



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT MOMBASA
CAUSE NUMBER 811 OF 2015
BETWEEN
ELIZABETH MURUNGA NAKHUNGU.....CLAIMANT
VERSUS
WILKEN TELECOMMUNICATIONS [K] LIMITED.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Mudeshi Muhanda & Company Advocates for the Claimant

Odero Osiemo & Company Advocates for the Respondent

JUDGMENT

1. The Claimant filed her Statement of Claim on 29th October 2015, and amended version on 26th May 2016. She states she was employed by the Respondent as a Front Office Administrator, on 23rd May 2005. Her first salary was Kshs. 12,000 monthly. She rose through the ranks, to become a Branch Supervisor earning a salary of Kshs. 40,000 monthly.

2. She received an e-mail from the Respondent on 17th March 2015, requiring her to move Respondent's Office from Mombasa to Nairobi, effective 1st May 2015. She was required to move along with the Office to work at Nairobi. She immediately wrote to the Respondent, informing the Respondent she would not be able to move, because she had a 5 month old baby to take care of, and was in the middle of pursuit of Master's Degree at an Institution based in Mombasa. On 31st March 2015, the Respondent informed the Claimant if she was not able to move, her position would be declared redundant. Alternatively she was asked to resign. On 18th May 2015, she received a letter of termination, which referred to notice of termination issued on 18th September 2014. The Claimant had no knowledge of such a notice. Her contract did not have a relocation clause. There was insufficient time given to relocate. There was no hearing before termination. She prays for Judgment against the Respondent in the following terms:-

- a. Severance pay at the rate of 15 days' salary for 10 years worked at Kshs. 200,000.
- b. Damages for wrongful/unfair termination on redundancy at Kshs. 480,000.
- c. 10 annual leave days at Kshs. 20,000.
- d. Damages for unfair termination equivalent of 12 months' salary at Kshs. 480,000.

Total Kshs. 1,900,000

- e. Declaration that termination was improper and the Claimant is entitled to payment of terminal dues and compensatory damages.
- f. Costs, Interest and any other suitable relief.

3. The Respondent filed its Statement of Response on 20th June 2015. It is conceded the Claimant was employed by the Respondent on the date, and terms and conditions stated in the Claim. The Respondent was making substantial losses at Mombasa. An economic decision was made to shut down Mombasa Office and transfer Employees to Nairobi Office. Employees were informed through a letter dated 18th September 2014, of the need to close Mombasa Office, and need to relocate them to Nairobi. They were accorded sufficient time to organize themselves. The Respondent offered the Claimant promotion and relocation fee which she rejected. The Respondent bent backwards to accommodate the Claimant. She declined to move, making it necessary for the Respondent to terminate her contract. Termination was fair. The Respondent prays the Court to dismiss the Claim with costs to the Respondent.

4. The Claimant gave evidence, and closed her case, on 11th July 2017. Parties agreed on the same date that the Respondent would file and serve the Claimant with a Witness Statement; the Statement to be accepted as Respondent's evidence without requiring the Witness to testify; Respondent's case to be marked as closed on filing and serving Witness Statement within 21 days; Claimant to file and serve her Closing Submissions within 14 days of receiving Respondent's Witness Statement; Respondent to file and serve its Closing Submissions within 14 days of receiving Claimant's Closing Submissions; and the dispute is mentioned on 14th September 2017. The Parties confirmed compliance with the agreed mode of disposal, at the last mention in Court on 5th March 2018.

5. The Claimant confirmed her employment history, terms and conditions of employment with the Respondent, as outlined in her Pleadings and Witness Statement. She was informed through e-mail by Respondent's Head of Alternative Energy Solutions Sam Mbogho, to ensure Employees at Mombasa relocated to Nairobi. She was to terminate all the contracts in place at Mombasa between the Respondent and Service Providers. The Claimant gave the Respondent reasons why it would not be possible for her, to relocate. She was advised if it was not possible, her option was to exit on redundancy or resignation.

6. The Parties consulted a Human Resource Consultancy Firm on the issue. The Claimant was informed by this Firm that it had been decided the Claimant's contract is terminated, and terminal dues availed to her. However, one of the Directors Managing Telecommunications and Solar Divisions, Andrew Lopokoiyit, reneged on the terminal package offered through the Consultancy Firm, saying the Claimant was offered too much money, the Respondent would not pay, and she could as well take the Respondent to Court as she had declined to move to Nairobi.

7. The Claimant in the meantime went on to arrange for relocation of the Mombasa Office and other staff to Nairobi.

8. She was told her salary would be increased by Kshs. 10,000 if she moved to Nairobi. She would be promoted to the position of Project Manager. She would be given relocation fee. No amount was mentioned. The Claimant suggested a figure of Kshs. 150,000. She asked to be allowed to be traveling to Mombasa regularly once relocated as she was studying at Mombasa. She asked the Respondent to reduce this into a written agreement. The Respondent did not revert to her. She only received the letter of termination in response.

9. Cross-examined, she stated there was no sufficient time to relocate. She wrote to the Respondent on 18th May 2015, mentioning the offer to relocate. She did not ask for more time to relocate. She stated she would not relocate.

10. She was involved in moving Respondent's assets to Nairobi. She was first informed on 17th March 2015 that the Respondent would move Office. She was not aware before, that Mombasa Office was closing down. Offer to relocate extended to all Staff. The Respondent alleged relocation fee requested for by the Claimant, was inordinately high. Promotion was mentioned as a by-the-way. Her salary was all-inclusive. She made attempts to collect terminal dues offered by the Respondent. The Respondent informed the Claimant her settlement cheque would be ready, only after demand letter had issued from Claimant's Advocates. Termination was unfair. Redirected, she insisted she learnt of relocation on 17th March 2015. Service Providers' contracts were to be terminated by end of April 2015. The Claimant was required to report to Nairobi by 1st May 2015. She gave reasons why she would not be able to relocate immediately. She rejected the offer, but indicated she would be willing to relocate in the future. Offer of salary raise and promotion was not made formally.

11. Graham Shaw, Respondent's Director filed a Witness Statement on 6th February 2018. His Statement does not add much to what is contained in the Statement of Response. As he did not give oral evidence in Court, it adds no value to this Judgment to restate here, the contents of his Witness Statement. His position is summarized at paragraph 3 above.

The Court Finds:-

12. The Claimant was employed by the Respondent, first as a Front Office Administrator at Mombasa, on 23rd May 2005. She later became Branch Supervisor. Her contract was terminated by the Respondent through a letter of termination dated 18th May 2015. The letter indicates the Claimant was given 1 month notice, which would take the effective date of termination to 18th June 2015.

13. The Respondent gave its reasons for the decision to comprise the following: -

I. The Respondent had communicated to the Claimant on 18th September 2014 that it would be closing down Mombasa Office. The Respondent would be operating a centralized model based at Nairobi, with effect from 1st May 2015.

II. The Claimant was given sufficient time to relocate.

III. The Respondent endeavored to make Claimant's transition to Nairobi as smooth as possible by among others, offering her promotion and salary increment.

IV. She declined the offers and declined to move.

14. The Claimant wrote to the Respondent on 18th March 2015, thanking the Respondent for the offer to move to Nairobi, but declining the offer. She gave her reasons for declining the offer: she had a young family, who included a 5 month old baby, and relocation would destabilize her family; and two, she was studying for MBA, with research based at Mombasa. It would be expensive to complete her study within the stipulated time.

15. The Court is not able to agree that the Claimant's contract was terminated by the Respondent unfairly. The Respondent took an operational decision to centralize its business at Nairobi. The Employees had been informed as early as 18th September 2014 that the Mombasa Office would be merging with Nairobi Office. Respondent's tenancy of premises at Mombasa would terminate by end of April 2015. The Claimant was running Mombasa Office with a Colleague named Eliakim. They would terminate the contracts of Service Providers at Mombasa, and facilitate movement of assets and staff, from Mombasa to Nairobi.

16. The decision to relocate, and move staff was well within the managerial prerogative of the Respondent. The Claimant has not shown this prerogative was unreasonably exercised by the Respondent.

17. Her contract did not limit her to working at Mombasa. She was merely asked to facilitate movement of the Office to Nairobi, and report by 1st May 2015. The Respondent had already notified its Landlord at Mombasa that it would be moving out by end of April. Where would any Employee operate from without premises in Mombasa?

18. The decision to move was not abrupt. Employees were given sufficient notice to move. The Claimant was asked to report to Nairobi by 1st May 2015. She was not told she would not be availed more time to relocate after reporting, upon her request. She was offered salary increment and promotion to work as Project Manager in Nairobi. She appears to fault this offer on the ground it was not reduced into writing. It was not necessary to have the offer made in writing immediately. She was offered relocation fee. She asked the Respondent for a specific amount in relocation fee. In the absence of a straight answer from the Employer, she took this as a withdrawal of the facility. She ought to have pursued the offer upon report at Nairobi on 1st May 2015 as directed. In any case why ask for Kshs. 150,000 in relocation fee, if she had decided not to relocate for the reasons stated in her letter to the Respondent dated 18th March 2015?

19. Her letter of 18th March 2015 persuades the Court there was a meeting of minds between the Parties that, owing to the inability of the Claimant to move to Nairobi, the contract of employment should be mutually terminated. Circumstances existed, making it impossible in the view of the Claimant, to continue working away from Mombasa; and for the Respondent to continue running its business in Mombasa. The Respondent bent backwards to accommodate the Claimant, and make her move to Nairobi possible. She rejected the endeavors of the Respondent. The Court does not think the Respondent acted unreasonably. The Claimant and her young family, as well as Claimant's studies, were not ignored by the Employer. She was asked to report to Nairobi; and was offered promotion and salary increment. She expressed her inability to move and desire to terminate the contract owing to the circumstances. Why did she not report to Nairobi, and ask her Employer for more time, and for adequate finances to relocate? The Respondent asked the Claimant to travel to Nairobi, in Eliakim's car, because the Respondent's car at Mombasa was an unserviceable jalopy. This does not suggest that the Claimant was being asked to move her family, and start working by 1st May 2015 in Nairobi. She merely was asked to report, which in the understanding of the Court, left room for working out the details of relocation. The Respondent did not go the way of declaring Employees' positions at Mombasa redundant from the outset. No Employee except one unfortunate intern, was asked to leave employment on relocation of the Office. The Claimant was not to lose her employment, and was going to be promoted and earn a higher salary at Nairobi. While not being insensitive to the Claimant's position about her young family, the Court notes there are young families, with working Fathers and Mothers, living in Nairobi. Labour is highly mobile and Employees, in all family and social circumstances, must have a degree of flexibility on where to work. The Claimant should perhaps have pleaded for time to move and adjust in Nairobi, not rebuff the offer to continue working, and when her contract was mutually terminated, turn around and claim it was terminated unfairly at the instance of the Employer.

20. Severance pay is not available to the Claimant, as termination was not instigated by the Respondent, on account of redundancy under Section 40 of the Employment Act 2007. Work was still available for the Claimant, in a superior position to that which she held at Mombasa. The Parties in the end, were in agreement the contract was no longer workable, and ought to be terminated.

21. Damages for wrongful/unfair termination on redundancy, claimed at Kshs. 480,000, are not available to the Claimant for the reasons stated above.

22. The Claimant has not established the prayer for 10 annual leave days. Her Witness Statement, Oral Evidence and Pleadings do not support the prayer for 10 days of annual leave.

23. The repeated prayer for damages for unfair termination at Kshs. 480,000 is not available to the Claimant. She has not shown why she should be compensated twice, for a single act of termination of employment. Secondly, the Court as discussed above, has concluded termination was by agreement of the Parties. It was not necessary to ask the Claimant to show cause why, she should not be disciplined, or to discipline her, once she had elected not to continue working in a new environment. The reasons why she could not go on working were known to both Parties. She thanked the Respondent for offering to continue employing her, but declined the offer, because she was not ready to go on working at the time. Disciplinary proceedings are only necessary where the facts underlying termination are contested. Such proceedings, with all the legal accoutrements of fair procedure and substantive justification, are absolutely unnecessary, where there is a meeting of minds between the Employer and the Employee that, the employment relationship cannot go on. Compensation the equivalent of 12 months' salary is not payable to the Claimant.

24. There shall be no order on the costs.

IN SUM, IT IS ORDERED:-

a. The Claim is hereby dismissed in its entirety.

b. No order on the costs.

Dated and delivered at Mombasa this 8th day of June 2018.

James Rika

Judge