Nguli v Southern Sky Safaris Limited & another (Cause E091 of 2023)
[2025] KEELRC 50 (KLR) (23 January 2025) (Judgment)

Neutral citation: [2025] KEELRC 50 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE E091 OF 2023

M MBARŨ, J

JANUARY 23, 2025

BETWEEN

FLORENCE NGULI ..... CLAIMANT

AND

SOUTHERN SKY SAFARIS LIMITED ..... 1ST RESPONDENT

PHILEMON MWAVALA ..... 2ND RESPONDENT

JUDGMENT

1. During the hearing, the claimant was acting in person. The claim is for wrongful deductions of salary, refusal to pay leave, overtime, transport allowance and service.

2. The claimant is a female adult. The 1st respondent is a limited liability company. The 2nd respondent is the proprietor of the 1st respondent.

3. The respondents employed the claimant in October 2018 as a tour and reservation manager. On 31st July 2023, the claimant resigned from her employment. At the time, she was earning Ksh.100, 000 per month.

4. The claim is that upon her resignation, the respondent refused to pay the claimant her terminal dues. She gave two months' notice but her dues were not processed. She resigned due to the refusal by the respondents to pay her accrued dues in salary and the continued withholding of the same is unreasonable, unfair and meant to deny her livelihood. The claimant is seeking the following dues;

    a. 3 months' salary in notice pay Ksh.300,000;

    b. Service pay for 4 years Ksh.240,000;

    c. Overtime Ksh.156,300;

    d. Leave for 4 years Ksh.400,000;

e. Outstation transport allowance Ksh.200,000;

f. Deductions during Covid Ksh.1,245,438;

g. Certificate of services;

h. Costs of the suit.

5. The claimant testified in support of her case that she was employed by the respondent through a letter dated 8 October 2018 as a tour and reservations manager, earning Ksh.70,000 per month. The Salary was increased to Ksh.100 000 per month by 2023, when she resigned.

6. The claimant testified that despite working diligently and over time, she was overworked and underpaid. During the COVID pandemic, the respondent made unlawful deductions from her salary and has since refused to make payments, leading to her resignation.

7. During COVID, the respondents only paid Ksh.13, 000 and Ksh. 33,171 on alternate months between April 2020 to July 2021 instead of Ksh.100, 080 per month.

8. For 8 months, the salary is due at Ksh. 100,080 was reduced and what is due is Ksh.800, 640.

9. For 8 months she was paid Ksh. 33,171 instead of Ksh.100, 080 and there is a due amount of Ksh.538, 272.

10. From July 2022, the respondents paid the claimant Ksh.33, 171 instead of Ksh.100, 080, and for 12 months, what is due is Ksh. 1,200,960.

11. The illegal deductions were Ksh.2, 034,820, which is the amount due.

12. The claimant testified that the respondents allege that the salary deduction during COVID-19 was justified, but a request to have the audited accounts for the period was not complied with. The respondents have not produced bank statements proving they face financial problems, hence the salary reduction. The claimant asked for office security locks to show that she worked late and was unpaid, but the respondent refused to comply.

13. The claimant testified that she is entitled to service pay for 4 years and 10 months. For two years, her annual leave for 2019 and 2020 was not paid, and she was not paid the leave allowances, which the respondent does not contest.

14. Overtime work and transport allowance are benefits the respondents should pay. In 2019, the claimant worked for 5 hours each day for 6 days each week. An hour is Ksh.417, and the total due is Ksh.650, 150. While the claimant was not in the station, she incurred transport costs of 20,000 and for 3 trips, she is entitled to ksh.60, 000. She would travel to her home county, Makueni and use other means of transport to save the allocated vehicle, but the respondents refused to refund her transport costs. Whenever she travelled to Nairobi by air, she used other means of transport to save the respondents huge costs, but the refunds were not processed.

15. There is no response to the claims made to challenge that the claims made are not due.

16. In response, the respondents admitted that the claimant was an employee of the first respondent from 8 October 2018, earning Ksh. 70,000 per month plus a house allowance of Ksh. 14,000. She had 24 annual leave days. The salary increased to Ksh.100 000 per month when she resigned on 31 July 2023 and gave 2 months' notice. Upon the voluntary resignation, the first respondent paid all terminal dues.

17. The claims made are not justified. Notice pay is not due since the claimant resigned from her employment. Service pay is unjustified since the respondents complied with the deduction of statutory payments to NSSF and NHIF. The claimant was part of management and cannot claim overtime payments. She took her annual leave in full.

18. The outstation transport allowances are not payable because the claimant had a fully fueled company vehicle to meet all her transport expenses. The provision of transport allowances was not contractual.

19. The claim for salary deductions was lawful. Covid deductions are not payable as the 1st respondent's activities were not ongoing due to the pandemic. The 1st respondent was compelled to stop all tour-related activities immediately owing to the worldwide effects on international and domestic travel. Despite the claimant not being at work, the 1st respondent paid 50% salary until the pandemic restrictions were lifted. The claims made should be dismissed with costs to the respondents.

20. The 2nd respondent, Philemon Mwavala, the managing director of the 1st respondent, testified in support of the response that the 1st respondent employed the claimant, and there is no cause of action established against him as the second respondent. Employment was by the first respondent, and the joinder herein is unjustified.

21. Mr Mwavala testified that on 18 October 2018, the 1st respondent employed the claimant and issued her a written contract. Her position as tour and reservations manager at a gross salary of Ksh.84, 000 inclusive of house allowance. On 3 July 2023, the claimant issued a resignation notice, which he accepted even though the notice was shorter than required under the contract. The claimant forfeited one month's leave pay as restitution from work. At the time, the claimant was earning Ksh.100, 080 per month.

22. Mr Mwavala testified that the claimant's claims were without merit. She resigned from her employment voluntarily and cannot claim notice pay. All statutory payments were made, and service pay is not due. As a senior manager, the claimant had no overtime claims, and all leave dues were paid upon resignation.

23. The claimant was allocated a company vehicle, KBQ 417A, which was serviced, fueled, and available for her use. She cannot justify transport allowances outside such benefits. Upon resignation, the claimant declined to return the vehicle, and the respondents were forced to seek police assistance for its return. The car was allocated with employment, and upon resignation, the claimant could not justify the retention of the vehicle. She later abandoned the car at a garage.

24. During the COVID pandemic, all employees were required to remain home, and the 1st respondent continued to pay 50% of the due salary. The 1st respondent adhered to government restrictions on travel and could not afford to keep employees on full salary; hence, the claim for deducted salaries is not justified.

25. The claim was filed in Mombasa instead of Malindi and should be transferred and dismissed for want of jurisdiction.

26. At the close of the hearing, both parties agreed and filed written submissions.

27. The pleadings, evidence and written submissions are analyzed, and the issues which emerge for determination can be summarized as follows;

    1. Whether the remedies sought should be issued;

    2. Who should pay the costs?

28. As outlined above, the claimant was initially represented by her advocates but later opted to act in person.

29. During the hearing on 7 October 2024, the claimant admitted that the notice pay claim was not due since she served the notice period upon resignation.

    The claims are for;

    1. Service pay for 4 years;
    2. Overtime pay;
    3. Leave pay for 2 years in 2019 and 2020;
    4. Claim for out of station transport allowances;
    5. Salary deductions during the Covid pandemic.

30. Before addressing these issues, the 2nd respondent challenged his joinder to these proceedings since the employer was the 1st respondent. Indeed, the contract of service dated 8 October 2018 was issued by the 1st respondent and not the 2nd respondent. Even though the two respondents are interlinked and closely connected, the employment relationship was between the claimant and the 1st respondent. The 2nd respondent was not a necessary party in these proceedings but this issue ought to have been addressed before the matter progressed this far.

31. On filing the claim in Mombasa instead of the Malindi ELRC registry, the parties appreciated that the registry at Malindi is currently covered under the main station of Mombasa. For access to justice, parties are served at Malindi or Mombasa registries. For ease of workload for the court, jurisdiction is national save to allow physical access. The boundaries on whether to file a matter in Mombasa or Malindi should not be a bar.

32. Service pay is a benefit due under Section 35(5) and (6) of the *Employment Act*. It accrues when the employer has not placed the employee under pension cover or medical scheme or has failed to remit statutory dues as required under the law. Service pay is also due when parties agree to confer such benefit under the written contract.

33. The claimant was under a written contract of employment. Part of the work records filed includes the payment statements for each month. The 1st has confirmed that there were payments of statutory dues to NSSF and NHIF for the claimant's benefit. Under the contract, there is no service pay benefit at the end of employment.

34. On the claim for overtime, this, in its nature, is a continuing injury as it arises monthly and should be addressed as and when it accrues or upon 12 months after cessation thereof. This is now the accepted principle guiding the court as held by the Court of Appeal in the case of Ol Pejeta Ranching Limited v David Wanjau Muhoro [2017] KECA 329 (KLR); Attorney General & Ministry of State for Immigration & Registrar of Persons v Andrew Maina Githinji & Zachary Mugo Kamunjiga [2016] KECA 817 (KLR); and The German School Society & another v Ohany & another [2023] KECA 894 (KLR) where the court held that a claim premised on a continuing injury must be filed with 12 months after cessation of the injury or damage.

35. In this regard, overtime claims were due; these accrue monthly, and as such, an aggrieved employee should address them under the protections of Section 46(h) of the *Employment Act*. In this case, the claimant testified that as the manager, she was forced to work 5 hours or more daily to keep up with work requirements. As the manager in charge of her work, the need to work overtime was not

a direction of the employer. It was a personal decision to cope with her work. Where the employee decides to work overtime, such as not being a requirement of the employer, the basis for a claim for overtime pay is lost.

36. Where the employer requires overtime work, records must be kept and approved. Otherwise, the claimant's need to work for over 5 hours each day to the detriment of her health and family did not arise from the employer's requirement. As a manager in her department, the claimant did not formally raise the need for overtime work with the employer for approval.

    The claim for overtime pay is not justified.

37. On the claim for leave pay for 2019 and 2020, under section 28 of the *Employment Act*, taking annual leave is a legal right. However, this right is regulated. Annual leave must be taken as and when due. It will not be accumulated for over 18 months under Section 28(4) unless the employer has approved the carrying over of accrued leave days.

    The claim for leave allowances instead of taking annual leave is not provided for under the employment contract.

38. On the claims for outstation travel allowances, as submitted by the respondents, under the employment contract, the claimant was provided with a company vehicle for all her transport needs. Such facilities and benefits were at her disposal without conditions. The option to travel on one's account and outside the provided benefit and then claim for the provision of allowances is unjustified. The claimant's case that she was saving the respondent's costs by opting to travel to Makueni County and Nairobi without the company vehicle is not approved for her claim of transport allowances.

39. The purpose and allocated benefit of a company car are lost when the claimant opts to leave it behind and opt for other modes of transport/travel. The workstation is noted as Malindi. The need to travel out of the station must be with the approval of the employer, which is not the case here.

40. On the claim for salary deductions during COVID, a challenge of a contract term or condition must be with the written approval of the employer as required under Section 10(5) of the *Employment Act*;

    > (5) Where any matter stipulated in subsection (1) changes, the shall, in consultation with the employee, revise the contract to reflect the change and notify the employee of the change in writing.

41. Any change(s) to the employment contract must be in writing and with the approval of the employee. See Nyangendo v Road Focus Consulting Limited [2023] KEELRC 812 (KLR); Anthony v Communications Authority of Kenya & 3 others [2022] KEELRC 1117 (KLR) the court held that;

    > Section 10(5) of the *Employment Act*, 2007 required that any change to the employment contract be made in consultation with the subject and affected employee and upon the revision of the contract of service, it had to be done in writing, and the subject employee(s) must signify his/her consent to the change/revision. In the instant case, where indeed the respondent had made changes, revised and or reviewed the terms and conditions of employment of any employee, there was a need for interrogation as to whether written consent and approval were obtained and, if so, whether any matter aggrieved the subject employee and if not, the matter must rest as the consent entered into in any other matter between another employee(s) and the CAK had to be looked at in its own merits. Employment was personal and specific, and every employment contract had to be addressed in its terms and conditions.

42. In this case, the respondents assert that due to the COVID-19 pandemic, they were forced to close down operations and opted to pay 50% of their salary while the claimant and other employees remained at home. The employer is only required to pay an employee who is at work. The COVID-19 pandemic was a result of government restrictions and affected travel worldwide; hence, the option to keep the claimant on 50% salary was not mandatory but discretionary.

43. The respondents also assert that a force majeure led to events and could not pay the claimant her full salary. However, in employment and labour relations, the employment contract is sanctified. Indeed, the law drafters found it necessary to allow for lawful termination of employment under Section 40 of the *Employment Act*, where the employer is operationally unable to sustain an employee(s) due to events beyond its control. The employer can recall the employee back at the end of such event(s).

44. Such an eventuality gives the employer a lawful reason to end employment and, on the other hand, gives the employee a fair chance to look for alternative employment.

    The contractual payment is due without any written approval/consent to reduce salary.

45. In this case, the 2nd respondent wrote to the claimant through an email dated 30 April 2020 about austerity measures. He noted that due to the COVID-19 pandemic, the company suffered a sudden loss in early March 2020. He proposed that;

> ... Further to our telephone conversation, it is prudent that we cut costs in any way we can to survive this scourge. In this thread, I call upon individual input of support to the company to see us through these difficult times, as mentioned earlier.
>
> As discussed, the company will push to pay you 50% of your salary every month (Skipping a month), effective this month. ... Kindly confirm your concurrent by return email. ...

46. The claimant replied on 3 May 2020 that;

> ... I concur with you that we have to take some measures to stay afloat, and I agree with the 50% pay cut. However, skipping a month without pay is too punitive, considering we had a very busy and successful season, which was cut short by only two weeks into the low season. ... I humbly request that the company take care of my rent in the subsequent months (when there is no pay). I have tried talking to the landlord about deferring or reducing my rent, but he is adamant that his houses are the cheapest in Malindi.
>
> I am confident that this will, too, come to pass and that we will make a full recovery soon. ...

47. The claimant approved and consented and proposed that her rent be paid. In her evidence in court on 7 October 2024, the claimant admitted that the respondents paid her rent but continued to make salary deductions.

48. Under section 10(5) of the *Employment Act*, the respondents made a written proposal to vary the employment terms and conditions, particularly the salary due, and gave the reasons for such action. In concurrence, the claimant made a written response and agreed to the variation.

    The salary review is lawful and justified.

49. Before conclusion, what emerged as the main issue leading to the claimant's resignation from her employment was what she noted as frustrations and low pay. For 5 years, she had trained other employees who were paid better while she worked overtime without compensation. She stated that she had neglected to take care of her family and her employment. But she felt she was placed under intolerable working conditions and her employment was no longer tenable.

50. As outlined above, the claimant was represented by her advocates but later opted to act in person. Where the employee finds her continued employment untenable and is forced to resign, the court jurisprudence has adopted the concept of constructive dismissal as an acceptable mode of seeking remedy. However, the claimant did not plead such a matter to allow the court to apply it and remedy her case. To the court, the claimant stood out as a diligent employee who offered her best energy to the employer but was forced to tender her resignation due to what she honestly believed was frustration and being placed under intolerable working conditions. However, the court can only award what is pleaded, particularly when the claimant is represented by her advocates.

51. On the whole, the claim is found without merit. The claimant acted in person, but the respondents attended as required and are entitled to their costs. These shall be paid at 25%.

52. Accordingly, the claim is without merit and is hereby dismissed. The claimant is to meet 25% of the respondent's costs.

DELIVERED IN OPEN COURT AT MOMBASA THIS 23 DAY OF JANUARY 2025.

M. MBARŨ

JUDGE

In the presence of:

Court Assistant: Japhet

..... and .....