



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE 775 OF 2016

(Before Hon. Lady Justice Maureen Onyango)

MUTHONI NYAGAKI MUGO.....CLAIMANT

VERSUS

KEMETRICA LIMITED.....RESPONDENT

JUDGMENT

Vide her statement of claim dated 5th May, 2016 and filed in Court on 6th May, 2016, the claimant avers that his employment was unfairly and unlawfully terminated by the Respondent, a registered limited liability company.

Her case is that she was first employed by the Respondent on or about 15th July 2013 as a Monitoring and Evaluation Specialist. She was promoted to head the department as its Communication Specialist with effect from 1st June 2014, which position she held until her termination on 30th September 2015.

The Claimant averred that she performed her duties diligently and to the Respondent's satisfaction. It is her contention that on or about June 2015, the Claimant was summoned to a meeting by the Respondent's Human Resources Specialist where she was informed that the Respondent's Chief Operations Officer, based in South Africa had expressed his dissatisfaction in her work as a result of which the Claimant was placed on a two months' probation on account of poor performance backdated by six weeks.

The Claimant avers that she sent an email dated 29th June, 2015 to the Respondent's Director explaining the challenges she was facing in performing her duties. Her concerns raised in the said email were not addressed by the Respondent. Instead she was issued with a warning letter for escalating her grievances to Directors.

She further stated that she was also subjected to a two month Performance Improvement Plan (PIP) under which her performance was to be formally evaluated and assessed commencing from 2nd July, 2015 to 30th August, 2015. Upon expiry of the said period she held another meeting with the Respondent's Human Resources Specialist who informed her (the Claimant) that her performance assessment period would be extended by a month to allow her supervisor more time to give feedback. She was issued with a letter by the Respondent dated 28th September 2015 confirming the extension of the PIP period.

On 30th September 2015, the claimant was informed that her position had become redundant and that her employment had been terminated with immediate effect.

She contends that the said termination on account of redundancy was unfair and unlawful as the Respondent failed to adhere to the mandatory provisions as provided under Section 40 of the Employment Act, 2007.

Aggrieved by the Respondent's decision to unfairly and unlawfully terminate her services the Claimant filed the instant Claim seeking the following reliefs:-

- a) A declaration that the Claimant's termination was unlawful and unfair.
- b) A declaration that the termination was discriminatory and violated the Claimant's right to fair labour practices.
- c) An order for compensation for unfair and unlawful termination.

- d) Damages for unfair and unlawful termination.
- e) Interest in (c) and (d)
- f) Costs.

The Respondent in its Response to the Claimant's Statement of Claim dated 5th July, 2016 and filed in Court on 8th July, 2016 admits having engaged the Claimant as indicated. However, the Respondent denied that the Claimant's services were unfairly and unlawfully terminated as alleged.

The Respondent contends that the performance of the claimant was not exemplary as alleged and that she was not promoted as alleged but rather her job title was redesigned to a new title, which did not amount to a promotion. The respondent avers that the Claimant started showing signs of poor performance in her work output from the month of June 2015 prompting meetings between the Respondent and the Claimant.

The Respondent contends that the Claimant failed to follow its Employee Manual by raising her grievances with the Respondent's Director as opposed to raising the same with her immediate supervisor as evidenced by her email dated 29th June 2015.

The Respondent contends that it did notify the Claimant of the intended termination and it did comply with the procedure for redundancy as prescribed in the Employment Act, 2007. The Respondent further contends that the only position that was affected by the redundancy was the claimant's and therefore the Claimant cannot allege discrimination and the said allegation is made in bad faith.

It is the Respondent's contention that the Claimant was paid her terminal dues at the time of separation in accordance with the law and on this basis the Claimant is not entitled to the reliefs as sought in her Statement of Claim. The Respondent urged the Court to dismiss the instant claim with costs to the Respondent.

In view of the fact that the facts of the claim are not contested, the court directed the parties to proceed by way of written submissions.

Submissions by the Parties

It is submitted on behalf of the Claimant that the Respondent has failed

to prove that it had a valid reason for terminating the Claimant's services and that in doing so it did follow due process as provided by law. To buttress this argument the Claimant relied on case of *Kenya Airways Limited Vs Allied Workers Union Kenya & 3 Others (2014) eKLR* where it was held:

"Part VI of the Employment Act 2007 in a nutshell outlaws unreasonable and unjustified termination of employment. Though it requires an employee to prove that the termination of his employment was unlawful, in my point of view, it places a higher burden of proof upon the employer to justify any termination of employment."

To further fortify her argument the Claimant cited and relied on the Court of Appeal decision in the case of *Barclays Bank of Kenya Ltd & Another Vs Gladys Muthoni & 20 Others (2018) eKLR* where it was held that there is a heavy burden of proof placed upon the employer to justify any termination of employment.

The Claimant further submitted that she had, on her part, fully discharged her burden of demonstrating that the Respondent unfairly and unlawfully terminated her employment.

The Claimant contended that the Respondent failed to comply with the mandatory provisions of Section 40 of the Employment Act, 2007 while declaring her position redundant and as such the redundancy was unfair and unlawful. To fortify her argument the Claimant relied on the several Authorities among them *Banking Insurance & Finance Union (Kenya) Vs Murata Sacco Society Limited (2014) eKLR*, *Osore Sammy Mohan Vs Tononoka Rolling Mills Limited (2018) eKLR*, *Gladys Muthoni Mwangi & 20 Others Vs Barclays Bank of Kenya Limited & Another (2016) eKLR* and *Kenya Airways Limited Vs Aviation & Allied Workers Union Kenya & 3 Others (2014) eKLR*.

The Claimant further submitted that her termination on account of redundancy was not justified and that there was no substantive justification for the same. She urged the Court to find that the redundancy was pre-meditated and only meant to target her thereby making the redundancy unfair and unlawful. The Claimant cited and relied on the case of *Hesbon Ngaruiya Waigi Vs Equitorial Commercial Bank Limited (2013) eKLR*.

The Claimant submitted that she is entitled to the reliefs sought in her Statement of Claim having proved that her termination on account of redundancy was not justified and that the same was in fact unfair and unlawful relying on the case of *Hesbon Ngaruiya Waigi* (supra).

In Conclusion, the Claimant urged the court to allow her statement of claim as prayed.

Respondent's Submissions

The Respondent on its part submitted that it was justified in declaring the Claimant's position redundant and that in doing so it did follow the Mandatory provisions of Section 40 of the Employment Act, 2007. The Respondent relied on the decision in *Kenya Airways Limited Vs*

Aviation & Allied Workers Union Kenya & 3 Others (2014) eKLR where it was held:

“Redundancy is a special situation. The employees have done no wrong. It is simply that in the circumstances the employer as a matter of commercial judgment that there are too many employees in the particular area or overall, it is for the employer as a matter of commercial judgment to decide on the strategy to adopt in restructuring exercise and what position or positions should be dispensed with in the implementation of that strategy...”

The Respondent further submitted that it did pay the Claimant one month’s salary in lieu of notice and that this pay was sufficient as set out in law and that it ought not to be condemned for complying with the law. To buttress this argument the Respondent cited and relied on the case of **Mary Nyawira Karimi Vs Pure Circle (K) Limited (2018) eKLR** where the Court held that payment in lieu of notice constituted sufficient compensation.

On the issue of payment of severance pay and leave days the Respondent submitted that the same was duly paid at the time of separation in accordance with the provisions of Section 40(1)(g) of the Employment Act, 2007. The respondent further submitted that it did issue the Claimant with a certificate of service as produced in its Bundle of Documents.

On the issue of alleged discrimination, it is submitted that the Claimant has failed to adduce evidence in support of the assertion and as such the Respondent urged the Court to dismiss the claim on discrimination. To fortify its argument the Respondent cited and relied on the cases of **Kenya Chemical & Allied Workers Union Vs Bamburi Cement Limited (2013) eKLR** and **Heritage Insurance Company Limited Vs Christopher Onyango & 3 Others** in which the court held that discrimination was not proved.

In conclusion the Respondent urged the Court to find that the redundancy was justified and that due process was followed by the Respondent. The Respondent further submitted that the Claimant was paid all her dues at the time of separation and therefore has no claim against it. It is on this basis that the Respondent urged the Court to dismiss the Claim in its entirety with costs to the Respondent.

Analysis and Determination

Having considered the facts of this cause, evidence, submissions and authorities cited, the following are the issues for determination:

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

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 employer is required to notify required the employee and the Labour Officer where the employee is not a member of the union.

The Claimant contends that the Respondent’s did not follow due process while declaring her position redundant. The Claimant further contends that she was a victim of discrimination and that she was the only staff member affected by the redundancy. She further contended that the Respondent failed to comply with the mandatory provisions of Section 40 of the Employment Act, 2007. To fortify her argument the Claimant relied on several authorities among them **Banking Insurance & Finance Union (Kenya) Vs Murata Sacco Society Limited (2014) eKLR** where the Court held as follows:

“These provisions of the law are set out in mandatory terms. They are to be followed by every employer as redundancy does not occur overnight. It is a process. It is necessitated by operational requirements of the employer. Companies restructure not necessarily, because they are in financial distress, but for such other reasons as mechanization of modes of production.”

The Respondent on the other hand contended that it followed due process in declaring the Claimant redundant as set out in the employment contract as well as Section 40 of the Employment Act, 2007.

It was further contended that the Claimant was duly paid all her dues at the time of separation and therefore has no claim as against it.

Was procedure followed?

The Respondent issued a letter dated 30th September, 2015 to the Claimant reading in part:

“Dear Muthoni,

TERMINATION OF CONTRACT

We are continuously reviewing our business structure as we grow and harmonizing our human resources accordingly. As part of

this harmonization, we will no longer have the position of Communication Specialist in Kemetrica Kenya effective 01 October 2015. As a result your last day of employment will be 30th September, 2015. Thank you for the time you have served Kimetrica Limited.

As per the Contract signed, we are required to give you one month's pay in lieu of notice. We have chosen the latter and we will process your payment accordingly. You are also entitled to a severance pay and payment of unused leave days...

Sincerely,

SIGNED

William Robert Rose

Chief Operating Officer, Kimetrica Limited”

The Respondent on the same date, 30th September 2015 did issue yet another letter this time to the Labour Officer notifying them of the intended redundancy. The letter reads as follows

“Ministry of Labour

Labour Officer

Dear Sir/Madam,

RE: REDUNDANCY AT KIMETRICA LIMITED

We as Kimetrica Limited are currently evaluating our business structure to allow us to effectively pursue the opportunities in our business environment. In a bid to streamline our human resources accordingly, we have reduced the number of positions we have. As a result we are declaring the holders of those positions redundant.

Of immediate impact is the position held by:

- Muthoni Mugo (Communication Specialist)

Pursuant to the Employment Act 2007, Section 40, we are hereby notifying your office of the said redundancy.

We also aver that we have complied with the other requirements of the Employment Act in regard to redundancy. We have calculated their terminal dues as follows:

- Days worked
- One month's pay in lieu of notice
- Leave days accrued and not taken
- Severance pay

Sincerely,

SIGNED

Nyasie Mkang'ombe Ngwiri

Human Resource Specialist”

The date stamp on the letter shows that the same was received at the County Labour Office on 6th October 2015 this being 6 days after the Claimant's services were declared redundant

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.

There is no evidence adduced to indicate that the Claimant was served with a notice of intention to declare her position redundant prior to her termination. In the case of **Margaret Mumbi Mwago Vs Intrahealth International (2017) eKLR** it was held:

“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”

There is no evidence that the Claimant was issued with a notice under Section 40(a) of the Employment Act. What is adduced in evidence is the notice to the Labour Officer as well as the termination notice to the Claimant.

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 a declaration that her termination was unlawful and unfair. I find that the redundancy was un-procedural and therefore unfair.

The Claimant further prayed for a declaration that the termination was discriminatory and violated the Claimant’s right to fair labour practices. The claimant however did not adduce evidence to support this contention. Her only evidence is that she was the only one declared redundant, as also confirmed in the notice to the Labour Office. This alone is not proof of discrimination. The same therefore fails for want of proof.

The Claimant also prayed for damages for unlawful termination from employment.

Having found the redundancy unprocedural, it amounted to an unfair termination of employment and the claimant is entitled to compensation. Taking into account all the circumstances of the case it is my opinion that compensation equivalent to three months’ salary is reasonable. Based on her September 2015 salary of Kshs.116,144.05 x 3 months totalling to Kshs.348,432.15. This amount shall be subject to statutory deductions. In the case of **Francis Maina Kamau Vs Lee Construction (2014) eKLR** where the Court having found that the Respondent failed to adhere to the provisions of Section 40 of the Act proceeded to award compensation as follows:-

“There is no evidence that the Respondent complied with any of the conditions set in Section 40 of the Employment Act, 2007 and I therefore find the termination of the Claimant’s employment to have been unfair within the meaning of Section 45 of the Act. Consequently, I award the Claimant the equivalent of 3 months’ pay in compensation. I also award him one month’s salary in lieu of notice.”

Award

1. Three (3) months’ compensation **Kshs.348,532.15/=**
2. Costs of the suit
3. Interest from date of judgment till payment in full.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 25TH DAY OF OCTOBER 2019

MAUREEN ONYANGO

JUDGE