



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 1661 OF 2014

BEATRICE RACHUONYO.....1ST CLAIMANT

SABINA KANANI.....2ND CLAIMANT

JILLO HALAKE.....3RD CLAIMANT

MOHAMMED HALAKE GALGALO.....4TH CLAIMANT

ROBA HALAKE.....5TH CLAIMANT

REUBEN MULWA MUTIO.....6TH CLAIMANT

VERSUS

KONRAD ADENAUER STIFTUNG.....RESPONDENT

JUDGMENT

Introduction

1. The Claimants are all former employees of Konard Adenauer Stiftung, an international non-governmental organization operating in Kenya. They brought this action seeking compensation for unfair termination of employment. Their claim is contained in a Memorandum of Claim dated 24th September 2014 and filed in court on even date. The Respondent filed a Statement of Response on 31st October 2014.

2. When the matter came up for hearing, the 1st Claimant testified on her own behalf and her co-claimants. On its part, the Respondent elected not to call any *viva voce* evidence.

The Claimants' Case

3. The 1st Claimant, Beatrice Rachuonyo, states that she was initially employed by the Respondent as a temporary secretary on 27th September 2004. She was subsequently assigned the additional responsibilities of part time office assistant and was later confirmed in her appointment.

4. On 15th April 2014, the Respondent issued the 1st Claimant with a one month's notice of intention to terminate her employment on account of redundancy. The 1st Claimant states that at the time the notice was issued, she was on maternity leave. By letter dated 7th May 2014, she was issued with a second one

month's notice of intention to terminate her contract of employment.

5. The 1st Claimant states that there were two secretarial positions within the Respondent's establishment; one for the Rule of Law Program held by a German national and the other for the Country Program, held by her. The 1st Claimant pleads discrimination in the abolition of the position held by her and retention of the one held by the German national. She adds that she had been by-passed in the selection for special training in South Africa, for which she had been identified and recommended.

6. The 2nd Claimant, Sabiba Kanani, was employed by the Respondent as a cleaner in March 1999. She states that she performed extra duties, among them opening the office and conducting security checks. Her employment was also terminated on account of redundancy.

7. The 3rd Claimant and 4th Claimants were terminated on similar grounds of redundancy in February 2014.

8. The 5th Claimant, Roba Halake was employed by the Respondent as a security guard on 1st March 1995. On 23rd January 2014, he was issued with a one month's notice of intention to terminate his employment on account of redundancy and by letter dated 28th February 2014, his employment was terminated.

9. The 6th Claimant, Reuben Mulwa Mutio was employed as a gardener from 1st January 1998 until 31st March 2014, when his employment was terminated on the ground of redundancy.

10. The Claimants aver that the redundancy dues paid to them were lower than their entitlement since the tabulation was based on a wrong formula generally and specifically did not include a 4% salary increment approved by the German Embassy in Nairobi.

11. The Claimants further aver that they were not paid house allowance throughout their period of employment with the Respondent.

12. It is the Claimants' case that the termination of their employment on account of redundancy was unconstitutional and unlawful as it violated Article 41 of the Constitution and the selection criteria was unfair. Additionally, the Respondent did not involve the Claimants in the redundancy process.

13. The Claimants state that the Respondent failed to explore other less drastic alternatives. They add that the reasons for redundancy were unjustifiable.

In particular, the Claimants fault the Respondent's decision to outsource cleaning and guarding services hitherto provided by support staff, including the 2nd and 5th Claimants. They aver that the companies contracted to provide these services are not registered in Kenya.

14. The Claimants plead that there was no genuine case of redundancy and that they were subjected to racial discrimination. They cite the following particulars of discrimination:

- a) The redundancy was designed to ensure that no German employee lost their job;
- b) German employees work for 35 hours per week as against 40 hours worked by the Claimants;
- c) German nationals do not work during weekends, Kenyan holidays and German holidays while the Claimants and other African employees are only entitled to rest during weekends and Kenyan holidays;
- d) Trainings are skewed in favour of German employees;

e) German employees are retained beyond retirement age;

f) There is open dislike for African employees by the Respondent's managers;

15. Overall, the Claimants state that the termination of their employment on account of redundancy was unlawful and unfair. They claim the following:

a) A declaration that the redundancy was unlawful and unfair hence null and void *ab initio*;

b) A declaration that their rights and fundamental freedoms as protected by the Constitution have been violated by the Respondent;

c) An order for compensation to each Claimant at Kshs. 5,000,000 for violation of their rights and fundamental freedoms as protected under the Bill of Rights;

d) An order for payment of balance of severance pay;

e) An order for payment of 4% difference in salaries from October 2013 to date of being declared redundant;

f) House allowance for the entire period of employment

g) Costs plus interest.

The Respondent's Case

16. In its Statement of Response dated 30th October 2014 and filed in court on 31st October 2014, the Respondent admits that the 1st Claimant was employed as a reliever secretary on 27th September 2004. She was subsequently employed on part time contracts between 1st July 2005 and 30th June 2007. From 1st July 2007, she was employed on a full time basis. At the time of termination of her employment, the 1st Claimant earned a monthly salary of Kshs. 116,922.55.

17. The Respondent states that the 1st Claimant was duly informed that owing to merging of responsibilities within the organization, the position of one secretary was no longer required. The Respondent adds that the reorganization leading to the redundancy was informed by reduction in funding from the German Government. The Respondent terms the inference of racial discrimination in the redundancy as unfortunate and baseless.

18. The Respondent admits the employment particulars of and issuance of redundancy notices to the 2nd, 3rd, 4th, 5th and 6th Claimants as pleaded in the Statement of Claim. The Respondent however states that the grounds for redundancy were valid. In this regard, the Respondent states that the decision to outsource cleaning and security services, was driven by the need for greater efficiency and focus on core business.

19. The Respondent states that all the Claimants' terminal benefits were properly calculated, based on their basic salaries and paid to them. The Respondent adds that the Claimants' claim that they were entitled to a 4 % salary increment is based on a guideline issued by the German Embassy in Kenya, which was not binding. Further, in tabulating the Claimants' dues, the transport allowance paid to the Claimants was not a factor.

20. In response to the claim for house allowance, the Respondent states that each Claimant received a remuneration that was adequate to enable them obtain reasonable accommodation. At any rate, this claim would be time barred by dint of Section 90 of the Employment Act, 2007.

21. The Respondent goes on to state that upon receipt of their terminal dues, the Claimants, save for the

1st Claimant, executed a Release and Discharge, confirming that they had received all their dues and that they had no further claims to make against the Respondent. It is the Respondent's position that the Claimants are estopped from asserting any rights beyond the Release and Discharge.

22. On the selection criteria, the Respondent states that the positions held by the 2nd to the 6th Claimants were being abolished within the organization. Regarding the position of secretary, the Respondent avers that the 1st Claimant was considered alongside her colleague, Inez Odongo. The considerations of reliability, skill and ability were taken into account. In this regard, at paragraph 18(a) of its Statement of Response, the Respondent cites a number of performance and conduct lapses against the 1st Claimant. Additionally, the Respondent states that Inez Odongo was not only more qualified than the Claimant but was also more senior in the number of years served.

23. In sum, the Respondent states that there was a genuine case of redundancy and the Claimants' claims are therefore without basis.

Findings and Determination

24. There are two (2) issues for determination in this case:

- a) Whether the termination of the Claimants' employment was lawful and fair;
- b) Whether the Claimants are entitled to the remedies sought.

The Redundancy

25. On 7th May 2014, the Respondent wrote to the 1st Claimant as follows:

“NOTICE OF INTENTION TO TERMINATE CONTRACT OF EMPLOYMENT ON ACCOUNT OF REDUNDANCY”

Dear Beatrice,

We refer to your contract of employment with Konrad-Adenauer Stiftung. As we informed you, the organization has undertaken a review of its operational requirements and has decided to outsource and merge some responsibilities.

As a result of this, one secretarial position will no longer be required and will be abolished.

We therefore deeply regret to inform you that we intend to terminate your contract of employment with us on account of redundancy, and hereby give you notice of that intention. Your employment with the organization will therefore come to an end on 9th June 2014.

You will receive pay in lieu of notice as well as the final dues payable upon termination on account of redundancy in accordance with your contract and the Employment Act of the Laws of Kenya.

During the period of this notice, which lapses on 7th June 2014, you are requested to proceed on paid leave. As the termination of the contract will take effect immediately thereafter, kindly return all property allocated to you during your employment, before proceeding on your leave.

You will receive a Certificate of Service and payment of your full dues on your last working day.

We thank you for your most valuable contribution during your employment with us and wish you all the best for your personal and professional future.

Yours faithfully

KONRAD-ADENAUER-STIFTUNG

(Signed)

Andrea E. Ostheimer”

26. Prior to this, similar letters had been issued to the 2nd, 3rd, 4th, 5th and 6th Claimants, the only variation being that their redundancy was informed by the Respondent’s decision to outsource the functions performed by these Claimants.

27. Upon expiry of the redundancy notices, the Claimants were issued with termination letters setting out the terminal dues payable to them.

28. From the evidence on record, the termination of the Claimant’s employment was on account of redundancy. Section 2 of the Employment Act and the corresponding section in the Labour Relations Act define redundancy as:

“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 practices commonly known as abolition of office, job or occupation and loss of employment.”

29. The law recognises redundancy as a legitimate form of separation from employment but sets stringent conditions to be met by the employer. In this regard, Section 40(1) of the Employment Act,2007 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 of 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 the 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 an employee declared redundant severance pay at the rate of not less than fifteen days pay for each completed year of service.

30. In their claim before the Court, the Claimants allege that there was no genuine case of redundancy. For the 1st Claimant, it is alleged that the selection criteria was skewed against her while the 2nd, 3rd, 4th,

5th and 6th Claimants challenge the Respondent's decision to outsource the functions previously provided by them.

31. On its part, the Respondent sought to justify the redundancy as follows:

a) With respect to the 1st Claimant, the redundancy was dictated by the necessity to merge two secretarial positions; one held by the Claimant and the other held by Inez Odongo;

b) With regard to the 2nd, 3rd, 4th, 5th and 6th Claimants, their functions were outsourced after the Respondent shifted its office premises.

32. In support of its decision, the Respondent produced Inez Odongo's curriculum vitae as proof of her qualification. The Respondent also set out a litany of performance and conduct lapses against the 1st Claimant, further stating that Odongo was more senior in years of service. The 1st Claimant did not produce her curriculum vitae nor did she respond to the allegations made against her by the Respondent at paragraph 18(a) of the Statement of Response. With this in mind, the Court found no justification in the complaint by the 1st Claimant that the selection criteria was tilted against her.

33. Regarding the complaint by the 2nd, 3rd, 4th, 5th and 6th Claimants, the Court was referred to the decision in ***Kenya Airways Limited v Aviation & Allied Workers Union of Kenya & 3 others [2016] eKLR*** where the Court of Appeal affirmed outsourcing as an acceptable business strategy that may occasion a genuine redundancy. This was the same conclusion arrived at by this Court

in ***Kenya Union of Commercial Food and Allied Workers v Agricultural Society of Kenya [2017] eKLR***. In light of this jurisprudence, the Court finds that the Respondent was well within its right to outsource cleaning and security services and the ensuing redundancies cannot therefore be said to be unlawful.

34. The Claimants also made general claims of racial discrimination. However, none of the allegations made in this regard, which I must add are serious, was supported by any evidence.

35. Having settled the substantive question as to whether there was a genuine case of redundancy, I will now examine the procedural requirements of Section 40(1) of the Employment Act. From the evidence in record, the Claimants were given one month's notice of intention to terminate their employment on account of redundancy and upon expiry of the notice period, they were paid one month's salary in lieu of notice.

36. On the face of it, this appears to have satisfied the requirement of Section 40(1)(a) &(b) of the Employment Act. A closer look however reveals material fault with the redundancy notices issued to the Claimants. The first fault is that there was no communication to the Labour Officer as required.

37. The requirement for notification to the Labour Officer is not an idle one. In ***Frederick Mulwa Mutiso v Kenya Commercial Bank Limited [2017] eKLR*** this Court held that the notice serves the dual purpose of eliciting advice on the modalities to be employed in the redundancy process, while guarding against it from abuse. This was a material omission by the Respondent for which there is a price to pay.

38. There is more that is wrong with the redundancy notices issued to the Claimants and it is this; they were all required to take their pending leave during the notice period. This instruction, which was clearly in contravention of Section 40(1)(e) which requires that any pending leave be paid in cash, placed the Claimants at a disadvantage.

Remedies

39. In light of the foregoing findings, I have reached the conclusion that in effecting the subject redundancies, the Respondent failed to fully comply with the dictates of Section 40(1) of the Employment

Act. I therefore award each of the Claimants, three (3) months' salary in compensation.

40. The Claimants also claim house allowance. Section 31(1)and(2) of the Employment Act provides that:

(1) An employer shall at all times, at his own expense, provide reasonable housing accommodation to each of his employees either at or near to the place of employment or shall pay to the employee such sufficient sum, as rent, in addition to the wages or salary of the employee, as will enable the employee to obtain reasonable accommodation.

(2) This section shall not apply to an employee whose contract of service-

(a) contains a provision which consolidates as part of the basic wage or salary of the employee, an element intended to be used by the employee as rent or which is otherwise intended to enable the employee to provide himself with housing accommodation; or

(b) is the subject matter of or is otherwise covered by a collective agreement which provides consolidation of wages as provided in paragraph (a).

41. The Claimants' contracts of employment and pay slips provided for a basic salary plus a travel allowance. Evidently, there was no specific sum for house allowance. The Court however took judicial notice that all the Claimants were paid way above the minimum wage. Indeed, the 1st Claimant told the Court that she was paid well enough to afford decent housing. It seems to me therefore that the intention of the parties in this case was that the Claimants would be paid a consolidated sum, inclusive of house allowance. The claim for house allowance therefore fails and is dismissed.

42. The Claimants further claim that in tabulating their final dues, the Respondent wrongly discounted the sum of Kshs. 10,000, being monthly travel allowance. In its defence, the Respondent argued that the amount paid as travel allowance was not part of the Claimants' salary. Ordinarily, there are two types of allowances paid to employees; remunerative and facilitative.

43. Remunerative allowances are standard in amount and are paid alongside basic salary through the payroll. Facilitative allowances on the other hand vary in amount and are intended to facilitate the employee to perform specific duties. They are paid off the payroll either on reimbursement or advance basis.

44. In *Caroline Wanjiru Luzze v Nestle Equatorial African Region Limited [2016] eKLR* this Court held that for purposes of tabulating a claim under the Employment Act, 2007, the monthly salary of an employee is deemed to include remunerative allowances paid on a monthly basis. Looking at the nature of the travel allowance paid to the Claimants, the Court finds that it was remunerative in nature, forming a component of the Claimants' salary. It therefore ought to have been factored in, in the tabulation of their terminal dues.

45. Regarding the claim for 4% salary increment, I have this to say; the Claimants were employed on written contracts and every variation in their remuneration was clearly documented. The guideline from the German Embassy on which this claim is based, cannot therefore be said to have been part of the Claimants' terms of employment. This claim is therefore without basis and is dismissed. In similar fashion, no basis was laid for the claim for damages for violation of rights which also fails and is dismissed.

46. Pursuant to the foregoing I make the following orders:

a) The Respondent is directed to re-tabulate the Claimants' final dues based on their last monthly salary, inclusive of travel allowance and to pay the resultant balance to the Claimants within the next thirty (30) days from the date of this judgment;

b) The Respondent is directed to pay to each Claimant the equivalent of three (3) months' salary,

inclusive of travel allowance, within the next thirty (30) days from the date of this judgment;

c) Interest on the amounts herein allowed will accrue at court rates from the 31st day hereof until payment in full;

d) The Claimants will have the costs of the case.

47. It is so ordered.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 13TH DAY OF OCTOBER 2017

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JUDGE

Appearance:

Mr. Wambola for the Claimant

Miss Kirimi for the Respondent