



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSE NO. 42 OF 2016

KENYA UNION OF COMMERCIAL, FOOD AND ALLIED WORKERS..... CLAIMANT

VERSUS

KIGETUNI FARMERS CO-OPERATIVE SOCIETY LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 2nd December, 2016)

JUDGMENT

The claimant union filed the memorandum of claim on 24.02.2016 on behalf of its members Kanguogo Kigau, Olufemi Maina Macharia and Joshua Waweru (hereinafter the 1st, 2nd, and 3rd grievants respectively). The parties are bound by valid recognition and collective agreements and the collective agreement was filed in court.

The respondent filed the response to the claim on 11.04.2016. Subsequently the respondent appointed J.G Waweru & Company Advocates to act in the matter.

The 1st issue for determination is whether the grievants were employed by the respondent. The respondent has lamented in the defence that the records to establish the grievants' employment were not available and therefore it was impossible to determine the grievants' terms of service including their salaries. Further the respondent has stated that the 3rd grievant left the respondent when he handed over a bankrupt society having mismanaged the respondent and therefore the respondent lacked the funds to pay the grievants.

The 3rd grievant testified that the respondent employed him in 1985 as a machine operator. In 1989 the respondent's manager retired and he was then employed as the machine operator and factory manager. The respondent's permanent employees had been the 3 grievants.

The court has considered the 3rd grievant's evidence and the admission by the respondent that the 3rd grievant was its employee and returns that the respondent and the grievants were in employment relationship. As testified, the 1st and 2nd grievants served as guards.

The 2nd issue for determination is whether the grievants are entitled to the remedies as prayed for.

By the acknowledgement dated 10.05.2013 the grievants signed acknowledging payment of unpaid dues from 2002 to 2011. The 1st grievant was paid Kshs.182, 814.00; the 2nd grievant Kshs. 118,025.00; and the 3rd grievant Kshs.364, 848.00. Each grievants signed acknowledging receipt of the payment cheques. There is no reason to doubt that the dues were paid and the court finds that the grievants are guilty of non-

disclosure of that crucial and material fact; that they were paid all their accumulated arrears. The court finds the claim for the same dues as pleaded was not justified as it was calculated to mislead the court.

Second, the 1st grievant left employment in December 2014, the 2nd grievant August 2013, and the 3rd grievant 17.11.2014. The certificate of dispute was issued on 02.02.2015 and the suit was filed on 24.02.2016. The claims are for annual leave, off days, house allowance and underpayments for 2008 to 2014 for 1st grievant, unknown years being 6 years ending August 2013 for 2nd respondent, and for the period ending 17.11.2014 for the 3rd grievant. The court finds that the claims were of a continuing injury and the suit ought to have been filed within 12 months from the date of the cause of action as per section 90 of the Employment Act, 2007. If the cause of action accrued on the alleged respective dates of separation, then the suit was clearly time barred when it was filed on 24.02.2016 and as relates to the said continuing injuries. Those claims and prayers will therefore fail.

Even if the certificates of dispute under section 62 of the Labour Relations Act, 2007 are to be taken into account, it cannot be said that it has been established that the claimant had complied with the timelines for reporting and prosecuting the disputes as prescribed in the Act and in any event, the court has found that the time ran from the date each claimant had left employment.

Clause 4 of the collective agreement provides for gratuity at the rate of 2 months at current salary for each year served in case of an employee leaving employment on grounds other than on account of dismissal for gross misconduct or redundancy and provided the employee had served for at least 3 complete years.

The grievants testified and pleaded that each tendered a notice to retire and each retired accordingly and gratuity was not paid. The court has revisited the acknowledgement of payment dated 10.05.2013 and it was at a time when all grievants were in the respondent's service. It cannot therefore be found that the pay included gratuity. In absence of any other material on record the court finds that the grievants would be entitled to gratuity as prayed for. The 1st grievant was employed in January 1996 to December 2014 making 18 years at Kshs. 6, 223.00 per month x 2 months x 18years making **Kshs. 224, 028.00** as prayed for. The 2nd grievant was employed in August 2007 to August 2013 making 6 years x Kshs.6, 223 x 2 making **Kshs.74, 676.00**. The 3rd grievant was employed in 1985 to 17.11.2014 making 29 years x 2 x Kshs.8, 870.00 making **Kshs.514, 460.00**. The claimants are awarded accordingly.

In conclusion, judgment is hereby entered for the claimant against the respondent for:

- a. The respondent to pay the grievants' gratuity being 1st grievant **Kshs. 224, 028.00**, 2nd grievant **Kshs.74, 676.00**., and the 3rd grievant **Kshs.514, 460.00** by 01.02.2017 failing interest to be payable thereon from the date of the suit 24.02.2016 until full payment.
- b. The respondent to pay the claimant's costs of the suit.

Signed, dated and delivered in court at **Nyeri** this **Friday, 2nd December, 2016**.

BYRAM ONGAYA

JUDGE