



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA
AT NAKURU
CAUSE NO.490 OF 2014

JACKSON KIMANI WAWERU.....1ST CLAIMANT
DANIEL KAGORI NJUGUNA.....2ND CLAIMANT
BENJAMIN CHE'TEREK KIMENGICH.....3RD CLAIMANT
DAVID KIRIMI MARETE.....4TH CLAIMANT
PATRICK GAKOBO MATHENGE.....5TH CLAIMANT
HASSAN GODANA BAGAJA.....6TH CLAIMANT

VERSUS

ATTORNEY GENERAL.....1ST RESPONDENT
COMMISSIONER OF POLICE.....2ND RESPONDENT
NAKURU COUNTY PUBLIC SERVICE BOARD.....3RD RESPONDENT
NAKURU COUNTY GOVERNMENT.....4TH RESPONDENT

RULING

1. The 3rd and 4th respondents through application and Notice of Motion dated 18th July, 2018 and brought under the provisions of Rule 33 of the Employment and Labour Relations Court (Procedures) Rules, 2016 are seeking for orders that;

The court be pleased to interpret and or clarify its judgement to give effect to the same regarding paragraph 57 on page 13 of the judgement on wages accrued/due up to dates of separation.

2. The application is supported by the affidavit of **Maureen Litunda** and Advocate and employee of the 4th respondent and on the grounds that on 19th November, 2017 the court directed parties to sit with their respective accountants and do computation with a view to agreeing on the computation and reconciliation of the accounts but this has not been achieved. The parties are not agreed on the interpretation of the judgement and seek clarification.

3. The grounds for interpretation and clarification are that;

4. The 3rd and 4th respondents believes that they are not supposed to pay any monies with respect to the consent order dated 17th September, 2010 in which the claimants were to be paid half salaries pending the hearing and determination of the suit as the court found the same to be vague whereas the claimants believe this should be paid. The 'dates of separation' referred to by the court meant the time of death, dismissal, retirement or transfer of the claimants while the claimants believe the same to mean and to include computation until date of judgement.

5. The respondents believe the 1st claimant was transferred from the Nairobi City Council on 5th November, 2008 before the occurrence of the said suspension and as such is not entitled to payment of wages by the respondent yet the 1st claimant believes that he is entitled to the payments.

6. The respondents believe that the 3rd claimant passed away on 5th September, 2013 and had been retired in the public interest on 22nd December, 2009 therefore he was only entitled to payment of dues until the time of retirement and not the time of his death.
7. The 4th and 5th claimants withdrew the suit and reinstated back to work and thus not entitled to any wages as there was no separation.
8. The 6th claimant was summarily dismissed on 21st December, 2009 and is entitled to wages computed until then.
9. The above matters ought to be clarified by the court and as a sign of good faith the 4th respondent on 27th June, 2018 deposited with the court Kshs.7, 315,618.60 into the court's account pending the interpretation of the judgement delivered on 7th October, 2016. The claimants shall not be prejudiced by the court addressing the application herein.
10. In her affidavit, Ms Litunda avers that following judgement herein the parties are unable to agree on the computation of dues as directed by the court and thus seek interpretation and clarification.
11. In reply the claimants filed a Replying Affidavit sworn by the 2nd claimant, **Daniel Kagori Njuguna** and who avers that on 27th February, 2018 the accountants for both parties held a meeting and another on 5th June, 2018 and where the 3rd and 4th respondents' accountants were furnished with computations by the claimant and there were no disagreements. The claimants were shocked with the respondents' letter dated 8th June, 2018 stating that the accountants could not reach agreement on computations.
12. The reasons given by the respondents for interpretation and clarification of judgement are not valid as the court did not pronounce itself on the consent of 17th September, 2010 as the same has not been honoured and at paragraph 7 the court was clear that the consent was adopted as the order of the court on 24th September, 2010. Such consent order has not been set aside or reviewed.
13. Mr Njuguna also avers that at paragraph 54 of the judgement the court held that the 3rd and 4th respondents should pay wages due during the period of suspension and date of separation and/or transfer in terms of the consent of 17th September, 2010. The remedies due to the claimants were based on the consent order. The respondents were to pay the wages which accrued during the period of suspension. The claimants were also to be padding their wages during the period of transfer.
14. During the period of suspension of the claimants, the computations should take into account all wages which accrued therefrom incorporating pension contributions, allowances and increments in the Collective Bargaining Agreement (CBA) registered in 1993, 1997, 2002, 2005, 2010 and 2012. The due wages accrue and continue to accrue to date and until the 3rd and 4th respondent comply with the consent order of 24th September, 2010.
15. At paragraph 42 of the judgement the court held that the claimants ought to have been placed under interdiction as set out under Regulation 24 of the Public Service Commission (Local Authority Officers) Regulations, 2007 and thus the court was alive to the fact of the 1st claimant's transfer and subsequent suspension and the consent orders of 24th September, 2010. The 3rd claimant's dues relates to the period of his suspension. The reasoning that the computations for the 5th claimant should be until his retirement and not death is not justified. All the claimants ought to be paid until their period of suspension which the respondents have failed to pay, including dues to the 2nd claimant. The 6th claimant was included and part of the consent order of 17th September, 2010 and should be paid to date.
16. The conflict has arisen following delayed payment to the claimant despite express orders of the court. The application now filed by the respondents is not in good faith and meant to be a delaying tactic not to pay the dues owing to the claimants and should be dismissed.
17. Both parties made their oral arguments in court.

Determination.

18. In the judgement of the court delivered on 19th November, 2017 at paragraph 57 it was held;

The Court finds and holds that the suspension of the Claimants was unlawful and orders the 3rd and 4th respondents to compute and pay them

(a) Wages accrued/due up to dates of separation.

19. Employment can terminate by mutual consent as held in the case of **Max Masoud Roshankar & another versus Sky Aero Limited [2015] eKLR**; can terminate by mutual agreement where the notice period is agreed upon; can terminate at the expiry of a fixed term contract as held in **Samuel Chacha Mwita versus Kenya Medical Research Institute [2014] eKLR**; and can terminate by the retirement of an employee upon attaining the requisite retirement age or upon exit of employment through death and resignation. Such are recognised methods leading to termination of employment.
20. Whereas the Employment Act, 2007 does not directly address itself to separation' in employment, such term can be inferred by the 'termination' of employment when the employee has to exit, depart, and leave employment or in any other lawful manner end employment with a given employer.
21. In this regard therefore, in the judgement of the court delivered on 19th

November, 2017 at paragraph 57 as set out above, 'separation' and 'dates of separation' refers to the end date(s), exit date(s) and or departure of the employee(s) from employment with a given employer. The court reading of the judgement and the reference to 'dates of separation' cannot be construed in any other manner. To take such 'dates of separation' to mean and refer to any other matter other than the end date of employment would be a wrong interpretation of such a finding. Separation dates in employment refers directly to the last date in employment and when the employee was last at work.

22. In this case, the parties are unable to agree on computation of terminal dues payable to the claimants with regard to the separation dates and in the court reading of the subject ruling, each employee herein had their dates of separation of employment noting the last date in employment.

23. Putting the above into account and based on the affidavits of Ms Litunda and Mr Njuguna for the 3rd and 4th respondents and the claimants respectively, the submissions of the parties in court, the court reading of the judgement and particularly the paragraph under reference by the 3rd and 4th respondents at paragraph 57, the orders were that the suspension of the claimants was found to be unlawful and they should be paid wages accruing to each up to the date of separation. Each claimant ought to receive dues owing up to the dates of end of employment. Wages accruing up to the end date of employment.

24. The 3rd and 4th respondents should therefore make payments to the claimants for half salary due during the period of suspension and which is unpaid up to and until the last date in employment. Paragraph 57 of the judgement did not state that such wages are due up to the date of judgement, to the contrary, the due date for payment of due wages is the date of separation. Such dates differ for each claimant.

25. With regard to the payment due to the 1st claimant, the court made its findings at paragraph 50 as follows;

50. The Court also finds it curious that the 1st Claimant who was transferred to the City Council of Nairobi through a letter dated 5 November 2008 could be suspended in January 2009 on other grounds and not for failing to report to the new work station; and that a consent could be entered by the parties on

17 September 2010 to pay the Plaintiffs half salaries ... That consent was vague.

26. On the above findings, the 1st claimant was effectively removed from the cause of action. The 1st claimant has not moved the court with regard to clarification(s) on the consent found by the court to be vague as far as his claims were concerned.

27. With regard to the 2nd claimant the court at paragraphs 36 and 40 of the judgement held that;

36. The Claimants were all suspended a week after being charged in Court,

through letters dated 19 January 2009 (except for the 2nd Claimant who was suspended on 24 December 2008 for unrelated reasons) and the letters set out the circumstances of the suspensions.

40. The Claimants had only been charged with criminal offences a week earlier, on 12 January 2009 (except for 2nd Claimant who was charged on 9 February 2009 and convicted on 15 August 2011 but later successfully appealed).

28. The claimant was therefore removed from the cause of action before the court and in addressing the remedies due to the claimants he was singled out with a finding under paragraph 51 a follows;

51. Before examining appropriate remedies, the Court wishes to stress that none of the Claimants have challenged their dismissals in the present proceedings though they were aware immediately after filing the suit of the termination of their employments (Court was informed that the 2nd Claimant had challenged his dismissal in Nairobi Cause No. 132 of 2006 which is yet to be concluded).

29. In the Amended Complaint filed on 13th November, 2015 the claim is that the 2nd claimant was suspended on 12th January, 2009 and whereupon he lost income. In the *List and Bundle of Documents* filed by the claimants on 25th February, 2016 document No.7 is the 2nd claimant's letter of suspension dated 24th December, 2008 over alleged use of a fake single business licence.

30. In his witness statement dated 23rd February, 2016 the 2nd claimant states that on 24th December, 2009 he was suspended over an investigation involving an alleged fake licence and on 9th February, 2009 he was charged in court and a decision issued on 15th August, 2011 which he contested through an appeal.

31. Effectively, noting the variances, the cause relating to the 2nd claimant is foundationally separate and different from that of the other claimants herein. The findings of the court upon trial as set out above have not been challenged.

32. The 3rd claimant last date in employment is 22nd December, 2009. Employment ceased on this date. Computation of wages due and owing relate to such date as the date of separation.

33. The 4th and 5th claimants withdrew their claims against the respondents. The orders herein do not relate to these claimants as they have no existing suit against the respondents. A withdrawal of suit ended the same and cannot be revived for computation and payments as set out by the 4th and 5th claimants. These claimants are not parties herein since the withdrawal of their claims. These facts are reiterated by the

court in its judgement at paragraph 1 and 10 therefrom, the 4th and 5th claimants withdrew the claims on 17th January, 2012.

1. The Claimants commenced legal proceedings on 16 December 2009 in the Chief Magistrates Court against the Attorney General (1st Respondent), Commissioner of Police (2nd Respondent), one Shadrack Mulanga and the Municipal Council of Naivasha alleging defamation, false detention and malicious prosecution and unlawful suspension from employment (4th and

5th Claimants were reinstated and withdrew their claims on 17 January 2012).

10. On 17 January 2012, David Karimi Marete and Patrick Gakobo Mathenge withdrew their suits against the Respondents because they had been reinstated to work.

34. The 6th claimant separated employment with the respondents on 21st December, 2009. Dues accruing to him relate and refer to such date as his end date.

Accordingly, with the interpretations and clarifications above, the application by the 3rd and 4th respondents dated 18th July, 2018 is allowed in terms of analysis above with orders as follows;

(a) The separation date is effectively the last day/date each claimant was at work, left work, exited work and or employment with the respondents ceased;

(b) The 1st claimant is removed from the cause of action;

(c) The 2nd claimant Is not part of the cause of action herein;

(d) The 3rd claimant last date at work is 22nd December, 2009;

(e) The 4th and 5th claimant withdrew suit against the respondents on 17th January, 2012 and no claim(s) exists therefrom;

(f) The 6th claimant date of separation of effectively the 21st December, 2009 and dues shall be computed from such date.

The computations of owing dues and wages shall put the above orders into account. The security deposits by the 3rd and 4th respondents shall be released putting the above into account.

Orders accordingly.

Delivered in open court at Nakuru this 3rd day of October, 2018.

M. MBARU JUDGE

In the presence of:

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