



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT ELDORET**

**CIVIL APPEAL 142 OF 2009**

**GEORGE WILLIAMSON (K) LTD**

**KAPCHORUA TEA ESTATE).....APPELLANT**

**AND**

**LEAH CHEPTOO.....RESPONDENT**

***{Being an appeal from the judgment of the Resident Magistrate, Hon. G. Mutiso dated 6<sup>th</sup> August, 2009 at Kapsabet Senior Resident Magistrate’s Court in Civil Case No.100 of 2005}***

**JUDGMENT**

This is an appeal from the judgment and decree of the Learned Resident Magistrate – **G.M. Mutiso** dated 6<sup>th</sup> August, 2009 at Kapsabet. The appellant, **George Williamson (K) Ltd** was the unsuccessful party in a suit which was commenced by plaint by **Leah Chelimo**, the respondent in this appeal, in which she claimed accrued salary and general damages for wrongful retirement and a declaration that the retirement was unlawful and wrongful.

The respondent was employed by the appellant in the year 1975 and worked for them until she was retired on 31<sup>st</sup> December, 2004 at the age of 50 years. At that time, she was earning a salary of Kshs 10,288.00. The respondents’ case, as pleaded and according to her oral testimony, was that she was employed by the appellant as a nurse and performed her duties with diligence which was rewarded with presents and certificates. However, by their letter dated 10<sup>th</sup> May, 2004, the appellants informed her that, she would be retired on 31<sup>st</sup> December, 2004 on attaining 50 years of age. She was paid Kshs 30,000/= for her children’s school fees and Kshs 210,000/= as gratuity. She had not requested to retire and, according to her, the retirement was wrongful since she expected to retire at 55 years age. She therefore lodged her claim in the Lower Court seeking to be paid salary for the unexpired five (5) years and for general damages for unlawful retirement.

The appellant’s case, on the other hand, was that they employed the respondent in 1975 as a nurse-aid until the year 2004, when, after discussion, she requested to retire. She was allowed to do so vide

the appellant's letter dated 10<sup>th</sup> May, 2004 after attaining the age of 50 years. She was then paid three (3) months salary to assist her with school fees as per her request. She was also paid gratuity of Kshs 240,906/= from which Kshs 39,175/= was deducted as tax. According to the appellants' witnesses, the respondent could retire at 50 or 55 years of age. The appellants therefore contended that they owed the respondent nothing.

After regarding submissions of counsel, the Learned Resident Magistrate did not find as fatal the failure to pay court fees on the amended plaint. He also concluded that special damages had been specifically pleaded and strictly proved. On the issue of retirement, the Learned Resident Magistrate held that the respondent did not apply to be retired early and further that the issue had not been discussed before the appellant served her with the letter notifying her of her impending retirement at the age of 50 years. He concluded that although the appellant had termed its action as early retirement, they in reality wrongly dismissed her from their employment and were accordingly liable to pay her as she claimed in the plaint.

The appellant was aggrieved and has lodged this appeal on seven (7) grounds. The gist of the appeal is that the Learned Resident Magistrate wrongfully and contrary to the respondent's own pleadings, held that the respondent had been unlawfully dismissed which claim was of a specific nature and accordingly had to be specifically pleaded and strictly proved which the respondent failed to do.

So, was the respondent unlawfully dismissed" The Learned Resident Magistrate was prepared to award the respondent salary for the remainder of the period she would have worked until the age of compulsory retirement of 55 years on the basis that she was so dismissed. In his evidence at the trial, **Luke Omondi Odire** (D.W.2) testified, *inter alia*, as follows:

**“CBA provided retirement age at clause 29 that she can retire at 55 or at 50”.**

Clause 29 of the CBA is in the following terms:

**“ Retirement age will be 55 years, however, an employee may opt to retire at the age of 50 years in line with the NSSF withdrawal benefits”**

From the wording of the clause, it is quite clear that retirement at 50 years of age is as the option of an employee. The respondent had herself to elect to retire at 50 years. The appellant indeed appreciated that position and that is why **Mwema Mutie** (D.W.1) and **Luke Omondi Odire** (D.W.2) alluded to discussion having taken place between them and the respondent over retirement at 50 years.

The Learned Resident Magistrate did not believe D.W.1 and D.W. 2 that the respondent agreed to retire early. He gave his reasons for his finding. I have no basis to fault that finding. Being a finding of fact, I can only interfere if it was, *inter alia*, made without basis. In his case, the Learned Resident Magistrate gave his basis for not believing the appellant's witnesses. He did not make the finding on whim. It then means that the respondent did not exercise the option to retire at the age of 50 years.

Under Clause 23 (c) of the Collective Agreement produced by the appellant at the trial, either party could terminate the contract on notice or pay in lieu of notice. As the respondent was a permanent employee, she was entitled to not less than two months notice or not less than two months pay in lieu of notice. However, the appellant did not exercise that option. The letter dated 10<sup>th</sup> May, 2004 asking the respondent to retire on 31<sup>st</sup> December, 2004 was not such a notice. Indeed, D.W.1 and D.W.2 did not say so. The appellant also paid to the respondent three months salary as an ex gratia payment. It was

not salary in lieu of notice. D.W.1 and D.W.2 did not say so.

In all those premises, the respondent's employment with the appellant was not terminated in accordance with the terms of the Collective Agreement. Her early retirement was accordingly wrongful.

What was the respondent entitled to" Despite the unlawfulness of the termination of the respondent's employment, I do not think she was entitled to salary and other monies for the balance of the period the respondent would have worked. The appellant would have lawfully terminated her contract on serving her **with not less than 2 months notice or paying her salary in lieu thereof**. The appellant notwithstanding the provisions of clause 23(c) of CBA still served the respondent with a seven (7) months notice of early retirement. They must have, no doubt, considered the distinguished service the respondent had rendered and the duration of the same. I think in the circumstances of this case, seven (7) months salary in lieu of notice would have been appropriate.

If this appeal turned only on the complaint that the respondents claim was a special damage claim which had not been specifically pleaded and strictly proved, I would have dismissed it because, in my judgment, the respondent specifically pleaded the same in paragraph 8 (1) (i) of her amended plaint. At the trial, she demonstrated that her monthly salary was Kshs 10,285 and asked the court to order the appellant to pay her for the unexpired period of 5 years.

That is however merely academic as I have held that the respondent was not entitled to the same even though her employment was terminated without the requisite notice.

In the event, the appeal is allowed to the extent that the sum of Kshs 300,000/= awarded to the respondent is set aside. I substitute that sum with an award of Kshs 72,021/= being the equivalent to seven (7) months salary in lieu of notice.

Although the appellant has partly succeeded in this appeal, given the previous long relationship between the appellant and the respondent, the order which commends itself to me is that each party bears its own costs of this appeal.

It is so ordered.

**DATED AND DELIVERED AT ELDORET THIS 31<sup>ST</sup> DAY OF JULY, 2012.**

**F. AZANGALALA**

**JUDGE**

Read in the absence of the parties and their counsel, the date having been taken in court.

**F. AZANGALALA**

**JUDGE**

**31/7/2012**



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