



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 938 of 2010

KENYA UNION OF COMMERCIAL FOOD AND ALLIED WORKERS.....CLAIMANT

VERSUS

KILIMANJARO COMPANY LIMITED.....1ST RESPONDENT

(Before Hon. Lady Justice Maureen Onyango on 3rd December, 2012)

AWARD

This trade dispute was reported by Kenya Union of Commercial Food and Allied Workers on behalf of their members FINA ABDI FAMAU and RACHEL NJERI herein after called the 1st Grievant and the 2nd Grievant respectively. The dispute commenced with a report to the Minister for Labour as provided for under section 4 of the Trade Disputes Act Cap 234 (now repealed) in September 2004. The dispute was referred to the Industrial Court by the Notification of Dispute Form dated 29th September 2009. The court took cognizance of the case and invited the parties for mention before Hon Justice Charles P. Chemuttut the Principal Judge (as he then was) on 16th November 2010 when the Respondent did not appear. The court directed the Claimant to file its memorandum of claim on or before 17th January 2011 while the Respondent was ordered to submit its reply statement on or before 17th February 2011. The Court fixed the dispute for hearing on 8th March 2011 at 10.00 am when the Claimant was present but the Respondent did not attend Court. The Court granted the Respondent an extension to file its reply on 29th March 2011 and fixed the case for hearing on 18th May 2011 at 9.30 a.m. The Claimant was directed to serve a hearing notice upon the Respondent.

On 18th May 2011 when the case came up for hearing, the Respondent was again absent and was granted further extension to file reply on or before 2nd June 2011 and hearing fixed for 15th September 2011. The case was further mentioned on 15th September and 30th September 2011 when the Respondent failed to attend. On the 30th September 2011 the Respondent was again given an opportunity to file its reply on or before 14th October 2011 and the case fixed for hearing on 8th March, 2012. The case was finally heard on 8th March 2012 in the absence of the Respondent.

On the hearing date the Claimant relied entirely on its Memorandum of Claim and the submissions therein. The Court reserved the award to be on notice.

Before the judge could prepare the award the Court was reconstituted and the file placed before me to prepare award. The parties were invited by the Registrar of the Industrial Court to appear before me on 2nd October 2012 for directions.

On 2nd October 2012 the Claimant was represented by Mr. Owiyo but there was no appearance for the Respondent. Mr. Owiyo informed the Court that the Respondent may have changed its name to Kilimanjaro Water Bottling Company and sought leave to confirm the position and report to the Court. The case was then fixed for further mention on 9th October 2012 and the Claimant was directed to serve a mention notice on the Respondent. On 9th October, 2012 Mr. Nyumba appeared for the Claimant but there was no appearance for the Respondent. Mr. Nyumba confirmed to the Court that the Respondent had not changed its name and asked the Court to enter judgment against the Respondent. The Court declined and asked him to take a hearing date and serve the Respondent. When the parties came to Court on 29th October, 2011 Mr. Owiyo appeared for the Claimant and Ms. Kashindi for the Respondent. Ms. Kashindi informed the Court that she had filed a notice of appointment and a notice of preliminary objection. Mr. Owiyo objected to the preliminary objection on the grounds that it was filed without leave long after the hearing had been closed and the case was pending for judgment. He gave a brief history of the case. He prayed for striking out of the preliminary objection. The Court agreed with him and expunged the preliminary objection from the record.

I have found it necessary to give this detailed background as the Respondent appears to be unaware of the proceedings up to the time they were served with a hearing notice on 17th October 2012, which was inadvertent, as the case was pending for judgment, the confusion having been caused by the appearance of Mr. Nyumaba who was holding brief for Mr. Owiyo on 9th October 2012 and who did not explain the proper position of the case to the Court on that day.

The Claimants case is that both Ms. Fina Abdi Famau and Ms. Rachel Njeri were employed on 1st February 2001 as sales persons, that they were both confirmed in employment on 1st May 2001 with a basic salary of Kshs.5,812 and house allowance of Kshs.1,500 per month and were dismissed by identical letters dated 14th June, 2004 which read as follows;

“The Management has been evaluating your performance over a period of one year. We regret to inform you that your sales and debt collections are well below what is expected of you.

Accordingly this letter is to be regarded as your formal notice of termination of your service with company.

This letter serves as a months notice. You will leave our employment with immediate effect.

Your full terminal dues will be calculated and paid at the end of this month with salaries.

We thank you for all the effort you have made during your time with Kilimanjaro and wish you all the best in your future endeavours.”

The Respondent declined to pay their terminated benefits requiring them to collect all outstanding debts generated by them before releasing their terminal benefits.

The Claimant argues that having been dismissed from employment they had no authority to collect debts on behalf of the Respondent.

At the time of dismissal both Claimants were earning a basic salary of Kshs.7,856 and house allowance of Kshs.2,200. They were both employed under terms contained in a collective agreement negotiated between the Claimant and the Respondent dated 23rd February 2004.

The Claimant prays for payment of the following on behalf of the 2 grievant.

1. Gratuity = 17 days X 3 years = 51 days
= 51 X 302.15 daily rate

= 15,400.65

1. Notice = 7,859.00

1. Days worked = 15 days X 302.15

Daily rate
= 4,532.25

1. Annual Leave pending = Kshs.7,856 X 2200
= 10,056

1. Refund of safari allowance) Kshs.1,000 per week X 16 weeks
= 16,000

1. Prorate Leave = 4 days X 302.15
= 1,208.60

1. Less deduction of 4

days leave taken

=1,208.60

Total = 53,852.90

Before the case was brought to the Court, the Claimant reported the dispute to the Minister who after hearing the parties recommended that the dismissals be reduced to normal termination to enable the grievants collect their terminal dues.

As already stated above, the Respondent did not file any reply to the Claim and the Claimant relied entirely on the written memorandum of claim with the documents attached to the same.

Having read the record of proceedings, the memorandum of Claimant the documents attached thereto and having perused the proceedings, the report of the investigations carried out by the Minister for Labour and findings thereof, I agree with and the findings and recommendations. The grievants did not have any adverse reports against them except the outstanding debts from the clients served by them. The termination of their employment was without notice and the company declined to pay their terminal dues, after advising them in the letter of termination to collect the same at the end of the month by letters dated 14th June 2004. The Court rules as follows in respect of each claim made by the Claimant on behalf of the Claimants:

1. **Gratuity**

Having worked for 3 years, each of the grievants is entitled to gratuity as provided in the collective agreement at the rate of 17 days salary for each completed year of service. The grievants were each earning a basic salary of Kshs.7,859 and house allowance of Kshs.2,200 giving a total of Kshs.10,059.00. 17 days salary for 3 years (10,059-: 30 X 17 X 3) is Kshs.17,100.3. Each of the grievant is entitled to Kshs.17,100.30 on this head.

1. **Pay in Lieu of Notice.**

The grievants were terminated without notice. Each of them is therefore entitled to Kshs.10, 059 being

one month's salary in lieu of notice.

1. Days worked

The grievants employment was terminated on 14th June 2004. The Respondent confirmed that they had not been paid when they appeared before the investigator appointed by the Minister for Labour. Each of them is therefore entitled to 14 days salary for days worked in the month of June 2004. This amounts to (10,059-: 30 X 14) Kshs.4, 694.20

1. Annual leave

In the letter dated 30th June 2004 the Respondent stated that the final dues of the grievants would be paid in full. This was in response to the demand for final dues by the Claimants by letter dated 29th June 2004. I will therefore presume that the Respondent does not deny that the grievants had outstanding leave of 1 year which as provided for in the collective agreement was 21 days leave per year. Each of the grievants is therefore entitled to (10,059-: 30 X 21) Kshs.7, 041.30 on account of annual leave earned but not taken.

1. Refund of Safari Allowance

No evidence was submitted in support of the claim for safari allowance. The claim is therefore dismissed.

1. Pro-rata leave

The Claimant has not explained how this item is different from the claim for annual leave above. The claim is therefore rejected as being a duplication of the claim for annual leave.

7. Reinstatement/compensation

In the memorandum of claim the Claimant has prayed for either reinstatement with no loss of benefits on or 12 months salary as compensation. Reinstatement is not an option as the law has now changed and an order for reinstatement can only be made within 3 years from the date of termination of employment. The only option available to the grievants is therefore compensation. Taking into account the fact that the Respondent agreed to owing the terminal benefits but made the payment conditional contrary to the provisions of section 5 of their Employment Act (1976) which required employers to pay terminal dues immediately upon termination of employment, taking into account the fact that I cannot award interest as the Law applicable then did not provide for the same and also the fact that the Claimant did not pray for payment of interest, I award the grievants the maximum compensation of 12 months salary of (10,059 X 12 Kshs.120,708.

From the foregoing I award each of the grievant the sum of Kshs.162, 620.50.

made up as follows:

- | | |
|-------------------------------------|------------------|
| 1) Gratuity – | Kshs.17,100.30 |
| 2) Pay in Lieu of Notice – | Kshs.10,059.00 |
| 3) Days worked – | Kshs.4,694.20 |
| 4) Annual leave– | Kshs.7, 041.30 |
| 5) 12 months salary as compensation | Kshs.120, 708.00 |

Total Kshs.162, 620.50

The same should be paid within 30 days from the date of this award failing which the Claimant may move the Court for execution.

Orders accordingly.

M.O.