



REPUBLIC OF KENYA



**Ndung'u v E.D.G & Atelier Limited (Cause E937 of 2022)
[2024] KEELRC 963 (KLR) (2 May 2024) (Judgment)**

Neutral citation: [2024] KEELRC 963 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E937 OF 2022**

JK GAKERI, J

MAY 2, 2024

BETWEEN

VIRGINIA MUGURE NDUNG'U CLAIMANT

AND

E.D.G & ATELIER LIMITED RESPONDENT

JUDGMENT

1. The Claimant commenced this suit by a Memorandum of Claim filed on 15th December, 2022 alleging failure or refusal by the Respondent to pay her salary due and owing as well as terminal dues.
2. It is the Claimant's case that she was employed by the Respondent on 27th May, 2019 under a written contract of service at a consolidated salary of Kshs.140,000/= per month.
3. That in breach of the contract of employment, the Respondent failed, refused or neglected to pay the Claimant's full salary for various months in 2021 and 2022 amounting to Kshs.1,561,500.00.
4. The Claimant avers that she was forced to resign on 31st October, 2022 and forfeited the salary for October 2022 consistent with the terms of employment, having worked consistently until 31st October, 2022.
5. The Claimant prays for;
 - i. Outstanding salary of Kshs.1,561,500.00.
 - ii. One month's salary in lieu of annual leave for 2022, Kshs.139,200/=.
 - iii. General damages for breach of contract.
 - iv. Costs of this suit.
 - v. Interest on (i) and (ii) above at court rates.



vi. Any further or other relief as this court may deem just.

Response

6. By its response dated 1st March, 2023, the Respondent avers that it employed the Claimant as alleged under a contract with a 3 months probationary period from 27th May, 2019 to 31st August, 2019.
7. It is the Respondent's case that the COVID-19 Pandemic adversely affected its business in 2020 but paid the Claimant's salary, her non-attendance notwithstanding.
8. That the Claimant absconded duty severally which affected the Respondent's operations and resigned on 31st October, 2022 without giving the requisite notice and ignored attempts to reconcile her dues amicably and rejected the offer made in November 2022.
9. The Respondent denies that the Claimant worked consistently and was owed Kshs.1,561,500/= as salary arrears.
10. It is the Respondent's case that the Claimant requested for unpaid leave to attend to private/personal matters without indicating when she would resume duty and was absent from 5th December, 2021 to 31st October, 2022 and the prayer for pay in lieu of leave had no basis.
11. The Respondent prays for dismissal of the Claimant's suit with costs.

Claimant's evidence

12. On cross-examination, the Claimant confirmed that she called Mr. Mugo on 5th December, 2021 requesting for time to attend to her sick father but denied that it was unpaid leave. That she was working remotely and her last project was a Safaricom Tender and worked online until her resignation but could not recall the last date of her employment.
13. The witness admitted that the COVID-19 Pandemic affected the construction industry but meetings were conducted on site in the open and she had no company driver to take her to the site as it was not a daily affair and working hours were 8.15 am to 5.15 pm from Monday to Friday.
14. The witness confirmed that she gave a resignation notice under Clause 8 of the contract and forfeited the October salary as notice pay and resigned voluntarily.
15. On re-examination, the Claimant testified that the latest email communication was on 24th October, 2022 on the Safaricom tender and the Respondent was the custodian of records of site visit meetings as restrictions had been lifted.

Respondent's evidence

16. RWI, Mr. Edward Mugo confirmed that the Claimant's salary was Kshs.139,000/= as stated by the Claimant.
17. That there were projects she was in charge of and her input was necessary and had requested for leave from December 2021 to October 2022 by phone call and had no evidence of the call.
18. That although the Claimant's name appeared on the attendance register, there was no signature and the signature on some of the days did not appear to be hers.
19. The witness confirmed that after the demand letter was served, he called the Claimant and offered her Kshs.127,000/= as a compassionate gesture for work done but she declined the offer.



20. That he had no evidence of the alleged unpaid leave and had no internal human resource function.
21. On re-examination, the witness testified that between December 2021 and October 2022, the Claimant was on unpaid leave but remained a member of staff and could access office emails but no work had been allocated to her.
22. The witness testified that during COVID-19 Pandemic, no employee was dismissed and payments were made as funds became available to clear salary backlog.
23. It was his testimony that the Claimant was not signing the attendance register using her official signature.
24. That it was an inside job.

Claimant's submissions

25. On the alleged unpaid leave, counsel submitted that the Respondent availed no evidence of the alleged leave as required by Section 107(1) of the [Evidence Act](#).
26. Reliance was made on the decision in Kipkebe Ltd V Petterson Ondieki Tai (2016) eKLR on the burden of proof.
27. Counsel submitted since the Claimant rendered services, the Respondent was obligated to remunerate her under Section 17(1) of the [Employment Act](#), 2007.
28. The decision in Erastus Kwaka Otieno V Dhanush Infotech Ltd (2021) eKLR was relied on to buttress the submission.
29. Counsel further urged that the Claimant was underpaid for the period January 2021 to September 2022 by Kshs.1,561,500/=, the amount she was claiming.
30. Concerning damages for breach of contract, counsel cited Anson's Law of Contract 28th Edition 589 at 590 to urge that Claimant was entitled to damages for the breach.
31. Counsel further submitted that the Claimant was entitled to pay in lieu of leave as the Respondent tendered no evidence of leave records.

Respondent's submissions

32. As to whether the Claimant absconded or deserted work, counsel submitted that the Claimant was summoned by the Respondent owing to her inconsistent attendance and was not allocated work.
33. That she deserted on 5th December, 2021 and had no evidence of having attended any meetings.
34. Counsel cited the decision in Boniface Francis Mwangi V B.O.M Iyego Secondary School (2019) eKLR.
35. Counsel submitted that the Respondent granted the Claimant unpaid leave owing to the COVID-19 Pandemic.
36. According to counsel, the Claimant tendered no evidence to show that she worked for 2 years having been granted unpaid leave by the Respondent and was thus not entitled to any salary.
37. Counsel submitted that the Respondent retained the Claimant to work on commission basis and cited Kenya Pilots Association V Kenya Airways PLC (2021) eKLR on the doctrine of frustration.



38. Counsel submitted that the parties agreed to separate mutually and varied the contract of employment as permitted by law and cited the sentiments of the court in *Godfrey Mworira V Water Resources Management Authority* (2015) eKLR quoted in *John Muogi V Kenya National Commission for Unesco* (2020) eKLR.
39. That the parties herein agreed on commission based tasks while the Claimant was unpaid leave as evidenced by remittances to the Claimant for services rendered.
40. As to whether there was a breach of contract, counsel urged that the Claimant availed no proof of the alleged breach.
41. Counsel submitted that if the Claimant was not paid her dues and continued working for almost 2 years, she was estopped from claiming a constructive dismissal as held in *Coca Cola East & Central Africa Ltd V Maria Kagai Ligaga* (2015) eKLR as well as the sentiments of Lord Denning in *Joyce Sang V Sumaria Industries Ltd* (2019) eKLR on estoppel by conduct.
42. Finally, counsel submitted that the Claimant had not proved her case against the Respondent as the parties changed the terms of their relationship mutually.

Determination

43. It is common ground that the Claimant was an employee of the Respondent from 27th May, 2019 under a written contract of service which was subject to a 3 months probationary period and the Claimant served the 3 months period and remained in employment until 5th December, 2021 when the parties do not appear to agree on what transpired and/or how their relationship continued until the Claimant's resignation on 31st October, 2022.
44. Did the Claimant remain an employee of the Respondent under the contract she signed on 1st June, 2019 or were the terms varied and if so when and how? Did the Claimant apply to proceed on unpaid leave and for how long?
45. The issues for determination are;
 - i. Whether the Claimant proceeded on unpaid leave or deserted.
 - ii. Whether the terms of employment changed after 5th December, 2021 or remained the same.
 - iii. Whether the Claimant is entitled to the reliefs sought.
46. As to whether the Claimant took unpaid leave or deserted the workplace, parties have adopted opposing positions with the Respondent contending the Claimant not only took unpaid leave but also absconded duty. The Claimant argues otherwise.
47. In its response to the Memorandum of Claim, the Respondent claims that the Claimant absconded duty severally prompting Mr. Edward Mugo, RWI to reach out to her to establish the reasons for the absence.
48. In his written statement, RWI states that the Claimant's action of absconding duty severally affected the Respondent's operations and deliverables with its clientele.
49. The written statement makes no reference to attempts to get in touch with the Claimant by the witness, when he did so or how and the outcome.
50. On the other hand, the Claimant testified that on 5th December, 2021, she called Mr. Edward Mugo and requested for time to attend to her sick father but was still working.



51. The Claimant denied having applied for unpaid leave.
52. The Claimant testified that during the restrictions occasioned by the COVID-19 Pandemic, they worked remotely and visited construction sites, though not on a daily basis.
53. In his oral testimony in court, RWI confirmed that the Claimant was in charge of certain projects.
54. Although RWI testified that the Claimant requested for leave in December 2019 by calling, he admitted that he had no evidence of the call or what transpired and in particular what was agreed upon.
55. In the absence of any shred of evidence to show that the Claimant was on unpaid leave for a specified duration on defined terms, it is difficult for the court to make a finding that she was indeed on leave of absence.
56. Section 107(1) of the *Evidence Act* is unambiguous that he who alleges must prove the allegations as follows;
- “Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”
57. Similarly, the burden of proof of any particular facts is borne by the person who alleges the same. (Section 109 of the *Evidence Act*).
58. The Respondent has failed to discharge the burden of proof that the Claimant proceeded on unpaid leave in December 2021.
59. Although the Respondent availed raw hard copies of its attendance register from 10th March, 2020 to 1st July, 2022, it availed no evidence to show the number of days the Claimant was absent or was present bearing in mind that COVID-19 restrictions on movement took root in late March 2020 and continued for a long time and remote working was the norm.
60. RWI’s allegation that the Claimant’s signature may have been forged lacked supportive evidence.
61. As regards desertion or absconding duty, Black’s Law Dictionary (10th Edition) defines desertion as;
- “The wilful and unjustified abandonment of a person’s duties or obligations.”
62. In the South African case of *Seabolo V Belgravia Hotel* (1997) 6 BLLR 829 (CCMA), the court stated as follows:
- “... desertion is distinguishable from absence without leave, in that the employee who deserts his or her post does so with the intention of not returning, or having left his or her post, subsequently formulates the intention not to return”.
63. Contrary to the Respondent’s submission that it was the Claimant’s obligation to adduce evidence of having been at the workplace, whenever an employer pleads desertion, it is incumbent upon it to adduce evidence of the steps it took to ascertain the employee’s whereabouts to resume duty and/or issue a notice to show cause to the employee to notify him or her that termination of employment on the ground of desertion is being considered. (See the sentiments of Onyango J. in *Felistas Acheha Ikatwa V Peter Charles Otieno* (2018) eKLR as well as the decisions in *Evans Ochieng Oluoch V Njimia Pharmaceutical Ltd* (2016) eKLR, *Simon Mbithi Mbane V Inter Security Services Ltd* (2018) eKLR, *Silas Wandera V Principal Bristar Girls High School* (2020) eKLR among others).



64. The Respondent tendered no evidence of having contacted the Claimant during the alleged desertion and explain how the Claimant resumed duty for purposes of the resignation.
65. To the question whether the Claimant proceeded on unpaid leave and/or deserted the workplace, the court returns that the Respondent has failed to demonstrate either of the alleged actions by the Claimant.
66. Concerning the alleged change of terms of employment, the Claimant maintains that she remained an employee of the Respondent as she attended to her sick father and rendered services and was paid part of the salary in light of the impact of the Covid-19 Pandemic on the business.
67. Strangely, although the Respondent submitted on the issue of the terms of the Claimant's employment having been changed by mutual consent to commission-based, neither Mr. Edward Mugo's written statement dated 14th August, 2023 nor the oral testimony adduced in court make reference to any change in the terms of employment.
68. In fact, RWI furnished no evidence or allege that he and the Claimant met or discussed any alteration or variation of the terms of the Claimant's employment.
69. The only call RWI acknowledges is the one the Claimant made in December 2021 requesting for time to attend to her sick father.
70. On re-examination, RWI testified that he did not dismiss or terminate the employment of any of his staff and was paying them as money was received to clear the salary backlog, a clear admission that the Respondent was not paying its employees full salary due to the challenges attributable to the Covid-19 restrictions.
71. Copies of Mpesa statements filed by the Claimant for the period 8th March, 2021 to July 2022, which the Respondent did not contest reveal that the Claimant regularly received monies from one Lucy Mburu and Wendy Peter.
72. The Respondent did not deny that the two were its employees or allege that they were not acting on its behalf.
73. The Claimant did not submit on this issue perhaps because it never arose from the evidence adduced by the Respondent.
74. Flowing from the foregoing, it is clear that the Respondent has failed to establish that the Claimant's terms of employment changed after December 2021.
75. On entitlement to the reliefs prayed for, the court proceeds as follows;
76. It is not in dispute that the Claimant resigned from employment by letter dated 31st October, 2022 by invoking Clause 8.0 of the Letter of Appointment dated 27th May, 2019 which allowed either party to the contract to terminate the same by one month's written notice or one month's salary in lieu of notice.
77. According to the notice, the Claimant forfeited the salary for August 2022 and was not claiming it.
78. The notice of resignation provided no reason for the action but attached a copy of a demand for owing dues and expressed her gratitude for the opportunity afforded to serve the Respondent.
79. On cross-examination, the Claimant confirmed that she resigned voluntarily and neither pleaded nor alleged that she was constructively dismissed by the Respondent.



80. Relatedly, copies of email messages between the Claimant and the Respondent reveal that the Respondent was aware of and admitted owing the Claimant her dues and engaged her on the issue but the engagement yielded no fruits as the Claimant declined the offer of Kshs.127,000/=, which according to RWI was a compassionate gesture yet the Finance Department of the Respondent admitted via email that they were willing to settle the Claimant's outstanding dues.
81. From the prayers set out in the Claimant's Memorandum of claim, it is clear that the Claimant is principally claiming outstanding salary arrears and pay in lieu of leave.
- i. Outstanding salary arrears
82. The Claimant's demand letter dated 31st October, 2022 demanded payment of salary arrears amounting to Kshs.1,561,500.00 and pay in lieu of leave for the year 2022, kshs.139,200/=, a total of Kshs.1,700,700.00.
83. The demand letter tabulated the portion of the salary paid from March 2021 to July 2022.
84. The Respondent did not deny the fact of having paid part of the salary to the Claimant as evidenced by the Claimant's Mpesa records.
85. By an email dated 1st November, 2022 to the Claimant and copied to the Claimant's counsel, Finance EDG confirmed that the Respondent had outstanding dues of the Claimant and had not refused to pay.
86. In the absence of evidence of the particulars of the outstanding dues, the court is persuaded that it was the unpaid salary the Claimant had demanded.
87. It is trite, salary or wage is one of the salient features of the contract of employment and is jealously protected under Part IV of the *Employment Act*, 2007.
88. Section 17(1) of the Act provides that;
1. Subject to this Act, an employer shall pay the entire amount of wages earned by or payable to an employee in respect of work done by the employee in pursuance of a contract of service directly, in the currency of Kenya – . . .”
89. In the case of a person employed for more than one month, wages or salaries is payable at the end of each month or part thereof.
90. Under the letter of appointment, the Claimant was entitled to the sum of Kshs.140,000/= per month but is claiming Kshs.139,200/=.
91. Having failed to demonstrate that the Claimant proceeded on unpaid leave from December 2021 to 31st October, 2022 or that she deserted the workplace, and having further failed to prove that the Claimant was paid the full salary entitlement for the period March 2021 to September 2022, it is evident that Respondent failed, refused and/or neglected to pay the Claimant's salary in full and the amount outstanding is due to her and is accordingly awarded Kshs.1,561,500.00.
92. The Respondent adduced no evidence to controvert the amount claimed.
- ii. One month's salary in lieu of leave
93. Neither the Claimant's written statement nor the oral evidence adduced in court show that the Claimant had any pending leave days and how many they were.
94. The prayer lacks supportive evidence and particulars and is accordingly declined.



- iii. General damages for breach of contract
95. The Claimant adduced no evidence to prove that she was entitled to general damages in an employment contract.

The prayer is declined.

96. In the upshot, judgment is entered in favour of the Claimant against the Respondent in respect of the outstanding salary, Kshs.1,561,500.00.
97. As the claim is only partially successful, it is only fair that parties bear their own costs.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 2ND 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 15th March 2020 and subsequent directions of 21st 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

