



REPUBLIC OF KENYA
IN THE EMPLOYMENT LABOUR AND RELATIONS COURT
AT MOMBASA
CAUSE 9 OF 2015

PHILIP KARUGA KANOGA.....CLAIMANT

- VERSUS -

KENYA SUITCASE MANUFACTURERS LIMITED...RESPONDENT

JUDGEMENT

Introduction

1. The Claimant was employed by the respondent on 1. 4. 1989 as an Industrial Relations officer and worked up to 8. 10. 2014 when he retired. His salary was Kshs.22,000 per month at the time of his retirement. His position was a managerial cadre and as such he was not covered by the Collective Bargaining Agreement (CBA) like the unionisable staff on matters retirement.

2. After the Claimant's retirement, a disagreement between him and the respondent arose regarding the rightful retirement package. As a result the claimant brought this suit to recover his employment terminal dues amounting to Kshs.1,019,619.

3. The respondent has denied liability to pay the claimant the said Kshs.1,018,619 and averred that the claimant is only entitled to Kshs.16,153 from her in respect of salary for 8 days worked in October 2014, pro rata leave and leave travelling allowance. She further averred that the claimant was a member of the NSSF and as such he is disqualified from claiming service pay

4. The suit was disposed of by written submissions on the basis of the pleadings, witness statements and the documentary evidence filed.

Analysis and Determination

5. There is no dispute that the claimant was employed by the respondent on a managerial position and retired on 8. 10. 2014 on account of age. The issue for determination is whether he is entitled to the reliefs sought in this suit.

Reliefs Sought

House allowance for 1989 - 2000

6. The claimant alleges that he was not paid any House allowance or allocated a house by the respondent between 1989 and 2000. He therefore prays from the same at the rate of 15% of the salary last salary of

Kshs22,000. The respondent has denied liability to pay the alleged House Allowance and contended that under the employment contract, the monthly salary during that period was a consolidated pay.

7. I have perused the Appointment letter dated 30. 3. 1989 and confirmed that the monthly salary for the claimant was a consolidated pay. Paragraph 2 of the letter stated as follows:

“Salary: - Your consolidated salary will be Kshs.2400 per month inclusive of House Allowance . . .”

I therefore dismiss the claim for house allowance.

Service Pay

8. The prayer for service pay is at the rate of one month’s salary per year of service. The claim is founded on the assumption that since the CBA provided for 16 day’s pay per year of service, he was entitled to a higher benefit than the unionized staff.

9. The respondent has denied the said claim and averred that the claimant was a member of the NSSF and as such he was disqualified from claiming service pay by section 35 (6) (d) for the Employment Act (EA).

10. I agree with the foregoing contention by the respondent and proceed to dismiss the claim for service pay. Section 35 (6) (d) of the EA disqualifies employees who are members of the NSSF from, claiming of service pay. The only reason why the court should decide otherwise is in case the employer fails to remit the NSSF contributions regularly. In this case the claimant has not adduced any evidence to show that the employer did not remit his NSSF contributions regularly.

General damages

11. The claimant stated that he attained retirement age of 55 years in 2000 but the respondent requested him to continue working until the respondent was able to raise his terminal dues. That the delay of his retirement was extended to 8. 10. 2014 which was 14 years. That during the said period of extended service the claimant was exposed to poor working conditions and harassment. He therefore prayed for general damages for the suffering occasioned to him by the delayed retirement.

12. The respondent has denied that he coerced the claimant to continue working for her after attaining the retirement age. She contended that it was the claimant who requested for the chance to continue working after attaining the retirement age. Additionally the respondent contended that the EA does not provide for any award of general damages for delayed retirement or at all.

13. After careful consideration of the material presented to the court, I find on a balance of probability that the claimant agreed to continue serving the respondent voluntarily. He did not produced any records of the communication from the respondent to him, or any other form of evidence for that matter, to prove that he was forced to continue working after reaching 55 years because the respondent was not able to pay his retirement benefits. Consequently the claimant for general damages for delay and retirement is dismissed for lack of merits.

Salary/Leave/Leave Allowance

14. The claimant for salary for 8 days worked in October, pro rata leave for 2014 and leave travelling allowance for Kshs.5864, Kshs8796 and Kshs.1500, respectively have been admitted. I therefore grant the said claims as prayed.

15. The claimant has also prayed for his 2013/2014 annual leave. The respondent has however denied that claim and contended that the said leave was taken during the retirement notice period as per the letter dated 5. 9. 2014.

16. I have perused paragraph 5 of the retirement notice dated 5. 9. 2014 which I find to be in consonance with the contention by the respondent that the claimant utilized his annual leave days for 2013/2014. The said paragraph states as follows:

“ . . . We are agreeable to your request and allow you to proceed on your annual leave from 8th September 2014 to 7th October 2014.”

17. The foregoing leave was taken the claimant had reported back to work from his annual leave for 2012/2013 on 2. 9. 2014. In view of the foregoing, and the fact that the claimant never denied that he remained away from work during the whole period of the retirement notice, between 8. 9. 2014 and 7. 10. 2014, I find no merit in the claim for the annual leave for 2013/2014 and I dismiss it.

Disposition

18. For the reasons stated above I enter judgment for the claimant in the sum of **Kshs.16153** plus interest from the date thereof. Each party will bear his or her own costs because the respondent has proved the letter dated 27. 10. 2014 that the sum awarded herein had already been admitted before the filing of the suit

Signed, Dated and Delivered this 9th day of September, 2016

ONESMUS MAKAU

JUDGE