



REPUBLIC OF KENYA
EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

CAUSE NO. 517 OF 2014

(FORMERLY MILIMANI CMCC NO. 7094 OF 2005)

THECLA MOKEIRA ONYANCHA.....CLAIMANT

VERSUS

KENYA WILDLIFE SERVICES.....RESPONDENT

Mr Mariaria for Claimant

Mr Were for Respondent

JUDGEMENT

1. The suit was filed at the Chief Magistrate Court in Nairobi as Civil suit No 7094 of 2005. Matter was transferred to the Employment and Labour Relations Court ad registered as Cause No 517 of 2014.
2. The Plaintiff relies on the amended plaint dated 25th September 2011 and filed on the same date.

Facts of the Claim

3. The Plaintiff was employed as a radio operator by Kenya Wildlife Services in 1990 upon transfer from the mother ministry where he was employed in 1982.
4. The Plaintiff worked continuously for 18 years on permanent and pensionable basis until he was dismissed from employment vide a letter of dismissal dated 28th February 2000 but received on 23rd March, 2000.
5. At the time the plaintiff earned a basic salary of Kshs 11,515. The Claimant had a contributory pension scheme in the ratio of 5:10 by the employee and the employer respectively. In 1997 December the Plaintiff fell sick while on leave and was admitted at Kenyatta National Hospital and stayed at the hospital for about 6 months.
6. The Plaintiff wrote to the Respondent and asked for voluntary retirement by a letter dated 28th January 1999 on grounds that she was sickly and had attained 44 years. The plaintiff suffered high blood pressure which made it difficult for her to work. At the time she had served government for 16 years. The letter was produced in court.
7. On 5th November 1998, Dr H. O. Aseo Consultant Cardiologist at Kenyatta national Hospital had written a letter to whoever it may concern informing them that the plaintiff was under his care and had presented one (1) year ago with primary hypertension and was under various drugs because of poor control. The doctor recommended that the plaintiff be transferred to a bigger working Centre like Kisumu from Homabay where medication was accessible. The letter was also produced as an exhibit. The doctor wrote again on 10th June 1999 having attended to her on 31st may 1999. She

- was still under treatment and showed measured improvement according to him.
8. On 22nd June 1999, Mr Mutua W. K, Director KWS acknowledged the letter from Dr H. O. Areso and requested for a comprehensive medical report of the plaintiff indicating her physical fitness for future deployment in the service.
 9. The Director also wrote to Dr. G. A. Achiya of Kenyatta National Hospital to provide a comparative report on the fitness of the plaintiff who the Director acknowledged was under treatment from January 1998 at the hospital. The director sent a reminder to Dr. G. A. Achiya by a letter dated 10th February 1999 to be provide him with the requested medical report.
 10. On 24th January 2000 one Anne Nambiro wrote on behalf of the Director KWS, a show cause letter to the plaintiff stating that the plaintiff had never attended to any function of the office since January 1992. She was to show cause within 14 days why disciplinary action should not be taken against her.
 11. The Plaintiff acknowledged receipt of the letter on 1st March 2000 and responded on the same day. The Plaintiff explained that she attended work from January 1997 upto 8th December 1997. That she fell sick in December 1997 while on annual leave.
 12. That on 8th January 1998, she was admitted at Kenyatta National Hospital and was on continuous treatment for hypertension. In April 1998 she was referred to Dr Omar a physician in Kisii District Hospital and was placed on continuous treatment. She continued to be on treatment at Kenyatta and Kisii Hospital until she wrote in September 1998 requesting to be retired on grounds of sickness. The Plaintiff continued to be absent from work.
 13. In January 1999, the Plaintiff wrote again requesting to be retired. That her Husband visited the Homabay office regularly while the Plaintiff was at home and in hospital. The Plaintiff was placed under observation by Dr Achiya for six (6) months to enable him write a report requested by the Director KWS regarding her medical fitness status. The Plaintiff continued to rest, while awaiting feedback on her retirement request.
 14. By a letter dated 23rd March 2000, one Leresia R. Lesi yaupe wrote a letter of dismissal from the service on behalf of the Director for reasons of prolonged absenteeism without permission. The dismissal was with effect from 28th February 2000. She was to lose all benefits she would have received under normal termination. She was only to be paid salary upto 27th February 2000 plus her superannuation contribution. She was allowed to appeal within 14 days.
 15. The Plaintiff appealed the decision and the appeal was scheduled for hearing on 27th July 2000 and then was rescheduled to 14th September 2000. The Plaintiff made personal representation to the Disciplinary Appeals Advisory Board which commuted the dismissal to termination with effect from 1st July 1998.
 16. The Plaintiff was therefore to be paid her retirement benefits under the Pension Act, cap 189 and also was entitled to retirement benefits under KWS staff Superannuation Scheme. On 26th February 2001, the Advocate for the Plaintiff wrote a letter of demand to the Respondent, hence this suit.
 17. The Plaintiff sought leave to amend the plaint on 7th November 2011 which leave was granted and the plaint dated 25th October 2011 was deemed as duly filed. The Plaintiff seeks;
 - a. A declaration that the termination of the plaintiff's employment with the Defendant was illegal, wrongful and unlawful.
 - b. Payment of terminal benefits tabulated as follows;
 - i. Unpaid salary of 10 months in the sum of Kshs 115,150
 - ii. One month salary in lieu of notice Kshs 11,515
 - iii. Accrued leave Kshs 7,254.45
 - iv. Contribution to pension scheme Kshs 644,739
 - v. Compound interest at 12% P.A of amount owed as at 04/4/2006 Kshs 778,658.45
 - vi. Costs
 - vii. Interest

Response

18. The Defendant relies on the amended statement of defence dated 19th October, 2012 and filed on 23rd October, 2012. The Defendant avers that the suit is statute barred as the cause of action arose on 1st July 1998. This preliminary issue was not dealt with before the suit commenced.
19. The Defendant avers that the Plaintiff was a habitual deserter and had become incapable of discharging her duties as contemplated in the contract of employment. That the Plaintiff was paid all her terminal benefits and allowances in full and final settlement of her dues hence the defendant does not owe any sum at all.
20. All the particulars of the claim in amended plaint are denied by the Defendant.
21. The Defendant called Wilson Mutua (RW1) from KWS Headquarters Nairobi in support of its case. RW 1 is the Human Capital Officer of the Defendant. RW1 told the court that he knows the plaintiff and that she was no longer in the service of the Defendant. That she left employment on 28th February 2000 on grounds of desertion.
22. That in 1997 she was frequently absent from work and the Respondent did not know her whereabouts. She was stationed in Ruwa National Park in Homabay. That upon termination the Plaintiff was paid pension due to her as follows in the sum of Kshs 214,913.

i. Pension contribution Kshs 644,739

23. RW 1 denied the sum of Kshs 644,739 claimed as pension contribution stating that it was not based on any facts. That the amount of pension was paid by a cheque dated 26th February 2000. The amount was for the period 1st July 1991 to 28th February 2000 when she contributed. The Plaintiff was a member of staff superannuation scheme in which the contribution were 5% by employee and 10% by the employer. The payment done was in respect of both employee and employer contributions. The Plaintiff had been seconded to KWS by Ministry of Tourism and Wildlife and was also under the Civil Service pension scheme for the period she worked for the Ministry.

ii. **The Claim for 10 month's arrear salary** is denied because the plaintiff did not work for that period but she was non the less paid the salary except for the two month's salary for January and February 2000 in the sum of Kshs 10,720 subject to leave.

iii. Notice pay

The Defendant admits it owes Kshs 11,515 in lieu of notice payable upon clearance.

iv Accrued Allowance

The Defendant owes the plaintiff three (3) days leave in the sum of Kshs 1,570.20. The rest of the claim is denied.

24. RW 1 stated further that the letter of dismissal is dated 23rd March 2000. The plaintiff was informed her salary was payable upto 7th February 2000 plus her own superannuation contributions. She appealed and the Board heard and considered the appeal. The plaintiff appeared in person and explained her case and the dismissal was reduced to normal termination and therefore, the plaintiff was paid her full pension. The salary was stopped pending the conclusion of the case.

25. That the Plaintiff was served with a show cause letter in 1999, but did not respond to it until 1st March 2000. Dismissal letter was written on 24th January 2000. The Claimant salary was stopped. The Respondent learnt much later that the Claimant was receiving treatment at Kenyatta National Hospital and other clinics. RW 1 requested for a medical report and a report dated 5.11.1998 was provided showing that the Claimant was under care and suffered hypertension. This report was considered during the appeal according to RW 1.

26. On 28th January 1999 the Claimant had requested to be retrenched on medical grounds. She was

- 44 years old and had served for 16 years. No action was taken on that. This was a disciplinary case for desertion according to RW 1 since the warden was not aware of the claimant's whereabouts and her medical condition. It was the claimant's responsibility to communicate in writing to the Respondent about her illness but she did not.
27. RW 1 prays the plaintiff's case be dismissed save for 2 months' salary arrears; 3 days in lieu of leave and notice pay.
28. The witness was subjected to very close cross examination on his evidence. RW 1 admitted visiting the Claimant at Kenyatta national Hospital in 1999. He visited the Chief Personnel office after the Claimant had called RW 1. RW 1 interviewed the Claimant and wrote a report on 15th June 1999 to the Deputy Director Human Resource Management. RW1 recommended reinstatement of Claimant's salary and called for more medical reports.
29. The salary was reinstated vide a letter dated R2. The Claimant was paid salary for the entire period she was away except for two months. On 24th October 2000, the Director commuted dismissal to termination to enable the Claimant get her terminal benefits. The Claimant's salary was Kshs 11,515 per month. RW 1 recommended that the Claimant be retired on medical grounds but that recommendation was not considered.

Determination

30. The issues for determination are as follows;

- i. Was the Plaintiff's termination for a valid reason?
- ii. Was the termination effected in terms of a fair procedure?
- iii. Is the Plaintiff entitled to further terminal benefits?

Issue i

31. From the totality of evidence by the Plaintiff and that by RW 1 the Claimant was away from work from December 1997 when she developed hypertension and did not return to work until she was dismissed from employment in February 2000.
32. The dismissal was commuted to normal termination upon the Claimant lodging an appeal on 24th January 2000. Whereas it is correct that the Plaintiff was under treatment during that period of two (2) years, it is also true that the Claimant was hospitalized for a short period during that time and she was in a position to visit the Respondent to discuss her status and more importantly get formal permission to be away from work either on full pay, half pay or without pay depending on the Human Resource Policy of the Respondent and the provisions of the Employment Act.
33. It is apparent that the Plaintiff remained away from work for many months in 1998 without visiting the work place and without writing a formal letter seeking permission to be away on medical grounds from work for a period of more than 2 years.
34. Section 44 (4) (a) provides that;

“without leave or other lawful cause an employee absents himself from the place appointed for the performance of his work”

Amounts to gross misconduct so as to justify the summary dismissal of an employee for lawful cause.

35. It is the court's considered view that initially the Plaintiff had a lawful cause to be away from work while she remained hospitalized. However, as soon as the plaintiff was out of the hospital and she remained away from work for a long period, her conduct amounted to desertion.
36. On 28th January 1999 the plaintiff wrote to KWS requesting to be retrenched on medical grounds. RW1 actioned this letter but the plaintiff's request was not granted. The Plaintiff continued to be away without formal permission and without visiting her workplace to discuss her status with the employer.
37. Notwithstanding that medical status of the claimant it is the court's considered view that the Claimant failed to follow proper procedures to get formal permission to stay away upon being

discharged from hospital. The Employer had a valid reason therefore to terminate her employment with full payment of terminal benefits..

Issue ii

- 38.The Plaintiff was given a show cause letter to which she responded. She did not attend the initial disciplinary hearing. This led to her dismissal. The Plaintiff lodged an appeal and attended the hearing. The Plaintiff was heard and the dismissal was reduced to a normal termination. The Court finds that the Respondent acted in accordance with a fair procedure in terminating the employment of the Plaintiff while allowing her to earn her full terminal benefits including pension.
- 39.The Court is of the considered view that the Defendant had a valid reason in the circumstance of the case to terminate the employment of the Claimant. The Defendant acted responsibly to allow the Plaintiff earn her full pension upon termination.
- 40.The Claimant had after all sought to be retired at the time on medical grounds. Had the Plaintiff been retired on medical grounds, she would have been entitled to similar terminal benefits. No financial prejudice was occasioned the Plaintiff.

Issue iii

- 41.The Defendant has adduced evidence which the court believes to be true that the Plaintiff received her salary for the entire period she was away from work, except for two (2) months. The Defendant also conceded that the Plaintiff was entitled to three (3) days in lieu of leave and to one (1) month's salary in lieu of notice since the dismissal was reduced to a normal termination.
- 42.Upon commuting the dismissal to a normal termination on 24th October 2000 it was proper for the Defendant to date the termination from 1st July 1998, the date of the initial dismissal. I find that the Plaintiff is not entitled to any salary arrears for that period between July 1998 and 24th October 2000 because she was no longer in employment and did not render any services to the Defendant.
- 43.The Plaintiff is therefore entitled to;
- a. Two month's arrear salary in the sum of Kshs 23,030
 - b. One month salary in lieu of notice in the sum of Kshs 11,515
 - c. Three (3) days salary in lieu of leave in the sum of Kshs 1,570.20

Compensation

- 44.The Court has found that the termination of employment was for a valid reason and same was effected in terms of a fair procedure. The claim for compensation is therefore not warranted and same is dismissed with costs.

Total Award Kshs 36,115

- 45.The Claimant is partly successful and is entitled to the costs of the suit.
- 46.The award is payable with interest at court rates from date of filing suit till payment in full.

Dated and delivered at Nairobi this 20th day of November, 2015.

MATHEWS N. NDUMA

PRINCIPAL JUDGE