



**Mulei v Total Kenya PLC (Appeal E001 of 2023)
[2024] KEELRC 1743 (KLR) (11 July 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1743 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
APPEAL E001 OF 2023
CN BAARI, J
JULY 11, 2024**

BETWEEN

JACKSON NZUVI MULEI APPELLANT

AND

TOTAL KENYA PLC RESPONDENT

*(Being an appeal from the Judgment of Hon. S. Telewa (SRM) delivered
on 22nd December, 2022 in Kisumu CMELRC Cause No. 169 OF 2021)*

JUDGMENT

1. The Appellant herein, sued the Respondent before Kisumu Chief Magistrate’s Court claiming constructive dismissal, 12 months’ salary for unfair termination, damages for character assassination, bonus pay, house allowance and salary increments withheld and an order for payment of pension.
2. In a Judgment delivered on 22nd December, 2022, the Trial Court found in his favour and awarded him an order for issuance of a certificate of service, a declaration that the Appellant was constructively dismissed and 3 months’ salary for unfair termination.
3. The Appellant being dissatisfied that the Trial court did not grant all the prayers in his claim, lodged the instant appeal on 20th January, 2023, premised on the grounds THAT: -
 - i. The Learned Magistrate erred in fact and in law in finding that the Claimant was being paid an all-inclusive sum despite evidence that he was paid a basic salary only, and not a consolidated salary.
 - ii. The Learned Magistrate erred in law by ignoring the Appellant’s submissions and evidence on the issue of house allowance.



- iii. The Learned Magistrate erred in law in making a decision on the Appellants entitlement to house allowance that is without any legal precedent and is contrary to the provisions of Section 31 of the *Employment Act* and various decisions of the Court of Appeal and the Employment and Labour Relations Court.
- iv. The Learned Magistrate erred in law by failing to exercise her discretion judicially.
4. The Appellant prays that the appeal be allowed and in addition to the orders granted by the Trial Court, he be awarded house allowance for the period 2013 to 2021.
5. The appeal was canvassed by way of written submissions. Submissions were filed for both parties.

The Appellant's Submissions

6. The Appellant submits that the Learned Magistrate misdirected herself in reaching a finding that the Appellant was paid a consolidated salary in view of the contractual document produced in evidence. He sought to rely in the case of *Vipingo Ridge Limited v Swalehe Ngongwe Mpitta* [2022] eKLR, to buttress this position.
7. It is the submission of the Appellant that Section 31 (2) of the *Employment Act* makes provision for house allowance, and provides that where a contract of service contains a provision which consolidates as part of basic wage or salary of the employee, an element intended to be used by the employee as rent or which is otherwise intended to enable the employee provide himself with housing accommodation, then the employer does not have to provide accommodation or payment of such sufficient sum as rent to the employee as mandated under Section 31(1).
8. The Appellant submits that the position by the Respondent militates against Section 26 of the Employment which provides that the provisions of the *Employment Act* shall constitute the basic minimum terms and conditions of service.
9. It is the Appellant's submission that he is entitled to house allowance for the entire duration of his contract as the Learned Magistrate erred in ignoring decisions of the ELRC and Court of Appeal that were binding on her. He placed reliance in *Vipingo Ridge Limited v Swalehe Ngongwe Mpitta* [2022] eKLR where the court held thus:

“From the foregoing and going by the decision of the Court of Appeal in the G4S case which is binding on this court, it does appear to me that the suit by the Claimant in the current case was not time barred. He filed his claim on 21st May 2020 following the resignation on 4th October 2019. This was within the three (3) years contemplated by Section 90 of the *Employment Act*. If the Court of Appeal decision aforesaid is to guide me on the issue, it follows that the claims for house allowance that accrued prior to the year 2017 could still be validly entertained by the trial court so long as suit for their recovery was filed within three (3) years of the contract of service between the Appellant and Respondent coming to an end.”
10. The Appellant finally urges the Court to allow this appeal and in addition to the orders of the lower Court, award him the house allowance for the entire duration of his employment from November 19, 2013 to July 9, 2021 and costs of the appeal.



The Respondent's Submissions

11. It is the Respondent's submission that the Appellant is not entitled to house allowance as a separate component, since it was already paid to him as part of his monthly salary and which is confirmed by the Appellant's own payslips.
12. It is submitted that this Court ought to examine the Appellant's payslips as a reference document for purposes of demonstrating that the Appellant's house allowance was not provided/paid for as a separate component from his monthly salary, and that the said allowance was actually paid as part of his monthly salary.
13. The Respondent further submits that at all material times during the Appellant's employment, he did not have any issue or raise any formal challenge with the Respondent in so far as the inclusion of his house allowance as part of his monthly salary was concerned. That the Appellant did not dispute the reference to basic monthly salary in Clause 3(a) of his Letter of Appointment as constituting his entire remuneration throughout the period he was in employment, including house allowance.
14. The Respondent submits that the Appellant did not justify or lay any basis whatsoever as to how he arrived at the house allowance in the sum pleaded in his Memorandum of Claim, which he was not entitled to. It submits further that no basis was laid by the Appellant to justify an award of house allowance at the rate and sum of Kshs. 15,000/= per month
15. It is submitted for the Respondent that in the case of *Grain Pro Kenya Inc. Ltd v Andrew Waithaka Kiragu* [2019] eKLR the Court held that:-

“Counsel cited many authorities where house allowance was calculated at the rate of 15% of the monthly salary and in accordance with the General Wages Guild. The cases of *Ananna Yonemura v Liwa Kenya Trust* [2014] eKLR and *Kedhihia Workers v B.O.G Maseno School for the deaf* [2013] eKLR were cited. To us, 15% is reasonable percentage that an employee spends from part of a salary to pay house rent.”
16. The Respondent submits further that if the trial Court or this Court were to award house allowance at this rate, then the Appellant would have been entitled to a monthly house allowance of Kshs. 5,250/= as at the time he started his employment (being 15% of his starting basic monthly salary of Kshs. 35,000/= and Kshs. 8,403.33/= as at the time his employment ended (being 15% of his basic salary of his final reviewed basic monthly salary of Kshs. 56,025.92/=).
17. It is submitted that these basic monthly salary amounts were pleaded by the Appellant himself at paragraphs 4 and 5 of his Memorandum of Claim.
18. The Respondent submits that the trial Court was correct to find that the Appellant was not entitled to the house allowance as prayed in his Memorandum of Claim since the same was paid as part of his monthly salary, which salary the Appellant did not dispute during his employment and which the Appellant was paid up until the end of his employment at the Respondent.
19. The Respondent's final submission is that the Appellant has failed to demonstrate any of the grounds of appeal in the Memorandum of Appeal for this Appeal to succeed and the appeal ought to be dismissed with costs to the Respondent.



Analysis and Determination

20. Having considered the memorandum and record of appeal together with the rival submissions, the 4 grounds of appeal coalesce into just one, which is whether the trial Court erred in denying the Appellant's claim for house allowance as pleaded in his Memorandum of Claim.
21. In the case of *Okeno v Republic* [1972] EA, 32, the then East African Court of Appeal had this to say on first appeals: -
- “An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya v R*, [1957] EA 336) and for the appellate court to make its own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (*Shantilal M. Ruwala v R*, [1957] EA 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses”
22. The Trial Court held thus on the Appellant's claim for house allowances: -
- “Under house allowance, I am aware that the employer is under an obligation to pay house allowance or provide for housing for his employees, However, I decline to give an award because he used to be paid a whole inclusive sum.”
23. Section 31(1) of the *Employment Act*, 2007 provides thus:
- “An employer shall at all times, at his own expense, provide reasonable housing accommodation for each of his employees either at or near to the place of employment, or shall pay to the employee such sufficient sum, as rent, in addition to the wages or salary of the employee, as will enable the employee to obtain reasonable accommodation.
- (2) This section shall not apply to an employee whose contract of service—
- (a) contains a provision which consolidates as part of the basic wage or salary of the employee, (emphasis own) an element intended to be used by the employee as rent or which is otherwise intended to enable the employee to provide himself with housing accommodation; or....”
24. From the foregoing provision, it is clear that housing is a right an employee is entitled to by law. A look at the Appellant's pay slips produced in evidence only indicates payment of a basic salary and other allowances which are not in dispute herein.
25. Neither the pay slips nor the employment contract carries a provision on payment of house allowance or a consolidated salary as held by the Trial Court, or as suggested by the Respondent under their submissions.
26. I am thus clear from the evidence tendered herein, that the Appellant was not paid house allowance at any one point during his employ with the Respondent, and the only issue then is how much he is entitled to on account of the house allowance.



27. The Appellant sought payment of Kshs. 15, 000/- per month as housing allowance premised on a tenancy agreement held between himself and his landlord.
28. In the case of Grain Pro Kenya Inc. Ltd (Supra) also cited by the Respondent, it was held that 15% is reasonable percentage that an employee spends from part of a salary to pay house rent. Further, it has largely been settled that house allowance is to be calculated at the rate of 15% of the basic salary.
29. The Appellant's position is that he was employed on a Kshs. 35,000 basic salary in November, 2019 and that this amount was subsequently reviewed to Kshs. 56,025.92 as shown in his pay slips for April and June, 2021.
30. What is not clear is when exactly this increment was made, but being that the only evidence available are the April and June, 2021 pay slips, the court will assume that the increment took effect in April, 2021 in calculating the Appellant's entitlement.
31. On time limitation, I am guided by the Court of Appeal holding in Vipingo Ridge Limited v Swalehe Ngonge Mpitta [2022] eKLR to the effect that the Appellant's suit having been lodged within three years after his separation with the Respondent, means that the claim for house allowance that accrued in 2019 could still be validly entertained.
32. In the circumstances, I find and hold that the Appellant is entitled to payment of house allowance for the period November, 2019 to July, 2021 at the rate of 15% of the basic monthly salary, and which is awarded at total sum of Kshs. 122,850/-(5250x17 and 8400x4)
33. The Respondent will bear the costs of the appeal.
34. The costs of the suit before the lower court shall remain undisturbed.
35. Judgment of the Court.

DATED, SIGNED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 11TH DAY OF JULY, 2024.

C. N. BAARI

JUDGE

Appearance:

Mr. Jeji present for the Appellant

Mr. Aluoch h/b for Mr. Wahisi the Respondent

Ms. Debra O.- C/A.

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