



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 39 OF 2016

(Before Hon. Justice Hellen S. Wasilwa on 28th May, 2020)

JANE MARY MBUGUA.....CLAIMANT

VERSUS

CMC MOTORS GROUP LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant was employed by the Respondent on 4/4/1979 as a copy typist. She served the Respondent until 31/11/2015 when she sought early retirement. At the time of separation, she was a senior secretary earning a salary of Kshs. 77,935.00.

2. On 1/10/2015, the Claimant formally requested for early retirement on the ground of compelling family obligations which needed urgent attention. The Respondent issued the Claimant with a letter accepting her early retirement together with a duly executed computation of her final dues and a certificate of service. Consequently, her services were terminated on 31/10/2015.

3. The Claimant cleared with all the Respondent's departments save for the payroll department who refused to clear her and pay her terminal dues despite the several futile requests made.

4. As a result, the Claimant filed this suit on 18/1/2016, seeking payment of her withheld dues as well as unlawful deductions made but not remitted. In particular she sought the following reliefs-

i. A declaration that the actions of the Respondent amounted to discrimination and abuse of human dignity and therefore unlawful.

ii. Punitive damages for delayed dues, discrimination and subsection of the Claimant by the Respondent to inhumane treatment.

iii. Salary in lieu of notice of Kshs. 77,935.00.

iv. Leave encashment as at 31/10/2015 of Kshs. 79,181.96.

v. Gratuity (a months' basic salary for 37.11 years) amounting to Kshs. 2,892,167.85.

vi. Severance pay of 15 days for each year worked amounting to Kshs. 1,446,018.98.

vii. Unlawful deductions made but not remitted.

vii. Pension as contemplated in the Respondent's Rules and Regulations of the Trust Deed.

ix. Interest on (iii), (iv), (v) and (vi) above.

x. Costs of this suit.

xi. Any other/further relief that this Honourable Court may deem fit to grant in the interest of justice.

5. The Respondent filed its response on 1/4/2016, denying the allegations and sought to have the suit dismissed with costs.

The Claimant's Case

6. The Claimant avers that under her contract, she was entitled to the following:-

- *Gratuity allowance.*
- *Unlawful deductions made but not remitted.*
- *Basic salary for the month of October 2015.*
- *One months' salary in lieu of notice.*
- *Leave encashment for 30.48 days earned up to and including 31/10/2015.*
- *Severance pay at the rate of 15 days for every year of service.*
- *Pension as contemplated in the Respondent's Rules and Regulations of the Trust Deed.*
- *Any other statutory entitlements.*

7. The Claimant avers that in failing to heed to her requests to pay her terminal dues, the Respondent discriminated against her and violated her fundamental rights and freedoms. She further avers that the Respondent's refusal to remit her final dues without giving her a justification for such action is unlawful and has caused her and her family pain and trauma.

8. During trial, the Claimant testified as CW1 and adopted her witness statement dated 11/4/2018 together with the documents she filed in the matter, as her evidence. It was her testimony that she had not been paid by the Respondent to date.

9. Upon cross examination, she conceded that her retirement age was set at 60 years. It was her testimony that by the time she was issued an early retirement notice, she was aware that she was set to retire that same year. She testified that she was supposed to have been paid as an employee taking early retirement.

10. It was her testimony that the payroll department refused to clear her because Mr. Sifuna had given them directions not to pay her. However, the reason was not communicated to her. She denied receiving the letter revoking her early retirement letter or rejecting the dues offered by the Respondent.

11. It was her testimony that the difference in the computation and early retirement letter was the severance pay, which was supposed to have been paid to her. She denied colluding to put her separation terms under redundancy.

12. During re-examination, it was her testimony that she never applied to be included in the redundancy programme that had been ongoing. She maintained that the Group HR Manager had accepted her early retirement letter together with the computations contained therein. She denied receiving the letters of 4th and 9th November 2015, from Mr. Sifuna.

The Respondent's Case

13. The Respondent avers that the letter of 19/10/2015, accepting the Claimant's resignation was revoked on 4/11/2015 because the issuance had been engineered by the Claimant's misrepresentation hence the proper lawful dues were set out in the letter of 9/11/2015.

14. The Respondent contends that the Claimant placed unreasonable demands on the payroll department upon revision of her terminal dues to reflect the lawful and valid dues. They further contend that they have always been ready and willing to pay the Claimant her rightful dues as stipulated in her revised retirement letter of 9/11/2015.

15. The Respondent urged this Court to grant them leave to deposit the Claimant's dues in court as she was unwilling to accept it. The Respondent denies discriminating against the Claimant and reiterates that she refused to accept her dues.

16. It is the Respondent's position that the Claimant is a non-unionisable employee hence not entitled to gratuity allowance or severance pay thus not entitled to the reliefs sought.

17. Kennedy Mugo testified as RW1 and adopted his witness statement dated 6/7/2018, as his evidence. It was his testimony that the letter of 18/11/2018 regarding the Claimant's retirement date was served upon her. According to him, the Claimant requested to be included in the redundancy list vide her letter of 1/10/2015 and on 18/10/2015, her name was included.

18. However, it was later realized at the payroll office, that the letter issued was improper. As such, the redundancy notice was revoked and the Claimant was informed vide the letter of 4/11/2015 that she would retire normally.

19. It was his testimony that the Claimant's dues were a months' notice, outstanding leave and pension. He further testified that he had a meeting with the Claimant and explained to her the issue. He stated that the Claimant was still being paid her pension.

20. During cross examination, he maintained that the Claimant was issued with a retirement notice, followed by a redundancy notice which was later revoked upon realizing that she had actually been issued with a retirement notice.
21. He conceded that the Claimant had requested for early retirement in her letter, which request was allowed. It was his testimony that the Claimant refused to acknowledge the revocation letter of 4/11/2015 but conceded that the same was sent via email.
22. He conceded to not having evidence to prove that the Claimant had misrepresented facts and that the issue of redundancy had not been raised in the defence.
23. Upon re-examination, it was his testimony that severance pay was payable under the redundancy clause.

The Claimant's Submissions

24. In her submissions filed on 22/1/2020, the Claimant submits that the letter of 19/10/2015 was not issued erroneously. No evidence of the emails purporting to revoke the said letters or the meeting that took place between the Claimant, RW1 and the Group Human Resource Manager; were adduced in Court. She asserts that the same was issued procedurally with the approval of the CEO, Divisional Manager, Payroll officer and the Group Human Resource Manager, which she accepted.
25. The Claimant submits that she did not receive the letters of 4th and 9th November 2015 and contends that the same were overtaken by events as her employment ceased on 31/10/2015.
26. The Claimant submits that the evidence regarding redundancy should be expunged as it was not pleaded in the defence thus denying her a chance to respond to the same. She relies on the case of Stephen **Ndolo Wambua vs. Beatrice Mbula Mutilu & 2 Others; Machakos Civil Appeal 12 of 2017** where the Court held that a party is bound by their pleadings and one cannot be allowed to raise a fresh case without the proper amendment being made.
27. The Claimant submits that Courts cannot rewrite a contract unless it is proved that there was an element of duress, error or misrepresentation; which has not been proven in this case.
28. The Claimant submits that she is entitled to exemplary and punitive damages for the continued violation of her human dignity, discrimination and inhumane treatment. She relies on the case of **Daniel Musinga T/A Musinga & Company Advocates vs. Nation Newspaper Limited [2006] eKLR** as cited in **V.M.K vs. CUEA [2013] eKLR** where it was held that a Court has to look at the whole conduct of the parties before action, after action and in compensatory damages such sum, as will compensate him for the wrong he suffered.

The Respondent's Submissions

29. In their submissions filed on 5/2/2020, the Respondent submits that the Claimant's retirement does not amount to early retirement as defined in the HR Manual as she requested for early retirement after attaining the normal retirement age. The Respondent contends that a conjunctive reading of clause 3 and 4 of the HR manual indicates that the benefit payable to a non-unionisable employee is pension.
30. It is the Respondent's submissions that the listing of the items in the Claimant's early retirement letter was a manifest error in view of the clear provisions of the Respondent's HR Policy. It is their position that RW1 explained how the error occurred.
31. The Respondent submits that the Claimant is not entitled to the claim for severance pay as it is only reserved for an employee who has been declared redundant.
32. The Respondent further submits that despite issuing a certificate of service, they had the right to rectify any errors made regarding the Claimant's termination hence cannot be bound by the terms of the letter of 19/10/2015. They are of the opinion that this Court should act equitably and relieve the Respondent of the contractual obligations it undertook by mistake as no third party will be prejudiced.
33. They rely on the case of **Solle vs. Butcher [1949] 2 ALL ER 1107** where it was found that a court had the power to set aside a contract whenever it was of the opinion that it was unconscientious for the other party to avail himself of the legal advantage which he had obtained.
34. I have examined all the evidence and submissions of the Parties. The main issue for this Court's determination is what the Claimant's termination dues are and whether the Claimant should accept what the Respondent offered her.
35. From the Claimant's appendix letter dated 1/10/2015, the Claimant tendered a request for early retirement effective 31/10/2015.
36. On 19/10/2015, the Respondent's Group Human Resource Manager responded to the letter accepting her request for early retirement and setting out her retirement benefits as:-

- ***Basic salary for the month of October 2015.***
- ***One months' salary in lieu of notice.***
- ***Leave encashment for 30.48 days earned up to and including 31/10/2015.***

- Severance pay at the rate of 15 days for every year of service.

37. The Respondent submitted that the letter allowing the early retirement was revoked through a letter sent to her by email. The Respondent referred to a letter dated 4.11.2015.

38. Another letter dated 9.11.2015 is also exhibited by the Respondent but the Claimant denied receiving the said letter. The email purportedly used to send the 2 letters to the Claimant is also not attached. The 2 letters were sent to the Claimant through the Respondent's own address after her exit on 31.10.2015. Without proof that these 2 letters were sent to the Claimant, there is no evidence that the early retirement letter was revoked.

39. It is true that there had been an earlier letter of 2015 advising the Claimant of her retirement in 2015. But this letter notwithstanding the Respondent seem to have overlooked it and allowed an early retirement vide their letter of 19/10/2015 and even issued her with a certificate of service to that effect.

40. It is therefore my finding that the Claimant applied for and was allowed to retire early as per the letter of 19/11/2015, which also set out her retirement benefits. That being the case, I find that the Claimant is deemed to have retired on 31/10/2015 and was to be paid as set out in the letter of 19.10.2015.

41. I therefore find for the Claimant and enter judgement for her as prayed as follows:-

1. Leave encashment as at 31/10/2015 of 30.48 days = 79,181.96.

2. 1 months' salary in lieu of notice = 77,935/=.

3. Basic salary for October 2015 = 77,935/=.

4. Severance pay at the rate of 15 days for every year of service = $\frac{1}{2} \times 77,935 \times 36 \text{ years} = 1,402,830/=.$

Total = 1,637,882/=

Less statutory deductions

5. Payment of pension as contemplated in Respondent's Rules and Regulations of the Trust Deed.

6. The Respondent will pay costs of this suit plus interest at Court rates with effect from the date of this judgement.

Dated and delivered in Chambers via zoom this 28th day of May, 2020.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Orina for Respondent – Present

Claimant – Absent