



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 490 OF 2012

(Before Hon. Lady Justice Maureen Onyango)

LILIAN SYOKAU MATHEW.....CLAIMANT

VERSUS

NETPLAN EAST AFRICA LIMITED.....RESPONDENT

JUDGMENT

By statement of claim dated and filed on 23rd March 2012, the claimant seeks the following orders against the respondent –

1. A declaration that the Claimant's dismissal from her employment was wrongful and unlawful.
2. The Claimant be paid her terminal benefits as set out below –
 - (i) Salary in lieu of notice 27,500
 - (ii) July 2011 salary 27,500
 - (iii) Part of April 2011 salary 14,178
 - (iv) 10 days for September 10 x 27,500 13,0952
 - (v) Severance pay 15 x 27,500 x 2 years 39,285.70

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- (vi) 12 months compensation=27,500 x 12 330,000
- (vii) Certificate of service

Total amount Kshs.451,558.75

3. The Respondent be ordered to compensate the Claimant for wrongful dismissal at the equivalent of twelve (12) months gross salary.
4. The Court do issue such orders and give such directions as it may deem fit to meet the ends of justice.
5. The respondent to pay the costs of this claim.
6. Interest at court rates

The respondent filed response out of time on 20th June 2017 and the same was admitted on record by order of the court on 21st June 2017. In the defence the respondent admits that the claimant was employed by the respondent as pleaded in the claim but denies that she is entitled to

the prayers in the claim.

By consent adopted by the court on 2nd November 2012 the parties agreed that the respondent pays the claimant an undisputed sum of Kshs.78,727 within 21 days and the balance be subjected to a determination by the court.

The case was heard on 27th November 2017 when the claimant testified. The case was adjourned to 16th April 2018 for respondent's case.

On 16th April 2018, the respondent was unable to produce its witness and was compelled to close its case after the court declined to adjourn the case on grounds that the respondent's witness was on leave. The court was of opinion that leave is not justifiable ground for adjournment of a case filed in 2012. The parties thereafter filed and exchanged written submissions.

Claimant's Case

It is the claimant's case that she was employed by the respondent on 10th August 2009 as Office Administrator at a salary of Kshs.16,225. The salary was increased to 20,000 in November 2009 following her confirmation and further to 27,500 by letter dated 29th July 2010 effective 1st August 2010.

By letter dated 10th August 2011 the claimant's employment was terminated. The letter of termination although titled TERMINATION OF EMPLOYMENT confirms that the claimant had been declared redundant and offers to pay the claimant the redundancy benefits. The letter is reproduced below –

“LILLIAN SYOKAU

P. O BOX 1453

NAIROBI

10th August 2011

Dear Madam,

REF: TERMINATION OF EMPLOYMENT

We refer to the above and due to financial constraints the Company has decided to declare you redundant and is hereby giving you a One Month's notice effective from 10th August 2011.

You will be required to return all Company's Properties that may be in your custody by 5th September 2011.

In the meantime we consider your terminal dues are as follows

(a) Part of April 2011 Salary Kshs.14,178.00/=

(b) July 2011 Salary Kshs.9,158.00/=

(c) August 2011 –Salary Kshs.19,158.00/=

(d) 10 days of September 2011 Kshs.7,075.00/=

(e) Severance Pay: Kshs.19,158.00/=

(f) Certificate of Service

Kindly note due to lack of funds the Company intends to pay you the above amount of money of Kenya Shillings Seventy Eight Thousand Seven Hundred and Twenty Seven (Kshs.78,727/=) within 3 months upon expiry of the notice period.

Yours Faithfully

On and on behalf of Net Plan East Africa Limited

SIGNED

Andrew Ayres

The claimant testified that there was no valid reason for the termination, that she was not given notice before she received the letter of termination, was not issued with a notice to show cause and was not summoned for any meeting. That she learned about the termination on the day she received the letter of termination. She testified that the letter of termination stated that it was due to financial constraints but she was not given notice of redundancy. She prayed for judgment as prayed in her claim, less Shs.78,787 paid to her pursuant to settlement recorded in court on 2nd November 2012.

Claimant's Submissions

It is submitted for the claimant that the respondent failed to prove valid reasons for termination of the claimant's employment as required by Section 43(1) of the Employment Act, which provides that –

(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.

It is further submitted that no notice was given to the claimant or to the Labour Officer as required under Section 40 of the Act. It is submitted that it is not enough for the respondent to state that the company was facing financial constraints without producing evidence to demonstrate the same.

It is submitted that Section 40(1) of the Act stipulates in mandatory terms “**an employer shall not terminate a contract of service on account of redundancy unless ... (he) complies with conditions**” therein stipulated being –

(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.

The claimant submitted that the respondent failed or refused to engage in consultation with the claimant on ways to mitigate the effects of the purported redundancy in compliance with the law applicable in termination of employment on account of redundancy as set out in ILO Convention No. 158 ratified by Kenya in 1985 which requires the respondent to provide an opportunity for consultation where redundancies are contemplated. The claimant further relied on the decision in the case of **BANKING INSURANCE AND FINANCE UNION (KENYA) –V- MURATA SACCO SOCIETY LIMITED [2014] eKLR** where the court stated –

“Thus reading the applicable law together with jurisprudence on how a redundancy should be undertaken, conducted and or processed; it involves the existence of genuine business reasons that require consultations, development of a pre-set criteria looking at seniority of affected staff; skill, ability, reliability and the class of each employee before arriving at the decision to terminate. Such a process must involve the Union without disadvantaging employees not Unionised and as of importance, the Labour Officer responsible for the area where the Respondent employer is situate must be informed and involved. The Labour Officer is the government representative, neutral in the redundancy process to advice both the employer and employees on the applicable law and adherence to best practice especially as regards the set criteria. The inclusion of the Union where applicable and the Labour Officer is not optional; the law is framed in mandatory terms. Any resultant redundancy process without compliance with the law is unprocedural and a breach to the employment contract. Such breach where pleaded is curable by payment of damages.”

Respondent's Case

As already stated above the respondent filed its defence on 20th June 2017 and its case was closed on 16th April 2018 after it failed to avail its witness on the hearing date.

In the submission filed on behalf of the respondent it is stated that the respondent complied with Section 40(1)(b) and 43 of the Employment

Act by serving a letter of termination dated 10th August 2011 to the claimant explaining the reasons for termination and further by serving notice on the Labour Officer. The respondent prays that the claim be dismissed as it paid the claimant all that was due to her following the termination of her employment including part salary for April and July 2011.

Findings and Determination

The facts of this case are not contested. The claimant's letter of termination expressly states that her termination was a redundancy. The only issues for determination are therefore whether the redundancy was carried out procedurally and if she is entitled to the prayers sought.

Procedure

The procedure for redundancy is provided for under Section 40(1) of the Employment Act, subsections (1)(a) and (b) provides for notification in the following terms –

(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;

The claimant's letter of termination is dated 10th August 2011 and gives her one month's notice effective from the date of the letter. It states that she was required to clear by 5th September 2011. Salary is however payable up to 10th September 2011.

The letter thus gave her termination notice under Section 40(1)(f) but not the notification of one month before the redundancy is effected.

Further the letter of redundancy states that payment would be made within three months, without specification of the actual date of payment. The claimant was not paid until after filing this suit on 23rd March 2012, more than six months after she was declared redundant.

Section 40(1) the Act is express, that no redundancy is to be carried out until the employer has complied.

The respondent has argued that it complied yet it is glaringly clear that it did not. I thus find and declare that the redundancy did not comply with the provisions of the law and was unprocedural.

Remedies

The claimant is entitled to salary in lieu of notice in the sum of Kshs.27,500/=. She is entitled to salary for July 2011 in the sum of Kshs.27,500, part salary for April 2011 in the sum of Kshs.14,178, 10 days salary for September 2011 in the sum of Kshs.10,577. She is further entitled to severance pay for two years at Kshs.27,50.

Having not been given notification of the redundancy, which should have been done one month before the declaration of redundancy, she is entitled to one month's salary to cover the notification period which I award her at Shs.27,500.

I am satisfied that the respondent was undergoing financial constraints based on the fact that the claimant was not paid full salary for April and July 2011. The respondent did not need to prove that as the claimant did not contest the same.

The claimant has claimed 12 months compensation for unfair termination. Having found that the reason for redundancy was genuine and that the respondent was undergoing financial constraints, I think it would be punitive to slap the respondent with compensation. However since payment was to be made at the time of redundancy but was not, the respondent will pay interest at court rates for the admitted sum of Kshs.78,727 up to the date on which it was paid. Having made the claimant wait for her redundancy pay for more than six months, I award her a further one month's salary as compensation for the delay.

Conclusion

In conclusion, I make the following orders –

1. I declare the redundancy unprocedural for what of notification.
2. I award the claimant the following –
 - (i) Salary in lieu of notification Kshs.27,500
 - (ii) Salary for July 2011 – Kshs.27,500
 - (iii) unpaid salary for April 2011 Kshs.14,178

(iv) 10 days salary for September Kshs.16,577

(v) Severance pay of Kshs.27,500.

(vi) Interest of Kshs.78,727 from 10th September 2011 to 2nd November 2012 (14 months) at 12% per annum.

(vii) From the resultant sum will be deducted Kshs.78,727 already received by the claimant.

(viii) Kshs.27,500 compensation.

(ix) The respondent to issue certificate of service to the claimant.

(x) Respondent to pay claimant's costs.

(xi) Interest to accrue on the amount payable from date of judgment.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 19TH DAY OF OCTOBER 2018

MAUREEN ONYANGO

JUDGE