



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT MOMBASA
CAUSE NUMBER 757 OF 2015

BETWEEN

SALIM FUNDI CHAMBIKA
CLAIMANT

VERSUS

MASH EAST AFRICA LIMITED
RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Martin Tindi & Company Advocates for the Claimant

Respondent

Oloo & Chatur Advocates for the

JUDGMENT

1. The Claimant filed his Amended Statement of Claim, on 1st September 2016. He states he was employed by the Respondent as a Bus Driver in December 2003. He resigned voluntarily on 1st June 2011. He did not receive terminal dues for 8 years served. In October of the same year, he was invited back to continue driving, with a promise his service pay for the past 8 years would be paid. Nothing was paid. The Claimant continued driving until April 2015, when he was diagnosed with diabetes. He was unable to continue driving and applied for retirement on medical grounds. He retired but was not paid terminal dues for the aggregate period of 12 years. He states he was only paid salary for 1 month in the month of May 2015. His last salary was Kshs. 30,000 per month. He prays for:-

- a) 1 month salary in lieu of notice at Kshs. 30,000.
- b) pay at Kshs. 15,000 for every complete year of service at Kshs. 180,000.
- c) Annual leave pay for 8 years, at 21 days per year, at Kshs. 168,000.
- d) Un-accorded off days at Kshs. 536,000

Total... Kshs. 914,000

e) Certificate of Service.

f) Costs.

g) Any other relief.

2. The Respondent filed its Statement of Response on 8th November 2015. It concedes to have employed the Claimant as a Driver, in the year 2003. It is true the Claimant resigned in 2011. He was allowed to return to work upon making a request to do so, the same year. There was no promise he would be paid terminal benefits for the previous service. He continued serving on previous terms. He was diagnosed with diabetes in April 2015, and recommended for retirement by the Doctor, on medical ground. The Claimant applied for early retirement on 11th May 2015, which the Respondent acceded to, in its acceptance letter of 2nd July 2015. He was paid salary for the month of April. The Respondent states there could be some days of annual leave owing, and that the Claimant was free to approach the Respondent for computation. He did not deserve service pay as he was actively subscribed to the N.S.S.F.

3. Parties agreed to have the Claim considered and determined on the strength of the record, in an order recorded in Court on 7th February 2017. They confirmed filing of Submissions on 14th March 2017.

The Court Finds:-

4. The Claimant was employed by the Respondent Transport Company as a Bus Driver in December 2003.

5. He resigned voluntarily in June 2011 to attend to domestic issues.

6. He returned to work in October of the same year. Parties do not agree on the circumstances of return. The Claimant states he was recalled and advised he would be paid terminal dues for the past 8 years of service, a promise which was not fulfilled. The Respondent's position is that the Claimant was retaken on request.

7. It is not relevant whether the Claimant returned upon his own request, or at the request of the Respondent.

8. The Parties agree the Claimant continued to work for the Respondent up to April 2015 when he was unfortunately diagnosed with diabetes. He had worked for an aggregate 12 years, less approximately 4 months when he away on resignation to attend to domestic matters unrelated to his illness.

9. There is no case established warranting payment of notice pay. The Claimant initiated termination on both occasions- first on resigning to attend to domestic issues, and second on retirement on medical grounds. Why should the Respondent pay notice, when the Respondent did not initiate termination? The prayer for notice pay is rejected.

10. There was no evidence of un-accorded off days whose valuation the Claimant gives at Kshs. 536,000. He does not give details of these un-accorded off days, little less show the mode of computation resulting in the bulky amount claimed. The prayer is rejected.

11. He claims service pay at 15 days' salary for 12 years. He relies on the decision of this Court in ***Elijah Kipkoros Tonui v. Ngara Opticians t/a Bright Eyes Limited [2014] e-KLR***, in making this prayer.

12. The decision is distinguishable from the present case. Although both Employees retired on medical grounds, the Court in ***Tonui*** found N.S.S.F contributions were remitted erratically, so that at the end of 25 years of service, there was only a tiny sum of Kshs. 52,480 in his N.S.S.F account. The opinion of the

Court was that the service pay regime under Section 35 [5] of the Employment Act 2007, adopting a minimal 15 days' salary for every year completed in service, conferred upon Tonui superior social security benefits. The Court ordered Tonui is paid service pay, less what was in his N.S.S.F account. Basic membership to the N.S.S.F, the Court stated, did not in itself bar Employees from accessing service pay. The Court has an obligation to enforce the social security regime, which offers superior benefits to an Employee, as contemplated under Section 26 of the Employment Act 2007.

13. In the present case, the Claimant does not say his N.S.S.F contributions were not remitted, or were inconsistently, or that the service pay regime would confer him superior social security benefits. It was shown the Respondent consistently remitted N.S.S.F dues. The Claimant did not avail to the Court counter-evidence from the N.S.S.F showing how much was in his account at the end of service, so as to enable the Court compare what he claims as service pay with what his N.S.S.F account offered him.

14. The material provided by the Claimant is insufficient to bring his prayer for service pay within the reasoning in the **Tonui** case. The only conclusion the Court can make is that the Claimant was actively subscribed to the N.S.S.F and did not show to the Court that the N.S.S.F regime offered him less than the service pay regime under the Employment Act 2007, offered. The prayer for service pay is declined.

15. The Respondent pleads and submits that there were some annual leave days owed to the Claimant, as of the date he left employment. The Claimant is invited to go to the offices of his former Employer, to do a tabulation of these annual leave days.

16. This is the wrong approach. Once the dispute is in Court, tabulation should have been done in Court. Alternatively, the Respondent ought to have made a serious offer to the Claimant, and present a consent letter for adoption by the Court before Judgment. As it is there is an admission that the Claimant is owed part of his annual leave entitlement. The Respondent is not able to say what has been paid, or how many days were utilized. There is in truth, no material to contradict the Claimant on this item. **The Claimant prays for annual leave pay of 168 days, covering 8 years worked before October 2011. The prayer is allowed at Kshs. 168,000 as prayed.**

17. **Certificate of Service to issue.**

18. No order on the costs.

19. **Interest granted at 14% per annum from the date of Judgment till payment is made in full.**

IN SUM, IT IS ORDERED:-

a) The Respondent shall pay to the Claimant annual leave pay at Kshs. 168,000.

b) Certificate of Service to issue.

c) Interest granted at the rate of 14% per annum from the date of Judgment till payment in full.

d) No order on the costs.

Dated and delivered at Mombasa this 20th day of June 2017

James Rika

Judge