



**REPUBLIC OF KENYA**

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

**CAUSE NO. 2258 OF 2014**

**ROSE WANJIKU KAMAU (Legal representative of the  
estate of the late FRANCIS KAMAU WAITHAKA).....CLAIMANT**

**V**

**FINLAYS HORTICULTURE (K) LIMITED.....RESPONDENT**

**JUDGMENT**

1. Francis Kamau Waithaka (Claimant) was offered employment through a letter dated 29 November 2003 as an *Assistant Operations Manager* by Homegrown (K) Ltd. Homegrown was later acquired by Flamingo Horticulture (K) Ltd which in turn was taken over by Finlays Horticulture (K) Ltd (Respondent).
2. Around 2 September 2011, the Claimant was transferred to Mt. Kenya Region to serve as *Processing and Technical Manager*.
3. On or around 6 January 2014, the Respondent notified the District Labour Officer, Nairobi that it intended to carry out restructuring due to a challenging business environment.
4. The notification indicated that about 18 employees would be affected.
5. On 6 October 2014, the Respondent's General Manager wrote to the Claimant informing him that due to the restructuring involving the *Pack House Operations*, it had been decided to terminate his employment on account of redundancy.
6. The termination on account of redundancy led the Claimant to institute legal proceedings against the Respondent and he stated the Issues in Dispute as
  - (a) unfair/wrongful/arbitrary/malicious declaration of redundancy contrary to section 40 of the Employment Act, 2007;
  - (b) discrimination and harassment contrary to section 5(3)(b) of the Act
  - (c) unfair/wrongful termination contrary to section 45 of the Employment Act, 2007;
  - (d) breach of employment contract.
7. The Respondent filed a Response on 29 July 2015.
8. On 29 September 2015, the parties entered into a consent pursuant to which the Claimant was to be paid Kshs 2,008,597/40 being *severance pay, fixed bonus, car allowance and pay in lieu of notice* (amount was paid to the Claimant's advocate).
9. The Claimant died before the Cause could be determined and on 29 August 2016, the Court allowed Rose Wanjiru Kamau to be substituted as the nominal Claimant (being the legal representative of the deceased).
10. The Cause was then scheduled for hearing on 16 January 2018. The nominal Claimant and the Respondent's Legal and Human Resource Director testified.
11. The Claimant filed her submissions on 31 January 2018 while the Respondent filed its submissions on 16 February 2018.
12. The Court has considered the pleadings, evidence and submissions.

13. There are essentially 3 issues arising for the Court's determination and these are, *whether the redundancy was unfair, whether there was discrimination and appropriate remedies.*

### **Was redundancy unfair?**

14. Section 40 of the Employment Act, 2007 has outlined the conditions an employer should comply with in the process of redundancy.

15. One of the conditions is that a written notification should be issued to the employee at least one month in advance.

16. The local labour officer is also required to be notified, and where the employee is unionisable, the Union should be informed.

17. The provision of the law on advance written notification and compliance with the other conditions have been amplified in decisions by the Court of Appeal including *Thomas De La Rue (K) Ltd v David Opondo Omutelema* (2013) eKLR where the Court posited

It is quite clear to us that **sections 40 (a) and 40 (b)** provide for two different kinds of redundancy notifications depending on whether the employee is or is not a member of a trade union. Where the employee is a member of a union, the notification is to the union and the local labour officer at least one month before the effective redundancy date. Where the employee is not a member of the union, the notification must be in writing and to the employee and the local labour officer. **Section 40 (b)** does not stipulate the notice period as is the case in **40 (a)**, but 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.

18. In an attempt to demonstrate that it complied with the notification, the Respondent's witness informed the Court that verbal consultations/briefings were held with the employees including the Claimant, and thereafter the notification to the Labour Office was made.

19. It is apparent that the Respondent (and it is admitted in the submissions) did not give a written notification to the Claimant as envisaged by section 40(1)(b) of the Employment Act, 2007. Such notice was only given to the Labour Office.

20. The Respondent urged that the verbal notice and the fact that the Claimant remained on the payroll for some time after ameliorated the failure to give the written notice.

21. Section 40(1)(c) of the Act on its part contemplate that an employer considering redundancy will take into account seniority in time, skill, ability and reliability of the employees in carrying out redundancies.

22. Although indicating that it considered *Last In First Out* during oral testimony, the Respondent did not place sufficient evidence before Court as to how that criteria applied in redundancies in 2014 and more in the case of the Claimant.

23. On the basis of the failure to give one month written notice to the Claimant and not demonstrating that it applied any reasonable criteria in selecting the Claimant for redundancy, the Court reaches a conclusion that the process did not meet the statutory muster and therefore unfair.

24. It is noteworthy that the Respondent recruited for a position whose responsibilities were or the same similar to the ones performed by the Claimant during the material time.

### **Discrimination**

25. Section 5 of the Employment Act, 2007 outlaws discrimination on some enumerated grounds.

26. The nominal Claimant did not lead any evidence at all to remotely suggest that the Claimant was discriminated against on in respect of *recruitment, training, promotion, terms and conditions of employment, termination of employment or other matters arising out of the employment.*

27. If the altercation the Claimant had with his General Manager was the foundation to the discrimination claims, the same was not proved as constituting discrimination as it was a one off incident which was resolved to the satisfaction of the Claimant.

28. All in all, the allegations of discrimination were pleaded generally without particulars to help the Court in assessing whether there was discrimination.

### **Appropriate remedies**

#### **Declarations**

29. The Claimant sought some 3 declarations. In the view of the Court, this being a purely ordinary employment relationship, the declarations would not add any legal value to the orders the Court will issue shortly.

#### **Certificate of Service**

30. A certificate of service was part of the consent entered by the parties and need not be part of this judgment.

### **Damages for unfair redundancy**

31. The Court has concluded that the Respondent did not comply with some of the conditions prior to redundancy.

32. The fact that there was a consent in terms of which some dues were paid to the Claimant, in the view of the Court, do not amount to a waiver to the challenge on the fairness of the redundancy.

33. Considering that the Claimant served the Respondent for about 10 years and that he was paid severance pay, the Court is of the view that the equivalent of 5 months gross wages would be fair and appropriate (gross wage at time of separation was Kshs 356,138/- in terms of August 2014 pay slip).

### **Punitive damages**

34. As the Court has found there was no discrimination, punitive damages is not available.

### **Damages for breach of contract**

35. The Claimant did not prove breach of contract save for the unfair redundancy, in which relief has already been allowed. This relief is therefore dismissed.

### **Severance pay**

36. This was already paid and nothing turns on it.

### **3 months' pay in lieu of notice**

37. The Claimant was paid Kshs 856,109/- being the equivalent of 3 months remuneration as pay in lieu of notice.

### **Unpaid holidays**

38. No evidential basis for unpaid holidays was laid before Court and therefore the relief is declined.

### **Unpaid leave**

39. No evidential foundation was placed before Court on this item and it is declined.

### **Wages for October 2014**

40. Claimant was paid Kshs 56,292/- on account of 6 days worked in October 2014.

### **Management bonus**

41. The Claimant did not plead and prove an entitlement to management bonus, an item of special damages.

### **Conclusion and Orders**

42. The Court finds and holds that the termination of the Claimant's contract on account of redundancy was unfair and awards him and orders the Respondent to pay him

(a) Compensation **Kshs 1,780,690/-**.

43. Claimant to have costs on half scale having filed submissions outside the agreed and set timeline.

**Delivered, dated and signed in Nairobi on this 23<sup>rd</sup> day of February 2018.**

**Radido Stephen**

**Judge**

**Appearances**

For Claimant Mr. Karanja instructed by Muthomi & Karanja Advocates

For Respondent Mr. Obura instructed by Obura Mbeche & Co. Advocates

