



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

**AT NAIROBI**

**CAUSE NO. 1080 OF 2014**

**(Before Hon. Lady Justice Hellen S. Wasilwa on 26<sup>th</sup> January, 2017)**

**PETER MAINA WANDU.....CLAIMANT**

**VERSUS**

**UNIGHIR LIMITED.....RESPONDENT**

**JUDGMENT**

1. The Memorandum of Claim herein is dated 30<sup>th</sup> June 2013 and filed on the same date through the firm of Mudeshi Muhanda and Company Advocates.

2. The claim is one for refusal to pay salary dues and service pay by the Respondent after the resignation of the Claimant. The Claimant prays for judgment against the Respondent for:

***1. An order of payment of Claimant's final dues totaling to Kshs 574,549.00 and particularized as:***

***a. One month's salary worked but not paid .... Kshs. 53,999.00***

***b. Leave pay (3.2 days)..... Kshs 5,760.00***

***c. Service Pay (26/30 x 53,999.00 x 11) ..... Kshs 514,790.00***

***TOTAL.....Kshs. 574,549.00***

***2. Compensatory damages.***

***3. An order for the Respondent to pay costs of this suit plus interest thereon.***

***4. Any relief as the court may deem fit.***

3. The Claimant's evidence is that he was employed on or around March 2002 as a Draughtsman at an initial salary of Kshs.53,999.00. He carried out his duties diligently which included training of employees who would then be promoted to senior posts leaving him at the same post.

4. He resigned from his job following the procedure set out in his employment letter, which is giving

notice, and surrendering all that was in his possession that belonged to the Respondent. His resignation was accepted and dues that he was entitled to calculated, however, the Respondent failed to release the funds subjecting him to undue hardship and inhumane treatment.

5. He prays for the Courts to award as prayed.

6. The Respondent herein has filed a Reply to the Memorandum of Claim through the firm of LJA Associates dated 7<sup>th</sup> day of August 2014 and filed on the 8<sup>th</sup> of August 2014. In it they confirm that the Claimant was in their employment at the stated period but state that his initial salary was that of Kshs.10,000.00 inclusive of house allowance.

7. They state that his salary was periodically increased as sign of appreciation for work done and as at June 2013, he was earning a basic salary of Kshs.46,956.00 with housing allowance of Kshs.7,043.00 both subject to statutory reductions.

8. The Respondent confirms receipt of the resignation letter which was to be effected for the notice period from 29<sup>th</sup> July 2013 until 29<sup>th</sup> August 2013. They duly responded to the letter and sent their calculation of the Claimant's dues subject to statutory reductions. They state that final pay was accordingly prepared but it was the Claimant who refused to collect the said dues including a certificate of service.

9. The Respondents state that the calculation they prepared was up until the 29<sup>th</sup> of August 2013 the official working days of the Claimant and have at all times been willing to pay the Claimant. The Claimant's current tabulation is erroneous as the amounts are subject to statutory deductions, further, that the Claimant being a contributor to the National Social Security Fund is not entitled to service pay.

10. They state that the case presented by the Claimant is full of misconceptions and has therefore perjured himself in this suit and should be held accountable. They pray that the suit is dismissed with costs to the Respondent.

### **Submissions**

11. The Claimant submits that there were monies owed to them that were not paid. This they claim is due to the dire financial situation of the company. They submit that their NSSF dues were also not submitted and have presented a document showing the same.

12. The Claimant submit that by virtue of the following clause:

***“The company is not liable to pay any service during your employment with the company, but at its discretion may or may not pay whatever amounts it feels justified at the time”.***

13. He avers that he has a right to claim for service pay. He submits that the irregular pay of his social security benefits should incline the Court toward granting of this claim.

14. The Claimant submits that they have never taken an advance as claimed by one witness and put the Respondent to strict proof thereof, further, that the deductions made have been done unjustly in an effort to frustrate him.

15. They submit that the Respondents should bear the costs of this claim as it is them who ignored the provisions of law and frustrated the Claimant.

16. As to damages, the Claimant relies on **Lillian Nyaboke Nyabiro vs Wireless Innovations Nairobi Limited** where Marete J stated:

***“The Respondent took its time at breaching the law and must pay the price for doing so....”***

17. They pray that the claim be allowed as prayed.

18. The Respondents submissions are dated 21<sup>st</sup> October 2016. They have submitted that the testimony by the Claimant in open Court where he averred that the Respondent's Directors orally agreed to pay him service pay which is to be calculated at the rate of one month for every year that the Claimant worked should not be accepted as sufficient evidence was not given to corroborate it. The Claimant did not give details as to where the agreement took place, or its terms. The Collective Bargaining agreement he alludes to was also not applicable as the Claimant was not part of any union.

19. The Respondent submits that through their witness RW-1 the Human Resource Manager Mr. Elijah Njenga, a petty cash voucher was produced to show that the Claimant had taken out an advance of Kshs. 5,000.00 which amount is deductible from his total dues to justify the amount issued in a cheque dated 27<sup>th</sup> September 2013 of Kshs.39,315.00.

20. The witness also testified to a delay in issuing the cheque which was due to the fact that the Respondent was facing financial difficulties.

21. The Respondents submit that their second witness RW-2 informed the Court that the cheque was still available for collection and further, that there had been no employee of the Respondent who had been paid service pay at the rate of one month per year. He testified that it was only those who had entered into a Collective Bargaining Agreement with the Respondent who benefited from service pay and the Claimant was not part of this group.

22. The Respondent submits that under Section 35(5) of the Employment Act, 2007:

***“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.”***

23. Section 35(6) of the Employment Act, 2007 goes on to state:

***“this section shall not apply where an employee is a member of (d) the National Social Security Fund.”***

24. They submit that the pay slip submitted show that the Claimant was a contributor to NSSF a fact that was confirmed by both the Claimant and the first witness RW-1. He is therefore not entitled to service pay.

25. They submit that the Claimant earned a basic salary of Kshs.46,956.00 with Housing Allowance of Kshs.7,043.40 and the amount is subject to tax, further Kshs.3,391.31 was deducted from his pay as absent amount because he was absent from work for a total of 13 working days. His gross salary then becomes Kshs.56,368.00 and Kshs.12,053.00 was deducted as statutory contributions being Kshs.10,783.00 (PAYE), Kshs. 200.00 NSSF and Ksh.320.00 NHIF. Kshs.550.00 was for a salary advance and Kshs.200.00 was a contribution toward the company welfare. The amount after deductions was then Kshs.39,315.00 which cheque was prepared and is ready for collection.

26. They conclude by submitting that as they had responded to the demand letter of the Claimant clearly stating their position advising the Claimant against starting legal proceedings, the Claimant is not entitled to costs and urge the Court to dismiss the suit with costs to the Respondent.

27. Having considered all evidence and submissions of both parties, the issue is whether the Claimant is entitled to any terminal benefits and if so how much the claimant worked for Respondent for 11 years from 2002 to 2013. His gross pay was 53,999 at time of his resignation in 2013.

28. He has told Court that he was a member of NSSF and this is evidenced from his payslip Annex 2. The Respondent also produced his NSSF Statement to show he was a member of NSSF save that the statement shows that they didn't remit contributions for certain months – totaling = 17 months = 17 x 400

= 6,800/=.

26. Since the Claimant resigned and given that he was an NSSF contributor, by virtue of Section 35(5) and (6) of Employment Act which states as follows:

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.***

6. ***This section shall not apply where an employee is a member of:***

***a. a registered pension or provident fund scheme under the Retirement Benefits Act;***

***b. a gratuity or service pay scheme established under a collective agreement;***

***c. any other scheme established and operated by an employer whose terms are more favourable than those of the service pay scheme established under this section; and***

***d. the National Social Security Fund”.***

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

31. 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.

32. Given that the Claimant is not entitled to service pay, the only award I grant him is:

***1. The unpaid NSSF dues = 6,800/=***

***2. Certificate of Service***

***3. 1 month salary worked and not paid August 2013 = 53,999/=***

***4. Leave pay for 3.2 days = 5,760/=***

***Total = Kshs.66,559/=***

***Less statutory deductions***

***Plus costs.***

Read in open Court this 26<sup>th</sup> day of January, 2017.

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Miss Dave for Respondent – Present

No appearance for Claimant