



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT KISUMU**

**CAUSE NO. 53 OF 2020**

**HUMPHREY AWORI RAKEWA.....CLAIMANT**

**VERSUS**

**JOSHUA KHAMATI SHIVEKA.....1<sup>ST</sup> RESPONDENT**

(Chairman Board of Directors-Nyawek Network)

**PETER DANIEL ONYANGO.....2<sup>ND</sup> RESPONDENT**

(Executive Director-Nyawek Network)

**JUDGMENT**

**Introduction**

1. This suit was lodged by way of a Statement of Claim dated 20<sup>th</sup> July, 2020 and filed on 21<sup>st</sup> July, 2020. The Claimant prays for Judgment against the Respondents jointly and severally for a total of Kshs. 1,204,100.00 being unpaid salaries, acting allowances, pay in lieu of leave, unremitted NHIF, NSSF and PAYEE deductions, a certificate of service, costs of the suit and interest thereon.
2. The Respondent entered appearance and opposed the claim vide a Statement of defence dated and filed on 10<sup>th</sup> August, 2020.
3. The Claimant testified in support of his case, adopted his witness statement and produced a bundle of documents filed in the claim.
4. The Respondent presented a **Mr. Joshua Khamati Shiveka** to testify on behalf of Nyarwet Network, the entity that the Claimant worked for. Mr. Khamati asked to adopt his witness statement and produced documents filed in the case in support of the Respondents' case.
5. The Respondents filed submissions. The Claimant did not.

**The Claimant's Case**

6. The Claimant's case is that he first joined the Respondent in March, 2016 as a Project Officer earning a monthly salary of Kshs.40,000/-. It is his further case that he was upgraded to the position of Monitoring and Evaluation Officer in the year 2018 at a monthly salary of Kshs.90,000/-
7. It is the Claimant's case that in March, 2019, he was again promoted to the position of acting Programs Manager, and continued earning a monthly salary of Kshs. 90,000/-. The Claimant avers that he was confirmed to the position of Programs Manager in September, 2019 and his salary raised to Kshs. 150,000/-
8. It is the Claimant's case that the Respondents stopped paying him salary sometime in October, 2019, and that he continued to serve until February, 2020, when he tendered his resignation notice.
9. The Claimant states that he did not utilize his leave days in the year, 2019.

10. On cross-examination, the Claimant stated that his employment contract with the Respondent was for a two-year term, commencing on 1<sup>st</sup> January, 2018. He further confirmed that from 2016 when he started working for the Respondent, he was given a new contract for each

new term.

11. The Claimant confirmed signing leave forms, and further confirmed having seen leave forms filed by the Respondent and that the forms filed, were those he signed when he took his leave.
12. The Claimant further confirmed that he was paid leave allowances. He further confirmed that he was paid salary up to September, 2019.
13. The Claimant stated that he was not issued with pay slips and that he wrote an email in regard to the pay slips. The Claimant further confirmed that he was covered by NHIF in the year 2019. He confirmed that he did not submit his NSSF statement in court as proof of non-remittance.
14. The Claimant further states that his PAYE deductions were not remitted to Kenya Revenue Authority (KRA).
15. The Claimant stated that he was not aware that the Respondents were relying on Donor funding to pay salaries and further averred that the Respondents had other sources of revenue such as membership registration and subscription fees.
16. The Claimant further stated that no body communicated to him as to why his salaries for the months of October, November and December, 2019, were not paid.
17. The Claimant confirmed on cross-examination that his contract expired on 31/12/2019. He further stated that he did not sign a contract for the year 2020/2021, and admitted that the Respondents only owed him salaries for three months.

### **The Respondents' Case**

18. It is the Respondents' case that the Claimant was employed on a specified year contract.
19. The Respondents states that the Claimant was paid all his salaries except for the months of November and December, 2019, being the only unexpired term of his contract.
20. The Respondent states that the claimant was paid all his acting allowances and that the same is captured in his pay slips. The Respondents states that the total amount of the acting allowance payable was Kshs. 9,450/-
21. It is the Respondents' position that the Claimant is not owed any dues in respect of NHIF and NSSF.
22. The Respondent's witness (RW1) confirmed that the Claimant was not paid salary for the months of October, November, and December, 2019. RW1 stated that the Respondent relied on donor funding which was not received during the period, and hence the reason the Claimant was not paid. He confirmed that the Claimant's monthly gross salary was kshs. 150,000/- as at the time of expiry of his contract.
23. RW1 stated that contrary to the Claimant's assertion, the Claimant did not work for them in January and February, 2020. He further stated that though some staff worked voluntarily despite not being paid, the Claimant was not among the staff that volunteered. It is the Respondent's case that the Claimant sent his resignation email to the Respondent in February, 2020, by which time he had already left the Respondent's employ.
24. The Respondents aver that they did not, and have not refused to pay the Claimant and are aware that they owe him a three months' salary of Kshs.450,000/- and are willing to pay as soon as they have the money. The Respondent further states that the Claimant brought this suit prematurely as they had not refused to pay him.
25. On cross-examination, the RW1 stated that the Claimant was paid a total of Kshs. 9,450/- being 10% of his salary in acting allowances as his salary at that point was Kshs. 94,500/-. He further stated that he is not aware that the law requires that an employee is paid 20% of his salary as acting allowance.
26. RW1 confirmed that according to the leave forms produced in evidence before this court, the Claimant had 14 days of unutilized leave. The witness further admitted that he had no proof of NSSF remittance.
27. It is the Respondent's position that the Claimant has retained some property belonging to the Respondent to date for reason of the unpaid salaries. It is the Respondents' further position that the Claimant has never returned to clear with the Respondent, and hence the reason he has not been issued with a certificate of service.

### **The Respondents' Submissions**

28. It is submitted for the Respondents that the claim for unpaid salaries for the months of October, November and December, 2021, was not disputed. The Respondents further submitted that the Claim for salaries for the months of January and February, 2020, is unfounded for reason that the Claimant's contract of service was fixed term, and that it expired on 31/12/2019. The Respondents cited the case of **George Onyango v Board of Directors Numerical Machining Complex Ltd & Others (2014) eKLR** for the holding that the Claimant did not have legitimate expectation to continue working at the end of his contract.
29. It is further submitted for the Respondent that the letter of acting appointment issued to the Claimant, clearly indicate the payable acting allowance as 10% of his salary which at the time was Kshs. 94,500/-. It is submitted that the Claimant was paid the amount agreed as acting

allowance, and which payment is evidenced by the Claimant's pay slips produced before court.

30. The Respondent further submitted that it remitted all the statutory deductions as required by law. He further submitted that statutory accounts are personal accounts and which the Claimant has access to, and has not produced any evidence to prove that the deductions were not remitted. They submit that the claims are baseless and should be dismissed.

### **Analysis and Determination**

31. I have considered the pleadings, the witnesses' oral testimonies and the submissions. The issues for determination are:

- i. When the Claimant's contract is considered to have been terminated
- ii. Whether the Claimant is entitled to the remedies sought.

### **When the Claimant's contract is considered to have terminated**

32. The issue of when the Claimant's contract terminated, arises on account of his assertion that he was in the service of the Respondents until 19<sup>th</sup> February, 2020, being his date of resignation.

33. The Respondents' position is that the Claimant's contract was fixed term commencing on 1<sup>st</sup> January, 2018 and terminating on 31<sup>st</sup> December, 2019.

34. The Claimant stated that he was in the service of the Respondent from the year 2016 to February, 2020. He further told the court that the Respondents issued him with contract agreements annually.

35. The contract of service between the parties that was produced in evidence before this court by both parties stated as follows: -

**“We are pleased to offer you employment with effect from 1<sup>st</sup> January, 2018 to 31<sup>st</sup> December, 2019...”**

36. The Claimant produced an earlier contract of employment between himself and the Respondents that commenced on 1<sup>st</sup> January, 2017 to December, 2018.

37. The Respondents told the court that the Claimant did not renew his contract in January, 2020 upon expiry of his last contract.

38. The letters of acting appointment and promotion only indicated the starting date for the acting appointment, and the promotionary appointment and did not indicated the expiry date.

39. No evidence has been adduced to indicate that the Claimant's contract was renewed and/or extended beyond the date indicated in his last contract with the Respondents. It would then mean that the contract term remained unchanged in as far as the duration was concerned.

40. The court finds and holds that the Claimant's contract was fixed term stating on 1/1/2018 and expiring on 31/12/2019. In *Mombasa Apparels (EPZ) Limited v Tailors and Textiles Workers Union (2016) eKLR*, it was held that a fixed term contract of employment lapses automatically, unless otherwise mutually agreed by the parties. It then follows that in the absence of the renewal, the Claimant cannot claim for a period not covered in his contract.

### **Whether the Claimant is entitled to the remedies sought**

41. The Claimant prays for Judgment against the Respondents for the following reliefs: - unpaid salaries for October, 2019 to February, 2020, Six (6) months Acting Allowances at the rate of 20% of his gross salary, pay in lieu of leave, deductions that were not remitted in relation to NHIF, NSSF and PAYEE, a Certificate of Service, Costs of the suit and Interest.

### **Unpaid salaries for October, 2019 to February, 2020**

42. The Respondents did not dispute that they owe the Claimant salary for the months of October, November and December, 2019. On this ground, the three months' salary is awarded at the rate of Kshs. 150,000 per month.

43. In regard to the claim for salaries for the months of January and February, 2020, this court has found that the Claimant's contract did not cover this period, and hence the claim fails and is dismissed.

### **Six (6) months Acting Allowances at the rate of 20% of his gross salary**

44. The Claimant served the Respondents in an acting capacity from 18<sup>th</sup> March, 2019 to 1<sup>st</sup> September, 2019. The Claimant admitted during the hearing that he was paid acting allowance. His claim is that he ought to have been paid the acting allowance at the rate of 20% and not the 10% that he was.

45. The letter of Acting Appointment states:

**“You will be paid in addition to your monthly salary of Kshs.94,500, an acting allowance equal to 10% of monthly basic salary which is Kshs. 9,500...”**

46. The contract of employment between the parties herein does not indicate the rate of acting allowance applicable to the Respondents' Organization, and neither have the parties produced a Human Resources Manual or Policy indicative of the amount payable in acting allowance.

47. In the opinion of this court the terms of the letter of Acting Appointment, are an extension of the Claimant's contract of service in respect of the Acting Appointment. In