



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 1581 OF 2013

DOMINIC N. NJENGA CLAIMANT

- VERSUS -

SUSTAINABLE AGRICULTURE COMMUNITY

DEVELOPMENT PROGRAMME

(SACDEP KENYA)..... RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 8th June, 2018)

JUDGMENT

The claimant filed the memorandum of claim on 01.10.2013 through M.M. Rungare & Company Advocates. The claimant prayed for judgment against the respondent for:

- a) A declaration that the purported withholding of the benefits of the claimant by the respondent is illegal, unlawful, wrongful, improper, unconstitutional and contrary to the rules of natural justice.
- b) Upon granting prayer (a) hereinabove the respondent be ordered to pay to the claimant as per contract the sum of Kshs.1, 545, 718.48 as terminal benefits.
- c) Costs of the suit. Interest on (b) above.
- d) Any other relief deemed fit to be granted by the Honourable Court.

The memorandum of defence was filed on 12.11.2013 through Muturi S.K & Company Advocates. The respondent prayed that the claimant's suit be dismissed with costs.

The claimant's case is that he was employed by the respondent on 18.04.1994 initially as a driver and mechanic and later to the position of transport coordinator. His initial monthly salary was Kshs. 15, 500.00 and later Kshs. 36, 012.83 as at the time of termination.

The claimant's further case is that the respondent frustrated his continued service by recruiting another person as a transport coordinator and requiring the claimant to handover without informing the claimant whether he had been demoted, suspended or dismissed. The claimant being frustrated delivered the resignation letter dated 25.11.2010. The resignation letter was addressed to the respondent's executive director. The claimant raised several grievances including lack of official communication on some two reports about some motor vehicle parts where there was a benefit of doubt that they had been replaced; holding of the payments of suppliers and labour related to transport unit without any reason thereby putting the claimant in an awkward position of conflict with suppliers for a duration of over 4 months; recruitment of the transport coordinator being the position the claimant held and no official communication given as to whether he had been promoted, demoted or transferred so that the claimant's fate was left hanging; many complaints had emerged as to how the respondent's motor vehicles had been mismanaged and not serviced and the same must have related to the new transport coordinator's induction because for the claimant's 15 years of service, there had been no such complaints; and the stores had failed to account for the used spare parts. The letter then concluded thus,

“The above issues raised have of late given me very difficult times and of now not bearable not to mention leading to like mental torture. When not regretting what contribution given to SACDEP, I cannot hesitate saluting SACDEP management for opportunity given to me all those years have been working there in terms of capacity building , economically, socially and above all a very good working environment with very supportive and cooperative staff. I extend my thanks to the BOT members for their unlimited support and to Mary M. and Mr. Matura for their extra parental support.

As from the above I take this humble opportunity to tender this my resignation application with effect from the date of this letter, with a special request to access some of my benefits as an urgent matter like the Sawea and pension in support of my family especially not to affect the children education since this is untimely decision as I do the general clearance as required by the personnel manual.”

The respondent's case is that the claimant had no business at all as to what persons were to be recruited by the respondent and his duty was to perform the contract of employment as per his contract. The respondent admitted that the claimant had resigned from employment but denied that the reason for the resignation were the frustrations as was alleged by the claimant. The respondent admitted that a demand notice had been delivered but the claimant had been advised to clear with the respondent and to collect his terminal dues which amounted to Kshs. 182, 977.00. Further, the claimant had neglected to clear and had failed to collect his terminal dues. The respondent further pleaded that the claimant had through the backdoor and fraudulently obtained from CFC Bank Kshs. 514, 000.00 without the respondent's authorization or consent thereby preempting the respondent's legitimate claims. As per the respondent's Personnel Policy Manual of 2002 at clause 6.4 thereof, the respondent set up a contributory pension scheme over and above the statutory remittance to NSSF and the claim for gratuity was misguided. Further the claimant unilaterally resigned prior to taking his annual leave and therefore his prayer for pay in lieu of annual leave was misconceived as it was not available under clause 6.1 of the manual.

On 25.04.2018 the parties recorded consent thus, **“By consent all documents admitted as filed. Medical allowance Kshs. 43,000.00 granted as prayed. Claimant to file and serve submissions by 15.05.2018 and respondent by mention date on 29.05.18 at 9.00a.m for directions on judgment. Suit to be determined on documents. Costs in the cause.”**

Submissions were filed for the parties. The Court has considered the documents, the pleadings and the submissions on record. The main issue for determination is whether the claimant is entitled to the remedies as prayed for. The Court makes findings as follows:

a) The claimant prayed for a declaration that the purported withholding of the benefits of the claimant by the respondent is illegal, unlawful, wrongful, improper, unconstitutional and contrary to the rules of natural justice. The respondent has submitted that the claimant's benefits were not unlawfully withheld because they would be released once the claimant cleared with the respondent after the resignation. In the resignation letter the claimant reckoned that the personnel manual prescribed clearance with the respondent. The respondent's internal memo to all staff dated 11.07.1990 provides thus, **“(e) All Terminal benefits will be subject to deductions for recovery of the organization's deductible payments, penalties, recovery of losses of organisation property during employment and any other deductions as per the terms and conditions of service and staff service policies.”** The material on record shows that the claimant had not cleared and clearance being a precondition for payment of terminal benefits, the declaration as prayed for is found unjustified. By the internal memo of 10.09.2012 the respondent informed the claimant thus, **“The Board of Trustees and the PMT reviewed your case and accepted your resignation with effect from the date of resignation letter. You are, therefore advised to initiate the clearing process so as to access any monies due to you from the organization or any other institutions holding your funds. You are reminded that though you have been out of office since May 2012, the organization continued paying your salary up to 31st July 2012. This was a sign of goodwill. By a copy of this memo, the Finance and Resources Manager is advised to take note and follow up this case so as to facilitate a smooth flow in the clearance process.”** The Court has considered all such material facts and returns that the claimant knew that without the clearance, he would not access the terminal benefits. The Court finds that the claimant's failure to clear with the respondent amounted to a reasonable justification to withhold the terminal benefits. The prayer will therefore fail.

b) The claimant prays for gratuity at 25% of monthly salary for each completed month of service being 18 years x 12 months and then less Kshs. 514, 000.00 deductions paid to CFC under the contributory pension scheme leaving a net of Kshs.1, 322,652.20. The claimant's case is that he is entitled to gratuity as per the letter of appointment for the period worked at 25% of the gross annual salary for every year worked. The internal memo of 11.07.1990 stated thus **“(a) Terminal benefits will be paid to all permanent employees leaving the organisation under the calculation formula of ¼ (25%) of annual gross salary multiplied by the number of years worked. Gross annual salary will be the amount received monthly on the date the employee is terminating services to SACDEP – Kenya.”** The respondent's case is that as per the respondent's Personnel Policy Manual of 2002 at clause 6.4 thereof, the respondent set up a contributory pension scheme over and above the statutory remittance to NSSF and the claim for gratuity was misguided. The respondent's further case is that in 2002 the respondent joined the CFC provident fund and the claimant being a permanent member of staff, the respondent contributed and remitted 15% of the claimant's salary to the Fund. For the years preceding 2002, the claimant was a member of the NSSF and the respondent remitted all the statutory dues. First, the exhibited internal memo of 11.07.1990 was issued prior to the claimant's employment (on 18.04.1994). The claimant has not explained how the memo might have come to apply to his service as it is not shown to have been incorporated in his initial contract of service. Accordingly, the court returns that the memo did not apply to the claimant's benefits flowing from his resignation. Second, the respondent has explained that the CFC Provident Fund came to apply effective 2002 and prior to that year the relevant NSSF contributions were made in favour of the claimant. Further the Court returns that the claimant's claims in that regard are incoherent because in the letter of 12.02.2013 being the demand letter by the advocates, the claimant invokes clause 2.6:4 of Personnel & Policies Manual for Staff and urges for 15% of salary whereas in the memorandum of claims, the claimant shifts and pleads for 25% gross salary for each year worked. The figures as computed at paragraph 12 (a) of the memorandum of claim thus Kshs.36, 012.83 x 25% =Kshs.9003.20 x 18 x 12 =1836652.3 are equally not coherent. In the circumstances, the Court returns that the claimant has failed to establish the claims and prayer for gratuity.

c) The claimant has prayed for pay in lieu of annual leave from date of employment till date of resignation making 176 days converted into 5 working months making a claim for Kshs.36, 012.83 x 5 =Kshs.180,064.15. The claimant resigned on 11.06.2012 and the suit was filed on 01.10.2013, long after the lapsing of the 12 months from cessation of a continuous injury as provided in section 90 of the Employment Act, 2007. The Court finds that the pay in lieu of annual leave throughout the period of employment amounted to a continuous injury and the cause of action was time barred under section 90 of the Act. The prayer will therefore fail.

d) The parties recorded consent on Kshs.43, 000.00 medical allowance for 2008 to 2012 as was claimed and in view of that partial success by the claimant, each party shall bear own costs of the suit.

In conclusion judgment is hereby entered for the respondent against the claimant for dismissal of the claimant's memorandum of claim with orders that each party shall bear own costs of the suit.

Signed, dated and delivered in court at **Nairobi** this **Friday 8th June, 2018**.

BYRAM ONGAYA

JUDGE