



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF MOMBASA

(BIMA TOWERS)

CAUSE NO. 374 OF 2013

**(ORIGINALLY KISUMU HIGH COURT CIVIL CASE NO. 398 OF 2001 AND LATER
MOMBASA HIGH COURT CIVIL CASE NO. 412 OF 2002 AND CIVIL CASE NO. 29 OF 2008)**

GEORGE ASEY

CLAIMANT

V

MABATI ROLLING MILLS LTD

RESPONDENT

JUDGMENT

1. George Assey (Claimant) was employed by Mabati Rolling Mills Ltd (Respondent) as a Commercial Assistant effective 1 July 1983 though the letter of appointment dated 15 January 1985. He was later promoted to Personnel and Administration Officer on revised terms and conditions of employment from 1 January 1998.
2. The Claimant's case is that on or about 28 November 2000 he was summoned by the Respondent's Executive Director and coerced into writing a retirement letter (referred to in pleadings as resignation letter).
3. The Claimant wrote a resignation letter on the same date. The resignation letter made reference to a meeting on 27 November 2000. This was apparently after complaints by local politicians within the locality where the Respondent's plant was situated. The Executive Director through a letter dated 30 October 2000 accepted the retirement effective 4 December 2000 (there must have been typographical errors in the letters).
4. On 27 July 2001 the Claimant wrote a letter to the Respondent's Chairman claiming he had been forced into retirement and asking him to look into the matter with a view to getting better compensation.
5. The Claimant appears to have been dissatisfied with the circumstances of the separation and on 29 October 2001 he filed a Complaint before the Kisumu High Court seeking various damages for breach of contract and costs.
6. The Respondent was served and on 12 November 2001 it filed a Defence denying breach of contract and stating that the Claimant retired voluntarily and was paid Kshs 899,170/- as terminal benefits and an *ex gratia* of Kshs 140,054/- (there was another Defendant but it is unnecessary to discuss the Defence he filed as the case against him was ultimately withdrawn).
7. By consent of the parties filed in Court on 14 June 2002, the suit was transferred from the High Court in Kisumu to the High Court in Mombasa.
8. On 29 October 2013 Kasango J ordered that the suit be transferred to the Industrial Court. Upon the transfer, the Claimant, on 5 December 2013 sought leave to amend the Statement of Claim. The Court granted the leave.
9. On 10 December 2013 the Claimant filed a Memorandum of Claim but this was subsequently

- withdrawn on 7 April 2014 when it was brought to the attention of the Court that an Amended Plaintiff had been filed on 20 December 2013. The Respondent filed an Amended Statement of Defence on 22 January 2014.
10. In the Amended Plaintiff, the Claimant's cause of action was maintained as breach of contract and he sought special damages amounting to Kshs 8,258,000/-.
 11. At the time that the cause of action arose, a different statutory regime in respect to the employment relationship obtained. At that time, an employer could dismiss an employee at will or without cause provided that notice or damages equivalent to the notice period as provided for in the contract document (or reasonable notice) was given.
 12. Decisions such as *Nyaga Kabute v Kirinyaga County Council*, Civil Appeal No. 29 of 1985, *Rift Valley Textiles Ltd v Edward Onyango Oganda*, Civil Appeal No. 27 of 1992 and *Kenya Ports Authority v Silas Obengele* (2008) eKLR made it clear that what flows from wrongful termination is only damages according to the terms of the contract and no more.
 13. The security of tenure given ordinary employees by sections 41 and 45 of the Employment Act, 2007 was not part of the statutory regime in place then.
 14. The Claimant's contentions as to the circumstances under which he retired have not been controverted in any material way by the Respondent. The Respondent did not bring forth any facts to suggest otherwise. A meeting was held with local leaders and the issue of employment was put on the agenda. The minutes/notes produced show the Claimant was part of the discussions. Soon thereafter, the Claimant tendered his resignation. This is after the Respondent's Executive Director asked him to resign after initially informing him he would be given a letter of termination. He even wrote to the Respondent's Executive Chairman complaining about the circumstances of the retirement and compensation.
 15. What is clear is that the Claimant retired under what appear to have been circumstances beyond his control. The Court is satisfied that the retirement of the Claimant was not voluntary.
 16. The Court also observes that the Respondent opted not to call any oral testimony.
 17. The Court will therefore discuss the reliefs/damages sought by the Claimant and whether the same are sound in the contract the parties had, customs and practices of the Respondent, the law applicable at the time and any promises made.

3 months salary in lieu of Notice

18. The Claimant sought the equivalent of 3 months' salary in lieu of notice. The Respondent contended that he was not entitled to the 3 months salary in lieu of notice.
19. The Claimant was serving under a written contract. The contract provided for the giving of 30 days written notice or payment of 30 days pay in lieu of notice.
20. The Claimant produced and sought to rely on the payment of 2 months pay in lieu of notice to one Francis Oloo Odhiambo.
21. The circumstances under which the said Francis Oloo Odhiambo left the Respondent and what were the terms of his contract was not disclosed.
22. The Court finds that the Claimant was entitled to the equivalent of 30 days salary in lieu of notice.

Loss of Gratuity of 2 months for each year of service

23. The Claimant under this head sought Kshs 1,989,000/-. The Claimant produced his pay slip for December 2000 which indicated that he had been paid gratuity of Kshs 200,000/-.
24. The Claimant's original letter of appointment did not provide for payment of gratuity. Clause 5(c) provided for payment of accrued terminal benefits, if any upto the date of termination.
25. On promotion to the position of Personnel and Administration Officer, the terms and conditions of service of the Claimant were revised. Clause 8(c) had a similar provision to clause 5(c) of the initial contract on accrued terminal benefits.
26. There was no explicit reference or provision for payment of gratuity. The Claimant sought to base this claim on the Collective Bargaining Agreement entered into between the Respondent and Kenya Engineering Workers Union.

27. The Claimant did not produce any evidence that he was a member of the named Union or that he was unionisable.
28. The Claimant did not draw the attention of the Court to any statutory provision at the material time which would have incorporated the terms of a Collective Bargaining Agreement into his relationship with the Respondent.
29. The Court is of course aware that sections 57(1) and 59(1)(b) of the Labour Relations Act appear to contemplate the terms and conditions of employment agreed in Collective Bargaining Agreement apply to all unionisable employees rather than to employees who are actually union members. But it is not necessary for the Court to determine or even discuss the exact limits of those provisions here.
30. The Claimant's contract did not provide for payment of gratuity. The final dues he was paid included Kshs 200,000/- particularized as gratuity. The Respondent did not explain on what basis it paid the gratuity which was not part of the written contract.
31. The Claimant's unchallenged evidence was that the Respondent's Executive Director had promised he would be paid gratuity at the rate of 30 days wages for each completed year of service.
32. Because this evidence was not controverted, the Court would give the benefit of doubt to the Claimant and find that he was entitled to gratuity at the rate of 30 days pay for each year of service, based on a promise by the Respondent's Executive Director, Mr. Khaterpal.
33. At the time of retirement, the Claimant was earning a monthly wage of Kshs 58,500. For the 17 years served he would be entitled to Kshs 994,500/- gratuity. From this amount, the sum of Kshs 200,000/- already paid should be deducted leaving a sum of Kshs 794,500/-.

Loss earnings and benefits upto retirement age

34. No contractual or statutory basis for this claim was laid. The Claimant only based the claim on the ground that he was forced to retire at 51 years old while the retirement age at the material time was 55 years.
35. In the written submissions, the Claimant indicated that he was abandoning this prayer.

Ex gratia payment of Kshs 351,000/-

36. The Claimant pleaded that his Assistant was paid *ex gratia* equivalent to 6 months wages. He produced a computation of the said Assistant's final dues which show that he was paid Kshs 409,200/- on account of *ex gratia*.
37. The contract document produced did not provide for payment of *ex gratia*. *Ex gratia* as the name suggests is paid at the discretion of the person paying. It cannot be a right.
38. The Claimant has not demonstrated that there was a certain, notorious and reasonable practice by the Respondent to pay *ex gratia* to retiring or terminated employees and what was the applicable formula.

Loss of discriminatory grading

39. The Claimant under this head sought Kshs 2,735,000/-. His case was that from 1 January 1998 the Respondent had adopted a new salary grading and that on promotion to Personnel and Administration Officer he should have been placed on Grade 5E. To support this contention the Claimant produced Respondent's Guidelines for Local Staff Salaries and Benefits from 1 January 1999.
40. The Claimant's letter of revised terms and conditions did not indicate his grade or category. He signed the same to signify his acceptance of the salary and benefits offered.
41. No material has been placed before Court to prove this claim. The Court notes that the Claimant in the written submissions indicated he was abandoning this claim (the Court therefore need not address why it admitted the exhibit 7).

Transportation of personal effects to home of origin

42.No contractual or statutory basis for this head of claim was given and it is dismissed.

Conclusion and Orders

43.From the foregoing, the Court finds and holds that the retirement of the Claimant was not voluntary and further that the Respondent made a promise to pay him gratuity and awards him and orders the Respondent to pay him

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|---------------------------------------|----------------|
| a. One month salary in lieu of Notice | Kshs 58,500/- |
| b. Gratuity for 17 years | Kshs 794,500/- |

TOTAL	Kshs 853,100/-
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44.The claims for loss of earnings and benefits upto retirement, ex gratia payment, loss of discriminatory grading and transportation of personal effects are dismissed.

45.The Claimant to have costs.

Delivered, dated and signed in open court in Mombasa on this 20th day of June 2014.

Radido Stephen

Judge

Appearances

For Claimant	Mr. Kisa
instructed by S.O Oguk & Co. Advocates	

For Respondent	Ms.
Mango instructed by C B Gor & Gor Advocates	