



**REPUBLIC OF KENYA**

**IN THE INDUSTRIAL COURT OF KENYA AT MOMBASA**

**BIMA TOWERS**

**CAUSE NO. 40 OF 2013**

**(Originally Mombasa High Court Civil Case No. 83 of 2006)**

**ELISHA KIRIGHA GEZZAM**

**aka ELISHA KIRIGA GEZZAM MWAMBI.....CLAIMANT**

**v**

**BROOKE BOND KENYA LTD.....RESPONDENT**

**JUDGMENT**

1. It is unfortunate this case is being determined over 7 years after it was filed.
2. Elisha Kirigha Gezzam (Claimant) initially filed a Plaintiff in the High Court against Brooke Bond Kenya Ltd (Respondent) on 28 April 2006. For one reason or another hearing never took off.
3. On 19 February 2013 Muya J of the High Court ordered that the file be transferred to the Industrial Court, which now has exclusive jurisdiction over employment and labour matters. On 8 March 2013 the file was placed before me and I fixed hearing for 15 April 2013. Because of other engagements I did not sit on 15 April 2013 and the hearing was postponed to 28 May 2013.
4. On 28 May 2013 the parties informed me that they had agreed to have the Cause determined on the basis of submissions. This is consonance with rule 21 of the Industrial Court (Procedure) Rules, 2010. Consequent upon the agreement, the Claimant filed his written submissions on 23 July 2013 while the Respondent filed its submissions a day earlier on 22 July 2013.
5. Prior to filing the submissions, the Claimant had filed a witness statement on 25 June 2012 while the Respondent filed witness statements and documents on 4 June 2013.

**Claimant's pleading and case**

6. In his pleadings, the Claimant stated that he was employed by the Respondent on 16 May 1972 as a technician rising to the position of Factory Maintenance Supervisor after loyal and diligent service and that he was to retire at 60 years.
7. Claimant also pleaded that he was declared redundant after 30 years service without payment of terminal benefits/entitlements at the rate of 1.5 months per year for every year worked. The Claimant in this regard claims Kshs 2,979,697/50. The Claimant stated he had been paid Kshs 1,499,184/- as redundancy payment and that this had nothing to do with terminal benefits and that the terminal benefits were payable by 5 July 2002. He seeks the payment with interest at 12% per annum.
8. In his submissions, the Claimant submitted that he was employed as a maintenance mechanic in 1972 at a salary of Kshs 950/- per month and after probation was confirmed vide letter dated 22

- February 1973. Due to diligence and commendable work he was promoted and the salary rose to Kshs 62,465/50 per month as at time of termination through letter dated 2 July 2002 on ground of redundancy at the age of 58 years.
9. The Claimant submits that he was paid Kshs 1,499,184/- as '*compensation for loss of office based on 1.5 months pensionable salary for every complete year of service or balance of months to retire whichever is lower*' according to the retirement letter and that this was not severance pay as provided for under section 16A (1)(f) of the Employment Act( in operation at the time).
  10. The position taken by the Claimant is that *compensation for loss of office* is different from *severance pay* as provided for in section 16A(1)(f) of the Employment Act (repealed) and *compensation for loss of office* as provided for in the redundancy letter. According to the Claimant what he was paid was a result of negotiations with the Respondent and that he is also entitled to the statutory payment under the repealed Employment Act.
  11. The Claimant confirms payment of Kshs 3,132,841/- from the Retirement Saving Scheme and Kshs 68,280/- for outstanding leave. He denies receiving payment of Kshs 1,124,319/- as full and final benefits from the Respondent as indicated in the Certificate of Final Payment as well as the Clearance form.

### **Respondent's pleading and case**

12. The Respondent filed a Defence on 9 June 2006 and an Amended Defence on 13 June 2006 and it contented that the suit was misconceived/incompetent. It denied that the Claimant was employed on 16 May 1972 as a technician in Kericho, rose to the position of Factory Maintenance Supervisor, served it with diligence and loyalty, that the Claimant's salary in 2002 was Kshs 749,586/- per annum and that the Claimant would work until attaining 60 years.
13. The Respondent admitted that the Claimant was declared redundant, but that this was not in breach of contract. It further pleaded that the Claimant was paid all his dues and is not entitled to anything above what was paid.
14. The Respondent submitted that the Claim should be dismissed with costs and that the Claimant had not established he was entitled to work until 60 years. It further submitted the redundancy had not been shown to have been unlawful, unfair or unprocedural, and that it acted within the law.
15. On the gravamen of the Claimant's contention that redundancy payment (severance pay) was distinct from terminal benefits and that the same cannot be *interchanged*, the Respondent submitted that there was no distinction between the two, as both refer to payment made to an employee upon termination of employment and *it all depends on the mode of termination*.
16. Further, it was submitted that terminal benefits is a general term and refers to benefits payable to an employee upon termination and the termination could be based on the terms of a contract or law. Redundancy was just but one way of terminating employment and that an employee declared redundant was entitled to redundancy payment in terminal benefits.
17. Finally it was submitted that the Claimant was paid all that was due to him and there was no miscalculation.
18. Before discussing the questions arising for determination I need to put on record that the Claimant without leave of Court filed another 'Statement of Claim' on 22 July 2013. Because no leave was granted I must expunge this Statement of Claim from the records of the Court.

### **Questions for determination**

19. From the pleadings and submissions of the parties there are two crucial questions which arises for determination and these are whether redundancy payment and terminal benefits are separate and distinct items and whether the Claimant has established a basis for grant of the reliefs sought.

### ***Whether redundancy payment and terminal benefits are separate and distinct***

20. Before starting the discussion, I must regret that the parties did not define with precision nor zero in on the issues they wanted to be determined.
21. The Claimant sought to rely on section 16A (1)(f) of the repealed Employment Act, though he never specifically referred to the repealed Act. The section provides that *an employee declared*

*redundant shall be entitled to severance pay at the rate of not less than 15 days pay for each completed of service as severance pay*

22. It is difficult to understand how and why the parties made reference to *redundancy payment* rather than *severance pay* which is the word used in the statute to refer to the payments made to an employee declared redundant. I would therefore consider the question as one of whether severance pay and terminal benefits are the same.
23. 'Terminal benefits' was not defined in the repealed Employment Act. To my mind the term terminal benefits is a general term used in ordinary employment language to denote all the sum total and different categories of payment made to an employee on the coming to an end of the employment relationship while severance pay is a term of art referring to the specific or precise payment made to an employee who has been terminated at the behest of an employer for no mistake on his/her part. The termination is involuntary. In this regard severance pay would generally be a terminal benefit loosely defined. Severance pay is therefore a species of terminal benefits/dues.

### ***Whether Claimant has established a basis for grant of relief***

24. The Claimant claim was stated to be brought pursuant to a statutory provision. He argued that the payment of Kshs 1,499,184/- was contractual on the basis that it was paid after negotiations between the parties.
25. But neither of the parties brought to my attention any policy document/staff manual in which the parties agreed on the terms of the redundancy. Not even the letter declaring the Claimant redundant was produced.
26. The Claimant did not place sufficient material before the Court to enable it determine that its claim was based on contract.
27. In terms of statutory foundation to the Claim, the relevant provision made provision for payment of severance pay at a rate not less than 15 days pay for each completed year of service.
28. According to the statement of Richard Kipkemoi Rotich, the Claimant was paid based on the months remaining to normal retirement age of 60 years. Because at time of declaration of redundancy the Claimant was earning Kshs 62,466/- he was paid the equivalent of 24 months' salary, hence the Kshs 1,499,184/-.
29. This formula used by the Respondent even if it was the result of agreement was contrary to the statute applicable at the material time. The correct formula would have been to get the Claimant's daily rate (basic salary plus house allowance divided by 26) and multiply by 450 (15 days for each year multiplied by the 30 years Claimant worked).
30. The total, according to the correct formula would have given a total severance package of Kshs 1,093,155/-, less than what the Claimant was paid. The Claimant did not suffer any prejudice or loss. What he was paid was generous and more than what the statute had provided. The statute has set out the irreducible minimums.

### **Conclusion**

31. In conclusion, I do find that the Claimant has failed to establish or demonstrate that he is statutorily entitled to Kshs 2,979,697/50 as severance pay on top and above what he was paid. I dismiss the Cause with no order as to costs.

**Delivered, dated and signed in open Court in Mombasa on this 27<sup>th</sup> day of September 2013.**

**Justice Radido Stephen**

**Judge**

**Appearances**

Mr. Kabebe instructed by Gikandi & Co Advocates for Claimant

Ms. Adagi instructed by Inamdar & Inamdar Advocates for Respondent