



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI**

**CAUSE NO 1782 OF 2011**

**NICHOLAS WACHIRA KOIGIA .....CLAIMANT**

**VERSUS**

**NCR KENYA LIMITED ..... RESPONDENT**

**JUDGMENT**

By a Memorandum of Claim dated 17<sup>th</sup> October and filed on 19<sup>th</sup> October 2011 the Claimant alleges unlawful termination of his employment on grounds of redundancy and failure to pay his terminal dues by the Respondent. He alleges he was employed on 27<sup>th</sup> February 1986, that in early January 2011 the Respondent reconfirmed his continued employment through the Respondent's Manager Pay Audit Process and he was given the official salary payment details for the annual review cycle commencing 1<sup>st</sup> March 2011. That he was also asked to sign the bonus compensation contract.

That on 11<sup>th</sup> April 2011 the Respondent notified him of termination of his employment through redundancy, that the redundancy was both unlawful and unfair for failure to comply with the legal requirements. He seeks a declaration that the redundancy was unlawful and unfair, payment of terminal dues in the sum of Kshs.18,332,260.30 plus unpaid bonus with interest, costs and any other relief the Honourable court may deem just to grant.

The Respondent filed its Response to the Memorandum of Claim dated 2<sup>nd</sup> November 2011 on the same date.

The Respondent avers the Claimant was declared redundant after both parties had extensive deliberations and an amicable package agreed on, that the Claimant subsequently refused to accept the agreed package because he was required to execute a General Agreement which he claimed was oppressive, that it fully complied with the provisions of the Employment Act, that it tried to withdraw the redundancy notice on 23<sup>rd</sup> May in consideration of the period of service worked by the Claimant and asked him to resume duty under a different docket but the Claimant rejected the offer.

The Respondent avers that it offered the Claimant his terminal benefits of Kshs.9,928,408.78 made up of leave days, severance pay, ex-gratia payment of 6 months salary and bonus but the Claimant declined. The Respondent prays that the Claim be dismissed with costs.

The case was heard on 23<sup>rd</sup> May 2013. The Claimant was represented by Mrs. Ngugi while the Respondent was represented by Mr. Oyatta.

The Claimant testified that he was employed by the Respondent on 27<sup>th</sup> February 1986 and worked in

various capacities. At the time of termination he was Manager Professional Services as confirmed in his appraisal for 2011. That appraisals were done in 2 stages with the 1<sup>st</sup> one done in January at which he was given a salary review for the next 12 months. The 2<sup>nd</sup> was a performance appraisal to be done by his line Manager who is stationed in Cyprus and was scheduled for 11<sup>th</sup> April 2011 which fell on a Monday. That after the appraisal he was ambushed by being informed that his position had been declared redundant. He was then sent a letter dated the same date through email. He was supposed to work until 11<sup>th</sup> May 2011. That he prepared handover notes as requested by the Managing Director. That he held discussions with the Managing Director on his exit package but no agreement was reached. That he did not sign any document before leaving employment. That on 31<sup>st</sup> May 2011 he was presented with 2 disclaimers. One was the normal disclaimer signed by exiting employees. The other was more detailed and he declined to sign it as it contained some information that was not correct and also some unfavorable conditions on how he should conduct himself after exiting the Company. That he got the final tabulation of his benefits on 31<sup>st</sup> May 2011 and it was about Kshs.9 million. He did not agree with the calculations as his car allowance was not factored in the calculations. That the correct calculation including the car allowance is Shs.7,655,857.70. He also claims one year's additional salary as there was expectation of salary for another year at kshs.7,361,401. He further claimed Medical Cover in the sum of Kshs.3,315,000 as per Medical scheme. He also claims unpaid salary in the sum of kshs.263,786. His total claim is Kshs.18,696,046 which he claims with interest and costs. He denied that there were any prior discussions about his redundancy, and he first heard about the redundancy on the date of his appraisal.

Under cross examination the Claimant stated that he knew Reuben, the Managing Director, that they had worked together since he was employed and they had good working relations. They had discussed his terminal dues with Reuben. He denied that he failed to sign his discharge voucher because of the agreement at page 6 of the Response which is an additional agreement that had been newly introduced for senior staff to execute on disengagement. He denied that he had agreed on the figure to be paid to him and that he only declined to sign because of the conditions in the additional agreement. He stated that there was no dispute over his leave days and the bonus. That he disputed the severance pay and the ex-gratia payment which did not include car allowance, that if the figure is computed without car allowance then the Respondent's calculation is correct. He was also claiming medical cover. That he was also asking for an additional 1 years salary as ex-gratia as that was his expectation. He further stated that there is no dispute over his pension. He admitted that the Respondent offered to pay him 9.9 million based on its calculations.

RW1 Reuben Opondo Omamo testified on behalf of the Respondent. He stated that he is the Managing Director of the Respondent and had worked for the Respondent for over 30 years. That he worked with the Claimant for all the 25 years that the Claimant worked for the Respondent.

That on 11<sup>th</sup> April 2011 the Claimant held discussions with his line Manager Mr. Panicos Demetrides after which the Claimant walked into his office and briefed him about the discussions on redundancy. He informed the Claimant that he was yet to be advised. The Claimant informed him that he had been told roughly what was payable based on Kenyan law and was informed that the details will be discussed with the Managing Director. That there was communication on email through the Claimant's line manager, that he was informed that discussions had already been held with the Claimant. A copy of the Claimants letter was scanned and sent to him. That he told the Claimant exactly what was payable to him which is 15 days per year worked and incentive pay. That car allowance was not part of basic salary as it was given only to employees who were required to visit customers. That car allowance is not included in calculation of the terminal benefits. That the medical cover was taken through an insurance policy for inpatient cover while outpatient cover was managed in house and had a limit of Shs.90,000/=. That it is only payable when an employee gets sick. That the Claimant had not submitted any medical claims. That there was no basis for the claim of Shs.3.3 million. The medical policy covered the Claimant up to June 2011.

That ex-gratia is normally paid at 3 months' salary, that the Claimant entrusted him with negotiation of the ex-gratia due to their good relationship and he negotiated for the Claimant from 12<sup>th</sup> April to 11<sup>th</sup>

May and managed to get an approval to pay the Claimant 6 months' salary as ex-gratia. That ex-gratia is paid at the discretion of the company. That there was no dispute on leave days and bonus. The total amount payable to the Claimant was kshs.9,664,622.78. That they agreed on the figure with the Claimant on 27<sup>th</sup> May 2011 and what remained was the signing of the disclaimer. That this was scheduled to be done on 31<sup>st</sup> May 2011. That the agreement and disclaimer were presented to the Claimant for signature on 31<sup>st</sup> May 2011. The Claimant he said he was fine with the disclaimer but not the agreement, that he explained to the Claimant that Human Resource had introduced the agreement for senior positions and the Claimant was not the first person to sign it, that the previous Managing Director had signed the same agreement. That the Claimant said he was not going to sign and he was going to reconsider his position. That when RW1 informed the Claimants line manager and Human Resource Department that the Claimant had declined to sign the agreement they opted to withdraw the redundancy and offer the Claimant another position on the same terms. That the Claimant declined both offers. That this is confirmed by the letter from the Claimants lawyer dated 6<sup>th</sup> June 2011 annexed at page 11 of Response. That the Respondent did not get any demand for Shs.18 million from the Claimant. That the Claimant's dues were not paid because he declined to sign the disclaimer even after the agreement was withdrawn. He urged the court to order the Claimant to sign the disclaimer so that he could be paid the shs.9.9 million less taxation.

Under cross examination RW1 stated that the Claimant was a gentleman and a very tough man when negotiating with customers. That the Claimant was not a disagreeable person. That there were no discussions about the redundancy prior to 11<sup>th</sup> April 2011, that there were no engagements with the Ministry of Labour, that he got official communication about the Claimants redundancy a day after the Claimant informed him about it. That medical cover and security benefits are not included in annual performance and salary review. That medical cover runs up to June every year. That performance appraisal is done in January and salary was discussed at that point. That car allowance was factored into the payslip but security was not factored. That the Claimant was in the office up to 11<sup>th</sup> May 2011 and thereafter used to go to the office to check if ex-gratia of 6 months had been approved. That the letter of re-instatement is dated 23<sup>rd</sup> May 2011 after the Claimant had already left, that the Respondent never received the demand for Kshs.18 million, that the last letter from Claimants lawyers was dated 29<sup>th</sup> July 2011. That the Claimant was a manager and knew reasons for payment of ex-gratia and therefore had no expectation of payment of 1 year's salary as ex-gratia. That the Respondent is still ready to pay the Claimant shs.9.9 million.

The parties filed and exchanged written submissions after conclusion of the hearing.

I have considered the pleadings, the documents filed by the parties, the oral evidence and the submissions.

The issues for determination in my opinion are the following;

1. Whether the redundancy of the Claimant was unlawful and unfair.
2. What the Claimant is entitled to as the redundancy package.
3. Whether the Claimant is entitled to interest and costs.

1. Whether the redundancy of the Claimant was unlawful and unfair.

The Employment Act provides for redundancy at section 40(1) as follows;

**40. Termination on account of redundancy**

***(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.*

The Claimant alleges that the redundancy was unfair as the Labour officer was not notified. The Claimant has relied on the case of **Aviation and Allied Workers Union versus Kenya Airways Ltd & 3 others (2012)eKLR**. The case deals with the issue of consultation, which is not mentioned under section 40 (1) which only provides for notification of the employee personally in writing. The circumstances of that case are not similar to this case. The case was decided on the basis that the Respondent wanted to get rid of an employee who was involved in trade union activities. That is not the case herein. In any event the case is pending on appeal before the Court of Appeal and can therefore not be cited as an authority until the appeal has been determined. The other cases cited by the Claimant have not been availed to the court.

The Respondent however admits not notifying the Labour Officer about the redundancy of the Claimant. As submitted in the Claimant's submissions this is a mandatory requirement of the law.

It has also been submitted for the Claimant that he was only notified of the decision to declare him redundant after such decision had been reached without asking for his input.

My understanding of the provisions of Section 40(1) (a) and (b) is that there is no requirement that the Claimant should be notified before a decision is made. The law in my understanding is that the employer would have made the decision to declare an employee redundant before it can notify the employee of that intention. The employee may then question the redundancy if the reasons given by the employer is not genuine or the selection is not fair.

In the present case the Claimant was notified of the intention to declare him redundant at a meeting with his immediate supervisor. He did not question the redundancy. In fact he immediately informed the Managing Director about the decision and after receiving the letter that was sent to him, he immediately embarked on discussing his exit package.

I find that the redundancy was only unlawful to the extent that the Respondent failed to notify the Labour Officer.

## **2. What the Claimant is entitled to as redundancy package**

The law provides for payment of leave in cash, notice or pay in lieu and severance pay at not less than 15 days pay for each completed year of service.

The Claimant stated that there is no dispute, over the leave and notice. He however disputes the severance pay which he submits should have included the car allowance. He further claims payment of 1 years salary and medical allowance based on the fact that both were a legitimate expectation.

The only issues I have to decide on are therefore whether the Claimant is entitled to calculation of severance pay to include the car allowance or not, and whether he is entitled to 1 year's salary and medical expenses.

Section 40(1) (g) of the Employment Act provides that an employee is entitled to severance pay at the rate of not less than fifteen days salary for each completed year of service. Pay is not defined in the Employment Act. During the hearing the Claimant testified that the Respondent previously used to give him a car to facilitate his work but later on withdrew the car and gave him a car allowance instead. This means that the car allowance is not part of the Claimants pay, wages or salary but a separate allowance to enable him perform his work. Not being part of his wages or salary, the car allowance cannot be included in the calculation of the terminal benefits.

The Claimant himself testified that he is claiming car allowance as part of his basic pay. Basic pay does not include allowances. It covers only the wage or salary. Severance pay is normally calculated on the basic salary.

For this reason I find that the calculation of severance pay based on the Claimant's basic salary is correct and that the car allowance is not part of basic salary and is therefore not taken into account in the calculation of severance pay.

The Claimant further claims 1 year's salary as ex-gratia. RW1 testified that the company usually pays 3 months' salary as ex-gratia and that the Claimant entrusted him to negotiate a higher rate which was eventually approved at 6 months' salary. The fact that this is called ex-gratia and that it is negotiated means it is not a right. The court cannot impose a higher rate than that which the Respondent usually paid or a higher figure than that negotiated and agreed upon between the Claimant and the Respondent. I therefore find that there is no basis for the claim of 1 years salary as exgratia as the Claimant could not have legitimately expected that which was not a normal payment by the company.

The Claimant further claims medical allowance of shs.3.3 million. He testified that he had a medical cover for the said amount. I find that the Claimant is not entitled to the payment as medical cover is only

claimed upon an employee falling sick and utilizing medical attention.

It is not an allowance that was payable in cash. The Claimant has not alleged that he fell sick and incurred such an expenses for which he seeks re-imbursement.

I find that the claim has no legal basis.

For the foregoing reasons I find the Tabulation of the Claimants terminal benefits by the Respondent in the sum of kshs.9,928,408.78 to be correct. I dismiss the claim by the Claimant and direct that the Respondent do pay the Claimant's terminal benefits of Kshs.9,928,408.78.

Each party shall bear its costs.

Orders accordingly.

Read in open Court this 30<sup>th</sup> day of September 2013

**HON. LADY JUSTICE MAUREEN ONYANGO**

**JUDGE**

In the presence of:

**Nicholas Wachira** Claimant in person

**Otieno h/b for Mr. Onyatta** for Respondent