



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 226 OF 2019

MARIAM SENSALIRE.....CLAIMANT

VERSUS

AFRICAN INSTITUTE FOR CAPACITY DEVELOPMENT.....RESPONDENT

JUDGMENT

1. The Claimant instituted this claim against the Respondent vide a Memorandum of Claim dated 26th March 2019, seeking for payment of gratuity and general damages for breach of the contract of employment. She avers that she was appointed by the Respondent on 12th June 2014 as the Information, Network and Documentation Director and that it was a term of her employment contract that the Respondent would promptly pay her gratuity when the same fell due. The Claimant averred that she tendered her resignation on 15th May 2017 which the Respondent accepted on 27th June 2017 but that the Respondent has deliberately and maliciously refused to process her gratuity payment for the period May 2014-June 2017. She urges this Court to find that the Respondent's actions contravene the contract of employment and the right to fair labour practice under Article 41 of the Constitution of Kenya, 2010.

2. The Claimant states in her Witness Statement that under Clause 1.4.1 of the Respondent's Terms, Conditions of Service and Regulations, a regional staff may resign by giving three months written notice through the Executive Director or pay three months basic salary in lieu of notice. That under Clause 1.5 of the Respondent's Terms, Conditions of Service and Regulations, every employee of the Respondent was entitled to a 25% gratuity for every year of service completed and which Gratuity was payable after successful completion of the contract or resignation.

3. The Respondent filed an Amended Memorandum of Response dated 9th February 2021 wherein it computes the gratuity due to the Claimant at Kshs. 970,468.93 being gratuity for years worked less: loan taken by the Claimant, payment in lieu of notice and payment voucher number 20661. It further avers that the Claimant is not entitled to general damages for alleged breach of contract as alleged or at all and that it has been unable to pay the Claimant the said gratuity for the following reasons:

- a. There is an outstanding gratuity liability of Kshs. 55,956,791/- relating to gratuity for current staff and staff that have left service, which has not been paid due to cash flow challenges.
- b. The cash flow challenges are historical and trace back to the period when the Respondent was faced with significant drop in revenue due to withdrawal of funding by a major donor (Japanese International Cooperation Agency - JICA) and member countries not honouring their contributions to fill the gap.
- c. There are other staff other than the Claimant who have also been affected by the non-payment of gratuity and which the Claimant is well aware of the same and the Management Board and Governing Board are working together to have the same fully addressed and settled.
- d. The Respondent has demonstrated in the circumstances that the non-payment of gratuity is neither deliberate nor laced with malice as alleged by the Claimant or at all.

4. The Respondent also filed a Further Witness Statement dated 19th February 2021 from its Executive Director, Prof. Dominic Byarugaba. He avers that he is aware that the Claimant took out a new top up loan with Barclays Bank of Kenya Limited which the Respondent approved payment of in the sum of Kshs. 550,000/- and that the same was to be recovered from the Claimant as per e-mail communication of 13th September 2017 and an inter-office communication. He re-computes the gratuity due to the Claimant to Kshs. 716,468.93 with the revision being a deduction of a different voucher number 21329 and avers that the Supplementary List and Bundle of documents confirm the said position.

5. The Claimant in rejoinder filed a Reply to Amended Response dated 19th February 2021 computing the gratuity due to her at Kshs. 2,177,871/-. In comparison to the Respondent's computation, the Claimant's stated amount constitutes a lower amount for the notice pay and includes interest on gratuity over a period of three (3) years, calculated at 15% of Kshs. 1,500,000/- per year.

6. The Claimant adopted her witness statement as her evidence in chief and admitted the Claimant's bundle of documents as her exhibits. She raised an objection to the calculation of gratuity set out by the Respondent its Amended Memorandum of Response and confirmed in cross examination that the Respondent paid part of the loan on her behalf and that the sum of Kshs. 550,000/- was to be deducted from the gratuity sum. She admitted that as per the contract she was a regional staff and was to give notice of 3 months upon resigning and further confirmed that she resigned on 15th May 2017 and her last working day was 10th July 2017. She acknowledged that her resignation notice did not meet the 3 months threshold and which issue the Respondent also raised in its letter to her in May 2017 that the remainder would need to be settled. She denied having been paid anything by the Respondent stating that they only cleared her.

7. The Respondent's witness, Prof. Dominic Byangaba adopted his witness statement and further witness statement as his evidence and also produced the Respondent's bundle of documents as exhibits. He stated that they paid Kshs. 525,000/- to everyone who had delayed gratuity which payment the Claimant's bank statement should reflect and that the accountant can also produce that evidence. He stated in cross-examination that they paid the sum on the voucher to Mariam's account and that there is a list of all payees which he wished he could refer to as the same was not in Court. He also confirmed that the payments were made in May 2020. He stated in re-examination that when they wire money to the bank of employees they get the printout and that the accounts assistant must stamp the document and file for external audit.

8. The Claimant in her submissions urged the Court to look at Clause 1.5 of the Respondent's Terms, Conditions of Service and Regulations. She submits that every employee was entitled to a 25% gratuity for every year of service completed, payable after the successful completion of the contract or upon resignation and that she is entitled to payment of a 25% gratuity for every year of service completed having tendered her resignation in line with her contract of employment and the Respondent having accepted the resignation. She further submits that the payment of gratuity by an employee is gratis and based on the practice of an employer or as agreed under the contract of service; as also reiterated in the case of **Nelson Keshei v Narok County Government & another [2019] eKLR** which cited with approval the case of **Bamburi Cement Ltd v Farid About Mohammed [2016] eKLR**. She submitted that since the Respondent's Terms, Conditions of Service and Regulations had been adopted as part of the contract of employment she signed, the Respondent is as such in breach of the employment contract it had with her. She relied on the case of **Kenyatta Maita Mwashe v Plan International Kenya [2017] eKLR** which cited with approval, **Industrial Court of Kenya at Nairobi, Cause Number 746 [N] of 2009 - Kenya Union of Journalists v The Standard Group Limited [unreported]** where the Court held that:

"Human resources manuals are not in themselves contracts of employment. They are quotidian aspects of human resources management, which are generated by Senior Management. To be considered as terms and conditions of employment, they must be adopted as part of the contract of employment. Adoption means they are received, acknowledged, read, understood and signed by the Employee."

9. The Claimant submitted that despite following due process in resigning, having diligently served the Respondent organization for years, discharging her responsibilities with utmost professionalism and fidelity even warranting a promotion in the course of her service, the Respondent has wilfully neglected to remit the sum owed to her in terms of gratuity. She further submits that her suit ought to be allowed as prayed since equity will not suffer a wrong to be without remedy.

10. The Respondent submitted that there is consensus between parties on the figure of the loan payment sum of Kshs. 550,000/- and its deduction from the amount of gratuity due to the Claimant and the same is therefore not in issue. It further submits that since the Claimant failed to state why the rate of 15% ought to be adopted as interest on gratuity, interest should be capped at Court rates if at all. On the issue of the Payment Voucher No. 21329, the Respondent submits that the same is attached at page 5 of the Respondent's supplementary list and bundle of documents and is endorsed "PAID" with a narration of payment of Kshs. 525,000/- in to account number 0100000548922. It further submits that the Claimant had ample time to avail documentation to disprove the said voucher having been served with the said documents in February 2021. That it has on its part proved that the sums were paid to the Claimant. On the issue of the sum payable by the Claimant as Notice, the Respondent submits that the same is clearly set out in Clause 1.4.1 of the Claimant's contract and that the Claimant also confirmed in her evidence that she ought to have issued a three months' notice or pay three months in lieu of notice upon her resignation. That the Claimant's last day of employment having been 10th July 2017, the notice she gave was shy of forty-four days (1 month 14 days) but the Claimant has only admitted the figure of Kshs. 250,000/- in her reply to the amended response. The Respondent submitted that the said notice payment should further incorporate a figure for the fourteen days calculated as $(\text{Kshs. } 250,000/30 = 8,333.33 \times 14) = \text{Kshs. } 116,666.62$ and that therefore the sum of Kshs. 366,666.62 ought to be deducted as salary in lieu for 44 days. The Respondent urges this Honourable Court to dismiss the claim for general damages for breach of contract of employment sought by the Claimant in her Claim. It relies on the case of **Nairobi ELRC Cause No. 1255 of 2014, Ishmael Omula Egala & 7 Others v The Attorney General [2019] eKLR** where Lady Justice Maureen Onyango observed that:

"The general rule then was that the court could not award general damages for breach of contract and or employment terms. This was succinctly summed up in the case of **Securicor Courier (K) Ltd v Benson David Onyango and Ann**, Civil Appeal No. 323 of 2002 (UR) as follows:

'As general damages for breach of contract, this court has repeatedly held that general damages are not awardable for breach of contract...'

11. The Respondent submits that akin to the foregoing, the gratuity sum to be awarded to the Claimant is the sum of Kshs. 860,314.31 and not a penny more.

12. The dispute before me is confined to the gratuity due to the Claimant. As the Respondent never filed a counterclaim, it can not seek to recover that which it did not plead against the Claimant. As such, the Judgment will be focused on the gratuity. It is not disputed that gratuity is owing. The Respondent asserts the sum due to the Claimant is Kshs. 860,314.31 and not a penny more. The Claimant asserts the sum due

to her is Kshs. 2,177,871/- which sum takes into account interest at 15% per annum on the sum of Kshs. 1,500,000/-. The Claimant is stated to have been paid Kshs. 525,000/- which the Respondent and its Executive Director, Prof. Dominic Byarugaba assert was paid in May 2020 to the Claimant. Other than an office document showing the schedule of payments and stamped 'Paid' the Respondent did not avail any additional document such as bank statement to show that the intention to pay was actually executed. As such the sum is considered as unpaid in the absence of proof that it was actually paid. The sum of Kshs. 1,910,314.31 is due from the Respondent's calculations. Whereas interest is chargeable for the unpaid sum, the Claimant did not demonstrate why a rate of 15%pa should apply instead of Court rates which is 12%pa. By applying the interest rate for the years 2018, 2019 and 2020, the sum due is Kshs. 2,598,027.46 ($1,910,314.31 * 12 / 100 = 229,237.71$. $229,237.71 * 3 = 687,713.15$. Gratuity = $1,910,314.31 + 687,713.15 = 2,598,027.46$.) In the final analysis I enter judgment for the Claimant for the sum of Kshs. 2,598,027.46. The Respondent to settle this within 2 months failing which the Claimant may execute and recover the sum together with interest at commercial rates from the date of judgment till payment in full. The Claimant to have costs of the suit as well.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 16TH DAY OF JUNE 2021

NZIOKI WA MAKAU

JUDGE