



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NYERI

CAUSE NO. 339 OF 2017

ANN WARINGA WAITURU.....CLAIMANT

VERSUS

KENYA METHODIST UNIVERSITY.....RESPONDENT

JUDGMENT

1. The Claimant filed suit seeking to recover for the dismissal on 23rd May 2017 while on maternity leave. She averred that she was employed as a senior administrative officer of the Respondent since 2006, duly applied for and was granted maternity leave commencing 7th April 2017 to end on 7th July 2017. She averred that the Respondent unfairly targeted her for dismissal on account of her pregnancy and that the purported redundancy was a mere cover. She averred that she was not heard before the dismissal and was not given any consideration. She prayed for damages for unlawful dismissal, general damages for unfair labour practice and discrimination on grounds of pregnancy, one month in lieu of notice, three month's pay in lieu of the maternity leave, and 30 days pay in lieu of leave for 2017, costs of the suit plus interest.

2. The Respondent filed a response to memorandum of claim on 23rd November 2017. In it, it was averred that the Claimant was among a number of employees declared redundant and that the same was on the basis of staff rationalization to enhance competitiveness and effectiveness in the education sector. The Respondent averred that a pre-redundancy consultation is not provided for under the Employment Act and it is therefore not mandatory. The Respondent averred that the redundancy process was undertaken with effect from 23rd May 2017 and the Claimant was duly notified of this redundancy. The Respondent averred that it adhered to the parameters set out in Section 40 of the Employment Act and the Claimant was legally declared redundant and the requisite dues paid in accordance with the termination letter dated 22nd May 2017.

3. The Claimant testified on 29th January 2018 whereat she stated that she had been employed by the Respondent as a staff administration officer in charge of operations. She said it while she was on leave she heard that she was going to be dismissed and she received emails showing that a letter of redundancy had been prepared and sent dated 23rd May 2017. She testified that she earned Kshs. 109,000/- a month and that she did not have prior notice of the impending redundancy. She stated that she received terminal dues of Kshs. 352, 421/- upon being declared redundant.

4. On cross-examination she testified that she received a notice on 24th of May which was dated 23rd May 2017 and that she also received the letter of 22nd May 2017 which gave the payments she was to receive. She confirmed receiving the sums due and that she paid sums to using her basic salary rather than gross salary. She indicated that she do not accept the payment as correct. The Respondent did not call any witness and that marked the end of oral testimony.

5. Parties filed submissions and in her submissions, the Claimant submitted for the process of declaring her redundant is was not in accordance with the law particularly Section 40 of the Employment Act. The case of **Doris Kairuthi Kaaria & 59 Others v Kenya Methodist University [2017] eKLR** was cited. The Claimant submitted that redundancy was unfair was designed to circumvent payment in lieu of the statutory leave that had been granted which was maternity leave. She thus sought compensation for the leave days including maternity which was in addition to and not in exclusion of the maternity leave. She submitted that this figure was not taken into account in computation of her dues and submitted this comprises unfair labour practice. She thus sought compensation as enumerated in her pleadings.

6. The Respondent submitted that it was undertaking a redundancy process which it actualized on 23rd May 2017 and the Claimant was among those that were declared redundant. Per the termination letter on account of redundancy dated 22nd May 2017, the Claimant was to receive payment in lieu of notice per employment contract, leave days earned but not taken, severance pay of 15 days for each year of service. These dues were paid to the Claimant vide the cheque dated 29th August 2017 and the Claimant given a certificate of service. The Respondent therefore submitted that the claim should be dismissed. The Respondent identified two issues for determination:

1. whether the claimant was lawfully terminated from the employment of the respondent

2. whether the claimant is entitled to the relief sought

7. The Respondent submitted that the Claimant was lawfully terminated from the employment of the Respondent on account of redundancy. The procedure for undertaking redundancy processes outlined under section 40(1) of the Employment Act and that this was adhered to when declaring the Claimant redundant. The Respondent submitted that the Claimant was duly notified as well as the labour officer by the letters of 22nd May and 23rd May 2017. The Respondent submitted that it applied an objective criterion in determining the Claimant was one of the staff declared redundant and the fact that the Claimant was on maternity leave, which is the main focus of the claim, does not make the move by the Respondent of declaring her redundant, subjective. The Respondent submitted that the case referred to by the Claimant being, **Doris Kairuthi & 59 Others v Kenya Methodist University** (*supra*) was not binding on this Honourable Court and that in this particular claim the Respondent has clearly indicated that it followed the correct procedure in declaring the Claimant redundant and she was therefore in their considered view, terminated lawfully from her employment. The Respondent submitted that the Claimant was estopped from asserting something contrary to what was implied in her previous action or statement. Reliance was placed on the case of **Prisca Kemboi & 2 Others v Kenya Post Office Savings Bank [2014] eKLR** where Ndolo J. discussed the issue of estoppel and made a finding that “*The doctrine of estoppel operates as a principle of law which precludes a person from asserting something contrary to what is implied by a previous action or statement of that person.*” The Respondent argued that general damages for unfair labour practice or discrimination ground of pregnancy was not a remedy known in law. Section 49 of the Employment Act outlines the remedies available to Claimant been instances wrongful dismissal and unfair termination submitted that this was not amongst those provided for in the particular section. The Respondent submitted therefore the claims by the Claimant should therefore fail.

8. The Claimant was declared redundant by the Respondent and upon being declared redundant was paid certain dues. It is common ground that the redundancy was declared during the Claimant’s maternity leave. Section 40(1) of the Employment Act makes provision for redundancy. The section provides as follows:

40(1) An employer shall not terminate an employee’s 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 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 and time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy;

d.

9. It is clear that in order for redundancy to hold it must be in strict compliance with section 40(1) of the Employment Act. The letter issued on the redundancy was in accordance with Section 40(1)(b) of the Employment Act, it was addressed to the Claimant and copied to the labour office. The redundancy was by law required to be executed in terms of Section 40(1)(c) of the Employment Act. There is no evidence that the employer applied the test which is enumerated in that sub-section. There is no indicator that in the selection of employees to be declared redundant the Respondent had due regard to seniority and time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy. As was held in the case of **Doris Kairuthi Kaaria & 59 Others v Kenya Methodist University**, (*Supra*) there is an objective criteria that must be invoked in the declaration of redundancy. I am persuaded by the reasoning in the case of **Kenya Airways Limited v Aviation and Allied Workers Union & 3 Others [2014] eKLR** where the Court of Appeal (per Murgor JA) held that “*It is evident that Section 40(1)(c) requires the employers to apply all the selection criteria specified, with due regard to seniority in time, skill, ability and reliability of each employee.... As a consequence, I find that the appellant did not apply a fair selection procedure as required by section 40(1)(c) of the Act, and in so doing unfairly terminated the contracts of the 447 affected employees.* I have scoured the material the Respondent produced in evidence and have not found the criteria that was used to select the Claimant as one of the employees to be declared redundant. It was admitted that she begun working for the Respondent since 2006 and therefore can qualify as an employee to whom the classification of seniority would apply. In my view, the redundancy in her case could be faulted on account of the absence of criteria for determining her suitability as one of the staff to be declared redundant. The Claimant sought damages for discrimination on account of pregnancy but failed to produce any evidence that she was on maternity leave or that she was otherwise entitled to the remedy she claims on account of the termination. The only relief she has proved she is entitled to is compensation for the unlawful termination for which she will be awarded 6 months salary as compensation. She will also be entitled to costs of the suit and interest at court rates from the date of the judgment till payment in full. I enter judgment for the Claimant against the Respondent for:-

i. Kshs. 719,790/- being compensation for 6 months for the unlawful termination on account of redundancy;

ii. Costs of the suit;

iii. Interest on i) and ii) above at court rates from date of judgment till payment in full.

It is so ordered.

Dated and delivered at Nyeri this 5th day of April 2018

Nzioki wa Makau

JUDGE