



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NUMBER 54 OF 2015

BETWEEN

BILLY MUTHUI MUSEMBI.....CLAIMANT

VERSUS

TOTAL KENYA LIMITED [Formerly Chevron Kenya

Limited, Formerly Caltex Oil [Kenya Limited].....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Mokaya Ogutu & Company Advocates for the Claimant

Munyithia, Mutugi, Umara & Muzna, Advocates for the Respondent

JUDGMENT

1. The Claimant filed his initial Claim against the Respondent at the High Court Mombasa, registered as Civil Suit Number 127 of 2006, on 15th June 2006. The Suit was transferred to the E&LRC by an order of the High Court, on 24th November 2014.
2. The Claimant filed an Amended Claim before the E&LRC on 19th May 2015.
3. He states he was employed by the Respondent Company as a Clerk. By the time his employment contract was terminated by the Respondent on 2nd October 2000, he had risen through the ranks to become Accounts Operations Assistant.
4. He claims that the Respondent did not pay him Provident Fund Contributions amounting to Kshs. 302,900; and Pension Scheme Contributions at Kshs. 318,758. He claims also that termination was unlawful, and prays for damages for wrongful termination, and for costs of the Claim.
5. The Respondent filed its initial Statement of Defence on 12th June 2006 before the High Court, and Amended Statement of Response before the E&LRC, on 16th June 2015.
6. The Respondent's position is that it lodged a complaint with the Police at Changamwe Police Station in respect of forgery of its documents, which were used to procure products on behalf of the Respondent, resulting in huge loss to the Respondent. The Claimant was arrested alongside another Person and charged with several offences in the Chief Magistrate's Court Criminal Case Number 2728 of 2000. The Respondent lost confidence in the Claimant and summarily dismissed him on 30th September 2000. Dismissal was lawful.
7. The Claimant gave evidence on 28th July 2017 and 12th June 2018 when he rested his case. He confirmed his employment history and the terms and conditions of employment, as told in the Pleadings. He was a Member of the Company's Provident Fund, and Retirement Benefits Fund. He was taken through a criminal trial that lasted about 3 years. The Claimant availed to the Court 14 Documents contained in a list filed on 18th May 2015 as part of his evidence.

8. Cross-examined, the Claimant told the Court that he was tried for criminal offences and acquitted. He was suspended on full pay during the period of the trial. He joined the Scheme on 26th June 1991. Contributions varied. The amount increased gradually. The Respondent also made some contributions. It was the same with regard to the Provident Fund. It is not true that the Claimant is claiming double social security payments. The letter of termination stated the reason for the decision. He had loan with Sacco. This was deducted from his terminal dues. Redirected, the Claimant explained that Pension and Provident Accounts were different. He claims from both Accounts separately. He was not paid any terminal dues.

9. The Respondent informed the Court on 14th February 2018 that it would not adduce any evidence. Parties confirmed the filing of their Submissions on 12th June 2018.

The Court Finds:-

10. The Claimant was employed by the Respondent as a General Clerk, way back on 1st July 1991 as shown in his letter of employment on record. He was promoted to Senior Clerk. Subsequently the Respondent put in place a new grading/salary structure, with the Claimant designated as Accounts/Operations Assistant, effective 1st April 2000. On 24th July 2000, he was suspended on allegation that he was involved in forgery of Respondent's Documents which were used in fraudulent accounting. He was summarily dismissed through a letter dated 2nd October 2000, on the ground that the Respondent had lost confidence in the Claimant. He was charged with the offences of stealing and forgery, in Mombasa CM Criminal Case Number 2728 of 2000, and acquitted in a Judgment read on 10th April 2003.

11. The Respondent did not give evidence before this Court. The Court is not able to find any justification in the allegations made by the Respondent against the Claimant, leading to summary dismissal. There is no record of disciplinary hearing or independent investigation, which contradicted the findings of the criminal proceedings. It is difficult to substantiate the assertion made by the Respondent that termination was lawful. There is no evidence showing lawfulness of termination. The Employment Act 2007 was not in force at the time of termination. The Claimant's submissions based on this law are misconceived. However, the Claimant would be entitled to general damages for breach of contract. He would similarly have been entitled to compensation under the Trade Disputes Act Cap 234 the Laws of Kenya, had he presented his Claim under that regime, at the time termination took place. He should therefore not be denied a remedy, merely because Employment Act 2007 was not in force at the time of termination. His last gross monthly salary was Kshs. 42,810, as shown in his pay slips. ***Guided by the law applicable to wrongful and unfair termination at the time of termination, the Court grants the Claimant general damages for wrongful termination at Kshs. 428,810 being the equivalent of the Claimant's 10 months' gross salary.***

12. The bundle of pay slips exhibited by the Claimant shows he made Provident Fund Contributions and Pension Scheme Contributions monthly. The pay slip for September 2000 shows a Provident Fund Contribution of Kshs. 1,736 and Pension Contribution of Kshs. 961.

13. The Notification of Withdrawal from the Provident Fund, exhibited by the Claimant shows Contributions made by the Claimant as of the date of withdrawal/ termination, at Kshs. 151,450. The Employer made a similar contribution, giving the total at Kshs. 302,900. The Notice does not indicate what the sum due to the Employee, resulting from the Employer's contribution, was. The Court does not think that it was intended that at the end of employment, the Claimant only takes back what he had contributed. The Court has not been shown evidence or directed to any law supporting the position, that the Employer would have back what had been contributed to benefit the Employee, as social security, at the end of employment. What would be the rationale in requiring the Employer to contribute if there is clawing back of benefits due to the Employee at the end of employment? Provident Funds are savings platforms that help Employees save a fraction of their salary every month, which they can use in case they are rendered unable to work, or are retired. The entire Contributions made by the Employee are available to him at the end of employment. There should be a percentage of the Employer's Contribution available to the Employee alongside the Employee's Contributions. In the Notification of Withdrawal, space is shown for inclusion of sum due to the Employee from the Employer's Contribution. No sum is stated. The remainder of the Contribution made by the Employer ought to revert to the Employee's Pension Account. The Court does not think that Contributions made by the Employer, should revert to the Employer. It would not make sense to require an Employer to make a Contribution, if there is provision for clawing back. The Claimant is allowed the prayer for Provident Fund Benefits at Kshs. 302,900.

14. The amount of Kshs. 318, 758 claimed as Pension Contributions is questionable. The Claimant has not supplied the Court with any document showing how this amount has been arrived at. The prayer has not been explained by the Claimant, either in Evidence or Submissions. This is just a sum, made in a vacuum. The pay slips on record show the Claimant last made a Contribution of Kshs. 961 monthly. The Notification of Withdrawal concedes a total sum of Kshs. 7,929. The Court is not able to reconcile the figure claimed as Pension Contributions with the Evidence on record. ***The Court grants him Pension Benefits at Kshs. 7,929.***

15. ***Costs to the Claimant.***

IN SUM, IT IS ORDERED:-

a) The Respondent shall pay to the Claimant: damages for wrongful termination at Kshs. 428,810; Provident Fund Benefits at Kshs. 302,900; and Pension Scheme Benefits at Kshs. 7,929- total Kshs. 739,639.

b) Costs to the Claimant.

Dated and delivered at Mombasa this 27th day of September, 2018.

James Rika

Judge