



Ng’ati v Sports, Arts & Social Development Fund Oversight Board & 3 others (Employment and Labour Relations Cause E6590 of 2020) [2024] KEELRC 1371 (KLR) (6 June 2024) (Judgment)

Neutral citation: [2024] KEELRC 1371 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE E6590 OF 2020**

MN NDUMA, J

JUNE 6, 2024

BETWEEN

MARTIN NG’ATI CLAIMANT

AND

THE SPORTS, ARTS & SOCIAL DEVELOPMENT FUND OVERSIGHT BOARD 1ST RESPONDENT

THE ADMINISTRATOR, SPORTS, ARTS & SOCIAL DEVELOPMENT FUND 2ND RESPONDENT

THE CHIEF EXECUTIVE OFFICER SPORTS, ARTS & SOCIAL DEVELOPMENT FUND 3RD RESPONDENT

THE HON. ATTORNEY GENERAL 4TH RESPONDENT

JUDGMENT

1. The claimant filed suit on 30/12/2021 seeking the following reliefs:-
 - a. The court to grant the sum of Kshs 5,024,750.00 as particularized in paragraphs (i), (ii), (iii), (iv), (v) and (vi) of the statement of claim.
 - b. Costs of the suit
 - c. Interest on (a) and (b) above at court rates from the date the cause of action arose until date of judgment and with regard to the claimant’s pension benefits interest accruing at court rates with effect from the date of first deduction until payment in full.
 - d. Any other or further relief that this court may deem fit to grant.
2. CW 1, the claimant adopted a witness statement dated 1/2/2020 as his evidence in chief.



- 3 CW 1 testified that he was employed by the 1st respondent as a corporation secretary on permanent and pensionable terms at a monthly gross salary of Kshs 327,700/= on 6/12/2016. The 1st respondent issued the claimant with a letter of appointment dated 16/12/2016 with an addendum dated 7/4/2017.
- 4 The claimant started work on 7/4/2017 and served the respondent for 30 ½ months until August 2019 when he formally tendered his resignation by issuing to the 1st respondent the requisite thirty (30) days' notice of termination.
- 5 CW 1 testified that the 1st respondent regularly made monthly pension deductions from October 2017 up to August 2019.
- 6 That the pension ought to have commenced from the date of employment in February 2018 and contributions made in arrears upon completion of the probation period and confirmation to the substantive position on permanent and pensionable basis.
- 7 That the claimant prosecuted and defended civil cases before courts of law during the tenure of his employment as evidenced by proceedings in petition no. 533 of 2017 and petition No. 129 of 2019 copies of which have been produced in court.
- 8 That CW 1 was therefore entitled to payment of non-practice allowance payable to legal personnel in the public service legal subsection as evidenced by a public service circular dated 11/6/2010 produced before court.
- 9 That CW 1 incurred reimbursable travel expenses while representing the 1st respondent in official functions such as the SOYA Awards event held on 11/1/2019 at Fort Jesus, Mombasa for which the claimant incurred reimbursable travel and taxi expenses and was entitled to daily subsistence allowance for two (2) nights at the level of his job group. Copies of documents in respect of the travel and expenses incurred were produced before court.
- 10 CW 1 testified that upon resigning, he formally cleared and handed over to the 1st respondent all the case files, documents and assets of the 1st respondent in his possession to the Human Resource Manager Ms. Dorcas Mukin and state counsel, Ms. Rispha Mukunyo on 11/12/2019. CW 1 produced handing over documents before court.
- 11 CW 1 stated that despite demand, the 1st respondent has failed and/or neglected to pay his terminal benefits set out in the memorandum of claim including Kshs 1,800,000/= in respect of non-practice allowance and prosecutorial allowance for 31 months at Kshs 20,000/= per month and Kshs 40,000/= per month respectfully; claimant's pension benefits in the sum of Kshs 1,625,150/= being Kshs 413,809/= salary deduction from December 2017 to August 2019 and Kshs 1,211,341/= being employer contribution for February 2017 to August 2019.
- 12 These included, reimbursement of incurred subsistence travel allowance and taxi expenses on official duty to SOYA Awards on 11/1/2019 in the sum of Kshs 39,600/= being Kshs 6,000/= return ticket and Kshs 16,800/= per day for two days subsistence allowance.
- 13 The claimant also seeks payment of general damages for discrimination and exemplary damage for the 1st respondent abrasive, arbitrary and unconstitutional action in the sum of Kshs 500,000/= respectively totaling Kshs 1,000,000/=.
- 14 The claimant further seeks an award of aggravated damages for mental distress and hurt and loss of dignity, anxiety and uncertainty suffered while undergoing litigation in the sum of Kshs 500,000/=



- 15 CW 1 was subjected to cross-examination by counsel for the respondent Mr. Mulili and stated that he voluntarily resigned from employment of 1st respondent by a letter dated 17/7/2019. That he had served 3 months' probation which ended on 31/7/2019 and that he prays to be paid terminal benefits and damages set out in the statement of claim.
- 16 CW 1 said advocates in public service are paid non-practice allowance and prosecutorial allowance in terms of the circular before court and HR manual. CW 1 added that he however served six (6) months' probation. CW 1 said that the high court has supported payment of the allowances claimed in previous judgments. That the circular dated 11/6/2016 from the prime minister's office was in existence at the time the claimant was employed.
- 17 Under cross examination, CW 1 said he raised the issue in various meetings but there was no positive response. CW 1 said the letter of appointment did not provide for the non-practising allowance and prosecutorial allowance but the addendum to the letter of appointment referred to terms and conditions of service in place in public service.
- 18 CW 1 denied that prosecutorial allowance is only paid to prosecutors as the circular was addressed to the Solicitor General in the office of the Attorney General. The claimant said he did not prosecute criminal matters but attended to civil matters only.
- 19 The claimant admitted that on 27/9/2021 his pension was paid in the sum of Kshs 411,600/= and Kshs 84,827/= in October 2021 respectively. The claimant stated that the claim he is making is over and above the amount already paid. That he seeks pension for the period February 2017 up to August 2019 which includes the six (6) months period he was under probation as per clause 2.15 J of the HR manual and further four (4) months not paid upon confirmation.
- 20 That the pension claim is therefore 10 months period in respect of the 20% contribution by the employer which was not done. That he was disadvantaged by the non-contribution for a period of 10 months.
- 21 The claimant reiterated his evidence regarding reimbursements for Mombasa travel and taxi hire. The claimant stated with regard to non-payment of non-practising allowance that he was discriminated as against all other advocates in public service who were paid the allowance that he was not paid.

Defence

- 22 The respondent called RW 1 Charles Maina who stated that he was the Principal Human Resource Manager and Development Officer of the 1st respondent. He adopted a witness statement dated 14/12/2022 as his evidence in chief and produced exhibits '1' to '3' in support of the case.
- 21 That the claimant was first appointed by the defunct National Sports Fund by a letter dated 16/12/2016 as a Corporation Secretary at job scale NSF2 on permanent and pensionable terms.
- 22 That the claimant served on probation until 2nd August 2017 when the fund issued him with a letter of confirmation at the same job scale. That the claimant did not contribute any pension payments during his probation period and therefore his claim under paragraph 3(e) of the statement of claim has no merit.
- 23 That the letter of appointment specifies clearly the terms and conditions of appointment including any applicable benefits thereto which do not include non-practising allowance and prosecutorial allowance.



- 24 The claimant voluntarily resigned from employment by a letter dated 17/7/2019 in which he made outstanding claims now set out in this suit.
- 25 That the claimant was paid all pension dues duly owed to him for the period served.
- 26 That delay in paying the terminal benefits was caused by winding up of the defunct National Sports Fund which caused transfer of pension contributions of all staff into the custody of the state department of sports awaiting appointment of the approved issuer who was later appointed by the 1st respondent. The transfer was finalized in 2021 hence the claimant was paid his pension dues.
- 27 That the claim for travel allowance has no merit as his travel claims were settled and none was outstanding at that time of filing this case. The claimant has not proved the travel claims. That the suit be dismissed with costs.
- 28 RW 1 was cross-examined by counsel for the claimant in which RW 1 reiterated the evidence adduced in chief. RW 1 said employees contribute 10% and employer contribute 20% to the pension fund. That monies are remitted to ICEA, the Pension Provider. That interest is payable on the contribution per year to members and final payment is made upon retirement. That the winding up and transfer of the fund to the present sports board caused the delay in payment of pension to the claimant.
- 29 RW 1 said that clause 12.15 j of the HR manual of the 1st respondent provides that probation period shall be considered in computing pension, gratuity and other terminal benefits. That the claimant became eligible for payment upon confirmation in terms of his letter of appointment. But no contributions were done by the claimant or the employer to the pension fund during the period of probation.
- 30 That the claimant did not write to be paid pension in respect of the probation period.
- 31 RW 1 said he was not aware of the matter until it was before court.
- 32 That the claimant was paid pension on 27/7/2021 and was paid salary up to August 2019. RW 1 said government circulars apply to the organization. RW 1 said he was not aware of circulars that apply to legal officers of the 1st respondent. RW 1 said SRC guided the fund on salary and allowances payable to staff of 1st respondent.
- 33 RW 1 said he was not aware that the claimant was owed any travel allowance claimed. RW 1 said that all dues were paid to the claimant and none was outstanding. RW 1 said pension scheme was not in place when the claimant joined the fund. That the pension became operational in December 2017 and so no contributions were done during the 10 months period claimed in this suit.

Determination

- 34 The parties filed written submissions which the court has carefully considered together with the testimony by CW 1 and RW 1. The issues for determination are:-
- a. Whether the claimant has proved that he is owed the special damages claimed.
 - b. Whether the claimant has proved discrimination and harassment by the 1st respondent so as to be entitled to general, exemplary and aggravated damages as claimed.

Non-practice and prosecutorial allowance.

The claimant bases his claim for non-practice and prosecutorial allowance on government circular dated 11/6/2010 and 9/10/2012 as well as the holding by ELRC per Hon Byram



35 In the present case, the Board resolved upon considering these circulars to only apply and enhance non-practice allowance with effect from 1st July 2010.

36 In the judgment of the court, Byram Ongaya held *inter alia* that: -

“In the instant case the court returns that the claimants are clearly advocates employed in the public service to perform the duties by public officers whom the circulars in issue applied to and they are entitled to these allowances like the other legal practitioners in the public services in respect of whom the circulars have been implemented. The court finds that the claimant, performed duties of equal value like those public officers referred to in the circulars and further finding that the circulars directly applied to the claimants because the circulars applied to all such officers serving in the legal subsector of the public service.”

37 It is beyond per adventure that the claimant served as a legal officer in a legal subsector of the public service, the 1st respondent being a public corporation. The respondent has failed to distinguish and or remove the claimant from the premises of the circular relating to non-practice allowance. However, the claimant has expressly admitted that he was not involved and did not conduct any prosecutorial work.

38 The court is satisfied that the claimant was in the cause of his employment involved in other legal services including conduct of civil litigation before courts of law.

39 Accordingly, the claimant has proved that the relevant circulars which granted and enhanced non-practice allowance to legal officers in various legal subsectors in public service applied to the claimant.

40 The court finds that the claimant has proved that he was entitled to payment of non-practising allowances for a period of 31 months at Kshs 20,000/= per month in the sum of Kshs 620,000/=.

41 The claim for prosecutorial allowance has not been proved and is dismissed for lack of merit.

Pension Scheme.

42 From the testimony of RW 1, the pension scheme for the 1st respondent commenced in December 2017. It has been proved that the claimant was appointed by the 1st respondent from 1st February 2017 and that in the period from 1st February 2017 up to December 2017, the pension scheme of the respondent was not in place.

43 During this period, the claimant served six (6) months' probation and four (4) months upon confirmation. Therefore, during the 10 months served prior to the commencement of the pension scheme of the 1st respondent in December 2017, the claimant did not contribute the 10% applicable to employee to the pension scheme nor did the 1st respondent contribute the 20% employer contribution to the pension scheme. Secondly, the pension scheme that commenced in December 2017 was an independent pension fund on behalf of employees of the 1st respondent known as ICEA, which insurance firm is not a party to this suit.

44 The court finds that the claimant has failed to prove on a balance of probability that he was entitled to any pension benefits in terms of his contract of employment in the period 1st February 2017 to December 2017, before the 1st respondent's pension scheme was born.

45 The pension scheme simply did not exist and the contract of employment of the claimant did not provide for a stop gap measure before the scheme was put in place. The claimant was under NSSF Fund



during this period and it cannot be said that the 1st respondent violated the Employment Act during the transition period.

46 The claimant has also prayed for refund of Kshs 413,809/= being 10% salary deduction for the period December 2017 to August 2019. The court is satisfied that the pension scheme provided by ICEA to employees of 1st respondent was a contributory pension scheme in which the employee paid 10% and the employer paid 20%. The court is satisfied that all pension benefits due to the claimant were fully paid by ICEEA Lion, on the dates stated by RW 1.

47 The claimant is therefore not entitled to payments of any further pension benefits as claimed or at all in this matter.

48 Accordingly, the claim for payment of pension benefits for the period February 2017 to August 2019 being employer contribution for the period in the sum of Kshs 1,211,341/= has no merit and is dismissed.

Subsistence and travel Allowance

49 With regard to the claim for daily subsistence for two days at Mombasa @Kshs 16,800/= per day and Kshs 6000 Air ticket, all totaling Kshs 39,600/=, RW 1 was unable to rebut the claim. The court awards the claimant Kshs 39,600/= in respect thereof.

Discrimination, abuse and harassment

50 The evidence adduced by the claimant to prove discrimination, oppression, abuse and deprivation of personal dignity is undeRW helming.

51 RW 1 denied any such discrimination and/or abuse by the 1st respondent. The delay to pay allowances and late payment of terminal benefits to the claimant was ably explained by RW 1. The court finds that the claimant did not prove that the 1st respondent discriminated and/or harassed or abused him so as to entitle the claimant to an award of general, aggravated or punitive damages. These claims by the claimant lack merit and are dismissed.

52 In the final analysis judgment is entered in favour of the claimant against the respondent as follows: -

- a. Kshs 620,000/= being unpaid non-practice allowance for 31 months.
- b. Kshs 39,600/= being reimbursement for travel to Mombasa on 11/1/2019
Total award Kshs 659,600/=
- c. Interest at court rates from date of filing suit till payment in full.
- d. Costs of the suit

DATED AT NAIROBI THIS 6TH DAY OF JUNE, 2024.

MATHEWS NDERI NDUMA

JUDGE

Appearance:

Mr. Kimata for claimant

Mr. Mulili for respondent

Mr. Kemboi, Court Assistant

