



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO 808(N) OF 2009

ANNE WAITHERA KIMANI.....CLAIMANT

VS

STEPHEN NDUNGU NJENGA.....RESPONDENT

AWARD

Introduction

1. The Claimant's claim brought by way of Memorandum of claim dated 14th December and filed in Court on 18th December 2009 is for failure to pay terminal dues. The Respondent filed a Memorandum of Reply on 22nd March 2010 and the matter was heard on 21st November 2013 with Miss Amboko appearing for the Claimant and Mr. Nyabena for the Respondent. The Claimant and the Respondent gave *viva voce* evidence and then filed written submissions.

The Claimant's Case

2. According to the Claimant, she was employed by the Respondent on 1st June 1987 in the position of copy typist and subsequently took up additional duties. The Claimant worked for the Respondent until 6th December 2003 when she gave a one month's notice of termination of her employment effective 6th January 2004. In her notice, the Claimant asked the Respondent to release her terminal benefits.

3. Upon receipt of the Claimant's resignation notice, the Respondent wrote to the Claimant on 9th December 2003 accepting the resignation but requesting her to extend the notice until the end of January 2004. In his letter, the Respondent stated that he was not aware of any benefits due to the Claimant. The Claimant wrote back to the Respondent on 28th December 2003 indicating that she was not able to extend her resignation notice as requested by the Respondent. She also reiterated her claim for terminal benefits.

4. On 26th February 2005, the Claimant wrote to the Respondent yet again asking for her terminal benefits and on 5th June 2004 the two parties met at the Respondent's office and at this meeting the Respondent asked the Claimant to quantify her claim for his consideration. The Claimant computed her claim by letter dated 11th June 2004 to which the Respondent did not respond. On 28th July 2008, the Claimant wrote a final reminder and in December 2008, her Advocate sent a demand letter to the Respondent.

5. The Claimant claims the following:

a. Service pay for 16 years

- b. Leave pay for 16 years
- c. House allowance at 15% for 16 years
- d. Overtime compensation for 11 public holidays worked for 16 years

The Respondent's Case

- 6. The Respondent admitted having employed the Claimant as a copy typist/receptionist effective 1987 until she voluntarily resigned by giving notice on 6th December 2003. The Respondent further admitted the Claimant's salary as at the time she left employment as Kshs. 17,000.
- 7. The Respondent accepted the Claimant's resignation notice by letter dated 9th December 2003 but asked her to consider extending the resignation notice until end of January 2004, a request that the Claimant rejected. The Respondent stated that he was not aware of any benefits due to the Claimant upon her voluntary resignation.

Findings and Determination

- 7. In her Memorandum of Claim, the Claimant did not tabulate her claim and in the written submissions filed on her behalf on 2nd December 2013, her Counsel sought to rectify this error and relied heavily on the Employment Act, 2007. Yet, on 17th July 2013, pursuant to a preliminary objection taken by the Respondent on the ground that the Claimant's claim was statute barred by dint of Section 90 of the Employment Act, 2007 this Court held that at the time the cause of action arose, the Employment Act, 2007 was not in force.
- 8. The question of the applicable law being the Repealed Employment Act (Cap 226) and not the Employment Act, 2007 having been settled at the interlocutory stage, the Court was unable to understand why Counsel for the Claimant chose to base her submissions on the new law.
- 9. As was held by Nduma J in the case of *Jeremiah Ojwang Ojak Vs Central Bank of Kenya [2012]eKLR* there is no provision for retrospective application of the Employment Act, 2007 to employment contracts terminated before its operationalisation. In the circumstances, the Court finds that the only claim that may be sustained under Cap 226 is for house allowance which is hereby allowed. All the other claims are dismissed for want of proof. I therefore make an award in favour of the Claimant in the sum of Kshs. 476,850 being house allowance for 187 months being her entire period of employment with the Respondent.

Each party will bear their own costs.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 5TH DAY OF MARCH 2014

LINNET NDOLO

JUDGE

In the Presence of:

.....*Claimant*

.....*Respondent*