



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT NAIROBI

CAUSE NUMBER 988 OF 2011

BETWEEN

GABRIEL NGUGI NDUMBU

..... CLAIMANT

VERSUS

GAICHANJIRU CATHOLIC HOSPITAL

..... RESPONDENT

Rika J

CC. Elizabeth Anyango

Mr. Nyabena instructed by Nyabena Nyakundi & Company Advocates for the Claimant

Mr. Njoroge instructed by Kibatia & Company Advocates for the Respondent

ISSUE IN DISPUTE: GRATUITY/ SERVICE PAY

DATE CLAIM WAS FILED: 22ND JUNE 2011

DATE PROCEEDINGS CLOSED: 18TH FEBRUARY 2013

DATE OF DETERMINATION: 12th July 2013

AWARD

1. The Claimant was employed by the Respondent as Assistant Maintenance and Driver on 1st April 1994, at a basic salary of Kshs. 3,407. His contract was terminated by the Respondent on 30th October 2010. The Claimant has no issue with the manner of termination. His Claim is that he was not paid the correct service/gratuity pay. He was paid Kshs. 48,020 instead of Kshs. 78,196. He claims the difference of Kshs. 30,896. Parties agreed to have the issue determined on the strength of submissions, which the Parties have placed on the record.

2. The Claimant explains that the shortfall arose because the Respondent adopted the basic salary, rather than the gross salary paid monthly to the Claimant, as the base rate. Secondly, computation was based on 15 days' salary for each completed year of service, rather than 16 days' salary. Thirdly, the amount paid

to the Claimant was based on 30 working days, instead of the normal limit of 26 days a month.

3. The Respondent answers that any service/ gratuity paid to the Claimant, was made in error. The Claimant was subscribed to the National Social Security Fund [N.S.S.F]. He was not eligible to be paid service/ gratuity by virtue of Section 35 [6] [d] of the Employment Act 2007 which exempts employees under the N.S.S.F, from receiving service/ gratuity pay. The Respondent counterclaims the amount of Kshs. 48,020 paid to the Claimant as service/gratuity.

4. In responding to the counterclaim, the Claimant states that the Respondent aims at intimidating the Claimant from pursuing his rightful balance of terminal dues. The Respondent offered the Claimant gratuity, and cannot be allowed now, to renege, and make demands on the Claimant.

The Court Finds and Awards-:

5. The Claimant appears to have left employment consensually, after working for 14 years as Artisan Maintenance. The Respondent offered to pay him, and he received gratuity payment of Kshs. 48,020. This consensual exit package was calculated at 15 days' salary for every year completed in employment, based on the last basic salary earned by the Claimant. There is nothing shown in the contract or the law to which the Parties were subject, that required the Respondent to pay to the Claimant 16 days' salary for every completed year of service. There is similarly nothing in law that compels Parties to a consensual disengagement, to adopt the gross salary rather than the basic salary, in crafting the terms of disengagement. The Court does also not see any prejudice suffered by the Claimant in the adoption of 30 days instead of 26 days, in calculating the service/ gratuity. This payment was made in addition to the pension benefit accruing under the N.S.S.F. The Respondent argues, and this is technically correct, that the Claimant would not ordinarily have been entitled to service/gratuity under Section 35 of the Employment Act 2007. However, this was a consensual termination, in which Parties gave concessions, and limited their rights and obligations, as they deemed suitable to amicable separation. They cannot come later to this Court, and unsettle the consent dated 1st November 2010, which is titled 'clearance certificate.' This is not a case where it is suggested that termination was anything but consensual. Unless it was to be shown to this Court that what was agreed was loudly below the minimum employment standards, the Court has no reason to intervene. Parties should therefore let the matter rest, and move on with their respective lives. *It is hereby ordered-:*

[a] The Claim and the Counterclaim are rejected.

[b] Parties to meet their respective costs.

Dated and delivered at Nairobi this 12th day of July 2013

James Rika

Judge

