



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

CAUSE NO. 124 OF 2016

JAMES MWANGI MURAYA

CLAIMANT

v

COUNTY GOVERNMENT OF NAKURU 1ST RESPONDENT

COUNTY SECRETARY

2ND RESPONDENT

JUDGMENT

1. The delivery of judgment was brought back to today because am proceeding on transfer.
2. James Mwangi Muraya (Claimant) was employed by the defunct Municipal Council of Nakuru in 1980.
3. With the coming into effect of the Constitution, 2010 and devolved government, the Claimant became an employee of the County Government of Nakuru (1st Respondent).
4. On 27 January 2014, the 1st Respondent, through the County Secretary (2nd Respondent) wrote to the Claimant giving him notice of retirement on attainment of 60 years, effective 30 December 2014.
5. The retirement notice also advised the Claimant to take his accumulated leave days and that his terminal benefits would be prepared and paid accordingly.
6. On 4 April 2016, the Claimant instituted legal proceedings against the Respondents alleging breach of contract (failure to remit Lap Trust deductions, National Social Security Fund contributions; salaries from June 2014 to December 2014; failure to pay overtime worked from May to November 2013 and annual leave.
7. The Respondents filed a Joint Response on 27 May 2017 and this prompted the Claimant to file a Reply to Response on 13 June 2016.
8. On 5 October 2016, the Court directed the Respondents to file and serve witness statements before 12 October 2016. The order was not complied with.
9. During the same appearance, the Court ordered that *Agreed Issues* be filed but the *Agreed Issues* were not filed and thus on 7 November 2016, the Court extended the time to 30 November 2016.
10. Despite the Claimant forwarding to the Respondents *Proposed Issues*, the Respondents did not respond and on 9 March 2017, the Court adopted the *Issues* as framed by the Claimant and fixed hearing

for 11 October 2017.

11. The Claimant testified on 11 October 2017 and 24 October 2017.

12. An attempt by the Respondents to secure an adjournment was declined by the Court essentially because the Respondents had failed to file and serve a witness statement, and therefore it could not be determined that the reason given that the anticipated witness was on suspension could not be verified.

13. There is ample case law addressing failure by a party to comply with pre-trial processes and Court orders (see *David Macharia v Christopher Mwangi* (2015) eKLR, *Jared Kangwana & Ar v Samson Keengu Nyamweya & Ar* (2014) eKLR and *Moses Mwangi Kimani v Shammi Kanjirapparambil Thomas & 2 Ors* (2014) eKLR).

14. Further, the Respondents' advocate exhibited a most casual attitude to the Cause coming to Court late for the hearing without offering any explanation.

15. Although the Claimant had framed 11 Issues as arising for determination, in the view of the Court, the same can be condensed into 6 being, *whether the Claimant had reached retirement age, whether the Respondents failed to remit Lap Trust deductions, whether the Respondents failed to remit National Social Security Fund contributions, whether the Respondents failed to pay Claimant salaries from June to December 2014, whether Claimant is owed overtime pay and appropriate remedies.*

16. The Claimant filed his submissions on 8 November 2017, while the Respondents filed their submissions on 29 November 2017.

Joinder of 2nd Respondent

17. The question of the joinder of the 2nd Respondent was not raised in the pleadings or during the hearing but only in the submissions and the Court therefore declines to consider it. In any case, misjoinder is not a fatal defect.

Retirement age

18. The Claimant had framed the question as to whether he had reached retirement age, and asserting that the retirement was unlawful.

19. In the same vein he testified that he retired at 60 years.

20. It being in the public knowledge that the retirement age in the public service is 60 years, the Court finds no merit on the retirement age question.

Failure to remit Lap Trust contributions

21. The Claimant produced as exhibit 4 a *Members Contributions Statement* from Lap Trust which statement show that contributions for August 1996, January, May, and June 2013, and for January and February 2014 were not remitted to the Fund.

22. The Claimant's pay slips confirm that the deductions were effected.

23. The total contributions not remitted amounted to Kshs 31,531/60.

24. Without any evidence or records from the Respondents, the Court finds that though deductions were made for the stated period, the Respondents failed to remit the deductions to Lap Trust and they are liable for the same.

National Social Security Fund contributions

25. Before joining Lap Trust, the Claimant was a member/contributor to the National Social Security Fund and the *Provisional Member Statement of Account* show that deductions/contributions for 1987, 1988, 1989, 1990, 1991, 1992, 1993 and 1994 were not remitted.

26. Unfortunately, the Claimant did not compute the amount of deductions/contributions not remitted and in that regard, the Court is unable to make a conclusive determination on this issue.

27. The Claimant may well take up the question with the Fund as the applicable law authorises it to follow up on unremitted contributions and even penalise the employer.

June to December 2014 salaries

28. The letter dated 27 January 2014 giving the Claimant notice of retirement was clear that the last working day would be 30 December 2014 and cannot be superseded by the dates in the pay slips.

29. The Claimant's testimony that he did not receive any salary after proceeding on leave in June 2014 up to effective date of retirement (amounting to Kshs 378,000/-) was not controverted by production of pay records and the Court concludes that the Claimant has discharged the evidentiary burden required of him.

30. An employee on terminal leave pending retirement is legally entitled to remuneration for that period despite not reporting to work.

Overtime

31. The Claimant produced copies of Overtime Master Rolls for the period May to November 2013 and some of the copies have the stamp of the 1st Respondent's Revenue Officer.

32. The description of the work the Claimant did are indicated as well as the overtime hours.

33. The Court would therefore find for the Claimant in the sum of Kshs 207,900/- as sought.

Annual leave

34. The Claimant was directed to take all accumulated leave pending retirement and he took the leave of 92 days.

35. The Court therefore cannot accede to the claim for leave.

Conclusion and Orders

36. The Court finds and holds that the Respondents breached the Claimant's contracts/rights and awards him and orders the Respondents to pay him

(i) Lap Trust contributions	Kshs 31,531/60
(ii) Unpaid salaries	Kshs 378,000/-
(iii) Overtime	Kshs 207,900/-
TOTAL	Kshs 617,432/60

37. Claimant to have costs.

Delivered, dated and signed in Nakuru on this 7th day of December 2017.

Radido Stephen

Judge

Appearances

For Claimant	Ms. Mukira instructed by Elizabeth Wangari & Co. Advocates
For Respondents	Mr. Chege instructed by Munene Chege & Co. Advocates
Court Assistants	Nixon/Martin