



REPUBLIC OF KENYA



KENYA LAW
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**Denyo v Minolta Limited (Cause 135 of 2018)
[2023] KEELRC 1022 (KLR) (3 May 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1022 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 135 OF 2018**

JK GAKERI, J

MAY 3, 2023

BETWEEN

ELIJAH VIDENGEDE DENYO CLAIMANT

AND

MINOLTA LIMITED RESPONDENT

JUDGMENT

1. The Claimant commenced this suit by a Memorandum of Claim dated February 8, 2018 alleging wrongfully and unfairly withheld terminal dues.
2. The Claimant avers that he was an employee of the Respondent vide Letter of Appointment dated May 4, 2012, as a driver at a monthly salary of Kshs 25,000/= per month and the contract was terminable by one month's notice of either party.
3. It is the Claimant's case that he worked diligently until he resigned on March 22, 2017.
4. That despite leaving employment procedurally, the Respondent declined and/or refused to pay terminal dues.
5. The Claimant prays for;
 - (a) A declaration that the Respondent withheld terminal dues wrongfully and/or unfairly.
 - (b) Payment of the Claimant's full terminal dues as per paragraph 7 comprising;
 - (i) Service pay for 5 years one month salary per year Kshs 26,812/=.
 - (ii) Salary for February and March 2017 Kshs 53,624.00.



- (iii) Self-Help Group dues deducted but not forwarded to the Self-Help Group Kshs 39,000/=.
 - (iv) NSSF deductions not forwarded Kshs 3,600.00.
 - (v) NHIF deductions not paid Kshs 8,100.00.
- Total Kshs 238,384.00
- (c) Costs of the suit.
 - (d) Interest at commercial rate from date of lawful resignation.
 - (e) Any other relief that the court may deem fit to award.

Respondent's case

6. The Respondent filed its response vide a Memorandum of Response filed on April 9, 2018 admitting that the Claimant was indeed its employee at Kshs 25,000/= per month but denies that the Claimant was diligent and avers that he was indolent and apathetic. It also denies owing the Claimant any dues and avers that the Claimant was a member of the National Social Security Fund (*NSSF*).
7. It is the Respondent's case that the Claimant was discharged from employment after having tendered his resignation.
8. The Respondent prays for dismissal of the Claimant's suit with costs.

Claimant's evidence

9. The Claimant's written statement rehashes the contents of the Memorandum of Claim and repeated the same in court at the hearing.
10. Although the Respondent entered appearance on March 12, 2018 and filed a Memorandum of Response on April 9, 2018, it did not file a witness statement and despite service of the hearing notice, it did not participate in the hearing on February 7, 2023 as none of the parties was present on December 6, 2022, the scheduled hearing date. The new hearing date was given by the court and served on the parties via email on December 6, 2022.

Claimant's submissions

11. Counsel for the Claimant identified two issues for determination, namely;
 - (i) Whether the Claimant is entitled to the terminal dues.
 - (ii) What are the implications of the Respondent's failure to participate in the suit?
12. As regards entitlement to terminal dues, specifically unremitted NHIF contributions, counsel relied on the decision in *Morris Kavale v Narcol Aluminium Rolling Mills Ltd* [2014] eKLR where the Respondent was ordered to refund unremitted NHIF deductions.
13. Counsel submitted that the last NHIF contribution was in June 2016 yet he worked upto March 2017.
14. On NSSF deductions, the decision in *Catherine Mbithe Maingi v Dilip Shah* (2017) eKLR was relied on to urge the court to award service pay on the basis of unremitted NSSF deductions.



15. As regards unpaid wages, counsel relied on the provisions of Section 49(4) of the *Employment Act, 2007* to urge that he worked for the months of February and March 2017 but was not paid.
16. As regards self-help dues, counsel urged that the Claimant was contributing Kshs 1,000/= per month for 3 years 3 months during his employment and was claiming the sum of Kshs 39,000/=.
17. As to the implications of the Respondent's failure to participate in the suit, counsel relied on the decisions in *Boniface Amenya v Wilson Kanyi* [2022] eKLR and *Kenneth Mukbengi Masinde v Mr. and Mrs Cunningham* [2017] eKLR to urge that the Claimant's evidence was uncontroverted.
18. The court was urged to find the Claimant's testimony credible since the Respondent was aware of the suit.

Respondent's submissions

19. Despite service of submissions and hearing notice on February 17, 2023, the Respondent's counsel neither filed submissions nor attended the mention scheduled for February 23, 2023.

Findings and determination

20. The singular issue for determination is whether the Claimant is entitled to the terminal dues prayed for.
21. Before delving into the individual claims as set out in the Memorandum of Claim, it is elemental to note that since the Respondent did not participate in the proceedings, the Claimant's evidence remains uncontroverted.
22. However, guided by the mantra that he who alleges must prove the allegations as ordained by the provisions of the *Evidence Act*, it is the duty of the Claimant to prove his allegations on a balance of probabilities.
23. Courts have laid it bare and consistently that even where the suit is undefended or the Respondent is absent, the burden of proof does not become any lesser. It is still incumbent upon the Claimant to prove his or her case.
24. The court is further guided by the sentiments of Onyango J. in *Humphrey Munyithia Mutemi v Soluxe International Group of Hotels & Lodges Ltd* [2020] eKLR as follows;

“In the case of *Monica Kanini Mutua v Al- Arafat Shopping Centre and another* [2018] eKLR, the court held that in an undefended claim, it is trite that the Claimant establishes all the facts of the claim and must establish the existence of an employment relationship with the Respondent as a preliminary issue before establishing the alleged unfair termination of the employment.”
25. Having voluntarily resigned from employment, it is the duty of the Claimant to prove that the terminal dues claimed accrued prior to the date of resignation in March 2017.
26. As regards an employment relationship between the parties, there is sufficient evidence that the Claimant was an employee of the Respondent since 2012. But more significantly, the Respondent admitted that fact in its Memorandum of Response.
27. Nothing turns on that issue.



28. On entitlement to the terminal dues claimed, the Claimant's uncontested testimony is that he tendered his resignation notice on February 23, 2017 stating that he would be leaving employment by the end of March 2017 and the Respondent received the letter.
29. The Claimant thanked the Respondent for the opportunity and wished the Respondent and its staff well.
30. The Claimant further testified that he was not paid terminal dues.
31. The Claimant testified that he was not paid for the month of February and March 2017 at least up to March 23, 2017 and in the absence of evidence to contradict the Claimant's evidence, the evidence affirms his averments.
32. In the circumstances, the court is satisfied that the Claimant is entitled to all unpaid dues that accrued prior to his resignation. The Respondent adduced no evidence of having paid the Claimant's salary up to March 23, 2017.

Terminal dues

- (i) Having found that the Claimant was entitled to accrued terminal dues and no payment was made, a declaration that his terminal dues were wrongfully and/or unfairly withheld is hereby granted.
- (ii) Service pay for 5 years, Kshs 134,060/=
33. Neither the Claimant's written statement nor the oral testimony addressed the issue of entitlement to service pay.
34. Instructively, the Claimant's NSSF statement on record reveals that Respondent deducted and remitted NSSF contributions from September 2011 to March 2016.
35. Based on the Claimant's testimony, the Respondent deducted but did not remit NSSF deductions for 12 months at Kshs 200/= per month less the months of February and March 2013.
36. The court is satisfied that the Claimant is entitled to the Kshs 2,000/= refund.
37. The employer's contribution of Kshs 200/= is not refundable to the employee as the law provides for its recovery from the employer by the National Social Security Fund Board.
38. Since the Claimant was a member of the NSSF and contributions were routinely remitted but for the last 10 months of the Claimant's employment, the Claimant is not entitled to service pay by virtue of Section 35(6)(d) of the Employment Act, 2007.
The claim for service pay is unsustainable and is declined.
- (iii) Salary for the months of February and March 2017
39. Since the claimant worked upto March 23, 2017 and was not paid for the month of February and the days worked in March 2017, the prayer for salary is granted as follows. Salary for February 2017 and the 23 days worked in March 2017, Kshs 46,705/=.
- (iv) Deductions to the Self-Help Group for 3 years and 3 months
40. Copies of the Claimant's payslip for 2016 show that the Claimant made a voluntary Chama contribution of Kshs 1,000/= per month and claims for Kshs 39,000/= as the total amount contributed as at the date of resignation.



41. In the absence of evidence to the contrary, the Claimant is awarded Kshs 39,000/= as chama contributions.
- (v) NHIF unremitted deductions July 2016 to March 2017 Kshs 8,100.00
42. The Claimant's NHIF statement on record reveal that the Claimant's employer changed from Minolta Ltd to Dukes Transporters Ltd though the payroll number remained the same.
43. The Claimant is awarded the sum of Kshs 8,100.00 being a refund of the NHIF deductions made but not remitted to the NHIF.
44. In the end, judgement is entered for the Claimant against the Respondent in the following terms;
- a. Declaration that withholding of the Claimant's terminal dues is unfair.
 - b. Salary for February 2017 and 23 days in March 2017 Kshs 46,705/=.
 - c. Self-Help deductions Kshs 39,000/=.
 - d. NSSF deductions Kshs 2,000/=.
 - e. NHIF deductions Kshs 8,100/=.
- Total Kshs 95,805/=
- f. Costs of this suit.
 - g. Interest at court rates from date of judgement till payment in full.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 3RD DAY OF MAY 2023

DR. JACOB GAKERI

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 *Civil 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.

DR. JACOB GAKERI

JUDGE

