



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 1758 OF 2013

ELIZABETH ONYANGO.....CLAIMANT

VERSUS

MOBILE PLANET LIMITEDRESPONDENT

JUDGMENT

By a Memorandum of Claim dated 29th October 2013 and filed in court on 30th October 2013 the claimant seeks the following orders against the Respondent:

- a) A declaration that the Respondent's dismissal of the Claimant from employment was un-procedural and improper and the Claimant is entitled to payment of his terminal dues compensatory damages as pleaded.
- b) An order for payment of the Claimant's terminal dues of Kshs.227,000 and damages totaling to Kshs.720,000/=.
- c) The Respondent do issue a certificate of service to the Claimant as required by law.
- d) An order for the Respondent to pay costs of this suit plus interest thereon.
- e) Any other relief as the Court may deem just.

The claimant filed an amended Memorandum of Claim on 8th January 2014 in which she alleges that she was declared redundant.

The Respondent filed a response to the Amended Memorandum of claim on 28th January 2014 in which it averred that the termination of the Claimant's employment was in accordance with the law, was valid and fair and that the Claimant did not suffer any damages as alleged. The Respondent denied that the claimant is entitled to Kshs.947,000 as prayed in the Memorandum of claim and urged that the claim be dismissed with costs.

On 20th March 2014 when the case came up for mention the parties recorded a consent in the following terms;

1. That the Claimant admits that full terminal benefits being severance pay, pay in lieu of notice and leave days have been paid by the Respondent.
2. The Court shall determine whether the procedure of termination of the claimant was fair.

3. The Court determine costs if any.

The case was heard on 5th June and 16th July 2014. The Claimant testified on her behalf while the Respondent called Kigen Kandie (RW1), the Chief Commercial Officer of the Respondent, and Irene Wangechi (RW2), the Respondent's Human Resources Consultant. The parties thereafter filed written submissions.

The Claimant was represented by Ms. Muhanda instructed by Mudeshi Muhanda & Co. Advocates. The Respondent was represented by Mr. Omulama instructed by Mboya Wangong'u & Waiyaki Advocates.

According to the evidence, the Claimant was employed by the Respondent on 10th May 2010 as a System Support Agent at a salary of Kshs.50,000/= per month. On 11th October 2013 the claimant received a text message from her immediate supervisor inviting her to a meeting at 10.00 am in the Respondent's boardroom. The Claimant who was on night shift stayed over after her shift ended at 7.00 am to attend the meeting. The meeting was attended by the claimant, her immediate supervisor who had sent her the text message Mr. Machocho Kilalama, a colleague who worked with her in the same department Mr. Darrel Sakwa, Mr. Kigen Kandie, the Respondent's Chief Commercial Officer (RW1) and Irene Wangechi (RW2).

At the meeting the claimant, Mr. Kilalama and Mr. Sakwa were informed by RW1 that the Respondent had decided to terminate their employment. RW1 explained that the Claimant and her 2 colleagues were identified by RW2 to be terminated out of the total number of 7 System Support Agents.

According to the Respondent, the termination was due to loss of business from several clients and they would no longer have to run a 24 hour customer care service.

The Claimant received her termination letter on 15th October 2013. The letter was dated 11th October 2014. The letter reads as follows:

MOBILE PLANET

October 11, 2013

Elizabeth Onyango

P.O. Box 565-00606

NAIROBI.

Dear Elizabeth,

RE: TERMINATION OF EMPLOYMENT BY NOTICE

We refer to your employment contract with Mobile Planet Limited

It is with sincere regret that we wish to inform you that Mobile Planet has made the difficult decision to terminate your employment effect October 11, 2013.

We will provide you with a severance package, details of which are outlined in the attached Termination Agreement, (Appendix A). This package is open for your review and acceptance until October 16, 2013. The calculation of the same will be made available to you on October 18, 2013.

We would also like to take this opportunity to remind you that, notwithstanding the termination of your employment with Mobile Planet, certain obligations under your Mobile Planet employment contract and other agreements that you may have signed during your employment with Mobile Planet continue. These

obligations include, but may not be limited to, obligations of confidentiality and obligations relating to any intellectual property to which you may have contributed while at Mobile Planet Limited.

If you have any questions concerning the information contained in this letter, please contact me directly.

We would like to take this opportunity to thank you for your valued contribution while you were in the Support Department any future employer is welcome to contact the Human Resource Department for references. Wishing you success in all your future endeavors.

Yours Sincerely,

Nyanjiru Macharia

CHIEF OPERATIONS OFFICER

The Claimant was paid her terminal benefits through the account into which her salary was normally paid. The terminal benefits included notice, severance pay and leave.

Both the claimant and the Respondent are in agreement that the termination of the claimant's employment was by way of redundancy.

Following the consent recorded by the parties in court on 20th March 2014, the only issues for determination are issues 2 and 3 of the consent, that is, whether the procedure of termination of the Claimant was fair and costs.

Section 40 of the employment Act provides for the procedure for redundancy as follows:

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 to 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 an 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 to an employee declared redundant severance pay at the rate of not less than fifteen days pay for each completed year of service.

(2) Subsection (1) shall not apply where an employee's services are terminated on account of insolvency as defined in Part VIII in which case that Part shall be applicable.

(3) The Minister may make rules requiring an employer employing a certain minimum number of employees or any group of employers to insure their employees against the risk of redundancy through an unemployment insurance scheme operated either under an established national insurance scheme established under written law or by any firm underwriting insurance business to be approved by the Minister.

The Respondent has submitted that it complied with Section 40 (1) with regard to notification, criteria used for selection and payment of terminal benefits. The Respondent asked court to find that the claimant is not entitled to compensation.

The Respondent relied on the case of **D.K. Njagi Marete V Teachers Service Commission** and argued that payment of compensation would be preposterous and amount to unjust enrichment as the Claimant has managed to mitigate her loses and secured employment where she was earning Kshs.45,000/= at the time of hearing of the case. On the same issue the Respondent relied on the cases of **Menginya Salim Murgani v Kenya Revenue Authority** and **Olga Auma Adede v New Kenya Co-operative Creameries Limited**.

The Claimant on the other hand argues that the Respondent did not give proper notification as her termination was effective immediately and the Labour Officer was notified on 16th December 2013 after she had filed suit.

The Claimant further submitted that the selection process for the employees to be declared redundant was flawed as the reason given for her selection being that she had shown interest in a human resource position but failed to apply when there was a vacancy in the department is not a valid reason, further that the Claimant was not the last to be recruited in the department.

The Claimant further submitted that RW2 testified that she was a very good employee, an averment that was repeated in her letter of redundancy in the following words "*...we would like to take this opportunity to thank you for your valued contribution while you were in the support department*".

The Claimant further submitted that she was not given an opportunity for a fair hearing as the decision to terminate her employment was final at the time of communication to her. The Claimant submitted that she is entitled to both compensation and costs.

The question I have to determine is whether the redundancy of the claimant was in accordance with the law, and, if not, whether she is entitled to compensation as prayed, and costs.

Section 40(1) of the Employment Act sets out in detail the procedure for redundancy. First, there must be notification which should be to both the employee and the Labour Officer at least one month before the redundancy. As stated in the case of **Charles Kambo Wamai v Bamburi Cement Limited** which the Claimant relied on, redundancy is a special mode of terminating employment and that is why the law provides for special reasons for it including involvement of a government officer to validate the process.

In the present case, the claimant had been terminated at the time of notification. She was not notified at least one month before the date of redundancy as required by law.

The Labour Officer was never notified of the redundancy at all. The letter to the Labour Officer was to inform the office that the Claimant ceased being an employee of the Respondent on 11th November 2013. The letter was written on 16th December 2013 after the filing of this case. It did not mention the redundancy. Even the letter of termination issued to the claimant did not notify her of a redundancy. The letter does not give any reason for the termination.

Section 40(1)(a) as read together with (1)(b) is very specific. The notification must state the reason for,

and the extent of the **intended** redundancy not less than a month prior to the date of the intended termination on account of redundancy. Subsection (1)(b) further states that the notification must be in writing.

As stated in the case of **Thomas De La Rue (K) Limited V Daniel Opondo Omutelema** by the Court of Appeal, the Claimant was entitled to the notification of the redundancy of 1 month.

For these reasons I find that neither the Claimant, nor the Labour Officer, were given notification of the intended redundancy.

On selection criteria, I agree with the submissions by the Claimant to the effect that the selection did not comply with the express provisions of Section 40(1)(c) which requires the employer to take due regard to seniority in time, and to skill, ability and reliability of each employee of the particular class of employees affected.

There having been 7 employees in the department, no reason was given on the criteria used to select the claimant who has stated that she was the 2nd to be employed in the department and had not been informed of any shortcomings. Failure to apply for a vacant position as stated by the Respondent is not a criteria under Section 40(1)(c) for selection of an employee to be declared redundant.

In this regard I agree with Makau J. in **Agnes Wakio Mwachofi v Transoceanic Project Development (K) Ltd (2013) eKLR** when he stated that “*there was however no evidence that the Claimant was ever warned about her poor performance or whether she was subject of any hearing on her performance*”. Indeed in this case the Respondent confirmed that the Claimant was a very good employee. I also agree with the decision of Justice Ongaya in **Kenya Plantation and Agricultural Workers’ Union v Harvest Limited (2014) eKLR** when he stated as follows:

“Section 40(1) (c) of the Act clearly provides that in selecting employees for redundancy, the employer shall have 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. The Court holds that the idea of last in first out satisfies the seniority criterion. As far as skill, ability and reliability are concerned, it is the opinion of the court that the employer must have, prior to the redundancy exercise, instituted objective qualifications for skill, ability and reliability attached to the office held by the workers against which the skills, ability and reliability possessed by the individual workers targeted in the redundancy will be scored or measured against. The employer, in the court’s opinion, must demonstrate the objective score sheet and the ranking of the targeted employees against that score sheet with respect to the selection factors set out in Section 40(1) (c) of the Act failing which, it is difficult to establish compliance with the section. The court also holds that the selection parameters in Section 40(1) (c) are not in alternative so that in a redundancy process, the employer must establish that all the parameters have been taken into account and in an objective manner. It is the opinion of the court that the employer enjoys the discretion to place given weights on each of the parameters but one can be applied in exclusive of the others”.

From the foregoing it is clear that the Respondent failed to comply with Section 40(1)(a) and (c) of the employment Act in declaring the Claimant redundant.

I find the other cases relied upon by the Claimant that is **Lillian Nyaboke Nyaribo v Wireless Innovations Nairobi Limited (2013) eKLR**, **Kenneth Njiru Njorani v Dodhia Packaging Limited** and **Alphonse Maghanga Mwachanya v Operation 680 Limited** are not relevant to this case as they relate to dismissal while this was a redundancy.

I find that the redundancy of the claimant was unfair for failure to comply with the law.

2. Reliefs sought

The Claimant has already been paid terminal dues and the only reliefs for my consideration are those specified in the consent recorded by the parties being compensation and costs.

Having found that the claimant was unfairly declared redundant, she is entitled to any benefits provided under section 40 but not granted her by the Respondent and to compensation.

The Claimant was not given notification of at least one month before being declared redundant. She therefore lost the income she would have earned during that period of notification of at least one month.

The Claimant was also not given any explanation for her selection. As I already pointed out, she was unfairly selected for redundancy as no consideration was given to her seniority in time, ability, skill and reliability.

Having been declared redundant unfairly, she is also entitled to compensation for unfair termination.

Taking into account all these factors, the length of service of the claimant of 14 months and the reasonable expectations taking into account the provisions in her contract of employment, I award the Claimant as follows:

- (i) 1 months gross salary in lieu of notification of redundancy being Kshs.60,000/=.
- (ii) 9 months salary on account of discrimination in selection.
- (iii) 2 months salary on account of compensation for unfair termination.

In total I award the Claimant 12 months salary in the sum of Kshs.720,000/=.

The Respondent shall also pay the claimants costs of this suit based on the sum awarded in the Judgment.

Orders accordingly.

Read in open Court this 7th day of November, 2014

HON. LADY JUSTICE MAUREEN ONYANGO

JUDGE

In the presence of:

Omulama for Respondent

Makori holding brief for Muhanda for Claimant