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| Case Number:   | Cause 7 of 2013  |
| Date Delivered:  | 04 Oct 2013  |
| Case Class:  | Civil  |
| Court:   | Employment and Labour Relations Court at Nyeri           |
| Case Action:   | Judgment   |
| Judge:   | Nelson Jorum Abuodha                                     |
| Citation:  | Peter Kariuki Mugo v Kirinyaga Dairy Farmers [2013] eKLR |
| Advocates:   | Kimuthu for the Respondent                               |
| Case Summary:  | -  |
| Court Division:  | Industrial Court   |
| History Magistrates:   | -  |
| County:  | Nyeri  |
| Docket Number:   | -  |
| History Docket Number:   | -  |
| Case Outcome:  | Allowed  |
| History County:  | -  |
| Representation By Advocates:   | One party or some parties represented                    |
| Advocates For:   | -  |
| Advocates Against:   | -  |
| Sum Awarded:   | -  |
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**REPUBLIC OF KENYA**

**IN THE INDUSTRIAL COURT OF KENYA AT NYERI**

**CAUSE NO. 7 OF 2013**

**(Nairobi Cause No. 135 of 2011)**

**PETER KARIUKI MUGO.....CLAIMANT**

***Versus***

**KIRINYAGA DAIRY FARMERS.....RESPONDENT**

**JUDGMENT**

The claimant in this suit was an employee of the respondent having been initially employed by the latter sometimes in 1975 as a driver. A post he held until 1978 when he got involved in an accident in the line of duty and lost one of his arms.

According to his memorandum of claim he avers that upon amputation of his arm the respondent terminated his services and only reinstated him in 1979 after nine months and upon intervention by his Union.

Upon reinstatement he was redeployed as a telephone operator at a salary of Kshs.7,829 per month. According to him he served in this position until April 2000 whereupon he proceeded to annual leave and was due to resume duty on 26th June, 2000 but was retired on medical grounds awaiting the payment of his benefits.

He avers that he waited for the benefits until 2004 when he was compelled to complain to Kenya National Commission on Human Rights to intervene on his behalf. The respondents responded to the query by the Commission and indicated that they were in the process of finalizing the claimant's benefits. This did not happen prompting the claimant to commence the present action. According to the claimant his terminal benefits amount to Kshs.222,080 made out as follows:-

- |    |   |   |                |
|----|---|---|----------------|
| a) | Terminal benefits 7,829 x 25 years            | = | 198,625        |
| b) | 3 months salary in lieu of notice 7,829 x 3 = |   | <u>23,455</u>  |
|    |   |   | <b>222,080</b> |

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The respondent on its part does not deny that the claimant was its employee. It further does not deny that he was injured in the line of duty as averred. The respondent however denies terminating his services on the account of injury stating in its memorandum of response that the claimant was on leave recuperating in the light of the serious injuries he sustained. The respondent further denies that the claimant was earning Kshs.7,829 but rather Kshs.4,063 as provided under Regulation of Wages and Conditions of Employment Act. According to the respondent therefore, the claimant is entitled to:-

|    |   |        |                              |
|----|---|--------|------------------------------|
| a) | One months salary in lieu of notice                                   | 4,063  |                              |
| b) | Service pay @ 15 days for each year service completed year of service | 44,693 | $\frac{4063 \times 22}{2} =$ |
|    |   |        | 48,756                       |
| c) | Taking into account payment of  |        |                              |
|    | Kshs.46,480, payment to claimant                                      |        | <b>2,276</b>                 |

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The respondent further avers that delay in paying the claimants terminal benefits was not deliberate but was due to the fact that the respondent encountered difficulties in tracing relevant records that were material in determining what was due to the claimant. The respondent further averred that there had numerous changes in management within it and at one time its operations got wound up leading to loss or misplacement of various employees records and crucial documents. As a result the respondent could not trace the CBA that was in force at the time the claimant was retired.

During the hearing of this matter, both parties' witnesses reiterated their positions as averred in their statements of claim and defence respectively.

This case however presents a very difficult case scenario for the court. Not in terms of the complexity of issues involved but in terms of the quality of evidence necessary to arrive at a determination either way. Efforts by the court to assist the parties bring forth documentary evidence was met by claims by both parties that such documents were either lost or could not be traced. From the claimant's part, the essential documents including his payslip were destroyed in a fire that consumed his house at some point. An attempt to retrieve a copy of his payslip from the SACCO where at some point he applied for a loan also did not yield much as he claimed the SACCO could not retrieve the same.

The respondent for its part stated that its operations at some point got wound up and restructured hence it lost documents in the process.

It is not in dispute that the claimant was an employee of the respondent. It is further not in dispute that he got retired on medical grounds. Indeed not even the fact that he should be paid his terminal dues is in dispute. What is disputed is the basis of their calculation which is centered around his exit pay. Whereas the claimant maintains that his salary as at the time of retirement was Kshs.7,829, the respondent maintained that it was paying the claimant Kshs.4,063 as provided under the Regulations of Wages and Conditions of Employment Act which was then applicable.

The claimant in his memo of claim avers that he proceeded on annual leave in April, 2000 and was to resume on 26th June, 2000 but was on 23rd June, 2000 served with a letter informing him of his retirement on medical grounds. That is to say the claimant was given only 3 days notice of termination of his employment on medical grounds.

The claimant's letter of appointment issued on 13th May, 1985 provided that his appointment could be terminated by one month's notice on either side or payment of equivalent salary in lieu of notice. This was the only document the court could rely on in so far as termination of employment contract between

the parties was concerned. No amended or new contract or CBA was produced to show that the notice clause changed. In any event in absence of any other document, the court would have still resorted to section 35(1) (c) read together with Section 36 of the Employment Act which provides for the giving of at least 28 days next following the notice of termination or payment of equivalent amount of wages in lieu thereof. In the circumstances, it was unlawful not to give the claimant at least one month's notice of termination or payment in lieu thereof. The court therefore awards him one month's salary in lieu of notice.

It is not disputed that the claimant is entitled to service pay, the dispute is over the claimant's monthly basic pay. Whereas the claimant maintains that his basic pay was Kshs.7,829 the respondent insists that it paid the claimant the recommended minimum wage of Kshs.4,063. Neither party availed to court any documentary or oral evidence to vouch for their positions. This is part of the difficulty referred to earlier in this judgment.

Section 38 of the repealed Employment Act (Cap 226) to which these proceedings relate required an employer to keep a written record of all employees with whom such employer has entered into a contract under the Act and the record was to be made available for inspection by authorized officers for any period relating to the preceding twelve months. Unlike Section 74 (1) of the current Act which extended the period to 36 months, the old Act obligated an employer to keep records for only twelve months. The events relating to this suit took place in the 2006, the claim herein was filed in court in 2011, almost five years later. This period is outside the provisions of the old Act and the current Act.

The court therefore lacks the power to impose responsibility on the respondent to keep and produce employment records beyond the period prescribed by law. Besides the respondent has stated that during the supervening period it had undergone what it called winding up in process of which some records were lost. As much as the court may not believe the respondent, that is as far as it goes since as stated above, the court does not have any legal ground either in the old or the new Act to impose such obligation.

The claimant brought this claim to court, the burden of proof therefore lay more on him. Unless for those situations where the evidentiary burden of proof shifts to the defendant, the onus is always on the plaintiff to prove his or her case.

With fairness to the claimant, the court tried every possibility to assist the claimant retrieve any document that could support his claim that he was earning Kshs.7,829 per month at the time he was retired without success. The court noted in the claimant someone who was mistrusting and fiercely careful in answering any question put to him even by the court regardless of whether the answer to such question was for his benefit. In short, the claimant wanted the claim awarded as prayed without evidence whether primary or secondary and no matter how plausible, to support it.

In the circumstances the only option this court is left with is to resort to the minimum wage applicable at the time of the retirement. The wage guidelines applicable are those issued in 1999 under Legal Notice No. 49 which placed the claimants emoluments at Kshs.4,063 per month. This therefore becomes the base rate for calculating the claimants service pay as provided for under 35(5) of the new Employment Act which provides:

**“.....”An employee whose contract of service has been terminated under subsection (1) (c) shall be entitled to service pay for every year worked, the terms of which shall be fixed.”**

The Act does not fix the terms and its left to the parties to the contract to fix. The claimant's contract

referred to earlier makes no provision for service pay however being a legal obligation, failure to make provision for it in the contract does not disentitle the claimant to it. The practice in the Industry has been to fix service pay at a minimum of 15 days salary for each year worked. The court in the absence of any evidence to the contrary will adopt this practice in this case.

The claimant was employed on 1st September, 1976 and terminated on 23rd June, 2000. By the time of his termination, he had therefore served the respondent for 24 years (approximately). Taking his exit basic salary of Kshs.4,063 multiplied by the years worked, the claimant is entitled to Kshs.48,756.

Under Section 9 of Cap 226 and Section 31, the respondent had a responsibility to provide the claimant with a house or housing allowance. This issue though not pleaded is a matter of law and flows from the fact that the claimant was an employee of the respondent.

Being a matter of law, no estoppel can lie against it. The court therefore awards the claimant one third of his exit salary as house allowances as is the practice, for the period he worked for the respondent. This works out to Kshs.32,504.

Regarding the claimants claim for injury sustained in the course of his employment, the court declines to make any award under this head for want of jurisdiction. The claimant subject to law of limitation is advised to pursue this claim before the relevant court as stipulated in Work Injuries Benefits Act and relevant legislation.

In conclusion the court awards the claimant as follows:-

**Kshs.**

|                                       |               |
|---------------------------------------|---------------|
| 1. One month salary in lieu of notice | 4,063         |
| 2. Service pay for 24 years           | 48,756        |
| 3. House Allowance                    | <u>32,504</u> |

**85,323**

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This award shall attract interest at court rates and subject to applicable statutory deductions.

It is so ordered.

***Dated at Nyeri this 4th day of October, 2013.***

**NELSON ABUODHA J.**

**JUDGE**

***Delivered in open Court in the absence of the Claimant and in the presence of Kimuthu for the***

***Respondent.***

**NELSON ABUODHA J.**

**JUDGE**



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