



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
Civil Case 17 of 2008

SHAFFIQ MOLU.....PLAINTIFF

VERSUS

S.D.V. TRANSAMI (K) LTD.....DEFENDANT

JUDGMENT

In the plaint filed on 16th May 2008, the plaintiff, Shaffiq Molu, claimed from the defendant, SDV Transami (Kenya) Limited, Kshs. 4,488,000.00 being reasonable and/or agreed gratuity due to him from the defendant. The foundation of his claim was that he was employed by the defendant vide a contract dated 6th March 1989 as an Export Manager and under the said contract, he was entitled to receive gratuity upon expiry of his employment with the defendant. The plaintiff pleaded that, by a letter dated 16th January 2002, the defendant notified him that employees who had joined a pension scheme introduced by the defendant would not be paid gratuity for the period after the introduction of the pension scheme but that the same would be paid for the period prior to joining the scheme at the rate of 22 days for each year served. The plaintiff further pleaded that he worked for the defendant until the year 2007 when he resigned at which time he was entitled to the sum claimed of Kshs. 4,488,000.00 as gratuity for the period between January 1987 to December 2002. The plaintiff further averred that despite demand for the said sum, the defendant has not paid the said sum.

The defendant filed a defence in which it denied the plaintiff's claim. It pleaded that the plaintiff was paid all his dues and duly discharged the defendant. With respect to gratuity, the defendant averred that the plaintiff accepted the variation to his terms of employment in 2002 and the period prior to 2002 was fully accounted for. Without prejudice the defendant pleaded that the plaintiff's claim for gratuity prior to the year 2002 was statute barred.

After the close of pleadings, the plaintiff framed the following issues:

- 1) **What were the terms of employment?**
- 2) **What were the terms of the defendant's pension scheme?**
- 3) **Is the plaintiff entitled to a full account of how the parties made their contributions to the scheme?**
- 4) **What were the new terms of employment introduced by the defendant's letter dated 16th January 2002?**
- 5) **Did the defendant via the aforesaid letter commit itself to pay gratuity to the plaintiff for the period prior to joining the scheme?**
- 6) **If yes to 5 above, how much is the plaintiff entitled to?**
- 7) **Has the defendant paid all the dues that the plaintiff is entitled to?**
- 8) **By joining the pension scheme did the plaintiff forego his right to gratuity for the period prior to 2002?**
- 9) **Is the plaintiff's claim time barred?**
- 10) **Is the plaintiff entitled to claim the sum of Kshs. 4,488,000?**
- 11) **What award should be made in respect of interest and costs?**

The plaintiff testified and called no witness. The gist of his evidence was that he was employed as the defendant's Assistant Exports Manager from 2nd January 1987 upto 6th January 1987 when he was appointed the Exports Manager, a

position he held until 15th December 2007 when he resigned from the defendant's employment to become a self employed transporter. In 1994, the defendant introduced a pension scheme for its staff which the plaintiff joined. By its letter dated 16th January 2002, the defendant informed the plaintiff that staff, including himself, who had joined the pension scheme would not be paid for service from the date they had joined the scheme. The plaintiff understood the letter to mean that he would be paid for his service upto 2002 when the defendant informed him of the variation in its policy. He expected to be paid at the rate of 22 days of every year completed. The plaintiff admitted being paid his salary upto the time he resigned. He further acknowledged receiving a bonus payment the year he resigned and also the defendant's contribution to the pension scheme. Referring to the defendant's Human Resource Policy Manual availed in 2004, the plaintiff testified that the same provided for payment for service at the above rate for the period from 1987 to the date of resignation which sum he claimed from the defendant. He produced a bundle of documents in exhibit one (P.EX.1) which included his letter of appointment dated 6th March 1989, a letter dated 21st January 1994 from the defendant to the plaintiff inviting him to join the defendant's staff pension scheme, a letter dated 16th January 2002 from the defendant to the plaintiff informing the latter that service would no longer be payable to employees, including the plaintiff, from the date of joining the pension scheme but would be payable for the period prior to joining the scheme at the rate of 22 days per year served, the plaintiff's resignation letter dated 30th October 2007, the defendant's letter accepting the same dated 1st November 2007, a letter from the defendant to M/S NSSF advising the latter of the contributions on behalf of the plaintiff from 1st January 1987 to 15th December 2007, the plaintiff's letter of demand before action dated 19th February 2008 and the defendant's Human Resource Policy Manual.

In conclusion, the plaintiff testified that he did not voluntarily accept the change in the policy of the defendant not to pay service for the period he joined the pension scheme. He testified that he acknowledged the change and signed the letter dated 16th January 2002 to save his employment.

The defendant's case was presented through Morara Matunda, its Human Resources Manager for Kenya. He testified that the plaintiff was a member of the defendant's pension scheme which was introduced in 1994 and on resignation in 2007, he was only entitled to the pension and not to service dues in terms of the defendant's policy which the plaintiff had accepted. He referred to the defendant's letter dated 16th January 2002 addressed to the plaintiff which, he stated, had been signed by the plaintiff accepting that he would not be paid anything for service for the period he was a member of the pension scheme. For the period prior to joining the scheme Mr. Matunda testified that the defendant could not be paid any service dues because he had resigned from the defendant's employment. For that contention, he referred to the defendant's Human Resource Policy Manual clause F (10) (c) which, he contended, had been brought to the notice of the plaintiff. Mr. Matunda testified that the plaintiff had been paid all dues due to him on resignation which dues he had acknowledged and the defendant owed him nothing.

At the conclusion of the evidence, counsel agreed to file written submissions which they duly filed. In his submissions, counsel for the plaintiff contended that in the letter dated 21st January 1994 vide which the defendant informed the plaintiff of the pension scheme, no mention of gratuity or service dues was made. In his view therefore, the pension scheme was an additional benefit due to the plaintiff and not in substitution of the gratuity accrued upto the time of the introduction of the scheme. At any rate, according to counsel for the plaintiff, there was no dispute that gratuity prior to joining the pension scheme was payable. He made that submission because, the plaintiff was informed of the change by the defendant in the letter dated 16th January 2002 which letter recognized that the plaintiff was entitled to gratuity for the period before 1994. Counsel further submitted that the plaintiff, like other workers of the defendant was forced into signing acceptance of the said letter of 16th January 2002 and the variation of his terms of employment was therefore not effected voluntarily.

In response to the plaintiff's submissions, counsel for the defendant submitted that the plaintiff had failed to prove his case on a balance of probabilities. In her view, the plaintiff's own documents did not support his case. With regard to the period of employment she submitted that the letter of employment dated 6th March 1989 was clear as to when the plaintiff was employed. With regard to the introduction of the pension scheme, counsel submitted that the terms of the letter dated 16th January 2002 were clear. The letter expressly told the plaintiff that he would not be paid service from the date of joining the pension scheme but that the same would be paid for the period prior to joining the scheme. With regard to payment of service for that earlier period, counsel submitted that the plaintiff could not be paid because he resigned from the defendant's employment. In counsel's view, the provisions of the defendant's Human Resource Policy Manual aforesaid were known to the plaintiff and clause F (10) (c) excluded payment of service dues to any employee of the defendant on resignation.

Having considered the pleadings, the evidence and the submissions of counsel, I can now answer the issues framed

by the plaintiff. It is common ground that the plaintiff was once an employee of the defendant and that he was issued with the letter of appointment dated 6th March 1989. That letter expressly stated that the plaintiff was being confirmed as an Export Manager in the defendant's Mombasa Office with effect from 1st January 1989. The letter implied that the plaintiff had been an employee of the defendant before being served with the letter of appointment hence the phrase: ***"We are pleased to confirm your appointment as an Export Manager in our Mombasa Office."*** The leave application form dated 16th May 1989 and the defendant's letter dated 14th December 2007 addressed to N.S.S.F. show that the plaintiff's employment with the defendant commenced in January 1987. Neither the plaintiff nor the defendant however, adduced any documentary evidence on the plaintiff's terms of employment between January 1987 and January 1989. The plaintiff's own pleading in paragraph 3 of the plaint is however categorical that by ***"a contract of Employment entered into by the plaintiff and the Defendant dated 6th March 1989, the defendant employed the plaintiff as an Export Manager from 6th March 1989....."*** No reference is made to the period prior to January 1989 in the entire plaint save in paragraph 8 (1) where January 1987 is mentioned without stating how the date is introduced. In the premises, I find and hold that the plaintiff was employed by the defendant between January 1987 and January 1989 on temporary or probationary terms.

It is common ground also that the plaintiff's employment with defendant was governed by: the Letter of Appointment dated 6th March 1989, the letter dated 21st January 1994 on the defendant's pension scheme and the defendant's Human Resource Policy Manual. All these documents were produced by the plaintiff. The letter of appointment did not make provision for pension, service or gratuity. It however stated, the plaintiff's employment with the defendant would be terminated by either party giving three (3) months notice or salary in lieu of notice.

By its letter dated 21st January 1994, the defendant informed the plaintiff that it had introduced a contributory staff pension scheme with effect from January 1994. The plaintiff accepted to join the said scheme by an endorsement on the defendant's said letter dated 21st January 1994. The letter did not mention anything about gratuity/service dues. The latter was mentioned in the defendant's letter dated 16th January 2002 which informed the plaintiff of a change in the defendant's policy governing its pension scheme. The letter notified the plaintiff that service would not be payable to any employee of the defendant from the date such employee joined the pension scheme. The letter further informed the plaintiff that service would be paid for the period prior to joining the pension scheme at the rate of 22 days per year of completed service. The plaintiff acknowledged and accepted the said change. He did so on 22nd January 2002.

It is not in dispute that after the said change of policy, the plaintiff continued in the defendant's employment until he resigned in 2007. His resignation was communicated to the defendant by his letter dated 30th October 2007 and accepted by the defendant in its letter dated 1st November 2007. Upto the time the plaintiff resigned, he did not challenge the change in the policy regarding the defendant's pension scheme introduced in January 2002. In his evidence, the plaintiff alleged that he did not accept the said change of policy voluntarily. He claimed that if he had not accepted the change, he would have lost his employment and since he had several financial commitments, he was forced to accept the changed terms. The plaintiff has not persuaded me in that regard. I am not so persuaded because, the plaintiff did not challenge the policy change for the entire period of about 5 years he worked for the defendant after the said change. Further, he did not plead being compelled to accept the change neither did he plead undue influence or unfair advantage. The assertion that he was coerced to accept the change is therefore without foundation. I therefore find and hold that the plaintiff voluntarily accepted the defendant's change of policy regarding its pension scheme. By that change, the plaintiff would not be entitled to service or what he describes as gratuity from the year 1994 when he joined the defendant's pension scheme.

For the period before 1994, the defendant offered to pay the plaintiff service in accordance with its policy i.e. 22 days per completed year of service. The letter dated 16th January 2002 by which the change was introduced did not attach any conditions to payment of service prior to joining the scheme. In the plaintiff's view, therefore the defendant's liability to pay for the service before 1994 was unconditional. The defendant did not agree. In its view, the payment of service for any period was subject to clause F (10) (c) of the defendant's Human resource Policy Manual which is in the following terms:-

"The requisite period of notice may be reduced or waived at the discretion of the company. No service/gratuity is paid with resignation."

The plaintiff was of the view that the above condition did not apply to him because the Policy Manual was availed to him in the year 2004 and could not alter, to his detriment, his terms of employment. The plaintiff therefore acknowledges that he was aware of Clause F (10) (c) of the said Manual before he resigned in 2007. He knew of the consequences of resignation

under the said clause and still resigned stating as follows:-

“My 21 year tenure at SDV, has been the most challenging and rewarding period of my career and now I have to make a difficult announcement.

With the Global changes in the world, I have decided to pursue a new carrier (sic) and therefore tender my resignation from SDV Transami (K) Limited.....”

The plaintiff's resignation was accepted by the defendant in its letter dated 1st November 2007. The letter started among other things as follows:-

“We wish to advise you that your resignation has been accepted with regret with effect from 30th January 2008.

The company will pay you any outstanding leave days earned that have not been taken.

You will be paid all your contributions to the pension scheme. The balance is supposed to be collected at retirement point.

Attached is a clearance form which you are required to have signed by the listed offices before presenting it to the Human Resources Department who will facilitate payment of your final dues if any.....”

The plaintiff duly completed the clearance form and was paid his contributions to the pension scheme. In acknowledging the same, the plaintiff confirmed that the amount he received reflected his benefit entitlement and that no further monies were payable to him. The plaintiff also signed a discharge voucher dated 17th December 2007 which contained a declaration that he had no further claim(s) past, present or future arising from or in relation to his employment and resignation from the defendant's employment. One of the payments received by the plaintiff was a sum of Kshs. 612,000.00 described as **“End year bonus”**.

The plaintiff held a very senior position with the defendant. He was obviously conversant with the terms of his employment and took a calculated decision to resign. He was fully alive to what his terminal dues were and clearly accepted the computation made by the defendant. He did not allege that he was coerced to sign the documents referred to above or suggest that the defendant used undue influence or otherwise compelled him to sign the same. I consider counsel's submission in this regard as unfounded and I reject his submission that the plaintiff was a weaker party to the employment contract. There is no reason why the plaintiff could not have waited until retirement if he desired to take benefit of the service/ gratuity payment for the period before joining the pension scheme in 1994. If anything the plaintiff appeared to leave the defendant's employment for **“greener pastures”**. I find and hold that his decision to claim for service/ gratuity was an afterthought and the same was not payable under the terms of his employment with the defendant.

I believe I have now considered all the issues framed by the plaintiff save for issue number 9 and 11. Issue number 9 was whether the plaintiff's claim was time barred. Neither the plaintiff nor the defendant addressed this issue. On my part however, I find that no part of the plaintiff's claim can be said to be statute barred. Given my above findings however, it must be obvious that the plaintiff has not established his claim on a balance of probabilities. His claim must therefore fail. It is accordingly dismissed.

Issue number 11 relates to costs. The plaintiff worked for the defendant for 21 years and, I dare say, with distinction. Taking into account that service, and the relationship of employee/employer which existed for that period, it is my view that costs should not follow the event. I order that each party shall bear its own costs of this suit.

Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 18TH DAY OF FEBRUARY 2010.

F. AZANGALALA
JUDGE

Read in the presence of:

Ole Kina holding brief for Cootow Advocates for the Defendant.

F. AZANGALALA

JUDGE

18TH FEBRUARY 2010