



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 176(N) OF 2009

PERIS NJERI KINYANJUI.....CLAIMANT

VERSUS

KOBO SAFARIS LIMITED.....RESPONDENT

M/s Kangethe for Claimant

Mr. Ohenga for Respondent

JUDGMENT

1. The Claimant filed a Memorandum of Claim dated 15th April 2009 and a Supplementary Memorandum of Claim dated 22nd July 2009.
2. The Respondent filed its Statement of Defence dated 27th May 2009 and a Reply to the Claimant's Supplementary Memorandum of Claim dated 6th October 2009.
3. The Claimant seeks compensation for wrongful termination of employment and payment of terminal benefits to wit;
 - a) Severance pay in the sum of Ksh. 320,000.
 - b) Unpaid wages Ksh. 40,000 for April and May 2008.
 - c) Payment for 35 days accrued leave and
 - d) One months salary in lieu of notice.

Claimant's case

4. The Claimant was employed as an Assistant Marketing Executive on 4th May 2005 on probation. She was confirmed to that position on 29th August 2005. The Claimant was subsequently promoted to the position of East Africa Marketing Coordinator and her salary was Ksh. 80,000 per month.
5. The Claimant worked diligently hence the promotion and increase in salary from Ksh. 25,000 to Ksh. 80,000 by the time she left employment.
6. On the 15th January 2009, the Respondent summoned the Claimant and informed her that the

Respondent was to terminate her employment with immediate effect. The Respondent had already prepared a letter of termination and a cheque of Ksh. 96,000.

7. At the time the Claimant was eight (8) months pregnant and was due for her three months maternity leave. The Claimant had medical cover provided by the Respondent which was also terminated immediately.

8. The letter of termination dated 15th January 2009 gave no reason at all for the sudden termination of employment.

9. The payment offered to the Claimant comprised of one month salary in lieu of notice; 1.75 days accrued leave up to 15th January 2009 and salary for the 15 days worked in January 2009. The net pay after statutory deductions was Ksh. 96,512.

10. The Claimant states that she was discriminated upon on account of her pregnancy especially because she was to proceed on three months maternity leave.

11. The Claimant states that this decision to terminate her employment came as a great shock to her. That she was suddenly placed in hardship and unable to meet her maternity expenses, the Respondent having terminated her medical cover immediately.

12. The Claimant further states that the termination of her employment was unlawful and unfair because no reason was given to her for it having served the Claimant for over 4 years with distinction.

13. The Claimant states that due to the imminent financial obligations on her due to her pregnancy, she was coerced and unduly influenced by the Respondent to sign a discharge voucher In full and final settlement of her dues. Accordingly the Claimant renounces the same and asserts her right to further claim set out in her case.

Response

14. The Respondent admits the particulars of employment, promotion and the remuneration paid to the Claimant.

15. The Respondent states that the contract of employment permitted either party to terminate the same giving one month notice or payment in lieu of notice.

16. The Respondent denies that the Claimant was discriminated upon or that the termination was unlawful and unfair.

17. The Respondent states that upon termination the employment of the Claimant, she was paid her terminal dues up to 15th January 2009 set out in para. 7 of the Statement of Response and the net payment was Ksh. 96, 517 after making all lawful deductions.

18. The Respondent states that it is common knowledge that the Tourism Industry in Kenya and which the Respondent is engaged in has suffered a huge slump and has undergone serious economic difficulties. As a result thereof and because of major reduction in profit levels, the Respondent has since the year 2008 gradually downsized its staff and terminated in excess of 30 of its employees including the Claimant.

19. The Respondent adds that 15 other employees were on the same date as the Claimant terminated by the Respondent and among whom only two (2) were pregnant.

Moreover, the Respondent at the same time retained in employment a pregnant female staff and who continues being in the Respondent's employment. In this light, the Respondent denies particulars of discrimination as alleged by the Claimant or at all.

Respondent admits allowing a colleague of the Claimant whose employment was terminated on the same date, by the name Winnie Muthoni Kahuki to retain her medical insurance benefit for the rest of the year 2009 after termination which benefit allowed the said colleague to access maternity cover.

21. That all the 15 employees whose employment was to be terminated were invited to one-on-one meetings where the Respondent explained to each individual staff, including the Claimant that the business could not support the existing number of employees due to the Industry's wide slump and consequently, the Respondent would have to take the painful decision of having to terminate their services due to the said circumstances and which circumstances were beyond the control of the company.

Respondent therefore states that the Claimant was given reasons for the termination.

22. The Respondent denies all the claims made by the Claimant in the Memorandum of Claim including severance pay because the Claimant was not declared redundant.

23. RW1, Mr. Gunnar Hillgarfuer testified in defence of the Respondent and restated the averments contained in the Memorandum of Defence.

The witness in particular denies that the termination of employment of the Claimant was discriminatory and unlawful.

RW1 confirmed that employment of the Claimant and 14 others were terminated on 15th January 2009 due to the drop in tourism business as a result of post election violence and as a result the Respondent needed to downsize its staff as it was no longer able to pay their salaries.

RW1 confirmed that the 15 employees were called to one-on-one meetings and their employment was terminated on the same day upon payment of one months salary in lieu of notice and other terminal benefits.

24. The Respondent prays that the suit be dismissed with costs.

Determination

The issues for determination are as follows:

- (i) Was the termination of the employment of the Claimant a normal termination or was it a declaration of redundancy?
- (ii) If the termination was a declaration of redundancy was it effected in accordance with Section 40 of the Employment Act 2007
- (iii) Was the Claimant discriminated on account of pregnancy?
- (iv) Is the Claimant entitled to the reliefs sought?

Issue (i)

25. In the words of RW1, the Human Resource Manager of the Respondent, the employment of 15 employees including the Claimant were terminated due to the dire financial situation the Respondent experienced after the post election clashes. The Respondent had to 'downsize'.

26. Section 2 of the Employment Act, No. 11 of 2007 defines redundancy thus;

'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”

27. RW1 told the Court that the targeted employees were given the aforesaid explanation verbally before the termination was effected.

It is clear from the testimony of the Respondent itself, even though no reason was given in the letter of termination to the Claimant, that her employment and that of her 14 colleagues were terminated for operational reasons due to the financial constraints the Respondent was experiencing at the time.

It is without doubt that the termination amounted to a declaration of redundancy within the meaning of Section 2 of the Employment Act 2007.

Issue (ii)

28. This being the case, the Respondent was bound to adhere to the provisions of Section 40 of the Employment Act, 2007. Section 40 of the Act reads;

“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 to which the employee is a member and the Labour Officer in charge of the area where the employee is employed and the reason 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) The employer has where leave is due to an employee who is declared redundant, paid off the leave in cash;

(e) The employer has paid an employee declared redundant not less than one month’s wages in lieu of notice; and

(f) The employer has paid to an employee declared redundant severance pay at the rate of not less than fifteen days pay per each completed year of service.”

29. From the pleadings of the Respondent and testimony of RW1, the Respondent well knowing that it was offloading 15 of its employees on the basis of redundancy simply ignored the provisions of Section 40 (b) (c) and (g) of the Employment Act, 2007 in that it did not notify in writing the Claimant or the Labour Officer in writing the impending redundancy of 15 employees including the Claimant.

30. It did not disclose the criteria used in selecting the 15 employees targeted for termination including the Claimant; and it did not pay the 15 employees including the Claimant ‘*not less than fifteen days pay for each completed year of service*’.

31. For these reason, the termination of the employment of the Claimant was unlawful and unfair.

Issue (iii)

32. The Claimant contends that she was specifically targeted for termination because she was eight (8) months pregnant and was due for three (3) months paid maternity leave. That her colleague who was also

pregnant was targeted for termination. That she was not only denied the three month's maternity leave which she was entitled to but her medical cover was terminated with immediate effect and this put her in great financial hardship. That she was forced to sign a discharge voucher and accept the money paid to her due to the situation she was in. That her colleague was allowed to use her medical cover up to the end of 2009 but she was denied this facility and had to change her hospital to one she could afford using the terminal benefits paid to her.

She prays the Court to find that she was discriminated upon and award her for the unlawful termination.

33. The denial by the Respondent on the issue of wrongful targeting two pregnant women who were due for their maternity leave is feeble and not convincing at all. The Court is satisfied that the Claimant was placed in a weaker position than her colleagues and was easily targeted for termination in the redundancy exercise particularly due to her condition. It is clear the Claimant had a good performance record and had been promoted with good salary increase until the company started experiencing financial difficulties due to the post election clashes of 2008. The evidence that the position the Claimant held was not abolished but she was targeted in the ensuing downsizing is indicative that the Claimant was indeed discriminated against on account of her pregnancy.

34. In view of the fact that, there is no specific prayer to award general damages on account of discrimination, the Court considers this an aggravating factor in assessing the amount of compensation for the wrongful and unlawful termination of employment of the Claimant.

Issue (iv)

35. In view of the finding by the Court on the issue of liability, the Court finds that the Claimant is entitled to compensation in terms of Section 49 of the Employment Act, for the unlawful and unfair termination of employment.

36. In this regard, Section 49(1)(c) of the Act, provides for award of maximum of equivalent of 12 months salary as compensation for unlawful and unfair termination of employment.

On the other hand Section 49(4) provides the guidelines for the Court to consider in assessing such compensation.

37. In this regard, the Claimant has not sought to be reinstated to employment. The Court has established that there are aggravating circumstances including being targeted for termination on the basis of pregnancy; being denied medical cover during the ensuing maternity period; being denied three (3) months paid maternity leave and being discriminated in this regard as her colleague had the medical cover extended up to the time she gave birth. The Claimant had served diligently and had a clean record for a continuous period of 3 (three) years.

38. The Claimant being a young person had good prospects of career development till retirement. She was not given a Certificate of Service to enable her obtain alternative employment and was not paid severance pay upon termination.

The fact that the Claimant got no prior notice of the impending termination increased her shock, pain and suffering and she suffered loss and damage as a result thereof.

39. In the circumstances of this case, the Court awards the Claimant ten (10) months salary as compensation for the unlawful and unfair termination of employment in the sum of Ksh. 800,000.

(ii) Terminal benefits

40. Based on the finding of the Court that the Claimant was declared redundant without following the provisions of Section 40 of the Employment Act, the Claimant is entitled to payment of severance pay equivalent to 15 days salary for the three completed years of service in the sum of Ksh. 120,000.

Notice Pay

The Claimant was paid one months salary in lieu of notice and the claim has therefore been satisfied.

Accrued leave days

The Claimant was also paid in lieu of accrued leave days and the claim was also satisfied.

Unpaid salary for the months of April and May 2008

The claim for payment of Ksh. 20,000 unpaid salary for the months of April and May 2008 has been proved on a balance of probability. This was in respect of salary cuts made to the employees due to the financial difficulties being experienced by the Respondent at the time. The Court awarded Kshs. 40,000 to the Claimant accordingly.

41. In final analysis the Court makes the following order;

The Claimant is awarded as against the Respondent;

(a) Ksh. 800,000 being 10 months salary as compensation for the unlawful and unfair termination of employment.

(b) Ksh. 120,000 being severance pay for 3 years.

(c) Kshs. 40,000 being salary for the months of April and May 2008.

Total award **Kshs. 960,000.**

(d) Costs of the suit to be paid by the Respondent.

(e) The award is payable with interest at Court rates from date of filing suit till payment in full.

Dated and Delivered at Nairobi this 6th day of May, 2016.

MATHEWS NDERI NDUMA

PRINCIPAL JUDGE