



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 650 OF 2016

JOSEPH GESORACLAIMANT

VERSUS

AMERICAN FRIED CHICKEN LIMITED.....RESPONDENT

JUDGEMENT

1. The Claimants suit is contained in the Amended Memorandum of claim filed on 5.12.2016 and seeks the following reliefs:

(a) Accrued leave for 19 yearsKshs. 199500

(b) Service pay for 19 yearsKshs. 285000

TOTALKshs. 484.500

2. The Respondent filed defence on 19.12.2016 denying the said claims for accrued leave and service pay for 19 years. She contended that the claimant utilized all his leave days during his 19 years of service and prayed for the suit to be dismissed with costs.

Evidence

3. The Claimant testified that he worked for the respondent as a cook from 1.1.1996 until 16.9.2013 when he was given 3 days off to visit his upcountry home. On 20.9.2013, he was involved in a greasily accident while travelling back to the city and he was hospitalized for 2 ½ years. He reported the matter to his employer but for the whole period he was in hospital the employer paid him nothing.

4. The Claimant further testified that after getting well, he travelled to the city and met the respondent and an agreement was reached for mutual separation and payment of service pay and accrued leave for the 19 years of service. However, the respondent failed to pay the agreed dues and he brought this suit.

5. Upon cross-examination, the claimant admitted that after the termination, he was paid Kshs. 97000 by the NSSF. He however maintained the claim for accrued leave. He denied that he went for all his annual leave and further disowned the signatures on the leave application form filed by the respondent as exhibits.

6. The Respondent’s Director Mr. Naushad Mamdani testified as

RW1. He confirmed that he employed the claimant for 19 years. He further contended that in September 2013, he gave the claimant 3 days off to attend funeral at his home and on his way back to the city he suffered injuries in a road traffic accident and notified the respondent. Thereafter he delegated the matter to his manager to deal with the claimant. He, however, denied that the claimant entered into an agreement to mutually separate.

7. RW1 further testified that after the claimant’s accident, he continued to pay NSSF and NHIF for him until March 2016 on compassionate grounds. He contended that the claimant went for his annual leave for 19 years and relied on the copies of the leave forms as evidence.

8. Upon cross-examination, RW1 admitted that the claimant was not paid any salary after the accident. He contended that the original leave forms were given back to the claimant. He admitted that the copies of the leave forms produced were identical but denied that they were copies of one document. He contended by stating that it was impossible for an employee to work for 19 years without going for leave.

Issues for determination

9. There is no dispute that the claimant was employed by the respondent for 19 years. The issues for determination are:

(a) Whether the claimant, is entitled to service pay for the 19 years.

(b) Whether the claimant is entitled to accrued leave for the 19 years of service.

Service Pay

10. The Respondent produced NSSF statement to prove that she remitted NSSF contributions on behalf of the claimant upto March 2016. The claimant also admitted that after the termination he was paid Kshs. 97000 by the NSSF. Under Section 35(6) of the Employment Act, an employee who benefits from NSSF, Pension or Gratuity Scheme is disqualified from claiming service pay. Consequently, the claim for service pay falls on its face in the circumstances.

Accrued leave for 19 years

11. The Claimant prayed for his annual leave for the period of 19 years he served the respondent. The respondent produced copies of leave application forms to prove that the claimant took all his leave. The Claimant disowned the signatures on the said leave forms. The dispute of the authenticity of the leave forms in my view is beside the point.

12. The main question to consider is regulations in the hotel industry where the claimant was serving and whether leave could be accumulated. Regulation 9 (1)(a) of the **Regulation of Wages and Conditions of Employment (Hotel and Catering Trade) Order**, an employee is entitled to 24 leave days per year which cannot be accumulated save for very special circumstances and with mutual agreement between the employer and the employee.

13. In this case, the claimant has not demonstrated any special circumstances which barred him from going for his annual leave and he did not produce any evidence of mutual agreement for accumulation of his leave. Consequently, I return that the claim for leave for 19 years cannot be granted except for the last 12 months of his service being 24 days.

14. In reaching the foregoing view, I have treated the leave form produced as not sufficient evidence to prove that the claimant took his leave for the last 12 months. Consequently, I award the claimant cash for 24 days leave based on the undisputed salary of Kshs. 15000 equalling to Kshs. 13,646.15. The said sum is in addition to costs and interest at court rates from the date of filing suit. The award is however subject to statutory deduction if any.

Dated, signed and delivered in open court at Nairobi this 21st day February, 2020.

ONESMUS N. MAKAU

JUDGE