



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 1104 OF 2016

PHILIP MUTINDA.....CLAIMANT

-VERSUS-

LADY LORI (KENYA) LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant's suit is contained in the Amended Statement of Claim filed in Court on 24th November, 2017 in which he states that he was employed by the Respondent as a pilot between October, 2010 and December 2015 for a monthly salary of \$ 5,000; that he worked diligently and to the Respondent's satisfaction until on or about 1st December, 2015 when he in compliance with his Contract of Employment, issued a Notice of Intent to terminate his employment on 31st December, 2015; that despite serving his notice period the Respondent failed to pay his salary for the month of December, 2015 until 2016 when she paid him only paying \$ 500 leaving a balance of \$ 4,500 unpaid plus gratuity, accrued house allowance and 155 outstanding leave days. He further averred that during the period of his employment with the Respondent his salary was underpaid contrary to the provisions of his employment Contract. He therefore prayed for the following reliefs:-

- i. General damages for stress, anxiety and mental anguish.
- ii. That the Respondent to pay the Claimant the salary in arrears for the month of December 2015 amounting to \$ 4,500/-
- iii. Accrued leave days from October 2010 to December 2015 (155 days) \$ 25,834/-
- iv. Gratuity Pay equivalent to 15 days of service for each year he was in employment \$ 12,500/-
- v. House allowance from October 2010 to December, 2015 \$ 47,250/-
- vi. Issuance of a Certificate of Service.
- vii. USD \$ 124,000 being the amounts not paid during his employment term
- viii. Costs of the Claim and interests (in respect to the December salary from the date it was due until payment in full and also in respect to the underpaid amount as stipulated above in vii) from the date due until payment in full.
- ix. Such other reliefs that this Honourable Court may deem fit and just to grant in the interest of Justice.

2. The Respondent filed her Defence on 5th August, 2016, admitting that she engaged the Claimant as a Pilot in the manner indicated in the Amended Statement of Claim but denied the alleged failure to pay terminal dues to the claimant. She averred that she prepared a cheque for the balance of \$ 4,500/- being the balance of the Claimant's December, 2015 salary but the Claimant failed to collect the same demanding gratuity and outstanding leave days on top of the said amount. She denied the claim for accrued leave of 155 days and contended that under the claimant's contract of service, he could not accrue more than Thirty (30) leave days. She denied all the alleged outstanding payments for the Claimant save for his salary for December 2015 which amount she is willing to settle and urged the Court to dismiss all other Claims with costs.

3. The suit was heard on 22nd July, 2019 when both parties tendered evidence and thereafter filed written submissions.

Claimant's Case

4. The claimant testified as CW1 and adopted the facts contained in his Amended Statement of Claim filed in Court on 24/11/2017 as his

evidence and further produced the 5 documents annexed to the original statement of Claim filed in Court on 8th June, 2016 as his exhibits in this matter. He contended that he used to be paid per diem (for daily sustenance) through petty cash vouchers but denied that the amount was not part of his monthly salary. He clarified that the said per diem was not reflected on his payslip and it was not subjected to statutory deductions.

5. He further testified that during the entire period of his employment with the Respondent he did not take any annual leave and contended that some of the days the Respondent alleges that he was on leave, he was actually on duty in Juba. CW1 urged this Honourable Court to allow his Claim as prayed.

6. On cross examination CW1 admitted his monthly salary was \$ 5,000/- which amount was all inclusive. He however insisted that the said amount was not inclusive of per diem which was only payable when he went to Juba. CW1 further admitted that he was housed and provided with transport to work while in Juba. He further confirmed that his work station was Juba but contended that there were times when he was assigned duties in other areas such as Nairobi.

7. He admitted that despite the Respondent's Handbook encouraging taking of leave days he did not apply for the same as he had mandatory classes to attend. He further stated that the Handbook also provided for gratuity. He maintained that he was entitled to two weeks of rest and recuperation every two weeks in a month that was distinct from leave days but he was unable to get the same.

The Respondent's Case

8. The Respondent called her Finance and Human Resource Manager, Mr. Joseph Nderitu Githiga who testified as Rw1. He confirmed that the Claimant was employed by the Respondent as a pilot earning an all-inclusive monthly salary of \$ 5,000/-. He contended that the claimant was paid all his salary except US\$4500 for December 2015 which he refused to take. He maintained that the respondent is still ready and willing to pay the claimant the said balance of salary for December 2015.

9. Rw1 further testified that the Claimant was entitled to two (2) weeks of Rest and Recuperation after every four weeks that was not part of his annual leave. He contended that the Claimant took a total of 846 days of R & R as against his entitlement of 612 days accumulated over the period between 2010 and 2015. He further contended that it was agreed between the Claimant and the Respondent Company that the extra R & R days would be deducted from his annual leave and as such the Company does not owe him any amount in respect of leave days not taken.

10. He further testified that the Claimant's contract did not provide for any per diem and explained that the Respondent provided its members of staff with food and other services while on duty. He therefore denied that the Claimant was not entitled to any per diem.

11. On cross examination RW1 maintained that the Claimant's Salary for December 2015 was availed to him on 15.1.2016 but he refused to take the cheque. He admitted that R & R was not the same as annual leave and that the Claimant's contract did not provide that leave days could be deducted from annual leave days. He further admitted that it was not possible for the Claimant to take R & R of 2 weeks after serving 4 weeks. He also admitted that the master roll produced does not indicate any leave days deducted to recover the excess R & R days.

12. After the hearing, both parties filed and exchange written submissions.

Claimant's submissions

13. The Claimant submitted that the Respondent witness (RW1) failed to produce any documents before this Court and that therefore the documents filed by the Respondent in support of her defence ought not to form or to be considered or evaluated as evidence to form part of the record as exhibits. To buttress this argument, the Claimant cited the Court of Appeal decision in the case of **Kenneth Nyaga Mwige Vs Austin Kiguta & 2 Others (2015) eKLR** where the Court held that a witness must produce the document and tender it in evidence as an exhibit and lay the foundation or the authenticity and relevance to the facts of the particular case. The Court in that matter went on to hold that if such a document is not marked as an exhibit, it shall not form part of the record.

14. The Claimant further submitted that he is entitled to the Reliefs sought in his Amended Statement of Claim and in particular payment of the balance of his December 2015 salary of \$ 4,500/- as the Respondent has made an admission of the said amount.

15. The Claimant further contended that he is entitled to USD \$ 124,000/- being the amounts not paid during the employment because the respondent did not disprove the same by documents. He relied on the provisions of Sections 20 and 74 of the Employment Act, 2007 to support his claim.

16. The Claimant submits that he is also entitled to accrued leave days from October 2010 to December 2015(155 days) an equivalent of USD \$ 25,834/- because he never took any leave during the entire period of his contract with the Respondent. For emphasis he relied on **Regulation 240 of the Civil Aviation (Operation of Aircraft) Regulations, 2013**. He further contended that the Respondent cannot purport to deduct his leave days from the Rest and Recuperation days as her Employee Handbook fails to make a provision on the same. He therefore urged this Court to find in his favour and award him the same.

17. The Claimant further submitted that he is entitled to gratuity pay by dint of Section 35 (1) (c) of the Employment Act, 2007. To buttress this argument, the Claimant cited the case of **Elijah Kipkoros Tonui Vs Ngara Opticians T/A Bright Eyes Limited (2014) eKLR**.

18. The Claimant further contended that he is also entitled to House Allowance by dint of Section 31 of the Employment Act, 2007. He contended that the crew house provided by the Respondent did not cover for house allowance as he and his family was based in Nairobi. For emphasis the Claimant relied on **Joyce Kwamboka Oiriga & Another Vs Pauline Wanja Munene T/A Vistraline Book World and**

Stationery (2018) eKLR.

19. The Claimant further submitted that he is entitled to issuance of a Certificate of Service by virtue of the provisions of Section 51 of the Employment Act, 2007 and urged the Court to allow the same.

20. The Claimant further submitted that he is entitled to general damages for stress, anxiety and mental anguish suffered as a result of the Respondent's action of wrongful withholding of his terminal benefits and dues. For emphasis he cited the case of **Mary Mutanu Mwendwa Vs Ayuda Ninos De Africa- Kenya (Anidan K (2013) eKLR** in which the learned Judge relied on **East African Airways Vs Knight (1975) EA 165** where it was held that: -

“...where the damages are for ruin of career extending over a long period and involving imponderables as to future earnings then it can be claimed as general damages.”

21. In conclusion the Claimant submitted that he has proved his case in support of his Claim on a balance of probabilities thus urging this Court to allow the same in terms of the reliefs sought therein.

Respondent's Submissions

22. The Respondent submitted that she did not withhold the Claimant's December, 2015 salary as alleged and that she has was willing and ready to make the said payment but the Claimant declined the same. She further contends that the Claimant is not entitled to any compensation for stress, anxiety and mental anguish as pleaded in his Amended Statement of Claim.

23. She further submitted that the Claimant is not entitled to house allowance since Clause 3 of his employment Contract provided that the Claimant's Salary was an all-inclusive pay of USD \$ 5,000/-. She further submitted that the Claimant was provided with housing at his place of employment in Juba a fact he admitted during the hearing. For emphasis the Respondent relied on the case of **Stephen Miheso Vs Kaimosi Tea Estate Limited (2014) eKLR** where the Court was of the view that under Section 31 of the Employment Act, 2007 the employer was bound to either provide reasonable housing accommodation as prescribed or pay her employees house allowance in lieu thereof.

24. On the issue of payment of gratuity, the Respondent submitted that the Claimant is not entitled to the same as his employment contract did not provide for its payment. For emphasis the Respondent relied on the Court of Appeal decision in the case of **National Bank Kenya Limited Vs Pipeplastic Samsolit (K) Limited and Another (2002) EA 503** where the Court was of the view that no court of law can rewrite a contract between parties and that parties are bound by the terms of their contracts unless they can prove that coercion, fraud or undue influence was used to procure the contract. She also relied on **Michael Obudho Amondi Vs United Millers Limited (2016) eKLR.**

25. On the issue of payment accrued leave days, the Respondent submitted that the Claimant was not entitled to the same by virtue of the provisions of Clause 5.2 of her Employee Handbook which provides inter alia that employees are strongly encouraged to use their leave days as Pay in lieu thereof is NOT AN OPTION.

26. The Respondent further contended that the Claimant was entitled to 612 R & R days and that on audit it was discovered he took a total of 846 days. The Respondent contended that the additional 234 days were to be utilized as annual leave and therefore the Claimant had no pending days for annual leave when he exited. She therefore urged this Honourable Court to dismiss the Claim for payment in lieu of leave days not taken.

27. Finally, Respondent contended that the Claimant has failed to prove salary underpayment and prayed for the same to be rejected. For emphasis the Respondent relied on the case of **Capital Fish Kenya Limited Vs The Kenya Power & Lighting Company Limited (2016) eKLR.**

28. In conclusion, she urged this Honourable Court to dismiss the Claim herein with costs to the Respondent.

Issues for determination

29. There is no dispute that the Claimant was employed by the Respondent between October 2010 and December 2015 as a Pilot earning a monthly salary of USD \$ 5,000/-. There is further no dispute that the Claimant issued the respondent with a notice of intent to terminate his employment on 1st December, 2015 and was to take effect from 31st December, 2015. The only issue for determination in my view is whether the Claimant is entitled to the reliefs sought in his Amended Statement of Claim.

Withheld Salary for the Month of December, 2015

30. The Claimant contended that the Respondent paid him US \$ 500/- only at the time of separation and withheld US\$4500 despite working through the entire notice period. The Respondent admitted owing the Claimant USD \$ 4,500/- being the balance of his December, 2015 salary but contended that it is the Claimant who declined to receive the same. I therefore award the claimant the undisputed sum of US\$4500 being the outstanding balance of his salary for December 2015.

House Allowance for the entire period of his employment contract with the Respondent

31. The Claimant contended that he is entitled to house allowance since the accommodation provided by the Respondent in Juba did not apply in Nairobi where he was based together with his family. He however admitted during cross examination that his workstation was Juba

South Sudan and that the respondent provided him with housing and a vehicle. Section 31 (1) of the Employment Act, 2007 provides as follows:

“An employer shall at all times, at his own expense, provide reasonable housing accommodation for each of his employees either at or near to the place of employment, or shall pay to the employee such sufficient sum, as rent, in addition to the wages or salary of the employee, as will enable the employee to obtain reasonable accommodation.”

32. In the instant case it is clear that the Claimant was provided with accommodation in Juba where he was based. He is therefore not entitled to the relief of house allowance as sought.

Payment of Gratuity

33. The Claimant contended that he is entitled to gratuity by dint of Section 35 of the Employment Act, 2007. He relied on **Elijah Kipkoros Tonui Vs Ngara Opticians T/A Bright Eyes Limited (2014) eKLR** for emphasis. However, the Respondent was of a contrary view and urged that the Claimant is not entitled to gratuity as his Contract of employment did not provide for the same and for emphasis cited the Court of Appeal decision in the case of **National Bank Kenya Limited Vs Pipeplastic Samsolit (K) Limited and Another (2002) EA 503**.

34. I agree with the respondent that gratuity is only payable when the same is provided for in the employment contract. In this case the Claimant's contract did not provide for gratuity and therefore the same cannot be paid. In addition, looking at the Claimant's payslip he was a member of NSSF and deductions to the said body were being made. He is therefore not eligible to payment of gratuity by dint of Section 35(6) of the Employment Act, 2007. In the case of **Bamburi Cement Ltd vs Farid Aboud Mohammed (2016) eKLR** the Court of Appeal noted that there is no express provision for gratuity in the Employment Act and held that it is usually payable under the terms set out in a contract of service or collective bargaining agreement.

35. In **Michael Obudho Amondi Vs United Millers Limited (2016) eKLR** the court held that: -

“Gratuity and retirement are not provided for by the law as part of terms presumed in every contract. The Regulation of Wages and Conditions of Employment Regulations provide for gratuity in some sectors only. However there is no general order for the Sector in which the Claimant was engaged, which although not stated to court, I gather is the grain milling sector. There is therefore no statutory provision for payment of gratuity or retirement benefits to the Claimant.

There is also no contractual obligation on the part of the Respondent to pay the Claimant gratuity as the Claimant's contracts of employment that have been exhibited in his Memorandum of Claim do not provide for the same.”

Payment in lieu of Accrued Leave days

36. The Claimant contended that he had accrued his annual leave of 155 days and prayed for cash in lieu. The Respondent denied said claim and put reliance on Clause 5.2 of her Employee Handbook which disallowed for payment in lieu of leave. She further contended that the Claimant took 234 extra days as his R & R and agreed that the excess 234 days be applied to offset his annual leave. The claimant denied the alleged agreement to treat the alleged extra R&R days as leave but admitted that he never applied for his annual leave during his tour of duty. Under paragraph 8 of the Defence, the respondent acknowledged that under clause 5.2 of the Employee Handbook the claimant could not accrue more than 30 days of his annual leave.

37. I have carefully considered the provisions of Clause 5.2 of the Respondent's Employee Handbook and confirmed that the Claimant was allowed to accrue a maximum of 30 leave days. I therefore award him leave for 30 days only, being 30/26 x US\$5000 equalling to US\$ 5769.23.

Salary Arrears being USD \$ 124,000/- being amounts not paid during the employment term

38. The Claimant maintained that during the subsistence of his employment relationship he was paid USD \$ 3,000/- instead of USD \$ 5,000/- as provided for in his employment contract. The Respondent maintained that the Claimant did not prove the alleged underpayments and cannot therefore be awarded. It is trite law that he who alleges must prove but in this case the claimant has not proved the alleged underpayment by evidence.

Issuance with a Certificate of Service

39. The Claimant worked for the respondent for several years and as such I find that he is entitled to the Certificate of Service by dint of Section 51 of the Employment Act, 2007.

40. In conclusion I enter judgment for the claimant against the respondent in the following terms:

Unpaid salary for December 2015	USD\$ 4,500
30 days Accrued leave	USD\$ 5,769.23
Total	US\$ 10,269.23

The award is subject to statutory deductions but in addition to costs plus interest at court rates from the date of filing the suit.

Dated, signed and delivered at Nairobi the 6thth day of March, 2020.

ONESMUS N MAKAU

JUDGE