



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS**

**COURT OF KENYA AT NAIROBI**

**CAUSE NO. 1363 OF 2011**

**DAVID NDERITU ..... CLAIMANT**

*VERSUS*

**KENYA AIDS NGOs CONSORTIUM ..... RESPONDENT**

Mr. Nthiga for the Claimant

Mrs. Oduor for the Respondent

**JUDGMENT**

1. The Claimant brought this suit by way of a Memorandum of Claim dated 5<sup>th</sup> August, 2011 and filed on 11<sup>th</sup> August, 2011 seeking for the following reliefs;

- a. Payment of Gratuity/Severance pay in the sum of Kshs.294,000.00
- b. Payment of pension contribution in the sum of Ksh.565,514.00
- c. Payment of Expenses/Losses incurred following termination in the sum of Ksh.50,000.00
- d. Provision of Certificate of Service
- e. Costs of the suit.

2. The suit is based on the particulars of claim in the Memorandum and annexure thereof, sworn testimony of the Claimant and final written submissions as follows;

3. The Claimant was employed by the Respondent via a letter of appointment dated 21<sup>st</sup> March, 2007, as a Program Officer earning a salary of Ksh.46,229.00.

4. The Claimant worked continuously and diligently for a period of 3 years and 8 months until when he was declared redundant with effect from 30<sup>th</sup> November, 2010 by a written notice dated 21<sup>st</sup> October, 2010.

5. In terms of the Respondent's Personnel Policy and Procedure Manual, the Claimant was entitled to one month's salary for each completed year of service and was also entitled to provision of a Certificate of Service.

6. Furthermore, the Human Resource and Procedure Manual provided for a contributory pension scheme under which the employee contributed 10% of the basic salary whereas the employee contributed 25%. It is the Claimant's case that the Respondent unlawfully made contributions at a rate of 10% of the Claimant's salary for the months of May to September in 2010 totaling Ksh.36,750.00

7. Subsequently, upon demand being made by the Claimant, the Claimant was paid Ksh.83,227.00 (which is presumably inclusive of interest earned thereon) on account of pension contribution.

8. The Claimant therefore states he is entitled to a sum of Ksh,565,514.00 being the unpaid contribution by the Respondent out of the total possible contribution of Ksh.602,264.00.

9. The Claimant set out a table of would be contributions from 16<sup>th</sup> July, 2007 to 30<sup>th</sup> November, 2010 totaling the said amount of Ksh.602,264.00 and claims the balance thereof in the sum of Ksh.565,514.00

10. The Claimant further claims that the Respondent's aforesaid unlawful omissions have caused him immense psychological, financial and mental anguish especially in light of dedicated and honest service rendered by the Claimant to the Respondent. As a result, the Claimant has incurred telephone, travelling and accommodation costs as well as time lost in following up his dues in the sum of Ksh.50,000.00 which the claimant claims in respect thereof.

11. The claimant states that inspite of demands being made and a notice of intention to sue being given, the Respondent has failed, refused and/or neglected to pay the claimant his full terminal dues.

12. The claimant prays for the reliefs sought accordingly.

13. **Statement of Response**

The Respondent filed a Statement of Response to the claim dated 5<sup>th</sup> September, 2011.

14. The Respondent denies the issues in dispute as framed in the Memorandum of Claim and in particular;

a) Admits all the particulars of the Claimant's employment as set out under paragraphs 1, 2, 3 and 4 of the Memorandum of Claim save for the "claimed benefit for contributions towards a pension scheme." The Respondent avers in respect thereto that the same was mistakenly stated in the Claimant's letter of appointment.

b) The Respondent denies that it was bound to contribute 25% of the basic salary of the employee as alleged by the Claimant adding that the Claim is based on a wrong document instead of the Respondent's Personnel Policy and Procedure Manual which formed part of terms of employment of the Claimant which does not contain such a clause nor does it provide for any particulars of pension contribution. The alleged current document was produced as annexure "KANCO I" to the Statement of Reply.

15. The Respondent states that the alleged Human Resource Policy and Procedure Guidelines is still work in progress pending further discussions by the Respondent's Board and subsequent adoption.

16. That the Respondent has implemented some of the benefits in the draft policy guidelines but not as a matter of legal obligation. An example is the provision of 10% contribution to the Unit Trust to which the Claimant was a member. That this contribution of 10% to the Unit Trust was paid in the month of May to September, 2010 in good faith but was not a legal obligation.

17. The Respondent denies that the Claimant was declared redundant but his contract was terminated in the ordinary course of employment in terms of **Section 35(1)(c) of the Employment Act No. 11 of 2007.**

18. That the Claimant was paid all his outstanding dues at the time of termination.

19. **Claimant's Reply to the Respondent's Response**

In Response to the denial by the Respondent aforesaid, the Claimant annexed "Minutes of the Respondent's Staff Retirement Benefits Scheme AGM Meeting held on 18<sup>th</sup> July, 2011 and the Scheme's Financial Statement for the years 2008 and 2009."

20. Under Minute 4/07/06 Item 4 are guidelines of the pension scheme which reads;

*"What do I contribute to the scheme and also the company? Members contribute 10% of their pensionable annual salary....."*

21. The KANCO contributes towards the purchase of Retirement benefits, 25% of member's pensionable annual salary, but excluding overtime, commissions and bonuses."

22. The Respondent called RWI, Everlyne Agala, the Human Resource Manager, RW2 Allan Ragi, Human Resource Director of the Respondent who testified on the issues in dispute and also filed written submissions.

23. **Issues for Determination**

1. Was the Claimant declared redundant or was it a normal termination? Was the separation lawful and fair?
2. Was the Respondent obliged to make a 25% contribution to the employee's pension scheme?
3. Is the Claimant entitled to Expenses/Losses incurred following termination as claimed?

24. **Issue 1**

The Claimant's employment came to an end by virtue of a letter dated 21<sup>st</sup> October, 2010 which partly reads;

***"End of Program.***

*We would like to make reference to your engagement as a policy and advocacy officer. The RAY Project is coming to an end in March, 2011 and therefore only the initial specialized skills may be required to facilitate service delivery.*

*This letter is therefore to give you a one(1) month notice to terminate your services with effect from 1<sup>st</sup> November, 2010."*

25. The **Employment Act No. 11 of 2007 under Section 2** defines redundancy as follows;

*"Redundancy" means the loss of employment, occupation, job or career by involuntary means through no fault of an employee, involving termination of employment at the initiative of the employer where the services of an employee are superfluous and the practices commonly known as abolition of office, job or occupation and loss of employment."*

26. A plain reading of the letter by the Respondent dated 21<sup>st</sup> October, 2010 clearly shows that the employment of the Claimant was terminated by the employer through no fault of the Claimant because his services had become superfluous following the coming to an end of the RAY Project.

27. It is without doubt that the claimant was declared redundant by the Respondent.

28. The Claimant was therefore entitled to benefits under Clause 15 2.10(d) of the Personnel Policy and Procedure Manual titled **“Redundancy or Abolition of Office.”**

29. In terms thereof, the Claimant was entitled to one month’s notice and payment of one month’s salary for each completed year of service. This rate is more favourable than that provided under Section 40 of the Employment Act. The Respondent was obliged to apply this Clause therefore and the court finds accordingly.

30. To the extent that the Respondent did not comply with its own Personnel Policy and Procedure Manual nor did it comply with the minimum requirements provided under **Section 40 of the Employment Act**, in that, Respondent did not pay the minimum severance pay, the declaration of redundancy was effected in an unfair manner.

### 31. **Issue 2**

Though the letter of appointment dated 21<sup>st</sup> March, 2007 provided under Clause 4 (b) for “Contribution towards a Pension Scheme” the annexed Personnel Policy and Procedure Manual signed on 8<sup>th</sup> May, 2007 by the Claimant did not provide for a pension scheme and contribution terms.

32. The Claimant relies on a document titled “Human Resources Policy and Procedure Guidelines” KANCO 2010, which is not referred to in his contract of employment nor does it bear the claimant’s signature.

33. The Respondent has testified that this document was work in progress and had not been concluded and adopted for implementation by the time the claimant left the employment of the Respondent.

34. Furthermore, the Claimant was not a member of the Staff Retirement Benefits Scheme managed by CFC in place at the time.

35. This scheme was voluntary and members had to personally apply, which the Claimant had not done.

36. The court finds that the Claimant has not proven on a balance of probabilities that he was entitled to 25% contribution to a pension scheme by the Respondent. The question is therefore answered in the negative with the effect that this claim by the Claimant must fail.

### 37. **Issue 3**

Expenses/loss incurred following termination as claimed in the Memorandum of Claim are by nature special damages.

38. These must be specifically pleaded and proved by way of verifiable documentation. The Claimant did not make any attempt at all to specify and/or prove the alleged expenses and losses incurred by fact of termination. This claim must also fail accordingly.

### 39. **Remedy to the Claimant**

From the foregoing, the Claimant is awarded Gratuity/Severance pay calculated at one month’s gross salary for every completed year of service in the sum of Ksh.294,000.00. This is calculated from a gross salary of Ksh.73,500.00 which the Claimant earned at the time of termination. Only eight (8) months were served in the year 2010 and the calculation is done on pro rata basis for that year.

40. The other claims are dismissed. Had the Claimant pleaded compensation for unfair termination on grounds of redundancy, the court would have been obliged to consider an award under that head.

41. In the final analysis, the court awards the Claimant as against the Respondent;

- a) Kshs.294,000.00 being Gratuity/Severance pay.
- b) Payment is to be done with interest at court rates from the date of termination to payment in full.
- c) Respondent to provide certificate of service within 30 days from today.
- d) The Respondent is to pay the costs of the suit.

**Dated and Delivered at Nairobi this 13<sup>th</sup> day of February, 2015.**

**MATHEWS N. NDUMA**

**PRINCIPAL JUDGE**