



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO. 1235 OF 2014**

*(Before Hon. Justice Mathews N. Nduma)*

**NDOMBI GEORGINA NGINA ..... CLAIMANT**

**VERSUS**

**ECOBANK KENYA LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The facts of the claim are that the Claimant was employed by East Africa Building Society (EABS) on 11<sup>th</sup> June, 2007 in the position of Customer Service Resolution '(CSR)'. She worked until 9<sup>th</sup> May 2014, when her employment was terminated on account of redundancy.
2. A communication of the intended restructuring of the department of Domestic Bank Department and communication where the Claimant worked was sent on 6<sup>th</sup> August, 2013. The County Labour Office was however notified in writing on 28<sup>th</sup> May, 2014, after the Claimant had been declared redundant and had left the company.
3. It is not in dispute that upon termination, the Claimant was paid one month salary in lieu of notice. The Claimant was paid service gratuity calculated at one (1) month's salary for each completed year of service.
4. The Claimant was allowed to enjoy the preferred loan rates for six months upon termination and her medical cover remained in places until 31<sup>st</sup> December, 2014.
5. The Claimant states that she was wrongly identified for retrenchment. The department she worked was not offered opportunity to discuss and apply for alternative positions. That she ought to have been paid severance pay calculated at three (3) months salary for each completed year of service and that she ought to have been paid three months salary in lieu of notice in terms of her letter of appointment.
6. The Claims are contained in her pleadings and in her testimony under oath. The Claimant states that the Respondent did not follow section 40 of the Employment Act, 2007 nor did it follow its own Human Resource Policies. That she was rudely and harshly sent home like a conman or criminal when she asked Gloria, questions on the redundancy. That she was called one morning and handed the letter of termination. The computer link was terminated forthwith and was escorted by security out of the premises trying to get clarification on her sudden, and unexpected termination.
7. The Claimant was paid terminal dues set out under paragraph 18 of the Memorandum of Claim on the same date.
8. The Claimant prays for:-
  - i) House allowance and Fuel and Transport allowance for May 2014 in the sum of Kshs.58,753.
  - ii) Two months salary in lieu of notice Kshs.611,408.
  - iii) Severance pay calculated at three (3) months salary for every completed year of service Kshs.6,419,784.
  - iv) Damages for wrongful dismissal and loss of earnings to retirement date in 5 years .
  - v) Certificate of Service.

**Response**

9. The Respondent filed a Memorandum of Response on 4<sup>th</sup> September, 2014. Filed list of documents and called RW1, Gloria Everlyne Byamngisha, the Head of Human Resource for Kenya and East Africa.

10. The Respondent's case is that the Bank was undergoing reorganization in phases within a period of five years. The first to be restructured was the Corporate Bank, followed by the Treasury Department and finally, the Domestic Bank, where the Claimant worked. The communication was made to the Department on 4<sup>th</sup> and 6<sup>th</sup> September, 2013.

11. RW1 testified that the Claimant worked with Rhoda Kariuki who was her supervisor. That the position of Customer Service Resolution (CSR) fell within the Customer Service Quality (CSQ) Unit. The unit was headed by Rhoda. The Claimant handled customer complaints. That the CSQ was replaced with client engagement managers (CEM) which RW1 explained was a broader and deeper new role and this was communicated to all staff. The customer unit became a fully fledged department. That the Domestic Bank Department was scrapped off. According to RW1, the change entailed a new role, a new job description, a new grading level and new key performance indicators.

12. She told the court that the Claimant had neither the education background nor the ability required in the new position. As a result the Claimant and Rhoda were retrenched and a new suitable person was recruited to fit the new position. That the CEM cut across six countries and CEM would sit in the Executive Committee of the Bank reporting directly to the Managing Director and providing support to all business and support department.

13. In short, this was the justification not to re-deploy the Claimant to the CEM. RW1 told the court that this information was well communicated to all staff concerned including the claimant.

14. That the Respondent was left with no choice but to declare the Claimant redundant. The Respondent prays that the suit be dismissed with costs.

### **Determination**

15. The issues for determination are:-

(i) Whether the termination of the employment of the Claimant was for a valid reason and if it was done following a fair procedure.

(ii) Whether the Claimant is entitled to the reliefs sought.

### **Issue i**

16. Upon careful consideration of the evidence tendered by the Claimant and the rebuttal by the Respondent, the court is satisfied that the retrenchment of the Claimant was for a valid reason. The position held by the Claimant had been abolished. The Claimant did not have the educational background and competence to fit in the new position hence it was prudent and reasonable to declare her redundant. The court so finds.

17. The Respondent however did not strictly follow section 40 of the Employment Act, in effecting the redundancy. The Respondent admitted that there was no notice specifically addressed to the Claimant and to the Labour office notifying the Claimant personally and the Labour office that the position held by the Claimant was about to be declared redundant. Section 40 speaks in mandatory terms 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 –*

*(b) where an employee is not a member of a trade union, the employer notified the employee personally in writing and the labour officer.”*

18. It is apparent that the Respondent did not comply with section 40(1) (b) in declaring the Claimant redundant.

19. Even though, the Respondent has carefully explained why it did not re-deploy the Claimant, it is also apparent that it did not accord the Claimant personal audience with regard to the selection criteria applied and did not before declaring the Claimant redundant explain to her why she was selected for the redundancy and why she could not be re-deployed to the new created positions. It is evident that Gloria was hostile to the Claimant when she sought explanation on the matter and she ordered her to immediately vacate the company premises. She was treated rudely, and escorted out of the compound like a criminal. The Claimant was not allowed to clear from her office and her communication account was disabled immediately upon being given the letter of termination.

20. This is not the letter and spirit of section 40(1)(c) of the Act. Clearly the Respondent also violated this provision in the manner it dealt with the Claimant.

21. Accordingly, the court finds that even though the Respondent had a valid reason to declare the Claimant redundant, it did not meet the mandatory procedural requirements provided under section 40 as read with section 41 and 45 of the Employment Act, 2007. The court so finds.

22. The Claimant is therefore entitled to compensation in terms of section 49 of the Act.

23. Following the decisions cited by the Respondent in its submissions as proper guide in determining appropriate compensation in the event a finding of procedural deficiency in effecting a redundancy including **Charles Nyangi Nyamohanga v Action Aid International [2015] eKLR**, where the court awarded the Claimant three (3) months salary in compensation for unprocedural declaration of redundancy.

24. **Hellen Nyanganyi v Mattresses Limited & Another [2017] eKLR** where the court awarded two (2) months salary in compensation for failure to give a notice of redundancy to the labour officer.

25. **Stephen Musyoka Muia v Munyiri 64 Traders Limited T/A Munyiri Fish & chips [2014] eKLR** where the court awarded three months salary in compensation for failure to comply with section 40.

26. The court awards the Claimant, upon consideration of the peculiar circumstances of this case five (5) months' salary in compensation for the failure to adhere to the procedural requirements under section 40 of the Employment Act, 2007 in the sum of Kshs. (305,704 x 5) Kshs.1,528,820.

#### **Terminal Benefits**

27. The Claimant established on a balance of probabilities that she was owed Kshs.58,753 house allowance, fuel and Transport allowance as at the time of the termination. The court awards her accordingly.

#### **Notice Pay**

28. The Claimant equally proved on a balance of probabilities that she was in terms of her contract of employment entitled to three months termination notice. She was paid in lieu of one month notice and the court awards her Kshs.611,408.00 in lieu of two months' notice.

#### **Certificate**

29. It is mandatory for an employer to provide a certificate of service to an existing employee. The court directs the Respondent to provide a certificate of service to the Claimant within 30 days of the judgment.

30. The Claim for Severance Pay at the rate of three (3) months for every completed year of service has not been proved. The service gratuity at the rate of one month salary for each completed year of service already satisfied the requirements under section 40(1) (g) of the Employment Act. This claim is therefore dismissed.

31. In the final analysis, judgment is entered in favour of the Claimant as against the Respondent as follows:-

(i) Five (5) months in compensation for the unprocedural declaration of redundancy in the sum of Kshs. 1,528,820.

(ii) Two months notice pay Kshs. 611,408.

(iii) Unpaid allowances as at the time of termination. Kshs. 58,753

**Total award Kshs.2,198,981.**

(iv) Provision of certificate of service within 30 days of the judgment.

(v) Interest at court rates from date of filing suit in respect of (ii) & (iii) above and from date of judgment in respect of (i) above till payment in full.

(vi) The Respondent to pay costs of the suit.

**Dated and Signed in Kisumu this 31st day of July, 2018**

**Mathews N. Nduma**

**Judge**

**Delivered and signed in Nairobi this 10th day of August, 2018**

**Maureen Onyango**

**Judge**

**Appearances**

Mr. Nyasimi for Claimant

Mr. Mwihuri for Respondent

Anne Njuge – Court Clerk