



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 2246 OF 2014

*(Before Hon. Lady Justice Maureen Onyango)*

CAROLINE ATIENO ONYANGO.....CLAIMANT

VERSUS

STYLE INDUSTRIES LIMITED.....RESPONDENT

**JUDGMENT**

The claim herein was instituted vide the claimant's memorandum of claim dated 15<sup>th</sup> December 2014 and filed on 17<sup>th</sup> December 2014. It is the claimant's averment in the memorandum of claim that he was employed by the respondent's manufacturing plant situated at Lunga Lunga Area, Nairobi as a general worker from 2007.

The Claimant further averred that she worked for the Respondent continuously and without taking any leave between the period of 2007 to 2014. She further avers that she did not receive any payment in lieu of such leave taken.

She contends that she only proceeded on leave in January 2014 and April 2014 to cover leave for the year 2013 and 2014 respectively. She further averred that when she resumed duty on 25<sup>th</sup> April 2014 she was terminated.

The claimant prays for the following remedies against the respondents—

1. Compensation for unfair termination Kshs.132,960
2. Notice of payment Kshs.11,080
3. Payment in lieu of leave Kshs.27,700

Less money paid (Kshs.21,140)

**Total Kshs.150,600**

4. Costs and Interest.

The Respondent filed a Memorandum of Defence dated and filed in Court on 18<sup>th</sup> January, 2016 in which it admits entering into an employment relationship with the claimant herein and that the Claimant was earning a consolidated gross monthly salary of Kshs.11,080.

The Respondent avers that the Claimant was laid off as a result of restructuring within its operations. It is contended that the Claimant was duly informed in adequate time of the intended changes as required under Section 40 of the Employment Act. Further that all the terminal dues owing to the Claimant were settled as required by Law.

The Respondent urged the Court to dismiss the instant Claim with costs to the Respondent.

The suit was heard on 9<sup>th</sup> May 2018 and 9<sup>th</sup> October, 2018 with both the Claimant and the Respondent's witness testifying. Both parties filed written submissions after the close of the hearing.

In her evidence the Claimant reiterated the averments made in her Memorandum of Claim. She further testified that she worked at the Respondent's production department and was producing weaves.

It was claimant's evidence that her services were terminated on 25<sup>th</sup> April 2014 for reason that she had absconded duty previously. She testified that she was away on leave which was approved by the Respondent.

The claimant confirmed having received a letter of termination dated 31<sup>st</sup> March 2014, which she signed on 25<sup>th</sup> April 2014. She further confirmed that upon separation. She received payment of Kshs.21,140 as terminal dues. She urged the Court to allow her Claim as drawn.

On cross examination the claimant stated that her services were terminated on 25<sup>th</sup> April, 2014 after she had resumed duty from leave. That she was aware of positions being declared redundant which affected several other employees of the Respondent.

On further cross examination the claimant stated that she now seeks payment of leave having proceeded on leave only twice during the subsistence of her employment with the Respondent.

She further stated that she was not aware of any notice issued to the Ministry of Labour by the Respondent with regard to the intended redundancy.

On re-examination, the claimant confirmed that the letter of termination was issued to her on 25<sup>th</sup> April, 2014 while she was at work.

The Respondent also called one witness, Margaret Lillian Ngeno (RW1), Head of Human Resources who reiterated the averments made in the Memorandum of Defence to the claim. RW1 testified that the Respondent did declare 80 employees redundant, the Claimant being one of them.

She further testified that the Respondent did notify the Ministry of Labour of the intended redundancy and that no objection was raised to the same. It was RW1's further testimony that all members of staff declared redundant including the claimant were duly paid all terminal benefits. She averred that the laid down provisions for redundancy were duly followed.

On cross examination RW1 stated that the Ministry of Labour was informed of the intended redundancy on 5<sup>th</sup> February, 2014 and that a week later the Respondent was allowed by the Ministry to proceed with the process and was advised to adhere to the provisions of Section 40 of the Employment Act, 2007. RW1 confirmed that the Claimant was paid by cheque Kshs.21,140 as terminal dues as a result of the redundancy.

On re-examination RW1 clarified that the sum paid to the Claimant was for days worked in March, Notice and Leave. She further added that the said amount was then subjected to tax.

Parties thereafter filed and exchanged their written submissions to the Claim.

### **Submissions**

The claimant submitted that the termination of her services amounted to summary dismissal, which was unfair as she was not accorded the chance to explain herself and no reason was given for her termination. It is further submitted that the Respondent failed to follow the provisions of Section 41, 43 and 47 of the Employment Act, 2007. To fortify her argument the Claimant cited and relied on the Authority of **David Gichnana Omuya Vs Mombasa Maize Millers Limited (2014) eKLR** where it was held:

*“Section 41 of the Employment Act requires an employer to notify and explain to an employee in a language the employee understands it is considering terminating the services of the employee. The employer is also under an obligation to hear and consider any representation which the employee may make before taking any decision to terminate an employee.”*

The Claimant contended that the burden of justifying grounds of termination rests on the employer, which the employer has failed to satisfy. The Claimant relied on the case of **Kennedy Maina Mirera Vs Barclays Bank of Kenya (2018) eKLR**.

The Claimant further submitted that she is entitled to compensation for unfair termination and relied on the cases of **David Ochieng Vs Uniliver Kenya Limited, Cause No. 2 of 2018** and **Pamela Nelima Lutta Vs Mumias Sugar Co. Ltd (2017) eKLR** as well as the provisions of Sections 35(1)(c) and 49(1)(a) and (c) of the Employment Act, 2007.

It is further submitted that the Respondent while declaring the Claimant redundant failed to comply with the mandatory provisions of Section 40 of the Employment Act. The Claimant relied on the cases of **Thomas De La Rue Vs David Omutelema (2013) eKLR** and **Kenya Airways Limited -V- Allied Workers Union of Kenya & 3 Others (2014) eKLR**,

The Claimant urged this Court to allow the Claim as drawn.

The Respondent on the other hand submitted that it did comply with the mandatory provisions of Section 40 of the Employment Act while declaring the Claimant herein redundant.

It is further submitted that the Claimant was not a member of any union hence there was no reason to notify any union. The Respondent further submitted that the instant Claim is an afterthought as the Claimant was not opposed to the redundancy and that she accepted payment.

The Respondent urged the Court to find that the Claimant was duly compensated and as such is not entitled to the reliefs as sought in her Memorandum of Claim.

### **Determination**

There is no dispute that the Claimant was employed by the Respondent from the year 2007 until 31<sup>st</sup> March, 2014 when her services were terminated on account of redundancy. The issues for determination therefore are:

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

### **Whether the Claimant's 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) the employee and the Labour Officer are to be notified where the employee is not a member of the union.

It is worthy to note that the Respondent contended that it did write to the Ministry of Labour informing it of the intended redundancy. It however did not avail any such communication to this Court as part of its evidence.

The Claimant's employment was terminated by letter dated 31<sup>st</sup> March 2014, which reads as follows:

*“Dear Ms. Onyango*

#### ***Re: Termination of Employment***

*The Company is in the process of re-structuring various sections and due to the same we have to lay off some employees. Unfortunately you are one of the employees affected and your employment is hereby terminated with effect 31<sup>st</sup> March 2014.*

*You will receive be paid your dues in accordance with your contractual and legal requirements as follows:*

- Your salary up to and including 31<sup>st</sup> March 2014*
- One month's pay in lieu of notice*
- 15 days severance pay*
- Your earned but unutilised leave*

*The above payments will be less any monies you may be owing to the Company and subject to tax and other statutory deductions where applicable.*

*The payments will also be subject to the return of any Company assets in your possession.*

*Payment of NSSF dues is the responsibility of the Fund. You are however advised to obtain the relevant claim forms from the Fund's offices (if or when you are qualified for payment) and bring the same to the Human Resources office for updating and confirmation of your contributions.*

*A schedule of payments as detailed above, a cheque for the net pay together with a certificate of service will be ready for collection on*

*or after Friday 11<sup>th</sup> April 2014.*

*Finally, I wish, on behalf of the Company to thank you for your service and wish you a successful life outside Style Industries Limited.*

*Yours Faithfully,*

(Signed)

Margaret L. Geno

Head – Human Resources”

The law is now settled that when declaring redundancy, an employer is required to issue two separate notices of at least one month each. The first is a communication to employees generally notifying them of the impending redundancy. The second is a specific notice of termination to the affected employees. The employer is further required to issue a one month notice to the local Labour Officer as was held in the case of **Thomas De La Rue v David Omutelema [2013] eKLR**.

From the evidence on record, I find that the Respondent did not fully comply with the provisions of Section 40 of the Employment Act, 2007 as it failed to provide the notification to the Ministry of Labour on the intended redundancy. Further, as per the above letter the Claimant was notified on the same date her redundancy was to take effect thereby not giving her any notice as envisaged by the Provision of

Section 40 of the Employment Act.

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 the case of **Margaret Mumbi Mwago Vs Intrahealth International (2017) eKLR** wherein the Court deciding the case based on similar facts arising out the same cause of action as the instant case 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”*

I therefore find 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.

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

The Claimant prayed for compensation for unfair termination, notice payment and payment in lieu of leave less amount paid of Kshs.21,140 which brings the amount to Kshs.150,600.

From the termination letter, I note that the Claimant was paid the following at the time of separation as evidenced by the termination letter dated 31<sup>st</sup> March 2014:

- *Your salary up to and including 31<sup>st</sup> March, 2014*
- *One month's pay in lieu of notice*
- *15 days severance pay*
- *Your earned but unutilised leave*

The letter goes on to state that the Respondent would provide a schedule of the payment as well as the payment cheque from Friday 11<sup>th</sup> April 2014.

The Claimant acknowledged receipt of the said letter and also confirmed having received payment of Kshs.21,140 as settlement of her terminal dues.

#### **The respondent did not submit a breakdown of the payments made to the claimant. What she was entitled to is the following –**

- (i.) Notification period as per Section 40(10)(b) Kshs.12,104 being basic salary of Kshs.10,525 and house allowance of Kshs.1,579 as per evidence of RW1.
- (ii.) Notice as per Section 40(1)(f) of 12,104
- (iii.) The claimant was further entitled to severance pay which for 2 years was Kshs.12,104 at 15 days per year worked.
- (iv.) She was further entitled to salary for days worked which was 11 days at Kshs.5,121.
- (v.) The respondent did not state how much the claimant was paid for leave or how many days leave she was entitled to. Having

worked for two years as per RW1, she would be entitled to 42 days at 21 days a year, based on her basic pay of Kshs.17,002. This would add up to Kshs.58,435.

Less payment received (Kshs.21,144)

Net Kshs.37,295

(vi.) Having been irregularly declared redundant, I award her 3 months' salary as compensation at Kshs.36,312.

**I therefore award her a total of Kshs.73,607.00.**

The respondent shall also pay claimant's costs and the decretal sum shall attract interest at court rates.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 5<sup>TH</sup> DAY OF JULY 2019**

**MAUREEN ONYANGO**

**JUDGE**