



IN THE REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

ELRC. CAUSE NO. 2036 OF 2016

DICK KAMECHERWOACLAIMANT

-VERSUS-

HIGHWAY SECONDARY SCHOOLRESPONDENT

JUDGMENT

1. The Claimant was employed by the Respondent as a Watchman from 1.3.1996 to 31.3.2016 when he retired on account of age. Thereafter a dispute arose concerning his retirement benefits and he brought this suit on 3.10.2016 seeking terminal benefits totalling to Kshs. 3,133,598 plus costs and interest.

2. The Respondent filed defence on 11.11.20 admitting that it employed the Claimant until he retired as alleged in the statement of claim. It further averred that the Claimant was entitled to payment of gratuity for his services from 1996 -2008 but from 2009-2016, he was entitled to pension from the RBA contributory scheme. It assessed the gratuity it owed him as Kshs. $13 \times 12/12 \times \text{Kshs. } 11370 = \text{Kshs. } 147,810$ and contended that the Claimant refused the pay check. It averred that the Claimant should follow his pension from the pension scheme. He also denied all the other claims and prayed for the suit to be dismissed with costs.

3. The suit went to full hearing. Both parties gave evidence and thereafter filed submissions.

Evidence

4. The Claimant testified as CW1. He stated that he worked until 30.3.2016 when the Respondent's Principal verbally advised him to stop working because he had attained the retirement age of 60 years. He further said that on the same day the Principal served him with a letter dated 22.3.2016 which stated that he was to retire from 1.2.2016 but the letter did not indicate how his terminal benefits would be paid.

5. He explained how his effort to discuss his benefits with Principal were in vain because he was told that the school did not owe him anything. The principal also did not give the trade union any audience to discuss the matter. As a result he brought this suit. He maintained that he is entitled to gratuity for 20 years plus costs.

6. On cross-examination he admitted that he was a member of Retirement Benefits Scheme and the Respondent remitted his pension to the scheme.

7. He maintained that he is entitled to payment for public holidays and overtime worked. He contended that he has produced documents to prove those claims. He further stated that he never went for leave and denied that there are documents showing that he applied for any leave.

8. Mr. Irungu Nduati is the Principal of the Respondent and the Secretary to the Board of Management. He testified as RW1 and he stated that from 1.3.196 to 31.12.2008, the Claimant was entitled to gratuity from the school but from 1.1.2009 all the BOM employees including the Claimant entered the RBA Pension Scheme where they contribute 25% and the employer contribute 75% of the gross pay.

9. He further stated that for 7 years the Claimant contributed Kshs. 90,048 to the RBA Scheme. He also stated that the Claimant retired while in Job Group E earning a basic pay of Kshs. 11370 and as such for 13 years he was entitled to Kshs. 147,810 as gratuity. He contended that his leave balance was 21 days for the year 2013 equalling to Kshs. 14,174 based on gross pay of Kshs. 20,249.30.

10. In brief RW1 admitted that the Claimant is entitled to Kshs. 161,984 from the school made up of 13 years gratuity plus 21 leave days. He further admitted that the claim for pension benefits for the remaining 7 days should come from the RBA pension scheme.

11. On cross-examination RW1 stated that the Claimant was called to collect cheque dated 7.6.2016 but he declined and on 21.7.2016 he

served demand letter through a lawyer.

12. RW1 further contended that the Claimant went for his annual leave during his service and relied on the leave application forms as evidence. However he did not produce leave records for 1996 -2011 and for 2015-2016.

13. RW1 further stated that the Claimant was supplied with uniform during his service but again he did not produce any documentary evidence to substantiate that contention. On re-examination RW1 contended that the law does not allow accumulation of leave beyond 15 days. He further stated that there is no evidence showing that the Claimant applied for leave and it was declined.

Submissions

14. The Claimant submitted that the Respondent is withholding part of his retirement benefits amounting to Kshs. 161,984 as contained in cheque number 003139 dated 7.6.2016 and has failed to call him to collect. He prayed for the same plus interest from 19.8.2016. He further submitted that the Respondent has failed to produce leave records to disprove his claim for leave for 1996-2010 and 2015- 2016 totalling to 17 years.

15. He further submitted that the Respondent has not disproved his claim for uniform and soap for the 20 years of service.

16. The Respondent reiterated that the Claimant is only entitled to Kshs. 147,810 as gratuity and Kshs. 14,174 on account of leave from the school.

17. It further submitted that the Claimant has not discharged his burden of proving the other claims and relied on **Charles Kariuki Mwangi v Intersecurity Services Limited [2018]eKLR, Patrick Lumumba Kimuyu vs Prime Fuels (K) Ltd [2018]eKLR, Rogoli Ole Manadiegi v General Cargo Services Ltd [2016]eKLR and China Overseas Engineering Co. Ltd v. Isaaq Kichwen Kijo [2019]eKLR** where the Court of Appeal underscored the Principle that the burden of prove remains on the Claimant who is duty bound to adduce evidence to establish his/her claim and not to rely on the default by the opposing party to adduce evidence.

Issues for determination

18. The main issue for determination is whether the Claimant is entitled to the sums Claimed in his suit.

19. The Respondent has admitted that it owes the Claimant gratuity for 13 years totalling to Kshs. 147,810 and leave of 21 days equalling to Kshs. 14,174 but the claimant wants. Having carefully considered the evidence from both sides, I am satisfied that the Claimant worked for 13 years under a gratuity scheme. Under clause 31 of the CBA, the rate for calculating gratuity was one twelfth of each completed months served. Hence 13 years x 12 months equals to 156 months which multiplied by 1/12 x Kshs. 11370 = Kshs. 147,810.

20. I have also considered the calculation of the leave due and confirmed that $21/30 \times \text{Kshs. } 11370 = \text{Kshs. } 14,174.20$.

21. As regards the retirement dues for 2009-2016, the Claimant admitted that he was a member of RBA pension scheme and that the employer remitted pension contributions to the scheme for him. Consequently, I agree with the Respondent that the Claimant should pursue his pension from the RBA pension scheme under the scheme rules.

22. As regards the claims for leave for 1996-2010 and 2015-2016 overtime, rest days and public holidays I seek guidance from the cited judicial precedence. In **Charles Kariuki case, supra**, this court held that:-

“It is trite law that he who alleges must prove. The Claimant had the onus of proving on a balance of probability that there was no leave taken. . . The claim therefore was not proved by the claimant and his allegations remain just that, allegations. I will dismiss the suit for want of proof. . .”

23. Again in **Patrick Lumumba Kimunya, supra** the Court of Appeal held that:

“Whereas we appreciate that the Employment Act enjoins an employer to keep employment records in respect of an employee, that does not absolve an employee from discharging the burden of proving his/her claim. If anything, that burden weighed more heavily upon the appellant in view of the Respondent’s categorical denial that the Appellant had worked on the days claimed. It behoves the appellant to first discharge the burden by showing that he had indeed worked on public holidays and Sundays as contended. Only upon such proof would the evidentiary burden then shift to the Respondent to show that she paid for the overtime worked.”

24. In **Rogoli Ole Manadiegi case supra**, the Court of Appeal held that:

“It is true the employer is the custodian of employment records. The employee, in claiming overtime pay however, is not deemed to establish the claim for overtime pay by default of the employer bringing to the court such employment records. The burden of establishing hours or days served in excess of the legal maximum, rest with the employee.”

25. In this case the Claimant made generalised claims for accrued leave, overtime, rest days and public holidays worked for 20 years. He did not plead particulars or adduce evidence to establish how he arrived at the sums sought. Guided by the foregoing binding precedents, I decline to grant the said claims merely because the Respondent has failed to produce his employment records.

26. In the end I enter judgment for the Claimant against the Respondent in the sum of Kshs. 161,984 plus interest at court rates from the date of filing suit. The Claimant will also have costs because the suit was necessitated by the Respondent. In my view the Respondent should have paid the money to the Claimants account or released to his lawyer to avoid the claim for interest.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 30TH DAY OF SEPTEMBER, 2021.

ONESMUS N. MAKAU

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE