



**Waitha v Sketchers Design Promoters Limited (Employment and Labour Relations Cause E091 of 2021) [2024] KEELRC 899 (KLR) (5 April 2024) (Judgment)**

Neutral citation: [2024] KEELRC 899 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS CAUSE E091 OF 2021**

**AN MWAURE, J**

**APRIL 5, 2024**

**BETWEEN**

**LORNA MUTHOKI WAITA ..... CLAIMANT**

**AND**

**SKETCHERS DESIGN PROMOTERS LIMITED ..... RESPONDENT**

**JUDGMENT**

**Introduction**

1. The Claimant filed a Memorandum of Claim dated 5<sup>th</sup> February 2021.

**Claimant's Case**

2. The Claimant avers that vide a letter of appointment dated 18.02.2014, she was employed by the Respondent as an Executive Account Manager on an initial basic salary of Kshs 63,417.
3. The Claimant avers that she served the Respondent diligently and owing to that her salary was reviewed to Kshs 120,000 vide a letter dated 31.01.2018.
4. The Claimant avers that her performance appraisal and salary review is evidence of her performance and the remarks are clear indication of the Claimant took her work seriously as her work was acknowledged and appreciated by her employer.
5. The Claimant avers that on 29.08.2019, she received a one month's notice separation letter from the Respondent on account of redundancy with effect from 30.09.2019 citing that it had been adversely affected by the slowdown and slump in the Kenya Business Environment. Specifically, business opportunities in the branding sector has declined as most customers and prospects reduced significantly their budget expenditure.



6. The Claimant avers that vide the redundancy letter, the Respondent indicated it would remit her final remuneration package which included: - a) salary earned until 30.09.2012 (b) Severance pay equivalent to 15 days pay for each completed year of service (c) leave accrued but not taken up to September 2019.
7. The Claimant avers that pursuant to the *Employment Act*, the Respondent deducted her statutory deductions every month for onward transmission to the statutory body.
8. The Claimant avers that the Respondent went ahead and overtaxed her severance pay and till date the Respondent has not remitted what is rightfully due to her.
9. The Claimant avers that the Respondent's decision to terminate her employment was unlawful and wrongful as it failed to follow due process and or pay her severance pay in accordance with Section 40 of the *Employment Act*.
10. The Claimant avers that the Respondent's action has cost her loss and damage as she has lost jobs on account of lack of certificate of service and she is ineligible for government jobs due to lack of tax clearance.
11. The Claimant avers that the Respondent's action of delaying to award her severance pay will cause her to suffer penalties, interests and cumulative loss due to non-remittance of her statutory taxes to the Kenya Revenue Authority.

### **Respondent's Case**

12. In opposition to the Claim, the Respondent filed its Memorandum of Response dated 23<sup>rd</sup> March 2021.
13. The Respondent avers that the Claimant was subjected to the redundancy process as her skill was no longer required by the company noting digitization in the management of clients' accounts which rendered her role redundant.
14. The Respondent avers that the Claimant was given notice of the intended redundancy vide the separation letter which stated the reasons and her envisaged remuneration package.
15. The Respondent denied that it overtaxed the severance pay as it can only be applied as per the percentage dictated by statute and not at its discretion and puts the Claimant to strict proof.
16. The Respondent avers that in declaring redundancy, due process was followed with issuance of the requisite notice to the Claimant and the declaration of her expected final remuneration package including her severance pay.
17. The Respondent avers that the Claimant's certificate of service has remained in the Respondent's file as the Claimant has failed to collect the same from its premises despite being called upon to collect the same.
18. The Respondent avers that the Claimant has failed to demonstrate the alleged loss of job opportunities as averred.
19. The Respondent avers that the Claimant cannot claim to be paid taxes as she is not authorised in law to collect tax and neither is she a tax agency.
20. The suit was canvassed by way of written submissions.



### **Claimant's Submissions**

21. The Claimant submitted that on 26.02.2021 the Respondent responded to the Claimant's demand letter dated 01.10.2020, where they indicated that they were not in dispute that they owed the Respondent Kshs. 291,185.
22. The Claimant submitted that by failing to remit her final package to date, the Respondent was not acting in good faith. The Respondent had a habit of always delaying payment of salaries and would delay remitting her dues hence she entitled to interest as a form of compensation for the delayed payment.
23. The Claimant submitted that to date she has not been issued with a tax clearance certificate indicating that all the taxes have been deducted in form of PAYE from her salary income have duly been paid to KRA. The Claimant provided a ledger showing unremitted taxes that are due.
24. The Claimant submitted that the Respondent's actions of delaying to award her the severance pay is in contravention with section 40 of the Employment Act and hence it is a violation of her rights. Section 40 of the Employment Act stipulates that the severance pay should be remitted effectively from the date of termination.
25. The Claimant submitted that there has been inordinate delay in issuance of the Certificate of service. She made numerous inquiries, follow-ups and further to the demand letter dated 01.10.2020, however, the Respondent elected to neglect and ignore as would have been sent earlier.
26. It is the Claimant's submission that the Respondent acted in malice and bad faith, as it sent a backdated the Certificate of service, it's dated 12.11.2019 to her advocates on 24.03.2021.
27. The Claimant submitted that the Respondent has not complied with Section 40 of the Employment Act as the Respondent has not been cooperative in issuing her tax clearance certificate as a result the Claimant has suffered loss of job opportunities on account of the acts of commission and omission by the Respondent.

### **Respondent's Submissions**

28. It is the Respondent's submission that upon the Claimant's termination on account of redundancy, the Respondent calculated her severance package at Kshs. 291,185.00. However, upon the onset of the Covid-19 pandemic, the Respondent's business was significantly affected. Vide a letter dated 26.02.2021, it informed the Claimant of these unfortunate circumstances and sought to pay the severance package in monthly instalments of Kshs. 20,000.
29. The Respondent submitted that despite not receiving any response to this letter, it deposited Kshs. 50,000 with the Claimant in March 2021 and another Kshs 50,000 May 2021. Thereafter, during the pendency of the proceedings, the Respondent paid Kshs. 191,185 to the Claimant, thus clearing the full severance package of Kshs. 291,185.00 owing to the Claimant and as demanded and claimed. It is against this that the parties entered into the partial consent dated 16.06.2023.
30. It is the Respondent's submission that the Claimant seeks to impose interest and other related costs on the principal amount without any lawful justification.
31. The Respondent submitted that the Claimant has failed to demonstrate how the applicable interest rate has been applied; She has failed to evidence where the same is anchored in law; and has failed to give the Respondent and this court a breakdown of how she arrived at any additional sums.



32. The Respondent submitted that pursuant to the employment agreement and in respect to its duties as an employer, the Respondent was responsible for remitting taxes and statutory deductions to the Kenya Revenue Authority (KRA), the National Hospital Insurance Fund (NHIF), and the National Social Security Fund (NSSF) on behalf of its employees, including the Claimant herein.
33. The Respondent submitted that it has always diligently, dutifully and without fail fulfilled its tax and statutory obligations through regular and timely remittances to the relevant authorities. As proof, it produced in court, the Claimant's P9A forms for the years between 2014-2019 (RE-3); the Respondent's NHIF Statements as at 20.06.2023; and the Respondent's NSSF Statements as at 22.06.2023. These documents demonstrated that it made timely and regular payments to the relevant authorities. They further show the amounts paid, dates of remittance, and the specific tax and statutory schemes covered.
34. It is the Respondent's submission that it has not received any official notice or communication from KRA, NHIF, or NSSF indicating non-compliance or demanding any outstanding dues. And further, the Claimant has not raised a complaint with either of statutory bodies to evidence that indeed the Respondent has not been remitting her statutory deductions.
35. It is the Respondent's submission that there is no specific legal provision that mandates it to issue a tax clearance certificate to the Claimant. Tax clearance certificates are solely within the purview of the tax authority, which independently verifies an individual's or entity's tax compliance status.
36. The Respondent submitted that its role is limited to deducting and remitting PAYE from the income due to its employees to the revenue authority and thereafter it is only the authority that can issue a tax clearance certificate. The Respondent has demonstrated that it has been remitting the Claimant's PAYE as evidenced by the Claimant's P9A forms. This was corroborated by the Claimant's exhibit, a General Ledger Report, that shows PAYE deductions were remitted to KRA as per the Claimant's P9A Forms.
37. It is the Respondent's submission that it has cleared the path for the Claimant to apply for a tax clearance certificate from KRA and it is the Claimant's duty to directly approach KRA to obtain the tax clearance certificate, an action which she has failed to undertake or evidenced any challenge that she has had in obtaining it.
38. The Respondent submitted that the Claimant's certificate of service dated 12.11.2019 was made available to her upon her leaving her employment with the Claimant. However, the Claimant failed and or neglected to collect the same from the Respondent's offices. It would be unfair and unconscionable for such indolence to be visited upon the Respondent.
39. The Respondent submitted that Claimant must establish a direct link between the lack of a Certificate of Service and Tax Clearance Certificate and the alleged loss of job opportunities. The Respondent maintains that it did not engage in any actions that would hinder the Claimant's future employment prospects.
40. The Respondent submitted that the Claimant's severance pay has been fully settled and since the filing of this suit the Certificate of Service has since been issued to the Claimant.
41. The Respondent submitted that the burden of proof lies with the Claimant to establish her entitlement to general damages; she must demonstrate that the Respondent's actions or omissions directly caused the alleged harm, and such harm warrants the award of damages. The Respondent contends that it has faithfully fulfilled all its contractual obligations towards the Claimant.



## Analysis and Determination

42. Having considered the pleadings, witness statements, submissions and the evidence of record, the issues for determination are:
  - a. Whether the Claimant is entitled to interest and related costs on the principal severance pay
  - b. Whether the Respondent has paid all due taxes and other statutory deductions due from the Respondent to KRA, NHIF and NSSF.
  - c. Whether the Respondent is mandated to issue the Claimant with a tax clearance certificate.
43. On the first issue, it is not disputed that the Claimant was terminated on account of redundancy and subsequently entered into a partial consent dated 16<sup>th</sup> June 2023 in which the Claimant confirmed that her severance pay of Kshs 291,185 has been settled in full.
44. The Respondent in reply to the Claimant's demand letter indicated that due to the Covid 19 pandemic it experienced significant loss of business and is struggling to get back on its feet hence the delay in settling the Claimant's severance pay.
45. The Claimant sought in her claim payment of interest and related costs on the principal severance pay, however, the basis of calculation of the said interest has not been provided before this court. The claimant admitted she was paid kshs 291,185/- as per the partial consent dated 16<sup>th</sup> June 2023. That was her entitlement according to her salary and the period she worked for the respondents as per her averment.
46. Therefore, the Claimant is not entitled to interest sought as there is no supporting document or fact that support the same.
47. On the second issue, the Respondent produced in court in following documents: - Claimant's P9 A forms for the years between 2014-2019 (RE-3); the Respondent's NHIF Statements as at 20.06.2023; and the Respondent's NSSF Statements as at 22.06.2023. These documents clearly evidence that the Respondent remitted the required statutory deductions to the relevant authorities. So again the court finds no support of this particular prayer.
48. On the third issue, this court agrees with the Respondent's submissions that tax clearance certificates are solely issued by the tax authority which independently verifies an individual and entity's tax compliance status.
49. The Respondent has duly produced the Claimant's P9A forms for the years between 2014 to 2019 and proven that it undertook its duty of remitting the PAYE deductions as required by the law, it was the Claimant's duty then to apply for a tax clearance certificate.
50. No evidence was produced in court that the Claimant duly made an application for a tax clearance certificate and that the same was rejected by KRA for being non compliant so as to warrant the Respondent's intervention. It was the claimant's responsibility to peruse her clearance certificate for KRA.
51. The court therefore holds that the prayers sought by he claimant in her claim and in paragraph 17 of the same are not justified and are therefore all disallowed. To highlight prayer 19(d) there is no evidence



that the claimant lost job opportunities for lack of certificate of service and form p9 A from KRA. In the case of *Douglas Moturi Nyairo v University of Nairobi* (2018) eKLR the court held:

“the petitioner did not however demonstrate through tangible evidence that he missed employment opportunities.

52. In view of the foregoing, the court holds the claimant is not entitled to the reliefs sought and her claim is dismissed in total.
53. The court orders however that each party to meet their costs of the suit.
54. For abundant precaution the respondents to avail P9 A forms for the years the claimant worked for them and certificate of service within the next 30 days hereof.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 5<sup>TH</sup> DAY OF APRIL, 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 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 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**

