



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSE NO.105 OF 2015

(Formerly Civil Suit No. 116 of 2001 in the Principal Magistrate's Court at Kerugoya)

JANE WANJIKU WAMUGUNDA.....PLAINTIFF

VERSUS

KENYA TEA DEVELOPMENT AGENCY LTD....DEFENDANT

(Before Hon. Justice Byram Ongaya on Friday, 1st April, 2016)

JUDGMENT

The plaintiff filed the plaint on 23.04.2001 through J. Ndana & Company Advocates and subsequently changed her advocates to Gacheru & Company Advocates. The plaintiff prayed for judgment against the defendant for:

- a. Damages for wrongful dismissal.
- b. Payment for the salary and allowances as from 1st April 2000 until finalisation of the suit.
- c. Reinstatement of the plaintiff to her employment.
- d. Costs of the suit.
- e. Interest on a, b, and d above at court rates.

The defendant filed the defence on 22.08.2001 through Gitonga Kamiti & Company Advocates and subsequently changed representation to Magee Wa Magee & Company Advocates. The defendant prayed that the suit be dismissed with costs.

The plaintiff was employed by the defendant as a general worker in November 1991 and deployed to serve at Kangaita Farm in the then Kirinyaga District and at a monthly pay of Kshs. 925.00 per month and increasing to Kshs. 5400.00 per month at the time of the alleged voluntary retirement effective 1.04.2000.

The evidence is that the defendant desired to retire some of its employees under a voluntary early retirement scheme. The workers were prepared for the retirement through training sessions. The workers were to indicate their voluntary option to retire early by completing, signing and submitting the standard form designed by the respondent for that purpose.

The evidence is that the plaintiff never desired to retire early and she did not opt to retire. Thus, she did not receive, sign and complete the relevant form to indicate the option to retire. Nevertheless, she received the letter dated 14.03.2000 from the defendant referring to her alleged application dated 15.09.1999 requesting to be considered for early retirement from services of the defendant under the voluntary early retirement scheme. The letter conveyed to the plaintiff that her request had been

considered and granted and that she would be released from service with effect from 1.04.2000.

Being dissatisfied and surprised with the turn of events, the plaintiff made enquiries at the defendant's head office. She was then shown the completed form dated 15.09.1999 and signed 'for her'. It was the plaintiff's case that she never gave authority for the form to be completed and signed on her behalf. The plaintiff's case was that she was a person with illiteracy and she was never advised about and was not aware of the completion of that form.

That form dated 15.09.1999 was produced as exhibit R2. The evidence in court was clear that it had been completed and signed by the farm manager at Kangaita Tea Farm one Nyaga. The said Nyaga had also signed forwarding the form to the defendant's head office in Nairobi. The evidence is that the said Nyaga had done all that without the knowledge and authority of the plaintiff. Thus the court returns that the plaintiff never opted to retire as was alleged by the defendant to have been the case.

To answer the 1st issue for determination, the court returns that the reason for the early retirement of the plaintiff being allegedly that the plaintiff had opted to retire early has not been established. The court finds that the plaintiff did not opt to retire early as the retirement was unfair, the respondent having surreptitiously taken advantage of the plaintiff's illiteracy as demonstrated by the actions of the farm manager to complete, sign, and forward the form requesting for early retirement without the knowledge and authority of the plaintiff. The early retirement was unfair.

The court is alert that at the time of the cause of action the Employment Act, 2007 and the Constitution of Kenya, 2010 were not in force. Nevertheless the facts of this case fit well with the persuasive opinion in Stephen Miheso –Versus-Kaimosi Tea Estate Limited [2014]eKLR where this court stated thus,

“The court has considered the evidence on record and particularly the evidence by the claimant that he was illiterate and that he had been duped to sign the alleged resignation letter. The documents on record show that the claimant consistently signed by his thumb print. Accordingly, the court finds that the claimant was illiterate. What was the consequence and obligation placed upon the respondent in view of the claimant's illiteracy?

Section 2 of the Employment Act, 2007 defines “disability” to mean a physical, sensory, mental or other impairment, including any visual, hearing, learning, or physical incapability, which impacts adversely on a person's social and economic participation. The court holds that a person with illiteracy like the claimant is a person with disability and is entitled the rights of persons with disabilities as protected in the constitution and the relevant statutes. The court further holds that under section 5 (3) (a) of the Employment Act, 2007, the claimant was entitled to freedom from harassment by the respondent on account of the disability of illiteracy and in particular, under the section the claimant was entitled to freedom from harassment in respect of termination of employment or other matters arising out of the employment relationship.

It is the further holding of the court that the claimant being a person with illiteracy, he was entitled to other appropriate means of communication (other than writing and reading) as provided for in Article 54(1) (d) of the Constitution. In particular, the claimant was entitled to verbal explanations of applicable terms and conditions of service in a language that the claimant understood in view of the employment relationship. The Employment Act, 2007 specifically protects illiterate employees in section 9 (3) and (4) which provide as follows:

“9. (1)....

(2)....

(3) For the purpose of signifying his consent to a written contract of service an employee may?

(a) sign his name thereof, or

(b) imprint thereon an impression of his thumb or one of his fingers in the presence of a person other than his employer.

(4) Where an employee is illiterate or cannot understand the language in which the contract is written, or the provisions of the contract of service, the employer shall have the contract explained to the employee in a language that employee understands.”

The court has taken into account the quoted sections, considers that by permutation and expansion they apply to a contract to end employment by agreement as may be initiated by the employer and finds that the claimant ought to have imprinted, on the alleged letter for agreement to resign, his thumb or one of his fingers in the presence of a person other than the respondent’s appointed supervisor who asked the claimant to sign the letter. The court has arrived at that finding because the respondent had initiated the idea of resignation and it ought to have been an offer under which the claimant ought to have been invited to accept or reject. The opinion of the court is that it was fraudulent for the respondent to hatch a request to resign on the part of the claimant without the claimant harboring any such intention and in which case, the court’s view is that the respondent ought to have made an offer for resignation and in good faith invited the claimant to accept or reject it but which never happened in the case. Thus, the court finds that there was no valid agreement to end the employment relationship by resignation as was submitted and suggested for the respondent. Further, the respondent was required to cause the contents of the alleged letter to be explained to the claimant in a language that the claimant understood. In the circumstances, the court finds that the respondent failed to discharge the crucial statutory obligations imposed upon the respondent as an employer and in protection of the claimant as provided for in the quoted section.”

In the present case, there were no safeguards by the defendant to protect the plaintiff in view of her being a person with illiteracy. The court finds that like in the cited case, there was no valid agreement to end the employment relationship by way of the purported early retirement of the plaintiff.

The 2nd issue for determination is whether the plaintiff is entitled to the remedies as prayed for. The plaintiff prayed for reinstatement. The defendant’s witness RW confirmed that the work performed by the plaintiff was available as other persons, including those who had retired in the early retirement scheme, had been engaged to perform the same job. The court considers that the plaintiff is energetic, she is willing to work and there is no bar to her reinstatement. Accordingly, the court returns that the plaintiff is entitled to an order of reinstatement effective 1.04.2000 and without break in her service and with full salary, allowances and service benefits throughout that period. In view of that finding, the court finds that the plaintiff is entitled to full pay throughout that period as prayed for being Kshs. 5400.00 times 192 months as at the date of this judgment making **Kshs.1, 036,800.00**.

While making that finding as founded upon the reinstatement, the court further considers and upholds its opinion in **Kenya Union of Printing, Publishing, Paper Manufacturers and Allied Workers –Versus-Timber Treatment International Limited,[2013]eKLR, Industrial Cause No. 21 of 2012 at Nakuru, page 10-11**, where the court stated thus **“In making the findings the court considers that the employee is entitled to pay for the period he or she is kept away from work due to unlawful and unfair suspension or termination. In such cases, the employee is entitled to at least partial reinstatement, and therefore compensation whose measure is the proportionate unpaid or withheld salary throughout that period of unlawful or unfair suspension or termination. During such period, the court considers that the employee carries a valid legitimate expectation to return to work and not to work elsewhere until the disciplinary or the ensuing conciliatory and legal proceedings are concluded. In arriving at the finding of entitlement to reinstatement during unlawful or unfair suspension and termination, the court has taken into account the provisions of subsection 49(4) (f) which states that in arriving at the proper remedy, there shall be consideration of, ‘(f) the reasonable expectation of the employee as to the length of time for which his employment with that employer might have continued but for termination;’. The court is of the opinion that for the period the question of unfairness or fairness of the suspension or termination has not been determined, the employee carries a reasonable expectation that for the period pending the**

determination of that question, the employment has not validly terminated and the employee is entitled to reinstatement during that period provided the employee is exculpated; with pendency of such serious question, the employee is validly expected to pursue the resolution with loyalty not to work for another employer. It is the further opinion of the court that where the court finds that the suspension or termination was unlawful or unfair, the employee is entitled to at least partial reinstatement, and therefore, a total of the salaries due during that period. The exception (to such entitlement to partial reinstatement for the period pending a final decision on the dispute) is where it is established that during that period, the employee took on other gainful employment or the employee fails to exculpate oneself as charged.”

In conclusion, judgment is entered for the plaintiff against the defendant for:

- a. The declaration that the plaintiff is entitled to reinstatement and is hereby reinstated to her position of a general worker upon the prevailing permanent terms of service, salary, allowances and other benefits effective 1.04.2000 and without break in her service and with full salary, allowances and service benefits throughout that period; and for that purpose the plaintiff will report to the defendant’s manager at Kangaita Tea Farm in Kirinyaga County not later than 04.04.2016 at 8.00am for appropriate deployment and assignment of duties.
- b. The defendant to pay the plaintiff a sum of **Kshs.1, 036,800.00** by 01.06.2016 failing interest at court rates to be payable thereon from the date of the suit 23.04.2001 till full payment.
- c. The defendant to pay the plaintiff the costs of the suit.

Signed, dated and delivered in court at Nyeri this Friday, 1st April, 2016.

BYRAM ONGAYA

JUDGE