



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSE NO. 91 OF 2015

LILLIAN NYAMBURA NDUATI.....CLAIMANT

VERSUS

HIGHLANDS MINERAL WATER COMPANY LIMITED..... RESPONDENT

(Before Hon. Justice Byram Ongaya on Thursday, 24th March, 2016)

JUDGMENT

The claimant filed the statement of claim on 21.05.2015 through Muchiri Wa Gathoni & Company Advocates. The claimant prayed for judgment against the respondent for:

- a. A declaration that the act of the respondent of terminating the services of the claimant on the grounds of redundancy was unprocedural, illegal and unlawful.
- b. The respondent to be ordered to pay the claimant Kshs. 300,000.00 being damages for unlawful termination.
- c. Costs of the suit.
- d. Any other relief the court may deem fit to grant.

The respondent filed the statement of response on 06.07.2015 through Ogola & Company Advocates. The respondent prayed that the claimant's suit be struck out or dismissed with costs.

The respondent employed the claimant as a receptionist effective 3.01.2012. The claimant was trained and promoted to the position of production supervisor performing duties of preparing the staff work schedules, ensuring plant cleanliness and other duties as assigned by the head of department. It was the claimant's case that there were no changes in the production department though new products such as soda drinks had been introduced.

The claimant received the respondent's letter dated 29.08.2014 which stated that following strategic changes in the production department and as part of an ongoing process reengineering, the position of production supervisor would require technical qualifications in production and maintenance. Thus, the claimant was notified that her services would be terminated under section 40 of the Employment Act, 2007 on account of redundancy. The letter stated that her services would end on 30.09.2014. Subsequently the respondent served the claimant a certificate of service stating that the claimant had served as a production supervisor from 03.01.2012 to 29.09.2014.

The respondent's witness (RW) stated that the respondent's business was reorganised when in addition to water, the respondent engaged in production of soda drinks. The claimant was identified because she had a shorter period of service. There were two production supervisors, the claimant and one Andrew Otieno who was retained as the shift officer.

The claimant signed on 15.10.2014 for final dues of Kshs. 25, 734.00 agreeing to the computation and stating that she had no other pending claims whatsoever against the respondent. RW admitted that the claimant had worked with the respondent for a very long time since 1990s and RW had no evidence that the claimant had received the cheque for terminal dues. RW further testified that certain activities in the production department such as cleaning could still be performed by the claimant with the kind of qualifications held by the claimant. Finally, RW confirmed that there was no notice to the labour officer about the claimant's redundancy.

The only issue for determination in this case is whether the redundancy was lawful and therefore the termination fair. The court finds that the termination was unfair for the following reasons:

- a. It was not shown that the claimant's selection was fair per section 40 (1) (c) of the Employment Act, 2007 because the kind of job she was performing continued to exist in the respondent's production department, other staffs were retained and yet she had been in long service of the respondent since 1990s. The labour officer was not notified about the redundancy as provided for in section 40 (1) (b) of the Act.
- b. Thus, the reason for termination was not valid as the claimant could reasonably have been retained in employment rather than the respondent deceptively stating that her job of production supervisor had ceased to exist because a new holder had to possess a Bachelor of Science degree. The respondent did not produce the evidence of reorganization and details of the new person who was hired to perform the claimant's job. Indeed, in cross-examination, RW confirmed that the duties of preparing staff work plans or shift schedules as well as cleaning, both performed by the claimant, continued to exist. The court finds the termination was unfair under section 43 of the Act for want of a valid reason. While making that finding the court has further considered that the respondent has not shown that it notified the director of employment about the vacancies, filling of the vacancies, abolition of offices and details of employees in view of the reorganisation leading to the claimant's redundancy and as provided for in sections 76, 77,, 78 and 79 of the Employment Act, 2007.
- c. As was held in **Charles Nyangi Nyamohanga –Versus- Action Aid International [2015]eKLR** and in **Simon Muguku Gichigi –Versus- Taifa Sacco limited [2012]eKLR**, employers will not escape their obligation to employees by waiving a discharge signed by the employee.

The court finds that the claimant is entitled to the remedies as prayed for including 12 months compensation at Kshs. 25,000.00 per month under section 49(1) (c) of the Act making Kshs. 300,000.00. While making that finding the court has considered the claimant's long service, the aggravating factor that the respondent failed to notify the labour officer and the director of employment and there are no mitigating factors in the case.

In conclusion judgment is entered for the claimant against the respondent for:

- a. The declaration that the respondent's termination of the claimant's employment on alleged grounds of redundancy was unfair and unlawful.
- b. The respondent to pay the claimant Kshs. 300,000.00 by 1.05.2016 failing interest at court rates to be payable thereon from the date of this judgment till full payment.
- c. The respondent to pay the claimant's costs of the suit.

Signed, dated and delivered in court at Nyeri this **Thursday, 24th March, 2016.**

BYRAM ONGAYA

JUDGE