



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 246 OF 2020

ABEDNEGO NDOLO MULINGE.....CLAIMANT

VERSUS

KENYA INSTITUTE OF MANAGEMENT.....RESPONDENT

JUDGMENT

1. The claimant was employed by the Respondent as a training officer with effect from 8th March, 2010 earning a consolidated salary of Kshs 55,000. Thereafter he was promoted through the ranks to the position of Senior Officer, Administration and Logistics. His salary was increased serially upto Kshs 68,544 with effect from 1.2.2014.

2. It is the claimant's case that it was a term of employment that he would be subjected to the normal statutory deduction including the pension and staff welfare every month. He was therefore deducted 10% of his basic salary of his towards the pension and staff welfare contribution which was matched by an equal amount by the employer. However, that the employer's contribution was reduced from 10% to 5% with effect from August, 2016.

3. The Respondent then stopped remitting the statutory contribution from January, 2015 and despite the email dated 11.2.2019, the letter to CEO of the Respondent dated 2.10.2019 and another reminder dated 20.12.2019 together with a demand letter dated 22.1.2020, the Respondent has failed to remit the said statutory deduction.

4. He brought this suit on 18th June, 2020 seeking the following reliefs;

a) This Honourable Court be pleased to Order the Respondent to remit the statutory deductions totaling to Kshs. 593,066 to the relevant handlers.

b) Punitive damages for failing to remit the monthly contributions

c) This Honourable Court awards costs of this suit to be borne by the Respondent.

5. The Respondent never entered appearance or filed any response to the claim, despite being served with the pleadings in this cause on the 15th July, 2020. Therefore, the claim proceeded by a formal proof hearing on the 24th May, 2021 when the claimant testified as Cw1.

6. The claimant basically adopted his witness statement dated 10.6.202 and produced the documents in the list of documents dated 10.6.2020 which were marked as Ex-1 to 11 respectively. He prayed for the judgment to be entered in his favour and the money be paid to the pension handler, Jubilee life insurance Company limited.

7. The claimant submitted that section 19(1) (f) of the Employment Act allows an employer to make statutory deductions as and when they are due. Accordingly, the Respondent had provided for a provident fund under clause 6 of its Letter of Appointment which fund was to increase with salary increase. Further, he urged that section 19(2) makes it mandatory for the employer to deduct statutory dues before making payment to the employee.

8. The claimant cited the case of **Richard Michosi Mwasaru V Beverly Schools of Kenya Limited [2020] eKLR** where the Court held that; -

“under the RBA Regulations an employee is entitled to 100% of employer's contributions to a pension or provident fund scheme upon completion of one year. The claimant worked for one and a half years and is thus qualified for 100% of employer's contributions.”

9. The claimant also cited the case of **Nicodemus Ochieng Ogutu V Village of Hope Kenya [2018] eKLR** where the Court held that;

“The claimant prayed that the respondent update his statements with the NSSF and NHIF deductions that were not remitted. RW1 however stated that the respondent is holding the money and is ready to refund the same. I order that the monies be refunded to the claimant with interest at court rates from the date of deductions till payment in full. The claimant can use the same to update his account with NSSF personally. It is not necessary to update NHIF so he can pay the same from current date.”

10. The claimant then urged this Court to allow the claim as prayed and compel the Respondent to remit the statutory dues to the pension handlers.

Analysis and determination.

11. I have carefully considered the pleadings, evidence and the submission presented by the claimant. As stated above, the facts set out by the claimant are not challenged and therefore I am constrained to determine the issue at hand relying on the evidence and facts brought forward by the claimant.

12. The only issue for determination is whether the claimant is entitled to the remedies sought.

13. It was an express term of the claimant’s employment contract under clause 6 that he is eligible to join the Respondent’s contributions Pension plan. The Claimant joined the said pension plan and received updates and communication from the Respondent as evidence by the letter dated 28.2.2017 informing him of the reduction of the employer’s contribution towards the said scheme.

14. The respondent was deducting 10% of the claimants’ salary and forward to the Provident Fund together with the employer’s contribution to match the claimant’s contributions. The claimant alleged that the Respondent stopped making the said contribution from January, 2015.

15. The respondent did not deny that the claimant was its employee between 2015 and 2018 and that it made the said deductions from the claimant’s salary towards his pension contribution. However, the burden of proof lies with the claimant to show that the pension continued to be deducted but not remitted until July 2018.

16. He produced as exhibit 2, a schedule sums of money as proof of the said unremitted deductions. However he did not produce pay slips or other documentary evidence to prove that the said unremitted money was indeed deducted from his salary. We cannot make any assumption that the money was deducted, but even if were to assume that the money was deducted, the claimant must produce, his pension statement from the Provident Fund to prove he had verified that the employer did not remit the money after deduction. The claimant has not produced his pension statement before this court.

17. The claimant having failed to prove by documentary evidence that the Kshs. 593,066 was deducted by the respondent from his salary towards his pension contributions between January 2015 and July 2018, and that the said money was never remitted to the provident fund handlers, I find and hold that the claim is bereft of merits.

18. Likewise, the prayer for punitive damages is decline for lack of legal basis.

19. In the end, I dismiss the suit with no costs. However, the claimant is given the liberty to verify with the provident fund whether his pension remittance is upto date and if not file fresh proceedings.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 28TH DAY OF JANUARY 2022.

ONESMUS N MAKAU

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 April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE