



REPUBLIC OF KENYA  
 IN THE INDUSTRIAL COURT AT NAIROBI  
 CAUSE NUMBER 871 OF 2012

**BETWEEN**

ELIJAH KIPKOROS TONUI .....  
 CLAIMANT

**VERSUS**

NGARA OPTICIANS t/a BRIGHT EYES LIMITED..... RESPONDENT

*Rika J*

CC. Mr. Kidemi

*Ms. Ngetich instructed by Mitey & Associates Advocates for the Claimant*

*Ongegu & Associates Advocates for the Respondent*

ISSUE IN DISPUTE: TERMINAL BENEFITS

AWARD

1. The Claimant filed his Statement of Claim on 24<sup>th</sup> May 2012. The Respondent filed its Statement of Response on 19<sup>th</sup> November 2012. The Hearing was scheduled by the Claimant for 5<sup>th</sup> July 2013, and the Respondent, though notified did not attend the hearing. The Claimant gave evidence *ex parte* and closed his case on 5<sup>th</sup> July 2013.

2. His position is that he was employed by the Respondent as an Optical Technician on or about 1<sup>st</sup> December 1986. He applied to go on early retirement on 30<sup>th</sup> June 2011 on medical grounds. He gave the Respondent written notice of termination of one month, through his Advocates, dated 30<sup>th</sup> June 2011. He had lost his wife and wished to have the time to run the family business and look after the family. He worked for 25 years. He claims the Respondent did not pay him terminal dues for the years worked. He last earned a monthly salary of Kshs. 28,000. Mr. Anil Vara, Director of the Respondent advised the Claimant that the Respondent would call the Claimant to pick his terminal dues when ready. This never happened. The Respondent did not remit National Social Security Fund contributions consistently. The Claimant prays for:-

- a. Gratuity pay for 25 years at 15 days’ salary for each completed year of service, totaled at Kshs. 350,000;

- b. Outstanding annual leave pay for 2011 at Kshs. 28,000;
- c. Unremitted National Social Security Fund contributions amounting to Kshs. 14,400; and
- d. Any other relief in the circumstances

3. As stated at the outset the Respondent filed a Statement of Response, but did not attend Court on the hearing. The Statement of Response is a general denial. It denies that the Claimant was employed on permanent basis, and states the Claimant is not entitled to the prayers sought.

*The Court Finds and Awards:-*

4. The Claimant was employed by the Respondent as an Optical Technician on 1<sup>st</sup> December 1986. He retired early on medical grounds on 30<sup>th</sup> June 2011. There is a letter of his appointment dated 1<sup>st</sup> December 1986, signed by the Director Mr. Anil Vara. There is a certificate of service dated 12<sup>th</sup> January 2012 signed by Mr. Vara. There are various pay slips issued to the Claimant in the name of Ngara Opticians. There are Statements of Account from the National Social Security Fund indicating the Claimant was employed by the Respondent on 1<sup>st</sup> December 1986. There is abundant evidence showing the Claimant was, and the Court finds he was, an employee of the Respondent on the terms and conditions of service stated in his Statement of Claim.

5. He left employment on his own volition. He was not paid anything by way of terminal benefits, after 25 years of service. His N.S.S.F contributions were not made consistently. There were no contributions made at all for 5 years between 1988 and 1993. In 25 years, the Respondent remitted Kshs. 52, 480 to the N.S.S.F in contribution on the Claimant's account. The questions that are raised by this Claim are:-

1. Whether gratuity or service pay should be paid to the Claimant;
2. Whether the unremitted N.S.S.F contributions should be forwarded to the Fund; and
3. Whether the claim for annual leave pay of Kshs. 28,000 should be paid to the Claimant.

6. On gratuity or service pay, the relevant law is Section 35 of the Employment Act 2007. Under Section 35 [1] [c] the Claimant's contract of employment entitled him to receive a salary at intervals of, or exceeding one month, and the contract would be terminable by either party at the end of the period of twenty eight days next following the giving of notice in writing. The Claimant gave notice of termination of 30 days on 30<sup>th</sup> June 2011, which took effect on 30<sup>th</sup> July 2011. Under subsection [5] an employee whose contract has been terminated under Section 35 [1] [c], shall be entitled to service pay for every year worked in service, the terms of which shall be fixed. The terms of the service pay are left for the parties to fix, through the individual contract of employment, collective agreement, company policy or practice, or to be fixed through wage orders under the Labour Institutions Act. This Court has in some past decisions determined that in the absence of fixed terms of service pay, the employee would have no basis to enforce payment of service pay in a vacuum.

7. This position has since changed with the coming into force of the Constitution of Kenya, which under Article 41 calls for fair Labour Practices. Decisions of the Honourable Judges of the Industrial Court have in the recent past viewed the payment of service pay as a bare statutory minimum, and enforced the provision even in the absence of express fixed terms of service pay, based on the minimum 15 days' salary for every completed year of service given under the redundancy law, and which is also the floor in most industrial wage orders on severance, gratuity or service pay. Employees who hold terms and conditions of employment without fixed terms on the service pay should not be discriminated, and the Court fully embraces recent decisions which have adopted the 15 days' salary for each completed year of service, whenever such default is present.

8. The other relevant consideration in granting service pay are the restrictions given under Section 35 [6] of the Employment Act which are:-

Service pay under section 35 [5] is not payable 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.

9. This law is intended to ensure employees do not enter into retirement without social security. At the same time, the interest of employers is safeguarded, through the restriction on employees being paid double social security benefits. Service pay is therefore payable under Section 35 [5] only to employees who are not covered under the different social security mechanisms elaborated under Section 35 [6].

10. Basic membership to the National Security Fund or other Schemes is not in itself a bar to an employee accessing service pay under Section 35[5]. As the evidence in this Claim has shown, an employer could register an employee with the N.S.S.F, but fail to remit the monthly contributions, or remit irregularly. Secondly, the Court must look at the social security route that confers overall greater benefit on the employee. The Claimant in this dispute worked for 25 years. He was unfortunately forced to retire on medical grounds. He lost his wife, and had to take care of the family and family businesses back in his rural home. The N.S.S.F membership was not a serious social security mechanism in the eyes of the Respondent. Contributions in favour of the Claimant were remitted erratically, and after 25 years of service, there was only a tiny amount of Kshs. 52,480 in the Claimant's account.

11. In contrast if the Court is to disregard the N.S.S.F Membership, or conclude that the Membership affords the Claimant inferior social security benefits in comparison to the bare minimum service pay accruing under Section 35 [5] of the Employment Act, the service pay available to the Claimant after 25 years of service would be Kshs 28,000 divided by 26 working days = Kshs. 1,076.92 x 15 days = Kshs. 16,153.84 **x25 years of service= Kshs. 403,846.15**. The N.S.S.F membership seems to confer inferior social security benefits, and the Court is inclined to order that the Claimant shall be paid service pay, calculated as above. This shall be paid less any benefits made on the Claimant from the National Social Security Fund. There shall be no order in the circumstances for the Respondent to remit contributions it failed to contribute on account of the Claimant in the past. Annual leave pay is claimed for the last year in service. The Respondent did not provide any material to show the Claimant took his leave on the last year of service. The item is granted, but reduced to the minimum of 21 days allowed under Section 28 of the Employment Act 2007. In effect, the Claimant is granted 21 days' salary at **Kshs. 22, 615.30 in annual leave pay**. The Claimant shall have the costs of the Claim. In sum-:

***[a] The Respondent shall pay to the Claimant service pay at Kshs. 403,846.15 less any pension received by the Claimant from the N.S.S.F;***

***[b] The Respondent shall pay to the Claimant annual leave pay at Kshs. 22,615.30;***

***[c] The full amount shall be paid to the Claimant by the Respondent within 30 days of the delivery of this Award; and***

***[d] Costs to the Claimant.***

Dated and delivered at Nairobi this 28<sup>th</sup> day of January 2014

James Rika

Judge