



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 1991 OF 2012

CHARLES NYANGI NYAMOHANGA.....CLAIMANT

VS

ACTION AID INTERNATIONAL.....RESPONDENT

AWARD

Introduction

1. Charles Nyangi Nyamohanga, the Claimant in this case worked as a Programme Coordinator for Action Aid International, the Respondent herein. Following the termination of his employment on 15th March 2011, the Claimant brought this action seeking compensation for unfair redundancy.
2. The Respondent filed a Reply to Claim on 28th November 2012. At the trial, the Claimant testified on his own behalf and the Respondent called its Human Resource Manager, Edna Wanjira Indimuli.

The Claimant's Case

3. The Claimant states that he was employed by the Respondent in the position of Programme Coordinator effective 6th April 2010 at a monthly basic salary of Kshs.111,258.00 plus a transport allowance of Kshs.6,000.00. The Claimant's employment contract was for an initial period of three (3) years subject to a three (3) months' probation period. The Claimant was confirmed in his appointment on 15th September 2010. By letter dated 15th March 2011, the Respondent declared the Claimant's position redundant effective 31st March 2011.
4. The Claimant avers that the redundancy was unlawful and unfair because there was no notification of the intended redundancy to him and to the Labour Officer as required by law. The Claimant further states that soon after his departure, the Respondent employed another officer to take up his position.
5. The Claimant's claim is as follows:
 - a) A declaration that the termination of his employment was wrongful and unlawful
 - b) Reinstatement with full salary, benefits and continuity of service
 - c) In the alternative Kshs.3,003,966.00 in terminal benefits

- d) In the alternative 12 months' salary in compensation for unfair redundancy
- e) Costs and interest

The Respondent's Case

6. In its Reply dated 26th November and filed in Court on 28th November 2012, the Respondent admits having employed the Claimant as a Programme Coordinator by letter of offer dated 30th March 2010. The Respondent however denies that it maliciously declared the Claimant's position redundant. It is the Respondent's case that in response to its goals and in line with its country strategy, its programmes in Kenya were reorganised leading to abolition of some positions, including that of the Claimant.

7. By letter dated 11th March 2011, the Respondent notified all its staff, including the Claimant of a review, restructuring and reorganisation of its programmes which would lead to abolition of some positions. Subsequent to this, the Respondent wrote to the Claimant on 15th March 2011 notifying him that the position of Programme Coordinator-Kuria D1 which he held, would be abolished and that his contract would be terminated with effect from 31st March 2011.

8. On 10th May 2011, the Claimant was paid Kshs.329,995.20 as final dues upon which he signed an indemnity stating that he had no further claims against the Respondent. The Respondent denies employing another officer to fill the position of Programme Coordinator-Kuria D1.

Findings and Determination

9. The following are the issues for determination in this case:

- a) Whether the Respondent's declaration of redundancy was lawful and fair;
- b) Whether the Claimant is entitled to the remedies sought.

The Redundancy

10. On 15th March 2011, the Respondent wrote to the Claimant as follows:

*“As communicated to all staff on **11th March 2011**, it has become necessary to restructure the Kenya programme due to financial constraints currently experienced by the organisation. The outcome of this review includes the reorganization of the Action Aid Kenya programme structure, management and support. These changes are in response to the organization goals and in line with delivering our country strategy. As a result, it has become necessary to abolish some country programme positions.*

*I wish to inform you that one of the positions being abolished is the one you currently occupy: Programme Coordinator-Kuria D1. I hereby notify you that your contract of employment will be terminated with effect from **31st March 2011**.*

In accordance with the Action Aid International Kenya Programme HROD Policy as per clauses 9.2.3; 9.2.4 and 9.6.3, you will receive the following compensation:

- 1) *Three months' salary in lieu of notice*
- 2) *A severance payment of one month per year of service (pro-rated for incomplete year)*
- 3) *Payment in lieu of any unutilised leave*
- 4) *Accrued gratuity as per contract*

Do note that such full and final settlement of dues to you is dependent on:

- 1) Receipt of a formal clearance from the Finance Department listing any dues owed by you;*
- 2) A confirmation in writing from you that the above payments are in full and final settlement of your terminal dues;*
- 3) The above benefits will be subject to taxes applicable in Kenya;*
- 4) Any dues owed by you will be deducted from the final payment.*

*Also kindly prepare a handover document listing all pending official actions and covering all your areas of outstanding official work. Please hand over all Action Aid International property under your care by **25th March 2011** to your line manager.*

On behalf of Action Aid International, I extend my most sincere appreciation and gratitude to you, for your contribution to the organisation.

I wish you the best in your future plans.

*In the event you feel that you need clarification in any area please feel free to speak to **Linda Miano, Head of HROD.***

With best wishes,

Yours sincerely,

Jean N Kamau

Country Director”

11. From this letter, it would appear that the reason for the termination of the Claimant's employment was redundancy. 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.”

12. The Claimant contests his redundancy on the ground that it was coloured by malice and unfairness. In this regard, he claims that the position he held was in fact filled after his departure. There was however no evidence to support this allegation which was denied by the Respondent.

13. The law recognises redundancy as a lawful form of termination of employment but there are stringent conditions to be observed. Section 40 of the Employment Act, 2007 sets out the following conditions precedent to be met by an employer before terminating employment on account of redundancy:

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.

14. While the law recognises redundancy as a legitimate form of termination of employment, it must be undertaken within the law and as held by this Court in ***Francis Maina Kamau Vs Lee Construction [2014] eKLR*** where an employer declares a redundancy without observing the conditions set out under Section 40 of the Employment Act, the redundancy becomes an unfair termination within the meaning of Section 45 of the Act.

15. From the evidence adduced before the Court, the Claimant was not a member of any trade union. Conditions (a) and (d) above are therefore inapplicable. Additionally, there was evidence that the Claimant was paid his dues under redundancy.

16. The Respondent however faltered on the issue of notice. It is now well settled that there are two kinds of notices under redundancy. First, there is the one month notification of the reasons for and extent of the intended redundancy to the employee and the labour officer. Second, there is the termination notice under the employee's terms and conditions of employment.

17. The two notices cannot be issued simultaneously and there is good reason for this. Redundancy as a form of termination of employment happens at the behest of the employer through no fault of the employee and since employment is not only a means of livelihood but also a form of identity and dignity, an employee leaving employment on account of redundancy ought to be treated with soft gloves.

18. From the evidence on record, the Claimant first learnt of an impending redundancy through a general staff communication on 11th March 2011 and on 15th March 2011 he received notification of his termination which was to take effect on 31st March 2011. The entire transaction took less than a month and without any explanation on the shortcut taken by the Respondent, coupled with failure to notify the Labour Officer of the redundancy, the Court finds the termination of the Claimant's employment unfair within the meaning of Section 45 of the Employment Act.

19. It was submitted on behalf of the Respondent that because the Claimant signed a declaration of receipt of final dues which contained a discharge clause to the effect that he had no further claims against the Respondent, his claim was unsustainable. In ***Simon Muguku Gichigi Vs Taifa SACCO Limited [2012]eKLR*** this Court held that an employer cannot circumvent their obligation

to an employee by waving a form of discharge signed by the employee. If the law is not followed, no form of discharge can cure the illegality in a termination of employment. Human Resource Managers are therefore well advised to concentrate their efforts in ensuring compliance with the law rather crafting forms of discharge.

Remedies Available to the Claimant

20. In view of the Respondent's evidence that the position previously held by the Claimant no longer exists and the fact that the Claimant is gainfully employed elsewhere, I decline to order reinstatement.

21. I however award the Claimant three (3) months' salary in compensation for unfair termination of employment. In making this award I have taken into account the Claimant's length of service alongside the Respondent's conduct in the declaration of redundancy. No basis was laid for the claim for Kshs. 3,003,966 in terminal benefits which is hereby dismissed.

22. Overall, I make an award in favour of the Claimant in the sum of Kshs.351,774.00 being three (3) months' salary in compensation for unfair termination of employment. I further award the Claimant the costs of this case. The award amount will attract interest at court rates from the date of the award until payment in full.

23. Orders accordingly.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 5TH DAY OF JUNE 2015

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JUDGE

Appearance:

Mr. Nyabena for the Claimant

Miss Njoroge for the Respondent