



Siobi v Ken-Kaz Sacco Society Limited (Employment and Labour Relations Cause E936 of 2022) [2024] KEELRC 2118 (KLR) (26 July 2024) (Judgment)

Neutral citation: [2024] KEELRC 2118 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE E936 OF 2022**

**AN MWAURE, J
JULY 26, 2024**

BETWEEN

WILLIAM WESONGA SIOBI CLAIMANT

AND

KEN-KAZ SACCO SOCIETY LIMITED RESPONDENT

JUDGMENT

1. The Claimant filed a Statement of Claim dated 14th December 2022.

Claimant's Case

2. The Claimant avers that on 10/4/2017, he was employed by the Respondent as a General Manager on a 3-year contract expiring on 30/4/2020.
3. The Claimant avers that the Respondent vide a termination letter indicated he would be paid his final dues upon returning all the Respondent's properties.
4. The Claimant avers that the Respondent paid him a sum of Kshs 100,000 in two instalments in 2020, leaving an outstanding balance of Kshs 157,000.
5. The Claimant avers that the Respondent has refused to pay the outstanding amount despite demand and notice of intention to sue.

Respondent's Case

6. In opposition to the claim, the Respondent filed its response dated 23rd January 2023.
7. The Respondent avers that it made it clear in the termination letter that any dues payable to the Claimant were to be paid as per his appointment letter.



8. The Respondent avers that the sum of Kshs 100,000 was paid to him as gratuity and denies that the Claimant was entitled to Kshs 257,000 and puts the Claimant to strict proof.

Evidence in Court

9. The Claimant (CW1) adopted his witness statement dated 14/12/2022 as his evidence in chief and produced his exhibits 1-8 to support his case.
10. CW1 testified that before he was employed, the former General Manager, Martin Wakhungu, served for 2 years and he was paid his final dues.
11. CW1 testified that he was tasked to prepare Mr Wakhungu's dues as 15 days for every year worked. The management also paid 1.5 months' salary for every year worked. He similarly wishes his dues are paid and awarded the same plus interest and costs.
12. During cross examination, CW1 testified that his contract of employment has no provision for payment of final dues .
13. CW1 testified that he is basing his claim on what Martin was paid but however he does not have Martin's letter of appointment or evidence of how he was paid.
14. CW1 testified that he has not brought any policy from the Respondent to show how he was paid and based his calculation on what the former manager was paid.
15. CW1 testified that he was paid Kshs 100,000 but the Respondent did not communicate the purpose of the payment. He never signed any payment voucher but signed delivery books.
16. CW1 testified that his salary was Kshs 50,000 and Kshs 5,000 as house allowance and by the time he left employment, he had pending leave days equivalent of Kshs 10,000.

Respondent's Case

17. The Respondent's witness, Kelvin Mokaya (RW1) produced his witness statement dated 22/6/2023 as his evidence in chief and list of documents dated 22/6/2023 as his exhibits.
18. RW1 testified that the Claimant was paid Kshs 100,000 as gratuity and it was explained to him vide a letter stating the same was gratuity.
19. During cross-examination, RW1 testified that the Respondent paid gratuity at the discretion of the board. The former manager was paid his dues as per his letter of appointment. However, the same was not produced in court.
20. RW1 testified that he prepared the payment voucher and the Claimant signed the collection cheques.
21. RW1 testified that there is no policy for gratuity payment and the Claimant has not particularised his final dues but depended on payment of the former manager.

Claimant's Submissions

22. The Claimant submitted that his termination letter dated 24/4/2020 expressly acknowledges that the Respondent owes him final dues as it states:- " he should hand over any Sacco's properties to facilitate final preparation of the Claimant's dues."



- 23. It is the Claimant’s submission that the Respondent admitted to owing him final dues as stated in the termination letter. There is no other way to interpret this provision, rather than the Respondent was going to pay his final dues.
- 24. The Claimant submitted that he is entitled to service pay for the 3 years worked at the rate of 15 days’ pay for each year worked. The Respondent made a promise to pay his dues by instalments and in reliance to this promise, the Respondent did not honour the same to the Claimant’s detriment.

Respondent’s Submissions

- 25. The Respondent submitted that final/terminal benefits are final entitlements of an employee upon termination of his/her employment which includes remuneration for work done before termination, annual leave pay for leave days not taken and notice pay. The Claimant herein does not have any unpaid salary, leave pay and/or notice pay due.
- 26. It is the Respondent’s submission that the job offer letter did not provide provision for payment of final dues; further no agreement was produced before court to prove that it agreed to pay the Claimant Kshs. 257,000 as his final dues. It is clear that the Claimant was paid Kshs. 100,000 as gratuity which is discretionary.
- 27. The Respondent submitted that it’s the Claimant’s claim that Kshs. 257,000 was based upon the final dues paid to the immediate former manager of the Respondent. Therefore, the Claimant cannot seek to derive a benefit he is no entitled to under his employment contract.

Analysis and Determination

- 28. Having considered the pleadings, affidavits evidence in court and submissions, the main issue for this court’s determination is whether the Claimant is entitled to payment of final dues as claimed.
- 29. Section 47(5) of the *Employment Act* provides: -

“For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.”

- 30. It is the Claimant’s case that he entitled to final dues amounting to Kshs 257,000, however, he based this claim on the former General Manager’s claim and not on his employment contract or terms of his employment.
- 31. In *Abdulkadir Giro Tutu v Martin Kimathi Guantai* [2022] Eklr the court held:

“It is trite law that "whoever alleges must prove. Section 107 of the *Evidence Act*, Chapter 80 Laws of Kenya states as follows:

- 1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts, which he asserts, must prove that those facts exist.
- 2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person

.....



The Court of Appeal in the case *Mbuthia Macharia v Annah Mutua & Another* [2017] eKLR discussed the burden of proof and stated thus:

- (16) “The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced.

The Halsbury’s Laws of England, 4th Edition, Volume 17, at paras 13 and 14: describes it thus:

“The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party’s case.....”

32. The claimant was employed on a three year’s contract at a monthly salary of Kshs 50,000/- and 5,000/- house allowance. The contract did not have a provision for terminal dues. When the claimant received the termination letter he was asked to hand over the properties of sacco and was informed he was to be paid his dues.
33. The respondent paid him kshs 100,000 as gratuity and that was not because it was in the contract but was out of good will of the respondent as even the respondent claims.
34. The claimant alleges he is entitled to a further 157,000/- as he is comparing his dues to those of his successor who was paid dues of kshs 257,000/- at termination. The law provides parties are to be paid in equal pay for equal work but in this case the claimant did not tender evidence what his successor was entitled to, what was the nature of his contract etc. There are no clear comparables therefore and so the court would not find the claimant was entitled to such terminal dues in the absence of any basis for is calculations.
35. The court holds therefore the claim for a further kshs 157,000/- are baseless and are not granted and so the claim fails.
36. The court orders each party to meet their respective costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 26TH DAY OF JULY, 2024.

ANNA NGIBUINI MWAURE

JUDGE

Order

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of *the Constitution* which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.



A signed copy will be availed to each party upon payment of Court fees.

ANNA NGIBUINI MWAURE

JUDGE

