



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1770 OF 2016

(Before Hon. Justice Hellen S. Wasilwa on 10th December, 2019)

ROBERT EVANS KIWANUKA.....CLAIMANT

VERSUS

ASSOCIATION OF CHRISTIAN

RESOURCE ORGANISATION

SERVING SUDAN ACROSS.....RESPONDENT

JUDGMENT

1. The Claimant, Robert Evans Kiwanuka filed a Statement of Claim dated 30/08/2016 and later filed an Amended Statement of Claim on 13/09/2019 seeking employment benefits under the pension scheme and unpaid leave against the Respondent, Association of Christian Resource Organisation Serving Sudan (ACROSS).

2. He avers that the Respondent offered him employment as Accounts Assistant based in Juba, Sudan. That he was promoted to Accountant by the end of 2010 and that the contract was renewed every year under different capacities. That in 2013, the Respondent offered him another 1 year contract as a Project Assistant, which position had been widely advertised and that he signed the contract in January 2013 to end on 31/12/2013.

3. That during his employment, the Respondent had a pension scheme held with Jubilee Insurance Company of Kenya Limited which deducted from him a varied monthly sum of Kshs. 27,834/= thereabout or more and duly remit the same to the Staff Retirement Benefits Scheme held with the said Jubilee Insurance Company Limited.

4. He avers that on 26/07/2013, he received a notice ending his contract, which would be terminated on 31/08/2013 due to non-renewal of his working permit by the government of South Sudan under the explanation that positions were being nationalised as the nation had gained independence. That he thus pursued clearance with the relevant departments and was issued with a Final Exit Clearance Form indicating he had 12 days' leave which were pending.

5. That he left the South Sudan office on 30/08/2013 and travelled to Nairobi to pursue the final dues with the Financial Controller at the Head Office in Nairobi. That on diverse dates between 2013 and 2016, he visited the Respondent's Nairobi Head Office and the Regional office in Juba demanding his pension payments and that after several email correspondences, the Respondent stopped the email communication in 2015.

6. It however received him at the Head Office and promised to follow up on the payments and when he formerly requested them for details of his pension in May 2016, they issued him with a statement and informed him the Respondent had withdrawn Kshs. 662,075.17 on 06/03/2014.

7. That he sought a proper explanation from the Respondent as to when the payments would be made but none was given thus necessitating this suit. That from the statements, he realised his last contribution as per the Pension Fund was in January 2013 yet the Respondent duly deducted the contributions from February 2013 until August 2013 but never remitted the same to the fund. That this deprived him of earned interest at fund rates and that for 3 years, the Respondent never denied or informed him the reasons why they had withdrawn and withheld his pension.

8. That his advocates wrote a demand letter and notice of intention to sue to the Respondent but its advocates responded denying knowing him as an employee and he particularizes his pension and leave at *paragraph 16 of his Claim*. He prays for award/judgment against the Respondent for:-

- a) *A declaration that the Claimant was an employee of the Respondent.*
- b) *Leave days amounting to Kshs. 109,480.00*
- c) *Kshs. 662,075.17 being pension withdrawn on 06/03/2014.*
- d) *Interest from date of withdrawal of the payment till payment at fund rates.*
- e) *Kshs. 191,688.00 being pension for the unremitted contributions for the period of seven months.*
- f) *Interest on the unremitted deductions above at fund rates.*
- g) *The interest to be calculated by the fund managers at Jubilee Insurance Company Ltd at the Respondent's cost.*
- h) *The Honourable Court do issue orders and give such directions as it deems fit to meet the ends of justice.*
- i) *The Respondent to pay costs and interests.*

9. In his Witness Statement, the Claimant states he was employed by the Respondent from 01/08/2010 and that as an Accounts Assistant, he was under the Finance Manager who was based in Nairobi and was attached to the integrated Response program funded by UNHCR.

10. That all financial reports would be sent to Nairobi for approval and system uploading and that he also undertook finance system training for 8 weeks in October 2010 in Nairobi which got him promoted to the Accountant position.

11. He states that he was asked to serve at the Head Office for further inductions from January to March 2011 and that he held the accountant position until December 2012. That after receiving the termination notice, he requested to clear with the organization and got busy with the then strategy review process which delayed his departure.

12. CW1, the Claimant testified in court on 17/09/2019 and adopted his filed Statement, List of Documents and Further List of Documents as his evidence. He stated that he also visited Jubilee Insurance in 2017 who gave him a statement as to how much in terms of growth the fund would have grown and stated that the amount would have been Kshs. 778,000/=.

13. That the unremitted would have grown to Kshs. 283,848.60 but he did not know how much it would have grown in 2018 and 2019. He asked the court to grant him what the fund would have been today and further asked for leave days and cost of the suit.

Claimant's Submissions

14. The Claimant submits that his payslips in **document number 4 in his filed bundle** shows that 8% pension fund was deducted but that **document number 8** indicates the last month of contribution as January 2013. That the pension fund savings were held in Kenya Shillings and that **document number 1 in his further list** shows that the withdrawn amount would have earned interest and that the total fund amount was Kshs. 778,335.42 by the end of 2017. He submits that the leave days he claims amount to Kshs. 218,961.60, which he erroneously calculated and pleaded as Kshs. 109,480.

15. He prays that the amount for leave days be paid in Kenya Shillings given the time that has passed since he left employment when he would still have held a bank account in South Sudan Pounds and calculates the prevailing exchange rate as Kshs. 88.00.

16. He urges this court to restore him to the same position he would have been if he was collecting his pension savings which he tabulates its estimated full value in the last paragraph of his submissions and together with the leave days, to a total of Kshs. 1,392,655.42.

17. I have considered the evidence and submissions of the Claimant. I note that the Respondent was served with the claim and summons to enter appearance in this case on 17.11.2016 at their offices in Karen Nairobi.

18. The Respondent never filed any defence nor entered appearance.

19. On 22/2/2017, the Hon. Court ordered that the matter proceeds undefended. The Claimant was able to establish that he was an employee of the Respondent who served on contract until the contract was terminated on 3/8/2013.

20. From the Claimant's payslip of February 2013, gross pay was 4,147 Sudanese pounds (exchange at 88 Kshs per dollar). 8% was deducted as pension = 329 dollars. At the exchange of 88 Kshs, this translates to about 28,776. The Claimant put it at Kshs.662,072.17. I will let it remain as pleaded.

21. The Claimant also exhibited his financial statement from Jubilee Insurance Company which show the amount contributed was Kshs.688,962/= as at 31/12/2013. The Claimant contends that a further 201,684 was also deducted from him and was never remitted to the fund.

22. The above evidence remains uncontroverted by the Respondent. This Court therefore finds that the Claimant has established his case as required by law. I find for Claimant and enter judgement for him as prayed as follows:-

a) "A declaration that the Claimant was an employee of the Respondent.

b) Leave days amounting to Kshs. 218,961.60.

c) Kshs. 662,072.17 being pension withdrawn on 06/03/2014.

d) Kshs. 201,684 deducted and not remitted to pension.

e) Interest on the above payments till payment at fund rates.

f) The Respondent to pay costs and interests.

Dated and delivered in open Court this **10th** day of **December, 2019.**

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Mburu for Claimant – Present