



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL DIVISION
CIVIL CASE NO 803 OF 2004
PHILIP BURURU.....PLAINTIFF
VERSUS
PLAN KENYA.....DEFENDANT
SETTLEMENT OF TERMS OF DECREE

1. The main reliefs sought by the Plaintiff in this suit were -
 - (i) A declaration that the termination of his employment with the Defendant was wrongful.
 - (ii) A declaration that he was entitled to damages for wrongful dismissal.
 - (iii) An order for payment of special damages of KShs 38,396,686/00 (consisting mainly of lost income for the period he would have worked until retirement).
 - (iv) Costs and Interest at commercial rates from the date of filing suit.
2. In a **judgment dated and delivered on 7th May 2010** the Court (Ali-Aroni, J) found –
 - (i) That the Plaintiff had worked for the Defendant for 11 completed years.
 - (ii) That his gross pay at termination was KShs 148,258/00 per month.
 - (iii) That the Plaintiff was paid one month’s salary in lieu of notice.
 - (iv) That the Plaintiff was paid KShs 1,043,045/00 as his terminal dues under **Clause 10.2** of the **Personnel Policy Manual** of the Defendant.
 - (v) That the Plaintiff should have been paid six (6) months pay in lieu of notice and severance pay at the rate of 1½ months for each completed year of service under **Clause 10.4** of the **Personnel Policy Manual**.
3. The Court then entered judgment for the Plaintiff in the following terms –
 - “(a) A declaration that the Plaintiff’s termination under Clause 10.2 of the Personnel Policy Manual was wrongful.**

(b) That the Defendant do pay to the Plaintiff 6 months pay in lieu of notice in accordance with Clause 10.4 of the Personnel Policy Manual.

(c) That the Defendant do pay to the Plaintiff severance pay being 1½ months' salary for each completed year of service.

(d) Cost.

(e) Interest at commercial rates.”

4. The parties have been unable to agree on the terms of the decree to be drawn from this judgment, hence this reference to a Judge in chambers under **Order 21, Rule 8(4)** of the **Civil Procedure Rules, 2010** (the **Rules**). Nevertheless the parties' advocates made representations in court on 4th July 2013. I have considered those representations. I have also seen the affidavit sworn by the Plaintiff on 16th January 2013 in respect to settlement of the terms of the decree.

5. The differences between the parties regarding the terms of the decree appear to be –

- i. Is the applicable monthly salary for the severance pay **basic** pay or **gross** pay? For the Plaintiff it was submitted that gross pay of KShs 148,258/00 per month should be used. For the Defendant it was submitted that the basic pay of KShs 138,158/00 per month should be used.
- ii. What is the **commercial rate of interest** to be used? For the Plaintiff **18% per annum** at the date of judgment was proposed. For the Defendant it was urged that it should be the **Central Bank rate** at the date of judgment: no figure was put to it.

6. The statute law in place regarding redundancy at the time of termination of the Plaintiff's employment was the **Employment Act, Cap 226** (since repealed). It provided in the relevant portion at section 16A –

“16A. (1) A contract of service shall not be terminated on account of redundancy unless the following conditions have been complied with –

- a.;
- b.;
- c.;
- d.;
- e. **an employee declared redundant shall be entitled to one month's notice or one month's wages in lieu of notice;**
- f. **an employee declared redundant shall be entitled to severance pay at the rate of not less than 15 days pay for each completed year of service as severance pay.”**

7. The guidance we may derive from this section is that the monthly pay to be applied in calculating the severance pay is the gross pay as it is not restricted to the basic pay.

8. As for the commercial rate of interest, no party has bothered to find out what it was as calculated by the Central Bank at the time of judgment or at any other relevant time. The relevant time ought to be at the time of payment, not at the time of judgment.

9. As we all know the commercial rate of interest keeps fluctuating depending on various factors, including the national rate of inflation and foreign exchange rates. I think that in the interests of justice,

and to bring this matter to a close, the Court ought to determine what the commercial rate of interest to be used in the decree herein ought to be. I will determine the same at **17% per annum**.

10. There is another issue that was not mentioned by either party. The Plaintiff had already been paid one month's pay in lieu of notice (instead of six months). He had also been paid severance pay calculated under Clause 10.2 (instead of under Clause 10.4).

11. It cannot have been the intention of the Court in the judgment herein that the Plaintiff should be paid **seven (7) month's** pay in lieu of notice, or be paid severance pay under **both** Clauses 10.2 and 10.4! Under the decree herein he will be entitled to an additional five month's pay in lieu of notice (as he had been paid one month's pay). He will also be entitled to the **difference** between what he is entitled to under Clause 10.4 (**KShs 148,258/00 X 1.5 X 11 years = KShs 2,446,257/00**) and what he was paid under Clause 10.2 (**KShs 1,043,045/00**). That difference by my calculation is **KShs 1,403,212/00**. The amount will carry interest at 17% p.a. from the date of filing suit until payment in full.

12. The five months pay in lieu of notice works out at **KShs 148,258/00 X 5 = KShs 741, 290/00**. That sum will also carry interest at 17% p.a. from the date of filing suit until payment in full.

13. There should be no issue regarding costs as the same had to be taxed if not agreed. The taxed or agreed costs would carry similar interest from the date of filing suit until payment in full.

14. Let the decree be drawn in accordance with the terms as settled above. There will be no order as to further costs. It is so ordered.

DATED AND SIGNED AT NAIROBI THIS 16TH DAY OF OCTOBER 2013

H. P. G. WAWERU

JUDGE

DELIVERED AT NAIROBI THIS 18TH DAY OF OCTOBER 2013