



**REPUBLIC OF KENYA**

**INDUSTRIAL COURT OF KENYA AT NAIROBI**

**CAUSE NO 736 OF 2012**

**LOICE ROSE OBENGO..... CLAIMANT**

**VERSUS**

**NYANZA REPRODUCTIVE HEALTH SOCIETY .....RESPONDENT**

**JUDGEMENT**

**Mr. Nyabena for Claimant**

**Mr. Baluto for Respondent**

The Claimant Loice Rose Obengo filed a Claim against Nyanza Reproductive Society (NRTS) the Respondents herein claiming payments of terminal benefits and compensation for the unexpired term of contract alleging, Unlawful and unfair termination of employment.

The memorandum of claim dated 2 May, 2012 was filed on 3/5/2013 and the prayer thereof are as follows.

Payments of.

- a. *One month salary in lieu of notice in the sum of Ksh. 45,000.*
- b. *Payment in lieu of 22 Leave days not taken in the sum of Ksh. 45,000.*
- c. *Payment of Leave allowance in the Sum of Ksh.22,500*
- d. *Payment of the unexpired term of contract in the sum of Ksh.315,000*
- e. *Costs of the suit*
- f. *Any other remedy as the court deem fit.*

The case for the Claimant is that she was employed on the 15/11/2008 via a letter of appointment annexed to the statement of Claim as annexure 'LR 01'.

In terms thereof, she was to work as a Stores Manager at a monthly salary of Ksh 45,000.

The contract was due to end on 31<sup>st</sup> July 2012. She was placed on 3 months probation. was entitled to 21 days Leave and her salary would be reviewed annually subject to the prevailing economic conditions, satisfactory performance and good conduct.

Other terms and conditions of employment are outlined in the letter of employment, including;

- a. *Termination by either party by giving one month notice or*

*Payment in lieu thereof*

- b. *Notice of renewal of contract would be served 30 days prior to the expiry of the contract;*
- c. *No modifications to the contract until same was done in writing and agreed upon by both parties;  
and*
- d. *Upon termination of the contract the employer will pay all amounts due to the employee under the contract.*

On 10<sup>th</sup> January 2012, the Respondent terminated the employment of the claimant by a letter of the same date.

She had on 1<sup>st</sup>/11/ 2011 been Interdicted for 2 months pending investigation and disciplinary proceedings which allegedly took place on 4<sup>th</sup> January 2012 in terms of the said letter.

The letter states that she was found guilty on infractions which bordered on gross inefficiency in the stores and procurement disposals and tender price variations.

The letter authored by Mr. Ezra Owuor Okello Human Resource Manager finally stated;

*“ Informed by the departmental performance the committee resolved that an immediate restructuring be done. This excise has immediately eliminated the position you are currently holding and has created a new position of which you can express interest in once the advertisement is raised.*

*Consequently, the management would like to inform you that your current employment contract has been terminated with immediate effect . You will however be paid one month’s salary in lieu of notice as provided by Law upon satisfactory clearance”*

By the time of termination on 10/1/2012, she had been on paid leave (interdiction) for about four months.

As at October 2011, She was earning a gross salary of Ksh. 69,300 and was dully registered with NSSF and NHIF. The payslip of the said date was produced in court and marked Annexure 8.

In her testimony the Claimant confirmed that she was sent on paid Leave pending an Audit of the stores on 22/11/2011 and was called to a meeting on 4/1/2011 where she was interviewed about her education background and experience on stores management. She was then told to await a letter from the committee which she received on 10/1/2012 terminating her service.

She testified that she was yet to serve 7 months of her contract and was not paid December 2011 salary.

She told the court that she did not know the Agenda of the meeting until the time she entered the room. That she was unaware that it was a disciplinary hearing that would lead to her termination. She had not received a notice to show cause and therefore was unable to defend herself.

The Clamant finally added that she did not receive two months’ salary and 5% annual increment per the contract of employment. She was not given notice nor paid in lieu thereof. That she had 22 days leave pending but was not paid in lieu and that she should be compensated for the un served period of contract since the termination was unlawful and unfair.

Under cross examination she states that though she had not claimed December salary in the memorandum of claim she had a letter indicating that the Respondent had undertaken to pay the salary for that month . That this was an omission on the part of her Advocate.

She also denied that she had taken full leave noting that she had worked extra days on Saturdays and Sundays which were to be compensated by way of extra leave.

She denied that she had mismanaged the store as alleged or at all and would have demonstrated that well had she been given an opportunity to do so.

In particular she denied allegations made against her by the counsel to the Respondent. She also denied that she was incompetent and inefficient as alleged stating that she was singled out for victimization and her service was terminated unlawfully and unfairly.

She added that she had put in place the systems and set the stores management policy of the Respondent from scratch. That she did not sign the minutes of the meeting that purported to be a disciplinary hearing nor was she afforded a copy.

That she had no warning letters at the work place and had a good record which explains her salary increment in terms of her contract of service based on permanence.

The Respondent filed a statement of Response dated 9<sup>th</sup> July 2012 and filed on the same date.

The Respondent in the pleadings admits the particulars of employment, the fact of compulsory paid leave and an audit that took place with respect to the stores .

The Respondent also admits to the meeting of 4/1/2012 in which the Claimant was to be provided with feedback on the preliminary findings of the audit excise in the stores and transport department to determine irregularities and lack of efficiency in the said department that hampered the operations of the organization.

The Respondent alleges, which is denied, that the claimant acknowledged and admitted to several program infractions which bordered on gross inefficiency in the stores and procurement disposals and tender price variations.

In that meeting a decision was reached to terminate the services of the Claimant and a termination letter dated 10/1/2012 was given accordingly to the Claimant.

The Respondent denied that it owes the claimant any salary increments and that her terminal benefits were duly paid ,was owed no leave days or payment in lieu thereof and that since the termination was in terms of the contract she was duly offered payment in lieu of one month notice and was paid in respect of all days worked . That the Claimant be dismissed with costs.

One Mr.Fedinand Kizito Osama testified in support of the Respondents case. He is currently the Human Resource Manager of the Respondent but was not employed by the Respondent when the Claimant was there. That he solely relied on the records provided to him.

He testified that in terms of the records in her file, her performance was unsatisfactory and her employment was terminated in terms of her contract of service and therefore the Respondent did not owe her any terminal benefits, salary arrears nor was she entitled to be paid for the remaining period of her contract of service

He relied on the minutes of the meeting held on 4/1/2012 which are annexed to the statement of Response on page 38. The minutes are not signed by the Claimant and do not reflect that the meeting was one to conduct a disciplinary hearing in respect of the Claimant.

On the face of it the Agenda was to provide feedback on the preliminary findings of an audit conducted in stores and transport department to determine irregularities and those departments that hamper operations of the organizations.

### **Finding of facts**

The Court has carefully analyzed the pleadings and the evidence adduced by the Claimant and the

witness for the Respondent and has come to the following conclusion of facts;

1. That the Claimant was employed as a Stores Manager on contract from 15<sup>th</sup> November 2008 and the contract was to expire on 31<sup>st</sup> July 2012;
2. That she served until 10<sup>th</sup> January 2012 when the contract was terminated.
3. That the remaining period to be served by the time of termination was therefore 6 months and 20 days;
4. That through there is conflicting evidence between the Claimant and the Respondent regarding the reason why the contract of employment was terminated the letter of termination speaks for itself as follows;

*“ This exercise has immediately eliminated the position you are currently holding and has created yet a new position of which you can express interest in once the advertisement is raised ”*

It is therefore an irrefutable fact that the position of stores manager held by Claimant was abolished following a restructuring leading to the termination of the employment of the Claimant.

In short the Claimant was retrenched.

All other issues raised with regard to performance of the Claimant became irrelevant once a decision was taken by the Respondent to abolish her position following a restructuring exercise. Her fate was sealed once that decision was taken.

The Court has however looked at the reasons given for retrenching the Claimant to determine if the same were lawful and genuine and whether the procedure used was fair in accordance with the Law.

S.2 of the Employment Act, defines redundancy as

*“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 practice commonly known as abolition of office, job or occupation and loss of employment”*.

A plain interpretation of this provision identifies the elements of redundancy in simple terms as follows;

- a, loss of employment
- b, through no fault of employee
- c, loss of employment is initiated by the employer because the job is no longer available for various structural and operational reasons not to do with the employee.

A plain reading of the letter of termination shows that the employer clearly violated these requirements to the loss and detriment of the claimant in that;

- i. The office of Stores Manager was abolished due to alleged incompetence and gross inefficiency of the employee
- ii. That a new position not defined was immediately created to replace that of the Stores Manager and the employee was asked to apply to be re-employed in that position.

The conduct of employer above said is indicative of extreme bad faith and in direct violation of the employment Act. Furthermore in terms of section 40 of the employment Act an intended declaration of redundancy as happened in this case has to be notified to the Labour officer and to the employee herself.

The selection criteria for declaring the employee redundant having due regard to seniority in time and to

the skill, ability and reliability of each employee of the particular claim of employee affected by the redundancy her to be applied.

The employee declared redundant has to be paid not less than one months salary in lieu of notice, where notice is not served as happened here and the employer has to pay the employee declared redundant severance pay at the rate of not less than 15 days pay for each completed year of service.

To the extend that the Respondent disguised a termination for misconduct as abolition of office and therefore a declaration of redundancy, the termination was unlawful and unfair abinito.

This denied the claimant opportunity to know the real reason for the termination of her employment and therefore gave her no chance at all to provide reasons why she should not be targeted for termination.

**In the case of Swaziland Agricultural and Plantations Workers Union and Royal Swaziland sugar corporation Limited. Industrial Court of Swaziland case No 60/05**

I stated as follows;

*“it has been stated time and again that for retrenchment to be valid it must be substantially and procedurally fair and just towards the affected employees. In the case of **Anthantis Diesel Engine (pty) Ltd Vs NUMSA 1994 ILJ 1242 (A); and Sfonza vs Lekato Vet AG LTD 1994 ICJ 408 (IC)**; was restated that the employer is entitled to decide in principle to retrench employees but not to finalize and execute the decision without consulting the trade union or employees involved.”*

As to the requirement of

The notice to the affected employee(s) I stated as follows at page 13 of the judgement'

*“In the written notice the following information should be disclosed;*

- i. The reasons for the retrenchment;*
- ii. The alternatives considered by the employer to avoid retrenchment and the reasons given for rejecting them;*
- iii. The number of employees identified to be affected and their job categories;*
- iv. The selection criteria to be applied;*
- v. The date of termination of services;*
- vi. The proposed severance pay;*
- vii. The assistance to be offered to employee likely to be affected by the retrenchment; and*
- viii. The possibility of the future re-deployment of the retrenches.”*

The duty to consider alternatives is provided in the ILO recommendation 166 as follows;

Parties are to;

*“Seek to avert or minimize as far as possible termination of employment for reasons of an economic, technological, structural or similar nature without prejudice to the efficient operation of the undertaking establishment or service, and to mitigate the adverse effects of any termination of employment for these reasons.”*

It is the courts considered view that the conduct of the Respondent in this matter was not in good faith. This in effect was an unlawful and unfair termination of employment disguised as redundancy.

The Respondent has failed to proof the real reason for the termination of the Claimant as required by section 43(1) of the Employment Act.

The Claimant has clearly demonstrated and indeed proved on a balance of probabilities that an unlawful

and unfair termination took place as required under section 47 (5) of the Employment Act and the Respondent having failed to give the reason for the termination has failed to discharge its onus under the section of justifying the grounds for the termination.

Accordingly, the reason for the termination was not valid and the termination was not in terms of a fair procedure as required by section 45(2) (a) and (c) of the Employment Act.

Remedies

### **Notice Pay**

The Claimant is entitled to payment of one months salary in lieu of Notice in the sum of Kshs 69,300 which is admitted to have been her basic salary at the time of termination.

### **Payment in lieu of Leave**

The court is satisfied that at the time of termination the Claimant was owed 22 days leave and was not paid in lieu thereof. The Respondent is therefore ordered to pay Kshs 50,800 being payment in lieu of 22 days leave (This is calculated on the basis of a basic salary of 69,300/=)

### **December Salary**

The Claimant testified under oath that she was not paid salary for December 2011. The Respondent as the custodian of employment records had a duty to rebut this evidence by producing a payslip for the month but did not. The court finds that the Claimant is owed Kshs 69,300 being the salary for December, 2011.

### **Leave Allowance**

The claim for leave allowance is unproven and same is dismissed.

### **Compensation**

The Claimant's employment was unlawfully and unfairly terminated. Her career prospects as a Stores Manager was cut in the nub. She suffered lack of income and contractual entitlement up to the 31<sup>st</sup> July, 2012 when her contract was due to expire. She therefore did not serve a period of 26 months and 20 days.

Section 12 (3)

iii. Empowers the court to issue orders for specific performance and/or in terms of (v) award compensation in any circumstances contemplated under this Act or any written Law.

In the circumstances of this case, the claimant has prayed for compensation for the remaining period of the contract. The court has found that the said contract was unlawfully breached and proceeds to award compensation equivalent to 7 months salary as compensation for unlawful termination in terms of S 49 (1)(c) of the Employment Act in the sum of Kshs 485,100

**Total Award is Kshs 674,500/=.**

It is so ordered.

**Dated and Delivered** at Nairobi this 13<sup>th</sup> day of August, 2013

**MATHEWS N. NDUMA**

**PRINCIPAL JUDGE.**