



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE NO. 1320 OF 2013

ESTHER NDINDA MUSYIMI.....CLAIMANT

VERSUS

H YOUNG & COMPANY (EA) LTD.....RESPONDENT

JUDGMENT

1. Esther Ndinda Musyimi (Claimant) was employed by H Young & Co. (EA) Ltd (Respondent) through a letter dated 30 April 2008 as a Data Officer. The Claimant rose to the position of Administrator.
2. On 8 July 2013, the Respondent wrote to the Claimant to inform her that her employment had been terminated.
3. The Claimant was aggrieved and on 19 August 2013, she moved Court alleging unlawful and unfair termination of employment and/or redundancy and non-payment of terminal benefits.
4. In a Response filed in Court on 6 November 2013, the Respondent pleaded that the termination of the Claimant's employment was lawful and was on account of redundancy.
5. The Cause was heard on 17 May 2018 when the Claimant testified and closed her case.
6. An attempt by the Respondent to secure an adjournment was declined by the Court, thus the Respondent closed its case without leading evidence.
7. The Claimant filed her submissions on 28 May 2018.
8. The Respondent was directed to file its submissions on or before 15 June 2018. By this morning, the submissions were not on file/record.
9. The Court has considered the pleadings, evidence and submissions and adopted the Issues as identified by the Claimant in her submissions.

Whether termination through redundancy was unfair

10. The termination of contract letter issued to the Claimant did not give any reasons.
11. However, in a reply to the Claimant's demand letter, the Respondent indicated that the reason for termination was on account of re-engineering of business.
12. That is the line of defence which the Respondent advanced in the Response.

13. Considering that it is the employer which knows the real reason for terminating the services of an employee, the Court will accept that the separation was due to redundancy (operational requirements).

14. In terms of section 40 of the Employment Act, 2007, the Respondent was under an obligation to give the Claimant 1 month written notice. A similar notice should have been sent to the local Labour Officer.

15. It is not in dispute, and the Respondent did not prove or suggest that the notices were given.

16. On account of failure to give the notices and in consideration of the holding by the Court of Appeal in *Thomas De La Rue (K) Ltd v David Opondo Omutelema* (2013) eKLR that the notice(s) are mandatory, the Court is satisfied that the termination on account of redundancy was procedurally flawed.

17. Pursuant to section 43 and 45 of the Employment Act, 2007, the Respondent was expected to prove that the redundancy was due to operational requirements and that the reasons were valid and fair.

18. The Respondent did not discharge that obligation and the Court finds that the termination was substantively unfair.

Leave

19. Outstanding leave was paid as part of terminal dues after the filing of this Cause.

Salary for July 2013

20. The salary was paid after commencement of the Cause.

Notice pay

21. Notice pay was paid as part of the terminal dues after commencement of the Cause.

22. The Court notes that the Claimant's dues were used to offset liabilities she owed.

Severance pay

23. Section 40 of the Employment Act, 2007 provides that an employee released on account of redundancy is entitled to severance pay at the rate of 15 days for each year worked.

24. Under this head, the Claimant sought Kshs 66,000/- which figure the Respondent did not interrogate.

25. The Court will allow the same.

Compensation

26. The Court has reached a conclusion that the termination of the Claimant's employment was unfair.

27. Considering the length of service, the Court is of the view that the equivalent of 6 months gross wages as compensation would be appropriate (gross wage was Kshs 33,001/-).

Conclusion and Orders

28. The Court finds and holds that the termination of the Claimant's employment on account of redundancy was unfair and awards her

(a) Severance pay Kshs 66,000/-

(b) Compensation Kshs 198,006/-

TOTAL **Kshs 264,006/-**

29. Claimant to have costs.

Delivered, dated and signed in Nairobi on this 13th day of July 2018.

Radido Stephen

Judge

Appearances

For Claimant Mr. Rakoro instructed by Rakoro & Co. Advocates

For Respondent Ms. Muriu instructed by Wanjiku Muriu & Co. Advocates

Court Assistant Lindsey