



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT KERICHO

CAUSE NO. 21 OF 2018

(Before D. K. N. Marete)

BONIFACE MOMANYI NYACHAE.....CLAIMANT

VERSUS

KENYA ORIENT INSURANCE LTD.....RESPONDENT

JUDGEMENT

This matter was originated by way of an Amended Memorandum of Claim amended 4th June, 2018. The issue in dispute is therein cited as;

‘Withholding final benefits due and discrimination’

The respondent in a Respondent’s Reply to Claim dated 12th March, 2018 denies the claim and prays that it be dismissed with costs.

The claimant further amplifies his case in a Reply to Respondent’s Reply to the Claim dated 27th March, 2018.

The claimant’s case is that at all material times to this suit he was an employee of the respondent as Assistant Legal Officer. This was per the letter of appointment dated 16th March, 2016.

It is his further case that he worked with dedication and diligence meeting his KPI of Kshs.4 million savings for every month of service. Despite his zealous, unwavering and devoted commitment at work and also against existing labour laws and practice, the respondent provided him with unfavourable working conditions breaching express provisions of the law and the constitution as follows;

Particulars of Acts of breach, neglect and default by the Respondent

- a) Discriminating the Claimant based on sex and social origin contrary to Article 27, 28 and 41 of the Constitution of Kenya.*
- b) Paying the claimant lesser than other employees doing equal work contrary to section 5 (3), (5) and (6) of Employment Act cap 226.*
- c) Refusing to pay and withholding the claimant final benefits without any lawful justification contrary to section 25 of cap 226.*
- d) Making unlawful deductions to the claimant’s salary.*
- e) Not issuing the claimant with certificate of service contrary to section 51 cap 226.*

The claimant’s further case is that on 16th August, 2016, he resigned from employment and the respondent waived the notice. She further avers that despite clearance, the respondent as to date defaulted in performing her part of the contract.

The claimant’s other case is that on entry to employment, he had requested for a net salary of Kshs.50,000.00 (exclusive of deductions) and this was offered by the respondent’s human resource executive then in office. In April, 2016 he was paid a salary of Kshs.75,806.00 for 27 days worked which translates to Kshs.85,000.00 per month. This was thereafter significantly reduced and in subsequent months he received Kshs.35,000.00.

The claimant’s posits that he was underpaid on grounds of sex (being a man as well as his social origin.) His female colleagues at the same level were paid a gross salary of Kshs.120,000.00 while the other two legal officers were paid Kshs.150,000.00. When he discovered this, he raised it with human resource manager and requested for rationalization. The manager was non committal and dismissive. He therefore

prays for general and punitive damages for unlawful discrimination.

He claims as follows;

- i. *Salary due for the month of August [9/30 x 85,000].....Kshs.25,500/=*
- ii. *Salary in lieu of notice*
(notice period waived) [15/30 x 85,000].....Kshs.42,500/=
- iii. *Unlawful deductions from the months of*
May – July [5,000 x 3].....Kshs.15,000/=
- iv. *Withheld salary for the months of*
May – July [35,000 x 3].....Kshs.105,000/=
- v. *Unpaid leave days [8.6/24 x 85,000].....Kshs.30,458/=*
- Total liquidated Claim.....Kshs.218,458/=***

He prays as follows;

- a) *Kshs.261,785/=*
- b) *Certificate of service.*
- c) *General damages as pleaded at paragraphs 13, 15 and 16.*
- d) *Costs of the suit and*
- e) *Interest at court rates*

The respondent's case is a denial of the claim. This is as follows;

3. The respondent denies all the allegations made in paragraph 4 of the Claim and will demand strict proof thereof. In particular, the Respondent denies:-

- a) *Ever providing unfavorable working conditions to the Claimant.*
- b) *Ever breaching any provisions of the law and/or the Constitution.*
- c) *Discriminating the Claimant based on his sex and social origin contrary to Article 27, 28 and 41 of the Constitution of Kenya.*
- d) *Paying the claimant lesser than other employees doing equal work contrary to section 5 (3) (5) and (6) of Employment Act cap 226.*
- e) *Ever refusing to pay or withholding the Claimant's alleged final benefits.*
- f) *Ever made unlawful deductions to the Claimant's salary*
- g) *Ever failing to issue the Claimant with a certificate of service*

The respondent's case further comes out as follows;

4. The respondent will crave that:-

- a) *The Claimant entered into a contract with the Respondent wherein his salary was agreed at Kshs.50,000/= inclusive of house allowance as seen in the letter of Employment dated 16.3.2016 (Appendix 1).*
- b) *The Claimant's employment commenced on 4.4.2016 and not 16.3.2016.*
- c) *The Claimant's salary for April 2016 was erroneously computed to include 15 days worked in March, and when the error was*

discovered, the Claimant was advised that the overpaid amount would be recovered in subsequent months.

- d) *The Respondent's band of salaries shows that for Assistant Legal Officers, the basic salary was 30,000 to a maximum of Kshs.70,000.00*
- e) *The Respondent does not pay different salaries to men and women based on their sex, or based on their social origin.*
- f) *The payment of salaries by the Respondent to its workers is dependent on the salary band of the worker, and the length of service.*
- g) *Employees of equal rank and equal service would earn equal pay while those of different ranks and different service periods would earn different pay.*
- h) *There were no other Legal Assistants at the time in question employed by the Respondent, but there was an intern and two legal officers, whose ranks and pay were different from the Claimant's, a legal Assistant.*
- i) *The Respondent did not have any "female colleague" of the Claimant's job level during the currency of the Claimant's employment, nor did the Respondent ever pay Kshs.120,000/= gross pay to any such "female colleague on the same level".*

Again, the respondent's come out thus;

6. *Without prejudice to paragraph 5 above, the Respondent specifically denies that:-*

- a) *The Respondent ever waived Notice of termination of Contract.*
- b) *The Respondent ever refused, neglected and/or failed to perform its obligations under the contract of employment.*
- c) *There was ever any agreement that the Claimant would be paid a net salary of Kshs.50,000/=*
- d) *The Respondent is aware or prior made or authorized the alleged conversations in paragraph 7 and 8 of the Claim.*
- e) *The Respondent ever requested, or received any letter from the alleged then employer of the Claimant alleged in paragraph 8 and 9 of the Claim.*
- f) *The Respondent ever forced the Claimant to sign the letter of employment*
- g) *The Respondent made, through its authorized officers, any assurances on "equal pay, equal work" basis, and craves that any such assurances were unnecessary.*
- h) *The Claimant's salary for April 2016 was Kshs.75,806/= and craves the said salary was wrongly computed and mistake clarified to the Claimant.*
- i) *There was ever any reduction of the Claimant's salary from the contracted salary.*
- j) *The Respondent ever discriminated or underpaid the Claimant on the grounds of sex or social origin*
- k) *The Respondent ever paid its women employees differently from men on account of their sex or social origin*
- l) *The Claimant ever raised any concerns on the alleged sexual or social origin discrimination or at all.*
- m) *The Respondent is aware of another assistant legal officer employed before the Claimant and earning, based on sex and social origin, more pay than the Claimant.*

The respondent in the penultimate expresses his case thus;

7. *The Respondent denies all the Claimant's claims set out under paragraph 15 of the Claim, and further denies:-*

- a) *Owing the Claimant any salary for August 2016.*
- b) *Owing any amount in lieu of Notice.*
- c) *Ever having made, or owing any amount due to, any unlawful deductions in May, June and July.*
- d) *Withholding any salary or part thereof for the months of May to July 2016.*
- e) *Owing any money for unpaid leave*

The matter came to court variously until the 10th July, 2018 when the parties agreed on a determination by way of written submissions.

The issues for determination therefore are;

1. Whether the claimant was discriminated against on the basis of his sex and social origin contrary to Articles 26, 28 and 41 of the Constitution of Kenya, 2010?
2. Whether the claimant's terminal dues were withheld?
3. Is the claimant entitled to the relief sought?
4. Who bears the costs of this claim?

The 1st issue for determination is whether the claimant was discriminated against on the basis of his sex and social origin contrary to Articles 26, 28 and 41 of the Constitution of Kenya, 2010. The claimant in his written submissions dated 12th July, 2018 reiterates his case and submit discrimination on the basis of sex and social origin in violation of the Constitution of Kenya, 2010. This vehemently denied by the respondent.

The respondent submits that the claimant vide a letter of appointment dated 16th March, 2016 was employed at an agreed salary of Kshs.50,000.00 – see annexure 1 of the Respondent's Reply to claim. He was paid all his salaries as agreed, taking into account a computation error that raised this salary to Kshs.75,806.00 paid on the first month of employment – April, 2016.

It is the respondent's further submission that the claimant's allegations of discrimination on the basis that his other colleagues, all of whom were female earned higher salaries than his was his to prove. The burden of proof of discrimination as alleged and submitted lies on the claimant and this has not in the least been discharged. He does not adduce any evidence in support of a case of discrimination on any basis and therefore throws everybody on a wild goose chase. I agree.

It was always the burden of proof of the claimant to tender evidence on these serious allegations of discrimination. He did not thereby failing to satiate the provisions of section 107 of the Evidence Act, Chapter 80, Laws of Kenya, which provides as follows;

i) Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

ii) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

It is trite law that he who asserts, not he who denies must prove (*ei incumbit probatio qui dicit, non qui negat.*) The claimant's case of discrimination is therefore superfluous and I find as such. This answers the 1st issue for determination.

The 2nd issue for determination is whether the claimant's terminal dues were withheld. Again, the respondent denies this *in toto*. It is her case that the respondent resigned on 18th August, 2016 and in a letter of acceptance of even date the respondent set out that the claimant would be paid his salary upto the date of resignation subject to statutory deductions and taxation. The claimant did not attend the respondent nor did he complete his staff exit form with a view to clearance and payment. A computation of his final dues would have been as follows;

i. Salary upto 18.8.2016.....Kshs.30,000/=

ii. Nine days leave 9/30.....Kshs.15,000/=

Kshs.45,000/=

Less salary Advance Kshs.15,806/=

Less 15 days in lieu of Notice Kshs.25,000/=

NET Kshs.4,194/=

It is her submission that if this was subjected to taxes and statutory deductions, it would result in a negative net balance of payment.

It would appear that the claimant is the author of his allegation and claim of nonpayment of final dues. Why? Even on clear communication on the terms of payment of these dues, he failed to comply with the procedural requirements for such payment. He did not clear or follow up computation, ostensibly opting to come to court for better tidings. This also applies to the issue of a certificate of service. This claim must therefore fail. No terminal dues for the claimant were withheld by the respondent, or at all.

The 3rd issue for determination is whether the claimant is entitled to the relief sought. He is not. Having lost on the salient basis of his claim, discrimination, he becomes disentitled to the relief sought.

This is an interesting matter. Sizably daring. What with a claimant who lays down a claim on *inter alia*, discrimination but does not take any efforts to prove the same. This claim is preposterous. I am not sure whether it was actuated by a quest to actualize a genuine claim or a

mere gamble. The future would have to provide an answer for this.

I am therefore inclined to dismiss the claim with orders that each party bears their own costs of the claim.

Delivered, dated and signed this 23rd day of July, 2018.

D.K.NJAGI MARETE

JUDGE

Appearances

1. Mr. Orenge instructed by Ongori Auta & Company Advocates for the claimant.
2. Mr. Karanja instructed by Peter M. Karanja Advocate, for the respondent.