



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT MOMBASA
CAUSE NUMBER 6 OF 2015

BETWEEN

FATMA OMAR MOHAMEDCLAIMANT

VERSUS

PATH CARE KENYA LIMITEDRESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Annette Mbogoh Advocate instructed by Kituo Cha Sheria, Advocates for the Claimant

Ms. Opolo Advocate instructed by the Federation of Kenya Employers [FKE] for the Respondent

JUDGMENT

1. Fatma Omar Mohamed filed her Statement of Claim on the 16th January 2015. An amended version was filed on 20th July 2015. She states she was employed by the Respondent as a Receptionist/ Data Capture, on 1st September 2004. She was retired by the Respondent on 30th September 2014, in circumstances she considers unfair and unlawful. Her last salary was Kshs. 19,550. She avers her contract entitled her to work until she was 60 years. She prays against the Respondent for:-

- a) 1 month salary in lieu of notice at Kshs. 19,550.
- b) Balance of service pay at Kshs. 9,750.
- c) 12 months' salary in compensation for unfair termination at Kshs. 234,600.
- d) Refund of unlawful medical deductions at Kshs. 3009.
- e) Arrears of house allowance from 2004 to 2013 at Kshs. 372,600

Total.... Kshs 639,504

f) Any other suitable relief.

g) Costs and interest.

2. The Respondent filed its Statement of Response on 20th July 2015. It is accepted the Claimant was employed by the Respondent. The Claimant was retired due to technical reasons. She was issued her Certificate of Service. After she filed this Claim, the Respondent conceded retirement was unfair, and advised the Claimant to return to work on several occasions. She rejected the offer, insisting she only wanted to be paid her anticipatory salary, up to the age of 60 years. The Respondent states the Claimant is seeking to enrich herself unjustly. She was paid service pay at Kshs. 87,620 on retirement. She cannot claim additional service pay. She was paid pension through Jubilee Insurance Company, at Kshs. 25,940. She was paid pending annual leave days. She is not entitled to compensation. The Respondent prays for dismissal of the Claim.

3. The Claimant was heard, and closed her case, on 15th February 2016. Dr. Narsinh Mandalia, a Pathologist in charge of the Respondent, gave evidence for the Respondent on 27th June 2016. The dispute was last mentioned on 17th October 2016, when Parties confirmed the filing of their Closing Submissions, and Judgment reserved for 24th March 2017.

The Claim:-

4. The Claimant testified she was 55 years when retired. Mandatory age of retirement was 60 years, as per her letter of employment. No reason was given for the forced early retirement. On 29th September 2014, she received a salary alert on her mobile phone. It was a big amount of money. The following day, her boss called her, and informed her that was her last day at work. There was no notice at all.

5. The Respondent is a Partnership of Pathologists. They have a medical lab in Mombasa. Their head office is in Nairobi. Dr. Mandalia advised the Claimant to enquire from Nairobi why she was dismissed. She approached KITUO CHA SHERIA for legal advice.

6. Her pension was not paid. She was told by the Respondent Jubilee Insurance would pay her pension of 2 years. 4 months were excluded in the payment of pension. She seeks service and notice pay. She prays for house allowance, which remained unpaid up to 2013. There were fumes at the workplace which made the Claimant ill. She was treated at AAR. The Respondent deducted the cost of treatment from her salary. The Respondent painted its premises while the Claimant and other Employees were working; she developed sinuses. She was treated, and again, the Respondent deducted the cost of treatment from her salary. She was paid terminal dues at Kshs. 88,676, comprising gratuity, and September salary. She worked for 10 years, but was paid gratuity based on 8 years.

7. She testified under cross-examination that she was employed in 2004, but signed her letter of employment in 2006. She used to fall sick once or twice every year. It did not affect her performance. She was offered her job back. It was not possible to go back. She seeks house allowance from the year 2004. Her contract referred to gross salary. She did not know this meant inclusive of house allowance. Jubilee Insurance paid her about Kshs. 25,000. Gratuity was paid at Kshs. 87,620 in total. The relationship with the Employer was cordial until 2014 when the Claimant was frustrated. Redirected, she told the Court her pay slip gave the correct date of employment- year 2004. She was unwell in 2008 for about a month. She was not always unwell. She had already filed the Claim when the Respondent offered to re-employ her. Certificate of Service showed the period of service, 2004 -2014. It is signed by the Dr.

The Response:-

8. Dr. Mandalia told the Court he has known the Claimant from 1980s. He employed her in his Medical Laboratory. He closed the Laboratory, and joined Pathcare with the Claimant in tow.

9. The Claimant was employed in 2004 as Receptionist/Data Capture. Her salary was Kshs. 19,550.

Termination was fair. She was ill for some time. She retired on medical grounds. It was amicable. She was paid all her dues.

10. It was much later when the Respondent realized she had sued the Respondent for unfair termination. The Respondent sought advice from its Advocates. The advice was that termination was unfair.

11. The Respondent offered to reinstate the Claimant. She rejected the offer. She was paid her rightful terminal dues. She is not entitled to compensation for unfair termination. Her salary was gross, as shown in the contract. Her claim for arrears of house allowance is misplaced.

12. On cross-examination, the Dr. testified Fatma worked for 10 years. He conceded retirement was not in accordance with the contract of employment. Another Employee was recruited to do Claimant's work. Gratuity was for the entire period. The Claimant suffered urinary problems. House allowance was included in her salary. The Respondent prays for dismissal of the Claim.

The Court Finds:-

13. There is sufficient evidence to conclude the Claimant was employed by the Respondent as Receptionist/ Data Capture in the year 2004. This is clear in the evidence of Dr. Mandalia; the pay slip exhibited at annexure 2 of the Respondent's documents; and in her Certificate of Service. She was retired by the Respondent, on 30th September 2014. As at the time of retirement, she earned a monthly salary of Kshs. 19,550.

14. Parties agree after the Claimant lodged this Claim, the Respondent sought legal advice from its Advocates. The advice was that termination was unfair. The Respondent offered to re-employ the Claimant. She rejected the offer, insisting on pursuing the Claim. She testified it was not possible to return, but did not explain why it was not possible.

15. The Court has in the past suggested that where an Employer acknowledges to have acted unfairly and unlawfully in terminating an Employee's contract, and has offered reinstatement, the Employee must show very good reasons why the remedy of reinstatement is unacceptable. This so, because monetary compensation, is predicated on the need to redress economic injury suffered by the Employee as a result of loss of the job. If the job has been offered back, what would be the justification in the Employee pursuing compensation? The Claimant submits that compensation was not an adequate remedy. Why would reinstatement, which places an Employee where she/ he was immediately before termination, be inadequate? Where is the logic in the Claimant's argument that she would have worked until the age of 60, after she has rejected the offer for reinstatement?

16. The Court is nonetheless required to consider the wishes of an Employee, under Section 49 read with Section 50 of the Employment Act, in considering reinstatement. The Claimant is entitled under the law, to reject reinstatement. The Court must respect the Claimant's wish not to continue working for the Respondent.

17. The offer for reinstatement therefore, can only be taken by the Court as mitigating, to a considerable degree, the wrongful act of the Employer. It could have been a full and final remedy, had it been accepted by the Employee. There is no need to repeat here that the Claimant was retired ostensibly because she was persistently unwell; she was not given any form of notice of termination; and was not reasonably accommodated. The Dr. simply called her to office, and told her it was her last day at work. The Respondent was correctly advised by its Advocates, but perhaps a little late in the day, that its decision amounted to unfair termination. A remedy, which the Courts rarely grant, was placed in the hands of the Employee by the Employer, and declined. The Employee was entitled to reject the offer, but as suggested above, such rejection must have a mitigatory influence on the unfair act of the Employer, and consequently on the value of the compensatory award.

18. *The Court finds the Claimant was unfairly and unlawfully retired, and grants her 2 months' salary in compensation at Kshs. 39,100.*

19. ***The prayer for notice pay at Kshs. 19,550 is allowed.***

20. The Claimant submits she was paid service pay based on a period of 8 years, rather than 10 years. She was paid pension through Jubilee Insurance, from the period between February 2013 and September 2014. She claims she is owed service pay of 4 months. This prayer has no merit and is rejected. The Claimant was paid service pay of Kshs. 87,620, although a beneficiary under the N.S.S.F. Service pay in any case is based on complete years of service, and it is doubtful that it can be computed based on a period of 4 months. The prayer is rejected.

21. The contract dated 1st September 2006 described Claimant's salary as 'gross.' It encompassed all conceivable allowances, including house allowance. There is no foundation in the claim for arrears of house allowance from the year 2004. The prayer is declined.

22. Lastly the Court is not able to locate any evidential material in the record, establishing the prayer for medical deductions. There is no pay slip showing medical deductions. The contract suggests the Claimant was on a medical scheme. The Respondent submits she had a medical cover. This prayer was not mentioned in the Claimant's Witness Statement dated 15th January 2015. It is declined.

23. No order on the costs.

IN SUM, IT IS ORDERED:-

a) The Claimant was unfairly and unlawfully retired.

b) The Respondent shall pay to the Claimant the equivalent of 2 months' salary in compensation for unfair retirement at Kshs. 39,100; and 1 month salary in lieu of notice at Kshs. 19,550- total Kshs. 58,650.

c) No order on the costs.

d) Interest granted at 14% per annum from the date of Judgment till payment in full.

Dated and delivered at Mombasa this 17th day of February, 2017.

James Rika

Judge