



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS
COURT OF KENYA AT NAIROBI

CAUSE NO. 1215 OF 2013

ELIZABETH TUMAINI ADHOLA.....CLAIMANT

VERSUS

THE MANAGEMENT BOARD OF ST. MARY'S SCHOOL...RESPONDENT

Mr. Mburugu for Claimant

Mr. Ibrahim for Respondent

JUDGMENT

1. The suit was initially filed in the Chief Magistrate's Court, Milimani Commercial Courts as **Civil Suit No. 457 of 2007**.
2. The matter was subsequently transferred to the Industrial Court and the pleadings were adopted as filed.
3. In the Amended Complaint, the Plaintiff seeks the following reliefs:
 - a. a declaration that the plaintiff, termination was null and void;
 - b. severance pay in the sum of Kshs.369,264.00;
 - c. general damages for wrongful termination; and
 - d. costs of the suit and interest at Court rates.

4. The suit is premised on the following particulars;

That the Plaintiff was employed by the Defendant on or about 3rd March 1992 in the position of I.B. Secretary which position she held until her termination on 9th December 2005.

The Claimant was initially employed by the Holy Ghost Fathers until 1st January 2003 when the Archdiocese of Nairobi, Kenya took over her employment.

5. The employment of the Plaintiff was brought to an end, vide a letter of termination dated 29th November 2005 which designated her last day at work to be 9th December 2005.

The letter reads thus;

“over the last one year the school management has been carrying out an indepth review of the schools operations so as to identify opportunities for improving performance operational efficiency and reducing management expenses.

The already concluded process has revealed that the school is grossly over-manned.

Consequently a decision has been taken to reduce staff numbers considerably.

Regretably you are one of the employees affected by this process. Your last day at work is 9th December 2005.....”

6. Trustees took over the ownership and management of the Respondent.

7. Clause 26.1 of the letter of appointment between the Plaintiff and the Management Board of St. Mary’s School (old Adm. Staff). entered into on 1st January 2003, reads:

“this contract supersedes any other contract that may have been signed before.”

8. The Plaintiff however continued to hold the same position of I.B. Secretary and was paid Kshs.52,752.00 gross salary per month at the time of termination.

It is the Plaintiff’s case that this was a declaration of redundancy which ought to have been implemented in terms of **Section 16A** of the repealed **Employment Act Cap. 226** of the laws of Kenya.

9. That the Defendant instead treated this process as a normal termination and therefore failed to;

- a. give the Plaintiff reasonable notice of termination on basis of redundancy;
- b. inform the local Labour Officer of its intention to declare the plaintiff redundant;
- c. observe the principle of last in first out which it ought to have observed in the event of redundancy; and
- d. to pay the Plaintiff severance pay at the rate of 15 days pay for each completed year of service.

9. The erstwhile **Section 16A Cap 226** provided similar conditions for declaration of redundancy as contained under **Section 40** of the current **Employment Act, No. 11 of 2007**.

10. Defence

The Defendant relies on the statement of defence dated 28th February 2007 in which it avers that;

- a. the contract of employment was entered into on 1st January 2003 and not on 3rd March 1992 as alleged by the Plaintiff;
- b. that this contract superseded all previous contracts of employment;
- c. admits that the Plaintiff’s employment was terminated on 9th November 2005;
- d. denies all particulars of unlawful and / or breach of the contract of employment;
- e. states that the Plaintiff was upon termination paid terminal benefits in the sum of Kshs.115,859.40 and executed a clearance certificate acknowledging receipt in full and final

settlement and discharged the Defendant from further claims arising out of her employment with the Defendant. The certificate dated 13th December 2005 bearing a signature of one person was produced in Court.

f. that the Claimant was also paid staff provident fund dues in the sum of Kshs.918,295 per discharge form dated 20/12/2005 and settlement cheque to the plaintiff in the sum of Kshs.872,551 being the net payment.

g. that the Plaintiff was paid three months salary in lieu of notice in terms of **Clause 23.3.3.** of the contract of employment.

h. that the termination of the Plaintiff's employment did not amount to redundancy as defined in **Section 2** of the **Trade Disputes Act Cap 226** of the laws of Kenya (now repealed) and so the Defendant was not obliged to observe the provisions of **Section 16A of the Employment Act Cap 226** (now repealed).

11. Issues for Determination

1. Was the termination a redundancy in terms of the law and therefore the Defendant was bound to observe **Section 16A** of the repealed **Cap 226**?

2. If the answer is in the Affirmative, what remedies is the Plaintiff entitled to?

12. Issue I

Section 2 of the Trade Disputes Act, Cap 234 of the laws of Kenya (now repealed) reads;

“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 practices commonly known as abolition of office, job or occupation and loss of employment due to the Kenyanization of a business, but it does not include any such loss of employment by a domestic servant.”

13. A plain reading of the letter of termination partly reproduced in this judgment clearly shows, the termination of the plaintiff had the following characteristics;

i. it followed an indepth review of the school's operations;

ii. it was aimed at improving performance and operational efficiency;

iii. it was aimed at reducing management expense;

iv. the process revealed that the school was grossly over-manned;

v. decision was taken to reduce staff numbers considerably as a result, and the Plaintiff was one of the staff affected by the exercise;

14. The inevitable conclusion of the Court is that the exercise conducted by the Respondent was a restructuring exercise that led to a declaration of redundancies affecting several staff including the Plaintiff.

15. The Defendant was therefore bound by the provisions of **Section 6A(1) of the Employment Act, Cap 226** which reads;

“A contract of service shall not be terminated on account of redundancy unless the following conditions have been complied with –

- a. *The union of which the employee is a member and the Labour Officer in-charge of the area where the employee is employed shall be notified of the reasons for, and the extent of, the intended redundancy;*
- b. *The employer shall have 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;*
- c. *No employee shall be placed at a disadvantage for being a member of the trade union;*
- d. *Any leave due to any employee who is declared redundant shall be paid off in cash;*
- e. *An employee declared redundant shall be entitled to one month's notice or one month's wages in lieu of notice;*
- f. *An employee declared redundant shall be entitled to severance pay at the rate of not less than fifteen (15) days pay for each completed year of service as severance pay."*

16. It is common cause that the Defendant did not consider the termination of the Plaintiff a declaration of redundancy in terms of the mandatory provisions of **Section 6A** aforesaid.

The Defendant however adhered to the contractual provisions in the letter of appointment; and

- a. made a more favourable payment equivalent to three (3) months salary in lieu of notice to the Plaintiff.
- b. processed all the contractual terminal benefits including payment of provident fund dues to the Plaintiff.

17. This notwithstanding, the Defendant fell foul of the law by failing to;

- i. notify the local labour office of the intended redundancy;
- ii. discuss with the Plaintiff the criteria for selection of the targeted employees of the particular class of employees affected by the redundancy and disclose the same to the Court as a justification for the termination of the Plaintiff.
- iii. pay severance pay for the Plaintiff of not less than fifteen (15) days salary for each completed year of service.

18. The inevitable conclusion of the Court is that the declaration of redundancy was unlawful because it was not based on a valid criteria and was not effected in terms of a fair procedure.

19. The Plaintiff is therefore entitled in addition to the mandatory benefits under **Section 6A of Cap 226** to compensation for unlawful and unfair termination.

20. Given the long period the plaintiff had served; that she was terminated for operational reasons and for no fault of her own and that the Court has now awarded her severance pay for the entire period served, the Court will award her five months salary being compensation for the unlawful and unfair termination of employment.

21. The Court also finds that, Plaintiff was not paid severance pay when her employment was taken over by the Respondent.

22. The Respondent took over the obligation to pay all the accrued benefits in the absence of any exclusion Clause in the contract when the school changed hands. Contrary to the assertions by the Respondent, **Clause 26.1** is not an exclusion Clause capable of extinguishing statutory benefits due and

owing to the plaintiff.

23. Similarly, the certificate of clearance signed in full and final settlement of all the claims against the school, is incapable of extinguishing lawfully owed statutory benefits to the Plaintiff.

24. Any such exclusion Clause is unlawful to the extent of its inconsistency with the provisions of **Section 6A of Cap 226** (now repealed).

25. The Court adopts its reasoning in the case of **Loice Rose Obengo V. Nyanza Reproductive Health society [2013] eKLR** cited by the Plaintiff in its findings on the substantive and procedural validity of a declaration of redundancy.

26. In the final analysis the Court awards the plaintiff as against the Respondent as follows;

1. Kshs.369,264.00 being severance pay calculated at fifteen (15) days salary for each completed year of service ($52,752 \times 0.5 \times 14$).
2. five (5) months salary being compensation for the unlawful and unfair termination of employment in the sum of Kshs.263,760.00.
3. total amount Kshs.633,024.00.
4. costs of the suit.
5. the decretal amount to be paid with interest at Court rates from the date of this judgment till payment in full.

Dated and Delivered at Nairobi this 25th day February, 2015.

MATHEWS N. NDUMA

PRINCIPAL JUDGE