



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA

AT MOMBASA

CAUSE NO 113 OF 2012

AHMED ABUBAKAR .....CLAIMANT

VERSUS

BAMBURI CEMENT .....RESPONDENT

**J U D G M E N T**

The claimant filed this suit on 11/10/2010 against the respondent claiming for declaration that he was at all material time a unionisable employee and that respondent's move to pay him terminal dues as a management staff was illegal, unjustified and wrongful. Secondly, he pray for Ksh.10,175,481 plus interest as his terminal benefits and gratuity as a unionisable staff on the basis of the Collective Bargaining Agreement (CBA) in force in 2009.

The respondent has denied liability and contended that the claimant was a management staff since 1985 and as such his terminal benefits on retirement in 2009 was pension and not gratuity under the CBA. That all the said pension had been paid to the claimant and as such the suit ought to be dismissed for lack of merits.

After several adjournments the suit was heard on 25/6/2013 and 27/6/2013 when the claimant testified as CW1 and Pius Musyoki represented the respondent as RW1. CW1 testified that he was employed by the respondent in 1971 as a Tester a position he served until 6/3/1985 when he got a letter appointing him as a Salaried staff. That he signed on the appointment letter as requested to show acceptance. That before then he was a union member and used to pay union dues through check off system but after the promotion, he stopped paying union dues and the respondent stopped to reflect it on his payslip. That he did not however resign form the union and he continued to consider himself as a unionisable employee until he retired in 2009.

He claimed gratuity based on his last salary of ksh.91,671 per month. That under the 2008 CBA, the formula for calculating gratuity was one month basic salary X 3 X years served. Hence  $ksh.91671 \times 3 \times 37 = ksh.10,175,481$ . That after retirement he was not paid any gratuity but upon demand he was offered ksh.1.9 million which was later increased to ksh.3,387,188. That the formula for calculating the said sum was never told to the claimant.

On cross examination, he admitted that the letter of appointment in 1985 and on which he signed acceptance indicated that his new position was non-unionisable. He also admitted that since 1985 he was contributing to pension and that after retirement he was paid ksh.5 million as pension and he had no complaint with that. That his payslip was not reflecting union dues deductions.

He also admitted that his dues from 1971-1985 were calculated at ksh.,3,391,188 as per respondents exhibit "c" of which he singed but only ksh.2,373,831.60 was paid to his lawyer.

RW1 was the Compensation and Benefits Manager for the respondent. He confirmed that the claimant worked for the respondent from 1971 to 2009 when he retired. That from 1971-1985 he was a unionisable staff but on 6/3/1985 he was promoted from unionisable to a management staff. That the letter clearly stated that the position was non-unionisable and the claimant accepted the appointment by signing on the letter.

That after the new appointment the claimant stopped contributing to the union and started to contribute to the pension upto June 2009. That he was paid all his pension after retirement and he could not get both pension and gratuity except for the period he was unionisable staff from 1971 to 1985. That the gratuity for the said period was Ksh.2,373,831 net of taxes and was paid to the claimant's advocate. That ksh.1,017,356.40 was withheld as tax and and such no further dues are payable to the claimant.

On cross examination he confirmed that salaried staff is a term used by the respondent to refer to management staff. That there are many benefits for the salaried staff which includes pension, school fees benefits among others. He admitted that the claimant was paid gratuity 3 years after retirement while this case was pending in court.

He denied knowledge of the formula for calculating the gratuity but maintained that it was based on an agreement between the management and the staff representatives. He further maintained that gratuities are payable after retirement. That the applicable CBA in calculating the gratuity should be the 1985 one when he ceased membership. After the close of the hearing, the parties filed written submissions.

I have carefully perused the pleadings and considered the evidence adduced and the submission filed. I am satisfied that the court has jurisdiction to determine the dispute before it because it relates to employment and labour relations as contemplated under Section 12 of the Industrial Court Act read with Article 162(2) of the constitution of Kenya. The following are the issues for determination arising from the pleadings, evidence and submissions:

- 1. whether the claimant was a unionisable employee through out his service with the respondent.**
- 2. Whether the claimant is entitled to the reliefs sought.**

The answer to the first issue is in the negative and the court need not spend much effort on it. It is clear from the pleadings and evidence that the claimant served in two phases. The first phase is the period between 1971 and 1985 when the claimant was a unionisable staff. He paid union dues through check off system and the same was reflected on his payslips. During the said period he did not contribute to the pension scheme and was therefore covered by a gratuity scheme under the CBA of the time.

The second phase was the period between 1985 and 2009 when the claimant was a management staff. During that time he did not pay union subscriptions but contributed to the pension scheme as was reflected on his payslip. His appointment letter dated 6/3/1985 also very clearly indicated that the position was non-unionisable and requested the claimant to append his signature if he was accepting the new office of which he voluntarily did sign. That he enjoyed all the many benefits which went with the status of a management staff until retirement which culminated with ksh.5 million pension.

The court is therefore satisfied on a balance of probability that the claimant was not a unionisable staff through out his service with the respondent and as such the claimant's allegation to the contrary is dismissed.

With respect to the second issue of the remedy sought, the court agrees with the respondent that the only gratuity payable to the claimant is for the 13 years in between 1971-1985 when the claimant served as a unionisable employee. The respondent had already paid to the claimant's advocate Ksh.2,373,831 as gratuity for the claimant after deducting ksh.1,017,356.40 as government tax. That means that the accrued

gratuity for the claimant was ksh.3,391,187.40 as per defence exhibit w.

The claimant demanded for the formula used in the final gratuity but RW1 said he cannot give because it was only known by the fund manager. The court finds that explanation not valid because it was an obligation on the respondent to pay the rightful quantum. That contractual obligation cannot be converted into a discretion on the part of the employer.

On the other hand the claimant has prayed for ksh.10,175,481 based on the CBA in force as at the time of his retirement in 2009. The court is not in agreement with the claimant on the said prayer in view of the earlier findings on the first issue for determination. The court therefore enters judgment for the claimant as follows:

- a. **That the claimant is entitled to payment of gratuities for the period served as a unionisable employee between 1971 and 1985.**
- b. **That the respondent is ordered to file with the court the formula and the workings followed to calculate the gratuities for the claimants service from 1971 to 1985 within 14 days of today.**
- c. **That the ksh.3,391,168 calculated by the respondent shall be the quantum of gratuity payable to the claimant less government taxes.**
- d. **The said sum has already been paid to the claimant through his advocate but he will get interest in the sum from the time of retirement to the time the money was paid to his advocate.**
- e. **That the claimant will also have costs of the suit because the respondent did not pay the gratuity before the suit was filed and even after the suit was filed she denied the claimant's claim totally.**

Orders accordingly.

**Signed dated and delivered this 6th September 2013.**

**ONESMUS MAKAU**

**JUDGE**