



**Kimani v Letshego Kenya Limited (Cause 702 of 2018)
[2022] KEELRC 1692 (KLR) (12 May 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1692 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 702 OF 2018
MA ONYANGO, J
MAY 12, 2022**

BETWEEN

STEPHEN KIMANI CLAIMANT

AND

LETSHEGO KENYA LIMITED RESPONDENT

JUDGMENT

1. Vide his Memorandum of Claim dated 10th May, 2018 and filed in Court on 11th May, 2018, the Claimant avers that the Respondent, a Limited Liability Company unfairly and unlawfully declined and/or refused to pay his terminal dues following his successful resignation effective 10th November, 2017.
2. He avers that he was employed by the Respondent on or about 7th July, 2011 in the capacity of a Relationship Officer where, as at 1st October, 2017 he was earning a gross salary of Kshs.145,200/-.
3. The Claimant avers that on or about 24th October, 2017, he resigned from the Respondent and indicated that his last day of service would be 10th November, 2017.
4. That on 3rd November, 2017 the Respondent acknowledged the Claimant's resignation and issued him with a letter in which his terminal dues were tabulated to include days worked up to 10th November, 2017 and 7 leave days earned but not taken.
5. The Claimant maintains that the computation made by the Respondent was not accurate and excluded 4 days of leave earned but not taken, prorated bonus of ten months, service pay and a Certificate of Service.
6. The Claimant averred that he was entitled to 11.75 leave days earned but not taken as was evidenced through his October and November 2017 payslips and that service pay is provided for under Clause 12.4 section (iv) of the Respondent's Human Resource Policy Manual.



7. He averred that the Respondent did notify him on 30th November, 2017 that the Human Resource Manual had been revised as at 28th June, 2016 and as a result the terms as contained therein were not applicable to the Claimant upon his resignation.
8. The Claimant contended that the failure to pay him his terminal dues as computed is tantamount to unfair labour practice on the part of the Respondent and therefore filed this claim seeking the following reliefs: -
 - a. A declaration that the actions of the Respondent amount to unfair labour practice.
 - b. The sum of Kshs.1,242,843/- comprising of the following:-
 - i. 11.75 leave days earned but not taken Kshs.81,243
 - ii. Gross salary for 10 days worked in November Kshs.48,400
 - iii. Service Pay .Kshs.871,200
 - iv. Prorated bonus pay for 10 months...Kshs.242,000Total Kshs.1,242,843
 - c. Certificate of Service
 - d. Costs
 - e. Any other or further relief that this Court deem fit and just to grant.
9. The Respondent in its Reply to the Memorandum of Claim dated 11th June, 2018 and filed in Court on 20th June, 2018 admits that it engaged the Claimant as stated in his Memorandum of Claim. It denies withholding the Claimant's terminal dues as alleged.
10. The Respondent confirmed that the Claimant did in fact tender his resignation which was duly accepted. However, the Respondent maintained that the Claimant failed to provide one (1) months' notice as required at the time of his resignation.
11. The Respondent confirmed that it tabulated the Claimant's terminal dues and additionally notified him of deductions to be made on the terminal dues being 13 days in lieu of notice and outstanding chap chap loan arrears.
12. The Respondent further averred that the Claimant is not entitled to service pay by operation of the law as provided under Sections 35(5) and (6) of the Employment as he was a member of a British American Pension Fund, Staff Welfare Fund and NSSF to which the Respondent made contributions.
13. The Respondent avers that there were changes in its structure and as a result there were changes in policies in the year 2015 which fact was communicated to all members of staff including the Claimant.
14. As regards the Certificate of Service, it was the Respondent's averment that it is willing to issue the Claimant with a Certificate of Service and the same would be available for collection after full compliance with clearance formalities.
15. It is the Respondent contention that in view of the foregoing, the suit is devoid of merit and should be dismissed in its entirety with costs to the Respondent.



16. Prior to this matter being listed for hearing, the same was referred for mediation where parties reached a partial consent with respect to payment of leave days earned but not taken, gross salary for 10 days worked in November and the issuance of a certificate of service to the Claimant.
17. Parties proceeded with the other prayers in the Claim by way of Witness Affidavits and Submissions.

Claimant's Case

18. In support of his case the Claimant, relied on his witness statement dated 10th May, 2018 and filed in Court on 11th May, 2018 as his evidence in chief. He further relied on a total of 12 documents attached to his List of documents filed in Court on 11th May, 2018 as exhibits in this matter.
19. In his statement the Claimant reiterated the averments made in his Memorandum of Claim and urged this Court to find merit in his Claim and allow it in terms of the reliefs sought therein.

Respondent's Case

20. The Respondent relied on the reply to memorandum of claim dated 11th June, 2018, the witness affidavit sworn by Peter Anavila dated 24th September, 2021 together with annexed documents and the list and bundle of authorities dated 24th September, 2021.
21. In his witness Affidavit Mr. Anavila reiterated the averments made in the Reply to the Memorandum of Claim. He stated that as per the Respondent's Human Resource manual there was no provision for service pay. Further, that bonus pay was not an automatic right and was in fact not payable to an employee whose contract was terminated prior to the board's approval of payment of such bonuses. The Respondent relies on annexure PA-8, its Employee Performance Bonus Policy
22. The Respondent maintains that as at 28th June, 2016 its previous Human Resource manual had ceased to operate a fact that was brought to the attention of all its' staff including the Claimant herein. It is further the Respondent's contention that the Claimant cannot claim not to have been aware of the changes at this juncture.
23. It is further stated that the Claimant was issued with a certificate of service dated 20th March, 2018 on 7th October, 2020 and that it is therefore no longer an issue for determination in this matter.
24. The Respondent maintains that it has discharged all its obligations to the Claimant herein and there is therefore no claim as against it. It is on this basis that the Respondent urged this Court to find the instant Claim devoid of merit and to dismiss it in its entirety with costs to the Respondent.
25. Parties thereafter filed and exchanged their written submissions.

Submissions by the Parties

26. In support of his case the Claimant filed his submissions and supplementary submissions dated 8th June, 2021 and 4th February, 2022 respectively.
27. In his submissions the Claimant maintains that he is entitled to service pay for a total of 6 years he was under the Respondent's employment. To fortify his argument under this head, the Claimant relied on the provisions of Section 35(5) and (6) of the Employment Act as read with the Respondent's Human Resource Manual for the year 2015.
28. On the issue of the Human Resource Policy, the Claimant submitted that no evidence was adduced by the Respondent of any communication to him of any changes in policy and/or proof that the review and development of a new policy was ever completed and shared by the Respondent.



29. The Claimant argues that the absence of any communication directly to him on changes on the Respondent's policy is tantamount to a breach on the Respondent's part as such communication must be done in writing in compliance with the provisions of Section 10(5) of the *Employment Act, 2007*. The Claimant further submitted that the Respondent's actions are in breach of the provisions of Articles 41 and 47 of *the Constitution* of Kenya, 2010.
30. The Claimant urged this Court to find that in absence of any proof there were no changes on the Respondent's Human Resource Manual and therefore make a finding in its favour. In conclusion, the Claimant argues that he is entitled to Kshs.871,200/- under this head. He relied on the case of Nairobi ELRC Cause No. 755 of 2018 Simon Ndicu v Karatina University where the Court held that reduction in employment benefits cannot apply retrospectively without the consent of the employee.
31. On the issue of bonus pay, the Claimant submitted that he is entitled to bonus pay as provided under clause 10.18 of the Respondent's Human Resource Manual. He submitted that he was entitled to compensation of Kshs.242,000/- under this head for the prorated period of 10 months worked in the year 2017. The Claimant further submitted that no evidence had been adduced by the Respondent to prove that he was not eligible to payment of bonus. To fortify this argument the Claimant relied on the case of Nairobi ELRC Cause No E471 of 2020 Banking Insurance & Finance Union v Mua Insurance (Kenya) Ltd where the Claimant sought and was allowed his prayer for bonus pay.
32. The Claimant urged this Court to find merit in his Claim and award him the sum of Kshs.1,113,200/- being service pay and bonus pay. He further urged this Court to award him costs of the suit as well as interest.

Respondent's Submissions

33. The Respondent submitted that the Claimant is not entitled service pay following the revision of its Human Resource Manual. That, the Claimant cannot be allowed to approbate new policies on the one hand by claiming bonus pay and then reprobating on the other hand by insisting on the application of the old Human Resources Manual. The Respondent relied on the case of *Evans v Bartlam (1937) 2 ALL ER 649* on the doctrine of approbation and reprobation in support of its submission.
34. The Respondent further submitted that all employee entitlements were clearly spelt out to all its members of staff including the Claimant herein contrary to his contention that he was not issued with any changes.
35. The Respondent proceeded to distinguish the authorities relied upon by the Claimant in this case. It argues that the case of Simon Ndicu v Karatina University [2021] eKLR differs from the Claimant's case as the holding in the case is clear that for the benefit to be payable it must have accrued prior to the changes taking effect, in which case it would be unlawful and unfair to take away such benefit from an employee.
36. The Respondent further submitted that the Claimant is not entitled to service pay having been a member of the British American Pension Fund as well as a Staff Welfare and the National Social Security Fund to which the Respondent made contributions as was evidenced by the Claimant's payslips.
37. For emphasis the Respondent relied on the provisions of Section 35(5) and (6) of the *Employment Act, 2007* and the case of Elijah Kipkoros Tonui v Ngara Opticians T/A Bright Eyes Limited [2014] eKLR where the Court held that service pay is only payable under Section 35(5) to employees who are not covered under different social security mechanisms elaborated under Section 35(6).



38. On the claim for bonus pay, the Respondent submitted that the Claimant is not entitled to the same based on the provisions of Clauses 5 and 10 of the Respondent's Human Resource Policy. It further argued that the prorated bonus pay was never approved by the Respondent's board and is therefore not payable to the Claimant herein. The Respondent argued that bonus payment is largely discretionary and urged this Court to be guided by the findings in the case of *John Muthomi Mathiu v Mastermind Tobacco (K) Limited* [2018] eKLR where the Court held that payment of bonus is at the employer's discretion.
39. The Respondent submitted that the claims for service pay and bonus pay as contended by the Claimant cannot be allowed and therefore urged this Court to dismiss the claims in their entirety with costs to the Respondent.

Analysis and Determination

40. As stated previously, this matter was referred to Court Annexed Mediation and the parties entered a partial consent on various aspects of the Claimant's Claim including payment of leave days earned but not taken, pay for days worked in November, 2017 and the issuance of a Certificate of Service.
41. This Court further notes that there is no dispute as to the manner and procedure in which the Claimant left the Respondent's employment. The only issues left for determination therefore are:
- i. Whether the Claimant is entitled to service pay
 - ii. Whether the Claimant is entitled to bonus pay
 - iii. Who is entitled to costs of the suit?

Whether the Claimant is entitled to Service Pay

42. The Claimant put up lengthy submissions on his entitlement to service pay for the period of six (6) years that he was under the Respondent's employment relying on the provisions of Clause 12.4 (iii) and (iv) of the Respondent's Human Resource Policy and Procedure which provides that employees who resign from employment after 5 years of service will be entitled to service pay of one month's salary (gross) for every completed year of service for the first ten years.
43. The Claimant submitted that he is entitled to Kshs.871,200/- under this head as tabulated hereunder Kshs.145,200/- x 6 years = Kshs.871,200/-.
44. The Claimant submitted that this Court ought to be guided by the Respondent's Human Resource Manual, that provides for more favourable provisions with regards to service pay and as such the same takes precedence over the provisions of the *Employment Act*.
45. The Claimant further submitted that failure and/or refusal to pay the amount is tantamount to unfair labour practice on the part of the Respondent contrary to the provisions of Articles 41 and 47 of *the Constitution* of Kenya, 2010.
46. The Respondent on its part maintained that the Claimant is not entitled to any compensation under this head having successfully reviewed its Human Resource Policy manual and effectively communicated the changes to all its members of staff including the Claimant herein on 23rd June 2016 and 1st July, 2016.
47. It was further the Respondent's case that the Claimant was being untruthful when he claims not to be aware of the changes in the respondent's Human Resource Manual yet the basis of his claim for bonus pay is the revised Human Resource Manual.



48. I have examined the evidence adduced by both parties and the documents relied upon and find that the Claimant was a member of the British American Pension Fund, a staff welfare fund and the National Social Security Fund to which the Respondent made deductions and remittance as clearly evident in his payslip. This fact was not disputed by the Claimant.
49. In the defence at paragraph 6(c), the Respondent pleads as follows with respect to the service pay –
- “At the time of resignation, the Claimant was not entitled to any service by dint of operation of the law as enshrined in Section 35(5) and (6) of the *Employment Act* since the Claimant was a member of British American Pension Fund, Staff Welfare Fund and NSSF to which the Respondent employer made contributions.”
50. It is therefore not clear from the Respondent whether the Claimant does not qualify by virtue of Section 35(6) of the *Employment Act* or because of the change of the Human Resource Policy, which changes have not been produced in Court.
51. Section 35(6) is not a bar to payment of service pay where the same is expressly provided for in the terms of service of the employee. Section 26 of the Employment which provides that –
26. Basic minimum conditions of employment
1. The provisions of this Part and Part VI shall constitute basic minimum terms and conditions of contract of service.
 2. Where the terms and conditions of a contract of service are regulated by any regulations, as agreed in any collective agreement or contract between the parties or enacted by any other written law, decreed by any judgment award or order of the Industrial Court are more favourable to an employee than the terms provided in this Part and Part VI, then such favourable terms and conditions of service shall apply.
52. The Human Resource Policy of Micro Africa applicable to the Claimant that has been produced in Court specifically provides for service pay at Clause 12.4 (iii) as read with (iv) as follows –
- iii. “Where service is terminated by the company, an employee will receive service pay as follows:
-One month salary (gross) for every complete year of service for the first 10 years or One and a half months salary (gross) for every complete year of service above 10 years.
 - iii. Service pay as above for employees who resign from employment after 5 years of service.”
53. The Respondent has through the witness affidavit of PETER ANAVILA, the Human Resources Business Partner of the Respondent, deposed at paragraph 4 and 6 of the affidavit that –
- “4. The Claimant (“Stephen”) was employed by Micro Africa Limited as a Relationship Officer on 27 July 2011. His contract was transferred to the Respondent sometime in 2012 following the acquisition of Micro Africa Limited by the Respondent. The Claimant consented to the said transfer and took up his new role with the Respondent.
 6. Following the acquisition mentioned in paragraph 4 above, the Respondent embarked on a review of its Human Resource Manuals to ensure that they



aligned with the employees' terms and conditions of employment as well as the group company regulations.”

54. Paragraph 6 of the affidavit read with the memo for staff dated 23rd June 2013 would signify that the Respondent continued using the Staff Policies of Micro Africa Limited until replaced by its own policies as developed gradually. There is no evidence that at the time the Claimant left service, a new policy had been developed by the Respondent with respect to service pay.
55. The Respondent has not produced a copy of the alleged revised Human Resource Policy on payment of service pay. It only refers to communication in a circular dated 23rd June 2013 under reference “EMPLOYEE STAFF POLICIES”. The letter is reproduced below –

“ 23 June 2016

TO: ALL LETSHEGO GROUP AND SUBSIDIARY EMPLOYEES

FROM: GROUP HEAD OF HUMAN RESOURCES

EMPLOYEE STAFF POLICIES

In reference to the above subject matter, Management has

recently reviewed the existing Staff Policies to align them with the Terms and Conditions of Employment. In addition, the policies will ensure compliance to company regulations.

In 2015 Management completed 15 Staff Policies and they were all posted in the Group portal. We have issued out an additional 18 policies and we are in the process of developing another 11 policies. At the end of this exercise, we believe that these policies will strengthen our people management process and therefore our overall business performance.

The rollout of the 18 policies commences this week with a despatch to GMC, CEOs and Functional Heads to ensure alignment to the country labour laws. This process will take one month and thereafter all employees will be able to access all the issued policies from the Group Portal. Details of the portal will be communicated at the time of the roll out.

Kind regards

SIGNED

Tim Mwai

Group Head of Human Resources”

56. I thus find that the Claimant is entitled to service pay in accordance with Clause 12.4(iv) of the Respondent's Human Resource Policy.

Whether the Claimant is entitled to bonus pay

56. On the issue of bonus pay, the Claimant maintained that he is entitled to 10 months prorated bonus pay for the 10 months worked in the year 2017.
56. The Respondent on the other hand maintained that the Claimant is not entitled to the same arguing that bonus pay is discretionary and was not approved by the board for it to accrue.



56. The Respondent's bonus policy provides as follows:

“Clause 10 of Staff Performance Bonus Policy that employees who resign, dismissed or are terminated before the bonus is proved by the Board shall not be eligible for a bonus payment.”

56. I therefore find that the Claimant is not entitled to the prorated bonus pay as pleaded as the same was still subject of review and approval by the Respondent's board before accruing.

56. In conclusion, I find that the claim for service pay is merited and award the Claimant the sum of Kshs.871,200/- as prayed. The prayer for prorated bonus pay is without basis and is dismissed.

56. The Respondent shall pay the Claimant's costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 12TH DAY OF MAY 2022

MAUREEN ONYANGO

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 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 *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.

MAUREEN ONYANGO

JUDGE

