



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE NO 1 OF 2017

MAUREEN ATIENO OUMA.....CLAIMANT

VS

NJUCA CONSOLIDATED COMPANY LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. Maureen Atieno Ouma, the Claimant in this case, was an employee of Njuca Consolidated Company Limited. She brought this claim alleging unfair termination of her employment. The claim is contained in a Statement of Claim dated 30th November 2016 and filed in court on 3rd January 2017.

2. The Respondent filed a Statement of Response on 20th April 2017 but did not call any witnesses. The Claimant testified on her own behalf. Both parties filed written submissions.

The Claimant's Case

3. The Claimant states that she was first employed by the Respondent in December 2008 in the position of Clerk in the Finance Department, at a daily rate of Kshs. 200. She adds that her daily rate was progressively increased up to Kshs. 800 as at 2013.

4. The Claimant avers that from May 2013, the Respondent started paying her monthly house allowance of Kshs. 5,000 plus airtime allowance of Kshs. 2,000. The Respondent also started remitting NSSF and NHIF dues on the Claimant's account from this date.

5. The Claimant pleads that on 4th June 2016, the Respondent gave her one (1) month's leave and upon resuming duty on 5th July 2016, she was asked to take a further five (5) days' leave. When the Claimant reported back on 13th July 2016, she found no information regarding her employment status. The following day she spoke to the Project Manager, Mwangi Kihara and the

Accounts Clerk, one Mr. Kinuthia, who informed her that she should stay away until further notice.

6. On 13th September 2016, the Claimant wrote to the Respondent asking when she should report back to work and the following day, she received a call from the Accounts Assistant, one Raphael who told her to collect her cheque from a Mr. Brian. The Claimant met Brian who told her that he had been instructed to issue her with a cheque in payment of her terminal dues since the project had come to an end. The Claimant contested the tabulation of her dues and therefore declined to receive the cheque.

7. It is the Claimant's case that the Respondent did not give her any reason for the termination of her employment nor was she issued with any prior notice. Her claim is as follows:

- a) One month's salary in lieu of notice.....Kshs. 24,000
- b) Accumulated leave for 3 years.....72,000
- c) Compensation for unfair termination.....288,000
- d) Severance pay @ 15 days' for each completed year.....96,000
- e) Costs

The Respondent's Case

8. In its Statement of Response dated 20th April 2017 and filed in court on even date, the Respondent states that it was unable to provide most of its workers with work due to reduction in operations and a general downturn. This had rendered most workers redundant.
9. While denying terminating the Claimant's employment, the Respondent states that it notified all affected workers that it was no longer able to offer them work. The Respondent states that it had no option but to declare these workers redundant.
10. The Respondent pleads that it notified all its employees, including the Claimant, of the impending redundancy and proceeded to tabulate the dues payable to them as required by law. The Respondent adds that the Claimant declined to collect her dues and instead opted to file the current suit.

Findings and Determination

11. There are two (2) issues for determination in this case:
- a) Whether the termination of the Claimant's employment was lawful and fair;
 - b) Whether the Claimant is entitled to the remedies sought.

The Termination

12. The Claimant was issued with a termination letter dated 26th September 2016 stating as follows:

"RE: TERMINATION OF EMPLOYMENT

The Directors of Njuka Consolidated Co. Ltd wish to inform you that your employment will be terminated effective _____ due to the completion of the projects we have been working on.

The projects that are completed and handed over are as follows:

1. *K.T.D.A Chai warehousing which ended in July 2016*
2. *Storm water Drainage Improvement Mombasa ended in May 2016*
3. *Lungalunga Project which ended in April 2015*

We thank you for your immense contribution and performance to (sic) our projects. If an opportunity arises in the future we shall not hesitate to consider you.

We want to thank you for your efforts and wish you the best in your future endeavors.

Your dues are as per the attached schedule.

Yours faithfully

(Signed)

ANNVANESSA MUTHONI

CORPORATE AFFAIRS DIRECTOR

NJUCA CONSOLIDATED CO. LTD

13. This letter, which instructively has no effective date, gives completion of projects as the reason for termination of the Claimant's employment. This falls within the province of redundancy.

14. Section 2 of the Employment Act, 2007 and the corresponding section in the Labour Relations Act, 2007 define redundancy as:

"the loss of employment, occupation, job or career by involuntary means through no fault of an employee, involving termination of employment at the initiative of the employer, where the services of an employee are superfluous and the practices commonly known as abolition of office, job or occupation and loss of employment."

15. The law allows termination of employment on account of redundancy subject to the following conditions as codified in Section 40 of the

Employment Act:

a) where the employee is a member of a trade union, the employer notifies the union of 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 the 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 an employee declared redundant severance pay at the rate of not less than fifteen days pay for each completed year of service.

16. In *Thomas De La Rue v David Opondo Omutelema [2013] eKLR* and *Kenya Airways Limited v Aviation and Allied Workers Union & 3 others [2014] eKLR* the Court of Appeal affirmed that the foregoing conditions are mandatory, not optional. Apart from the letter communicating the termination of the Claimant's employment which had no effective date, the Respondent did not produce any other document to demonstrate due notice to the Claimant and the Labour Office, as required by law. Moreover, the Respondent did not adduce any evidence to prove compliance with any of the other conditions set by Section 40 of the Employment Act.

Remedies

17. In light of this, the Court finds the termination of the Claimant's employment unfair within the meaning of Section 45 of the Act and awards her ten (10) months' salary in compensation. In arriving at this award, I have taken into account the Claimant's length of service and the Respondent's conduct in the termination transaction.

18. I further award the Claimant one (1) month's salary in lieu of notice as well as severance pay for eight (8) completed years of service.

19. The Court did not find any basis for the claim for accumulated leave pay since in the Claimant's leave application forms, which were produced before the Court, there was no indication of any such leave.

20. Ultimately, I enter judgment in favour of the Claimant in the following terms:

a) 10 months' salary in compensation.....Kshs. 240,000

b) 1 month's salary in lieu of notice.....24,000

c) Severance pay for 8 years (24,000/30x15x8).....96,000

Total.....360,000

21. This amount will attract interest at court rates from the date of judgment until payment in full.

22. The Claimant will have the costs of the case.

23. Orders accordingly.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 3RD DAY OF MAY 2018

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JUDGE

Appearance:

Miss Onyango for the Claimant

