



**REPUBLIC OF KENYA**

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

**CAUSE NO. 95 OF 2017**

***(Before Hon. Justice Mathews N. Nduma)***

**AGNES NALIAKA MASIKA..... CLAIMANT**

**VERSUS**

**CHILD OPPORTUNITY TRUST.....RESPONDENT**

**JUDGMENT**

1. The suit commenced on 10<sup>th</sup> March 2017. The claimant testified as CW1 that he was employed on 1<sup>st</sup> February 2014, as a Chief Executive of the respondent Child Opportunity Trust at a monthly salary of Kshs 150,000 a month. The claimant worked diligently until 29<sup>th</sup> October 2014 when her employment was terminated by a letter of the same date without prior notice.
2. The reason for termination was lack of funds and therefore was declared redundant.
3. Claimant states that the reason was not valid since the respondent operates to date. The claimant seeks maximum compensation for the unlawful and unfair termination. One month salary in lieu of notice and prorata leave for 9 months in the sum of Kshs. 90,000.
4. Demand was sent and not heeded. The claimant was based at Kakamega. CW1 said her program was to run for two years but only served for nine (9) months. CW1 added that she was informed that there were no funds to pay her any longer. CW1 said she handed over to her junior staff.
5. That Section 40 procedure of the Employment Act, 2007 was not followed. That she had a very good relationship with the Board of trustees. That she was a widow and suffered loss and damage. That she would even have accepted a salary reduction. That she was not given a chance to consult and explore alternatives to the retrenchment. CW1 denied having filed a similar case at Kisumu being Kisumu ELRC Case No. 321 of 2015. CW1 denied having instructed one Kiven Advocate to file the alleged suit. CW1 said her employment did not depend on the stopped funding. That her program was different. Claimant denied any theft by staff during her tenure. CW1 denied that the respondent was broke to continue employing her.
6. RW1 John Nyapola testified for the respondent. RW1 said the respondent's main objective was to rehabilitate street children and orphans and to take care of mothers with HIV –Aids and related activities. That the claimant was paid all her dues upon termination including notice pay; salary for November and payment in lieu of leave days not taken. RW1 added that respondent no longer had funds to employ the claimant. That the donor had withdrawn the funds. That the respondent had five (5) employees. That the reasons for termination were given in the letter of termination. That whilst claimant was CEO, an employee forged a cheque and withdrew Kshs. 2 Million. RW1 said that terminal dues for the claimant paid were Kshs. 116,000 gross and a net of Kshs. 37,000 upon deductions. That the payments are reflected in November 2014 payroll and bank statements.
7. Under cross examination, RW1 said the claimant had no issue of performance at all except that her proposals were not approved by the donors and funds were withdrawn.
8. RW2 was Tabitha Makokha. She testified that she was a program facilitator for the respondent from 2009 to 2016. That claimant was CEO in 2014. That she was paid benefits when she left including one month salary for November 2014, in lieu of notice Kshs. 150,000, payment in lieu of leave not taken being 208 days because she had already taken 8 days and had worked 9 months. That the claimant has no valid claim against the respondent.
9. Under cross examination RW2 admitted that the respondent had several programmes but the claimant was employed to run one of the programmes whose funds were stopped.

**Determination**

10. The issues for determination are:

(i) Whether the declaration of redundancy of the Claimant was for a valid reason and in terms of a fair procedure.

(ii) Whether the claimant is entitled to the reliefs sought.

**Issue (i)**

11. The court is satisfied that the donor community had stopped funding the programme the claimant was employed to run and that the respondent could not be expected to continue employing the claimant once the funding was stopped. The court finds that the respondent run several programmes hence it did not fold its operations upon terminating the employment of the claimant. The onus of proving that the termination was unlawful and unfair is upon the claimant in terms of *Section 107 and 108 of the Evidence Act, Cap 80 laws of Kenya*.

12. The court notes that the claimant's employment was terminated by a letter dated 29<sup>th</sup> October 2014, and her last date of employment was 31<sup>st</sup> October 2014.

13. The respondent did not give the claimant one month notice of intended termination in terms of *Section 40 (b) of the Employment Act, 2007*. The respondent did not notify the Ministry of Labour of the intended termination on grounds of redundancy in violation of the said *Section 40(b) of the Employment Act*. This procedural deficiency is not cured by payment of one month salary in lieu of notice, which the court finds was paid to the claimant.

14. The purpose of *Section 40*, notice is to give time to an employee to prepare for the intended redundancy to reduce its impact on the employee and to explore possibilities of averting the intended redundancy. A consultative process is meant to take place in terms of *Section 40 (c)* in that regard. Failure by the respondent to initiate that process under *Sections 40(1) (2) and (3) of the Employment Act*, makes the declaration of redundancy of the claimant procedurally unfair.

15. Having said that, the court notes that the respondent had a valid reason to declare the claimant redundant. The redundancy declaration was therefore substantively lawful

16. The court finds also that contrary to the allegations by the claimant, the claimant was paid one month salary in lieu of notice. The claimant was also paid in lieu of 208 leave days not taken. These are mitigating circumstances on the part of the respondent. The respondent therefore complied with *Sections 40(e) and (f) of the Act*.

17. The claimant had not completed one year but severance pay ought to be paid *pro rata* in terms of *Section 40(g) of the Act*, at the rate of half salary for the period worked. This amount was however not claimed by the claimant.

**Compensation**

18. The claimant had expectations to work for at least two years for the respondent according to her testimony. The claimant had been confirmed to her position upon completion of probation. The claimant's employment was terminated for no fault of her own. The respondent had a valid reason to terminate her employment in that they no longer had funds to support her continued employment. The respondent however failed to follow the provisions of *Section 40(b) (c) and (g)*. The respondent was not declared insolvent and so these provisions were applicable to the claimant and respondent was not exempt under *Section 40(2)* thereof.

19. The claimant was paid terminal benefits upon separation. Lack of prior notice made her shocked and the separation more painful.

20. Upon consideration of the circumstance of the case, the court awards the claimant the equivalent of two (2) months salary to ameliorate the damage she suffered as a result of failure by the respondent to follow statutory procedure set out under *Section 40* in declaring her redundant. The court is guided by the case of *Francis Maina Kamau vs Lee Construction Industrial Court Cause No. 1344 of 2011* in which Ndolo J. awarded the equivalent of three (3) months salary for failure by an employer to follow procedure under *Section 40* in declaring an employee redundant.

21. Accordingly, judgment is entered in favour of the claimant as against the respondent for compensation in the sum of Kshs. 300,000 being equivalent of two months salary.

22. Interest at court rates from date of judgment till payment in full.

23. Costs of the suit.

**Judgment Dated, Signed and delivered this 9<sup>th</sup> day of July, 2019**

**Mathews N. Nduma**

**Judge**

**Appearances**

M/S Guserwa for Claimant

Mr. Mukele for Respondent

Chrispo – Court Clerk