



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSE NO. 187 OF 2015

CHARITY WANGUI GICHABA.....CLAIMANT

VERSUS

ENEA SACCO MANAGEMENT COMMITTEE

THROUGH CHAIRMAN PATRICK WACHIRA GABRIEL.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday, 22nd July, 2016)

JUDGMENT

The claimant filed the memorandum of claim on 15.10.2015 through Mercy Kabethi & Company Advocates. The claimant prayed for judgment against the respondent for:

- a. The respondent be ordered to pay the claimant gratuity benefits amounting to Kshs.596,414.80.
- b. Costs of the suit.
- c. Interest on (1) and (2) above.

The respondent filed the response to the claim and counterclaim on 30.11.2015 through Lucy Mwai & Company Advocates. The respondent prayed for judgment against the claimant for orders:

- a. That the claimant's claim be dismissed with costs.
- b. The respondent's counterclaim of Kshs.747,900.00 be allowed with costs.
- c. Any further or better relief that the honourable court may deem fit to grant.

The claimant filed the reply to response and response to counterclaim on 20.01.2016. The claimant prayed that the response to claim and the counterclaim be dismissed; that the claimant's claim be allowed with costs; and that there be any further or better relief that the honourable court may deem fit to grant.

The claimant was employed by the respondent from 13.05.2002 to 16.12.2014 when the claimant resigned from employment.

The **1st issue** for determination is whether the claimant is entitled to gratuity as prayed for. The parties are in agreement that the claimant was entitled to 20% of the basic salary for each month worked and as per RW1's evidence. The respondent has in submissions computed the gratuity from November 2003 to

January 2015 making Kshs.223,287.00 while the claimant has computed the same from May 2002 to January 2015 making Kshs.295,413.00. The evidence was clear that the claimant was employed on probationary service for three months effective May 2002, confirmed August 2002 and she resigned 16.01.2015. In absence of any other material the court awards the claimant **Kshs.295,413.00** being gratuity.

The **2nd issue** for determination is whether the respondent is entitled to the counterclaim of Kshs.747,900.00. The claimant's evidence and position is that as per the audit report for the year ended 31.12.2014 at page 15 under note 6 the amount lost was indicated as receivables and payables attributable to Lazarus Miano as Kshs.1,673,651.00. It was Lazarus that was involved in the fraud and that fact was known to the respondent.

The claimant's further evidence was that as a teller there was no way she would have known about the fraud and declined to pay customers involved in the fraud because one Ngatia and the said Lazarus had conspired to alter the particulars in the customer's data records with the consequence that any customer that the claimant paid in the fraud scheme had proper particulars as had been altered to further the fraud.

RW2 was the auditor. He testified that in the fraud the customer's name and identification card number were changed in the respondent's data system and a dubious customer's name inserted. After the fraudulent withdrawal, the name and identification card number of the genuine customer would be reverted back in the respondent's data system. RW2 confirmed that it was one Lazarus who was involved in changing the customer's particulars in the respondent's data system and thereby facilitating the fraud. RW2 testified that the tellers made payments beyond Kshs.50,000.00 without approval as required in the respondent's policy but he was not given any explanation for that discrepancy. The policy requiring approval for withdrawals beyond Kshs.50,000.00 was said to be verbal per RW2's evidence.

The court has considered the evidence by RW2 that the culprit in the fraud was one Lazarus. The claimant has established by CW2's evidence that tellers who made out payments in the fraud like CW2 were paid their gratuity without any deductions and further evidence by RW1 was that such tellers who were still in the respondent's employment had not been surcharged in view of the fraud. The court returns that it would be unjustified and discriminatory to find the claimant liable as counterclaimed. Further the court finds that the policy for withdrawals beyond Kshs.50,000.00 requiring approval was not established as the respondent failed to show that such policy existed and had been communicated to the employees or the tellers such as the claimant. Accordingly the counterclaim will fail.

In conclusion, judgment is hereby entered for the claimant against the respondent with orders as follows:

- a. The respondent to pay the claimant a sum of **Kshs.295,413.00** being gratuity by 01.09.2016 failing interest at court rates to be payable thereon from the date of the claimant's resignation 16.01.2015 till full payment.
- b. The counterclaim is dismissed.
- c. The respondent to pay the claimant's costs of the claim and counterclaim.
- d. As the claimant is entitled to a certificate of service, the same to be delivered by the respondent by 01.08.2016.

Signed, dated and delivered in court at Nyeri this **Friday, 22nd July, 2016.**

BYRAM ONGAYA

JUDGE