IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, ODEK & KANTAI, JJ.A)

CIVIL APPEAL NO. 148 OF 2015

BETWEEN

NEXT GENERATION COMMUNICATION LTD.....APPELLANT

AND

GEORGE M. KIRUNGARU.....RESPONDENT

(Being an Appeal from the Judgment of the Employment & Labour Relations Court at Nairobi (J. Rika, J.) Dated 12th April, 2014

in

H.C. Cause No. 1632 of 2012)

****

JUDGMENT OF THE COURT

The respondent, **George M. Kirungaru,** was employed by the appellant, **Next Generation Communication Limited**, vide a letter of appointment which stated *inter alia* that employment took effect on 17th August, 2001. The said letter provided on the issue of termination:

"Notice of termination of service is 2 months by either party. In the case of separation 2 months' salary in lieu of notice is payable to either party not notified on time."

By a handwritten letter dated 11th March, 2012 the respondent resigned from the said employment stating amongst other things that the letter served as his one month notice to terminate the contract of

employment, and that his last day of employment would be 31st March, 2012. The resignation was accepted.

By a Memorandum of Claim filed at the then Industrial Court of Kenya at Nairobi (renamed "Employment and Labour Relations Court"), the respondent claimed that he had worked for the appellant in various capacities from 1st August, 2001 to March, 2012; that he had retired in March, 2012 after serving for 10½ years; that at the time of resigning he earned a monthly salary of Kshs. 66,000 but that upon resigning the appellant had not paid him "entitlement" or "accrued dues" Kshs. 330,000 calculated at the said salary multiplied by 15 days for every completed year for 10 years. He claimed that sum.

The appellant denied the claim stating that the respondent, who had resigned, was not entitled to any dues. It stated that the claim was a disguised claim for service pay and that the respondent was not entitled to service pay as he was a member of National Social Security Fund (N.S.S.F.) which membership disentitled him from being paid service pay.

The matter was heard through written submissions filed by both parties and at the end **Rika, J.** delivered an Award on 12th February, 2014 where he made various findings. He found as fact that the respondent was a member of N.S.S.F where monthly remittances were made by the

appellant for the respondent; that the remittance made amounted to

Kshs. 50,400; that **section 35** of the Employment Act 2007:

"....intends that employees are not paid social security

benefits twice on termination of employment. It is contrary to the law to receive pension from the N.S.S.F and claim service pay. Where service pay is due under section 35(5) the mode of computing service pay is left to the Employer and Employee to fix...."

The trial Judge, however, found that the Industrial Court had by practice adopted 15 days salary for each completed year of service stating that that was the practice where Collective Bargaining Agreement and Wage Orders had been negotiated and reached. The Judge therefore found that the respondent was entitled to service pay in the sum of "Kshs.66, 000 divided by 26 working days x 15 x 10= Kshs. 380,769". He deducted a sum of Kshs. 50,400 which he found to have been remitted by the appellant to N.S.S.F for the respondent and in the end awarded the respondent Kshs. 330,369.

There are 7 grounds of appeal in the Memorandum of Appeal drawn for the appellant by its lawyers, **M/S Kwengu** and Company Advocates. It is stated that the trial Judge erred by holding that **section 35(6)** of the Employment Act intended that employees are not paid social security benefit twice on termination of employment and then proceeded to award the respondent service pay; that the Judge erred in adopting

section 40 of the Employment Act in computing service pay; that the Judge erred in adopting a provision of the said Act when the respondent had resigned; that service pay was awarded when it had not been pleaded and manner of computation had also not been pleaded; and, finally, that the Judge erred in failing to consider the dispute between the parties based on the weight of evidence adduced by the parties.

When the appeal came up for hearing before us, learned counsel **Miss Opiyo** appeared for the appellant while learned counsel **Mrs. Keya** appeared for respondent. Counsel for the appellant submitted that **section 45** of the Employment Act 2007 did not permit award of service pay where an employee was a memebr of N.S.S.F. Counsel faulted the learned trial Judge for holding that the respondent could not benefit twice but proceeded to make the award that he made. Further that the Judge erred in adopting **section 40** of the Employement Act to make the award to the respondent when the respondent had not been declared redundant but had resigned. In conculsion, it was learned counsel's submission that the Judge erred in awarding "superior award available" which had not been claimed for in Memorandum of claim.

Mrs. Keya for the respondent admitted that the respondent had resigned. According to counsel, although the respondent was a member of N.S.S.F. he was entitled to "superior award".

The issues for our determination in this appeal are simple and straight forward.

The respondent in this appeal admits that he resigned from his employment when he wrote a resignation letter which was accepted by his employer, the appellant.

The trial Judge found as fact that the respondent was a member of N.S.S.F. **Section 35** of the Employment Act specifically declares that an employee who is a member of N.S.S.F is not entitled to

service pay. It was proved as fact that the respondent was a member of N.S.S.F. as per certificate No. 041694910. The contract of employment between the respondent and the appellant was terminated when the respondent gave one month's resignation notice. Although his letter of employment required him to give 2 months' notice that issue is not an issue in this appeal. The respondent's resignation was accepted by the appellant and the employment contract came to an end. The respondent was not entitled to service pay as the Employment Act did not allow such an award when the respondent was a member of N.S.S.F. In any event and as properly submitted by learned counsel for the appellant, the memorandum of claim did not have a prayer for service pay and in that event the same could not be awarded.

In passing, we note that the trial judge awarded the sum of Kshs. 330,369 as service pay when the prayer in the memorandum of claim was Kshs. 330,000. It was a specific claim which needed to be properly pleaded and proved and the Judge could not award that which was not prayed for or proved.

The appeal is merited and we allow it. We set aside the award of service pay of Kshs.330,369 made by the then Industrial Court in its entirety and order that the claim be dismissed. We award costs of this appeal and costs below to the appellant.

Dated and Delivered at Nairobi this 19th day of July, 2019.

W. KARANJA

.....

JUDGE OF APPEAL

J. OTIENO-ODEK

.....

JUDGE OF APPEAL

S. ole KANTAI

.....

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR