



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA
AT MOMBASA
CAUSE NO. 152 OF 2013

TAILORS & TEXTILES WORKERSCLAIMANTS
VERSUS
AFRICAN COTTON WORKERSRESPONDENT

J U D G M E N T

BACKGROUND

The claimant brings this suit on behalf of Benstone Kimonge (grievant) against the respondent claiming terminal benefits amounting to ksh.301,450/-. The respondent has denied liability and proposed that any terminal dues should be based on the fixed term contract between the grievant and herself and not the CBA between the parties herein.

The suit was heard on 23/9/2013 when the grievant testified as CW1 but the defence called no witness but only filed a letter dated 6/9/2013 tabulating payments proposal.

CLAIMANT'S CASE

CW1 confirmed that he was employed by the respondent in February 2002 as a general worker but in 2003 he was promoted to a Machine Operator. He served until 27/5/2010 when he served a 30 days resignation notice to the respondent. On 31st May 2010 and before completing his notice period, the respondent told the grievant to go home for a rest and wait for his dues. No dues were paid as promised.

CW1 at all material time was a members of trade union (claimant) which had a valid CBA with the respondent. He was receiving Kshs. 8540 salary per month but no house allowance. He never used all his leave days and as at the time of termination he had 20 accrued leave days. He prayed for service pay.

On cross examination, CW1 confirmed that the respondent accepted the resignation and offered to pay his dues. He contended that he was entitled to notice pay because he was dismissed before serving his notice period. He also confirmed that his contract of employment was to lapse on May 2011 and he indicated that he did not wish to have it renewed. He confirmed that clause 21 of the CBA provided for service gratuity of 18 days pay per year of service. Referring to FKE's letter dated 6/9/2013, CW1 confirmed that the respondent had offered to pay 20 days leave and service gratuity for 10 years. He

maintained that he was receiving Ksh.8540 as basic salary and was never paid any house allowance. Referring to contact letter, he confirmed that the letter provided for consolidated salary.

He however maintained that he was a member of the union and the contract to be followed is the CBA. He added that he was forced to sign the fixed term contract or else he would have lost his job. He maintained that he served a one month notice as per the fixed term contract but the CBA provided for 2 months notice period. After hearing the evidence both parties filed written submission. The claimant calculated his claim to Ksh.156,277.07 while the respondent maintained the sum of ksh.51,070.94. The two parties based their calculation on the CBA.

ANALYSIS AND DETERMINATION

The issues for determination arising from the pleadings, evidence and submissions are:

- 1. whether the employment contract herein was governed by the CBA between the claimant and the respondent.**
- 2. Whether the contract was wrongfully and unfairly terminated by the respondent**
- 3. whether the grievant is entitled to the reliefs sought.**

The answer to the first issue is in the affirmative. Although the defence initially denied that the CBA covered the grievant, no witness were called to support that view. Instead the defence filed a letter assessing the terminal dues based on the CBA and repeated the same by way of written submissions after the close of the hearing. I will not take much time analyzing that view because the defence has not contested grievant's membership with the union (claimant).

As regards the second issue of whether the respondent wrongfully and unfairly terminated the grievant's employment, the court resolves it by considering the intention of the parties from the resignation notice dated 27/5/2011 and the termination notice by the respondent dated 31/5/2011. It is the court's view that by the exchange of the two letters, both parties had mutually agreed to terminate the contract after 30 days from 27/5/2011. It followed therefore that if the respondent relieved the grievant of his duty before the lapse of the notice period, that did not prejudice the claimant so long as he was paid his full salary for the agreed period. The court is therefore of the considered view that where parties agree to terminate a contract voluntarily, like in this case, they are free to waive any right to prior notice. In the present case the parties only agreed on 30 days notice which allegedly the respondent further waived and paid the salary due for the agreed notice period. The same must have been paid because it is not being claimed herein. Nothing more than the salary was demonstrated to have been at stake.

Lastly, the court must consider whether the grievant is entitled to the relief sought. Obviously, arising from the court's finding on the issue of termination, the prayer for salary in lieu of notice must fail. Likewise the prayer for compensation for unfair termination must also fail due to the same reasons that the employment was ended by mutual agreement by the parties concerned.

The grievant will however get cash in lieu of 20 days accrued leave as admitted by the defence. The defence urges the court to apply the basic salary as opposed to gross salary but without any basis. The court will therefore apply the gross salary which works to ksh.7493.33. The claimant however prayed for ksh.6419.00 and that is what will be awarded. The grievant will also get service gratuities for 10 years at the rate of 18 days per year. The CBA does not state whether or not to apply the gross salary in calculating the gratuity payable. The claimant has applied the basic pay of $ksh.8540 \times 18 / 30710 \text{ years} = 51240$. I will award the same to the grievant.

Lastly the grievant will get his certificate of service for the years served. The court will not deal with the criminal aspect of the claim and it stands struck out.

DISPOSITION

For the reason stated above, judgment is entered for the claimant on behalf of the grievant for they

payment of:

1. **20 leave days6,419.00**
2. **service gratuity for 10 years51,240.00**

57,659.00

The above sum will attract interest at court rates from 31/5/2011 till payment in full. The claimant will get half the cost of the suit in view of the difference between the admitted and the proved claim.

Signed, dated and delivered this 6th day of December 2013

ONESMUS MAKAU

JUDGE