



**REPUBLIC OF KENYA**

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

**CAUSE NO. 398 OF 2012**

**DR. PRISCA NYAMWAYA ..... CLAIMANT**

**VERSUS**

**MP SHAH HOSPITAL ..... RESPONDENT**

Opiyo for the Claimant

Pramod Patel for the Respondent

**JUDGMENT**

1. In the Memorandum of claim dated 5<sup>th</sup> March 2012, the Claimant seeks payment of terminal dues she alleges are unlawfully withheld from her in the sum of Kshs.1,256,500 tabulated as follows:
  - i. basic pay for April 2011, Kshs.11,600.00;
  - ii. payment in lieu of leave days, Kshs.364,500.00;
  - iii. two (2) months salary in lieu of notice, Kshs.263,200.00;
  - iv. house allowance for two months, Kshs.50,000.00;
  - v. thirty eight (38) days ....., Kshs.31,667.00;
  - vi. benefits two (2) months, Kshs.11,600;
  - vii. thirty eight (38) days, Kshs.7,134.00;
  - viii. gratuity calculated at fifteen (15) days salary for eight (8) years and one hundred twenty (120) days in the sum of Kshs.526,400.00.

**Claimant's Case**

2. The Claimant's case may be summarized as follows;

The Claimant was employed by the Respondent as a doctor for eight (8) years. That on 16<sup>th</sup> March 2011 she resigned from service giving three (3) months' notice.

3. The Respondent accepted the resignation by a letter dated 21<sup>st</sup> March 2011 but indicated the Claimant's last working day would be 14<sup>th</sup> April 2011.
4. On 11<sup>th</sup> April 2011, the Claimant acknowledged receipt of the acceptance letter and acknowledged the terminal benefits offered to her. The Claimant however stated that the letter of acceptance was silent on housing aspect. That she was living in an institutional house and she would vacate at the expiry of the three months' notice she had given.
5. The Claimant also sought payment of any cash claims pending prior to expiry of the notice period.
6. That the Respondent should confirm clearance and complete payments of the HELB loan by M.P.

- Shah Hospital and make payment of gratuity.
7. This letter was not responded to. The Claimant wrote another letter dated 16<sup>th</sup> April 2011 through which she handed over the key to the doctor's flat No. 6 which she was occupying and job identification card. She thanked the Hospital for the opportunity it had given her to serve the Hospital.
  8. The Claimant states that the Respondent has until the time of filing this suit withheld her terminal dues. That the conduct by the Respondent was unlawful, malicious and in bad faith. That she had a clean record at work and had been commended severally for her good service.
  9. That the Respondent had no reasonable excuse not to pay her dues.
  10. The Claimant wrote a letter of demand but this was not heeded by the Respondent hence this suit.
  11. The Claimant claims payment of the sum of Kshs.1,256,500.00 as terminal benefits plus maximum compensation of twelve (12) months salary for the unlawful withholding of her dues.
  12. The Claimant also seeks the Respondent to provide her with certificate of service; pay balance of her HELB loan and interest on the award.

### **Statement of Response**

13. The case by the Respondent may be summarized as follows;

The Claimant was employed by the Respondent and that the Claimant had resigned with effect from 14<sup>th</sup> April 2011. That the Respondent curtailed the notice period given by the Claimant and offered to pay her in lieu of two months' notice. That the Claimant was under National Social Security Fund (NSSF) and therefore no gratuity was payable to her as claimed or at all.

14. The Respondent denies that the Claimant cleared from the Respondent as she was supposed to do. That the Claimant failed, refused and / or neglected to handover and return all hospital property.
15. That the final dues were to be paid following clearance. The Respondent admits that it owes the Claimant terminal dues set out in the tabulation it produced in Court in the sum of Kshs.280,278.00;

### **16. Determination**

- i. What is the correct sum of terminal benefits due and owing to the Claimant?
- ii. Was the Respondent justified to withhold the same?
- iii. Is the Claimant entitled to any compensation as claimed?

### **Issue i**

17. This matter proceeded on the basis of pleadings and supporting documents filed by the parties and final submissions by consent of the parties. No oral evidence was adduced therefore.
18. The Court has arrived at the following conclusions of fact;

The Claimant was registered with NSSF and the Respondent contributed to the NSSF on her behalf. In addition the Claimant was a member of the Respondent's pension scheme.

19. The Claimant is therefore not entitled to payment of gratuity for the number of years served by dint of Section 35(5) as read with Section 35(6) (c) & (d). The Claim for gratuity is therefore ill founded and same is dismissed.
20. The Claimant was offered housing by the Respondent and upon resignation was entitled to remain in the house for the period of three (3) months' notice she was entitled to serve under the contract. This notice was however cut short by the Respondent who offered to pay her two months' salary in lieu of notice.
21. The Claimant handed over the key to the house and her job identity card on 16<sup>th</sup> April 2011. She therefore claims payment in lieu of housing allowance which she calculates at 15% of her basic salary for two months in the sum of Kshs.50,000.00 The Court finds that the Claimant was entitled to housing during the period of notice, and since, the Respondent opted that the Claimant does not serve two months' notice, the Claimant is entitled to be paid in lieu of two months

- housing. This was computed by the Respondent to be in the sum of Kshs.73,956.47 plus Kshs.3,930.00 electricity benefits totaling Kshs.77,887.47..
- 22.The Claimant is also entitled to Kshs.164,500.00 in lieu of thirty eight (38) days unutilized leave which is in the sum of kshs.164,500.00 which sum is not disputed by the Respondent.
  - 23.The claim for thirty eight (38) days encashment in the sum of Kshs.31,667.00 and 7,347.00 respectively remains unsubstantiated by the Claimant. He who alleges must proof.
  - 24.The Court finds that this item has not been proved by the Claimant on a balance or probability.
  - 25.The deduction of Kshs.70,186.56 for sixteen (16) days not worked in the month of April is common cause and therefore only Kshs.61,414 is due and owing in salary for the month of April 2011.
  - 26.The Claimant is also entitled to Kshs.1,162.00 tax relief.
  - 27.It is the Courts considered view that the gross pay the Claimant is entitled to is Kshs.489,113.00 as computed by the Respondent and in addition Kshs.73,956.47 in respect of two months' housing and electricity benefit making a total taxable income of Kshs.560,220.00 the amount is less Kshs.163,160.40 tax plus Kshs.1,162.00 tax relief.
  - 28.The net pay to the Claimant is Kshs.280,278.00 as was correctly calculated by the Respondent in the pay-slip for April 2011.

## Issue ii

- 29.The Claimant has adequately proved vide her letter dated 16<sup>th</sup> April 2011 addressed to the Human Resource Manager, that she vacated the Respondent's flat No. 6 timeously, which fact is acknowledged by the Respondent and handed over her job identification. In the said letter she stated; *"These were the hospital property that I had."* This letter was not responded to at all by the Human Resource Manager of the Respondent inspite that the letter bears a stamp acknowledging receipt on the same day by the Human Resource Office.
- 30.The Court is satisfied that the Claimant had duly handed over and that no more demands were made by the Respondent to her in respect of further clearance as alleged in the statement of Response or at all.
- 31.The Respondent therefore wrongly withheld the terminal dues of the Claimant and further failed to provide the Claimant with a certificate of service as is required of the Respondent in terms of Section 51 of the Employment Act, 2007.
- 32.Where there is a dispute on the actual amount of terminal benefits payable, an employer acting in good faith simply deposits the amount not in dispute in the salary account of the employee or submits a cheque to the nearest Labour Office with advice to the employee to collect the same.
- 33.In this case, the Respondent, even upon demand by the Advocates for the Claimant did not pay the non-disputed amount and therefore unlawfully withheld terminal benefits of an employee contrary to law.
- 34.The Respondent is therefore ordered to pay the sum of Kshs.208,278.00 with interest at Court rates with effect from 14<sup>th</sup> April 2011 till payment in full.
- 35.The Claim for compensation made by the Claimant is without basis, the Claimant having voluntarily resigned from employment. There is no iota of evidence to show that the resignation was due to unlawful conduct by the Respondent and therefore this Claim is dismissed.
- 36.No basis also has been laid for the prayer for payment of HELB loan by the Respondent. The same is equally dismissed.
- 37.The Respondent having unlawfully withheld the terminal benefits of the Claimant is to pay the costs of this suit.
- 38.In the final analysis the award to the Claimant is as follows;
  - i. Kshs.280,278.00 terminal benefits;
  - ii. provision of certificate of service within thirty (30) days;
  - iii. interest on the award at Court rates from 14<sup>th</sup> April 2011 till payment in full;
  - iv. costs of the suit.

**Dated and Delivered at Nairobi this 18<sup>th</sup> day of December 2015**

**MATHEWS NDERI NDUMA**

**PRINCIPAL JUDGE**