



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1040 OF 2013

(Before Hon. Justice Hellen S. Wasilwa on 9th July, 2018)

NJOROGE NJIHIA CLAIMANT

VERSUS

K-REP BANK LIMITEDRESPONDENT

JUDGEMENT

1. The Claimant filed suit on 9th July 2013 through the firm of Mang'erere Bosire & Co. Advocates seeking damages for unfair, unlawful redundancy, variation of agreed terms of employment and non-payment of outstanding terminal dues.
2. He avers that at all material times he was an employee of the Respondent company having worked as Head of Business Development with due diligence to the satisfaction of the Respondent and his last salary having been computed at Kshs.462,000 per month.
3. He states that he joined the bank in June 2008 after a headhunt through one of the Respondent's recruitment agent based on the benefits the Respondent was offering in regard to staff loan. On 28th April 2011, the Respondent unlawfully and unprocedurally declared his position redundant and therefore unlawfully terminating him from service.
4. He further avers that by the time he was being declared redundant, there was a subsisting mortgage at an interest of 6% which was the staff rate and as a result of the aforesaid redundancy, the Respondent proceeded to vary his interest rates to his detriment and breach of his reasonable expectations and therefore subjecting him to loss and inconvenience.
5. He appealed against the decision of the Respondent and negotiations were made on the interest rates, resulting into a letter dated 5th September 2012 allowing him to continue paying the outstanding loan balance at the interest rate of 16%.
6. He states that he was not given any reason for redundancy as required by Section 40 of the Employment Act hence making the Respondent's action unlawful, wrong, unfair and inhuman and tainted with malice.
7. He further states that as a result of the wrongful redundancy from his employment, he has suffered loss of income, trauma and inability to meet his obligations and thus claims maximum compensation. He also states that he is entitled to terminal dues. He avers that despite demand and notice of intention to sue, the Respondent has refused, neglected and or failed to make good of his claim.
8. The Respondent filed their Memorandum of Defence where they denied in totality all the allegations by the Claimant that he was unlawfully declared redundant and more specifically that he is entitled to the prayers sought. They also deny the allegations of malice as particularized in the Memorandum of Claim and puts him to strict proof thereof.
9. They aver that his redundancy was lawful and in accordance with his contract of employment. He was also paid his redundancy benefits and his claim for service pay and that for compensation are untenable.
10. They state that he became ineligible to continue enjoying staff loan at rate of 16% once he was declared redundant and left the Respondent's employment and that demand and notice to sue were received save that the same could not be settled as his demand was unjustified.

Submissions

11. The Claimant filed his submissions where he submits that his termination was unfair, unlawful and violates the provisions of Section 40 of the Employment Act 2007, as it is difficult to ascertain the reasons for his termination.

12. He avers that the Respondent in their own admission recruited another employee who replaced him in the same position save that it was enhanced. He also states that the reasons and process of terminating his employment were unfair, unlawful and cannot by any means whatsoever meet the threshold set out in Employment Act 2007 particularly Section 40, 41 and 50 of the said Act.

13. He further avers that the reasons advanced for redundancy were not genuine as the Respondent recruited another person to replace him, which demonstrates that the Respondent was determined to use redundancy as an excuse to terminate him unfairly. Therefore, in a nutshell, the Respondent violated the provisions of Section 40 of the Employment Act 2007 in the manner in which it terminated him and having not demonstrated any reason or proof that the termination was in accordance with fair procedure, he urges this Court to be persuaded by the evidence on record and enter judgment against the Respondent. He states that his submissions were guided by the case of **Gladys Agayo Vs Somak Travel Ltd (2015) Eklr.**

14. I have examined evidence on record from both parties plus the submissions filed. The issues for determination by Court are:-

1. Whether the Claimant was unfairly terminated on account of redundancy.

2. Whether the Claimant is entitled to prayers sought.

15. The Claimant was indeed employed by the Respondent on 2/6/2008 vide a letter dated 4.4.2008 at a salary of 462,000. He was thereafter confirmed in appointment vide a letter dated 30/1/2009 reference 1.3.2009.

16. On 30/7/2010, his designation was changed to Head Business Development but his salary remained the same. On 28/4/2011, the Claimant was served with a redundancy letter stating that due to the ongoing job evolution, the position he had previously occupied had been declared redundant and hence his last working day is 30th April 2011.

17. From this letter, it is apparent that the Claimant was declared redundant without notice whatsoever. This breached provisions of Section 40(1) of Employment Act which states as follows:

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;

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 to an employee declared redundant severance pay at the rate of not less than fifteen days pay for each completed year of service.

18. There is no indication that there was ever consultation between the Respondent and the Claimant before the said termination.

19. The need for notice and consultation before redundancy can be effected as was determined by the **Court of Appeal in CA No. 46 of 2013 (2014) eKLR Kenya Airways Union and 3 others** where JA Maraga (as he then was rendered himself as follows:-

“As I have said, besides this Convention, the requirement of consultation is implicit in the principle of fair play under Section 40(1) of the Employment Act itself and our other labour laws. The notices under this provision are not merely for information. Read together with Part VIII of the Labour Relations Act, 2007 which provides for reference to the Minister for Labour of trade disputes, including those related to redundancy (see Section 62(4)) for conciliation, I am of the firm view that the requirement of consultations implicit in these provisions. The purpose of the notice under Section 40(1) (a) and (b) of

the Employment Act, as is also provided for in the said ILO Convention No. 158-Termination of Employment Convention, 1982, is to give the parties an opportunity to consider “*measures to be taken to avert or to minimise the terminations and measures to mitigate the adverse effects of any terminations on the workers concerned such as finding alternative employment.*” The consultations are therefore meant to cause the parties to discuss and negotiate a way out of the intended redundancy, if possible, or the best way of implementing it if it is unavoidable. This means that if parties put their heads together, chances are that they could avert or at least minimize the terminations resulting from the employer’s proposed redundancy. If redundancy is inevitable, measures should be taken to ensure that as little hardship as possible is caused to the affected employees. In the circumstances, I agree with counsel for the 1st respondent that consultation is an imperative requirement under our law. Mr. Oraro’s criticism of the learned trial Judge’s reliance on the UK Employment Appeals Tribunal’s decision in *Mugford v. Midland Bank*, UK Employment Appeal Tribunal,¹⁰ and the treatise by Rycroft and Jordan, - “A guide to the South Africa Labour Law” both of which dealt with the requirement of consultation, was therefore unfair. Those were authorities on comparative jurisprudence which the learned Judge was perfectly entitled to make reference to and where appropriate rely on....”.

20. It is apparent that the Claimant was not given any notice nor were there discussions or consultations between him and the Respondent.

21. The Claimant has also complained that the reasons for redundancy were not justified because another person was employed to fill up the same position. The Respondent did not deny this contention nor point out that the Claimant was not qualified to take up the enhanced position having excelled in his performance previously.

22. I therefore find for the Claimant and awarded him as follows:-

1. 1 month salary in lieu of notice = 462,000/=.

2. 12 months salary as damages for unfair redundancy = 12 x 462,000 = 5,544,000/=.

Total = 6,006,000/=

Less statutory deductions

3. The Claimant will be issued with a certificate of service.

4. A declaration that the rate of interest of the mortgage taken by the Claimant be maintained at staff rate at 6%.

5. Respondent will pay costs of this suit and interest at Court rates with effect from the date of this judgement.

Dated and delivered in open Court this 9th day of July, 2018.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Bonyo holding brief for Were for Respondent – Present

No appearance for Claimant