



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT NAIROBI
CAUSE NUMBER 1 OF 2008

BETWEEN

KENYA LOCAL GOVERNMENT WORKERS UNION.....1ST CLAIMANT

SIMON GITHIORA KARIUKI.....2ND CLAIMANT

VERSUS

SUB-COUNTY ADMINISTRATOR, THIKA

[KIAMBU COUNTY]..... RESPONDENT

Rika J

CC. Edward Kidemi

No appearance for the 1st Claimant

Mr. Simon Githiora Kariuki 2nd Claimant in Person

Mr. Kahonge instructed by Macharia Kahonge & Co Advocates for the Respondent

RULING

1. This dispute was referred to the Court by the Minister for Labour on 10th December 2007, under Section 8 of the repealed Trade Disputes Act Cap 234 the Laws of Kenya. The Court took cognizance of the dispute upon receipt of the statutory certificates from the Minister and the Labour Commissioner under Section 14[9] [e] and [f], on 8th January 2008.

2. The dispute was brought to Court in the name of the 1st Claimant Trade Union. The 2nd Claimant is a Member of the Union, and was the Grievant on whose behalf the Claim was instigated. Thika Municipal Council was then named as the Respondent. The Grievant was employed by the Council way back on 11th November 1980 as an Askari. His contract was terminated by the Respondent on 5th May 1993. He did not agree with the termination decision and approached his Union, which reported a formal dispute to the Minister on 14th July 1997.

3. The Minister invoked the dispute settlement procedure under the Trade Disputes Act, consulted A Tripartite Committee and appointed an Investigator. The Investigator found the Grievant was wrongfully dismissed and would have ideally merited reinstatement, but given that 15 years had lapsed from the date

of dismissal, recommended the Grievant be paid 10 months' salary in compensation and normal terminal benefits as per the Collective Agreement in place. The Claimant Union accepted the findings and recommendation, but the Employer rejected the report, resulting in the institution of the Court proceedings.

4. At the Court Hearing, the Claimant Union for the Grievant, prayed for two alternative prayers: reinstatement of the Grievant without loss of salary, benefits, privileges and continuity of service; or in the alternative, the Grievant is paid accumulated salary for the period out of employment from 1993 to 2008 at Kshs. 1,724,620, leave allowance at Kshs. 136,921, Leave traveling allowance at Kshs. 42,865, and Uniform allowance at Kshs. 40,000, total claimed at Kshs. 1,944,406.

5. The Respondent's position was that the Grievant's contract was terminated fairly and lawfully, under clause 29[ii][a] of the CBA which allowed either Party to terminate the contract through one month notice or one month salary in lieu of notice. He was paid one month salary in lieu of notice at Kshs. 27,791 which he accepted. Without prejudice to this, the Respondent took the position that if the Grievant was still in employment at the time of the hearing, he would be entitled to accumulated salary of Kshs. 965,000, house allowance of Kshs. 506,300 and leave allowance of Kshs. 54,873, total Kshs. 1,526,973.

6. In its Award dated 26th September 2008, the Court [Hon. Justice Charles P. Chemmutut, Members O.A. Wafula and J.M.Kilonzo] adopted the position that reinstatement would not be a reasonable remedy. Instead, and in the interest of justice, the Court allowed the Grievant the alternative prayer of Kshs. 1,944,406, less leave pay, leave traveling allowance, uniform allowance and Kshs. 27,791 paid the Grievant as notice pay. In total the amount of Kshs. 247,578 was deducted, and the Grievant received the amount of Kshs. 1,696,828.

7. The Respondent Council filed an application for Judicial Review at the High Court in Nairobi, J.R. Application Number 708 of 2008 seeking to quash the decision of the Industrial Court. The High Court delivered a Judgment [Hon. Justice Jeanne Gacheche], on 29th March 2011, declining to interfere with the decision of the Industrial Court.

8. The Grievant was paid the entire amount granted by the Industrial Court. He filed an application for review of the Award on 1st June 2013, in which he names himself as the 2nd Claimant and the Union as the 1st Claimant. The Union did not participate in the filing or prosecution of the application. He filed an amended application for review on 7th October 2013.

9. He claims he should be paid the following additional sums which were omitted by the original Court: Leave pay at Kshs. 9,565 for 15 years at Kshs. 143,475; 12 months' salary in compensation at Kshs. 114,780; service pay at 2 ½ months per every year worked at Kshs. 23,913; and damages at Kshs. 114,780 for 13 years at Kshs. 1,492,140. In total he seeks Kshs. 1,774, 308 from the Respondent. He also claims costs, interest and any other assistance the Court may find fit to grant.

10. The Respondent filed Grounds of Opposition on 10th January 2014. Its position is that the application for review is an abuse of the process; the 2nd Claimant has received all the money granted in the Award; his remedy lies in appeal; and the application has no merit. The 2nd Claimant and the Respondent agreed to have the application disposed of by way of written submissions, which are on record.

Upon careful consideration of the entire record, the Court Finds and Rules:-

11. Section 15 of the repealed Trade Disputes Act allowed the Court to remedy what was described as wrongful dismissal through reinstatement. The Court could, in addition to reinstatement or instead of reinstatement, order the Employer to pay to the Employee compensation capped at 12 months' salary. Where reinstatement was granted, compensation was restricted to the actual pecuniary loss suffered by the Employee. This Claim was initiated under the Trade Disputes Act.

12. The Trade Disputes Act was repealed through Section 84 of the Labour Relations Act 2007. This

provision states under Schedule 5, that all disputes on termination which arose prior to enactment of the Labour Relations Act, would be dealt with in accordance with the Trade Disputes Act.

13. The Trade Disputes Act granted the Court discretion under Section 15, to determine appropriate remedies in cases of wrongful dismissal. The Court exercised this discretion in determining that the bare payment of accumulated salary over a period of 15 years was an adequate redress. The Court was not obliged to order that the 2nd Claimant receives additional sums in compensation, terminal dues, costs and interest. It was perhaps the consideration of the Court that over the 15 years, the Claimant had rendered no labour to the Council, although not to blame for the termination. He was in the end paid the basic salary for every month, which he had not worked for. The Court balanced the interests of the Employer against those of the Employee, exercised its mind judiciously, and gave an Award which this Court cannot interfere with.

14. The application for review as argued by the Respondent is defective. The 2nd Claimant invoked the Industrial Court Act of 2011 which has no application in a dispute brought under the Trade Disputes Act. He relies on the Industrial Court [Procedure] Rules 2010, which did not regulate proceedings under the Trade Disputes Act. The proper procedural rules would be the Industrial Court [Procedure] Rules which existed before 4th May 2010, under Section 58 [1] of the Trade Disputes Act Cap 234 the Laws of Kenya.

15. The only way the Industrial Court could revisit its Award under the Rules made pursuant to the Trade Disputes Act, was through an application for rectification under Rule 20, or interpretation under Rule 21. The 2nd Claimant instead invoked the incorrect substantive and procedural laws in his application for review.

16. Other than these flaws the amended notice of review is drawn, signed and filed by Mrs. S. Kariuki. It was not made clear to the Court who this is, and in what capacity she drew, signed and filed the amended notice. The 2nd Claimant was not even a Party to the original Claim; he was a Grievant. The Court gave him the opportunity to amend his application after his Union refused to continue representation. He did not do a decent amendment job, introducing documents signed by a stranger.

17. Ultimately, the Court is satisfied that the Award on record was arrived at fairly, lawfully and legally. The application is without merit, and improperly before the Court. The Grievant ought to be satisfied with the sum of Kshs. 1,696,828, which was paid to him although he performed no work for the former Employer, during the period of 15 years when these salaries were deemed to fall due. Litigation ought to come to an end. The first Court exercised its discretion reasonably. ***The application for review is dismissed with no order on the costs.***

Dated and delivered at Nairobi this 27th day of June 2014

James Rika

Judge