



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 372 OF 2016

FLORENCE WAMBUA.....CLAIMANT

VERSUS

NJIHIA MUOKA RASHID CO. LTD.....RESPONDENT

J U D G M E N T

INTRODUCTION

1. This is a claim for terminal dues plus compensation for unfair termination of the claimant's contract of service by the respondent on 1/3/2016. The respondent has denied the alleged unfair termination and avers that the termination was fair because it was done on account of redundancy in strict compliance with the redundancy procedure provided under Section 40 of the Employment Act. The issues for determination revolve around substantive and procedural fairness and the remedies available for any breach of the tenets of fair terminations of employment contracts.

CLAIMANT'S CASE

2. The claimant testified as CW1. She stated that she was employed by the respondent as an Assistant Secretary on 20/9/2010. The contract was then reduced in writing on 6/10/2010 providing for termination by either party upon service of notice of one month to the other or paying one month salary in lieu of notice. Her salary was ksh.12000 per month but later it was increased to ksh.28000.

3. On 9/11/2015, she went for her maternity leave after discussing with her boss Mr. Haron Rashid Shake. The leave was to end on 28/3/2016 but before then she received letter on 28/1/2016 giving notice of termination of her services effective 1/3/1026. The reason for the termination cited was reduced work. She deemed the termination to be unfair because she was never accorded any prior hearing or notice. She also denied that work has reduced and averred that that reason was not valid. She however admitted that she was paid salary upto 28/3/2016 but contended that she was not paid her accrued leave. She explained that every year the respondent used to close operations from 18th December every year and reopen on 4th January the following year but denied that such break amounted annual leave. She therefore prayed for terminal dues plus compensation amounting to ksh.648,307.69.

4. On cross examination, CW1 admitted that she had no disciplinary problems with the respondent; that there were other secretaries who joined the respondent before her; that she went for two maternity leaves of 90 working days each before the termination; that the termination notice served on her was more than one month; that the reason for termination was redundancy and not misconduct or poor performance; that all the secretaries she left there were employed before her; and that termination notice offered to pay one

month salary despite service of the termination notice. She further admitted that she was contributing to NSSF, that the contract of service did not provide for payment of gratuity; that she never went back to the office after termination; and that her salary was being paid through the bank.

DEFENCE CASE

5. Mr. Rashid Haron Shake is one of the directors of the respondent, a firm of valuers and he testified as RW1 herein. He confirmed that CW1 was an Assistant Secretary for the respondent since 6/10/2010 and worked until 1/3/2016 when she was terminated by a written notice served on 28/1/2016. The reason for the termination was reduction of work which he contended to have been occasioned by termination of valuation tender from the main claimant, Kenya Commercial Bank (KCB). In Mombasa Branch, the claimant and one other employee were axed while Nairobi office axed five employees on the ground of redundancy. He therefore denied the contention by the claimant that she was terminated for going for her maternity leave or any other form of discrimination. He further contended that the employees terminated were from both gender. He stated that the claimant was paid one month salary in lieu of notice but refused to go to the office for any assistance needed because she had no academic papers. He confirmed that CW1 was married to his brother.

6. RW1 denied the claim for leave and explained that every year all the employees went for leave from 18th December to 4th January of the following year. He also denied the claim for gratuity because it was not provided in the contract of service. He further explained that the claimant was contributing NSSF. He therefore prayed for the suit to be dismissed.

7. On cross examination, RW1 admitted that the claimant's maternity leave was approved on 21/10/2015 and she was to resume duty on 28/3/2016. However due to termination of retainer by KCB, the services of the claimant among other employees had to be terminated on account of redundancy. He however admitted that the termination notice was never served on the labour officer. He also admitted that the claimant was never paid severance pay and leave because she was being paid one month salary every year for leave. He further explained that the claimant went for leave every year from 18th December to 4th January. He denied that CW1 was terminated because she married his brother. He maintained that the reason for termination was reduction of volume of work in the year 2015/2016.

ANALYSIS AND DETERMINATION

8. After careful perusal and consideration of the evidence and the submissions presented to the court, it is clear that the claimant was employed by the respondent from 6/10/2010 to 28/2/2016 when her contract of services was terminated by the respondent. The issues for determination herein are:

- (a) Whether the termination of the contract of service was unfair.
- (b) Whether the reliefs sought should be granted.

Unfair termination

9. Under Section 45(2) of the Act, termination of employment contract by the employer is unfair if he fails to prove that it was grounded on valid and fair reason, and that it was done after following a fair procedure. In this case the reason cited for the termination was redundancy caused by economic down turn in the year 2015. The letter dated 28/1/2016 stated as follows:

"...as a company we have in the last year experience down turn which necessitated the Board of directors to rethink on workable options to equally cut down costs...As a result we are forced to reduce our work force"

10. RW1 alleged that the reason for laying off the claimant was due to termination of retainer by KCB on 27/1/2016. The claimant has however denied the validity of the said redundancy. In her view the respondent still has large volume of work. Under Section 43 of the Act, the employer has a burden of

proving the reason for terminating his employee if the same is challenged like in this case. After careful consideration of all the materials presented to the court, I find that the respondent has not discharged the burden of proving the reason for terminating the claimant's contract of service. RW1 alleged that the redundancy was caused by failure to renew tender for valuation services for KCB. No evidence was adduced to prove that KCB was the respondent's major client and that termination of retainer by the bank crippled her operations. In addition the oral testimony by RW1 was in sharp conflict with the termination notice dated 28/1/2016 which cited reason for termination as economic down turn for the previous year as opposed to the alleged failure to get tender from KCB. Consequently it is my holding that failure by the respondent to prove the reason for termination on a balance of probability rendered the termination unfair within the meaning of Section 45 of the Act.

11. Even if the reason was to be found valid and fair, the termination would still be unfair because the procedure for terminating services of an employee on ground of redundancy under Section 40 of the act was not followed. Although the respondent pleaded in paragraph 8 of her defence that the termination was in compliance with Section 35(i) and 40 of the Act, RW1 admitted that the redundancy notice was never served on the labour officer due to urgency and that the claimant was never paid severance pay and leave.

12. Section 40 of the Act provided that at least one month redundancy notice must be served upon the employee or his trade union; and the labour officer and thereafter a fair selection is to be done to identify the victims of the lay off. Thereafter the identified victims must be paid salary in lieu of notice, accrued leave plus severance pay at the rate of 15 days pay per year of service. On account of his admission, I find and hold that termination of the claimant's contract of service without complying with the mandatory procedure provided by Section 40 of the Act was unfair within the meaning of Section 45 of the Act.

Reliefs

13. Under Section 49 of the Act, I award the claimant 12 months salary being ksh.336000 as compensation for unfair termination. The reason for awarding the maximum compensation is because the claimant had served for a fairly long period of about 5 years without any disciplinary issues with the employer and she did not contribute to the termination through misconduct. The claim for one month salary in lieu of notice is dismissed because it was paid to the claimant after termination as admitted by her in evidence. The claim for service pay is also dismissed because the claimant is disqualified from that benefit by dint of Section 35(6) of the Act. The said provision disqualifies employees who are beneficiaries of NSSF from claiming service pay. Finally the claim for leave outstanding as at the time of termination is dismissed for lack of particulars and evidence. Whereas CW1 admitted in evidence that she used to take a break every year from 18th December to 4th January, she never pleaded that and never even calculated leave due after deducting the leave days utilized during the December/January annual break. Granting any cash award for leave in the circumstances would be based on guesswork and would also grant the claimant unfair enrichment.

DISPOSITON

14. For the reason that the termination of the claimant's services was unfair, I enter judgment for her in the sum of ksh.336,000 plus costs and interest.

Datd signed and delivered this 17th November 2017

O. Makau

Judge