Magondu v NK Brothers (Cause E731 of 2022)
[2024] KEELRC 1849 (KLR) (12 July 2024) (Judgment)

Neutral citation: [2024] KEELRC 1849 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE E731 OF 2022

NJ ABUODHA, J

JULY 12, 2024

BETWEEN

WILLIAM NJUGUNA MAGONDU ..... CLAIMANT

AND

NK BROTHERS ..... RESPONDENT

JUDGMENT

1. The Claimant through his Memorandum of Claim dated 11th October, 2022 pleaded inter alia: -

   a. That at all material times to this Claim the Claimant was an employee of the Respondent having being employed in March 1968 rising to become a site supervisor. (Filed herewith are copies of his employment card and the National Authoriiy Construction (NCA) registration cards).

   b. That the Claimant avers that he served the Respondent for duration spanning over 50 years creating a strong bond with the Respondent company that transcended a mere employer employee relationship.

   c. That at the time of his termination the Claimant earned consolidated salary of Kshs 117,000.

   d. The Claimant avers that the Respondent never embraced the use of electronic funds transfer in salary disbursement during his service and neither issued payslips.

   e. That the Respondent's practice was to have its senior employees sign biannual salary vouchers, upon which the employee would collect the salary as availed by the Respondent, which oftentimes was in 2 -3 instalments.

   f. That, for instance; the Claimant signed a salary voucher of Kshs 702,000 in January 2019 (for Jan- July 2021) and a similar voucher in July 2021 (for July-Dec 2019).

g. That prior to the year 2019, the employees would collect their salaries in cash but the Respondent started issuing cheques in the 2019. (Filed herewith are copies of the Claimants Kenya Commercial Bank statements for the years 2019 and 2020)

h. The Claimant avers that despite the near lifetime relationship he had established with the Respondent, in July 2020, the Respondent's Managing Director Mr Pravin.M. Khoda informed the Claimant not to report to work from the 1st August 2020.

i. That the reasons, as given by the managing director, was that he (Mr Pravin) was headed for his retirement and wished to retire with the Claimant, one of his oldest and faithful employee.

j. That the Respondent did not issue a written notice of termination or retirement.

k. At all material times to this Claim, the Claimant was a member of Kenya Building Construction, Timber A Furniture Employees Union and the nominated as the company's shop steward (Filed herewith is the Claimant's Union Membership card renewed in 2017 and other Union membership documents)

l) That the said Union and the Respondent had a valid CBA for the year 2020 upon whose terms the Claimant is subject. (Filed herewith is a copy of CBA valid for year 2020).

m. That the claimant avers that all the time of his termination, the respondent still owed him Kshs.400,000/= as salary arrears.

n. That on or about the 23rd September 2020, the Respondent paid to the Claimant Kshs 2,332,816 as his final dues for the 52 years of his service.

m. That the Claimant objected to the calculations of his service dues to the Respondent.

p) That as a general practice, an employee has to sign a letter of discharge before receiving any settlement from the Respondent. The Claimant thus signed one upon receipt of the said amount. (Filed herewith is a copy of a discharge letter dated 23rd September 2020).

q) That on or about the 15th Oct 2020, the Claimant wrote to the Respondent demanding payment of his service benefits arrears together with his salary arrears.

(Filed herewith is demand notice dated 15th Oct 2020)

r) That after several reminders and follow-ups, the Respondent, on or about the 5th July 2022, paid to the Claimant an additional Kshs1,000,000 termed as a token of appreciation in addition to his service benefit its already paid. (Filed herewith is a copy of a letter titled 'Token of appreciation dated 5th July 2022)

s) That the said letter has elicited no response prompting the Claimant to now bring this cause to this Honourable court for intervention.

And the Claimant's cause against the Respondent is for a claim of

a. Notice

2 months' payment in lieu of notice @ Kshs 117,000 X 2 = 234,000

b. Service payment (@ 22days for each completed year)

117,000/26 days X 21 days X 52 years less 2,332,816=Ksh 2,581,184

c) salary arrears

Kshs - 410,000

Total = Kshs 3,225,184

And the Claimant prays for compensation for wrongful loss of employment.

2. The Respondents filed its Memorandum of Response dated 14th November, 2022 and averred inter alia:

   a. The Respondent denies the contents of paragraph 3 and 4 of the memorandum of claim and states that the Claimant was employed by the Respondent in the year 1968 as a mason and not a site supervisor and has maintained an Employer- Employee relationship since then.

   b. The Respondent denies the contents of paragraph 5 of the memorandum of claim and states that the Claimant was paid a monthly salary with accordance to the Laws of Kenya which salary had escalated to a gross salary of Kshs. 62,995/= in the year 2020.

   c. The Respondent denies the contents of paragraphs 12 and 13 of the memorandum of claim and states that the said Mr. Pravin M. Khoda is still the Respondent's Managing Director and puts the Claimant to strict proof thereof.

   d. In response to paragraph 14 of the memorandum of claim, the Respondent states that the Claimant in the year 2020 insisted that he was ready to retire and sought to have his terminal due calculated to enable him proceed to retirement.

   e. As the Claimant was past the retirement age and was as a result handling minimal tasks the Respondent did not object to his request for retirement and thus his terminal dues would be calculated and paid to him.

   f. The Respondent admits the contents of paragraph *17* and states that the Claimant's dues were calculated and paid to him.

   g. In response to paragraph 19 and 20 of the memorandum of claim the Respondents state that they indeed calculated and paid the Claimant's final dues from when the Claimant joined the Respondent to 1st August 2020 when his retirement would commence which amounted to Kshs. 2,332,816/= which amount was acceded to by the Claimant in a letter dated 23rd September 2020.

   h. The Respondent denies the contents of paragraph 21, 22, 23 and 24 of the memorandum of claim and states that the sum of Kshs. 1,000,000/= paid to the Claimant was a token of appreciation and not payment of any demanded dues as there were no pending dues to be paid by the Respondent as had been demonstrated in the letter of the 23rd September 2020 which was signed in acknowledgement of this fact by the Claimant.

   i. The Respondent also states that the Claimant rightfully retired and is thus not entitled to the sought for two months' salary in lieu of notice and that during his retirement no salary arrears were pending.

   Counterclaim

   j. The Respondent reiterates the contents of its reply to memorandum of claim and states as follows by way of counterclaim: -

   k. The Claimant was employed by the Respondent on 1st March 1968 as a mason and worked as such till his retirement on 1st August 2020.

l. The Claimant was paid a monthly salary which had escalated to Kshs. 62,995/= at the time of the Claimant's retirement on the 1st August 2020.

m. The Claimant having attained the retirement age notified the Respondent of his intended retirement in the year 2019 which the Respondent did not object to.

n. The Claimant however did not proceed to retirement immediately after issuing the said notice but further continued to report to work whilst still communicating his intended retirement.

o. Due to the good relation between the Claimant and the Respondent, the Respondent proceeded to settle all of the pending payments together with the Claimant's terminal dues being Kshs. 402,000/= on the 22nd July 2019, a sum of Kshs. 408,000/= on the 20th November 2019 and a sum of 320,000/= on the 25th March 2020 amounting to payment in the sum of Kshs. 1,130,000/=.

p. The Claimant thereafter officially proceeded for retirement on the 1st August 2020 and in compliance the Respondent further paid a sum of Kshs. 2,332,816/= towards the Claimant's terminal dues.

q. The Claimant vide a letter dated 23rd September 2020 acknowledged receipt of the said sum of Kshs. 2,332,816/= and further confirmed that his terminal dues had been fully settled and that he had no further claim from the Respondent.

r. The Respondent avers that due to the good relation the Respondent had with the Claimant, it on the 5th July 2022 paid a further sum of Kshs. 1,000,000/= to the Claimant as a token of appreciation for the work done during his employment and for the said good relations which the Claimant accepted and further confirmed that he had no further claims as against the Respondent.

s. The Respondent therefore paid a total sum of Kshs. 3,462,816/= towards the Claimant's terminal dues without including the said token of appreciation.

t. The Respondent therefore avers that at the time of the Claimant's retirement, the Respondent had settled any salaries due together with the service charge for the 52 years that the Claimant worked for the Respondent and in accordance with paragraph 19 of the Memorandum of Agreement between Kenya Association of Building and Civil Engineering Contractors and Kenya Building, Construction, Timber and Furniture Industries Employees union which the Claimant is a subscriber to.

u. The Respondent has however re-calculated the Claimant's benefits and realized that it had overpaid the Claimant a sum of Kshs. 1,130,000/=.

v. The Respondent is a good employer who treats his employees fairly and has never failed to pay one of its employees' terminal dues whatsoever.

w. The Claimant actually owes the Respondent for overpayment of his terminal benefits.

x. The Respondent has always acted in good faith.

y. This Honourable Court has jurisdiction to hear this matter.

Reasons Whereof: The Respondent prays that the Claimant's memorandum of claim be dismissed with costs and its Counter-claim be allowed as follows;

a. An order be issued against the Claimant for payment to the Respondent of the overpaid sum of Kshs. 1,130,000/=.;

b. Damages for tarnishing the Respondent's reputation;

c. Costs of this suit and of the counterclaim;

d. Interest on (a) and (b) above;

e. Any other relief as this court may deem fit and just to grant.

EVIDENCE

3. At the hearing the claimant stated that her recorded a statement on 11th October, 2022 which he adopted as his evidence in chief he also relied on the documents filed with the claim. According to him, he was employed in 1968 by the respondent as a Mason. He was on a monthly salary but this stopped in 1971 when he became a shop-floor official for his union. He however complained telling the respondent that monthly payment was the one recognized by law. In 2021, he signed vouchers for salary which covered the period between January to July, 2021 totaling to Kshs. 702,000/-. He was not given the copies of the vouchers he signed. In 2019, the respondent started paying him by cheque. According to him, the respondent would make him sign for a higher amount but issued with a cheque of a lesser amount. He further stated that he retired in 2020 and that he never signed any payslip and that he could not remember any of the payslips attached.

4. In cross-examination he stated that he started working in 1968 and was at the time of trial aged 75 years. He confirmed that he started working as a mason at a salary of Kshs. 6/- per day. At the time of retirement, he a drew an accumulated salary of Kshs. 702,000/- for six month and that the respondent's director retained all the vouchers after he signed. It was further his evidence that in 1999 he was promoted to the position of a supervisor and that he left employment due to age. He retired and that he was 72 in 2020 when he retired. His director asked to retire with him after paying his dues.

5. It was his evidence that his monthly salary was Kshs. 117,000/- and not Kshs. 50,000/-. When shown Bank statement where salary was paid as Kshs. 50,000/- he denied the same. According to him staff gave their account numbers and so that whenever the respondent gets money it could deposit. According to him he sat down with his Director and told him he preferred monthly payment but was told that if he was not comfortable with the mode of payment he should leave employment. He informed his union of the matter. He confirmed that upon retirement he was paid Kshs. 2,332, 816/- and told that the money was for service and that he signed for the cheque. He confirmed that he read the accompanying letter and understood it and further he was later paid another Kshs. 1 million by the respondent's director and that the money was paid before he issued a demand letter. It was his evidence that he was paid less than he signed for in the voucher.

6. In cross-examination he stated that the Kshs. 50,000/- were payments for his salary balances retained Concerning the payslips he stated that there were no other payslips apart from the ones produced by the respondent. Regarding. The discharge voucher, he stated that he signed the same because he needed money and that the Kshs. 1 million was paid later on.

7. The respondent's witness Mr. Rajesh Dayaram Rathood informed the Court that he was the CEO of the respondent and that the respondent had other directors. He confirmed that he knew the claimant and that he had been their employee for a long time. He confirmed that the claimant retired in 2020. He informed the court that he recorded a witness statement on 18th January, 2023 which he relied on as his evidence in chief. He also relied on the documents filed with the response to the claim.

8. According to RW1, the claimant was 71 when he retired and was paid his terminal dues. He was paid Kshs. 402,000/- in July, 2019, the second payment of Kshs. 408,000/- was made onn 20th November, 2019, the third payment of Kshs. 320,000/- was made on 25th March, 2020 and the 4th payment of Kshs. 2,332,816 was made on 14th September, 2020. This brought the total payments to Kshs. 3,462,816/-. According to him, the earlier payments were made because the claimant had asked to retire. The respondent further paid the claimant Kshs.1 million.

9. It was further his evidence that the claimant was paid a monthly salary and that his gross salary was Kshs. 62,995/- and not Kshs. 50,000/- and that there were payslips. He denied that the respondent used to skip paying salary for some months and that there were no lumpsum payments or arrears. To arrive at the terminal benefits, the respondent used the gross salary as a base and deducted tax for KRA and deducted NSSF which they remitted monthly on behalf of the claimant. Concerning the counterclaim, it was his evidence that the respondent was claiming the extra payments made to the claimant. According to him, the claimant was supposed to be paid Kshs. 2,332, 816/-

10. In cross-examination he stated that the claimant was employed as a mason but retired as a foreman. The card stating the claimant's designation was issued by National Construction Authority and not them and that they never needed it to continue employing the claimant. It was his evidence that the claimant retired in July, 2020 and neither party issued retirement notice but the issue was verbally discussed.

11. It was further his evidence that in 2019 the claimant was still in employment but was contemplating retirement and that the HR Department calculated his terminal dues which were paid in three instalments by cheque and the claimant signed the discharge voucher. Regarding salary, he stated that the same was paid monthly and that the computer generated the payslips.

12. The Court has reviewed and considered the pleadings and evidence tendered by the parties in dispute. The Court has further considered submissions filed by Counsel for the parties and notes that the claimant and the respondent had a relationship spanning over 56 years. They both acknowledged that they had a good employer-employee relationship. It was common ground that by September, 2020 when the claimant retired he was approximately 72 years.

13. The respondent produced in evidence a letter dated 23rd September, 2020 which was titled "Discharge Of Final/service Dues. This letter was not denied by the claimant. He in fact acknowledged signing it. The only qualification was that he had no choice because he needed money. The letter stated that the claimant accepted the sum of Kshs. 2,332, 816/- from the respondent as final settlement of his final dues from when he joined the respondent up to 1st August, 2020. The claimant further did not deny that prior to his retirement, the respondent paid him Kshs. 1,130,000/- and further that the respondent paid him another additional sum of Kshs. 1,000,000/- and these payments were made prior to the claimant issuing a demand letter and filing the present suit.

14. This far, the Court takes the view that the bone of contention between the claimant and the respondent is not whether he was wrongfully retired but the quantum of his retirement dues. In fact the claimant in his own evidence admitted that he retired voluntarily. The dispute over the quantum payable is based from the claimant perspective that his monthly payment at the time of retirement was Kshs. 117,000/- and that this payment was not done regularly and was mostly made in arrears sometimes spanning up to six months.

15. The respondent however denied this allegation and maintained that the claimant's gross salary was Kshs.62,995/- as at the time of retirement and that after statutory deductions, the claimant's monthly pay was Kshs. 50,000/-. To support their contention the respondent produced sample payslips for the months of January, 2020 through to April, 2020. The respondent further exhibited KRA tax

deductions for the year 2017, 2018 and 2020 as well as NSSF contributions for the period January, 2020 to August, 2020. The respondent also produced bank statements showing deposit of the balance of salary of Kshs. 50,000/- in the claimant's account after the deductions.

16. Whereas the claimant alleged that the payments the claimant made to him amounting to Kshs. 1,130,000/- were salary arrears, he did not satisfactorily explain to the Court what the deposits by the respondent to his Bank account of Kshs. 50,000/- as demonstrated were for.

17. The burden of proof in civil claims such as this one is on the person who alleges and expects the Court to believe and find in their favour. In the matter before me, the claimant has alleged that his monthly salary was Kshs. 117,000/- payable in arrears but has not reasonably shown to the court that this was the case. Further, the claimant testified that he was a member of a Union and a shop-floor representative yet did not provide even a single case of an industrial dispute with the respondent concerning non-payment of agreed salary or late payment.

18. The Court acts on evidence and where such evidence meets the threshold provided for by law. It does not act on feelings. It is true and commendable that the parties herein enjoyed an employment relationship for such a long time. The Court would therefore be reluctant to interfere with such relationship unless good cause is shown by the claimant that the respondent ignored or violated his rights during and or post-employment.

19. From the record, and it is not denied by the claimant, the respondent paid him a total of Kshs. 4,462,816/-. Further, the respondent reasonably showed that it deducted and remitted the claimant's taxes and NSSF dues. Assuming the claimant was entitled to service pay as per clause 19(a) of the memorandum of agreement between the Union and the respondent, then for approximately 52 years he worked for the respondent, his service pay would if calculated on the basic salary of Kshs. 62,995/- at the rate of 22 days salary for each complete year of service would be Kshs. (62,995/30)x 22x 52(years) = Kshs. 2,402,209/-. This including taxes payable. The respondent has paid the claimant a total of Kshs. 4,462,816/- which is 2,060,607/- over the service pay provided for in clause 19(a) of the memorandum of agreement between the Union and the respondent.

20. The Court is therefore satisfied that the respondent handled the claimant with respect and in recognition of his long service and paid him adequate retirement package over and above that which was agreed on between the union and the respondent. The Court in the same spirit will not allow the counterclaim.

21. The claim is therefore found unmerited and is hereby dismissed with no order as to costs.

22. It is so ordered.

DATED AT NAIROBI THIS 12TH DAY JULY, 2024 DELIVERED VIRTUALLY THIS 12TH DAY OF JULY, 2024

ABUODHA NELSON JORUM

JUDGE