



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

CIVIL SUIT 404 OF 2004

INGRID KIVUMBIPLAINTIFF

VERSUS

DEUTSCHE GESELLSCHAFT FUER

**TECHNISCHE ZUMAMMENARBEIT (GTZ) GmbH.....
DEFENDANT**

J U D G M E N T

THE PLEADINGS

1. The plaintiff commenced her suit by way of a plaint that was filed in court on 22.04.04. The Plaintiff's suit is based on alleged unfair and/or wrongful termination of her employment by the defendant. In her plaint the plaintiff alleges that she was entitled to have her contract of employment renewed upon expiry. She also says that the defendant breached the terms of her employment contract when it failed to renew the same on expiry and that in the circumstances, she is entitled to damages for unfair dismissal. The plaintiff prays that if she fails in her claim for damages for unfair dismissal then she should be compensated for being declared redundant at the expiry of her contract of employment with the defendant. She claims severance pay of not less than 15 days pay for each completed year of service.

2. Yet further, the plaintiff prays in the further alternative that she is entitled to severance pay at the rate of 30 days pay for each completed year of service, particularly because, she argues, she gave long and uninterrupted service to the defendant and that by the time her services were terminated she was holding a senior position with the defendant and that she was still capable of working for the defendant.

3. It is also the Plaintiff's case that she is entitled to one months pay in lieu of notice under the terms of the contract dated 29/11/2002. That particular contract was made for one month beginning from 1/10/2003 to the 31/01/2003. As per the amended plaint dated 14/04/2008, the Plaintiff seeks the following reliefs from the Defendant:

- (a) *General damages for unfair and/or wrongful dismissal from employment.*
- (b) *Damages amounting to DM 23,375 under paragraph 10 above.*
- (c) *Alternatively damages amounting to DM 46,750 under paragraph 11 above.*
- (d) *The sum of Euro 2,066 being damages and/or one month's salary in lieu of Notice pursuant to the terms of the Contract of Employment dated 29th November 2002.*

- (e) *Interest at court rates on (a) and (c) above.*
- (f) *Costs of the suit plus interest thereon at court rates.*
- (g) *Any other relief as this honourable court may deem fit and just to grant.*

4. In its defence filed in court on the 27/05/2004, the Defendant denies the whole of the Plaintiff's claim and contends that the Plaintiff's employment with the Defendant was lawfully terminated upon expiry of the contractual term. The Defendant alleges and sought to prove at the hearing of the suit that

a. *The plaintiff's contracts of employment were for fixed terms and that the contract for the period January to December 2001 case (sic) to end at the expiry of the term.*

b. *There was neither a contractual, statutory nor a common law obligation on the defendant to renew the contract once it came to an end.*

c. *The plaintiff received all her terminal dues and there can be no other claims in law against the defendant.*

d. *The issue of redundancy does not arise in this case and the claim for severance pay is without basis both in law and in fact. The post of Head of Procurement exists within the defendant's organization to this day and was never abolished.*

e. *General damages cannot be awarded under a contract of employment.*

The Issues:

5. The following are the issues as framed by the Plaintiff. Though counsel for the Defendant did not sign them, she dealt with each issue in detail in her submissions:-

1. *For how long was the plaintiff in the employment of the Defendant?*

2. *Was the Plaintiff's employment with the Defendant continuous and/or uninterrupted?*

3. *Was the Plaintiff's employment wrongful terminated by the Defendant?*

4. *(a) Whether the Plaintiff was rendered redundant by the Defendant.*

(b) Whether the Plaintiff is entitled to redundancy pay in accordance with the provisions of the Employment Act and the Trade Disputes Act of the Laws of Kenya.

5. *Is the Plaintiff entitled to one month's salary in lieu of notice in respect to the Contract of Employment dated 29th November 2002?*

6. *Whether the Plaintiff is entitled to payment of severance pay and/or damages for unfair and wrongful dismissal.*

7. *Whether the Plaintiff is entitled to any of the reliefs as claimed in the suit.*

8. *Who bears the costs of this suit?*

The Facts:

6. It is not disputed that the Plaintiff was employed by the Defendant for about 17 years between 1/04/1984 and 31/01/2003. The Plaintiff claims that the Defendant unlawfully terminated the said employment by a letter dated 26/11/2001. According to the Defendant, the letter simply informed the

Plaintiff that the Defendant would not renew her contract when the same expired on 31/12/2001. Thereafter the Plaintiff was employed by the Defendant in a different project for about two (2) years upto 31/01/2003. The Plaintiff claims that her employment with the Defendant was continuous and uninterrupted for the entire nineteen (19) years and that that being the case, she was not merely an employee on term contracts but that she considered herself to be a permanent employee entitled to terminal dues from the Defendant based on her last salary of Deutch Marks 5500 (equivalent to Euro 2750) for 17 years in accordance with her last full contract of employment dated 15/11/2001.

7. On its part, the Defendant claims that it was under no obligation to give any notice to the Plaintiff who worked on fixed term contracts; that it would only give notice to the Plaintiff if it intended to renew the contract and would usually do so a month in advance of the expiry date of the contract. The Defendant also contends that a notice of termination of contract would become relevant if the contract was being cut short but that in the instant case, all the Plaintiff's contracts ran their full term.

8. The Plaintiff gave evidence in support of her claims against the Defendant and testified that her job was with the projects administration office and not pegged to completion of any particular project as the Defendant would have the court believe; that her employment was therefore not by annual contracts. The Plaintiff also testified that she was effectively declared redundant by the Defendant when her previous post of Head of Procurement was abolished by the Defendant and she was transferred to another project at much less pay. That is why the Plaintiff says she is entitled to payment of severance pay at the minimum statutory rate of fifteen (15) days for every completed year of service for the seventeen (17) years from 1/04/1984 to 31/12/2001. In the alternative, the Plaintiff says she is entitled to severance pay at the rate of thirty (30) days for each completed year of service due to her age, skill and seniority at the time of her unlawful dismissal. The Plaintiff also claims that she is entitled to one month's salary in lieu of notice amounting to Euro 2,066 under the contract of employment dated 29/11/2002. In support of her claims, the Plaintiff produced the following exhibits:-

1. *Contract of employment between the Plaintiff and the Defendant for the period 1st April 1984 to 30th September, 1984.*
2. *Contract of Employment between the Plaintiff and the Defendant for the period 1st October 1985 to 30th September, 1986.*
3. *Contract of Employment between the Plaintiff and the Defendant for the period 1st October 1987 to 30th September 1988.*
4. *Defendant's internal memorandum to the Finance Department and copied to the Plaintiff dated 14th December 1988.*
5. *Contract of Employment between the Plaintiff and the Defendant for the period 1st January 1995 to 31st December 1995.*
6. *Defendant's internal memorandum to the Plaintiff dated 9th June 1997.*
7. *Contract of Employment between the Plaintiff and the Defendant for the period 1st January 1999 to 31st December 1999.*
8. *Contract of Employment between the Plaintiff and the Defendant for the period 1st January 2000 to 31st December 2000.*
9. *Contract of Employment between the Plaintiff and the Defendant for the period 1st January 2001 to 31st December 2001.*

10. Letter dated 26th November 2001 written by the Defendant to the Plaintiff and the Discharge Voucher attached thereto.
11. Letter dated 9th January 2002 written by the Plaintiff to the Defendant.
12. Contract of Employment between the Plaintiff and the Defendant for the period 1st January 2002 to 30th June 2002.
13. Contract of Employment between the Plaintiff and the Defendant for the period 1st July 2002 to 31st July 2002.
14. Contract of Employment between the Plaintiff and the Defendant for the period 1st August 2002 to 31st August 2002.
15. Contract of Employment between the Plaintiff and the Defendant for the period 1st January 2003 to 31st January 2003.
16. Defendant's internal memorandum to all project leaders dated 27th November 2000.
17. Defendant's internal memorandum dated 14th December, 2000 addressed to the Plaintiff.

9. The Plaintiff also testified that for a period of six (6) years and the three (3) months, she did not sign any contracts with the Defendant. The Defendant did not deny that during the following periods, the Plaintiff worked without any formal contracts:-

1st October 1988 to 31st December, 1988

1st January 1990 to 31st December 1990

1st January 1991 to 31st December 1991

1st January 1994 to 31st December 1994

1st January 1996 to 31st December 1996

1st January 1997 to 31st December 1997

1st January 1998 to 31st December 1998

The Plaintiff claims that these periods during which she worked without contracts confirm that she was employed on a long-term basis by the Defendant, during which time she took her annual leave which she says is a privilege reserved for permanent staff.

10. The Defendant claims that on expiry of her contract with the Defendant the Plaintiff was paid a total of DM 32542 in full and final settlement of her terminal dues as stipulated by Clause 11.1 of the contract being PExhibit 9. This was the contract of employment between the Plaintiff and the Defendant for the period 1/01/2001 to 31/12/2001 and the relevant clause which is entitled 'GRATUITY/SEVERANCE PAY' stipulates as follows:-

"11.1 Employees who have completed four years continuous service in a series of contracts with the Employer counting from 1st April 1984 to 31st December 2001 will be entitled to ten calendar days' pay for every completed year of service by way of gratuity/severance pay, based on the Employee's wages at the time of termination of his/her service."

According to the Defendant, the payment of DM 32542 was inclusive of the gratuity computed in terms of the contract and that thereafter, the Plaintiff was offered a position with another of the Defendants projects, the Integrated Food Security Project, Eastern a posting which the Plaintiff accepted. The Defendant further says that though the Plaintiff accepted the payment of DM 32542, she declined to sign the Discharge Voucher on the ground that she was entitled to severance pay at the rate of Fifteen (15) days for every completed year of service, but when the Defendant refused to comply with the demand for severance pay, the Plaintiff filed suit.

11. The Defendant called one witness, DW1, Mr. Dieter Schmidt who joined the Defendant as Head of Administration and Finance from January 2004. Mr. Schmidt's evidence was based on the records which he found at the Defendant's offices since he had neither met nor worked with the Plaintiff before. He stated on cross examination that he was not aware of the terms under which the Plaintiff was employed though he said that employment contracts for all of the Defendant's employees in Kenya were pegged to the life of a project. DW1 denied that the Plaintiff's position in the Department of Procurement of Goods was abolished. The Plaintiff's counsel thought that DW1 was not a competent witness since the evidence he gave appeared to be hearsay. The Defendant produced the following Exhibits to demonstrate that there was no abolition of office as far as the Plaintiff was concerned:-

DExhibit 1 – GTZ Organization Programme as at October 2001.

DExhibit 2 – GTZ Organization Programme as at January 2001.

DExhibit 3 – List of Personnel as at 2002.

DExhibit 4 – List of Personnel as at 2003

In response to the Plaintiff's submissions the Defendant invited the court to look at section 125 of the Evidence Act and to find that the question of redundancy is one of facts on the record; that DW1 had properly addressed himself to the issues from the records kept by the Defendant and that such evidence could not be said to be hearsay; that the issue of hearsay evidence does not therefore arise.

The Submissions:

12. Both counsel appearing made excellent submissions. Counsel for the Plaintiff contends that the contract clearly and expressly provides for notice of one month and urged the court to find that a written document cannot be proved or qualified by oral evidence. In this case, counsel for the Plaintiff referred the court to the provisions of sections 97 and 98 of the Evidence Act. On the other hand, counsel for the Defendant contends that if the Plaintiff claims wrongful dismissal, she must demonstrate that the Defendant was in breach of contract; and if she claims redundancy, it is incumbent upon her to satisfy the conditions set out in the Trade Disputes Act. It is the Defendant's case that the Plaintiff has not proved her case on either limb.

The Issues and the Law

13. It was contended on behalf of the Plaintiff that section 2 of the Trade Disputes Act, Cap 234, Laws of Kenya applies to the Plaintiff's case by reason of the fact that the Plaintiff's office was abolished. Section 2 of the Trade Disputes Act provides:-

“Redundancy” means the loss of employment, occupation job 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 due to the Kenyanization of a business but it does not include any such loss of employment by a domestic servant.”

Learned counsel for the Plaintiff submits that because the Plaintiff suffered redundancy, she is entitled to severance pay in accordance with section 16A(1) (f) of the Employment Act. He contended further that

in view of the age of the Plaintiff, her seniority at work and her experience at the time of dismissal, the Plaintiff is entitled to at least 30 days for each completed year of service for seventeen (17) years being severance pay. Learned Counsel also argued that the Contract of Employment ending 31/12/2001 (PExhibit 9) expressly provided for payment of severance pay at the rate of ten (10) days for every completed year of service. Counsel urged the court to reject the ten (10) days provided therein as being contrary to the provisions of section 16A of the Employment Act.

14. In the alternative, Plaintiff's counsel submits that the Defendant should be compelled to pay the Plaintiff the balance of five (5) days having already paid gratuity to the Plaintiff at the rate of ten (10) days for each completed year of service, on the understanding that the court finds that what was paid to the Plaintiff as gratuity is actually severance pay since in learned counsel's view, Clause 11.1 of PExhibit 9 provided for both gratuity and severance pay. In learned counsels view, for the Plaintiff to succeed in her claim for severance pay, she must prove:-

(i) *That she did not volunteer to terminate her contract of employment*

(ii) *That her services were indeed declared superfluous, unnecessary and/or duplication which was not in the interests of GTZ.*

(iii) *That the company closed down after laying her off.*

15. Finally, counsel for the Plaintiff submits that the Plaintiff's employment with the Defendant was permanent and continuous and that her services were effectively declared redundant when she was removed as Head of Procurement to another project and thereafter accorded brief periodical contracts. Counsel cited the case of Sammy C.L. Alafuma vs Shell Development (K) Ltd. – HCC No. 501 of 1997. In the said case, it was expressly communicated to the Plaintiff that the position of Financial Controller, hitherto occupied by the Plaintiff was going to be permanently abolished as it was found that the position was unnecessary in a small company. The General Manager's letter to the Plaintiff, dated 18/10/1995 also stated:-

“In view of your age and the significant downsizing of the company in 1993/4 --- as advised to you orally, we have decided you will be retired on your 50th birthday in December 1996 (subject to the court case outcome). This as you will know has not been an uncommon practice in Shell Chemicals worldwide in recent years.”

The learned judge in the said case found a clear case of redundancy and referring to the definition of redundancy in Halsbury's Laws of England, 4th ed Vol 16 (paragraph 412, the learned judge said that:?

“redundancy denotes a cessation of employment where the employer “has ceased or intends to cease to carry on the business in the place where the employee was so employed, or “the requirements of that business for employees to carry out work of a particular kind, or for employees to carry out work of a particular kind in the place where he was so employed, have ceased or are expected to cease or diminish.”

There are the correct principles governing redundancy and counsel for the Plaintiff has asked the court to determine these same issues. Can it be said that there is clear evidence of redundancy in this case as defined above?

16. Before reaching a conclusion in the matter I want to consider what the Defendant's counsel has said. On the issue of whether or not the Plaintiff's employment with the Defendant was continuous and/or uninterrupted, counsel for the Defendant submitted that employees of the Defendant were usually engaged on one year contracts for a specific project and that a contract would only be extended where such project went beyond the one year period, and that in any event, any particular contract would not be guaranteed beyond 2 or 3 years. In the instant case, counsel argued that according to PExhibit 16, a memorandum dated 27/11/2000 to the Plaintiff, it was clear that all contracts with the Defendant would not exceed one year. Counsel submitted that the Plaintiff was not employed for an indefinite period

herein in order to qualify to be a permanent employee – see *Salt v Power Plant Company Limited* [1936] 3 All ER 322. The Plaintiff in the *Salt* case (above) therein was employed on the strength of a letter dated 24/12/1925 for a minimum of 3 years subject to the Defendant’s right to terminate by giving six (6) months notice in writing prior to the ensuing December 31. If no such notice was given the employment was to be considered as permanent. Upon being given the 6 month’s notice to terminate the engagement on December 31, 1936 the Plaintiff sued for wrongful dismissal and it was held that “*in the absence of notice to determine the employment at the end of the three years, ending December 31, 1928, the Plaintiff’s engagement was for life and there had been a breach of the agreement*”. Counsel for the Defendant contends that the position in this case is that the Plaintiff was employed on a series of fixed term contracts. Counsel also contends that the fixed term contracts were clear as to when they commenced and when they would end, and that no other terms, whether implied or not can be read into the contracts – see *Muthuuri –vs- National Industrial Credit Limited* [2003] KLR 145. Counsel also submitted that even in those cases where the Plaintiff did not execute any contracts, she admitted to having executed the fixed one year term contracts thereafter and that this was the reason why the Plaintiff was paid the gratuity.

17. I have carefully considered submissions by both counsel on this point and I do find and hold that the Plaintiff was employed on fixed term contracts namely for a year where that was applicable and as the situation demanded. I have looked at all the contracts executed between the Plaintiff and the Defendant and in all the cases, Clause 1.3 provides:-

“1.3. The contract of employment shall end on --- unless it is extended by written agreement by 30th November --- at the latest.”

So that for each contract details of the expiry date and date of the notice were inserted according to the period of contract. I also find that as a result of this the Plaintiff was paid her gratuity. It is also clear from all the contracts executed between the Plaintiff and the Defendant that Clause No. 11 which I have already set out above provided for GRATUITY/SEVERANCE PAY.

In the contract dated 3/12/1999 for example, the four years were to be counted from 1/04/1984, but of course the clause does not say when such gratuity/severance pay was payable and whether it was one or the other. The Defendant contends and it is not disputed by the Plaintiff that at the end of her one-year fixed term contracts with the Defendant, she was paid a lumpsum as provided under the contract. I do not think that it would be reasonable for the Plaintiff to expect to be paid both a gratuity and severance pay and as was held in the *Muthuuri* case (above) no “*intrinsic evidence is admissible to contradict, vary, add to or subtract from the terms of a document*”, I am also persuaded that the termination of the Plaintiff’s contracts of employment with the Defendant was in accordance with the terms of the contracts themselves.

18. The Plaintiff has contended that she was entitled to one month’s notice in respect of the contract for the period of 1/01/2003 to 31/01/2003 but in my view, it would be unreasonable for the Plaintiff to expect to get a one month’s notice for a one month contract which specifically stated that the contract was with effect from 1/01/2003 and “*shall end on 31/01/2003*”. In this regard the Defendant contends that for the Plaintiff to succeed, she must show that

(a) *she was engaged for a fixed period or for a period terminable by notice and dismissed either before expiration of that fixed period or without requisite notice as the case may be;*

(b) *her dismissal must have been wrongful, that is to say without sufficient cause to permit her employer to dismiss her summarily.*

19. The Plaintiff herein contends that her contract should have been automatically renewed but from the circumstances surrounding the Plaintiff’s contracts, it is clear that each contract and especially the contract dated 15/11/2000, provided for a fixed term of one year, and that the contract ran the whole course. It cannot therefore be said that the said contract was terminated before its full term expired nor that it was terminated without the notice required under the contract. It is my finding that the Plaintiff has

not proved either of the two conditions as set out above. I consequently find that the fact of not having her contract renewed was in accordance with the specific terms of the contract itself. The Defendant's letter of 26/11/2001 to the Plaintiff was clear in its term that the contract in question was not going to be renewed at the end of its term on 31/12/2002. Having given the notice of non-renewal to the Plaintiff within the time stipulated for the giving of such a notice, the Defendant lawfully brought to an end the relationship between itself and the Plaintiff. Infact the Plaintiff would have done the same if she did not wish the contract to be renewed.

20. The Defendant cited the case of Simon Kibunga Kimani –vs- International Federation of Red Cross & Red Crescent Societies (Kenya) – Nairobi HCCC No.613 of 1999 (Unreported). The Plaintiff therein was employed under an Employment Contract dated 19/07/1997 as a driver for a period of eight months from 1/05/1997 to 31/12/1997. It was provided under Clause 5 of the contract that during the trial period, either party could terminate the contract by seven days notice. For the remainder of the period one month's notice was required. On 1/01/1998 the Plaintiff's contract was renewed for one year to the 31/12/1998. Following the Plaintiff's failure to account for some per diem, the Defendant suspended him from work on full pay but by a letter dated 16/11/1998, the Plaintiff was notified that his contract with the Defendant would not be renewed. After the notice was served, the Defendant lifted the suspension on being satisfied that the per diem had been properly accounted for; but the decision to terminate the contract was not lifted. The Plaintiff then sued alleging breach of contract. The Defendants denied breach, claiming that the Plaintiff's contract which was for a fixed term expired according to its terms.

21. The court dismissed the Plaintiff's claim for wrongful dismissal on the ground that the contract was terminated in accordance with its terms. I would reach a similar finding in the instant case, that the disputed contract between the Plaintiff and the Defendant was terminated in accordance with its terms and therefore that the Defendant was not in breach of the same.

22. On the issue of redundancy, I find that it did not arise in this case. In addition the Defendant adduced evidence to show that the office – Head of Procurement was not abolished as alleged by the Plaintiff. Nor has the Plaintiff placed evidence before this court to show that her services were found unnecessary by the Defendant nor that the Defendant closed down after redeploying her. Having reached the above conclusion it is also my finding that the Plaintiff was not entitled to severance pay pursuant to clause 11.1 of the contract of 20/12/2000. The Defendant has contended that the wording of clause 11.1 provides for either gratuity or severance pay. I have also come to that conclusion after reading the wording of the clause. I believe that the Plaintiff also read the same meaning into clause 11.1 because she has asked that if this court should not find that she is entitled to severance pay, then it should order that she be paid for an additional 5 days pay over and above the gratuity which she has already received from the Defendant. In my view, there is no evidence to support such a claim. I am satisfied that there would be no justification for such payment and I disallow the same.

22. The other issue for determination is whether the Plaintiff is entitled to one month's salary in lieu of notice on the one month contract. My finding is that the Plaintiff worked for the duration of the contract and as such there was no obligation on the part of the Defendant for a notice to be given. The contract came to an end at its appointed time. What about the claim for general damages for breach of contract? The law is clear that general damages cannot be paid on breach of contract and in any event, in the instant suit, the Plaintiff received all her dues under the term contracts.

23. In the result, I find that the Plaintiff has not demonstrated to this court that the Defendant unlawfully and wrongfully terminated her employment. The Plaintiff has also failed to prove to the court that she is entitled to redundancy pay since no evidence has been adduced by her to show her services were terminated on grounds of redundancy. Accordingly, I dismiss the whole of the Plaintiff's suit with costs to the Defendant.

It is so ordered.

Dated and delivered at Nairobi this 18th day of November 2008.

R.N. SITATI

JUDGE

Delivered in the presence of:

..... For the Plaintiff

.....For the Defendant