



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA
AT NAIROBI
CAUSE NO. 774 OF 2011

KUDHEIHA WORKERS..... CLAIMANT
VERSUS
BOG GATUGI GIRLS' SEC. SCHOOL..... RESPONDENT

AWARD

Kenya Union of Domestic, Hotels, Educational, Institutions, Hospitals and Allied Workers (hereinafter referred to as KUDHEIHA WORKERS) filed the Claim herein by Memorandum of Claim filed on 17th August 2010, alleging the wrongful termination and non payment of retirement benefits to Mr. Samuel Muchora Theuri. The Claimant alleges in the Memorandum that the Grievant Mr. Theuri was issued with a retirement letter but was not paid service gratuity for the 25 years that he worked with the Respondent. The Claimant avers that it reported a dispute to the Minister for Labour but parties failed to agree prompting the filing of this case.

It is the contention of the Claimant that the Grievant was employed by the Respondent on 16th January 1979 without specifying the work to be performed by him. The Claimant has annexed the letter of appointment as Appendix 1 to the Memorandum of Claim. On 20th February 2004 the Respondent issued a letter of retirement to the Grievant giving him 3 months' notice. The Claimant alleges that the Respondent is bound by the Memorandum of Agreement between the Claimant and the Ministry of Education. That Clause 31(a)(i) and (ii) of the agreement provides for service gratuity. An extract of the Agreement is annexed to the Memorandum of Claim as Appendix 8. The Claimant further avers that the Respondent discriminated against the Grievant as it paid service gratuity to Mr. Charles Githaiga Kabachia who retired in 2009. A copy of the Respondents retirement letter for Mr. Kabachia is annexed to the Memorandum of Claim as Appendix 10.

The claimant prays for the following;

1. Service gratuity at Shs.3490 x 25 amounting to Kshs.87,250.
2. Maximum compensation of 12 months salary amounting to kshs.41,880.
3. Costs.

The Respondent filed a Memorandum of Defence under protest through the Attorney General on 5th

November 2010 in which it alleges that the Claimant has no locus standi to institute or prosecute the claim as the Claimant is not privy to the Grievant's employment contract. That the claim is frivolous and vexatious, that the Respondent complied with clause 31 of the agreement by deducting NSSF from the Grievant's salary and remitting to NSSF monthly. The Respondent denied the allegations of discrimination.

The case was heard by Justice Charles P. Chemuttut (now retired) on 2nd March 2011 when Mr. Charles Kariuki appeared for the Claimant while Mr. Lawrence Mwendwa, State Counsel appeared for the Respondent. Justice Chemuttut left the court before preparing the Award and the file was allocated to me to prepare the award.

At the hearing Mr. Kariuki submitted that the Grievant was employed on 16th January 1979 at a salary of Shs.1,375 per month. His salary was increased over the years and his last salary was Shs.3,490 with a house allowance of Shs.700. He was retired on 31st December 2004. He prayed for orders as prayed in the claim.

Mr. Mwendwa for the Respondent submitted that the Grievant was a contributor to NSSF and is not entitled to gratuity and further that the Agreement does not apply to the Claimant.

I have considered the pleadings and the oral submissions of the parties. The issues for consideration are the following;

1. Whether the Memorandum of Agreement applied to the Grievant.
2. Whether the Grievant is entitled to service gratuity and compensation.

The Claimant has attached to its Memorandum of Claim an extract of the Memorandum of Agreement between the Claimant and the Ministry of Education Science and Technology. The Respondent has not denied the authenticity of the agreement. It only states that the agreement is not applicable to the Grievant by virtue of Section 35(6) of the Employment Act. The Respondent did not deny that it paid gratuity to Charles Githaiga Kabachia, an employee who retired from its employment on 31st April 2009, by virtue of the provisions of the agreement.

The Employment Act was enacted in 2007 and became effective on 2nd June 2008. Section 35 thereof is therefore not applicable to the Claimant who was retired in March 2005. I find that the Memorandum of agreement was applicable to the Claimant.

The Memorandum having been applicable to the Grievant, he is entitled to gratuity at the rate of one twelfth of each completed month of service based on his last salary of shs.3490 as provided therein and not 1 month's salary per year worked as claimed. The Grievant served the Respondent for 327 months from January 1978 to March 2005. He is therefore entitled to Kshs.136,947.60 which I award him.

Having been lawfully retired and not terminated, the Claimant is not entitled to compensation.

I award the Claimant costs of the claim based on actual disburseable expenses as the Claimant did not engage the services of an advocate and therefore cannot be entitled to professional fees based on the Advocates Remuneration Order.

Orders accordingly.

Read in open Court this 7th day of November 2013

HON. LADY JUSTICE MAUREEN ONYANGO

JUDGE

In the presence of:

Mwari Stephen Njiru_____ for Claimant

No appearance_____ for Respondent