



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAKURU

CAUSE NO. 3 OF 2013

(Formerly Nairobi Cause No. 1118 of 2011)

PETER GITHINJI.....CLAIMANT

-VERSUS-

NATIONAL CEREALS AND

PRODUCE BOARD..... RESPONDENT

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

JUDGMENT

The claimant **Peter Githinji** filed the memorandum of claim on 08.07.2011 through J. M. Kimani Advocate. The claimant prayed for judgment against the respondent for:

- a. **Overtime worked from December 1996 to September 2008 – Kshs.845,932.65.**
- b. **Staff savings for the month of October, 2008 – Kshs.4,692.00.**
- c. **Two years leave for the years 2007 and 2008 – Kshs.50,930.00.**
- d. **Gratuity from July 1982 to July 1999 at Kshs.9,205 x 17 years- Kshs.156,485.00.**
- e. **Total claim of Kshs.1,058,039.65.**
- f. **Costs of the suit.**
- g. **Interest.**
- h. **Any other or further relief the court may deem fit to grant.**

The respondent **National Cereals and Produce Board** filed the memorandum of response on 23.03.2012 through Lutta & Company Advocates. The respondent prayed that the claimant's claim be dismissed or to make orders as the court deems expedient to meet the ends of justice.

The case was heard on 29.04.2013 and on 31.05.2013. The claimant gave evidence to support his case and called one witness Joseph Tala Chemjo, the claimant's supervisor at all material times as the Nairobi Regional Manager covering the claimant's station of deployment being Konza Depot. The respondent's witnesses were George Abila (RW1), the respondent's Assistant Human Resource Manager and Ambrose Njoroge Mutua (RW2), the respondent's Senior Internal Auditor.

The claimant was an employee of the respondent from July, 1982 to October, 2008 serving for 26 years. The claimant's last deployment was at Konza Depot under the respondent's Nairobi region. He last served as the stores clerk under the supervision of the Depot Manager stationed at Machakos.

Upon retirement in October 2008, his name was removed from the respondent's payroll but he worked in

November, 2008 and was paid cash by way of a payment voucher. He actually stopped working on 5.12.2008 due to delays in the handover process attributable to absence of the responsible officer to witness the final handover.

The claimant's retirement was preceded by the letter dated 5.06.2008 notifying him about his normal retirement being appendix F on the memorandum of claim. The letter addressed to the claimant stated that the claimant would have attained the mandatory retirement age of 55 years in October, 2008 and therefore, would retire from the respondent's service with effect from 31.10.2008. The management thanked the claimant for his services and wished him the best of luck in his future endeavours. The letter advised that the respondent was preparing the final dues upon the claimant delivering the clearance certificate from his depot manager based at Machakos. The retirement notice did not mention any pending investigations or disciplinary case relating to the respondent's service.

The claimant served as a general labourer from 1982 as per appendix C on the claim being the letter of appointment dated 25.06.1982 to July, 1999 when he was promoted to a stores clerk. He served as a general labourer for 17 years and therefore, became entitled to staff savings and provident fund.

The claimant made personal demands for his retirement benefits and subsequently made notices to sue through his Advocates as per the letters marked appendix D on the memorandum of claim. The respondent replied by the letter dated 26.08.2010 being appendix E on the memorandum of claim and stated that the details of the claimant's case were under investigation and the respondent would revert back.

The respondent's case was that it had not paid the retirement dues because the claimant was surcharged in view of the losses the respondent suffered and attributable to the claimant. The respondent submitted that while serving as the clerk in charge at Konza Depot in 2007 to 2008 and before the retirement, the respondent's audit team reported certain irregularities in the operations of the depot. That due to the claimant's negligence and staff conspiracies to defraud the respondent, the Konza Depot incurred a stock loss reflected as a physical shortage of 2,711 bags of white maize valued at Kshs.4,974,685/=. The audit report is appendix 3 on the respondent's additional documents. The respondent also anchored its case on the stock verification certificate of 3.12.2008 being part of the bundle marked appendix 5 on the respondent's additional documents. It is notable that the signing of that verification certificate was long after the claimant's effective retirement date of 31.10.2008.

The issues for determination in this case are as follows:

1. Whether the respondent is entitled to withhold the claimant's retirement benefits on account of recovering the losses as submitted for the respondent.
2. Whether the claimant is entitled to the reliefs as prayed for in the memorandum of claim.

On the first issue, the respondent has submitted that the respondent is entitled to deduct as the employer, a reasonable amount for any damage done or loss of the employer's property that was in the lawful possession or custody of the employee and which loss is as a result of the employee's willful default and failure to protect the employer's property and as provided for in section 19(1) (b) of the Employment Act, 2007. Further, clause 29.1 of the collective agreement, the claimant was obligated to make good any damage or loss attributable to the employee's failure to comply with the respondent's standing order or departmental instructions or from misconduct or neglect of duty by the employee. Clause 29.2 of the collective agreement, it was submitted, entitled the respondent to recover the loss from the claimant's benefits such as the retirement benefits in issue.

For the claimant, it was submitted that the audit team's findings could not constitute a fair and valid decision to surcharge because there had been no due process leading to the decision. It was submitted that Article 47 entitled the claimant to the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. The Article also entitled the claimant to written reasons for decision to surcharge. The decision maker was the respondent's Board and there was no decision of the Board to surcharge the claimant.

The court holds that the decision to surcharge is a punishment to be imposed after due process of fairness. Other than the audit team's preliminary recommendations to recover the alleged losses from the claimant, there was no notice of the allegations and the hearing of the claimant in self exculpation as envisaged in section 41 of the Employment Act, 2007. Under clause 29.1 (1) of the Terms and Conditions of Service applicable to the claimant and being appendix 2 on the respondent's additional documents, the authority to impose a punishment in event of losses attributable to the employee is vested in the Board. The court finds that in this case the Board did not direct its mind to the alleged losses as the case was never tabled before the Board for consideration and determination. The court further holds that there is no decision to surcharge on record and to answer the first issue, the court finds that the respondent is not entitled to withhold the claimant's retirement benefits on account of recovering the losses as submitted for the respondent because the alleged decision to surcharge was fictitious and was never made by the Board at all or in the due process of justice.

The second issue for determination is whether the claimant is entitled to the reliefs as prayed for. The court makes the following findings:

- a. The claimant has prayed for overtime worked from December, 1996 to September, 2008 being Kshs.845,932.65. The procedure for assigning an employee to undertake overtime in the respondent's organization is not in dispute. The procedure entails the supervisor assigning the employee to work overtime; the employee claims the pay for worked overtime by filling the relevant forms; the supervisor verifies the employee has worked by signing on the claim forms; the regional manager signs to approve; the regional auditors sign to confirm; the forms forwarded to respondent's head office for processing payment or to compute the overtime hours into equivalent off days; and rejected claims are send back to the claimant. In this case, the only dispute was that some forms may not have been signed by the regional manager or auditor.

The court has considered the overtime procedure and finds that once the immediate supervisor signed, the claimant established that he had worked. There is no evidence of the overtime hours having been converted to off days. In any event, working overtime must have been occasioned by the overwhelming work and therefore absurd to expect the claimant to have taken off days in lieu of payment for the overtime. Any overt decision by the management to reject the claims has not been established. The court finds that in the circumstances, the claimant has shown that he worked overtime as claimed and is entitled to **Kshs.845,932.65** as claimed less **150 hours in 2005** the claimant took as off days as admitted in his evidence being less **Kshs.14,793.75**; applying the undisputed formula for calculating overtime thus, prevailing basic monthly salary times hours of overtime divided by 160 and as per clause 4.2.3 of Terms and Conditions of Service for Unionisable Employees being document No. 1 on the respondent's additional list of documents.

The respondent submitted that the claim for overtime was time barred under section 90 of the Employment Act, 2007 as the claims went back beyond three years from the date of filing the suit. The court holds that the contract of employment constitute a continuous transaction between the parties for the unbroken tenure as far as payment and reconciliation of the rights and obligations will always take place at the moment of separation. Thus, employers are entitled to claim un-surrendered imposts over the entire period and the employees are entitled to urge their claims for wages and other benefits. Such claims, in the opinion of the court, accrue at the time of separation and are not time barred as the cause of action accrues on the separation date. The exception is where the parties have expressly made a lawful and reasonable agreement that claims for given rights or obligations must be urged and claimed within given timelines. In the instant case, there was no such agreement between the parties on the issue of payment for overtime which the court holds to have essentially been a payment of wages for work actually performed by the claimant.

In the opinion of the court, it is not reasonable and prudent for parties to a contract of service to sue on every claim of right and obligation or liability while the relationship is subsisting because in absence of specific urgency in the claim, parties are deemed to be in one continuous relationship whose rights and obligations are reconciled on the date of the separation, the termination. In particular, the court has taken into account the provisions of section 18 (5) (a) of the Employment Act, 2007 which states that upon the

termination of a contract of service by effluxion of time, it shall be the duty of the employer to ensure that the employee is paid the entire amount of the wages earned by or payable to the employee and of allowances due to him as have not been paid. In this case, the court finds that the claimant's contract of service terminated by reason of effluxion of time namely, attaining the mandatory retirement age of 55 years and the respondent was to ensure that all wages and allowances such as the pay for overtime now claimed for are paid to the claimant.

- b. The staff savings for the month of October, 2008 were not in dispute and the court finds that the claimant is entitled to **Kshs.4,692.00** as claimed.
- c. For two years leave for the years 2007 and 2008 being a claim for Kshs.50,930.00, the respondent's witness confirmed the pending leave days were 51 being **Kshs.43,307.50** and the court finds the claimant is entitled as per the respondent's evidence.
- d. For gratuity from July, 1982 to July, 1999 at Kshs.9,205 x 17 years the claim was for **Kshs.156,485.00**. The respondent did not object to this claim and the court finds the claimant is entitled as prayed.
- e. The claimant is entitled to the costs of the suit.

In conclusion, judgment is entered for the claimant against the respondent for:

- a. The respondent to pay the claimant **Kshs.1,035,623.40**.
- b. The respondent to pay the judgment sum in (a) by 1.9.2013 in default interest to be payable from the effective date of retirement on 31.10.2008 till full payment.
- c. The respondent to pay the costs.

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

BYRAM ONGAYA

JUDGE