



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAKURU
CAUSE NO. 72 OF 2013

JACKSON NGURE GATHUKA.....CLAIMANT

-VERSUS-

TIMSALES LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 19th July, 2013)

JUDGMENT

The claimant **Jackson Ngure Gathuka** filed the memorandum of claim on 27.03.2013 through Ikua, Mwangi & Company Advocates. The claimant prayed for special damages of Kshs.2,090,365/= being the difference between the alleged actual gratuity of Kshs.2,190,115/= and the amount paid of Kshs.99,750/= as paid. He also prayed for general damages, costs of the suit and interest.

The respondent's memorandum of defence was filed on 16.05.2013 through A.O. Ambenge of the Federation of Kenya Employers. The respondent prayed that the claimant's case be dismissed with costs.

The case was heard on 13.06.2013 when the claimant gave evidence to support his case. The respondent urged its case on the basis of the documents on record.

The claimant was employed by the respondent on 12.05.1975 then as a machine operator and retired on 24.08.2012 as Head of Department – Production. Upon retirement, he was paid all his dues including pension and gratuity. The total amount of his final dues paid was Kshs.674,773/= as per exhibit 4 on the memorandum of defence. Upon payment, the claimant signed the final settlement dated 07.09.2012 being exhibit 5 on the memorandum of defence. The final settlement signed by the claimant stated that he received the pay in full and final settlement from the respondent and further stated, **“I hereby state that there is no any other claim against Timesales Limited, Sokoro Sawmills, Sokoro Fibreboards, Sokoro Plywoods and Amalgamated Saw/ Mills, Njoro and have left the Company in good health with no claim on casualty reported.”** The claimant was also paid a sum of Kshs.1,022,199/= from the provident fund and was entitled to the National Social Security Fund's payment of the dues as contributed over his long service of 37 years.

By the letter dated 23.02.1998 being exhibit 1 on the memorandum of defence, the claimant was promoted from the unionisable cadre to the management staff cadre effective 1.03.1998. At retirement, his gratuity was computed using Kshs.6,500/= being his monthly salary as at promotion from unionisable cadre to management staff. Clause 16 (a) of the collective agreement being exhibit C1 stated that, **“On**

completion of four years' service with an employer with effect from 1st July 1977 an employee shall be entitled to nineteen (19) days pay for each completed year of service to be based on the employee's wages at termination of service."

After retirement, the claimant visited the District Labour Office and he received what in his understanding was a great enlightenment that the computation of his gratuity on the basis of the salary at promotion in 1998 was erroneous because his employment had terminated upon retirement and he ought to have been paid a sum computed on the basis of the salary at retirement being Kshs.81,000/= and now being the subject of the claim in this case.

The first issue for determination is whether the claimant was barred from suing in view of the execution of the final settlement discharging the respondent from any further liability. The respondent invoked the holding in **Kenya Union of Commercial Food and Allied Workers Union –Versus- Kenya National Library Services, Industrial Cause No. 494 of 2011** , where the court upheld the opinion that where an employee signs a discharge the court cannot permit the reopening of the matter. The claimant submitted that as held in **Ramokia Housing Co-operative Limited –Versus- George Kuria Mwaura & 2 Others (2012) eKLR**, the court is now enjoined by Article 159 of the Constitution and sections 1A and 1B of the Civil Procedure Act to dispense substantive justice without undue regard to technicalities.

The court has considered that the final settlement was signed by the claimant of his own free will and it was a valid and binding agreement between the parties. The court further finds that the final settlement was a binding agreement and not a mere technicality and it was not a procedural aspect in administration of justice as submitted for the claimant. Far from such submission, it was a substantive agreement defining the rights and obligations of the parties. It did not offend any constitutional or statutory provision and the court finds that it was binding upon both parties as it operated as a bar for the claimant to file this suit.

The next issue for determination is whether the computation for the gratuity under the collective agreement was unfair. The court has considered the circumstances of this case and finds that the relevant clause in the collective agreement referred to computation thus, **"...based on the employee's wages at termination of service."** In the opinion of the court, termination of service meant the coming to an end of the service under the collective agreement and in the case of the claimant that service terminated upon promotion to management staff in 1998. Ideally, he ought to have been paid the gratuity dues in 1998 when that service terminated but as parties remained in the employment relationship, it was paid at the final separation upon the claimant's retirement. There is no allegation that the payment was demanded for by the claimant and denied by the respondent prior to retirement and after the promotion. The court finds that the respondent acted within the collective agreement and the claimant's illusory enlightenment at the District Labour Office was unjustified as was unfounded.

In conclusion, judgment is entered for the respondent against the claimant for dismissal of the memorandum of claim with costs.

Signed, dated and delivered in court at Nakuru this Friday, 19th July, 2013.

BYRAM ONGAYA

JUDGE

