

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**CAUSE NO. E849 OF 2023**

**SILAS NJERU NGARI.....CLAIMANT**

**VERSUS**

**GIBB AFRICA LIMITED .....RESPONDENT**

**J U D G M E N T**

1. Through a Statement of Claim dated 13<sup>th</sup> October 2023, the Claimant states that he was employed by the Respondent as a Senior Structural Engineer under a contract of employment dated 23<sup>rd</sup> February 2001. He avers that over the course of more than 20 years of service, he diligently performed his duties, earning several promotions and ultimately rising to the position of Unit Leader/Head of Department.
  
2. The Claimant contends that, without lawful justification, the Respondent failed to remit his full monthly salary from September 2019 until 17<sup>th</sup> March 2022, when he resigned and transitioned to consultancy work.

3. The Claimant further asserts that the Respondent failed to remit Pay As You Earn (PAYE) on his account to the Kenya Revenue Authority (KRA), resulting in a tax liability of **Kshs 1,609,005.08**.

4. On the basis of the foregoing, the Claimant seeks the following reliefs against the Respondent:

*a) A declaration that the claimant's fundamental right under Article 41 of the Constitution of Kenya to fair labour practices has been violated and/or infringed by the Respondent.*

*b) An award of Kshs 32,663,955.88 made up of;*

*i. Unpaid salary from 1<sup>st</sup> July 2020 to 17<sup>th</sup> March 2022...Kshs  
13,456,600.50;*

*ii. Sub consultancy arrears.....Kshs  
8,262,500.00;*

*iii. Unpaid PAYE .....Kshs  
1,609,005.08;*

*iv. Service pay (29,637.62x15x21).....Kshs  
9,335,850.30;*

*c) Costs of the suit.*

*d) Interest at court rates on (b) and (c) until payment in full.*

*e) Any other relief that this Honourable Court may deem fit and just to grant.*

5. The Respondent did not take the claim lying down. In its Statement of Response dated 4<sup>th</sup> December 2023, the Respondent admitted the employment relationship but stated that the Claimant voluntarily resigned. The Respondent further averred that, due to the adverse economic effects of the COVID-19 pandemic in 2020, several clients delayed payments, resulting in cash-flow challenges that hindered its ability to fully meet salary obligations.
6. The Respondent asserts that it has been settling the outstanding salary arrears progressively as payments were received, which explains the part payments made. It maintains that the arrears have since been cleared and denies owing the Claimant any outstanding salary.
7. Consequently, the Respondent argues that the Claimant is not entitled to the reliefs sought and prays that the claim be dismissed with costs.
8. The matter proceeded for hearing on 24<sup>th</sup> November 2025, during which both parties called oral evidence in support of their respective cases.

### **Claimant's Case**

9. The Claimant testified as CW1 in support of his case and, at the outset, sought to adopt his witness statement as well as the list and bundle of documents filed with the Statement of Claim as his evidence in chief.

10. It was the Claimant's testimony that to date, he has not been paid his outstanding salary accrued during his tenure as a full-time employee of the Respondent. To this end, he urged the Court to order the Respondent to settle the outstanding salary arrears as claimed.

### **Respondent's Case**

11. The Respondent adduced its oral evidence through **Ruth Odengo**, who testified as RW1. Ms. Odengo identified herself as the Respondent's Human Resource Manager and similarly adopted her witness statement, along with the list and bundle of documents filed on the Respondent's behalf, as her evidence in chief.

12. RW1 testified that in 2020, the Respondent was adversely affected by the COVID-19 pandemic, resulting in financial constraints after its clients either delayed or failed to make payments. According to her, this caused cash-flow challenges that hindered the Respondent's ability to pay full salaries.

13. She added that the Respondent opted to settle salary arrears progressively as payments were received from clients, rather than waiting for lump-sum payments, which accounted for the part-payments made to employees.

14. RW1 further stated that, through an email dated 17<sup>th</sup> March 2022, the Claimant communicated his decision to terminate his employment. She asserted that the Claimant did not issue the requisite notice of termination as required under the contract.

15. She also testified that on 18<sup>th</sup> March 2022, the Claimant commenced providing consultancy services to the Respondent.

16. RW1 maintained that the Respondent had fully cleared all outstanding salary arrears.

### **Submissions**

17. The Claimant submitted that, although the Respondent cited COVID-19 as a reason for failing to pay his salary arrears on time, this argument is unfounded, as he demonstrated that some arrears arose prior to the pandemic. He further contended that his evidence regarding unpaid salary arrears went unchallenged throughout the hearing.

18. Relying on the decisions in *Oluoch v Sibed Transport Co Limited [2025] KECA 98 (KLR)*, *Jackson Muiruri Wathigo t/a Murtown Supermarket v Lilian Mutune [2021] KECA 388 (KLR)*, and *Simon Kimani Gitura & 2 others v Administrator, Thika Sub County [2016] KEELRC 1861 (KLR)*, the Claimant submitted that where an employer fails to adduce evidence confirming payment of arrears, as in this case, the Court is entitled to draw the inference that such payment was not made.
19. The Claimant further submitted that he is entitled to recovery of unremitted PAYE deductions to enable him to offset outstanding tax liabilities and obtain a tax compliance certificate from the KRA. On this score, the Claimant cited the case of *Matseshe v Kenya Institute of Management Limited [2022] KEELRC 4051 (KLR)* in support of his argument.
20. It was further submitted by the Claimant that the Respondent's actions constituted a violation of his employment rights as protected under Article 41(1) of the Constitution of Kenya, 2010.
21. On its part, the Respondent contended that the Claimant's claim, as presented, is legally untenable as it amounts to double recovery and contravenes the statutory framework governing wages and lawful deductions.

22. The Respondent further argued that the Claimant failed to demonstrate any breach of their rights under Article 41(2)(a) of the Constitution of Kenya, 2010. According to the Respondent, its actions did not infringe upon the Claimant's right to fair remuneration but were instead necessitated by prevailing economic conditions. It maintained that the adjustments were undertaken transparently, through a consultative process in which the Claimant actively participated and voluntarily consented.

23. The Respondent additionally submitted that the changes to the Claimant's contract were not unilateral. It asserted that the revised terms were clearly communicated, openly discussed, and mutually agreed upon by both parties. The Respondent further submitted that the Claimant's continued service as a consultant under the new terms, without raising any objection, signified acceptance.

### **Analysis and Determination**

24. Flowing from the record, the sole issue distilled for determination by the Court is whether the Claimant is entitled to the reliefs sought.

25. It is worth noting that, through a Ruling delivered on 2<sup>nd</sup> May 2025, the Court upheld the Respondent's Preliminary Objection dated 4<sup>th</sup> February 2024, holding that it lacked jurisdiction to determine the claim relating to sub-

consultancy arrears. As such, this issue is not subject to determination through the instant proceedings.

### **Unpaid Salary Arrears**

26. The Claimant seeks **Kshs 13,456,600.50** under this head, being salary arrears allegedly accruing between 1<sup>st</sup> July 2020 and 17<sup>th</sup> March 2022.

27. While the Claimant maintains that he has not received any payments towards settling the outstanding salary arrears, the Respondent asserts that all arrears were fully paid.

28. Despite this assertion, the Respondent did not tender evidence to demonstrate that it indeed settled the Claimant's outstanding salary arrears. This is bearing in mind that Section 74(1) of the Employment Act imposes a statutory duty on employers to keep and maintain employment records.

29. It was therefore reasonably expected that the Respondent would produce payment records to show that the Claimant's salary had been fully remitted as and when it fell due. In the absence of this crucial evidence, the Court finds no reason to doubt the Claimant's assertions that his salary was not fully paid.

30. What's more, during cross-examination on this issue, RW1 testified that she prepared the payroll up to 17<sup>th</sup> March 2022 when the Claimant resigned. She stated that, based on her preparation of the payroll, she believed the Claimant had been paid. Notably, RW1 was uncertain about this position, stating that only the Respondent's finance office could confirm whether payment had been made. This is particularly striking given that RW1 was the sole witness called by the Respondent. Ultimately, the Respondent failed to rebut the Claimant's evidence.

31. Indeed, it is unclear how the Respondent could determine the status of the Claimant's salary arrears without the requisite payment records.

32. In light of the foregoing, the Court is satisfied that the Claimant has proved, on a balance of probabilities, that the Respondent failed to remit his full salary as claimed.

33. Consequently, the Claimant's claim for unpaid salary succeeds.

#### **Unremitted Income Tax (PAYE)**

34. Under this head, the Claimant seeks payment of **Kshs 1,609,005.00**, being unremitted income tax (PAYE). On this score, the Claimant asserts that the Respondent failed to remit the said tax to the KRA from 2017 to 2019. In

support of this claim, the Claimant exhibited copies of his KRA P9 forms for 2018 and 2019. A review of the forms shows that the Respondent did not remit the Claimant's PAYE for the months of March, April, August, and October 2018, and for March, June, July, and September 2019.

35. The Claimant further exhibited a screenshot of his iTax portal, which reflected outstanding tax liabilities for the period January 2017 to December 2019. According to the portal, the Claimant's total tax liability stood at **Kshs 950,181.62**.

36. There is no evidence that this amount has since been remitted to the KRA. Consequently, the Court has no basis to doubt that this remains the outstanding tax liability attributable to the Claimant.

### **Service pay**

37. The Claimant has further claimed payment of **Kshs 9,335,850.30** as service pay.

In his submissions, the Claimant indicated that he had withdrawn this claim. Accordingly, the Court will not consider it further.

### **Orders**

38. In the final analysis, the Court enters judgment in favour of the Claimant against the Respondent on the following terms:

- a) The Claimant is awarded unpaid salary arrears amounting to Kshs 13,456,600.50 for the period 1<sup>st</sup> July 2020 to 17<sup>th</sup> March 2022.
- b) The Respondent shall remit to the KRA the Claimant's outstanding tax liability of Kshs 950,181.62 within 30 days from the date hereof, failing which the said amount shall be paid to the Claimant for direct remittance.
- c) Interest shall accrue on the amount awarded under (a) at court rates from the date of judgment until payment in full.
- d) The Respondent shall bear the costs of this suit.

**DATED, SIGNED and DELIVERED at MERU this 13<sup>th</sup> day of March 2026.**

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**STELLA RUTTO**

**JUDGE**

**In the presence of:**

For the Claimant	Mr. Orina
For the Respondent	Mr. Kimanzi
Court Assistant	Qabale

**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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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 had 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 Civil 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.

**STELLA RUTTO**  
**JUDGE**