



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1309 OF 2012

(Before Hon. Lady Justice Hellen S. Wasilwa on 11th July 2017)

KUDHEIHA WORKERS.....CLAIMANT

VERSUS

KENYA GIRL GUIDES ASSOCIATION.....RESPONDENT

JUDGMENT

1. Before the Court is a Memorandum of Claim dated 2nd August 2012 where the Claimant claims unfair termination.

2. The Claimant seeks the following prayers:

1. Underpayment as per the Respondent’s Circular to all staff of 10%

(a) January 2004 – December 2004 by 10 % $\underline{15000 \times 10} = 1,500 \times 12 \text{ months} = 18,000/-$

100

(b) January 2005 – December 2005 by 10 % $\underline{1650 \times 1} = 1650 \times 12 \text{ months} = 19,800/-$

100

(c) January 2006 – December 2006 by 10% $\underline{18000 \times 10} = 1800 \times 12 \text{ months} = 21,600/-$

100

(d) January 2007 – December 2007 by 10 % $\underline{19800 \times 10} = 1980 \times 12 \text{ months} = 23,760/-$

100

(e) January 2008 – December 2008 by 10% $\underline{21789 \times 10} = 2178 \times 12 \text{ months} = 26,136/-$

100

(f) January 2009 – December 2009 by 10 % $\underline{23958 \times 10} = 2398 \times 12 \text{ months} = 28,749.60/-$

100

(g) January 2010 - December 2010 by 10 % $\underline{26356 \times 10} = 2637 \times 12 \text{ months} = 31,638.40/-$

100

TOTAL UNDERPAYMENTS = 169,680.00

2. Service gratuity

Kshs 26,356.20 x 34 years of service (1976- 2010) = 896,110.80

3. Pending Leave days

Kshs 26,356.20 x 19 days

30 days = 10,669.00

Total Amount to be paid to the aggrieved = 1,076,450.40

Less Amount Paid = 342,668.70

Balance to be paid = 733,792.70

Facts

3. The Claimant was employed by the Respondent on the 1st September 1976 as an Office Assistant at a basic salary of Kshs 450 per month. She was promoted to Headquarter Secretary on the 13th November 1989.

4. She was seconded to the Family Health International Programme via a letter dated 1st June 2004 earning her a consolidated salary of Kshs 36,933.75 from a basic salary of Kshs 15,000.00 per month. She was in good standing with her employer and had no disciplinary action taken against her.

5. She received a retirement notice on the 14th of June 2012 ending 31st December 2012. She was asked to proceed on her pending leave days of 116 days and a calculation of her terminal dues would be done.

6. The Claimant claims that her leave days were in fact 135, commencing from 9th August 2010 and the Chief Commissioner granted her 102 days with a balance of 33 days. She further was entitled to gratuity of services rendered at the rate of one month's salary for every year worked.

7. The Claimant states that on the 29th of February 2000 the Respondent sat and prepared a circular indicating how each individual will earn 10% as a yearly increment the aggrieved being included which was not effected.

8. She aired her grievances with the Respondent and went to the Minister of Labour under Section 62 (1) of Labour Relations Act 2007 where a Conciliator was appointed. Two meetings were convened but the parties failed to agree on the issues.

9. The Respondent has filed a Memorandum of Response dated 9th November 2012 where they admit that the Claimant was their employee on the given dates.

10. They state that at her secondment her salary was higher than what she earned at the Respondents'. They state that according to their records the Claimant's year of birth was 1953 and was due to retire in 2008. The subsequent terms served could therefore only be contractual. At the time of her retirement she was entitled to one month's salary for every year worked (1976 – 2003) totaling to 28 years which was duly paid and her contractual terms 2004 – 2010 she was paid her gratuity of 15 % for the 6 years through

a UAP provident fund.

11. They state that the Respondent has an internal grievance handling policy which the Claimant did not explore before filing this claim in Court. They ask the Court to dismiss the claim.

12. The Claimant produced one witness in Court, Florence Ogolla who is the Claimant in this matter.

13. She reiterated what was in the pleading emphasizing that there was a miscalculation of her dues. She admits receipt of Kshs.342,668.

14. The Respondent produced one witness Mr. Eric Okong'o who testified that the Respondent had never indicated to the Grievant that her salary was to be increased by 10 % annually. The letter she refers to dated 29th February 2000 was not in the Claimant's file and her new proposed salary of 25,356 did not have a legal basis.

15. They further testify that her salary increment was on secondment and she never suffered underpayment. He went on to testify that the calculated dues were done using Kshs.15,000.00 as the salary for 28 years instead of 34 years as the Grievant was a member of the provident fund for the six years she was on secondment.

16. In their submissions dated 22nd February 2017, the Claimant reiterates what was in their pleadings and adds that the payment given to the Claimant of Kshs.342.668.00 did not include the increment due to the Claimant and asks the Court to consider the same. They ask the Court to award as prayed. They pray that the Claimant pay the cost of the suit.

17. The Respondent has filed submissions dated 3rd March 2017. They submit that the Grievants' claim for underpayment is baffling and misleading and if granted would amount to unjustified enrichment. Her pay and dues were properly calculated.

18. They emphasize that there is no letter granting a pay increment of 10% as their witness earlier testified and the said letter was not in the file, she was not entitled to an annual salary increment of 10% and ask the Court to use Kshs.15,000.00 to calculate her dues.

19. As to service pay, they submit that under Section 35 of the Employment Act, situations are provided where an employee is entitled to the pay and as the Grievant is registered member of a provident fund they are not entitled to service pay. They rely on the case of **James Musembi Mweu vs. Buseki Enterprises Limited [2014]** where it was held that where an employee has an alternative pension scheme, the employer is not entitled to pay service gratuity. They urge the Court to be guided by the same authority. They submit that they acted fairly and justly and that there was no underpayment of the Claimant. They urge the Court to dismiss the claim with costs.

20. Having considered the submissions of both parties, the issue for determination is whether the Claimant is entitled to the terminal dues as prayed. It is true from the evidence submitted that the Claimant was employed by the Respondent vide an appointment letter dated 18.1.1977 (Appendix 1).

21. She was later promoted on 13/11/1989. On 1.6.2004, she was seconded to Family Health International (FHI) with the implication that Family Health International was to review her remuneration along with other staff on their payroll and advise on annual basis. She however remained an employee of the Respondent during the secondment period.

22. The Claimant served the Family Health International on secondment until June 2006 when the Family Health International project she was serving in came to an end. She then served under another project with effect from 1st December 2006. During the period she served on secondment she was paid her gratuity at 15% of her salary at the end of the agreement.

23. Secondment is defined by the Cambridge English Dictionary as a period of time when an employee is sent to work somewhere else temporarily either to increase the number of workers there or to replace a worker or to exchange experience and skills. Indeed it is for the purpose of exchange of her special skills that the Claimant was seconded to Family Health International but she permanently remained an employee of the Respondent. According to her letter of secondment however, Family Health International was to be responsible for her remuneration along with other staff on their payroll – FHI.

24. The Claimant remained on secondment for 7 years from 2004 to 2010 and it is this period that she states that she was underpaid. The question then is whether she is entitled to salary raises accorded to employees in her parent employer whilst she was serving under Family Health International. The Answer to this question is NO.

25. During the time the Claimant served on secondment, her remuneration was paid by Family Health International. At the same time she was a member of UAP Provident Fund which means that her retirement benefits were catered for by Family Health International and the Respondent cannot be responsible for any payments during that period.

26. On issue of underpayments, the Claimant remained an employee of the Respondent however and so any pay rise that affected employees thereof was to trickle down to her benefit. She has produced letter as Appendix 12 of her documents to state salary rise entitled to 10% salary rise every year. Appendix 12 however is a letter whose authenticity cannot be ascertained. It is not addressed to anyone and some figures have been blotted out making it difficult to ascertain whether it was addressed to a staff of the Respondent and whether the said staff was in same level as the Claimant. This Court is unable to rely on the same.

27. The last item is on pending leave. It has not been established the period under consideration and therefore the Court is unable to award anything under this limb.

28. The Claimant was indeed an employee of the Respondent but she was also a member of NSSF and so she is not entitled to payment of service pay as this falls under Section 35 of Employment Act.

29. It is this Court's finding that the Claimant has not established her case and the same is dismissed.

30. Each party will bear its own costs.

Read in open Court this 11th day of July, 2017.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

John Ombima for Claimant – Present

No appearance for Respondent