



**Moyuki v Jim Nduruchi (Sued in his Capacity as the Registered Trustee or Official) Rise up Society (Cause 39 of 2018) [2022] KEELRC 1397 (KLR) (28 April 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1397 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA  
CAUSE 39 OF 2018**

**JW KELI, J  
APRIL 28, 2022**

**BETWEEN**

**BETHUEL MATUNDA MOYUKI ..... CLAIMANT**

**AND**

**JIM NDURUCHI (SUED IN HIS CAPACITY AS THE REGISTERED TRUSTEE  
OR OFFICIAL) RISE UP SOCIETY ..... RESPONDENT**

**JUDGMENT**

1. This is a claim for salary arrears and general breach of damages by way of Memorandum of claim dated 10<sup>th</sup> May 2018. The Claimant having left the Respondent's employment seeks the following orders:-
  - a. Payment of Kshs. 220,000/- being salary arrears.
  - b. General damages for breach of contract as stated in paragraph 8 of the claim
  - c. Costs of this claim
  - d. Interest at court rates
  - e. Any other relief the Honourable court may deem fit to grant.
2. Together with the Claim the Claimant filed list of documents dated 10<sup>th</sup> May 2018 and produced the said documents at the hearing.
3. The Respondent entered appearance and filed response dated 18<sup>th</sup> June 2018 and list of documents of even date and attached the bundle of documents and Respondent's witness statement dated 11<sup>th</sup> July 2018.



4. The Claimant filed response to the Respondent's response to the claim dated 12<sup>th</sup> July 2018 and a further list of witnesses dated 12<sup>th</sup> July 2018, claimant's further list of documents dated 12<sup>th</sup> July 2018, list of disagreed issues dated 12<sup>th</sup> July 2018 and Claimant's issues of determination dated 12<sup>th</sup> July 2018.

#### **The Claimants' Case –**

5. The Claimant called 3 witnesses of facts.

On the 31<sup>st</sup> January 2019 the Claimant's case was heard by the court, Justice Nduma presiding . According to the recorded proceedings CWI ( the claimant ) was employed on 7<sup>th</sup> May 2015 and served until December 2017 on contract and was paid kshs. 20,000/- per month forthrightly. That he was paid salary in 2015, 2016 and 2017 January. That he was not paid for 11 months till December total unpaid salary amounting to Kshs. 220,000/-.

The Claimant told the court he did not sign the vouchers for payment filed by the Respondent. That he was not paid the alleged arrears. That he reported the alleged vouchers to DCIO and DPP and matter is pending investigations. That he was not paid by mode of MPESA. That NSSF was paid only in January 2017 but no payment in February – December 2017.

6. During cross – examination CWI said he wrote a resignation letter dated 16<sup>th</sup> December 2017 and signature on documents for 2017 are forged. And he reported to the police on 27<sup>th</sup> December 2017 OB NO. 25/27/2017. That he recorded a statement dated 10<sup>th</sup> May, 2018 and did not indicate he made a report to the police. That he wrote a demand letter demanding Kshs. 300.000/- . The court records that he said he was paid Kshs. 400,000/- and that a typing error of the lawyer. CWI said he resigned on 16.12.2017 and produced resignation letter as exhibit NO. 1.
7. CW2 Isaiah Githaga Arisa a former Accountant of Respondent adopted his statement dated 7.7.2018. He said he was not there when Claimant resigned. He told the court he prepared the vouchers of 21<sup>st</sup> August 2016 and one of 31<sup>st</sup> June 2016 by Allan Masinde. He said Allan Masinde came over the weekend to sign vouchers.
8. CW3 Cosmas Momanyi told the court he knew the Claimant having worked with him 2014 -2015. That he was an accountant. CW3 adopted his statement dated 7th July, 2018 . He said he worked with Claimant shortly and does not know how he left employment.

#### **Defence Case.**

9. The defence was scheduled for hearing on 18<sup>th</sup> January 2021 . On that day the Respondent was absent . The said date had been taken with Counsel Abok holding brief for Mr. Omondi for Respondent. The defence case was closed and parties directed to file submissions.
10. On the 8<sup>th</sup> February 2022 the court considered a Notice of Motion application by defence dated 2<sup>nd</sup> February 2022 under Certificate of urgency seeking for re-opening of defence case. The court gave dates for interpartes hearing of the application for 17<sup>th</sup> February 2022. On that day the Respondent was absent . The defence case thus stood closed. The court considered recorded proceedings, documents filed in court, statements and submissions by Claimant. The Respondent had not filed submissions at time of writing judgment.



## Determination

### Issues for determination

11. The Claimant filed list of issues for determination as follows:-
  - a. Whether the claimant worked for the Respondent between February 2017 to December 2017.
  - b. Whether the Claimant was entitled to salary for the period of 11 months.
  - c. Whether the Claimant was entitled to be paid for the NHIF and NSSF.
  - d. Whether the Claimant is entitled to general damages as a result of lack of salary payment.
12. The court will adopt the issues identified by the Claimant as the Respondent did not appear in court to produce his evidence.
  - a. Whether the Claimant worked for the Respondent between February 2017 to December 2017.
13. In paragraph of 6 of the Memorandum of claim , it is stated, “The said employment terminated on 27<sup>th</sup> June 2017 while the Claimant was working in dual capacity as the Respondent’s information technology ( ICT) Manager and receiving Manager respectively”.
14. The Claimant in his witness statement dated 10<sup>th</sup> May 2018 filed in court on the 11<sup>th</sup> May 2018 it is stated “ The employment terminated on 27<sup>th</sup> June 2017 while working in dual capacity as Respondent’s Information Technology and receiving Manager respectively. At the date of said termination my salary arrears unpaid by the Respondent accumulated to kshs. 220,000/- which still remains due..... I now claim”.
15. The Claimant further produced demand letter by his advocates dated 9<sup>th</sup> April 2018 filed in court on 11<sup>th</sup> May 2018. In the 2<sup>nd</sup> paragraph it is stated “That he is your employee as your IT Manager from date of employment on 7<sup>th</sup> May 2015 till termination of his employment on 27<sup>th</sup> June 2017 in his dual capacity as IT Manager and shopping and receiving Manager. In the demand letter it is stated Kshs. 300,000 was due for unpaid wages together with unremitted NSSF and NHIF deductions.
16. The Claimant further in list of documents dated 10<sup>th</sup> May 2018 produced a recommendation letter by the Respondent dated 27<sup>th</sup> June 2017 and in the first paragraph it is stated” The above mentioned person – Bethuel Matunda Moyoki of identity card No. 22536745 worked for Rise Up /society starting 7<sup>th</sup> May 2015 to 27<sup>th</sup> June 2017 in dual capacity as an IT Manager and shopping and receiving Manager”.
17. It is evident from the pleadings by the Claimant and his documents filed in court that he was employed from 7<sup>th</sup> May 2015 and served upto 27<sup>th</sup> June 2017 when he resigned.
18. The court notes that there is a hand written note dated 16<sup>th</sup> December 2017 produced in court as exhibit 1. The said letter states the arrears were kshs. 150,000/- . The court finds the said letter inconsistent with Claimant’s own pleadings before the court and other documents. The said letter is also not in any of the list of documents and does not have any evidence of having been received by the Respondent by way of stamp. The said letter is not credible evidence being in contradiction with the pleadings and other documents filed in court as evidence by the Claimant.
19. The court is of firm position that parties are bound by their pleadings. The Claimant attached a recommendation letter by employer which he indicates he left employment on 27<sup>th</sup> June 2017



consistent with his pleadings. The said exhibit 1 is isolated and the court finds and determines that the claimant's employment with the Respondent terminated on the 27<sup>th</sup> June 2017.

(b) Whether the Claimant is entitled to salary for 11 months.

20. The court has found that the employment terminated on 27<sup>th</sup> June 2017. The Claimant told the court he was paid salary for January 2017 and his claim is for 11 months till December 2017. The court considered the evidence on record including the payment vouchers for payments alleged to have been done in cash. The employer paid salary in January 2017 through the bank and according to the NSSF statement the deductions is reflected. There is no remittance for February 2017 onwards. The Court finds that on balance of probability the Claimant was not paid wages for February to June 2017 and finds that the claimant is entitled to unpaid salary for the period.

(b) Whether the Claimant was entitled to be paid for NHIF and NSSF.

21. The answer is yes.

(c) Whether the Claimant is entitled to general damages as a result of lack of salary payment.

22. The answer is no. General damages are not payable under employment contracts. The court can only award compensation for unfair termination under Section 49 of the Employment Act which is not applicable in the case of normal resignation like in the instant case.

(d) On reliefs sought

26. The court has found that the Claimant was not paid salary for the months of February to June 2017 and grants the following reliefs:-

- a. Payment of salary from months of February to June 2017 @ Kshs.15,000/- as per January 2017 payment schedule by Respondent . The Claimant having admitted he was paid salary and not producing contrary evidence of payment of another figure. Total award  $15,300 \times 5 = 76,500/-$
- b. On arrears of NHIF and NSSF claim, the court finds those being statutory deductions to an authority, any arrears not remitted should be pursued with those bodies which have mechanisms for recovery from employers.

### **Conclusion And Disposition**

23. The Claimant having been found to have left employment on 27<sup>th</sup> June 2017 and not having been paid salary from February to June 2017 is awarded as follows :-

- a. Salary arrears for 5 months @  $15,300 \times 5 = 76,500/-$ . The Respondent to pay the Claimant Kshs. 76,500/- as salary arrears.
- b. The Respondent to pay the Claimant costs of the Suit
- c. Interest on the award and costs at court rates from the date of judgement to payment in full.

**DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 28<sup>TH</sup> DAY OF APRIL, 2022.**

**J. W KELI,**

**JUDGE.**

**IN THE PRESENCE OF:-**

Court Assistant : Brenda Wesonga

Claimant : Onkangi h/b Sawe



Respondent : Absent

