



**REPUBLIC OF KENYA**

**Industrial Court of Kenya**

**Cause 240 of 2011**

**CAROLINE ATIENO OSWETA.....CLAIMANT**

**VS**

**KENYA YUNGHENG PLATE MAKING LIMITED.....RESPONDENT**

**AWARD**

**Introduction**

1. By a Memorandum of Claim dated 16th February and filed in Court on 24th February 2011, the Claimant sued the Respondent for unfair termination of employment. The Respondent filed a Reply on 9th March 2011. Pursuant to directions by Madzayo J (as he then was) the parties filed written submissions.

2. The matter then proceeded to viva voce hearing between 29th October 2012 and 30th January 2013 after which the parties filed supplementary submissions. Mr. Mwangi instructed by Wanjiku Nduati & Co Advocates appeared for the Claimant while Mr. Muchoki instructed by Muchoki Kang'ata & Co Advocates appeared for the Respondent.

**The Claimant's Case**

3. The Claimant was employed by the Respondent on 1st August 2008 in the position of Human Resource Manager at a basic salary of Kshs. 45,000 and a housing allowance of Kshs. 7,000 per month (letter of offer is marked "CAOL 2" in the Claimant's documents"). In her sworn evidence, the Claimant testified that her employment with the Respondent commenced on 14th April 2008. Before taking up this appointment, the Claimant was working in a similar capacity at Thermopak Limited. The Claimant worked for the Respondent until 7th July 2009 when her employment was terminated on the ground of redundancy arising out of restructuring of the Respondent's operations (termination letter is marked "CAO3" in the Claimant's documents).

4. It was the Claimant's case that her termination was wrongful, irregular and unfair. She claimed that the position held by her was not abolished, rather she was replaced. The Claimant added that during the currency of her employment with the Respondent she had maintained a clean record and good performance. The Claimant accused the Respondent of misleading her to resign from her previous employment and then abandoning her after using her skills, competence and knowledge to establish the Respondent's structures.

5. The Claimant therefore claimed the following:

- a) Payment for loss of earnings.....Kshs. 540,000
- b) Damages for unfair and unlawful termination of employment
- c) Costs of the suit
- d) Any other relief the Court may deem just to grant

### **The Respondent's Case**

6. In its Reply to the Memorandum of Claim, the Respondent denied the Claimant's claim that she was in stable employment when she was offered employment by the Respondent on 1st August 2008 having left her former employer on 12th April 2008. The Respondent further stated that by the time the Claimant joined the Respondent, there were already structures in place.

7. It was the Respondent's case that the Claimant was lawfully declared redundant following restructuring of the Respondent's operations. The Respondent's witness, Hezron Munanga testified that the position previously held by the Claimant had been abolished and the Human Resource function transferred to the Financial Controller. The Respondent had discussed the redundancy with the Claimant who tabulated the terminal dues paid to her in full and final settlement. The Respondent took the view that the Claimant's claim was an afterthought and an abuse of the court process and asked that it be dismissed with costs.

### **Findings and Determination**

8. The main issue for determination is whether the termination of the Claimant's employment was lawful. The Respondent's case was that the termination was a result of restructuring which rendered the position held by the Claimant redundant. Conversely the Claimant's case was that the said restructuring was a cloak employed by the Respondent to camouflage her unlawful and unfair termination. The Claimant told the Court that the Respondent had misled her to leave her previous job on the understanding that she would enjoy longevity of employment and job security with the Respondent.

9. 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***

10. Before proceeding to make my finding on whether the termination of the Claimant's employment complied with the law, I need to deal with the effect of the discharge note executed by the Claimant to the effect that she had no further claims to make against the Respondent.

11. This Court has pronounced itself on this matter in the case of **Simon Muguku Gichigi Vs Taifa Sacco Society Limited (Industrial Court Cause No. 681 of 2012)** where the Court stated as follows:

***Before proceeding to address the issue of remedies, I will dispense with the discharge note signed by the Claimant to the effect that he had no further claims to make against the Respondent. I take judicial notice that this is a common requirement by employers for departing employees. It is however expected that parties will act within the law. An employer cannot therefore circumvent their obligation to an employee by producing a form of discharge executed by the employee. If the law is not followed, no form of discharge can cure the irregularity. I have therefore disregarded the discharge note executed by the Claimant in determining this case.***

12. In line with my ruling in the **Taifa Sacco Case**, I have disregarded the discharge note executed by the Claimant in reaching my decision in this case.

13. Back to the issue of redundancy. The right of the employer to declare redundancy is well secured in law. However, this right must be exercised judiciously and in good faith. In the case of **Super Group Supply Chain Partners Vs Arthur Dlamini & Another (JA 77/10)** the Labour Appeal Court of South Africa held that:

***It is trite that an employer is permitted to dismiss an employee for its operational requirements. However for the employer to do so successfully, it is obliged to have a bonafide economic rationale for the dismissal.***

14. Closer home, Justice Rika in the case of **Aviation & Allied Workers Union Vs Kenya Airways & 3 Others (Industrial Court Cause No. 1616 of 2012)** stated that:

***Retrenchment becomes a colourable exercise if done for collateral purpose of getting rid of an employee.***

***So long as the decision is reasonable and exercised in good faith, the Court is encouraged not to intervene. The Court however has a duty to investigate facts and circumstances and determine if the exercise of managerial prerogative was reasonable and clothed in good faith.***

15. The Claimant testified that the Respondent relied on her expertise in employment matters. This was confirmed by the fact that the Claimant actually prepared and co signed her letter of offer, in her capacity as Human Resource Manager. The Claimant also set and tabulated the following terminal benefits for herself:

- a) Days worked 26/06/09-7/7/09.....Kshs. 17,307.70
- b) Leave arrears.....24,230.80
- c) One month leave pay.....45,000.00
- d) Ex gratia payment.....10,000.00

16. The Claimant further testified that the Respondent relied on her to provide advice on Kenyan employment law and there was no evidence that any of the advice given by the Claimant was rejected or ignored by the Respondent.

17. According to the documents produced in Court, the Claimant worked with the Respondent from 1st August 2008 to 7th July 2009. The Court was unable to confirm the Claimant's claim that she took up her appointment on probationary basis on 14th August 2008. Consequently, the Claimant's claim that the Respondent misled her to leave her job with Thermopak could not be verified and has been disregarded in reaching the decision of the Court.

18. Moreover, the Respondent's witness Hezron Munanga testified that the position previously held by the Claimant had been abolished and the Human Resource function transferred to the Financial Controller. Having examined the facts and circumstances of this case, I find no bad faith on the part of the Respondent in declaring the Claimant redundant. I therefore find that there was substantive justification in the termination of the Claimant's employment.

19. Having dispensed with the issue of substantive justification, I now turn to the question whether there was procedural fairness in the Claimant's termination.

20. Section 40 of the Employment Act, 2007 sets out the conditions precedent to be met by an employer before terminating a contract of service on account of redundancy.

21. The conditions are as follows:

- 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.*

22. From the evidence on record, the Claimant was not a member of a trade union nor were her terms of employment subject to a collective agreement. Conditions number (a) and (d) of Section 40 are therefore not applicable in this case. There was no evidence of notification of the redundancy to the Labour Officer as required by condition number (b). According to the Claimant, she was the only one knowledgeable in Kenyan labour law and she therefore ought to have advised the Respondent on this requirement. At any rate, it is my view that this omission did not render an otherwise lawful exercise unlawful.

23. As regards condition number (c) it was common cause that the Claimant was the only person in the Human Resource Department and there was therefore no class of employees against which she could be measured. The Claimant was paid all her pending leave thus satisfying condition number (e). From the evidence adduced in Court it seems to me that the Claimant was not given due notice and therefore award her one month's salary in lieu of notice. From the evidence on record, the Claimant had worked for slightly less than a year and did not therefore qualify for severance pay. Under condition number (g). At any rate, the Court took notice that the Claimant, most likely upon her own advice, was paid Kshs. 10,000 as an ex gratia payment.

24. In the final analysis, I award the Claimant the sum of Kshs. 52,000 being one month's pay in lieu of notice.

Each party will bear their own costs.

Orders accordingly

**DELIVERED IN OPEN COURT AT NAIROBI THIS 10TH DAY OF APRIL 2013**

**LINNET NDOLO**

**JUDGE**

**In the Presence of:**

.....**Claimant**

.....**Respondent**