



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 2075 OF 2015

(Before Hon. Lady Justice Maureen Onyango)

LILIAN MWENDE NZABU.....CLAIMANT

-VERSUS-

THE TRUSTEES AND OFFICE

BEARERS OF DIOCESE OF ANGLICAN

CHURCH OF KENYA.....RESPONDENT

JUDGMENT

The facts of the case are not in dispute. The claimant was employed by the respondent as a Kenya Enrolled Community Health Nurse by letter dated 30th June 2000. The engagement was effective from 1st July 2000. She worked without incident until 1st May 2015 when she tendered her resignation giving one month's notice. She served the notice period and her engagement with the respondent ceased on 1st June 2015.

The claimant's starting salary was Kshs.7,280 which increased gradually to Kshs.19,081 at the time of leaving employment.

By letter dated 5th July 2015 the claimant requested the respondent to pay her gratuity for the period worked from 2000 to 2015. Apparently the respondent did not reply to the letter. The claimant thereafter approached her advocate who sent a demand letter dated 22nd September to the respondent title "*WRONGFUL, UNLAWFUL, ILLEGAL, UNCONTRACTUAL, UNSTATUTORY NON-PAYMENT AND WITHHOLDING OF PENSION CONTRIBUTION, NSSF AND GRATUITY DUES AND TERMINAL DUES OF LILIAN M. NZABU.*" Apparently there was no response to the demand letter.

In the memorandum of claim dated 23rd November 2015 and filed on even date the claimant avers that –

That by virtue of her employment contract with the respondent, the claimant was contractually entitled to and enrolled to the Church African Church of Kenya Staff Provident Fund in 2003.

That it was an express term of the claimant's employment contract that since she was eligible and had joined the Provident Fund, the respondent would from her salary deduct and forward to the Provident Fund her provident/pension contribution together the respondent's contribution wherein the respondent would make payments to the Provident Fund to match the claimant's contributions. Viz 50% to 50% basic contributions.

That under statutory law the respondent was required also to deduct from the claimant's salary, make and remit timely NSSF deductions.

The claimant carried out her employment duties diligently to the respondent and at some stage in 2011 realized that the respondent had without any cause unilaterally, un-contractually, illegally and unlawfully failed to deduct and make her Provident Fund Contribution and/or withheld her contributions to the Church's Provident Fund from 2005 without any notice, explanation, reason and/or lawful case.

The claimant repeatedly protested to the respondent about the unilateral adverse action and she was severally assured that the respondent would update and make the necessary follow up upon which the claimant resorted to making the payments from her own salary by personally deducting and making her contributions to the Provident Fund directly as she awaited the respondents to update and make its pension contribution payments.

The claimant further avers that she also opted to clear arrears in respect to her percentage and proportion of contributions to the Provident Fund whilst optimistic and under the legitimate expectation that the respondent would likewise clear all the outstanding arrears and also be current in its payment of its portion, share and/or percentage of the pension payment.

The claimant also avers that she later on further realized that the respondent had without any cause, unilaterally, un-contractually, illegally and unlawfully failed to deduct and remit her NSSF contributions.

The claimant prays for the following remedies –

(1) Declaration that the respondent's failure and omission to pay, deduct and remit its pension contribution alongside the claimant's contribution, pay NSSF, gratuity and/or accrued annual bonuses is wrongful, callous, unlawful, arbitrary, illegal, un-procedural, unconscionable, wrongful and un-contractual.

(2) Payment to the claimant by the respondent of:-

a. Provident Fund Arrears	307,080
b. Total NSSF	38,400
c. Total Gratuity	133,859

(3) Service letter and unpaid outstanding annual bonuses for 14 years at Kshs.30,000 per year.

(4) Costs of this suit and interest.

(5) Any further relief as the court may deem fit.

The respondent filed a reply to the memorandum of claim denying all the averments in the memorandum of claim. It is the respondent's case that it stopped payment to the Provident Fund in 2005 with the claimant's consultation and consent and that the claimant secretly continued making contributions to the Provident Fund both on her own behalf as employee and on behalf of the respondent as employer without the respondent's knowledge or consent.

It further avers that from 2005 the claimant was entitled to NSSF contributions only. The respondent denies only the claimant provident fund arrears, NSSF arrears, gratuity and bonuses as claimed and further denies withholding the claimant's service letter. It prays that the claim be dismissed.

The claimant filed a reply to statement of response joining issues with the respondent.

Since the facts of the case were uncontested and the only issue was whether or not the claimant was entitled to the remedies sought, the parties agreed to dispose of the claim by way of pleadings as provided under Rule 21 which provides that the court may either by an agreement of all parties or on its own motion proceed to determine a suit before it on the basis of pleadings, affidavits, documents filed and submissions made by the parties.

The claimant submitted that her employment contract and terms of service could not be altered other than in writing and with her consent, that it was unlawful for the respondent to purport to alter the claimant's terms of service without due notification and securing her acceptance in writing. It is further submitted that NSSF contributions are mandatory and does not oust additional contributions to private pension funds which generally offer higher returns, is more lucrative and attracts or retains employees in service.

The claimant urges the court to find that the bare response of the respondent did not challenge the claim for annual bonus and gratuity claimed by the claimant, that the respondent failed to discharge its obligation to procure minutes, resolutions or other communication which would have suspended or withdrawn the pension and that the respondent has not set out the basis that NSSF was at any time an optional contribution.

The claimant relied on the case of **NYAMODI OCHIENG NYAMOGO -V- TELKOM KENYA LIMITED [2012] eKLR** in which the court held that–

“Where like this case it was alleged without being proved that some board meeting had been called to discuss and prove the retirement of the claimant wherein the court held that: -

At page 16... (vii) Circumstances which led to the issue becoming a candidate for deliberations before said board meeting have not bene displayed. There is therefore nothing to counter the plaintiff's assertion that he had a good work record with the defendant and it is only malice which could account for the defendant...

...The defendant has not disputed the fact that the plaintiff had been employed on permanent and pensionable terms...

...Page 17 sets out that pension and gratuity is normally provided for in writing and cannot be varied otherwise...

...page 21...(i) *There are no minutes to show that indeed such an issue ever arose before the board of directors.*

(ii) *There is no communication for the defendant to the plaintiff alerting the plaintiff that such deliberations are going on about his retirement.*

(iii) *In the absence of exhibition of minutes of the deliberations of the Board on the issue, there is nothing to show that indeed such deliberations took place.*

(iv) *Matters afore said in (a), (b) and (c) above are within the control of the defendants who were in a position to produce them but they did not. Their failure to do so invites the drawing of an inference by the Court that these are either non-existent and if they exist their production would have been prejudicial to the interests of the defendant in this case.*

At page 24 with regard to prayed on the payment of the plaintiff benefit in full under the permanent and pensionable scheme the court finds this is proper –

Although the defendant rubbished these working no attempt was made by them to offer evidence on how gratuity and other pension entitlement due to the plaintiff could have been worked.”

The claimant urged the court to accept and adopt the calculations made by the claimant.

For the respondent it was submitted that both demand letter and the claimants witness statement are silent on the source of the figures the claimant relied on for the claim for gratuity, pension and NSSF. It is submitted that the figures lack credibility and are insufficient to form the basis of a claim. The respondent submits that gratuity is only payable when the claimant is not a member of a registered provident fund scheme, NSSF or a gratuity/service pay scheme as provided in Section 35(5) and 35(6) of the Employment Act.

The respondent submits that the claimant was paid her provident fund benefits together with bonuses and accrued interest up to 31st July 2015, retaining 50% of the employer's contribution which the claimant can only withdraw upon attaining the age of 50 years. The respondent referred to its appendix 6, 7 and 8 annexed to the response. It submits that the claimant was paid the sum of Kshs.613,406.76 vide cheque no. 10579.

The respondent prays that the claim be dismissed.

Determination

As I have stated above, the facts are not in dispute. The only issue for determination is therefore if the claimant is entitled to the remedies sought.

Provident Fund Arrears

The claimant prays for arrears of Kshs.307,080 under this head. She has not stated how she arrived at the figure. In the claim and in her statement, she states that the respondent stopped making remittances to the provident fund and she opted to continue on her own and was remitting both the employee's and employer's contribution from her own resources.

The claimant has pleaded that the stoppage of remittances was illegal and she opted to make the payments herself. She avers that she repeatedly protested to the respondent about the unilateral stoppage of the remittances and was severally assured that the respondent would make the necessary updates and follow up which was not done.

The respondent on the other hand states that the stoppage of the provident fund contributions was discussed and consented to by the claimant and she made secret remittances which it only learnt about when the provident fund remitted her contributions through the respondent after she resigned.

The claimant worked from 2005 to 2015 after the provident fund was stopped. She did not adduce any evidence to prove that she ever protested the stoppage for the 10 years. Having not protested and having taken over and paid the remittance for such a long period the court is of the view that she acquiesced to the stoppage and cannot therefore complain of the same. The same is further not provided for in her letter of appointment and is not mandatory under any law.

For these reasons the court finds no merit in the claim and dismisses the same.

NSSF

The claimant prays for NSSF of Kshs.38,400. It is not clear on what basis she claims the same. The NSSF statement annexed to the memorandum of claim as appendix 4 reflects that remittances were made in the sum of Kshs.400 per month from May 2009 to May 2015 with the exception of July and August 2009 when no contributions were made.

In any event NSSF contributions are statutory contributions which cannot be made to the claimant as the National Social Security Fund Board is mandated by statutory authority to collect the funds from defaulting employers, complete with powers to prosecute, charge interest and penalties and file suit for recovery. The only option available to the claimant is to report to NSSF so that the Board can collect the same directly from the respondent. The payment is thus not due to the claimant with the consequence that the claim is dismissed.

Gratuity

Gratuity is not provided for under the claimant's terms of employment or by law. The claimant did not plead the basis upon which she became entitled to gratuity or how she arrived at the figure claimed.

I find the prayer to be neither a statutory nor a contractual benefit of the claimant. The claim has no basis and is dismissed.

Annual Bonus

The claim for annual bonus like the other prayers, has not been justified by the claimant. Neither the law nor her contract of employment provide for the same.

I find no merit in the prayer and dismiss the same.

Certificate of Service

The claimant is entitled to a certificate of service as provided under Section 51 of the Employment Act and the respondent is directed to issue the same to her within 30 days of delivery of this judgment.

Orders

Having found no merit in the prayers for provident fund arrears, NSSF arrears, gratuity and bonuses, the prayers are dismissed. The only prayer granted is for issuance of certificate of service to the claimant.

There shall be no orders for costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 18TH DAY OF JULY 2018

MAUREEN ONYANGO

JUDGE