



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

CAUSE NO. 38 OF 2020

DR. PETER ONYANGO OGOLA.....CLAIMANT

VERSUS

HOMABAY COUNTY GOVERNMENT.....RESPONDENT

JUDGMENT

Introduction

1. The Claimant lodged this claim against the Respondent on 9th June, 2020, seeking payment of Kshs. 1,123,525/= being salary underpayment, unpaid salary for the Month of December, 2018, a service gratuity and a monthly pension of Kshs. 24,700/= together with costs of the suit and interest.
2. The Respondent filed a response to the claim on 15th December, 2020, wherein, it admitted that the Claimant was under its employment, but wholly denying the rest of the Claimant's claim.
3. During the trial, the Claimant testified in support of his case, while the Respondent presented one Mr. Lamech Otieno Ogot, a Director of Recruitment and Selection with the Respondent to testify on its behalf.
4. Both parties put in submissions to support their positions.

The Claimant's Case

5. The Claimant's case is that the Respondent appointed him County Director in charge of Early Childhood Education on permanent and pensionable terms of service with effect from 14th April, 2015.
6. It is his case that he held the position until 30th November, 2018, when he was prematurely retired from service, before attaining the mandatory retirement age of 60 years.
7. The Claimant's case is that he was underpaid between the months of July, 2015 and January, 2016. The Claimant avers that in these months, he was paid a salary of Kshs. 65,290/- per month, instead of Kshs. 89,740/=-, which was the salary agreed upon between him and the Respondent and captured in his letter of appointment.
8. It is the Claimant's further case that although the Respondent deducted 31% of his salary as pension contribution, it did not remit the amount to the Teachers Service Commission, which was the Claimant's previous employer or the Pensions Department. The Claimant avers that the none remission has adversely affected both his lumpsum and monthly pension. He avers that he has lost a monthly pension of Kshs. 24,700/- to the none remission.
9. The Claimant states that the Respondent retired him one month before his actual retirement date and claims Kshs. 89,740/- as salary for the month of December, 2018. He further avers that both his Birth Certificate and National Identification Card, indicate his date of birth as 31st December, 1958 and not 30th November, 1958.
10. The Claimant stated on cross-examination, that his pay slips indicated that he was to retire on 30th November, 2018. He further confirmed that he did not challenge the date given in his pay slips as his retirement date.
11. The Claimant states that the Respondent has remained adamant to his repeated demands for his unpaid salary, service gratuity, salary

underpayment and an undertaking to pay his monthly pension. He prays that this court grants him the prayers listed in his statement of claim.

The Respondent's Case

12. The Respondent's case is that the Claimant was an employee of the Teachers Service Commission (TSC), where he served as Early Childhood Coordinator, which function was devolved by dint of Article 174 of the Constitution. The Respondent further avers, that the Claimant transferred his services from the TSC to the Respondent and was absorbed as an employee of the Respondent effective 1st July, 2015 in the position of Deputy Director Early Childhood Education on permanent on pensionable terms of service.

13. The Respondent's case is that the Claimant's pension scheme is with the TSC which is a none contributory scheme charged on the Consolidated Fund. The Respondent avers that the Claimant has not shown proof that he submitted his Integrated Personal Payroll Data Pay slip to the TSC for computation of his pension, but that the TSC has declined to consider for payment of his pension.

14. The Respondent avers that the Claimant has not provided any basis upon which the Respondent should have remitted 31% of his basic salary to the TSC as pension. The Respondent further avers that no public officer benefits twice through earning both a pension and a gratuity from the same government funds.

15. The Respondent states that there was never an agreement to remit 31% of the Claimant's basic Salary either between him and the Respondent or between the Respondent and the TSC. The Respondent denies owing the Claimant Kshs. 839,657/- being 31% of his basic salary and Kshs. 24,700/- as a monthly pension.

16. The Respondent states that it dully served the Claimant with a retirement notice upon attaining 60 years of age as per government policy. It states that the system that government uses to process staff salaries automatically locks out staff when they attain retirement age and further, that the Claimant never raised issues concerning his age, either with the Respondent or his previous employer, the TSC so as to rectify and capture his actual age before retirement.

17. The Respondent's further case is that the Claimant did not complain about his age when he received his notice of retirement. It avers that the Claimant did not raise the issue of underpayment with the relevant office.

18. The Respondent's witness, Mr. Lamech O. Ogot on cross-examination, confirmed that he had seen the Claimant's Birth Certificate and National Identification Card and agrees that the Claimant's date of birth is 31/12/1958 and not 3/11/1958. He further confirmed that the Claimant was retired one month earlier, but that according to his pay slip, he was to attain the age of 60 years on 30th November, 2018 and hence the reason he was retired when he was.

19. Mr. Lamech O. Ogot further admitted on cross-examination that the Respondent did not remit 31% of the Claimant basic salary to TSC and further confirmed that the Claimant is eligible for the payment.

20. The Respondent's witness averred that the list produced as exhibit 8 by the Claimant on employees for whom the Respondent had budgeted to pay service gratuity, included the Claimant. He further avers that the gratuity though budgeted at Kshs. 839,657/=, was never paid to the Claimant.

21. The Respondent's witness confirmed that the Respondent deducted 31% of the Claimant's basic salary for purposes of pension, but that it never remitted to the Teachers Service Commission. It is his averment that the Respondent is liable to bear the loss.

22. Mr. Lamech Ogot further told the court, that the Claimant was paid Kshs. 65,290/= (July-2015 to Jan.2016) and not Kshs. 89,749/= as agreed under his letter of appointment. He confirmed that the Claimant was underpaid in this period.

23. The Respondent asserts that the Claimant's suit is misconceived, bad in law and an abuse of the court process and should be dismissed with costs.

The Claimant's Submissions

24. It is submitted for the Claimant that the Respondent's failure to remit 31% deducted from his basic salary affected the Claimant's monthly pension payments. It submitted that the pension as computed was only up to July 2015, which did not include the period the Claimant was in the service of the Respondent.

25. It was submitted for the Claimant, that per letter dated 17th April, 2019 from the Director of Human Resources of the Respondent to their Chief Officer Finance and Planning, the deductions of 31% made from the Claimants salary was a total of Kshs. 839,657/=. It is submitted that this is similar to the amount the Claimant would have been paid as service gratuity.

Respondent's Submissions

26. It is submitted for the Respondent that the retirement notices issued to the Claimant, left no doubt as to the Claimant's retirement date. That the Claimant never raised issues on his age with the TSC which submitted the record that indicated his date of birth as 1st December, 1958, and which date the Claimant did not challenge.

27. The Respondent submitted that the Claimant is not entitled to the salary for December, 2018, as he had by this time, ceased to be an employee of the Respondent.

28. It is submitted that all through the Claimant's service with the Respondent, he failed to raise the issue of underpayment and that he did confirm during cross-examination that he indeed, did not ask to be paid this amount.

Issues for determination

- i. Whether the Claimant was prematurely retired
- ii. Whether the Claimant is entitled to the reliefs sought
- iii. Who bears the costs of the suit

Whether the Claimant was prematurely retired

29. The Respondent's contention is that the Claimant never complained to TSC that had given a record of his date of birth as 1st December, 1958 and not 31st December, 1958. Further, the Claimant's pay slips indicated his retirement date to be 30th November, 2018 by virtue of the date of birth stated therein.

30. The Claimant produced both his birth certificate and National Identification card, which indicated his date of Birth as 31st December, 2018. To the extent that the birth certificate and the national identity card are authoritative on an individual's date of birth than would a pay slip, I find that the Claimant has proved a case of premature retirement. He was retired at 59 years and 11 months instead of the 60 years provided by government policy.

Whether the Claimant is entitled to the reliefs sought

Unpaid salary for December, 2018

31. The evidence before this court show that the Claimant was born on 31st December, 1958. Both his identification card and birth certificate confirm this position to be true. The Respondent's claim that the pay slips bear a different date of birth is untenable as the both the identification card and the birth certificate are authoritative on the date of birth than would a birth certificate.

32. The court determines that the Claimant was retired prematurely and is entitled to payment of salary for the month of December, 2018, which should have been his retirement month.

33. The Claimant is awarded Kshs.89,740, as unpaid salary for the month of December, 2018.

Salary under payment

34. The claim for salaries under this heading is for underpayments for the months of July, 2015 to January, 2016. The Respondent's witness confirmed to this court that the Claimant was not during this period paid the salary agreed upon under his letter of appointment.

35. The letter of appointed produced in evidence before this court gave the Claimant's salary as Ksh. 89,749, but the pay slips for these months carried a salary of Kshs. 65,290/=.

36. The Claimant has proved a case of underpayment. However, the period between the time the claim for underpayment accrued and the time the suit carrying this claim was lodged in court is three years and six months. Section 90 of the Employment Act, states as follows in respect of filing of claims based on employment contracts:

“Notwithstanding the provisions of section 4(1) of the Limitation of Actions Act (Cap. 22), no civil action or proceedings based or arising out of this Act or a contract of service in general shall lie or be instituted unless it is commenced within three years next after the act, neglect or default complained or in the case of continuing injury or damage within twelve months next after the cessation thereof.”

37. This court does not have power to enlarge this time and it follows that the court lacks jurisdiction to make orders in this respect (**See G4S Security Services (K) Limited v Joseph Kamau & 468 others [2018] eKLR**) The Claim for salary underpayment is statute barred and is hereby dismissed.

Service Gratuity and 31% Pension Remission

38. This court was told that the Respondent budgeted for gratuity for employees who were to exit its employ in the year 2018. Mr. Ogot, testifying on behalf of the Respondent, told this court that the Claimant was among the employees that the Respondent had planned to pay service gratuity in that year. The court was further told that the gratuity budgeted to be paid to the Claimant is Kshs. 839,657/=.

39. The evidence before this court, is that the Respondent made deductions from the Claimant's salary being 31% of his basic salary, so as to form part of his pension on retirement. It was confirmed by both the Claimant and RW that these deductions, though made, were never remitted to the TSC or the Pension Department.

40. The Claimant stated that the none remission, adversely affected both his lump sum pay and the monthly pension. Although it is admitted that the 31% was deducted from the Claimant's salary, the question becomes whether he can be paid a pension and a gratuity from the same purse.

41. The answer in my opinion is no. The reason being that the deductions were never remitted and both the gratuity and the pension are calculated at 31% of basic salary for the period worked and the two are supposed to serve the same purpose.

42. I find that it will be tidier to pay the Claimant a gratuity as the pension if remitted at this point, may not serve the intended purpose. It will not accrue an interest as it should have had it been remitted in 2015 when the Claimant first joined the service of the Respondent and secondly it is not feasible for the Respondent to pay the Claimant a monthly pension as it does not have a pension arrangement in place.

43. The court was told that the amount deducted from the Claimant's salary for purposes of pension is to Kshs. 839,657/-

44. I conclude by awarding the Claimant a gratuity of Kshs. 839,657/-

45. I further hold, that having awarded the Claimant a gratuity, the claim for a monthly pension of Kshs. 24,700 fails and is dismissed.

46. In conclusion, Judgment is entered for the Claimant against the Respondent as follows:-

i. That the Respondent to pay the Claimant salary for December, 2018 at Kshs. 89,740/=

ii. That the Respondent to pay the Claimant gratuity at Kshs 839,657/-

iii. Costs of the suit and interest at court rate until payment in full

47. Judgment accordingly

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 9TH DAY OF DECEMBER, 2021.

CHRISTINE N. BAARI

JUDGE

Appearance:

N/A for the Claimant

Ms. Namusubo Present for the Respondent

Christine Omollo- C/A