



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CASE NO. 280 OF 2017

(Before Hon. Justice Mathews N. Nduma)

JOSEPH JAOKO OLWAL.....CLAIMANT

VERSUS

AGROLINE HAULIERS LIMITED.....RESPONDENT

JUDGMENT

1. The suit commenced by way of memorandum of claim filed on 19th June 2017. The claimant prays for terminal benefits to wit:
 - (a) One month notice as stipulated in the CBA.
 - (b) House allowance at 15% of the basic salary.
 - (c) Pensions deducted for six years.
 - (d) Costs of the suit.
2. The claimant testified as CW1 that he was employed as a driver by the respondent on 17th March 2011 and worked continuously until March 2017 when the respondent by way of a general notice on the company notice board notified that there was little work at the time and the company had decided to reduce its work force. That the exercise would affect 50 employees.
3. The claimant was affected by the redundancy exercise. He was retrenched and was paid his full service pay, leave pay and two months in lieu of notice. The claimant now claims an extra one month notice, pension dues and house allowance for six years worked in terms of the CBA. The claimant demanded payment but the respondent declined to honour the demand. Matter was reported to the Ministry of Labour but was not resolved hence the suit.
4. The suit is opposed vide a memorandum of response in which the declaration of redundancy is admitted. That the respondent states that the claimant earned Kshs. 12,978 per month at the time or Kshs. 22.53 per tonne per month whichever was higher.
5. Respondent states that the claimant was paid all his dues which included:
 - (a) Two months' notice pay in terms of clause 9(b) and 10 of the CBA.
 - (b) Service pay at 18 days salary for each completed year of service for Six years as per clause 10 of the CBA.
6. The respondent through RW1, Kassim Lukanda Yusuf denies an extra one month salary in lieu of notice. The claim for house allowance is also denied in total since house allowance for employees who were not housed was paid at the end of the month.
7. Respondent denies having deducted any pension dues from the claimant since it had not registered any pension fund for its employees.

Determination

8. The reliefs sought by the claimant are premised on the CBA in place at the time of declaration of redundancy. The lawfulness of the redundancy has not been challenged. The claimant seeks payment of further terminal benefits set out in the memorandum of claim.

9. The court has perused the CBA in question and has come to the following conclusion:

10. In terms of *clause 9(b)* any employee who had served the respondent for a minimum of six consecutive years was entitled upon termination to two months' notice or payment of two months' salary in lieu of notice. The court is satisfied the claimant was paid according to this clause and the claim for an extra one month salary in lieu of notice is misconceived and same is dismissed.

House allowance

11. *Clause 20 of the CBA* provided that employees who were not housed were entitled to a housing allowance at the rate of 15% of the basic pay. The claimant presented a pay slip for the month of December 2011 which provides for gross earning of the claimant for the month. The same did not include payment in lieu of housing. The claimant told the court that he was not housed for six years and was not paid house allowance.

12. The respondent provided same pay slip as did the claimant which shows no house allowance was paid to the claimant. The respondent has failed to rebut this claim by the claimant. The court finds that the claimant has proved on a balance of probabilities that he was entitled to 15% of his basic salary monthly but same was not paid. The court awards the claimant accordingly.

Pension dues

13. From the pay slip produced by both parties, there is no indication that the respondent deducted NSSF from the salary of the claimant. The claimant testified that no pension was deducted from his salary and claims payment of pension by the respondent. The respondent did not provide any evidence to the contrary. In terms of *Section 35(5) of the Employment Act*, an employer who does not provide any form of pension to an employee is bound upon termination of employment to pay gratuity to the employee.

14. The claimant has proved that he is entitled to payment of gratuity in terms of *Section 35(5) of the Employment Act*, at the rate of 15% of the basic salary for every completed year of service. The court awards the claimant accordingly.

15. In the final analysis judgment is entered in favour of the claimant as against the respondent as follows:

- (a) Housing allowance calculated at 15% of the basic salary for six years in the sum of Kshs 140,162.4.
- (b) Gratuity calculated at 15% of the basic salary for six years in the sum of Kshs. 140,162.4.

Total award Kshs. 280,324.8

- (c) Interest at court rates from date of filing suit till payment in full.
- (d) Costs of the suit.

Judgment Dated, Signed and delivered this 24th day of October, 2019

Mathews N. Nduma

Judge

Appearances _____

Claimant in person

Mr. Ouma for Respondent

Chrispo – Court Clerk