REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 519 OF 2014

MIRIAM NKATHA RIUNGU.....CLAIMANT

- VERSUS -

RENNAISSANCE CAPITAL (KENYA) LTD.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 14th June, 2019)

JUDGMENT

The claimant is Miriam Nkatha Riungu. The respondent is Rennaissance Capital (Kenya) Limited.

The claimant filed the memorandum of claim on 01.04.2014 through Kinyanjui Kirimi & Company Advocates. The claimant prayed for judgment against the respondent for:

a) USD 20, 000.00 (equivalent Kshs.1, 740, 000.00 at exchange rate of Kshs.87.00) being bonus for year ended 31.12.2013.

b) Kshs. 218, 650.40 for two weeks pay in lieu of notice.

c) Kshs.385, 566.50 being balance of service pay for 6.25 years worked.

d) Kshs.4, 060, 656.00 being 12 months compensation as per company practices and customs on employees declared redundant.

e) Kshs.1, 015, 164.00 for leave allowance for six years.

f) Kshs.4, 060, 656.00 salaries for one year as compensation.

g) Such other dues as may be found due to the claimant.

h) Costs and interest.

The respondent filed the statement of response on 17.04.2014 through Ochieng', Onyango, Kibet & Ohaga Advocates. On 19.07.2018 the respondent filed a notice of change of advocates to Kaplan & Stratton Advocates. The respondent prayed that the claimant's suit be dismissed with costs.

There is no dispute that the parties were in a contract of service. The respondent employed the claimant by the letter of offer of employment dated 25.09.2007 and accepted by the claimant on 28.09.2007. The claimant was employed as Office Administrator and reporting to the Business Manager. The appointment was on full time basis and the provisions of the Group's Employee Handbook applied as updated from time to time. The commencement date was 15.10.2007 and the claimant was to serve a probation period of 3 months. Clause 15.1 applied the laws of Kenya to the contract of service. Clause 4.2 provided that the claimant may be paid an annual bonus commensurate with her performance and the Group's overall position during the relevant calendar year and the payment being in the **"....sole and absolute discretion..."** of the respondent's board and subject to provisions of clause 4.3 which provided, " **You will not be eligible to receive any amount of bonus for any calendar year should you serve notice to terminate your employment with the Group or if your employment is terminated by RCKL in any of the circumstances set out in paragraph 8.3.1 through 8.3.8 below or otherwise (with or without cause) during the Probation Period (as defined below) or should you cease active, full-time employment for any reason whatsoever before year end of the calendar year in respect of which the bonus was to be awarded.**" Clause 8.3.1 through 8.3.8 provided for circumstances of the claimant failing to meet any of the performance targets; claimant's engaging in stated misconduct or gross misconduct; claimant's breach of the contract of service; claimant's professional misconduct; and claimant's committing any act of bankruptcy or compounding with her creditors. The evidence is that at all material time none of the circumstances accrued as against the claimant.

The claimant served with due diligence, loyalty and dedication per contract of service and was promoted through salary increments as per material on record. The claimant last held a position designated as Office Manager – Associate. As per the claimant's email dated 14.01.2014 the duties attached to that designation included:

a) CS budget control and monitoring.

b) Archiving solutions.

c) Formulation of local CS policies.

d) Implementation of the remaining OHS report recommendations.

e) Landlord and Tenant management, facility or office management.

f) Maintenance of office and mechanical equipment.

g) Travel management in compliance with global policy.

h) Vendor management,

i) Tagging of office equipment for insurance renewal.

The claimant's employment was terminated by the respondent by the letter dated 04.02.2014 signed by Kirsty Ross, Head of HR Africa. The letter was titled, "**Notice of Termination of Employment on Account of Redundancy**". It referred to the meeting of 04.02.2014 and notified the claimant that her employment would be terminated on account of redundancy within one month from the date of the letter, that is, on 04.03.2014. Further, the following payments would be made to the claimant on 25.02.2014:

a) Kshs.1, 078, 610.00 being 15 days pay for each completed year of service.

b) Kshs. 721, 893.33 being salary up to the last day of employment and an additional one month's salary in lieu of notice.

c) Kshs. 249, 8886.15 being payment for 16 days accrued leave year as at termination.

The letter advised the claimant to speak to Kirsty Ross if she needed any clarification on the matter. The letter further conveyed that the claimant's medical cover would remain in place up to 04.03.2014.

The **1st issue** for determination is whether the termination of the claimant's employment by way of redundancy was unfair. The claimant's case is that section 40 of the Employment Act, 2007 on redundancy was breached. In particular she states that she was disadvantaged because it was abrupt without prior consultations and notice as it came and took effect in March 2014 at a time when the respondent was due to pay the annual bonus for the year 2013 – and which bonus the claimant has stated that it was denied together with the due promotion. The claimant further states that by the letters of 26.02.2014 and 24.03.2014 the area labour officer was asked to confirm if the respondent had served the relevant notice to the labour officer under section 40 of the Act but no response was received. The claimant's further case was that she was keen to continue in employment, she had set her targets for 2014, and her employer acted unfairly in frustrating her efforts in that regard.

The respondent's case is that the bonus was payable strictly in accordance with the terms of the contract being at the sole and absolute discretion of the respondent's board; the bonus was commensurate with the claimant's performance and the respondent's overall position during the relevant calendar year; the bonuses awarded in one year would not be a benchmark for bonuses in subsequent years; and no employee would assume entitlement to annual bonuses. The respondent's further case was that it terminated the claimant's employment on 04.02.2014 on account of redundancy and paid the claimant all the dues in accordance with the terms of the letter of redundancy. Further, the respondent stated that it fully explained to the claimant the reasons for the redundancy being reduction in the scope of her work entailing reduction of the office space, reduction of staff and sale of most of office equipment leading to the respondent's restructuring and reorganisation.

The Court has considered the pleadings, the evidence and the submissions. The claimant testified that on 04.02.2014 she had stepped out for lunch when the respondent's head of legal one Susan Iminza Kaisha (also the respondent's witness – RW) telephoned her and asked her to quickly return to the office. The claimant returned to the office and RW told her that she had been terminated from employment. RW handed to the claimant the redundancy letter dated 04.02.2014. The claimant testified that she was shocked as she had not been prepared at all. She received the letter and left. The claimant testified that the reason for redundancy was that office space had reduced but her job included managing people and not managing only the physical infrastructure. It was her case that the Head of Legal had been hired in a scheme for her to be designated as Head of Legal, Compliance and Chief Administrative Officer in circumstances whereby she was due to take up, on promotion, the role of Chief Administrative Officer. The claimant testified that the redundancy letter referred to a meeting which had never taken place. Further, the conference call had taken place long after she had received the redundancy letter and it had been with the Head of Human Resource and Corporate Services, Africa, and who was based in South Africa. In that teleconference the Head of Human Resource and Corporate Services, Africa, tried to explain the reasons for the redundancy but after the claimant had already been terminated. The claimant testified that the respondent had reduced its office space as well as equipment and in 2012 – 2013 some staff left but that did not reduce her workload because she did not only manage space and equipment but also managed security, business support unit, investment bank and other matters. She stated thus, "**My scope of work reduced to some extent but did not justify redundancy....In November 2013 Chief Administration Officer was tied up with Legal Officer. We used to have a law firm to handle legal matters. Am not aware**

respondent was required to have in-house counsel."

RW testified that on 04.02.2014 the respondent gave a notification on redundancy of some staff members and it was a global redundancy exercise. RW stated that it was on the same date that a telephone conference was held and the explanations were made to the claimant about the reasons for the redundancy and that her services were no longer required. RW testified that office space reduced from 8,000 square feet to 2, 500 square feet and staff reduced by half. Thus operations shrunk completely and a decision was made that the claimant would not be adequately occupied. RW testified that the redundancy was not meant to stop the claimant's promotion and that RW had already been assigned the administrative roles. RW testified that she was employed by the respondent in June 2013 in the position of Chief Administration Officer and Head of Legal and Compliance as joined roles. RW confirmed that after 04.02.2014 the claimant never came back because she did not have her access cards and that it was on 04.02.2014 that the respondent wrote to the area labour officer notifying about the claimant's redundancy and the labour officer had received that letter on 05.02.2014.

The Court finds that the evidence as provided for both parties is that office space reduced and the number of staff reduced thereby making it necessary that the claimant is put on redundancy. The further undisputed evidence is that the roles undertaken by the claimant were subsumed in the roles of the position of Chief Administration Officer and Head of Legal and Compliance and there is no reason to doubt that RW who performed the joined roles had the qualifications necessary as she was a qualified advocate. It could be that the claimant was due for promotion to the role of Chief Administration Officer but it is also true that the respondent was entitled to make such reorganizational arrangements as was deemed appropriate. It could be that another employer could have decided to retain the claimant but in so far as the respondent acted to render her redundant, the reason as established was genuine and cannot be said to have been unreasonable or not to exit at all. The Court holds that the test is subjective and for so long as the respondent has established that it acted in good faith in view of the genuine circumstances making redundancy necessary, the reason for the termination was valid as genuine as at the time of termination and as envisaged in section 43 of the Employment Act, 2007.

There is no doubt that the claimant was not accorded due preparation prior to the termination on 04.02.2014. On that date she reported on duty and was suddenly required never to report on duty again in view of the respondent's global redundancy decision and strategy. Her office access cards were permanently withdrawn from that date. The Court holds that preparation by way of a month's notice to the employee and the area labour officer prior to the intended date of termination on account of redundancy as per section 40(1) (a) is a mandatory requirement. In redundancy the employee is not guilty of poor performance or misconduct or other adverse report attributable to the employee and the Court has time and again found that an employee due for redundancy should be properly prepared and the statute has set the period for such preparation to be at least one month. The requirement for such notice is mandatory and the Court returns that the same cannot be sufficiently satisfied and served by the employer simply paying a month's remuneration in lieu thereof. In that regard and in view of the mandatory statutory provisions, the Court is not persuaded to follow the holding in **Phyllis Njeri Kamau & 2 Others –Versus – Mumias Sugar Company Limited [2017]eKLR** (Onyango J) thus, "**The Court will however not treat a redundancy as unfair termination merely because the notice was not in accordance with the provisions of the Employment Act as urged by the Claimants as this can be remedied by the Claimant's being paid the salary they would have earned during the notification period. What would make a redundancy amount to unfair termination are more serious breaches such as discrimination in terms, selection or intention of an employer where the redundancy is used to cover up an otherwise unfair termination.**" As submitted for the claimant, the Court finds that the termination was not in accordance with a fair procedure as envisaged in sections 41 (1) (a) and 45 (2) (c) of the Act. The Court finds that in the instant case the claimant was required to exit on the same date she received the purported notice and the purported notice served no preparatory purpose because the decision that she leaves had been made; she left abruptly without consultations or psychological preparatory comfort; there was no room for advisory by the area labour officer; and there was no opportunity to consider options in view of the respondent's desired redundancy such as whether the claimant would be reasonably absorbed elsewhere in the respondent's establishment.

Thus the Court follows the holding **in Fredrick Mulwa Mutiso –Versus- Kenya Commercial Bank Limited [2017]eKLR** where in holding that the termination of the claimant's employment on account of redundancy was a facade for an unlawful and unfair termination, Ndolo J further held, " **40. With much respect, I think this is a complete misapprehension of the law and practice. In my understanding, the notice to the Labour Officer serves a dual purpose. First, as held in Bernard Misawo Obora V Coca Cola Juices Kenya Limited [2015]eKLR the notice to the Labour Officer is meant to elicit advice to the employer on the modalities to be employed in the redundancy process. Second and more importantly, the notice acts as a control measure to curb against unlawful terminations clothed in redundancy language.**" The Court adds that the notice to the employee or the employee's trade union under section 40(1) (a) serves to curb against unlawful terminations clothed in redundancy language as found by Ndolo J in the cited case and also, serves to allow sufficient consultations including considerations of alternatives to possibly avert redundancy in view of options that may be available for the employee's continued employment, and if redundancy must proceed, the employee is psychologically and emotionally prepared to appreciate that it is not his or her fault to be out of employment, but that in the established circumstances, redundancy is the only option available to the employer.

Thus in **Kenya Airways Limited –Versus- Aviation & Allied Workers Union Kenya & 3 Others [2014]eKLR**, it was held by the Court of Appeal that the purpose of the notice under section 40(1) (a) and (b) of the Employment Act, as is also provided for in the ILO Convention 158 – Termination of Employment Convention, 1982, is to give the parties an opportunity to consider measures to be taken to avert or to minimise the terminations and measures to mitigate the adverse effects of any termination on workers concerned such as finding alternative employment.

The Court further follows the holding by Ndolo J in **Charles Nyangi Nyamohanga –Versus- Action Aid Kenya [2015] eKLR** that there are two kinds of notices in a redundancy as provided for in section 40 of the Act thus, "**First, there is the one month notification of the reasons for and the extent of the intended redundancy to the employee and the labour officer. Second, there is the termination notice under the employee's terms and conditions of employment. The two notices cannot be issued simultaneously and there is good reason for this. Redundancy as a form of termination of employment happens at the behest of the employer through no fault of the employee and since employment is not only a means of livelihood but also a form of identity and dignity, an employee leaving employment on account of redundancy ought to be treated with soft gloves.**"

Accordingly, the Court returns that the termination was procedurally unfair.

The **2nd issue** for determination is whether the claimant is entitled to the maximum statutory compensation for unfair termination.

The claimant has prayed for 12 months' compensation under section 49 of the Employment Act, 2007. The Court has considered the factors under that section that are to be considered in awarding compensation. First, the Court considers the mitigating factor in favour of the respondent that the reason for termination was established as genuine and valid. The factors in favour of the claimant are that she had a clean record of service with good performance; she had served for a considerably long period; she desired to continue in employment; and she was subjected to abrupt termination without any preparation. The court has revisited the record and evidence. As at the time of termination the respondent's business was profitable and the claimant had a good performance that entitled her to a bonus. Though in the sole and absolute discretion of the respondent to award such annual bonus that was due as at the time the claimant was declared redundant, the respondent for unexplained reasons failed to exercise the discretion to award or not to award the bonus for 2013 – making the claimant to lament that the redundancy decision was calculated to deny her the due bonus for 2013. The Court returns that failure to exercise discretion and to make the decision on the award or denial of the bonus for 2013 in that regard amounted to a serious aggravating factor against the respondent – the claimant having been awarded annual bonus in previous years and for 2012 having been awarded USD 10, 000.00 in that regard. The Court has considered the respondent's indecision on the claimant's 2013 bonus as seriously affecting the claimant's expected earnings but for the termination. Accordingly the Court awards the claimant 9 months compensation under section 49 of the Act thus Kshs. 338, 388.00 per month making **Kshs.3, 045, 492.00**.

The **3rd issue** for determination is whether the claimant is entitled to the other remedies as prayed for. The Court makes findings as follows:

a) The claimant prayed for USD 20, 000.00 (equivalent Kshs.1, 740, 000.00 at exchange rate of Kshs.87.00) being bonus for year ended 31.12.2013. As submitted for the respondent, the bonus was in the sole and absolute discretion of the respondent. The Court has found that a decision on award or denial of the bonus had become due but was never made by the respondent – and the failure to exercise the discretion one way or the other has been found an aggravating factor in making an award under section 49 of the Act for the unfair termination. The Court has considered the submissions and has found no basis for the Court to substitute its own discretion with that of the respondent and further the Court finds that the claimant failed to establish the basis for the quantum of bonus for 2013 as was claimed. Accordingly, the Court returns that the prayer will fail.

b) The claimant prayed for Kshs. 218, 650.40 for two weeks pay in lieu of notice being the unpaid notice pay out of the agreed 6 months' notice pay. The respondent admitted the liability in the submissions and the evidence. The last monthly gross pay was Kshs. 338, 388.00 and for 2 weeks the claimant is awarded **Kshs.169, 194.00**.

c) The claimant prayed for Kshs.385, 566.50 being balance of service pay for 6.25 years worked. As submitted for the respondent under section 40(1) (g) provides for severance pay for each completed year of service and in absence of an agreement to the contrary, the prorate payment allegedly for unpaid term of incomplete last year of service will fail as lacking contractual and statutory basis.

d) The claimant prayed for Kshs.4, 060, 656.00 being 12 months compensation as per company practices and customs on employees declared redundant. The claimant had alleged that others who left the respondent's employment were paid differently including service pay as was claimed. She then testified that she had not exhibited evidence of payment of such service pay to such employees who may have left earlier. Accordingly, and as submitted for the respondent, the claim and prayer had no contractual or statutory basis and it will fail as not justified at all because in any event the alleged practice was not proved.

e) The claimant prayed for Kshs.1, 015, 164.00 for leave allowance for six years. As submitted for the respondent the claimant did not establish the contractual basis of the claim and the same will fail.

In conclusion judgment is hereby entered for the claimant against the respondent for:

a) The respondent to pay the claimant a sum of **Kshs.3, 214, 686.00** by 01.08.2019 failing interest at Court rates to be payable thereon from the date of this judgment till full payment.

b) The respondent to pay the claimant's costs of the suit.

Signed, dated and **delivered** in court at **Nairobi** this **Friday 14th June, 2019.**

BYRAM ONGAYA

JUDGE