



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONC ORU TOF KENYA

AT NAKURU

CAUSE NO.194 OF 2017

SCHOLASTICA ANYONA KILAHA.....CLAIMANT

VERSUS

EQUITY BANK LIMITED.....RESPONDENT

JUDGEMENT

The claim is on the facts that the claimant was employed by the respondent on 2nd January, 2012 as a Relationship Manager – operations and on 30th December, 2014 transferred to Equity bank (Kenya) Limited as part of Equity 3.0 transformation.

On 22nd December, 2016 the claimant received letter dated equal date from the respondent terminating employment which was without prior notice and contrary to the rules of natural justice.

The claim is that employment terminated unfairly and without any notice, explanation and as a result there was suffering, loss of credibility and chances of new employment have diminished. As no reason was given for termination of employment future employment opportunities were lost and marketability as an accountant lost.

The claim is also that there was breach of contract, there was no fairness and the claimant is seeking for an order of reinstatement to her capacity as held before employment terminated and payment of damages and outstanding dues and costs of the suit.

The claimant also testified in support of her claims that she worked diligently for the respondent in Juba, South Sudan and moved to different branches upon promotion and with a salary review until 22nd December, 2016 while in Kenya on compassionate leave she was issued with notice terminating her employment effective 30th December, 2016. The respondent stated that employment was being terminated on the grounds that due to serious political crisis in South Sudan and due to closure of several branches as a result employment was not viable.

The claimant also testified that she was not paid as set out in the letter terminating employment. There were other employees working with her in South Sudan who were recalled back to Kenya and redeployed and thus seek reinstatement and compensation for loss of employment. At the time of termination she had a running mortgage facility which converted to commercial rats and has caused her great distress. Where reinstatement is not possible the claimant is seeking for compensation.

Defence

The defence is that the claimant was employed by the Equity bank South Sudan (SS) Limited and based in South Sudan and letter of termination was issued by the employer and not the respondent. The orders sought are not due as the court lacks jurisdiction to award as claimed.

Winfred Mwendu Kyalo testified that she is the human resource officer, employee relations with the respondent and that he claimant was employee din South Sudan under a different entity from the respondent and has never worked in Kenya. He appointment letter was by Equity Group and not the respondent. Employment was offered on the basis the claimant was to work for the South Sudan subsidiary under the Group.

The claimant was given the reasons for the termination of her employment as this resulted from political crisis in South Sudan and all subsidiaries closed after some were destroyed or closed. The crisis affected bank operations and led to low transactions and deteriorating logs which required a rationalisation of operations and had to terminate all international employees and some local staff. In total 8 branches closed in South Sudan.

On the claims made, reinstatement is no possible as there is no vacancy for the position held in South Sudan and cannot be redeployed anywhere else.

The letter upon which the claimant has relied to assert that she was employed by the respondent was issued in error as it was to go to Kenyan and respondent employees and was sent to all employees of the subsidiary companies in error. There was no case of unfair termination of employment as there was notice issued and this resulted due to extreme political crisis in the employer country, South Sudan.

At the close of the hearing the parties filed written submissions.

By ruling dated 15th November, 2018 the court addressed the question of jurisdiction, who the employer is and the forum of filing suit. The court found the respondent bound in the employment terms of the claimant as the employer and employment having been addressed thus, the respondent did not address the filed defence and left the defence comprising mere denials and without any substance as this was filed and premised on the facts that the court lacked jurisdiction. Such issue determined, there was no effort to offer any defence.

On the evidence of Ms Kyalo for the respondent, she testified that the letter issued to the claimant and dated 30th December, 2014 transferring the claimant from Equity Bank Limited to Equity Bank (Kenya) Limited was in error and that this was meant for the other employees and not those under the subsidiary, South Sudan noted, upon the realisation that this was an alleged error, there was no effort taken to regularise the same. From 30th December, 2014 to the date the witness testified on 9th October, 2019 it was not clarified as to when the error was noted for it to form a substantive element of the defence.

As noted above and in the court ruling on 15th November, 2018 the question of employment was addressed.

The employer is allowed by statute to terminate employment for lawful cause as outlined under section 40 of the Employment Act, 2007 for operational reasons defined as redundancy. Under section 40 of the Act, the employer is required to give a general notice to the employees and another notice to the affected employee(s) whose employment is to be terminated following the redundancy. In the case of **Kenya Airways Limited versus Aviation & Allied Workers Union Kenya & 3 Others [2014] eKLR** it was held as follows;

... When an employer contemplates redundancy, he should first give a general notice of that intention to the employees likely to be affected or their union. It is that notice that will elicit consultation between the parties, and I will shortly show that consultation is imperative, on the justifiability of that intention and the mode of its implementation where it is found justifiable. At that initial stage, the employer would not have identified the employee(s) who will be affected. So that notice cannot have the names of the employees ... It does not have to be a calendar months' notice The Act requires one month's notice. The period runs from the date of service of that notice. It is after the conclusions of the consultations on all issues of the matter that notices will be issued to the affected employees of the decision to declare them redundant.

This position is reaffirmed in the case of **Barclays Bank of Kenya Ltd & another versus Gladys Muthoni & 20 others [2018] eKLR**. In the case of **Africa Nazarene University versus David Mutevu & 103 others [2017] eKLR** the Court of Appeal held that once the employee is made aware, whether in writing or orally that there will be work stoppage due to operational reasons, such notification is sufficient. This position is reiterated by the Court of Appeal in the case of **Heritage Insurance Company Limited versus Christopher Onyango & 23 others [2018] eKLR**.

In this case, by letter dated 2nd December, 2016 the respondent notified the claimant that;

SUBJECT: TERMAINTION OF EMPLOYMENT CONTRACT

As you are aware, South Sudan has gone through a serious political crisis which has negatively affected the economy of the country and as well as the Bank with two branches having been destroyed and closed. As a result, the bank has had to rationalise the staff complement.

This is to advice you therefore that your employment contract with Equity bank (SS) had regrettably been terminated with effect from December 31st 2016. Consequently you will be paid up to and including 31st December 2016, which was your last date of service. In addition that Bank will pay you the following as your final dues;

- *One month's notice gross pay in lieu of notice;*
- *Leave entitlement pay*
- *National social insurance contribution*

Please organise to hand over ...

The reasons given for the redundancy notice have not been challenged or controverted in any material way. The fact of South Sudan going through a political crisis in December, 2016 is as given.

Did the respondent then comply with the mandatory provisions of section 40 of the Employment Act, 2007 once faced with a political crisis pitting the claimant's employment therein?

The employee is entitled to a general notice and a specific/personal notice following a redundancy. the Court of Appeal in **Africa Nazarene University versus David Matevu & 103 others (2017) eKLR** where the court was called on to interpret section 40 of the Employment Act, 2007 and in particular the requirements as to notice under this section. The Court stated that;

We agree that construction as well as observation of section 40 1 (b) says nothing about the length of the notice or the contents. In our view however, the only difference between Section 40 (1) (a) and 40 (1) (b) is whether an employee is a member of a trade union or not A proper construction of both sections would show that the phrase: - 'the reasons for and the extent of intended redundancy not less than a month prior to the date of redundancy' is common to both kinds of employees.

In our context the rationale of both notices, general and specific is addressed in the case of **BIFU versus Kirinyaga District Co-operative Union Limited & another [2014] eKLR**, where the court held that the intent and purpose of the redundancy notification is;

The purpose of the notification is to enable the Union and the Labour Officer to understand and appreciate the purpose of the redundancy. It is aimed at calling into participation, the Union and Labour Official, to ensure the other provisions of Section 40(1) are observed in carrying out the redundancy. It is further meant to ensure that the employees affected are compensated, on the minimum, as provided in the Employment Act or the CBA and that the exercise is being carried out in a transparent manner and does not amount to unfair labour practice.

The claimant was not unionised and even in her case, the right to a notice as set out in the *Africa Nazarene Case*, cited above is to be addressed by the employer.

Save for the notice dated 22nd December, 2016 terminating employment with effect from 31st December, 2016 the claimant learnt of the redundancy and the termination of employment with the same letter. the Court of Appeal in the case of **THOMAS DE LA RUE (K) LTD versus DAVID OPUNDO OMUTELEMA**, in addressing this question held that the notification period of one month provided for in Subsection 40(1)(a) applies to the notification under Subsection 40(a)(b) as well;

... In our view, a purposive reading and interpretation of the statute would mean the same notice period is required in both situations. We do not see any rational reason why the employee who is not a member of a union should be entitled to a shorter notice.

Sae for the notice issued to the claimant herein, without the general notice being issued, she is entitled to the same in redundancy. See **Gerrishom Mukhutsi Obayo versus Dsv Air and Sea Limited [2018] eKLR**.

The claimant submitted that her salary was reviewed by letter dated 27th may, 2014 to Ksh.180,000 per month. The gross wage in not stated throughout these proceedings. I take it the last paid salary is that of ksh.180,000.00 which is due in notice pay.

On the claim for reinstatement, the reasons for redundancy no challenged, the respondent operations in South Sudan having suffered following the political crisis, the same necessitating a rationalisation of operations, to order reinstatement or specific performance would not aid justice.

On the claim for general damages, such was not particularised as held in **Okulu Gondi versus South Nyanza Sugar Co. Ltd [2018] eKLR**. The alleged loss, damage and suffering arising out of termination of employment were matters not given specifics to allow the respondent a fair chance to give a defence.

Accordingly, save for the award of notice pay due under the provisions of section 40(1)(a) read together with 40(a)(b) all at ksh.180,000.00 the other claims are dismissed. The claimant shall be paid 50% of her due costs.

Delivered at Nakuru this 11th day of December, 2019.

M. MBARU

JUDGE

In the presence of:

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