



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NO. 1602 OF 2011

PATRICK MUDAKICLAIMANT

-VERSUS-

DEPOSIT PROTECTION FUND BOARDRESPONDENT

Claimant in person.

Mr. Okelo for Respondent.

JUDGMENT

This suit was brought by way of a Memorandum of Claim dated 19th September, 2011 seeking payment of terminal benefits for unlawful termination of employment.

The facts giving rise to the suit are that the Claimant **Patrick Mudaki** was employed by the Respondent, **Deposit Protection Fund Board** from 10th October, 1997 until the 16th January, 2009 as a clerical officer.

The Claimant did not get a letter of appointment. He was initially paid Kshs.500/= per day which was later increased to Kshs.1,000/=.

The Claimant was stationed at Kitui Road in Industrial area. At the time of employment the Respondent was a department of the Central Bank of Kenya, but it has since become an independent corporation.

The Claimant had no pay slip and was paid either weekly or monthly. No other benefits were paid to him.

There was at the time 200 employees working under similar terms and conditions and were described as casual labourers for a period of nine (9) years.

The Claimant told the court that he started having problems when his Member of Parliament, Hon. Mr. Moses Akaranga wrote a letter to the Central Bank Governor complaining why the Claimant and others remained as casuals for more than nine (9) years.

On 16th January, 2009, five (5) of them were selected and sent home without payment of terminal benefits. The salary for the days worked was paid after four (4) months.

The Claimant told the court that he was not granted leave for ten years. That he only got off on 25th and 26th December for Christmas. During public holidays, he was granted off without pay. He now claims salary for all the public holidays for ten years.

Furthermore, the Claimant testified that he worked on Saturdays from 9 a.m. to 2.30 p.m. and makes a claim for one hundred and four (104) weekends for ten years.

Similarly, he claims payment of one (1) month salary in lieu of notice. He worked for twenty (20) days in a month and thus earned Kshs.20,000/=.

Furthermore he claims house allowance at 15% of his basic pay, travel allowance, medical allowance and contributions to the National Social Security Fund (NSSF) and National Hospital Insurance Fund (NHIF) for ten (10) years.

The Claimant has annexed a letter of demand dated 25th July, 2011 written to the Director of the Respondent which contains the tabulated claims totalling Kshs.2,086,400/=.

The demand letter was responded to on 30th August, 2011 by the Assistant Director of the Respondent **Mrs. L.C. Soi** wherein the claims were denied in total.

The Assistant Director stated that the claim was referred to the District Labour Office, Nairobi and same was resolved amicably.

In terms of the Memorandum of Response filed by the Respondent on 5th March, 2012, the Respondent made a cheque in favour of the Claimant in the sum of Kshs.49,000/= in full settlement of the claim.

The settlement comprised of payment in lieu of 24 months leave; one week's payment in lieu of notice and one week's salary arrears as per the letter from the Ministry of Labour dated 7th April, 2009 which is Appendix 8 to the Statement of Response.

The Respondent states that it was surprised to receive further demand on 17th November, 2010 from the National Legal Aid and Awareness Programme (NALEAP).

The Respondent avers that a total of Kshs.54,000/= was paid to the Claimant via cheque number **01526** for Kshs.49,000/- and cheque number **001378** for Kshs.5000/=.

The Respondent prays that the claim be dismissed with costs.

The Respondent called **Mr. Daniel Leparau Ngatuny** to testify in support of the Respondent's case. He told the court that he was presently a businessman but was employed by the Central Bank of Kenya (CBK) on 4th January, 1988 as a graduate trainee and he retired as a manager.

He told the court that he knew the Claimant well as a casual employed by banking institutions in liquidation. That there were about 24 such institutions at the time. That CBK appointed the Respondent as a liquidator who in turn appointed a Liquidation Agent.

That the Liquidation Agent in turn appointed the casuals including the Claimant. He testified that the Claimant was not an employee of the Respondent. That indeed the Respondent has no employees as its activities are manned by the employees of CBK. The Claimant was also not an employee of CBK.

He narrated that, once a bank became bankrupt, the liquidator relocates the liquidation files to their premises and the same are arranged in an orderly manner. This is what the Claimant was employed to do by the institutions under liquidation.

The institutions under liquidation utilize casual labour because the activities are time bound and the bankrupt institutions do not have sufficient funds to employ permanent staff, the witness testified further.

The Liquidation Agent was therefore the employer of the Claimant and it is the Agent who terminated the Claimant's employment.

He told the court further that the Claimant like other casuals was paid daily rates every Friday and by the time the contract ended there was no arrear salary.

However, when the Claimant reported a dispute to the Ministry of Labour the same was settled amicably and final payment was made through the Ministry of Labour to the Claimant.

He explained that the Claimant earned between Kshs.500/= to Kshs.1,000/= per day. He worked five days in a week between 8.15 a.m. to 4.30 p.m. He also had one hour lunch break.

The Respondent annexed a copy of attendance register to the Statement of Response marked Appendix 4.

The witness denied that the Claimant worked on weekends and holidays as alleged or at all stating that CBK does not have any provisions for working on holidays.

The CBK employees serving the Respondent supervised the casuals according to the witness.

The witness denied that the Claimant is owed any notice pay as same was settled. No house allowance was payable as the Claimant was a daily paid casual. There was similarly no provision for travel allowance.

Medical allowance only arose if one was sick. The Claimant was not registered with National Social Security Fund (NSSF) and National Hospital Insurance Fund (NHIF) by the Respondent.

The witness further noted that the work by the casuals including the Claimant was not continuous and referred to a memo dated 27th July, 2007 which suspended services of casuals from 30th July, 2007 to 3rd August, 2007.

The witness told the court that he was the Liquidation Agent and he hired and fired the casuals according to the dictates of the work availability.

As a Liquidating Agent, he was an employee of CBK and the Respondent which is an independent Board was not the employer of the Claimant.

He said further that the settlement through the Ministry of Labour was indeed paid out by Heritage Bank in liquidation.

It is his evidence that the Claimant worked for various banks under liquidation but not for the Respondent and prays that this suit be dismissed on this point alone.

He added that the liquidator treated the Claimant fairly and in a reasonable manner considering all the circumstances of the case.

Under cross examination, the witness explained that the Respondent still operates as a department of CBK and was not yet fully autonomous but it will be when it transits to Kenya Deposit Insurance Corporation (KDIC). He further explains that the liquidator is the Respondent whilst the Liquidating Agent is the principal person in the insolvent institution. So he served as a manager at CBK as well as a Liquidating Agent of five (5) banks.

Upon close of the Respondent's case the Claimant and counsel for the Respondent made brief oral

submissions emphasizing the particulars of their respective cases already canvassed.

The court has identified the following issues for determination: -

1. *Who was the employee of the Claimant?*
2. *Were his terminal dues fully paid?*

Who was the employer of the Claimant?

From the evidence before court especially the letter by Mrs. L.C. Soi Assistant Director, Finance & Administration, Deposits Protection Fund, it is clear that the employer of the Claimant was the Respondent, the Deposit Protection Fund Board. The Board had indeed accepted liability with respect to the claim presented to the Ministry of Labour by the Claimant and went on to settle the same.

The denial by the Respondent that it was not the employer of the Claimant is only an afterthought. The claim is therefore brought properly against the Respondent, a Board capable of suing and being sued.

What terminal benefits if any are due to the Claimant?

The claims by the Claimant for non-payment of overtime for ten (10) years is largely unsubstantiated by the oral or documentary evidence.

No evidence was tendered to show that the Claimant worked during weekends and public holidays. These allegations are denied by the Respondent. The court finds that the Claimant has failed to prove on a balance of probabilities that he is owed in respect of work done as overtime.

The court finds therefore that the claims for payment of overtime, payment for work done during public holidays and weekends are dismissed for want of proof.

Similarly, from the evidence before court, the Claimant initially received a daily rate of Kshs.500/= which was later increased to Kshs.1,000/=. He was employed as a labourer and no evidence has been tendered to show that his daily rates were below the general order for the period worked. The claim for housing allowance is also not substantiated by any evidence. Both claims are therefore dismissed for want of proof.

Equally the claims for travel allowance and medical allowance have not been substantiated by any tangible evidence and the same are dismissed for want of proof.

It is however, not in dispute that the Claimant served the Respondent from 13th October, 1999 to 16th January, 2009. This is acknowledged in the correspondence from the Ministry of Labour that led to a payment of Kshs.49,000/= in full settlement of the claim. This payment however was with respect to 42 days leave at the rate of Kshs.1,000/= per day in the sum of Kshs.42,000/= and salary in lieu of 7 days notice in the sum of Kshs.7,000/=.

It is undeniable that the work by the Claimant was continuous save for a few breaks. That he was not given leave at the time, a fact acknowledged during conciliation. He was therefore for all intent and purpose a permanent employee though he was paid and treated as a casual.

He lost many benefits which would otherwise have accrued to him had he been employed either on contract or on permanent basis.

The Claimant was not registered with NHIF and NSSF for the entire period due to the fact that he was treated as a casual. This effectively denied him any pension, service gratuity or severance pay upon termination.

Effectively the claimant and his colleagues employment was terminated because there was no

longer work for them. But because the employer regarded them as casuals, the provisions of the Employment Act, 2007 were not utilized to pay them one month salary in lieu of notice and a minimum of 15 days salary for each completed year of service.

It is the court's considered decision that given the continuous nature of the service given by the Claimant for a period of nine (9) years he was in fact, not a casual at the time of termination in January, 2009. The Claimant is therefore entitled to severance pay for each completed year of service in terms of **Section 35 (5)** of the Employment Act.

With regard to the issue of termination, the court finds that the employment of the Claimant was terminated for operational reasons and the Claimant has failed to show that the said termination was unlawful and/or unfair within the meaning of **Section 45** of the Employment Act.

The work the Claimant and others employed with him did was time bound and was destined to come to an end upon finalisation of the liquidation process of the various bankrupt banks.

In the final analysis the court orders the Respondent to pay the Claimant:

0. 1 month's salary in lieu of notice in the sum of Kshs.20,000/= (less the amount of Kshs.7,000/= for 7 days) Kshs.13,000/=.
0. 15 days salary for each completed year of service for 9 years. (13/10/1999 – 16/01/2009), in the sum of Kshs.135,000/= .

Total award Kshs.148,000/=.

0. Costs of the suit.

Dated and delivered at Nairobi this 27th day of August, 2013.

MATHEWS N. NDUMA

PRINCIPAL JUDGE