



**Wafula v Fidelity Security Limited (Cause 24 of 2017)
[2023] KEELRC 3418 (KLR) (20 December 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3418 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 24 OF 2017
K OCHARO, J
DECEMBER 20, 2023**

BETWEEN

RICHARD MAFWABI WAFULA CLAIMANT

AND

FIDELITY SECURITY LIMITED RESPONDENT

JUDGMENT

Introduction

1. Claiming that he voluntarily resigned from his employment with the Respondent after serving for twenty years, the Claimant seeks service pay, which he alleges the Respondent unlawfully failed to settle at the time of separation or at any time thereafter.
2. The Respondent resisted the claim, asserting that under the Law the Claimant was not entitled to service pay. Further, at the separation, he was paid all his terminal dues and executed an acknowledgement document.

The Claimant's Case.

3. The Claimant stated that he was employed by the Respondent in September 1997 as a security Guard basic at a salary of Kshs. 12,500. He served the Respondent diligently for twenty years, until the 8th of September 2017 when he resigned voluntarily vide a letter of the even date. Further, under law, he was entitled to service pay, which the Respondent wrongfully and unlawfully failed to pay.
4. The Claimant further testified that he was a member of the National Social Security Fund. As his employer, the Respondent was supposed to contribute an amount of KShs. 1,190, reflecting 6% of his salary to the Fund on his account, monthly. In breach of this statutory obligation, the Respondent used to remit a lesser amount, KShs. 400. Following the breach, the Respondent is obligated to pay him service pay.



5. Cross-examined by Counsel for the Respondent, the Claimant reiterated that he was a member of NSSF and that his employer, the Respondent, was remitting less than 6% of his salary to the fund contrary to the legal requirement. Further, the pay slips availed in evidence show that his salary was being deducted for the NSSF remittances.
6. Shown the Certificate of payment of final dues, the Claimant asserted that though the national identification number thereon is his, the signature appearing on the document isn't his. He didn't at any time sign the document. Further, he was not paid the sum reflected on the certificate.
7. Pressed further under cross-examination, and referred to the payslip for November 2017, he admitted that thereon is an amount of KShs. 8697, indicated as terminal dues. Indeed, he received the amount.
8. In his evidence under re-examination, the Claimant stated that the amount foretasted was salary for the days that he worked in October 2017.

The Respondent's Case

9. The Respondent presented one witness, Peter Kimemia, to testify on its behalf. The witness stated that the Claimant resigned from employment through a letter dated 7th October 2017, citing an opportunity he had secured with a different employer. Upon the resignation, the Respondent paid him his dues. In acknowledgement, he executed a certificate of final payment on the 2nd of November 2017.
10. The Claimant's Claim lacks merit. He was a member of NSSF, and as such not entitled to service pay. Additionally, he executed the certificate confirming that he had received all his terminal dues.
11. In his evidence under cross-examination, the witness testified that the employer keeps records of all its employees. However, NSSF statements are normally given to the employees, not the employer. Therefore, it was a duty upon the Claimant to tender the same in evidence. The pay slip for March 2017, showed the gross taxable amount as KShs. 19, 549, and that of August 2017, KShs. 22, 506. Considering these figures, it is clear that the remittances were at 6%.
12. The witness asserted that he is the one who prepared the certificate of payment, and the amount of KShs. 8, 697 thereon was what the Claimant was entitled to as terminal dues. The Claimant worked during the notice period. He was paid for this period and the salary reflected on the October 2017 pay slip.
13. In his evidence under re-examination, the witness stated that at all material times, the Respondent remitted NSSF contribution on the Claimant's account dutifully and according to the law.

The Claimant's Submissions

14. The Claimant's Counsel identified five issues that in his estimation present themselves for determination in this matter, thus;
 - I. Whether the Claimant was employed by the Respondent as a security Guard since 27th September 1997.
 - II. Whether by a letter dated 8th September 2017, the Claimant lawfully tendered his resignation from service, in accordance with section 35[1][c] of the *Employment Act*.
 - III. Whether in flagrant breach of section 35[5] of the *Employment Act*, the Respondent failed to pay the service pay to the Claimant for 20 years of Service rendered to the Respondent.



- IV. Whether the Claimant merit the relief as pleaded in paragraph iv of the Memorandum of Claim as prayed therein.
- V. Whether the Claimant merits the costs of this claim.
15. Counsel submitted that it is incumbent upon the employer to make remittances to the Fund. It was therefore the Respondent's duty to produce in evidence the statement of the Claimant's account obtained from the Fund. That the provisions of Section 10-14 of the National Social Security Act, contemplate that. Further, the evidence on record demonstrates that the Respondent failed to comply with the provisions of Sections 10 and 11 of the Act. Therefore, it became obligated to pay service pay under the provisions of Section 35 of the Employment Act. To buttress this submission, reliance was placed on the decision in the case of Elijah Kipkoros Tonui v Ngari Opticians t/a Bright Eyes Ltd [2014] eKLR,
- “Basic membership to the National Security Fund or other Schemes is not in itself a bar to an employee accessing service pay under section 35[5]. As the evidence in this claim has shown, an employer could register an employee with the NSSF but fail to remit the monthly contributions or remit irregularly. Secondly, the Court must look at the social security route that confers overall greater benefit on the employer.”
16. Further reliance was placed on the case of Wyckliff Makhoka Ouma vs Security Guards Ltd [2011] eKLR.
17. Lastly, the Claimant was employed in the Protective Security Sector. He is therefore covered by the Regulation of Wages [Protective Security] Order 1998 which provides for payment of service gratuity irrespective of membership of NSSF.

The Respondent's Submissions

18. Counsel for the Respondent distils three issues for determination in this matter, thus;
- I. Whether the Claimant was paid his terminal dues.
- II. Whether the Claimant is entitled to the reliefs sought.
- III. Which Party is to bear the costs of this suit?
19. It was submitted that the Claimant was paid all his dues as evidenced by the Terminal dues payment slip and certificate of receipt of final payment of dues all dated 2nd November 2017. He was paid KShs. 8,697. The Claimant signed the certificate of receipt of final payment, thereby discharging the Respondent from any liability as regards terminal dues payable to the Claimant.
20. The certificate of receipt of final payment dues was in the form of a contract. The Claimant accepted the terms thereof and derived a benefit therefrom, he therefore cannot turn and change his position even if he deemed the compensation given to him inadequate.
21. To support the foregoing submissions, Counsel cited the decision in Trinity Prime Investment Limited v Lion of Kenya Insurance Company Limited [2015] eKLR, where the Court of Appeal held;
- “The execution of discharge voucher, we agree with the learned judge, constituted a complete contract. Even if payment by it was less than the total loss sum, the appellant accepted it because he wanted payment quickly and execution of the voucher was free of misrepresentation, fraud or other...[Emphasis Ours]. The appellant was fully discharged.”



22. Counsel further submitted that courts of law are required to give effect to the intention of the parties. To support this reliance was placed on the case of *National Bank of Kenya Limited v Hamala Bana & 103 Others* [2017] eKLR. Giving effect to the parties' intention in the instant matter means that this Court should not entertain the Claimant's suit. He waived his rights to make any further claim in relation to his relationship with the Respondent.
23. The Claimant is not entitled to service pay since the necessary statutory deductions and remittances were made in accordance with the law. The pay slips tendered as evidence in this matter are a testament to the deductions and remittances.
24. The Claimant did not avail any evidence from the various statutory bodies to confirm his position that the Respondent deducted and failed to remit the statutory dues. The Claimant cannot just be awarded a figure claimed in his pleadings without him adducing any evidence on the specific times and specific amounts that the Respondent deducted but failed to remit. To support this submission Counsel cited the holding in ELRC Case Number 1888 of 2016, *David Kariuki Nderitu V Telecom Limited* [2021] eKLR.
25. Lastly, the Claimant is not entitled to service gratuity as submitted by the Claimant's Counsel. Payment of gratuity by an employer is gratis. It is normally payable if it is provided for under an enterprise's policy or as agreed under the contract. To buttress this submission the holding in the Court of Appeal case of *Bamburi Cement Limited v Farid Aboud Mohammed* [2016] eKLR, was cited.
26. The Claim herein should be dismissed with costs to the Respondent, as it was so submitted.

Analysis and Determination

27. I have carefully considered the pleadings, the evidence, and submissions by the Parties herein and only a single issue emerges for determination, that, whether in the circumstances of the matter, service pay is payable to the Claimant.
28. The Claimant's case was that though he was a member of the NSSF, the Respondent at all material times remitted funds to his account that were far much less than what was statutorily expected. He innovatively argued that since the Respondent breached its statutory obligation, this Court should compel it to avail him of service pay. As shall come out shortly hereafter, this Court is not persuaded by this innovative line of thinking.
29. Section 35[5] of the *Employment Act* provides for service pay. However, Section 35[6] of the *Act*, exempts particular classes of employees from the benefit of service pay. Therefore, even agitating for the benefit. The subsection states;

“ This section shall not apply where an employee is member of –

- (a) a registered pension or provident fund scheme under the *Retirement Benefits Act*;
- (b) a gratuity or service pay scheme established under a collective agreement;
- (c) any other scheme established and operated by an employer whose terms are more favourable than those of the service pay scheme established under this section; and
- (d) the National Social Security Fund.”



30. The Claimant falls under the categories of those employees contemplated under subsection [6][d]. In my view, where it is alleged that an employer didn't fully or at all make due contributions as contemplated under the NSSF Act, the remedy for an offended employee lies under Section 14 of the same Act, which provides;

“ 14. If any contribution for which a contributing employer is liable under this Act is not paid within one month after the end of the month in which the contribution period or the last day of the contribution to which it relates falls, a sum equal to five per cent of the amount of that contribution shall be added to the contribution for each month or part of a month thereafter that the amount due remains unpaid, and any such additional amount shall be recoverable in the same manner as the contribution to which is added.

31. Where a Statute has expressly provided for a remedy for a particular situation as the Act mentioned hereinabove has done, it will be inappropriate for the litigants or the Court to version another remedy for the same situation. The provision mentioned above does not contemplate an order of payment of service pay as a sanction for the employer's default in making remittances duly. There would not be any justification for this Court to make the order.

32. Assuming that the Respondent didn't make full contributions as alleged by the Claimant, the latter would only find a cause of action under Section 14 above, and pursue the remedy thereunder. This the Claimant didn't do. His claim is for rejection. It is hereby rejected.

33. In the upshot, the Claimant's claim herein is dismissed with costs.

READ SIGNED AND DELIVERED VIRTUALLY THIS 20TH DAY OF DECEMBER 2023

OCHARO KEBIRA

JUDGE

In the Presence of;

Mr. Jaoko for the Claimant

Ms. Mwaniki for the Respondent.

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.

OCHARO KEBIRA



JUDGE

