



**Mburu v Medecines Sans Frontieres (Cause E713 of 2023)  
[2024] KEELRC 1224 (KLR) (23 May 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1224 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E713 OF 2023**

**JK GAKERI, J**

**MAY 23, 2024**

**BETWEEN**

**ANNE WAMBUI MBURU ..... CLAIMANT**

**AND**

**MEDECINES SANS FRONTIERES ..... RESPONDENT**

**JUDGMENT**

1. The Claimant commenced this suit by a Statement of Claim filed on 1<sup>st</sup> September, 2023 alleging unlawful deductions of wages.
2. The Claimant avers that she was employed by the Respondent as a Social Worker under two distinct contracts for 2022 and 2023 and the 1<sup>st</sup> contract lapsed on 2<sup>nd</sup> January, 2023.
3. That the Respondent issued her with a mobile phone No. 0711 943 126 for purposes of her work.
4. The Claimant alleges that in December 2022, she was coerced to sign a payment plan submitted as a loan agreement that she had overused her telephone bill to the tune of Kshs.194,346/= and it was repayable as a loan.
5. It is the Claimant's case that she was invited for a disciplinary hearing and accused of misuse of the Respondent's property by having exceeded the capped phone bill by Kshs.82,730.26 in September and Kshs.121,616.40 in October and denied having misused the phone and received a warning on 31<sup>st</sup> January, 2023 and a salary deduction of Kshs.35,000/= was made.
6. That the Claimant protested the deduction of salary vide an appeal and the deduction was reduced to Kshs.10,000/= to recover the sum of Kshs.80,000/=.
7. The Claimant further avers that the deductions commenced in May 2023 and a total of Kshs.30,000/= had been deducted.



8. The Claimant characterises the deductions as wrongful and unfair on account of her phone had no capping, was not in direct subscription of the workplace, memo on capping was issued after allegations had been made, proceedings were conducted outside the prescribed period, deductions were made under a new contract, and the Claimant did not consent to the deduction.
9. The Claimant prays for;
  - i. Refund of Kshs.10,000/= for May 2023, June 2023 and July 2023.
  - ii. A declaration that the recovery of Kshs.80,000/= from the Claimant is wrongful.
  - iii. Interest on (i) from date of deduction till payment in full.
  - iv. Costs of the suit.

### **Response**

10. In its response, the Respondent admits that the Claimant was its employee effective 3<sup>rd</sup> January, 2022 under a fixed term contract due to end on 2<sup>nd</sup> January, 2023 after which the Claimant was issued with another contract effective 3<sup>rd</sup> January, 2023 at a salary of Kshs.87,889/= per month and was subject to the Respondent's Handbook including restriction on misuse of its property.
11. The Respondent avers that the work phone issued to her had a cap of Kshs.5,000/= per month.
12. That the Claimant's phone bill for September 2022 was Kshs.82,730.26 and October 2022 Kshs.121,616.40 and according to the Respondent, only Kshs.35,846/= was attributable to legitimate work-related usage and Kshs.159,199.17 was not accounted for and queried the same and the Claimant responded and discussions were held on 14<sup>th</sup> December, 2022 and the Respondent proposed an amicable settlement of reimbursing the airtime but the Claimant did not execute the agreement and a formal notice to account was issued, Claimant responded, was invited for a hearing in January 2023 and attended alone.
13. It is the Respondent's case that the Claimant could not explain phone usage on personal matters and the Respondent issued a warning letter and surcharge the Claimant for the telephone bill.
14. That the Claimant appealed and the Respondent reduced the amount deductible from Kshs.159,199/= to Kshs.80,000/= and deductions commenced from May 2023 to December 2023 having agreed by her email dated 16<sup>th</sup> February, 2023.
15. The Respondent prays for dismissal of the Claimant's claim with costs.

### **Claimant's evidence**

16. On cross-examination, the Claimant confirmed that she was subject to the Respondent's Handbook and in particular Clause 2.12 which forbid employees from use of the Respondent's property for personal use.
17. That as a Social Worker, she was given a work phone and her work day was 8.00 am to 5.00 pm but could pick calls from patients, respond to emails and emergencies.
18. The witness confirmed that she had total control of the phone and it was in a working condition.
19. That the phone bills for September and October 2022 were abnormally high at Kshs.82,730/= and Kshs.121,616/=.



20. That she responded to the notice to show cause and made representations at the hearing which resulted in a warning letter and deductions but appealed and the amount to be deducted was reduced by half and deductions begun in May as per the Claimant's request.
21. On re-examination, the Claimant testified that she was unaware of the Kshs.5,000/= cap and the memo was issued after the hearing and did not receive any message on excessive use of the phone.

### **Respondent's evidence**

22. RWI, Mr. Susmita confirmed that a memo on capping was issued to all staff in 2019 but was not filed and the Claimant joined the Respondent in January 2022 and the witness had no document on the capping.
23. That the cap applied to all employees and it was fair to hold the Claimant liable.
24. The witness testified that the employer learned of the overuse in the 3<sup>rd</sup> week of October and notified the Claimant in early November 2022.
25. That the Claimant could work after hours where need arose and the sum of Kshs.80,000/= she was to repay was not based on any formula. The Head of Mission made the decision.
26. On re-examination, the witness testified that the Claimant did ask for any clarification.

### **Claimant's submissions**

27. As regards the deduction of Kshs.80,000/= from the Claimant's salary, counsel submits that the Claimant was unaware of the cap and no complaint had been raised on the usage of the phone until November 2022. Similarly, the Claimant could work outside official working hours and the logic of the amount to be deducted from the Claimant's salary was not given.
28. Counsel submits that the Claimant did not violate paragraph 2.12 of the Respondent's Handbook as the usage of the phone was not capped and the Claimant could not tell whether there was under, normal or over usage and bill for previous months were not availed as evidenced by her email messages.
29. According to counsel, Section 19(1) of the *Employment Act*, 2007 relied upon by the Respondent was not applicable as no damage or loss of property had taken place.
30. Reliance was made on the decision in *Kennedy Mutua Mwangagi V Madison Insurance Co. (K) Ltd (2020) eKLR* on deduction of salaries as were the sentiments of the court in *Denis Wamalwa Sifuna V African Line Terminal & Logistics Ltd (2020) eKLR* were cited.
31. As to whether the deductions were consented to, counsel submits that the Claimant only did so because she was notified that the decision was final and did not sign any agreement. That the Claimant's consent was not express.
32. As regards the disciplinary process, counsel urges that Clause 10(3) of the Respondent's Manual provided for the timelines for taking disciplinary action against an employee and in this case the duration had lapsed and as the Claimant's case was heard on 24<sup>th</sup> January, 2023, the same had lapsed.

### **Respondent's submissions**

33. As to whether the deduction was lawful, counsel submits that it was as the Claimant admitted that she had control of the phone, was bound by the Handbook and confirmed being aware of the cap of Kshs.5,000/= and the telephone bills were excessive.



34. Reliance was made on the provisions of Section 19(1)(b) of the *Employment Act*, 2007 as the basis for the deduction.
35. Counsel invites the court to view the Claimant's conduct against the test of a reasonable man.
36. That since the deductions were made after due process, the same was reasonable as the amount had been reduced to Kshs.80,000/=.
37. Reliance was made on the sentiments of the court in *Liech V Sameer Agricultural & Livestock (K) Ltd (now) Devyan Food Industries (K) Ltd (2022)* to justify the deduction and urge the court to make a similar finding.
38. As regards estoppel by consent, counsel submits that the email by the Claimant to Mr. Hassan showed that the Claimant had consented to the deductions as from May 2023 and the Claimant was estopped from denying the consent as held in *Serah Njeri Mwobi V John Kimani Njoroge (2013)* eKLR.
39. On entitlement to the prayers sought, counsel urges that the Claimant was not entitled to any as she had been negligent which led to monetary loss and the Respondent acted reasonably.

### **Findings and determination**

40. It is common ground that the Claimant was an employee of the Respondent from 3<sup>rd</sup> April, 2022 to 24<sup>th</sup> January, 2024 under two fixed term contracts of service, as a social worker in Mombasa at Kshs.87,889.00 per month and was subject to the Respondent's Employee Handbook and other operative policies.
41. It is equally not in contest that the Respondent gave the Claimant a phone for official use under a Safaricom Simcard No. 0711 943126 as a Social Worker. RWI confirmed that at the Mombasa Hospital the Respondent had a Primary Health Care Centre and employees, including the Claimant could work after hours whenever need arose, a fact the Claimant confirmed as well on cross-examination.
42. Equally not in dispute is that the Respondent considered the Claimant's phone bill for September and October 2022 excessive and surcharged her the sum of Kshs.80,000/= after a disciplinary process.
43. The issues for determination are whether the deductions made to the Claimant's salary effective May 2023 were lawful, whether the Claimant consented to the deductions, and whether the Claimant is entitled to the reliefs sought.
44. On the lawfulness or otherwise of the deductions, parties have adopted opposing positions with the Respondent contending that it was not only lawful but consented to and reasonable in the circumstances. The Claimant's counsel argues otherwise.
45. It requires no emphasis that wages or salary is the cornerstone of an employment relationship as exemplified by the definition of the term "employee" under Section 2 of the *Employment Act*, 2007.
46. The foregoing is also underscored by Article 41 of *the Constitution* of Kenya, 2010.
47. Article 41(2)(b) provides that;  

**"Every worker has the right to fair remuneration."**
48. More significantly, Part IV of the *Employment Act*, 2007 addresses protection of wages and salaries exclusively in relation to payment, when due, deduction of wages itemised, pay statement and statutory deductions among others.



49. Part IV of the Act prescribes when wages or salary must be paid, how and what deductions may be made by an employer.
50. Counsel for the Respondent urges that deduction of the Claimant's wages was justifiable under Section 19(1)(b) of the *Employment Act*, 2007 which provides that;  
Notwithstanding Section 17(1), an employer may deduct from the wages of his employee.
  - (b) a reasonable amount for any damage done to, or loss of, any property lawfully in the possession or custody of the employer occasioned by the wilful default of the employee.
51. According to counsel, the bill incurred by the Claimant's telephone line constituted wilful negligence and was recoverable under Section 19(1) of the *Employment Act*, 2007.
52. A plain reading of Section 19(1)(b) above creates the impression that its focus is the employer's property damaged or lost on account of the employee's wilful default.
53. It would appear to follow that if the Claimant misplaced or damaged the Respondent's mobile phone in her possession, the Respondent was justified in recovering a reasonable amount for the loss or damage.
54. The more pertinent issue is whether financial loss allegedly occasioned by the employee is deductible from his or her wages.
55. The provision is explicit on damage or loss of property not financial loss.
56. The court is not persuaded that financial loss is recoverable from the Claimant's wages by deduction.
57. The foregoing reasoning finds support in the Claimant's submission that the Respondent tendered no evidence as to how it arrived at the sum of Kshs.80,000/=.
58. Was it the loss it allegedly suffered from the Claimant's use of the phone?
59. RWI confirmed on cross-examination that the Respondent had no formula of determining the amount it was to deduct.
60. Similarly, in *Denis Wamalwa Sifuna V African Line Terminal Logistic Ltd (Supra)*, Rika J. ordered a refund of monies deducted from the Claimant's salary as demurrage and costs by the Respondent under Section 19(1)(b) of the *Employment Act*, 2007 as the loss was not recoverable under this provision of the Act.
61. The learned judge stated inter alia;
 

“ . . . The court does not think demurrage and costs imposed on the Respondent as a result of the operations department delay in clearance of cargo was a loss which could be recoverable by the Respondent under the above provisions of the law . . .

The amounts deducted were not shown to be the equivalent of losses attributed to the Claimant. The court is satisfied that the Claimant merits refund of deductions made upon his salary.”
62. These sentiments apply on all fours to the circumstances in the instant case.
63. Relatedly, although the Respondent alleges that the Claimant's phone bills for September and October were high or excessive at Kshs.82,730.00 and Kshs.121,616/= respectively, the argument appear to have



- based on the Respondents supposedly limitation of consumption of Kshs.5,000/=, a proposition the Respondent failed to demonstrated applied to the Claimant's phone.
64. The Claimant's email message dated 19<sup>th</sup> December, 2022 to the MSFCH-Mombasa-Admin is emphatic that her phone was not capped and could not tell when the limit, if any was exceeded.
  65. When questioned about the capping during cross-examination, RWI testified that the phone was capped internally not by the service provider but could not explain how the Claimant would have known that the limit had been exceeded.
  66. Puzzlingly, the witness cited a memo on the capping released in January 2023 post facto and had no record of any other memo or instruction or policy on the alleged capping.
  67. Similarly, RWI confirmed that all telephone bill from Safaricom were sent to the employer and the Respondent learnt of the overuse in late October 2022 and notified the Claimant in early November 2022 after the second month of the alleged overuse of the phone.
  68. Strangely, the witness could not explain how the Respondent expected its members of staff to adhere to a direction without the requisite tools. Whereas, it is common knowledge that a pre-paid line's usage is dependent on the amount loaded and capping can be fairly effective by the employer, post-paid lines are different and only the employer and the service provider can enforce capping, if any.
  69. In this case, the Respondent gave the Claimant a post-paid line with no capping but expected the Claimant to enforce a cap of Kshs.5,000/= per month which the court finds unreasonable as it was the obligation of the employer to enforce the capping.
  70. In her email dated 19<sup>th</sup> December, 2022 to MSFCH-Mombasa-Admin, the Claimant makes it clear that her line was not capped and no information had been given to her about capping.
  71. The Respondent ought to have had written instructions or policy on the usage of its telephone lines by staff to obviate such disputes.
  72. Before concluding this issue, it is important to determine whether the Respondent had a valid reason to deduct monies from the Claimant's salary effective May 2023.
  73. It is the Respondent's case that the Claimant overused the line given to her in September and October as evidenced by the bill from Safaricom.
  74. The salient question to determine is whether the Claimant had overused the line given to her by the Respondent for official use.
  75. According to the Respondent, the bills of Kshs.82,730.26 and Kshs.121,616.40 for September and October 2022 respectively were excessive and the Claimant appear to have appreciated that the bills were high and called Safaricom Ltd on 20<sup>th</sup> December, 2022 as evidenced by the email to MSFCH-Mombasa-Admin dated 21<sup>st</sup> December, 2022 and was notified that they would investigate the bill and the matter had been forwarded to the Billing department and it would revert.
  76. The Claimant furnished evidence to show that she had lodged a query with Safaricom and requested the Respondent to follow up. In any case, it was the Respondent's line.
  77. RWI provided no evidence of any follow up with Safaricom.
  78. The Claimant had sought clarification on autorenewals of certain subscriptions every midnight without prior notification as she was not responsible for any subscriptions.



79. Having raised the issue, it was incumbent upon the employer to follow up and ascertain whether the billing was correct as the line belonged to it but the Respondent did not.
80. From the minutes of the disciplinary hearing, it is clear that the Claimant was charged with misuse of the Respondent's property as the Claimant had exceeded the Kshs.5,000/= limit, an issue addressed elsewhere in this judgment.
81. The Respondent found that the bill incurred during working hours was Kshs.35,846/= and the balance of Kshs.159,199.7 was incurred in non-work related activities.
82. As adverted to elsewhere in this judgment, RWI admitted on cross-examination that being a Social Worker, the Claimant could work after office hours and in particular, as the Claimant confirmed, it was a hospital set up.
83. Were the Claimant's telephone bills for September and October 2022 excessive?
84. According to Black's Law Dictionary (10<sup>th</sup> Edition), excessive means;  
"The amount or degree by which something is greater than another. The act of exceeding . . ."
85. Having found that the Claimant's line had no capping and the Respondent had no institutionalised mechanism of notifying employees when the alleged cap was attained, other than relying on bills issued after the fact, it is, in the court's view unfair to hold the Claimant liable for alleged excessive usage of a phone.
86. But more significantly, the Respondent could effortlessly prove that the usage was excessive by setting out the Claimant's record of usage of the line over several months prior to September 2022.
87. RWI did not avail such evidence.
88. In the circumstances, the alleged excessive use of the line was, in the court's view not proved and the Respondent had no valid reason to deduct monies from the Claimant's salary.
89. Did the Claimant consent to the deductions?
90. It is common ground that after the disciplinary hearing, the Respondent issued the Claimant with a warning letter dated 31<sup>st</sup> January, 2023 and cited Section 19(1) of the *Employment Act*, 2007 as the basis of the deduction of Kshs.159,199.17 as a reasonable amount for "damage to or loss of property" and tabulated the schedule of deductions from February 2023 to June 2023 at Kshs.35,000/= per month save for June 2023 when the sum of Kshs.19,199/= would be deducted.
91. The Claimant received the letter under protest and appealed on 7<sup>th</sup> February, 2023 citing 6 grounds including non-disclosure of limit of usage or failure to have a limit cap, failure by the Respondent to follow up the matter for clarity, bias of the committee, previous contract, loss not wilfully occasioned and paragraph 10.3(f) of the Respondent's Employee Handbook.
92. After the appeal, the Respondent reduced the amount to be deducted to Kshs.80,000/= and RWI confirmed that no formula or criteria was used to make the determination.
93. A previous attempt by the Respondent to have the Claimant execute a payment plan in December 2022 fell through when the Claimant declined to do so.
94. The Respondent relies on the Claimant's email dated 16<sup>th</sup> February, 2023 by which the Claimant requested that the deductions begin in May 2023.



95. This email was written after the hearing, warning letter and the appeal and the Respondent had already made a decision to recover Kshs.80,000/= from her salary.
96. The email, in the court's view was not the Claimant's consent that the deductions were in order but a plea to enable her adjust to the new financial reality.

### **Whether the Claimant is entitled to the reliefs sought**

#### **(I) Declaration**

97. Having found that the Respondent had no justification to deduct monies from the Claimant's salary as recovery of Kshs.80,000/= for the alleged misuse of its phone by the Claimant, a declaration that the same was wrongful is merited.
- ii. Refund of Kshs.10,000/= deducted in May, 2023, June 2023 and July 2023 and other months
98. Having found that the deductions could not lawfully be made under the provisions of Section 19(1) (b) of the *Employment Act*, 2007, the same were unlawfully made and are therefore recoverable from the employer.
99. Consequently, the Respondent shall refund the total amount deducted from the Claimant's salary.
100. In the upshot, judgement is entered in favour of the Claimant against the Respondent as follows;
- a. Declaration that recovery of Kshs.80,000/= from the Claimant was wrongful.
- b. Respondent shall refund monies deducted from the Claimant's salary with interest at court rates from date hereof till full payment.
101. In the circumstances, it is only fair that parties shall bear own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 23<sup>RD</sup> DAY OF MAY 2024

**DR. JACOB GAKERI**

**JUDGE**

#### **ORDER**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1** of the **Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the *Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the *Constitution* and the provisions of **Section 1B** of the *Civil Procedure Act (Chapter 21 of the Laws of Kenya)* which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**DR. JACOB GAKERI**

**JUDGE**



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