



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**CAUSE NO. 625 OF 2011**

*(Before Hon. Lady Justice Maureen Onyango)*

**MORRIS NDUGURE.....CLAIMANT**

**VERSUS**

**TRUSTEES OF THE AGRICULTURAL**

**SOCIETY OF KENYA.....RESPONDENT**

**JUDGMENT**

The claimant was employed by the respondent by letter of appointment dated 21<sup>st</sup> April 1993 as an Accountant III. He worked for the respondent until 29<sup>th</sup> July 2008 when he tendered his resignation letter dated 30<sup>th</sup> June 2008. It is his averment that during the period he was in employment, he was entitled to gratuity in accordance with the collective bargaining agreement (CBA) then in force and that he was not paid gratuity for the period May to December 1993, when he was promoted and joined the respondent's Staff Provident Fund.

By letter dated 23<sup>rd</sup> April 2007 the claimant wrote to the respondent seeking refund of over-deductions on advances he had taken which he avers he was never refunded. The claimant further avers that by letter dated 30<sup>th</sup> May 2007, he was transferred to the respondent's Kisii Branch effective 4<sup>th</sup> June 2007 for which the respondent was to meet costs for transportation of his baggage but the respondent failed to approve the quotations submitted by the claimant. He was thus forced to use his own resources to facilitate the transportation of his baggage. The costs thereof was never refunded by the respondent.

The claimant further avers that his salary for May, June and July 2008 was withheld by the respondent without just cause. He further avers that he is entitled to 60 leave days which he had earned but which the respondent did not pay for upon his leaving the respondent's service. The claimant further avers that the respondent failed to pay his medical allowances.

By his statement of claim dated 9<sup>th</sup> March 2011 claimant seeks the following remedies –

- a) Payment of three months' salary amounting to Kshs.144,240
- b) Payment of Unpaid transport allowance amounting to Kshs.45,000
- c) A sum of Kshs.62,000 being the balance of 30 days subsistence allowance payable on the transfer as per the Respondent's Constitution.
- d) 60 days unpaid leave amounting to Kshs.44,327
- e) Payment of Gratuity amounting to Kshs.36,312
- f) Reimbursement of over deduction in an Advance amounting to Kshs.16,722
- g) Payment of medical allowances amounting to Kshs.9,600
- h) Co-operative deductions for the three (3) unpaid months stated in (a) above which were not remitted amounting to Kshs.38,550

**Total Kshs.396,751**

- i) Costs of this suit
- j) Interest on at court rates

The respondent filed a memorandum of reply and counterclaim in which it denies that the claimant is entitled to gratuity as claimed on grounds that the CBA did not apply to the claimant at the time of resignation, as he was a management staff. The respondent further denies any over deduction, obligation to pay for transportation of claimant's baggage allowance of Kshs.45,000 or withholding claimant's salary for May, June and July 2008. The respondent further denies that the claimant is entitled to 60 days paid leave.

The respondent counterclaims as follows against the claimant –

That during the course of his employment with the Respondent, the Claimant misappropriated and converted to his own use monies belonging to the Respondent totalling Kshs.1,119,460 made up as follows; -

|  |                       |
|--|-----------------------|
| Undertakings.....                                    | Kshs.315,952          |
| Underbankings.....                                   | Kshs.275,887          |
| Un-supported payments and office float.....          | Kshs.374,650          |
| Direct banking.....                                  | Kshs.61,350           |
| Office float un-surrendered and unaccounted for..... | Kshs.91,621           |
| <b>Total</b>   | <b>Kshs.1,119,460</b> |

The respondent prays that the claimant's suit be dismissed and judgment be entered in favour of the respondent on the counterclaim as follows –

- a) Kshs.1,119,460
- b) Costs of the Suit
- c) Interest on (a) above at Court rates from the date of filing suit till payment in full.

The claimant filed a reply to memorandum of reply and reply to counterclaim denying the averments in the counterclaim and reiterating the averments in the statement of claim.

At the hearing of the case the claimant testified on his behalf while the respondent called ANNE WANGUMO NGUGI, its Human Resource Manager who testified on its behalf. The parties thereafter filed and exchanged written submissions.

The issues arising for determination from the pleadings, evidence and submissions are the following –

- 1) Whether the claimant is entitled to the prayers in the claim.
- 2) Whether the respondent is entitled to the prayers in the counterclaim.

The respondent's witness Ann Wangumo Ngugi did not state that the claimant was not entitled to any of the prayers sought. Indeed, she admitted that the clamant has not been paid his terminal dues. Her only reason for the respondent not having paid the terminal dues was that the respondent needed some documentation which was not availed. The only issue for determination is therefore if the claimant is entitled to the prayers sought in his claim. I will consider each of the prayers of the claimant.

**(a) 3 months' salary for withheld for May, June and July 2008**

The respondent's argument was that the claimant was supposed to give three months' notice but gave only one month's notice.

The claimant's letter of resignation reads as follows –

*“The Chief Executive*  
*A.S.K Head Office*  
*P. O Box 30176,*

Nairobi.

30<sup>th</sup> June 2008

Dear Batram

The above matters refers.

In accordance to A.S.K code of the regulation section F I .1(b) 1 hereby submit three months' notice of termination of my service to the society effective 1<sup>st</sup> July 2008. My last day of working for the society will be 31<sup>st</sup> July 2008.

Please take the month of July and my leave balance as the three months in lieu of notice and expedite in payment of my dues held by the society or otherwise.

Regards.

SIGNED

Mr. Morris Ndugire

10147 – 00100

Nairobi

Cc Branch Chairman”

[Emphasis added]

In the resignation letter the claimant states that his service in July will serve as notice and the respondent would recover the balance of notice from his leave balance.

It has not been denied that the claimant was not paid salary for the months of May, June and July 2008. The respondent has further not given any reason or justification for withholding of the salary. I find that the claimant is entitled to his salary for the months of May, June and July 2008 in the sum of Kshs.69,054 per month based on his payslip for the month of July 2008 at page 28 of respondent's bundle of documents.

I accordingly award him Kshs.207,162 being gross salary for the said months.

#### **(b) Transport Allowance**

The claimant prayed for Kshs.45,000 transport allowance. Under Section G, paragraph 5.6 of the respondent's Code of Regulations annexed to the claimant's bundle as appendix 1 under Disturbance Allowances, an officer who is transferred from one station to another is granted a disturbance allowance equivalent to one month's basic salary and is also entitled to baggage allowance in accordance with paragraph 5.14 which provides as follows–

##### *“5.14 Baggage Allowance*

*a. An officer traveling on duty by air shall not be granted any baggage allowance in addition to the free allowance on his air ticket, unless an excess is required for official purpose in which case the Society shall consider reimbursement for excess baggage.*

*b. The Society shall arrange to meet the costs of transport of an officer's baggage by rail, bus or other mode of transport when travelling on first appointment, transfer, duty or termination of appointment. In each case the Society shall the discretion to limit the baggage allowance to reasonable weights.”*

The respondent's response to claimant's letter seeking baggage allowance was that it was on the higher side but without offering what was considered reasonable. Since no offer has been made by the respondent, I award the claimant as prayed in the sum of Kshs.45,000.

#### **(c) Balance of Subsistence Allowance**

As stated under (b) above, the respondent's Code of Regulations provides for disturbance allowance equivalent to one month's basic salary. The claimant has not stated what he is claiming as the balance of subsistence allowance. Under Section 9, paragraph 5.7 of the respondent's Code of Regulations, subsistence allowance is payable when travelling on duty outside Kenya and not while on transfer.

I therefore find that this prayer has not been proved and dismiss the same.

#### **(d) 60 days unpaid leave**

In his letter of resignation the claimant offered his leave allowance in lieu of notice. He therefore does not have any leave balance. The prayer is dismissed.

**(e) Gratuity**

At the time of termination of his employment, the claimant was not a member of the union and was therefore not covered by the CBA. He was a member of the respondent's Staff Provident Fund.

In his testimony, the claimant states that what he is claiming is for the period before joining the provident fund. He however did not produce the provisions relating to the gratuity for unionisable employees or state his salary at the time of joining the provident fund. He further did not explain how he arrived at the figure claimed.

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

**(f) Reimbursement of Over deduction**

The claimant prays for Kshs.16,722. The respondent states the claimant did not provide proof of over deduction of his salary to pay the salary advances. He has not provided the court with the proof leaving his prayer without proof. Appendix 10 of claim which the claimant refers to is not proof of payment.

The claim having not been proved is dismissed.

**(g) Medical Allowance**

The claimant prays for payment of medical allowance of Kshs.9,600. The claimant did not explain when or how the medical claim arose.

I find the prayer not proved and dismiss the same.

**(h) Co-operative deductions for three months unpaid**

Having not been paid for three months, it follows that no deductions were made from a non-existent salary.

I find no proof of the deductions and dismiss the prayer.

**Counterclaim**

The respondent counterclaimed the sum of Kshs.1,119,460. No evidence was adduced to support the counterclaim. The claims relate to Kisii Branch and cover periods before the claimant was transferred to Kisii.

I find no proof of the counterclaim and dismiss the same.

**Costs and Interest**

The claimant having substantially succeed in his claim, I award him costs of the suit together with costs for the counterclaim. He will also have interest on the amounts granted from date of filing suit. Interest will be payable on the decretal sum after subjecting the same to PAYE where applicable.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 28<sup>TH</sup> DAY OF SEPTEMBER 2018**

**MAUREEN ONYANGO**

**JUDGE**