



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE 1710 OF 2013

(Before Hon. Lady Justice Maureen Onyango)

JERUSHA NYAMBURA MAINGI.....CLAIMANT

VERSUS

SEN-TECH LIMITED.....RESPONDENT

JUDGMENT

The Claimant filed her Memorandum of Claim on 23rd October 2013 alleging unfair termination by the Respondent on account of redundancy. The Claimant seeks the following reliefs:

1. Maximum Compensation.
2. General damages for unlawful redundancy.
3. Costs of the suit.
4. Any other remedy the court deems fit to grant.

The Respondent filed its Memorandum of Defence on 4th February 2014 denying the Claimant's allegations in the Memorandum of Claim. The suit came up for hearing on 7th October 2015 when the claimant's case was heard. However, the Respondent neither appeared in court on 19th April 2018 for the hearing of its case nor did it file submissions as directed by the Court.

Claimant's case

The Claimant testified that she was employed by the Respondent from August 2006 to June 2013 and held positions of Accountant, Senior Accountant and lastly Human Resource Manager. She testified that she was tasked to start the Human Resource Department and was taken for training in human resource at the Institute of Human Resource Management.

She testified that there was no indication that the Company was ceasing operations. According to her the Respondent operated KHS East Africa which was a reflection of the Respondent's success. She further testified that the Respondent had expanded its operations.

She testified that she had trained most of the Respondents staff including the Finance Manager's wife who eventually filled the position held by her husband.

The Claimant admitted that she was paid a sum of Kshs.366,037 as terminal dues but she felt that she had been wrongly targeted and that procedure was not followed.

In cross examination the Claimant testified that no redundancy had occurred. She stated she did not know if KHS was a separate entity from the Respondent but stated that it was supplier of the Respondent and the two companies operated together.

She further stated that the Notice of Intended redundancy was issued on 30th April 2013 and a month later a notice of termination was issued. She stated that though she gave verbal objections she was not given a chance to give their explanations.

The Claimant submits that the Respondent failed to comply with the Employment Act, as the reason given for her redundancy was not genuine. In addition, that her colleagues whom she had trained replaced her as the Respondent continued to carry out business using a different name.

Determination

The issues for determination are –

1. Whether the Claimant's termination on account of redundancy was unfair
2. Whether the Claimant is entitled to the reliefs sought.

1. Whether the Claimant's termination on account of redundancy was unfair

The Notification for Intended Redundancy issued on 30th April 2013 stated that the Respondent was ceasing operations. This Notification was personally addressed to the Claimant. A month later the Claimant was issued with a letter of termination. The Claimant in her testimony stated that Respondent continued to conduct business and that the persons she trained replaced her. The termination letter issued to the Claimant stated:

“You are requested to train your colleagues, Mrs. Patel, Mehul and Arnold accordingly to allow for a smooth transition and no disruption in daily activities.”

From the above statement it is surprising why the Respondent would require the Claimant to train other persons yet it was ceasing operations. The explanation in the Respondent's response that the Claimant was to train other employees since she performed two tasks which no other employee knew, raises issue on what the training was to set achieve even if it was for smooth transitioning.

The Claimant was issued with two notices. Section 40 of the Employment Act requires issuance of a notice of the intended redundancy and a notice to the labour officer and thereafter a termination notice. The Respondent in its Memorandum of Defence only produced the response from the Labour Officer on the termination but did not produce the letter sent to the Labour Office. Hence, it is not certain the reasons advanced in the Notice sent to the Labour officer. Section 40 (1) of the Employment act provides:

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.**

In **Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 Others [2014] eKLR** the Court of Appeal held; -

“At the outset it essential to pointed out, that the provision does not specify the format or the details to be contained in the notice. What is required is that the employer issue a notice to the union, as well as to the Labour Officer in charge of the employment area of the employee specifying the reasons for and the extent the redundancy. Finally it is specified that a one months' notice is required to be given.”

The Claimant states that at the time of her termination she was a senior employee holding the position of Human Resource Manager. Section 40 (1) (c) requires that in instances of redundancy seniority in time be considered before declaring an employee redundant. The Claimant stated that the Respondent retained all employees that she had trained. Clearly, the Respondent did not consider the seniority and skill of the

Claimant in declaring her redundant but retaining her trainees. Further the respondent did not controvert the claimant's evidence as it did not call any witness.

In **Barclays Bank of Kenya Ltd & another v Gladys Muthoni & 20 others [2018] eKLR** the Court of Appeal cited the Kenya Airways case (Supra) in expounding on the importance of consultations prior to redundancy and held:-

"In the end, we are persuaded that the dicta of Maraga and Murgor, JJA regarding consultations prior to declaration of redundancy resonate with our Constitution and international laws which have been domesticated by dint of Article 2 (6) of the Constitution...Furthermore, consultation was necessary before the redundancy notices were issued. Article 13 of Recommendation No. 166 of the ILO Convention No. 158 - Termination of Employment Convention, 1982 ... That law is applicable in this country. The purpose of the provision as Maraga, JA emphasized: "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...Murgor, JA in the same case stated as much, adding:" ..consultations in redundancies are two-way discussions between the employer and the union to be conducted with candour, reasonableness and commitment towards addressing the concerns of both management and the employees and focused on reaching solutions."

The Respondent pleaded that the decision to terminate the claimant was based on the reasons in the Employee Assessment Form. However, the notification of intended redundancy stated that the decision to terminate the Claimant's employment did not reflect her performance, which was satisfactory. Therefore the reason for termination based on her performance was not genuine. In any case should her performance have been wanting the respondent was expected to comply with the provisions of Section 41 of the Employment Act by providing a notice and convening a hearing.

The Respondent pleaded in its Memorandum of Defence that there were three accounting officers in Sen-Tech including the Claimant and that the work at the KHS East Africa could not justify the position of an additional staff. The Respondent further stated that at KHS East Africa there was only one accountant who was also a debt collector and one finance manager. These statements contradict the need for the Claimant to train other persons on her role. In any event, the Claimant's role was that of Human Resource Manager according to her uncontroverted evidence.

Having failed to follow the procedure set out under Section 40 of the Employment Act, the redundancy of the claimant was unlawful and amounted to an unfair termination. I declare accordingly.

2. Whether the Claimant is entitled to the reliefs sought.

The Claimant seeks maximum compensation. She did not pray for any specific remedies. In addition, she stated that she had received a sum of Kshs.366,037 as her dues. She is therefore entitled to only compensation for unfair termination.

Having worked with the respondent from August 2006 to June 2013, a period of about 7 years and taking into account the fact that the termination was not at the fault of the claimant, further taking into account the terminal dues which amounted to only Kshs.363,037.45/=, I award the claimant compensation equivalent to 6 months' salary in the sum of **Kshs.1,200,000/=** based on her gross pay of Kshs.200,000. The respondent shall also pay her costs. The decretal sum shall attract interest at court rates.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 7TH DAY OF DECEMBER 2018

MAUREEN ONYANGO

JUDGE