



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 2161 OF 2015**

*(Before Hon. Lady Justice Maureen Onyango)*

**PROF. STEPHEN KEYO OLUS.....CLAIMANT**

*VERSUS*

**INTRAHEALTH INTERNATIONAL.....RESPONDENT**

**JUDGMENT**

The Claimant in his Memorandum of Claim dated 24<sup>th</sup> November, 2015 and filed in Court on 7<sup>th</sup> December, 2015, alleges that the Respondent unlawfully terminated his employment and failed to pay his terminal dues. The Claimants seeks the following remedies:

- a) A declaration that the Claimant's services were wrongfully, maliciously and unlawfully terminated contrary to what was purportedly stated in the termination letter.
- b) A declaration that the Claimant is entitled to be paid his terminal dues and compensatory damages as particularised in the Claim.
- c) An Order compelling the Respondent to pay the Claimant his terminal dues and compensatory damages totalling to Kshs.38,449,580/-
- d) General damages for unlawful termination from employment
- e) And in the alternative an order be issued by the Court compelling the Respondent to unconditionally reinstate the Claimant back to employment.
- f) Interest on the award from the date of filing suit until payment in full, without loss of benefits.
- g) Costs of the suit.
- h) Any other or further relief that this Court may deem just and fit to grant.

The Respondent filed its Statement of Response to the Claimant's Claim dated and filed in Court on 12<sup>th</sup> February, 2016, in which it is admitted that the Claimant was its employee but denies that the termination of the claimant's employment was unfair and unjustifiable. It states that the termination was procedural as he was duly informed vide the Respondent's letter dated 20<sup>th</sup> August, 2015.

The Respondent avers that due notice was accorded to the Claimant prior to his separation with the Respondent and that fair administrative process was followed as required under the Constitution of Kenya and the relevant provisions of the Employment and Labour Relations Law.

The Respondent further avers that the Claimant's Notice of Termination was issued pursuant to the Claimant's Contract of Employment and the laid down Employment and Labour Relations Law. Further, that at the time of separation the Claimant was paid all dues owed to him by the Respondent as prescribed under the Law which amounted to Kshs.1,274,156.40, which dues the Claimant duly accepted.

In conclusion the Respondent contends that the Claimant's Memorandum of Claim has no basis and that the Claimant is not entitled to the reliefs sought in his Memorandum of Claim. The respondent urges the Court to dismiss the Claim with Costs.

On 24<sup>th</sup> January, 2018, the Claimant (CW1) testified on his behalf. In his testimony he stated that he was employed by the Respondent on 30<sup>th</sup> April, 2012 in the position of Assistant Director with his first salary being Kshs.450,000/- per month.

CW1 testified that there were discriminatory practices within the Respondent Company which he pointed out to the director. He stated that it was in this context that the assertion by the Respondent that he was not performing his duties to the Respondent's satisfaction was not true.

CW1 averred that over the years he worked for the Respondent he was given salary increments indicating that his services were above board. He further averred that he came across email communication indicating that his services would be terminated in the year 2013. Following CW1's protest his services were not terminated as indicated however, he testified that he was demoted from the position of Assistant Director to Senior Manager and finally to Team Leader.

CW1 stated that he was further placed on probation for 3 months but remained on probation until his services were terminated in 2015. CW1 further stated that underperformance would lead to an employee to be put on probation and eventually sacked, which was not in his case.

CW1 testified that eventually he was declared redundant in the year 2015. He further testified that the process of declaring his position redundant was unfair as the duties CW1 performed and the position held was not scrapped adding that he was called upon to assist the organisation at least 4 times without pay after he was declared redundant.

CW1 contends that the process of redundancy was flawed in that the letter to the Labour Officer was sent on 20<sup>th</sup> August 2015 and his services were terminated on 27<sup>th</sup> August, 2015 and that the principle of last in first out was not followed while declaring the Claimant redundant.

CW1 further contends that his termination was un-procedural and urged the Court to allow his Claim as prayed and further urged the Court to consider general damages for discrimination and unlawful termination.

On cross examination CW1 confirmed that in his oral evidence he included facts that are not covered in his statement of Claim, more specifically is the issue of discrimination which he referred to in evidence but not included in his Statement of Claim.

On further cross examination CW1 stated that he was demoted as evidenced in his letter of complaint to the Human Resources Department. However, CW1 confirmed that the certificate of service issued to him indicates his position at the time of separation as Assistant Director.

CW1 further confirmed that he attended an exit interview with regards to redundancy. He further confirmed that Clause 2 and 15 of the Contract of employment provided that his contract duration was predicated upon availability of funds and that either party may terminate the Contract with one month's notice or payment in lieu thereof.

On Re-examination CW1 stated that his redundancy was discriminative and un-procedural.

CW1 further confirmed that the Project is still on. Further, he stated that there were no interviews to decide which employee remains and who would be declared redundant.

On further re-examination CW1 confirmed that he received his termination notice on 27<sup>th</sup> August, 2015 while the letter to the Labour Officer was sent on 20<sup>th</sup> August, 2015.

The Respondent's case proceeded on 26<sup>th</sup> April 2018 with RW1, **Jackline Moraa**, Human Resources Manager of the Respondent testified on behalf of the Respondent.

RW1 adopted her witness statement dated 24<sup>th</sup> May 2016 as evidence in chief in which she reiterates the averments in the Statement of Response filed.

On cross examination RW1 stated that she joined the Respondent Company on 21<sup>st</sup> November, 2016, which is after the Claimant had left the Respondent's employment. She further testified that her evidence is based on documentary evidence availed by the Respondent.

RW1 further testified that the Claimant's services were terminated with effect from 30<sup>th</sup> September, 2015 and that he was given notice on 27<sup>th</sup> August, 2015. RW1 further stated that the Respondent did notify the labour officer of the intended redundancy vide its letter dated 20<sup>th</sup> August, 2015.

On further cross examination RW1 stated that the donor wrote to the Respondent informing them of reduction on the scope of work and indicated areas which were to be subject to reduction which included the areas under which the Claimant among other employees worked. RW1 further confirmed that the employees were duly informed of the changes.

RW1 confirmed that the Claimant's position at the time of separation was Assistant Director and that the Claimant was not demoted as alleged as there is no record of demotion in the Claimant's file.

On re-examination RW1 confirmed that the certificate of service issued to the Claimant indicated his designation as Assistant Director Systems Strengthening. She further testified that the project Funzo Kenya is no longer on going despite the fact that the Respondent currently has about 44 members of staff they are attached to different projects.

RW1 further confirmed that all employees affected by the Redundancy, inclusive of the Claimant, were taken through training.

The parties then filed and exchanged written submissions.

### **Claimant's Submissions**

In the written submissions the Claimant reiterated the contents of the Memorandum of Claim and CW1's oral evidence in Court.

The Claimant submitted that the termination of his services was procedurally unfair as it contravened the provisions of Sections 2 and 40 of the Employment Act that provides for the procedure to be followed while declaring an employee redundant which includes:

**(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 Claimant further submitted that the Respondent failed to prove that the Claimant and the Labour Officer were informed of the reasons for and extent of the redundancy at least one month prior to the Redundancy. For emphasis the Claimant relied on the Authority of **Addah Adhiambo Obiro Versus Ard Inc (2014) eKLR** where it was held that:

*“Section 40 of the Employment Act provides for notification of the employee (or the employee's union) and the Labour Officer about the intended redundancy at least one month before the redundancy is effected.”*

The Claimant submitted that since he was not notified of the redundancy at least on month prior to the date of redundancy and thus the same was not in accordance with the procedure in law with regards to redundancy and therefore amounted to unfair termination of his employment.

The Claimant contends that the redundancy notice was issued on 20<sup>th</sup> August, 2015 and that prior to the expiry of the 30 days period the Respondent issued another notice dated 27<sup>th</sup> August, 2015 terminating the Claimant's employment contract. The Claimant further relied on the case of **Bernard Misawo Obora Vs Coca Cola Juices Kenya Limited (2015) eKLR** where it was held *“that the notice to the Labour Officer is meant to elicit advice to the employer on the modalities to be employed in the redundancy process. This is an important process which not only ensures proper preparation for the affected employees but also acts as a control measure to curb against unlawful termination clothed as redundancy.”*

The Claimant further submitted his termination was unfair under the meaning of Section 45 of the Employment Act and relied on the Authority of **Francis Maina Kamau Vs Lee Construction (2014) eKLR** where it was held that

*“where an employer declares a redundancy without observing the conditions set out under Section 40 of the Employment Act, the redundancy becomes unfair termination within the meaning of Section 45 of the Employment Act.”*

The Claimant contends that the termination of his services fails the substantive fairness test as the Respondent failed to give reasons for the termination and to further demonstrate the reasons for such a termination are valid in accordance with Section 43 of the Employment Act, 2007.

The Claimant further contends that the reason advanced by the Respondent that the Claimant was terminated owing to re-alignment in budget allocation was coloured by malice and unfairness as the Respondent failed to show the following:

1. To demonstrate during trial and in its pleadings that the project, Funzo Kenya for which the Claimant was hired was being done away with. The Claimant submits that the project was on-going at the time of termination of his services.
2. The Claimant was one of the senior most employees of the Respondent as far as the project, Funzo Kenya is concerned. The Claimant submitted that the Respondent failed to follow due regard to seniority in time and to skills and ability while declaring the Claimant redundant as highlighted in Section 40 of the Employment Act.
3. The Claimant contends that he performed his duties well and to the satisfaction of the Respondent as evidenced by the performance appraisals, the salary increments and an acknowledgement by the Respondent in the Claimant's termination letter.
4. The Claimant submitted that the purported termination on account of redundancy was actuated with malice and ill-motive.

The Claimant further submitted that he is entitled to the reliefs sought in his Memorandum of Claim in accordance with Section 49 of the Employment Act, and as embodied in other relevant provisions of the law. For emphasis the Claimant relied on the case of **Francis Maina Kamau Vs Lee Construction (2014) eKLR** where the Court having found that the Respondent failed to adhere to the provisions of Section 40 of the Act proceeded to award compensation as follows:-

*“There is no evidence that the Respondent complied with any of the conditions set in Section 40 of the Employment Act, 2007 and I therefore find the termination of the Claimant's employment to have been unfair within the meaning of Section 45 of the Act. Consequently, I award the Claimant the equivalent of 3 months' pay in compensation. I also award him one month's salary in lieu of notice.”*

In conclusion the Claimant urged the Court to allow his Claim as drawn.

### **Respondent's Submissions**

It is submitted that the Respondent followed the provisions of Section 2 and 40 of the Employment Act, 2007 while declaring the Claimant redundant. Further, the Respondent submitted that it had a Human Resource Policy which provides for instances of redundancy and/or termination of program or reduction of force, which was adhered to in the process of declaring the Claimant redundant.

The Respondent further submitted that the Claimant's termination on account of redundancy had both substantive justification and complied with the relevant procedure in the impugned process. For emphasis the Respondent relied on the Authority of **Kenya Airways Limited Vs Aviation & Allied Workers Union Kenya & 3 Others (2014) eKLR** where the Court of Appeal stated:

*“Section 40 (1) of the Employment Act is merely procedural by its tenor. It has to be read together with Sections 43 (proof of reason for termination), 45(unfair termination) and Section 47 (5) (burden of proof of unfair termination) of the Employment Act. It is implicit from the four sections that to establish a valid defence to claim for unfair termination based on redundancy, an employer has to prove:*

- i. The reasons for termination;*
- ii. That reason for termination is valid;*
- iii. The reason for termination is fair reason based on operational requirements of the employer; and*
- iv. That the employment was terminated in accordance with fair procedure.”*

The Respondent further submitted that the decision to declare the Claimant redundant was justified as the Claimant's employment was pegged on the availability of funds to the project, Funzo Kenya, and the decrease of the funds was a genuine reason to declare employees under the project redundant.

The Respondent contends that it complied with the requirement of notice as contemplated by Section 40(1)(b) of the Employment Act, 2007. It is further contended that the Respondent was not obligated to comply with Section 40(1) (d) and (f) as there was no CBA between the Claimant and the Respondent and that the termination notice was adequate and there was no need for salary in lieu of notice.

The Respondent further contends that it took the affected employees through counselling process showing that there was no malice intended in declaring the affected employees redundant. For emphasis the Respondent relied on the case of **Africa Nazarene University Vs David Mutevu & 103 Others (2017) eKLR** where the Court of Appeal held:

*“It is in evidence that the university held meetings with the affected employees to explain the restructuring process and provided counselling services amongst other initiatives to address the respondent's impending plight, before issuance of the notice envisaged under subsection (b) ... in sum, and we so find, the University not only complied with the statutory requirements but also paid each employee one month's salary in addition to one month's notice when they were not working. That hardly amounts to unfair labour practice.*

The Respondent submitted that the Claimant is not entitled to the Claim for future earnings and relied on the case of **Simon Patrice Matianyi Vs G4S Security Services (K) Ltd (2013) eKLR** where the Court stated:

*“...There is no law that I am aware of or which has been brought to my attention that provides for payment of future earnings beyond the date of termination of employment.”*

In conclusion the Respondent submitted that the instant claim be dismissed with costs to the Respondent.

### **Determination**

Having considered the facts of this cause, evidence, submissions and authorities cited, the following are the issues for determination:

1. Whether the Claimant's redundancy was lawful and fair
2. Whether the Claimant is entitled to the reliefs sought

### **Whether the redundancy was lawful and fair**

Redundancy is defined under Section 2 of the Employment Act as –

**“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;**

Section 40 sets out the procedure for redundancy. Under Section 40(1)(b) required the employee and the Labour Officer to be notified where the employee is not a member of the union.

The Claimant in his pleadings, evidence and submissions contends that the Respondent's did not follow due process while declaring his position redundant. The Claimant further contends that he was one of the senior most employees of the Respondent and therefore if the process of redundancy was genuine the Respondent ought to have paid due regard to seniority, skill and reliability of each employee before declaring such employees redundant which was not done by the Respondent.

The Respondent on the other hand averred that due to reduced donor funding, more specifically on project Funzo Kenya, it was forced to declare redundant inclusive of the Claimant. The Respondent further averred that under the Employment Contract the Claimant's employment was subject to Clause 2 which provided that:

*“Continuity of the Claimant's services is subject to availability of funds to intrahealth and continued funding for the project he was hired.”*

The Respondent further submitted it was a term of the employment Contract that the employment contract could be terminated by either party by giving one month notice in writing or one month's pay salary in lieu thereof.

The Respondent submitted that it followed due process in declaring the Claimant redundant as set out in the employment contract as well as Section 40 of the Employment Act, 2007.

### **Was procedure followed?**

The Respondent issued a letter on *“NOTICE OF DECLARATION OF REDUNDANCIES AND TERMINATION OF STAFF CONTRACTS DUE TO REDUCTION IN FUNDING”* dated 20<sup>th</sup> August, 2015, to the Labour Officer as required by the provisions of Section 40 (1) (b) of the Employment Act, 2007

The Claimant's employment was then terminated by letter dated 27<sup>th</sup> August 2015, stating as follows:

*“Dear Prof. Okeyo*

*Re: Notice of End of Employment Contract*

*Reference is made to the reduction in scope of work for the project, following communication from the donor, which conveyed the decision to de-emphasize specific result areas, leading to re-alignment in budget allocation and hence a proportional reduction of staff.*

*This is a follow-up to our various staff communication on the same subject and consultative meeting held with you, in which we regrettably informed you that your position was affected by the above reduction in force. As per your contract letter clause 2, the continuity of your services is subject to availability of funds to Intrahealth International and continuity of funding for the project that you were hired for. This letter therefore serves to provide one month's notification of termination of your employment contract as per our Human Resource Policies and also in line with the local labour laws. Your last day of service will be September 30, 2015.*

*You will receive the following benefits:*

- Severance pay (15) days for every completed year of service
- Any leave days earned but not utilized
- Salary up to September 30, 2015

*This being your last day of employment I take this opportunity, on behalf of the organization, to express deep appreciation for the important role you played in contributing to the success of FUNZO Kenya Project. You have been a great asset to the organization and have contributed immensely to project's successes, giving us a strong reputation.*

*I want you to feel supported in making the transition forward, and if you have any questions, please do not hesitate to contact the undersigned or Human Resources Office.*

*Please arrange to surrender any Company property in your possession before or by September 30, 2015.*

*Sincerely*

*(Signed)*

*Meshack Ndolo Country Director”*

From the foregoing the Respondent failed to comply with the provisions of Section 40 of the Employment Act, 2007 as it failed to adhere by the set timelines for notices. The Respondent sent out a notice to the Labour Officer on 20<sup>th</sup> August 2015 and 7 days later on 27<sup>th</sup> August 2015, the Claimant was issued with a termination notice. In the case of **Bernard Misawo Obora vs Coca Cola Juices Kenya Limited [2015] eKLR**, it was held that the notice to the Labour Officer is meant to elicit advice to the employer on the modalities to be employed in the redundancy process. This is an important process which not only ensures proper preparation for the affected employees but also acts as a control measure to curb against unlawful termination clothed as redundancy.

In view of the foregoing I find that the process of redundancy was flawed as the Respondent failed to fully comply with the provisions of Section 40 of the Employment Act. In the case of **Margaret Mumbi Mwago Vs Intrahealth International (2017) eKLR** where the Court deciding a case based on similar facts arising out the same cause of action as the instant case it was stated:

*“My understanding of the sequence in the issuance of notices under Section 40(a) and (b) is that the first, which is the redundancy notice, goes out simultaneously to the employee or their trade union and to the Labour Officer and the second which is the termination notice, goes out to the employee in accordance with the subsisting employment contract”*

*There is no evidence that the Claimant was issued with a notice under Section 40 (a) of the Employment Act. What is adduced in evidence is the notice to the Labour Officer as well as the termination notice to the Claimant.*

*I therefore opine that the respondent failed to comply with the redundancy procedure set out under Section 40(a) of the Employment Act with the result that the redundancy of the claimant was un-procedural and therefore unfair.”*

I therefore declare the redundancy unprocedural for failing to comply with the requirements for notice.

#### **Whether the Claimant is entitled to the reliefs sought**

The Claimant prayed for a declaration that his services were wrongfully, maliciously and unlawfully terminated contrary to what was purportedly stated in the termination letter. There is no proof of malice. I would for reasons discussed above make a declaration that the redundancy was un-procedural and therefore unfair.

The Claimant further prayed for an Order compelling the Respondent to pay the Claimant his terminal dues and compensatory damages totalling to Kshs.38,449,580/-. The Claimant seeks payment for the unexpired term of his contract being two years to his retirement age. The Court cannot award the same as it amounts to unjust enrichment by the Claimant which the Court cannot entertain. In the case of **Pamela K. Butalanyi Vs University Council for the Kenya Polytechnic University College (2015) eKLR** where it was held that employment of remedies must be proportionate to the injury sustained by the Employee and are not aimed at advancing any parties desire for unjust enrichment.

The Claimant further seeks payment of his terminal dues. The Respondent stated that the Claimant was paid his terminal dues amounting to Kshs.1,274,156.60 at the time of separation.

From the Claimant was duly paid his terminal dues as the Respondent's letter dated 27<sup>th</sup> August, 2015 provided that:

*“...You will receive the following benefits:*

- Severance pay (15) days for every completed year of service

- *Any leave days earned but not utilized*
- *Salary up to September 30, 2015 this being your last day of employment.”*

Based on the evidence on record I find that the Claimant was duly paid as the Discharge dated 29<sup>th</sup> September, 2015, the Claimant confirms receipt of Kshs.1,274,156.60 as payment of his terminal dues and goes further to confirm that he had no other or further claims of any nature whatsoever against Intrahealth International Inc., its affiliates, directors, sponsors or officers.

The Claimant also prayed for general damages for unlawful termination from employment. The Claimant tabulated 12 months' compensation for unlawful termination amounting to Kshs.452,348 x 12 months totalling to Kshs.5,428,176/-.

Since the redundancy was valid save for the notification period, the claimant is not entitled to maximum compensation. I would award him three month' salary as compensation for unprocedural redundancy.

The claimant prayed in the alternative for an order be issued by the Court compelling the Respondent to unconditionally reinstate the Claimant back to employment. This prayer has been overtaken by events, the Claimant having attained the retirement age. Further, he did not prove exceptions circumstances to warrant reinstatement. He is therefore not entitled an order for reinstatement to the Respondent's employment.

### **Orders**

From the foregoing the Claimant is entitled to the following:-

1. Kshs.1,357,044/= being an equivalent three (3) months' salary in compensation. In making this award I have taken into account the Claimant's length of service, his seniority and the Respondent's conduct in the termination process.
2. Costs

The decretal sum shall attract interest at court rates from the date of judgment till payment in full.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 1<sup>ST</sup> DAY OF MARCH 2019**

**MAUREEN ONYANGO**

**JUDGE**