



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA

AT MOMBASA

CAUSE NO. 218 of 2013

KATIWA KANGULICLAIMANT

VERSUS

BAMBURI CEMENTRESPONDENT

J U D G M E N T

INTRODUCTION

This is a claim about underpayment of the claimants employment terminal dues by the respondent. The claimant served as a unionized employee for 8 years (1976 to 1984) and when he was promoted to a management position which he served for 25.7 years when he retired on 30/6/2010. He was paid lumpsum pension and he continues to receive monthly pension in respect of the period he served in the management capacity.

His contention, however which is the basis of this case is that he was underpaid with respect to the gratuity payable for the period he served as a unionized staff. According to him, his gratuity should have been calculated on the basis of the salary and the CBA in force at the date of his retirement.

The respondent has denied liability and maintained that the claimant was paid all his gratuity for period worked between 1976-1984 to which he acknowledged by signing a discharge voucher in addition to the pension for the period served as management staff between 1984 and 2010. The respondent further denied that the claimants' gratuity ought to have been calculated using his salary at the time of retirement and maintained that only the salary of 1984 was applicable. The suit was disposed off by way of written submissions after the parties narrowed down the issue for determination to one namely, whether the claimant's gratuity was underpaid using erroneous calculations.

CLAIMANT'S SUBMISSIONS

The the claimant admitted that he was paid Ksh.2,372,732 as gratuity for the 8.3 years served in the capacity of unionized staff. The claimant does not however know how that figure was calculated but only guessed it was done using Treasury Bill Rates. It was contended that the said sum was too little because it was not based on the CBA in force at the time of retirement. He maintained that his colleague Mr. Mungala Tofa who retired in 1995 was paid his gratuity based on the CBA in force at the time of retirement in 1995. Going by the formula under the CBA of 2010, the claimant would have been paid ksh.191,00X2.5 monthsX8.3 years served = 3,963,250. The foregoing figure is more than the gratuity paid by Ksh.1,590,518. He relied on this court's decision in **ICC NO. 87 OF 213 DIDAS TOM OKEMWA vs BAMBURI CEMENT.** and prayed for judgment in the sum of ksh.1,590,518 being the

underpaid gratuities.

RESPONDENT SUBMISSIONS

The respondent submitted that the claimant was not unionized staff in 2010 when he retired and as such the CBA in force then did not apply to him. He further submitted that the claimant could not derive any benefit from the CBA because he was in management position. Doing so would be to benefit him twice since he was paid pension and continues to receive monthly pension.

In addition to the foregoing, the respondent submitted that the claimant received the payment of gratuity and executed a discharge voucher acknowledging the payment as full and final settlement and promised thereby not to raise any further claim in future. Consequently, according to the respondent the claimant is *estopped* from raising the present claim for underpaid gratuity.

ANALYSIS AND DETERMINATION

Upon careful reading of the pleadings and the submissions filed the following issues arose for determination.

- a. **Whether the claimant gratuity for the period between 1976-1984 was underpaid through erroneous calculations**
- b. **whether the claimant is estopped from bringing this suit.**
- c. **Which orders should issue.**

UNDERPAID GRATUITY

The claimant believes he was underpaid because the sum paid was not calculated based on his basic salary at the time of retirement and secondly because it was based on the Treasury Bill Rates instead of the formula provided for under the CBA in force at the time of his retirement.

The respondent has denied the claimant's contention and maintained that since the claimant was no longer a unionized employee, the CBA in force at the time of his retirement was not applicable to him and he could not derive any benefit from it. The respondent produced the calculation of the sum of gratuities paid which was based on the Treasury Bill interest. The sum was calculated for the period between 28/4/1976 and 15/8/1994 (8.33 years) at the rate of 2.5 months per year multiplied by the basic wages then of Ksh.3600. The total gratuities earned for the period was ksh.74,970 which based on the Treasury Bill Average interest rate the gratuity increased to ksh.2,282,974.32 as at the date of retirement.

The respondents calculations is not founded on the letter transferring the claimant to the management position. It appears to be based possibly on company policy or practice rather than any express or implied term of the contract of service. The court has noted from the documents filed by both parties that the claimant had meetings with the respondents representatives and the Actuary and he voluntarily accepted the payment as calculated in full settlement of his gratuity. The said process took quite some time before it was completed.

Without any other evidence to support the claimant's alleged formula of applying the basic salary as at the time of retirement, the court has no other option than to agree with the respondents contention that the basic salary applicable in calculating gratuity is that of the time the employee ceased to be unionized. Consequently, without any express or implied contract that, part of the CBA in force at the time of retirement shall apply in calculating gratuity, the claimant cannot derive any benefit from the CBA. The court is therefore persuaded that the formula by the defence is not only rational and making sense, but also, fair to both parties in the circumstances.

In view of the foregoing finding, the court sees no point of considering the issue of estoppel as advanced by the defence since the suit has already collapsed.

DISPOSITION

The suit is without merits and it is dismissed. With no order on own costs.

It is so ordered.

Dated, Signed and delivered this 20th June 2014

O. N. Makau

Judge