



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA

AT MOMBASA

CAUSE NO. 49 OF 2012

CHARLES KAMBO WAMAI.....CLAIMANT

VERSUS

BAMBURI CEMENT LTD .....RESPONDENT

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

The claimant has sued the respondent claiming terminal dues and salary for the years he would have served before his normal retirement. The claim is made up of the following:

- a. **terminal benefits for the period served as a casual ..ksh.231,000**
- b. **gratuities for service as unionized staff.....350,964**
- c. **lost income for 4 years due to unlawfully**

**redundancy .....4,826,083**

**5,408,047**

The respondent has denied liability and prayed for the suit to be dismissed with costs. She averred that the claimant was lawfully declared redundant and paid his terminal dues. Hat as at the time of redundancy he was not a unionisable employee and as such the Collective Bargaining Agreement (CBA) in force then was not applicable to him. In addition she averred that she held the gratuities for the claimant lawfully and with his consent.

The suit was heard on 4/6/2013 and 27/6/2013 when the claimant testified as CW1 and Pius Musyoki testified for the respondent as RW1. CW1 told the court that he was employed by the respondent in 1982 and worked as such until December 1996 when he was appointed on permanent basis as a driver. That his gratuities for the casual service were calculated at ksh.43,236. That money was never paid to him and according to him the correct amount was ksh.231,000/

That from 1996 he served as a unionisable permanent employee up to April 2001 when he was promoted to a salarized staff to serve as a Sales Clerk. That his gratuity for the 1996-2001 period was never paid and the claimant had to wait until 21/2/2011 when the HR Manager notified him by email that his gratuity was ksh.350,964. That the claimant disputed the sum because he was not shown how it was calculated. According to him he was entitled to ksh.535000 based on the CBA formula of 1 ½ month's salary per completed year of service.

That as a salaried staff he was no longer unionisable and he served until June 2011 when he was

unlawfully terminated by redundancy. That the redundancy was unlawful because he was just 4 ½ years to his retirement and was replaced by other persons in the same capacity immediately thereafter in July 2011. That his gross salary at that time was ksh.78,482 and he asked the court to award the full salary he would have earned for the 4 ½ years until his normal retirement which he calculated at ksh.4.826,083. He also prayed for damages for unlawful redundancy. That instead of redundancy the respondent should have transferred him to the Production Department which had a vacancy of an operator like him but the transfer was rejected. That he applied for the transfer in April 2010 but he was declared redundant in June 2011.

On cross examination he admitted having been paid his pension but denied that it was inclusive of his gratuities. He maintained that when he received email advising him of his gratuities but he disputed the quantum through email. He denied ever signing to authorize the transfer of his gratuities to pension. He was also never shown how the gratuities were calculated upto the day of his testimony herein.

On the issue of availability of an alternative vacancy at the time of redundancy, he stated that the letter given was not produced in court. He clarified that on 30/6/2011 he was given a letter to sign that he was exiting the company after the HR Director was said to have rejected his request for an alternative vacancy as Clinker Loading Operator. That according to him the Labour Officer was never involved. He however admitted that he was paid all his pension, salaries, baggage allowance and 3 months salary in lieu of notice. That his only outstanding claim was his gratuities.

RW1 is the compensation and Benefits manager for the respondent. He told the court that the claimant was formerly employed by the respondent. That his compensation dues were fully paid on 3/8/2011 as follows:

|                                     |                            |
|-------------------------------------|----------------------------|
| a. <b>redundancy pay</b> .....      | <b>775,925</b>             |
| b. <b>gratuity</b> .....            | <b>581,944</b>             |
| c. <b>overtime</b> .....            | <b>70,634</b>              |
| d. <b>3 months notice pay</b> ..... | <b>235,446</b>             |
| e. <b>accrued leave</b> .....       | <b>118,793</b>             |
| f. <b>baggage allowance</b> .....   | <b><u>100,000</u></b>      |
|                                     | <b><u>1,882,742.41</u></b> |

That after taxation the net sum paid was reduced to ksh.1,336,371 for which the claimant signed a discharge voucher on 6/7/2011 accepting the said sum and fully discharging the respondent from any further claims. That the gratuity sum of Ksh.581,944/ was for the entire period served.

On cross examination he could not tell the period for which the gratuity was paid. He could not tell whether the Ksh.350,964 gratuity sum notified to the claimant was ever paid to him. He could not also prove whether or not the said gratuity was transferred to the pension. He confirmed however that the claimant never signed the authority to transfer the gratuity to pension. He also confirmed that all the exiting employee signed a discharge and the employer retained some of his money for managing any claims against the departing employees. After the close of the hearing of evidence the parties filed written submission.

I have carefully perused the pleadings and considered the evidence adduced by the witnesses in addition to the submissions made by the counsel. The dispute before the court concerns employment and labour relations and therefore the court has jurisdiction to determine it by dint of Section 12 of the Industrial Court Act read with Article 162(2) of the Constitution of Kenya. The issues for determination arising from the pleadings, evidence and submissions are:

- a. **whether the declaration of redundancy on the claimant by the respondent was unlawful and unfair.**
- b. **Whether the claimant is entitled to the prayers sought.**

In answer to the first issue, I agree with the defence that the claimant was not a unionisable employee and as such the provisions of the CBA concerning the unionisable employees did not apply to him. According to the CBA produced as document No, 2 filed in court on 9/7/2013, the job group A-E are only workers covered by the CBA and they earn much lower salaries than the claimant. Whether the claimant rejoined the union after appointment to management office was neither here nor there, it did not change the terms of contract which excluded him from benefits of the CBA.

Consequently the terms of redundancy for him were to be dealt with under Section 40 of the employment Act 2007. Section 40 of the said Act provides that before termination by redundancy, the employer shall firstly serve one month prior written notice upon the labour officer and the employee. Secondly the selection of the employees to be declared redundant should be done fairly and with due regard to seniority in time and to the skill, ability and reliability of each class of employees affected by the redundancy and thirdly the employer shall pay terminal dues including accrued leave days, not less one month notice pay, and severance pay of not less 15 days pay for each completed year of service.

In the present case the claimant was given a verbal notice by the HR Manager on 29/6/2011 and then a written notice was served on him on 30/6/2011 which stated that it was to be his last working day. That he signed and left his employment for good. That the labour office was not involved in the matter. That he was paid 3 months salary in lieu of notice, salary, leave and baggage allowance in full.

I have considered the letter dated 27/4/2011 (marked Appendix 10) which was the redundancy notice. It was copied to the labour officer but no address is shown. In my view it was not a notice to the labour officer but to the claimant alone and only copied to several people including the labour officer. The letter did not qualify to be a redundancy notice to the labour officer within the meaning of Section 40 of the Employment Act. The said law does not say that a Notice shall be to the employee and copied to the labour officer. Even if the copied notice was to be treated as a notice, there is no proof that it was ever served and which labour officer.

It follows therefore that the area labour officer was never served with a redundancy notice and was never involved in the redundancy process according to the uncontested evidence by the claimant. Even if the claimant was paid all his statutory dues the declaration of his redundancy amounted to an unlawful and unfair termination within the meaning of Section 45 of the employment Act. Redundancy is a special mode of terminating employment and that is why the law provides for special process for it including involvement of a Government Officer to validate the process. Any default by the employer to comply with the set rules of procedure the redundancy process become invalid and therefore unfair termination.

As regards the second issue, the court finds that claimant was paid all his gratuities. The first to be paid was the terminal dues of ksh.43,236 for the period worked as casual which was acknowledged by the claimant by signing on 10/10/1996 according to the sheet annexed to the memorandum of claim.

The second gratuity to be paid was ksh.581,944 which was paid on 25/7/2011 and the claimant acknowledged receipt thereof as per the respondents documents filed in court on 26/6/2013. He has also admitted payment of pension, all his salary, notice pay and baggage allowance. The claim for further gratuities is therefore dismissed. However in view of my earlier findings that the redundancy of the claimant amounted to unfair termination, the court awards a compensation of 12 months gross salary to the claimant as provided for under Section 49 and 50 of the employment Act.

Consequently, I enter judgment for the claimant against the respondent as follows:

- a. **Ksh.78,486X12.....941,832**
- b. **costs and interest from today.**

Orders accordingly.

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

**ONESMUS MAKAU**

**JUDGE**