



Kenya Union of Commercial, Food and Allied Workers v Sunmatt Ltd (Employment and Labour Relations Cause 1360 of 2018) [2025] KEELRC 151 (KLR) (30 January 2025) (Judgment)

Neutral citation: [2025] KEELRC 151 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 1360 OF 2018**

**BOM MANANI, J
JANUARY 30, 2025**

BETWEEN

**KENYA UNION OF COMMERCIAL, FOOD AND ALLIED
WORKERS CLAIMANT**

AND

SUNMATT LTD RESPONDENT

JUDGMENT

Introduction

1. This case was instituted by the Claimant in a bid to compel the Respondent to pay its (the Claimant’s) two members alleged outstanding terminal benefits following their (the Claimant’s members) decision to resign from the Respondent’s employment. Whilst the Claimant contends that the benefits ought to have been computed based on the 2017 Collective Bargaining Agreement (CBA) between the parties, the Respondent disputes this fact. And hence the disagreement.

Claimant’s Case

2. The Claimant is a Trade Union which is registered in the Republic of Kenya. It has instituted these proceedings on behalf and for the benefit of Yustino Abala and Judy N Murage (the 1st and 2nd Grievant respectively).
3. The Grievants were both employees of the Respondent. The 1st Grievant, is said to have been employed by the Respondent in the position of Shop Assistant from 1st August 2005. The 2nd Grievant is said to have been employed by the Respondent in the position of Shop Assistant as from 1st January 1997. However, she was allegedly subsequently promoted to the position of Computer Clerk.



4. The Grievants are said to be members of the Claimant having been recruited on account of their employment to the Respondent. It is in this capacity that the Claimant has instituted these proceedings in a bid to protect their interests.
5. The Claimant contends that the Grievants resigned from the Respondent's employment on diverse dates in the year 2017. This was after the two issued the Respondent with the requisite notice to terminate their contracts of service through resignation.
6. The Claimant's case centers on a CBA it entered into with the Respondent on 27th July 2017. It contends that the CBA took effect from 1st April 2016. Thus, the Grievants are entitled to benefit from it given that they resigned during the period that was covered by it.
7. The Claimant contends that the Respondent did not pay the 1st Grievant salary arrears as from 1st April 2016 based on the CBA. It is the Claimant's case that it reported the matter to the Ministry of Labour which appointed a conciliator to resolve the dispute but to no avail. The Claimant contends that the Respondent erroneously insisted that the 1st Grievant was not entitled to claim exit benefits based on the aforesaid CBA.
8. In relation to the 2nd Grievant, the Claimant avers that sometime in 2014, the Respondent arbitrarily stopped paying her house allowance. It further contends that the Respondent neglected to pay this Grievant transport allowance of Ksh. 3,000.00 per month.
9. The Claimant contends that the 2nd Grievant is entitled to benefit from the 2017 CBA since it was executed during the currency of her employment with the Respondent. However, the Respondent has irregularly deprived her of this benefit.
10. The Claimant avers that the 1st Grievant is entitled to be paid the following:-
 - a. Salary arrears Ksh. 37,554.00.
 - b. Gratuity Ksh. 145,411.00.Less notice pay Ksh. 40,965.00
Total Ksh. 142,583.00
11. The Claimant avers that the 2nd Grievant is entitled to be paid the following:-
 - a. Salary arrears Ksh. 172,500.00
 - b. House allowance Ksh. 458,512.00
 - c. Gratuity Ksh. 1,089,000.00.
 - d. Pay for days worked Ksh. 63,525.00.Total Ksh. 1,783,537.00.

Respondent's Case

12. On its part, the Respondent contends that the 1st Grievant left employment before the 2017 CBA was agreed upon and registered. Therefore, he is not entitled to benefit from it.
13. As regards the 2nd Grievant, the Respondent contends that at the time she resigned from employment, she was serving as its Procurement Officer. It contends that this was a management position which was not unionizable. As such, the 2nd Grievant cannot seek benefits from the aforesaid CBA.



14. The Respondent contends that the 2nd Grievant was not on the check off forms which were used to deduct and remit union dues to the Claimant. As such, she was not a member of the Claimant Union.
15. The Respondent further contends that the 2nd Grievant was earning consolidated salary. As such, she is not entitled to claim house allowance.

Issues for Determination

16. After evaluating the pleadings, the evidence, the law and the submissions on record, I am of the view that the following are the issues for determination in the cause:-
 - a. Whether the CBA of 2017 between the Claimant and Respondent applied to the Grievants.
 - b. Whether the Grievants are entitled to the reliefs which they seek in the action.

Analysis

17. On the first question, it is apparent that although the CBA in question is dated 27th July 2017 and was registered on 30th October 2017, it took effect from 1st April 2016. That this is the position is clear from clause 34 of the instrument which provides as follows:-

“EFFECTIVE DATE DURATION

This Agreement shall be effective from 1st April 2016 and it shall remain in force for a period of 24 months. Thereafter, it shall continue in force until [it] is amended by mutual agreement between the two parties. Provided that any party wishing to amend it gives the other party one month’s notice of such intention giving in writing the detail of the amendment so required.”

18. The 1st Grievant resigned on 26th August 2017 after the CBA had been signed. He was therefore in the Respondent’s service at the time the instrument was signed.
19. Although the CBA was registered after the 1st Grievant had resigned from employment, the effective date for the instrument was backdated to 1st April 2016. The fact that the CBA’s effective date was backdated to 1st April 2016 means that it covers the period between 1st April 2016 and 26th August 2017 when the 1st Grievant was still in active employment of the Respondent. As such, he is entitled to draw benefits from the instrument which apply to this period and backwards.
20. The 2nd Grievant resigned on 22nd November 2017 long after the CBA had been executed by the parties. Further and as noted earlier, the CBA was backdated to April 2016 meaning that it covered the period from April 2016 when she was in the Respondent’s employment.
21. The Respondent has argued that the 2nd Grievant was not covered by the CBA because she was part of the management. The basis for this contention is that the 2nd Grievant was engaged as its Procurement Officer and not Computer Clerk or Shop Assistant.
22. Conversely, the 2nd Grievant denies that the Respondent ever engaged her as a Procurement Officer. She contends that the Respondent initially hired her services as a Shop Assistant before it promoted her to a Computer Clerk.
23. I have considered the evidence which was tendered by the parties to support their contrasting positions. It is not in dispute that although the parties were in the employment relationship for several years, they did not document it in writing.



24. Section 9(1) of the *Employment Act* obligates parties to an employment relationship which has been in existence for three months to reduce it (the relation) into writing. By virtue of section 9(2) of the Act, the obligation to ensure that the contract is reduced into writing is placed on the employer.
25. Section 10 of the Act requires a written contract of service to speak to a number of things. These include the: job description; commencement date; and the form and duration of the contract.
26. By virtue of section 10(6) of the Act, the employer is obligated to maintain a record of the particulars of the contract. In essence, he has to, inter alia, have a record of: the contract itself; the remuneration; the leave entitlements; and other benefits such as house allowance and the like.
27. By virtue of section 10(7) of the Act, if there is a dispute regarding any of the matters which touch on the particulars of the contract, the employer is required to produce the written contract to speak to the contested issue. If he fails to do so, the burden of providing evidence to prove or disprove the contested matter rests with him.
28. The Respondent's engagement with the Grievants spanned over a year. As such, the Respondent was under obligation to reduce their contracts into writing. However and as the evidence demonstrates, it did not.
29. The Respondent and 2nd Grievant have taken contrasting positions on whether the latter was in management at the time that she resigned. In terms of section 10(7) of the *Employment Act*, the burden lies with the Respondent to provide the written contract between them to resolve this matter. It has not because no such contract was drawn.
30. The Claimant produced in evidence a clearance form between the Respondent and the 2nd Grievant. The form shows that the 2nd Grievant's last day of service was 21st January 2018 and she exited employment when she was holding the position of Shop Assistant. It is worth noting that this document was generated by the Respondent.
31. The Claimant also produced the 2nd Grievant's pay slips for October 2014 and March and November 2017 which describe her position as Computer Clerk. It is also worth noting that these slips were generated by the Respondent.
32. The above evidence demonstrates that the 2nd Grievant left employment whilst holding the position of Computer Clerk/Shop Assistant. They do not support the Respondent's contention that she was serving as its Procurement Officer.
33. The Respondent has sought to rely on a business card it generated for the 2nd Grievant describing her as a procurement person to support its contention that she was its Procurement Officer. However, this cannot pass the muster. The card was generated by the Respondent without the involvement of the 2nd Grievant. As a matter of fact, during trial, the 2nd Grievant denied ever having been given such a card. Therefore, the possibility that the card was generated for convenience for purposes of this action cannot be ruled out.
34. The Respondent has also sought to rely on an air travel ticket for the 2nd Grievant to Bangkok to contend that the latter was its Procurement Officer. It argues that the 2nd Grievant made the trip to Bangkok to procure goods for it.
35. However, nothing turns on this. An air ticket cannot substitute the requirement for a written contract evidencing whether the 2nd Grievant was a Procurement Officer.



36. The fact of the matter is that the Respondent generated various documents which describe the position which the 2nd Grievant held differently. The motive for describing the 2nd Grievant differently cannot be discerned from the aforesaid documents. However, it was up to the Respondent to provide cogent evidence in terms of section 10 (7) of the Employment Act to resolve this haze. Absent this evidence, the court accepts the evidence by the 2nd Grievant that she exited employment whilst holding the position of Computer Clerk/Shop Assistant and not Procurement Officer.
37. The Respondent did not suggest that the positions of Computer Clerk/Shop Assistant fell within the realm of management within its rank and file. Its contention was that the position of Procurement Officer is the one which was part of management. As such and having found that the 2nd Grievant exited employment whilst serving as Computer Clerk/Shop Assistant, I find that she was not in the Respondent's management at the time. Consequently, she was entitled to join a Trade Union of her choice as she indeed did.
38. The Respondent has argued that the 2nd Grievant was not a member of the Claimant because her name does not appear in the Claimant's check off form. On the other hand, the Claimant maintains that the 2nd Grievant was its member number 4401 as evidenced by the membership card it produced in evidence.
39. The Claimant contends that one need not be on a check off form to qualify as its member. According to it, the law entitles its members to pay union dues directly to it without going through the employer by way of a check off system.
40. The position expressed by the Claimant in this respect is correct. Section 52 of the Labour Relations Act entitles members of a Trade Union to make direct remittances to it. It provides as follows:-
- “Direct payment of trade union dues
- Nothing in this Part prevents a member of a trade union from paying any dues, levies, subscriptions or other payments authorized by the constitution of the trade union directly to the trade union.”
41. Having regard to the foregoing, I find that the fact that the 2nd Grievant was not included in the Claimant's check off form which was shared with the Respondent did not exclude her from being a member of the Claimant. From the evidence on record, the Claimant had issued the 2nd Grievant with a membership card which shows that she was member number 4401. As such, it is apparent, on a balance of probabilities, that the 2nd Grievant is a member of the Claimant.
42. From the foregoing, it is apparent that 2nd Grievant was a unionisable employee and that she is indeed a member of the Claimant. It is also apparent that she was in the Respondent's employment when the 2017 CBA came into force. As such, she is entitled to benefit from its provisions.
43. The 1st Grievant seeks to recover the alleged shortfall between the salary that he was earning before the 2017 CBA came in force and what he would have earned under the CBA. However, there was paucity of evidence tendered on the subject.
44. According to the Statement of Claim, the basic pay for the 1st Grievant was Ksh. 16,691.00 exclusive of other allowances. Clause 4 of the CBA shows that the agreed basic salary for Shop Assistants for the period between 1st May 2015 and 1st May 2017 was to be Ksh. 14,986.00. Thereafter, this amount was to increase to Ksh. 17,647.00.



45. The 1st Grievant contends that he was underpaid by a margin of Ksh. 20,029.00 for the duration between 1st April 2016 and 31st March 2017. However, he does not provide a breakdown of how this figure was arrived at.
46. If clause 4 of the CBA is anything to go by, the 1st Grievant appears to have been earning a higher basic salary than had been agreed on for Shop Assistants for the aforesaid period. He was earning Ksh. 16,691.00. Yet, under the above clause, Shop Assistants were to earn Ksh. 14,986.00 during the aforesaid period. As such and absent a clear explanation, he cannot contend that he is entitled to arrears of Ksh. 20,029.00 for the period.
47. From May 2017, the 1st Grievant was to earn basic pay of Ksh. 17,647.00 as per the CBA. However, the pay slips he produced in evidence show that he was earning Ksh. 16,691.00. In effect, his salary was understated by Ksh.956.00 every month between May 2017 and the time he resigned from employment on 26th August 2017. As such, he is entitled to recover Ksh. 956.00 x 4 = Ksh. 3,824.00 as arrears. Accordingly, I enter judgment for him for the aforesaid amount of Ksh. 3,824.00 to cover salary arrears.
48. The 1st Grievant contends that he was employed by the Respondent on 1st August 2005. In its defense, the Respondent does not deny this averment. Instead, it affirms that the 1st Grievant was indeed its employee and that he resigned in August 2017 to pursue greener pastures. In the premises, the court finds that the two entered into the employment relationship from 1st August 2005.
49. Clause 28 of the CBA entitles an employee to gratuity at the rate of eighteen (18) days' basic pay for each completed year of service. Between 1st August 2005 and 1st August 2016, the 1st Grievant worked for the Respondent for eleven (11) years. As indicated earlier, his basic salary during this period was Ksh. 16,691.00 per month. Therefore, basic salary for eighteen (18) days amounts to Ksh. 10,014.60. As such, gratuity for eleven (11) years works out to Ksh. 10,014.60 x 11 = Ksh. 110,160.60.
50. As found out earlier, salary for the 1st Grievant was supposed to have gone up to Ksh. 17,647.00 from May 2017. As such, his gratuity for the year August 2016 to August 2017 is his basic salary for eighteen (18) days computed using the aforesaid salary, that is to say Ksh. 10,588.20.
51. Therefore, the total gratuity due to the 1st Grievant is Ksh. 110,160.60 + Ksh. 10,588.20 = Ksh. 120,748.80. Accordingly, I enter judgment for the 1st Grievant for the aforesaid amount on account of gratuity.
52. The 1st Grievant has conceded that he did not issue the Respondent with the requisite notice to resign as required under section 35 of the [Employment Act](#). As such, he concedes that he is obligated to pay the Respondent an amount that is equivalent to his salary for two months in lieu of notice. Accordingly, the amount awarded to the 1st Grievant shall be discounted by Ksh. 35,294.00 being the equivalent of his basic salary for two months.
53. The 2nd Grievant has claimed for unpaid house allowance since November 2014. She contends that the Respondent paid her this allowance until October 2014 when it capriciously stopped the benefit.
54. On the other hand, the Respondent contends that salary for this Grievant was consolidated. As such, she is not entitled to claim house allowance as a standalone benefit.
55. Section 31 of the [Employment Act](#) entitles an employee to be housed by the employer. The employer may elect to either provide the employee with physical housing or an allowance which the employee will use to source and pay for own housing.



56. The law allows the employer to consolidate this allowance with basic salary. In such case, the employer is not obligated to pay the employee house allowance. However and in order for this to happen, the contract between the parties must contain an express provision consolidating the house allowance with the basic salary (see section 31 (2) (a) of the Act) (Njuki v Roche Kenya Limited (Cause 311 of 2019) [2023] KEELRC 1850 (KLR) (27 July 2023) (Judgment)).
57. As was observed earlier in the decision, the Respondent was required by sections 9 and 10 of the *Employment Act* to reduce the contracts of the Grievants into writing. However, it did not. As such, there is no written contract between the parties to demonstrate that the salary for the 2nd Grievant was consolidated to include house allowance.
58. Absent such contract and in terms of section 10(7) of the *Employment Act*, the burden rests with the Respondent to provide evidence to prove its contention that the basic salary and house allowance for the 2nd Grievant were consolidated. Apart from making an assertion in this respect, the Respondent has not tabled any such evidence.
59. I have looked at the pay slips for 2nd Grievant. Whilst the pay slip for October 2014 shows that house allowance was paid to her as a standalone benefit, the pay slips for March and November 2017 show that the benefit was removed from her pay. The pay slips talk of basic and gross pay of Ksh. 75,000.00. However, one cannot tell from them what was comprised in the basic/gross salary.
60. In the case of Grain Pro Kenya Inc. Ltd v Andrew Waithaka Kiragu [2019] eKLR, the Court of Appeal was emphatic that a pay slip is not a contract between parties. It is a document which is unilaterally produced by the employer without the input of an employee. As such, it cannot be invoked to authoritatively speak to the terms of engagement between parties to a contract of service. Consequently, parties who are required by law to have a written contract of service are better off ensuring that the contract is drawn as this will enable them to avoid unnecessary pitfalls which may not be filled by referring to entries in peripheral documents such as pay slips.
61. Having regard to the foregoing and absent evidence to demonstrate that the salary for the 2nd Grievant was consolidated as purported by the Respondent, I reach the conclusion that the Respondent did not pay this Grievant house allowance from November 2014 in contravention of section 31 of the *Employment Act*. As such, she is entitled to this benefit.
62. The record shows that the basic salary for the 2nd Grievant was Ksh. 75,000.00. From case-law, house allowance is normally fixed at 15% of the basic pay (Grain Pro Kenya Inc. Ltd v Andrew Waithaka Kiragu [2019] eKLR). As such, the 2nd Grievant was entitled to receive 15% of her basic pay as her monthly house allowance. This converts to Ksh. 11,250.00 per month.
63. The 2nd Grievant last received house allowance in October 2014. As such, I award her house allowance from November 2014 to January 2018 when her resignation notice crystalized. This converts to Ksh. $11,250.00 \times 38 = \text{Ksh. } 427,500.00$.
64. The 2nd Grievant has also claimed gratuity. Just like the 1st Grievant, she was entitled to this benefit at the rate of basic pay for 18 days for every year worked in terms of clause 28 of the CBA.
65. From the evidence on record, the 2nd Grievant worked for the Respondent from January 1997 to January 2018. This was a period of twenty one (21) years. Thus, her gratuity for the period is Ksh. $2,500.00 \times 18 \times 21 = \text{Ksh. } 945,000.00$. I enter judgment for her for this amount.
66. The 2nd Grievant has prayed for salary arrears of Ksh. 172,500.00. She asserts that this claim is meant to bridge the shortfall in her salary as dictated by the 2017 CBA.



67. As has been observed earlier, the 2nd Grievant remained a Shop Assistant/Computer Clerk for the duration of her service to the Respondent. The CBA shows that basic salary for a Shop Assistant was expected to rise from Ksh. 14,986.00 in May 2015 to Ksh. 17,647.00 in May 2017. At this time, the 2nd Grievant was already earning Ksh. 75,000.00 way above the basic salary for her grade. As such, she cannot contend that she suffered underpayments. Consequently, the claim for salary arrears fails.
68. The 2nd Grievant has prayed for Ksh. 63,525.00 for days worked. However, she did not tender evidence to substantiate the claim. As such, it is not granted.

Final Award

69. After evaluating the pleadings, the evidence on record and the applicable law, the court finds and awards as follows:-
- a. The 2017 CBA applied to the Grievants.
 - b. As such, their benefits ought to have been worked out based on it (the CBA).
 - c. The 1st Grievant, Yustino Abala, is awarded as follows:-
 - i. Salary arrears Ksh. 3,824.00.
 - ii. Gratuity Ksh. 120,748.80.Less notice pay Ksh. 35,294.00
Total Ksh. 89,278.80
 - d. The 2nd Grievant, Judy Nyawira Murage, is awarded as follows:-
 - i. House allowance Ksh. 427,500.00.
 - ii. Gratuity Ksh. 945,000.00.Total Ksh. 1,372,500.00
 - iii. The claims for salary arrears and for days worked are declined.
 - e. Since the action was not presented by an advocate, the Claimant is not entitled to recover costs under the Advocates Remuneration Order. However, it is permitted to recover the actual expenditure incurred in prosecuting the case.

DATED, SIGNED AND DELIVERED ON THE 30TH DAY OF JANUARY, 2025

B. O. M. MANANI

JUDGE

In the presence of:

..... for the Claimant

.....for the Respondent

ORDER

In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.



B. O. M MANANI

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