



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1139 OF 2017

(Before Hon. Justice Dr. Jacob Gakeri)

MICHAEL MACKENZIE MAINGI

CLAIMANT

VERSUS

STEEL STRUCTURES LIMITED

RESPONDENT

JUDGMENT

1. By a memorandum of claim dated 19th June 2017, the Claimant sued the Respondent for terminal dues/benefits after having given the Respondent notice of intention to retire dated 2nd September 2016. The Claimant prays for –

(a) Gratuity pay for 36 years at 22 days' salary for each completed year of service amounting to Kshs.1,462,153.00

(b) Outstanding annual leave for 2016 (21 days) at Kshs.38,769.23

(c) Unpaid September 2016 salary amounting

to Kshs.48,000.00

The total claim is for **Kshs.1,548,922.00**

(d) Claimant's certificate of service

(e) Costs and interest.

2. The Respondent filed a memorandum of appearance and its response to the memorandum of claim on 5th July 2017 admitting that the Claimant was in its employment effective 1st June 1981 until October 2016 when he retired and had assessed the Claimant's dues amounting to Kshs.62,712 and had drawn a cheque for the sum which the Claimant rejected. Finally, the Respondent was ready and willing to pay the terminal dues to the Claimant in the amount of Kshs.62,712. The Respondent denied having violated the provisions of the Employment Act, 2007 as well service of notice of intention sue.

Evidence

3. By mutual consent the Respondent filed a supplementary list of documents. CW1 and RW1 adopted their written statements and list of documents and were cross examined on the same. CW1 testified that he joined the Respondent as a Checker from 1st June 1981 earning Kshs.800 per month and rose through the ranks to the position of Stocks Assistant earning Kshs.48,000 per month and had served the Respondent for 36 years when he retired in October 2016.

4. The genesis of the dispute is that on 2nd September 2016, the Claimant wrote to the Respondent indicating that he intended to retire from employment in November 2016. Records show that he was unsure of the length of the notice and intimated 3 months. The Respondent responded on 9th September 2016 accepting the Claimant's notice but indicating that he would not be required to work after 1st October 2016 which signified that the Respondent required one (1) month's notice only. That subsequently, the Respondent either failed/refuse and/or neglected to pay the terminal dues. He testified that the Respondent did not accept his notice because it instructed him not to report to work from 1st October 2016 and he was not paid anything. He disclosed that he was invited to collect a cheque which he rejected on the ground that the amount was too low for his 36 years of service. That he had not taken leave in 2016 as the salary for September was outstanding. CW1 confirmed that whereas his promotion letter dated April 26th 2007 required either party to give the other two months' written notice or

salary in lieu for termination, a communication to him dated 24th September 2016 stated that senior management staff notice period given by either party had been modified to one (1) month. CW1 confirmed that the letter had his reference number and acknowledged receipt on 29th September 2016. He also confirmed that there was no document which provided for a notice period of three months and agreed that based on the documents on record, the notice period lapsed in October 2016.

5. On the other hand, RW1 testified that computation of terminal dues was not contested and the Claimant did not give a counter offer or complaint. The witness confirmed that the notice period was supposed to be one (1) month as set out in the letter dated 24th September 2016 which changed the earlier position for senior management staff. He told the Court that the Claimant was not forced to retire earlier. The Claimant requested to retire and the company applied its policy. That the Claimant's claim for gratuity has no contractual basis.

6. On cross examination RW1 confirmed that by the time the Claimant retired his gross pay was Kshs.48,000 per month and he was entitled to the net after deductions. The witness could not confirm whether the deductions were remitted to the relevant bodies. He also confirmed that he did not remind the Claimant the Respondent's policy on retirement when he expressed his desire to retire. He testified that the cheque was returned to accounts for cancellation.

Claimant's Submissions

7. The Claimant's Counsel submitted that although his letter dated 2nd September 2016 one early retirement was accepted, the Respondent's letter dated 9th September 2016, required the Claimant not to work from 1st October 2016, that the Respondent provided no reason for the one (1) month yet early retirement is voluntary. Counsel submitted that the Claimant was a lawful employee of the Respondent and the Claimant had the right to seek early retirement. Counsel relied on the decision in **Krystalline Salt Ltd v Kwekwe Mwakele & 67 Others (2017) eKLR** for the proposition that in Kenya employment is governed by the general law of contract as much as by the principles of common law now enacted and regulated by the Employment Act, 2007 and other related statutes.

8. He also relied on the decision in **Kenya Plantations & Agricultural Workers Union v Bamburi Cement Ltd & Another (2015) eKLR** for the proposition that the terms of voluntary early retirement are entirely contractual as opposed to a termination initiated by the employer. It is a contractual termination. It was further submitted that the one (1) month's notice did not apply to early retirement, that the Respondent's letter of 9th September 2016 violated the consensual nature of an early retirement agreement since it required the Claimant not to work after 1st October 2016.

9. Counsel contended that the decision to retire early was exclusively the choice of the employee not employer, the one (1) month's notice as opposed to the three (3) proposed by the Respondent ignored the nature of an early retirement agreement and was intended to frustrate the Claimant. The language of the Respondent's letter, it was submitted was not based on consensus or voluntariness but was dictatorial, that the stoppage of work after 1st October 2016 without being heard amounted to unfair termination.

10. Further reliance was made on the decisions in **Florence Kavosa Wanyanga v Kenya National Examinations Council, Cause No. 511 of 2016** and **Kenya Plantation & Agricultural Workers Union v Bamburi Cement Ltd & Another (2015) eKLR** and Section 45 of the Employment Act, 2007 to urge that the Respondent's letter dated 9th October, 2016 was contrary to the Claimant's proposal to voluntarily retire in November 2016. That it was entirely dependent on the Claimant whether or not to retire before attaining the retirement age and not the Respondent to dictate the timing of retirement, that the Respondent failed to give reasons why the Claimant's proposal of early retirement in November 2016 as not viable and did not accord the Claimant a hearing to discuss the early retirement and instead invoked its power as an employer to unlawfully terminate the Claimant without giving reason for its decision and/or fair hearing.

11. The Claimant cited the decision in **Florence Kavosa Wanyanga v Kenya National Examinations Council** in support of the remedy of compensation where an early retirement initiated by the employer was found to be unfair. The Court awarded a sum equivalent to 12 months' salary as compensation.

12. Counsel urged the Court to find and that the retirement in the instant case was unfair and award compensation equivalent to 12 months' salary in the sum of Kshs.576,000/=.

13. Finally it was submitted that compensation for the outstanding annual leave days stood at Kshs.46,413.46.

14. On costs, the Claimant invoked the decision in **Florence Kavosa Wanyanga v Kenya National Examinations Council** where the Court ordered the Respondent to pay costs of the suit and interest to urge the Court to hold the Respondent liable for costs of the suit for unfair termination of the Claimant.

Respondent's Submissions

15. The Respondent submitted that there was no dispute that an employer-employee relationship existed between the Claimant and the Respondent and that the only issue for determination was whether the Claimant was entitled to the reliefs sought.

16. Counsel further submitted that it was a well-established principle of law that parties are bound by their pleadings. He relied on the decision in **Samuel Nyabeta Gesacho v Laban Munene** where Mbaru J. relied on the decision of Limo J. in **Boniface Kinyua Kathuri v David Munyoki (2020) eKLR** to underline the binding character of pleadings. Reliance was also made on the decision in **Philmark Systems Company Ltd v Andermore Enterprises (2018) eKLR** on the same issue.

17. The Respondent contended that the Claimant was consistent in his claim in paragraphs 13 to 16 of the memorandum of claim. According to the Respondent, paragraph 12 underscored the Claimant's claim, namely recovery of unpaid terminal dues and paragraph 16 catalogued

the specific reliefs the Claimant sought in the memorandum of claim, a total of Kshs.1,548,922/=.

18. It was further submitted that pleadings could not be amended during the hearing or by written submissions as permitting such practice would negate the right to fair hearing and right of the Respondent to defend the claim. It was contended that the claim was specifically on payment of terminal dues, accrued annual leave days and unpaid September 2016 salary and there was no averment and/or prayer for unfair termination. Counsel urged the Court to reject the claim for compensation for unfair termination

19. On gratuity, the Respondent submitted that the remedy did not arise because it was not provided for by the contract of service between the parties. Reliance was made on the decision in **Samuel Nyabeta Gesacho v Dr. Laban Munene** where the Learned Judge observed that –

“On the claims made for gratuity, without any contract existing between the parties and giving this as a benefit, it is not due.”

20. Relatedly, it was submitted that the Claimant was a member of the NSSF and that the Respondent had complied with the law on submission of contributions.

21. Finally, in the issue of the notice dated 2nd September 2016, it was submitted that although the contract of employment dated 25th June 1981 provided for 3 months' notice, the duration was mutually varied to two months as evidenced by the Respondent's letter dated 26th April 2007 and ultimately to one (1) month by the letter dated 24th September 2010, which the Claimant acknowledged receipt by appending his signature on 29th September 2010, a fact he admitted during cross examination and his last working day was October 1st, 2016. The Respondent contended that introduction of shorter notice period benefitted employees to the detriment of the Respondent.

22. In conclusion, it was submitted that the Respondent had computed the Claimant's terminal dues at Kshs.62,712/= and prepared a cheque which the Claimant rejected on the premise that he had served the Respondent for 36 years and made no counter offer or other calculations for consideration by the Respondent. Since the computation was not challenged, the Respondent submitted that it was ready to release the amount of Kshs.62,712/= to the Claimant if the Court so ordered.

Analysis and Determination

23. I have carefully considered the pleadings, evidence, submissions and the law. The issues for determination are

- (a) Whether the Claimant is entitled to the reliefs sought.
- (b) Certificate of service
- (c) Costs of the suit and interest.

24. It is common ground that the Claimant was an employee of the Respondent from June 1981 until October 2016, a duration of 35 years and 3 months and the salient issue for determination is whether the Claimant is entitled to the reliefs prayed for in the memorandum of claim dated 19th June 2017.

25. Before delving into the issue of reliefs, it is imperative to dispose of the peripheral question whether the Claimant could amend his memorandum of claim through written submissions.

26. The Respondent submitted that it was trite law that parties are bound by their pleadings. This is a well-established principle of law. There is sufficient judicial authority for this principle, some of which were relied upon by the Respondent. Paragraph 12 of the Claimant's memorandum of claim identified the Respondent's neglect or failure to pay the Claimant's terminal dues as the substratum of the claim. Relatedly, the reliefs sought are as follows: -

- (a) *Gratuity pay for 36 years at 22 days' salary for each completed year of service amounting to Kshs.1,462,153.00*
- (b) *Outstanding annual leave for 2016 (21 days) at Kshs.38,769.23*
- (c) *Unpaid September 2016 salary amounting*
to Kshs.48,000.00
- (d) *Any other relief in the circumstances.*

27. The Claimant isolated as one of the issues for determination, the question whether the Claimant was unfairly terminated. In his view, the Respondent's letter dated 9th September 2016 which informed the Claimant that he would not be required to report to work after 1st October 2016 was contrary to the Claimant's proposal to voluntarily retire and thus amounted to termination of the Claimant without giving reason and hearing the Claimant's representations as required by the Employment Act, 2007.

28. Consequently, the reliefs sought by the Claimant are as follows: -

- (a) *Compensation equivalent to 12 months' salary as follows 12 x 48,000 Kshs.576,000.00*

(b) Gratuity pay for 36 years at 22 days' salary for each completed year of service amounting to Kshs.1,462,153.00

(c) Outstanding annual leave for 2016 (21 days) at Kshs.38,769.23

(d) Unpaid September 2016 salary amounting

to Kshs.48,000.00

Total Kshs.2,132,566.00

29. According to the Respondent, it is trite that issues for determination flow from the pleadings and the evidence adduced by the parties and the question of unlawful termination was not one of them. Similarly, the purported amendments to the memorandum of claim required leave of the Court which was never sought at any stage during the proceedings.

30. Order 8 Rules 3 and 5(1) of the Civil Procedure Rules is clear on the plenary power of the Courts to allow amendment of pleadings at any stage of the proceedings subject to inbuilt qualifications and modifications. The principle and its qualifications were discussed at length by Nyakundi J. in **St. Patricks Hill School Ltd v Bank of Africa Ltd (2018) eKLR** and Okwany J. in **City Clock Ltd v County Clock Kenya Ltd (2020) eKLR**.

31. Granted that the Claimant purported to amend the pleadings without leave of the Court, the purported additions and or changes or modifications to the memorandum of claim and the prayers are hereby expunged from the record for purposes of this judgment.

32. The Court associates itself with the submissions of the Respondent that parties are bound by their pleadings.

Reliefs Sought

33. On reliefs, the Claimant prayed for the following –

(a) Gratuity for 36 years 22 days' salary for each completed year of service at Kshs.1,462,153.00

34. It is not disputed that the Claimant worked for the Respondent from 1st June 1981 to 1st October 2016, a total of 35 years rising from the position of Clerk to the Stocks Assistant, a milestone he attributed to hard work and diligence. Regrettably, the Claimant has not established a basis for claiming gratuity on retirement. He has not provided any evidence to justify the claim.

35. The Respondent's Counsel submitted that a claim for gratuity is unsustainable in the absence of any contractual justification. Reliance was made on the decision in **Samuel Nyabeta v Dr. Laban Munene, Cause No. 2570 of 2016** in urging the Court not to award gratuity. In addition, the Respondent submitted that it was not in dispute that the Claimant was registered with the NSSF. However, it is essential to acknowledge that it is not uncommon for Claimants to use the terms "gratuity" and "service pay" interchangeably.

36. Section 35(5) of the Employment Act, 2007 which provides for payment for every year worked uses the word "service pay". However Section 35(5) does not apply to employee who is a member of registered pension or provident fund scheme under the Retirement Benefits Act or a gratuity or service pay scheme established under a collective agreement or the NSSF or any other scheme established and operated by an employer whose terms are more favourable than those of the NSSF Act.

37. In **Chengo Kitsao Chengo v Umoja Rubber Products Ltd [2017] eKLR** where the Claimant had prayed for gratuity for the 17 years worked, the Court of Appeal expressed itself as follows: -

"In the present case, the appellant was found to be a permanent employee earning monthly salary. That finding was not contested. As such, his contract was terminable by a month's notice being given by either party. However, from the payslips presented before court by the respondent, it is evident that the appellant was an NSSF member, with a monthly contribution of Kshs.200/=. The respondent too had met its part of the bargain by equally contributing its portion to the NSSF. In the absence of an agreement to the contrary, between the parties, his NSSF membership disentitles him to any service pay and/or gratuity."

38. It would appear that in the instant case, the Claimant has not provided any evidence that he is not a Member of the NSSF. Furthermore, the letter to the Claimant's Counsel on the computation of terminal dues dated 18th July 2017 shows that the Respondent deducted Kshs.200.00 as the Claimant's contribution to the NSSF and there is nothing to suggest that the Respondent did not honour its part of the bargain during the long period of the Claimant's employment.

39. The upshot of the foregoing is that the Claimant has not on a balance of probabilities proved that he is entitled to gratuity. The claim for gratuity is accordingly dismissed.

(b) Outstanding annual leave 2016 (21 days) at Kshs.38,769.23

40. The Claimant testified that he had not taken leave for 2016 and the Respondent did not controvert the claim. The claim is awarded as prayed.

(c) Unpaid September 2016 salary amounting to Kshs.48,000

41. The Claimant testified that he was not the salary for September 2016 and the Respondent confirmed as much.

The claim is awarded as prayed.

(d) Certificate of Service

42. On the Certificate of Service, the Court finds that the Claimant is entitled to the Certificate of Service.

43. **In conclusion, judgment is entered for the Claimant for the sum of Kshs.86,769.23 less statutory deductions.**

44. Interest at Court rates from the date of judgment.

45. Since the claim is only partially successful, the Claimant is awarded 50% of the taxed costs of the suit.

46. Orders accordingly.

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

DR. JACOB GAKERI

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 March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE