



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 2056 OF 2013

(Before Hon. Justice Hellen S. Wasilwa on 29th June, 2017)

SAMUEL EUSTACE WACHIRA MURAGE 1st CLAIMANT

A. G. THAKURA2ND CLAIMANT

VERSUS

DELPHIS BANK LIMITED.....RESPONDENT

JUDGMENT

1. The Claimants initially filed suit in the High Court as HCCC No. 1821 and 1822 of 1995 claiming damages for unlawful termination through the firm of Mbai & Kibuthu Advocates.
2. They allege that they were employed by the then Bank of Credit and Commerce International Overseas) Limited (BCCI) and served them in the position of Managers with a monthly salary of Kshs. 95,305/= and 94,754/=, respectively.
3. That it was a term of their contracts of employment that in the event of the Claimant's being made redundant, BCCI would defray the cost of education of the Claimants' children under the age of 13 years for a maximum of a period of one year.
4. Further that the Claimants were entitled to 21 working days leave and a security allowance. It was also a term of the Contract that in the event of redundancy a reasonable notice of not less than one month would be given to the Claimants.
5. That the Respondent herein took over the operations of BCCI on or about 30.8.1991, and the Claimants were subsequently transferred to the Respondent's employment. They further state that by a letter dated 20.2.1995 in breach of the terms and conditions of the contract of employment and in total disregard of the Trade Disputes Act unlawfully terminated the Claimants' employment.
6. The Respondent filed a Defence wherein they admit the employment relationship but deny that it was a condition of the contract that BCCI would defray education expenses of the Claimants' children under the age of 18. They further deny the emoluments claimed in the Plaint and that the Claimants were unlawfully terminated. They pray for the Claim to be dismissed with costs.
7. The 1st Claimant in his statement stated that when the Respondent took over from BCCI he was transferred to Eldoret Branch on 10.1.1994, as the Credit Controller as a result of his good performance. On 2.2.1995, he received a sealed envelope from the Chief Executive via messenger, informing him that

his services were no longer warranted. That he was to hand over all bank assets, records, and keys by end of that day. This was allegedly as a result of a strategic review of the bank's operations. He states that he was not given notice and principles of natural justice were not adhered to.

8. That as a result of the Respondent's actions the Claimant has been unable to get alternative employment which has caused him great suffering. That as at the time of retrenchment his salary was Kshs. 102,205/=. He prays for his claim to be allowed as drawn.

9. In his statement the 2nd Claimant Albert Thakura stated that by a letter dated 20th February 1995, which was delivered to him at 4.00 pm while in a meeting with a fellow Manager, he was informed that he had been made redundant with effect from that day and that he was not to report to work the following day. He was not given any notice contrary to the Respondent's policy. As at the time of termination his salary was Kshs. 94,754/=.

10. He avers that he has faced difficulties in securing alternative employment in the banking sector and the Respondents' actions have caused him a lot of suffering and prays for his claim to be allowed as drawn.

11. At the trial, evidence was led as per the pleadings and witness statements.

Submissions

12. The Claimants submit that they have prayed for one year benefits in lieu of their termination relying on a circular issued by BCCI on 8.6.1990 wherein it was stated:

“we wish all the members of staff to know that if they are made redundant, either under a voluntary scheme or by unavoidable compulsory redundancy, and they are in receipt of a basic annual salary which is under US\$30,000 or the local currency equivalent, we would wish to provide some additional support in certain specific circumstances, as detailed below:-

1. Where the cost is reasonable, from the children under the age of 18 years in education, for whom fees are paid, and because with changed circumstances there is a likelihood of this education having to be discontinued because it now proves to be beyond the available means of the family.

2. If because of abnormal health problems, any member of the family, whether it be the employee or spouse or defendant children under the age of 18, are currently being treated because this is essential and unavoidable, and again by changed circumstances such expenditure is beyond the available means of the family to obtain reasonable medical assistance.

In either of the above circumstances the concerned staff member should write to the management reorganization committee, explaining the problems which they were experiencing, attaching documentary evidence of both the stated circumstances and the total cost, then consideration will be given for reasonable assistance being made available to the staff member to help defray the cost for a maximum of one year.”

13. They are of the view that the above cited circular was meant to protect employees on redundancy which is why the Respondent had issued a circular in that regard.

14. They further submit that their termination was unlawful as they were not given notice and neither were the rules of natural justice followed and as such their claims should be allowed.

15. On the claim for payment in lieu of notice, the Claimants state that they both received one day notice and therefore this Claim should be allowed. They also allege that the claim for security allowance is payable as the Respondent has not disproved it. They state that the security allowance is for the period between January, 1994 and February, 1995.

16. The Claimants also state that they experienced a lot of suffering as a result of the Respondent's actions which led to hospitalization and as such the 2nd Claimant has made a claim for hospital expenses amounting Shs. 145,821/=. The 2nd Claimant also claimed for school fees totaling to Kshs. 113,400/= since this claims are undisputed they should be allowed.

17. The Claimants also pray for general damages in lieu of the wrongful and unlawful termination since Section 40(1) of the Employment Act which is couched in mandatory terms was not followed. That the Courts have previously awarded General Damages where the law has not been followed in declaring workers redundant. They cite the case of **Kenya Airways Limited Vs. Aviation & Allied Workers Union Kenya & 3 others (2014)eKLR** where it was held:

“As a whole, for any termination of employment under redundancy to be lawful, it must be both substantially justified and procedurally fair... The purpose of the notice under Section 40(1) (a) and (b) of the Employment Act, as is also provided for in the ILO Convention No. 158 – Termination of Employment Convention, 1982, is to give the parties an opportunity to consider measures to be taken to avert or to minimize the terminations and measures to mitigate the adverse effects of any terminations and measures to mitigate the adverse effects of any termination on the workers concerned such as a finding alternative employment.”

18. They also submit that consultation must be a reality, not a charade. The party to be consulted must be given sufficiently precise information to allow a reasonable time to respond. The person doing the consulting must also keep an open mind and listen to suggestions, consider them properly, and then decide what is to be done; per Maraga J (as he then) was in the Kenya Airways case (supra).

19. They therefore pray for their claims to be allowed as drawn.

20. The Respondent on the other hand submits that Section 40 of the Employment Act provides for termination on account of redundancy. They admit that both Claimants were discharged on account of redundancy on 20.2.1995. The issue of one year's notice they submit that it does not apply in the instant case as at the time when BCCI was taken over by the Respondent both Claimants were offered employment by the Respondent under new terms which the Claimants accepted by executing their appointment letters.

21. That the Respondent in assessing the dues owed to both Claimants, they relied wholly on the terms and conditions of service for officers and secretaries. That the circular relied on by the Claimants to justify their claim for one year's notice does not expressly say so. That the Claimants are only entitled to three months' salary in lieu of notice which the Respondent took into account when declaring them redundant. They pray for the Court to find that redundancy was in compliance with procedural safeguards both contractual and statutory.

22. The Respondent further submits that there was justified reason for redundancy. They submit that evidence was led to the effect that the Respondent restructured and had determined some positions not to be feasible with the then Company's strategy including those held by the Claimants. That this was a prerogative of the employer which was done as there was a necessity to reorganize, to enhance operations and prevent closure. This reason was advanced to the Claimants in their termination letters as follows:

“Dear Mr. Thakura,

I have to advice that following the strategic review of the Bank's operations, the Bank has determined that the position of Assistant Manager, International Division is no longer warranted. I am sorry to say that it has proved possible to re-deploy you in the Bank's service and with regret I have to advise you that it has been decided to discharge you from the Bank's service.”

“Dear Mr Murage,

I have to advise that following the strategic review of the Bank's operations, the Bank has determined that the position of Credit Controller, Credit Control Departments is no longer warranted. I am sorry to say that it has proved possible to re-deploy you in the Bank's service and with regret I have to advise you that it has been decided to discharge you from the Bank's service."

23. They rely on the case of Walter Ogal Anuro vs. Teachers Service Commission (2013) eKLR where it was held:

"for a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer in effecting the termination".

24. The Respondent submits that the Claimants were paid all their dues and as such their claims should fail with costs.

25. Having considered submissions of both parties, the issues for determination are as follows:

- 1. Whether the Claimants' redundancy was justifiable.*
- 2. Whether the redundancy was in compliance with procedural safeguards of the law.*
- 3. Whether the Claimants are entitled to prayers sought.*

26. On the 1st issue, the Claimants received letters declaring them redundant dated 20/2/1995 addressed to Mr. Murage advising that:

"I have to advise that following the strategic review of the Bank's Operations the Board has determined that the position of Credit Controller in Credit Controller Department is no longer warranted. I am sorry to say that it has not proved feasible to redeploy you elsewhere in the Bank's service and therefore it is with regret that I have to inform you that it has been decided to discharge you from the Bank's service.

In this regard the Board has determined that your terminal package shall be:

- 1. 3 months emoluments in lieu of notice.*
- 2. Cash in lieu of leave.*
- 3. Severance pay at the rate of 15 days per each completed year so service.*

The benefits due to you upon discharge will be credited to your account with our Nairobi Branch, net of PAYE and other statutory deductions. In this respect you should liaise with the Chief Executive's Assistant.

It is noted that you presently enjoy a Furniture Loan and Car Loan and the board has decided that these loans may continue to be extended to you upon current terms and conditions including the concessionary rate of interest for a period of 6 months from date hereof. This period has been granted to allow you time to either repay them or to arrange for them to be transferred to another institution. Should the loans not have been discharged within that period then the interest rate will be increased to the commercial lending rate for loans in force from time to time presently 27% p.a.

It will not be necessary for you to serve out the 3 months' notice period and you should upon receipt of this letter hand over all Bank assets, records, keys etc to the Senior Credit Controller".

27. The 2nd Claimant Albert Gaturu Thakura on his part also received his termination letter dated 20th February 1995, couched in similar terms to the one addressed to the 1st Claimant but in terms of the package to be paid, he was informed that he would be paid severance pay in terms of the Staff Manual. For each completed year of service, i.e. for first 3 years at the rate of 15 days and the balance at ¾ months' salary for each completed year.

28. He was not required to serve 3 months' notice period but was asked to hand over to his Control Manager on receipt of the said letter.

29. Under the Respondents' Bank Policies, at Clause dealing with redundancy at page 15 of the documents:

“An employee who is terminated because of lack of work or redundancy will receive as much notice of the banks' intention to terminate his services as possible and such notice will not be less than one month.....”.

30. Redundancy shall be subject to the Trade Disputes Act (Cap 234 and Employment Act) together with the relevant provisions of the Collective Agreement in the case of unionisable employees.

31. The repayment package is also stated as being for employees upto 3 years' service – ½ months bank salary per completed year of service – upto 10 years of service – ½ months basic salary for the first 3 years, ¾ months bank salary for the remaining years upto ten. Over ten years' service – 1/3 months basic salary for first 3 years, ¾ months basic salary for the remaining years upto ten. Over ten years' service – ½ months basic salary for first 3 years, ¾ months basic salary upto ten years and 1 month basic salary for all years thereafter.

32. The Claimants had first been employed on 1st July 1987 and 9th December 1985 respectively.

33. The issue then is whether this reason given by the Respondent to declare the Claimants redundant was valid. Under the then Employment Act (now repealed) redundancy was defined 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 an employee are superfluous and the practice commonly known as abolition of office, job or occupation and loss of employment due to the Kenyanization of a business, but it does not include any such loss of employment by a domestic servant”.

34. Under Cap 226 Employment Act (repealed) Section 16 A states as follows:

1. “A contract of service shall not be terminated on account of redundancy unless the following conditions have been complied with:-

a. the union of which the employee is a member and the Labour Officer in charge of the area where the employee is employed shall be notified of the reasons for, and the extent of, the intended redundancy;

b. the employer shall 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;

c. no employee shall be placed at a disadvantage for being or not being a member of the trade union;

d. any leave due to any employee who is declared redundant shall be paid off in cash;

e. an employee declared redundant shall be entitled to one month's notice or one month's wages in lieu of notice;

f. an employee declared redundant shall be entitled to severance pay at the rate of not less than 15 days pay for each completed year of service as severance pay.

2. For purposes of this section -

"trade union" means a trade union registered under the Union Act (Cap 233) and

"redundancy" has the meaning assigned to it in section 2 of the Trade Disputes Act (Cap 234)".

35. From the provision of the law herein redundancy could be effected if it is true that the job position was no longer available or feasible. There must be valid reasons. Industrial Court Civil Appeal No. 46 of 2013, **Kenya Airways Limited vs. Aviation and Allied Workers Union Kenya and 3 others (2014) eKLR**, the Hon JJA emphasized the need for consultation before redundancy takes effect in order to give the concerned parties time to adjust and have sufficient time to look for an alternative employment.

36. It is not clear from submission presented whether the Respondents had a valid reason to declare the Claimants redundant or not. They have alluded to restructuring as their main reason to do so.

37. However, it is noteworthy that Courts had held employers have the prerogative to determine the structure of their business and therefore make some positions redundant. This may be actuated by decrease in business, operational changes and the necessity to reorganize in order to enhance operations and prevent closure. (see Kenya Airways case supra). ILO recommendation 166 of Convention 158 Termination of Employment Convention 1982 reiterates the same position contemplating a redundancy:

"when the employer contemplates termination for reasons of an economic, technological, structural or similar nature".

38. I will take the presumption that the Respondents had a valid reason to declare the Claimants redundant as no evidence is adduced to the contrary.

39. On the 2nd issue of due process, the same is stated above under Section 16A of the Employment Act (repealed). The process involved due notice to the concerned employee and where he is a member of a trade union, to the concerned union. Notice was also to be given to the labour officer of the area and no employee was to be placed at a disadvantage by virtue of being or not being a member of a trade union. The notice period envisaged was 1 month or one month wages.

40. In the case of the Claimants, it is apparent from the letter issued to them that no notice was given to them as the redundancy took effect immediately.

41. They were however offered 3 months' pay in lieu of notice. That therefore adequately covers the notice period or months' pay in lieu thereof.

42. There is however no indication that the Labour Officer was notified because the letters were addressed to the Claimants directly. The whole purpose of the notice period to the employee and the Labour Officer in my view is to ensure no injustice is occasioned to either party and to allow also for consultation with a view to ascertain whether the redundancy could be averted if other options were pursued. This avenue was never followed and without any notice to the area Labour Officer, it follows that the entire process was flouted and riddled with procedural unfairness and this makes it unlawful.

43. The Respondent offered to pay the Claimants some dues including 3 months' salary in lieu of notice plus leave not taken and a severance package. It is not clear whether the same was even paid because it is claimed for by the Claimants' as per the Amended Complaint filed on 3.5.2000. The Respondents' defence dated 29.6.2000 is a mere denial of the averments of the Claimant save for paragraph 7 which acknowledges that the Claimants were entitled to 21 days leave every year.

44. It is therefore my finding that the Claimants are entitled to the following remedies:

1. 12 months' salary as damages for unlawful redundancy payable as follows:

$$1^{\text{st}} \text{ Claimant} = 12 \times 102,205 = 1,226,460/=$$

$$2^{\text{nd}} \text{ Claimant} = 12 \times 94,754 = 1,137,048/=$$

2. 1 month salary as notice pay there being no evidence of the payment of 3 months' pay in lieu:

$$1^{\text{st}} \text{ Claimant} = 1 \times 102,205 = 102,205/=$$

$$2^{\text{nd}} \text{ Claimant} = 1 \times 94,754 = 94,754/=$$

3. Severance pay being:

$$1^{\text{st}} \text{ Claimant} = 15 \text{ days for 8 years} = 408,832/=$$

$$2^{\text{nd}} \text{ Claimant} = 15 \text{ days for 3 years} = 142,131/=$$

$$\text{and } \frac{3}{4} \text{ for 7 years} = 497,458.5/=$$

$$\text{Total} = 639,589.50$$

4. Leave of 21 days, for each Claimant:

$$1^{\text{st}} \text{ Claimant} = 21/30 \times 102,205 = 71,544/=$$

$$2^{\text{nd}} \text{ Claimant} = 21/30 \times 94,754 = 66,328/=$$

Total for each Claimant:

$$1^{\text{st}} \text{ Claimant} = \underline{1,809,041/=}$$

$$2^{\text{nd}} \text{ Claimant} = \underline{1,937,719.50/=}$$

5. The Claimants are also entitled to payment of costs by Respondents plus interest at Court rates with effect from the date of this Judgment.

Read in open Court this 29th day of June, 2017.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Miss Sang for Respondent – Present

Claimants – Present