



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 666 of 2012

JOHN MBURU KAMAU.....CLAIMANTS

VERSUS

KENYA SAFARI LODGES..... RESPONDENT

JUDGEMENT

The main facts of this case are not in dispute. The Claimant was employed by the Respondent as Finance Manager on a 3 year fixed term contract commencing on 15th September 2009 and expiring on 15th September 2012. On 25th June 2011 the Claimant gave 3 months notice of resignation from employment. He proposed to work until 30th July 2011 and that the balance of the notice period be recovered from his accumulated annual leave of 52 days. The resignation was accepted by the Respondent’s letter dated 5th July 2011.

The Respondents letter of resignation amended the last day of service for the Claimant from 30th July to 29th September 2011 thus the accumulated leave days were treated as part of the notice period to be served while the Claimant was on annual leave.

The letter also confirmed that the Claimant would be paid salary to the end of September 2011. In addition the Claimant would be paid gratuity at the rate of 25% of basic salary for the period served up-to 29th September 2011 being two years. The Respondent later worked out the terminal benefits of the Claimant and paid him a total of Kshs.267,101.00 which he did not agree with. According to the Claimant the proper amount payable is Kshs.1,439,282.58 less payment received of Shs.254,133 leaving a balance of Kshs.1,013,629.58. In his tabulation the Claimant has included accrued leave of 52 days and one months’ basic salary in lieu of notice. After deduction of tax and adding tax relief, the Claimant prays for payment of Shs.609,732.81 being the balance of his terminal dues. The Claimant further seeks a declaration that the Respondent is in breach of contract and terms of employment in failing to pay his terminal dues, 12 months’ salary as damages for breach of contract in the sum of Shs.2,058,240.00, a Certificate of Service and interest at 24% from the date of resignation to the date of payment in full.

The Respondent denies owing the Claimant the sums claimed having paid him his full terminal benefits save for the sum of Shs.12,280 which has not been paid as the Claimant did not submit a bank account to which the said sum was to be deposited.

Both parties called one witness each at the hearing. The Claimant **JOHN MBURU KAMAU** testified on his behalf while **VICTOR MNYIKA MWAMBUI** testified on behalf of the Respondent.

The issue for determination is whether the Claimant was paid his full terminal benefits and if not, the exact amount due to him.

In his letter of resignation, the Claimant stated that his last working day would be 30th July 2013. He however proposed to utilize his accrued leave balance of 52 days to offset the balance of leave. In the letter accepting the resignation, the Respondent reviewed this position and changed the last working day for the Claimant to 29th September 2011. This meant that the Claimant was to proceed on annual leave after 30th July 2011 so that the balance of the notice period is served while he was on leave. This is confirmed by the following sentence under the title “**Notice period**”

“You will be thus required to fill up a leave form to cover the leave balance outstanding that is applied to run concurrently with and cover the balance for the notice period as shown above.”

The Claimant did not protest this position. This therefore means that the Claimant proceeded on leave and utilized all his pending leave days which ran concurrently with his notice. I do not believe the Claimant when he states that an agreement was reached during his exit interview under which he was to proceed on terminal leave. In the first case, the same was not pleaded in his claim. Secondly, verbal agreements cannot be used to amend contents of written documents. 3rdly and most fundamentally is that the Claimant was not entitled to terminal leave as he had not served for the minimum qualifying period of 2 years as provided under Paragraph 10.7 of the Respondents Terms and conditions of service annexed as an exhibit by other the Claimant and the Respondent.

Both the Claimant and the Respondent have confirmed that the Claimant was on the payroll of the Respondent up-to the end of September 2011. A copy of the Claimants September payslip is exhibited in the Memorandum of Claim as Appendix “J.K.I.D”.

Having found as above, the terminal benefits of the Claimant should therefore be calculated up-to the end of September 2011.

On the issue of gratuity, the Claimants’ contract provided for payment of gratuity at the rate of 25% of his annual basic salary. His annual basic salary from 15th September 2009 to 30th June 2010 was Shs.152,790 and from 1st July 2010 to 30th June 2011 was Shs.161,880. From 1st July 2011to 30th September 2011 his salary was Shs.171,520. The Respondent calculated the gratuity up-to 30th July 2011which amounted to Shs.872,298.00. The only months not included were for the months of August and September 2011 which would amount to Shs.(42,880x2) 85,760.

I therefore find that the Claimant was entitled to gratuity in the sum of Shs.958,058. This is before taxation. The Respondent is entitled to deduct the following from this amount.

1. Pay as You Earn (Income Tax)
2. KCB Loan – Shs.61,564.00

Since the Claimant was in employment up-to the end of September 2011, no deductions should be made in respect to the salaries he was paid in August and September 2011. He was also entitled to airtime as he was still in employment and no deduction of the same should be made from his terminal dues.

Annual Leave

The Claimant is not entitled to annual leave as he took all his leave which run concurrently with his notice from 1st August to 30th September 2011.

Tax Relief

The Claimant is not entitled to tax relief of Shs.27,888 as pleaded as he did not demonstrate how the same

was arrived at. This is a matter that he may follow up with the relevant department of Kenya Revenue Authority.

Damages for Breach of Contract.

The Claimant's contract was not breached. His claim for damages for breach of contract is therefore dismissed.

Certificate of Service

The Claimant is entitled to Certificate of Service.

Interest

The Claimants' prayer for interest is dismissed. He did not submit any evidence in support of the same.

Conclusion

In conclusion, I find that there was no breach of the Claimants contract and he is not entitled to damages for breach.

I further find that the Claimant is entitled to terminal benefits in the sum of Shs.958,058/= less the amount already paid to him, income tax on Shs.85,760/= and KCB loan repayment of Shs.61,564/=.

The Claimant is also entitled to a Certificate of Service.

Costs

The Respondent will pay 50% of the Claimant's costs as taxed.

Orders accordingly.

Read in open Court this 27th day of February 2013.

HON. LADY JUSTICE MAUREEN ONYANGO

JUDGE.

In the Presence of: _____ for Claimant
_____ for Respondent