



**Kens Metal Limited v Shikanga (Civil Appeal 139 of 2018)
[2022] KECA 561 (KLR) (13 May 2022) (Judgment)**

Neutral citation: [2022] KECA 561 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 139 OF 2018
HM OKWENGU, MSA MAKHANDIA & S OLE KANTAI, JJA
MAY 13, 2022**

BETWEEN

KENS METAL LIMITED APPELLANT

AND

PETER SHIKANGA RESPONDENT

(An appeal from the Judgment of the Employment and Labour Relations Court of Kenya at Nairobi (Abuodha, J.) dated 14th July, 2017 in ELRC Cause No. 254 of 2014)

JUDGMENT

1. Peter Shikanga (the respondent) was an employee of Kenya Metal Limited (the appellant) for many years. His employment was summarily terminated for gross misconduct by the appellant's letter dated 3rd February, 2014. The respondent who was aggrieved by that decision filed suit at the then Industrial Court of Kenya at Nairobi (this is today the Employment and Labour Relations Court – ELRC) and in a Judgment delivered on 14th July, 2017 Abuodha, J., found that the appellant had followed process envisaged in law and termination of employment was proper. The main claim by the respondent was therefore dismissed but on the prayer for service pay the Judge found that:
 12. "The claimant claims service pay for the period worked. The respondent countered this by saying that the claimant is not entitled to make this claim since he was registered with NSSF. The respondent however never attached any statement or produced any evidence that the claimant was a member of NSSF to effectively rebut his claim for service pay. The court therefore enters judgment in respect of this claim."
2. The respondent was awarded Ksh.208,998 as service pay.



3. That award of service pay has aggrieved the appellant which has taken 3 grounds of appeal in the Memorandum of Appeal drawn by its lawyer, Grace Kanyiri, Advocate. It is said in sum that the award offends Section 35(6) of the *Employment Act*. It is also contended that the learned Judge erred in law and fact in awarding the respondent costs of the suit even after finding that the dismissal was fair.
4. The appeal came up for hearing before us on 15th March, 2022 when we allowed it to proceed in the absence of the respondent after being satisfied that the respondent's lawyers M/S Kwengu & Company Advocates had been served with a hearing notice on 8th March, 2022 at 11.49 a.m. but were absent and had not filed written submissions as directed in the hearing notice.
5. Learned counsel for the appellant Mr. Ouma submitted that the respondent was a registered member of National Social Security Fund (NSSF) and that the Judge fell into error when he awarded service pay to the respondent. He asked us to allow the appeal.
6. Section 35(5) and (6) of the *Employment Act* on "Termination notice" states:
 - (5). 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.
 - (6). This section shall not apply where an employee is a member of—
 - (a) a registered pension or provident fund scheme under the Retirement Benefits Act;
 - (b) a gratuity or service pay scheme established under a collective agreement;
 - (c) any other scheme established and operated by an employer whose terms are more favourable than those of the service pay scheme established under this section; and
 - (d) the National Social Security Fund."
7. This Court in the case of *Board of Management Ngararia Girls Secondary School v KUDHEIHA Workers* [2017] eKLR where the employee had other benefits in a Collective Bargaining Agreement stated on the effect of Section 35(6) of the *Employment Act*:

"Section 35(6) of the *Employment Act*, 2007 disentitles an employee from double payment of Social Security benefit from NSSF and a service pay scheme established under clause 31 of the CBA. However, be that as it may and as rightly held by the trial Judge "... section 35 of the *Employment Act* 2007 does not preclude parties from entering an agreement for retirement benefits or gratuity over and above the statutory NSSF arrangement".
8. As we have seen the Judge found that the appellant had not tendered evidence to show that the respondent was a member of NSSF. This finding is, with respect, made in error. There was produced before the Judge as appears at page 47 of the record of payslip in respect of the respondent for December, 2013 where a payment of Ksh.200 is shown in respect of NSSF. In addition, the respondent testified that he was a registered member of NSSF (page 115 of the record).
9. The "Memorandum of Agreement" between the appellant and Kenya Union of Commercial Food and Allied Workers Union produced before the Judge was not an elaborate one. It for instance has no provision for pension and it is difficult to know whether the respondent received any superior benefit to that envisaged as service pay by the *Employment Act*.
10. The Judge found that there was no evidence to show that the respondent was a member of NSSF. As we have seen there was such evidence and this must lead us to conclude that the Judge was wrong to find that there was no such evidence and the award in respect of service pay was in the circumstances



made in error and we hereby set it aside. The appeal is allowed and we award costs to the appellant here and below, the suit at ELRC being without merit.

DATED AND DELIVERED AT NAIROBI THIS 13TH DAY OF MAY, 2022.

HANNAH OKWENGU

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

S. OLE KANTAI

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR

