



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT MOMBASA

CAUSE NO. 53 OF 2013

(Originally Nairobi Cause No. 1164 of 2010)

ISABELLA HARUSI SHEHE

CLAIMANT

v

BRANCH SECRETARY, KENYA NATIONAL

UNION OF TEACHERS (KILIFI BRANCH)

1ST RESPONDENT

SECRETARY GENERAL, KENYA NATIONAL

UNION OF TEACHERS

2ND RESPONDENT

JUDGMENT

1. Isabella Harusi Shehe (the Claimant) was employed as a copy typist in 1984 by the then Kilifi branch of the Kenya National Union of Teachers (KNUT Kilifi). The letter of appointment was dated 21 January 1984 though it indicated the employment had commenced on 1 July 1983.
2. On 17 November 1994 the Claimant was promoted to Higher Clerical Officer. In the course of her employment she got several salary adjustments and the terms and conditions of service were reviewed.
3. On 6 May 2010 KNUT Kilifi wrote to the Claimant notifying her that her employment was being terminated through redundancy with effect from 1 July 2010 and that she would be paid previous gratuity of Kshs 298,744/- and current terminal benefits of Kshs 38,006/10.
4. The letter of termination further indicated that the Claimant would be proceeding on 30 days leave with effect from 19 May 2010 and that the 2nd Respondent would prepare and pay her further gratuity from 1 April 2008 to date of termination.
5. The Claimant was not amused and on 1 October 2010 she filed a Memorandum of Claim in which the issue in dispute was stated as *wrongful termination and failure to pay terminal dues*. She has set out various heads of relief.
6. The main issue is whether the termination of the Claimant was wrongful and unfair and consequential relief. I will deal with the issues in that order and will make reference to the parties' positions in that order rather than lay out each parties' position in advance.
7. I have considered the respective parties written submissions and the authorities cited in reaching my determination.

Whether the termination was wrongful

8. It is not in dispute that the Claimant was terminated through letter dated 6 May 2010. The letter

- clearly stated that it was termination of service/redundancy and that KNUT Kilifi could no longer maintain the Claimant on its payroll due to proliferation of KNUT branches.
9. According to the Claimant, the termination was unfair because the Respondents' did not give her six months notice. The letter of termination was dated 6 May 2010. It informed the Claimant her services would be terminated effective 1 July 2010.
 10. Clause 21 of the Terms and Conditions of Service of employees in the category of the Claimant produced as Exh. 2 provided for termination with three months notice or payment of three months' salary in lieu of notice. Clause 22 makes provision for retirement with 6 months notice.
 11. In the instant case the Claimant was given notice of termination 2 months and three weeks in advance. This fell just about a week of the three months provided.
 12. Section 40 of the Employment Act sets out how declaration of redundancy should be carried out. The Claimant was notified in writing. The Letter of termination through redundancy was copied to the Local Labour Officer. The Claimant was being declared redundant.
 13. Both the Claimant and the Respondents' witness testified that the original Kilifi Branch of KNUT was split to form Kilifi, Malindi and Kaloleni branches.
 14. In my view the termination of the Claimant was substantially in compliance with the law.
 15. Both the statute and contractual terms may set out an employees' entitlements on termination through redundancy and therefore I will proceed to consider the individual heads of claim asserted by the Claimant to confirm whether they are sound in law and or contract.

Individual heads of claim

Severance pay

16. The fundamental rights and basic conditions of employment are set out in the Employment Act. The Labour Institutions Act on its part through various Regulations of Wages Orders have set out the minimum standards within various sectors of industry. These two Acts sets out the basic irreducible minimums. The Claimant does not fall under any of the Regulation of Wages Orders and it is the Employment Act I turn to.
17. Section 40 of the Employment Act has provided for what an employer who contemplates declaration of redundancy has to comply with. The section also provide for the entitlements of an employee who has been declared redundant. These are payment in cash of due leave, notice pay of not less than one month in lieu of notice and severance pay at rate of not less than fifteen days pay for each completed year of service. These are statutory minimums.
18. It is not in dispute that the Claimant was declared redundant. The Claimant pleaded that she is entitled to Kshs 466,439.87/- as severance pay.
19. I have keenly gone through Claimant's Exh. 2 which set out the terms and conditions of employment. I have not seen any clause which provides for termination through redundancy and what would be the consequence of such termination through redundancy as far as severance pay is concerned.
20. In the circumstances it is my view that section 40(1)(g) of the Employment Act becomes implicated. The Claimant would be entitled to severance pay at the rate of fifteen days pay for each year of service. The Claimant testified she was engaged effective 1 July 1983. She was terminated effective 1 July 2010. That is some 27 years.
21. At the time of separation the Claimant was earning basic salary of Kshs 27,664/-. I assume this amount comprised basic salary and housing allowance because the parties did not bring this out clearly in evidence. Using the correct formula of adding the basic salary and housing allowance and dividing the same by 26, the Claimant's daily rate was Kshs 1064/-. The Claimant having worked for twenty seven years is entitled to severance pay equivalent to 405 days pay (15 multiplied by 27). The calculation comes to Kshs 430,920/- and not the Kshs 466,439/87 pleaded.

Gratuity 1991-2001, Salary arrears 1998-2003, Commuter allowance arrears 1997-2003, housing allowance arrears 1999-2002

22. After the termination the Claimant wrote several letters to the Respondents' requesting to be paid her entitlements. The letters include the undated letter of appreciation seeking grand total of Kshs

- 724,683/95, letter dated 5 May 2001 to 1st Respondent on gratuity, NSSF,commuter allowance and salary adjustment, letter dated 5 July 2006 to 1st Respondent making a total claim of Kshs 496,156/-, letter dated 12 February 2007 to 1st Respondent to address gratuity and other claims, totaling Kshs 613,940/80,letter dated 10 July 2007 on unpaid claims of Kshs 613,940/-, letter dated 6 January 2010 to 1st Respondent on over deduction towards income tax, letter dated 14 January 2010 to 1st Respondent on remittance of NSSF deductions, letter dated 19 May 2010 to 1st Respondent Chairman, letter dated 26 July 2010 to 2nd Respondent, letter dated 10 August 2010 on total claims of Kshs 1,576,906/60 and letter dated 29 November 2010 to 1st Respondent.
- 23.The Claimant admitted in cross examination that gratuity was payable every five years to follow the cycle of the term/tenure of the Respondents' officials elections. The outgoing office would always pay the entire gratuity accrued during their tenure.
- 24.In my view because of the admission by the Claimant the claims in respect of gratuity for the period 1991-2001, salary arrears for 1998-2003, commuter allowance arrears 1997-2003 and housing allowance arrears 1999-2002 are time barred by virtue of section 4(1) of the Limitation of actions Act and section 90 of the Employment Act.
- 25.A letter dated 10 July 2006 to the 2nd Respondent and signed by Tom Kittu Gwengwele,the then Executive Secretary, James Hare, then Branch Chairman and Raphael Washe then Branch Treasurer, admitted that the Claimant was owed some dues.

Salary arrears 2005, TME 2002-2006 and Gratuity 2002-2006

- 26.The applicable statute regarding limitation at the time of admission in respect of the claims on salary arrears for 2005, TME 2002-2006 and Gratuity 2002-2006 arose provided for a period of 6 years. These claims in respect of these should have been filed by 2011 and 2012 respectively. The Memorandum of Claim was filed in 2010 within time.
- 27.Based on the admission letter already referred to I would award the Claimant salary arrears of Kshs 46,029/-, Gratuity TME of Kshs 165,122/- and Gratuity of Kshs 117,784/80.
- 28.The Claimant had admitted receiving Kshs 88,000/- from the 2nd Respondent and this should be deducted from any awards granted to her.

NSSF Contributions/deductions and PAYE

- 29.The Statutes governing the National Social Security Fund and Pay as You Earn have set out elaborate provisions on default to remit/deduct what is due and the Claimant should make use of those mechanisms. Both NSSF and Kenya Revenue Authority have clear mandates based on law and they can deal with the issues raised by the Claimant.

Conclusion and Orders

- 30.In conclusion I do find and hold that the termination of the Claimant through redundancy was substantially in compliance with both the statutory provisions and therefore fair and that the Claimant is entitled to severance pay as set out by section 40 of the Employment Act.
- 31.I award the Claimant and order the Respondents to pay her

a. Severance pay for 405 days(27 years)	Kshs 430,920/-
b. Salary arrears for 2005	Kshs 46,029/-
c. Gratuity TME 2002-2006	Kshs 165,122/-
d. Gratuity 2002-2006	Kshs 117,784/80

TOTAL **Kshs 759,855/80**

Less Kshs 88,000/-

TOTAL **Kshs 671,855/80**

32. There will be no order as to costs.

Delivered, dated and signed in open Court in Mombasa on this 26th day of July 2013.

Justice Radido Stephen

Judge

Appearances

Mr. Mwanyale instructed by Mwanyale &

Kahindi Advocates

for Claimant

Mr. Sigei instructed by Katwa & Kemboy

Advocates

for Respondent