REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 421 OF 2012

ADDAH ADHIAMBO OBIERO…………………CLAIMANT

VERSUS

ARD INC…………………………………. RESPONDENT

JUDGEMENT

By a Memorandum of Claim filed in court on 15 March, 2012, the Claimant sought a declaration that the attempt by the Respondent to terminate her employment was null and void and that she was entitled *inter alia* to compensations in the sum of Kshs. 20,712,814.24 for wrongful termination of her employmentbeing payment for salary, pension, severance and leave for the unexpired term of her employment contract.

The Respondent opposed her claim through its memorandum of reply filed in court on 19 April 2012 stating in the main that the termination of the Claimants employment was on grounds of redundancy pursuant to section 40 of the Employment Act and therefore was lawful.

The case was initially allocated to justice P.K. Kosgei (Retired). After reconstitution of the court in July 2012 the case was allocated to Justice Abuodha who was later transferred to Nyeri upon which the case was allocated to me for hearing and determination.

I heard the case on 10th July 2013. The Claimant was represented by Mr. Otachi instructed by Ogetto, Otachi & Company Advocates while the Respondent was represented by Ms Mbabu instructed by Hamilton Harrison & Mathews Advocates. The Claimant testified in her case while the Respondent called DENNIS DANIEL MWANZA, the Chief of Party of the Respondent.

The two witnesses were examined in detail both in their evidence in chief and cross examination. Some of the evidence is not relevant for the determination of the claim herein. I will therefore restrict my summary of the evidence to the facts relevant for the determination of the case.

The Claimant testified that she was employed by the Respondent on 16 November 2009 as Small Investment Program Manager at a salary of US$4042 (Kshs. 301129) per month. She was to work for the Respondent under a project called SUWASA, an initiative of the US Agency for International Development (USAID) implemented by ARD, Inc. a Tetra Tech Company (the Respondent). During her employment her designation changed twice, the first in July 2010 to Sub-contract and Budget Manager and finally to Contract and Budget Specialist.

On 20th January 2012 the Claimant was called to a meeting and handed a letter of termination on account of redundancy. She was told to hand over everything. Prior to that date she did not receive any

notification of the intention to declare her position redundant. Her position was the only one that was restructured leading to her redundancy. Her work environment was made intimidating and inhuman by Kauder Stefan, the Chief of Party to whom she reported. Initially she took part in Management meetings but was later excluded although according to her job description she was supposed to attend the meetings. Her last salary was US$4560 (about Kshs. 365,000 at the time).

She prayed for relief as follows:-

a. A Declaration that the attempt by the management of the SUWASA project to terminate the Claimant's contract is null and void.
b. A Declaration that the Respondent has breached and/or frustrated the Employment contract.
c. A Declaration that the Claimant is entitled to the enforcement of her rights under the Contract.
d. Kshs.20,712,814.24 particularized in the Plaint .
e. Such further or other relief as this Honourable Court may deem just ad appropriate to grant.

RW1 DENNIS DANIEL MWANZA testified that he worked for the Respondent Tetra Teck ARD as Chief of Party. He was the Deputy Chief of Party during the period the Claimant was in employment of the Respondent. Tetra Tech bought ARD hence the new name. He was the immediate supervisor of the Claimant. The Claimant was employed to work for SUWASA project which was initially to last for 4 years but was extended by 2 years. The project is expected to end in September 2015. The terms of employment of all employees were covered by the Respondent's Personnel Policies and Procedures Handbook which came into force around June/July 2010. The Claimant was initially employed as Small Investments Program Manager. There were no grants issued and no programs implemented. This made the Claimant's position superfluous.

After considering her qualifications, she was redesignated to Contracts and Budget specialist. She was consulted and agreed before the change of designation was effected. The Claimant was oriented on the new job by Ms. Duran, the contracts specialist, Head Office and RW1 assisted her in the new role.

In December 2011 a restructuring was done and the functions of the position of the Claimant were redistributed as her position was not as busy as was anticipated when the position was created. This led to her redundancy. There was a meeting with the Claimant when her position was declared redundant. The rationale of declaring her position redundant was explained to her and she was given an opportunity to be accompanied to the meeting but she did not call anybody. Minutes of the meeting were recorded. The Kenyan law on redundancy was complied with. The Claimant was given notice of termination and notification was sent to the Labour Officer. She was paid 3 month's salary as severance pay and her salary paid up to 20 February 2012 which was the effective date of her termination. She was also paid 1 month's salary in lieu of notice and accrued leave. She was paid severance of 3 years although she worked for 2 years and 2 months only.

Payment remitted to her was subjected to taxation as required by law. The Respondent therefore does not owe the Claimant any amount. Her contract did not provide for the amounts claimed in the memorandum of claim.

In the written submissions on behalf of the Claimant, it is submitted that the Claimant's designation was changed in contravention of her contract of employment which provided that any changes must be in writing signed by both parties; that the effect of the changes resulted in the demotion of the Claimant; that the Claimant was not informed of the impending redundancy; that it is only the Claimant who was singled out for redundancy; that the Claimant was subjected to discriminatory treatment. It is further submitted that the employer had the duty to consult the employees and consider alternative employment for the employee.

The Claimant relied on the case of **Williams v Compare Maxam Ltd 91982)ICR 156 where the court set the principles for redundancy as follows;**

i. Give a warning of impending redundancies to allow employers to seek alternative employment.

ii. Consult with the union as to the best means by which desired result may be achieved fairly and with little hardship to the employee as possible. This should be done in good faith, and that consultation from the very beginning of the process is the show of good faith.
iii. The employer should seek to establish a criteria for selection which so far as possible does not depend solely upon the opinion of the person making the selection but can be objectively checked against such thing as attendance record, efficiency at the job, experience and length of service. The employer must make sure that the selection is made fairly and objectively in accordance with the established criteria.
iv. The employer should ensure that the selection is made fairly in accordance with the criteria. **Protective Service (Contract) Ltd v Livingstone 1991) EAT 269/91.** The appeal tribunal upheld the employment's tribunal decision that an employee was unfairly selected because the employer failed to show how the selection criterion was applied.
v. The employer should consider whether instead of dismissing an employee he could offer him/her alternative employment e.g. with a subsidiary group looking for workers.

The Claimant relied on the case of **Aviation and Allied Workers Union V Kenya Airways Limited & 3 others [2012]** where the court observed that the notice given was to satisfy the law, it stated;

"The notice by KQ was issued as a formality, to satisfy the law, but completely shorn of good faith. This Court in the case Omutelema v. De la Rue observed that, "The entire process must be marked by good faith. Good faith is implied at every turn in the process" KQ appears to have determined sometime ago that it would have its labour outsourced and managed by Career Directions for no other reason, other than to escape what Naikuni has termed as tough, collective bargaining positions. Reorganized labour to fit the new business model has come in two forms- outsourced and non-Kenyan."

The Claimant further relied on the case of **King & Others v Eaton Ltd (1996) IRLR 199.** In this case the court held that there was no extensive consultation since the discussions with the union only took place after the employer's proposals had been formulated, and that the union had not been given enough time to respond and therefore there was no meaningful consultation.

The Claimant also relied on **William v compare Maxam (1982) ICR 156.** In this case the court held that ***"…in considering the reasonableness of a redundancy dismissal where a selection has to be made between those who are to be retained and those who are to be dismissed, the most important matter upon which the employer has to satisfy the court is that he acted reasonably in respect of the selection of a particular employee. That normally involves two questions, namely whether the employer adopted reasonable creiteria for selection, and whether those reasonable criteria were reasonably and fairly applied in respect of the individual".***

On procedure the Claimant relied on Polkey **v A E Dayton Services Ltd (1987)UKHL**. The issue in this case was whether failure to give warning or consult could make the dismissal unfair. Judge Bridge said " ..an employer having prima facie grounds to dismiss for redundancy will in the great majority of the cases not act reasonably in treating the reason as sufficient reason for dismissal unless and until he has taken steps, conveniently classified in most of the authorities a "procedural" which are necessary in the circumstances of the case to justify their course of action…."

It was further submitted for the Claimant that she had legitimate expectation that she would be retained in employment to the end of the contract term. The Claimant relies on the case of **Isabel Wayua Muasu v Copy Cat Limited [2013]eKLR** where the court defined legitimate expectation as follows;

"Legitimate expectation has been a principle well referred to in public law but the English Courts over a decade ago imported it into the employment relationship. I believe this is because of the implied term of trust and confidence expected of an employer and employee."

It is further submitted that Mr. Kauder had no authority or capacity to terminate the Claimants

employment, that he did not in the letter of termination represent ARD, but SUWASA which is not a legal entity. It is also submitted that the Claimant's contractual position was not declared redundant and that the Claimant's contract therefore still subsists.

For the Respondent it was submitted that the Claimant's contract was never intended to subsist to the end of the project as it provided specifically that "**nothing contained in the contract constitutes a formal and permanent work relationship with the employee and the employee has no power to bind the contractor in any way, except in that specifically agreed to in the contract**." That the contract further provided for termination by either party upon giving 30 days' notice.

On the redundancy, it was submitted for the Respondent that the provisions of section 40 of the Employment Act were complied with in terms of notification of both Claimant and Labour office, selection and payment of terminal benefits. It was further submitted that there was no proof of mistreatment as alleged by the Claimant, that the changes of her designation were necessary and that the Claimant never complained about the changes of designation during the time of her employment.

After considering the evidence adduced by the parties and their submissions, it is my opinion that the issues I have to determine are the following;

1. Whether the termination of the Claimant's contract by way of redundancy was valid

2. Whether the Claimant is entitled to her prayers

1. **Was the Claimant's redundancy valid?**

On the validity of the termination of employment the Claimant argues that Mr. Kauder who terminated the contract had no authority to do so, that the Claimant's contractual position was not declared redundant as the position declared redundant was not that in which the Claimant was employed in accordance with her contract and that the Claimant's contract still subsists. The Respondent on the other hand submitted that the contract was legally terminated by way of redundancy.

The Claimant has referred this court to several cases. It is instructive to note that most the authorities relied upon by the Claimant are from foreign jurisdictions. The Claimant has not shown that the law that was interpreted in the cited foreign court decisions are similar to the law under which the Claimant was declared redundant. The law on redundancy in Kenya is provided for in Section 40 of the Employment Act. For these reason I find the authorities of little probative value.

On the issue that the Claimant's position in the contract was not declared redundant, the Claimant testified that both her responsibilities and designation changed three times. She did not raise any objection and continued to work in the new roles until she we declared redundant. She cannot therefore complain that the position in her contract was not declared redundant when she was no longer working in that position. She can also not allege she was not declared redundant yet make a claim for severance pay.

Section 40 of the Employment Act provides for notification of the employee (or the employee's union) and the Labour officer about the intended redundancy at least one month before the redundancy is effected. The section further provides in fair selection, in a non-discriminatory manner and for terminal benefits which include termination notice, payment of salary and earned leave to the last day worked and severance pay. The Respondent complied with the law in payment of notice, annual leave and severance pay. The Respondent has also demonstrated that the selection was based on the fact that the Claimant's duties were merged with others to create a different role that the Claimant was not qualified to occupy.

The Respondent has however failed to prove that the Claimant and the Labour officer were notified of the reasons for and extent of the redundancy at least one month prior to the redundancy. The Claimant and the Labour officer were notified on 20th January 2012 the very date that the redundancy took effect.

To the extent that the Claimant was not notified of the redundancy at least one month prior to the date of

redundancy, I find that the Claimant's redundancy was not in accordance with the procedure in the law and therefore amounted to an unfair termination of her employment contract.

This however does not make the redundancy null and void. It only makes the Claimant entitled to the remedies provided for in Section 49 of the Employment Act.

2. **Is the Claimant entitled to her prayers?**

The Claimant prayed for a raft of orders. I consider each prayer below.

a. **A declaration that the attempt by the Management of SUWASA Project to terminate the Claimant's contract is null and void**

The Management of SUWASA Project did not attempt to terminate the Claimant's contract. The Claimant's contract was terminated by the Respondent's Chief of Party of SUWASA Project to whom she reported under her contract entered into with the Respondent. Paragraph 4 to Appendix 1 of Claimant's contract specifically provides that she will report directly to and be supervised by the ARD Chief of Party in Nairobi Kenya. The letterhead used was explained by RW1 wh testified that ARD bought Tetra Tech hence the new name and letterhead.

I find no merit in this claim and dismiss it.

b. **A declaration that the Claimant is entitled to the enforcement of her rights under the contract**

The Claimant is entitled to the enforcement of her rights. However these rights are only enforceable during the validity of the contract and to the extent permitted by law, and do not extend beyond the date of termination of the contract.

c. **A declaration that the Respondent has breached and/or frustrated the Employment contract**

As I already found above, the contract was terminated by way of redundancy. The Respondent however did not comply with the procedure set out in Section 40 of the Employment Act resulting in the redundancy becoming an unfair termination.

d. **Kshs. 20,712,814.24 being salary, pension, severance pay and leave for the unexpired term of the contract**.

The Claimant did not explain how she arrived at the figure claimed. She did not state the expiry date of the contract or give a breakdown of the amount claimed. That notwithstanding, the courts have laid down the principles for payment of employment remedies in several cases. In High Court Civil Case No. 1139 of 2002 between ***Menginya A Salim*** ***Murgani vs Kenya Revenue Authority***, 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 when his contract of employment was terminated. He prayed for remuneration he would have received between the time of termination and date of expected mandatory retirement age of 55 years. The court observed that the Plaintiff was able bodied, intellectually and professionally well-endorsed and likely to find occupational engagement outside the Defendant's employs. The court applied the principle that an aggrieved party has the obligation to mitigate his or her losses. This principle is incorporated in Section 49 (4) (g) and (l) as follows.

> **(g) the opportunities available to the employee in securing comparable or suitable employment with another employer, and**
>
> **(l) any failure by the employee to reasonably mitigate the losses attributable to the unjustified termination.**

In the case of **D.K. Njagi Marete v Teachers Service Commission eKLR** Justice Rika advanced this principle when he stated "***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."*** He further state ***"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 unfair and capricious decision…."*** Justice Rika stated that the court has a duty to observe the principle of a ***fair go all round***.

I agree with the decisions of both Justice Ojuang' and Justice Rika. The Claimant stated in her testimony that although she was unemployed, she did a consultancy for 2 months in May and June 2012. She needs to move on if she has not already done so more than 2 years since her contract was terminated. Like justices Ojwang' and Rika in the two cases I have referred to above, I find no merit in the claim for future anticipatory benefits and dismiss the same.

(e) Such further or other relief as this Honourable Court may deem just and appropriate to grant

The Act provides that an employee whose employment contract has been unfairly terminated is entitled to notice, wages due and compensation equivalent to a maximum of 12 months' salary. Section 49(1)(b) of Employment Act also provides for payment of any wages for the period when the employee would have worked had appropriate notice been given. In this case I have found that the redundancy of the Claimant was unprocedural to the extent that she was not given notification of at least one month before her employment was terminated. Although the claimant did not specifically pray for the same, I find that it is just and equitable to grant the claimant the equivalent of one month's salary that she would have earned during the period of notification.

Again having found that by failing to comply with the procedure or redundancy the termination of her employment was unfair, I find that she is entitled to compensation for unfair termination. Having worked for just over two years and taking into account all the circumstances of her case, I think compensation equivalent to two months salary is reasonable.

I therefore award her the sum of Kshs. 1,095,000 being the equivalent of Claimant's 3 month's salary at the rate of US$4560 which was Claimant's last salary using equivalent in Kenya Shillings as given by the Claimant being Kshs. 365,000 per month. This is in respect of 1 month's salary in lieu of notification and 2 month's salary as compensation. This amount shall be subject to taxation.

Having substantially failed to prove her claim the Claimant is not entitled to costs. Each party shall therefore bear its costs.

Orders accordingly

DATED DELIVERED AND SIGNED IN OPEN COURT ON 19TH MARCH 2014

HON. LADY JUSTICE MAUREEN ONYANGO

JUDGE

In the presence of:

Ms Milcah Kimani for the Claimant

Miss Gathoni Kariuki for the Respondent