



**REPUBLIC OF KENYA**

**EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 1779 OF 2015**

**(Before Hon. Justice Hellen S. Wasilwa on 12<sup>th</sup> March, 2018)**

**HARRIET OTIENO.....1<sup>ST</sup> CLAIMANT**

**PHYLLIS NYAIDHO.....2<sup>ND</sup> CLAIMANT**

**RUEBEN NJOROGE MITHAMO.....3<sup>RD</sup> CLAIMANT**

**VERSUS**

**MY JOBS EYE KENYA LIMITED.....RESPONDENT**

**JUDGEMENT**

1. The Claimants filed suit against the Respondent on 5.10.2015 through the firm of Collette Akwana and Company Advocates seeking damages for unfair and wrongful termination.
2. That the 1<sup>st</sup> Claimant was employed on 9.11.2010 as Accounts Manager and later verbally promoted to head of Sales while the second Claimant was employed on 1.3.2011 as a Recruitment Consultant and the Third Claimant was employed on the 1.10.2012, as Accounts Consultant.
3. They aver that they worked diligently for the Respondent earning salaries of Shs. 55,000/=, Shs. 40,000/= and Shs. 22,280/= respectively until 15.9.2015 when they were wrongfully terminated from employment by the Respondent.
4. It is their case that on the 15.9.2015 around 4.00 pm, the Respondent's Finance and Administration Manager, informed all the Respondent's employees that they were not to go home because the Respondent's Director, Mr. Moyes Alibhai wanted to have a brief meeting with them. On the same day at 4.30pm the Director informed all the employees that some of them would have to go home as their employment were to be terminated. He further added that the same was due to low performance of the Company as a whole, and that if the same remained to be the position, other employees would follow suit.
5. That thereafter the Director handed the meeting over to the Managing Director who stated the employments alluded to by the Director would be effective immediately. He also informed them that the terminated employees were to remove their passwords from their computers, take their personal belongings and leave the Respondent's premises immediately.
6. They further contend that the Respondent's General Manager, Finance and Administration Manager

retreated into a private room and called the Claimants one by one, handing over to them the termination letters dated 15.9.2015 and asked them to leave the Respondent's premises with immediate effect.

7. They aver that they were never given an opportunity to be heard on any reasons for their termination neither were they furnished with one month's notice prior to termination which they contend was in bad faith and has occasioned them a lot of suffering. They also allege that they were not paid salary for the month of September and their terminal dues as well.

8. Further the Claimants aver that during their employment they were never paid house allowance nor did the employer provide reasonable housing for them.

9. It is also alleged that sometime in July 2015, the Respondent's General Manager overtly expressed to the 3<sup>rd</sup> Claimant that he hated Luos and that every Luo who worked for the Company would soon be terminated from employment or be forced to resign due to harsh working conditions. That shortly thereafter the receptionist who was a Luo gave notice after the said General Manager consistently made tribal remarks against her.

10. The Claimants allege that the termination was a redundancy owing to the reasons advanced in their termination letters as no other reason was advanced for termination. Further, that they had worked for the company the longest and as such the formula adopted for their redundancy was not communicated to them. They pray for damages as broken down in the claim and certificates of service that have not been issued to them to date.

11. The Respondent filed a Response to the Claim through the firm of Muumbi & Company Advocates, wherein they admit an employment relationship with the Claimants but deny unfairly terminating them and state that the Claimants were terminated in accordance with the provisions of the Employment Act with payment in lieu of notice, salary for days worked and leave pay. They also allege that the Claimants were paid all their terminal dues.

12. The Respondent also deny that the General Manager made tribal remarks to its employees and puts the Claimant to strict proof. They pray for the Claim to be dismissed with costs.

13. The Claimants led evidence in accordance with the Statement of Claim and prayed for the same to be allowed in their favour.

14. RW1 in evidence stated that the Company decided to issue redundancy letters as the Company was not performing well and they had to let go of some employees. That the criteria used in choosing affected employees was not on tribal basis. She stated that the Claimants were paid their salaries less statutory deductions and they also took their leave. That house allowance was covered in the gross salary.

### **Submissions**

15. The Claimant's Counsel submits that according to the Respondent's witness they were terminated on the ground of redundancy and the formula employed was based on competencies. That this ground was not pleaded in the Response. This, it is urged does not qualify as redundancy as the employer should demonstrate that the employee has no fault and that the services of the employee are superfluous.

16. The Counsel urges that the procedure followed in terminating the Claimants was not as envisaged under Section 40 of the Employment Act and the termination cannot be said to be lawful.

17. On the ground of discrimination on tribal grounds, the Claimants' Counsel submits that the Respondent has not proved that discrimination did not take place. They cite the case of **E.D.K. Vs K.U. (2014) eKLR** where it was held:

***“The Employment Act Section 5(6) places a burden on the employer to prove that discrimination did not take place. The said section provides:***

***In any proceedings where a contravention of this section is alleged, the employer shall bear the burden of proving that the discrimination did not take place as alleged, and that the discriminatory act omission is not based on any of the grounds specified in this section.”***

18. It is also submitted that the Respondent did not present to Court proof that any terminal benefits were paid and as such they pray for the Response to be struck out and the Claim to be allowed as drawn.

19. On behalf of the Respondent, it is submitted that the Claimants were lawfully terminated as the reasons were explained to them during the meeting with the Director, Mr. Moyes Alibhai which were cited as low performance of the Respondent. They cite the case of **Carole Nyambura Thiga Vs Oxfam (2013) eKLR** where Rika J held:

***“The Respondent did not state the actual reason for termination in the letter dated 1<sup>st</sup> April 2011. It was however explained to the Court that the Claimant and the Respondent’s Officer Michael O’Brien had held a meeting prior to 1.4.2011, where the reason for termination was explained to the Claimant. Oxfam is donor dependent, and funds for the project Carole was overseeing were reassigned elsewhere. It was not possible for the Respondent to finance the project. She appears to have been contented with the Respondent’s justification. She did not protest against termination immediately. The Court is satisfied that the Respondent had a valid reason in terminating the Claimant’s contract of employment.”***

20. As to discrimination, it is submitted that the only selection criteria applied was based on competence and no more. That among the terminated employees, were people from different communities and the Claimants have thus not established bias.

21. On the Claim for notice pay, it is submitted that the same had been prepared but that it is the Claimants who failed to go and collect. The claim for house allowance it is submitted that it cannot be pleaded separately as it was part of the Claimant’s salary. Further that no leave days were pending at the time of redundancy and as such the same is not payable.

22. The Counsel submits that the Respondent is ready and willing to pay the Claimants salary for days worked in September, 2015. They submit that the Claim should fail on all heads save for what they have admitted.

23. I have considered evidence and submissions of the parties. From the termination letters given to the Claimants dated 15/9/2015, the termination was to be effected immediately. There were no reasons given in the termination letters. The Respondent in their evidence have averred that the termination was effected due to redundancy.

24. Going by this affirmation by the Respondent, if the reasons for termination was redundancy, then provisions of Section 40(1) of Employment Act were to be followed.

25. Section 40(1) of Employment Act states as follows:-

***(1) “An employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions:-***

***(a) Where the employee is a member of a trade union, the employer notifies the union to which the employee is a member and the labour officer in charge of the area where the employee is employed of the reasons for, and the extent of, the intended redundancy not less than a month prior to the date of the intended date of termination on account of redundancy;***

***(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) Where there is in existence a collective agreement between an employer and a trade union setting out terminal benefits payable upon redundancy; the employer has not placed the employee at a disadvantage for being or not being a member of the trade union;*

*(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.*

26. From the evidence given by the Respondents, the notice of termination were served on 15/9/2015 and so no notice was given to the Claimants. Other than the notice, there was no consultation before this redundancy for the employees to understand the inevitable nature of the exercise and the transparent manner in which it was carried out.

27. The issues of consultations have been well articulated in the **CA No. 46 of 2013 Kenya Airways vs Aviation Allied Workers Union** where the Court of Appeal (JA Maraga) – as he then was emphasized the need for consultation and stated that this is not the same as notice but it requires participation and consideration leading to constructive diligence.

28. Under Section 40 of Employment Act the criteria used to select employees for redundancies was not explained to the Claimants. The Claimants have pleaded discrimination on grounds of tribe.

29. The Respondents categorically denied discriminating against the claimants on grounds of tribe. I would agree with the Respondents because the Claimants before Court did not tell Court that they are from the same tribe and the Respondent submitted that the people affected by the redundancy were from various communities.

30. I have considered the manner and process by which the redundancy was affected and it is my finding that the process was flawed and unprocedural and offends the provisions of Section 40 of Employment Act.

31. Having found that the redundancy was unfair and unjustified I award each of the Claimants 12 months' salary as damages for unfair and unjustified redundancy.

32. On remedies sought, I also award the Claimants: -

**1<sup>st</sup> Claimant – Harriet Otieno**

**1. 12 months salary as damages for unfair redundancy =  $12 \times 55,000 = 660,000/=$ .**

**2. September salary (15 days) = 27,500/=.**

**3. Severance pay of 15 days salary for each year worked =  $\frac{1}{2} \times 55,000 \times 5 = 27,500 \times 5 = 137,500/=$ .**

**4. 1 month salary in lieu of notice = 55,000/=.**

**5. House allowance being  $15\% \times 55,000 \times 58 \text{ months} = 478,500/=$  .**

Total = 1,358,500/=

2<sup>nd</sup> Claimant – Phyllis Nyaidho

1. 12 months salary as damages for unfair termination =  $12 \times 40,000 = 480,000/=$ .

2. September salary (15 days) = 20,000/=.

3. Severance pay of 15 days salary for each year worked =  $\frac{1}{2} \times 40,000 \times 4 = 20,000 \times 4 = 80,000/=$ .

4. 1 month salary in lieu of notice = 40,000/=.

5. House allowance being  $15\% \times 40,000 \times 55$  months =  $15\% \times 40,000 \times 55 = 6,000 \times 55 = 330,000/=$ .

Total = 950,000/=

3<sup>rd</sup> Claimant – Rueben Njoroge Mithamo

1. 12 months salary as damages for unlawful termination =  $12 \times 22,280 = 267,360 =$

2. September salary (15 days) = 11,140/=.

3. Severance pay of 15 days salary for each year worked =  $\frac{1}{2} \times 11,140 \times 3 = 33,420/=$ .

4. 1 month salary in lieu of notice = 22,280/=.

5. House allowance being  $15\% \times 22,280 \times 36 = 120,312/=$ .

Total = 454,512/=

33. Each party is also entitled to a Certificate of Service plus costs of this suit payable by the Respondents plus interest at Court rates with effect from the date of this Judgement.

**Read in open Court this 12<sup>th</sup> day of March, 2018.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Odera holding brief for Akwana for Claimant – Present

No appearance for Respondent