

REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT AT NAIROBI

CAUSE NUMBER 1632 OF 2012

BETWEEN

GEORGE M. KIRUNGARU..... CLAIMANT

VERSUS

NEXT GENERATION COMMUNICATIONS LIMITED..... RESPONDENT

Rika J

CC. Victor Odundo

Mr. Munoko instructed by Ameyo Guto, Etole & Company Advocates for the Claimant

Mr. Kiprono instructed by Kwengu & Company Advocates for the Respondent

ISSUE IN DISPUTE: TERMINAL DUES

AWARD

1. The Claimant instituted this Claim against his former Employer by way of a Statement of Claim filed on 13th September 2012. The Respondent answered in a Statement of Reply filed on 1st November 2012. The Claimant gave evidence and closed his case on 25th February 2013, while the Chief Executive Officer of the Respondent Richard Kimani Karanja testified on behalf of his Outfit on 5th July 2013, when the hearing closed. Parties were advised by the Court to file and exchange their submissions within 28 days of the closure of the proceedings, and Award would be delivered on notice.

2. The Claimant states he was employed by the Respondent in various positions, between 1st August 2001 and March 2012. He last held the position of Operations Manager. He resigned in March 2012, after having served the Respondent for 10 ½ years. He did not have any warnings in his file. He did not have any disciplinary issues. When he gave the letter of resignation to the Director on 1st February 2012, the Director asked him to hand over within 2 days and leave, which he did. He was paid nothing apart from 1 month salary in lieu of notice. He was earning a monthly salary of Kshs. 66,000 on resignation. He claims that upon resignation, he was entitled to service pay at 15 days' salary for every completed year of service at Kshs. 330,000. This is the amount he claims from the Respondent, together with costs and interest. He conceded in cross-examination that National Social Security Fund contributions were deducted from his monthly salary. Payment of service pay used to be in the policy of the company. He did not have documents to support his claim for service pay. He confirmed his name was in the Respondent's schedule of N.S.S.F contributors. He explained in redirection that he expected to work his notice period in the month of March 2012. The documents exhibited as N.S.S.F records in the Respondent's Statement of Reply were not certified. He prays the Court to grant his Claim

3. The Respondent agrees the Claimant was its Employee as stated in the Claim. He resigned. He is not entitled to service pay as he was N.S.S.F Member Number [particulars withheld]. He cannot draw service pay and pension from the N.S.S.F as this would amount to unjust enrichment. In the alternative the Respondent holds that the Claimant would not be entitled to service pay for the period before 2nd June 2008 when the Employment Act 2007 was enacted.

4. Karanja testified the Claimant gave the letter of resignation to him. The letter was accepted by the Respondent. He did not consult Karanja before the resignation. He was paid for the month of March and allowed to leave. His letter of employment did not provide for service pay. He was subscribed to the N.S.S.F. Contributions were up-to-date. Cross-examined, the Witness testified that the Claimant worked for 10 ½ years. He did not engage in gross misconduct. He is not entitled to service pay. The Respondent urges the Court to dismiss the Claim.

The Court Finds and Awards-:

5. The Claimant was Member Number 041694910 of the National Social Security Fund. His contributions were remitted consistently by the Respondent as shown in the bundles of documents attached to the Statement of Claim. The Claimant did not suggest which month or year, contributions were not remitted. The Claimant had the opportunity during the hearing to challenge the authenticity of the documents or seek to expunge them from the record filed by the Respondent, if it was felt the documents were inauthentic. The Court is satisfied that the documents reflected true records of the Claimant's N.S.S.F Account. At the rate of Kshs. 400 per month for 10 ½ years, his principal sums in the Fund would amount to Kshs. 50,400. Section 35 [6] intends that Employees are not paid social security benefits twice on termination of employment. It is contrary to the law to receive pension from the N.S.S.F and claim service pay. Where service pay is due under Section 35 [5] the mode of computing service pay is left to the Employer and the Employee to fix. The Industrial Court has adopted 15 days' salary for each completed year of service in the absence of a contract or other instrument concluded between the parties. This is taken from the minimum 15 days' salary for every year completed in service given in cases of redundancy under Section 40 of the Employment Act 2007. It is held that as Section 35 [5] makes it mandatory for Employees whose contracts are terminated under that law to receive service pay, the absence of a mode of computation, should not prejudice a deserving employee. 15 days' salary for each completed year of service has also been the common mode in granting service, severance or gratuity payments under most Collective Bargaining Agreements and Wage Orders across the industries.

6. This Court has been persuaded by the recent decisions of the Industrial Court that this is the correct approach to Section 35 of the Employment Act on service pay. The position that if there is no fixed mode for computation, an Employee should lose his service pay, is discriminatory and unfair labour practice, as it denies the employee reward and recognition. This Court recently concluded in ***Industrial Court Cause Number 871 of 2012 between Elijah Kipkoros Tonui v. Ngara Opticians t/a Bright Eyes Limited*** that in determining whether service pay is receivable under Section 35, it is important to look beyond the mere N.S.S.F Membership, or Membership to other Schemes, and adopt the mechanism within Section 35, that confers on the Employee superior social security benefit. After 10 ½ years of service, the Claimant's N.S.S.F account would only earn him approximately Kshs. 50, 400. Service pay at a minimum of 15 days' salary for the 10 years completed in service, would result in the sum of Kshs. 66,000 divide by 26 working days x 15 x 10= Kshs. 380,769. Service pay, even taking into account any interest the N.S.S.F account may have accrued, and factoring in taxation, offers a superior form of reward and recognition of the Claimant's 10 years of service. It is not proper that he left employment with only a month's notice pay after 10 years of work, and no more than Kshs. 50,400 in social security payment. The Court must ensure he does not receive double social security payments. Importantly, the Court must ensure he receives the most superior of the social security mechanisms that are available to him. In this case the Court finds the Claimant should have service pay at Kshs. 380,769 less the N.S.S.F pension of Kshs. 50,400 = Kshs. 330,369. ***The Respondent shall pay to the Claimant the sum of Kshs. 330,369 in service pay within 30 days of the delivery of this Award. No order on the costs.***

Dated and delivered at Nairobi this 12th day of February 2014

James Rika

Judge