



REPUBLIC OF KENYA

IN THE HIGH COURT

AT KISUMU

Civil Case 113 of 2011

LAKE BASIN DEVELOPMENT

AUTHORITY.....APPELLANT

VERSUS

PAUL OWINO

RAMOLI.....RESPONDENT

JUDGMENT

The lower court on 2nd August 2011 delivered its Judgment which ordered the Appellant to pay the defendant the sums of Kshs. 846,340 together with costs and interest.

Aggrieved by the said judgment the Appellant filed its appeal citing the following grounds:-

- 1. The learned trial magistrate erred in law and in fact in making his decision based on facts and evidence not pleaded nor tendered before the Court.**
- 2. The learned Trial Magistrate erred in law and in fact in failing to find that the respondent's claim was governed by the circular Number OP9/93 dated 17th April 2002 which superseded the earlier circular number OP13/19A dated 23rd June 2000.**
- 3. The learned trial magistrate erred in law in venturing into interpreting a circular that was explicit on its terms and gave to it a meaning that could not have been interred on its surface.**
- 4. The learned trial magistrate erred in law and in fact failing to find that the defendant having been an agent for the government in staff rationalization (retrenchment) was bound by the directions of the same government as and when ordered.**
- 5. The judgment was thus against the pleading on record and the weight of evidence adduced.**
- 6. The calculation of the sum due was in any event convoluted and not proved at all.**

From the evidence on record the respondent was employed by the appellant on 14th August 1985. His position was a workshop foreman at the time of retrenchment.

According to the respondent case the Appellant retrenched him from the said employment pursuant to the then government policy of retrenchment which demanded that the government agencies and parastatals

which included the appellant do undertake the exercise.

To this end the appellant vide a circular dated 23rd June 2000, wrote to the respondent on 24th June 2002 that he was among its staff who had been earmarked for the said retrenchment exercise.

The letter dated 23rd June 2000 hereafter referred to as the “ **Dr. Leakey’s Letters or circular** ” clearly spelt out the terms and conditions within which the appellant was to undertake the same.

Subsequently the appellant received another letter or circular dated 17th June 2002 by Dr. Sally Kosgey, hereinafter referred to as “**Dr. Kosgey’s Letter or circular** ” which equally gave the process and guidelines on retrenchment.

Dr. Leakey’s letter among other things set out the following process of retrenching the staff.

- (i) **Sensitizing of staff on retrenchment**
- (ii) **Identification of staff for front-loading**
- (iii) **Compilation of bio-data of staff in over-manned areas and areas identified for abolition.**
- (iv) **Isolation of staff to leave the service under natural attrition from staff to be front-loaded.**
- (v) **Determination of staff for front-loading**
- (vi) **Notification of staff identified for front-loading**
- (vii) **Seeking approval for retirement of front-loaded staff**
- (viii) **Communication of approval, processing and disbursement of safety net benefits for the front-loaded staff.**

The front loading was defined in the said Leakey’s Letter or circular as

“Front-loading is the release of an officer from duties but continuing to pay salary house and medical allowance until the separation is finalized and the officer is paid safety net benefits”

“Normal off loading is the release of an officer from duty once separation formalities having been finalized”.

The gist of the appellant’s appeal is that the trial court followed Dr. Leakey’s letter in arriving at its final computation instead of Dr. Kosgey’s. **Mr. Otieno** further argued that since Kosgey’s letter was the latter, it therefore cancelled that of Dr. Leakey.

Kosgey’s letter similarly set out the retrenchment package as follows:-

- (i) **Golden hand shake of Kshs. 40,000 per retrenchee.**
- (ii) **Payment of 2 months basic salary in lieu of notice.**
- (iii) **Severance pay calculated at 2 ½ months for every year worked based on monthly basic salary as at 30th June 1995.**

It is therefore necessary at this level to answer whether indeed the trial court erred in basing its findings on Dr. Leakey’s letter.

What is not in dispute throughout the proceedings is the fact that the respondent was the appellant's employee as at the time of retrenchment. Is it true therefore to suggest that Dr. Kosgey's Letter more or less cancelled that of Dr. Leakey's?

Dr. Kosgey's letter states :-

“Lake Basin Development Authority (LBDA) proposed to retrench 174 employees”.

Reference is made to your letter Ref No MOARD/B – 33Adated 13th December 2001 regarding proposals by Lake Basin Development Authority to retrench 174 employees. The proposal have been considered and analyzed in accordance with a circular number OP 13 / 19A of 7th November 1995 on the administration of the reform programme in the Public Service....”

The said letter obviously referred to Dr. Leakey's Letter which was OP 13/19A.

On 24th June 2002 the appellant wrote to the respondent as follows:

RE: Notification of early Retirement

Further to office of the President Circular number OP 13/19A of 23rd June 2000 the government is in the process of implementing the staff Retrenchment Programme which is aimed at achieving optimal staffing levels in the Civil service.

In view of the above you are hereby notified that you have been identified amongst others to be retired under the programme with effect from 1st July 2002.....”

Further exhibit P10 are minutes of the appellants. The same states:

“Brief on LBDA Retrenchment Exercise

“Further to the Head of Public Service / Secretary to the Cabinets circular Ref OP 13/19A on 23rd June 2000 LBDA made a proposal on Restructuring and Retrenchment of 223 staff of the LBDA”.

From the above quotation I am persuaded that Dr. Leakey's circular was the basis for the entire appellants retrenchment exercise. Dr. Kosgei's letter was merely an addendum so to speak. In fact the contents of Kosgei's letter merely reiterated what Dr. Leakey had already indicated. It did not change anything at all. In fact it further buttressed the nature of pay packages the retrechees were supposed to get.

As a matter of fact and as earlier observed Dr. Kosgei referred to and or quoted from Dr. Leakey's letter meaning that it was not necessarily original in its content and or substance.

On this limb again, the fact that the appellant quoted and relied on them extensively even in their own minutes confirms my findings that they knew which circular to rely on, and that is Dr. Leakey's.

On this element therefore the trial court was right in relying on the same. Dr. Kosgei's letter did not supercede that of Dr. Leakey or at all.

The appellant's 4th ground of appeal does not in any way exonerate it from its legal duty to pay the respondents dues. The issues between the government and the appellant have no bearing at all to the respondent. The government asked the appellant to retrench some of its staff. This the appellant did and one of the persons identified is the respondent. The same government gave the appellant over Kshs. 23 million to oversee the exercise. How then can the appellant blame the government in failing to pay the respondent his dues?.

Was the court correct in arriving at its calculation? The trial court found that the respondent had been in

the appellant's employment since 1985.

I have perused the evidence on record especially the appointment letters. It is true that the respondent was employed on contract basis but was later confirmed. This date back to 1985. At the time of his retrenchment the respondent had worked for the appellant for seventeen (17) years.

Based on the above findings I do find that the sum of Kshs. 603,926 severance pay was sound. I do also find that the other computation found by the trial court findings including salary in lieu of notice and thus totaling Kshs. 846,340 are fit and proper.

The appellant argued that the respondent was not entitled to interest, since he had failed to pick up the cheque of Kshs 203,790.50.

There was nothing to stop the respondent from collecting his cheque and further demanding the payment of the balance. In any case he would have filed proceedings to recover the same.

For this reason the respondent shall only receive interest for the sum of Kshs. 642,550 after subtracting Kshs. 203,790 from the awarded sum of Kshs. 846,340.

I further order that the respondent costs both in the lower court and in this appeal be calculated based on the sum of Kshs. 642,550.

The decision of **Titus Korir Komen vs= Lake Basin Development Authority – Kisumu HCC 156 of 2004** is worth my consideration. The above decisions found for a fact that the appellant did not apply the circular by Dr. Leakey. This was fundamental. In this regard therefore the said authority should apply to this case in all equal force.

For the foregoing reasons I shall disallow this appeal. The proper formula and procedure that ought to have been applied is Dr. Leakey's letter. Kosgei's letter was an addendum to that of Dr. Leakey and in any event it never contradicted each other in any way.

Costs as earlier stated shall be to the respondent based on a figure of Kshs. 642,550 for avoidance of doubt.

Dated, signed and delivered at Kisumu this 13th day of July 2012

H. K. CHEMITEI

JUDGE

HKC/aao