



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 100 OF 2015

(BEFORE HON. LADY JUSTICE MAUREEN ONYANGO)

ANDREW ABOK OSIROCLAIMANT

-VERSUS-

CHEMELIL SUGAR COMPANY LIMITEDRESPONDENT

J U D G E M E N T

The issue in dispute in this case is the amount payable to the Claimant ANDREW ABOK OSIRO following his voluntary early retirement from Chemelil Sugar Company Limited where he worked from 15th July, 1976 to 25th December, 2011.

In the letter dated 21st November, 2011 accepting the Claimant's application for early retirement the Respondent set out his terminal dues as follows -

- (a) Salary up to 25th December, 2011.
- (b) 5.5 days accumulated annual leave earned up to 25th December, 2011.
- (c) 28 days pay for each completed year of service since joining the company on 15th July 1976 to 7th March 1999, during the period you were on union terms.
- (d) Ex-gratia payment of Kshs.8,000/-.
- (e) Retirement benefits under the pension scheme as per the current regulations. The actual figure will be communicated to you in due course.
- (f) The company will facilitate the National Social Security Fund (NSSF) withdrawal benefits. Relevant withdrawal form SF/BN/AB/004 is enclosed for your completion in order to obtain your NSSF contributions. As a rule, you will be expected to surrender your current membership card to NSSF Officials in Kisumu.

The Claimant was later paid a sum of shs.248,161.80 made up as follows -

Gratuity

634.18 days @ 26042.10 Shs.786,443.60

Less Advances Shs.300,000.00

Tax Shs.238,281.80

Net Payable Shs.248,161.80

In his Memorandum of claim filed herein the Claimant seeks payment of Shs.1,204,283.60 made up as follows -

3.1. Salary up to 25th December, 2011 amounting to Kshs.46,260.00

3.2. 5.5 days accumulated annual leave earned up to 25th December, 2011 amounting to Ksh.10,177.20.

3.3. Severance pay amounting to Kshs.1,139,846.40.

3.4. Ex-gratia payment of Kshs.8,000.00;

The Claimant further seeks the following remedies -

(a) The payment of the claimant's terminal dues;

(b) Interest on (a) at bank rates from the 1st January, 2012 and until payment thereof in full;

(c) Punitive and/or aggravated damages for breach of contract and for the violation of his statutory and constitutional rights together with interest thereon at court rates of 14% per annum from the date of Judgement and until payment thereof in full;

(d) The costs of this suit both party and party as well as advocate and client with interest thereon at court rates of 14% per annum from the date of filing suit and until payment thereof in full;

(e) Any other or further award as the court may deem fit and just to grant in the circumstances.

According to the Claimant the tabulation of his terminal dues should be as follows:-

(a) Salary up to 25th December, 2011 having been retired on 25th December, 2011. The claimant earned a basic salary of Kshs,46,260.00 per month;

(b) 5.5 days accumulated annual leave earned up to 25th December, 2011 amounting to Kshs.10,177.20/-;

(c) Service pay.

The Claimant relied on the case of **James chege & 6 others vrs Aqua Plumbing Company Ltd [2013]eKLR** in which the Court held that:

"To get the amount of service pay an employee is entitled, it is necessary to convert an employee/claimant's monthly wages/salary into a daily rate by taking the basic salary & housing allowance and dividing the same with 26 (working days) to get the daily rate. The daily rate is then multiplied by 15 days to get the yearly rate. The yearly rate is then multiplied by the number of years an employee has served to get the total service pay."

Therefore: Kshs.46,260.00(basic pay)+Kshs.12,000.00(house allowance) =Kshs.2,240.80(daily rate) 26 (working days)

Then: Kshs.2,240.80 (daily rate) x 28 days =Kshs.62,742.4(yearly rate)

The claimant multiplied the his daily rate by 28 days as a guideline offered by the Respondent in its letter dated November 21,2011to arrive at Kshs.62,742.4 x 23 years = Kshs.1,443,075.2 (service pay)

The submitted that the Respondent is therefore liable to pay the claimant's terminal dues in the total sum of Kshs.1,443,075.2.

It was submitted that the quantum includes a summation of; salary up to 25th December 2011, 5.5 days accumulated annual leave up to 25th December 2011, Ex Gratia Payment of Kshs.8,000.00 and service pay thereby arriving to an aggregate sum of **Kshs.1,507,512.40**

LESS Kshs.248,161.80 paid to the Claimant acknowledgement of which is duly received leaving a balance of Kshs.1,259,350.6.

The Respondent on the other hand submits that the Claimant worked for the Respondent as a unionisable employee for 22.64 years from 15th July, 1976 to 7th March, 1999 when his terms were converted to pensionable service. According to the Respondent, the Claimants terminal benefits were tabulated as follows -

i. Salary upto 25/12/2011

(Basic Salary was $Kshs.55,512 \times 25 \times 12 = Kshs.45,626.30/-365$

ii. 5.5 days accumulated annual leave

$55,512 \times 5.5 \times 12 = Kshs.10,037.78/-$

365

iii. Ex-gratia payment indicated as sundry pay

= Kshs. 8,000.00/-

The Respondent submitted that the Claimant was at the time of his retirement, was entitled to severance pay based on at the rate of Kshs.35,615pm tabulated as follows:-

22.64yrs x 28 days = Kshs.634.15 days

= $(35615 \times 643.15) = Kshs.1,075,488.20$

21 days

Less Tax = Kshs.(318,942.85)

Net payable = Kshs.756,545.35

Less deductions

a. Advance payment Cheque No.234556 dated 21/8/2013 = Kshs.100,000/-

(Cheque Payment Voucher dated 21.8.2013)

b. Advance payment Cheque No.236054 dated 20.1.2014 = Kshs.200,000/-

(Cheque Payment Voucher dated 20.1.2014)

c. Advance payment Cheque No.008553 dated 27.11.2014= Kshs.248,161.80/-

(Cheque payment voucher dated 27.11.2014)

Total deductions - Kshs.(548,161.80)

Amount outstanding - Kshs.208,383.55

It is the Respondents position that the only amount due to the Claimant is Shs.208,383.55.

It would appear that the point of divergence between the parties is the rate of pay used for calculation of the gratuity of 28 days pay per year worked.

The Claimant did not take into account the tax charged and advance payments of Kshs.300,000 made by the Respondents on 21st August, 2013 (shs.100,000) and 20th January, 2014 (shs.200,000) which the claimant has not denied receiving. The Respondent produced payment vouchers and cheques in respect of payment of the advance payments. The Claimant has also not acknowledged payment of salary for December 2011, accumulated leave and ex-gratia paid through his payslip for December 2011.

The Respondent on the other hand did not explain why the gratuity calculation in the written submissions is less than that in the tabulation used to pay the Claimant in the cheque payment voucher dated 27th November, 2015 attached to the Respondent's list of documents filed on 12th May 2015. The Respondent has further not explained why it did not use the rate of salary that the claimant was earning at the time of retirement in December 2011 in the calculation of gratuity. The letter dated 21st November 2011 which set out the payments due to the Claimant does not state that the gratuity will be based on any pay other than what the claimant was earning at the time of retirement.

It is therefore the courts finding that the Claimant's gratuity should be based on the last basic salary of Shs.55,512 and not Kshs. 35,615 used by the Respondent. Applying the Respondent's formula of deriving daily rate by dividing the basic salary by 21 days, the claimant is entitled to gratuity calculated as follows:-

22.64 years x 28 days = 633.92 days (to be multiplied by salary of 55,512)

$(633.92 \times 55,512) = 1,675,722.24$

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Less advance payments - 300,000.00

Less tax withheld by the

Respondent - 248,161.80

The Claimant is therefore entitled to Shs.1,127,560.44.

Conclusion

Judgement is therefore entered for the Claimant in the sum of Shs.1,127,560.44.

The Respondent shall also pay the Claimant's costs for this suit.

Dated, Signed and Delivered this 6th day of October, 2016

MAUREEN ONYANGO

JUDGE