

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

CAUSE NO. 2013 OF 2015

FREDERICK O. ONTERE.....CLAIMANT

VERSUS

KENYA NATIONAL UNION OF TEACHERS.....RESPONDENT

JUDGMENT

1. The Claimant asserts that he was a teacher and trade unionist. He averred that he was employed sometime in 1986 as the branch chairman Kisii Branch and was elected the national treasurer on 1st September 2006. He averred that through the circular No. KNUT/CIRC/122/2/88 dated 8th February 1988 the compulsory age for permanent and full time elected union officials was set at 60 years. The Union wrote to the Claimant on 4th November 2010 informing him he was due to retire and in the same letter advised him of the Respondent's decision that he should proceed on terminal leave with effect from 1st December 2010 to 30th May 2011 which was to be his last day with the Union. During the leave period he was entitled to full payment of salaries and allowances. He averred that the Respondent did not settle his terminal dues per the letter of 17th January 2012 which was terminal benefits of Kshs. 6,832,008.50, gratuity Kshs. 2,003,003/-, motor vehicle Kshs. 6,800,000/- less taxes on terminal benefit and gratuity Kshs. 2,465,759/- leaving a sum of Kshs. 13,169,252.50 after tax. The Claimant averred that the Respondent paid Kshs. 3,369,252.50 through EFT to his account leaving a balance of Kshs. 9,800,000/-. The Claimant averred that the Respondent had erroneously deducted the sum of 9.8 million as advance payment received between August 2007 and May 2010. He averred that he filed the suit after he had read of the judgment of a colleague. He averred that he was also entitled to salary between May 2011 and December 2011 amounting to Kshs. 3,769,384/-. He thus sought payment of the sums due including the costs of the suit plus interest on the sum of 9.8 million and the unpaid salary for May – December 2011.

2. The Respondent in its defence averred that the Claimant served it diligently at both branch and national level until he turned 60 years of age the mandatory retirement age as per the Respondent's terms and conditions of service. It averred that upon attaining the retirement age he was promptly informed of the impending retirement vide a letter dated 4th November 2010 and subsequently sent on terminal leave from 1st December 2010 to 30th May 2011 during which period he was entitled to full payment of his salary and allowances. The Respondent provided the formula that was used to pay the terminal benefits which was lump sum payment equals to total monthly emoluments multiplied by total months of service divided by 10. The Respondent averred that the Claimant's total emoluments were 3,369,252.50 which was remitted through electronic funds transfer (EFT) to his account held at Kenya Commercial Bank. The Respondent averred that whereas the total retirement benefits were Kshs. 13,169,252.50, a sum of Kshs. 9,800,000/- had been paid in advance and the figure was deducted from the final payment. The Respondent averred that the advance payments were made to the Claimant on diverse dates between 31st August 2007 and 30th May 2010. The Respondent averred that it was incorrect to assert that the sums were paid to the Claimant to run the affairs of the Respondent. It averred that the Claimant's suit was an afterthought as it was filed after the Claimant read of the judgment of a colleague which judgment the Respondent holds to have been erroneous and in which a stay was granted pending the determination of the appeal. The Respondent averred that the Claimant was not entitled to salary between May 2011 and December 2011 when he was retired and out of the service of the Respondent as his dues were being processed.

3. The Claimant and the Respondent's witness Caroline Ndolo testified. The Claimant testified that he worked from 1986 till 2010 was forcefully retired from office in 2010. He stated the environment was very hostile and the annual delegates conference in December 2010 was where officials who wanted to take over ousted them. He stated that he was not paid his correct terminal dues as the sums the Respondent deducted had been used for operations of the Respondent. The Respondent's witness stated that the Claimant was retired in accordance with the Respondent's constitution and that part of his terminal dues had been paid as advances which were recovered from the final sum due to the Claimant leaving the balance that he received. She confirmed that she did not have records to show the application for advance payments that the Respondent deducted from the terminal dues.

4. The parties filed submissions and the Claimant in his submissions submitted that upon retirement he was entitled to receive the full payment of the terminal dues. The Claimant submitted that the issue for determination was whether the Respondent was entitled to deduct the sum of Kshs. 9,800,000/- from the terminal dues of the Claimant. He submitted that nothing was easier for the Respondent than to demonstrate the deduction was legitimate since it held the records. He relied on the case of **Joseph Kamau & 486 Others v G4S Security Services (Kenya) Limited [2015] eKLR** where the Court held that "*The terminal benefits claimed constitute basic minimum conditions of employment provided under part V of the Employment Act, 2007, and enhanced in the contracts of employment. Once earned and accrued, the benefits remain due and owing to the employees continuously until paid in full.*" The Claimant submitted that the inability of the Respondent to rebut the evidence of the Claimant means that his evidence is uncontroverted. He relied on the case of **Karuru Munyoro v Joseph Ndumia Murage & Another Nyeri HCCC No. 95 of 1988 (unreported)** where Makhandia J. (as he then was) held:-

"The plaintiff proved on a balance of probability that she was entitled to the orders sought in the plaint and in the absence of the defendants and or their counsel to cross-examine her on the evidence, the plaintiff's evidence remained unchallenged and uncontroverted. It was thus credible and it is the kind of evidence that a court of law should be able to act upon." The Claimant submitted that he was entitled to the salaries and allowance from 30th May 2011 till 31st December 2011 as the terminal dues were

delayed and were only paid in December 2011. He thus urged the grant of orders sought in his claim.

5. The Respondent submitted that the Claimant's benefits were governed by the formula articulated in its defence and that he was to be paid the sum as tabulated vide the letter of 17th January 2012 forwarding the tabulated terminal dues. The Respondent submitted that the Claimant had been paid a total of Kshs. 9,800,000/- as an advance payment upon his request on the premise that the sum would be deducted from his retirement dues. The Respondent submitted that the issues for determination were whether the Claimant was paid the terminal dues; whether the claim for payment of alleged outstanding dues is sustainable; whether the Claimant can maintain a claim for payment of salary for the period he was legally retired. The Respondent submitted that the Claimant was the national treasurer of the Respondent and was well aware of the terminal dues payable to him upon retirement. The Respondent submitted that he was privy to the advance payments made to him as part of terminal dues. The Respondent submitted that the suit was a malicious attempt to try his luck upon learning of the case by his colleague Mr. George Wesonga Ojwang. The Respondent submitted that the case had been reversed on appeal in **Kenya National Union of Teachers v George Wesonga Ojwang [2017] eKLR** and submitted that in the determination the Court of Appeal held:-

As there is no evidence that the respondent was paid Shs 5.8 million as bonuses for work done, the assertion by the appellant that it made the payments to the respondent as advance payments which are deductible from the terminal benefits holds sway. It has not been dislodged. A look at the manner in which the sum of Shs 5.8 million was disbursed to the respondent in seven installments, five of Shs 500,000/-each and one of Shs 300,000/= between 5th March 2008 and 3rd September 2008 and two other installments of Shs 1.0 million and Shs 2 million on 30th June 2009 and 30th May 2010 respectively does not, ex facie, support the submission that it was in respect of bonuses for work done not least because no such allegation was made in the respondent's statement of claim dated 22nd February 2012 filed in the lower court. The Respondent submitted that the amounts paid to the Claimant could not be for operations of the Respondent as asserted by the Claimant as there was no evidence these sums were for operations of the Union. The Respondent submitted that if that was the case there ought to have been authorisation for the Claimant to use his personal money for running union affairs.

6. The Claimant's claim was a fishing expedition. He was paid his terminal dues according to the formula stated to be the monthly emoluments multiplied by the total number of months worked divided by 10. In this case the dues were calculated and established to be Kshs. 13,169,252.50. From this figure, a sum of Kshs. 9,800,000/- was withdrawn being a sum that had been paid in advance to the Claimant. The Claimant and the Respondent were all in agreement on the figures comprising the total and the sum deducted as well as the sum paid. The only grouse the Claimant had is the deduction of the 9.8 million he had received earlier. He was emboldened to file suit by the case of **George Wesonga Ojwang' v Kenya National Union of Teachers (KNUT) [2014] eKLR** where Rika J. had awarded the claimant in that suit Kshs. 16,616,209.70. The Claimant pleaded as much at paragraph 12 of his claim and in my view, the attempt by the Claimant was not based on fact and circumstances but was an effort to benefit as his colleague had done through the suit aforementioned. The terminal dues the Claimant was entitled to were properly calculated and paid out less the figure of Kshs. 9.8 million which was deducted from the final payment having been received by the Claimant prior to the retirement. He did not prove that he was entitled to this sum either as a loan to the Respondent and he himself did not have any explanation why he was paid these sums during the pendency of his service. He also never challenged the letter of 17th January 2012 being KNUT/FO/63/1/2012 which set out the retirement benefits due to the Claimant. He was given a detailed breakdown and the Claimant thus was aware of the deduction long before he filed the suit on 11th November 2015 almost 3 years later. He seeks payment of salary between May 2011 and December 2011 but he is not entitled to salary for the period he was awaiting the processing and payment of his terminal dues. He neither was an employee nor at work during the period in question to entitle him to a salary. The upshot of the foregoing is that the suit lacks merit and is dismissed. Each party to bear their own costs.

It is so ordered.

Dated at Nyeri this 4th day of June 2019

Nzioki wa Makau

JUDGE

Delivered at Nairobi this 11th day of June 2019

Radido Stephen

JUDGE