



**Ngusu v BOM, Kyome Girls Secodnary School (Cause 2560 of 2016)
[2024] KEELRC 1146 (KLR) (15 May 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1146 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 2560 OF 2016
NZIOKI WA MAKAU, J
MAY 15, 2024**

BETWEEN

LYDIA NGUSU CLAIMANT

AND

BOM, KYOME GIRLS SECODNARY SCHOOL RESPONDENT

JUDGMENT

1. In the amended statement of memorandum of claim dated May 22, 2023, the Claimant prays that judgment be entered against the Respondent for: 12 months' salary as compensation for unfair labour practices; unpaid leave allowance for 14 years; unpaid house allowance; compensation for underpayment; interest at court rates from date of filing suit until payment in full; costs of this suit; and any such other or further relief as this Honourable Court may deem appropriate. The Claimant averred that she was employed by the 1st Respondent on 19th February 2001 as a laboratory assistant earning a monthly salary of Kshs. 2,400/- and later on within the following year, she was appointed to double up as a Librarian without a salary increment. She asserted that it is owing to her dedication and commitment to the assigned duties that the respondent confirmed her appointment to the position of laboratory assistant and librarian on 7th January 2003 on permanent basis, with her salary slightly increased to Kshs. 3,160/- without house allowance, leave allowance and other benefits. She further averred that the Respondent did not issue payslips and that it was not until June 2014 that her salary payments started being effected through her bank account. According to the Claimant, she qualified from the Nairobi Technical Training Institute in Stage II Science Laboratory Technology and after notifying the respondent of the same, her salary was increased to a gross of Kshs. 3,500/-. That in 2008, her salary was increased to a gross of Kshs. 6,400/- upon being orally assigned yet a further responsibility of Storekeeper and which salary she earned until termination of her employment. The Claimant stated that she had all along been seeking to get better terms of employment including salaries that were in line with the applicable government minimum wage guidelines. That she joined the Kenya Union of Domestic, Hotels, Educational Institutions, Hospitals and Allied Workers (KUDHEIHA) in 2011 for



agitation of better terms of employment but it was all in vain, as the Respondent did not act on the Union's demands for better terms of her employment. She contended that she nevertheless continued working diligently for the Respondent and seeking better employment until October 6, 2014 when she voluntarily resigned from her employment, having served the Respondent the requisite Termination Notice dated September 30, 2014.

2. The Claimant's case was that after her employment terminated, the Respondent failed, refused and/or neglected to pay her terminal dues and in having the matter resolved through conciliation/ arbitration. She averred that earning a gross salary of Kshs. 6,400/- per month was against the recommended basic minimum wage of Kshs. 11,370/- per month and that the Respondent was thus in breach of her constitutional right to fair labour practices and the relevant provisions of the law and the applicable policies, guidelines and orders. She hence seeks compensation against the Respondent for having grossly underpaid her during her employment. She further asserted that the Respondent never accorded her annual leave and/or paid salaries in lieu of leave, for which she thus claims compensation and seeks house allowance for the period she served it. It was the Claimant's averment that the aforementioned Respondent's conduct together with its failure to pay her corresponding remuneration for the extra duties assigned amounted to unfair labour practices, which entitles her to general and special damages. In her witness statement, the claimant stated that she used to be paid salaries on a register kept by the respondent before the School Board started paying the salaries through her bank account. She noted that she carried out three (3) different duties for the Respondent at the gross pay of Kshs. 6,400/- per month, which amount she earned from 2008 to 2014. The Claimant contended that since the Respondent never enrolled her into a pension scheme thus denying her pension, she is also entitled to compensation.

3. Respondent's Case

In response, the respondent filed an amended reply to the memorandum of claim and a witness statement made by Ms. Anastasia Ndwigah, both dated July 12, 2023. The respondent averred that it employed the claimant with effect from March 1, 2001 *vide* appointment letter dated February 19, 2001. That according to the appointment letter, the claimant was appointed following a mutual agreement between her and Kyome Girls Secondary School and upon her acceptance of the salary offered. That the claimant's salary was arrived at after considering the size of the School and the fact that she had no training at all having had just completed her secondary education at the respondent school in 2001. That the respondent appointed the claimant even before her KCSE results were out and she therefore did not have any formal training for the job. The Respondent denied that it assigned the claimant a further role of store keeper, stating that all responsibilities undertaken by the claimant were within the terms of her employment. It confirmed that the claimant indeed resigned voluntarily but without giving the requisite notice or paying the respondent one month's salary in lieu of notice and that she also failed to hand over procedurally as was required. That it thereafter discovered the claimant had gotten another job in a nearby school – Mbitini Girls Secondary School whereat she was starting the same month she resigned from the respondent school.

4. The respondent's case was that it was ready and willing to settle what was believed to be the claimant's correct terminal dues but she was not co-operative and that her claim is thus unsubstantiated and misguided. It fronted that the Claimant's salary was increased progressively during her employment and that as at the time of resignation, she was earning a basic salary of Kshs. 6,400/- and house allowance of Kshs. 1,400/- per month. According to the Respondent, the Claimant was fairly paid during the course of her employment and in line with the laws, regulations, policies and notices applicable at the time. It contended that the claimant did not raise the claim for underpayment within the time set out in the [Employment Act](#) and that the same is therefore time-barred. Moreover, that the Claimant's salary



and house allowance were within the Government minimum wages regulations and that at no such time was she underpaid as alleged.

5. Regarding the reliefs sought, the Respondent averred that the Claimant had been proceeding on leave after close of schools every term and that the claim for unpaid leave for 14 years does not hold any water. It notified the court that the claimant was further granted leave on separate occasions upon request *vide* letters dated September 27, 2010, October 29, 2007 and August 3, 2009. On the claim for house allowance, the respondent stated that it provided the claimant with a house from the date of her employment in February 2001 up to August 2009 and thereafter, she was paid house allowance that was more than 15% of her basic salary. On the issue of non-enrolment of the claimant to a pension scheme, the respondent averred that the claimant was a member of NSSF and it had been remitting NSSF contributions in full and therefore the issue of damages sought does not arise. It was the Respondent's averment that the claim for 12 months' pay is not applicable since she resigned voluntarily and was not unlawfully terminated from employment. The respondent further stated in its counter-claim that judgment be entered for the respondent against the claimant for the sum of Kshs. 6,400/-, being one month's salary in lieu of notice, together with interest at the court rates prevailing at the time of resignation. In addition, it sought costs of this suit and of the Counterclaim.

6. Claimant's Submissions

The Claimant submitted that evidence clearly shows she served the Respondent in two (2) positions and that the allegations by the Respondent's witness, in her evidence in Court that the school did not have a functional library, were afterthoughts more so because the Respondent never made that assertion in any of its pleadings. She argued that the rule of *eiusdem generis* on interpretation dictates that the "other duties" set out in her letter of appointment were to be duties the Respondent could properly assign her only as related to the laboratory but not to serve as a librarian and storekeeper. That it was clear that the Respondent exploited her in the course of employment by assigning other duties of a librarian and storekeeper without remunerating her for the same.

7. It was the claimant's submission that section 31(1) of the *Employment Act* provides that the employer ought to either provide a reasonable housing accommodation for the employee or pay the employee sufficient housing allowances as rent in addition to the basis salary. That in the case of *Peter Ngunjiri Kariuki v Board of Management Magomano Secondary School* [2022] eKLR, the court affirmed that house allowance is payable to the employee as a separate item at 15% of the basic pay unless it is expressly provided for as a component of a consolidated basic pay. The claimant fronted that the respondent did not produce any evidence in the form of photographs or any records to support the allegations of having housed her up to 2009 and paying her house allowances after 2009. She noted that section 74(1)(i) of the *Employment Act* of 2007 mandates employers to keep a register of particulars of housing allowance paid to an employee or alternative shelter provided. That however, the evidence on record shows that from 2008 to 2014, she was paid only the basic salary of 6,400/- and the Respondent is not being candid in denying her claim for house allowance

8. The Claimant submitted that her evidence in regard to the claim for unpaid annual leave was not properly refuted as the Respondent did not produce any records to prove its allegations, even though it has a statutory duty under section 74(1)(f) of the *Employment Act* to keep a record of annual leave entitlement of every employee, days taken and due. She further submitted that although the Respondent testified that it had enrolled her to the NSSF and that deductions used to be made for contributions to the Fund, it did not produce any record to support the allegation and the inference drawn is that it did not enrol her for any pension scheme. As regards the claim that she was underpaid, the Claimant cited the case of *Kenya Tertiary & School Workers Union (KETASWU) v Board of Management, Kabarnet High School (Cause E018 of 2022)* [2023] KEELRC 830 (KLR) (13 April



2023) (Judgement) in which the court found in favour of the claimant who had been employed in 1995 as a lab assistant/technician at a starting salary scale of 1254 pounds (Kenyan) equivalent to Kshs. 25,080/-. The Claimant argued that as a lab assistant, she was in Job Group E on the Civil Service Scale and upon re-alignment of the salary structure for civil servants, the starting monthly basic salary was pegged at Kshs. 11,370/-, exclusive of house allowance and any other allowances payable. That this Court can take judicial notice that ordinarily, the service of an employee as relates remuneration is continuous, which would the claimant at the highest monthly basic salary of Kshs. 13,140/- on the said circular on re-alignment of the salary structure for civil servants. That she has nevertheless made a claim for the minimum basic salary of Kshs. 11,370/- to run for the period of her employment of 14 years. She relied on the case of *Rachael Githigia Macharia v B.O.M Ngangarithi Secondary School* [2019] eKLR in which the Court found in favour of the claimant who had served the school as a lab assistant for a monthly salary of Kshs. 11,000/- even though the claimant had no proof of a formal training on the said position and also did not have a formalised letter of appointment for the position.

9. It was the Claimant's submission that she had indicated in her Notice of Termination that the Respondent deduct the one month's salary in lieu of notice from her service benefits. She noted that the Respondent has never remitted to her the service benefits despite having served it well for 14 years and it did not give any proof on the allegation that she did not co-operate with it. She further noted that since the Respondent's witness stated under cross-examination that the amount due to the Claimant was around Kshs. 54,000/-, the Court be pleased to award to the Claimant the same on the admission of the Respondent. The Claimant fronted that the Respondent's Counter-Claim ought therefore to fail, firstly because her Notice to terminate her employment was proper and secondly because the Counter-Claim is an afterthought, bad in law for being limited in time, having been lodged in 2023 on an a claim that allegedly arose in 2014. She asserted that she had demonstrated a good case for judgement in favour of the Claimant for the reliefs sought.

10. Respondent's Submissions

The Respondent submitted that the issues for determination by this Court are:

- a. Whether the instant claim is time-barred pursuant to section 90 of the *Employment Act*, No. 11 of 2007.
- b. Whether the Claimant was assigned other duties other than the position of a laboratory assistant.
- c. Whether the Claimant is entitled to payment of house allowance, leave allowance and pension benefits.
- d. Whether the Claimant was underpaid.
- e. Whether the Claimant should be granted the reliefs sought.
- f. Whether the Counter-Claim against the Claimant should succeed.

11. It was the Respondent's submission that the allegation that the claimant was given additional duties of a librarian without a salary increment is time-barred under section 90 of the *Employment Act*, having been introduced through the amended claim on May 22, 2023, which was nine (9) years after the claimant resigned. That section 90 of the *Employment Act* demands that claims of the nature of continuing injuries must be instituted within 12 months from the date of their cessation. Notably, the instant Claim was first filed on December 13, 2016, about two years and two months after cessation of the claimant's employment. The respondent cited the case of *Serab Wairimu Kibara v Nokia Solutions Branch Operations* [2021] eKLR in which the Court affirmed that a claim for underpaid allowances and



underpayment falls within the classification of continuing injuries envisaged under section 90 of the *Employment Act* and held that the claimant's claim was stale and thus unfit to be entertained by Court. It was the Respondent's submission that the Claimant having not filed her claim within the required 12 months, the instant Claim is time-barred and should be declined on that basis. That it therefore ends that this Court lacks the requisite jurisdiction to admit, hear and determine the instant Claim for continuing injuries/damages. That this Court would still lack jurisdiction to determine the claim on additional duties and underpayment because section 90 of the *Employment Act* generally requires all employment proceedings to be instituted within three (3) years after the cause of action arose.

12. Without prejudice to its foregoing submissions, the Respondent submitted that the duties and responsibilities assigned to the Claimant in her capacity as a Laboratory Technician were meticulously communicated to her through a letter dated February 28, 2002. That the said responsibilities as elucidated in the said correspondence did not encompass duties associated with the role of a storekeeper or even a librarian, contrary to the Claimant's assertions. It asserted that it had affirmed the permanency of the Claimant's appointment through a letter dated 7th January 2003, which letter explicitly outlined that her responsibilities would remain as set out in the appointment letter and did not introduce any new roles. That in any case, the evidence of the Respondent's witness was that the School has never had a library and therefore the Claimant's allegations are untrue and the burden of proof was still upon her to demonstrate the specific roles she discharged as a librarian/storekeeper, but she did not. The Respondent asked the Court to consider the Leave Application Form dated 29th October 2007 at page 16 of the Respondent's Bundle, wherein the Claimant, while applying for her leave, indicated her position as "Lab Assistant" and attached to the "Laboratory (Science) Department". That the Court should also note that the Claimant indicated in her Notice of Termination that she was terminating her services "as a Laboratory Assistant". That further in the Demand Letter dated 2nd July 2015, the Claimant's Union (KUDHEIHA) sought compensation on her behalf while stating that she was employed "as a Lab Technician", which position the Union repeated in all its other correspondence to the Respondent. The Respondent maintained that the claim that the Claimant performed the roles of librarian and storekeeper lacks merit and should be dismissed.
13. Regarding the claim for house allowance, the Respondent submitted that in the correspondence dated 2nd July 2015, the Claimant's Union formally acknowledged the disbursement of a house allowance amounting to Kshs. 1,400/- to the Claimant. That having fulfilled its obligation to provide suitable accommodation to the Claimant from 2001 until August 2009 and having thereafter paid her a house allowance of Kshs. 1,400/- when she moved out of the school residence in 2009, her claim for house allowance should be dismissed. On the claim for pension benefits, the Respondent submitted that the School's records show that it used to remit Kshs. 400/- to NSSF every month on behalf of the Claimant and that she was a registered member of NSSF. That be as it may, the Claimant has not prayed for service pay and therefore even if pension as a statutory deduction was to be awarded, the same would be payable through a pension scheme and not directly to the Claimant. With regard to leave pay, the Respondent submitted that the Claimant had not produced before Court any leave applications that were declined by the Respondent and the Court should thus dismiss the claim. It relied on the case of *Josephine Nzau Nzilu v Board of Management Rasul Al Amin Preparatory School* [2020] eKLR where the Court found that teachers and non-teaching staff would be expected to utilize their annual leave during the school vacation and that it is not reasonable to compel the respondent to pay annual leave in arrears of the entire period worked, whereas the claimant did not work in continuity, without break, over that period.
14. It was the Respondent's submission that even if this Court was to find in favour of the Claimant on the issue of underpayment, any award for the same would only apply to the period falling within a maximum of three (3) years prior to the date of filing the instant claim. That this is to say that the three-



year period ran between December 2016 when the Claim was filed and ended in January 2014 and that the Claimant would hence only be compensated for the months of January to September 2014 when she resigned. It notified the Court that the Claimant was employed by the Respondent School Board of to clear the balance of the outstanding fees and not the Public Service Commission and that the Re-alignment of Salary Structure for Civil Servants relied upon by the Claimant would not therefore apply to her. That instead, Schedule 1 of the Regulation of Wages (General) Order should guide the Court. In the upshot, the Respondent submitted that the Claimant should not be granted any of the reliefs sought and that the reliefs on leave and house allowances as well as underpayment are time-barred and should summarily fail. That its Counter-Claim on the other hand succeeds because the Claimant's letter of appointment dated 19th February 2001 clearly provided for termination of the employment relationship by giving one month's notice or payment of one month's salary in lieu of notice. That the Claimant having failed to serve the required notice, should be ordered to pay one month's salary in lieu of notice.

15. The Claimant was employed initially as an untrained science lab assistant and later was engaged as a Laboratory Assistant after qualification from the Nairobi Technical Training Institute. She asserts she doubled up as the storekeeper and librarian at the School. In her letter of 19th February 2001, she was engaged on temporary basis as a laboratory assistant. At the time of confirmation in January 2003, she served in the dual role of laboratory assistant and librarian per the confirmation of appointment letter of 7th January 2003. The Claimant was not given any house allowance based on the terms in the appointment letter of 19th February 2001 which expressly provided that her payment was exclusive of house allowance. The Claimant sought better terms as indicated on her letters of 22nd January 2009 and 16th March 2011. The Claimant gave notice of termination of her service vide her resignation letter of 30th September 2014. In the letter she notified the Respondent that she was forfeiting her notice which was to be deducted from her terminal dues. She resigned as the school laboratory assistant. That means that over the years she had relinquished her role as librarian and storekeeper. These prior positions seemed to have been voluntary as the Claimant never brought a claim in respect of the positions within the 12 months contemplated in section 90 of the Employment Act. As such there will be no award under the head of unpaid salary for the position of librarian and storekeeper.
16. The claimant was entitled to obtain proper payment for her role as a laboratory assistant and it would seem she was underpaid over the years. In terms of section 90 of the Employment Act, the only period that would be covered would be the preceding 3 years from the date of termination. That means that she had forfeited the claims in respect of previous years. She earned Kshs. 6,400/- which means her underpayment was a sum of Kshs. 4,970/- a month. This means she would be entitled to only Kshs. 178,920/- for the underpayment. She resigned from employment and therefore there was no unfair termination of employment. In her letter to the respondent she indicated that she had obtained better prospects elsewhere hence her abrupt departure from the respondent. She was entitled to house allowance which was 15% of the basic pay. It is clear the sum due would be limited to the 3 years preceding which would be Kshs. 1,750.50 a month times the 36 months she was entitled to – Kshs. 61,398/-. She would also be entitled to costs of the suit. She will however pay to the School a sum of Kshs. 11,370/- out of the sums due meaning the final amount due to her will accordingly be reduced by that sum. The Respondent had sought the payment of Kshs. 6,400/- being the sum due as notice for the Claimant's termination of employment. As the Respondent was thus successful in this, the Claimant will be mulcted in costs for the sum due which the court assesses at Kshs. 20,000/-. There will be no award of interest as the sum is netted off the award to the Claimant. In the final result I enter judgment for the Claimant against the Respondent for:



- a. Kshs. 147,550/- being the sum awarded for underpayment less one month's salary as notice and costs awarded of Kshs. 20,000/ for the counterclaim.
- b. Kshs. 61,398/- being unpaid house allowance.
- c. Costs of the suit.
- d. Interest at court rates on the sums in a) and b) above from the date of judgment till payment in full.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 15TH DAY OF MAY 2024

NZIOKI WA MAKAU

JUDGE

