



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU

CAUSE NO.403 OF 2016

MARY NYAWIRA KARIMI.....CLAIMANT

VERSUS

PURE CIRCLE (K) LIMITED.....RESPONDENT

JUDGEMENT

Issue in dispute – unlawful redundancy and unfair termination of employment

On 4th December, 2014 the claimant was employed by the respondent as Senior Accounts Assistant in the Finance and Administration Department at a salary of Ksh.55, 000.00 per month. The salary was adjusted to Ksh.65, 500.00. the claimant was issued with a two-years contract of employment dated 2nd December, 2014.

On 18th July, 2016 the respondent decided to declare the claimant redundant.

The claim is that such action was inhuman and contrary to the provisions of section 40 and 41 of the Employment Act. the claimant was issued with summary notice and without being given a fair chance to be heard. There was no prior notice on the redundancy or notice issued to the labour officer as required under section 40 of the Employment Act.

The claim is also that the respondent refused to pay the claimant her terminal dues and despite demand there is no payment. The claimant is seeking the following dues;

- a) Salary for 18 days worked in July, 2016 at Ksh.39,300.00;
- b) One month notice pay in lieu of redundancy notice Ksh.65,50000;
- c) One month in lieu of notice Ksh.65,500.00;
- d) Leave days due Ksh.43,875.00;
- e) 3 days worked over the weekend Ksh.6,550.00;
- f) One public holiday worked Ksh.4,366.00;
- g) Compensation; and
- h) Costs.

The claimant is also seeking for a declaration that termination of employment by redundancy was wrongful and unfair and lacked due process. No certificate of service was issued.

The claimant testified that upon employment by the respondent she worked diligently and her employment terms reviewed with a salary increase. On 18th July, 2016 she was issued with a redundancy notice taking effect immediate and without being issued with prior notice or being given a hearing. The notice to the labour officer was only served after employment had terminated on 19th July, 2016.

The respondent has since settled terminal dues of leave days, 18 days worked, notice pay, severance pay all at Ksh.180, and 375.00.

There are three (3) items not resolved;

- a) Work during one public holiday;
- b) Days worked during weekends; and
- c) Compensation for unfair termination of employment.

The claimant also testified that she has since cleared with the respondent and been paid Ksh.180, 375.00.

In response, the respondent's case is that the claimant was employed as Senior Accounts Assistant on 3rd January, 2015 to 18th July, 2016 on a two years contract renewable. Her salary was reviewed from Ksh.50, 000.00 to Ksh.55, 000.00 per month and effective 1st April, 2015 upon completing the probation period. Subsequently the salary was increased to Ksh.65, 000.00 from 1st January, 2016.

The claimant was declared redundant and in the contract issued the respondent had the right to terminate the contract upon notice or payment in lieu thereof. The claimant was issued with notice and paid for the period of notice.

The respondent followed due process in terminating the claimant from her employment. All owing dues have been settled. Upon being declared redundant the claimant went and sought treatment at Valley Hospital under the respondent's account and where she incurred expenses amounting to Ksh.14, 990.00. the claimant has since been paid all her dues at Ksh.126, 991.00.

The dues paid includes;

Leave days at Ksh.43, 875.00

Notice pay Ksh.65, 000.00

Salary for 18 days Ksh.39, 300.00

Other claims are denied as not owing or payable to the claimant. The claim should be dismissed with costs.

In evidence the respondent called Wesley Rotich Kiplangat the head of Finance and who testified that Simon Girdlestone is the former employee of the respondent and who was general manager. Upon the employment of the claimant her salary was reviewed and her last pay was Ksh.65, 000.00. the claimant was declared redundant and issued with notice and her terminal dues have since been paid. Upon such notice the claimant proceeded to incur costs under the respondent medical cover at Valley hospital and such was reduced from her final dues.

At the close of the hearing both parties filed written submissions.

The claimant submits that her employment was terminated unfairly as the respondent failed to adhere to the provisions of section 43(1) of the Employment Act, 2007 (the Act). such provisions required the respondent to have reasons leading to termination of employment as required under section 40 of the Act. the termination of employment was not procedural and was contrary to section 43(2) and section 40 of the Act as held in the case of **BIFU versus Murata Sacco Society Limited Cause No.616 of 2010**. The claimant is therefore entitled to the reliefs sought.

In submissions, the respondent states that they complied with the law in terminating the claimant's employment. She was issued with notice and which was copied to the labour officer as held in **Thomas De la Rue (K) Ltd versus David Opondo Omutelema [2013] eKLR**. such notice indicated the date of the intended redundancy and the reasons and extent of the same as required under section 43(2) of the Act as held in **Kenya Airways Limited versus Aviation & Allied Workers Union Kenya & 3 others [2014] eKLR**.

The respondent also submits that the claimant has since been paid her terminal dues and which includes pay for days worked, notice pay of one month, severance pay and accrued prorated leave. Such settled the matter.

In her evidence the claimant confirmed several claims as having been settled. That of;

- a) 18 days worked in July, 2016;
- b) Notice pay of one month;
- c) Accrued leave days.

The respondent also confirmed to having paid the claimant a severance pay.

The claims contested are those of work during the weekend, work on a public holiday and compensation for unlawful termination of employment.

It is common cause that the claimant was terminated in her employment by the respondent on the reasons of redundancy. In the notice dated 18th July, 2016 the respondent noted that due to poor company performance and for restructuring of the human resources, the claimant's position was found redundant under section 40 of the Employment Act. It was not indicated as to when the notice was to take effect. However, the claimant has confirmed she was paid for 18 days worked in July, 2016.

Indeed as submitted by the respondent, in the case of **Kenya Airways Limited versus AAWU & others**, cited above, the Court of Appeal held that where there is a redundancy the employer must ensure two fundamental requires of substantive justification for the same and procedural fairness.

Section 40(1) of the Act gives the requirements and conditions precedent to a redundancy. The employer must justify the redundancy. Notice of The intended redundancy should be issued to the employees likely to be affected and another notice issued to the labour officer.

The notices under section 40(1) of the Act are mandatory. The court held that;

...both the notices themselves and their duration of 30 days under this provision are mandatory. Section 40(1) of our Employment Act does not expressly state the purpose of the notice. Although it also does not expressly provide for consultation between the employer and the employees or their trade unions before the final decision on redundancy is made, on my part I find the requirement of consultation provided for in our law and implicit in the Employment Act itself

Even where an employer intends to pay for the notice period, the notice of intended redundancy must issue to the employees noting the extent and reasons leading to the same. It does not simply suffice that an employer picks on a specific employee and proceeds to attach a reason of redundancy for termination of employment as held in **Agnes Ongadi versus Kenya Electricity Transmission Company Limited [2016] eKLR** the court held;

*A redundancy must therefore be justified before an employer can commence recruitment of new officers to replace existing employees who have on-going contracts of employment and hold substantive offices in similar capacity as the advertised position. The justification of the redundancy is upon the employer as this cannot be applied as a general term so as to lay off an employee on a whim as held by the Court of Appeal in **Kenya Airways Limited versus Aviation and Allied Workers Union Kenya and Others [2014] eKLR**.*

*A restructuring or abolition of office are not matters that just happen. They require serious considerations by the employer and based on the positions held by various officers, all efforts must be shown to have been made to retain or redeploy such officers as to abolish office and then advertise for recruitment of persons with similar skills or abilities without giving a consideration internally, would be to abuse the very essence of a restructuring and purpose of abolition of office as held in **Aviation and Allied Workers Union 7 Others versus Kenya Airways Limited, Cause No.1616 of 2014**. This position is given affirmation by the Court of Appeal in the same Case upon the employer going on appeal as cited above.*

In this case, the summary action taken by the respondent to terminate employment of the claimant even where there was an underlying reason of redundancy lacked procedural fairness. There is no material evidence that there was prior notice of the intended redundancy and that only her position became affected and there was no chance of redeployment. The specific target of the claimant for termination of her employment is not explained as held in **Jane I Khalachi versus Oxford University Press E. A Ltd, Cause no.924 of 2010**. A redundancy cannot be undertaken to target a single employee. Such would defeat the purpose of the law as set out in section 43(2) of the Act. A notice ought to have issued to the claimant before termination of her employment even where the respondent intended to pay for notice as under section 40(1) (f) and which pay is mandatory.

The claim for notice pay in redundancy made by the claimant is hereby found justified.

On the remedies sought for compensation, the court taking into account the provisions of section 45(5) where the respondent has since paid the due terminal dues and also paid a redundancy pay which the claimant had not pleaded, such puts the respondent in good stead and such is found as adequate compensation to the claimant.

The claim for work during 3 weekends and work on public holidays though pleaded and the claimant failed to elaborate in her evidence. This is also not addressed in the written submissions. Without the details thereof, I take it the respondent was also denied the same and thus no payment is due.

In a redundancy there is notice due to the claimant under section 40(1) (b) and also under (f);

(b) where an employee is not a member of a trade union, the employer notifies the employee personally in writing and the labour officer;

And

(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

The respondent has since paid to the claimant notice pay for 30 days. Unpaid is the redundancy notice to address the notices due under section 40(1) (b) and (f) of the Act.

Accordingly, the claimant is awarded notice pay due and unpaid under section 40(1) (b) and (f) of the Employment Act, 2007 at Ksh.65, 000.00 and each party to bear own costs.

Dated and delivered at Nakuru this 18th day of December, 2018.

M. MBARU JUDGE

In the presence of:

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