



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 1478 of 2010

JAVAN WERE MBANGO.....CLAIMANT

VERSUS

H. YOUNG & CO. (EA) LTDRESPONDENT

JUDGEMENT

This is a claim dated 26th November 2010 for wrongful termination of the claimant and failure to pay his terminal dues by the respondent. A response dated 17th December 2010 is on record where the claim is denied on the ground that the terminal was not wrongful and that all terminal dues were settled in full. The parties appeared for hearing in court and called witnesses for both parties and there are submissions on record.

That the claimant was employed by the respondent on 4th January 2000 as a foreman until 9th October 2010 when he was terminated. His last salary was kshs.30, 000/= a month. That upon this termination he was not paid severance pay of 15 day per year for the 10 years worked, 30 days payment in lieu of notice, annual leave of 21 days for the 9 years worked, 11 public holidays per year for the 10 years worked, 4 weekly resting days per month for the 10 years worked were not paid as lawfully due under the Employment Act. That all these claims amounted to kshs.1, 119,228/= which he now claims from the respondent. He further claims pay for the 9 days worked in October 2010.

The respondent on their part stated that the claimant was employed with them from 26th February 2001 and that indeed he was terminated as claimed on account of redundancy. That since 2007, the claimant had become part of management as a result of which , he agreed to work on public holidays and odd hours at no extra pay and thus the claim for 11official public holidays worked is misplaced and a claim meant for unjust enrichment.

That upon termination the respondent admitted what was owing and this was paid being 9 days worked in October 2010, all accumulated leave, one month salary in lieu of notice, and gratuity at 15 days for each year worked. However, upon this computation, the claimant had an outstanding loan with the staff saving scheme that had an outstanding loan balance of kshs.231, 912/= which was recovered before the difference was payable to the claimant.

Thus, according to the respondent, they paid the following

1. 9 days worked in October 2010
2. One month salary in lieu of notice

3. 164.62 leave days balance
4. Gratuity as 15 days for 9 years

That from the payment of the above agreed items, an amount of Kshs. 231,912/= was deducted as dues to the claimant Sacco loan balance.

On the other hand the claimant computations of his dues are:

1. 9 days worked in October 2010
2. One month pay in lieu of notice
3. Total of leave days outstanding being 195 (6 days in 2000 and 189 for 9 years)
4. Severance pay of 15 days for each year worked
5. 110 public holidays worked for 10 years.
6. 480 weekly rest days worked for 10 years

What thus seem to be in dispute are the following items:

- a) The balance of leave days of 164.62 to 195 the difference being 30 days
- b) 110 public holidays worked
- c) 480 weekly rest days worked

In evidence the claimant stated that on 4th January 2000 he was employed by the respondent as a Mechanic/Foreman being qualified as Grade 1 level mechanic and was sent to Tanzania at Iringa, then Mumias and was paid kshs.25, 000.00 a month and later this increased to 30,000.00. That on 9th October 2010 he was terminated without warning or offence. At the time he was at Portland cement working on a contract and upon receiving a call that he was required at the office, he proceeded to Industrial Area office where he was informed that his services had been terminated. The Human Resource officer indicated that his dues would be accessed after 3 days and he was to come for them. That he had no previous notice of termination until the letter he got on 9th October 2010.

That upon return to collect his dues, there were disparities as he was entitled to kshs.1,119,228.00 for days worked in October 2010, notice pay, balance of leave, severance pay, leave days due, work on public holidays, and weekly rest days not taken but he was only given Ksh.15,640.00. That he never went on leave even though he made several applications to do so and whenever he did he was told there was too much work and only in 2000 when he was paid for his leave days. That for 9 years he never took his leave days.

Claimant also gave evidence that he never took any off days except on a few occasions. That he worked for 7 days a week without rest instead of the 6 statutory allowed days. He now claims for all the off days due not taken and not paid for as well as one day rest day due for every week worked.

That while at work he took a loan with the savings Sacco amounting to kshs.200,000.00 and at the time of termination he had paid it but a balance of Kshs.231,912.00 was due and was deducted from his terminal dues and paid to the Sacco yet he was not owing the respondent but the Sacco.

On cross-examination the claimant confirmed that he got letter dated 10th March 2007 on changed status but was not in the management level though he was required to work extra time without more extra pay.

He stated that he was entitled to time served before he was given the new title he had 11 public holidays not paid; he had not gone on leave even when he had applied to go. That in 2010 he was paid for his leave since there was no assistant to take over his work and when he was terminated, a foreigner was brought in to do his job.

The Respondent first witness Ms Lillian stated that she is the Accountant and also Treasurer of cooperative, the Wanachuma Sacco and has worked with the respondent since February 2001. The members of the Sacco are the employees of the respondent as no outsiders are allowed and the officials of the Sacco are also all from the respondent employ. That the Sacco serves various interests of the members like development loans payable in 36 months, school fees loan payable back in 12 months and short term loans payable back in 3 months or less. That the claimant took a loan almost every month, short term loans and a further 40,000.00. At the time of termination there was a balance of kshs.40, 000.00 and owed Kshs.200, 000.00 development loan given 2 days before the termination and had a short term loan recoverable at the end of the month. He had household loan balance of Kshs.2, 600, and outstanding loan of kshs.231, 000.00 and had shares in the cooperative amounting to 161,000 and in his pay slip there were deductions to repay the various loans.

That upon a termination, the Sacco has an agreement with employer to deduct outstanding dues and this was affected with regard to the claimant. That the Claimant was bound by the Sacco by-laws and given consent to the deductions and thus the Sacco had written to the respondent on 11th October 2010 to deduct balance due and he was paid the difference balance due in a cheque that was cleared by the Sacco bank. That these deductions had been approved by all members of the Sacco. That Wanachuma Sacco through registered on its own name has made by-laws showing that they share a bond with management of the respondent. There is sharing of information between the Sacco and the respondent and when there is a termination they are notified. Even though Wanachuma Sacco is registered and can be sued and sue in its own name, member sign and give guarantors for loans taken if their shares are not enough. Claimant had taken a loan of kshs.200, 000.00 2 days before termination and the Sacco charge a 1.2% interest.

Respondent second witness was the Human Resource officer Mr. Alfred Mwendwa who knew the claimant well and that in 2007 claimants' status changed to senior staff and he signed the letter of appointment that he was not entitled to overtime or to join Union and therefore his claim for overtime is not tenable as well as that of public holidays. That before he became a senior staff he was paid all overtime and at the time of termination he was entitled to days worked, leave, leave travel allowance, gratuity and notice pay less statutory deductions and Sacco loans. That the final dues made included leave, notice and other allowances as well as gratuity at the rate of 15 days for every year worked and the deductions were PAYE, advance salary, outstanding Sacco loans and he was to collect his Sacco shares in full.

That from the deductions there was a loan of Kshs.202, 400.00 and he refused to take the final dues arguing that the amount was low. That according to Sacco by-laws, there was a demand of loan due which was effected before balance was issued to claimant and this was lawful and fair since the guarantors would suffer if he failed to repay the loan.

The witness further stated that as Human Resource officer, he had access to all files and also those of the Sacco even though he was not a Sacco member. The claimant got a higher salary since he was in management and so he was not to claim for extra hours worked. That the claimant went on leave and it was his duty to apply for it when it was due. In some applications he made they are not signed.

What is clear from the proceedings herein is that upon receipt of the termination letter on 9th October 2010, he was not keen on the lawfulness of the process all what he is keen about is the payment of his terminal dues. This is despite of the fact the due process was not followed in declaring him redundant as by law outlined and by pursuing this unfair procedure, the Claimant becomes entitled to seek compensation.

Is the claimant entitled to the dues claimed?

The above notwithstanding, an employee declared redundant and does not challenge it is still entitled to remedies as set out under Section 40 of the Employment Act. Under Section 40(1) (e) to (g):

(e) The employer has where leave is due to an employee who is declared redundant, paid off the leave in cash;

(f) the employer has paid an employee declared redundant not less than one month's notice or one month's wages in lieu of notice; and

(g) The employer has paid to an employee declared redundant severance pay at the rate of not less than fifteen days pay for each completed year of service.

Contracts of employment as made between the parties herein cannot be made to negate any legal provisions they can only be upheld in law if made to further the rights of the parties. So that provisions of Section 28 of the Act cannot be negated by any other provisions and the entitlement for annual leave is due to every employee having worked for 12 months to take 21 leave days with full pay. An employer can only increase these days but cannot go below the legal minimum. That is the law.

Though the claimant stated that he never went on leave for the 9 years he worked for the respondent, I note that annexure 76 to 83 outline days taken for leave, some were sold and cash received and others were broken down to facilitate him to take his child to school. He was not honest in this regard and I take the computation of the Respondent that indeed leave days were taken and a balance of 164.62 was outstanding and award the same.

However, upon one being declared redundant as the Claimant was, any leave days due are to be paid in cash. This does not seem to have been done as Claimants evidence which was not refuted in any material way was that he received his termination and advised to come later to collect his dues and a cheque was issued. Hence, any leave due should have been paid to him in cash to help him move on with his life after losing his job once his position was declared redundant.

I will therefore grant the amount of Kshs. 165,000.00 leave days balance.

Notice pay is also due. Respondent admitted that in calculating the terminal dues owing to the Claimant, the one month notice was out into consideration as due. This is admitted and Court will confirm the same as payable.

Even where leave days are granted or paid for, an employee has a right to rest days of at least one day per week. The contract as between the parties in change of employment status does not change this right as under the Employment Act now repealed and the Employment Act, 2007 Section 27(2). This is a right that cannot be taken away through private contracts. Claimant commenced work on 26th February 2001 and his last day was 9th October 2010 making these is 492 weeks and a day of rest for each week amounts to 492 days. The practice in the sector is to compute pay for work undertaken over rest days and on public holidays at twice the daily rate payable. On a salary of 30,000 the daily rate translates to 1,000 and twice this salary on the 492 rest days worked all amount to Kshs.98, 400.00. This court will award this amount.

Severance pay is also payable. The law envisage that since an employee has lost employment due to reasons that he has no control over, his need to get this severance pay to set him off and use his skills elsewhere. Sections 2 of both the Employment Act No. 11 of 2007 and the Labour Relations Act No. 14 of 2007, define the term 'redundancy' to mean:

the loss of employment, occupation, job or career by involuntary means through no fault of the employee, involving termination of employment at the initiative of the employer, where the services of an employee are superfluous, and the practices commonly known as abolition of office, job or occupation, and loss of employment.

Positions and not employees, become redundant. When the position becomes redundant, the employee can

be re-deployed, which means the employee is given another job, or the employee is retrenched, meaning the employee loses the job altogether. The affected employee has done no wrong: neither their conduct, nor their capacity is in issue; it is only that in the circumstances, the employer feels the employee is not needed for the purposes of the business. Employers have the prerogative to determine the needs of their businesses and therefore make positions redundant. Positions may become redundant because there is a decrease in business, the operations have become mechanized, or there is a necessity to re-organize, to enhance operations and prevent closure. The employer has the prerogative to change job descriptions, duties and responsibilities. There may also be situations, where positions become redundant for technical reasons, such as the sale of a business, or relocation to a different geographical place.

I note the claimant was not paid his severance pay. In evidence the Respondent stated that part of the dues giving to the Claimant was gratuity. Gratuity is only due as under Section 35 of the Employment Act where an employee is terminated without notice. The pay for gratuity is not equivalent to pay for severance under a redundancy situation and this therefore is outstanding unpaid.

This court will therefore award severance pay noting the circumstances of the claimant termination. His position was declared redundant. I note the Claimant served the respondent from for 9 complete years by 9th October 2010 and thus an award of 15 days pay for every year served amounts to Kshs. 135,000.00. these are the dues in a case for redundancy.

The claim for work on official public holidays though pleaded the same were not confirmed as to how they arise. This Court will decline to make an order in this regard. These must be particularized as to how they arise since each year come with different set of public and official holidays. The Court is cognizant of these differences and it was the claimant's duty to prove which days he worked that fell under this head.

In making payments to any employee, an employer must ensure that all the statutory deduction due are removed from the gross pay. And employer is therefore in law entitled to make a deduction of any amount which is authorised by any written law for the time being in force, collective agreement, wage determination, court order or arbitration award; This Court is guided by provision of Section 19 of the Employment Act.

Employees who out of their own free will join employees Sacco do so by virtue of their employment and do authorize the employer to make deductions from their salaries to the Sacco for their welfare and for the collective good of all. An employee is therefore stopped from claiming that once their employment is terminated, there are owed all their savings without taking into consideration the collective agreement under their Sacco and or cooperative society. Where an employee has enjoyed a loan facility from the collective kitty he is equally under a duty to make good any dues where his relationship with the collective is severed by virtue of the termination of his relationship with the principal.

At the time of termination, the claimant owed his Wanachuma Cooperative savings and Credit Society and amount of Kshs. 231,912.00 which was due. In computing terminal dues, the employer was under a duty as under Section 19 of the Act to make this deduction.

This Court will there enter judgement for the Claimant in the following terms:

1. Pay for 9 days worked in October 2010 unpaid amounting to Kshs.10,384.00
2. Notice Pay amounting to Kshs. 30,000.00
3. 6 days balance leave amounting to kshs.165,000.00
4. 492 rest days worked amounting to Kshs.98,400.00
5. Severance pay amounting to kshs.135,000.00

Less loan due amounting to Kshs. 231,912.00

Total due Kshs. 196,488.00

These are the orders of this Court.

Dated and delivered in open Court at Nairobi this 14th day of November 2012.

Justice Monica Mbaru

**Judge
Industrial Court of Kenya**

Appearances:

.....
.....