



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 82 OF 2015

FREDRICK ODHIAMBO CLAIMANT

VERSUS

KENYA SAFARI LODGES & HOTELS LTD..... RESPONDENT

J U D G M E N T

INTRODUCTION

1. The claimant was employed by the respondent from 6.12.1984 to 8.8.2014 when he resigned after rising through the ranks from a cashier to the General Manager. He brings this suit claiming arrears of his terminal dues that accrued from his long service to the respondent. It is the claimant's case that the dues paid to him after his resignation was less than his lawful entitlement and blames the respondent for wrongful calculation of the terminal dues.
2. The respondent admits that she employed the claimant as from 1984 to 8.8.2014 when he voluntarily resigned. She however avers that she correctly calculated the claimant's terminal dues at kshs.3,481,417.50 and the claimant accepted the same as full settlement of his terminal dues by signing a discharge voucher. She therefore denies the claim herein and describes it as an afterthought.
3. The case was heard on 8.6.2015 and 30.7.2015 when the claimant testified as CW1 while the respondent called Eunice Nzilani as RW1. Thereafter both parties filed written submissions.

Analysis and Determination

4. After carefully considering the pleadings, evidence and the submissions, it is clear that the claimant was employed by the Respondent on permanent basis in 1984 and worked continuously in various ranks until 31.3. 2013 when his terms of service was converted to fixed term contract of three years after being promoted to General Manager of the respondent. There is further no dispute that the claimant resigned from work on 8.8.2014 and thereafter signed a "settlement agreement" and a "discharge voucher" after which he was paid kshs. 3,481,417.50.m The issues for determination are:
 - a. Whether the signing of the settlement agreement and discharge voucher fully relieved the respondent from liability for any further claims by the claimant.
 - b. Whether the calculation of the claimants dues by the respondent was erroneous and in breach of the terms of their contract.

- c. Whether the court should recalculate the claimant's terminal dues.

Settlement agreement after separation

5. Cw1 admitted that he received the kshs.3,481,417.50 as part of his rightful debt and that he could not refuse his money. He further explained that he never agreed to forfeit the balance of his rightful dues. On cross examination by the defence counsel Cw1 contended that he verbally disputed the computation of his dues but he was told to go to court. That he had no option but to receive the dues calculated by the respondent due to financial stress.

6. Rw1 is the respondent's HR manager. She contended that after the claimant completed his clearance, the respondent calculated his terminal dues for the whole period of service broken into three phases. Phase one was the period Cw1 served as a unionized employee under a CBA. Phase two was the period he served in management status on permanent basis while phase three is when he was on a fixed term contract before his resignation. That the claimant accepted the dues as calculated by the respondent and acknowledged receipt of kshs.3,481,417.50 as full and final settlement of his terminal dues and discharged her from any further claims.

7. The claimants counsel has admitted that a discharge voucher has the force of a contract and binds the parties unless it is vitiated by duress or undue influence. In this case the claimant waited for his dues for 60 days and the respondent refused to listen to his request for the proper calculation of his terminal dues. That the claimant had no alternative but to take the money offered by the respondent due to her undue influence and duress.

8. He relied on the High Court Decision in *Muthaiga county club vs Simon Wachira Muhuro (2009)eKLR* where it held that the employee was the weaker party in a settlement agreement compared to the employer. He also relied on the Court of Appeal decision in *Thomas De La Rue (K) Ltd vs David Opondo Omutelema (2013)eKLR* where it was held that a discharge voucher *per se* cannot absolve an employer from statutory obligation and it cannot preclude this court from enquiring into the issue of whether the discharge voucher was freely and willingly executed

9. On the other hand the defence counsel has submitted that after the respondent computed the terminal dues the claimant signed on the workings in acceptance of the same. Thereafter the respondent prepared cheques in favour of the claimant and he collected the same after signing acknowledgement that the kshs.3481417.50 was full and final settlement and discharged the respondent from all his terminal dues for services rendered.

10. The counsel further submitted that the discharge voucher was a binding contract willingly signed by the claimant without any objection to the sum paid and with full knowledge that it was a binding document. She relied on a recent court of Appeal decision in *Trinity prime investment limited vs Lion of Kenya insurance company Ltd (2015) eKLR* where it was held that the execution of a discharge voucher constituted a complete contract and it fully discharged the appellant because the execution of the voucher was free of any misrepresentation, fraud or other vitiating factors.

11. In addition to the foregoing, the counsel submitted that the claimant neither pleaded undue influence or duress in his claim nor did he prove the same in evidence. She contended that parties are bound by their pleadings and urged the court not to interfere with the discharge voucher as prayed by the claimant. She relied on court of Appeal decision in *Southern Cross Company [SECO] vs David Anzani Ombeba [2015] eKLR* where it was held that there was no justification for the court to interfere with a matter where the parties have freely agreed.

12. The court has carefully considered the evidence and the submissions filed and especially the alleged signed computation of dues and the discharge voucher in issue. First, the computation of the dues was done unilaterally by the respondent and it does not appear to be a mutually negotiated agreement by the parties herein. That the claimant signed bellow all the signatories in a blank space and did not declare that the sum calculated by the respondent thereon was full and final settlement.

13. On the other hand the alleged discharge voucher was a letter by the respondent to the claimant dated 6.10.2014. The said letter enclosed four cheques for the aggregate sum of Kshs.3,081,417.50 being the final payment of the claimant's terminal dues. The letter required the claimant to acknowledge receipt of the enclosed cheques by signing on the space provided at the bottom of the letter which stated as follows:

"I..... acknowledge receipt payment of Kshs.3,081,417.50 (Three Million and Eighty one Thousands, Four Hundred and Seventeen and fifty Cents) being final payment of my terminal dues."

14. The question that begs for answer is whether the foregoing letter constituted discharge voucher with the effect of relieving the respondent of any further claim. On a balance of probability, this court finds that it was not, because there is no declaration on the letter that the claimant had fully discharged and waved any further claim against the respondent with respect to his terminal dues. As correctly submitted by both parties the agreement in the said letter amounted to a binding contract. Consequently the court's jurisdiction is only limited to interpreting the express terms of the agreement as it is and not to rewrite it.

15. This case is therefore distinguishable from *Trinity prime investment limited vs Lion of kenya insurance company Ltd [2015] eKLR* and *Southern cross Company(SECO) vs David Anzani Ombeba [2015] eKLR* because in the present case there is no formal settlement agreement and discharge Voucher waving and relieving the respondent of any further claims in respect of his terminal dues. Consequently the court's answer to the first issue for determination is in the negative. The submission by the defence that the claimant did plead that the settlement agreement and the discharge voucher were vitiated by mistake, misrepresentation, duress or undue influence is neither here nor there because there was never any settlement agreement or discharge voucher executed by the parties herein.

Was the calculation of the dues proper?

16. Cw1 contended that his entire period of service can only be divided into two phases. First, when he served on permanent basis between December 1984 and March 2013, and second, the period between April 2013 and August 2014 when he served under a fixed term contract. That he was entitled to terminal leave at the end of his service in the permanent employment at the rate of 1.75 days for each completed month of service plus gratuity at the rate of one month per year of service under clause 10.7.1 and 12 of the 2009 Terms and Conditions of service.

17. Basing the said benefits on the last salary of Kshs.287,000 the terminal leave and gratuity, according to Cw1, works to Kshs. 5,692,167 and Kshs.8,036,000 respectively. That under the fixed term contract, he was entitled to gratuities at the rate of 31% of the basic salary of Kshs.260,000 for each completed month of service which works to Kshs. 967,000. That he had 274 and 17 accrued annual leave days respectively for the two phases of his service which he calculated at Kshs.2,621,266.70 and Kshs.206,833 respectively. That due to resignation without notice Cw1 is willing to forfeit his salary for three months being Kshs.1,095,000 to leave a net of Kshs.16,428,266.70 as the correct separation dues payable to him. That after considering the payment of Kshs. 3,481,417.50 already paid, he now claims the balance of Kshs.12,946,849.20. He denied that the respondent's terms and conditions of service for July 2013 were applicable to him.

18. Rw1 however disputed the foregoing computation by Cw1 and contended that cw1 served under three phases and as such maintained that the computation of the terminal dues by the respondent in the sum of Kshs.3,481,417.50 was correct. She contended that under clause 10.7 of the 2009 terms and conditions of service, terminal leave was only available to the employee who served through the period of his resignation notice. That for the employee to benefit he must have served for at least 2 years continuously. She however admitted that cw1 was promoted to management position on 1.1.2000 and that the letter dated 8.12.2001 revised and rendered void all the other previous terms.

19. After carefully considering the evidence and submission before it, this court makes a finding that the calculation of the claimant's terminal dues by the respondent was not proper. That the respondent fell into error, first, when she ignored the letter dated 8.12.2001 and the 2009 terms and conditions of service and

broke the period of service into 3 phases including the period served as a non- management staff.

20. Her second error was when she ignored the 2009 terms and conditions of service and calculated the claimant's terminal dues based on the salary for 1999 when cw1 was serving under a CBA. The said letter and the 2009 terms and conditions of service clause 3.2 stated that:

"These terms and conditions of service shall supersede and render void any other contrary terms, contracts and agreements in force prior to the date of approval."

21. In respect of dues under the fixed term contract the court finds that the respondent did not award the claimant 31% of his one year salary as gratuity. Clause 9 of his letter of appointment entitled him to gratuity at 31% for each completed year of service. Clause 11 of the said letter allowed him to terminate the contract by a notice of 3 months or salary in lieu. The respondent relied on clause 7.9 of the 2013 Terms and conditions of service to deny the claimant gratuity. The said clause allowed payment of gratuity only to the employees who successfully completed their fixed term contracts. That was an error because under clause 15 of the letter of appointment, the said terms and conditions of service were only limited in relation to general matters which were not specifically agreed in the letter.

22. In addition to the fore going clause 7.8 of the 2013 terms and conditions of service provides that:

"The provisions of this document apply to management staff appointed on regular indefinite contract of employment that is the category referred to as 'permanent and pensionable'. Other staff appointed on fixed term contract (FTC) basis shall be subject only to the provisions of this document that may be specifically in their contract of employment"

Recalculation of terminal dues

23. In view of the foregoing finding that the calculation of the claimant's dues by the respondent was erroneous and incorrect, the court will interfere with the same. The court will do so by treating the period served on permanent basis as a single phase of continuous service and award gratuity based on the 2009 terms and conditions of service which was the contract applicable to the claimant upto 31.3.2013 when his first phase of his continuous service ended.

24. The court will however not award him terminal leave because such

benefit was only reserved to the employees whose termination is through resignation or retirement. In this case the claimant never resigned or retired by notice and served throughout the notice period. Clause 1.7 s copied below:

"An employee who gives notice of resignation/ retirement and serves the notice period given by him/ her as required will be eligible to terminal leave and other related benefits as stated in 10.7.1 below"

25.The court also recalculate his dues for the fixed term contract by awarding the claimant gratuity at 31% of the basic salary for the one complete year served between April 2013 and March 2014.

26.The dues are recalculated as follows:

Phase 1 (December 1984 - March 2013)

Accrued leave days were 274 x kshs.287000kshs.2,621,267

30

Gratuity for 28 years x kshs.214000 (basic pay).....Kshs.5,992,000

kshs.8,613,267

Phase 2 (April 2013 - March 2014)

Accrued leave days were 17 x kshs.365000.....kshs.206833

30

Gratuity, 31% of kshs.260000(basic pay) x12 months.....kshs.967000

kshs.1,173,833

Put together, the above dues total to kshs.9,787,100 less 30% tax= kshs6,850,970 less kshs.3,481,417.50 earlier paid = kshs.3,369,552.50 due and payable to the claimant.

Disposition

27. For the reasons stated above,judgment is entered for the Claimant against Respondent for the sum **kshs3,369,552.50** plus costs and interest.

It is so ordered.

Signed, dated and delivered at Mombasa this 27th day of November 2015

O.N. MAKAU

JUDGE