



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI**

**APPEAL NO. 3 OF 2015**

**SEREMWAI ESTATES COMPANY LIMITED.....APPELLANT**

**VERSUS**

**ESTHER WANJIRU WANJAU..... RESPONDENT**

**(Being an Appeal from the Judgment by the Hon. K.Cheruiyot, Resident Magistrate, delivered on 05.04.2011 in CMCC No. 568 at Nyeri)**

(Before Hon. Justice Byram Ongaya on Thursday, 24<sup>th</sup> March, 2016)

**JUDGMENT**

The appellant filed the record of appeal on 28.09.2015 through Gathiga Mwangi & Company Advocates. The appellant in the memorandum of appeal dated 10.08.2012 prayed that the appeal be allowed and the orders of the honourable trial magistrate be set aside and costs of the appeal be awarded to the appellant.

The respondent filed the plaint dated 11.09.2007 through Karweru and Company Advocates. The plaintiff prayed for judgment against the appellant for:

- a. Kshs. 222, 215.00 in terminal and other dues being salary arrears, 22 leave days, house allowance, gratuity, underpayment, and leave travelling allowance.
- b. Costs.
- c. Interest.

The appellant filed the statement of defence dated 4.10.2007 through Gathiga Mwangi & Company Advocates. The appellant prayed for dismissal of the respondent's suit with costs. The honourable trial court heard the suit and delivered the judgment on 5.04.2011 by entering judgment for the plaintiff (respondent herein) against the defendant (the appellant herein) as prayed in the plaint.

The appellant being dissatisfied with the judgment and decree in their entirety filed the present appeal.

The court has considered the material on record and makes findings as follows:

1. The evidence is clear that the respondent was not a member of the trade union. The court finds that the trial court erred in making findings based on the collective agreement that the respondent was entitled to house allowance and leave allowance as there was no such collective agreement binding the parties.
2. The court returns that trial court erred in awarding gratuity upon the ground that the respondent resigned following the defendant's failure to pay her arrears and salary on time. As submitted for the appellant it was not in dispute that N.S.S.F contributions were made for the respondent and the

- respondent could not be entitled to service pay or gratuity in view of section 35(6) (d) of the Employment Act, 2007.
3. The respondent at paragraph 4 of the plaint stated that she was forced to terminate her services with the defendant in view of the unpaid salaries. The court finds that the cause of action was therefore founded upon constructive unfair termination. Under section 47 (1) of the Employment Act, 2007 the respondent had the option of filing a complaint with the labour officer and within 3 months of leaving employment. In alternative and mandatorily so, section 87(2) of the Act provides that no court other than the Industrial Court shall determine any complain or suit about rights and liabilities between employers and employees as envisaged in subsection 87(1) of the Act. Further, section 12(1) of the Labour Institutions Act, 2007 (now repealed but applicable to the present suit at time of its filing) stated that the Industrial court had exclusive jurisdiction in disputes between employers and employees. The court returns that in view of the cited relevant sections of the statutes, the trial court lacked jurisdiction to hear and determine the dispute between the parties.
  4. In view of the foregoing findings, the court need not delve into the other grounds of the appeal as the appeal has succeeded.

In conclusion, judgment is hereby entered for the appellant against the respondent for orders:

- a. That the appeal is hereby allowed.
- b. That the judgment and decree by the trial court and all processes flowing from there are hereby set aside.
- c. The costs of the appeal are awarded to the appellant.

**Signed, dated and delivered** in court at **Nyeri** this **Thursday, 24<sup>th</sup> March, 2016.**

**BYRAM ONGAYA**

**JUDGE**