



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT MERU

CAUSE NO.9 OF 2020

(Before D.K.N.Marete)

KENYA UNION OF COMMERCIAL, FOOD &

ALLIED WORKERS.....CLAIMANT

VERSUS

IVINGE FARMERS COOPERATIVE SOCIETY.....RESPONDENT

JUDGMENT

This matter was originated by way of Memorandum of Claim dated 29th July, 2020. The issue in dispute is therein cited as;

Failure to pay terminal benefits dues to Francis Gichovi

The Respondents in a Respondents Reply to the Memorandum of claim dated 18th August, 2020 denies the claim and prays that this be dismissed with costs.

The Claimant in a Claimant's Response to the Respondent Response and Counter Claim dated 24th September, 2020 rubbishes the response and prays that he be paid an amount of Kshs.698,059.70 and costs.

The Claimant's case is that Francis Gichovi, the grievant herein was employed by the Respondent on 1st August, 1999 as a machine operator of the factory. He earned Kshs.5000.00 per month and his duties comprised of operating and maintaining the machine and coffee pulping. The grievant worked as such until 2002 when he was instructed to double up as a machine operator and a factory manager following the resignation of the subsisting manager.

The Claimant's further case is that he continued in this double role until 2007 when the Respondent employed a machine operator, leaving him with the duties of factory manager. He remained in this position until June 2017 when he issued his employer a three (3) months notice retirement on attainment of fifty (50) years. This was an option contemplated under clause 21 (ii) of the Collective Bargaining Agreement.

The Claimant's other case is that the grievant continued working throughout his notice period and he stopped on 30th August, 2017 when this expired. He was not paid his terminal dues but this were indicated to be Kshs.195,732.00.

The Claimant avers that the collective bargaining agreement *inter partes* provided for service gratuity at the rate of 30 days pay for each year worked. This was not factored in the calibration and computation of his terminal dues. Arrears were also not taken into account.

The claimant's further case is that the grievant involved the respondent on this matter to no avail. It was then reported as a trade dispute and a conciliator appointed but this also failed because of the reluctance of the respondent to participate.

He prays as follows;

a) That the Respondent calculation of Kshs.195,732 is null and void and be hereby withdrawn and revoked.

b) That the Respondent to pay the following as the terminal benefits of the grievant based with the Collective Bargaining Agreement

i) Unpaid salaries=43,328

ii) Arrears for 2011/2012

=18,219.30 x 7%=1275.35

Basic salary=18,219.30 +1,275.35=19,494.65

House allowance=19,494.65x25%=4,873.70

19,494.65+4,873.70=24,368.80

24,368.80-13,049=11,319.30

11,319.30x12=135,831.60

iii) Arrears for 2012/2013

=19,494.65x5%=974.70

Basic salary=19,494.65+974.70=20,469.35

House Allowance=20,469.35x25%=5,117.30

Gross salary=20,469.35+5,117.30=25,586.65

25,586.65-13,049=12,537.65

Arrears=12,537.65x12=150,451.80

iv) Service Gratuity for 18 years

=20,469.35x18=368,448.30

TOTAL AMOUNT PAYABLE=698,059.70

c) Cost of the claim in favour of the claimant.

The Respondent's case is a denial of the claim. She however admits owing the Claimant an amount of Kshs.195,732.00 being due terminal benefits.

The Respondent's further case is a counter claim in that the claimant has prematurely lodged this matter in court.

It is her other case that the claimant was employed as a casual labourer on 1st August, 1999. This is the position he held until 2017 when he retired. All allegations on office by the claimant have no basis.

The Respondent's further case is that the Collective Bargaining Agreement as executed was to take effect when production levels peaked and would be implemented when the financial position of the respondent improved.

The Respondent's other case is that the claimant was a member of the society, member No.391, which membership ceased on his retirement and he cut down his coffee trees.

He further case is that coffee production is on a downward spiral which has adversely affected her financial standing and she is not able to pay the amount of Kshs.195,732.00 owing to the claimant.

She prays as follows;

a) An order that the terminal dues and benefits owed to the Claimant are Kshs.195,732/=.

b) Costs of this suit and interest.

The issues for determination therefore are;

1. Whether the claimant is entitled to the relief sought?

2. Who bears the costs of the cause?

The 1st issue for determination is whether the claimant is entitled to the relief sought. The Claimant in her written submissions dated 18th February, 2021 reiterates her case. It is her case that the grievant worked for the Respondent for a period of eighteen (18) continuous years and his last salary was Kshs.10,200.00 per month.

The Claimant further submits that the grievant was supposed to have basic salary of Ksh.20,469.35 and house allowance of Kshs.5,117.30 all totalling to Kshs.25,586.65 per the subsisting Collective Bargaining Agreement which was not implemented.

The claimant's other case is that on retirement, the claimant has not been paid his terminal dues which include but are not limited to unpaid salaries Collective Bargaining Agreement arrears and service gratuity. The Respondent only admitted Ksh.195,732.00 as cumulative terminal dues. This was unfair and unjust in that it did not pursue the provisions of the subsisting CBA.

The Respondent's in their written submissions also amplify their opposition to the claim and deny it *in toto*. It is their submission that the grievant is not entitled to the claim in that the alleged CBA was not in force or even implementable due to the economics of the coffee industry at the time.

Which of the two cases suffice for holding? The Claimant displays a case of working for seventeen (17) years in which he held various positions. This is disputed by the Respondent who insists that the grievant only served as a casual labourer through and through.

The Claimant has not adduced any evidence in support of the various allegations on office and claim. He has not demonstrated by documentary evidence his appointment to the various offices in all claims. He has also not demonstrated and established the efficacy of the collective Bargaining Agreement he now seeks to rely on in support of payment of terminal dues and service gratuity.

In a situation where this is contested, it is the onus of the claimant to prove her case on a balance of probabilities. In such absence, the case fails.

The Claimant's in the circumstances has failed to establish and demonstrate her case on a balance of probability. The matter therefore tilts in favour of the respondent. The claimant is therefore not entitled to the relief sought and I find as such. This answers the 1st issue for determination.

However, throughout the proceedings and submissions in this cause, the respondent admits liability to the tune of Kshs.195,732.00 being terminal benefits for the grievants. This is undisputed in the circumstances of the outcome of this cause. It becomes payable.

I am therefore inclined to dismiss the claim and order relief as follows;

1. The Respondent be and is hereby ordered to meet and pay Kshs.195,732.00 to the claimant upon clearance and other formalities.
2. Each party shall bear their costs of the claim.

Dated and delivered at Nyeri this 26th day of July, 2021.

D.K.Njagi Marete

JUDGE

Appearances

1. Miss Macharia for the Claimant/Union
2. Miss Maina instructed by Agnes Wanjiku Maina & Company Advocates for the Respondent.