



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 896 OF 2013

PETER G. GATHORO.....CLAIMANT

VERSUS

KENYA TEA DEVELOPMENT AGENCY LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. The Plaintiffs claim is contained in the Amended plaint filed on

14.7.2017. It seeks the following reliefs:

- (a) 5 years Gratuity PayKshs.49,550
- (b) 5 days leaveKshs. 1,650
- (c) One month salary in lieu of NoticeKshs. 9,910
- (d) Redundancy PackageKshs. 80,000

Kshs.141,110

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In addition, he seeks to recover damages for unlawful redundancy contending that his lay off was done without following the proper procedure.

2. The defendant has denied that the plaintiff was her employee and averred that he was employed by Ikumbi Tea Factory. She further avers that the alleged redundancy was done lawfully and the claimant was paid his benefits in full. She denied that a redundancy package of Kshs.80,000 was payable to factory employees as alleged by the claimant. She therefore prayed for the suit to be dismissed with costs.

3. The suit was heard on 7.5.2018 and 10.5.2018 when the claimant testified as Cw1 and the respondent called her factory Unit Manager Mr. Wilson Gichomba Gacua testify as Rw1. Thereafter both parties filed written submissions, which have carefully considered herein

Claimant’s Case

4. Cw1 stated that he was employed by the respondent in 1990 as a Leave Collection Clerk attached to Ikumbi Tea factory. He worked for 12 years until 2002 when he was terminated on account of redundancy. He testified that the respondent first issued a circular dated 10.12.2001 (Exh.2) which provided for what was to be paid to the laid off staff. The benefits included 2 months salary in lieu of notice and a redundancy package (golden handshake) of Kshs.80,000.

5. Cw1 further testified that contrary to the said circular, upon being laid off, he was paid less benefits than the ones set out by the said circular. He contended that he was paid one month salary in lieu of notice and was denied the golden handshake of Kshs.80,000. In addition, he was paid gratuity for only 7 years’ service but his 5 days accrued leave was not considered. He therefore prayed for the reliefs sought in

his amended plaint.

6. On cross examination, Cw1 contended that he was employed by the Kenya Tea Development Authority (KTDA) which later became Kenya Tea Development Agency (the defendant). He further contended that he was posted to Ikumbi Tea Factory by the respondent. He however admitted that the redundancy notice dated 25.10.2002 was written to him personally by Ikumbi Tea Factory Company Limited and not the respondent. He further admitted that the computation of his terminal benefits came from Ikumbi Tea Factory Company Limited. He further admitted that his demand letter through his counsel dated 5.5.2003 was addressed to the Unit manager, Ikumbi Tea Factory Company Limited. He further admitted that the redundancy circular by the respondent dated 10.12.2001 (Exh. 2) was not addressed to him like the redundancy notice by Ikumbi Tea Factory Company Limited dated 25.10.2002 aforesaid.

7. Cw1, however contended that Ikumbi Tea Factory Company Limited Was a factory owned by the respondent and observed that the letterhead on the redundancy notice dated 25.10.2002 bore the respondent's logo.

Defence Case

8. Rw1 joined Ikumbi Tea Factory Co. Limited just 2 years ago and therefore his testimony was based on the records he found at the factory. He admitted that the plaintiff was paid gratuity for only 7 and not the 12 years served contending that clause 16 of the Collective Agreement (CBA) provided that gratuity shall be paid less 5 years. He denied being aware of the Kshs.80,000 golden handshake payable to the plaintiff and contended that the severance pay of Kshs.97,743.47 for 12 years paid to the plaintiff was more than the said handshake of Kshs.80,000. Rw1 denied the claim for 5 leave days and relied on the leave records on page 38 of the defence exhibits to demonstrate that as at the time of termination, the plaintiff had nil leave days outstanding. Finally, Rw1 denied the claim for two months' salary in lieu of notice contending that the CBA provided for only one month's notice, which had already been paid.

9. On cross examination Rw1 admitted that Ikumbi Tea Factory is related to and that it is indeed managed by the defendant. He stated that the defendant seconds managers to the Tea Factories but averred that each factory has its own employees. He further admitted that the circular by the defendant dated 10.12.2001 provided for a redundancy package of Kshs.80,000 but the plaintiff was not paid the same. He however contended that the said circular was not addressed to the plaintiff and it never mentioned Ikumbi Tea Factory Limited.

10. He further admitted clause 16(a) of the CBA provided that after serving for 5 years one qualified for gratuity pay of 35 days' pay per year of service but contended that the claimant having worked for 12 years he was only entitled to gratuity for the 7 years served after the initial 5 years. He maintained that the plaintiff left no outstanding leave after the termination.

11. He contended that before the redundancy, the respondent served notice to the labour office and the claimant's union and also meetings with the employees. He however did not produce copies of the said notices and minutes of the alleged meeting with the staff.

Analysis and Determination

12. The issues arising from the evidence and submissions presented to the court are:

- (a) The plaintiff was employed by the defendant;
- (b) Whether the plaintiff was unlawfully laid off.
- (c) Whether the plaintiff is entitled to the reliefs sought.

Employment Relationship

13. The defendant denied that the plaintiff was her employee and averred that he was employed by Ikumbi Tea Factory Limited. The plaintiff, however, contended that he was employed by the defendant. He also produced a redundancy notice dated 25.10.2002 issued by Ikumbi Tea Factory Company Limited. Rw1 admitted that the factory was related to the defendant who seconds managers to work there. He however fell short of demonstrating how the plaintiff switched employer from the defendant to the Ikumbi tea factory Co. Ltd. On a balance of probability, therefore, find and hold that the plaintiff was employee of the defendant as at the time of his lay off.

Unlawful Redundancy

14. The cause of action herein occurred in 2002 and as such, the applicable law is the Employment Act cap 236, which was repealed and replaced by the 2007 Act. Section 16A of the repealed Act provided as follows:

“16A. (1) A contract of service shall not be terminated on account of redundancy unless the following conditions have been complied with:

(a) The union of which the employee is a member and the labour Officer in charge of the area where the employee is employed shall be notified of the reasons for, and the extent of, the intended redundancy;

(b)”

15. In this case, the claimant alleged that the redundancy was unlawful because it was not done in compliance with the foregoing provision because no prior notice was served on his trade union and the area Labour Officer about the reason for the layoff. Rw1, on the other hand

contended that a notice was served upon the plaintiff's union and the area Labour Officer. He however did not exhibit copies of the alleged redundancy notices after being challenged to do so during cross examination. Consequently, I find and hold that the redundancy was done without compliance with the mandatory procedure set out by section 16A of the repealed Act and as such, it was unlawful. In addition, the redundancy was done in breach of clause 17(c) of the CBA, which required that a notice of 60 days be served on the employee before redundancy. In this case, the plaintiff was served with 6 days only redundancy notice.

Reliefs

Gratuity Pay

16. The plaintiff prayed for 5 years gratuity pay, which was left outstanding after the payment of 7 years gratuity. Rw1 admitted that the plaintiff was paid gratuity for 7 years out of 12 years served because the CBA provided that. The plaintiff has insisted that he is entitled to the outstanding 5 years gratuity because what the CBA provided was that, for employee to qualify for gratuity pay, he had to serve for at least 5 years. Clause 16 of the CBA provided that:

“(a) Gratuity shall be paid to an employee on retirement, resignation or termination of his/her services by the company for any reason other than gross misconduct on the basis of 35 days’ pay for completed year of service in excess of five (5) years continuous services with company.

(b) Payment will be calculated on the basis of the current basic salary of the employee at any time of termination of his/her services, resignation or retirement.”

17. The Court finds the foregoing stipulation of the CBA clear and unambiguous and for that reason, I dismiss the interpretation by the respondent. All what the parties the CBA intended and expressly agreed was that for any employee to qualify for payment of gratuity, firstly his contract was not to be terminated on account of gross misconduct, and secondly he had to serve continuously for more than 5 years. In this case, the claimant was not terminated for gross misconduct and had served for 12 years. He was therefore entitled to gratuity pay for all the 12 completed years of service. Having been paid gratuity for only 7 years, he is still entitled to the outstanding gratuity for 5 years. I therefore grant the claim of Kshs.49,550 as prayed.

Accrued Leave

18. The plaintiff prayed for 5 days leave, which was not cashed after termination. Rw1 denied the said claim and relied on the leave records filed by the defendant. I have considered the leave record produced by the defence and confirmed that, as at December 2002, the plaintiff had no leave days outstanding. I therefore dismiss the claim for accrued leave of 5 days.

Salary in Lieu of Notice

19. As earlier stated herein above, the plaintiff was entitled to 60 days notice before redundancy but he was only given 6 days notice and then paid one month salary in lieu of notice. I therefore grant his prayer of Kshs.9,910 being the outstanding one month salary in lieu of the two months' salary.

Redundancy Package

20. The plaintiff produced a circular by the defendant (Exh 2) to demonstrate that he was entitled to Kshs.80,000 golden handshake on his layoff. Rw1 denied that the circular was applicable to the plaintiff alleging that it was not a benefit extended to factory workers. After careful consideration of the said circular, I find that it was not applicable to the plaintiff herein because it related to staff who existed on an early retirement basis effective 10.12.2011 almost one year before the plaintiff was terminated on account of redundancy. I therefore decline to grant the claim for Kshs.80,000 Golden Handshake for lack of evidence.

Damages for unlawful redundancy

21. I have already made a finding of fact that the redundancy of the Plaintiff herein was unlawful for failure to comply with the mandatory provision of section 16A of the repealed Employment Act. However, unlike the current Act, the repealed Act never provided for any compensation for such unlawful redundancy. I therefore decline to award any damages under this heading for want of legal or contractual basis.

Conclusion and Disposition

22. For the reasons that the defendant laid of the plaintiff unlawfully and failed to pay her full benefits, I enter judgment for the plaintiff in the sum of Kshs.59,460 plus interest at Court rates from date of filing suit till payment in full. The said sum shall be paid less the applicable statutory deductions.

Dated, Signed and Delivered in Open Court at Nairobi this 28th day of September 2018

ONESMUS N. MAKAU

JUDGE