



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSE NO. 21 OF 2013

(FORMERLY CAUSE NO.768 OF 2010 AT NAIROBI)

JOHN MUGO MURUMIA..... CLAIMANT

-VERSUS-

THE HON. ATTORNEY GENERAL..... RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 24th April, 2015)

JUDGMENT

The claimant filed the statement of claim on 5.07.2010 through Magee Wa Magee Advocates. The claimant prayed for judgment against the respondent for:

- a. Special damages of Kshs. 605,704.20 being unpaid salary for 26.11.2006 to 19.03.2010 Kshs. 389,000.00; 7 days annual leave balance for 2005 Kshs.3,241.70; annual leave for 2006 Kshs.9,725.00; 3 months' salary in lieu of notice Kshs.29,178.00 and service gratuity for 288 months Kshs. 174, 562.50.
- b. General damages.
- c. Costs of the suit.
- d. Interest on (a), (b) and (c) at court rates.
- e. Any other or further relief as the honourable court may deem fit and just to grant.

The respondent filed the memorandum of defence on 18.05.2011 through the learned litigation counsel, Nguyo Wachira. The respondent prayed that the suit be dismissed with costs.

It is not in dispute that the respondent was employed by the Board of Governors of Kianyaga High School as a cook with effect from 1.07.1984. He was later absorbed into the service of the Ministry of Education.

The case was heard on 4.03.2014. As at the hearing date, the claimant had received **Kshs 286,896.00** as terminal benefits being Kshs. 185,845.00 from the Ministry and Kshs. 100,994.00 from the National Social Security Fund (NSSF).

The parties by consent stated that the only issue for determination was whether the claimant was a member of a trade union and therefore entitled to gratuity under the provisions of the collective bargaining agreement (CBA).

The claimant testified that he was employed in July 1984 and he worked until November 2006 when he retired. He then testified that he was a member of KUDHEIHA Workers registered at the union's Embu branch as per exhibit C1, the membership card issued in 1989. Thus, he prayed for gratuity as per the

collective agreement.

The respondent's witness stated that the claimant was not a member of the union because no union dues were deducted and remitted on his behalf. The respondent's witness testified that the claimant had rejected the deduction of the union dues. Further, the union had not demanded union dues and the gratuity the claimant had already been paid would not be any different even if he had been a member of the union.

The claimant relied upon the membership card to show he was a member of the union. The claimant has not showed any evidence that he paid union dues. The claimant has not filed in court form S prescribed in section 48(3) of the Labour Relations Act No. 14 of 2007 or other evidence that he was keen to pay union dues. In any event, the respondent has testified that the gratuity already paid would not vary even if the claimant was a member of the union and, the claimant clearly never requested for deduction of union dues like it was shown that other workers had requested and the deductions effected. The claimant has not demonstrated to the court the prejudice he would suffer or he already suffered in view of the gratuity already paid as weighed against his current claims for further gratuity under the CBA. The claimant has further not demonstrated that the gratuity paid was based on provisions other than the CBA provisions. Thus, the court finds that the claimant has not showed that the respondent had failed to implement the CBA provisions on gratuity.

The court finds that the membership card and the letter by the union dated 14.07.2014 and produced in court at the hearing were filed on 14.10.2014 long after filing of the suit on 5.07.2010. Thus, as submitted for the respondent the court finds that they amounted to an afterthought and in absence of evidence to show that the claimant paid union dues, on a balance of probability, the court further finds that the claimant was not a member of the union. The court further holds that in absence of a clear contractual term permitting more than a single service payment or gratuity, where the employee is entitled to a pension or service payment under more than one formula, the employee would be entitled to the more favourable pay and not numerous payments under the more than one formula. In the instant case, the court finds that the claimant has been sufficiently paid the gratuity under contract and under the statutory NSSF provisions. The court further finds that the claimant has failed to show that the gratuity as paid was due under given contractual or statutory provision and further that over and above the gratuity as paid, he was entitled to further gratuity under the CBA.

In conclusion, judgment is entered in the suit with orders as follows:

1. The declaration that the claimant was not entitled to further gratuity under the CBA as claimed.
2. The respondent to pay 50% of the costs of the suit in view of the belated payment of the terminal benefits as per the letter dated 15.07.2013 and long after filing of the statement of claim on 5.07.2010.

Signed, dated and delivered in court at Nyeri this Friday, 24th April, 2015.

BYRAM ONGAYA

JUDGE