REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 1075 of 2010

ZAKARIA LIAMBU ANDIKA.....
…….....CLAIMANT

VS

CHEER LOGIC MANAGEMENT
CONSULTANTS LTD..... RESPONDENTS

AWARD

M/S Oginda for the Claimant
Mr. Kihanya for the Respondent

This claim was filed under Section 12 of the Labour Institutions Act, No.12 of 2007 and Section 73 of the Labour Relations Act No.14 of 2007 and any other enabling provisions of the law.

The Claimant alleges in his Memorandum of Claim that he was employed by the Respondent on 5-12-1998 as a Machine Attendant at a net salary of Kenya Shillings Seven Thousand (Kshs.7,000/-). However, in terms of the Letter of Appointment of the same date which is Appendix 1 to the Memorandum of the Claim, the starting salary of the Claimant was consolidated gross salary of Kshs.4,300/- and a consolidated gross travelling allowance of Kshs.2,700/-. His total gross package was, therefore Kshs.7,000/-. In terms of the said letter, of appointment, he was entitled to 21 days leave in a year and his working hours were between 8.00 a.m. and 4.30 p.m. with one hour lunch break between 1.00 p.m. and 2.00 p.m.

Clause 8 of the letter of appointment provided for a notice period of one month prior to termination of services by either party.

The parties, consented to proceed with the matter by way of written submissions placing reliance on the pleadings by the parties and the annextures thereto.

The Claimant further avers in paragraph 2.3 of the Memorandum of the Claim and in his written submissions that between the 1st June 1998 and the 31st December 2004, the Respondent, Sheer Logic Management Limited, seconded him to its Client, Bayer East Africa Limited where he rose to the rank of Assistant Store Supervisor earning a salary of Kshs.10,183. This is evidenced by Appendix '2' to the Memorandum of Claim dated 13th January 2005 and reads:-

"This is to confirm that the above named was employed by us from 1st June, 1998 to 31st December 2004 an Assistant Store Supervisor. During this period, we seconded him to our client, Bayer East Africa Ltd.…."

This Certificate of Service was signed by Mr. P.F. Aloo, the Managing Director of the Respondent.

The Claimant alleges Bayer East Africa Ltd had terminated his employment on 3rd January, 2005 without issuing him a termination letter. He was provided with the Certificate of Service by his substantive employer, the Respondent.

The Claimant avers that he was not given any notice upon termination nor was he paid in lieu of notice. He, therefore, claims Kshs.10,833 in lieu of notice.

He further states that, though he was lawfully entitled to a house allowance of 15% of his gross salary, he was never paid the same for the entire period of his employment. He therefore, claims Kshs.116,00/- being house allowance entitlement for 6 years. Appendix 3, is his payslip dated 20-12-2004 as confirmation of his monthly emoluments alluded to earlier.

The Claimant further states he had a clean record for the entire period he was in the employ of the Respondent but his employment was terminated unceremoniously without notice and with no reasons given at all. That he had at all times applied himself diligently in performance of his duties to the Respondent. He had no warning letter at all.

He also avers that despite demand for payment of his terminal dues, which included severance pay for six (6) years worked in the sum of Kshs.64,998/-. Accrued Leave calculated at 21 days for every year completed for six (6) years and leave travelling allowance at the rate of Kshs.3,000/- for each leave taken, the Respondent had refused to honour his demand. He claims in addition maximum compensation of twelve (12) months salary at the rate of Kshs.10,833/- per month totaling Kshs.129,996. He finally claims Legal fees paid to D.B. Wati & Company Advocates in the sum of Kshs.30,888/- in pursuance of these claims.

From the papers filed of record, the Advocates for the Respondent responded to the demand Letter refuting all the Claims made by the Claimant. Most importantly, the letter alleged that the Claimant was employed on one year's contract from 1st January 2004 to December, 2004. That he did not apply for renewal of his Contract one month prior to its expiry hence his contract expired by effluxion of time.

In its Statement of Response filed on 21st April 2011, the Respondent in paragraph 6 admits that the Claimant was employed by the Respondent from 5th June 1998 to 31st December, 2004 as evidenced by Appendix 'C2' to the Memorandum of Claim.

Furthermore, the Respondent admits in the same paragraph 6, that it seconded the Claimant to Bayer East Africa Ltd between 1st June 1998 to 31st December 2004. However, in Paragraph 7, the Respondent denies that Bayer East Africa Limited terminated the employment of the Claimant orally on 3rd January 2005. The Respondent further denied that the letter of appointment entitled the Claimant to one month's notice or one month's salary in lieu of notice in the event of termination. Furthermore the Respondent denies that the Claimant was entitled to house allowance and 21 days Leave for every completed year of service.

The Respondent avers that the Claimant was paid while he was on leave without affirming if indeed the claimant went on Leave at all.

In paragraph 12, of the Response, the Respondent avers that the Claimant entered into a one (1) year employment contract with the Respondent from 1st January 2004 to 31st December, 2004. The Respondent further states in paragraph 13 that in terms of the alleged 1 year contract, the Claimant had an option to renew it by giving a month's notice prior to the expiration of the Contract. The Respondent avers further that the Claimant never applied for such renewal hence his employment expired accordingly on 31st December, 2004.

The Respondent finally denies seriatim all the claims contained in the claimant's Memorandum of Claim. A legal objection to the Claim is raised in the Respondent's written submissions to wit; that the Claimant's services were allegedly terminated on 3rd January 2005, and he brought this suit on 17/9/2010. That a period of seven (7) years had lapsed since the alleged termination and, therefore, the suit is statute barred by virtue of Section 90 of the Employment Act No.11 of 2007.

The Section reads:-

"Notwithstanding the provisions of Section 4(1) of the Limitation of Actions Act, no. Civil Claim or proceedings based or arising out of this Act, or a Contract of Service shall lie or be instituted unless it is commenced within three years next after the act, neglect or default complained or in case of a continuing injury or damage within twelve months after the cessation thereof."

According to the claimant, the claim ought to have been filed on or before 2008.

Interestingly, in the same breath, the Respondent submits that the Employment Act No.11 of 2007 is not applicable to the suit because the cause of Action arose on 31st December, 2004 and the said Act cannot operate retrospectively to the suit.

The court has carefully considered the pleadings by the parties, the annextures submitted in support of the pleadings and the written submissions by both parties and the following issues fall to be determined:-

(i) Whether the suit is statute barred by virtue of Section 90 of the Employment Act No.11 of 2007.

(ii) If the claim is not statute barred, whether the same is to be determined in terms of the previous Employment Act, Cap.226 or the current Act. No11 of 2007.

(iii) Whether the Employment of the Claimant was unlawfully terminated or his contract of employment expired by effluxion of time.

(iv) Whether the Claimant is entitled to the remedies sought.

(i) Whether the suit is statute barred by virtue of Section 90 of the Employment Act No.11 of 2007.

With regard to this issue, from the evidence adduced by the claimant, his employment with the Respondent came to an end on 3rd January, 2005 when his employment was verbally terminated without notice. On the other hand, the Respondent states that the employment of the Claimant came to an end on effluxion of time on 31st December, 2004. It is not in dispute that this suit was filed by the Claimant on 17th September, 2010. Going by the version of either party, the suit was filed before expiry of six (6) years from the date the cause of action arose.

Cap. 226, the Employment Act, 1976 in place at the time the alleged cause of action arose did not provide a statutory bar to employment and labour claims. The claims for payment of one month's salary in lieu of notice and payment in lieu of leave days are based on the contract of service attached to the claim, but are also statutory in nature. On the other hand, compensation for unlawful termination is purely a statutory claim. The law covering statutory bar of claims based on contracts and actions to recover monies recoverable by virtue of a written law is the Limitations of Actions Act, Cap.22 of the Laws of Kenya.

Section 4(1) thereof provides; *"the following actions may not be brought after the end of six (6) years from the date on which the cause of action accrued:-*

(a) Actions founded on contract may not be brought after the end of six (6) year from the date on

which the cause of action accrued.

(b) Actions to recover a sum recoverable by virtue of a written law, other than a penalty or forfeiture or sum by way of penalty or forfeiture.

(c) Actions including actions claiming equitable relief for which no other period of limitations is provided by this Act or by any other written law".

These provisions adequately cover the relief sought by the Claimant in this suit.

It is a cardinal principle of legality that statutory provisions do not operate retrospectively. It is common cause that the Employment Act No.11 of 2007 was enacted after the Contract of Service between the parties had come to an end. The repealed Employment Act Cap.226 of 1976 had no Limitation clause, the Court therefore, finds that this cause of action is governed by the provision of Section 4(1)(a)(d) and (e) of Cap.22 referred to above. Accordingly the Court finds that the matter was filed prior to the expiry of the six (6) years from the date the cause of action arose and the same is, therefore not statute barred.

(ii) If the claim is not statute barred, whether the same is to be determined in terms of the previous Employment Act, Cap.226 or the current Act. No11 of 2007.

Following the reasoning above, the matter is also to be determined in terms of the provisions of the relevant law operational at the time the cause of action crystalised. Accordingly, the provisions of the Employment Act, Cap.226 of 1976 and the Trade Disputes Act, Cap. 234 of the Laws of Kenya are applicable to this dispute.

The court is fortified in its finding by the Transitional provisions in the fifth schedule of the Labour Relations Act, No.14 of 2007 which provides in Section 2(4); where any of the following matters commenced before the commencement of this Act, the matters shall be determined in accordance with the provisions of the Trade Disputes Act (now repealed).

"(a) Any trade dispute that arose before the commencement of this Act;

(b) Any trade dispute referred to the Industrial Court before the commencement of this Act;

(c) Any revision on Interpretation of an award by the Industrial Court; and

(d) Any summary dismissal that took place before the commencement of this Act".

This matter falls within the category 2(4)(a) and (d) above and is, therefore to be determined in terms of Trade Dispute Act, Cap.234 and Employment Act 226 (both repealed).

(iii) Whether the employment of the claimant was unlawfully terminated or his Contract of employment expired by effluxion of time

The Claimant and the Respondent have taken opposing views on this matter, the Claimant alleging that his employment was verbally terminated without notice on 3rd January, 2005. This in terms of Section 17 of the Employment Act, Cap.226 of 1976 amounts to summary dismissal for which an employer is only entitled to do for gross misconduct.

Under this provision is enumerated lawful grounds for such a dismissal to include absence from work without lawful cause, intoxication during working hours, willful neglect, use of abusive language against the employer or to a person placed in authority over him by his employer, failure to obey a lawful order, incarceration for over ten (10) days and suspicion of having committed a criminal offence detrimental to his employer.

The Respondent has admitted in its pleadings and the written submissions, that it had continuously

employed the Claimant from 1st June 1998 to December, 2004. The Respondent in the same vein purports that on 1st January, 2004 it entered into a one year Contract of Service with the Claimant which was due to end on 31st December 2004. No explanation whatsoever is given as to when, how and why the continuous employment of the Claimant was terminated resulting in a need to enter into a new one year contract as alleged. The purported one year written contract was not produced as evidence to support the said allegation.

The Respondent went on to add that the Claimant failed to signify a desire to renew the one year contract by giving a one month notice prior to its expiry and therefore his employment terminated by effluxion of time. Again no letter was produced by the Respondent to support this turn of events. These were bare allegations made to the court and for the first time, there being no documentary evidence to support that course of events.

The claimant has in contradiction to the above allegations by the Respondent produced a letter of appointment containing permanent and pensionable terms. The Letter is supported by the payslip dated 20th December, 2004, which shows that upto that date he was still on permanent and pensionable terms and was paying NSSF and NHIF dues. Furthermore, he was still contributing to the Cooperative Society through the employer.

Also the Claimant produced a statement attached to the Memorandum of Claim he made on 25th April, 2005, when this matter was still fresh in his mind. This statement to which the Respondent offered no objection clearly outlines the events leading to the termination of his employment. It supports his submissions before the court that he was indeed summarily dismissed by the Respondent on 3rd January, 2005. No reasons at all were offered by the Respondent for that sudden turn of events.

The Claimant submitted that he had a clean work record, had no previous warnings for misconduct and was surprised as to why the Respondent treated him in the manner it did.

Upon a careful consideration of the facts of the case and the law applicable, the court has no hesitation to find that the case presented by the Claimant is coherent, credible and sound. The Respondent was merely clutching on straws and its version of events is untenable. The Court therefore, finds in favour of the Claimant on a balance of probabilities that he was summarily dismissed without any reason whatsoever on the 3rd January, 2005.

Having found that the substantive law applicable to this Claim is the repealed Employment Act, Cap.226 of 1976, the Court deems it appropriate to deal with the issue whether the procedural requirements that appertained at the time the cause of action arose would adversely affect this Claim in view of the requirement in terms of Trade Disputes Act, Cap.234 which legislated against direct access to the Industrial Court by employees and in particular Section 14(9) provided:-

"The Court shall not take cognisance of any trade dispute or deal with any matter connected therewith:-

(a)Unless the trade dispute has been reported to the Minister and twenty one (21) days have elapsed since the date on which the dispute was so reported;

(e)Unless the court has received a Certificate signed by the Labour Commissioner stating that the Minister has accepted the report of the trade dispute and that all available machinery (including statutory machinery) for the voluntary settlement of dispute prior to reference to the Court has been exhausted.

(f) *Where the trade dispute solely concerns dismissal or reinstatement of any employee unless the Court has received, in addition to the Certificate required by paragraph (e) the written authority of the Minister for that purpose"*.

It is noteworthy that only Unions and Employers' Organisations could bring cases before the Industrial

Court.

On the other hand, the Labour Institutions Act No.12 of 2007 provides under Section

12(2):-

"An application, claim or complaint may be lodged with the Industrial Court by or against an employee, an employer, a trade union, an employer's organization, a federation, the Commissioner for Labour or the Minister."

For the first time in the history of this Country, individual employees in the private and Public Sector had direct access to the Industrial Court without a requirement that they be members ofa Union and that they seek permission from the Minister of Labour before they could approach the Industrial Court for relief upon termination or dismissal by their employers.

This is a milestone in the history of Labour Relations in Kenya that has hitherto passed unnoticed by many, but it is the reason why thousands of Kenyans now have access to the simple processes of dispute resolution and equitable remedies provided by the Industrial Court without much regard to procedural and legal technicalities that appertains in other Civil Courts.

It is important to note that the new Industrial Court Act, No.20 of 2011 that partly repealed the Labour Institutions Act No.12 of 2007 has retained this crucial provision verbatim under Section 12(2).

The Labour Relations Act, No.14 of 2007, repealed the Trade Disputes Act with savings contained in the fifth schedule of the Act referred to earlier in this judgment.

The Trade Disputes Act, had no provision for direct reference of disputes by individual employees to the Industrial Court. This vacuum was closed as aforesaid by the Labour Institutions Act. The Court notes that this law had opened an avenue for the Claimant to ventilate his right before the Industrial Court which right had hitherto been limited by the requirement to follow tedious procedures referred to earlier. The court in the circumstances, finds that this matter was rightly brought in terms of the new laws and therefore, did not violate any procedure by approaching the court directly without regard to the dispute resolution mechanism applicable in terms of the Trade Disputes Act, Cap. 234 of the Laws of Kenya now repealed. The substantive claim is however, to be resolved in terms of the repealed law.

(iv) Whether the Claimant is entitled to the remedies sought in the

Memorandum of Claim.

The claimant seeks compensation for unlawful summary dismissal and payment of Severance Pay, Service gratuity, being his terminal benefits for the continuous service to the Respondent from 1998 to 2005. One month's salary pay in lieu of notice not given upon termination. Accrued leave for six (6) years which he alleges he never took including leave travelling allowance, Legal Fees to D.B. Wati & Co. Advocates for services rendered with respect to this claim and House Allowance at 15% of his salary for six (6) years.

Regarding the Claim for one month salary pay in lieu of notice, the court has already found that the Claimant was verbally summarily dismissed on 3rd January, 2005. In terms of the letter of appointment, Appendix 'C' to the Memorandum of Claim, and in particular paragraph 8, thereof, the Claimant was entitled to a notice of one (1) month or payment of one month salary in lieu of notice upon termination of his services. He was not given notice nor paid in lieu therefore and the court finds that the Respondent is liable to pay him Kshs.10,833/- in lieu of notice.

The Claimant was summarily dismissed without any reason provided under Section 17 of the Employment Act, Cap.226 (now repealed). The Trade Disputes Act, Cap.234 (now repealed) provided under Section15(1), the following:-

"In any case where the Industrial court determines that an employee has been wrongly dismissed by his employer the Court may order that employer to reinstate that employee in his former employment and the Court may in addition to or instead of making an order for reinstatement award compensation to the employee:-

Provided that such compensation shall not exceed:-

(i) In a case where reinstatement is ordered, the actual pecuniary loss suffered by the employee as a result of the wrongful dismissal;

(ii) In any other case twelve (12) months monetary wages".

In this case the Claimant does not seek reinstatement, he instead seeks twelve months salary being maximum compensation for the wrongful dismissal. The court has found that he was summarily, wrongfully dismissed for no apparent reason at all. He has provided the court with unchallenged evidence of a clean record in his six (6) years of service to the Respondent.

He had no warning for misconduct. He suffered loss of employment which was his source of livelihood at the time without any time at all given to him to prepare for that. The conduct of the Respondent in the circumstances of the case was unconscionable, inhumane and unworthy of a good employer.

The Court deplores this conduct by the Respondent towards a reliable employee and awards ten (10) months' salary being compensation for wrongful and unlawful dismissal.

With regard to the Claim for accrued leave, the Claimant did not explain why he did not take leave for a period of six (6) years. No documentary evidence was tendered by way of a letter or letters written to the employer to request for leave or demand payment in lieu thereof. Leave is a statutory right to all employees and this appertained in terms of Section 7 of the repealed Employment Act, Cap.226. The Claimant has in all circumstances failed to show on a balance of probabilities that he was owed any leave days. Accordingly, the claim for accrued leave and leave travelling allowance is dismissed.

Severance pay or service gratuity is either statutory of contractual. The repealed Employment Act, Cap.226, had no provision for payment of severance pay upon termination other than in case of redundancy. However, contracts of employment, collective bargaining agreements and sectoral wage orders did make provision for severance pay. In the present case, the Contract of Service did not provide for severance pay. The court notes, however that the Claimant was pensionable by virtue of his NSSF contributions as evidenced in his last payslip presented to the Court. The claim for severance pay lacks merit and the same is dismissed.

The Court agrees with submissions by Counsel for the Respondent Mr. Kibanya that the claim for fees to the Claimant's advocate is both unfounded and misconceived in law. These were costs incurred if at all between the Claimant and his Advocates and the matter would be appropriately dealt with by determination of costs in the cause. The claim for fees is, therefore, dismissed.

With respect to the claim for housing allowance at the rate of 15% for the six (6) years worked by the Claimant, the Court refers to Section 9 of the Employment Act, Cap.226 (now repealed) which is applicable to this case. The provision reads as follows:-

"Every employer shall at all times, at his own expense provide reasonable housing accommodation for each of his employees ……..or shall pay to the employee such sufficient sum, as rent, in addition to his wages or salary, as will enable the employee to obtain reasonable accommodation."

The letter of appointment for the Claimant in Clause 2 titled Salary and Benefits provided payment of consolidated Gross Salary at Kshs.4,300/- per month and in addition a consolidated gross travelling allowance of Kshs.2,700/-.

Indeed, the Employment Act, No.11 of 2007, that succeeded Cap.226 provides in Section 31(2) that the provision of housing by an employer shall not apply to an employee:-

"…..whose contract of service: –

(a)Contains a provision which consolidates as part of the basic wage or salary as part of the employee, an element intended to be used by the employee as rent or which is otherwise intended to enable the employee to provide himself with housing accommodation."

The Claimant has failed to show that the consolidated package he received during the six (6) years period of employment did not constitute an element of housing. Indeed, he never demanded payment of housing allowance until his employment was terminated. Accordingly, the Claim for 15% housing allowance is also dismissed.

In the final analysis, the Respondent is found liable and is directed to pay to the Claimant the following:-

(a)Ten (10) months salary at the rate of Kshs.10,833/- per month as compensation for wrongful/unlawful dismissal in the sum of Kshs.108,033/-.

(b) One (1) month salary in lieu of notice in the sum of Kshs.10,833/-

Total = Kshs.118,866/-.

(c) Interest at court rates from the date of judgment.

(d) The Respondent shall pay costs of the case.

DATED and **DELIVERED** at Nairobi this 14th day of November, 2012.

Mathews N. Nduma
PRINCIPAL JUDGE