



REPUBLIC OF KENYA

IN THE EMPLOYMENT LABOUR AND RELATIONS COURT

AT MOMBASA

CAUSE 304 OF 2014

DANIEL KAMAU KARIITHI.....CLAIMANT

VERSUS

BAMBURI CEMENT..... RESPONDENT

JUDGMENT

Introduction

1. Mr. Daniel Kamau Kariithi (now deceased) was employed by the Respondent from 1977 to 20.2.2002 when laid off at the age of 52 years after his office was declared redundant. Although he was paid all his dues for the period of service up to the date he was terminated, he was not pleased with the decision by the Respondent to terminate him before his retirement age which was only three years away. He therefore filed this Suit in the High Court on 27.11.2002 as HCC NO. 428 of 2002 seeking reinstatement and in the alternative damages for loss of future earnings which he assessed at kshs. 4,183,068.00. Unfortunately the deceased was not lucky to see the end of this Case as he died on 28.6.2007 after having testified and closed his case. His estate then pursued the claim through the current Claimants who were appointed as the administrators of the estate vide the Grant of letter of Administration dated 13.6.2008.

2. The Suit was transferred to this court on 18.6.2014 and given the current number. The Respondent has contended that she acted within the law and contract of employment in terminating the deceased's services and denies liability for payment of future earnings to the deceased. She called Betty Kamyagia, who testified as RW1. After the close of the hearing both parties filed written submissions.

Analysis of the Case

3. There is no dispute that the deceased was employed by the Respondent from 1977 to 2002, a total of 24 years. That he was laid off in 2002 and was paid all his lawful dues for the entire period of his service and executed a discharge voucher voluntarily. That the suit herein concerns the loss of earnings for the 3 years he would have worked before attaining his mandatory retirement age of 55 years provided for in the collective agreement (CBA).

4. The issues for determination are:-

- a. Whether the termination of the Claimant's services before his retirement age of 55 years was wrongful and therefore null and void.
- b. If so, whether the deceased should be reinstated to his employment or be paid damages equivalent to the total earning for the 3 years remaining before he reached 55 years.

Wrongful Termination

5. There is no dispute that the contract of employment between the deceased and the Respondent was governed by the CBA signed by the Respondent and the Claimant's trade union. The said CBA permitted the Respondent to terminate the Claimant's employment contract at any time by a notice or payment of 3 months' salary in lieu of notice. The CBA also permitted the Respondent to declare the Claimant's Job redundant at any time upon terms if his services became superfluous due to abolition of his office, job or occupation or through retrenchment. Clause 17 and 19 of the CBA which provided for termination on notice and redundancy respectively supports the Respondent's evidence and submissions that the Claimant had no guarantee of employment until his mandatory retirement age of 55 years.

6. The said position is in consonance with the provision of section 16A of the Employment Act in force at the time of Claimant's lay off, but which is now repealed. The said Act however barred employer from declaring employees redundant unless certain procedural safe- guards were met including serving the employee's union and the area Labour Officer with a redundant notice, fair selection of the affected employees and paying them the separation dues.

7. In this case, RW1 explained that the job that was being done by the deceased involved machinery which became obsolete and as such his services became superfluous. That was valid and fair reason considering the operational needs of the Respondent. However, the procedure followed was wrong because no service of notice of redundancy to the Claimant's Union and the area Labour office was done. That rendered the redundancy unfair, unlawful and wrongful within the meaning of section 16A of the repealed Employment Act. Even though the Respondent had all the rights and a good reason for declaring the deceased redundant, he had no discretion to do so unfairly by breaching of the law as he did to the deceased.

Reliefs

Reinstatement

8. The foregoing relief was provided for under section 15 of the Trade Disputes Act, (now repealed). Under the said Act, there was no time limitation outside which such relief could not be ordered. However under section 12 of the Employment and Labour Relations Court Act (ELRCA), the relief is not available after 3 years from the date of termination of the employment contract. In addition to the foregoing limitation, it is common knowledge that the prayer for reinstatement is not tenable after the death of the employee like in this Case. Consequently, the court decline to make an order for reinstatement because it is not practicable to do so and the time within which to make reinstatement has lapsed.

Future Earnings

9. The Claimant has quantified the earnings he would received for three years before his normal retirement at kshs. 4,183,068. No provision of the law or the CBA were cited by the Claimant to support the claim for future earnings. As already stated above, the nature of the contract of employment for the deceased was such that it could be terminated by either party by notice or payment of salary in lieu of notice. It could also be terminated through redundancy death or summary dismissal at any time on disciplinary reasons. There was therefore no guaranteed earnings up to the retirement age of 55 years. In that regard the claim for future earning lost due to the lay off before retirement age must fail. To grant the request would be tantamount to reinstating the deceased to employment or paying for work not done. It is trite law and also public policy that salary is only payable for services rendered and not to ex-employees.

10. As a parting shot, however, the court must clarify that the law has changed with the coming into force the Employment Act 2007, which empowered the Court to make an award of damages not exceeding the employee's 12 months gross pay as compensation for unfair termination of the employee's employment contract.

Disposition

11. For the reasons stated above, this Suit is dismissed. Each party to bear their own costs.

Signed, Dated and Delivered at Mombasa this 24th day of June 2016.

ONESMUS MAKAU

JUDGE