



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE 1636 OF 2016

(Before Hon. Justice Hellen S. Wasilwa on 16th September, 2019)

RICHARD OGWENOH OYARE.....CLAIMANT

VERSUS

ICEA LION LIFE ASSURANCE COMPANY LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant herein filed a Memorandum of Claim dated and filed in Court on 15th August, 2016, seeking the following reliefs:

- a) *A declaration that the retrenchment is not supported by facts hence null and void.*
- b) *A declaration that the termination of employment of the Claimant was unfair, unlawful and wrongful.*
- c) *An order for reinstatement of the Claimant in the last position he served before his employment was terminated, with full benefits as he enjoyed before termination.*
- d) *In the alternative to reinstatement, maximum compensation for loss of employment and the termination dues.*
- e) *Compensation under Section 49 of the Employment Act for 12 months, i.e. 12 months x last salary*
- f) *Bonus due in respect of the year 2015.*
- g) *Loss of service, remainder of the period up to the Claimant's retirement at the last salary for up to 4 years.*
- h) *Remittance of the Claimant's terminal dues as follows:-*
 - i. *Full redundancy payment.*
 - ii. *The sum of Kshs. 7,110,312/= being salary for 12 months in lieu of notice.*
 - iii. *Severance pay at the rate of 30 days for each completed year of service.*
 - iv. *Payments of the deposit retained and subsequent instalments made towards the Respondent's Staff Provident Fund.*
 - v. *Deductions made towards the Respondent's Group Life Assurance Scheme.*
 - vi. *All unutilized leave days due and*
 - vii. *Allowances in respect of all above payments.*
- i) *General Damages as compensation for the unfair termination of the Claimant's employment as this Honourable Court will deem fit and proper.*

j) Compensation for unlawful discrimination for a sum not less than 10 million.

k) General Damages for the psychological trauma, distress and humiliation suffered by the Claimant as a result of the Respondent's callous actions.

l) An order that the Respondent do hereby issue a Certificate of Service to the Claimant.

m) Costs of and incidental to the suit.

n) Interest on monies due at Court rates; and

o) Any other or further reliefs this Honourable Court may deem just and fit.

2. The Claimant states that he was employed by the Respondent vide its Letter of Appointment dated 17th July, 2000 as the Manager, Ordinary Life Department with effect from 1st September, 2000 earning a basic monthly salary of Kshs. 140,000/- which was later reviewed upwards to Kshs. 592,526/- and was also promoted to the position of Assistant General Manager, Ordinary Life Business Development in the year 2012.

3. The Claimant further avers that he performed his duties diligently and to the Respondent's satisfaction as evidenced by his exemplary performance upon review which was noted by the Respondent and resulted in the various salary increments and bonuses on account of good performance.

4. The Claimant avers that he was on 4th February, 2016 summoned to the offices of the Respondent's Chief Executive Officer, one Justus Mutiga where he was informed, in the presence of the Respondent's Human Resources Manager, that he had been retrenched on the same date and handed a letter of retrenchment dated the same date.

5. The Claimant contends that no statutory notice was issued to him prior to his retrenchment as required under Section 40 of the Employment Act, 2007 and as such rendering his retrenchment as unconscionable, unfair and prejudicial in nature.

6. Aggrieved by the Respondent's decision to retrench him, the Claimant filed the instant claim seeking the aforesaid reliefs. He further urges this Honourable to enter Judgment in his favour in terms of the reliefs as sought in his Memorandum of Claim.

Respondent's case

7. The Respondent through the firm of Waweru Gatonye & Company Advocates filed its Memorandum of Response dated and filed in Court on 19th September, 2016 in which the Respondent admits having engaged the Claimant herein.

8. The Respondent avers that it did go through the process of reconstruction that affected the Claimant among other employees within the department and that it did follow the set guidelines as provided under Section 40 of the Employment Act.

9. The Respondent further contends that the Claimant was paid all his terminal dues at the time of separation. It further contends that the issue of bonuses is discretionary and that at the time of the Claimant's exit the bonuses for the year 2015 had not been awarded.

10. The Respondent urged this Honourable Court to dismiss the instant Claim with costs to the Respondent having followed the law.

Evidence

11. The Claimant gave his evidence on 28th February, 2019. The Claimant (CW1) in his testimony stated that he had worked for the Respondent herein for a period of 11 years.

12. He further added that he was a manager in charge of Ordinary life & Distribution channels, a position he held until 2012 when the Respondent merged with another company when he was promoted to the position of Assistant General Manager within the same department.

13. CW1 further testified that on 4th February, 2016 he was called for a meeting by his immediate supervisor (the CEO) & the Human Resource Manager and was issued with a letter of termination. CW1 contended that he was not given prior notice of any impending retrenchment before the said date.

14. CW1 stated that the reason given for his termination in the termination letter was shrinking of Ordinary Life business, which reason he did not agree with as there had been significant growth in the said sector.

15. CW1 averred that his secretary was also retrenched by the Respondent. However, he stated that she was duly given notice of three months prior to her retrenchment. He further contended that the staff were taken through psychosocial support which treatment he contends was not accorded to him prior to his retrenchment.

16. CW1 contended that he was unfairly targeted by the retrenchment, as due process was not followed by the Respondent herein. He added that if the Court would allow his prayer for reinstatement he would take it or in the alternative order for his compensation as prayed in his

Memorandum of Claim.

17. On cross-examination, CW1 admitted that in his letter of retrenchment the reason given was as an overhaul in Ordinary Life business and that he was the Assistant General Manager in charge of Ordinary Life & Alternative Distribution Channels.
18. CW1 also admitted to other employees within the department also being retrenched at the same time he was retrenched. He further stated that following his retrenchment he did not complain to the Company opting to seek the assistance of his lawyer for legal redress thus filing the instant Claim.
19. On further cross-examination CW1 admitted that his retrenchment letter provided for psychosocial support. He however did not seek any support. He further admitted that his terminal dues were duly paid but insists that he disputed the retrenchment package including the provident fund as tabulated by the Respondent herein.
20. CW1 further admitted that part of his claim was actually paid by the Respondent as terminal dues at the time of separation.
21. On re-examination, CW1 stated that he was not notified of the termination. He further stated that he was handed a termination letter on 4/2/2016, which was to take effect immediately. He also stated that he was not aware if the labour department was notified of the intended retrenchment.
22. CW1 insisted that the reason given by the Respondent for his retrenchment was not valid and that his performance over the years of service with the Respondent had been good.
23. He further contended that he was the only staff who was retrenched and therefore his retrenchment was unfair and was targeted. The Claimant urged the Court to allow his Claim as drawn.
24. The Respondent called a total of two (2) witnesses. RW1, Justus Mutabali Mutiga, the Chief Executive Officer and Principal Officer of the Respondent Company testified that the Claimant worked for the Respondent Company. He further testified that the department was subjected to reorganisation and the Claimant was retrenched.
25. RW1 contended that the Claimant was paid all his terminal dues at the point of separation from the Respondent's employment. He further stated that the Claimant was paid severance pay, 3 months' notice, days' worked & outstanding leave as part of his retrenchment benefits.
26. On cross-examination, RW1 stated that he did notify the Labour Office of the intended retrenchment. He however indicated that the communication did not give the number of staff that were to be affected by the retrenchment, their names or reason for the retrenchment. RW1 insisted that sufficient notice was given prior to the retrenchment.
27. RW1 averred that the Claimant was not targeted and was paid all his dues at the time of separation.
28. On re-examination, RW1 clarified that the Claimant was not given notice but was paid in lieu of notice and that reasons for his retrenchment were clearly indicated in his letter of retrenchment. RW1 continued by stating that other staff within the said department were also retrenched and thus the Claimant was not a target.
29. RW urged this Honourable Court to dismiss the instant Claim with Costs to the Respondent.
30. RW 2, Micah Mahinda, the Human Resource and Administrator of the Respondent testified. RW2 adopted his witness statement as his evidence in chief in which he reiterates the averments made in the Respondent's Memorandum of Response.
31. On cross-examination, RW2 admitted that no notice was given prior to the Claimant's retrenchment. He however insisted that the notice to the Labour Office was duly done.
32. RW2 further stated that the role played by the Claimant in the Respondent Company was abolished as there was a reconstruction procedure that was done and that the Claimant was not a target in the exercise.
33. RW2 also urged this Honourable Court to dismiss the Claim with costs to the Respondent.
34. Parties were thereafter directed to file and exchange written submissions to the Claim.

Submissions

35. It is submitted on behalf of the Claimant that his retrenchment was unfair and that the reason given by the Respondent for his retrenchment was concocted and was in fact invalid and contrary to the provisions of Sections 43 and 45 of the Employment Act, 2007.
36. The Claimant further submitted that the alleged retrenchment was unfair as the Respondent had no basis for termination as is the requirement set by Section 45 (2) (b)(i) of the Employment Act, 2007 and urged this Honourable Court to allow the Claim as drawn. To fortify this argument the Claimant relied on the case of **Kenya Airways Limited Vs Aviation & Allied Workers Union Kenya & 3 Others (2014) eKLR.**

37. It is further the Claimant's submission that the Respondent failed to follow due process in the process of retrenchment as envisaged in Section 45 (2) (c) of the Employment Act and Article 13 of the Recommendation No. 166 of the International Labour Organisation (ILO) Convention No. 158 – Termination of Employment Convention, 1982. For emphasis, the Claimant cited the Court decision in the case of **Banking Insurance & Finance Union (Kenya) Vs Murata Sacco Society Limited (2014) eKLR.**

38. The Claimant averred that the Respondent failed to adhere to the mandatory provisions for redundancy as set out in Section 40 of the Employment Act. He further contends that the process was clandestine and was lacking in transparency as he became aware of the Respondent's decision to terminate his services on the same day his services were terminated despite being in charge of the department. For emphasis on the same the Claimant relied on the Court's decision in the case of **Gladys Muthoni Mwangi & 20 Others Vs Barclays Bank of Kenya Limited & Another (2016) eKLR.**

39. The Claimant further contended that the Respondent's act of retrenchment was in complete breach of his legitimate expectation and therefore urged this Honourable Court to allow his Claim as drawn.

40. The Claimant urged this Court to award him compensation for malicious and unlawful discrimination for a sum of not less than Kshs. 10 million and relied on the findings in the case of **Geeta Joshi Vs Pandya Memorial Hospital (2019) eKLR** where a Claimant earning a monthly salary of Kshs. 43,450/= was awarded damages for discrimination to the tune of Kshs. 5,000,000/- in addition to compensation for unfair termination.

41. The Claimant further submitted that he is entitled to compensation for loss of employment/income for the remaining 4 years pending his retirement being 28,441,248/- calculated using his last salary of Kshs. 592,526/-. The Claimant relied on the Authority of **Thomas Nyangi Mwita Vs Kenya Commercial Bank (2015) eKLR.**

42. In conclusion, the Claimant urged this Honourable Court to find that his termination was invalid, unfair and unlawful and proceed to allow the same as drawn.

43. I have examined all evidence and submissions of the Parties. The issues for this Court's determination are as follows:-

1. Whether there were valid reasons for termination of the Claimant's services.

2. Whether the termination was done according to the law.

3. Whether the Claimant is entitled to remedies sought.

44. On the first issue, the Claimant has contended that he was terminated vide a letter dated 4.2.2016 and served upon him the same day to be effective the same day. The letter cited business turn down in the last 4 years as the reason for the termination for which the Respondent had decided to restructure the functions held by the Claimant to arrest the poorly performing class in order to sustain business class.

45. The Claimant has averred that this reason was not valid as the company was performing well at the time and he contends that he was targeted in this exercise.

46. To drive this point home, the Claimant testified that he had performed his work diligently and to the Respondent's satisfaction as Assistant General Manager, Ordinary Life Business Development and earned various salary increments and bonuses on account of good performance.

47. He also avers that his secretary was also retrenched but that she had been given notice prior to the termination.

48. The law is clear that a company is free to restructure its operations to ensure profitability for operational requirements of the employee.

49. However as was held in **Kenya Airways Limited vs Aviation & Allied Workers Union Kenya & 3 Others (2014 eKLR):-**

“while there may be underlying causes leading to a true redundancy situation, such as reorganisation, the employer must nevertheless show that the termination is attributable to the redundancy, that is that the services of the employee has been rendered superfluous or that the redundancy has resulted in abolition of office, job or loss of employment”.

50. The Respondent has submitted that there was business down turn. RW1 testified in Court and when cross-examined, he indicated that he did not have tabulation to show how the company had been declining in profitability.

51. He also admitted that bonuses were declared yearly and factors determining bonus declaration were how economy was doing, asset value and asset liability.

52. He also admitted that in the 4 years in question before the Claimant was terminated, he was awarded bonus based on performance, which he attributes to a performing company and not a performing department. He also admitted that page 41 of Claimant's documents indicate he was given bonuses in 2011 based on personal and departments performance.

53. In the circumstances, the reason given for retrenching the Claimant does not seem to be valid given that both the company and the department the Claimant was in charge of was performing well. In the circumstances, in reply to issue No.1, I find that there was no valid reason to declare the Claimant redundant.

54. On issue No. 2, the Claimant avers that he was issued with the termination letter without any notice being given to him and without any psychosocial support as others. Indeed, it is admitted that the termination letter was dated 4/2/2016 and was to take effect immediately.

55. Section 40 of Employment Act 2007 states that before retrenchment, due notice must be given and the Court of Appeal in the Kenya Airways case (supra) asserted that:-

*“52. As I have said, besides this Convention, the requirement of consultation is implicit in the principle of fair play under Section 40(1) of the Employment Act itself and our other labour laws. The notices under this provision are not merely for information. Read together with Part VIII of the Labour Relations Act, 2007 which provides for reference to the Minister for Labour of trade disputes, including those related to redundancy (see Section 62(4)) for conciliation, I am of the firm view that the requirement of consultations implicit in these provisions. The purpose of the notice under Section 40 (1) (a) and (b) of the Employment Act, as is also provided for in the said ILO Convention No. 158-Termination of Employment Convention, 1982, is to give the parties an opportunity to consider “measures to be taken to avert or to minimize the terminations and measures to mitigate the adverse effects of any terminations on the workers concerned such as finding alternative employment.” The consultations are therefore meant to cause the parties to discuss and negotiate a way out of the intended redundancy, if possible, or the best way of implementing it if it is unavoidable. This means that if parties put their heads together, chances are that they could avert or at least minimize the terminations resulting from the employer’s proposed redundancy. If redundancy is inevitable, measures should be taken to ensure that as little hardship as possible is caused to the affected employees. In the circumstances, I agree with counsel for the 1st Respondent that consultation is an imperative requirement under our law. Mr. Oraro’s criticism of the learned trial Judge’s reliance on the UK Employment Appeals Tribunal’s decision in *Mugford v. Midland Bank*, UK Employment Appeal Tribunal, 10 and the treatise by Rycroft and Jordan, - “A guide to the South Africa Labour Law” both of which dealt with the requirement of consultation, was therefore unfair. Those were authorities on comparative jurisprudence which the learned Judge was perfectly entitled to make reference to and where appropriate rely on”.*

56. ILO Convention No.158 Termination of Employment Convention 1982 at Article 134 also provide as follows:-

“When the employer contemplates terminations for reasons of an economic, technological, structural or similar nature, the employer shall:-

a) provide the workers' representatives concerned in good time with relevant information including the reasons for the terminations contemplated, the number and categories of workers likely to be affected and the period over which the terminations are intended to be carried out;

b) give, in accordance with national law and practice, the workers' representatives concerned, as early as possible, an opportunity for consultation on measures to be taken to avert or to minimise the terminations and measures to mitigate the adverse effects of any terminations on the workers concerned such as finding alternative employment”.

57. In the instant case, there was no consultation, no notice was issued, the labour office was not informed of who was to be rendered redundant and why. It is therefore clear that the redundancy was effected without following due procedure.

58. In the circumstances, I find the redundancy was unfair for want of valid reasons and failure to follow procedure as envisaged under Section 45(2) of Employment Act 2007 which states as follows:-

(2) “A termination of employment by an employer is unfair if the employer fails to prove:

(a) that the reason for the termination is valid;

(b) that the reason for the termination is a fair reason:-

(i) related to the employee’s conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer; and

(c) that the employment was terminated in accordance with fair procedure”.

59. As for remedies, the Claimant sought various remedies. I note that he has already been paid his terminal dues and redundancy package which he says he disputed. He has however not explained what is disputed. He was paid 3 months’ pay in lieu of notice.

60. In the circumstances, given that the Claimant was paid his dues as per the termination letter I only find that he is entitled to compensation for the unfairness of the process for which I find full 12 months’ salary, as compensation will be adequate.

61. I therefore award him salary equivalent to 12 months as compensation for unfair and unjustified redundancy:-

= 12 x Kshs.592,526

TOTAL = Kshs.7,110,312/=

62. The Respondent will also pay costs of this suit plus interest at Court rates with effect from the date of this judgement.

Dated and delivered in open Court this **16th day of September, 2019.**

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Awiti for Claimant

Khamala holding brief Wanga for Respondent – Present