



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NO. 356 OF 2010

JULIUS GATETE IHOMBACLAIMANT

-VERSUS-

WELLS FARGO LIMITEDRESPONDENT

Mr. Waiganjo for Claimant.

Mrs. Mutisya for Respondent.

JUDGMENT

This claim was brought by a Memorandum of Claim dated 1st August, 2010 on 7th April, 2010.

The Respondent filed a Memorandum of Defence dated 3rd June, 2010 on the same date.

The claim for payment in lieu of notice in the sum of Kshs.74,624/= and payment for arrear salary in the sum of Kshs.16,634/= is not disputed and the Respondent has reiterated at paragraph 8 of the Statement of Defence its willingness to pay the said amount. Accordingly, the court enters judgment in favour of the Claimant in respect of the two items in the sum of Kenya Shillings ninety one thousand two hundred and fifty eight (Kshs.91,258/=).

The only issue in dispute is whether the Claimant is entitled to payment of service gratuity in the sum of Kshs.560,000/= in respect of the period served.

The Claimant's evidence is that he was employed as a guard on 17th October, 1994 and worked continuously until the 14th January, 2010 when he applied for voluntary retirement and same was granted.

The Respondent offered to pay terminal benefits to the Claimant except the gratuity but was asked to sign a disclaimer in favour of the Respondent. When he refused to do so, the Respondent declined to give him the payment in lieu of leave and salary arrears.

The Claimant told the court that his work was to vet the credentials of applicants during recruitment and any other duties as assigned to him by the management.

He told the court that he was not part of management and was thus covered by the **Remuneration of Wage (Protective Security Service) Order 1998 and 2003**. That in terms thereof, he was entitled to payment of service gratuity upon termination of his employment.

He produced his pay slip for December, 2009 which shows that his Department was that of Guarding and the Sub-Department was Guards Office Staff.

He denied the allegations by the Respondent that he was a manager and therefore not entitled to any service gratuity.

The pay slip shows that he was registered with the National Social Security Fund (NSSF) and the employer deducted the NSSF dues and remitted accordingly.

The Claimant told the court that his colleague a **Mr. Peter Kilonzo** and **Mr. Julius Odero** were paid gratuity upon termination and that he was discriminated against by the Respondent. He had served the Respondent for 16 years and was entitled to service gratuity at the rate of 18 days salary for each completed year of service. He produced the terminal dues tabulation for Mr. Peter Kilonzo dated 7th April, 2009 wherein he was paid service gratuity for twenty three (23) years at 18 days for each completed year of service and a pay slip showing that the payment was made. He also produced the computation for Mr. Julius Odero who was also paid gratuity upon resignation and a pay slip for February, 2009 showing that the gratuity was actually paid.

The Claimant added that he had been promised payment of gratuity prior to his retirement and had served the Respondent diligently and faithfully for the 16 years and therefore failure to pay him was not only a breach of promise but also violated the wage order in the sector.

Mr. Stephen Kange then testified for the Respondent and produced Appendix I to the Statement of Defence which contains the Claimant's terms of service. He agreed that the Claimant's work was to vet personnel for recruitment. He interviewed and interrogated them and scrutinised their documentation as his background was police service.

He told the court that the Claimant earned more than ordinary guards though he admits that his pay slip shows that he worked in the Guards department and not management.

He said that Mr. Peter Kilonzo was a crew commander for cash-in-transit department hence he was a junior to the Claimant and was therefore paid gratuity. That Mr. Julius Odero was also an ordinary guard hence was paid gratuity but the Claimant was not paid gratuity because he was in management.

These employees made contributions to NSSF. The Claimant was not paid gratuity because he was in management.

He told the court that the Claimant had no letter showing that he had been promoted to managerial position but he remained in the Guards department throughout his service to the Respondent.

Counsel for the Respondent has submitted that the Claimant was not entitled to service gratuity because he was registered with NSSF in terms of **Section 35 (6) (d)** of the Employment Act.

This is however not the case put forth by the witness for the Respondent Mr. Stephen Kange who told the court the only reason he was not entitled to service gratuity was because he was a manager.

Evidence has been tendered to show that colleagues whose employment was terminated either through retirement or resignation around the same time the Claimant resigned were paid service gratuity by the Respondent. This evidence is not controverted by the Respondent at all.

The pay slip of the two officers who were paid gratuity shows that they were also registered with NSSF and their dues were remitted.

No evidence has been produced whatsoever by the Respondent to justify such blatant discrimination against the Claimant who had served the Respondent faithfully, in the Guards department, and not as a manager for a period of 16 years.

The service gratuity at the rate of 18 days for each completed year of service was the agreed rate in the sector. The mere fact that the agreement is recorded by way of a regulation does not make it less binding than any other contract of service.

The wage orders are binding documents enforceable in terms of *Section 26 (2)* of the Employment Act which provides:

“Where the terms and conditions of a contract of service are regulated by any regulations as agreed in any collective agreement or contract between the parties or enacted by any other written law, decreed by any judgment award or order of the industrial court are more favourable to an employee than the terms provided in this part and part VI, then such favourable terms and conditions of service shall apply.”

It is noteworthy that the provisions of *Section 35 (5)* as read with *Section 35 (6) (d)* referred to by counsel for the Respondent in the written submissions fall under *Part VI* of the Act, referred to above.

Accordingly the provision is not applicable to the Claimant where he enjoys much favourable terms of retirement and or termination as contained in *Regulation 17* of the **Regulations of Wages (Protective Security Services) Order 1998** as amended in the year 2003.

Accordingly the Claimant is entitled to the sum of Kshs.560,000/= being service gratuity for the period of 16 years he had served the Respondent.

The Respondent had the opportunity to deposit the arrear salary and payment in lieu of leave with the Ministry of Labour and/or the court but did not do so. Instead, the Respondent had demanded waiver of the rights of the Claimant to sue before making out the payment.

These are statutory protected dues to the Claimant from the date when they fell due. The Respondent is therefore to pay the entire judgment amount in the sum of Kshs.650,948/= with interest at court rates from 14th January, 2010 when the amount became due and owing to the Claimant.

The Respondent is also to pay costs of the suit.

It is so ordered.

Dated and delivered at Nairobi this 6th day of September, 2013.

MATHEWS N. NDUMA

PRINCIPAL JUDGE