



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**CAUSE NUMBER 501 OF 2015**  
**SUSAN NZISA MUSELLA.....CLAIMANT**  
**VERSUS**  
**BANK OF BARODA (KENYA) LIMITED.....RESPONDENT**

**JUDGMENT**

1. The claimant was an employee of the respondent having been employed on 1<sup>st</sup> August, 1977. She was on 21<sup>st</sup> November, 2014 retired from the Bank upon attainment of retirement age.
2. On or about 28<sup>th</sup> March, 2012 the claimant was suspended from the respondent's services following her arrest and prosecution on account of fraud involving an account at her branch. The suspension was to await the outcome of the criminal case and during which period she was placed on half basic salary.
3. The respondent did not deny that the claimant was entitled to be paid her terminal dues. The dispute seem to be over the amount payable and that the respondent cannot pay the terminal dues until the outcome of the criminal case is known.
4. This was the essence of the evidence presented before me at the hearing which the Court will not go over again. The issue to decide therefore is whether the claimant's dues can be paid before the conclusion of the criminal case against her.
5. Ms. Omolo for the claimant has submitted that the existence of a criminal case was not a reason to withhold the claimant's retirement benefits. Counsel submitted that there was no basis for withholding the money since there was no counterclaim filed for the amount allegedly lost by the respondent.
6. Mr. Kiura for the respondent on his part submitted that the respondent's customers lost money in the fraudulent transaction subject matter of the criminal trial which was the rationale for the withholding of half salary due to the claimant while the criminal case was pending and also the rationale for withholding claimant's benefits.
7. Counsel further relied on clause A5(c) of the Collective Bargaining Agreement which permitted payment of half salary during suspension for initial 90 days and which period can be extended pending the outcome of the criminal case.

8. The claimant herein has retired from the respondent's employment hence no longer bound by her contract of employment with the respondent. Her prosecution is independent and has no connection with her terminal benefits which accrue from the fact that she was the respondent's employee. Criminal prosecution for theft or fraud usually result in conviction and award of custodial sentence or in some occasions imposition of fine. In cases where a fine is imposed, this is payable to the government and not the complainant. Although the Court trying the accused may order that upon conviction the accused pays compensation, this rarely happens and where it is done enforcement usually presents problems. The most preferred procedure is usually to file a civil claim for the amount allegedly lost concurrently with the criminal prosecution since nothing prevents both processes running concurrently. The respondent herein has not done so hence there would be no justification to withhold the claimant's terminal benefits.

9. The Court however notes that the Collective Bargaining Agreement permitted the respondent to withhold salary pending the outcome of a criminal case. Since the claimant was bound by the terms of the Collective Bargaining Agreement during the time she remained an employee, the respondent is justified in invoking this provision of the Collective Bargaining Agreement. The amount in dispute however is Kshs.600,000/= which is less than the claimant's terminal benefits. If it be that the claimants salary at the time of suspension was Kshs.129,236.50, twenty one month's salary is Kshs.2,713,956. There is therefore no justification at all in withholding the entire amount.

10. The Court therefore makes the following orders.

- a. The respondent shall forthwith compute and pay to the claimant her retirement benefits including half salary withheld upto retirement.
- b. The payment shall be less Kshs.600,000/= the subject of the on going criminal case.
- c. The sum of Kshs.600,000/= shall be released to the claimant upon her acquittal of the charges she is facing.
- d. The claimant to have costs of the suit.

11. It is so ordered.

**Dated at Nairobi this 17<sup>th</sup> day of June 2016**

**Abuodha Jorum Nelson**

**Judge**

Delivered this 17<sup>th</sup> day of June 2016

**In the presence of:-**

.....for the Claimant and

.....for the Respondent.

**Abuodha Jorum Nelson**

**Judge**