



**Were v Marshalls (E.A ) Limited (Cause 1522 of 2016)  
[2022] KEELRC 1647 (KLR) (24 May 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1647 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 1522 OF 2016**

**JK GAKERI, J**

**MAY 24, 2022**

**BETWEEN**

**BONIFACE WERE ..... CLAIMANT**

**AND**

**MARSHALLS (E.A ) LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The claimant commenced this suit by a memorandum of claim dated April 14, 2016 and filed on August 3, 2016 alleging that the respondent had failed to remit pension dues.
2. The claimant prays for orders that the respondent to pay the claimant this unremitted pension dues and interest as follows:
  - a. Unremitted claimant's pension contributions November 2009 – 2012 Kshs.51,000
  - b. Unremitted pension payable by the Respondent November 2009 – 2012 Kshs.204,000
  - c. Interest due to the Claimant on contributions from November 2009 to January 2012 as computed by ICEA, that is for the year 2010, 2011 and 2012.
  - d. Costs of this suit.
3. The Respondent filed its response on 2<sup>nd</sup> September 2016.

**Claimant's Case**

4. The Claimant avers that he worked for the Respondent in various capacities up to 12<sup>th</sup> February 2013 when due to the Respondent's financial difficulties was forced to resign after 17 years of service.
5. The resignation letter was accepted on February 26, 2013.



6. It is the Claimant's case that before retirement took effect, he requested ICEA Limited, the Respondent's Pension Manager to provide a statement of his contributions and those of the employer which was provided. That the Claimant learnt that the Respondent ceased remitting contributions in December 2009 despite deducting the same from the Claimant's salary.
7. It is further averred that as at December 31, 2010, the claimant's pension contributions stood at Kshs.471,970/-excluding the Respondent's contribution in 2010 and interest that would have accrued.
8. That the Respondent admitted that it had not remitted Kshs.255,000/- to the Pension Fund Manager from November 2009 to January 2012. That at the date of resignation, the Claimant's gross monthly salary was Kshs.55,000/-.
9. Finally, it is averred that although the Respondent had promised to pay the outstanding dues when its financial position stabilised, it has not done it.

### **Respondent's Case**

10. The Respondent denies the Claimant's averments in total and avers that the Claimant had not exhibited any record that he made a request for his pension statement from the Fund Manager of ICEA Limited before he resigned or the alleged statement.
11. That the Claimant has no standing to bring this suit on behalf of the fund as he is not privy to the contract between the Respondent and ICEA Limited.
12. It is the Respondent's case that the Claimant has no reason or justifiable cause of action against the Respondent and the suit is an abuse of the court process.
13. The Claimant filed a reply to the Respondent's response dated 14<sup>th</sup> September 2016 stating that the computation was signed by the Human Resource Manager and the Respondent was facing financial hardships.
14. It is the Claimant's case that he has locus standi to move the Court to compel the Respondent to pay the contributions it was deducting from his salary.
15. Finally, the Claimant states that the Respondent's refusal to remit pension deductions was not only a civil but a criminal wrong under the *Employment Act*.

### **Claimant's Evidence**

16. The Claimant's statement rehashes the contents of the memorandum of claim.
17. On cross examination, the Claimant confirmed that he worked for the Respondent from 2000 to February 2013.
18. That he resigned without notice and Kshs.38,000/- was deducted from the pension fund and was not paid anything.
19. That the statement from ICEA shows that no contributions were remitted for three years and three months.
20. On re-examination, the witness testified that he was an employee of the Respondent from 2000 to 2013. That the sum of Kshs.255,000/- had not been remitted to ICEA Limited.
21. CW2 Henry Bonaventure, on cross examination confirmed that he was a consultant with ten years' experience. That he obtained the Claimant's statement from ICEA Limited.



22. The witness confirmed that insurance companies were required to declare interest annually. That the contested period is November 2009 to February 2013 when the Claimant left employment. That on leaving employment, the personal contribution of the employer is available in total. That the Claimant was 52 years old.
23. It was the witness's testimony that members contributions were supposed to earn interest as declared by the insurer and the Claimant's contributions would have earned interest as demonstrated.
24. According to the witness, the Claimant would have earned interest amounting to Kshs.399,060.42 if the unremitted sum of Kshs.255,000/- had been remitted to the insurance company.
25. RW1, Mr. Samson Maranga, confirmed on cross examination that he joined the Respondent in 2021 as the Senior Human Resource Manager.
26. That the Respondent had a contributory pension scheme with ICEA and the Claimant was an employee. The witness confirmed that he had no record of the deductions and ha not sought information from the insurance company (ICEA Limited). That he had no time to go through the file.
27. The witness told the Court that he was aware that it was an offence for an employer to deduct monies from an employee's salary and not remit the same as required.

### **Submissions**

28. On May 7, 2022, when the Court retired to write this judgment, the Claimant's submissions were not in the e-filing platform.

### **Respondent's Submissions**

29. The Respondent submits that the document relied upon by the Claimant dated February 16, 2013 is neither checked or approved nor authorised by anyone.
30. It is the Respondent's submission that the Claimant is not entitled to the alleged benefit since he has not attained the age of 50. That he filed this case before the cause of action had arisen since he was born in 1970 according to a copy of the identity card on record.
31. It is further submitted that CW2 Mr. Henry Bonventure Asiba was not a credible witness in this matter. That the Claimant should have sought a witness from a provident fund to speak to their documents. That the documents prepared by the consultant were inadmissible.
32. As regards the interest rates relied upon by the consultant, it is submitted that the consultant provided no evidence to authenticate the interest rates and the computations relied upon were unsigned and are thus inadmissible.
33. It is submitted that the Claimant confirmed that he was a member of the NSSF.
34. According to the Respondent, the salient issue for determination is whether the Claimant is entitled to the Kshs.255,000/- as claimed with interest.
35. It is the Respondent's submission that since the Claimant was a member of NSSF, he cannot seek to benefit from a provident fund. That courts have recognised membership to NSSF as sufficient social security for an employee. The Respondent submits that the Claimant was seeking double and excessive payment of benefits.
36. Finally, the Respondent submits that if the Court is persuaded by the Claimant's case, the Claimant should only recover the contributions proved to have been remitted from the Claimant's salary to



the fund less the contributions made by the Respondent and without any interest to 2007 when the Employment Act, 2007 came into force.

37. The Respondent prays that the Claimant's case be dismissed with costs.

### **Analysis and Determination**

38. From the pleadings, evidence and submissions on record, the only issue for determination is whether the Claimant is entitled to the contributions deducted from his salary and the employer's contribution which the employer did not remit to the Pension Fund Manager, the Insurance Company of East Africa Limited (ICEA Limited).

### **Context of the Dispute**

39. The Claimant alleges that he was an employee of the Respondent from 2000 to February 2013 when he resigned via letter dated February 12, 2013. The resignation notice gave no reason for the abrupt action by the Claimant. He did not accord the employer the requisite one (1) month's notice as acknowledged by the Respondent's response dated 2February 6, 2013.

40. A statement dated May 14, 2011 from the Pension Fund Manager (ICEA Limited) shows that the Claimant's total dues amounted to Kshs.471,970.10.

41. Relatedly, a copy of the Claimant's terminal computation show that nothing was due to him by reason of pay in lieu of the notice and the timing of the resignation.

42. Instructively, the document notes that there were pension contributions by the Claimant and the Respondent that were outstanding to the tune of Kshs.255,000/- the subject matter of this case.

43. Similarly, for unexplained reasons the Claimant did not avail a single copy of his payslip to ascertain as a matter of fact that he was a member of NSSF which is a requirement of the law as well as how much he was contributing to the pension fund. The Claimant led no evidence of his monthly contribution.

44. As confirmed by the Respondent's witness Mr. Samson Maranga, the Respondent had a pension fund for its employees operated by ICEA Limited. It was a contributory scheme.

45. Strangely, RW1 told the Court that he had no time to peruse the Claimant's file and had no record of deductions made from the Claimant's salary for purpose of pension. He was categorical that he had not gone through the Claimant's employment records. As the only witness of the Respondent, RW1 performance was below par.

46. Contrary to the Respondent's submissions, many organisations make contributions to the NSSF which is mandatory as well as to another pension fund as a way to cushion and motivate their employees. Both schemes are contributory and recovery from either is independent of the other.

47. Pension contributions are analogous to endowment insurance policies under which the insured is free to take out more than one policy on the same subject matter and risk provided premiums are paid.

48. The Claimant contributed to both as was the employer and there cannot be double or excessive payment. At any rate contributions to the pension fund operated by ICEA Limited was by agreement between the employer and the employee.

49. Regrettably, the Claimant made no effort to produce a more recent statement from ICEA Limited. The one on record is too old, more than five years before the suit was filed and more than 10 years before the suit was heard and determined.



50. It is unclear whether the Claimant engaged the Respondent on this issue or reported to the Retirement Benefits Authority (RBA), the regulator of pension schemes and funds before commencing the suit.
51. The home port should have been the RBA which has extensive regulatory powers over pension schemes and funds.
52. In the absence of a letter of appointment or payslip, to confirm that the Claimant was making contributions to the NSSF and the pension fund, the Court has to rely on the other evidence, such as the computation of dues dated 16<sup>th</sup> February 2013, through it is neither checked, approved or authorised.
53. However, it was signed by the Claimant and the Human Resource Manager on March 8, 2013 and neither of the parties disowned it.
54. In addition, the Claimant's evidence that he was a member of the pension scheme is largely corroborated by RW1 who testified that the pension scheme was for all employees of the Respondent.
55. In the premises, the Court is satisfied that the Claimant was a member of the Respondent's pension fund operated by ICEA Limited. Further, the Claimant's allegation is that the Respondent deducted monies from his salary for purposes of pension but did not remit the same to the pension fund and relies on a figure of Kshs.51,000/-. It is unclear how the amount was arrived at or covered which months. Be that as it may, the Respondent did not contest the amount or adduce evidence to prove the contrary.
56. On the other hand, the Claimant alleges that the Respondent did not contribute its pension to the pension fund amounting to Kshs.204,000/-. Neither party led evidence of the duration or months involved other than citing November 2009 to February 2013. Again, the Respondent did not vehemently contest the figure or amount.
57. In sum, the Claimant is claiming the sum of Kshs.255,000/- with interest which should have accrued had the sum been remitted to the pension fund.
58. CW2 was invited by the Claimant to demonstrate to the Court the indicative figures and places the interest at Kshs.399,060.42 making a total claim of Kshs.654,685.42 according to CW2.
59. It requires no gainsaying that salary is a fundamental component of the contract of employment. It is the consideration the employer provides to the employees promise to render the services the employee is engaged to render, a form of detriment on the part of the employer.
60. The right to remuneration has a constitutional underpinning in article 41(2)(a) of *the Constitution* of Kenya, 2010 which is emphatic that "Every worker has the right to fair remuneration."
61. This spirit is reflected in Part IV of the *Employment Act*, 2007 which is devoted to protection of wages. Section 17(1) is unequivocal that –
  1. Subject to this Act, an employer shall pay the entire amount of the wages earned by or payable to an employee in respect of work done by the employee in pursuance of a contract of service directly, in the currency of Kenya— ...
62. This section underscores the centrality of wages in contracts of employment. However, the law permits deductions of wages in certain circumstances as itemised by section 17(1) of the Act.
63. Unauthorised deductions are illegal and recoverable by the employee within three years.



64. The deduction from the Claimant's salary for purposes of pension contribution is authorised by section 19(1)(a) of the *Employment Act* which provides that –
1. Notwithstanding section 17(1), an employer may deduct from the wages of his employee—
    - a. any amount due from the employee as a contribution to any provident fund or superannuation scheme or any other scheme approved by the Commissioner for Labour to which the employee has agreed to contribute;
65. Finally, section 19(4) of the Act provides that:
- (4) An employer who deducts an amount from an employee's remuneration in accordance with subsection (1)(a), (f), (g) and (h) shall pay the amount so deducted in accordance with the time period and other requirements specified in the law, agreement court order or arbitration as the case may be.
66. Failure to comply with this provision of law attracts criminal sanctions.
67. In the instant case, it is common ground that the Respondent deducted money from the Claimant's salary for purposes of the pension fund managed by ICEA Limited but did not remit the same, a sum of Kshs.51,000/- which the Claimant is claiming with interest.
68. In a nutshell the dispute between the parties is the recovery of unremitted contributions.
69. Apart from the amount deducted from his salary, the Claimant's claim involves the unremitted portion of the employee's contribution of Kshs.404,000/- which in the Court's view makes the claim substantially a pension dispute as opposed to an employment dispute.
70. In *Abdalla Osman & 628 others v Standard Chartered Bank (K) Limited & 11 others* [2018] eKLR where Onesmus Makau J. stated as follows:
- “The court therefore finds that dispute is essentially a pension dispute between pensioners (claimants) and their respective pension schemes. Consequently, the court being aware that there is an alternative avenue for resolving the dispute provided by statute, it is only fair and just that it upholds the doctrine of exhaustion. Under the said doctrine, courts are supposed to exercise restraint and let the alternative process to be concluded before invoking their own jurisdiction.”
71. The Court is in agreement with these sentiments.
72. Instructively, the Claimant relied on no statutory or judicial authority in urging his case for the recovery of the unremitted contributions to demonstrate a legal entitlement.
73. More importantly, the Claimant led no evidence of his agreement with the employer on the right of duties of the parties under the pension fund.
74. Although the Court is persuaded that the Claimant may be entitled to recover the amount of Kshs.51,000/- deducted from his salary, inclusion of the employer's contribution make the dispute essentially a pension one and disaggregating the sums claimed would in the Court's view render the recovery untidy and occasion further delay in the resolution of the dispute.
75. Finally, as adverted to elsewhere in this judgment the Claimant led no evidence of attempts to engage the Respondent on the issue, other than by the demand letters dated 12<sup>th</sup> February 2014 and 10<sup>th</sup>



February 2016 almost two years later and subsequently filing of the suit herein. No attempt was made to engage the Pension Fund Manager (ICEA Limited) or the Regulator, the (RBA).

76. Needless to emphasise section 53A and 53B of the *Retirement Benefits Act*, 1997 provide a detailed and elaborate mechanism for the recovery of unremitted contributions. These provisions leave no doubt in the Court's mind that the recovery of unremitted contributions is jealously guarded by the law and efforts have been made to buttress the process to ensure recovery. This is exemplified by the provisions of section 53B(2) that:

Where an employer has failed to remit contributions, the trustees may with the approval of the authority, appoint the Kenya Revenue Authority, as an agent, to collect unremitted contributions, interests and penalties.

77. The recovery mechanisms prescribed by sections 53A and 53B of the *Retirement Benefits Act* are self-contained and do not contemplate any court action.
78. It is the view of the Court the first port of call should have been the Pension Fund Manager (ICEA Limited) an the second, the Retirement Benefits Authority.
79. The Claimant led no evidence of any such engagement. This could perhaps explain why the Pension Fund Manager was not joined as a Respondent. Its involvement would have enlightened the Court on the circumstances of the case including its contribution in the recovery process as well as the vexed issue of interest which the Claimant attempted to bring out in Court.
80. Consequently, it is the finding of the Court that the dispute herein is essentially a pension dispute and the Claimant did not involve the Pension Fund Manager in the suit to furnish the Court with essential information. But more significantly, the Claimant engaged neither the Pension Fund Manager nor the Retirement Benefits Authority, to facilitate recovery of the unremitted contributions. In the premises, the Court has no choice but to down its tools and refer the dispute to the Chief Executive Officer of the Retirement Benefits Authority for resolution on a priority basis.

81. There shall be no orders as to costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 24<sup>TH</sup> DAY OF MAY 2022**

**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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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**

