



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

Civil Suit 119 of 2000

DOUGLAS RIUNGU.....1ST PLAINTIFF

HELLEN KARAI.....2ND PLAINTIFF

RUTH GACHERI.....3RD PLAINTIFF

V E R S U S

MERU CENTRAL FARMERS CO-OP UNION LTD.....DEFENDANT

LAW OF CONTRACT

- **Contract of contract employment may be terminated in accordance with its terms.**
- **Law of contract - a contract of service cannot be foistered either on the employer or the employee.**
- **Contract of employment - measure of notice depends upon the terms of contract.**

J U D G E M E N T

The Plaintiffs herein were employers of the Defendant and were attached to Total Petrol Service Station within Meru Town. The station facility was owned and operated by the Defendant. The Plaintiffs were employed at various times in the year 1995 on temporary terms of employment. The 1st Plaintiff was employed on temporary terms of service with effect from 20.02.1992. The 2nd Plaintiff Helen Karai was employed on temporary terms of service with effect from 7.11.1995. The 3rd Plaintiff Ruth Gacheri was appointed on similar terms on 12.09.1988.

The Plaintiffs respective employment with the Defendant were terminated at various dates, on 22.09.1998 (for the 3rd Defendant), 21-09-1998 (for the 1st and 2nd Plaintiffs). The reasons in each case were the same, loss of cash for the sale of various petroleum products, principally, lubrication and meko, gas cookers, and cylinders. The termination letters in respect of each of the employees stated the amounts of loss and stated that the amounts of loss would be recovered from any sums due to the Plaintiff by way of terminal benefits.

In the Amended Plaint dated 7th August 2000, the Plaintiff's respective claims are as follows:-

1. DOUGLAS RIUNGU

(i)	Leave allowance	Shs. 6,524.40
(ii)	Arrears	Shs. 23,672.00
(iii)	Terminal Benefits	Shs.331,464.00

TOTAL **Shs.361,660.40**

2. HELLEN KARAI

(i)	Leave allowance	Shs. 5,217.80
(ii)	Arrears	Shs. 22,302.00
(iii)	Terminal Benefits	<u>Shs. 134,172.00</u>
<u>TOTAL</u>		<u>Shs.162,751.80</u>

RUTH GACHERI

(i)	Leave Allowance	Shs. 6,831.00
(ii)	Arrears	Shs. 24,990.00
(iii)	Terminal Benefits	<u>Shs. 449,800.00</u>
<u>TOTAL</u>		<u>Shs. 481,621.00</u>

The Defendant in its Amended Defence dated 13.12.2000 denied the above particulars of special damages and put the plaintiff to strict proof thereof.

All the three plaintiffs gave evidence in favour of their respective claims. They all produced their letters of temporary appointment as stated above. No evidence was adduced by any of the plaintiffs as to the status of their contract of service as of the time of dismissal from the defendant's employment. The irresistible conclusion is that they were all still on temporary terms. If that conclusion is correct the plaintiffs employment remained temporary, and could in terms thereof be terminated by 24 hours notice

on either side.

However having each worked for over two years they were engaged on permanent terms and thus entitled the plaintiffs to one months notice or one month's salary in lieu of notice except for the executive cadres who are entitled to 3 months notice. There was no evidence that either of the plaintiffs had ascended to executive ladders. This imputation comes from the Terms and Conditions of Service of the Defendant. Fifth Revised Ed 1995.

According to the evidence of P.W.3 (**Ruth Gacheri**) (**PExh. 22**) her gross salary was shs. 4165/- as at December 1997 that of P. was Shs.4583/- (gross) for 1st plaintiff and there was no salary slip for the 2nd plaintiff but was admitted by the Defendant to be shs.3,700/- for the 2nd Plaintiff. There was no evidence by either of the Plaintiffs on either the nature or amount of leave allowances. There was no evidence of any arrears (usually of salaries), and there was also no evidence of the nature of terminal benefits. The law and precedents in these matters is that special damages must not only be pleaded but must also be specifically proved.

In this case, although the alleged special damages are pleaded in paragraph 1(a) of the Amended Plaint, there is no prayer for them, hence perhaps the lack of supporting evidence thereof. The prayers in the Amended plaint are for:-

- (a) An order for reinstatement into their respective jobs at the Petrol station or any other place within the Defendants payroll.
- (b) Without prejudice to (a) above, in the alternative full payment of all dues and benefits as well as 3 months' salary in lieu of notice, and general damages for unlawful termination.
- (c) Any further relief, plus costs and interest.

I have examined the evidence carefully to ascertain whether the services of any of the plaintiffs was unlawfully terminated. I am satisfied that none of the plaintiffs services were terminated unlawfully. The 1st plaintiff services were terminated for loss of Shs. 104,325.30 (comprising loss from lubricant sales Shs. 52,809.55 gas and meko cookers and cylinders Shs. 51,427.75) The 2nd Plaintiff Hellen Karai Kungania for loss of Ksh.21,915.60 (Comprising loss from sale of lubricants (Shs. 17,255.75 and loss of sales of Meko Shs.4,659.85) and the 3rd Plaintiff Ruth Gacheri Shadrack (Sh.208,642.15 comprising loss from lubricant sales shs.174,173.80 and meko gas shs.33,868.35.

In respect of each of the plaintiffs the letters stated that the plaintiffs had been accorded an opportunity to be heard before the Defendants management committee to show cause each of the plaintiffs should not be held responsible for the loss. Each of the plaintiffs in reply asserted that the figures in the book copy of the delivery note in which the lubricants and meko gas were supplied, were inflated. Each of the plaintiffs was unable to produce the original delivery note signed by each of them to prove their stamen of inflated figures. The management committee in each case concluded that the plaintiffs were respectively dishonest. The Plaintiffs' services were accordingly terminated. The letters of termination in each case stated that each of the plaintiffs would be paid their terminal benefits less the shortage incurred by each of the plaintiffs.

The above was in essence the plaintiff's own evidence. The Defendant on its part denied any liability to the plaintiffs or any of them in respect of any special damages or general damages.

The claim for special damages was not prayed for. It was also not proved. It is therefore dismissed as not sustainable. As to general damages, the only sum payable to the plaintiffs would be their terminal benefits. Again these were not proved by the plaintiffs or any of them. A claim for leave areas for instance should show the days of leave entitlement, the leave allowance, and that such leave was not taken, and was not forfeited. If arrears related to salaries, evidence should have been shown, the days or months worked and not paid for and terminal benefits should likewise have shown categories thereof. A mere claim in a plaint without substantiation in evidence will not suffice to sustain a claim for any of these entitlements.

In the result therefore, the claims for leave allowance, arrears and terminal benefits are not sustainable and are also dismissed.

Counsel for the Defendant conceded in his submissions that the only sums due to the plaintiffs are one month's salary in lieu of notice. These are said to be respective Shs. 3,539/- Shs. 3,700 and shs.4,165. These sums are however subject to deduction of the losses occasioned to the Defendant by each of the plaintiffs. If these losses are deducted from the sums of one months notice, then the plaintiffs will remain liable to the Defendant for respectively shs.358,121.40 Shs.159,651/80 and Shs. 527,456/-. However because there was no counter-claim for these sums or any part thereof the Defendant is not entitled deductions from any those sums payable to the plaintiff in lieu of one months notice.

I therefore find for each of the plaintiffs in terms of shs.3,539, 3700/- and shs.4165/- together with interest thereon from the date of their termination till date of payment. I will however deny the plaintiffs any costs herein. I find the circumstances of and reasons of termination of their services with the Defendant as dishonorable on their part, and not deserving of costs.

There shall be orders accordingly.

DATED SIGNED AND DELIVERED AT MERU THIS 15TH DAY OF JANUARY 2010

M. J. ANYARA EMUKULE

JUDGE.