



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA
CAUSE NO. 1394 OF 2010

LEONARD K. MUDAVAD.....1ST CLAIMANT
JULIUS G. GACHOKI2ND CLAIMANT
ESTHER NJOKI.....3RD CLAIMANT
RICHARD M. KINYUA4TH CLAIMANT

VERSUS

THE MANAGING TRUSTEES OF
THE INSURANCE TRAINING & EDUCATION
TRUST (COLLEGE OF INSURANCE).....RESPONDENT

JUDGMENT

By a Memorandum of claim dated 8th November 2010 the Claimants Leonard K. Mudavadi, Julius G. Gachoki, Esther Njoki and Richard M. Kinyua filed this claim against the Managing Trustees of the Insurance Training & Education Trust (College of Insurance) alleging wrongful and unfair termination of their employment. They were employed by the Respondent as follows.

1st Claimant Leonard K. Mudavadi was employed on 4th January 2000 and terminated on 6th April 2009.

The 2nd Claimant Julius Gachoki was employed on 7th August 2001 and terminated on 6th April 2009.

The 3rd Claimant Esther Njoki was employed on 31st January 2002 and terminated on 6th April 2009.

The 4th Claimant Richard M. Kinyua was employed on 1st March 1996 and terminated on 30th June 2010.

The claimants pray for the following;

1. LEONARD KARAN MUDAVADI

- | | |
|------------------------------|--------------------|
| a. Days worked in April 2009 | Kshs.4,924.90. |
| b. Accrued Housing allowance | Kshs.213,832.00. |
| c. Accrued overtime worked | Kshs.1,077,313.60. |
| d. Medical claim, March 2007 | Kshs.7,875.75. |

e. Accrued annual leave	Kshs.94,465.00
f. Accrued leave allowance	Kshs.12,000.00
g. Severance pay	Kshs.155,134.00
h. Two months pay in lieu of notice	Kshs.40,896.30.
i. Maximum Compensation	Kshs.245,377.80.

TOTAL Kshs.1,852,819.60

2. JULIUS GATE GACHOKI

a. Days worked in April 2009	Kshs.7,406.00
b. Accrued Housing allowance	Kshs.308,134.40
c. Accrued annual leave	Kshs.69,901.05.00
d. Accrued leave allowance	Kshs.6,000.00
e. Severance pay	Kshs.181,462.00
f. Two months pay in lieu of notice	Kshs.61,504.30
g. Maximum compensation	Kshs.369,025.80

TOTAL Kshs.1,003,434.40

3. ESTHER NJOKI

a. Days worked in April 2009	Kshs.3,715.00
b. Underpayments	Kshs.21,532.00
c. Accrued Housing allowances	Kshs.132,161.80
d. Accrued Overtime worked	Kshs.481,156.10
e. Accrued Annual Leave	Kshs.15,890.65
f. Accrued Leave Allowance	Kshs.16,000.00
g. Severance pay	Kshs.91,019.00
h. Two month pay in lieu of Notice	Kshs.30,859.40
i. Maximum compensation	Kshs.185,099.40

TOTAL KSHS.977,424.35

4. RICHARD M. KINYUA

a. Accrued Housing allowance (15%)	Kshs.1,127,710.80	
b. Overtime worked 21,22,23,24,27,28,29&30 Dec. 2009	Kshs.57,170.85	
c. Accrued Leave allowance for year 2007	Kshs.4,000.00	
d. Accrued Acting Allowances	Kshs.320,000.00	
e. Two months salary in Lieu of Notice	Kshs.178,029.20	
f. Maximum compensation (12 months)		Kshs.1,068,175.20
TOTAL AMOUNT	<u>Kshs.3,882,746.85</u>	

The Respondent filed their Reply to the Claim on 21st December 2010 and a supplementary Reply on 4th February 2011 in which it admits the Claimants were its employees but denies that they were unfairly terminated or that they are entitled to the demands in the claim. The Respondent avers that the contracts of the claimants were terminated in accordance with the law, that they were paid in lieu of notice and that they were accorded a fair hearing in accordance with the law. The Respondent further avers that all the claimants were paid their full terminal benefits. The Respondent prays that the claim be dismissed with costs.

The parties appeared in court for hearing on 14th March 2011 before Justice E.K Mukunye (retired) when the hearing was rescheduled to 26th April 2011. Thereafter parties appeared in court severally but the case did not take off until 13th January 2012 when by consent the parties referred the dispute to

conciliation by the Nairobi Provincial Labour Officer. The Labour Officer was to consult the parties, peruse the pleadings, hold conciliation hearing and thereafter prepare a report containing findings and recommendations for settlement of the dispute within 30 days. The conciliation report was filed in court on 29th March 2012. The findings and recommendations were as follows.

FINDINGS

Subsequent to the submissions made by the parties the following was noted in regards to the claimants' prayer:

Common claims

1. Payment in lieu of Notice

Other than Esther all the other employees were paid one month's salary in lieu of notice which complied with the Employment Act 2007 and their individual contracts with the Respondent.

Esther was paid 7 days wages in lieu of notice, contrary to the provisions of the employment Act 2007 Section 35(1), whereby she would have been due one month's salary on account of the period after which she earns her salary.

2. Accrued Housing Allowance

The employment contract between the Respondent, Leonard and Julius was specific in that they were both earning a consolidated salary, which did not fall below the stipulated minimum consolidated wages.

Esther's contract with the respondent, however only gave a wage per month and specifically stated no other benefit was inclusive in the stated wage of kshs.13,413.00.

Richard was earning Kshs.77,404.00 per month, and the written contract with the Respondent did not reveal a housing allowance element, although his earnings were over and above the stipulated consolidated minimums.

3. Leave Travelling Allowance

It was established that the Respondents contract with Leonard and Julius provided for a leave allowance of Kshs.2,000 per year. Richard's contract stipulated a leave allowance of Kshs.1,200 which was enhanced over the years to Kshs.4,000 per year. Esther's contract with the Respondent gave her 20 consecutive days as annual leave but omitted to grant her leave travelling allowance.

The respondent's contention that leave travelling allowance is not payable is contrary to the practice and the individual written contracts.

4. Compensation for wrongful termination

The communication from the Respondent terminating the services of all the four claimants does not reveal the reason leading to separation. Deliberations of two disciplinary committee meeting held on the 28th November, 2008 and the 25th February, 2009 revealed the following;

Leonard was accused of gross insubordination of failing to fill in his appraisal forms, so was Julius. The committee recommended that their services be terminated with immediate effect on the 25th bebruary 2009.

Esther was accused of having taken a cake, fork and knife out of the premises without a gate pass, and engaging in business that was in conflict with her employment. Similarly the committee recommended

the immediate termination of her services on the 25th February, 2009.

There was no indication of the reason leading to Richards termination of services nor minutes to indicate he was subjected to the proceedings of the disciplinary committee. It should be noted that the alleged offences leveled against the first three claimants would result in the summary dismissal of their services without notice or less than that applicable.

That the disciplinary committee's minutes do not indicate the claimants presence in the meeting, nor are they represented by either a union or fellow employee when the charges are leveled as stipulated by the Employment Act 2007.

Other Claims

5. Wages for days worked

This claim is raised by the first 3 claimants for the six days worked in the month of April 2009. The submissions indicate that the three (3) claimants received payment for the same.

6. Accrued Overtime

The management has an elaborate overtime recording form which takes into account the number of hours worked as overtime in a particular day. The same is certified by the immediate supervisor and approved by the Section Head.

Only the first claimant availed copies of the above stated forms, which however were not approved by the head of section. The respondent is further on record doubting the authority of the submitted forms.

7. Accrued Leave

The first three claimants raised a claim on outstanding leave not taken, and the records availed established that the claimants on separation with the respondent were paid as follows;

1. Leonard – 7 days
2. Julius – 7 days
3. Esther – 6 days

Leave records were perused for the period of three years preceding the claimants separation from the respondent.

8. Medical Claim

The first claimant sustained an injury in March 2007 and was paid Kshs.5,500.00 as compensation for medical expenses. However records showed that he was non compensated for the period he was temporarily incapacitated, although the insurance forwarded kshs.7,875.00 to the Respondent.

9. Underpayment of Wages

The third claimant was employed as a house keeping steward; however the basis under which she claims underpayment of wages is pegged on the minimum stipulated wage of a cashier, heavy commercial vehicle driver or a salesman driver, of which she is not.

10. Acting allowance

No evidence was availed to indicate that the fourth claimant was instructed to undertake work in an acting capacity to justify the claim of the above stated allowance.

11. Severance Pay

The circumstances surrounding the separation of the claimants from the respondent did not indicate the abolition of any of the claimants' position, to warrant the claim of severance pay which is the consequence of redundancy.

The claimants were paid the following benefits on separation with the respondent.

Leonard

1. Salary for 6 days in April 2009	3,555.20
2. 7 days pro-rata leave of 2009	3,963.50
3. One month pay in lieu of Notice	17,781.00
4. 21 days outstanding leave days	125,059.00
Less statutory deduction	46,027.50
Net pay	103,688.45

Julius

1. Salary for 6 days April 2009	5,348.20
2. 7 days Pro-rata leave 2009	7,239.55
3. One month's pay in lieu of Notice	26,741.00
4. Employers pension contribution 2009	534.80
5. Less statutory deductions	5,592.00
Net pay	33,271.30

Esther

1. Salary for 6 days April 2009	4,892.40
2. 6 days pro-rata leave	2,682.60
3. 7 days pay in lieu of Notice	3,129.70
Net pay	10,704.70

Richard

1. Due months pay in lieu of notice	77,404.00
2. 22 days in lieu of leave	54,931.87
3. Leave allowance May-June 2010	19,351.00
Less statutory Deductions	39,439.00
Net pay	112,247.87

RECOMMENDATION

In view of the above findings, I recommend the following as a basis of setting the dispute in addition to the benefits already paid and received.

Leonard

1. Compensation for temporary incapacity	7,875.00
2. Leave travelling allowance 2007 and 2009	4,000.00

3. Four (4) months pay in compensation 71,148.00

Total 83,023.00

Julius

1. Leave travelling allowance of 2007 2,000.00
2. Three (3) months pay as compensation 80,223.00

Total 82,223.00

Esther

1. 3 weeks wages in lieu of Notice 9,389.10
2. House allowance 12 months x 2011.95 24,143.40

Total 10,704.70

Richard

1. Leave allowance 2007 4,000.00
2. 6 months pay as compensation 464,424.00

Total 468,424.00

SIGNED J.N. MAKAA FOR CHIEF INDUSTRIAL RELATIONS OFFICER

When parties appeared in court on 2nd May 2012, the Claimant accepted the findings but rejected the recommendations in the conciliation report while the Respondent accepted both findings and recommendations as a basis for settlement of the dispute. It was therefore decided that the court will adopt the findings but make its own determination in the case.

The parties were directed to file their submissions on the report and the case fixed for hearing of submissions on the report on 25th July 2012.

Following the retirement of Justice Mukunya, the parties appeared before me on 25th July 2012 when they asked for a date for submissions as Mr. Enonda who represented the claimants was indisposed. The case was fixed for hearing of oral submissions on 21st September 2012, but the court was not sitting on that day. When the parties appeared before me on 12th October 2012, they opted to canvas the case by way of written submissions.

In their submissions filed on 25th October 2012, the claimants agree with the findings of the conciliator but not the recommendations for settlement. The claimants urge the court to order re-instatement or in the alternative compensation of 12 months salary. They rely on the case of MAUREEN OCHIDO v KENYA PIPELINE LTD in Industrial court case no. 422 of 2011 where Justice E.K Mukunya awarded the claimant full compensation of 12 months and in addition general damages for psychiatric injury. The claimants further rely on the case of JOSEPH SITATI NATO v KENYA PORTS AUTHORITY (2010) eKLR in which Justice M. Odero awarded General damages for unfair dismissal and loss of office.

The Respondent on the other hand prays that the conciliators recommendations be adopted.

I have considered the conciliation report and the submissions by the parties. Since the parties agree with the findings, the only part of the report that I am called upon to reconsider is the recommendations for settlement.

From the claimant's submissions they do not disagree with the following recommendations;

1. Payment of compensation of shs.7,875/= for temporary incapacity and Shs.4,000/= travelling allowance for 1st claimant,
2. Leave travelling allowance of Shs.2,000/= for 2nd claimant,
3. Notice and house allowance for 3rd claimant
4. Leave allowance for 4th claimant.

I therefore adopt these recommendations as both parties do not contest them. The only issue for determination is therefore compensation or re-instatement. The conciliator's findings state that the minutes of the disciplinary hearings of 28th November 2008 and 25th February 2009 do not disclose that any of the Claimants were present at the hearing. This must have informed the conclusion that the Claimants were unfairly terminated hence the award of compensation as follows;

1st Claimant – 4 months

2nd Claimant – 3 months

3rd Claimant – nil

4th claimant – 6 months

The Claimants had served for various lengths of service as follows;

1st Claimant – 9 years

2nd Claimant – 7 years

3rd Claimant – 7 years

4th Claimant – 14 years

I find that the prayer for the re-instatement is not feasible in the circumstances as no re-instatement can be ordered more than 3 years after termination as provided in Section 12 (3) (viii) of Industrial Court Act. I find that the compensation granted by the conciliator taking into account length of service of each claimant and having found that the Claimants were unfairly terminated was on the lower side. For these reasons, I find that reasonable compensation for the claimants would be as follows;

1st Claimant is awarded compensation of 9 months salary being Kshs.160,083.00

The total amount awarded to the 1st claimant is therefore as follows;

- | | |
|--|-----------------|
| 1. Compensation for temporary incapacity | Kshs.7,875.00 |
| 2. Leave Travelling Allowance 2007-2009 | Kshs.4,000.00 |
| 3. Compensation | Kshs.160,083.00 |

Total

Kshs.171,958.00

2nd claimant is awarded compensation of 7 months salary amounting to kshs.187,187.00

The total amount awarded to the 2nd claimant is therefore as follows.

1. Leave Travelling allowance of 2007 Kshs.2,000.00

2. 7 months compensation Kshs.187,187.00

Total **Kshs.189,187.00**

3rd Claimant was not awarded any compensation. She had been subjected to working as a casual employee for 7 years 2 months against the law. She was not a member of the respondents staff retirement benefit scheme like all the other claimants. I therefore award her compensation of 12 months salary in the sum of Kshs.160,956.00.

The total amount awarded to her is therefore as follows;

1. 3 weeks wages in lieu of notice Kshs.9,389.10
2. House allowance Kshs.24,143.40
3. 12 months salary compensation Kshs.160,956.00

Total **Kshs.194,488.50**

4th Claimant is also awarded 12 months compensation in view of his length of service of more than 14 years. He is therefore awarded the following;

1. Leave Allowance for 2007 Kshs. 4,000.00
2. 12 months compensation Kshs. 928,848.00

Total **Kshs. 932,848.00**

The parties did not make any submissions on costs. I therefore make no orders on the issue of costs.

Orders accordingly.

Read in open Court this 15TH .day of JULY 2013

HON. LADY JUSTICE MAUREEN ONYANGO

JUDGE

In the presence of:

N/A for Claimants

N/A for Respondent