



Ngigi v Kenya National Union of Teachers (KNUT); Teachers Service Commission (TSC) (Interested Party) (Employment and Labour Relations Cause E6459 of 2020) [2024] KEELRC 615 (KLR) (14 March 2024) (Judgment)

Neutral citation: [2024] KEELRC 615 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE E6459 OF 2020
AN MWAURE, J
MARCH 14, 2024**

BETWEEN

JOSEPH MUNGAI NGIGI CLAIMANT

AND

KENYA NATIONAL UNION OF TEACHERS (KNUT) RESPONDENT

AND

TEACHERS SERVICE COMMISSION (TSC) INTERESTED PARTY

JUDGMENT

Introduction

1. The Claimant filed a Memorandum of Claim dated 8th December 2020.

Claimant's Case

2. The Claimant avers that he was employed by the Interested Party on 22.02.1989 as a teacher and served in various positions, his last duty being a teacher at Thika Barracks Primary School, Kiambu.
3. The Claimant avers that he joined the Respondent as a member and remained in good standing until his retirement on 01.04.2020.
4. The Claimant avers that he participated in the Respondent's Branch elections and was elected as an Executive Branch Secretary, Thika branch in September 2013 and became a senior official of the union.
5. The Claimant avers that subsequently, the then Secretary General of the Respondent wrote to the Interested Party on 14.10.2013 requesting that he be granted leave of absence to serve the union on full time basis.



6. The Claimant avers that the Interested Party granted the Claimant leave of absence and he was released from teaching service to serve the Respondent effective 01.11.2013 as requested vide a letter dated 13.11.2023.
7. The Claimant avers that upon his release, he cleared with his school and obtained the exit report confirming the date he stopped teaching, and as per the practice, the Interested Party stopped his salary paving way for his full time employment by the Respondent.
8. The Claimant avers that it was agreed by the parties that:
 - a. his salary and allowances would be paid by the Respondent to which he worked diligently earning several incremental emoluments resting at a gross sum of Kshs 201,801 as at March 2020;
 - b. the Respondent would remit 31% of his salary as per the Interested Party's salary scale to the Director of Pensions through the Interested Party to sustain his pension emoluments in the teaching services; and
 - c. the Respondent would further remit 2% as per the Interested Party's salary scale to the Commissioner of Domestic Taxes, Kenya Revenue Authority (KRA) and submit original receipt to the Interested Party to sustain the Claimant's Widows and Children's Pension Scheme (WCPS) as per of the *Pensions Act*.
9. The Claimant avers that according to the terms and conditions of his service, he was entitled to service gratuity payable at a lumpsum at the rate of 31% of the basic salary per month for the number of years served.
10. The Claimant avers that he served the Respondent diligently until 01.04.2020 when he took early retirement in line with the *Code of Regulations for Teachers*. His application for early retirement was duly endorsed by the Respondent's Secretary General and accepted by the Interested Party to take effect from 01.04.2020.
11. The Claimant avers that upon retirement he was shocked to learn that the Respondent did not remit the monthly pension of 31% or the 2% for the Widows and Children's Pension Scheme (WCPS) despite deducting the same from the Claimant's salary. Hence, he was not able to access his pension emoluments for the teaching service to date.
12. The Claimant avers that the Interested Party wrote to him demanding payment of Kshs 996,037.50 being his pension and WCPS contribution arrears
13. The Claimant avers that despite taking up the matter with the National Treasurer of the Respondent, no formal action has been taken by the Respondent to remedy the situation. Since his retirement, the Respondent has declined, refused and/or ignored to pay his service gratuity to date.
14. The Claimant avers he claims against the Respondent payment of service gratuity, terminal benefits and unpaid salaries for July, August and December 2019 and leave days.

Respondent's Case

15. The Respondent did not file its response to the Claim and never appeared in court and neither did he file submissions. That is despite the claimant serving the summons upon the respondent via a process server Michael Cleophas Opanga who deponed an affidavit of service dated 5th October 2021.



Evidence in Court

16. The Claimant (CW1) adopted his witness statements and his exhibits dated 08.12.2020 as his evidence in chief.

Claimant's Submissions

17. The Claimant submitted that he gave evidence that the Respondent never paid his service gratuity earned from 01.11.2013 to 31.03.2020 amounting to Ksh. 1,792,816 despite the guidelines stating very clearly that the same was payable after every two and a half years. He further submitted that he expressly provided the formulae for calculation and payment of the gratuity and there being no evidence of remittance of the amounts due, the court ought to award him the amount.
18. The Claimant submitted that the Interested Party vide a letter dated 13.11.2013 addressed to the Claimant's last school of service and copied to the Respondent's Secretary General advised that his pension shall be payable by the Respondent.
19. Further, the Respondent's guidelines titled Remuneration Packages for KNUT Branch Staff, clearly spelt out the formulae for payment of pension and the manner in which it shall be paid.
20. The Claimant submitted that the payslips produced in court are evidence that the Respondent deducted the pension contributions, which was to be transmitted to the Director of Pensions through the Interested Party. However, the Respondent failed to remit his pension contribution amounting to Kshs 996,937.50 as seen in letter dated 17.9.2020 from the Interested Party addressed to the Claimant through the Respondent's Secretary General.
21. The Claimant submitted that the Respondent's actions are illegal and amounts to unfair labour practice. This practice by employers such as the Respondent leaves employees vulnerable after disengagement of their services with their employers.
22. The Claimant submitted that he sought for unpaid salaries for the months of July, August and December 2019 amounting to Ksh. 603,243. It is trite knowledge, and the courts have held, that an employee shall be entitled to pay for work done, in the absence of any contrary evidence he is entitled to the award.
23. The Claimant submitted that he never went on leave for the entire duration of service and was not paid in lieu. The Respondent's guidelines at pages 31 & 32 of the claimant's bundle has provided at Schedule II (b) thereof, for the entitlement to cash payment in lieu of leave days unused.
24. The Claimant submitted that the Respondent committed to pay the claimant his terminal benefits. However, to date he is yet to be paid the same. The Claimant is thus entitled to the terminal benefits amounting to Ksh. 1,372,560 as calculated as at paragraph 20 of the Memorandum of Claim.

Analysis and Determination

25. Having considered the pleadings, witness statements, submissions and the evidence of record, the main issue for determination is whether the Claimant is entitled to the reliefs sought.
- a. Service Gratuity, Pension & WCPS Contribution
26. Hon. Lady Justice Mbaru in *Nelson Keshei v Narok County Government & another* [2019] eKLR held:
- “the *Employment Act, 2007* does not make it mandatory for employers to pay gratuity to employees. The payment of gratuity must be a term of contract, a provision under a private



treaty, a provisions under a Collective Agreement or a provision under a term and practice of the employer.”

27. The Respondent’s Remuneration Packages for KNUT Branch Staff provides under General Note 4 (a) that:

“Gratuity payable to Branch Executive Secretaries remains at 31% of their monthly basic salaries. This gratuity is payable to them after every 2½ years.”

28. Further, the Respondent in its letter to the Interested Party dated 14.10.2013 and the Interested Party’s release of the Claimant was clear that to maintain his pension his pension contribution of 31% and 2% WCPS contribution should be paid.

29. From the payslips produced in court, it is evident that the Respondent deducted 31% of the Claimant’s salary allegedly remitted to the Director of Pensions. However, vide the Interested Party’s letter dated 17.09.2020 addressed to the Claimant, it expressed that the union only remitted Kshs 20,473.20 vide receipt 6440822 and not Kshs 678,768.60 as indicated in its letter dated 11.06.2020. The Interested Party sought the payment of the balance of Kshs 996,037.50 to facilitate the Claimant’s retirement benefit processing. No evidence was adduced that the same was remitted to Teachers service commission for onward payment to the claimant.

30. The Respondent having failed to offer any evidence to the contrary, the evidence adduced by the claimant and his submissions remain unchallenged.

31. The Claimant’s evidence being uncontroverted and having established that the Respondent by his letter dated 14th October 2013 wrote to the teacher’s service commission for the release of the claimant in order to work for the respondent as their general secretary, the union therefore employed him from that date and undertook to maintain his pension at 31% for the period he would be working for them.

32. The issue of uncontroverted evidence was addressed by Justice Mwongo in *Peter Ngigi & Another (suing as legal representative of the Estate of Joan Wambui Ngigi) v Thomas Ondiki Oduor & Another* 2019 eKLR where he stated:-

“There are many authorities that deal with the question of uncontroverted evidence, such as the situation in the present case where the defence did not show up at the trial. The general position running through such authorities is that uncontroverted evidence bears a lot of weight and a statement of defence without any evidence to support the assertions therein will amount to mere statements.

33. In the case of *Shaneebal Limited v County Government of Machakos* [2018] eKLR, Odunga, J, relied on the cases below in reaching his judgment. In *Trust Bank Limited v Paramount Universal Bank Limited & 2 Others* Nairobi (Milimani) HCCS No. 1243 of 2001 the learned judge citing the same decision stated that it is trite that where a party fails to call evidence in support of its case, that party’s pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. In the same vein the failure to adduce any evidence means that the evidence adduced by the plaintiff against them is uncontroverted and therefore unchallenged.



34 Similarly, in *Janet Kaphiphe Ouma & Another v Marie Stopes International (Kenya) Kisumu* HCCC No. 68 of 2007 Ali-Aroni, J. citing the decision in *Edward Muriga Through Stanley Muriga v Nathaniel D. Schulter* Civil Appeal No. 23 of 1997 held that:

“In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations...Sections 107 and 108 of the *Evidence Act* are clear that he who asserts or pleads must support the same by way of evidence”.

35 In *Interchemie EA Limited v Nakuru Veterinary Centre Limited* Nairobi (Milimani) HCCC No. 165B of 2000, Mbaluto, J. held that where no witness is called on behalf of the defendant, the evidence tendered on behalf of the plaintiff stands uncontroverted. Mulwa J, however in the case of *Kenya Power and Lighting Company Limited v Nathaniel Karanja Gachoka & another* [2016] eKLR stated:

“I am of the opinion that uncontroverted evidence must bring out the fault and negligence of a defendant, and that a court should not take it truthful without interrogation for the reason only that it is uncontroverted. A plaintiff must prove its case too upon a balance of probability whether the evidence is unchallenged or not.

In light of all these authorities, I am of the view that the position taken by the trial magistrate in dismissing the suit was not warranted. I would reverse the lower court’s determination and substitute with this court’s determination, that the plaintiffs proved their case on balance of probabilities, and are entitled to damages.

In this regard, no evidence of apportionment of liability being available, 100% liability is attributed to the defendants jointly and severally.”

36 Worse of in this case the respondent did not even file a response to the claim leave alone tendering viva voce evidence and therefore the claimants case is not uncontroverted and therefore the court holds that the claimant is entitled to the following reliefs:-

1. unremitted pension and WCPS contribution Kshs 996,037/50
2. service gratuity is not a legal provision unless provided by the parties in their contract and is declined.
3. Terminal benefits also not proved. The court has noted claimant is depending on an unsigned document titled Kenya National Union of Teachers (KNUT) Remuneration Packages for KNUT Branch Staff). This is not an authentic document that the court can rely to calculate terminal benefits, and leave days as well as service gratuity.
4. The unpaid salary of July, August and December 2019 is granted since the respondent did not tender evidence that they paid the same. So total awarded to the claimant is kshs 1,599,280/50 plus interest at court rates from the day of filing this suit till full payment.
5. Claimant is also awarded costs of the suit.

37 Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 14TH DAY OF MARCH, 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

