



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT
OF KENYA AT NAIROBI
CAUSE NO. 559 OF 2013

TAHIRIH IVERIA KOMBE.....**CLAIMANT**

VERSUS

REGAL PHARMACEUTICALS LIMITED.....**RESPONDENT**

JUDGMENT

1. The Claimant filed this suit on 22nd April 2013 seeking to resolve an issue she framed as the unlawful/unfair termination and refusal/failure by the Respondent to pay terminal benefits due to the Claimant. She stated that the Respondent employed her on or about June 2004 as an IPOA analyst earning Kshs. 12,252/- a month until 2nd January 2013 when her services were terminated. She sought payment of 2 month's salary in lieu of notice – Kshs. 24,504/-, service – Kshs. 50,641.60, annual leave not taken – Kshs. 83,313.60, housing allowance – Kshs. 88,214.40, leave travelling allowance – Kshs. 21,375/-. She also sought compensation up to 12 months' salary being Kshs. 147,024/-. The Claimant prayed for a declaration that her termination was unfair, unlawful and wrongful; costs of the suit and any other relief the court may deem just and expedient.

2. The Respondent filed the reply to statement of claim on 2nd May 2013. In the reply, the Respondent averred that the Claimant was at all material times hired on a fixed term contract basis as an IPQA analyst for a period of 11 months and 5 days starting from 9th January 2012 and was to terminate on 14th December 2012. The Respondent averred that it was an express term of the contract that it would unless otherwise advised, terminate on the 14th day of December 2012 and that the renewal of the contract would be purely at the Respondent's own discretion. The Respondent averred that it had no legal obligation to issue any notice of termination. The Respondent denied that the Claimant was entitled to receive service pay as the Claimant is a duly registered member of the National Social Security Fund (NSSF) to which fund the Respondent diligently and regularly contributed to and as such the Claimant is not entitled to any service pay under the law. The Respondent denied that the Claimant was owed any leave days as she had utilised all her leave days and further denied that the Claimant is denied any pay on account of house allowance as she was paid a consolidated salary which was inclusive of house allowance. The Respondent denied that the Claimant was owed any leave travelling allowance and also averred without prejudice to the foregoing, that the issue of leave travelling allowance was currently the subject of a dispute between the parties and the union representative and is pending between before the Ministry of Labour and as such the Claimant's demand is premature. The Respondent averred that the Claimant was not unlawfully or unfairly dismissed from work but that the correct position was that her contract expired and was not renewed. The Respondent stated that therefore the Claimant was not entitled to notice, compensation, damages, service pay or any other benefits as outlined in the statement of claim. The Respondent averred that the Claimant never made any demand or notice of intention to sue.

3. The Claimant testified on 22nd June 2016 and stated that her services were terminated unfairly and her terminal dues were not paid. She stated that she had exhibited the documents on her statement of claim as proof of her claim and the dues claimed. She thus urged the Court to grant her the prayers in her statement of claim.

4. In cross examination by counsel for the Respondent Miss Kiiru, the Claimant testified that she was working for the Respondent from July 2004 and had produced a letter to that effect and had produced payslips, leave forms and documents to show she is owed. She stated that she worked for 7 years from 2004 till 2013 and had produced contracts from 2008 as she was a casual from then and on contract from 2008. She testified that she was given an annual contract from 2008 and stated that the 2008 contract was from 1st June 2008 till 31st December 2008 and she was given renewals. She stated that the contract for 2012 was from 9th January 2012 till 14th December 2012 and that she did not get any contract for 2013. She confirmed that she would read the contract before signing and that the contract had a clause that provided the refusal to renew a contract shall not constitute unlawful termination. She stated that the Respondent could renew the contract at its discretion and that she had worked from 2008 on contract per year on fixed term contracts with renewal at discretion of the employer. She testified that according to the CBA she was to be given notice but was not notified. She stated that she had sought service though NSSF and NHIF were paid, because between 2004 and 2008 none was paid. She stated that she went on leave and that house allowance was included in her pay and leave allowance was paid.

5. The Respondent called Joan Ndungu the HR officer of the Respondent. She testified that the Claimant was an Inter Process Quality Analyst and that the Claimant had commenced working for the Respondent in June 2008. She stated that she relied on the contracts on the Respondent had. She testified that as far as she knew the Claimant started working in June 2008 on fixed term contracts each year. She stated the contracts were renewed at the discretion of the Respondent and that the one for 2013 was not entered into and that this method was not unlawful as the Respondent was to determine if to renew the contract. She stated that the Respondent paid salary, house allowance, NHIF, NSSF and that the Claimant went on leave for all the years. She testified that the previous CBA's did not include leave travelling allowance and that only a sum of Kshs. 4,450/- as leave allowance was not paid.

6. She was cross-examined by the Claimant who showed her a casual list and stated that the casual list did not show that the Claimant joined the Respondent in 2004. She testified that what she had regarding the Claimant were the contracts from 2008.

7. The Claimant was acting on her own and did not engage counsel. She filed suit seeking various reliefs chief of which was a declaration that her termination was unlawful. The Claimant asserted that she was unlawfully and unfairly dismissed from employment. The Claimant thus sought to recover damages, unpaid leave dues, notice and costs of the suit. The Respondent on its part asserted that the Claimant was not dismissed and that the Claimant's contract ran its course and was not renewed. The Respondent also asserted that the Claimant was paid house allowance and was a contributor to NSSF and therefore not entitled to service pay. The Claimant was also stated to have taken her leave days and thus no leave entitlement was due. The Claimant's payslips produced by the Respondent in the bundle filed in court on 4th May 2016 clearly show that the Claimant received house allowance each month and that the Respondent deducted NSSF and NHIF dues. Under Section 35 of the Employment Act, if an employee is a contributor to NSSF or another retirement scheme that is set up for the employees' benefit, then the employee would not be entitled to service pay. The Claimant had sought pay for leave days not taken but the leave forms indicate that she had no balance on leave due. The Claimant was not entitled to notice of effluxion of the contract of employment. The contract was finite, it had an end date and if not renewed the contract would lapse on the expiry date. The Claimant therefore is not entitled to recover damages for unlawful or unfair dismissal as no dismissal took place. The Claimant's only legitimate claim was the leave travelling allowance which she is entitled to receive. The Respondent to make payment within 14 days of the judgment. She was unable to prove the balance of her claim. The orders that I make are:-

- a. The Claimant be paid leave travelling allowance of Kshs. 4,450/- within 14 days of the judgment.
- b. Each party to bear their own costs.

Orders accordingly.

Dated at Nairobi this 29th day of July 2016

Nzioki wa Makau

JUDGE

Delivered at Nairobi this 15th day of August 2016

Linnet Ndolo

JUDGE