



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT AT KISUMU

CAUSE NO. 335 OF 2013

(Before Hon. Lady Justice Maureen Onyango on 10th June, 2015)

CALEB ACHANDO ADUDA CLAIMANT

-VERSUS-

THE BOG USENGE HIGH SCHOOL RESPONDENT

JUDGMENT

Caleb Achando Aduda the claimant was employed by the respondent the Board of Governors of Usenge High School on 1st August 2000 as school bursar. He worked until 28th February 2013 when he retired after a 2 month terminal leave commencing 1st January 2013.

It appears that the relationship between the claimant and the Principal of the school who was also the secretary to the Board of Governors (BOG) was not good. The claimant first gave notice of his intention of early retirement by letter dated 28th January 2010 citing "hostile environment and frustrating conditions under which I perform my daily duties ..." At that time he intended to retire on 31st August 2010. He however did not retire.

On 7th May 2012 he wrote another notice of retirement. The letter stated he was retiring on 31st December 2012 at the age of 58 years but would proceed on 30 days annual leave in January 2013 followed by 30 days terminal leave so that his effective date of retirement would be 30th March 2013. In the letter he requested the BOG to work out and approve payment of his service gratuity for 12 years service and 5 years pending leave for the years 2004 to 2005.

The respondent replied to the claimant's letter on 28th September 2012 accepting the notice of retirement. The letter also stated that the claimant would be paid service gratuity at the rate of one month's salary for every year worked. The respondent acknowledged the 5 years outstanding leave.

The claimant retired as agreed but was not paid terminal dues as agreed prompting him to file this claim on 11th December 2013. The claimant was eventually paid part of the claimed amount in January 2014 while this claim was pending hearing.

In the Memorandum of Claim dated 10th and filed on 11th December 2013 the claimant seeks payment of the following:-

- 12 years gratuity 12 years X 22,662 = 295,944.00
- 4 years annual leave allowance 2009 - 2012 = 16,000.00

- **Continuous monthly payroll salary for the year 2013, 27,662 X 12 = 331,944.00**
- TOTAL = 643,888.00**
- **Cost and interest of the suit.**
- **Any other relief the court may deem fit to grant.**

In the Memorandum of Defence dated 3rd and filed on 4th February 2014 the respondent avers that it paid the claimant Kshs 123,310 in lieu of leave of 5 years and Kshs 295,944 on account of service gratuity both payments being pegged on claimant's last salary of Kshs 24,662 per month.

The respondent denied that the claimant was a public officer within the provisions of the Pensions Act and further denied that he is entitled to benefit from the provisions therein. The respondent prayed for the claimant's suit to be dismissed.

At the hearing of the case on 16th February 2015 the claimant testified on his behalf. The respondent called Daniel Wasambo, the School Principal and Secretary to BOG, the respondent. Both the claimant and Mr. Wasambo confirmed payment for outstanding leave and service gratuity. The claimant testified that what was outstanding was leave allowance of Kshs 4,000/= per year and payment of salary to date of payment of pension dues in full. He testified that he was paid on 6th January 2014, and that his claim is made pursuant to the provisions of Section 16A of the Pensions Act. He testified that he is covered by the Pensions Act as his remuneration was the same as for public servants.

Both parties filed written submissions.

In the claimant's submissions it is urged that the claimant is only seeking prayers (b) and (c), prayer (a) having been settled by the respondent.

In the respondent's submissions it is submitted that the claimant was paid Kshs 123,310 in lieu of pending leave and gratuity of Kshs 295,944/=, but the payment of gratuity was erroneous as the claimant was a member of NSSF. The respondent submitted that Section 16A of the Pensions Act did not apply to the claimant as the Section applies only to professional staff by dint of Section 4 of The Education (Board of Governors) (Non - Teaching Staff) Regulations, 1993. That the claimant did not submit any proof that he was a professional and is therefore not covered by the Pension Act.

The respondent relied on the case of **Gabriel Ngugi Ndumbu Vs Gaichanjiru Catholic Hospital [2013] eKLR.**

Courts Findings and Determination:-

The only issues for determination are whether or not the claimant is entitled to leave allowance and payment of salary up to 6th January 2014 pursuant to S. 16A of Pensions Act.

In his testimony Mr. Wasambo did not make any reference to either leave allowance or payment under Pensions Act. The claimant attached to his list of documents a circular from Kenya Union of Domestic Hotels Educational Institutions, Hospitals and Allied Workers (KUDHEIHA Workers) and Ministry of Education Guidelines for the implementation of Free Secondary Education which the respondent did not make any reference to. The respondent appears to confuse leave allowance and pay in lieu of leave. As explained by the claimant, he was paid in lieu of leave that he did not take for 2005 to 2008 but he was not paid leave allowance at Kshs 4,000/= per year for 2009 to 2012 which was introduced in 2009 when the Government took over payment of salaries for non-teaching staff. I find that the claimant is entitled to leave allowance at the rate of Kshs 4,000/= for 2009 to 2012 as stated in the uncontested circular from KUDHEIHA workers.

On the claim under the Pension Act, the claimant pegs his claim on the fact that his salary was the same as public servants.

The Pensions Act provides:-

"16A. A person to whom a pension or other allowance is payable under this Act shall be entitled to be retained in the service until the payment in full of the gratuity payable to him consequent upon the exercise by him of his option to receive such gratuity under the provisions of this Act".

From the foregoing the claimant was not covered by the Pensions Act and S. 16A thereof does not apply to him as he was not entitled to a pension under the Act. His claim is therefore without basis and is rejected.

On the respondent's argument that the claimant was erroneously paid service gratuity, Section 35(5) and (6) recognize gratuity. It states that an employee who is covered under a gratuity scheme is not entitled to service pay. The claimant did not claim service pay. He prayed for and was paid service gratuity as provided for under his terms of employment. The payment was rightfully due to him.

For the foregoing reasons I enter judgment for the claimant against the respondent in the sum of Kshs 16,000/= being leave allowance for 2009 to 2012.

The respondent will pay claimant's costs of this suit based on the amount prayed for in the claim as payment to him was made after he filed the claim.

Dated and delivered in Kisumu this **10th** day of **June**, 2015.

MAUREEN ONYANGO

JUDGE

Appearances:-

..... for the claimant(s)

..... for the respondent(s)

CC. Wamache