



**Kitui v Race Guards Limited (Cause 640 of 2016)
[2024] KEELRC 1982 (KLR) (29 July 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1982 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 640 OF 2016**

**JK GAKERI, J
JULY 29, 2024**

BETWEEN

JACOB KITUI CLAIMANT

AND

RACE GUARDS LIMITED RESPONDENT

JUDGMENT

1. The Claimant commenced this suit by a Memorandum of Claim filed on 19th April, 2016.
2. The Claimant avers that he was an employee of the Respondent from 2011 and served diligently until 30th September, 2015 when he issued a one (1) month’s notice of resignation to the Respondent.
3. The Claimant alleges that the Respondent did not adhere to the provisions of law on minimum salary and employment benefits.
4. It is the Claimant’s case that attempts to resolve the dispute through alternative dispute resolution approaches fell through.
5. The Claimant prays for;
 - a. Outstanding leave allowance, underpayment, uniform refund, National Social Security Fund arrears and public holiday amounting to Kshs.609,460.00 comprising;
 - i. Annual leave for 2015 Kshs.12,000.00
 - ii. Uniform refund Kshs.5,700.00
 - iii. House allowance Kshs.103,600.00
 - iv. Off-day allowance Kshs.92,160.00
 - v. Underpayment Kshs.366,000.00



- vi. Public holiday Kshs.19,200.00
- vii. NSSF arrears Kshs.10,800.00
- b. Costs of this suit with interest.
- c. Any other relief that the court may grant.

Respondent's case

- 6. The Respondent admits that the Claimant was its employee from 10th February, 2011 and resigned on 30th September, 2015 and was paid all his dues.
- 7. It is the Respondent's case that uniform refund was paid on termination of services, house allowance was catered for, off-days were paid for as were public holidays and NSSF deductions were remitted.
- 8. The Respondent prays for dismissal of the Claimant's suit.

Claimant's evidence

- 9. The Claimant confirmed, on cross-examination that he and the Respondent had agreed on the salary payable to him, that he was not paid off-duty and NSSF dues had been paid upto September 2015.
- 10. That the Respondent paid the sum of Kshs.365/= for public holidays in March 2013.
- 11. The Claimant admitted that his case was heard at the County Labour Office on 28th October, 2015 at 2.30 pm and he attended but was not satisfied with the outcome and did not disclose the same to his counsel.
- 12. The Claimant testified that the sum of Kshs.15,000/= he was being paid was too little.

Respondent's evidence

- 13. RWI, Mr. Bonface Maweu confirmed that the Respondent remitted NSSF deductions and the Claimant was paid his dues in cash and signed the documentation but the witness had no copy of the document.
- 14. On re-examination, the witness testified that although the Claimant was directed to report to the Respondent's office to collect his dues, he did not.

Claimant's submissions

- 15. By the time the court retired to prepare this judgment, the Claimant had not filed submissions.

Respondent's submissions

- 16. On terminal dues, the Respondent's counsel submits that the burden of proof lay on the Claimant to prove his claim.
- 17. That the Claimant reported a complaint to the Kiambu Labour Office but did not follow it up.
- 18. On the reliefs sought, counsel urges that the Claimant confirmed on cross-examination that off-duty was being paid as were public holidays and NSSF arrears and the year had not ended for annual leave to accrue.



Analysis and determination

19. It is common ground that the Claimant was an employee of the Respondent from 10th February, 2011 and remained in employment until 30th September, 2015 when he resigned on his own volition as he wanted to study Electrical Engineering.
20. Documents availed by the parties reveal that the Claimant reported the dispute to the Kiambu County Labour Office as early as 7th October, 2015 claiming off-days, uniform refund, pro rata leave, public holidays and other unidentified legal dues and a meeting was scheduled for 28th October, 2015 at 2.30 pm and both parties attended.
21. Documents availed by the Respondent show that as of March 2013, the Claimant's gross salary was Kshs.7,365.00.
22. The net salary vacillated between Kshs.6,000.00 and Kshs.7,335.00 from 2012 to September 2015.
23. The only issue for determination is whether the Claimant is entitled to the claims sought as terminal dues.
24. As aptly captured by the Respondent's counsel, it is trite law that the person who makes an allegation shoulders the burden of establishing its truthfulness.
25. Section 107 of the *Evidence Act* is unambiguous that;
 1. Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
 2. Where a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.
26. As regards the incidences of burden, Section 108 states that;

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

(See the sentiments of the Court of Appeal in *East Produce (K) Ltd V Christopher Astiado Osiro Civil Appeal No. 43 of 2001* and The Halsbury's Laws of England, 4th Edition Volume 17 at paragraph 13 and 14).
27. The foregoing lay it bear that where the legal burden lies, it is discharged by way of evidence, and the opposing party is required to adduce evidence in rebuttal.
28. In the instant suit, the duty to demonstrate entitlement to the reliefs sought lay on the Claimant.
29. The Claimant alleges that he was not paid anything after resignation.
30. The Respondent availed no evidence of having paid the Claimant any money when they separated in 2015. However, the Respondent's payroll for December 2012 and March 2013 reveal that Claimant had off-days and was paid for public holidays as well as a house allowance of Kshs.1,000/= per month, evidence the Claimant did not rebut.
31. Finally, a copy of the Claimant's NSSF statement dated 25th February, 2015 shows that deductions were remitted upto September 2015.
 - i. Annual leave for 2015



32. The Respondent adduced no evidence to prove that the Claimant proceeded on leave in 2015 and as leave is a statutory right under the provisions of Section 28 of the Employment Act, the Claimant is awarded pro rata leave for 2015, Kshs.9,597.80.
- ii. Uniform refund
33. The Respondent admitted that the amount deducted was refundable on separation, a figure of Kshs.5,000/= and the same is awarded, Kshs,5,000.00.
- iii. House allowance
34. Evidence on record reveals that the Respondent was paying a house allowance consistent with the provisions of Section 31 of the Employment Act, 2007.
35. It is unclear to the court how the sum of Kshs.103,000.00 was arrived at.
36. The prayer is declined for want of proof.
- iv. Off-day allowance
37. The Respondent's payroll on record show that the Claimant had 4 off-days per month and was paid for them at the end of every month.
- The claim lacks merit and is declined.
- v. Public holiday
38. Evidence on record shows that the Respondent paid for public holidays whenever the Claimant worked on public holidays.
39. More significantly, the Claimant adduced no evidence of the public holidays he allegedly worked and was not paid.
40. In the absence of relevant particulars, the claim is declined.
- vi. NSSF arrears
41. It is unclear to the court how the sum of Kshs.10,800/= was arrived at.
42. The Claimant has neither alleged nor proved that the amount claimed was deducted but not remitted to the NSSF.
43. The NSSF statement on record show that the Claimant was a member of the fund which is mandated by law to ensure that all employers deduct and remit NSSF dues.
44. The court has no mandate to enforce the provisions of the National Social Security Fund Act, 2014, as it is vested on the Board of Trustee and the Claimant has not demonstrated inaction by the NSSF Board of Trustees.
- The prayer is declined.
- vii. Underpayment
45. In his written witness statement, the Claimant alleges that the Respondent failed to comply with the law on minimum wage and prays for underpayment contrary to the Respondent's argument that the parties had agreed on the salary payable to the Claimant and he was contractually bound by the terms of the agreement.



46. It is trite law that the minimum wage is a prescription of law and must be complied with by employers.
47. Although the Claimant did not show by how much he was underpaid or how the figure of Kshs.366,600.00 was arrived at, he had the right to be paid a salary consistent with law.
48. Consequently, the Claimant is awarded underpayment for 3 years effective 1st September, 2012.
49. Based on the wage guidelines operational at the time namely, Regulation of Wages (General) (Amendment) Order, 2012, 2013 and 2015 which prescribed the minimum wage for a day guard, the Claimant is awarded the sum of Kshs.139,372.86 inclusive of a house allowance of 15% of the prescribed minimum salary.
50. In conclusion, judgment is entered in favour of the Claimant against the Respondent as follows;
 - a. Pro rata annual leave Kshs. 9,597.80
 - b. Underpayment Kshs.139,372.86
 - c. Uniform refund Kshs. 5,000.00Total Kshs.153,970.66
51. Considering that the Claimant voluntarily resigned to pursue other interests, it is only fair that parties bear their own costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 29TH DAY OF JULY 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

