



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 1274 of 2011

ALICE WAMBUKU KAGO..... CLAIMANT

VERSUS

EAST AFRICAN WOMEN'S LEAGUE

HARRISON HOUSE MANAGEMENT COMMITTEE..... RESPONDENT

Rika J

CC. Elizabeth Anyango

Mr. Kinyanjui instructed by Kinyanjui, Kiriimi and Company Advocates for the Claimant

Mr. Okeche and Mr. Molenje instructed by the Federation of Kenya Employers for the Respondent

ISSUE IN DISPUTE: UNLAWFUL TERMINATION AND UNFAIR TERMINATION

AWARD

1. Alice Wambuku Kago filed her Statement of Claim on 28th July 2011. The Respondent filed its Statement of Reply on 27th September 2011. The Claimant testified and closed her case on 3rd February 2012. The Respondent testified through its Management Committee Chairperson, Jackline Collins and closed its case on 22nd October 2012. Both parties filed their respective closing submissions on the last mention date, 26th November 2012, and were advised by the Court, Award would be delivered on notice.

Claimant's case

2. The Claimant's position is that the Respondent Manages Harrison House, a Care Home for the Aged. The Claimant was employed by the Respondent as an Assistant Supervisor, in a written contract of employment, dated 25th March 1993. The effective date of employment was 1st April 1993. The contract provided that her terms and conditions of employment would be in accordance with the Collective Bargaining Agreement concluded between Kenya Union of Domestic Hotels Educational Institutions, Hospitals and Allied Workers Union. On 28th December 2010 the Respondent wrote to the Claimant a letter stating:

“ It is with great regret that we must inform you that Harrison House is currently faced with unsustainable financial position. Unfortunately, this has led to re-organization which will result in loss of employment for members of staff..... We sincerely regret that you are one of those to whom redundancy will apply.”

The Claimant felt this decision was unlawful and unfair. It did not accord with the Employment Act 2007. The Respondent failed to recognize the long years worked by the Claimant; her ranking in the organization; and her dignity as a human being. The declaration of redundancy was meant to deny the Claimant the benefits she would have enjoyed had the Respondent terminated her contract regularly. The decision was in contravention of the Claimant's contract of employment. Prior to this decision, the Respondent had waged a campaign to disparage the Claimant. It was alleged that the Claimant had received overtime irregularly. She was placed on extended leave against her wish. Jackie Collins made certain changes while Alice was away, allegedly to improve health and safety situation at the House. Jackie Collins made defamatory comments about the Claimant, alleging that the Claimant had irregularly recruited 90% of the employees at the House. The Respondent has totally refused to pay the Claimant her terminal benefits. She seeks from the Court:-

§ Kshs. 316,000, comprising terminal benefits for the 18 years worked, calculated under Clause 18 of the CBA;

§ Kshs. 165,000 , being six months' salary in lieu of notice;

§ Kshs. 12,500, outstanding leave of 10 days;

§ Gratuity;

§ Damages for unlawful and unfair dismissal;

§ Such other dues as may be found merited by the Claimant;

§ Costs; and Interest.

3. Alice testified she did not join the Union, but her terms and conditions of employment were tied down to the CBA in force at the workplace. She was not given a notice of the redundancy. She was a Senior Supervisor at the time of termination. The CBA covered the period of redundancy. She had been asked to take early retirement on 25th April 2008. At the time, she had been told by the Respondent that gratuity would be paid in accordance with the CBA. It was a Voluntary Early Retirement Scheme. Alice opted not to take retirement. When the redundancy exercise arrived, 17 employees were affected. Alice was the most senior. Her juniors were left to work. She testified that her relationship with most of the officers serving in Management at the time of redundancy was not cordial. They saw her as allied to the previous Management. J.J. Austen Brown was the Respondent's Accountant. He recommended that the Claimant should have been paid terminal dues based on her full consolidated salary, reflecting her lengthy period of service and fair notice period; proper compensation for loss of office; unpaid leave and acting allowances; and service pay under the CBA.

4. The Respondent's financial position was not that bad. There were enough charitable groups supporting the House. No one was retired. Remaining employees informed the Claimant that more employees had been hired. In the year 2010, Wendy Stanley was the Manager. She earned a monthly basic salary of Kshs. 84,700. She left in July 2010. Patricia Helen Combes took her place, and earned a monthly basic salary of Kshs. 120,000.

5. Under cross-examination, Alice testified she was employed on 2nd February 1993. She joined as Assistant Supervisor. She was promoted in 1994. She was promoted by word of mouth. Her salary was raised upon negotiations with the Management Committee. She supervised 26 employees. Every year, the employees enjoyed salary increments. Other employees' salaries were raised through collective bargaining between the Employer and the Union. She was covered by the CBA by virtue of her contract. Her first salary was negotiated individually, and subsequent salaries adjusted in accordance with successive CBAs. She conceded the Employer and the Union had consulted before the declaration of redundancy. A notice dated 30th November 2010 was given to the members of the Union. There was a notice issued to the Labour Office and copied to KUDHEIHA and the FKE. She was not given two

different letters by the Respondent, both dated 28th December 2010. Alice conceded the letter from the Respondent dated 28th December 2010, attached to her Statement of Claim as appendix 4, differed in material details from the same letter, attached in the Respondent's Statement of Reply as appendix 6. She agreed that the two letters were signed by the same person, but had different signatures. The version availed by the Respondent stated at the tail end:

“ The redundancy will become effective on Monday the 31st January 2011.”

This was missing from the letter brought to Court by Alice. She testified she did not receive the version introduced by the Respondent. She received the letter dated 28th December 2010 in early January 2011. The letter did not say the Claimant would go on working indefinitely. She was not given a deadline. Other employees received a letter with a termination date. She testified that the Respondent used to have financial downs, but there were no financial problems. She was not able to understand financial data contained in the Harrison House Trust Income and Expenditure Statement 2010. She did not know about deficit and surpluses. She would not know if the accounts were truthful. She claims under clause 18 of the CBA. Clause 17 is on redundancy, and clause 18 on retirement/termination benefits. She conceded she was offered payment in accordance with clause 17, as evinced in Respondent's appendix 7. Other employees were paid under clause 17. She stated she is asking for terminal dues under clause 18; damages for unlawful dismissal; six months' salary in lieu of notice under clause 16 [a] [iii] of the CBA; and unpaid leave of ten days. These days were from September 2010 to January 2011. She had taken leave in August 2010, and sick leave in February 2010. She seeks gratuity as given in the CBA, but could not say which Clause provided for this. She suffered damages due to the allegation by the Respondent that she employed 90% of the staff. The new Management Committee did not like her. She had claimed to have worked twenty four hours for five days. She was not given reasons why she should take extended leave. The Respondent acted with malice towards her. Austen Brown wrote his advice on terminal benefits that should be paid to Alice at the behest of Alice. He was the Accountant up to 2010, and had been dealing with redundancy. Val Corr, who offered to be a character witness for Alice, worked with Alice from 1994 to 2003. She would know Alice's character in 2011. Corr is still resident in Kenya at Naivasha. The Claimant testified that she ought to have been retired or accorded a regular termination of employment, not leave through redundancy. In 2008, she refused to take early retirement because she was still young. The old Management Committee who Alice held she was comfortable with, had recommended she leaves on early retirement. The new Committee was inaugurated in 2010. Alice did not agree with the suggestion of the Respondent's Advocate that restructuring started with the old Management Committee.

6. Redirected, Alice testified that early retirement was voluntary and she opted against taking it. Annual salary increments came as a result of CBAs. She claimed overtime because at the time, there was no Manager and the Claimant did not have any chance to leave for home. She had not requested for extra leave when her leave was extended. She did not know certain management changes would be made in her absence. Clause 17 and 18 of the CBA were not exclusive of each other. The financial statements were not shown to the Claimant before her Court appearance. She had worked with Jackline Collins for one year. She was familiar with her signature. Her signature was on both versions of the letters dated 28th December 2010. She acknowledged the version that was sent to her. She would not know if other employees received what was indicated to be payable. What Austen Brown recommended was the practice. Alice implores the Court to uphold her Claim.

The Response

7. The Respondent agrees Alice was its employee. She was employed as an Assistant Supervisor, with a monthly salary of Kshs. 1,500, on 1st April 1993. She was promoted to the position of Senior Supervisor in 2002, earning a basic monthly salary of Kshs. 18,000 and house rent allowance of Kshs. 2,500. She ceased being a member of KUDHEIHA upon promotion. Her pay slips show no trade union dues were deducted from her salary. In the years 2008/2009 the Management Committee of the Harrison Trust

House, established that the House could not sustain its operations due to high labour costs. A decision was made to restructure, with the abolition of certain positions. KUDHEIHA and the Labour Office were notified of the intention to declare redundancy on 17th November 2010. Employees were notified through a notice placed on the notice board. Consultations followed between the Employer and the Union. A fresh notice issued on 30th November 2010 addressed to the Union, Labour Office and individual Employees. On 28th December 2010, the affected employees who included the Claimant were issued with letters informing them that their contracts were to terminate with effect from 31st January 2011, on account of redundancy. They were given notice of one month. The exiting employees were entitled to severance pay at the rate of fifteen days for each year completed in service; payment of outstanding leave; earned allowances; and outstanding overtime. Redundancy was carried out in conformity to the law contained in Section 40 of the Employment Act 2007. There was no campaign to denigrate Alice. She attributed to herself overtime work which she could not practically have performed. She indicated she did three to five days overtime round the clock, for twenty four hours consecutively. She was paid Kshs. 12,000 in overtime in February 2010, while she was on sick leave with full pay. The management changes that took place in her absence followed a report of a safety and health expert Dr. Capsticks. The changes were implemented to the benefit of the Aged, and all employees were informed about the changes. It was not an exercise aimed at undermining or disparaging Alice. Statements and views of former employee on the role of Alice had no relevance to the redundancy exercise.

8. With reference to the reliefs sought, the Respondent holds that the Claimant was entitled to severance, not service pay. She was not a member of KUDHEIHA, and even if she was, she would not be entitled to both severance and service pay. Clauses 17 and 18 of the CBA are exclusive. She was entitled to one month salary notice or payment in lieu, in accordance with her terms of employment and the Employment Act. She served her notice from 28th December 2010 to 31st January 2011. Her leave records show she only had one day of outstanding leave amounting to Kshs. 1,604.15. There is no factual or legal basis for gratuity payment. No evidence had been tendered by the Claimant to support her claim for damages. Redundancy followed the law, and nothing done by the employer could be said to have been unfair. The Claimant was offered severance pay of Kshs. 247,500; public holiday worked at Kshs. 1,375.00; and outstanding one day leave at Kshs. 1,604.15. Less tax due, she was offered Kshs. 183,959.20, which she has failed to collect from the Respondent. The Respondent states she should be ordered to collect this amount in full and final settlement of the dispute.

9. Jackline Collins testified that the redundancy situation was real; the Home was operating at a loss. It was on the road to closure. In 2008/ 2009, the Home incurred losses of Kshs. 200,000 per month. Staff salaries took 66% of the Respondent's monthly income. The Respondent decided to outsource and increase the resident rates. The Management Committee works voluntarily. The previous Management Committee had been grappling with the problem. Employees had earlier been invited to take early retirement. The Claimant had been asked to do so before the new Management Committee came to office. 17 positions were made redundant. Employees were offered the chance to leave and reapply for less well paying positions at the Home. They, their Union, FKE and Labour Office were consulted at every turn. Notices were issued to all these persons and offices. The exercise was approved by the Executive Committee and the Trustees. The Committee held a meeting with the Staff. Few employees took the option of less well paying job openings. Jackline wrote to the Claimant in person on 28th December 2010. The witness told the Court that she signed this letter using her full signature. The same letter produced by Alice had a full sentence missing, and was in Jackline's initials. The Claimant was offered redundancy payment which she has refused to collect. Jackline stated she did not have any personality issues with Alice; the Claimant worked well and even served when Jackline's father was serving the Home. The Respondent made a purely financial decision. Alice could not have worked four days consecutively, for twenty four hours. She needed to sleep. There was an expert report advising the Respondent that the kitchen needed to be restricted. There was nothing personal in these events. The Respondent outsources cleaning and gardening services. The position of Supervisor was merged with that on the Manageress. The position of Supervisor is no more. Alice had been offered early retirement earlier and decided against it. The witness testified that the Respondent followed the law.

10. Testifying further on cross-examination, Jackline stated she became Chairperson in March 2010. The position is filled after a three year cycle. It is an elective position. Alice left employment on redundancy, not for misconduct of any sort. She had worked for 18 years. She was Senior Supervisor. She and two other Supervisors were in charge when the Manageress was absent. The minutes leading to the decision on redundancy were not availed to the Court. There was only one letter of employment given to the Claimant. It mentioned that her terms would be tied to the KUDHEIHA CBA. This clause was not varied. The letter written by Austen Brown on 25th April 2008, appendix 3 of the Claim, offering the Claimant an opportunity to retire early, stated the terms of exit would be as laid down in the CBA. Jackline testified she had not seen this letter before the date of her testimony. Alice was not a member of KUDHEIHA in 2008. The CBA was in place at the time of the redundancy. If the CBA was not there, the Respondent would have followed the basic standards set by the law. Alice was not prejudiced by not being a member of the Union. There was no termination. Redundancy is not termination. The financial statement of the Respondent indicated it held assets worth Kshs. 13.9 million. The CEO in 2010 Wendy Stanley earned Kshs. 84,000 in salary. Patricia who came after her earned Kshs. 120,000. The witness testified that she is not familiar with Section 40 of the Employment Act. Alice was senior most, competent and reliable. There was a roaster for annual leave. The Respondent had not availed this to the Court. Jackline wrote a letter dated 5th July 2010 to Alice, charging that Alice was involved in fraud. The witness thought the claim for impractical overtime amounted to fraud. The Claimant's input was not important in the preparation and implementation of Dr. Capsticks' report. Redirected, the witness testified that redundancy and early retirement are not the same thing. The Claimant was offered early retirement earlier. She was not a member of the Union. Her salary was not subject to the annual increments. All supervisory positions were made redundant. Consultations preceded the redundancy. The Respondent prays for the dismissal of the Claim.

The Court Finds and Awards-:

11. There is no dispute that Alice was employed by the Respondent on 1st April 1993. She was designated as the Assistant Supervisor, and rose to become the Senior Supervisor. She left employment on 31st January 2011, through termination initiated by the Respondent on the justification of redundancy. She disputed the substantive justification and process of the redundancy and filed this Claim, which raises the following questions-:

- a. Was there a real redundancy situation justifying termination?
- b. Was the process carried out fairly and in accordance with the law and the contract of employment?
- c. Was she entitled to terminal benefits under Clause 17 or 18 of the CBA?

12. The Respondent has satisfied the Court that indeed, there was a real redundancy situation at the Home. The financial statements availed by the Respondent to the Court attest to a real redundancy situation. The evidence by Jackline Collins was erudite and quite persuasive on the problems that had arisen at the Home. The Respondent was operating at a loss. It is not a commercial entity, but a Home for the Aged, dependent on donors and whose work is largely philanthropic. The minutes of the Management Committee meeting held on 1st December 2008 indicate the financial problems had started much earlier than 2010. Alice was aware of this, and had been asked in 2008 to take voluntary early retirement, an offer she rejected. It had been proposed then, that Austen Brown would consult the Union, with a view to having some consensus on staff reduction. It was suggested in the meeting that the following year-2009-would be difficult financially. The financial statements availed by the Respondent for the year ended 31st December 2009, confirm that the prediction was well-founded. The redundancy situation of 2010 unfolded gradually, and does not look by any chance, to have been a sham or colourable exercise. The higher salary of Kshs. 120,000 earned by the incoming CEO Patricia Helen Combes, as opposed to the lower rate of Kshs. 84,700 earned by the outgoing CEO Wendy Stanley, cannot on its own lead to a conclusion that there was no genuine redundancy. It is not unusual for enterprises in financial problems to recruit a more effective CEO, and pay him/her a higher rate. The incoming CEO after all, faces a more difficult job of restoring financial stability to the enterprise. The allegations by Alice, that Jackline Collins

undermined and defamed her, do not appear to this Court to be relevant to issue of redundancy. There was a real financial problem facing the Home for the Aged. The Court cannot therefore fault the Respondent on the substantive validity of its decision. In terms of validity of reason, termination was fair.

13. Was the process fair? The Court finds the Respondent to have met all the requirements of a fair procedure. The Claimant was subject to the terms and conditions of employment contained in the CBA concluded between the Respondent and KUDHEIHA. It is not correct as argued by the Respondent, that she ceased to be covered by the CBA on ascending to the position of the Senior Supervisor. There was no letter varying her original terms and conditions of employment. When the Respondent offered her voluntary early retirement, it was to be undertaken under the CBA. The Respondent considered her employment terms still subject to the CBA. It is not given that because an employee has ascended to senior supervisory position, she ceases to be covered under the CBA in force. Exclusion should be explicit in the letter promoting the employee. Exclusion is not to be implied. The parties agreed that although the Claimant was in senior supervisory position, they would continue to apply the CBA in regulation of her terms and conditions of employment. In accordance with this CBA and the Employment Act 2007, the Respondent consulted the Union before any redundancy decision was made. There were consultations right from the year 2008. The Respondent gave a written notification to the Union, and the Labour Office on 17th November 2010. This was followed by another notice dated 30th November 2010 issued to the Union, the Labour Office and the FKE. The Respondent continued to consult. On the same day 30th November 2010, it issued all Employees, the Union, Labour Office, and the FKE a notice of its intention. The Claimant was issued with an individual notice of termination dated 31st December 2010. It is not clear where she obtained an edited version of the same letter, excluding the effective date of termination. She did however concede that all employees were issued notices of termination. The effective date of termination was given as 31st January 2011. Employees served the notice period and left on 31st January 2011. The Respondent offered to re-employ the affected employees in less glamorous positions. It is not common for employers in Kenya, to offer any form of re-employment to employees who have been forced to leave through redundancy. The Respondent scored well by its offer of re-employment. The process met the threshold of fair procedure. The entire process was consultative, with the Employees, the Union, FKE and Labour Office involved at every turn. In terms of procedural fairness, termination again, was fair. Finally the Respondent offered the Claimant Kshs. 183,942.95 in redundancy benefits, which the Claimant has not accepted.

14. Clause 17 of the CBA, and not Clause 18, applied. It regulated redundancy. Redundancy is of course a form of termination, but a form specifically regulated under Clause 17. It is inconceivable that any employee would claim terminal benefits under both Clauses. The Claimant was offered early retirement, which would perhaps have enabled her to legitimately claim under Clause 18 which is titled 'Retirement/Termination Benefits.' She waited until the Respondent decided on redundancy. There can be no confusion on what Clause of the CBA she finally left employment under. There can be no justification in Claiming under Clause 18, or both Clauses. Clause 18 relates to retirement and regular termination. Was the Claimant therefore offered the correct terminal benefits? Clause 17 did not provide for the applicable notice period. Section 40[1] [f] however provides for not less than one month termination notice, or one month notice pay in lieu. The Respondent offered the Claimant one month notice on 28th December 2010. She served the notice period, culminating in her departure on 31st January 2011. She claims she should have been given six months notice or pay in lieu of notice, under Clause 16 [a] [iii]. Clause 16 applied to termination *after probationary period and in the normal circumstances*. Redundancy is not termination carried out under normal circumstances, and therefore, Clause 16 was not available to the Claimant. She was given the correct notice period which she served out, and her claim for notice pay of six months is groundless and declined. Clause 17 provided for severance pay at the rate of fifteen days' pay for each completed year of service, based on the rate of pay applicable at the time of redundancy. This is the method followed by the Respondent in its offer of severance pay. The Court is convinced it was the correct approach under the CBA. The Claimant looked for severance under the other Clause that was irrelevant to the termination of her contract of employment. Her claim for terminal dues of Kshs. 316,000 is refused. She prays for unspecified gratuity. This again is without foundation. Nothing in the CBA or the law would warrant payment of gratuity. She has been offered severance pay, which affords her sufficient social security. The claim for gratuity is rejected. Alice seeks damages for unlawful

and unfair dismissal. The Court does not think she was dismissed. There was no breach of contract in the termination. There was nothing in the reasons, or procedure, that would be viewed as amounting to unfair termination. No form of damages are payable to Alice. The leave records provided by the Respondent satisfactorily show she did not have the balance of ten days of leave claimed. In the end, the Court upholds the offer of Kshs. 183,942.95 made to the Claimant by the Respondent. She is at liberty to collect this money from the Respondent. The Court would finally wish to commend the Respondent for the meticulous way in which it carried out the redundancy. This is a small enterprise, a Home for the Aged, but which showed a keen awareness of the rules pertaining to redundancy. Employers do not have to involve themselves in colourable exercises, or treat employees brutally, whenever there is a financial problem at the workplace. The level of consultation at every turn was superb. Other employers can learn from this Home of the Aged. ***The Claim is hereby dismissed with no order on the costs. The Claimant may collect her redundancy payment as offered by the Respondent.***

Dated and delivered at Nairobi this 3rd day of May 2013

James Rika
Judge.