



REPUBLIC OF KENYA
INDUSTRIAL COURT OF KENYA AT NAIROBI
CAUSE NO 2123 OF 2011

ABDALLA HADI RIFAI..... CLAIMANT

VERSUS

THE INTERNATIONAL

DONKEY PROTECTION TRUST (K)RESPONDENT

Mr Guandaro for Claimant

Mr Karanja for Respondent

JUDGEMENT

This matter came by way of a Notice of Motion on a certificate of urgency dated 21/12/2011 and filed on the same date. The application was heard ex-parte by Hon. Justice Madzayo on 21/12/2011 and interim orders were issued stopping the respondent from prematurely retiring the Claimant/Applicant and evicting him from the company accommodation pending the hearing and determination of the matter.

Meanwhile the parties had the hearing of the matter adjourned on numerous occasions to pursue an out of court settlement but that did not materialize. The interim orders abated.

On 26th February, 2013 another urgent application was brought seeking orders to injunct the Respondent from stopping the salary of the claimant and evicting him from the company house.

An interim order was granted to stop the eviction but the one for payment of salaries was declined. Matter was set for interparties hearing on 8th March 2013.

On 8th March 2013 the parties entered consent to the effect that the Claimant will remain in the company house until the main claim is heard and determined.

The issues in dispute in this matter are; the date of retirement for the Claimant; whether the claimant is owed leave days, and whether the claimant is entitled to severance pay.

The parties agreed not to adduce any evidence and proceeded by way of written submissions.

It is accepted by both parties that the Claimant is due to retire at the age of 60. It is common cause that the Claimant was born in 1953, but the exact date of birth is not in the company records. His national

identity card does not bear the date of birth.

It is also not in dispute that the claimant attains age 60 in the year 2013 but because the date of birth is not in the Records of the Respondent, it is not clear whether he should have retired on the 1st January, 2013 or on 30th December, 2013.

The Respondent served the Claimant with a retirement notice dated 25th April, 2012 informing him that he is due to retire on 1st January 2013. He was placed on terminal leave with effect from 1st June, 2012 upto 1st January, 2013. During the period of terminal leave he continued to be paid full salary. His contribution to the pension manager, Kenya Alliance Insurance Co. Limited would be paid until 31st December, 2013. He was also offered payment of contribution premiums for personal life assurance until it matures in 2013. The payment of premium on life assurance was said in the letter to be ex-gratia.

The letter asked him to vacate the house in January, 2013. He was to notify the Pension Manager of his impending retirement at least three (3) months prior to the retirement date.

This letter superseded an earlier letter dated 31st October 2011 which had asked him to retire on 31st December, 2012.

It is the Claimant's case that his identity card provides that he was born in 1953 but the actual date is not indicated. That it was common for parents at that time not to record the actual date of birth hence his inability to provide the actual date he was born.

That his letter of employment doesn't make reference to actual date of birth and thus the employee should give him the benefit of doubt and retire him with effect from 31st December, 2013.

The Respondent has submitted that the onus of proving the exact date of birth is on the claimant. That having failed to provide the date of birth, he should be presumed to attain the age of 60 on the 1st January, 2013 because the year of birth is not in dispute.

The Respondent submits that though the Claimant was entitled to 1 month notice the Respondent gave him 3 months notice in recognition of his longstanding service spanning from 1986.

That the Claimant does not have clean hands as he came to court when the retirement notice at 58 years was suspended. The application should be dismissed with costs.

The Respondent further submitted that the contention by the General Manager that he had worked without leave for 27 years was untenable when he was the one approving leave for everyone in the organization. The Respondent submits that the claim for payment of 24 months salary in lieu of leave in the sum of Kshs 419,811.05 be dismissed.

The Respondent further submits that there is no basis whatsoever for payment of severance pay claimed because the Claimant has a pension scheme under Kenya Alliance Insurance Co. Ltd which will pay out terminal benefits to the claimant upon retirement. That this claim is also not brought in good faith.

I have not seen any authority to assist the court to determine the question of age where the date of birth is not known.

The court however agrees with the Respondent that the one who alleges when he was born has the onus of proving the date of birth.

It is however understandable that many births were not recorded during the colonial era in Kenya when the Claimant was born. The claimant seeks the benefit of doubt especially because he has given selfless service to the Respondent for a period of over 27 years. The Respondent on the other hand argues that it has offered the Claimant very good exit package in recognition of his long service.

The court is inclined to determine this matter on the basis of equity in the absence of concrete evidence as to the actual date of birth. The respondent wishes the claimant to retire with effect from 1st January 2013 whereas the Claimant wishes to retire with effect from 31st December, 2013.

The court on the basis of equity and fair play sets the retirement age for the Claimant to be with effect from 31st June, 2013 and he should vacate the company house within a month from the date of this judgement.

The terminal benefits payable to the Claimant be adjusted accordingly.

The court finds that the claim by the Claimant for payment in lieu of leave and severance pay are unfounded and therefore lack any concrete

basis. The same are dismissed for want of proof.

It is so ordered.

Dated and Delivered at Nairobi this 13th day of August, 2013

MATHEWS N. NDUMA

PRINCIPAL JUDGE