



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 1150 OF 2014

CAROLINE ATIENO OSWETA.....CLAIMANT

VERSUS

BAKE & BITE MOMBASA LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. Caroline Atieno Osweta, the Claimant in this case worked for the Respondent in the position of Human Resource Manager from 5th November 2012 until 24th October 2013 when her employment was terminated.
2. By her Memorandum of Claim dated 8th July 2014 and filed in Court on 11th July 2014, the Claimant seeks relief for unlawful and unfair termination of employment.
3. The Respondent's defence is contained in a Memorandum of Response dated 15th August 2014 and filed in Court on 18th August 2014.
4. At the hearing the Claimant testified on her own behalf and the Respondent called its Managing Director, Seif Mohammed Seif and Security Officer, Isaac Oburu Ajong'o.

The Claimant's Case

5. The Claimant was employed by the Respondent as Human Resource Manager at a consolidated monthly salary of Kshs. 130,000 effective 5th November 2012. She was confirmed in her appointment on 1st June 2013.
6. On 25th September 2013, the Claimant was instructed to proceed on 28 days' compulsory leave for which she filled a leave form. Upon reporting back on 24th October 2013, the Claimant was shocked to find Isaac Oburu who she knew as Security Officer, seated at her desk and discharging the duties of Human Resource Manager.
7. The Claimant was prevented from resuming her duties. Oburu told her to wait for the Managing Director, Seif Mohamed Seif. Eventually, the Claimant was handed a termination letter dated 24th October 2013.
8. The reason for the termination was stated as structural adjustment in which the position of Human

Resource Manager was said to have been absorbed into the Operations Manager's portfolio.

9. The Claimant cleared on 24th October 2013 and was paid Kshs. 125,243 as terminal benefits. The Claimant was also issued with a letter of service dated 12th November 2013 signed by Oburu in his capacity as Acting Human Resource Manager. On 7th April 2014, Oburu wrote a letter to the National Social Security Fund in his capacity as Human Resource Manager.

10. It is the Claimant's case that the termination of her employment was without valid reason and in violation of the provisions of the Employment Act, 2007. She further states that she was not paid all her terminal dues.

11. The Claimant's claim is as follows:

- a. A declaration that the termination of her employment was unlawful and unfair
- b. 12 months' salary in compensation..... Kshs. 1,560,000
- c. Balance of notice pay.....30,000
- d. Balance of gratuity pay.....30,000
- e. Costs plus interest

The Respondent's Case

12. In its Memorandum of Response dated 15th August 2014 and filed in Court on 18th August 2014, the Respondent admits having employed the Claimant in the position of Human Resource Manager from 5th November 2012 until 24th October 2013, a period of less than a year.

13. The Respondent states that the Claimant is not entitled to any relief having unequivocally discharged the Respondent from any liability regarding her terminal dues on 9th November 2013.

14. The Respondent further states that the Claimant's claim is driven by personal vendetta between the Claimant and the Respondent's Security Officer, Isaac Oburu.

15. The Respondent denies that Isaac Oburu occupied the Claimant's office and that the Claimant was denied access.

16. The Respondent admits that the termination of the Claimant's employment was as a result of structural adjustments at the Respondent Company. In this regard, the Respondent's Board had in meetings held on 26th August 2013 and 1st November 2013, resolved to absorb the Human Resource function into the Operations Department with one centre of command reporting to the Managing Director.

17. The Respondent further states that owing to delays in obtaining a visa and work permit for Gopal Kamal Singh who was relocating from India to take up the position of Operations Manager, the Respondent's restructuring plans were adversely affected.

18. With regard to the issue of Isaac Oburu taking over the Claimant's job, the Respondent avers that due to the delay in the arrival of the Operations Manager and employee demands, Oburu briefly handled some '*skeleton side issues*' such as issuance of mail on behalf of the Managing Director. The Respondent offers this as an explanation to the letters issued by Oburu under the hand of the Human Resource Manager.

Findings and Determination

19. The issues for determination in this case are as follows:

- a. Whether the termination of the Claimant's employment was lawful and fair;
- b. Whether the Claimant is entitled to the remedies sought.

The Termination

20. The letter terminating the Claimant's employment which is dated 24th

October 2013 states as follows:

"Dear Caroline,

RE: TERMINATION OF EMPLOYMENT

Due to the operational requirements, the company is now undergoing structural adjustment and the position of Human Resources Manager has been absorbed into the Operations Manager's portfolio.

Therefore, your services are no longer required. We however regret any inconveniences caused.

Your final dues will be calculated and paid as follows:

- 1. One month salary in lieu of notice*
- 2. Salary for the month of October 2013*

The company will recover any other liabilities such as loans [including Sacco] and outstanding expenses from stores if any from your final dues.

You will also be issued with a certificate of service after you have duly cleared as per the company rules and regulations which are well known to you.

Please surrender any company property in your custody including the company identification. On behalf of the management we sincerely thank you for your services to the company and take this opportunity to wish you success in your future endeavors.

Yours faithfully,

FOR BAKE N BITE LIMITED

(Signed)

Seif Mohammed Seif

Managing Director"

21. From this letter and other evidence adduced before the Court, the reason for the termination of the Claimant's employment falls under what is commonly referred to as redundancy.

22. Section 2 of the Employment Act, 2007 and the corresponding section in the Labour Relations Act, 2007 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."

23. While the law recognises redundancy as a valid form of termination of employment, it sets stringent conditions to be met by an employer seeking to terminate the employment of an employee on this account. In this regard, Section 40 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.

24. In cases of unlawful termination on the ground of redundancy, the Court will not only inquire into compliance with Section 40 but will also check if the redundancy was real or a smokescreen for termination without cause.

25. The Claimant states that there was in fact no redundancy because immediately after she left, the Respondent's second witness, Isaac Oburu who was previously the Security Officer took over her position. To lend credence to this assertion, the Claimant produced a copy of her certificate of service dated 12th November 2013 which was signed by Oburu as Ag. Human Resource Manager. She also produced a copy of letter dated 7th April 2014 addressed to the National Social Security Fund signed by Oburu as Human Resource Manager.

26. The Respondent was at pains to explain that Oburu was never appointed to the position of Human Resource Manager, even suggesting that the Claimant somehow misled Oburu to issue her with these documents that she was now using to get back at the Respondent. The Court was baffled at this explanation. Even in the position of Security Officer, Oburu was by no means a junior member of staff to be so easily misled by the Claimant.

27. Moreover, Oburu himself told the Court that Gopal Kamal Singh who had come from India to take up the position of Operations Manager left after three months and that the position was abolished after his departure. It was not lost on the Court that the position of Operations Manager was central to the restructuring of the Respondent Company and it would appear that after the departure of Gopal Singh and the abolition of his position, the new structure collapsed.

28. The lingering question then is whether there was a genuine redundancy situation leading to the

termination of the Claimant's employment. The Claimant testified that prior to her termination, she had been sent on compulsory leave by the Respondent's Managing Director, Seif Mohammed Seif.

29. While denying this assertion, the Respondent stated that the Claimant had gone on authorised annual leave. However in his testimony before the Court, Seif stated that the Claimant had asked for 14 days' leave and he had told her to take 28 days.

30. In the absence of any explanation for this apparent contradiction, the Court disbelieved the Respondent's line of defence in this regard and thereby adopted the Claimant's testimony that she was forced to go on leave. Ordinarily, compulsory leave is taken in a disciplinary environment and it would appear that the Respondent had some other reason, other than redundancy, for terminating the Claimant's employment which reason was not disclosed to the Claimant nor to the Court. That being the case, the Court has arrived at the conclusion that the Respondent had no valid reason for terminating the Claimant's employment.

31. The Respondent claims to have complied with the law on redundancy in effecting the termination of the Claimant's employment. I will therefore examine the circumstances surrounding the termination in light of Section 40 of the Employment Act, 2007.

32. With regard to the notice of redundancy, the Court of Appeal in **Thomas De La Rue v David Opondo Omutelema [2013] eKLR** has settled that there are two separate notices in a redundancy situation. The first is a general notice to employees generally and to the relevant trade union, where one exists, setting out the reasons for and extent of an impending redundancy. The second is specifically directed at the affected employees giving notice of the termination of their employment on account of the redundancy whose notice they have already received.

33. The two notices are distinct and essential and one cannot replace the other. In the case now before the Court, while the Claimant was paid one month's salary in lieu of notice, there was no evidence that she had been issued with any prior notice of the redundancy that eventually led to her loss of employment. There was also no notification to the Labour Officer as required by law.

34. While the Last In First Out (LIFO) principle set out under Section 40 (c) of the Employment Act may not have been applicable in this case since the position held by the Claimant was of a singular nature, the Court for the reasons stated in the foregoing parts of this judgment, was not convinced that the redundancy was genuine and *bona fides* in the first place.

35. Overall, I find the termination of the Claimant's employment substantively and procedurally unfair and she is entitled to compensation.

Remedies

36. Before determining the level of compensation available to the Claimant, I need to dispense with the issue of a form of discharge signed by her on 9th November 2013. The Claimant told the Court that she signed this form in order to access her final dues which she needed. The Court found no reason to disbelieve the Claimant. In any event, there is now well grounded jurisprudence from this Court that an employer cannot circumvent obligations under the law by waving a form of discharge signed by an employee (see **Lillian Nyambura v Highlands Water Company Limited**

37. That settled I proceed to award the Claimant four (4) months' salary in compensation. In making this award I have taken into account the Claimant's length of service and the Respondent's conduct in the termination transaction. I also award the Claimant the sum of Kshs. 60,000 being shortfall in notice pay and gratuity.

38. Finally I enter judgment in favour of the Claimant as follows:

- a. 4 months' salary in compensation.....Kshs. 520,000

b. Notice pay and gratuity shortfall.....60,000

Total.....580,000

39. The judgment amount will attract interest at court rates from the date of the judgment until payment in full.

40. The Claimant will have the costs of this case.

41. Orders accordingly.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 9TH DAY OF SEPTEMBER 2016

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JUDGE

Appearance:

Mr. Rakoro for the Claimant

Mr. Onyony for the Respondent