



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 186 OF 2013

(Before Hon. Justice Mathews N. Nduma)

DAN OWUOR ONGADO CLAIMANT

VERSUS

LAKE BASIN DEVELOPMENT AUTHORITY RESPONDENT

J U D G M E N T

1. The Claimant is deceased and was substituted by his wife Lydia Acheng Owuor in the Amended Memorandum of Claim filed on 24th March, 2015. The Memorandum of Claim was further amended on 22nd March, 2016. An oral amendment was allowed by consent of the parties on 7th November, 2016 to paragraph 23 by adding paragraph 23(d) as follows –

“(c) Severance pay based on 26 years of successful service in the sum of Kshs.3,286,426”

Total Claim is Kshs.5,182,441

2. There were protracted attempts to settle the matter out of court which did not bear fruit as a result, matter was severally taken out of the hearing cause list by the parties. Eventually on 26th September, 2017, the Respondent proposed that the matter proceed by way of written submissions which request was accepted by M/s. Okech for the Claimant and Maureen Onyango J. recorded thus –

“Parties to proceed by way of written submissions. Claimant is to file within 21 days and Respondent to file within 21 days from date of service. Mention on 9th November, 2017 to confirm compliance and taking date for judgment.”

3. The parties when making such a compromise forgot to have the pleadings; the list of documents and witness statements adopted as evidence before court. When there is such failure, the pleadings do not all of a sudden become evidence for the purpose of evaluating the standard and burden of prove by the parties.

4. In such circumstances, the party who stands to be greatly prejudiced is the one who asserts and therefore stands to lose the case, if no evidence is tendered at all.

5. The provisions of section 107 and 108 are now fully applicable to the proceedings before the Employment & Labour Relations court, following the amendment of the Employment and Labour Relations Court Act, by Act No. 18 of 2014. Parties can no longer afford to be so casual before this court. They do so at their own peril. The consent to proceed without evidence was entered into on 26th September, 2017 long after the said amendment took effect.

Claimant’s Case

6. It is not in dispute that the deceased Claimant was employed by the Respondent on 1st September 1986 as an Accountant. At the time of termination, the Claimant was the Chief Manager Finance Administration and Human Resource.

7. The Claimant was retired in public interest in accordance with the Civil Service Code of Regulations Clause 2.3 after being found negligent in his duties by failing to advise both Management and Board on financial matters occasioning expenditure of Kshs.30,288,095.20.

8. The deceased was sent on compulsory leave on 2nd October, 2010. The deceased was informed of the charges made against him by the audit report and was requested to give an explanation on –

(i) failure to obtain the Board's, Ministry's and Treasury's approval before expenditure as required by the State Corporation Act.

(ii) Failure to get the Boards Ministry and Treasury's approval of expenditure in relation to Kazi kwa Vijana in accordance with State Corporations Act.

(iii) Why Deceased's handling, managing and control of imprest violated the rules that govern the Respondent's imprest management.

9. The deceased was requested to appear before the board on 6th August, 2010 and was on the same date informed that the board had resolved to retire him on public interest.

10. The deceased's clearance was not processed due to alleged outstanding matters.

11. On 25th November 2010, the Claimant was informed that the decision to retire him on public interest as communicated earlier had been rescinded on condition that he shows cause why he should not be retired on public interest for –

(i) Blatantly and negligently abdicating his duties by failing to advise both the board and management thus occasioning the expenditure of Kshs.30,288,095.20.

(ii) On 5th December 2008, the Deceased persuaded two officers of the Respondent to sign imprest to be used for unexplained purpose.

12. On 1st December 2010, the Deceased was invited to appear before the Board on 7th December, 2010. The Deceased appeared as scheduled. The Board again retired the deceased in public interest upon finding him guilty of the charges.

13. The Deceased was given letter of termination on 24th January, 2011. He was to be paid three months in lieu of notice and house allowance. The deceased was also requested to submit a liability clearance certificate duly signed before payment of his terminal dues. The deceased dues were not paid.

14. The Claimant seeks compensation for wrongful termination of employment and payment of terminal dues as prayed.

Defence following as fair procedure.

15. The Respondent avers that it found the deceased guilty of the charges made against him following a fair procedure. That it had valid reasons to terminate his employment by retiring the deceased in public interest.

16. That the deceased was not paid terminal dues because he failed to clear himself as per required procedure. That the suit be dismissed with costs.

17. That the deceased was a member of the Respondent's registered provident fund together with NSSF and does not qualify for service pay as claimed in terms of the provisions of section 35(6) of the Employment Act, 2007.

18. The claim of severance pay must therefore fail because the deceased was not declared redundant but his employment was terminated for his conduct.

19. That the suit be dismissed with costs.

Determination

(i) Has the Claim been proved on a balance of probabilities.

(ii) Is the Claimant entitled to the reliefs sought.

Issue i

20. From the facts that are admitted, the deceased was subjected to a disciplinary hearing by the Respondent board, and was retired in public interest. The Board reconsidered its decision and then lifted the termination of the deceased's in public interest.

21. After the deceased resumed work, he was again charged with the same offence he had been earlier charged with, tried and exonerated from, hence the lifting of the retirement in public interest.

22. On its own admission, the Respondent subjected the deceased to double jeopardy, against the principles of legality and rules of natural justice.

23. These being admitted facts by the Respondent, the conduct by the Respondent was in violation of Article 41 of the Constitution of Kenya 2010 in that the admitted conduct by the Respondent amounted to unfair labour practice. Furthermore, the conduct by the Respondent was in

violation of section 41 of the Employment Act, 2007 in that no one should be tried twice on the same facts.

24. Legitimate expectations of the deceased when his retirement in public interest was lifted were quickly dashed by a subsequent disciplinary action on the same facts.

25. The deceased had served the Respondent diligently for twenty six (26) years and did not deserve to be treated in such a shoddy manner. No wonder he died in the cause of this suit. One may only imagine the nature and extent of his suffering and mental torture following the shoddy treatment by the Board he had served for so long.

26. The court finds that the Claimant, by fact of the admission by the Respondent in its amended memorandum of defence has discharged the onus of proving the case by the deceased on a balance of probabilities and in terms of sections 47(5) of the Employment Act, 2007 as read with sections 107 and 108 of the Evidence Act, Cap 80 Laws of Kenya.

Issue ii

27. The claimant's severance pay in terms of paragraph 23(c) of the amended claim is misconceived the deceased having not been declared redundant and it is not in dispute that the deceased was both a member of a provident fund of the Respondent and NSSF from which his retirement benefits were drawn.

Compensation

28. Having found that the employment of the deceased was terminated in violation of Article 41 of the Constitution of Kenya 2010 as read with section 41 and 45 of the Employment Act, 2007, the court further finds that the deceased is entitled to compensation in terms of section 49(1)(c) as read with sub-section 49(4) of the Employment Act, 2007.

29. In this regard, the deceased had served the Respondent diligently for over twenty six (26) years. The deceased was nearing his retirement age. The deceased suffered loss and damage upon being subjected to an unfair and unlawful disciplinary process that saw him being tried twice on the same charges and/or allegations. He was reinstated back to work, and thereafter, re-tried and retired in public interest. This is not the way to treat a long serving employee in high management position.

30. The board bore the responsibility of protecting the Respondent and simply passed the buck on a very long serving public servant. Their conduct was in the court's view dishonorable and deserving of reprimand.

31. The deceased was not immediately paid terminal benefits upon termination under the pretext of non-clearance. His agony was multiplied by the Respondent's conduct.

32. The deceased obviously desired to continue working to honourable retirement. This hope was unlawfully denied by the Respondent.

33. The court has discretion in determining the extent of compensation to a maximum of the equivalent of 12 months salary considering all the circumstances of the case, and as guided by section 49(4) of the Act. The court also has considered similar cases as follows:-

(i) Ruth Pamela Adhiambo vs Maseno University Kisumu ELRC Cause No.65 of 2016

(ii) Eunice Ayoyi Cheti vs Evans Asenaka T/A Child of God Academy Nairobi ELRC Cause No.792 of 2010

And finds that an appropriate case to award the maximum compensation being the equivalent of 12 months gross salary for the wrongful and unfair termination of employment in the sum of Kshs.1,516,812.

Notice Pay

34. In the event the deceased did not receive the three (3) months salary in lieu of notice in the sum of Kshs.379,203, the same is awarded accordingly. The Claim is admitted by the Respondent but there is no clarity whether the same was paid or not before the death of the deceased.

35. In the final analysis, judgment entered in favour of the Claimant as against the Respondent as follows:-

(a) Kshs.1,516,812 being the equivalent of 12 months salary in compensation.

(b) Kshs.379,203 in lieu of three (3) months notice.

Total award Kshs.1,896,015.

(c) Interest at court rates in respect of (a) above from date of judgment and from date of filing suit in respect of (b) above till payment in full.

(d) Respondent to pay costs of the suit.

Judgment Dated, Signed and delivered this 6th day of June, 2018

Mathews N. Nduma

Judge

Appearances

Sam Onyango for Claimant

M/s. Oyombe for Respondent

Chrispo – Court Clerk