



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CIVI SUIT 808 OF 2006

PHELGONAH OKWACHPLAINITFF

VERSUS

EAST AFRICAN CABLES LIMITED.....DEFENDANT

JUDGEMENT

The Plaintiff has brought this action against the Defendant for payment for her terminal benefits in respect of service given to Defendant for twenty nine years and in respect of severance/redundancy pay for those number of years. The Plaintiff also claimed kshs 42, 712. 00/- which amount before the final hearing of this case was paid to the Plaintiff. In respect of service of twenty nine years the Plaintiff sought kshs 1, 303, 115. 00/-. In respect of severance/redundancy the Plaintiff sought kshs 1, 965, 816.00/-. The Defendant denied in its defence that the plaintiff was entitled to the money claim

The Plaintiff in support of her case gave evidence. She stated that she is presently living in Kisumu but previously had worked for the Defendant for twenty nine years, that is, from 6th August 1974 to 31st of July 2003. That she worked for the Defendant as a confidential secretary for the Works Manager. She said that each year of her service she obtained a salary increment from the defendant and that her last pay before her services were terminated was kshs 89, 870. 00/- per month. That her services were terminated by a letter dated 31st of July 2003. The Plaintiff said that she was summoned to the office of Managing Director of the defendant of on 29th of July 2003 in the company of others. The Managing Director proceeded to tell them that the Company was not doing well financially and because of that they were reducing their staff. They were then handed over letters of termination. The Plaintiff was subsequently given a certificate of employment on the 5th of August 2003. The Plaintiff was paid the amount due in accordance with the letter of appointment that is one month in lieu of service plus ex-gratia pay of 7 years service. She however stated that she disputed that pay and that she should have paid for her service of 29 years. The Plaintiff said that she is claiming from the Defendant kshs 1, 303, 115.00/-. She stated this is made out of two week's salary for every year that she had worked. She further said that her claim was in accordance with the Defendant's policy of payment of those who are retired early. That defendant retired employees at the age of 60 and at the time of her termination she was 55 years old. The Plaintiff stated that the Defendant had previously paid other employees whom she named the aforesaid amounts. The

Plaintiff produced a letter of calculation of payment made to a former employee of the defendant by the name of Julius Otiato. That calculation was for the payment of notice period also for redundancy and service pay for the years that employee had served. The Plaintiff sought to rely on this letter as evidence of the Defendant's policy in terminating employees.

P W 2 was Joseph Matelog. He said that he is an electrical contractor presently self employed. From 1st March 1990 to 2nd October 2002, he was employed by the Defendant as Works Manager. He said that the Plaintiff was his secretary whilst he worked for the Defendant. He said that he was in-charge of Human Resource in his department within the Defendants Company. That he further acted in the Kenya Federation Employers where he represented the Defendant. He said that further he was in the Management Review Committee which dealt with salaries, promotions and dismissals. He stated that the Defendant used to pay severance pay to employees for the number of years worked. That this payment was over and above the pension payment. He said that this payment of severance pay was a policy of the Defendants Company. The witness further stated that before he left the Company there were two other employees who had been paid severance pay in accordance with that policy. On being cross examined, the witness said he was not aware under which terms the plaintiffs employment was terminated. He however confirmed that the evidence he had given in regard to payment of severance or redundancy pay only related to those who are declared redundant. He however stated that the Company had even paid severance and redundancy pay to employees whose employment had been terminated due to their theft of Company property.

Defence evidence was given by Beatrice Linah Kowitti. She is presently the Human Resource Manager of the Defendant. She said that her evidence in this matter was obtained from the files in her office. She confirmed that the plaintiff was employed as a secretary on the 8th of August 1974. The Plaintiff was entitled to four weeks leave per year as set out in the letter of appointment. The Plaintiffs employment was terminated as 31st July 2003 when she was paid one month's salary in lieu of notice. He confirmed that the Plaintiff's salary at termination was ksh 89, 870/- per month. That the plaintiff was a unionzable staff upto 1981. Then she changed to management. That at the time of her dismissal the management worked out a figure due to her for the period when the Plaintiff was unionzable. The witness confirmed that unionzable staff get a gratuity. On the other hand she said that management gets pension but no other payment. The witness confirmed that the plaintiff is not entitled to severance payment because this was not a case of retirement and also because she was not unionzable at termination. The witness confirmed that the plaintiff contract of employment was terminated in accordance with her terms of employment. The witness said that P W 2 did work for the Defendant but the witness was unable to confirm that he was acting as a Human Resource Manager.

It is not denied that the Plaintiff did work for the defendant for the number of years claimed in the Plaint. The Plaintiff on being appointed in 1974 was given a letter of appointment. The Plaintiff has not denied that fact. That letter of appointment provided a term for the termination of employment as follows: -

“On the satisfactory completion of the probationary period, on month's notice of termination of service must be given in writing by either side or pay in lieu of notice”

The Defendant by their letter dated 31st July 2003 terminated the plaintiff's employment and stated as follows:

“RE: TERMINATION OF EMPLOYMENT

The Company has decided to terminate your services with effect from the 31st day of July 2003 in accordance with the termination clause contained in your letter of appointment as an employee of East African Cables Limited.

Accordingly, the Company shall pay you all emoluments due to you upon termination of your contract of employment as aforesaid as detailed herein under: -

- a) **Payment for your balance of leave earned but not taken, being 21 days.**
- b) **Salary equivalent to the period of notice you are entitled to as per your letter of appointment.**
- c) **Payment from the pension fund, which shall be paid to you through the company.**

The company shall also issue you with a certificate of service for the period that you have been in its employment.”

The parties, that is the Plaintiff and the Defendant freely entered into a contract by virtue of the letter of appointment dated 6th August 1974. On executing that contract the parties were implying that they would each rely on it. The Defendant in terminating the Plaintiffs employment did indeed rely on the term of that contract. It has been held in the past by courts that the courts will uphold a contract freely entered between the parties. Indeed it is a desirable principal of upholding the sanctity of contract. There has been decided cases in our courts which have upheld termination of employment on the basis of a term of a contract of employment. A case in mind is **Civil Appeal No. 27 of 1992 between Rift Valley Textiles Limited and Edward Onyango Ogampa**. In this case the court of Appeal in upholding termination of a contract of employment in accordance with the terms thereof stated: -

“In our view, even though the Respondent’s summary dismissal was unlawful, he had been paid all that he was entitled to be paid under and in accordance with the terms of his contract with the appellant”

Also the holding of the case of **Ombaya v Gailey & Roberts Ltd [1974]** stated as follows:

“I think it is established that where a person is employed and one of his terms of employment include a period of termination of that employment, the damages suffered are the wages for the period during which his normal notice would have been correct”.

It ought to however be noted that what the Plaintiff claims is severance/redundancy pay. The Plaintiff had a burden to prove to this court that her termination was not in accordance with the contract of employment but that rather it was a case of redundancy. Under the employment act section 16A [2] redundancy is said to have the meaning a signed to it at section 2 of the Trade Disputes Act. That section in Trade Disputes Act Cap 234 defines Redundancy as follows:

“Redundancy” means the loss of employment, occupation, job or career by involuntary means through no fault of an employee involving termination of employment as the initiative of the employee 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.”

The Plaintiff failed in the evidence that she tendered before this court to show that her case fitted within that definition of redundancy. Indeed the court having examined the evidence tendered in this court in totality finds that the plaintiff has failed to prove her case on the balance of probability. The only issue that could arise in this action is whether the defendant is entitled to severance/redundancy pay.

In view of I have stated herein before the court would respond to that issue in the negative. The Plaintiff has not proved her entitlement to that payment.

Accordingly the plaintiff’s case is hereby dismissed with costs to the defendant.

MARY KASANGO

JUDGE

Dated and delivered at Nairobi this 24th day of January 2007.

MARY KASANGO

JUDGE