



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1767 OF 2013

(Before Hon. Lady Justice Maureen Onyango)

MOSES OYOO AWUONDO.....CLAIMANT

VERSUS

PAPER CONVERTERS (K) LIMITED.....RESPONDENT

JUDGMENT

Moses Oyoo Awuondo, the claimant was employed by the respondent on 22nd January 1996 as an Electrician at a salary of Kshs.15,000. By letter dated 22nd April 2013, the claimant handed in a resignation notice to take effect on 31st May 2013. The respondent declined to accept the resignation and requested the claimant to be patient while they arranged to meet with the union, to whom the claimant was a member, to get a way forward.

By letter dated 12th March 2013, the respondent expressed concern to Kenya Union of Printers, Publishers, Paper Manufacturers and Allied Workers Union (KUPRIPUPA) that Clause 12 of the Collective Bargaining Agreement was being abused and sought a meeting to discuss the way forward. By the same letter, the respondent informed the union that it will not accept any resignations until a meeting was held with the union and the matter concluded.

The claimant wrote another letter to the respondent on 26th April 2013 confirming his resolve to resign as expressed in his resignation notice. On 10th May 2013, the respondent informed him that his notice was inappropriate and unwarranted and advised him to wait until a consultative meeting was held with the union.

On 31st May 2013, the claimant cleared with the respondent and wrote another letter to the respondent indicating that it was his last day of service. He requested to be issued with a certificate of service, as he would not be an employee of the respondent from 1st June 2013. The claimant left employment without being paid gratuity.

The claimant's salary at the time of resignation was Kshs.40,449.20.

By his memorandum of claim dated 3rd October 2013 and filed on 6th November 2013 the claimant prays for the following remedies
–

a) Award the Claimant the withheld gratuity for the 17 years he worked that is Basic pay 40,449.20 + 25 days = 1,617.96 per day

1,617.96 x 15 days x 17 years = 412,579.80

- b) Order that the Respondent does release to the Claimant a Certificate of Service;
- c) Twelve months pay in compensation for unlawful and wrongfully withheld dues that is Kshs.40,449.20 x 12 months = Kshs.485,390.40
- d) General damages;
- e) Costs of this suit
- f) Any other award or benefit, which this Honourable Court may deem fit and just to grant.

The respondent filed a response to the claim in which it avers that the claimant's notice was invalid as it was not in compliance with the CBA. The respondent further avers that while it was still discussing the resignation with the union the claimant abandoned the union and sought services of an advocate who immediately sent a demand letter to the respondent. That no meaningful discussions could be held with the union to discuss, the issue after claimant abandoned the union.

The respondent avers that the claimant failed to clear so that he would be issued with a certificate of service. The respondent prays for the following orders –

- a) There be a declaration that the Claimant failed to give a valid notice to the Respondent of his intention to terminate his services to the Respondent.
- b) The Claimant is not entitled to gratuity as claimed.
- c) The Claimant is not entitled to any compensation for giving inappropriate and unlawful notice.
- d) The Claimant is not entitled to any damages, award or benefit.
- e) The Claim is untenable and be dismissed with costs and the Claimant be Ordered to liaise with his Union for purposes of resolving his claim.

Determination

The only issue for determination is whether or not the claimant is entitled to the prayers sought. As there was no disagreement over the manner in which the claimant left service, the parties canvassed the case by way of written submissions in which they reiterated their positions in the pleadings.

Clause 12 of the CBA which applied to the claimant provides –

“12. TERMINATION OF EMPLOYMENT/RESIGNATION

a. Established-employees of up to five (5) years, service shall be subject to not less than one calendar month's notice or pay in lieu.

Those with more than five (5) years' service 'shall be, subject to two calendar months' notice or two months' pay in lieu.

b. An employee whose employment has been terminated by the employer shall be paid gratuity at the rate of 15 days basic salary for each completed year of service.

c. An employee may be summarily dismissed for proven gross misconduct and only to paid up to and including the date of

dismissal plus accrued leave.

d. Where an employee commits any act of misconduct, he shall be given a written warning for each: act -and on fourth' 'instance his employment may be terminated in accordance with paragraph (a) above. An employee shall be entitled to refer any- such warnings to his Union for appeal. If an employee who completes 12 months from the date of the third warning without further faults any waring recorded on his/her file will be cancelled.

e. An employee who has served the company for a minimum of five (5) continuous years and wishes to voluntarily resign from the company will be paid 15 basic paydays for each completed year of service a gratuity. Consequently, the company may relieve an employee of his/her services and be paid at the rate of 15 days basic pay for each completed year of service as gratuity. A notice of one month shall apply to both parties.

f. Those above (5) years' service shall be subject to two calendar months' notice or two months' pay in lieu by either party."

It is obvious from the clause that an employee with over 5 years' service was required to give 2 months' notice and that an employee who resigned was entitled to gratuity at the rate of 15 days basic salary per year worked.

The claimant is thus entitled to gratuity calculated as follows –

Basic salary = Kshs.36,849.20

No of years' service = 17

$(36,849.20/26 \times 15 \times 17) = \text{Kshs.}361,406.00$

From this amount the respondent will recover the short fall of notice being 22 days gross salary (Kshs.34,226.25).

The claimant is therefore entitled to Kshs.327,179.95. I award the claimant the said sums. The claimant is also entitled to a certificate of service.

The claimant was not unfairly terminated and is not entitled to compensation or general damages as prayed in the claim.

Since there was absolutely no reason for withholding the claimant's gratuity, the respondent will pay the claimant's costs and interest will accrue on the gratuity from date of filing suit.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 5TH DAY OF OCTOBER 2018

MAUREEN ONYANGO

JUDGE



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