



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 2053 OF 2012

ESTHER KAHAI KIHIMA CLAIMANT

VERSUS

TRIDENT INSURANCE COMPANY LIMITED..... RESPONDENT

JUDGEMENT

1. The claimant Esther Kahai Kihima filed the claim on 10th October 2012 for unfair termination and or wrongful dismissal by the respondent, Trident insurance Company Limited. The defence was filed on 26th November 2012 and the respondent admitted the claimant was their former employee who voluntarily retired at age 50 which the respondent converted to redundancy and deny there was unfair termination and the outlined claims. Both parties submitted their evidence with the claimant giving evidence in support of the claim while the respondent opted not to call any evidence. At the close of hearing both parties filed their written submissions.

Claimant's case

2. On 29th June 1995 the claimant was employed by the respondent insurance company as a Typist/Telephone operator at a salary of Kshs.9, 500.00 and a letter of appointment was issued. The employment did not included housing and the salary did not include housing allowance and the claimant was forced to rent her own housing. The salary was increased over the years the last pay being kshs.18, 360.00. On 3rd August 2007 the claimant was issued with a termination letter on the ground of ill-health without medical recommendation for such a measure and contrary to the law. The claimant did not voluntarily leave her employment and was wrongly terminated. Due process was not followed in the termination and terminal dues were never paid which was unfair and thus claim the following;

- i. *Accrued housing allowance for 12 years;*
 - a. *July 1995 to April 1999 at Kshs.109,250.00*
 - b. *May 1999 to April 2000 at kshs.39,652.80*
 - c. *May 2000 to April 2001 at kshs.42,033.00*
 - d. *May 2001 to April 2004 at kshs.138,708.00*
 - e. *May 2004 to April 2005 at kshs.51,000.00*
 - f. *May 2005 to April 2007 at kshs.123,930.00*

Total Kshs.504, 573.80.

- ii. *Severance pay at 30 days per year for 12 years at kshs.381,396.42*
- iii. *compensation for unfair termination at kshs.275,400.00*

- iv. 3 months' pay in lieu of notice at kshs.68,850.00
- v. Cost of transport for personal effects to home of origin at kshs.120,000.00
- vi. General damages emoluments/contingencies at the discount of 15% of the total amount (sickness, death and redundancies among others) at kshs.1,638,630.00

Total amount kshs.2, 988,850.20.

Vii) Certificate of Service

3. The claimant testified in support of her claim that upon employment by the respondent in 1996 as a Telephone Operator her terms were spelt out under her Appointment letter dated 25th May 1995 which employment she continued to hold until 1st July 2007 when she was terminated. That she was forced to resign on medical grounds when the respondent asked her to do a letter of resignation. At the time the claimant had a stroke and when she went to the hospital, the respondent refused to pay for the medical tests and Mr. Karanja refused to do a report. Mr. Kibe, the respondent Accountant, told the claimant that management had decided to terminate her on medical grounds. The claimant took her leave and while on leave her condition became worse and asked her niece to go and report to the respondent that she could not report to work as she was unable to walk. The claimant took one more week and when she was able to walk she reported back to work and found her duty station changed and was asked to go and see the accountant where she found Kibe and on 28th June 2007 she was at the officer when she found somebody seated at her desk and was told to go away. She asked for reasons of being sent away but none were given. The doctor also refused to do a report for her, the respondent thus asked her to apply for her dues. At this time the claimant was weak and asked to resign and later went report to the labour officer. She almost dies due to her condition as the place of work was very cold. The termination was unfair and claim dues as outlined in the statement of claim.

4. The respondent asked the claimant to resign which was forced on her and as a result went to report to the labour officer. The claimant was treated at Avenue Hospital but there are no records. When she asked the doctor for a medical report she was told to seek one from a government hospital but this was not done.

5. The only dues paid were leave day at kshs.7, 344; notice pay at Kshs.18, 360 and from these dues a loan of Kshs.89, 996.00 was deducted leaving a deficit and the net pay was zero as all dues were used to cover the unpaid loan. The sum of Kshs.66, 775.00 is still due and unpaid. She is seeking accrued housing allowance as this was not provided or a housing allowance.

Respondent's case

6. By a contract dated 29th June 1995, the respondent employed the claimant and was issued with a written contract at a salary that was inclusive of all allowance including housing. The claimant resigned when she voluntarily applied for early retirement at the age of 50 years which was subsequently converted to redundancy and was paid gratuity even though she was a member of the provident fund. The early retirement was out of the claimant's own volition; the retirement was converted to redundancy and payment made; the matter went to conciliation and on 18th October 2007 the claimant accepted her terminal dues and thus the claim is unfounded.

7. Nothing is due on housing allowance as the contract made provision for the same, severance pay was paid on 18th October 2007 pursuant to an agreement through conciliation by the Minister and there is no legal basis for the claim for compensation as there was any unfair termination. Notice pay was admitted and the respondent does not owe transport allowance, damages and emoluments. A certificate of service has already been issued to the claimant.

Submissions

8. The claimant submitted that the evidence is not opposed as the respondent chooses not to call any

evidence. Section 43 of the Employment Act shifts the burden to the employer to provide proof of reasons for termination which was not done. There were no valid reasons for the termination. The claimant was forced out of employment and her terminal dues were not paid. The respondent forced her to work when she was on sick off, she had suffered a stroke which hampered her work and the employer had tried to force her to retire on medical grounds. The claimant tried to do so but the respondent never took any action on her resignation letter. The respondent therefore failed to follow the law with regard to the termination as under section 44 and section 41 of the Employment Act. This was therefore a case of unfair termination and the claimant is entitled to the remedies sought.

9. The respondent submitted that the contractual relationship between the parties herein was based on a written contract which commenced on a salary of kshs.9, 500.00 that was inclusive of housing allowance and termination was by notice of four weeks. The respondent based the payment of terminal dues on the applicable law the Employment Act, Cap 226 (now repealed) and the evidence on record does not support the claim. The claimant did not outline the claims as this was drafted by a third party who did not explain to her the nature of remedies sought. That based on the provisions of the Evidence Act, the burden of proof rested upon the claimant whom she failed to discharge. The Minister directed the responding to pay notice pay, pro rata leave, service gratuity and issue a certificate of service which was done. All terminal dues have therefore been received.

Determination of the issues;

Whether there was voluntary retirement and or termination

Whether there was unfair termination

Whether there are remedies

10. The trial commenced with the respondent raising a preliminary objection on a point of law with regard to the suit being time barred by the applicable statute. The objection was on the grounds that under section 90 of the Employment Act, 2007 the employment contract/relationship between the parties herein was determined on 1st July 2007 while the claim was filed on 10th October 2012 a period of 5 years and 3 months later. To these objections, the court made a ruling on 13th June 2013 with an order that the cause of action arose before the coming into force of Employment Act, 2007 and the applicable law in this case is the repealed Employment Act, Cap 226 Laws of Kenya and not Employment Act, 2007.

11. The above is crucial to noting with regard to the issues outlined above for determination as the application of the repealed law; Cap 226 has a different contextual application as against the new law, Employment Act 2007. The ruling delivered by the court with regard to the applicable law and the time the claimant was able to file the claim is therefore crucial to consider herein.

12. The basis of the claimant's case is that she was forced to retire on medical grounds and that the respondent failed to pay terminal dues. On the other side the respondent contends that the claimant voluntarily retired which was accepted and they opted to convert this to redundancy and the applicable dues were paid. The claimant was employed by the respondent on and issued with a letter dated 29th June 1995 and terminated on 3rd August 2007. The new Employment Act came into force on 2nd June 2008. The Employment Act 2007 does not therefore apply in this case.

13. Under the regime of law under which the claimant employment was regulated, the repealed Employment Act, Cap 226, section 14 made provision that an employer was to reduce the employment into writing. This was effectively done in this case when the claimant received her letter of appointment dated 29th June 1995 which spelt out her terms and conditions of service. Under the contract, termination of employment was outlined under clause 5;

During the period of probation, employment may be terminated by either party by giving one week notice, or pay in lieu thereof. However, after satisfactory completion of the probationary period, the

period of notice on either side shall not be less than four weeks or salary in lieu therefore.

14. The contract letter does not address the eventuality of retirement whether voluntarily or on medical grounds. However it is now an accepted best labour practice that no party to the employment relationship can be forced to work and retirement based on applicable law is allowed and also either party, for good cause can voluntarily terminate the relationship either by resignation, retirement or for any other lawful cause. In this case, the claimant stated that she was forced to retire on medical grounds. This is a serious allegation against the respondent and thus the evidence in this regard crucial to revisit.

15. The claimant gave evidence that sometime in 2006 she had a stroke forcing her to attend hospital where the doctor wrote a report indicating that she should be retired on medical grounds. When she presented the report, she was advised by the respondent to seek a medical report from a government doctor which she was not able to do. However on 12th July 2007 the claimant wrote to the respondent as follows

...

Dear Sir,

Early Retirement

Due to health problem I wish to request for early retirement from your employment.

I wish to take this opportunity to thank you for the opportunity to work for you.

Thank you

...

16. This letter has been contested as 'forced retirement'. However I note that the letter is written in the claimants hand and there was no evidence into the circumstances into which the same was written or how it was obtained by force. What is clear is that from this letter, the respondent issued a letter of termination which is explained as a conversion of retirement to redundancy. Under the applicable law, the burden was on the claimant to outline the circumstances of her termination or forced retirement. I find no such evidence and this is buttressed by the fact that there existed circumstance that she was unwell and under section 12(2), Cap 226, the law required the claimant to make available such medical report as;

(2) It shall be a defence to a prosecution for an offence under subsection (1) if the employer shows that he did not know that the employee was ill and that he took all reasonable steps to ensure that the illness was so brought to his notice or that it would have been unreasonable, in all the circumstances of the case, to have required him to know that the employee was ill.

17. Where the claimant was therefore unwell and required to be away or was to seek retirement on medical grounds, this was her duty to outline. It was not for the employer, the respondent herein to undertake this duty. In the absence of evidence that there was fraud, force, forgery or any other malpractice when the claimant wrote the *early retirement* letter to the respondent, I find the same as voluntary and took the force it was intended for. Termination of employment.

19. With the above analysis, the question of unfair termination and the remedy sought as a result must fail. The concept of unfair termination, however looked at, only arise with claims filed under the employment Act, 2007. This does not apply to the employment regime under which the claimant worked and when the cause of action arose. This thus answers the first question for this analysis.

20. However the option taken by the respondent was to convert the voluntary retirement into redundancy. This is outlined in the defence filed and the only evidence offered by the respondent.

Redundancy under the repealed law was regulated by section 16A;

16A. (1) *A contract of service shall not be terminated on account of redundancy unless the following conditions have been complied with -*

(a) *The union of which the employee is a member and the Labour Officer in charge of the area where the employee is employed shall be notified of the reasons for, and the extent of, the intended redundancy;*

(b) *The employer shall have due regard to seniority in time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy;*

(c) *No employee shall be placed at a disadvantage for being or not being a member of the trade union;*

(d) *Any leave due to any employee who is declared redundant shall be paid off in cash;*

(e) *An employee declared redundant shall be entitled to one month's notice or one month's wages in lieu of notice;*

(f) *An employee declared redundant shall be entitled to severance pay at the rate of not less than 15 days' pay for each completed year of service as severance pay.*

(2) *For purposes of this section -*

"Trade union" means a trade union registered under the Trade Union Act (Cap 233) and

"Redundancy" has the meaning assigned to it in section 2 of the Trade Disputes Act (Cap 234).

21. The conversion by the respondent of the voluntary retirement of the claimant into a redundancy had its consequences. The applicable law was contextualized in a manner that a redundancy was to be addressed by an employed in the context of unionized employees but also where there was no union or the affected employee was not unionized, the process was not to work to the employee disadvantage. Redundancy in this case was also to mean that there was reduced work or the employer was reorganizing its business hence the need to declare some positions redundant. In labour relations, redundancy taken place in an economic context where an employer, through no action of their own and due to business dynamic must reorganize its business to avoid losses or adopt new measures for better productivity. Redundancy is therefore not a negotiable mode of ending employment as this only occurs in rarest of cases after a comprehensive process of business and work analysis and review where some employees are affected due to their positions being rendered redundant. It is not the employee who is redundant, rather, the positions they occupy no longer exists. So, an employer cannot confer a redundancy without having the context within which it arises.

22. In this case, a termination under the guise of redundancy is not an accepted labour practice under the repealed law. Where this arose a was contested, an employee could seek damages for termination of contract of service and not a compensation for unfair termination.

23. Where redundancy is applied there are payable dues. The employer must pay the leave days due, notice pay and severance pay. Where the process is not applied properly the court is to award damages.

24. There are outlined dues that the respondent paid as terminal dues. These comprised one months' notice pay, and severance pay. This is not contested by the claimant. On what is due with regard to the procedure applied by the respondent, that is redundancy where such redundancy did not exist, damages are due and this will be assessed at a rate of three (3) months' pay amounting to Kshs. 68,850.00.

Remedies

25. On the remedies sought, the claimant is seeking housing allowances due from 1995 to 2007. The

basis of this is that there was no accommodation offered or an allowance thereof. The employment contract at issued to the claimant and dated 29th June 1995 at paragraph 2 made provision for an all-inclusive pay package. I have no reason to read the context of this contract outside the agreed terms of the parties. The claim for housing allowance is declined.

26. Claims for severance pay, notice pay and issuance of certificate of service are admitted by the respondent as settled. This was not contested by the evidence of the claimant. I will therefore not award.

27. A cost of transport for personal effects is not specifically set out under the claimant's contract. However at clause 2, the salaries due are all-inclusive of all benefits and allowances save where it is provided for otherwise. This will therefore no be awarded.

Based on the above, judgment is entered for the claimant against the respondent with an award of damages amounting to Kshs. 68,850.00. Any dues owing from the claimant to the respondent by virtue of her employment to be offset from the above award.

Delivered in open Court at Nairobi this 7th Day of October 2014

M. Mbaru

JUDGE

In the presence of;

Lilian Njenga: Court Assistant

.....

.....