



**REPUBLIC OF KENYA**

**IN THE INDUSTRIAL COURT OF KENYA AT NAKURU**

**CAUSE NO. 233 OF 2013**

**(Formerly Nakuru High Court Civil Case No. 92 of 2011, Initially Nakuru Resident Magistrate's Court Civil Case No. 1446 of 2009)**

**ANN SIMON MUKUHE.....CLAIMANT**

**v**

**TELKOM KENYA LTD.....RESPONDENT**

**RULING**

1. Ongaya J delivered judgment on 7 March 2014 in which he entered judgment in favour of the Claimant and granted
  1. A declaration that the termination of the plaintiff's employment by the defendant was unfair and unlawful.
  - 2) The defendant to pay the plaintiff Kshs 525,018/- less due income tax by 1.4.2014, in default interest at court rates to be payable from the date of the judgment till full payment.
  - 3) A declaration that the plaintiff is entitled to terminal benefits including pension dues as agreed between the parties and as per the provisions of the collective agreement and the defendant's human resources policy manual.
2. The Claimant computed the terminal benefits and pension dues pursuant to order 3 of the judgment and wrote to the Respondent's Advocates on 2 April 2014. The computations totaled Kshs 721,176/- being *severance pay, transport allowance and 26 days outstanding leave*.
3. On 25 June 2014 the Claimant caused the Cause to be mentioned and the Court directed the Claimant to serve the computations upon the Respondent's Advocates on record and fixed mention on 7 July 2014 to record settlement on the terminal benefits/pension dues.
4. On 7 July 2014, when the Cause was initially called, Ms. Mbeche held brief for Mr. Waiganjo while Mr. Njuguna held brief for P.K. Mbaabu for the Respondent. The file was placed aside until 10.30am. When it was called Mr. Waiganjo was present for the Claimant while Mr. Njuguna was nowhere to be seen.
5. The Court directed that any objections to the computations by the Claimant be considered on 15 July 2014 and that a mention notice be served upon the Respondent.
6. On 15 July 2014, Mr. Waiganjo appeared for the Claimant and Mr. Karimi held brief for Mr. Mbaabu for the Respondent. The Court directed the Respondent to file an affidavit of objection to the Claimant's computations by 22 July 2014, and set the hearing of the objection for 28 July 2014.
7. The Respondent filed an affidavit of objection sworn by one Caroline Ndindi on 22 July 2014.

8. On 28 July 2014, Mr. Karuga on behalf of Mr. Mbaabu for the Respondent informed the Court that the pension dues had been paid. The Court fixed the objection for hearing on 7 October 2014.
9. On 7 October 2014, I directed the parties to attempt out of court settlement and report back on 8 October 2014. On this day only the Claimant was represented, and I directed the parties to address me on the issue of severance pay on 29 October 2014. I further directed the Claimant to serve a hearing notice upon the Respondent.
10. The hearing notice was duly served but the Respondent did not appear on 29 October 2014. Mr. Waiganjo submitted on behalf of the Claimant.
11. Mr. Waiganjo submitted that the Claimant was seeking Kshs 721, 176/- based on the monthly pay of the Claimant at time of redundancy and pursuant to a Collective Bargaining Agreement. Mr. Waiganjo also relied on an Agreement reached between the Respondent and the Communication Workers Union of Kenya on 26 June 2011.
12. Mr. Waiganjo further submitted that the Claimant was entitled to Kshs 40,000/- as transport allowance and 26 leave days pay.

## Evaluation

13. To understand and put in proper perspective the subject of this ruling, it is germane to trace the evolution of the Claimant's pleadings.
14. The Complaint filed on 8 December 2009, and the Amended Complaint filed on 9 July 2010 in the Chief Magistrate's Court Civil Case No. 1446 of 2009 presented the gravamen of the Claimant's cause of action as *unlawful termination and wrongful dismissal* on the ground of *performance* (not meeting sales targets).
15. The reliefs sought in the Amended Complaint were orders
  - a) Declaring the termination of the Plaintiffs services by the Defendant by the letter dated 27<sup>th</sup> October, 2009 unlawful null and void and that the said letter has no legal effect.
  - b) General damages for unlawful and wrongful dismissal.
  - c) Terminal benefits and or dues and;
  - d) In the alternative, reinstatement of the Plaintiff's employment with the Defendant herein as a typist.
16. It is crystal clear that the Claimant's cause of action was not pleaded as one of redundancy.
17. The evidence relied on included a termination of services letter dated 27 October 2009. This letter was preceded by a letter dated 30 September 2009 from the Claimant seeking voluntary early retirement but which the Respondent rejected vide its letter dated 1 October 2009.
18. Ongaya J determined the Cause therefore on the basis of unfair termination and at page 8 of the judgment, the Court stated

For the 1<sup>st</sup> issue, it is clear that the plaintiff was given show cause letters but it is also obvious that the respondent did not accord the plaintiff a hearing as envisaged in section 41 of the Employment Act, 2007. Thus, the court finds that the termination was unfair because the claimant was not given a hearing before the termination.
19. Ongaya J correctly determined the Cause on the basis of the facts as presented and again correctly applied the law applicable to unfair terminations/wrongful dismissal.
20. The Claimant did not plead termination on the basis of redundancy. Severance pay, which she is now seeking pursuant to Order 3 of the judgment is applicable only in cases of redundancy. It cannot be part of the terminal benefits ordered by Ongaya J.
21. Before concluding, I once again exhort practitioners in the employment field to familiarize themselves with the provisions of the primary labour statutes and make specific and concise prayers in their pleadings. This would obviate applications such as the present one, which needlessly consume judicial time.

22.The statutes have provided specific remedies for particular legal injuries/wrong. The remedies such as severance pay and service pay should not be confused.

23.Some remedies may also have a contractual foundation. These may include terminal benefits.

### **Conclusion and Orders**

24.On the basis of the evaluation above, the Court reaches the conclusion, finds and holds that the Claimant was not declared redundant and is thus not entitled to severance pay as part of terminal dues.

25.No order as to costs.

**Delivered, dated and signed in open Court in Nakuru on this 28<sup>th</sup> day of November 2014.**

**Radido Stephen**

**Judge**

**Appearances**

For Claimant Mr. Waiganjo instructed by Waiganjo & Co. Advocates

For Respondent P.K. Mbaabu & Co. Advocates