



## REPUBLIC OF KENYA

### IN THE EMPLOYMENT & LABOUR RELATIONS

#### COURT OF KENYA AT NYERI

CASE NO. 31 OF 2017

MARY WAIRIMU.....CLAIMANT

VERSUS

KENYA NATIONAL UNION OF NURSES.....RESPONDENT

#### JUDGMENT

1. The Claimant sued the Respondent her erstwhile employer for the termination of her employment on 8<sup>th</sup> January 2016. She averred in her memorandum of claim that she was employed on 18<sup>th</sup> September 2013 as the industrial relations officer of the union in the central region. She earned Kshs. 40,000/- at the point of termination. She averred that the Respondent was unfair in the dismissal as it discriminated against her, failed to give a notice to show cause and because no reasons were advanced. She averred she was not issued a certificate of service nor were her terminal dues paid. She sought unpaid leave for 60 days Kshs. 79,980/-, severance pay Kshs. 40,000/- and a certificate of service. She also sought Kshs. 480,000/- being 12 months compensation and costs of the suit, damages and any other relief the court may deem fit to grant. She attached her letter of appointment, confirmation letter, salary adjustment letter, letter deploying her to head office, a letter of appeal against deployment, letter giving the Claimant time to relocate, letters from both parties on the transfer, abolishment of office, clearance form, employment card, employee manual, work reports for 2013, 2014 and 2015, email and the demand letter from her lawyer.

2. The Respondent filed a defence and counterclaim and in it denied that the Claimant was dismissed unfairly. The Respondent averred that it paid the Claimant Kshs. 85,216 after deduction of PAYE for the unutilized leave and the severance pay, a sum that the Claimant duly acknowledged. The Respondent averred that the Claimant's services were not unfairly terminated but rather that the office at Nyeri was abolished and her services declared redundant. The Respondent averred that the Claimant did not file a work report for 2015 which prompted her transfer to the head office and abolition of her office. The Respondent averred that despite giving the Claimant sufficient time off vide the letter dated 11<sup>th</sup> December 2015 to enable her relocate, the Claimant kept giving flimsy excuses against the transfer and stated that it was impossible to move to the head office thereby offending the Employment Act. The Respondent averred that the refusal to comply with the instructions on transfer amounts to commission of an offence attracting summary dismissal contrary to the Employment Act, her letter of employment and the employee manual. The Respondent averred that the Claimant cleared with the office and obtained her certificate of service. The Respondent denied that the Claimant was entitled to any relief sought as it complied with all legal requirements while retrenching the Claimant. By way of counterclaim, the Respondent averred that the Claimant worked without being supervised and was required to file a work report as proof that she was working and was on duty. It was averred that the Claimant did not file a work report for 2015 prompting the Respondent to abolish the office for lack of production. The Respondent averred that this amounted to neglect of duty and therefore claimed all the salary received for 2015. The Respondent averred that the work reports for 2015 attached to the Claimant's claim were a fabrication and that there was no proof that they were ever delivered to the Respondent. It was averred that had the reports been received her position would not have been abolished. The Respondent sought compensation for underserved salary Kshs. 480,000/-, damages, costs of the suit, interest on the foregoing and any other relief the court may deem fit to grant.

3. The Claimant filed a reply to response and defence to counterclaim in which she averred that the payment of the sum of Kshs. 85,126/- was made after the suit was filed and was an admission of liability by the Respondent. She denied that she did not give reports in 2015 leading to the abolition of office. The Claimant averred that the response and counterclaim were a sham and abuse of the court process. The Claimant averred that the relief the Respondent sought was incapable of grant and the counterclaim was an afterthought intended to dissuade and intimidate the Claimant from pursuing her genuine claim against the Respondent. She sought the dismissal of the response to claim and counterclaim and judgment entered for the Claimant as prayed for in the statement of claim.

4. The Respondent filed an amended response and counterclaim in which it averred in addition to the prior averments that the Claimant had failed to file work reports and work plans as was required by her terms and conditions of service. The Respondent sought compensation for underserved salary for 19 months amounting to Kshs. 790,000/-. Leave to have the amended claim on record was sought and the Claimant orally amended her response to counterclaim to include denial of the additional sum.

5. The Claimant filed a supplementary list of documents attaching the email correspondence that dispatched the work reports and whatsapp messages for June 2016 to January 2017 as well as paylips for August, September and October 2015.

6. The Claimant testified that her contract was unfairly terminated in January 2016. She stated that part of her claim was settled leaving a balance. She said that the Respondent said she did not work for the whole of 2015 and in the letter of retrenchment there was no allegation that she did not work in 2015. She testified that she went through clearance and the Respondent did not say that she owed any money and no deduction was made to her dues for the sums claimed. She stated that she reported to Nairobi immediately, was assigned some work in Kitui and then she sought and was granted special leave to prepare for relocation to Nairobi. She was retrenched before she could complete the special leave as it was cancelled. She stated that she did not have any disciplinary issues. She testified that the reports she is alleged not to have prepared were produced alongside the emails forwarding the reports. She stated that the Nyeri office was still operational covering the Mt. Kenya region. She did not get a certificate of service and she further stated that she had not secured employment since retrenchment. She thus sought the grant of the prayers plus costs of the suit.

7. In cross-examination by Mr. Panyako for the Respondent, she testified that she was employed as an assistant industrial relations officer in Central Kenya region and that she reported to the Secretary General though there was no office. She narrated her duties were as per the letter of appointment. She stated that it was not procedural to prepare work plans and that she was to send a report monthly and she had a work plan. She testified that she was paid 3 month's in lieu of notice and service was not paid. She conceded that there were other industrial relations officers moved from Eastern and Western to the head office. She stated that her appeal against the relocation were in view of the difficulties at the time and she was given 45 days to relocate. She agreed that she did not appeal against the retrenchment and the payment of notice was made. She was paid Kshs. 129,032/- less deductions. She testified that she had sought Kshs. 119,980/- and was paid 70 leave days instead of the 60 leave days sought. She read the employee manual which provided that leave could not be carried over. She referred to the workplans for Nyeri County and the work reports and stated that she undertook recruitment and sent the work reports to the head office. She stated that she had not received any certificate of service though no job had been denied on account of the certificate of service and that she was employed in central. The office was still operational. She testified that the sums sought were paid except for compensation.

8. In re-examination she stated that she reported to the Secretary General Mr. Panyako. She testified that he never complained nor did he give her any warning or disciplinary letter, no workplan or report was pointed out as not being done. Her work was praised through the Respondent's bulletin and there was no deduction of any sums alleged to be due. She stated that the payment made was during pendency of the suit. She testified that there was no criteria given for the retrenchment and there were no claims of insubordination.

9. The Respondent closed its case without calling a witness and that marked the end of oral testimony. The parties were to file submissions and the Claimant filed submissions on 17<sup>th</sup> July 2018 and the Respondent filed theirs on 17<sup>th</sup> September 2018. In her submissions the Claimant submitted that the Respondent's counterclaim was an afterthought and that she was not given any reason for termination. She submitted that the redundancy effect was not in compliance with the provisions of Section 40 as read with Section 2 of the Employment Act. The Claimant submitted that the payment of the sums due to her during the pendency of the claim was an admission of liability. The Claimant cited the Court of Appeal decision in **Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 Others [2014] eKLR** where it was held that failure to comply with the procedural requirements for Section 40 of the Employment Act renders termination unfair. The Claimant submitted that the Respondent's case was not proved and that the said case was therefore a mere allegation. The Claimant submitted that the court had jurisdiction under Section 12(3)(vi) of the Employment Act to award damages and she sought the award of Kshs. 100,000/- as damages. The Claimant sought the award of the reliefs sought in her claim.

10. The Respondent submitted that the office was abolished on grounds of non-performance occasioned by the non-productivity of the Claimant. The Respondent submitted that the Claimant was deployed to the head office for close monitoring due to her non-performance and the Claimant declined precipitating her retrenchment. The Respondent submitted that it used its managerial prerogative to retrench as opposed to summary dismissal as provided for under Section 44(1)(e) of the Employment Act for failing to obey the order of redeployment. The Respondent submitted that the Claimant was paid all her terminal dues and that the sum was in excess by Kshs. 80,200/- which the Respondent sought to be refunded. The Respondent submitted that the certificate of service was issued to the Claimant and that the private messages between the Claimant and a fellow employee of the Respondent were not the proper channel of communication. The Respondent submitted that it had less than 50 employees and therefore the provisions of Section 12(3) of the Employment Act applied. It was the Respondent's position that the Claimant's allegations against the Respondent regarding her dismissal were not proved and that the Respondent had a valid reason to retrench the Claimant as provided for under the Employment Act. It was submitted that the provisions of Section 41 did not apply to an employee declared redundant for refusing to take up a deployment or transfer. The Respondent submitted that the Claimant was not clear as to how she exited the employ of the Respondent as she claims application of Section 40 and 41 which were mutually exclusive. The Respondent submitted that the Claimant's submissions were made upon non-existent laws and therefore should be expunged as they were null and void. The case of **Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 Others** and in specific page 36 stated to be absolutely irrelevant to this claim as it related to redundancy on account of financial difficulties unlike the Claimant's case which was on account of non-performance. The Respondent submitted that there was no CBA between the Claimant and the Respondent as was the case in the authority invoked by the Claimant. The Respondent submitted that the Employment Act under Section 49 made it mandatory for the labour officer and the court to consider the provisions of the said section when determining a complaint or suit under the Act. The Respondent submitted that the Claimant had connivingly failed to mention the provisions of Section 49(4)(b), (k), (i) and (m). The Respondent submitted that the Claimant failed to submit the quarterly work schedules and thereby breached her contract of employment. The Respondent cited the South African case of **National Union of Mine Workers and Another v Commission for Conciliation, Mediation and Arbitration and Others (JR 2512/2007) [2012] ZALCJHB 80; (2013) 34 ILJ 945 (LC) 16 AUGUST 2012 (46)** where the court held that *it is trite law both at common law and under the equitable dispensation created by the LRA, the employment relationship is regarded as one of the highest good faith and that the success of any enterprise depends on the absolute integrity and honesty of its employees, and any form of dishonesty or deception potentially may have more serious and far reaching consequences at executive level*. The Respondent submitted that the principles of integrity were stipulated in the Employee Manual and that the Claimant had admitted in cross examination that all the disputes were handled by the industrial relations officer in charge of Rift Valley region. It was submitted that this demonstrated her incompetency as she could not perform her duties as provided for in her letter of appointment. The Respondent relied on the case of **Evans Kamadi Misango v Barclays Bank of Kenya Limited [2010] eKLR** and **Bamburi Cement Limited v William Kilonzi [2015] eKLR** and submitted that it was not the choice of an employee as to where the employee would work. The Respondent relied on an article on **Workplace Relations & Safety** published originally in **Employment Law Adviser** where the Federal Circuit Court found that an employee who declined a deployment was denied entitlements. The Respondent urged the dismissal of the Claimant's claim and enter judgment for the Respondent in the counterclaim.

11. The Claimant was dismissed by the Respondent and the Respondent asserts that the Claimant had failed to report upon deployment and

her position was declared redundant. The Claimant sued for various relief part of which were settled during the pendency of the suit. The Claimant reported to Nairobi as evidenced by the Respondent in giving her 45 days to redeploy to Nairobi upon her reporting in December 2015. The Respondent dismissed her during the 45 days period. In my view this was erroneous as the Claimant had responded and acted as expected. Redundancy is defined in Section 2 of the Employment Act as follows:- '*redundancy*' means the loss of employment, occupation, job or career by involuntary means through no fault of an employee, involving termination of employment at the initiative of the employer, where the services of the employee are superfluous and the practices commonly known as abolition of office, job and loss of employment.

The provisions of Section 40 of the Employment Act make elaborate provision as to how the retrenchment is to take place. Section 40 provides 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—*

*(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.*

*(2) Subsection (1) shall not apply where an employee's services are terminated on account of insolvency as defined in Part VIII in which case that Part shall be applicable.*

These provisions can be summarized as follows. That the employer should have 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 in the selection of employees to be declared redundant and where the employee who is declared redundant has leave due, the employer has to pay off the leave in cash and the employer has to pay an employee declared redundant not less than one month's notice or one month's wages in lieu of notice and finally, that the employer has to pay the employee declared redundant, severance pay at the rate of not less than fifteen days' pay for each completed year of service. This was not done in respect of the Claimant and even her leave dues were paid during the pendency of the suit. It seems the Respondent even in its submissions is unsure as to whether the Claimant was relieved of her duties as a result of incompetence and non-performance or refusing to be deployed to the head office for close monitoring. Under Section 43 of the Employment Act, the employee has a burden to show that the termination was unfair while for the employer the burden is to show that there was reason for the termination. The Respondent failed to demonstrate the dismissal of the Claimant was justified and as such I find that the dismissal is therefore unfair in the circumstances.

The Respondent did not avail any witness and this did not aid it in dispelling the dark cloud of hubris that was hanging on its head. The counterclaim remains as mere allegations and the same was unproved and therefore stands dismissed with costs to the Claimant.

12. In the final analysis I enter judgment for the Claimant as against the Respondent for:-

- a. One month notice pay Kshs. 40,000/-
- b. Compensation for the unlawful dismissal amounting to 6 months pay Kshs. 240,000/-
- c. Costs of the suit.
- d. Certificate of service
- e. Payments in a) and b) above to be subjected to statutory deductions per Section 49 of the Employment Act.

It is so ordered.

**Dated and delivered at Nyeri this 9<sup>th</sup> day of October 2018**

**Nzioki wa Makau**

**JUDGE**