



**REPUBLIC OF KENYA**

**Industrial Court of Kenya**

**Cause 801 of 2010**

**MILLY KAGEHA SABWA..... CLAIMANT**

**VERSUS**

**TELEMEDIA COMMUNICATIONS LTD.....RESPONDENT**

**JUDGEMENT**

By a Memorandum of Claim dated 13<sup>th</sup> July 2010 and filed in Court on 16<sup>th</sup> July 2010, the Claimant alleges unfair termination by the Respondent and prays for the following orders:-

- a) Kshs.542,100
- b) General damages
- c) Costs of the suit
- d) Interest on a, b and c

The Respondent filed its reply and supplementary reply to the Memorandum of Claim in which it denies unfairly terminating the employment of the Claimant and avers that the Claimant was declared redundant due to the closure of the company and was paid Shs.104,000 in full settlement of her terminal dues.

The case was heard on 30<sup>th</sup> November 2012 when the Claimant was represented by Mr. Onyancha while the Respondent was represented by Mr. Walala. The Claimant testified on her behalf while the Respondent opted to call no witness but to prosecute the defense by way of written submissions.

The Claimant testified that she was employed by the Respondent from October 2004 to November 2009 by way of fixed term contract renewable yearly. She was a front office manager. Her last salary as Shs.35,000/=. She referred to her Exhibit MS 1 which is her contract of employment and exhibit 3, her payslip for October 2009. She was terminated by letter dated 23<sup>rd</sup> November 2009. The reason given in the letter of termination was that the Respondent had ceased its operations and giving her last day of work as 30<sup>th</sup> November 2009 (Refer to her Exhibit MS2). She was paid terminal dues in two installments, the 1<sup>st</sup> installment of Kshs.75,000/= on 9<sup>th</sup> February 2010 and the 2<sup>nd</sup> installment of Shs.29,000/= on 17<sup>th</sup> March 2010. Her claim against the Respondent was Shs.542,100 being salary from November 2009 to July 2010 when she filed the claim, service pay for 9 years, leave and leave travelling allowance, pay in lieu of notice and damages. She urged the Court to grant her prayers in the Memorandum of Claim. In cross examination she admitted that the contract she exhibited commenced on 1<sup>st</sup> January 2006 at a gross salary of shs.25,00/=:, that the contract does not provide for transport allowance.

The Claimant did not file written submissions. The Respondent filed its written submissions on 14<sup>th</sup> December 2012 in which it alleges that the Claimants salary was Shs.25,000 as shown in the contract and

not Shs.35,000 as per payslip annexed to Claimants Memorandum that the Claimant was over paid terminal benefits as she was only entitled to Kshs.87,500 but was paid 104,000 that she is not entitled to any further payment. The Respondent urges the Court to dismiss the claim with costs.

I have considered the pleadings and the viva voce evidence of the Claimant. The issue in dispute is whether the Claimant's termination was fair and if she was paid full terminal dues.

The Claimants letter of termination gives the reason for the termination as closure of employment. The Respondent has demonstrated in the documents attached to its supplementary answer to claim that the Respondent was taken and indeed the Claimants final dues were delayed and paid by a sister company Palm tree Ltd. I therefore find that the termination was indeed a redundancy. The Claimant was paid her terminal dues on the basis of a redundancy. The only issue for termination is whether she is entitled to Shs.542,100 in addition to the sum of Shs.104,000/= already paid.

The Claimant was entitled to the following:-

- (i) salary for November 2009
- (ii) Salary in lieu of notice
- (iii) Severance pay
- (iv) Leave earned but not taken

The Claimant in addition had claimed salary from December 2009 to July 2010 when she filed suit and transport allowance. She also claimed damages for loss of employment. The claim for salary from December 2009 to July 2010 is not payable as her employment with the Respondent was terminated in November 2009. The claim has no regal or contractual basis and is dismissed.

The Claimant dropped the claim for damages during her testimony in Court. She also admitted leave allowance as not provided for in her contract. The Respondent did not give a breakdown of the payment of Shs104,000/= paid to the Claimant. The Respondent further contends that the payslip attached by the Claimant as Exhibit MS3 is not authentic. Under Section 10(7) of the employment Act it is the Respondents responsibility to prove that the payslip is not genuine by producing the genuine one which it is its responsibility to keep as part of employment records. In the absence of such evidence the Court is obliged to assume that the document submitted by the Claimant is authentic. For this reason the Court will use the rate of Shs.35,000 as the last salary for the Claimant.

The Claimant is entitled to the following:-

- i) 1 months notice - Shs.35,000
- ii) Salary for November - Kshs.35,000
- iii) 28 days leave for 2009 - Kshs.52,500

Total:- **Kshs.155,166.70**

Less payment received Kshs.104,000.00

Net pay Kshs.51,166.70

I therefore give judgement to the Claimant against the Respondent in the sum of Shs.51,166.70.

The Respondent will also pay costs to the Claimant.

Orders accordingly.

Read in open Court and signed this 28<sup>th</sup> day of March, 2013.

**HON. LADY JUSTICE MAUREEN ONYANGO**

**JUDGE.**

No appearance

**In the presence of:-** \_\_\_\_\_ Claimant

No appearance

\_\_\_\_\_ Respondent