



REPUBLIC OF KENYA  
IN THE INDUSTRIAL COURT AT NAIROBI  
CAUSE NUMBER 1979 OF 2012

**BETWEEN**

CAROLE NYAMBURA THIGA ..... CLAIMANT

**VERSUS**

OXFAM.....RESPONDENT

*Rika J*

*CC. Leah Muthaka*

*Mr. Muriuki instructed by Mulondo, Oundo, Muriuki & Company Advocates for the Claimant*

*Ms. Muraguri instructed by Muriu, Mungai & Company Advocates for the Respondent*

ISSUE IN DISPUTE: UNLAWFUL AND UNFAIR TERMINATION

AWARD

1. Oxfam is a Non-Governmental International Organization, dedicated to the eradication of poverty and injustice everywhere. It has a strong presence in Kenya, with a registered Office at Shelter Afrique House in Nairobi. This Organization employed Carole Nyambura Thiga as its Regional Campaigns Manager, through a written contract of employment dated 3<sup>rd</sup> September 2010. She alleges her contract of employment was unlawfully and unfairly terminated by the Respondent on 1<sup>st</sup> April 2011. She filed a Statement of Claim on 3<sup>rd</sup> October 2012 seeking the following Orders:-

- a. Unpaid April 2011 salary at Kshs. 230,000;
- b. Salaries for the unexpired period of her contract at Kshs. 460,000;
- c. Damages for wrongful, unlawful termination of employment;
- d. Interest; and any other suitable remedy the Court may deem necessary to grant.

2. Oxfam filed its Statement of Reply and Counterclaim on 9<sup>th</sup> November 2012. Her contract was terminated on 1<sup>st</sup> April 2011, while she was still serving probation. It was terminated fairly and lawfully. At the time of termination, Carole had a medical bill which had overshoot her insurance limit by Kshs. 309,859.67. The Respondent prays the Court to dismiss the Claim and allow the Counterclaim. The Claimant filed a Reply to the Counterclaim on 5<sup>th</sup> February 2013. She testified and closed her case on 12<sup>th</sup> March 2013. The Respondent testified through its Human Resource Manager Daniel Waweru Kamunyu and closed its case, the same date. The dispute was last mentioned on 24<sup>th</sup> April 2013 when

Parties confirmed the filing of their Closing Arguments, and were advised by the Court Award would be delivered on notice.

3. Carole testified that she is a Gender Specialist. She is currently a Consultant with the United Nations. She worked for Oxfam from January 2008 to April 2011. She worked on a 6 month contract with Oxfam GB. Her last 6 month contract started on 3<sup>rd</sup> September 2010, and lapsed in March 2011. She was given a 3 month contract dated 25<sup>th</sup> March 2011. She performed the same role, but the Respondent advised her that the first 4 weeks of this latest contract, would be regarded as probationary. Carole did not understand the reasoning behind this. The contract would terminate automatically on 24<sup>th</sup> June 2011. The expiry date was however subject to confirmation on 24<sup>th</sup> May 2011.

4. The Respondent terminated the Claimant's contract in a letter dated 1<sup>st</sup> April 2011. She was informed her last working day at Oxfam would be 6<sup>th</sup> April 2011. She would be paid notice for the period from 7<sup>th</sup> April 2011 to 30<sup>th</sup> April 2011. The reason for termination was not given. Earlier in the day, her Line Manager called her to say that the donor had reassigned funds elsewhere, and there were no funds available to continue with her project. She did not receive pay in lieu of notice as promised. She demanded through her lawyers, for payment of her dues-

comprising notice pay and salary for April 2011, amounting to Kshs. 460,000. Oxfam responded in a letter dated 30<sup>th</sup> January 2012. The Respondent alleged Carole owed Oxfam Kshs. 249,159.67 in medical bills. She nonetheless had been cleared by the Respondent's Financial Office. The Check List Form confirms she was owed Kshs. 230,000 by Oxfam. It confirmed she owed Oxfam nil.

5. She explained that in the Check List, it was indicated by hand under column B that she owed her former employer Kshs. 309,859.67 in medical bills. She confirmed she signed this Form. At the time of signing, the medical bill of Kshs. 309,859.67 had not been indicated on the Form. She was cleared by the Finance Officer. The second Form was signed by her Line Manager. She denied that she owes Oxfam any money. The allegation that she owed such money came to her as a shock. The amount was claimed from her initial 6 month contract, which had a full medical cover.

6. She fell ill in February 2010. This was before the grant of the last 3 month contract. She was expectant, and was attacked by robbers at her residence. Her blood pressure went up, and she had to be hospitalized for about 3 weeks. The blood pressure did not stabilize, and the doctors advised her pregnancy be terminated. The bill was settled by Vanbreda International as captured in the Respondent's annexure 3. She was asked to pay the balance of Kshs. 249,157.67. She did not know why the amount changed to Kshs. 309,859. The Respondent had asked the Insurance Provider to treat the case as a maternity case, rather than an ordinary medical hospitalization, to enable Carole maximize the benefit. The proposal was accepted. She was not shown any proof that she had exceeded her cover. Before she filed her Claim in Court, Oxfam did not make any demands on her. It was only after she asked for her terminal dues, that she was informed of her indebtedness to the Respondent.

7. The Claimant told the Court on cross-examination that the first contract expired on 1<sup>st</sup> March 2011. The second one was an extension. The second contract did not state that the Claimant had been granted extension. She was designated Regional Campaigns Manager in either case. There was a gap of 23 days between the lapse and beginning of the two contracts. She reported to a different person when working under the second contract. She viewed the second contract as an extension.

8. The second contract was effective from 25<sup>th</sup> March 2011. The probationary clause provided for termination. She received the termination letter on 1<sup>st</sup> April 2011. It was within the probationary period, according to the terms of the second contract. The Respondent did not explain to the Claimant the lack of funding. There was a meeting with an Officer of the Respondent Michael O'Brien. Oxfam is donor-funded. Projects undertaken by the Organization had a lifespan. They would come to an end at some point in time. Carole did not have evidence that the Respondent had sufficient funds to keep her in employment. She does not believe termination was based on the reason given by the employer. She

however did not protest against termination at the time she was clearing with the Respondent.

9. She was given 30 days notice. The Respondent was not being generous. She testified that she is entitled to redundancy benefits. In actual sense she was not under probation. The contract was terminated maliciously. The hospital bill from Kenya Hospital Association was for Kshs. 983,416. Vanbreda wrote to the Claimant, but she never received the letter explaining the medical coverage. The bill was settled, but Carole did not know who settled it. She signed the Checklist in June 2011, but was not aware she had exceeded the limit of her maternity insurance cover. She would not have signed the checklist if the amount claimed by the Respondent was included. She does not know if the sum is due. The ceiling for the medical cover was 5,000 British Pounds. The maternity cover limit was for a similar amount. Carole testified she was entitled to both. She explained on redirection that she worked for Oxfam from 2008.

Contracts were renewed periodically. On her last contract, she was still attending to her project work. She had been at it from January 2008. The project was completed by someone else after Carole left. The termination letter said the Claimant could not appeal the decision. The Respondent did not pay anything as notice to the Claimant. The invoice was from the Hospital Association, not Oxfam or its Insurer. There was no demand made upon Carole to pay any money outstanding from the hospital bill, until she came to Court. She prays the Court to grant her prayers.

10. Daniel Waweru Kamunyu testified that the Claimant was employed on a 6 month contract on 3<sup>rd</sup> September 2010. She served this contract in full up to 2<sup>nd</sup> March 2011. The contract lapsed automatically, as mutually agreed. An extension could be granted. In such an extension, there would be no break in service. A break of 7 days between the contracts would mean there was no extension. There was a break of 23 days in the case of Carole. There was no extension. The contracts were independent of each other. The employee was aware. There was probation of 4 weeks. Termination took place on 1<sup>st</sup> April 2011 within the probationary period.

11. Oxfam is donor dependent. Without funds, it terminates pending projects. This is what happened to the project overseen by Carole. She was aware there were no funds to carry on with the project. The Line Manager explained to her. Waweru was aware of the discussion on the subject that took place between Carole and her Supervisor. Termination was fair, the funds having been apportioned elsewhere. Carole did not challenge termination at the time the decision was made. She was offered 1 month notice, yet she was on probation. Finance department had cleared her, but it was the Human Resource department tasked with computation of her medical bills. The figure due from her was calculated at Kshs. 309,859.67.

12. Waweru explained that the Respondent has an in-house medical scheme administered by Vanbreda. The employees are not covered through insurance. At the end of the day, the

Respondent was supposed to pay the bill. Waweru discussed with Carole and she was aware of the total maternity bill, and what was paid by Vanbreda. It was agreed her case be treated as a maternity, rather than a normal medical case. Maternity cover offered greater benefit. She cleared with the Respondent on 13<sup>th</sup> June 2011. Waweru wrote to her an email in April 2011, two months before she cleared, in which her full maternity bill was revealed to her. She cannot say she was not aware of her obligation to the Respondent at the time she cleared. She did not show the Respondent any evidence demonstrating she had paid the balance of her maternity bill. Waweru testified that termination was fair.

13. On cross-examination the witness testified that Carole was given the reason justifying the termination decision. Where the contract was to be renewed, the employee would discuss with her supervisor before renewal. There were no new conditions and terms of employment. Extension could only be done before the lapse of the old contract. Regardless of the nature of the contract, Oxfam Policy called for probation. It was not to be seen as a case of probation in perpetuity. She was not undertaking the same duty. The Respondent took into account what was paid by the National Hospital Insurance Fund, and came up with the balance of Kshs. 249,159.67. The Respondent is asking for Kshs. 309,859.67. The check list suggested she is owed Kshs. 230,000 by Oxfam. There was no set off. Waweru did not have any document in Court to show the limit for the medical and the maternity covers. It was Vanbreda who would advise if a case was to be treated as maternity or medical. Waweru was not aware that Carole

suffered hypertension. She signed the checklist on 13<sup>th</sup> June 2011, while Michael Obrien signed on 12<sup>th</sup> July 2011. The sum of Kshs. 309,859.67 was on the document at the time the Claimant signed. Waweru asked the Court to dismiss the Claim and uphold the Counterclaim.

*The Court Finds and Awards:-*

14. The Claimant was employed by the Respondent as a Regional Campaigns Manager on 3<sup>rd</sup> September 2010. She testified she had worked with the Respondent previously, from 2008. It was not clear what the terms of her previous employment were. She however exhibited a written contract dated 3<sup>rd</sup> September 2010, where she was engaged to work as the Oxfam Regional Campaigns Manager for 6 months. This contract lapsed on 2<sup>nd</sup> March 2011. Starting 25<sup>th</sup> March 2011, the Claimant was offered another contract for 3 months. She did not serve this contract in full. The Respondent terminated the contract on 1<sup>st</sup> April 2011. No reason or reasons are given by Oxfam in the letter of termination for its decision, but the witness who testified for Oxfam told the Court the decision was made due to financial constraints.

15. Termination on 1<sup>st</sup> April 2011 took place during probation. Although the Claimant was not a new employee, she was subjected to probation of 4 weeks. This according to the Respondent's evidence is the Policy of Oxfam. An old employee working under a new contract must undergo probation and is treated as a new employee under this Policy. This is a strange Policy that under the Kenyan Labour Law regime amounts to an unfair labour practice. The Claimant had been working for the Respondent from 2008. She was discharging the same role in continuity. There was only a short break of 23 days between her two written contracts.

16. Probation is served by new employees to provide job adjustment opportunity for both the new employee and the employer, to determine whether to continue with the employment relationship. Under Section 42 [1] of the Employment Act 2007, an employee who is on probation, is not entitled to the minimum statutory procedural guarantees created under Section 41, upon termination of the contract of employment. Employment during probation is at-will. The protections afforded to regular employees under the unfair dismissal laws are not available to employees whose contracts are terminated while on probation.

17. The Claimant was not a new employee on 25<sup>th</sup> March 2011 when the Respondent offered to employ her for 3 months. There was nothing new she was being called upon to learn. She was not a stranger at Oxfam, and needed no induction. There was no need to ask her to serve probation. Such a perpetual probation clause has no place in the Kenyan Labour Law. Employees would be denied the right to claim remedies under the unfair termination law, even after years of service, if such a policy is allowed to take root. The Court completely rejects the evidence of the Respondent that the Claimant was on valid probation at termination, and therefore disentitled to claim for unfair termination.

18. The contract given to her on 25<sup>th</sup> March 2011 was in the nature of a renewal. The expired contract provided for renewal for further term with the employee's consent, under the 'employment term' clause. It contemplated review, renewal and/ or extension. There were no new duties given to Carole on 25<sup>th</sup> March 2011. She remained the Regional Campaigns Manager, and worked on the same project. She continued to earn Kshs. 2,760,000 per annum.

19. Was her contract fairly terminated? She was entitled to work for 3 months in accordance with her last contract. Termination was on 1<sup>st</sup> April 2011. The Respondent did not state the actual reason for termination in the letter dated 1<sup>st</sup> April 2011. It was however explained to the Court that the Claimant and the Respondent's Officer Michael O'Brien had held a meeting prior to 1<sup>st</sup> April 2011, where the reason for termination was explained to the Claimant. Oxfam is donor dependent, and funds for the project Carole was overseeing were reassigned elsewhere. It was not possible for the Respondent to finance the project. She appears to have been contented with the Respondent's justification. She did not protest against termination immediately. The Court is satisfied that the Respondent had a valid reason in terminating the Claimant's contract of employment. Termination of employment that is occasioned by

economic reasons is properly in the domain of redundancy. The Claimant may have good reason to argue that the Respondent ought to have treated her case as one of redundancy. Carole is however bound by her contract, which had a clause with respect to a redundancy situation. The clause states, “ *If you are on fixed term contract, you will not be entitled to a redundancy payment. You will either work to the end of your contract or be paid to the end of your contract.*”

20. The Claimant’s contract was to terminate on 24<sup>th</sup> June 2011. The Respondent terminated the contract on 1<sup>st</sup> April 2011, 2 months and 24 days, before the agreed date of termination. As observed above, termination was necessitated by an economic reason, and the clause relating to redundancy/ severance payment in the Claimant’s contract should have governed her terms of exit. The alternative to her working to the end of her contract *was to pay her to the end of her contract*. The Court is satisfied that her claim for the unexpired contractual period is merited under this clause. That period amounts to 2 full months and 24 days. At the rate of Kshs. 230,000 per month, the Claimant is entitled to Kshs. 230,000 x 2 = Kshs. 460,000 + [Kshs. 230,000 divide by 26 working days x 24 days = Kshs. 212,307] = Kshs. 672,307. The Court is satisfied that the Claimant was entitled to a proper 1 month written notice of termination, or 1 month salary in lieu of such notice. It was improper as observed above, to subject her to probation while she had worked for years for the same employer, in the same capacity. The notice period applicable to probationary employees would not apply to her. She was to be treated as all confirmed employees were, and given 1 month written notice of termination, or 1 month salary in lieu of such notice. The Court grants to her 1 month salary in lieu of notice at Kshs. 230,000. The claim for damages is rejected, the Court having found that the Respondent had valid reason to terminate the contract.

21. Is the Claimant indebted to the Respondent in terms of the Counterclaim? There is no doubt that she was hospitalized at the Nairobi Hospital in the Months of February/ March 2011. She was expectant and had high blood pressure, necessitating surgical operation. In her evidence, Carole conceded the medical bill was paid, but surprisingly told the Court upon cross-examination that she did not know who paid this bill. She did not know she had overshot her limit, and did not know if the amount was due from her. She was not forthright in defending the Counterclaim. How would a reasonable patient not know the details of her hospital bill? The Court is satisfied that the Claimant’s maternity bill was met by the Respondent through its healthcare scheme. The Claimant exceeded her limit, and was informed by the Respondent of

her outstanding obligation to the Respondent, at the time of termination. The Respondent however, appears not to know the exact amount due from the Claimant. In the clearance forms, the amount was indicated to be Kshs. 309,859.67. In the reply to the Claimant’s demand letter, the Respondent wrote on 30<sup>th</sup> January 2012 counterclaiming Kshs. 249,159.67 from the Claimant. In the Counterclaim filed in Court, the Respondent seeks the sum of Kshs. 309,859 .67 from the Claimant. The testimony of Mr. Waweru appears to suggest that this last figure was arrived at without having factored in what portion of the bill was paid through the Claimant’s National Hospital Insurance Fund Account. In which case the sum of Kshs. 249,159.67 should be the correct sum owed to the Respondent by the Claimant. The Respondent is granted the sum of Kshs. 249,159 .67. In sum-:

***[a] Termination of the Claimant’s contract of employment was fair;***

***[b] The Respondent shall pay to the Claimant 1 month salary in lieu of notice at Kshs. 230,000, and salaries for the 2 months and 24 days left in the contract at Kshs. 672, 307, total Kshs.902,307;***

***[c] The Counterclaim succeeds in the sum of Kshs. 249,159;***

***[d] Upon offset the Respondent shall pay to the Claimant the sum of Kshs.653, 148 within 30 days of the delivery of this Award; and***

***[e] No order on the costs and interest.***

Dated and delivered at Nairobi this 27<sup>th</sup> day of September 2013

James Rika

Judge