



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE 2460 OF 2016**

*(Before Hon. Lady Justice Maureen Onyango)*

**BERTHA AWUOR KOWIDO.....CLAIMANT**

**VERSUS**

**SPEED CAPITAL LIMITED.....RESPONDENT**

**JUDGMENT**

The Claimant was employed by the Respondent in October 2014 as Human Resource Officer and served the Respondent until October 2016 when her services were terminated. Aggrieved by the termination, the Claimant filed the cause herein seeking the following reliefs-

- a. A declaration that the Claimant's services were unfair, unlawful and illegal.
- b. The Claimant be paid her terminal dues as set out below-
  - i. 12 month's salary compensation for unfair termination and loss of employment (112,500 x 12 months) amounting to Kshs.1,350,000.00.
  - ii. 1 months' salary in lieu of notice in the sum of Kshs.225,000.00.
  - iii. Gratuity/Service pay in the sum of Kshs.112,500.00.
  - iv. Accrued leave allowance (5 days) in the sum of Kshs.26,875.00.
  - v. 17 days salary for the days worked in October in the sum of Kshs.63,750.00.
- c. Cost of this suit.
- d. Certificate of Service in accordance with section 51 of the Employment Act 2007.
- e. The Court do issue such orders and give such directions as it may deem fit to meet the end of justice.

It is the Claimant's case that on 14<sup>th</sup> October 2015, her position was changed from Human Resource Officer to Human Resource Business Partner so as to expand her role. She avers that she performed her duties diligently and with good faith as was confirmed by her performance appraisal conducted on 12<sup>th</sup> March 2016, where she was highly rated. However, on 17<sup>th</sup> October 2016 she was issued with a letter terminating her employment on account of redundancy.

In her witness statement filed on 22<sup>nd</sup> June 2017, the Claimant averred that on 13<sup>th</sup> October 2016 (sic), she had a meeting with the Respondent's CEO and Finance Manager to enquire about the status of September salaries. She was later informed that the matter would be resolved. However, on 17<sup>th</sup> October 2017 she was called for a meeting only to be informed that her services had been terminated. Upon enquiry of when the termination was to take effect, she was told it was to take effect immediately.

It was also her testimony that she had been informed by one of the Respondent's employees that the Respondent intended to fill her position.

The Respondent filed its response on 25<sup>th</sup> April 2017 contending that the Claimant was accorded fair consideration in coming up with a decision to terminate her contract and that all the procedures were adhered to. The respondent further avers that the consultative meeting of 17<sup>th</sup> October 2016 was initiated by the Claimant as she preferred payment in lieu of notice as opposed serving during the notice period.

The Respondent avers that the Claimant's dues were calculated on 22<sup>nd</sup> October 2016 but she has never collected the same since she was required to clear before picking the cheque. The respondent denies that it is in breach of the Claimant's contract of employment or the employment laws.

In the witness statement of Jeremy Nyaga Imanene, it is averred that the Respondent was experiencing financial constraints. That the Claimant offered to be declared redundant in the meeting of 17<sup>th</sup> October 2017.

The case was disposed of by way of written submissions. The Respondent filed submissions on 25<sup>th</sup> April 2019 and the Claimant on 3<sup>rd</sup> May 2019.

The Claimant submits that since she was not a member of a trade union, notice of the intended redundancy ought to have been issued to her as well as the labour office. She therefore submits that the proper procedure as outlined in section 40 of the Employment Act was not followed and as such the termination of her employment was unfair. She relies on the cases of *Hesbon Ngaruiya Waigi vs. Equitorial Commercial Bank Limited [2013] eKLR*, *Banking Insurance and Finance Union (Kenya) vs. Kirinyaga District Co-operative Union Limited & Another [2014] eKLR*, *Gerrishom Mukhutsi Obayo vs. Dsv Air and Sea Limited [2018] eKLR* and *Kenya Airways Limited vs. Aviation & Allied Workers Union Kenya & 3 Others [2014] eKLR*.

The Claimant submits that she is entitled to payment of 5 accrued leave days and one months' notice pay which were not paid to her. She further submits that she is entitled to severance pay pursuant to Section 40(1)(g) of the Employment Act.

The Respondent submits that the right procedure was followed in accordance to section 40 of the Employment Act and Article 13 of the ILO Convention 158 – Termination of Employment Convention. It is the submission of the respondent that several meetings were held regarding the Company's financial viability and its financial position and it was decided that the Claimant's position needed to be abolished.

It submits that the Claimant is not entitled to a declaration of unlawful termination or compensation for unlawful termination of employment since she has not proved that her employment was unlawfully terminated. It submits that the Claimant's salary for the month of September is paid hence she was not entitled to the same. It is the submission of the respondent that the money due to the Claimant is Kshs.148,670.60 being salary for the 17 days worked and severance pay of Kshs.56,250.00 after taxation.

### **Analysis and Determination**

The issues for determination are as follows-

- a. Whether the Claimant's termination on account of redundancy amounts to unfair termination.
- b. Whether the Claimant is entitled to the prayers sought.

### **Termination**

Section 40(1) of the Employment Act provides as follows-

***An employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions—***

***a. ...***

***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. ...***

***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.***

It is not in contention that the claimant was declared redundant. However, the Respondent did not adduce any evidence to prove that indeed it was experiencing financial constraints or that the Claimant's redundancy was justified. It is therefore difficult to establish whether their failure to pay their employees the September salary was due to financial constraints or bad practice.

Additionally, the Respondent did not adduce evidence to prove that notice had been issued to the Claimant and the labour office, or that leave and at least one months' salary in lieu of notice was paid. In **Francis Maina Kamau vs. Lee Construction [2014] eKLR** it was held that-

*“Where an employer declares a redundancy, the conditions set out in section 40 of the Employment Act must be observed and where the employer fails to do so, the termination becomes unfair with the meaning of section 45 of the Employment Act.”*

The opening words of Section 40(1) are also material, that an employer SHALL NOT terminate the employment of an employee on account of redundancy unless it complies with the conditions set out therein. The respondent having failed to comply, the redundancy amounted to unfair termination of employment.

### **Prayers Sought**

Having found that the Claimant's termination on account of redundancy amounted to unfair termination, I award the Claimant one months' salary in lieu of notice and 3 months' salary as compensation for unfair termination in view of the fact that she worked for the Respondent for a period of 2 years. The claim for the 17 days worked is awarded as claimed as the Respondent admitted that the Claimant was entitled to the same and the same had been offered to her in the cheque that was never collected.

The claim for gratuity/service pay fails as the Claimant has not proved that she was entitled to the same under her contract.

The claim for 5 days accrued leave allowance succeeds since the respondent did not deny that the claimant was entitled to the same.

The respondent having admitted that the claimant was declared redundant, she is entitled to severance pay in the sum of Kshs.112,500/=.

I therefore enter judgment for the claimant against the respondent as follows-

- i) Pay for 17 days worked Kshs.63,750
  - ii) 3 months' salary as compensation Kshs.337,500
  - iii) Pay in lieu of one month's notice Kshs.112,500
  - iv) 5 days accrued leave Kshs.26,875
  - v) Severance pay at 15 days' salary
- per year worked Kshs.112,500

**Total Kshs.653,125**

The Respondent shall issue a certificate of service to the Claimant.

The respondent will further pay claimant's costs.

The decretal sum shall attract interest at court rates. Items (i), (iii), (iv) and (v) shall attract interest from date of filing suit as the same were payable upon termination as provided under Section 40(1) while item (ii) shall attract interest from date of judgment.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 25<sup>TH</sup> DAY OF OCTOBER 2019**

**MAUREEN ONYANGO**

**JUDGE**