



**Oruko v Roto Moulders Limited (Cause 1648 of 2017)
[2022] KEELRC 12859 (KLR) (14 October 2022) (Judgment)**

Neutral citation: [2022] KEELRC 12859 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1648 OF 2017
SC RUTTO, J
OCTOBER 14, 2022**

BETWEEN

ENOSH OKOTH ORUKO CLAIMANT

AND

ROTO MOULDERS LIMITED RESPONDENT

JUDGMENT

1. The claimant avers that he was employed by the respondent in the year 1995 and that he served in different capacities until his resignation on March 2, 2015. That at the time of his resignation, he was earning a gross monthly salary of Kshs 65,126.00. He avers that since his resignation, he has requested the respondent to pay his benefits and emoluments, to no avail. Subsequently, he claims against the respondent the sum of Kshs 713,882.00 being gratuity for 19 years of service, a certificate of service and an order that the respondent pays him unremitted National Social Security Fund (NSSF) contributions amounting to Kshs 5,440.00.
2. The claim was opposed with the respondent stating that it calculated the claimant's dues and that it has always been ready to pay up all the claimant's dues, issue him with a certificate of service and proof of the NSSF remittances for onward transmission and counterchecking at the NSSF offices.
3. The matter proceeded for hearing on May 30, 2022, with each side presenting oral evidence.

Claimant's Case

4. The claimant testified in support of his case and at the outset, asked the court to adopt his witness statement and documents filed together with his claim, to constitute his evidence in chief. He also produced the said documents as his exhibits before court.
5. It was his testimony that he resigned from the respondent's employment due to frustrations. That following his resignation, he was not paid his dues despite requesting the respondent to do so. That he



wanted to be paid service pay and to be issued with a certificate of service. That he was a contributor to the NSSF but the respondent was not consistent in remitting the contributions as required. In concluding his testimony, the claimant asked the court to allow his claim as prayed.

Respondent's Case

6. The respondent's evidence was presented through Mr George Akule Mutabari who testified as RW1. He described himself as a supervisor at the respondent company. He sought to adopt his witness statement and the documents filed on behalf of the respondent to constitute his evidence in chief. He further produced the said documents as the respondent's exhibits.
7. RW1 testified that the claimant tendered his resignation out of his own volition. That after the claimant's resignation, the respondent calculated his dues and requested him to collect the same but he refused to do so. That further, the respondent remitted all the claimant's dues to the NSSF. That the error appearing on the claimant's NSSF statement is not from its end but rather from NSSF. It was RW1's further testimony that the claimant refused to collect certificate of service.

Submissions

8. It was submitted on behalf of the claimant that he is entitled to service pay as the respondent was not consistent in remitting his NSSF dues. In support of his submissions, the claimant placed reliance on the authorities of *George Kirungaru vs Next Generation Communications Limited* (2014) eKLR and *Elijah Kipkoros Tonui vs Ngara Opticians t/a Bright Eyes Limited* (2014) eKLR.
9. On its part, the respondent submitted that the claimant had failed to prove his case on a balance of probability. That the claimant is a registered member of the NSSF hence is not entitled to service pay. The respondent placed reliance on the case of *Kennedy Nyangucha Omanga vs Bob Morgan Services Ltd* (2013) eKLR. Citing the case of *Grace Wairimu Njoroge vs NITI Computers* (2014) eKLR, the respondent argued that even if it were to be found that the claimant's NSSF dues were not remitted, the same cannot be paid directly to him.

Analysis and Determination

10. Flowing from the pleadings on record, the evidence exhibited, and the opposing submissions, it is evident that the court is being called to determine whether the claimant is entitled to service pay.
11. The gist of the claimant's case is that the respondent did not remit his NSSF contributions consistently hence he is entitled payment of service pay. The determination of this issue turns on the provisions of section 35(5) and (6) of the *Employment Act* which is couched as follows: -

“ [35(5) An employee whose contract of service has been terminated under subsection (1)(c) shall be entitled to service pay for every year worked, the terms of which shall be fixed.

(6) This section shall not apply where an employee is a member of—

- a. a registered pension or provident fund scheme under the Retirement Benefits Act (No. 3 of 1997);
- b. a gratuity or service pay scheme established under a collective agreement;
- c. any other scheme established and operated by an employer whose terms are more favourable than those of the service pay scheme established under this section; and



d. the National Social Security Fund.”

12. As stated herein, the basis for the claimant’s claim is that the respondent was not consistent in remitting his NSSF dues. In its defence, the respondent contends that the claimant was a contributor to the NSSF and therefore by dint of section 35(6)(d) of the *Employment Act*, he is precluded from payment of gratuity.
13. It is common ground that the claimant is a registered member of the NSSF, with his registration number being 048626910. This membership therefore places him within the exclusions under section 35(6) of the *Employment Act*. The only exception appears to be in circumstances where an employer has established and operated another scheme whose terms are more favourable than those under the *NSSF Act*.
14. Further, my understanding of section 35 (6) is that what disentitles an employee from claiming service pay is “membership” to any of the schemes mentioned thereunder and not the consistency of the contributions.
15. On this issue, I wholly concur with and apply the determination of the Court of Appeal in the case of *Chengo Kitsao Chengo vs Umoja Rubber Products Ltd* [2017] eKLR, where it was held as follows: -

“The said section basically stipulates that where an employee is entitled to termination notice of one month or more, he shall also be entitled to service pay for every year worked as long as he is not a member of registered pension or provident fund scheme under the Retirement Benefits Act, or a gratuity or service pay scheme established under a collective agreement, or the NSSF or any other scheme established and operated by an employer whose terms are more favourable than those under the NSSF Act. In the present case, the appellant was found to be a permanent employee earning monthly salary. That finding was not contested. As such, his contract was terminable by a month’s notice being given by either party. However, from the payslips presented before court by the respondent, it is evident that the appellant was an NSSF member, with a monthly contribution of Kshs 200/= . The respondent too had met its part of the bargain by equally contributing its portion to the NSSF. In the absence of an agreement to the contrary, between the parties, his NSSF membership disentitles him to any service pay and/or gratuity.”
16. In the instant case, there is no evidence that the respondent had established and operated another scheme whose terms are more favourable than those under the *NSSF Act*.
17. In the circumstances, I cannot help but find that being a registered member of the NSSF, the claimant is disentitled to payment of service pay as this puts him within the exclusions under section 35(6) of the *Employment Act*. That is the law and finding otherwise would be tantamount to amending the law.
18. It is notable from the claimant’s NSSF statement, that there are four months which do not indicate the remittances made by the respondent. The respondent has maintained that it made all the remittances and has placed blame on the NSSF for not updating the claimant’s statement.
19. In this regard, I will direct the respondent to avail the claimant with proof of remittances for the said months or make fresh remittances as appropriate, within 30 days from the date of this Judgment.
20. As regards the certificate of service, the claimant is entitled to the same pursuant to section 51(1) of the *Employment Act*. To this end, the respondent is directed to issue the same to the claimant within 30 days from the date of this Judgment.



Orders

21. In the final analysis, the claim is disallowed save for the order made in regards to remittances to the NSSF and issuance of the certificate of service.
22. Each party to bear its own costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 14TH DAY OF OCTOBER, 2022.

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STELLA RUTTO

JUDGE

Appearance:

For the Claimant Ms. Kogai

For the Respondent Ms. Otieno

Court Assistant Abdimalik Hussein

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 had 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.

STELLA RUTTO

JUDGE

