



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 922 OF 2014

GRACE ITUNGA.....CLAIMANT

- VERSUS -

COMMONWEALTH WAR

GRAVES COMMISSION.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 18th May, 2018)

JUDGMENT

The claimant filed the statement of claim on 03.06.2014 through Mokaya Ogutu & Company Advocates. Learned Counsel Gitobu Imanyara Advocate appeared for the claimant at the hearing and made the relevant final submissions. The claimant prayed for judgment against the respondent for:

- a) Declaration that the claimant was wrongfully, unfairly and unlawfully dismissed from her employment.
- b) The claimant should be reinstated to her employment with the respondent with full pay and benefits; or, in the alternative, the respondent be compelled to compensate the claimant for residue of her contractual working period from the date of dismissal until attainment of the retirement age of 63 years.
- c) Damages for wrongful and unlawful termination.
- d) Costs and incidental to the suit.

The respondent filed the defence on 30.06.2014 through Hamilton Harrison & Mathews Advocates. The respondent prayed that the claimant's claim be dismissed with costs.

It is not in dispute that the claimant was employed by the respondent from 26.06.2000 to 30.05.2013, a service of about 13 years. The claimant initially served as a secretary and was promoted over the years and as at termination on 30.05.2013 she held the position of Administrator of the respondent's offices in Kenya.

The claimant testified that on 30.05.2013 she received a termination letter. The letter addressed to the claimant stated as follows:

“Dear Grace,

I am now writing to confirm the outcome of our recent discussions.

We have been consulting with you regarding recent changes that have led to us also needing to consider and review the requirement for a locally based Administrator going forward. As such I met with you on 12th April 2013 to inform you that, since you are employed in that role, we were placing you at risk of redundancy.

Since that time we have been in consultation with you and I have met with you formally on several occasions to discuss this further. Any other representations you have made at other times during this period, including those provided in writing, have also been considered fully. However, despite such consideration, we have been unable to find a means of avoiding redundancy or to identify any suitable alternative employment for you. I regret to inform you that I must therefore now

confirm your redundancy.

In order to support you and provide you with time to seek alternative employment, we will not require you to work your formal notice period of one month. You will therefore be paid in lieu of your notice period and your employment will terminate today.

Your last day of employment will therefore be 30th May 2013. As you will be aware, you have already been paid by the Commission up to and including 31st May 2013 and, as a gesture of goodwill, we will not be seeking to reclaim this overpayment of salary.

With respect to your termination of employment due to redundancy, the Commission will make the following payments to you:

- Payment for your outstanding annual leave of 10 days. In accordance with Kenyan Labour Law, this will be paid to you in cash today.
- A payment of one month's salary in lieu of your notice period. We will make arrangements today to have this sum transferred to your bank account.

In addition the following payments will be made into your bank account within five working days of the date of the termination of your employment at the latest:

- **A Redundancy Payment**: in line with Legal requirements, we will make a redundancy payment to you which is equivalent to 15 days' pay for each year of service. Our payment to you will include payment for any complete years of service and a proportionate payment for any partial years of service.
- **Termination Indemnity payment**: Under the terms of your contract you may, at the sole discretion of the Commission, be awarded a Termination Indemnity payment of one month's basic pay for each complete year of service and a proportionate payment for any partial years of service. I can confirm that the Commission intends to exercise its discretion and make this payment to you.

Further details of the payments are detailed in your adjusted wage schedule for May which is attached. All payments made to you will be subject to any deductions that we are legally required to make. Payment is also subject to the immediate return of any company property.

You should be aware that you can, if you wish, appeal against the Company's decision to terminate your employment on the grounds of redundancy. You should do so in writing within five working days of receipt of this letter by e-mail to the Area Director, Philip Noakes at: philipnoakes@cwgc.org

Please acknowledge receipt of this letter by signing both of the enclosed copies and returning one to me. The other is for your own records.

I would like to take this opportunity to thank you for your contribution to the Commission. Please accept my very best wishes for the future.

Yours sincerely,

Signed

Rod Carkett

Regional Manager East Africa"

A certificate of service in favour of the claimant was issued on 31.05.2013. The May 2013 adjusted wage sheet showed that the particulars of payment on each heading as set out in the redundancy letter of 30.05.2013 amounting to a gross pay of Kshs.3, 856, 310.00 and after deductions of Kshs.743, 303.00, the net pay was Kshs.3, 133, 007.00.

The claimant appealed against the termination on account of redundancy by her letter dated 30.05.2013. She was given a hearing on telephone on 12.06.2013. The original decision to terminate her was upheld by the respondent's letter dated 19.06.2013. The claimant had lamented that the decision to terminate her employment had been abrupt. The respondent explained that she had initially been informed on 12.04.2013 that she was at risk of redundancy. The evidence shows there had been subsequent meetings and correspondence about the likely redundancy decision.

The reason for the redundancy on the part of the respondent was a restructuring under which: local administrative arrangement was reviewed; two IT supervisors were hired to do the regional manager's work in the field; the regional manager would thereby concentrate on office work thereby taking up most of the administrator's work (the claimant's work); and a new accounting technology would be deployed with the effect that accounts would be done in the UK.

The claimant's case was that she had been targeted and discriminated so because in previous restructuring the respondent had ensured that affected employees were accommodated in alternative jobs and redeployment. The claimant further stated that there had been no consultations but the regional manager had simply communicated that the Commission wished to terminate her employment on account of redundancy. Further, it was her position that she had always been willing to learn IT as per the annual appraisals so that she would be prepared towards being accommodated to perform the duties of the IT supervisors that had been hired – failure of being prepared not being attributable to the claimant and that she was ready to learn.

The claimant lamented that the correspondence and meetings about the redundancy had made her get traumatised and seriously stressed leading to seizures and hospitalisation. In her letter of 07.05.2013 she had informed the respondent as much and stated that she was not prepared to quit employment. That she was willing to be trained to take up another role and if the respondent lacked resources, she was prepared to do evening classes at her own expense to become fit for such alternative role.

The respondent's witness (RW) was Rod Carkett, the respondent's regional manager. His evidence was that the respondent had a worldwide restructuring. Some functions in Kenya were merged and some technical IT persons were hired to do part of claimant's job and RW also took up some of the claimant's job. The respondent was to develop its Nairobi office into a web-based accounting centre for Africa. It was necessary to hire a chartered accountant and the claimant did not hold such qualifications. Thus, at the Nairobi office, only the claimant was terminated to pave way for the restructuring. After the claimant had left there were other developments so that a chartered accountant and other persons were employed by the respondent at the Nairobi office. The persons so employed were field persons and not office staff like the claimant.

The **1st issue** for determination is whether the reason for termination namely redundancy was valid. The Court has considered the evidence on record. The court returns that indeed the respondent has established that it was restructuring its Nairobi office in view of the computerised accounting system to be hosted in the UK. The Court further returns that the same was clearly aimed at better economy and efficiency. The claimant did not dispute that reason and further did not dispute that she did not possess the relevant competencies and knowledge to undertake the changing workload. The claimant's main complaint was that she would have acquired the necessary skills and knowledge if she was given an opportunity to learn. Taking the evidence into account, the court returns that the reason for termination, namely, restructuring in view of the newly introduced computerised system, was valid and genuine as envisaged in section 43 of the Employment Act, 2007 as read with section 45 (2) (a) and (b) of the Act. In particular, the reason related to the claimant's compatibility and was based on the respondent's prevailing operational requirements.

The **2nd issue** for determination is whether the procedure on redundancy was complied with as provided for in section 40 of the Employment Act, 2007 – there being no dispute between the parties that the Act applied to the contract of service in issue. Section 40(1) of the Act states as follows,

“40.(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 ;”

The respondent was required to notify the claimant and the labour officer not less than a month prior to the date of the intended date of termination. It is clear that the respondent failed to notify the labour officer. It is also clear that as per respondent's letters of 22.04.2013, 23.04.2013, and 30.04.2013 addressed to the claimant and notes of the meeting of 08.05.2013, all showed that consultations about the redundancy were underway but the relevant one month notice had not been served. The notes of the meeting of 16.05.2013 state that the meeting was to confirm redundancy. The redundancy then came by the letter of 30.05.2013. Whereas the parties discussed the redundancy that was anticipated, the Court returns that the respondent failed to serve the claimant the month's notice prescribed under section 40 of the Act. The Court finds favour with the submissions by counsel for the claimant that the letter of 30.05.2013 could not serve as both redundancy notice and letter of termination nor could it combine the two. Further, as counsel for the claimant submitted, the Court follows the holding by Ndolo J in Charles Nyangi Nyamohanga –Versus- Action Aid Kenya [2015] eKLR that there are two kinds of notices in a redundancy as provided for in section 40 of the Act thus,

“First, there is the one month notification of the reasons for and the extent of the intended redundancy to the employee and the labour officer. Second, there is the termination notice under the employee's terms and conditions of employment. The two notices cannot be issued simultaneously and there is good reason for this. Redundancy as a form of termination of employment happens at the behest of the employer through no fault of the employee and since employment is not only a means of livelihood but also a form of identity and dignity, an employee leaving employment on account of redundancy ought to be treated with soft gloves.”

Thus, the Court returns that the claimant was entitled to lament that the termination was abrupt. The pay in lieu of notice did not cure the procedural requirement that a notice be served for obvious reason that the employee is entitled to be properly prepared in view of the looming redundancy. The termination in the present case was therefore procedurally unfair.

Under section 49 of the Employment Act, 2007, 12 months' salaries in compensation are the maximum compensation but awarded at the Court's discretion. The claimant had served for about 13 years with a clean record of service. The Court has considered the aggravating factor that for mishandling the redundancy process, the claimant suffered stress, trauma and was hospitalized. The claimant did not contribute to her termination. The Court has also considered the mitigating factor that the respondent granted a termination indemnity at one month basic pay for each complete year served. To balance justice in the matter, the court considers that 8 months' salaries in compensation for the unfair termination will meet ends of justice making **Kshs.1,429, 560.00** at Kshs.178, 695.00 per month.

Further, the court considers that reinstatement would not balance justice in view of the long time that has lapsed since the termination and the established technological changes that the respondent has instituted making it impossible for the claimant to cope if reinstated. In addition, the claimant has not established inability to mitigate her circumstances following the termination by engaging in other gainful activities. In any event, the claimant has been fully paid for her service including the indemnity payment as was done and other payments per section 40 of the Act. The Court returns that there would be no justification to order the payment of salaries up to retirement age. The prayers in that regard will fail.

In conclusion judgment is hereby entered for the claimant against the respondent for:

- a) The declaration that the termination was procedurally unfair as it was abrupt as the one month notice in section 40 of the Employment Act, 2007 had not been served upon the labour officer and the claimant.
- b) The respondent to pay the claimant **Kshs.1, 429, 560.00** by 01.07.2018 failing interest to ran thereon at court rates from the date of this judgment till full payment.
- c) The respondent to pay the claimant's costs of the suit.

Signed, dated and delivered in court at **Nairobi** this **Friday 18th May, 2018**.

BYRAM ONGAYA

JUDGE