonzo and Company Advocates on 29th July 2016 alleging that her contract of employment was wrongfully and unlawfully terminated by the respondents on account of redundancy or constructive dismissal. She therefore seeks the following reliefs:

- a) General damages for wrongful or unlawful redundancy;
- b) General damages or wrongful, unlawful or constructive dismissal;
- c) General damages for racial and gender discrimination;
- d) Aggravated and or exemplary damages for racial and gender discrimination;
- e) Reasonable Notice Period;
- f) Salary from May 2007 until age of maturity;
- g) An inquiry into and an order for payment of lumpsum and monthly pension;
- h) An inquiry into an order for payment of 10 years service award;
- i) An inquiry into and payment of eligible annual incentive awards;
- j) An inquiry into and payment of eligible vested stock options;
- k) Interest on (a), (b),(c), (d),(f),(h),(i) above at court rates from June 2007 until payment in full;

- l) Interest on (g) and (j) above at commercial rates from June 2007 until payment in full
- m) Costs and interest on such costs at court rates from the date of Judgment until payment in full;
- n) Any other relief this Honourable Court may deem fit to grant

2. The Respondents filed their defence through Kaplan & Stratton Advocates on 2.7.2013 and amended it on 28.10.2016. In brief, the Respondents averred that the Claimant was employed by the 1st and 3rd Respondents in various capacities and countries until she was terminated on account of redundancy on 30.4.2007. They further averred that the termination was lawfully done and the claimant was paid her terminal benefits. They therefore prayed for the suit to be dismissed with costs.

3. During the hearing the claimant testified as the Cw1 while the Respondents called the 3rd Respondent's HR Partner who testified as Rw1. Thereafter counsel for the two sides filed written submissions.

Claimant's case

4. The Claimant testified that she is a Chemical Engineer and that she was employed by the 2nd respondent as a Project Engineer vide an agreement dated 1st April 1997. Thereafter, she served in various positions and jurisdiction but she was enrolled in the 3rd Respondent's pension plan and the 3rd respondent contributed all her pension. She was confirmed to appointment by the letter dated 27.11.1997 which she described as her evidence that she was an employee of the 1st respondent.

5. The Claimant further testified that in a letter dated 18th May 2000 she was designated as Manager Technical Business Development in the North Africa Division of the 2nd Respondent. That between the years 2001 and 2003 she held various positions in the 2nd Respondent which include Manager, Innovation & Commercialization based in Casablanca, Manager Division Environmental, Scientific and Regulatory Affairs and Product Commercialization in the North West Africa division, Manager Pan Africa Environment and finally, Manager Pan Africa Capability in Nairobi. That all the appointment letters given to her were not for a fixed term and never provided for termination notice.

6. She testified that during the said continental and global assignments, she was never issued with any letter of transfer when she was moved from one company to another but was only designated from one position to another. She further testified that the 2nd Respondent was a legal entity registered in the UK and was not a geographical name. She further contended that the said entity is the one which employed her but the termination was done by 3rd respondent after she changed her name from Coca Cola Africa limited. She however stated that the 3rd respondent came into being as a legal entity in 2003 and then her services were transferred to the 3rd Respondent.

7. She further testified that by the letter dated 6.2.2006, the Claimant was appointed Manager Africa Water Partnership with the Global Environment and Water Resource Department of the 1st Respondent based in Nairobi. The assignment was for one year and she was reporting to the 1st respondent directly, and through dotted lines to the 2nd respondent. She further testified that, the 1st and 2nd respondents guaranteed her in writing that after the said assignment with the 1st respondent, she would be absorbed in the Coca cola Africa Foundation under the 2nd respondent. However, she was not absorbed into the 2nd respondent's foundation after the end of the one-year assignment on 31.12.2006.

8. Instead she was served with the letter dated 23.2.2007 from the Foundation telling her that the position Manager Africa Water Partnership had been eliminated and advising her to apply for another suitable position in her home country. However, she never applied for any other position because she was not qualified for the jobs listed for Kenya and the position of Manager Supply Chain Management, which had occupied before the 2006 assignment was not in the list. That she engaged the Respondents to save her job in the organization but all in vain, because on 27.4.2007 she was served with the letter dated 12.4.2007 terminating her services with effect from 30.4.2007. Surprisingly, a day after receiving the termination letter dated 12.4.2007, the Respondent advertised the post of Manager Supply Chain.

9. The Claimant testified that she was terminated, without prior redundancy notice and consultations, by the letter dated 15th May 2007 which took effect on 30th April 2007. She contended that the letter dated 5th April 2007 the voluntary separation letter dated 12th April 2007 which was served to her on 27th April 2007, 3 days before the redundancy, never mentioned redundancy. She contended that during the previous restructuring exercises, there were no redundancies. She testified that she was not paid her dues immediately after the termination. The Claimant testified that she had a long period to serve before retirement at the age of 65 years and she has not been able to get alternative employment.

10. In cross-examination the Claimant testified that she had evidence that she was employed by the 1st and 2nd Respondent in the confirmation letter of employment dated 27th November 1997, which was written by the 2nd Respondent, the predecessor of the 3rd Respondent. She testified that the email dated 13th February 2007 was sent by the predecessor Coca Cola Africa which in her view referred to a restructuring as opposed to a redundancy. She testified that the letter dated 23rd February 2007 informed her that her position was being eliminated but contended that the letter was not a redundancy notice but a first notice of restructuring. She testified that she was impacted which in the Coca cola fraternity meant that she was eligible to go to any other position.

11. She testified that she never applied for other jobs since they had not been posted and that she was to apply for a job that she was qualified for in Kenya. She testified that the President had indicated that the water roles had been covered by other roles and there was no need to create other separate water steward positions. She further testified that the President declined to make her a consultant despite the fact she was the one who had initiated that role. She concluded by stating that during the restructuring exercises in the year 2000,2004 and 2007 there was no mention of redundancy.

Respondents' Case

12. Rw1 ,Annette Ngugi , the Human resource Partner for East and Central Africa Franchise for the 3rd Respondent testified on behalf

of the Respondents. She testified that Coca-Cola Africa is not a legal entity but an internal terminology to define geographical area of operation. That Coca Cola Africa has 4 Divisions including East and Central Africa Division, South Africa Division, North and West Africa Division and Nigeria Division. She further stated that, the letter heads of Coca Cola Africa were only used for internal purposes.

13. She testified that between 2006 and 2007, the Claimant was serving in the water partnership role answerable to the 1st Respondent but she remained an employee of the 3rd respondent because she was based in Nairobi. She further testified that the Claimant's assignment to the water partnership was for only one year with no guarantee for further appointment in 2007. She testified that Mr. Cummings, the President of Coca Cola Africa Group notified all the employees in the Africa Region that there would be streamlining in the Africa Group and the organisational changes meant that redundancies were forthcoming. That thereafter consultation with the employees were held individually and collectively in a Town Hall meeting where the employees were given options to apply for various positions because the restructuring meant that the employees were to be reabsorbed in new roles by mid May 2007.

14. She further testified that the Claimant was notified by the letter dated 23.2.2007 that her position had been impacted, meaning that the role had changed and it was not going to continue in the same manner it was previously. That the letter also invited that claimant to apply for the vacant positions because the impacted employees are given priority if they show interest to continue serving. However, the Claimant never applied and instead between 23.2.2007 and 5.4.2007, she engaged the Respondents pushing for the role of water partnership to remain as before or she be sponsored as a consultant social entrepreneur. The request by the Claimant was however declined with reasons and on 11.4.2007, she was served with a list of jobs available for her to apply, including that of Project Director Job Group 13 based in Nairobi, but again she failed to apply. She contended that the claimant was eligible for the said position because she had previously served in that role of project management.

15. As a result of the foregoing matters, Rw1 testified that the Claimant was issued with the letter dated 12.4.2007 offering her a mutual separation at an enhanced package after the failure to secure a suitable role following the restructuring process. That the package had been discussed during the Town Hall meetings and also with the individual employees. However, the Claimant declined the offer within the stipulated time and by the letter dated 15.4.2007 the claimant was terminated on account of redundancy with effect from 30.4.2007. However, the redundancy letter, excluded the enhanced package and paid claimant the normal redundancy package totaling to Kshs.4,644,167 net of statutory deductions. She concluded by opposing the claim for earnings after the termination date and damages for discrimination.

16. In cross examination Rw1 confirmed that the amended defence admitted that the claimant was employed by the 1st and 3rd respondent. She however contended that the pleading was erroneous and not backed by any evidence. She maintained that the claimant was consulted before redundancy and later served with the letter dated 12.4.2007 for mutual separation. She further admitted that the letter contained erroneous information about the date when the claimant started working for the Respondent by about 20 months which meant that the package assessed was also erroneous by 20 months. She also admitted that the letter had erroneous numbering of paragraphs and specifically it had 2 paragraphs numbered 13. She admitted that the offer was communicated at 4.54 pm and she was to accept by the end of the day. She further admitted that had the claimant signed the offer she would lost the chance to correct the said error or challenge it in court. She admitted that the difference in the package in the letter dated 12.4.2007 and 15.5.2007 was Kshs 10 million and it was lost because she requested for time to verify the same and seek legal advice.

17. Rw1 stated that Coca Cola Africa Foundation was not a legal entity and ceased to exist in 2017 but the water programs still continue because water is the main ingredient of the Respondents' products globally. She further stated that the position for Program Director was in 1st and 2nd Respondent and not in the 3rd respondent. That from 1.1.2007 to 15.5.2007, the Claimant was working for the Coca Cola Africa Foundation which was operating under Coca Cola Africa Group which was also not a legal entity. She denied that Coca Cola Africa Group was a legal entity registered in the UK She contended that the 2nd Respondent was not in existence in 2007.

18. She further admitted that impacted employees including the Claimant were to apply for jobs in their home country but the claimant decided to exit. She admitted that the position of Supply Chain Management in Kenya continued from 1.5.2007 but it was not advertised. She testified that the Claimant was working as a programme manager and that her programmes were funded by the 1st Respondent. She further testified that after the Claimant left another programme manager was to continue with the funds from the 1st Respondent however, the water programme was never continued under Coca Cola Africa Foundation but under the 1st Respondent. Finally, she stated that the normal retirement age for claimant was 55 years.

Analysis and determination

19. After careful consideration of the pleadings, evidence and submissions by the two sides, the following issues arise for determination:

- a) Who among the three respondents was the claimant's employer before the redundancy.*
- b) Whether the claimant's redundancy or constructive termination was wrongful and unlawful.*
- c) Whether the claimant is entitled to the reliefs sought.*

Who was the Claimant's employer before the redundancy?

20. The Claimant pleaded, and produced documentary evidence to prove that she was employed by the 2nd Respondent vide an Agreement dated 1.4.1997 and served in various capacities and jurisdictions until 31.3.2005 when she was appointed Supply Chain Improvement Manager for the 3rd respondent based in Nairobi following the restructuring of the respondents in 2004. Although at a lower grade the Claimant retained the package for the higher grade she was serving at the 2nd Respondent. By the letter dated 6.2.2006, she was appointed by the 1st Respondent to the position of Manager, Africa Water Partnership based in Nairobi. She was answering directly to the 1st Respondent with dotted line to the 2nd Respondent. The said assignment was for one year ending on 31.12.2006. Rw1 contended that the 2nd Respondent was not a legal entity capable of employing any one but a geographical name for operational purposes. However, without

proof, the Claimant contended that the 2nd respondent is a legal entity registered in UK and is a subsidiary of the 1st respondent which is registered in the USA.

21. After perusing the letters produced by the claimant appointing her to various positions within the Coca cola fraternity, I find on a balance of probability that the Claimant was employed by the 3rd respondent as at the time she was declared redundant. The reason for the foregoing finding is that after the 2004 restructuring of the Coca cola Africa Group, the Claimant was appointed Supply Chain Improvement Manager for the 3rd respondent based in Nairobi. That although she was later appointed by the 1st Respondent to be Manager, Africa Water Partnership, the assignment was for only one year ending on 31.12.2006. The Claimant produced as an exhibit email dated 20.12.2005 by Mr. Daniel Vermeer (page 14 of the claimant's bundle No.1) which stated as follows in paragraph 2:

"... During this period, she would be retained as an employee of the East and Central Africa Division, and would maintain her current status as regards salary, grade, benefits etc. In 2006, EWR would agree to transfer funds to cover her salary and travel expenses to the Division, where she would continue employment in the Africa Foundation, starting January 1, 2007."

22. Although the Claimant contended that she was guaranteed and assured that she was to continue with the same job in the 2nd respondent, the letter dated 6.2.2006 appointing her to serve as the Manager Africa Water Partnership never gave such guarantee. The letter stated as follows in paragraph 2 and 3:

"This assignment is effective March, 1.2006 and its duration will end not later than December 31, 2006. You will report to Dan Vermeer, Director Global Water Partnerships for day- to-day direction. Your role will also have a dotted line reporting to Carol Wainana, Director, Coca cola Africa Foundation during the said duration."

During the course of this assignment, your job grade 13, terms and conditions of service will remain the same. Your next appointment will be confirmed towards the end of this assignment."

23. In view of the foregoing correspondences, the Claimant was to continue being employee of the 3rd during her assignment with the 1st respondent in 2006 and that her next appointment was to be confirmed towards the end of 2006. As admitted by the Claimant, she was never given any other appointment and as such, she continued under the 3rd respondent. In the meanwhile, the job she expected to get in the Coca Cola Africa Foundation from January 2007 was eliminated during the 2007 restructuring of the Coca Cola Africa group and she was advised to apply for another job within in Kenya. She however did not apply for any of the positions availed to her and she was terminated on account of redundancy by the 3rd respondent by the letter dated 15.5.2007 before changing the employer.

Whether the redundancy or constructive termination was wrongful and unlawful

24. In consideration of the fact that the redundancy of the claimant occurred on 15.5.2007, it is apparent that the applicable law to the cause of action herein is Section 16A(1) of the Employment Act Cap 226 (now repealed) Section 16 A of Employment Act stated as follows:

"A contract of service shall not be terminated on account of redundancy unless the following conditions have been complied with –

(a) the union of which the employee is a member and the Labour Officer in charge of the area where the employee is employed shall be notified of the reasons for, and the extent of, the intended redundancy;

(b) the employer shall have 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;

(c) no employee shall be placed at a disadvantage for being or not being a member of the trade union;

(d) any leave due to any employee who is declared redundant shall be paid off in cash;

(e) an employee declared redundant shall be entitled to one month's notice or one month's wages in lieu of notice;

(f) an employee declared redundant shall be entitled to severance pay at the rate of not less than 15 days' pay for each completed year of service as severance pay."

25. The claimant contended that she was not served with the any redundancy notice or consulted about it. She contended that the letter by Carole Wainaina, President, the Coca-Cola Africa Foundation dated 23.2.2007 stating that her position in the 2nd respondent had been eliminated and advising her to apply for another job in the 3rd respondent did not amount to a redundancy notice. The letter stated thus:

"As you are now no doubt aware, we are undergoing a restructure to better position the Africa Group for long-term transformational growth. As a result of this process, and the announcement of the new organizational structure for Group Centre various positions are going to be impacted, which means that the current position either does not exist in the new organization or it had significantly changed. Your position of Manager, Africa Water Partnerships has been eliminated and you are therefore impacted...As already communicated, all impacted associates are eligible to apply for any new positions in their home countries for which they qualify."

26. The respondent has not rebutted the foregoing contentions by the claimant and I agree with the claimant that the said letter by the 2nd

respondent did not amount to a redundancy notice as contemplated by the law. She further contended that the area Labour officer was not served with the one month redundancy notice as required by section 16A (1) (a) above. She also contended that the respondent never paid her terminal dues before the termination on account of redundancy as required by the same law. Consequently, I return that the redundancy without the requisite notice to the claimant and the area Labour officer was in breach of the express provisions of section 16A of the Employment Act (repealed).

27. The respondent also breached express provisions of section 4 (5) of the Trade Disputes Act (repealed) which stated as follow:

“(5) Termination of employment through redundancy shall, whether or not there is agreement between the employer and the employee as to the terms of the redundancy, be deemed to constitute a trade dispute for purposes of subsection (4) and the termination of employment shall not be effected until the matter has been reported to the Minister under that subsection; and the minister shall thereupon confirm the terms of the redundancy where he is satisfied that there is agreement between the employer and the employee or, in any other case, invoke the settlement procedure set out in the following sections of this Part.”

28. The foregoing provisions underscores the fact that redundancy is a very serious matter which the parliament of the day decided that it could not take effect even by mutual agreement without reporting it to the Labour Minister for consideration and approval. In this case, the termination of the claimant’s employment on account of redundancy by the 3rd respondent’s letter dated 15.5.2007 was therefore not done in accordance with the provision of section 4(5) of the Trade Disputes Act and it was therefore invalid since it was never reported to the Minister for Labour and sanctioned. The precedents cited by the claimant, though in relation to the Employment Act 2007, I find them relevant to this case because they buttress the principle of law that any redundancy done in breach of the express provision of the relevant statute, is unfair, wrongful and unlawful. The precedents include *Thomas De La Rue (K) Ltd vs David Opondo Omutelema [2013]eKLR*, *Joseph Tana Ndua & 11 others vs Jacaranda Hotels (Msa) Ltd [2014]eKLR* and *Kenya Airways Ltd vs Aviation & Allied Workers Union Kenya & 3 others [2014]eKLR*.

Reliefs

29. The claimant has made a number of prayers for general damages and salary after the said wrongful redundancy among other reliefs. Damages for wrongful termination of an employee’s services were provided vide section 14 of the Employment Act (repealed) in the form of salary in lieu of notice and also section 15 of the Trade Disputes Act (repealed) which stated as follows:

“15 (1) In any case where the Industrial court determines that an employee has been wrongfully dismissed by his employer, the court may order the employer to reinstate the employee in his former employment, and the court may in addition to or instead of making an order for reinstatement, award compensation to the employee:

Provided that such compensation shall not exceed-

(i) in any other case, where the reinstatement is ordered, the actual pecuniary loss suffered by the employee as a result of wrongful dismissal;

(ii) in any other case, twelve months’ monetary wages.”

30. The claimant has not prayed for reinstatement but salary from May 2007 till the age of retirement. Granting the salary as prayed would amount to reinstating her which is barred by section 12 of the Employment and Labour Relations Court Act if 3 years have lapsed after the separation. I will therefore award the claimant salary for 12 months as compensation for the wrongful redundancy under section 15(1) (ii) of the Trade Disputes Act (repealed). Under paragraph 51 of the amended Memorandum of the Claim the she pleaded that her annual gross pay as at the time of the wrongful redundancy was Kshs.11,165,766 and the employer has not disproved the same by employment records. I therefore award the said annual gross pay as compensation under section 15(1)(ii) of the Trade Disputes Act (repealed) considering her long service of 10 years, that she has not secured another job and the fact that she never contributed to the termination through misconduct.

31. In view of the foregoing award, I dismiss the prayers for general damages for wrongful and unlawful redundancy or constructive dismissal. I further dismiss the prayer for damages for racial and gender discrimination because the claimant did not prove the said violation on a preponderance of evidence.

32. The claimant has prayed for a reasonable notice period. The contract of service never provided of notice before termination. The employer offered 3 months’ salary in lieu of notice after the termination and I find that notice period to be reasonable. Consequently, I decline to award more than what the employer offered.

33. The claim for pension was not disputed. It will therefore be paid in accordance with the rules of the pension scheme. As stated by RW1, it is the claimant who has delayed to pursue the same under the said rules.

34. The claims for 10 years’ service award, annual incentive award and vested stock options are dismissed because they lack precise particulars and they have not been substantiated by evidence.

Conclusion and disposition

35. I have found that the claimant was employee of the 3rd respondent as at 15.5.2007 when she was terminated on account of redundancy. I have further found that the said redundancy was wrongful and therefore unlawful because it was done without compliance with the mandatory procedure laid down by sections 16A of the Employment Act and section 4(5) of the Trade Disputes Act which are both repealed. Finally, I found that the claimant is entitled to compensation for said wrongful redundancy and pension subject to the applicable rules of the

3rd respondent's Pensions Scheme.

36. Consequently, I enter judgment for the claimant against the 3rd respondent as follows:

- a) Kshs.11,165,766 being compensation for wrongful redundancy.
- b) Costs and interest at court rates from the date hereof.
- c) The said award is subject to statutory deductions.
- d) The said award is in addition to the claimant's right to severance pay for the period from April 1997 to May 2007, Three months' salary in lieu of notice and accumulated leave as at 30.4.2007 as calculated in paragraph 9 of the amended defence. The amount of severance pay shall however be rectified by calculating it based on the correct service period being April 1997 to May 2007 as opposed 1998 to May 2007.

Dated, Signed and Delivered in Open Court at Nairobi this 15th day of March, 2019

ONESMUS N. MAKAU

JUDGE