



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 353 OF 2014

AGNES MWIKALI WATHOME.....CLAIMANT

VERSUS

ERICSSON KENYA LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 13th March, 2020)

JUDGMENT

The claimant filed a statement of claim on 07.03.2014 through Munyao, Muthama and Kashindi Advocates. The claimant prayed for judgment against the respondent for:

- a) A declaration that the unauthorised deductions by the respondent were contrary to the provisions of section 17 and 19 of the Employment Act, 2007.
- b) An order for payment of the amount of deductions made to CIC Stanbic Bank namely in the sum of Kshs.1, 764, 768.00.
- c) An order for repayment of the Kshs. 299, 648.16 being the amount which the deductions exceeded the limit imposed by section 19(3) of the Employment Act, 2007.
- d) An order for payment of the claimant's emoluments under the Voluntary Retrenchment Agreement in the sum of Kshs. 1, 142, 503.59 which include:
 - i. Notice pay Kshs.148, 142.34.
 - ii. Severance pay Kshs.349, 032.33.
 - iii. Accrued leave days Kshs.126, 830.73.
 - iv. Gratuity Kshs.518, 498.19.
- e) Damages.
- f) Interest on b, c, and d above.
- g) Costs of the suit.

The claimant's case as pleaded is as follows. She was employed by the respondent in 2009 in the position of Market Logistics Manager stationed in Nairobi and in 2010 re-designated to Software Licence Handler. In March 2011 the respondent deducted from the claimant's salary Kshs. 47,798.00 and the claimant was informed that it was repayment of a loan she owed CfC Stanbic Bank. It is the claimant's case that the deduction was in breach of section 17 of the Employment Act, 2007 because prior to the deduction the claimant did not signify in writing her agreement or consent to such deduction. Thus under section 17(1) of the Act, the claimant by email dated 12.04.2011 advised the respondent to direct her salary to her Equity Bank account designated for the purpose. The claimant's further case is that the claimant disregarded her instructions and continued to direct her salary to the CfC Stanbic Bank which account the Bank had irregularly and unlawfully frozen. By that reason the claimant was unable to access her salaries directed to the CfC Stanbic Bank for 16 months between March 2011 to June 2012.

The claimant's further case is that in April, June, July, August, October and November the respondent made deductions in the aggregate sum

of Kshs.299,648.16 and the respondent informed her that the deductions were credit card repayments made to NIC Bank. The claimant's case is that the deductions were similarly in breach of section 17 of the Employment Act, 2007 because prior to the deduction the claimant did not signify in writing her agreement or consent to such deduction. In the process the claimant's case is that she was left without any income as at end month she got nil salary.

The claimant's further case is that around the same time the respondent rolled out a Voluntary Retrenchment Programme (VRP) and the claimant alleges that the programme was in breach of the prevailing employment law. The claimant alleges that the respondent's senior staff coerced her to apply for the VRP failing she'd be dismissed due to her financial predicament and troubles. Thus, the claimant alleges that based on the threats for dismissal, on 15.06.2012 she signed for the VRA in consideration of a sum of Kshs.1, 142, 503.59 payable under the VRA but the respondent breached the VRA by failing to remit the amount payable to her Equity Bank account. The claimant prays for judgment as per her statement of claim.

The response was filed on 07.04.2014 through Coulson Harney Advocates. The respondent prayed that the claimant's claim be dismissed with costs.

The respondent's case was pleaded as follows. The respondent admitted deducting the Kshs.47, 798.00 from the claimant's salary and it was pursuant to an agreement entered into between the Bank and CFC Stanbic Bank Limited on 09.08.2010 under which the respondent made a Staff Loan Scheme available to its employees. The employees who participated got loans at discounted interest rates. A term of the Staff Loan Scheme was that the respondent would deduct the repayments in respect of any loans taken by its employees and remit them directly to the Bank. In early 2011 the claimant participated in the Staff Loan Scheme by applying for a loan from the Bank. The claimant gave the respondent an irrevocable authority dated 31.01.2011 in respect of her loan with the Bank. The terms of the irrevocable authority were as follows:

- a) The respondent would deduct from the claimant's salary the monthly loan repayments due to the Bank and remit the deductions to the Bank.
- b) The respondent would make the deductions until such time the Bank gave written confirmation that the claimant had repaid her loan in full.
- c) The claimant authorised the respondent to remit her terminal dues to the Bank for the purpose of offsetting any outstanding loan balance.
- d) The instructions on the deductions would remain in force until the claimant's loans with the bank had been repaid in full.
- e) No changes would be made in respect of the instructions to deduct the loan repayments without the consent of the Bank.

The respondent's case is that in March 2011 the Bank instructed the respondent that the monthly deduction from the claimant's salary was Kshs.47, 798.00 and the respondent commenced the deductions with remittance to the Bank. The deductions were lawful and in accordance with the Bank's instructions to the respondent. The amount as deducted was indicated on the claimant's monthly payslips and she was aware of the deduction and the remittance to the Bank. The respondent received the claimant's email of 12.04.2011 to redirect her salary to Equity Bank but the loan she had taken from CFC Bank required that the claimant's salary is paid to that loan account unless CFC Bank instructed that the claimant's salary is paid to another account. By the irrevocable authority the respondent was precluded from remitting the claimant's salary to any other account unless CFC Bank consented in writing. The claimant provided to the respondent no such written consent by CFC Bank. The respondent denies that the Employment Act, 2007 was breached as alleged for the claimant. The respondent denied that it had occasioned the claimant loss as alleged and claimed. The respondent further admitted that it made the deductions of Kshs.299, 648.00 from the claimant's salary in respect of the credit card issued to her by the respondent. In that regard the respondent's policy was that employees in the rank such as held by the claimant would be provided a credit card to facilitate carrying out of official duties. The claimant while provided with such credit card incurred expenses of Kshs.299, 648.00 which were not work related. The respondent was therefore entitled to recover the Kshs.299, 648.00 being unauthorised expenses. Any loss suffered by the claimant cannot be attributed to the respondent. The VRA of 15.06.2012 expressly allowed the respondent to deduct from the claimant's final dues any outstanding balance in respect of the credit card. He claimant's final dues were fully paid as per the VRA.

The Court has considered the pleadings, the evidence and the final submissions filed for the parties. The Court makes findings as follows:

To answer the **1st issue** for determination the Court returns that there is no dispute that parties were in a contract of service.

To answer the **2nd issue** for determination the Court returns that the contract of service came to an end when the parties signed the VRA on 15.06.2012. The evidence is that the agreement was entered into voluntarily. The claimant has not established coercion as no evidence of force or threat of force has been shown to have been invoked at the time of signing VRA. In so far as the contract of service ended by conclusion of VRA, the Court finds that the termination or separation was lawful and fair so that no compensation under section 49 of the Employment Act, 2007 will issue.

The **3rd issue** for determination is whether the claimant is entitled to any of the other remedies as prayed for. The Court makes findings as follows:

- a) The claimant prays for a declaration that the unauthorised deductions by the respondent were contrary to the provisions of section 17 and 19 of the Employment Act, 2007. The evidence is that throughout the deductions the claimant was aware of the deductions. Section 17 (1) (b) of the Employment Act, 2007 provides that an employer shall pay the entire amount of wages earned and payable to an employee with respect to work done by the employee in pursuance to a contract of service directly in the currency of Kenya and into an account at a bank, or building society, designated by the employee. Section 17(1) provides for an offence in event of

violation of section 17(1) and makes it an offence punishable by a fine of one hundred thousand or imprisonment for 2 years or both such fine and imprisonment. It is not denied that the claimant instructed the respondent to direct the claimant's salary to her Equity Bank account by the email dated 12.04.2011. In so far as the respondent has not been tried in a court of competent jurisdiction and found guilty of the offence in section 17(1) of the Act, the Court finds that a finding of violation of the section would amount to a finding of criminal liability against the respondent free from the required due process. The Court has also considered that the deductions continued and ended on or about 15.06.2012 when VRA was signed and final dues deducted to settle the loans or debts. The other deductions were prior to that date during the claimant's service. Under section 90 of the Employment Act, 2007 time of limitation for a cause of action for a continuing injury such as the deductions in issue is 12 months from the date of cessation of the injury. The suit was filed on 07.03.2014 long after the lapsing of the 12 months of limitation. The Court finds that even if the deductions exceeded two thirds of the claimant's wages, the claimant is trapped by inexcusable delay to challenge the offensive deductions. The prayer for a declaration will therefore fail.

b) The claimant prays for an order for payment of the amount of deductions made to CIC Stanbic Bank namely in the sum of Kshs.1, 764, 768.00. The Court has already found that the claim is time barred under section 90 of the Act. In any event the claimant confirmed in her evidence that in December 2010 she discovered that there was Kshs.780,000.00 credited on her CfC Stanbic Bank account. She confirmed that she spent the deposit as credited and the respondent deducted the loan recoveries from April 2011 to July 2012 despite her CfC Stanbic Bank account having been frozen by Court order she obtained in a suit she filed against the Bank. The Court finds that the claimant has not explained why throughout the deductions and within 12 months after July 2012 she failed to file the suit. In any event the time of limitation could not be extended by the Court or otherwise. The claim is found time barred and in any event the claimant has sued the Bank in relation to the deductions for the allegation that the Bank mismanaged her account.

c) The claimant prays for an order for repayment of the Kshs. 299, 648.16 being the amount which the deductions exceeded the limit imposed by section 19(3) of the Employment Act, 2007. The Kshs.299, 648.16 was with respect to use of the credit card meant for work related expenses. The claimant testified that she was aware of the credit card policy and if the card was used on personal expenses then the employee was under a duty to refund the claimant. The respondent's witness (RW) testified as much and confirmed that the credit card was for use by staff on foreign travel but the claimant had used it to make her local private purchases. The Court returns that the claim was time barred under section 90 of the Act and further that the claimant was liable to be deducted in refund to the respondent per the credit card policy. The prayer will therefore fail.

d) The claimant prayed for an order for payment of the claimant's emoluments under the Voluntary Retrenchment Agreement in the sum of Kshs. 1, 142, 503.59 which include:

- v. Notice pay Kshs.148, 142.34.
- vi. Severance pay Kshs.349, 032.33.
- vii. Accrued leave days Kshs.126, 830.73.
- viii. Gratuity Kshs.518, 498.19.

The Court finds that the deductions were applied to recover Bank loans and debts the claimant owed the respondent. The respondent remitted Kshs.577,564.00 to CfC Bank under the irrevocable authority under which the claimant undertook that in event of termination of employment for any reason she authorised the respondent to remit her terminal dues to the Bank for the purpose of offsetting any outstanding loan balance and thereafter, she would make arrangements to clear any outstanding loan balance. Further it is clear that Kshs.577, 564.00 paid to the Bank was the balance as per the last claimant's payslip showing other deductions from her total dues of Kshs.1, 075, 166.50. The deductions were PAYE Kshs.317, 382.25; CfC Bank loan Kshs.47,790.00; NIC Credit card deductions Kshs.132, 421.65; and making a total of Kshs.497, 601 as submitted for the respondent. Besides the deductions being part of the previous deductions during service and therefore continuing injury that the Court has found as time barred, it is clear that the deductions on the final dues settled recoverable liability to the respondent under the credit card policy and the liability to the CfC Bank under the irrevocable authority. The claimant purported to deny that she signed the irrevocable authority but she never raised a grievance in writing over the many months that the Kshs.47, 567.31 were deducted and remitted to the Bank per her numerous payslips at the material time. The Court finds that she signed the irrevocable authority. The prayer will fail.

e) The Court finds that the claimant has not established a basis for award of damages as prayed for. While submitting on damages for emotional distress as a result of constitutional and statutory violations, the Court has made clear findings on alleged violation of section 17 and 19 of the Employment Act, 2007 in a manner that does not entitle the claimant to damages. As for emotional distress and constitutional violations, the Court finds that the claimant made no pleadings and provided no evidence in that regard and the submissions went against trite law that parties are bound by their own pleadings. Damages for breach of banker-customer confidentiality is clearly misconceived as parties were not in such a relationship. There was no pleading on discrimination as no particulars of discrimination were pleaded and similarly constructive dismissal was not pleaded and in any event separation was by signing VRA and nothing more. The Court finds that in this case the claimant has not established a ground to award general damages.

f) The Court has considered the parties' margins of success and returns that the suit is liable to dismissal with costs.

In conclusion judgment is hereby entered for the respondent against the claimant for:

- a) Dismissal of the suit.
- b) Costs of the suit in favour of the respondent.

Signed, dated and delivered in court at **Nairobi** this **Friday, 13th March, 2020**.

BYRAM ONGAYA

JUDGE