



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO. 169 OF 2018**

***(Before Hon. Lady Justice Maureen Onyango)***

**CATHLEEN NJERI KARIANJAH.....CLAIMANT**

**VERSUS**

**PRESBYTERIAN UNIVERSITY OF EAST AFRICA (PUEA)...RESPONDENT**

**JUDGMENT**

Vide a Memorandum of Claim filed on 14<sup>th</sup> February, 2018, the Claimant avers that she was employed by the Respondent on 23<sup>rd</sup> December 2010 as a Lecturer in the Department of Education on a 3 year contract.

She avers that on 31<sup>st</sup> August 2011, the Respondent without consulting her changed her contractual engagement to permanent and pensionable terms. She avers that she worked for the Respondent until September 2015 when the Respondent stopped remitting her dues or started remitting less than the sum she was entitled to.

She avers that she tendered her resignation on 30<sup>th</sup> June, 2017 and that her resignation elicited a response from the Respondent requiring her to clear with the University. She contends that she resigned due to non-payment of her dues. She avers that in letters dated 11<sup>th</sup> February, 2017 and 20<sup>th</sup> July, 2017 the Respondent admitted that it owed her dues.

She avers that the Respondent was tasked with deducting loan repayments and interests towards payment of her loan. However, it failed to remit the monthly loan repayment of Kshs.43,750 which led to accrual of interest amounting to Kshs.355,645.45 and loan repayment arrears of Kshs.1,051,425.08.

The Claimant prays for the following reliefs:

1. General damages for breach of contract of employment and for frustrating the Claimant’s legitimate expectation to receive her rightful dues as and when they fell due and costs of the suit.

2. At the time of termination, the Claimant was earning Kshs.98,000 per month. She claims Kshs.3,368,600 in total, which is worked out as follows:

i. Unpaid salary from September 2015 to the month of June 2018.....Kshs.604,980.18

ii. Unpaid Annual Increment (1,800 x 7)..... Kshs.12,600

iii. Loan Arrears.....Kshs.1,407,070.53

iv. Unpaid Retirement Pension/Gratuity from

31<sup>st</sup> August 2011 to July 2017.....Kshs.1,200,000

**Total** **Kshs.3,224,650.71**

During the hearing, only the Claimant testified. The Respondent chose to close its case without calling any witness.

**Claimant’s Case**

The Claimant adopted her witness statement dated 13<sup>th</sup> February 2018 as her evidence in chief. In the witness statement the claimant the claimant reiterates the averments in her memorandum of claim.

In cross-examination, the Claimant admitted that there were random payments made by the Respondent which she had deducted in coming up with her claim for Kshs.614,980. She testified that the Respondent gave her a breakdown of the amounts paid to her.

She testified that she resigned from the Respondent's employment and that the University stated that it would deduct 3 months' salary from her dues which it had deducted. She admitted that she did not give her resignation notice. It was her testimony that she had worked out the figure claimed and had a breakdown of the amounts.

However, she did not give this breakdown in her claim.

She testified that the breakdown on the loan balances was in her bank statement. She however admitted that there were several remittances towards her bank loan. She testified that there is no document showing how the loan was to be repaid or that the respondent was to make payments towards the advanced loan.

In re-examination, she testified that she worked for the Respondent from 23<sup>rd</sup> December, 2010 to July 2017. She testified that she was initially on a 3 year contract and before a year was over, she was issued with a letter converting her terms to permanent and pensionable terms.

She testified that according to paragraph 11 of her employment contract, she was entitled to gratuity at the rate of 30% of her basic salary. She testified that she was paid the first gratuity but never received any amount after the conversion of her employment terms.

She testified that she resigned because she could not even make it to work after many months of non-payment. She testified that every employee received a letter of salary arrears up to January 2017, that this was not a correct statement of the money owed to her. She testified that the staff, herself included were paid part of the amount owed but no remittances were made to her loans.

#### **Claimant's submissions**

The Claimant submits that from her personal account statement her salary was not remitted for some months. She submits that the Respondent did not pay her salary from the month of June 2016 to June 2017. She averred that her salary arrears amount to Kshs.604,980.18.

She submits that the Respondent withheld the deducted sum of Kshs.43,730 that was payable to her loan account every month. She submits that the accumulated amount plus interest is a sum of Kshs.1,407,070.53.

She submits that the Respondent was in breach of Clause 7 and 5 of the contracts dated 23<sup>rd</sup> December, 2010 and 31<sup>st</sup> August, 2011 respectively. She submitted that she was entitled to an annual basic salary increment of Kshs.1,800 per year but the increment was not effected.

It was her submission that she was entitled to gratuity of 30% of the annual basic salary but the amount was not paid after the lapse of 3 years. She submits that despite making her a permanent and pensionable employee the respondent did not remit any pension to the scheme. She relies on the Court of Appeal decision in in **Bamburi Cement Limited v William Kilonzi [2016] eKLR** that in the absence of evidence of pension membership, the claim for pension would be dismissed.

She submits that the purpose of general damages is to restore the Claimant to the same position as was held in **Standard Chartered Bank Limited v Intercom Services Limited and Others [2004] eKLR**. She submitted that there are exceptions to the general rule where the Respondent's actions were oppressive, highhanded, outrageous, callous and underhanded, as held in **Delilah Kerubo Otiso v Ramesh Chander Ndigra [2018] eKLR**.

She submits the Respondent used her services to enrol students, and that she was not accused of any misconduct thus she expected to be compensated. She submitted that the Respondent's failure to pay her dues has caused her mental anguish and that being enlisted with the credit reference bureau cost her massive damage.

She urges the Court to award her Kshs.756,00 as general damages. She submits that the lack of payment of her dues is unfair labour practice and urges the Court to allow her claim of Kshs.3,980,650.71.

#### **Respondent's submissions**

The Respondent submits that the claim is exaggerated and has not been proven. It submits that the Claimant in cross-examination stated that she had no proper breakdown of how she came up with the breakdown of Kshs.604,908.18 as salary arrears and Kshs.1,403,070.53 as unpaid loan balances.

In respect of unpaid gratuity, it submits that the Claimant admitted she resigned without notice and that there is no proper breakdown of the amount. It submits that no general damages are payable as she resigned and was not terminated.

It urges the Court to disregard the case of **Bamburi Cement Limited** (supra) as the gratuity is only payable on termination and not resignation and that the case involved a disciplinary hearing. It further relies on the case of **Kenya Tourist Development Corporation v**

**Sundowner Lodge Limited [2018] eKLR** where the Court held that special damages have to be strictly proved.

It submits that pursuant to section 38 of the Employment Act an employee is to give notice of termination while section 36 provides for payment of salary in lieu of notice. To buttress this point, it relies on the case of **James Chutha Gatherer v Nation Media Group Limited [2013] eKLR** and **Kennedy Obala Oaga v Kenya Ports Authority [2018] eKLR**.

It submits that it is only liable for the admitted arrears of Kshs.288,000. It submits that each party should bear its own costs as the claimant resigned.

### **Determination**

It is not a contested fact that the Claimant resigned from employment. The main issue for determination is therefore whether the Claimant is entitled to the reliefs sought.

### **Salary arrears**

The Respondent in its letter dated 11<sup>th</sup> February, 2017 to the Claimant tabulated the Claimant's salary arrears from the month of September 2015 to January 2017 in the sum of Kshs.266,820.36. In her Memorandum of Claim, the Claimant avers that she seeks a sum of Kshs.604,980.18 from September 2015 to June 2018. In cross-examination, she admitted that there was no breakdown to explain how she arrived at the figure.

The Claimant resigned on 30<sup>th</sup> June, 2017. There would be no basis for her to claim arrears for the period between 1<sup>st</sup> July 2017 to June 2018 when she was not in employment. The Claimant tabulated her arrears from the month of February 2015 to June 2017 in her submissions. I therefore find that the Claimant is only entitled to salary arrears in the sum of Kshs.266,820.36.

### **Unpaid Annual Increment**

The Claimant avers that the Respondent failed to pay her annual increment pursuant to Clause 7 and 5 of the letters of offer of appointment dated 23<sup>rd</sup> December, 2010 and 31<sup>st</sup> August, 2011 respectively. The Clauses provided:

*“You will be on salary scale (Kshs.45,000 x 1,800 - 90,000). Job Group G7. Your entry point will be, Kshs.63,000 per month and a housing allowance of Kshs.35,000 per month. Remuneration paid to you will be subject to taxation at such rates as may be determined by law from time to time.”*

I note that the Claimant's basic salary in January 2017 was Kshs.63,000 while in February and March 2017, it was Kshs.72,000.

I find that the prayer is not proved and I dismiss the same.

### **Loan Arrears**

The Claimant avers that the Respondent did not remit her monthly

Sacco deductions of Kshs.43,730. However, her payslips indicate that she had a Bank loan deduction of Kshs.43,730. The Claimant indeed received emails from the Bank demanding full payment of her bank arrears.

The Claimant in cross-examination stated that the Respondent made random payments of her salary. In the letter by lecturers dated 28<sup>th</sup> September, 2016 stated:

*“We the lecturers of School of Education are requesting for our salary arrears to enable us come and teach out students. At the moment the little amount that was deposited in our accounts has been withdrawn by various banks to pay off the loans that we owe them...”*

From the foregoing, the Claimant did receive random salary payments which were deducted by the bank. She testified that the breakdown in her loan balances were in her bank statement. She did not provide what was owing from her salary and only provided a schedule of the unremitted amounts in her submissions. There is no clear tabulation of the salary paid against the amounts remitted and those claimed to be unremitted. For this reason, this claim fails as it was not sufficiently proved.

### **Unpaid Retirement Pension/Gratuity from 31<sup>st</sup> August 2011 to June 2017**

The Claimant submits that pursuant to Clause 11 of her letter of appointment dated 23<sup>rd</sup> December 2010, she was entitled to gratuity at 30% of her annual basic salary. Clause 11 provided:

*“Upon successful completion of each contract term, you will qualify for a one-off Gratuity calculated at the rate of 30% of your annual basic salary. The gratuity is taxable. The gratuity shall not be paid if your separation from the University is due to gross misconduct as provided in the Employment Act.”*

She testified that she was paid the first gratuity. The Respondent submits that there was no proper breakdown on gratuity.

On 31<sup>st</sup> August 2011, the Claimant received a letter by which she alleges the Respondent unilaterally converted her terms of employment from contractual to permanent and pensionable. The Claimant accepted the terms by signing the letter on 20<sup>th</sup> May, 2011. I find that having agreed to these terms which had no provision for gratuity, the claimant can now not claim gratuity based on her previous contract. Further, she admitted having been paid gratuity once.

In respect of pension, the Claimant's letter of appointment dated 10<sup>th</sup> August, 2011 provided that she would be employed on permanent and pensionable terms with effect from 1<sup>st</sup> September, 2011. The letter did not state her eligibility to any pension scheme. Further, the Claimant's payslip did not have a pension deduction. There being no evidence of her membership to a pension scheme, this claim also fails and is dismissed.

### **General Damages**

This prayer fails for reason that the termination was not unfair but by voluntary resignation. Section 49 of the Employment Act and Section 12 of the Employment and Labour Relations Court Act only provide for compensation in circumstances where an employee's termination is unfair.

### **Conclusion**

In conclusion, I enter judgment for the claimant against the respondent in the sum of **Kshs.288,000** being the sum admitted. The respondent shall pay claimant's costs. The decretal sum shall attract interest at court rates.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 27<sup>TH</sup> DAY OF FEBRUARY 2020**

**MAUREEN ONYANGO**

**JUDGE**