



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CASE NO. 140 OF 2017

(Before Hon. Justice Mathews N. Nduma)

RAPHAEL O. KAMEMBA.....CLAIMANT

VERSUS

CHEMELIL SUGAR COMPANY LIMITED.....RESPONDENT

JUDGMENT

1. In the amended statement of claim filed on 4th August 2017 the claimant prays for payment of terminal benefits to wit
 - (a) Gratuity calculated at 31% of the total basic salary in the sum of Kshs. 2,460,815.
 - (b) Salary underpayment in the sum of Kshs. 597,470.
 - (c) 45 days untaken leave in the sum of Kshs. 316, 165.
 - (d) Costs and interest.
2. The suit is defended by an amended statement of defence filed on 20th September 2017 in which the respondent denies all the reliefs sought by the claimant.
3. The claimant testified as CW1 that he worked for the respondent for a period of three years. That he had a contract of employment dated 5th December 2013 in which he was employed in the position of Factory head in job grade JG 26. The contract was for a period of three years starting from 1st November 2013 up to 31st October 2016. The same was renewable upon giving notice six months prior to its expiry.
4. Under clause 12 of the contract the claimant was entitled to 33 working days as annual leave which leave was only to be carried over with the written approval of the Managing Director. In terms of clause 9 of the contract, the claimant was to be paid a basic monthly salary of Kshs. 191,753.22 same to be reviewed in terms of Clause 10 of the contract.
5. In terms of Clause 15, the claimant was entitled to 31% gratuity of the annual basic salary at the end of the contract. If separation was before expiry of the contract, gratuity was to be calculated on prorata basis. If the claimant opted to join Retirement Benefits Scheme, he would not be eligible to gratuity.
6. The claimant testified that a circular by the salary and Remuneration Commission dated 26th November 2014 announced salary increment. The claimant served the respondent until expiry of the same on 31st October 2016. The claimant testified that he did not opt to renew the contract. The claimant testified that the respondent failed to pay him terminal benefits despite a letter by Kipkering, head of Human Resource written to the claimant on 25th October 2016 informing the claimant that his contract would expire on 31st October 2016 and the respondent was to pay the claimant:
 - (a) Salary up to 31st October 2016 and
 - (b) Gratuity at the rate of 31% of the annual basic salary for three years produced as annexure 3 to the statement of claim. Letter of demand was written to the respondent by the advocates for the claimant on 9th December 2016 in which is demanded Gratuity and payment in lieu of 45 days leave in the sum of Kshs. 316,000.
7. The claimant testified that at the time of separation his monthly basic salary was Kshs. 210,775.97. He produced a pay slip to that effect.

8. Claimant testified that he had taken leave but at the time of expiry of contract, he was still entitled to 45 days leave.
9. Claimant testified further that in terms of the SRC Circular he was supposed to be paid Kshs. 236,753 basic salary per month with effect from 26th June 2017. That the salary was applicable to his position of Head of factory at Grade JG26. That SRC had approved a request from the company for salary increment accordingly but same had not been implemented at the time of separation. Claimant testified that he was entitled to terminal leave from August 2016 since the contract was ending on 31st October 2016.
10. The respondent however did not give the claimant opportunity to take the terminal leave which was 45 days. The claimant claims payment in lieu thereof. The terminal leave was 33 days and 12 days was a carryover from the year 2015. In June 2016, the Managing Director had differed with the claimant. Had given the claimant a letter dated 6th June 2016 to go on compulsory leave.
11. RW1 Moffat Omondi testified that he was the Acting Head of Human Resource department of the respondent from 5th May 2017. RW1 testified that the claimant had a 3 year contract from 1st November 2013 to 31st October 2016. That on 10th June 2016, the claimant was sent on compulsory leave due to poor work performance on full pay.
12. That the claimant consumed 45 days leave while he was on compulsory leave and is not entitled to any payment in lieu of leave. That his basic salary was Kshs. 210,775.95 at the time of separation. RW1 denied that the claimant was entitled to a salary of Kshs. 236,753 per month. That his salary was adjusted as per a letter from head of Human Resource department dated 22nd December 2014. RW1 stated that Kshs. 236,753 was gross pay for head of department in terms of the circular dated 26th November 2015. That that included house allowance and entertainment allowance. RW1 stated that the claimant's gratuity was tabulated according to the basic pay of Kshs. 210,775.95 per month on 10th April 2017 at 31%. RW1 admitted that the claimant was not paid due to financial challenges.
13. RW2 Isaack Chepsiroi testified that he was acting management accountant of the respondent from 2012. RW2 testified further that the claimant's initial basic salary was Kshs. 191,753 and was revised to 210,776 in December 2014. RW2 denied that the claimant should have been paid Kshs. 236,753. RW1 confirmed that gratuity due and owing to the claimant was Kshs. 2,246,316 subject to taxation of Kshs. 688,986. RW2 stated that claimant owed the company Kshs. 54,838 at the time of separation and that respondent still owed the claimant Kshs. 1,502,491 therefore. RW2 said that they would pay the claimant upon determination of the case.

Determination

14. It is not in dispute that the claimant served a three year contract term from 1st November 2013 to 31st October 2016. According to the respondent the claimant's basic salary was Kshs. 210,775.95 as at the time of expiry of the contract. The respondent testified that it has computed the claimant's gratuity, payable at the end of the contract and calculated at 31% of the basic salary. According to the respondent the respondent owed the claimant gratuity in the sum of Kshs. 2,246,316 less taxation of Kshs. 688,986 and loan owed by the claimant to the company in the sum of Kshs. 54,838 leaving a balance due and owing to the claimant in the sum of Kshs. 1,502,492.
15. It is also not in dispute that the claimant had prior to the expiry of the contract on 31st October 2016 been sent on compulsory paid leave by the Managing Director of the respondent with effect from 10th June 2016. The claimant was however not subjected to any disciplinary action during the period he was away on compulsory leave.
16. It being not in dispute that the claimant was away on leave from 10th June 2016 to end of contract on 31st October 2016, he cannot be heard to say that he is entitled to payment in lieu of leave days not taken during the same period he was at home on paid compulsory leave. The claim for payment in lieu of 45 days leave lacks merit and is dismissed.
17. With regard to the claim for underpayments from 26th November 2014 the date SRC is said to have sent a circular approving salary increment for the officers of parastatals, the court is satisfied that the claimant's basic salary was adjusted by a letter dated 22nd December 2014 from 191,750 to 210,775.95 with effect from 31st October 2016. The house allowance was also increased to Kshs. 21,000 from Kshs. 15,000.
18. From the documentary evidence tabled by the claimant, the court is satisfied that the claimant was not entitled to payment of a basic salary in the sum of Kshs. 236,753 as claimed or at all.
19. To the contrary the court finds that the claimant was paid a proper basic salary in his position in the sum of Kshs. 210,775.95.
20. The court however finds that the claimant is entitled to payment of gratuity in the sum of Kshs. 2,246,316 less taxation in the sum of Kshs. 688,986 and Kshs. 54,838, the claimant owed the respondent at the time of separation.
21. Accordingly, judgment is entered in favour of the claimant as against the respondent in the sum of Kshs. 1,502,491 being the balance of gratuity due and owing to the claimant with effect from 31st October 2016. The award is therefore payable with interest at court rates from 31st October 2016 until payment in full. The respondent to pay costs of the suit.

Judgment Dated, Signed and delivered this 14th day of October, 2019

Mathews N. Nduma

Judge

Appearances

Mr. Adongo Awino for Claimant.

Mr. Oyuko for Respondent

Chrispo – Court Clerk