



**Mwinzi v Management University of Africa (Cause 1743 of 2017)
[2022] KEELRC 3992 (KLR) (10 June 2022) (Judgment)**

Neutral citation: [2022] KEELRC 3992 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1743 OF 2017**

**J RIKA, J
JUNE 10, 2022**

BETWEEN
CHRISTOPHER MBUVI MWINZI CLAIMANT
AND
MANAGEMENT UNIVERSITY OF AFRICA RESPONDENT

JUDGMENT

1. The Claimant filed his Statement of Claim on September 1, 2017.
2. He states, he was employed by the Respondent Higher Learning Institution, as a Security Officer, on June 19, 2012.
3. He gave the Respondent a 1-month notice of resignation, on June 9, 2016. He simultaneously applied for annual leave, from June 13, 2016 to July 11, 2016.
4. His last salary was Kshs. 85,000 monthly, indicated on the pay slips as basic and gross.
5. The Respondent's Vice-Chancellor accepted resignation, and undertook to pay Claimant's terminal benefits. The Claimant cleared from the Respondent. The Vice-Chancellor however, changed his position and declined to pay the Claimant's terminal benefits.
6. During service, the Respondent severally altered the Claimant's contract unilaterally. In 2013, Pension Rules provided for 10% basic salary contribution each, from the Claimant and the Respondent. This was Kshs. 8,500 apiece. Between January and December 2013, the Respondent made deductions from the Claimant's salary in pension contribution. It then decided to refund the Claimant, but only refunded Kshs. 68,000, instead of the whole contribution made by both Parties.
7. The Claimant seeks full contribution from the Respondent, for 12 months in the year 2013, at Kshs. 102,000.



8. In 2014, the Respondent reduced contributions to 5% of the basic salary, amounting to Kshs. 4,250. The Claimant seeks another sum of Kshs. 102,000 being the difference in contributions after reduction, for the year 2014.
9. The Claimant was entitled to extraneous allowance of Kshs. 15,000 monthly. Payment was withheld for the months of May and June 2016.
10. The Claimant prays for Judgment against the Respondent for: -
 - a. Unpaid salary for the month of June 2016 at Kshs. 85,000.
 - b. Salary for 11 days worked in July 2016 at Kshs. 31,000.
 - c. Leave allowance for 2016 at Kshs. 17,000.
 - d. Leave allowance for 2017 at Kshs. 17,000.
 - e. Withheld allowances for May and June 2016 at Kshs. 30,000.
 - f. Pension dues at Kshs. 204,000.
Sub-total...Kshs. 384,000.
Less paid...Kshs. 46,814.
Total claimed...Kshs. 337,686.
 - g. Interest from the date of filing the Claim.
 - h. Costs.
11. The Respondent filed its Statement of Response on November 15, 2017. It admits that the Claimant was employed by the Respondent, and that he resigned as pleaded. His leave on resignation was not approved. The Claimant proceeded on leave before approval, which amounted to abscondment. He was paid his full dues, including salary for days worked, unpaid leave allowance for 2015 and pension dues for 2015 and 2016. He did not clear with the Respondent.
12. When the Respondent first came into operation in 2011, it did not have a Pension Scheme. In 2013, there was an intention to start one, effective January 1, 2014. This did not materialize due to financial constraints. It only started in January 2015. Initially, it was intended to have equal contribution of 10% of the basic salary between the Employee and the Employer. It was scaled down to 5% due to financial constraints. Employees were consulted on this, on October 23, 2013. They signed a document, indicating they were in agreement with the change.
13. All deductions made prior to the Scheme take-off in 2015 were refunded. The Claimant was refunded Kshs. 68,000 for 8 months deducted in 2013. He acknowledged receipt. In 2014, deductions were made for 5 months and refunded. The Claimant received Kshs. 21,250.
14. There was no operational Scheme for 2013-2014, and the Respondent was not making any contributions. That is why the Claimant received only what he had paid. The Respondent remitted N.S.S.F contributions in full, before the Scheme picked in 2015.
15. The Claimant was paid an extraneous allowance from December 9, 2013. He was advised it would no longer be paid, through a letter dated May 13, 2016, because the Respondent had appointed an Assistant Security Officer. There were no extraneous duties to continue being carried out by the Claimant. The Claimant was aware of the reason for discontinuation of the allowance, and did not raise any objection.



16. Leave allowance was not paid on a pro-rata basis. It was based on earned annual leave. The Respondent's policy did not permit leave allowance to be paid to Employees who resigned. This is because leave allowance is paid to assist Employees travel during leave, and on return to work.
17. The Claimant gave evidence, and closed his case on 15th October 2021. Administration Manager, Edna Moriasi, gave evidence for the Respondent, closing the hearing on February 9, 2022. The dispute was last mentioned on March 22, 2022, when the Parties confirmed the filing and service of their Final Arguments.
18. The Claimant adopted his Witness Statement and Documents on record. He explained that he resigned on securing another job. He cleared with the Respondent, but was not paid his dues. Clearance was manifested by grant of the Certificate of Service. He was not involved in the changes on the Pension Plan. He signed the letter accepting changes, through coercion. He was paid Kshs. 46,814. There was no breakdown.
19. Cross-examined, he admitted that page 61 of his documents, showed Kshs. 46,814 constituted leave allowance for 2015, and salary up to the date of resignation. Page 11 of the Respondent's documents captures the breakdown. The handover report was not signed by the immediate supervisor. It was indicated on the clearance form, that the Claimant had not handed over the keys / door locks for the cafeteria.
20. There was a Pension Scheme as of 2014. It was operated by Jubilee Insurance. All payments went to Jubilee Insurance. The Claimant was refunded Kshs. 68,000. It was for 8 months, yet he had contributed for 12 months. Pay slips for July, October, November, and December 2013, do not show deduction. The Claimant conceded there was no deduction for 4 months.
21. He saw the minutes of the Pension Scheme Board, altering the contributions, for the first time in Court. He was coerced to sign the letter accepting changes. The Vice-Chancellor threatened the Claimant that he would face accusations of insubordination, if he did not sign. This evidence was not captured in Claimant's Witness Statement.
22. Extraneous allowance was not in the Claimant's contract. His colleague in charge of security, Wanyonyi, left employment. It was then that the Claimant was assigned more duties and offered extraneous duty allowance. An Assistant Security Officer was employed in 2016. The Claimant was heading security department at the time. Extraneous allowance was discontinued. The Claimant filled leave form on resignation. The approval slot was blank.
23. Redirected, the Claimant told the Court that leave allowance for 2015 was paid. It was not for 2016. He was not given a breakdown of payments made. He was simply advised to collect a cheque. He was not told by Leting, why Leting did not sign the clearance form. The Claimant had the keys to the cafeteria gents. It was never opened. Clearance certificate shows all keys were handed over. The Claimant was assigned the responsibility of training the new Security Officer. His duties increased. He was not told that his application for leave had been declined.
24. Moriasi adopted her Witness Statement and Documents filed by the Respondent in her evidence. The Claimant was paid Kshs. 46,814 in terminal benefits. He was given a breakdown. He had not utilized leave for 2016, so he was not paid leave allowance. He applied for 21 days of annual leave, which was not approved. He had 6 days of annual leave carried over from 2015, and 12 days earned in 2016- total 18 days. He applied for 21 days, exceeding his entitlement.
25. He did extraneous duty when his colleague left. He was paid extraneous allowance. Once a replacement was employed, the Claimant was released from extraneous duty, and extraneous allowance was no



- longer payable. The Respondent transitioned from Kenya Institute of Management to Management University. The University registered its own Pension Scheme with Jubilee Insurance. Employees were refunded contributions made, before the Scheme came into force. The Claimant was paid back his 8 months' contribution. He was not cleared because he did not hand over cafeteria gents' keys.
26. On cross-examination, Moriasi told the Court that the Claimant was paid for days worked in June 2016. Leave allowance if pro-rated to June 30, 2016, would be Kshs. 8,500. It was Kshs. 17,000 annually. He was paid leave allowance for 2015. He was paid Kshs. 46,814 terminal benefits in total. This was paid after letter of demand. Page 62 of the Claimant's documents indicates 'final dues.' It does not give a breakdown. Page 59 gives a breakdown. Salary for June 2016, was Kshs. 85,000 before deductions. He was paid Kshs. 6,544 for days worked. Leave allowance was Kshs. 17,000. Extraneous allowance ceased to be paid from May 1, 2016, because the Respondent appointed an Assistant. Moriasi did not know if the Claimant continued to be on call, after May 1, 2016.
 27. Clause 7 of the contract regulated pension. Contribution was 10% apiece. Deduction was made from 2013, but not every month. Employer's contribution was Kshs. 8,500 monthly. Moriasi did not agree that the Respondent ought to have refunded its own contribution and the Claimant's, at Kshs. 17,000. Contribution was reduced from 10% to 5% from January 2014. 5% contributed by the Claimant after the change, was refunded through EFT. The Scheme kicked off in January 2015. It had taken long to register, hence the refunds. A statement from Jubilee Insurance at page 15 of Respondent's documents, shows date of Scheme commencement as January 1, 2014. The Respondent had not paid terminal benefits, before receiving the demand letter. All keys were returned, including the ones for the cafeteria according to the endorsement dated October 25, 2016.
 28. Redirected, Moriasi told the Court that the Claimant had not cleared prior to payment of terminal dues. He applied for 21 days of annual leave, while he only had 18 days remaining. Leave application was not approved by the Supervisor. Leave allowance is not pro-rated. Once an Assistant was employed, there was no justification for payment of extraneous allowance. There was no Pension Scheme, at the time Parties executed the employment contract. Contributions went to Jubilee Insurance as of 2014. Claimant consented to change in contribution from 10% to 5%.
 29. The single issue in this dispute is, whether the Claimant having resigned voluntarily, was paid his terminal dues in full.

The Court Finds: -

30. The Claimant resigned on June 8, 2016. His notice was for 1 month, which would expire on July 8, 2016.
31. He applied for 21 days of annual leave, from June 13, 2016 to July 11, 2016.
32. Leave was not approved by the Claimant's supervisor, as shown in the leave application form on record.
33. It is also noted that the Claimant's annual leave balance at the time of his application, was 18 days. He could not therefore have 21 days of annual leave.
34. Once the Claimant resigned, he utilized his pending leave days of 18 days, notwithstanding that there was no approval. Lack of approval did not take away this benefit. Why would the Respondent decline approval, to an Employee who was serving notice? The Court does not see any justification in denying him leave allowance, commensurate with the annual leave entitlement. The position by the Respondent that leave allowance was only payable, upon taking full annual leave days, has no support in the Claimant's contract of employment, and the Respondent's Staff Terms and Conditions of Service. Clause 7.2 [d] of the Terms and Conditions of Service, states that in case of termination



- or resignation, the Employee will qualify for leave on pro-rata basis, having regard to the total months served. Clause 7.4 states that the Respondent, provides leave allowance to assist staff with their travelling expenses when proceeding on leave. The allowance is pegged to annual leave, and is not subject to other regulations the Respondent testified about.
35. It was agreed that leave allowance for one year was Kshs. 17,000 or 5% of the Claimant's monthly salary. Clause 9 of his contract, entitled him to 28 days of annual leave. 18 days of annual leave would result in leave allowance of Kshs. 10,928. Leave allowance for 2016 is allowed at Kshs. 10,928.
 36. The Claimant was still an Employee of the Respondent, until his notice of resignation took effect, on July 8, 2016. He merited full salary for June 2016, and for 8 days of July 2016. He is allowed the prayer for June 2016 salary, at Kshs. 85,000 and for 8 days due in July 2016, at Kshs. 26,153 – total Kshs. 111,153. The Respondent paid Kshs. 46, 814, which included Kshs. 17,000 in 2015 leave allowance, upon demand. Less the leave allowance, the Claimant received Kshs. 29,814 in salary. The balance would be Kshs. 81,339. The prayer for arrears of salary is allowed at Kshs. 81,339.
 37. The Claimant was paid extraneous allowance, for the duration he was performing additional security duties. At the time the allowance was withdrawn, the Respondent had engaged an Assistant. The extra load was taken off the Claimant's shoulders. The employment of an Assistant cannot have resulted in additional load for the Claimant. The prayer for withheld extraneous allowances has no foundation and is declined.
 38. Clause 8.4 of the Staff Terms and Conditions of Service states that the Respondent had established a contributory Pension Scheme. The document on Terms and Conditions of Service is dated March 2012, and signed on March 3, 2013, presumably by the Vice-Chancellor. It would suggest that there was a Pension Scheme of some kind, from the date indicated in the Terms and Conditions of Service.
 39. Clause 8.4 [iv] of the Terms and Conditions of Service states that the benefits under the Scheme, would be regulated by the Pension Trust Deed Rules.
 40. The Trust Deed of January 1, 2013 deprives the Court of jurisdiction, to determine pension dispute involving the Sponsor, the Trustees, the Employer, the Members, the Members' Dependants or other relevant persons. The clause states that such dispute is to be placed before an Arbitrator, in accordance with the *Arbitration Act*, 1995. Other than the arbitration clause, the Court would think, it does not have jurisdiction on authority of Supreme Court of Kenya decision *Albert Chaurembo Mumba & 7 others v. Maurice Munyao & 148 others* [2019] e-KLR.
 41. The Court is not able to grant prayer 9 [vi] of the Statement of Claim.
 42. Cost to the Claimant.
 43. Interest allowed at court rates, from the date of Judgment till payment is made in full.

In Sum, It Is Ordered: -

- a. The Respondent shall pay to the Claimant leave allowance at Kshs. 10,928 and salary arrears at Kshs. 81,339 – total Kshs. 92,267.
- b. Costs to the Claimant.
- c. Interest allowed at court rates from the date of Judgment till payment is made in full.

DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY AT NAIROBI, UNDER THE MINISTRY OF HEALTH AND JUDICIARY COVID-19 GUIDELINES, THIS 10TH DAY OF JUNE 2022.



JAMES RIKA
JUDGE

