



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT KISUMU
CAUSE NO 231 OF 2014

(Before Hon. Lady Justice Maureen Onyango)

GERADINA KHAYELE WENDO.....CLAIMANT

VRS

**THE BOARD OF GOVERNORS SIGALAGALA TECHNICAL TRAINING
INSTITUTE.....RESPONDENT**

JUDGMENT

The Claimant **GERADINA KHAYELE WENDO** the Claimant was employed by the Respondent Sigalagala Technical Training Institute as a kitchen hand by letter dated 19th November 2001. She worked until 28th October 2013 when she received a notice of retirement informing her that she will be proceeding on terminal leave on 19th November 2013. The letter stated that she had attained mandatory retirement age of 55 years. The letter further advised her that her gratuity dues would be paid in March 2014.

The Claimant received another letter from the Respondent dated 31st December 2013 referring her to the Board of Governors Scheme of Service for Board of Governors employees (Chapter 11 page 53) and reminded her that she would retire on 28th January 2014.

The Claimant was dissatisfied with the decision to retire her at the age of 55 years and filed the present suit alleging that her retirement was premature as she was entitled to retire upon attainment of 60 years as provided by law. She further alleged that she was never granted annual leave for the entire period she worked for the Respondent. She prayed for the following Remedies:

- (a) Salary for 5 years she could have earned Shs. 715,140.00
- (b) Leave not taken for 12 years workedShs. 59,595.00
- (c) Sufferance allowance for 12 years workedShs. 71,514.00

Total Shs. 846,249.00

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She further prayed for costs and interest.

The Respondent filed a defence denying all the allegations in the claim.

The case was heard on 30th September, 2015 when the Claimant testified. The Respondent called one witness EVANS SANDE.

The issues for determination are whether the Claimant's retirement age was 55 or 60, whether she was prematurely retired and whether she is entitled to the prayers sought.

Determination

The Employment Act, or any other employment legislation for that matter, does not provide for retirement age. Retirement age is supposed to be provided for in terms and conditions of employment by specific employers.

In the present case the Claimant relies on a circular that extended retirement age for public servants from 55 to 60 years. The circular which was not produced by either the Claimant or Respondent, but which I take judicial notice of, provides for retirement age for public servants.

The Claimant alleges that she was an employee of the Government while the Respondent submitted that the Claimant's terms of employment provided for mandatory retirement at 55 years. The Claimant's letter advising her of retirement referred to the Board of Governors Scheme of Service for Board of Governors Employees.

The Claimant's letter of appointment is specific that she was employed on the terms and conditions of Employment of the Board of Governors. Her letters giving notice of retirement refer to the same terms. The Claimant did not prove that she became an employee of the Government or that terms applicable to Public servants, including retirement age for public servants, applied to her.

I therefore find that she was properly retired upon attaining retirement age provided for in her terms and conditions of service and that she is not a public servant, therefore the circular on retirement age of public servants does not apply to her.

The Claimant prayed for leave for 12 years that she worked. The Respondent's witness testified that the Claimant took leave and that there were leave forms in her file but the same were not produced.

According to Section 10 and 75 of the Employment Act it is the Responsibility of the Respondent to keep employment records and to produce such records. Section 10(7) of the Employment Act provides that where such records are not produced the burden of disapproving an allegation by the employee shifts to the employer.

Having failed to provide the records or to controvert the Claimant's allegations that she never took leave both in the Respondent's statement of Response to the claim and during the hearing, I find that the Claimant is entitled to leave of 21 days for each of the 12 years worked. Her salary according to the payslip for December 2013 was Shs. 11,719.00. At 21 days per year she is entitled to 252 days working out at Shs. 98,438.80 which I award her.

The Claimant prayed for "*sufferance*" allowance which in the written submissions counsel for the Claimant corrected to mean severance pay. Severance pay is only payable where an employee has been declared redundant. The Claimant was not declared redundant and is not entitled to severance pay. The claim is therefore dismissed.

The Respondent admitted that the claimant is entitled to Shs. 103,648.00 being her terminal gratuity pay.

I therefore enter judgement for the Claimant in the total sum of Shs. 202,086.80. I also award her 50% of her costs. There will be no order for payment of interest.

Judgement dated, signed and delivered this 2nd Day of February, 2016.

MAUREEN ONYANGO

JUDGE