



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 2502 OF 2012

SETH WINGIRA LUVUTSI.....CLAIMANT

VERSUS

MAENDELEO YA WANAWAKE (MYWO).....RESPONDENT

JUDGMENT

1. The Claimant filed his suit on 20th January 2004. He claimed that he was employed by Maendeleo Ya Wanawake Organisation (MYWO) as a Programme Assistant under renewable contracts of employment. The terms of the contracts included payments of gratuity at the rate of 25% of the basic salary at the termination of each contract of service. He claimed that between May 1997 and August 1999 his salary was set at 70,000/- but he was only paid 55,000/- per month. He claimed that between August 1999 and December 1999 the salary was increased to 75,000/- yet he continued to only receive 55,000/-. Between January 2000 and September 2001 while his basic salary was still 75,000/- he received 60,500/- as payment per month. He averred further that he was not paid gratuity from May 1997. His employment was terminated on 10th September 2002. He thus sought payment of gratuity totalling Ksh. 1,126,875/-, under payments totalling Ksh. 809,000/-, special allowance of Ksh. 1,449,200/-. The Amended Complaint was filed on 16th April 2008.
2. The Respondent filed a Defence under Protest and later filed an Amended Defence on 14th January 2005. In the Amended Defence the Respondent denied each and every allegation of the Claim. His employment was denied, the gratuity and under payments were denied, the Claimant was put to strict proof of all his averments.
3. The Respondent filed a witness statement by Mary Muriu the Acting Personnel and Administration Manager of the Respondent. She stated that the Claimant was paid all his dues and the only balance was the unpaid gratuity which was to be offset against the outstanding imprest in respect of a project the Claimant had handled.
4. The Claimant testified on 17th June 2013 and stated that he was now a farmer. He was employed on 26th September 1985 at a salary of 4,800/- a month. He continued serving the Respondent and had new contracts. He testified that on 15th November 1995 he was given additional duties for which he expected pay. He referred to the MYWO Personnel Policy Clause 7 on Acting Allowance. He testified that he undertook these duties between 1995 and 2002. He worked for 7 years and was not paid this allowance. He testified that the sums not paid would be given as part of his gratuity. He claimed 1,126,875/- as outstanding gratuity. He also sought payment of a special allowance of 809,000/-. He claimed a sum of 2,272,000/- for the preparation of project proposals.

5. In cross-examination the Claimant testified that he was employed under contract and the duties he was assigned were as an assistant project manager. He was to assist the project manager. He admitted that he did not complain as this was prohibited under the Manual and Staff Policy. He testified that he gave verbal complaint and did not make them in writing. He stated that he had discussions before his termination.
6. The Respondent called Mary Muriu the Acting Personnel and Administration Manager. She testified that she worked as accounts assistant and from the accounts point of view the payments made to the Claimant were per his contract and under direction of the personnel and administration department. The payments were as per the payslips. The Claimant's employment was terminated after the project ended. The Respondent sought a refund of 185,625/- from the Claimant as unsurrendered imprest. She testified that the gratuity in relation to the employment was paid till September 2001. She said the Claimant never complained at the time that he was not paid or that he had been underpaid. She testified that the sums owed including the sums owed on KWCP, NCEP and disallowed expenditure, overpayment on per diem and fuel costs brought the total to 239,755.75. The gratuity he is entitled to for the balance of the service from 2001 is 107,838/- after tax. She stated the Claimant was not entitled to acting allowance. The duties included proposals. She stated she never received any complaints from the Claimant. She stated that gratuity is paid each year or after 2 years. The Respondent claimed Kshs. 131,917.75 through its lawyers and the Claimant did not pay the sums nor reply to the demand letter.
7. In cross-exam she stated that the Claimant was never paid a salary of 70,000/- or 75,000/- but was paid as per the payslips. She denied it was underpayment as the letters could have been for funding purposes. She however admitted that 82,500/- was a correct figure and was paid to the Claimant as a salary. This was per the letter of increment and Memo of 7th August 2002. Gratuity was paid by transfer schedule though she did not have the schedule in Court. She stated the Claimant was aware of the imprest as his letter of 10th February shows. The gratuity owing was in relation to his last contract and not the gratuity over the years. She testified that if one is paid an acting allowance the amount is specified and is not left hanging.
8. The Claimant and Respondent filed their respective submission on 12th and 15th July 2013 respectively. In the submissions the Claimant reiterated his claim and asserted that the Claim he made were proved. The Respondent through their submissions stated that the Claimant never sought the alleged underpayments and only raised the issue in the suit. It was submitted to be an afterthought.
9. The employment law is clear. No claim can be entertained unless made within 3 years. The claims by the Claimant relating to the period before 2001 are therefore barred by limitation. The payslips he produces show that he received a slightly lower sum than the one reflected in the letters which he produced. The letters suggest that that Claimant received 60,500/- instead of 75,000/- for the period in question meaning an underpayment of 14,500/- from January 2001 till October 2001 amounting to Kshs. 130,000/-.
10. He wrote letters in September 2002 and October 2002. In those letters he never raised the issues of underpayment or non-payment of gratuity. If these were live issues they would have formed part of his demands. He therefore can only have made the demand on unpaid gratuity as an afterthought. He was entitled to gratuity for the last contract which works out to Ksh. 138,750/-. All the other sums claimed were not proved.
11. The sums claimed by the Respondent were not particularised in their Claim and thus cannot be awarded as they were not specifically claimed. It might well be that the Claimant owes the Respondent as exhibited by the demands made to him but these were not pleaded.
12. In the final result the Court enters judgment for the Claimant for **Kshs. 268,750/-**. The Claimant to have interest at Court rates from the date of filing in 2004 till payment in full. He will also have costs on the sum of 268,750/-.

It is so ordered.

Dated and delivered at Nairobi this 4th day of December 2013

Nzioki wa Makau

JUDGE