



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

CAUSE NO. 117 OF 2014

BEATRICE JUMBA MSEMBICLAIMANT

v

EASTERN PRODUCE KENYA LTD (KIBWARI LTD).....RESPONDENT

JUDGMENT

1. Beatrice Jumba Msembi (Claimant) instituted legal proceedings against Eastern Produce Kenya Ltd (Kibwari Ltd)-(Respondent) on 28 April 2014 seeking 2 months pay in lieu of notice, *pro rata* leave, service gratuity and compensation for wrongful termination.
2. The Respondent filed a Response on 20 May 2014, and the Cause was heard on 13 November 2014 and 3 December 2014.
3. The Claimant filed her written submissions on 16 December 2014 while the Respondent filed its submissions on 14 January 2015. The Court has considered the pleadings, evidence and submissions.
4. The Court has identified the issues for determination in this Cause as, *whether the Claimant was employed by the Respondent and from when, whether the Respondent terminated the services of the Claimant, whether such termination was unlawful, whether the Claimant was underpaid and whether the Claimant is entitled to the reliefs sought.*

Whether Claimant was employed by Respondent

5. The Claimant pleaded that she was employed by the Respondent as a tea picker with effect from 5 April 1996. In its Response, the Respondent denied employing the Claimant.
6. In examination in chief, the Claimant produced an employment letter (exh 1). The Respondent's second witness Charles Burgei in his evidence in chief stated that the Claimant was its employee from 1996.
7. The Court answers the first question in the affirmative and finds that the Claimant was employed by the Respondent as a tea picker from 5 April 1996.

Whether the Respondent terminated the services of the Claimant

8. The Claimant anchored her case on unlawful termination of services. She pleaded that her services were terminated on 21 December 2013 and the given reason was negligence.

9. During testimony, the Claimant stated that on 5 December 2013, the Respondent's clinic wrote to the Medical Officer, Nandi Hills District Hospital suggesting that the Claimant wanted to be retired on medical grounds (exh 4) and that on 9 December 2013, the Medical Superintendent Nandi District Hospital wrote a to *whom it may concern* letter indicating that the Claimant suffered from chronic peptic ulcers which had affected her ability to perform her duties and therefore she should be given necessary assistance (exh. 5).

10. The Claimant stated she never sought for the letter and that on 6 January 2014, she received a retirement letter informing her that she had reached retirement age of 53 years as stipulated in the Collective Bargaining Agreement and that she *stopped working on 21 December 2013* (exh. 6).

11. The Claimant testified that she had not reached retirement age and she did not know why she was retired but she was told she had failed to work properly.

12. She further stated that she did not write a letter dated 11 October 2013 seeking to stop working because she went up to standard 3 and did not know how to write. She used her thumb to sign documents.

13. But the Claimant admitted that she was given the letter dated 17 December 2013 purporting to acknowledge her request to leave employment.

14. The Respondent on its part contended that the Claimant retired voluntarily after being afforded an opportunity to be heard.

15. In what appears to be an inconsistency, the Respondent also pleaded that it had the right to terminate the Claimant on account of redundancy and that it justifiably terminated the services of the Claimant.

16. The Respondent's first witness, a nurse Jatwa Kipkemboi Kipserem stated that the Claimant wanted assistance to be retired on medical grounds and so he wrote a letter to the Medical Officer, Nandi Hills (exh. 4) to review the Claimant and advise on the way forward. As a result, the Medical Officer wrote the letter dated 9 December 2013 (exh. 5).

17. The Respondent's second witness stated that the Claimant requested to be retired and personally took to him a letter dated 11 October 2013 seeking retirement.

18. He stated that on 17 December 2013, he responded to the Claimant's request and informed her that her request to retire had been accepted and thereafter she was paid two months pay in lieu of notice and gratuity.

19. He stated that the Claimant was not dismissed.

20. In cross examination, the witness stated that the Claimant was ill and was no longer productive and that the Claimant left on her own volition.

21. He also acknowledged that a Senior Manager wrote to the Claimant on 6 January 2014 informing her of her retirement on age grounds (exh. 6). He stated the retirement age was 55 years.

22. He also admitted that the Claimant thumb printed the employment letter and that he did not know Claimant's educational background.

23. The Claimant's contention is that she could not have written the letter requesting for separation having gone up to standard 3. The Respondent asserts the Claimant asked to leave.

24. The puzzle of who is telling the truth can be resolved on the basis of letters written by the Respondent. This is the letter dated 6 January 2014 which categorically informed the Claimant that she was being retired having reached the retirement age of 53 years (exh. 6).

25. This letter was written by the Respondent's Group Manager. The letter dated 17 December 2013 was also written by *Group Manager*. It was purporting to accept the Claimant's request for retirement.

26. In the view of the Court, it would not have been necessary to inform the Claimant that she had reached retirement age on 6 January 2014, when the Group Manager had already informed her through a letter dated 17 December 2013 that her request for retirement had been accepted and her last working day was 21 December 2013.

27. The Court finds that the Claimant's services were terminated on account of retirement.

Whether the termination was unlawful

28. The letter of appointment given to the Claimant provided that the employment would be subject to the Agreement made between the Kenya Tea Growers Association and the Kenya Plantation and Agricultural Workers Union.

29. The said Agreement was not produced before Court and therefore the Court is unable to determine whether its provisions on retirement were adhered to.

30. However, the Respondent's second witness stated that the Claimant had an option to retire at 55 years. The letter dated 6 January 2014 indicated that the Claimant was 53 years.

31. The Claimant produced a copy of her identity card (exh. 3). According to the identity card she was born in 1960. She reaches 55 years in 2015.

32. On the basis of this single item of evidence, the Court reaches the conclusion that the retirement of the Claimant on the ground of age was premature and therefore in breach of contract.

Whether Claimant was underpaid

33. The Claimant did not concisely plead the issue of underpayments. In testimony, she stated that her wage depended on amount of harvest and she would earn an average of Kshs 5,000/- per month.

34. The Claimant annexed copies of her pay slips for November 2012, December 2012, January 2013, June 2013, September 2013 and December 2013. They all indicate nil basic salary.

35. The Claimant did not plead with clarity on this issue. She must have known how much underpayment she was claiming but did not disclose the same. The evidence was also deficient. The Court cannot make a determination on this question on the material placed before it.

Appropriate relief

Two months pay in lieu of notice

36. The Claimant sought Kshs 20,755/20 as two months pay in lieu of notice. The testimony led and which was not challenged was that she was paid two months wages in lieu of notice.

Pro rata leave

37. Under this head, the Claimant sought Kshs 4,446/-. The Respondent's evidence that *pro rata* leave was paid was not challenged.

Gratuity

38. The Claimant sought Kshs 153,408/- under this head of claim.

39. The Respondent's witness testimony that the Claimant was paid gratuity through cheque in June 2014 was not controverted.

Compensation

40. The Claimant sought Kshs 124,531/20 on account of compensation for wrongful termination of employment.

41. The Court has found that the retirement of the Claimant was premature and therefore in breach of contract.

42. The Claimant served the Respondent for some 18 years. She had 2 more or so years to serve. Considering the length of service and expectation to serve until retirement, the Court would award the Claimant the maximum 12 months compensation as claimed.

43. According to the Respondent's appendix 2(b), the Claimant's gross wage for December 2013 was Kshs 11,323/- and the Court will use this figure in assessing compensation.

44. Before concluding, the Court notes that the Claimant's case was pleaded as one of redundancy (section 40 of the Employment Act, 2007) but the evidence led was on breach of contract.

45. The Court has therefore proceeded to determine the Cause on the basis of breach of contract relying on the case of *Odd Jobs v Mubia* (1970) EA 476 on unpleaded issues but brought up in evidence and left for the court's determination.

Conclusion and Orders

46. From the foregoing the Court finds and holds that

- (a) the Claimant was an employee of the Respondent from 1996
- (b) the Respondent terminated the services of the Claimant through retirement
- (c) the pre mature retirement was in breach of contract.

47. The Court awards and orders the Respondent to pay the Claimant

- (a) 12 months compensation Kshs 135,876/-.

48. The Claimant to have costs of the Cause.

Delivered, dated and signed in open Court in Nakuru on this 13th day of February 2015.

Radido Stephen

Judge

Appearances

For Claimant

Mr. Bichana, instructed by Chepkwony & Co. Advocates

For Respondent

Ms. Waruguru instructed by Kibichiy & Co. Advocates