



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT MOMBASA

CAUSE NO 4 OF 2013

DAVID ANZANI OMBEBACLAIMANT

VERSUS

SOUTHERN ENGINEERING COMPANYRESPONDENT

J U D G M E N T

The claimant is a former employee of the respondent and has brought this suit alleging breach of contract and seeking terminal dues including accrued acting allowances.

A brief summary of his case is that he was employed as a filter and later promoted to a junior foreman and then acting foreman from October 2005 to July 2012 when he was declared redundant. That the respondent agreed to pay his dues but declined to pay the correct sum including the allowances for his acting foreman. The respondent denied liability for breach of contract and averred that the claimant was employed as the foreman and not an acting foreman and was paid all his terminal dues after being declared redundant. After several adjournments the suit was heard on 30/4/2013 and 10/7/2013 when the claimant testified as CW1 and the respondent was represented by Jane Wairimu as RW1.

CW1 who was not initially represented by counsel told the court that he first joined the respondent as a casual employee and worked as such upto 31/12/1993. That at the start of 1994 he was formally appointed as a mechanical fitter and worked until 1/6/2001 when he was promoted to an assistant foreman. That by letter dated 9/9/2005 he was appointed to act as the foreman whenever the foreman was absent.

That shortly thereafter the foreman left job and the claimant assumed the role of acting foreman for which he was paid acting allowance up to August 2007. The claimant further told the court that the redundancy declared on him was unlawful and went contrary to the 2008 CBA and the law. That he is the only one declared redundant and replaced by 3 people to do the same job for a higher salary. That the respondent continued with her business as usual. He however admitted being paid some dues but less 14 outstanding leave days, acting allowances from 2005 to 2011 and redundancy pay.

On cross examination he confirmed from July 2011 payslip that his salary was ksh.33934. That the letter for acting capacity did not state the acting allowance but the same was in the CBA. He further admitted that a redundancy notice dated 10/6/2011 was written to his Trade Union stating the reason for termination as incompetence. The notice was for one month and offered to pay terminal dues.

RW1 was the respondent HR Manager since 2010 and confirmed that the claimant formerly worked with her. That in June 2011 the respondent did a restructuring which necessitated the need for a more qualified person to replace the claimant. That they wrote a redundancy notice to the claimants union and

the labour ministry. That the union wrote back requesting for a meeting to discuss settlement which was done but in the absence of the claimant whereby it was agreed that the claimant be given an alternative job in the respondent's affiliate companies. The claimant was therefore "transferred" to Southern Shipping Services Ltd (SSSL) effective from 1/8/2011 by letter 19/7/2011 at a salary of ksh.40624/.

After a few months at SSSL, the claimant's union wrote to the respondent by letter dated 17/7/2012 reporting a trade dispute and alleging refusal to transfer the claimant's service from the respondent to SSSL. That the matter was conciliated upon and an agreement reached between the union and the respondent that the claimant be paid his gratuities for 17 years by the respondent and SSSL to pay him one month notice.

That the respondent paid Ksh.272272/ as full and final settlement while Ksh.38534/ was paid on 3/12/2012 as salary and end notice. She contended that clause 27(c) of the CBA outlined the procedure for redundancy which included one month notice to the union and the ministry, payment of prorata leave, 20 days per year of service. She also confirmed that the CBA provided for acting allowance where a letter to act is given, acting is for 12 or days and the allowance is the difference in the basic pay between the high position being acted and the normal lower office.

She denied that the claimant was given any letter to act in a higher grade. She maintained that the suit should be dismissed because the claimant was paid all his dues.

On cross-examination she contended that the claimant was the foreman and the head of the maintenance department for the respondent. She confirmed that the CBA provided for the first in last out principle in case of redundancy. That the respondent acted fairly in removing the claimant due to his lack of certain basic expertise.

She admitted that letter dated 9/9/2005 in her file stated that the claimant was to act in the capacity of head of Maintenance Department when Mr. Peter Olumula was absent. She also confirmed that when she joined the respondent she did not find peter Olumula.

On the transfer to SSSL, she contended that the same was an alternative job and did not need to be in the same rank. She maintained that the claimant received his payment from the respondent and also SSSL. The respondent paid ksh. 272,272/ being severance pay for the 17 years served at the 20 days per year against a daily rate of ksh1,131 totalling to Ksh348,540/. That sum less taxes netted at ksh.272272/.

On matters of monthly pay, she confirmed that as per the payslip for August 2007, the claimant earned a gross pay of ksh.42924 which included acting allowance of Ksh.12152. She also confirmed that as per the July 2011 pay slip, the claimants gross pay was ksh.68825 but without acting allowance. She however admitted that she did not know how the payslips were prepared and could not therefore know whether the acting allowance was paid upto 2007. After the cause of the hearing the parties agreed to file closing submission.

I have carefully gone through the pleadings and the evidence and considered the closing submission filed. There is no dispute that the parties herein related as former employee and employer respectively. It is also not in dispute that the said employment was terminated in July 2011 by way of redundancy. Consequently, In view of the foregoing, the court is satisfied that it has jurisdiction over the dispute. The issues of determination are

- a. **whether the redundancy was unfair and in breach of contract.**
- b. **Whether the claimant was paid all his employment dues upon the said redundancy.**

The answer to the first issue is contained in the employment contract and section 40 of the Employment Act. The applicable CBA is the one concluded on 16/7/2011 whose effective date was 1/7/2010. clause 27(e) provided for normal notice or pay in lieu of notice before redundancy. Section 40(1) (a) of the Employment Act on the other hand provides a redundancy notice of not less than one month. The court is satisfied that a redundancy notice was served upon the claimant union and the Labour office vide letter

dated 10/6/2011. whether or not the notice of one month was enough within the meaning of clause 27(e) of the CBA is a different matter and the court was not invited to consider it.

As regards the fairness in the selection process and whether the claimant was unfairly discriminated against the principle of "last in, first out", the court is satisfied with the uncontested evidence by the respondents that the claimant was the only person affected by the restructuring process due to his inability to meet certain basic qualifications. The issue of unfairness therefore in my view does not arise in a case where only one individual is affected.

The only concern I have but which the court was not invited to consider was, why was it not necessary that the claimant retained his office of junior foreman and then a more qualified foreman appointed to fill the vacancy left by Peter Olumula in the year 2005?. The court will not venture into that especially in view of the fact that the dispute was fully conciliated upon in proceedings wherein the claimant was ably represented by his union. I will therefore not declare the redundancy to have been in breach of the employment contract because the claimant and his counsel did not prove the alleged breach. The Court noted that much of the evidence and the closing submissions filed majored on the terminal dues.

As regards the answer to the second issue of the dues sought, the court has carefully considered the evidence adduced and more so the defence exhibits in support of payment of the terminal dues of ksh.272,272/ to the claimant. According to the RW1, the figure was calculated using the monthly basic pay of ksh.33934 multiplied by 20 days per year of service for 17 years less taxes. The claimant accepted the payment and discharged the respondent fully. The foregoing notwithstanding the court has the jurisdiction to review settlement if the employee appeals in order to correct the imbalance of the bargaining power.

Section 40(1) (g) of the Employment Act provides for severance pay at the rate of not less than 15 days pay for each completed year of service while clause 27(e) (5) provides for a severance pay of 20 days for each completed year of service. The respondent agreed to pay 20 days pay for each completed year of service as per the CBA. I see no need of contradicting that decision because it was a contractual obligation under the CBA.

The only question that arises is what constituted the claimant's 20 days pay?. The respondent has applied the basic salary exclusive of the other allowances. According to the July 2011 payslip produced by the claimant, his basic pay was ksh.33934 plus house allowance of ksh5090 and seniority allowance of ksh1700/. The rest was overtime which fluctuated and which I will not consider for purposes of calculating severance pay.

The court will however consider the acting allowance as money rightfully earned by the claimant by virtue of the respondent letter dated 9/9/2005. It has not been proved by way of written evidence from the respondent's employment records in relation to the claimant that he was appointed to serve as a substantive foreman and the head of maintenance department for the respondent. As such there is no evidence before the court to disprove and rebut the claimants allegation and evidence in the respondent's letter dated 9/9/2005 that he worked as the foreman on acting capacity after Peter Olumula left in 2005 until his termination through redundancy in July 2011.

Due to lack of further evidence on what was the correct acting allowance payable, the court will apply the same figure as indicated in the claimants payslip for August 2007 of ksh.12,152. This ksh.12152/ plus basic pay of ksh33934/ plus house allowance of ksh.5090 and seniority allowance of ksh.1700 sums the claimants monthly pay to ksh.52876/. His pay for 20 days per month is therefore $ksh52876 \times 20 / 30 = 35250.66$ that multiplied by 17 years earns the claimant a severance pay of ksh.599,261.33 which I award to him.

The court also award the claimant an acting allowance of ksh.12152 per month for the period between September 2007 to July 2011 as prayed. the acting allowance was a term of contract in clause 21 of both the CBA for 2008/10 and 2020/12 produced as exhibits by the claimant and respondent

respectively. The respondent was therefore bound to pay the acting allowance as provided for by the CBAS and the Employment Act in default of which the claimant had a right to sue for civil debt and also institute criminal case for the failure by the employer to pay earned salary in full. In view of the foregoing, I will award the claimant Ksh.12152X47 months (September 2007 to July 2011) = ksh.571,144/-.

I will also award him cash pay in lieu of the 14 leave days outstanding calculated at the rate of monthly salary of Ksh.52876/ which works to ksh.23675.46.

In summary I enter judgment in favour of the claimants and against the respondent for payment of following:

a. severance pay599,261.33
b. accrued acting allowance	571,144.00
c. pay in lieu of 14 leave days outstanding.....	<u>24,675.46</u>
	1,195,080.80
less paid	<u>272,272.00</u>
TOTAL	<u>922,808.80</u>

The balance shall be subjected to taxation and the certificate given to the claimant.

The respondent will also pay costs and interest

orders accordingly.

Signed, dated and delivered this 26th August 2013

ONESMUS MAKAU

JUDGE