



**Kijusa v Race Guards Limited (Cause 641 of 2016)  
[2024] KEELRC 2134 (KLR) (29 July 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2134 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 641 OF 2016  
JK GAKERI, J  
JULY 29, 2024**

**BETWEEN**

**PATRICK KIJUSA ..... CLAIMANT**

**AND**

**RACE GUARDS LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The Claimant filed this suit on 19<sup>th</sup> April, 2016 claiming terminal dues.
2. It is the Claimant’s case that he was employed by Respondent as a security guard in 2007 and served diligently until he gave a one (1) month notice and left on 30<sup>th</sup> September, 2015.
3. He alleges that the Respondent did not comply with the law on minimum wage and employment benefits.
4. That attempts to resolve the dispute out of court fell through.
5. The Claimant prays for;
  - i. Outstanding house allowance, uniform refund, off-day allowance, underpayment, NSSF arrears and public holiday allowance amounting to Kshs.950,600/=.
  - ii. Certificate of service.
  - iii. Costs of this suit with interest.
  - iv. Any other relief that the court may grant.



### **Respondent's case**

6. By a response to the Memorandum of Claim filed on 3<sup>rd</sup> February, 2017, the Respondent avers that it employed the Claimant on 19<sup>th</sup> September, 2007 and left in 2012 and was paid all dues but applied for employment in 2013 and was employed and resigned in 2015.
7. According to the Respondent, the Claimant had no claim before 1<sup>st</sup> January, 2013.
8. The Respondent avers that a uniform refund of Kshs.5,000/= is refundable on termination of employment, house allowance was catered for as were off-days, public holidays and NSSF dues were remitted by 10<sup>th</sup> of the succeeding month.
9. Finally, the Respondent avers that although the Claimant filed a complaint at the Kiambu Labour Office, he refused to participate in the proceedings and filed the instant suit.
10. The Respondent prays for dismissal of the Claimant's suit.
11. On cross-examination, the Claimant confirmed that he was employed in 2007 and separated with the Respondent in 2015 and his employment was continuous and no evidence of payment of dues had been adduced and was not paid in 2015.
12. That he received the letter from the Labour Office dated 28<sup>th</sup> October, 2015 on his dues of Kshs.103,386.00 but refused to sign for the amount to be deposited in his bank account as he did not agree with the Labour Officer.
13. On re-examination, the Claimant testified that he worked for 8 years.

### **Respondent's evidence**

14. RWI, Mr. Bonface Maweu, confirmed on cross examination that the Claimant was employed in 2007 and worked till 2012, when he left, was re-employed in 2013 and left in 2015 and was based at Kiambu.
15. The witness stated that in 2012, the Claimant's salary was Kshs.6,990/= but varied from time to time.
16. On re-examination, the witness maintained that the Claimant left in 2012, came back in 2013 and left in 2015.

### **Claimant's submissions**

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

### **Respondent's submissions**

18. On payment of terminal dues in 2013, counsel argues that the Claimant admitted on cross-examination that he was paid and signed a discharge voucher.
19. As regards the reliefs sought, counsel submits that none is due as there were no NSSF arrears or leave as the Claimant had not served for the entire year and salary payable was consensually agreed between the parties.

### **Analysis and determination**

20. Although it is common ground that the Claimant was employed by the Respondent on 19<sup>th</sup> September, 2007 and left in September 2015, there is no consensus as to what transpired in late 2012 and early 2013.



21. While the Claimant maintains that he served continuously from 2007 to 2015, the Respondent testified that the Claimant left in 2012 and was paid final dues but was at his instance re-employed on 1<sup>st</sup> January, 2013 and resigned in 2015.
22. In support of its case, the Respondent availed a copy of a document signed by the Claimant for the sum of Kshs.23,000/= being uniform refund of Kshs.6,600/= and service pay for 5 years at Kshs.16,500/=.
23. The Claimant did not deny having received and signing for the amount. The document is explicit that payment was for the period from July 2012 to December 2012 and service pay was for completed years of service.
24. The Claimant appended his signature and a thumb print as evidence of receipt in full settlement of final dues.
25. This document verifies, embellishes and lends credence to the Respondent's testimony that indeed the Claimant left employment in 2012 for sometime, no matter how nominal, was paid and was re-employed and as such had no claim against the Respondent for the pre-2013 employment period.
26. From the evidence on record, the court is satisfied that the Respondent has on a balance of probabilities proved that the Claimant left employment sometime in 2012 and having been a diligent employee was re-employed and resigned less than 2 years later.
27. RWI testified on re-examination that there was no complaint against the Claimant.
28. From the evidence on record, it is discernible that the Claimant reported his complaint to the Kiambu Labour Office on 14<sup>th</sup> August, 2015 and parties were heard on 28<sup>th</sup> August, 2015 and the Labour Officer assessed the Claimant's dues at Kshs.103,386.50 which the Claimant deemed too low and filed the instant suit 6 months later.
29. The sum was inclusive of uniform refund, 18 worked days, off-days, service pay and public holidays.
30. Documentary evidence availed by the Respondent, and in particular the payroll for December 2012 reveal that the Claimant's salary was Kshs.7,450/= but inclusive of allowances for off-duty allowance, public holiday allowance, house allowance of Kshs.1,000/= and had 4 off-days in the course of the month and a net pay of Kshs.6,990/=.
31. The Claimant's contention that he was not paid housing allowance is therefore untrue.
32. From the bank statements on record, it is clear that the Claimant's salary vascillated between Kshs.6,990/= and Kshs.7,400/=.
33. It is however unclear to the court when the Claimant resigned from employment. While the Claimant states that he and the Respondent separated on 30<sup>th</sup> September, 2015, and he gave notice, the Respondent's witness adduced no evidence of the date or mode of separation.
34. The Claimant's bank statement for the period 17<sup>th</sup> November, 2013 to 1<sup>st</sup> August, 2015 reveal that the Claimant received his last salary from the Respondent on 7<sup>th</sup> July, 2015.
35. It is unlikely that the Claimant resigned on 30<sup>th</sup> September, 2015 yet no salary was paid in August and September, notice notwithstanding, if there was any as he availed none.
36. Significantly, the Claimant is not claiming for any days worked and not paid which would appear to suggest that the Respondent discharged its obligations when the separation took place.



37. The singular issue for determination is whether the Claimant is entitled to the reliefs sought as terminal dues.
38. As contended by the Respondent's counsel, it is cardinal principle of law that the person who makes an allegation bears the burden of establishing its existence or truthfulness.
39. Section 107 of the *Evidence Act* provides;
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.
40. Section 108 of the Act captures the incidence of burden as follows;
- 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.
41. See the sentiments of the Court of Appeal in *East Produce (K) Ltd V Christopher Astiado Osiro Civil Appeal No. 43 of 2001* as well as The Halsbury's Laws of England, 4<sup>th</sup> Edition Volume 17 at paragraph 13 and 14 that the legal burden lies on the person who alleges and it is discharged by way of evidence and the opposing party is required to adduce evidence in rebuttal.
42. In this case, the Claimant bears the burden to show that he is entitled to the dues sought or that they had accrued before the separation.
43. It is noteworthy that the Claimant did not controvert the Respondent's evidence which reveals that it was paying for off-days, public holidays and house allowance.
44. Similarly, the Claimant's NSSF statement for the period 1<sup>st</sup> November, 2007 to 31<sup>st</sup> August, 2015 show that NSSF deductions were remitted upto August 2015 which would appear to suggest that there are no deducted and unremitted dues as the Claimant's last salary on record was in July 2015.

#### **i. Uniform refund**

45. In its response to the claim, the Respondent admits that the sum of Kshs.5,000.00 which is deducted from employees is refunded upon termination of service.
46. The Claimant is thus awarded Kshs.5,000.00 as uniform refund.

#### **ii. Off-duty allowance**

47. The Respondent's payroll on record shows that the Respondent was compensating the Claimant for off-duty days worked, four (4) in number per month. The Claimant did not controvert this evidence.
- The claim is declined.

#### **iii. House allowance**

48. Evidence on record show that the Respondent was paying its employees a standard housing allowance of Kshs.1,000/= as the basic salary was also the same consistent with the provisions of Section 31 of the *Employment Act*, 2007.
49. It is unclear to the court how the figure of Kshs.178,200/= was arrived at and relates to what duration.



50. In the absence of relevant particulars, the claim is declined.

**iv. Public holiday Kshs.33,000/=**

51. Evidence on record reveal that the Respondent paid its employees holiday allowance for work during public holidays, evidence the Claimant did not rebut.

52. More significantly, however, the prayer by the Claimant lacks particulars to be sustained.

53. It is unclear to the court during which public holiday the Claimant rendered services and when.

54. In the absence of supportive evidence, the claim lacks merits and is declined.

**v. NSSF arrears Kshs.1,200/=**

55. As adverted to elsewhere in this judgment, a copy of the Claimant's NSSF statement availed by the Respondent shows that deductions were remitted from November 2007 to August 2015 save for December 2007.

56. It is unclear to the court how the sum of Kshs.1,200/= was arrived at or relates to what months of which year.

57. More importantly, the mandate of recovery of unpaid NSSF deductions is vested on the Board of the Trustees of the National Social Security Fund under the [National Social Security Fund Act](#), 2014.

58. The prayer lacks particulars and is declined.

**vi. Underpayment**

59. In its claim dated 12<sup>th</sup> August, 2016 and the written witness statement of even date, the Claimant alleges that the Respondent did not adhere to the law as regards the minimum wage or salary and prays for underpayment for an unspecified duration of Kshs.576,000.00.

60. Contrary to the Respondent's averment that the parties had agreed on the salary payable to the Claimant and the Claimant did not complain of being underpaid, and the claim was an afterthought, it is trite law that the minimum wage or salary is a prescription of the law which the Respondent was bound to abide by.

61. Although the Claimant did not show how he was underpaid or how the sum of Kshs.576,000.00 was arrived at, he had the right to be paid a salary consistent with his job and the law.

62. Consequently, the Claimant is awarded underpayment from January 2013 to August 2015.

63. Based on the operational Regulation of Wages (General) (Amendment) Orders, 2012, 2013 and 2015, which prescribed the minimum salary for a day watchman, the Claimant is awarded Kshs.121,412.86 being the amount by which he was underpaid, inclusive of house allowance at 15% of the basic salary per month.

**vii. Certificate of service**

64. The Claimant is entitled to a certificate of service by dint of Section 51 of the [Employment Act](#), 2007.

65. The upshot of the foregoing is that judgment is entered in favour of the Claimant against the Respondent in the following terms;

- a. Uniform refund Kshs. 5,000.00



b. Underpayment Kshs.121,412.86  
Total Kshs.126,412.86

c. Certificate of service

66. Appreciating the fact that the Claimant voluntarily resigned his position for unexplained reasons on an unidentified date and the only question was the dues payable to him, it is only fair that each party bears its own costs.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 29<sup>TH</sup> 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 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**

**DRAFT**

