



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 22 of 2012

MUTHURI MAGIRICLAIMANT

-VERSUS-

VALLEY BAKERY LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 12th April, 2013)

RULING

The court made its final decision in this matter by the ruling delivered on 25.03.2011. The orders of the court were as follows:

- 1. That the termination of the claimant's employment was justified.**
- 2. That the claimant's dismissal is hereby reduced to normal termination.**
- 3. That the claimant be paid the following terminal dues as per clause 4 of the parties' Collective Bargaining Agreement:**
 - a) three(3) months pay in lieu of notice;**
 - b) salary plus overtime for the 26 days worked in June 2009;**
 - c) prorata leave pay for six months worked in 2009; and**
 - d) twenty one (21) days for each of the twelve(12) years of service registered by the claimant.**
- 4. That each party bear its costs of the suit**

Parties have disagreed on the amount of money due under order 3 hence they have both made submissions to justify their respective quantum of the amount payable.

The order is clear that the terminal dues payable are as per clause 4 of the parties' Collective Bargaining Agreement. The clause states as follows:

“CLAUSE 4: TERMINATION OF EMPLOYMENT

Notice

i. On completion of probationary period of three (3) months, it shall be obligatory for both the company and the employee to give in writing notice of termination of employment, such notice shall be given according to the length of service as follows:

- Under one (1) and up to five (5) years service – One (1) month.
- Over five (5) and up to ten (10) years service – Two (2) months.
- Over ten years service – Three (3) months

ii. The notice of termination of employment may be given on any day of the month by either party, and in lieu thereof, either party may pay to the other, the equivalent sum of money as would have been earned during the notice period.

Terminal Dues and Benefits

Any employee whose services are terminated by the company or who resigns by giving proper notice shall be paid terminal dues and benefits in addition to notice under paragraph 4(a) above as follows-

1. Dues

- i. Days worked and not paid for.
- ii. House allowance for days worked and not paid for.
- iii. Overtime payment due if any.
- iv. Acting allowance if any.
- v. Safari allowance if any.
- vi. Pro-rata or accrued annual leave earned during the period of employment but not taken as at the date of termination.
- vii. Leave travelling allowance on pro-rata basis to the accrued annual leave.

2. Benefits

Twenty-one (21) days pay for each completed year of service based on the rate of earnings (salary less allowances) at the time he/she ceases to be an employee of the company.”

In view of the provisions of Clause 4, the court makes the following findings:

1. As for the three months pay in lieu of notice, it is plainly agreed that the claimant is entitled to, “...the equivalent sum of money as would have been earned during the notice period.” The parties have agreed to a gross sum and not the basic sum that would have been earned over the three months. Where parties intended to exclude allowances such as under the last paragraph in Clause 4 quoted above on benefits, they have done so expressly. On payment in lieu of notice their intention is not in doubt and the court finds the claimant is entitled to **Ksh.64,328.70** at the rate of Ksh.21,442.90 gross monthly salary.

2. For salary plus overtime for the 26 days worked in June 2009, it is the finding of the court that since the claimant worked for the 26 days, his pay must be a function of his monthly agreed gross pay. Taking

his gross pay at Ksh. 21,442.90, the court finds he is entitled to **Ksh.18,583.80** for the 26 worked days. As for overtime, the claimant has submitted that there was no fixed rate. The respondent has submitted that under clause 21(iii) the entitlement was 15% of the basic pay due every month in view of the overtime. The court has considered the submissions, perused the collective agreement and finds that the claimant is entitled to the 15% of his basic pay of Ksh.11,456.87 which makes **Ksh.1718.53**.

3. On pro-rata leave pay for six months worked in 2009, the respondent did not submit on this point. The claimant submitted that the entitlement is half of the gross monthly pay. The court agrees. The test is, had the claimant taken the leave, what would have been the amount due to the claimant for the paid annual leave? The answer is that the pay would be the gross pay. Accordingly, the claimant is entitled to **Ksh.10,721.45** as submitted for the claimant.

4. On twenty one (21) days for each of the twelve (12) years of service registered by the claimant, Clause 4 stated, **“Twenty-one (21) days pay for each completed year of service based on the rate of earnings (salary less allowances) at the time he/she ceases to be an employee of the company.”** It is clear that the basic salary excluding the allowances is the base for the computation. The court finds that the claimant is entitled to **Ksh.96,306.00** as submitted and computed by the respondent.

5. Under the order the court finds that the claimant is entitled to a sum of Ksh.191,658.48 less the undisputed amount paid of Ksh.118,001.00 making Ksh.73,657.48.

In conclusion, the respondent shall pay the claimant **Ksh.73,657.48**.

Signed, dated and delivered in court at Nakuru this Friday, 12th April, 2013.

BYRAM ONGAYA
JUDGE