



REPUBLIC OF KENYA



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**Wanjiku v Vanela House of Coffees (Cause 454(N) of 2009)
[2018] KEELRC 663 (KLR) (9 November 2018) (Judgment)**

Hassanath Wanjiku v Vanela House of Coffees [2018] eKLR

Neutral citation: [2018] KEELRC 663 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 454(N) OF 2009
MA ONYANGO, J
NOVEMBER 9, 2018**

BETWEEN

HASSANATH WANJIKU CLAIMANT

AND

VANELA HOUSE OF COFFEES RESPONDENT

JUDGMENT

- 1 The claim herein is filed by Hassanath Wanjiru who avers that she was employed by the respondent on October 27, 1998 on terms and conditions of service as stipulated in her letter of appointment of the same date. She resigned from employment vide letter dated March 1, 2009.
- 2 It is her averment that upon resignation she was not paid severance pay and benefits as required by law such as NSSF and NHIF.
- 3 By her memorandum dated 11th August 2009, she seeks the following remedies against the respondent –
 - a. Severance allowance of.....Kshs.124,950
 - b. Statutory dues
 - i. National Social Security Fund (NSSF).....Kshs.48,000
 - ii. National Health Insurance Fund.....Kshs.38,000TOTAL Kshs.211,350
 - c. Costs of the dispute and interest on the above at court rates
 - d. Any other relief that the court would deem fit to grant.



4 At the hearing the claimant testified that she wrote a letter of resignation on March 1, 2009 and served one month's notice, that she was asked to willingly resign by the respondent and that upon expiry of her resignation notice she was paid salary for the month only.

5 In the submissions filed on behalf of the claimant it is stated that the respondent made deductions of NSSF and NHIF but failed to remit the same. The claimant relied on Section 19 of NSSF Act which provides inter alia –

“(1) Every employer who under a contract of service, employs one employee or more shall register with the fund as a contributing employer and shall register his employee or employees, as members of the fund.”

6 On the prayer for severance pay the claimant submitted that Section 35 (1) and (5) of the Employment Act provides that –

35. Termination Notice

(1) A contract of service not being a contract to perform specific work, without reference to time or to undertake a journey shall, if made to be performed in Kenya, be deemed to be –

a. where the contract is to pay wages daily, a contract terminable by either party at the close of any day without notice;

b. where the contract is to pay wages periodically at intervals of less than one month, a contract terminable by either party at the end of the period next following the giving of notice in writing; or

c. where the contract is to pay wages or salary periodically at intervals of or exceeding one month, a contract terminable by either party at the end of the period of twenty-eight days next following the giving of notice in writing.

(5) An employee whose contract of service has been terminated under subsection (1)(c) shall be entitled to service pay for every year worked, the terms of which shall be fixed.

7 The claimant relied on the decision in the case of Elijah Kipkoros Tonui v Ngari Opticians t/a Bright Eyes Limited [2014] eKLR, where Rika J. stated –

“Basic membership to the National Security Fund or other Schemes is not in itself a bar to an employee accessing service pay under Section 35[5]. As the evidence in this Claim has shown, an employer could register an employee with the NSSF, but fail to remit the monthly contributions, or remit irregularly. Secondly, the Court must look at the social security route that confers overall greater benefit on the employee.”

8. The respondent filed a statement of defence admitting the existence of an employment contract with the claimant but denies that the claimant is entitled to the prayers sought.

9 At the hearing Mary Kimoro, RW1 testified that she is the Manager of the respondent. She testified that the claimant was an employee of the respondent and they had a wonderful relationship as the claimant was reliable and honest. The claimant was engaged as a waitress at a salary of Kshs.5,500 per month and rose through the ranks to the position of supervisor earning Kshs.25,000 per month. The respondent remitted NSSF and NHIF for the claimant and all staff over and above the salary. The respondent started remitting NSSF in 2006 before it became mandatory for employers with less than



five employees and made remittances from January 2006 to March 2009 when the claimant left service. RW1 referred the court to appendices 7, 8, 9 and 10 being certificates of registration for NSSF and NHIF and certificates of remittances for both. She further referred the court to appendix 11, NHIF remittance statement from the period January 2006 to September 2009.

10. She testified that in addition the respondent had a medical cover for staff with Avenue Hospital, which the claimant benefited from together with her child.
11. RW1 testified that the claimant had resigned twice before and each time she persuaded her to rescind the resignation because she was so good at her work. That when the claimant resigned for the third time on 1st March 2009 she felt that she can no longer request her to stay on, that the claimant served notice and left amicably and all her dues were paid.
12. RW1 testified that the claimant is not entitled to the prayers sought. She is not entitled to severance as she resigned, that she was not forced to resign, that the case ought to be dismissed.

Determination

12. The claimant having resigned from employment, the only issue for determination is whether she is entitled to the prayers sought.
13. She prayed for NSSF and NHIF which from the statements filed by the respondent, were remitted to the said bodies. Even if no remittances had been made by the respondent, the claimant would still not be entitled to a refund of the same as both NSSF and NHIF have statutory and administrative structures to collect the same from defaulting employers, backed up by powers to prosecute and charge penalties for late payment.
14. On the severance pay claimed the claimant appears to confuse the term with service pay. In the submissions filed on behalf of the claimant reference is made to Section 35(5) and (6) which provides for service pay, while severance is provided for under Section 40(1)(g) as a benefit for an employee who has been declared redundant.
15. Under Section 35(6) an employee who is a member of NSSF is not entitled to service pay. The claimant having been a member of NSSF is not entitled to service pay. She is also not entitled to severance pay as she was not declared redundant.
16. The result is that the claimant's case fails in its entirety. The same is accordingly dismissed. Each party shall bear its costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 9TH DAY OF NOVEMBER 2018

MAUREEN ONYANGO

JUDGE

