



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI LAW COURTS)
CIVIL APPEAL NO. 734 OF 2006

PAUL WAMBUI
KIARIE.....APPELLANT

Versus

**TELEPOSTA CO-OPERATIVE SAVINGS & CREDIT SOCIETY
LIMITED.....RESPONDENT**

JUDGMENT

This is an appeal against the judgment of the Senior Resident Magistrate delivered on 28th September 2006 in Milimani CMCC No. 13447 of 2004 in which she dismissed the bulk of the Appellant's claim.

The facts of the case are that at the material time the Appellant was the General Manager of the Respondent. On 24th December 1998, while she was on leave, she received the Respondent's letter of the previous day terminating her employment on the ground that following the meeting of the Central Management Committee of the Respondent on 22nd December 1998 it had been found necessary to terminate her services forthwith. On 15th January 1999 the Respondent caused an advertisement to be published in the newspapers that the Appellant was no longer its employee. The Appellant claimed that as a result of that malicious advertisement she had been unable to secure gainful employment and that she had been shunned by her friends and relatives.

Aggrieved by that termination and advertisement the Appellant filed the said suit and claimed Kshs.51,810/= being salary under payment from June to December 1998; Kshs.52,899/= for 39 leave days; Kshs.175,320/= being 6 months salary in lieu of severance notice; Kshs.379,860/= being 3 month's salary for every year of service for 4 years; Kshs.51,500/= being cooperative share contribution and Kshs.5000/= being Plaza Investment shares making a total of Kshs.717,398/=. She also claimed general and exemplary damages for defamation arising from the said advertisement.

After hearing the case the trial court granted the Appellant's claims for salary underpayment and salary in lieu of leave but dismissed all her other claims. This appeal is against the whole of that judgment. By consent counsel for the parties asked the court to determine the appeal on the basis of their respective submissions which they had filed. Rather than deal with each ground of appeal, I will instead determine each of the Appellant's above stated claims. I will refer to those submissions as I deal with each claim.

Although the claims for payment in lieu of leave and salary underpayment were not granted as prayed in the Appellant's amended plaint, her counsel's submissions have not shown how the trial court erred on them. I therefore dismiss the grounds of appeal related to those claims.

The claims for 6 months' pay in lieu of severance notice and 3 months pay for every year worked for a period of 4 years were premised on the redundancy clause in the Revised Terms and Conditions of Service of the Respondent's Management Staff. It is not in dispute that those are the terms and conditions that governed the Appellant's contract of employment with the Respondent. What the Respondent disputes is the applicability of that clause. Its argument is that this was not a case of redundancy and the clause does not apply.

I agree with counsel for the Respondent that the burden was on the Appellant to prove that this was a case of redundancy disguised as termination for under-performance. Having carefully examined her evidence and the document she tendered I find that she failed to prove that claim. As a matter of fact that claim was not even properly pleaded. Either in her amended plaint or evidence she did not say that after her services were terminated her position as General Manager was abolished.

As stated in that clause, "[R]edundancy is understood to mean the involuntary loss of employment through no fault of the employee caused either by an excess of manpower or by the financial inability on the part of the employer to continue paying salaries."

As the Appellant conceded the termination letter did not allude to redundancy. The appellant did not adduce any evidence to prove that the Respondent had excess man power or any financial problems.

There was reference to the reorganization of the Respondent's operations leading to the separation of the Posta Sacco. In the absence of any evidence from the Appellant to support her claim of redundancy, I must accept DW 1's evidence that the separation of the Posta Sacco, which was being discussed in January 1999 had nothing to do with the termination of the Appellant's services in December 1998. In the circumstances I find that the trial court was right in rejecting the redundancy claim.

Counsel for the Appellant did not press the claim for damages for defamation. Besides the fact that the claim was not proved by the time when the suit was filed, it had long been statute barred.

The Appellant contradicted herself on the claim for her shares. At one time she said their value was more than the loan she had taken but later in cross-examination she conceded that the balance of her outstanding loan to the Respondent was more than the value of those shares. I accept the evidence of DW 2 that she owed the Respondent Kshs.5,925.50 more than the value of her shares. That claim was in the circumstance properly dismissed.

For these reasons I find no merit in this appeal and I accordingly dismiss it with costs.

DATED and delivered this 7th day of April 2011.

**D.K. MARAGA
JUDGE**