



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL APPEAL NO. 219 OF 2006**

**YAYA TOWERS LIMITED.....APPELLANT**

**VERSUS**

**ROSEMARY MWOSE OLIMBA.....RESPONDENT**

**J U D G M E N T**

The Respondent was employed by the Appellant as an Assistant Manager Properties at Yaya centre vide the letter dated 9<sup>th</sup> April 1992. Her terms of employment were clearly set in the said letter of offer. On 14<sup>th</sup> August 2000, the Appellant terminated her employment, stating that her position was being consolidated as a result of company restructuring. The termination letter was also accompanied by a termination agreement which stated what her final dues were. The letter also required Respondent to sign the agreement and on receipt thereof, the Appellant would release a cheque of her final dues.

Before the agreement was signed and sent to the Appellant, the Respondent received another letter dated 18<sup>th</sup> August 2000 withdrawing the termination agreement. The letter stated that the Respondent was on suspension and the Appellant was investigate her for fraudulent acts and illegal actions against the Appellant. A few days later, the Respondent also received another letter dated 24<sup>th</sup> August 2000, which stated that the investigations were completed and the Appellant required her to appear for a formal interview. The Respondent also received another letter of 27<sup>th</sup> October, 2000 which terminated her service and a cheque of her final dues enclosed.

By an amended plaint dated 19<sup>th</sup> May 2004, the Respondent filed proceedings in the chief magistrate court in Nairobi seeking the following:

- 1) *4 days salary for the month of October 2000 @ Ksh.5,018.*
- 2) *2 days pay for the month of November 2000 @ Ksh.5,018.*
- 3) *The difference between 31 annual leave days outstanding @ Ksh.5,018/- and 29 annual leave days outstanding @ Ksh.4,256/=*
- 4) *The difference between 31 days leave traveling allowance @ Ksh.29,792/-*

- 5) *The difference between one month notice payment @ Kshs.105,376/= and one month notice payment @ Kshs.89,376/=*
- 6) *Two months notice payment @ Kshs.105,376*
- 7) *Gratuity pay for 8 1/2 at 18 days per year for total of 153 days at Kshs.5,018.*
- 8) *Costs of the suit.*
- 9) *Interest on the above.*

The Appellant also filed an amended defence dated 6<sup>th</sup> August 2004. The matter was heard and judgment entered against the Appellant for Kshs.500,000/-. The Appellant being aggrieved with the decision filed this appeal on the following grounds:

1. *The learned magistrate having found and established as fact that the Respondent contract of employment was terminated by the letter dated 27<sup>th</sup> October 2000 had erred in finding and holding that the said termination was made on account of redundancy as there was no reference to redundancy in the said letter of termination.*
2. *The learned magistrate having found and established as fact that the Respondent termination was based on the termination letter dated 27<sup>th</sup> October 2000 erred in finding that the Respondent was entitled to gratuity as there was no provision for payment of gratuity in the said letter of termination , and erred in law and fact in finding that the contract of service was terminated on account of redundancy.*
3. *The learned magistrate erred in law and in fact in finding that the Respondent was entitled to gratuity pay of Kshs 500,000.*
4. *The learned magistrate erred in law and in fact in finding that the Respondent's service were terminated under section 16 A of the employment Act.*
5. *The learned magistrate erred in law and in fact in finding that the Respondent's claim had basis in the absence of express contractual provisions.*
6. *The learned magistrate erred in law and in fact in failing to take account of certain documents which were produced as evidence and relying heavily on others.*
7. *The learned magistrate erred in law and fact in his assessment and summing up the evidence given hence reaching the conclusion reached.*
8. *The learned magistrate erred in law and fact in finding that the Respondent was entitled to costs of the suit.*

During the hearing Mrs. Effendi, counsel for the Appellant and Mrs. Tangoi, counsel for the Respondent agreed to prosecute the matter by way of written submissions. The submissions were filed and exchanged.

The Appellant submitted on ground 1 & 4 of the appeal that the magistrate faulted by finding that the Respondent termination was made on account of redundancy under section 16A of **Employment Act Chapter 226 Laws of Kenya (now repealed)**. The Appellant stated that the Respondent pleaded in paragraph 4F of the amended plaint dated 19<sup>th</sup> May 2004 that her salary of August, September and 27 days in October was paid and that she was still in employment until 2<sup>nd</sup> November 2000. The Appellant further claimed that the judgment did not support the above conclusion as the magistrate had found that her termination was within the ambit of the contract between the parties. The Appellant alleged that the court did not address the issue of redundancy neither did it deliberate on the applicability of Section 16A

(1) of the Employment Act.

On ground 2, 3, and 5 the Appellant submitted that the court erred in finding that the Respondent was entitled to gratuity which was not provided for under the contract between the parties. The Appellant claimed that the court equated gratuity to severance pay. The Appellant submitted that gratuity is paid by an employer upon successful completion of an agreed term and therefore ought to be a term of employment contract as opposed to a statutory provision. The Appellant relied on the case of **Central Bank of Kenya Vs Davies Kiveiko Muteti (2009) eKLR** where the superior court held that gratuity payment has nothing to do with an employee being declared redundant. The Appellant submitted that gratuity payment can only be claimed on the basis of a contract between the parties and where the contract is silent the employee is not entitled.

In winding up the Appellant submitted that the Respondent's employment was on the basis of the contract with one month's payment in lieu of Notice and without redundancy being declared.

In response, the Respondent submitted that the Appellant, at all material times intended to terminate the Respondent's employment through redundancy as seen from the termination letter dated 14<sup>th</sup> August 2000. The Respondent maintained that gratuity was part of payment stated in the termination agreement. The Respondent further stated that her termination was attributed to the restructuring of the company which led to consolidation of the Respondent position. The communication vide an internal memorandum dated 15<sup>th</sup> August 2000 was also an indication that the management had predetermined that they no longer desired her service.

The Respondent also submitted that the magistrate did not find her termination to be as a result of redundancy. She stated that the inference was taken from the letter of termination dated 14<sup>th</sup> August 2000 which was the initial communication on the termination. The Respondent maintained that even though there was no specific mention of the word "redundancy" in the termination letter, the position was taken by the Respondent based on the letter which was later withdrawn by the Appellant even after the company's intention had been unintentionally revealed.

The Respondent further submitted that she was entitled to fair labour practices as provided for under Article 41 of the Constitution. She stated that she was treated unfairly as there was no justification why she did not receive the payment envisaged in the redundancy termination letter. According to the Respondent, she ought to have received 15 days salary for every year of service.

The Respondent also submitted that the learned magistrate rightly awarded Kshs.500,000/- in the light of the court jurisdiction. The Respondent stated that since the appeal is heard under the new regime of Labour Laws Section 35(1) (c) provides that an employee shall be entitled to service pay for every year worked. And in this case the Respondent is entitled for service pay for 8 years and half a year since she was not summarily dismissed as to disentitle her. The Respondent maintained that she was entitled to the sums awarded as the calculation applied therein was 15 days for every year which was reasonable and common measure by any standard for calculation of service pay.

I have carefully perused the record including the lower court pleadings and the ruling. I have also perused the written submissions before this court on the face of the grounds of appeal all of which have been considered, and in my view the main issues raised in this appeal are:

- 1. Whether the Respondent was terminated on account of redundancy and if so, her entitlement.***
- 2. Whether the Respondent claim was based on the contract and if so, what her entitlement would be.***
- 3. Whether the trial magistrate's conclusions are supportable.***

As to whether the Respondent was terminated on account of redundancy, the lower court examined the

Appellant's letter to the Respondent dated 14<sup>th</sup> August, 2000. The letter told the Respondent of the on-going restructuring and consolidation of the Plaintiff's position leading to the Plaintiff's services being no longer required. The letter then included the terminal benefits and a request to the Respondent to sign the letter for the purpose of receiving the cheque for the terminal benefits mentioned in the letter.

It is in evidence that the Respondent was not allowed to come back to work with the Appellant anymore. It is of course in evidence that thereafter the Appellant/Employer – wrote a second letter purporting to cancel the above letter and appearing to use a different reason i.e. the contract of employment to terminate the services. There after the appellant again changed tact and tried to raise a third ground i.e. gross misconduct for some purported foul play by the Respondent which in any case, was also discounted after investigations.

The court notes that the Appellant/Employer after serving the termination Letter of 14<sup>th</sup> August, 2000, continued to pay the Respondent until November, 2000. This gave the Appellant the reason to argue that the Respondent's employment was not terminated until November, 2000. It also gave the Appellant cover to try to wriggle out of the legal effect of the said letter of 14<sup>th</sup> August, 2000 which clearly spelt out that termination of the Respondent's services then sought, was on the basis of restructuring and consolidation of offices to abolish her job.

I have carefully considered this issue and the conclusion I find tenable and reasonable to reach is that, notwithstanding the payment of Respondent's salary by appellant for 3 more months after the 14<sup>th</sup> August, 2000 letter, the Respondent's employment effectively ended on 14<sup>th</sup> August, 2000 when she also physically was pushed out of her office.

**“Redundancy”** is, in Section 2 of the Trade Disputes Act, defined 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 services of an employee are superfluous and the practices commonly known as abolition of office, job, or occupation and loss of employment due to Kenyanization of a business but does not include any loss of employment by domestic servant.”***

In my view and finding accordingly, the Respondent's job or employment was terminated on redundancy basis and not on contract. The Respondent did not initiate it and the Employer by its own initiative and for its own purpose, effected the termination by its letter of 14<sup>th</sup> August, 2000. The court rules that the appellant's other two letters i.e. those of 24<sup>th</sup> August and 27<sup>th</sup> October, 2000, were deliberately instituted to try to cover up the effect of the letter of 14<sup>th</sup> August, 2000 which had already taken effect to terminate the Respondent's employment and oust her from office.

Indeed there was evidence from the Plaintiff that soon after she was terminated, the appellant reduced its work force in a restructuring process. The two existing General Managers were laid off and one new one was hired to run the job functions of the two who had been laid off. These confirmed the redundancy termination of the Respondent herein. There was evidence from the Respondents as well that during above mentioned restructuring, all the affected employees were properly compensated except herself.

In his judgment the trial magistrate failed to consider the Respondent's written submission which clearly asserted that the Respondent's job termination, was on redundancy basis.

Under redundancy termination basis the Respondent would be entitled to 15 days salary for every completed year of service of the eight (8) years she worked for the Appellant. The honourable trial magistrate due to pecuniary jurisdiction of the court, awarded Ksh.500,000/- on the basis of the contract between the parties herein by calling it **“gratuity”**. In this court's view, the trial magistrate having concluded that the termination of the Respondent's job or employment was on redundancy basis, erred in awarding the sum of Kshs.500,000/- under contract. The court agrees with the Appellant that the trial magistrate may have equated **“gratuity”** with **“redundancy”**.

However, as already hereinabove demonstrated, the Respondent was entitled to the sum of Kshs.500,000/- awarded by the trial magistrate, not under contract, but on the basis of “**redundancy**” which incidentally applies a similar formular of granting a 15 days salary for every year fully served. The Respondent had served 8 ½ years and the benefits due to her remain the same Kshs.500,000/- awarded which I hereby award and confirm.

In the circumstances of this case, this appeal in so far as it relates the award of level of damages aforestated, is hereby dismissed with costs. Orders accordingly.

Dated and delivered at Nairobi this 20<sup>th</sup> day of May, 2015.

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**D A ONYANCHA**

**JUDGE**