



**REPUBLIC OF KENYA**  
**EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 1516 OF 2014**

**(Before Hon. Lady Justice Hellen S. Wasilwa on 30<sup>th</sup> January, 2017)**

**PETER MUCHA GACHOKA ..... CLAIMANT**

**VERSUS**

**PROTOCOL SOLUTIONS LIMITED..... RESPONDENT**

**JUDGMENT**

1. The Claim before Court is one for unpaid terminal dues after resignation from employment.
2. The Claimant herein prays for judgment against the Respondent for:

***a) Judgment for Kshs. 5,100,000.00 being salary arrears;***

***b) Leave days Kshs 300,000.00;***

***c) Service Pay Kshs. 300,000.00;***

***d) Costs of the Cause.***

Or in the alternative to (d) above the Claimant prays for:

***a) The Respondent to remit the National Social Security Fund and the National Hospital Insurance Fund deducted from his salary to the National Social Security Fund and National Health Insurance Fund Respectively.***

3. The Claimant states that he was employed as the Chief Financial Officer at a gross salary of Kshs.600,000.00 by the Respondent via letter of employment dated 20<sup>th</sup> October 2012 which contained his offer, and terms of conditions of service, and he duly accepted.

4. He performed his duties diligently and dutifully, and worked up until the 30<sup>th</sup> of June 2014, handing in a 3 months' notice in accordance with his employment terms.

5. The Claimant avers that during his employment he was not paid his salary during the months of November 2012, December 2012, and January 2013, February 2013, March 2013, and April 2013. Moreover, he was paid half his salary in the months of May 2013, June 2013, July 2013, August 2013 and

September 2013. The Claimant's NSSF and NHIF contributions have also not been remitted despite their being deducted from his pay slip, further he had leave balance of 15 days which was also not paid.

6. The Claimant avers that he raised the issue of salary arrears with the Managing Director on several occasions in vain.

7. He was issued with a Certificate of Service confirming his employment from 1<sup>st</sup> November 2012, until 30<sup>th</sup> June 2014 and is therefore entitled to the amount claimed.

8. The Respondent has filed a Defence and Reply to the Statement of Claim dated 25<sup>th</sup> September 2014 where they deny the Claimant's claim for 11 months' salary amounting to Kshs. 5,100,00.00 as well as his claim for NSSF, NHIF, leave days and service pay.

9. They state as the Chief Financial Officer, any failure to make payments or remissions of statutory payment amounts to a gross abdication of duty and was in breach of Clause 6 of the Claimant letter of Appointment and in contravention of Company Management Staff Guidelines, as well as the terms and conditions of service.

10. The Respondent states that it was the Claimant's duty to approve and effect payment of all staff salaries and wages and as such he was the one who failed to pay his own salary from November 2012 to April 2013 and was also the one who paid himself half salary from May to September 2013.

11. They state that payment was made through the payroll and the only time the Claimant was paid half of his salary was in June, July and August 2013 while on other company assignments leaving a balance of 125,000.00 x 3 totaling Kshs.376,824.00 which was paid in October 2013 together with other accruals on assignments totaling USD 7,200.00 directly by swift transfer to the Claimant's bank account.

12. The Respondent states that the current calculations have been subject to the Gross Salary and not net salary which should be the case and the other statutory deductions were remitted and the Claimant is put on strict proof thereof.

13. The Respondent also submit that the Claimant was overpaid by a sum of Kshs.242,376.00 while on company assignment out of the Country in addition to other allowances and that they reserve a right of refund to set off for the said amounts.

14. In Response to the Defence and Reply to the Memorandum the Claimant has filed a Supplementary Memorandum of Claim filed on the 10<sup>th</sup> of October 2014 where they state that the claim was brought based on the letter of appointment that put the claim at Kshs 600,00.00.

15. They further state that as an employee of the Respondent they were not signatory to the accounts or authorized to sign cheques but had their mandate limited to supplying advise on the financial standing of the organization and failure by the Directors or the Managing Director to release the cheques on payment of necessary statutory payment cannot be blamed on the Claimant.

16. The Claimant further states that the approval of effecting of payment of salary and wages was done by the Managing Director and the Claimant had no authority to make payments without the authority of the Managing Director, further, no payment was made in October 2013 as alleged by the Respondent.

17. The Claimant states that his other assignments amounted to a consultancy agreement with a Company known as Protocol Solutions Africa Limited which is based in Mauritius, the payment of USD 7,200.00 was paid by Protocol Solutions Africa Limited for the services and not by Respondent.

18. The Claimant further states that the statutory deductions that were not remitted would have been reflected in the P9 form from the Kenya Revenue Authority which has not been availed to date. He reiterates that he has not been paid in the said months and is entitled to his dues as claimed.

19. In Response to the Supplementary Memorandum of Claim, filed on the 27<sup>th</sup> of October 2014, where they state that Claimant having being given his letter of appointment to take effect on the 1<sup>st</sup> of November 2012, the Claimant never took up the appointment for a period of six months from November 2012 to April 2013 as he was still employed by Iway Africa where he had not resigned until he joined the Respondent Sister Company Protocol Solutions Africa Limited on consultancy basis from May 2013.

20. They state that the current Managing Director of the Respondent who was then the Managing Director of Iway Africa and the Boss of the Claimant shall confirm that the Claimant was a full time employee until April 2013 and the companies being competitors, it took six months for the Claimant to disengage from Iway African and could not take full time appointment at the Respondent Company immediately.

21. The Respondents state that the Claimant agreed to be engaged by the Respondents Sister Company Protocol Solutions Africa Limited as a consultant for a period of four months from 01/05/2013 at a fee of USD 3,600 per month hence the signing of the consultancy agreement which took effect from 01/05/2013 signed much later on 30/09/2013.

22. The Respondent states that to avoid controversies between Iway Africa and themselves, the Claimant was engaged to run the Sister Company in Mauritius from Nairobi based on the consultancy agreement until his period of disengagement expired, he then took up full position with the Respondent from September 2013, and was paid his full salary as per the pay slips and pay roll of the same month until June 2014. They state that at the time he was a consultant they were not liable for his salary and his statutory deductions.

23. The Respondent further state that the Claimant having been engaged as a consultant working for the Respondent's sister company was paid his consultancy fee of USD 7200.00 as well as Kshs. 300,000.00 locally in June, July and August 2014 amounting to Kshs. 900,000.00 there being an over payment of Kshs. 242,376.00.

24. They reiterate that as Chief Financial Officer, the Claimant was fully in charge of dealing with his financial matters, wages, effecting of payments and remitting PAYE, NSSF, and NHIF contributions and advising the Board of Directors on all financial matters and if taxes were not remitted.

25. They state that his failure to do so amounted to gross professional negligence for which the Respondent reserves a right to report him to ICPAK for disciplinary action.

26. As to service pay, they state that the Claimant only worked for the Respondent from September 2013 to June 2014 and is not entitled to service pay or leave. He was paid his net salary.

### **Submissions**

27. The Claimant has filed written submissions dated, 10<sup>th</sup> September 2016 where they submit that the Respondent did not at any time complain about the service he rendered to them and they did not at any time raise the issue that the Claimant supposedly worked for Iway Africa at the time of his employment so he concludes that he met his full responsibility and duty to the Respondent.

28. Further, he submits that the Respondent admitted through RW1 that the Claimant worked for the Respondent without a break from 1<sup>st</sup> November to 2012 to 30<sup>th</sup> June 2014.

29. They submit that it is in the Respondents pleadings that the Claimant worked full time with no specification as to what mode of service was expected of the Respondent. The contract did not specify whether it was part time or full time, save for what is pleaded in the defence. Additionally the contract did not prohibit the Claimant from having another contract, the only caveat as specified was:

***“Your performance will be reviewed periodically, if performance does not meet the requirement of the company, you will be summoned with an intention of focusing on the way forward.”***

30. They submit that the Claimant dutifully performed his duties. They submit that the Respondent is bound by their pleadings and cannot depart from them unless there has been an amendment to the same.

**31. Mojeed Suara Yusuf vs. Madam Idiату Adegoke S.C 15/2002**, Judge Pius Aderemi JSC stated:

*“..it is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded...”*

32. The Claimant submits that he performed his contract for the 20 months that he was with the Claimant, further, that the Certificate of Service issued by the Respondent supports this and that there is not proper reason to deny him his dues.

33. He reiterates that it was the duty of the Respondent to submit the statutory deductions and that as he was not a signatory to any of their accounts, his duty was but to advise on payments due. He asks the Court to award as claimed.

34. The Respondents have filed submissions dated 19<sup>th</sup> October 2016, where they reiterate their pleadings and add that the Claimant did not offer any service to the Respondent on the months of May 2013 to August 2013 and did not deserve the Kshs 300,000.00 paid to him every month during that period. Further the amount claimed has no basis factual or otherwise and has not been proved to the required standard. They pray that it be disallowed.

35. As to leave days the Respondent submits that the Claimant did not finish off the year as envisaged in his contract of employment, he could not give particulars of the number of days not taken during his employment and nothing stopped him from requesting for his leave days, it is the Claimant's case that this claim has no basis and should be dismissed.

36. The Respondent submits that the claim for service pay is not supported by contract, as he was a registered member of NSSF supported by his claim for remittance of dues, he is not eligible for service pay.

37. The Respondent submits that it is the duty of the Court to evaluate all the evidence before it in relation to the pleadings and the case of **Mojeed Suara Yusuf** is one from outside Kenya and irrelevant to this matter.

38. They state that the correct position is the one in **Barclays Bank of Kenya Limited vs. Evans Ondusa ONzere [2015] eKLR** where the Court held that it is the duty of the trial Court to consider and evaluate the entire evidence on record placed before it.

39. They submit that the Court of Appeal also addresses how admissions made during cross examination should be treated and urge the Court to follow the decision.

40. They pray that the claim should be dismissed with costs to them.

41. Having considered evidence of both parties, and their submissions, I confirm from Claimant's letter of appointment that he was appointed vide a letter dated 20<sup>th</sup> October 2010 with effect from 1-11-2012.

42. His gross pay was 600,000/= per month. Probation period was waived but it was indicated that his performance was going to be renewed periodically.

43. On 26.3.2014 vide his letter at page 9, he gave a 3 months' notice to resign from employment. The notice was to run from 1<sup>st</sup> April 2014 and this implies that the date of resignation was 30<sup>th</sup> June 2014.

44. He indeed cleared from Respondents employment and was issued with a Certificate of Service

indicating that he served Respondent from 1-11-2012 to 30-6-2014 (appendix at page 13).

45. The Claimant also provided his last pay slip for June 2014 showing he was working for Respondent and was being paid 600,000/= gross salary.

46. The Respondent had contended that the Claimant agreed to be engaged by the Respondent's sister Company Protocol Solution Africa Limited as a Consultant for a period of 4 months from 1.5.2013 at a fee of USD 3600 per month and took up full position with Respondent from September 2013 and was paid his full salary as per the pay slips produced up to June 2014.

47. From the payslips produced by the Claimant from September 2013 to June 2014, the Claimant was paid his full salary. The contention that he was paid ½ salary in September 2013 is therefore not true.

48. He is not entitled to payment of service pay.

49. The Claimant had submitted that he was entitled to service pay due to a Clause in the Collective Bargaining Agreement but he has not produced any Collective Bargaining Agreement before Court nor has he shown that he was a member of any Trade Union binding him to such provision in the Collective Bargaining Agreement.

50. The Respondents have produced Appendix 1 to show that they had a consultancy agreement with Claimant running from 1.5.2013 and they were to pay the Claimant USD 3600. This consultancy does not refer to the contract of service between Claimant and Respondent dated 20<sup>th</sup> October 2012 and it is a stand-alone consultancy which didn't affect the contract of service.

51. In this case then, the averment by the Respondent that this consultancy was to run as part of the contract for 5 months is not true.

52. The Respondents have not averred to the Claimants' position that he didn't receive his salary from November 2012 to April 2013. No proof of payment is adduced before this Court. The Respondent indeed stated that the Claimant as Chief Financial Officer was responsible for preparing the payment schedules and he left himself out.

53. However the Claimant has submitted correctly that he was not a signatory to the Respondent's accounts and the Respondent decided who to be paid and he would prepare the schedules accordingly. I do agree with this position that though Claimant was Chief Financial Officer of Respondent, he couldn't pay himself unless the Respondents authorized so. Even payments of ½ salary of May 2013 to August 2013 (4 months) it is only the Respondent who would have authorized the payment of the same.

54. That being the position, this Court finds that indeed the Respondents didn't pay Claimant as stated for November 2012 to April 2013 (6 months) and paid him ½ salary for May 2013 to August 2013 (4 months). This is an equivalent of 8 months' pay =  $8 \times 600,000 = 4,800,000/=$ .

55. I also award Claimant payment for 18 days leave =  $\frac{1}{2} \times 600,000 = 300,000/=$

56. Service pay is not payable as the Claimant was a member of NSSF. He is however entitled to payment of his NSSF and NHIF contributions deducted and not paid which I direct the Respondent to remit directly to the said organization.

57. I therefore enter judgment for Claimant for total of **Kshs.5,100,000/= less statutory deductions.**

58. Plus costs and interest with effect from the date of this Judgment.

Read in open Court this 30<sup>th</sup> day of January, 2017.

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

No appearance for Respondent

No appearance for Claimant