



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 179 OF 2018

(Formerly CMCC No. 7201 of 2005 at Milimani, Nairobi)

BEATRICE OMBAKA ASIENWA.....PLAINTIFF

VERSUS

CITY COUNCIL OF NAIROBI.....DEFENDANT

(Before Hon. Justice Byram Ongaya on Thursday 20th December, 2018)

JUDGMENT

The plaintiff Beatrice Ombaka Asienwa filed the memorandum of claim on 06. 07.2005 through Okongo Omogeni & Company Advocates. The plaintiff prayed for judgment against the defendant for:

- a) Kshs. 430, 000.00 plus Kshs. 19, 484 monthly till payment in full.
- b) Costs of the suit.
- c) Interest on (a) and (b) at Court rates until payment in full.
- d) Any other relief that the Honourable Court may deem fit and just to grant in the circumstances.

The plaintiff pleaded and testified that at all material time between 01.07.1986 and up to 31.07.1999 the plaintiff was employed by the defendant in the position of Welfare Officer Social Services and Housing Department on local pensionable terms of service at Kshs. 19, 484.00. The appointment made it mandatory for her to be a member of the Kenya Local Government Officer's Superannuation Fund and by the time of retirement she had contributed and accumulated Kshs.250, 000.00 which had been deducted but not remitted by the defendant to the said Fund. The plaintiff retired on 31.07.1999 and had accumulated 205 paid leave days for which she had not been paid all totalling to Kshs. 180, 000.00.

The terms of service were that the plaintiff would continue to receive her full salary till the defendant fully remitted the contribution to the Kenya Local Government Officer's Superannuation Fund and the plaintiff claimed her last monthly pay of Kshs. 19, 484.00 till the defendant fully complied.

The plaintiff's claim against the defendant was therefore Kshs. 430,000.00 and salary of Kshs. 19, 484.00 from 31.07.1999 till payment in full.

The defendant filed the defence on 02.08.2005 through G.N. Gichuhi Ngari & Company Advocates. The defendant prayed that the plaintiff's suit be dismissed with costs. The defendant denied that the plaintiff had accumulated leave days as claimed; and denied that the plaintiff was entitled to as prayed for. The defendant admitted that the claimant was its employee.

The plaintiff testified to support her case. The respondent failed to file a witness statement and failed to avail a witness.

The evidence is that the plaintiff was employed by the respondent to the position of Welfare Officer in the Social Services Department by the letter dated 17.07.1986. The plaintiff successfully served the 6 months probationary period and was confirmed in appointment by the letter dated 25.06.1987. Over time the plaintiff rose through the ranks to the position of Chief Administrative Officer in the Public Health Department at a basic salary of Kshs. 15, 450.00 and house allowance of Kshs.4, 000.00 making a gross pay of Kshs.19, 450.00.

As per the terms of service the plaintiff was deducted, on monthly basis, contributions to the Kenya Local Government Officer's

Superannuation Fund (KLGOSF) as per exhibited pay slips.

By the letter dated 14.04.1999 the plaintiff gave a three months' notice of her intention to retire from the respondent's service due to her personal reasons. By the letter dated 29.11.1999 the defendant accepted the plaintiff's request and that she'd retire under rule 40A of the KLGOSF Rules as approved at the meeting of 05.07.1999. The plaintiff thereafter undertook relevant clearance.

By the letter dated 07.11.2000 the defendant alleged that the plaintiff had unsettled imprest amounting to Kshs.100, 000.00; overpaid salary of Kshs. 58, 455.00; medical claim recovery Kshs. 42, 500.00; and security bonds. The letter asked the plaintiff to indicate how she'd settle the claims or the same would be deducted from her terminal dues as a liability owed to the defendant. The plaintiff replied by her letter dated 14.12.2000 stating that she had settled the imprest per her letter dated 10.02.1999; for overpayment of Kshs. 58, 455.00 for August, September, October and November 1999 she stated that the same be offset from her 174 paid leave days, leave allowance for 1999 and 34 administrative leave days; and the respondent had never settled the medical claim and if it had, she requested to be provided with the documentary evidence and she'd pay her part of the bill directly to the doctor. She denied that she had signed a security bond to serve for certain prescribe time after her masters' studies. The claimant followed up the issues with the respondent and one Alice Muchangi advised the plaintiff that the issues had been cleared and she had to go to KLGOSF for payment of her benefits. The claimant did so and by the letter dated 13.01.2012 the plaintiff's advocates were advised that the documentation held at LAP Trust showed that the plaintiff's name was missing in the Fund member's database.

The plaintiff filed the final submissions on 07.12.2018 through Obura Mbeche & Company Advocates while Morara Onsongo & Company Advocates for the respondent opted not to file final submissions.

The only issue for determination is whether the plaintiff is entitled to the remedies as prayed for. The Court has considered the material on record and makes findings as follows:

a) The claimant has established by her payslips on record that she was deducted for the contributory Fund meant to be remitted to KLGOSF and as per confirmation by the Fund manager the respondent never remitted the deductions. The Court returns that claimant has established that she is entitled to the accumulated contributions of **Kshs.250, 000.00** as claimed and as prayed for. As submitted for the claimant, the Court follows the holding in **Morris Kavale Kasyoki –Versus- Narcol Alluminium Rolling Mills Limited [2014]eKLR.** (Onesmus Makau J) that a deduction without remission from the employee's salary by the employer amounted to extortion or was outright theft of the employee's money by the employer. The Court returns that such was the exact scenario in the instant case.

b) The plaintiff having cleared from the defendant's service and there being no disciplinary proceedings or other proceedings for recovery of monies as alleged and claimed in the defendant's letter dated 07.11.2000, the Court returns that the claimant duly and completely cleared from the respondent without liability. The Court finds that there is no reason to doubt that the respondent's officer one Alice Muchangi advised the plaintiff that the issues had been cleared and she had to go to KLGOSF Manager for payment of her benefits. The Court finds that the purported demands made to the plaintiff by the defendant long after she had cleared with the defendant were unfounded and as testified by the plaintiff were meant to delay her from getting her benefits because the respondent must have known that it had failed to remit the same. In any event, the defendant filed no counterclaim in the instant case if indeed it had a genuine and valid claim of liability against the defendant. The documentation by the defendant as exhibited by the plaintiff show that the defendant confirmed that as at retirement the plaintiff had an approved and accumulated 205 paid leave days for which she had not been paid and she is awarded **Kshs. 180, 000.00** as prayed for.

c) It was submitted for the plaintiff that clause 22(g) of the terms and conditions of service stated that leave allowance was payable to an employee proceeding on leave at 3% of annual salary. The Court returns that it was not established that the plaintiff proceeded on leave and was not paid due allowance so that the claim and prayer for leave allowance as submitted will fail. In any event there was no prayer and claim for leave allowance in the memorandum of claim and as now belatedly submitted for the plaintiff.

d) Clause 29(i) (e) of the terms and conditions of service applicable to the plaintiff stated, "**An officer should be able to collect his full retirement benefits as near as possible to the day of retirement. Where it is not possible to pay out the full entitlement, the officer may be employed on temporary basis until paid subject to a replacement not being employed until the officer's services are completely terminated.**" Upon that basis the plaintiff prays for last monthly pay of Kshs. 19, 484.00 till the defendant fully complies with paying the claimant's retirement benefits. It is submitted for the plaintiff that the salary for November 1999 to date is Kshs. 4, 520, 520.00 plus pension for that period being Kshs. 1, 318, 502.00 should be paid. The Court returns that under the clause payment was due if the plaintiff was employed on temporary basis but which option was not exercised partly because the retirement was at the instance of the plaintiff and she opted to retire from the defendant's service. The Court therefore returns that the claimant would not benefit under the clause as submitted because she did not work as retained in service on temporary basis pending the payment of final dues and she did not therefore earn pension in that regard.

e) The Court returns that the plaintiff is entitled to the sum of **Kshs. 430, 000.00** plus interest at Court rates from the first day after retirement 01.08.1999 to the date of this judgment 20.12.2018 as the principal amount awarded. While awarding the interest accordingly the Court has considered the immense suffering and obvious unexplained conduct by the defendant by which the plaintiff has been made to wait for her retirement benefits for over a very long period of time after her dedicated service and subsequent retirement.

In conclusion judgment is hereby entered for the plaintiff against the defendant for:

a) Payment of the sum of **Kshs. 430, 000.00** plus interest at Court rates from the first day after retirement 01.08.1999 to the date of this judgment 20.12.2018 as the principal amount awarded.

b) The defendant to pay the plaintiff the sum of money in (a) by 31.01.2019 failing interest to be payable thereon at Court rates

from the date of this judgment till full payment.

c) The defendant to pay the plaintiff costs of the suit.

Signed, dated and delivered in court at Nairobi this Thursday 20th December, 2018.

BYRAM ONGAYA

JUDGE