



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 1937 of 2011

IRENE NASERIAN KARBOLO.....CLAIMANT/APPLICANT

VERSUS

KENYA AIDS NGOS CONSORTIUM.....RESPONDENT

(Before Hon. Justice Byram Ongaya on 18th October, 2012)

JUDGMENT

The Claimant Irene Naserian Karbolo filed the memorandum of claim through Laichena Mugambi & Company Advocates. The Respondent Kenya AIDS NGOs Consortium filed the statement of response on 01.03.2012 through Nungo Oduor & Waigwa Advocates.

The Claimant is praying for judgment against the Respondent for:

- (a) A declaration that the termination of the Claimant's employment by the Respondent was illegal, unjustified and unlawful and was contrary to the law.
- (b) Three years service pay equivalent to one month salary times three making Ksh.158,700.
- (c) Reasonable 3 months notice pay being Ksh.158,700.
- (d) Unpaid salary for the month of June Ksh.52,900/=.
- (e) General damages for unlawful and unwarranted termination.
- (f) Damages for delay of payment of May, 2011 salary.
- (g) Interest on (b)(c) and (d) above.
- (h) Any other or further relief that the Honourable court may deem fit to grant.

This cause was heard on 15th October, 2012 and on 16th October, 2012. The Claimant gave evidence to support her case. The Respondent's witness was one Evelyne Muhonja Agala, the Respondent's Human Resource and Administration Officer.

The Claimant was employed by the Respondent by the letter dated March 2, 2009. The letter stated as follows:

**“March 2, 2009
Irene Naserian
P.O. Box 69866
Nairobi**

Dear Irene

RE: ENGAGEMENT

Kenya AIDS NGOs Consortium is a national membership network of NGOs/CBOs and religious organizations involved in or having interest in HIV/AIDS and STI activities in Kenya. Our mission is to be a Premier Organization committed to providing and promoting leadership, collaboration and enhancing capacity among Civil Society Organizations for Collective action towards effective responses to HIV and AIDS and its impact. KANCO coordinates over 900 NGOs and CBOs in Kenya and works closely with both business sector and Government of Kenya with specific focus on Policy and Advocacy, Capacity Building, Promoting HIV and AIDS information access and documentation, grants making and grant management.

Thank you for your application to be considered for employment as a Program Officer in Policy and Advocacy Department. I wish to inform you that your application has been accepted and you are expected to report to work with effect from 4th March, 2009. You will be expected to report to the Programs Manager in Policy and Advocacy Department. During this appointment, you will be entitled to a salary of Ksh.42,000/=.

Attached please find a bio-data form and your job description and return a signed copy of this letter to the undersigned.

We wish you all the best in your new appointment.

Yours faithfully,

KENYA AIDS NGOs Consortium

**SIGNED
Allan Ragi
Executive Director**

I have read and I accept the terms stipulated my job description.

**Name: IRENE NASERIAN KARBOLO
I.D. NO. 23394685**

Signature: SIGNED Date: 4th March, 2009”

Following the appointment, the Claimant testified that she served the Respondent until May 2011 when she was involved in implementing the Child Rights Project funded by the Health link International. On 6th June, 2011 the Claimant testified that she was served with a letter that the Child Rights Project had come to an end and the Respondent could not retain her in employment. The letter which was dated 2nd June, 2011 read as follows;

“June 2nd, 2011

**Irene Naserian Karbolo
P.O. Box 598-20500
Narok**

Dear Irene,
RE: END OF PROJECT

We would like to make reference to your engagement as a Project Officer. As you are aware this Child Rights Project ended on February 2011, we wish to inform you that KANCO is not in a position to keep you on employment effective from June 1st, 2011.

This is therefore to give you a one (1) month notice terminating your services and your last working day is June 30, 2011. During this time, you are advised to liaise with your supervisor to clear all the pending activities you may have been involved which including Clearing with the Finance Department. You are also advised to take pending leave days.

On behalf of KANCO team, I wish you all the best in your future endeavours.

Yours sincerely

KENYA AIDS NGO Consortium (KANCO)

SIGNED
Allan Ragi
Executive Director”

The Claimant testified that in the letter of 2.06.2011, she was required to stop working on 30.06.2011 and the letter had been delivered to her on 6.06.2011. The Claimant further testified as follows:

1. That her letter of appointment referred to employment in the capacity of a Programme Officer and it did not refer to the Child Rights Project.
2. That she was issued with her job description which she signed on 24.11.2010 in which her duties were elaborately set out and there was no specific reference to the Child Rights Project. That the Child Rights Project was only one of the many duties she was employed to perform.
3. That in June she was required to work to clear pending activities and to prepare a handing over report. That the report was submitted on 24th June, 2011 and she was not paid her salary for June 2011. She was never paid any of her terminal dues.
4. Being dissatisfied with the decision of the Respondent, the Claimant wrote to the Respondent the letter dated 15th June, 2011 and received on 16th June, 2011. The letter stated, thus,

“Dear Sir,

RE: UNLAWFUL TERMINATION OF MY EMPLOYMENT

I refer to the above matter and your letter dated 2nd June, 2011 and would wish to respond as follows:

1. **That I was employed by KANCO on 2nd March, 2009 as Program Officer in Policy and Advocacy Department.**
2. **That my conduct while in your employment was exemplary as confirmed in your confirmation letter dated 1st July, 2009.**
3. **However, and most surprisingly in your letter dated 2nd June 2011 you terminated my employment on the ground that the Child Rights Project came to an end and that you cannot keep me in employment. To my knowledge I started implementing the Child Rights Project in 2010 which came to**

end in October following the closure of healthlink. Since then I have been carrying out my duties as a Program Officer. I would like to bring to your attention my job description which lays out my duties and responsibilities as a legal and human rights advocacy officer.

4. That in the month of May, 2011, my salary was delayed without explanation whatsoever while the rest of the employees were paid. The delay affected my monthly provision to my family needs and expectations. That was total discrimination from the other employees.

5. I also note with a lot of concern that your letter dated 2nd June 2011 and served on 6th June 2011 gives me a one month notice effective from 1st June. The national laws and your Organization policies are very clear on termination of services hence the notice that was served on the 6th of June is not valid.

6. It is clear that the termination of my employment is in breach of the rules of natural justice and hence unlawful and in breach of the law.

7. I hereby demand an explanation of the mistreatment and discrimination. A one month notice on the termination or one month salary in lieu of notice.

8. The termination is in bad taste and suggests that malice is the key thing since there was no prior communication on the same.

TAKE NOTICE therefore that unless you comply as herein demanded within the next 14 days from the date of hereof I have the freedom to institute appropriate remedial action and at your risk as to attendant costs.

DRAWN BY:

KARBOLO IRENE NASERIAN

ADVOCATE

P.O. BOX 50797-00200

NAIROBI

**c.c. Irene Mwanja
Human Resource Officer, KANCO”**

The Claimant issued a further demand through her Advocates by the demand letter dated 22nd June, 2011.

The Respondent replied to the demand letters by the letter dated June 21, 2011. The letter stated as follows:

**“Irene Naserian Karbolo
P.O. Box 50797-00200
Nairobi**

Dear Irene,

RE: UNLAWFUL TERMINATION OF YOUR EMPLOYMENT

We acknowledge receipt of your letter dated June 15th 2011.

We wish to bring to your attention that the delay of your salary was not intended to discriminate

against you, neither did the termination letter violate the Employment Act nor the organization HR policy that clearly stipulate KANCO reserves the right to dismiss employees due to any reasons justified by the organization and in compliance with the law.

Kindly note the period preceding your dismissal, you were supported by the Child Rights Project which ended in November, 2010. With lack of other funding opportunities KANCO could not sustain your salary hence the termination.

Thank you.

Yours sincerely

Kenya AIDS NGOs Consortium

(KANCO)

SIGNED

IRENE MWANIA

Human Resource Officer

c.c. Allan Ragi, Executive Director

Kenya AIDS NGOs Consortium

(KANCO)”

Thus, the Claimant decided to file this cause.

The Respondent’s Human Resource and Administration Officer Evelyne Muhonja Agala testified as follows:

1. The Respondent is a Non-Governmental Organization (NGO) which runs periodic projects and for which it employs staff.
2. The Respondent has Human Resource, Finance and Administration Department, Policy and Advocacy Department and the Resource Mobilization Department.
3. Most of the projects run by the Respondent last 1 – 5 years and the organization is donor funded based on the project proposals that are send out. If donor funding is available, the Respondent will recruit relevant staff for the project funded.
4. The Claimant worked for the Respondent form March 2009, was confirmed in appointment on 1st June 2009 and worked till June 2011.
5. The Claimant worked in the Child Advocacy Unit. The project started in June 2004 as Child to Child Project and transformed to Child Rights project in 2006 to November 2010. The Claimant was employed when the project was already running. The project ended in February, 2011 since there was need to undertake project closure period from November 2010 to February, 2011.
6. The Claimant was retained with the Respondent with the hope that more funds would be available but another project did not come up. Thus her services were terminated. She worked under the Policy and Advocacy Unit till February 2011. Thereafter she was given a general job description.
7. The Claimant was given a letter dated 2nd June 2011 on 2nd June 2011 by the witness. That it was not given on 1st June 2011 because that was a Public holiday. The letter was a notice to terminate the Claimant’s employment. It gave her 28 days prescribed in law but on its face it referred to a one month notice. The appointment letter did not specify any notice or one of more than 28 days.

8. The only reason why the Claimant was terminated was the closure of the Child Rights Project.

9. On the date the salary for May 2011 was paid, the witness testified that salaries were released to the banks on 24th of every month by way of cheques. The banks then posted the salaries to individual bank accounts of the Respondent's staff. In May 2011, the witness stated that the Claimant's salary was posted by the bank on 31.05.2011. The delay had been, according to the testimony, due to the banks' internal procedures. However, in cross-examination, the witness accepted that in fact the Claimant's salary for May 2011 had not been released in the usual manner as she had stated in evidence-in-chief. She agreed that the May salary had been paid late through a cheque which had been deposited for the Claimant as per bank slip marked "KANCO4" on the statement of the Response.

10. The witness confirmed that she could not produce any evidence to show that the Claimant's June 2011 salary was paid by the accounts office.

11. Other than the late payment of the May 2011 salary, the witness was not aware of any other terminal dues paid to the Claimant.

12. That the letter of engagement did not state that the Claimant had been employed for the Child Rights Project. She was in fact, the letter stated, employed as a Program Officer in Policy and Advocacy Department.

Two key issues turn up for determination:

1. Whether the termination of the contract of employment was fair or unfair;
2. Whether the Claimant is entitled to the remedies as prayed for in the memorandum of claim.

However, before embarking on the two key issues, the court has to deal with a preliminary issue raised by Counsel for the Respondent in her submissions. Counsel submitted that the verifying affidavit was defective because in paragraph 1, the Claimant stated thus,

"1. That I am a female adult of sound mind and the plaintiff herein hence competent to swear this verifying affidavit".

Counsel stated that there was no plaintiff in the cause and as such the affidavit failed to meet the requirements of Rule 5(1) of the Industrial Court (Procedure) Rules, 2010 which provides that a statement of claim filed under rule 4 shall be accompanied by an affidavit verifying the facts relied on. That the Claimant had failed to identify herself in the affidavit and therefore the statement of claim should be struck out for failing to comply with the rules.

Counsel for the Claimant submitted that "Plaintiff" means "Claimant" and the Claimant had not failed to identify herself in the affidavit. Such variation in words that did not change the meaning was a mere technicality that was procedural in nature and did not make the statement of claim defective.

The court has considered the preliminary point of submission. The word "Plaintiff" means the party who brings a Civil Suit in a court of law (See Black's Law Dictionary, 9th Edition page 1269). The word "Claimant" means one who asserts a right or demand (see Black's Law Dictionary, 9th Edition Page 282). In the circumstances, the court finds that the Claimant in this case by referring to herself as a Plaintiff did not breach the provisions of the Rules of the court as submitted by Counsel because a Plaintiff by coming to court would be a person asserting a right or demand. Further, Rule 5(2) of the Rules provides that where a Claimant, in the course of hearing seeks to adduce additional evidence, the Claimant may, with the leave of the court, file a further affidavit or adduce oral evidence. In the instant case the Claimant had already adduced oral evidence and her identity is not in doubt. The court considers that objections on the preliminary requirements of the pleadings should be raised early in the proceedings. In any event, the court further considers that where a verifying affidavit is defective, the same does not invalidate the statement of claim. An irregular or defective verifying affidavit would be

struck off the record and the affected party be at liberty to file appropriate affidavit. The Constitution is clear on this point and Sub-Article 159 (2) (d) provides that justice shall be administered without undue regard to procedural technicalities. That Constitutional provision is amplified in Subsection 20(1) of the Industrial Court Act, 2011 which states,

“20(1) In any proceedings to which this Act applies, the court shall act without undue regard to the technicalities and shall not be strictly bound by rules of evidence except in criminal matters:

Provided that the court may inform itself on any matter as it considers just and may take into account opinion evidence as such facts as it considers relevant and material to the proceedings”.

Accordingly the court finds that the memorandum of claim is properly before the court and the procedural issue raised for the Respondent lacks merits. The verifying affidavit supporting the memorandum of claim is not defective as it identifies the Claimant properly as the person who is asserting her rights before this court.

The first issue for determination is whether the termination was fair or unfair. Counsel for the Claimant submitted that she was entitled to a proper notice of termination. The notice should provide for clear reasons for the termination. The reason given, Counsel submitted, was invalid because the “Child Rights Project” ended by February 2011 and if that was the reason for the termination, the Claimant would not have remained in employment until June 2011. Counsel submitted that even if there was no clear period for termination, then a 30 days clear notice of termination was necessary. That the purported notice was dated 2nd June 2011, was served on 6th June 2011 and was to take effect retroactively from 1st June 2011. Such, it was submitted, was an illegal notice.

Counsel for the Respondent submitted that a 28 days notice was sufficient under Section 35(1) (c) of the Employment Act, 2007.

To determine whether the termination was fair, the reasons for termination and the procedure invoked must both be taken into account. The Respondent has alleged that the Child Rights Project came to an end making it necessary to terminate the Claimant’s employment. That reason, if proved to be true, would amount to redundancy. The Employment Act, 2007 in Section 2 defines “redundancy” to mean 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.

A crucial element in redundancy is the act of abolishing the office that the employee affected is holding or acting in. The employer must show that the office has been manifestly and effectively abolished. Redundancy does not occur where there is mere desire to change the office holder by removing the affected employee. Redundancy does not also exist merely by redefining the workload or duties attached to the given office. The employer must, to justify redundancy, show that the office held by employee has been abolished, that is, ceased to exist because of lack of work load attached to that office arising out of better economy or diminished demand of the functions of the office.

Once the employer has proved abolition of office, it is vital to comply with the prescribed procedure for redundancy. It is not enough for the employer to prove the potentially fair reason for redundancy situation. Even if the fair reason for redundancy exists the redundancy will be unfair if the prescribed procedure for redundancy is not adhered to. Section 40 of the Employment Act prescribes the procedure for termination on account of redundancy. Under Section 40 (1) (f) the employer must pay an employee declared redundant not less than one month’s notice or one month’s wages in lieu of notice. An employer must also pay the employee, under Section 40(1) (g) at the rate of not less than fifteen days pay for each completed year of service. Under Section 40 (1) (b) an employee who is not a member of a trade union, like the Claimant, is entitled to a reasonable notification in writing and a Labour Officer must also be informed.

In the instant case, the alleged reason for termination has not been proved. The Claimant was employed as a Project Officer. The Respondent has not shown that the office in its establishment was abolished. Section 43 of the employment Act required the Respondent to prove the reason or reasons for the termination and the employer having failed to do so the termination was unfair within the meaning of Section 45 of the Act. Once the reasons were invalid and not proved, it is obvious that the procedure invoked to achieve the termination was unfair. The court finds the termination of the Claimant's employment by the Respondent was therefore unfair.

The second issue for determination is whether the claimant is entitled to the remedies as prayed for. Counsel for the Respondent submitted that the Respondent being an NGO should not be visited with compensatory liabilities as would happen to employers engaged in trade and profit making. The court has considered that submission and it is guided by the provisions of Sub Article 159 (2) (1) of the Constitution which provides that in exercising judicial authority, the courts shall be guided by the principle that justice shall be done to all, irrespective of status. Accordingly the court will proceed to consider the issue of remedies without due regard to the submission that the Respondent is not engaged in profit making business.

For the prayers made in the statement of claim, the court makes the following findings.

1. The court finds that the Claimant's employment by the Respondent was unfair and contrary to the law. In making this finding the court has taken into account the findings in the first issue as determined in this judgment.
2. For three years service pay the court finds that the Claimant served from March 2009 to 1st June 2011 being 2 years and 3 months. Neither party submitted on whether this was a case of redundancy under Section 40 of the Employment Act and the court has found that though this appeared to be an alleged case of redundancy, it was never treated as such. It is not disputed that the Claimant was a member of the National Social Security Fund. Thus, as submitted by Counsel for the Respondent, the Claimant is not entitled to service pay in view of the provisions of Section 35 (6) (d). The claim shall therefore fail.
3. The Claimant has prayed for reasonable 3 months notice pay of Ksh.158,700.00. The contract did not provide for any notice period in event of termination. Subsection 35 (1) (c) prescribes a 28 days notice. In the instant case the court finds that, on a balance of probabilities, the notice was served on 6th June 2011 because the Respondent failed to discharge its duty to keep the record of such service. Accordingly the Claimant is awarded **Ksh.52,900/=** being one month pay in lieu of notice.
4. The Respondent's witness testified that the Claimant worked until the month of June 2011 and she was not sure whether the Accountant had paid the Claimant for that month. The court finds that in absence of evidence of payment by the Respondent and the witness having admitted the Claimant worked, the Claimant is entitled to **Ksh.52,900/=** being her salary for the month of June 2011.
5. Subsection 49 (1) (c) provides that the employee may be granted the equivalent of a number of months wages or salary not exceeding twelve months based on the gross monthly wage or salary of the employee at dismissal. The Respondent has not shown any mitigating factors that would enable the court to award less than the maximum compensation for the unfair and unjustified termination. The court therefore awards **Ksh.634,800/=** being the gross salary for twelve months. In making this award, Court of Appeal decisions cited in **Walter Musi Anyanje - Vs – Hilton International Kenya Ltd and Tom Njiri, Civil Appeal No.269 of 2003**; [2008] eKLR do not hold anymore. The holding in those cases that general damages in respect of suits based on termination of employment contract are not available has since been modified with the express provisions of the Employment Act, 2007. The statutory intervention therefore overrides the common law position as set out in those decisions of the court of Appeal. In Addition, Subsection 12(3) of the Industrial Court Act, 2011 specifically confers jurisdiction of the court to make wide ranging orders including:

- (a) An award of compensation in any circumstances contemplated under the Act or any written law; and

(b) Any other appropriate relief as the court may deem fit to grant.

The Court has also considered the jurisdiction as conferred upon it under Sub Article 162(2) (a) of the Constitution to hear and determine disputes relating to employment and labour relations and finds that the jurisdiction confers power to grant remedies with respect to contracts of employment and remedies for injuries related or incidental to such contracts.

6. The Claimant has prayed for damages for delay of payment of May, 2011 salary. The Respondent's witness confirmed that it was true the Claimant's salary for May was not conveyed to the bank on 24th May alongside the salaries for other staff as was required and the practice in payment of salaries. The Respondent's witness lacked the explanation for the delay. The Claimant, in that regard, has alleged discrimination. Discrimination means the effect of a law or established practice that confers privileges on a certain class or that denies privileges to a certain class because of race, age, sex, nationality, religion or disability (see Black's Law Dictionary, 9th Edition Page 534). Sub Article 27 (5) of the Constitution provides that a person shall not discriminate directly or indirectly against another person on any ground including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age disability, religion, conscience, belief, culture, dress, language or birth. The court finds that the Claimant has not established discrimination within that broad meaning of discrimination. In particular, the Claimant has not pin pointed any of the broad classes or grounds of discrimination as provided for in the constitution.

Nevertheless, the Claimant has established discrimination as envisaged under Subsection 5(2) of the Employment Act, 2007. The subsection provides that an employer shall promote equal opportunity in employment and strive to eliminate discrimination in any employment policy or practice. The Court finds that it was a discriminatory practice for the Respondent to isolate the Claimant from the rest of staff by effecting payment of the Claimant's May 2011 salary long after paying the rest of the staff on 24th May 2011. It was also discriminatory to isolate the Claimant from the salary payment policies and practices as they applied to the staff of the Respondent generally. The court finds that such discriminatory isolation of the Claimant from the general payment policies and practices amounted to unfair labour practices in contravention of sub Article 41(1) of the Constitution. Accordingly the court awards the Claimant three months salary being **Ksh.158,700** for discriminatory late payment in the month of May 2011.

In conclusion judgment is entered for the Claimant against the Respondent for:

- (a) A declaration that the termination of the Claimant's employment by the Respondent was illegal, unjustified and unfair.
- (b) Payment to the Claimant of a sum of Ksh.899,300/= plus interest at court rates from the date of judgment till full payment; and
- (c) Payment to the Claimant of 75% of the costs of this cause.

Signed, dated and delivered this 18th day of October, 2012 in the presence of Counsels for both parties.

BYRAM ONGAYA
JUDGE