



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 203 OF 2012

LINNET NDOLO.....CLAIMANT

VERSUS

THE REGISTERED TRUSTEES OF THE NATIONAL

COUNCIL OF CHURCHES OF KENYA.....RESPONDENT

JUDGMENT

The claimant herein Justice Linnet Ndolo is a Judge of this court. She filed this claim on 9th February, 2012 and was later in July of the same year appointed Judge of this court. She is therefore a sister Judge in this court. Both counsels representing the claimant and the respondent were aware of this fact. Indeed the claimant sits in court No.3 while her case was heard in my court which is court No.2 which is directly opposite her court.

I wish to echo the sentiments expressed by **Justice Rika in D. K. Njagi Marere Vs Teachers Service Commission [2013] eKLR** where the Judge had to decide a case involving a brother Judge Justice D. K. Marete, also of the Industrial Court, filed before he was appointed as such. Justice Rika expressed the following sentiments.

“it is not an easy task for any Judge to be called upon to make a decision, in a matter involving a Colleague. This is much more so within the Industrial Court of Kenya, which has only 12 Judges, serving the entire Country. It is a small field, with Officers enjoying a degree of familiarity with one another. The Judges interact all the time, and it would be easy for the issues of bias, or appearance of bias to crop up. Cases such as these ones, can also result in a fallout between the concerned Judges. Judges caught up in such situations must tread carefully, and remind themselves of their Judicial Oath of Office, always dispensing justice fairly and dispassionately. This Court has fervently recited the Judicial Oath of Office, before embarking on this perilous undertaking. Mrs. Mbabu and Mr. Masese also confirmed they know the Claimant is now a Judge of the Industrial Court, and did not have any objection with this Court making the determination”

I am therefore acutely aware about the fears that Respondent and its counsel may be having with regard to my objectivity and impartiality in handling this matter. I wish to assure the Respondent that I have reminded myself constantly of that fact and that this case has been handled and the decision made impartiality and dispassionately, and further that the interests of both parties have been taken into account only in their capacity as litigants before the court.

The claimant in both her pleadings and testimony before the court stated that she was employed by the Respondent on 1st January 1992 as project secretary. She rose through the ranks over the next 20 years

g. Balance of gratuity on previous

Contract Kshs.150,000.00

h. Compensation as general damages

For unfair termination @

Kshs.270,400 x 12 Kshs.3,244,800.00

1. Costs and interest

10. Such further or other relief as this honourable court may deem fit to grant.

The Respondent filed its statement of defence on 16th March, 2012. At the hearing the respondent called one witness Befly Bisem (RW1) who is the Legal Officer of the Respondent.

The Respondent denied that the termination of the claimant's employment was unfair. The Respondent's position was that the redundancy of the claimant was as a result of a reorganization of the respondent structure resulting in the abolition or phasing out of three offices being the Director, Human Resources and Administration which was occupied by the claimant, the Director, commercial Services, then occupied by a Ms. Dora Waruiru and the Director, Information and Communications which was vacant at the time. The respondent stated that discussions relating to the reorganization had been going on from 1996 and a report by Corat Africa Limited had in its assessment for the period 1996 to 2001 recommended the very changes undertaken by the Respondent in 2011. Further that the Finance and Administration Committee had the mandate to make the recommendations to the Executive Committee, that the claimant was aware about the discussions and that the Executive Committee had authorized the Finance and Administration Committee to effect any changes deemed necessary to streamline operations, improve efficiency, cut down on waste and make savings to cover additional costs. The Respondent further stated that the changes were necessary following increased financial commitments of the respondent caused by depreciation of the Kenya shilling, increase in interest rates and general inflation.

The respondent stated that a meeting of the Executive Committee held on 1st and 2nd December 2011 approved the organization structure proposed by the Finance and Administration Committee and at a meeting held on 9th December 2011, the Finance and Administration Committee deliberated and resolved the changes leading to the phasing out of the claimant's position. That on the same day the claimant and Dora Waruiru were notified of the decision to phase out their positions.

The Respondents stated that it had offered to pay the claimant Kshs.2,412,615/= made up of 3 month's salary in lieu of notice, pay in lieu of accrued leave, severance pay and gratuity. The claimant has been paid Kshs.460,800/= on account of leave, Kshs.529,920/= being salary in lieu of notice and kshs.1,287,495/= being gratuity.

According to the respondent the only issues pending for determination are the claims for

- i. Salary for unexpired period of contract kshs.2,926,080/=.
- ii. 3 months pay in lieu of notice due from SMEP DTM LTD Kshs.120,000/=.
- iii. Damages for unfair termination equivalent to 12 months salary in the sum of Kshs.3,244,800/=.

I have considered the pleadings by the parties and the annexures thereto, the evidence adduced in court and the written submissions filed in court together with the authorities relied upon by the parties. In my opinion the issues for determination are the following:-

- i. ***Whether the claimant's redundancy was lawful.***
- ii. ***Whether the claimant is entitled to the remedies sought in the claim.***

The parties have referred me to the following authorities;

1. *Jane I. Khalechi vs Oxford University Press E. A. Ltd [2013] eKLR*
2. *Fredrick Ngari Muchira & 99 others vs Pyrethrum Board of Kenya [2013] eKLR*
3. *Ruth Gathoni Ngotho – Kariuki vs Presbyterian Church of East Africa & Ano.[2012] eKLR*
4. *Thomas De La Rue (K) Limited vs David Opondo Omutelema [2013] eKLR.*
5. *M’Nikiria Petkay Shen Miriti vs Rangwa Samuel Mbae & Two others [2013]eKLR.*

1. **Whether the claimant’s redundancy was fair.**

The procedure for redundancy is provided for under **Section 40(1) of the Employment Act**. **Section 40(1) (a) and (b)** provide for notification of redundancy to the employee or the employee’s union giving the reasons and extent of the redundancy at least one month before the redundancy is effected. **Subsection 40(1)(c)** provides for the mode of selection while **Subsections (d)(e) and (g)** provide for terminal benefits. **Subsections 40(1)(f)** provides for termination notice.

It is clear from the foregoing that there are two separate notices in the case of redundancy, one being the notification of the intention and the other being the termination notice.

In the instant case, the claimant first became aware of the intention to declare her redundant from the termination letter itself. It is the termination letter that was copied to the Union. There was no notification of redundancy as provided under **Section 40(1)(a) and (b)** which should have been sent a month prior to the date of effecting the redundancy.

There has been disagreement on the interpretation of **Section 40(1)(a) of the Employment Act** on whether an employee who is not a member of a trade union is entitled to one month’s notification of redundancy as is expressly provided in **Subsection 40(1)(a)** in the case of an employee who is a member of a trade union. This matter has recently been settled by the decision of the **Court of Appeal in the case of Thomas De la Rue Limited** cited by the respondent herein above. In that case the court observed as follows:

“As far as we can deduce, the requirements of Section 40 that the court found not to have been complied with by the appellant are those set out in Section 40(a) and 40(c), leading to the further finding that the termination of the respondent was unfair within the meaning of Section 45 of the Act.

It is quite clear to us that Sections 40(a) and 40(b) provide for two different kinds of redundancy notifications depending on whether the employee is or is not a member of a trade union. Where the employee is a member of a trade union, the notification is to the union and the local labour officer (at least one month before the effective redundancy date. Where the employee is not a member of the union, the notification must be in writing and to the employee and the local labour officer. Section 40(b) does not stipulate the notice period as is the case in 40(a) but in our view, a purposive reading and interpretation of the statute would mean the same notice period is required in both situations. We do not see any rational reason why the employee who is not a member of a union should be entitled to a shorter notice)

There must be a sound reason why there is a distinction in Section 40 based on whether the employee is or is not a member of a trade union. The right to form, join or participate in the activities and programmes of a trade union is underpinned by Art 41(2)(c) of the Constitution. That right is then actualized in the Labour Relations Act. Under that Act, membership in a trade union is voluntary. Section 57 of the Act empowers an employer and a trade union which the employer has recognized to enter into collective agreement setting out terms and conditions if service for all unionisable employees. Ordinarily those terms and conditions of service are better and more favourable to the employee than the terms in individual contracts of employment or the minimum conditions set in statutes. Under the Act the terms of the collective agreement are incorporated into the contract of employment of every employee covered by that agreement and under Section 59 a collective agreement is binding upon all parties including all unionisable employees employed by the employer.

Where an employee is a member of a trade union, the law contemplates that the employer will deal

with the employee through the union. That is why Section 40(a) requires notification of the union in cases of redundancy of unionisable workers. Under Section 56 of the Labour Relations Act, officials or authorized representatives of a trade union are entitled to reasonable access to the employer's premises to; among other things represent its members in dealings with the employer. It is only in cases where the employee is not a member of the union that the employer has to deal directly with the employee."

In the present case the claimant was not given notification of the intended redundancy at least one month before the redundancy was effected. It is alleged by the Respondent that the decision was made by the Finance and Administration Committee to declare the claimant redundant the very date that the letter was written and delivered to her watchman at night.

This would therefore mean that there was no notification to the Labour Officer at least one month before redundancy under Section 40(1)(b) as what is alleged to have been copied to the Labour Officer is the termination notice under **Section 40(1)(f)**.

Questions that remain nagging in my mind is why there was such an urgency in writing the letter which had to be done on the very date of the meeting? And if the claimant's copy of the letter of termination was delivered at night, when was the Labour Officer's copy, which is obviously different from the claimant's copy as exhibited, written and delivered to the Labour office? What time did the meeting end?

Since these questions were never answered during the proceedings I will leave them as such. Suffice to state that these questions raise sufficient doubt as to the motive of the redundancy and lends credence to the allegation of the claimant that the redundancy was actuated by malice.

The claimant further stated that of the 3 positions declared redundant, she is the only one who actually lost her employment as the position of Director, Communications had never been filled while Dora Waruiru's contract was expiring in January, 2012 and she had already indicated that she did not wish to apply for a renewal of the contract. RW1 confirmed that Dora's contract was expiring in two months from the date of redundancy, and that the position of Director, Communications was vacant.

Again a reading of the claimant's letter of redundancy raises further issues. The first two paragraphs read as follows:-

"Following the approval at the meeting of 1st December, 2011 of the proposal from Finance and Administration Committee to the Executive Committee to adopt and approve amendments by FAC of the management structure of NCKK as recommended by FAC on 19th July, 2011 and the subsequent approval by Finance and Administration Committee of the attached Management Structure on 9th December 2011, this is to inform you that the positions in the new structure will soon be advertised. As you can see, the position of Human Resource and Administration Director is phased out in this structure.

This is therefore to give you a three (3) month's notice of the termination of your services on this account as per your contract with the Council"

The letter informed the claimant that her position had been phased out and the new positions would soon be advertised. Why was there such an urgency to get rid of the claimant if her position was yet to be advertised?

From the foregoing I find that the redundancy was unprocedural and therefore amounted to an unfair termination of the claimant's employment.

2. Is the claimant entitled to the remedies sought.

a. Salary for unexpired term of the contract.

The remedies that can be awarded by this court are donated by **Section 12(3) of the Industrial Court Act at Section 12 and includes**

- (i) *interim preservation orders including injunctions in cases of urgency;*
- (ii) *a prohibitory order;*
- (iii) *an order for specific performance;*
- (iv) *a declaratory order;*
- (v) *an award of compensation in any circumstances contemplated under this Act or any written law;*
- (vi) *an award of damages in any circumstances contemplated under this Act or any written law;*
- (vii) *an order for reinstatement of any employee within three years of dismissal, subject to such conditions as the Court thinks fit to impose under circumstances contemplated under any written law; or*
- (viii) *any other appropriate relief as the Court may deem fit to grant.*

Compensation and damages are expressed to be **“in circumstances contemplated under this act or any written law”**.

The claimant has not stated the legal justification for award of this prayer. Neither the law nor the contract provides for damages equivalent to the unexpired term of the Contract.

In the case of **D. K. Njagi Marete vs Teachers Service Commission [2013] eKLR Justice Rika** in rejecting a claim for payment of salary to the date of retirement observed as follows:-

25. What remedies are available to the Claimant? This Court has advanced the view that employment remedies, must be proportionate to the economic injuries suffered by the employees. These remedies are not aimed at facilitating the unjust enrichment of aggrieved employees; they are meant to redress economic injuries in a proportionate way. In Industrial Court Cause No. 1722 of 2011 between David Mwangi Gioko & 51 Others v. Nairobi City Water & Sewerage Company Limited [2013 e.KLR] and the unreported Industrial Court Cause No. 611 [N] of 2009 between Maria Kagai Ligaga v. Coca Cola East Africa Limited, this Court found that in examining what remedies are suitable in unfair employment termination, the Court has a duty to observe the principle of a fair go all round.

26. A grant of anticipatory salaries and allowances for a period of 11 years left to the expected mandatory retirement age of 60 years, would not be a fair and reasonable remedy. The Claimant has moved on after the unfortunate and capricious decision of the TSC. He no longer renders any Labour to the Teachers Service Commission. The Employment Act 2007 requires he moves on as he has done, and mitigated the loss of his job as the Senior Legal Principal Officer of the TSC. He indeed more than mitigated that loss; he secured an appointment as a Judge of a Superior Court in the Kenyan Judiciary, about three years after the retirement from the TSC. It would therefore not make any sense, to grant salaries and allowances for 11 years from the same public coffers, from which the Claimant is currently drawing salaries and allowances. The Court would facilitate double remuneration of the Claimant from public funds, while he is no longer rendering any legal services to the TSC. It is not in the interest of the public, and would offend the principle of a fair go all round.

27. In the High Court Civil Case No. 1139 of 2002 between Menginya Salim Murgani v. Kenya Revenue Authority, Hon Justice Ojwang’ stated that it would be injudicious to found an award of damages upon sanguine assessments of prospects. In that case the plaintiff was 38 years old when his contract of employment was terminated. He asked for remuneration he would have received between the age of 38, and the expected mandatory retirement age of 55 years. The Court observed that the plaintiff was able bodied, intellectually and professionally well- endowed man, likely to find occupational

engagement outside the defendant's employ. The Court applied the principle, then confined to civil law, that an aggrieved party has the obligation to mitigate his or her losses. An aggrieved employee must move on, and not sit back waiting to enjoy anticipatory remuneration. The Claimant has moved on, and that he is serving as a Judge, attests to his sharp intellect, professionalism and high level of employability. The question whether he is likely to find occupational engagement outside the TSC Outfit, is spent. The High Court observed that the breach of the employment contract coalesced into one broad damage, and went on to award damages under one head. This High Court decision, agrees with the decision of this Court in the case of Maria Kagai Ligaga, where the Court upheld the principle of fair go all round; refused to grant anticipatory salaries and allowances; and declined to award multiple damages. The rationale was that employees must not be encouraged to replicate injuries, and multiply remedies. To his credit, the Claimant prays for general damages as an alternative to statutory compensation.

I agree with those sentiments. The claimant herein, as in that case, has moved on. She has prayed for general damages. She cannot get both general damages and anticipatory salaries for the unexplained term of her fixed term contract.

For these reasons this prayer is rejected and is accordingly dismissed.

b. 40x11 months (SMEP)

This too is anticipatory wages for the unexpired term of the claimant's contract and must fail as did the claim under (a) above.

The claim is accordingly dismissed.

c. Accrued leave

The claimant confirmed that she was paid accrued leave after the court ordered the respondent to pay the same. The claim is therefore spent and I make no orders in respect thereof.

d. 3 months salary in lieu of notice from SMEP DTM LTD.

The claimant made this claim on the basis that the respondent was a co-signatory to her contract with SMEP.

I find difficulty in awarding this claim for two reasons. In the first place, SMEP is a legal entity and is registered as a limited liability company. The Respondent's General Secretary signed the contract between the claimant and SMEP in his capacity as a co-owner of SMEP and not on behalf of the Respondent.

Secondly the claimant's contract with SMEP was for specific professional services. She was not an employee of SMEP. Her contract was explicit about that.

I find no justification in the claim and dismiss the same.

e. Gratuity Accrued on Contract 2011/2012.

The claimant in her testimony admitted having been paid gratuity. She explained that what she is claiming is balance of gratuity to the expiry of the contract.

This is not payable as gratuity was only payable as a percentage of the salary already received, and not anticipatory salary as already explained herein above.

The claim is therefore dismissed.

f. Balance of gratuity kshs.150,000/=.

It is not clear from either the pleadings or the submissions how this claim arose. The claimant at the hearing admitted having been paid Kshs.1,287,495/= being gratuity for the served term of her contract.

I find that the claimant has not proved to the court that further gratuity is payable to the claimant and dismiss this claim.

g. Compensation for unfair termination

As I have found hereinabove, the claimant's contract was terminated unfairly as the respondent did not comply with the procedure provided in the Employment Act.

Having found that the claimant was unfairly terminated she is entitled to payment of compensatory damages as provided in **Section 49(1)(c) of the Employment Act**. I have considered the provisions of **Section 49(4)** and specifically the total length of service of 20 years and the manner in which her employment was terminated, the position she held and her reasonable expectations. I am of the opinion that her case deserves maximum compensation. I therefore award her 12 month's salary as compensation in the sum of kshs.2,764,800/=.

h. Costs

The respondent shall pay the claimants costs of this case.

i. Interest

Interest shall be payable at court rates from the date of judgment.

Orders accordingly.

READ IN OPEN COURT THIS 7TH DAY OF FEBRUARY, 2014.

HON. LADY JUSTICE M. ONYANGO

JUDGE

In the presence of

Mrs. Njenga_____ for Claimant

No appearance_____ for Respondent