



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

AT NAKURU

CAUSE NO.114 OF 2015

JOSEPH WAMBULWO.....CLAIMANT

VERSUS

MAJANI MINGI ESTATE.....RESPONDENT

JUDGEMENT

The claim herein filed on 5th June, 2015 is based on the facts that the claimant was in April, 1987 employed by the respondent as a Welder and position he held until 1st October, 2014. A letter of appointment was issued on 1st May, 2008 and he was registered with the NSSF.

The claim is that the claimant was declared redundant contrary to the provisions of section 40 of the Employment Act with regard to payment of severance pay which was to be based on the number of years worked at 26 years but was paid less. The claimant was entitled to 13 days of annual leave which were not paid.

For the 26 years of service, the respondent ought to have calculated severance pay at $15,600 \times 26 \div 2$ all being ksh.202,800.00.

The respondent calculations arrived at Ksh.79, 129.00 less ksh.13, 000 which was a debt the claimant owed at Equity Bank and total paid was Ksh.66, 129.00 only. The claimant signed the discharge voucher in this regard. He was however dissatisfied with the payment and has therefore filed suit for the payment of his full benefits.

The claimant is seeking for the payment of the following dues;

- a) Outstanding leave days total 13 as at October, 2014;
- b) Severance pay for 26 years April, 1987 to October, 2014;
- c) Loss of future earnings;
- d) Compensation;
- e) Costs.

The claimant testified that he was employed by the respondent as a welder in the 1987 to October, 2014 when he was retired 3 years early before his due date. In computation of his terminal dues, the respondent ought to have used 26 years of service but a less number of years was used. The respondent issued a letter to the NSSF and confirmed he had worked for them from the year 1987 to 2014.

The claimant also testified that the defence that he worked for the respondent from the year 1987 to 2005 when he left and returned in the year 2008 to October, 2014 is not true. He was in the continuous service of the respondent.

There as a letter of appointment issued in the year 2008 as before such year there was no formal employment. There was a strike and work stopped for a while but the claimant continued in his role as welder for the full time in the service of the respondent.

The claimant also testified that he was unionised and the union was involved in his retirement.

Defence

The defence is that the claimant was an employee of the respondent from 1st May, 2008 when he was issued with a letter of appointment and the employment was terminated on 1st October, 2014 pursuant to clause 29(c) of the Collective Agreement (CBA) which provides for early retirement of employees upon attaining 48 years of age. The claimant was issued with a 3 months' notice before termination of employment, his dues were computed and he accepted the payment of Ksh.79, 129.00 and he signed the discharge voucher.

The claimant also authorised the respondent to pay the amount to his Equity Bank account Number 0310196685545 to repay his loan.

The claimant had taken all his leave days earned. A certificate of service was issued based on the CBA confirming employment was from May, 2008 to October, 2014. The claims made are without merit and should be dismissed with costs.

Stephen Edaan the manager with the respondent testified that the claimant was a welder in the workshop from 1st May, 2008 to 1st October, 2014 when he was retired in accordance with the CBA and paid his terminal dues. The claimant was unionized under the Tailors and Textiles Workers Union who witnessed the payment of terminal dues to the claimant.

The respondent as faced with business challenges since 2013 during elections and due to draught there were no raw materials and could not sustain the work force and therefore it was agreed with the union to retire workers in accordance with clause 29 on early retirement for all employees 48+ years. The claimant was aged 56 years at the time and was issued with 3 months' notice in this regard. Final dues were correctly paid and nothing owes.

Both parties filed written submissions.

The court has considered the evidence, submissions from both counsels and the issues which emerge for determination can be summarised as follows;

When employment commenced;

Whether there was redundancy or early retirement for the claim for severance pay;

Whether the reliefs sought are due.

Both parties have attached letter of appointment dated 1st May, 2008. This confirms the appointment of the claimant by the respondent as a welder.

The claimant states that he was employed in the year 1987 and this should be put into account in the tabulation of his severance pay at 26 years ending 2014.

The Employment Act, 2007 (the Act) came into force on 2nd June, 2008. The Act repealed the Employment Act Cap 226 with provision for transition that all contracts of service entered into before the date of taking effect of the Act should continue in force to the extent that the terms and conditions are not inconsistent with the Act. Section 93 of the Act provides as follows;

93. Transitional provisions

A valid contract of service, and foreign contract of service to which Part XI applies, entered into in accordance with the Employment Act (now repealed) shall continue in force to the extent that the terms and conditions thereof are not inconsistent with the provisions of this Act, and subject to the foregoing every such contract shall be read and construed as if it were a contract made in accordance with and subject to the provisions of this Act, and the parties thereto shall be subject to those provisions accordingly.

Where the claimant was therefore under a written contract of employment through the letter of appointment dated 1st May, 2008 which had taken effect before the Act took effect, such letter of appointment transitioned to a contract recognised under the Act. Under the repealed law, the Employment Act Cap 226 causal employment was allowed and the benefits were outlined therein. With the issuance of a letter of appointment on 1st May, 2008 the claimant ceased being a causal employee and his employment terms and conditions became defined.

In any event under the Act, the employer is allowed to convert causal employment to contract, permanent and defined employment under the provisions of section 10 of the Act.

In this case, employment of the claimant by the respondent before he was issued with letter dated 1st May, 2008 was causal and ended with the issuance of the letter of appointment. Any benefits arising, relates to the period covered from 1st May, 2008 to 1st October, 2014 as correctly stated in the Certificate of Service which is not contested.

There is letter and notice issued to the claimant and dated 1st July, 2014 on retirement on age ground and issued in accordance with clause 29(c) of the CBA.

The claimant confirmed he was unionised under the Tailors and Textile Workers Union and which union had a CBA with the respondent. Clause 29 of the CBA provided for gratuity payment after two years of service to be paid at 21 days having worked for 2 to 5 years and at 24 days having worked for 5 and above years. Clause 29(c) provided for early retirement upon attaining 48 years.

In this regard the claimant was issued with notice on 1st July, 2014 that he would be retired under the provisions of clause 29 (c) of the CBA. This fact is not contested.

There was no redundancy declared under the provisions of section 40 of the Act as claimed.

There is no severance pay due in this case.

Even where the provisions of clause 29 of the CBA are to be looked at in whole, years of service for the claimant started on 1st May, 2008 and not before.

The statement to the NSSF is not a letter of appointment. Such letter is only to help an employee access their pension funds with the statutory body.

In total the claimant had worked under appointment for 6 years. Under the band of 5 and above years, the tabulation of terminal dues at ksh.63, 648.00 is a generous payment.

With such payment is the travelling allowance and leave days due encashed.

The claims made for 13 days leave are addressed and severance pay is not due. The claimant for loss of future earnings does not arise in this case as retirement notice was properly issued and in accordance with the CBA.

Accordingly, the claims made are without merit and are hereby dismissed with costs to the respondent.

Delivered at Nakuru this 21st day of March, 2019.

M. MBARU JUDGE

In the presence of: