



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI**

**CAUSE NO. 1595 OF 2014**

**EVALYN MUMBI AYUB ..... CLAIMANT**

**VERSUS**

**ZETU KENYA LIMITED ..... RESPONDENT**

**JUDGEMENT**

1. The issue in dispute is the non-payment of terminal dues.
2. The claim was filed on 22<sup>nd</sup> September 2014; the respondent was served with summons and never entered appearance of filed any defence. Affidavit of Service was filed and a hearing notice served but the respondent remained unresponsive. The matter proceeded for hearing in the absence of the respondent.
3. The claim is that the claimant was employed by Mobile for Good Ltd in 2005 as a Data Entry Clerk, it changed names and became Zetu Kenya limited and the claimant retained her terms and conditions of work but was issued with a new contract of employment. At the time of change, the claimant position had changed to that of Customer Care. She served diligently and her last salary was Kshs.50, 000.00 per month. In 2012 the respondent started defaulting payment of salaries and would pay in bits through Mpesa or cash leaving a balance of Kshs.225, 685.00 by March 2014. On 31<sup>st</sup> March 2014 the claimant resigned from her position with the respondent, her notice was accepted but her salary arrears have not been paid. In the acceptance letter the respondent admits that the arrears would be paid as follows;
  - a. Kshs.10,000.00 on 31<sup>st</sup> March 2014;
  - b. Kshs.20,000.00 on 3<sup>rd</sup> April 2014; and
  - c. Kshs.22, 863.88 on every month in 9 months.
4. The claimant got the first instalment of Kshs.10, 000.00 but not the balance.

The claimant is seeking the payment of kshs.215, 685.00 in whole; payment of NSSF contributions since 2010 all at Kshs.15, 600.00 and damages for breach of contract.

5. In evidence, the claimant testified that upon her employment by the respondent she served diligently but her salaries were constantly delayed forcing her to resign from her employment. This was accepted by the respondent who also offered to pay the salary arrears and committed to the timelines. This was however not respected hence the claim herein.

6. It is the duty of an employer to ensure that an employee who has served diligently is paid their due salary at the appointed time or as agreed. Where the time of such payment of salary is not a term in the contract of employment and the employee is permanently employed and continuous to serve from month

to month, then such pay is due at month end. With the payment of such salaries, the employer is required to issue a statement in accordance with section 20 of the Employment Act thus;

*20. (1) An employer shall give, a written statement to an employee at or before the time at which any payment of wages or salary is made to the employee.*

*(2) The statement specified in subsection (1) shall contain particulars of—*

*(a) the gross amount of the wages or salary of the employee;*

*(b) the amounts of any variable and subject to section 22, any statutory deductions from that gross amount and the purposes for which they are made; and*

*(c) where different parts of the net amount are paid in different ways, the amount and method of payment of each part-payment.*

*(3) This section shall not apply to a casual employee or an employee engaged on piece rate or task*

*rate terms or for any period not exceeding six months.*

*(4) The Minister may exclude any category of employees or employees employed in any sector from*

*the application of this section.*

Whatever mode of payment of a salary, through the bank, in cash, Mpesa, an employee is entitled to get a written statement of the same. the statement must state the gross salary, statutory deductions, any other deductions and the net amount. In this case the claimant was paid through Mpesa but her statutory deductions were not effected.

7. The claimant is seeking the payment of the salary arrears not paid. The sum of Kshs. 215,685.00 is due and is hereby awarded to the claimant.

8. The claimant is seeking damages for being placed under difficult circumstances. This is claimed on the basis that the respondent breached the contract of employment. that she should be paid Kshs.150, 000.00 in damages. However in a claim of employment relations, to seek damages for breach of contract, this must be demonstrated. Failure to pay a salary in itself and where the unpaid amount is claimed do not speak to any breach. Such breach where it occurred, the claimant should have claimed her salaries due even as she remained under the employment of the respondent. where such non-payment of due salary occurred, the claimant had the right to claim for an unfair labour practice that find remedy in the award of compensation. There is no evidence of any unfair labour practice in the pleadings or in her evidence. The claimant must outline the unfair circumstances she was placed under so as to resign her position. Where such resignation is done not out of her volition, a claim for constructive dismissal is allowed and compensation is due. The claimant rely on the case of **Gideon Mutiso Mutua versus Mega Wealth International Limited [2012] eKLR**, I however find a fundamental difference between the cited case and the matter at hand. It relates to ordinary contract whereas the claim herein relate to employment and labour relations. One is regulated by the law of contract while the other is regulated by the Employment Act and the remedies available in the latter case are as under section 49 of the Employment Act read together with section 12 of the Industrial Court Act. In this I find no evidence of unfair labour practice and damages or compensation shall not be awarded.

9. The claimant is seeking the payment Kshs.15, 600.00 that should have been remitted to the NSSF. However these are dues that ought to have been remitted to a statutory body and not to the claimant. However Under section 35(6) of the Employment Act, where statutory deductions are not remitted, an employee is entitled to service pay. This shall be awarded at 15 days' pay for each year served based on

her salary last paid at Kshs.50, 000.00. The claimant commenced employment with the respondent in 2010 and had to resign in 2014. For the 4 years, the claimant is awarded Kshs.100, 000.00.

**Judgement is entered for the claimant against the respondent in the following terms;**

- a. **Salary arrears awarded at kshs.215,685.00;**
- b. **Service pay at kshs.100,000.00;**
- c. **Costs of the suit;**
- d. **Interests on (a) above.**
- e.

**Delivered, dated and signed in open Court at Nairobi this 9<sup>th</sup> July 2015.**

**M. Mbaru**

**JUDGE**

In the presence of:

Lilian Njenga: Court Assistant

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