



**REPUBLIC OF KENYA**

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

**CAUSE NO.2123 OF 2012**

**EDDIE MUTEGI NJORA .....CLAIMANT**

**VERSUS**

**MEGA MICROFINANCE CO. LTD ..... RESPONDENT**

**JUDGEMENT**

1. The issues in dispute is the withholding and non-payment of benefits arising under the claimant's contract of service and the contravention of his employment rights under his contract of service.

**The claim**

2. On the 19<sup>th</sup> October 2012, the Claimant Eddie Mutegi Njora filed his Memorandum of Claim against the Respondent for withholding his terminal benefits and contriving his rights under his contract of service. On 26<sup>th</sup> July 2008 the Claimant was employed as an Administrative Officer with the Respondent but a written contract of employment was only issued on 22<sup>nd</sup> February 2011 and was backdated to 26<sup>th</sup> July 2008. The Claimant was also simultaneously engaged with Mega Initiative Welfare Society which was a sister entity to the respondent.

3. The terms of the claimant's contract were that he would be paid kshs.40, 000.00 per month as his salary; have 30 days leave per year; and an inpatient medical cover. The contract of employment was not issued immediately per the law and as a result the Claimant did not know his terms and conditions of work to enable him claim his service pay for the 3 years he served. The Claimant performed his duties diligently with the Respondent and with mega initiate Society and in May 2010 his salary was increased to Kshs.50, 000.00.

4. On 27<sup>th</sup> June 2011 the Respondent issue the Claimant with a letter notifying him that his contract of service would end on 31<sup>st</sup> July 2011. The contract was however frustrated as the Respondent failed to pay for leave days due, compensation for use of personal lap top, no housing allowance was paid and medical cover and compensation for breach of contract. Upon termination of contract, the Respondent failed to pay;

*a) Accrued leave of 78 days for 3 years amounting to Kshs.130, 000;*

*b) 3 years' service pay at kshs.150, 000.00;*

*c) Unpaid medical cover Kshs.4, 633.00;*

*d) Compensation for use of personal lap top kshs.21, 000.00; and*

*e) Compensation for not being issued with an employment contract.*

The Claimant is seeking these dues.

5. In evidence, the Claimant testified that upon employment he was not issued with a letter of employment until 22<sup>nd</sup> February 2011 a backdated it 26<sup>th</sup> July 2008 which was unprocedural. It was agreed that the Claimant would serve as the Respondent as the Administrator and remain the executive officer of the sister company Mega Initiative Welfare Society (MIWS). He continued to work in the dual roles until 21<sup>st</sup> April 2011 when the Respondent directed him to proceed on leave but could remain working for MIWS. That this was irregular as the two entities could not be separated, they shared an office and thus the Claimant remained at work for both entities and did not take leave as directed. On 30<sup>th</sup> May 2011 the Respondent again directed the Claimant to hand over and proceed on leave but would continue to serve MIWS until 30<sup>th</sup> June 2011 when his contract was to expire. The Claimant on 6<sup>th</sup> June 2011 wrote to the Respondent noting that he could not proceed on leave from the Respondent but remain at work with MIWS as this would effectively mean he was not on leave. On 21<sup>st</sup> July 2011 the Respondent indicated that its board was considering the terminal benefits dues to the Claimant but these were not paid.

6. That he was issued with notice to proceed on leave but could not take such leave as he was still working for MIWS a fact that the Respondent was well aware of. He still had work to do for the Respondent and could effectively not go on leave while he still had to work for the sister company, MIWS.

7. The Claimant also testified that he served the Respondent for 3 years and was entitled to service pay; 78 leave days; pay for use of his lap top that he was forced to use while at work; accommodation for the contract period. The Claimant was issued with a loan by Mega Microfinance on check off system and was unable to repay as a result of breach of contract of service and had his terminal benefits been paid by July 2011 he would have settled it without incurring penalties.

8. On cross-examination, the Claimant confirmed that he is still working at MIWS. While working for the Respondent he was the Administrative Officer responsible for preparing pay rolls and was required to advise the Respondent on all staff statutory deductions. The Claimant was not a member of the NSSF and his dues were not paid. He did not intentionally fail to remit the NSSF dues in his case and this issue was never addressed by the respondent. His contract did not provide for service pay and house allowance was not agreed.

## **Defence**

9. In defence, the Respondent admit that they had employed the Claimant as the Administrative Officer and his terms stipulated under his contract dated 26<sup>th</sup> July 2008. His contract came to an end and was not renewed and is not owed any dues.

10. In evidence the Respondent called Eric Mutembei the General Manager. He testified that the Claimant was their employee on a 3 years contract from 1<sup>st</sup> August 2008 to 1<sup>st</sup> August 2011. Under the contract the Claimant duties were to report to the general manager; attend to all personnel matters, ensure office organisation; prepare accounts and attend to insurance matters; and attend to the shareholders. Before the claimant's contract expired, he was advised to take his annual leave due vide letters dated 30<sup>th</sup> May 2011 and 21<sup>st</sup> April 2011. He refused to take such leave and raised questions with his role at MIWS. That the Respondent and MIWS are two separate entities but the Respondent had allowed the Claimant to work for the sister company during the pendency of his contract with them. He continued to report on duty but to the respondent, he had been allowed and directed to proceed on his accrued leave. He was allowed to access his office as his other employer was in the same premises. He was however not allocated any duties by the respondent. On 2<sup>nd</sup> June 2011 the Claimant proceed on leave after handing

over. His had 74 days of leave at the time.

11. From 2<sup>nd</sup> June 2011 to 31<sup>st</sup> July 2011 the Claimant took 43 days of leave and while computing his terminal dues, the balance of 22 days of leave were paid for in cash at Kshs.36, 666.60. There was no house allowance as the contract amount was all inclusive. The contract had been signed on 26<sup>th</sup> July 2008. There was a medical cover that expired on 31<sup>st</sup> March 2011 and was not renewed and where the Claimant incurred any medical bills, he was to submit for reimbursement. Service pay was not in the contract. The Respondent provided all staff with computers as the use of private lap tops was not allowed due to the nature of financial transactions they had and such use of personal lap top was against Respondent policy and breach of work ethics. There was no breach of contract to warrant compensation.

12. The witness also testified that by the time the Claimant contract ended he had an outstanding loan and a salary advance of Kshs.14, 000 that he had not paid. He failed to remit his own NSSF dues while he was the one responsible for all staff statutory deductions. He submitted for some months but not all;

December 2008 Kshs.200.00;

February 2010 Kshs.200.00;

March 2010 Kshs.200.00;

April 2010 Kshs.200.00; and

November 2010.

13. These were the only remittances the Claimant remitted in his account while all other staff had their deductions and Respondent contributions remitted. When the Respondent discovered this anomaly, they proceeded and paid all the NSSF dues owing on the claimant's account and the penalties due. This was discovered when the Respondent called an auditor and were advised to pay all the NSSF dues owing.

14. The dues paid to the Claimant were;

**Accrued leave pay at Kshs.36, 666.60**

**Less tax due Kshs.5, 042.40**

**Balance due Kshs.31, 624.20**

15. From the due amount, the Respondent reduced the NSSF dues not remitted and the salary advanced to the Claimant being;

Balance due at Kshs.31, 624.20

Less NSSF dues Kshs.6, 400.00

Less salary advance of Kshs.14, 000.00

Balance owing to Claimant is Kshs.11, 220.00.

16. The balance owing to the Claimant was then used to reduce his loan balance which was at Kshs.200, 000.00. The Respondent has filed a claim before the Chief magistrates Court to recover this loan that the Claimant has failed to repay. The Respondent does not owe the Claimant any monies as he is the one owing.

## **Submissions**

17. The Claimant submitted that his letter of employment recognised that he was working for the Respondent and another entity and sister company, MIWS and when he was directed to take leave, the Respondent failed to recognise that in effect that leave was not effective. He is therefore claiming leave for 78 days. By 31<sup>st</sup> March 2011 he had earned 64 days of leave. He worked until the end of the contract period on 31 July 2011 and for the notice period he earned 14 more days of leave and all total due is 78 days. The Claimant did not take leave and was not in a position to take such leave. He continued to work at MIWS as directed by the respondent.

18. The Claimant also submitted that he is entitled to 3 years' service pay under the provisions of section 35(5) of the Employment Act. His statutory dues were not paid to the NSSF and is thus entitled to claim service pay. The Claimant has relied on various cases where such service pay was awarded – **Mary Rhobi versus Annah Bhamania [2014] eKLR; John Willice Opot versus Starehe Boys Centre [2013] eKLR; and Linet Akasa Shikoli versus Lilian Otundo [2014] eKLR.**

19. The claim for unpaid medical cover is on the basis that the cover that existed expired on 31<sup>st</sup> March 2011 and the Respondent failed to renew. That the Claimant was entitled to such cover under his contract of employment. The Claimant for housing allowance is on the basis that no such allowance was paid and the Respondent did not provide housing. That he should be paid for the use of his personal laptop and be compensated for the backdated contract.

20. The Respondent on their part submitted that the leave due to the Claimant was 74 days and that has since been paid. Such leave was computed;

By 31<sup>st</sup> March 2011 the Claimant had **64 days** of leave;

1<sup>st</sup> April to 31<sup>st</sup> July 2011 Claimant had **10 days** leave;

Total due **74 days;**

Less

From 2<sup>nd</sup> June to 31<sup>st</sup> July 2011 Claimant took **42 days** of leave; the balance leave days were **22 days** which were computed and paid to the claimant.

21. By letter dated 30<sup>th</sup> May 2011, the Claimant was allowed to operate for MIWS while seating at the respondent's office. He can therefore not claim for leave.

22. The Respondent also submitted that service pay was not due under the claimant's contract of employment. All NSSF dues were remitted despite the fact that the Claimant as the Administrative officer of the Respondent had failed to remit his own NSSF dues as the responsible officer for this role. Such NSSF dues have been remitted and the Respondent enjoyed a waiver from paying the penalties that were due for non-remittance. Medical cover is not due as the Claimant was to submit all his medical expenses after the medical cover lapsed on 31<sup>st</sup> March 2011. The contract sum was all inclusive and included all allowances the housing as well. The Respondent provided all the necessary facilities at work and there was a policy not use personal computers and where the Claimant used his own, it was against policy and cannot claim any allowance. The claimant had a written contract at all time.

## **Determination**

Whether there is a case for unpaid terminal dues

Whether the claimant's employment rights were violated

Whether the Claimant is entitled to the remedies sought

23. It is trite that all employees should be issued with written employment contracts. Such contract should spell out the terms and conditions of work. The particulars and details of such a contract is well outlined under section 9 of the Employment Act thus;

*(2) An employer who is a party to a written contract of service shall be responsible for causing the contract to be drawn up stating particulars of employment and that the contract is consented to by the employee in accordance with subsection (3).*

*(3) For the purpose of signifying his consent to a written contract of service an employee may—*

*(a) sign his name thereof, or*

*(b) imprint thereon an impression of his thumb or one of his fingers in the presence of a person other than his employer.*

24. In this case the Claimant has submitted a contract of employment dated 26<sup>th</sup> July 2008. The Claimant contests that he did not see this contract until 22<sup>nd</sup> February 2011. That this was a violation of his employment rights and that he did not know the terms of his contract until this late and was not able to contest it. On the other hand the Respondent witness was emphatic that the contract was issued to the Claimant immediately it was drawn on 26<sup>th</sup> July 2008.

25. What is apparent is that the letter of appointment is not an exact replica of section 9 of the Employment Act provisions as it is signed by the Respondent officer, but there is no indication of the claimant accepting the same as under the provisions of section 9(3) of the Act. The Claimant has not signed in acknowledgement. However, even where the Claimant has not signed this contract, he was aware that his salary was kshs.40, 000.00 until it was improved to Kshs.50, 000.00; that he was working for the Respondent as well as for the sister company MIWS where he had started work; his duties were set out as payment of salaries, remittance of statutory deduction and reporting to the Respondent General Manager. Such details are only available under the letter of appointment dated 26<sup>th</sup> July 2008. It cannot therefore be possible that the Claimant only came to learn on his contract on 22<sup>nd</sup> February 2011. By his own acts, conduct and operations, the Claimant acted with good knowledge of his contract. Where the Respondent failed to act in accordance with the provisions of section 9 by having the Claimant sign his contract, the Claimant admit that he received such a letter on 22<sup>nd</sup> February 2011. This is a period of 5 months before the expiry of his contract. He does not contest the term period of his contract and continued to serve under such terms until 31<sup>st</sup> July 2011. I find no merit in the submissions that the claimant's rights under his contract were violated for non-issue of the same.

26. Employment records are very crucial in any work environment and in any employment relationship. Such records become absolutely important where there is an employment dispute. The employment contract made available to the Court by both parties herein indicate that the Claimant was an employee of the respondent. In evidence, the Claimant confirmed that he was allowed by his employer, the Respondent to work for a sister company MIWS and was remunerated in that other capacity.

27. The contract of employment spelt out the terms and conditions of employment. The salary due was also agreed at a gross of kshs.40, 000.00 per month. The benefits due under such employment were also clearly set out. Housing or an allowance in lieu was not such one benefit. Whitten contracts are to be taken in their meaning and to infer other rights outside what was agreed would be to invite the Court to read-in such a right but this is in exceptional circumstances only. The Claimant does not state that his pay was below the minimum pay allowed for the position he held so as to claim other benefits that arise from any underpayment or housing outside his written contract. Where the pay due is agreed and the benefits as well, I find no good ground to claim housing or an allowance in lieu thereof.

28. The Claimant was under a fixed term contract running from 1<sup>st</sup> August 2008 to 31<sup>st</sup> July 2011. On 27<sup>th</sup> June 2011, the claimant was issued with notice of termination of his contract. This notice was not necessary as this was a fixed term contract but as a good labour practice, such notice was good as it

ensured the parties were clear on the impending lapse of the contract between them. Prior to the lapse of the contract, on 21<sup>st</sup> April 2011 the Respondent directed the Claimant to take his accrued leave. The Respondent also stated that;

*Your assignment with Mega initiative Welfare Society (MIWS) will continue normally and although you will be using our office for the same, you will be reporting directly to the Chairman, MIWS henceforth.*

29. I find no ambiguity in such directions. The Claimant was to proceed on leave from his employment with the Respondent but was allowed to continue operating from the employer's office as he was serving another entity. Further letter dated 30<sup>th</sup> May 2011 note that the Claimant had not taken his leave as directed and was asked to hand over and commence his leave.

30. Leave is a legal entitlement. It should be taken when due. This enables an employee to rest as such rest cannot be postponed and to do so only creates burnout and less productivity from such an employee. I find the notice issued to the Claimant in April and May 2011 a best practice as the employer noted the employee had accumulate leave days and should take such leave immediately. The employer in this case was the Respondent and not MIWS. The Claimant cannot thus say that he was directed to take leave by the employer but did not take such leave as he was seating in his office doing work for a third party. The contract of employment is clear to this extent. The Respondent was the employer and could legally direct him to take leave, which the Respondent did. From 21<sup>st</sup> April 2011 the Claimant had such notice and despite his protests that he had a lot of work to do before his contract lapsed, such work was for and for the benefit of the respondent/employer and such an employer had directed him to take his leave days. The Claimant cannot therefore claim for such leave days where he continued to report at his work place to do work for a third party and not to the Respondent as his employer.

31. There are legal entitlements upon the termination of employment. Section 35 of the Employment Act make provision for service pay. The circumstances where such service pay is dues is set out under section 35(5) thus;

*(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.*

32. For this purposes, section 35 (1) (c) of the Act states;

*(c) Where the contract is to pay wages or salary periodically at intervals of or exceeding one month, a contract terminable by either party at the end of the period of twenty-eight days next following the giving of notice in writing.*

33. The Claimant had a fixed term contract and was also issued with notice of termination. The service pay that is claimed as due under section 35(5) of the Employment Act does not stand out alone as this section should be read together with section 35(6) thus;

*(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.*

34. The contest here is that the claimant's dues to the NSSF were not remitted and should be paid his service pay for the 3 years contract period. The Respondent challenged this claim on the basis that the

Claimant was the employee responsible for the statutory dues deductions and remittances but he did so work all other employees but failed to make his own deduction and remit such to the NSSF. The duty to deduct and remit is upon the employer and not on the employee. To leave such a duty upon an employee is a misapplication of the law and the responsibility attached to the employer. It does not matter the position held by the employee. Before an employer can approve any payments to its employee, due diligence, duty and responsibility dictates that such an employer should ensure all statutory deductions are remitted with regard to all its employees, the chief executive officer, the administrator, accountants; all these inclusive. It is not the position held that matters in this regard, it is the status of being an employee that is important. In this case the Respondent should have ensured that all its employees were registered with the NSSF and all remittances deducted and made to such a body.

35. The non-payment of statutory dues to NSSF entitle the employee service pay. Such remittance should be to the NSSF and not to the employee. However in this case, the Respondent has since paid all the statutory dues to NSSF and updated the claimant's remittances. Such dues ought to have been paid with a high penalty but the Respondent has had a waiver upon good explanation as to how the lapse occurred. Such lapse was due to the non-adherence by the Claimant to his duties while in employment. To claim for service pay upon confirmation that such statutory dues have since been updated would be a double payment. Despite such remittance of the NSSF dues being paid after the fact of this matter being filed, the same was brought to the attention of the Court before judgement and this being a Court of justice, to pay service pay upon the knowledge of payment of the requisite statutory dues would be gross error.

36. The Claimant is also seeking pay for the unpaid prorated medical cover and compensation for use of his lap top. The duty to provide a medical cover; medical attention or medical care is upon the employer. Such requirements are well set out under section 34 of the Employment Act thus;

*34. (1) Subject to subsection (2), an employer shall ensure the provision sufficient and of proper medicine for his employees during illness and if possible, medical attendance during serious illness.*

*(2) An employer shall take all reasonable steps to ensure that he is notified of the illness of an employee as soon as reasonably practicable after the first occurrence of the illness.*

*(3) It shall be a defence to a prosecution for an offence under subsection (1) **if the employer shows that he did not know that the employee was ill and that he took all reasonable steps to ensure that the illness was brought to his notice or that it would have been unreasonable,** in all the circumstances of the case, to have required him to know that the employee was ill. [Emphasis added].*

37. Where an employer provides a medical cover, such a cover is to ensure the employer has taken a progressive step to ensure all employees are covered in terms of medical care and attention at all times. Where an employer has not provided such a medical cover, once an employee is unwell, such information should be brought to the attention of the employer as soon as it is reasonably practical. The employer then has a duty to address the matter as appropriate where such sickness has been brought to their attention. The evidence by the Claimant that he remained without a medical cover from March to July 2011 and therefore should be compensated for lack of such a medical cover. The Claimant however failed to submit any evidence of sickness and need for medical attention that was brought to the attention of the Respondent and that the Respondent failed to address such a situation or that the Claimant was forced to incur medical bills and the Respondent failed to reimburse. The duty here is for the Respondent *to ensure the provision sufficient and of proper medicine for his employees during illness and if possible, medical attendance during serious illness* as under section 34(1) of the Employment Act.

38. The Claim for lap top use by the Claimant is made on the basis that he undertook his work using his property for the benefit of the respondent. This was contested by the Respondent noting that such use of personal lap top was contrary to policy due to the nature of business of the respondent. Use of personal tools by an employee requires a careful balance. Such personal tools may be used if an employer fails to

provide such tools and for the employee to perform their work well they may be forced to use such personal tools. The Claimant failed to state why he had to use his personal laptop as the Administrative Officer of the respondent. He did not state that he required to use a laptop and the Respondent failed to provide it at the workplace and hence was forced to claim the same. Further, the quantification of such use of personal tool is not justified. I find no merit for seeking compensation in this regard.

**Remedies**

39. The claim for accrued leave; service pay; and house allowance as set out above are not due as set out by the claimant. Such benefits do not arise based on the law and the evidence adduced. Equally the claim for unpaid prorated medical cover and compensation for use of personal laptop lacks justification. No remedies are due in this case.

40. Noting the dues arising to NSSF were settled during the pendency of this case, no costs will be ordered. Each party shall meet their own costs.

**The claim herein is dismissed in its entirety.**

Delivered in open Court at Nairobi and dated this 22<sup>nd</sup> day of October 2015.

**M. Mbaru**

**JUDGE**

In the presence of:

Lilian Njenga: Court Assistant.....

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