



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 609 of 2011

GRACE GARAMA.....CLAIMANT

VERSUS

TELKOM KENYA LIMITED.....RESPONDENT

JUDGEMENT

The claimant **GRACE GARAMA** instituted this case through a Memorandum of Claim dated 8th April 2011 in which she claims the following:-

1. Declaration that the summary dismissal of the Claimant by the Respondent on 27th October 2009 was wrongful and illegal and contravened Section 44 [2] of the Employment Act, 2007.
2. Declaration that the termination of the Claimant's employment by the Respondent on 27th October 2009 was unfair and contravened Section 28 [1] [a], 45 [5] [a], [c], [f], and 51 of the Employment Act.
3. Damages for wrongful dismissal of the Claimant by the Respondent from the employment on 27th October 2009.
4. Damages for unfair termination of the claimant's employment by the Respondent on 27th October 2009.
5. Claim for expected salary from the time of Claimant's wrongful summary dismissal and unfair termination of services on 27th October 2009 to 2019, time of normal retirement with the appropriate adjustments over the years.
6. Claim for retirement fund benefits.
7. Declaration that without a certificate of service under Section 51 of the Employment Act, 2007, there was no valid termination for the Claimant's employment with the Respondent.
8. Claim of leave days allowances of six days for the year 2009 amounting to Kshs.8,935.81 [eight thousand, nine hundred and thirty five and eighty one cents only].
9. Claim for severance pay for two [2] months salary for every year worked.

The Respondent **TELKOM KENYA** filed its reply to the memorandum dated 24th June 2011 on 15th July 2011.

The claimant was represented by Mr. Onindo of S. Musalia Mwenesi Advocates while the Respondent was represented by Mr. Situma of Iseme, Kamau & Maema Advocates.

The main facts of the case are not disputed. The claimant was employed by the Respondent as a Clerical Officer II in 1983. She was upgraded to Clerical Officer III in 1991 and confirmed to pensionable terms in January 1997 backdated to March 1991. She rose through the ranks to the post of Sales Supervisor. In 2009 the claimant was made a sales agent.

At the same time in June 2009 the claimant introduced sales targets which were set every month and employees signed against the target. The claimant failed to meet her targets in July, August and September 2009. The claimant has annexed the letters informing her of the unsatisfactory performance at pages 20, 21 and 22 of her memorandum of claim. She was eventually terminated by letter dated 27th October 2009.

The issues for determination by the Court are the following:-

- (i) Whether the termination of the claimant's employment was justified; and
- (ii) Whether she is entitled to the prayers sought in her memorandum of claim.

Section 45 (2) of the Employment Act provides that termination of employment will be unfair if the employer fails to prove:-

- (a) that the reason for the termination is valid,
- (b) that the reason for the termination is a fair reason:-
 - (i) related to the employees conduct, capacity or compatibility
 - (ii) based on the operational requirements of the employer, and;
- (c) that the employment was terminated in accordance with fair procedure.

The reason given by the Respondent for terminating the claimant's services was that she failed to meet targets agreed between her and the Respondent. This is confirmed by the letters written to the claimant on 1st September, 23rd September and 19th October 2009.

The Court finds that there was a valid reason for termination of employment within the provisions of Section 45 (2) (a) of the Employment Act.

The other issue the Court has to determine is whether fair procedure was followed by the respondent before terminating the services of the employee. Section 41 of the Employment Act requires an employer to explain to the employee the reasons upon which the employer contemplates to terminate the services of the employee, and the employee is entitled to have either a colleague or a union official present during this explanation. The section further requires the employer to hear and consider any representation by the employee and the person accompanying the employee before terminating the employment of the employee.

In this case there was a standard letter that was sent to the employee referring to some unspecified severe disciplinary action on 1st and 23rd September and 19th October 2009. The letters do not refer to termination of employment as part of the disciplinary action contemplated. The employee was never informed of the intention to terminate her employment, nor was she given an opportunity to have such explanation given in the presence of a union official or a colleague. No formal hearing session was held

with the employee as anticipated in Section 41 of the Employment Act.

For these reasons I find that the termination of employment of the claimant was unfair.

I now have to deal with the prayers on damages and terminal benefits. The claimant has prayed for the following:-

- [i] Damages for wrongful dismissal
- [ii] Damages for unfair termination
- [iii] Expected salary to normal retirement
- [iv] Retirement benefits
- [v] Certificate of service
- [vi] Leave days
- [vii] Severance pay

I will handle each prayer but not in the order in which they have been pleaded.

[1] **Severance Pay**

This is only payable where an employee has been declared redundant. Since the claimant was not declared redundant, she is not entitled to the same.

[ii] **Certificate of Service**

The respondent did not deny this claim nor did it indicate that the certificate has been issued. The Respondent is directed to issue a certificate of service to the claimant forthwith.

[iii] **Retirement Benefits**

No evidence was submitted in respect of this head. The Court also takes judicial notice of the provisions of the Retirement Benefits Act which requires pensions to be managed by a manager and not the employer. The claim should be taken up with the pension's manager who is a separate legal entity from the Respondent.

[iv] **Expected Salary to normal Retirement**

There is no guarantee that the claimant would have worked until retirement. In any event, the law allows every employee or employer to terminate the employment relationship without tying either party to the retirement age. It is also instructive to note that retirement age is not provided for by law and is a matter of contract. The claimant did not submit any evidence that binds the respondent to employ her to the date of retirement or to pay for the period to retirement date should employment be terminated before that date. The claim is therefore not proved and is rejected

[v] **Leave days**

The claimant testimony that at the time of termination of her employment she was on leave. This fact has not been denied by the Respondent. Leave records are kept by the employer and none was produced to show that the claimant had exhausted her leave. She has claimed only 6 days as the balance of leave. Since there is no evidence to the contrary, I award the claimant the sum of Kshs.8,935.81 [eight thousand, nine hundred and thirty five and eighty one cents only] as claimed.

[vi] **Damages for wrongful dismissal; and**

Damages for unfair termination

The Industrial Court Act 2011 gives this Court jurisdiction to grant an award of compensation and

damages in any circumstances contemplated under the Act on any other written law.

The Employment Act at Section 49 [1] read together with Section 50 empowers this Court to award compensation in the event where dismissal or termination is found to be unjustified. The Act does not contemplate separate compensation for wrongful dismissal and unfair termination.

In this case I have already found, the claimant's termination was unfair. The claimant worked for the Respondent from 1983 to October 2009, a period of 26 years. She must have had reasonable expectation of working until retirement. There is no warning or other complaint that the claimant is accused of other than the performance in the last three [3] months of her employment.

For these reasons I find that it is fair to grant the claimant maximum compensation of 12 months consolidated salary. This would be 12x44679.04, that is **Kshs.536,148,48 [five hundred and thirty six thousand, one hundred and forty eight and forty eight cents only].**

In summary judgement is given to the claimant in the sum of Kshs.545,084.29 [five hundred and forty five thousand, eight four shillings and twenty nine cents only]. The claimant shall also get costs of this case.

Orders accordingly.

DATED AND DELIVERED IN NAIROBI THIS 26TH DAY OF OCTOBER 2012.

HON. LADY JUSTICE MAUREEN ONYANGO

JUDGE.

For Claimant_____

For Respondent_____