



Wanjala v Gillys Security and Investigation Services Limited (Cause 522 of 2017) [2024] KEELRC 140 (KLR) (6 February 2024) (Judgment)

Neutral citation: [2024] KEELRC 140 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 522 OF 2017
JK GAKERI, J
FEBRUARY 6, 2024**

BETWEEN

AUGUSTINE NYONGESA WANJALA CLAIMANT

AND

**GILLYS SECURITY AND INVESTIGATION SERVICES
LIMITED RESPONDENT**

JUDGMENT

1. The Claimant commenced this suit by a Memorandum of Claim filed on 17th March, 2017 claiming overtime, leave days between 2011 and 2013, underpayment, public holidays and unremitted NSSF deductions.
2. It is the Claimant's case that he was employed by the Respondent in July 2011 as a night guard and his employment was terminated on 29th February, 2016. That he served diligently.
3. The Claimant avers that the Respondent had advised him of a deployment to another place but it was untrue.
4. That he wrote to the Human Resource Manager for his pending remuneration but was not paid and engaged counsel.
5. The Claimant avers that he was not paid house allowance, overtime and public holidays.
6. The Claimant avers that the withholding of his dues by the Respondent is unfair and wrongful and prays for;
 - i. Underpayment Kshs.348,138.74
 - ii. Leave days Kshs.59,891.09
 - iii. Public holidays Kshs.31,699.00



- iv. Overtime Kshs.584,398.00
- v. Unpaid deductions Kshs.8,800.00
Cost of the suit
Interest till payment in full
- vi. Any other relief the court may deem fit to award in the circumstances.

Respondent's case

7. In its response filed on 24th May, 2017, the Respondent admits that it employed the Claimant in July 2011 and notified him of a redeployment via letter dated 29th February, 2016 but he wrote back indicating that he was not interested in an extension.
8. It denies that it was not paying house allowance, underpaid the Claimant and did not remit statutory deductions.
9. It denies owing the Claimant any dues.
10. In its Counter-claim, the Respondent prays for Kshs.7,000/= from the Claimant being one (1) month's salary for absconding duty.
11. The Respondent prays for dismissal of the Claimant's suit.

Claimant's evidence

12. The Claimant adopted his witness statement and produced exhibits on 7th December, 2022 and directions of submissions were given.
13. However, the Claimant's counsel was unable to trace the Respondent until sometime in March 2023.

Respondent's evidence

14. On 15th March, 2023, Mr. Wandegu was present for the mention and sought 21 days to put his house in order and the court acquiesced and slated a mention on 4th July, 2023 when hearing was adjourned to 18th October, 2023 when Mr. Wandegu told the court that he had realized that he had no witness statement on record and applied for an adjournment which the Claimant's counsel objected to on the ground that the Respondent's case had been pending since December 7th 2022 and sought the closure of the Respondent's case which the court did promptly and gave the Respondent's counsel 21 days to file and serve submissions.
15. On 29th November, 2023, the Respondent's counsel applied for 7 days to file and serve submissions and the court granted 7 days but had not filed by 11th January, 2024 when this Judgement was written.

Claimant's submissions

16. Counsel submitted on whether the Claimant resigned or absconded duty, Counter-claim, entitlement to the reliefs sought and costs.
17. On the 1st issue, counsel submitted that since the redeployment did not materialize as promised, the Claimant ceased to be the Respondent's employee through resignation by letter dated 2nd March, 2016 as held in Kennedy Obala Oaga V Kenya Ports Authority (2018) eKLR.



18. On the Respondent's Counter-claim, counsel urged that although the Claimant resigned, the fact that he was not redeployed as stated by the Respondent in its letter of 29th February, 2016, the Respondent waived its rights under Section 38 of the *Employment Act*, 2007 and did not respond to the Claimant's letter.
19. Reliance was made on the decisions in *Owade V Chandaria Industries Ltd 2021 KEELRC*.
20. As regards terminal dues, counsel submitted that the Claimant was entitled to underpayment as in July 2011 to April 2012, the minimum pay was Kshs.8,463/= and his salary was Kshs.5,500/= while in May 2012 to April 2013 the prescribed salary was Kshs.9,571.65 and he was paid Kshs.5,500/= and the underpayment continued until he resigned in 2016 when the salary was Kshs.12,221.10 and was entitled to the balance.
21. Counsel cited the decision in *Sheila Kasiti Matsyi V Mwikali Solo (2021) eKLR* and the provisions of Section 48 of the Wage Order.
22. On house allowance, counsel cited the decision in *Justus Atulo Ashioya V 'A' Team Security Ltd (2014) eKLR* to urge that no evidence of payment had been adduced.
23. On leave days, counsel cited Section 28 and 74(1)(f) of the *Employment Act*, 2007 on the right to leave and the employer's obligation to keep employment records respectively and cited the decision in *Abigael Jepkosgei Yator & another V China Hanan International Co. Ltd (2018) eKLR* to reinforce the submission.
24. As regards public holiday and overtime pay, counsel cited the decisions in *Patrick Lumumba Kimuyu V Prime Fuels Ltd (2018) eKLR* and *Samuel Ndungu Mburu V Midview Hotel Mombasa (2013) eKLR*.
25. On National Social Security Fund deductions, counsel cited the sentiments of the Court in *Morris Kavale Kasyoki V Narcol Aluminium Rolling Mills Ltd (2014) eKLR* where the court ordered recovery of the unremitted NSSF deductions from the employer.

Respondent's submissions

26. The Respondent's counsel had not filed submissions by 11th January, 2024 when this judgement was written.

Determination

27. The issues for determination are;
 - i. Whether the Claimant resigned or absconded duty.
 - ii. Whether the Claimant is entitled to the terminal dues prayed for.
 - iii. Whether the Respondent's counter-claim is merited.
28. Before delving into the issues isolated above, it is essential to dispose of a peripheral issue as to whether the Claimant was an employee of the Respondent.
29. This is essential as the Respondent did not actively participate in the proceedings and rendered no witness statement.
30. The principles governing undefended suits and those where the Respondent is absent are that employee must establish the existence of an employment relationship as a preliminary issue before



establishing other facts of the case. (See *Monica Kanini Mutua V Al-Arafat Shopping Centre & another* (2018) eKLR cited in *Humphrey Munyithia Mutemi V Soluxe International Group of Hotels & Lodges Ltd* (2020) eKLR).

31. As regards the burden of proof, the employee is still bound to prove his or her case to the required standard on a preponderance of probabilities. (See *Nicholus Kipkemoi Korir V Hatari Security Guards Ltd* (2016) eKLR).
32. Although the Respondent did not file a witness statement, its Response to the Memorandum of Claim dated 22nd May, 2017 is explicit that it employed the Claimant in July 2011.
33. Similarly, its letter dated 29th February, 2016 on redeployment and the Claimant's letter dated 2nd March, 2016 leave no doubt the parties had an employer/employee relationship.
34. As to whether the Claimant resigned or absconded duty as alleged by the Respondent in its response, the Respondent tendered no evidence of the alleged desertion by the Claimant or the steps it took to have him resume duty. It neither issued a notice to show cause nor notify the local Labour Officer of the desertion.
35. It is the finding of the court that the Claimant did not abscond duty.
36. More significantly, the Respondent provided documentary evidence showing that it informed the Claimant of an impending redeployment by letter dated 29th February, 2016 owing to the fact that the assignment at Nyayo was coming to an end on the same date and required the Claimant to hand over company equipment in his possession to the supervisor and report to the Operations Manager for allocation of duties.
37. The Claimant acknowledged receipt of the letter on the same day.
38. In his handwritten response dated 2nd March, 2016 under the reference 'Notice to terminate further extension of my current contract with your firm', the Claimant expressed his desire not to honour any further extension of his current contract and requested for his dues for service rendered.
39. In effect, the Claimant's letter is a resignation notice as it expresses his intention not to be redeployed and thanks the Respondent for the opportunity he was accorded to serve as a security guard.
40. The principles governing resignation are well settled. It is one of the legitimate approaches of terminating an employment relationship at the instance of the employee.
41. It is a unilateral act and terminates the relationship between the parties on the effective date and requires no acceptance to be effective. (See *Kennedy Obala Oaga V Kenya Ports Authority* (Supra) which cited *Edwin Beiti Kipchumba V National Bank of Kenya Ltd* (2018) eKLR).
42. Having resigned his employment, the Claimant became entitled to any benefits due to him and became liable to the Respondent for any liability occasioned by the termination such as pay in lieu of notice if he did not give the required notice.
43. As regards the dues sought, the court proceeds as follows:

Underpayment

44. A review of the Claimant's bank statements on record reveal that he was paid a salary less than the prescribed minimum wage under the relevant Regulation of Wages (General) (Amendment) Orders.
45. The claim is entitled to underpayment for 3 years computed as follows;



March and April 2013

Minimum salary Kshs.9,571.65+15% house allowance= Kshs.11,007.40 less Kshs.6,000 (x 2 months) = Kshs.10,014.80.

May 2013 to April 2014

Minimum salary Kshs.10,911.70+15% house allowance= Kshs.12,548.60–6,957 (x 12 months) = Kshs.67,097.52.

May 2014 to April 2015

Minimum salary Kshs.10,911.70 + 15% house allowance less Kshs.7,000 (x 12 months) = Kshs.66,581.52.

May 2015 to February 2016

Minimum salary Kshs.12,221.10 + 15% house allowance= Kshs.14,054.27 less Kshs.7,000/= (x 10 months) = Kshs.70,562.70

Total Kshs.214,256.54

b. Leave days

46. The Claimant's written statement makes no reference to leave or particulars as to why he did not proceed on leave and whether he applied for leave and it was denied by the Respondent.
 47. A blank and unsubstantiated claim of his nature is difficult to sustain for want of particulars.
 48. Relatedly, the resignation letter makes no reference to leave or other entitlements.
- The prayer is declined for want of proof.

Public holidays

49. Other than the tabulation in the Memorandum of Claim, the Claimant provided no particulars of this claim.
50. Although the written statement states that he worked during public holidays, he provided no particulars of the particular public holidays on which he worked.
51. In determining this claim, the court is guided by the sentiments of the Court of Appeal in Patrick Lumumba Kimuyu V Prime Fuels (K) Ltd (Supra) cited by the Claimant's counsel on the burden of proof.
52. It is the duty of the employee to demonstrate that indeed he worked on the particular public holidays. The prayer lacks the necessary particulars and it is dismissed.

Overtime

53. Analogous to the claim for public holidays, the Claimant provided no shred of evidence to prove that he worked extra hours on any day and was not paid. He rendered no evidence to show that he claimed for overtime and it was denied.
 54. Although the written statement states that he worked overtime, the statement is not supported by any evidence.
- The prayer for overtime lacks particulars and is declined.



NSSF deductions

55. Copies of the Claimant's payslip on record reveal that the Respondent was deducting Kshs.200/= per month for remission to the National Social Security Fund (NSSF).
56. The claims for the year 2011 and 2012 are unsustainable by virtue of the provisions of Section 90 of the Employment Act and only deductions made after February 2013 are recoverable.
- The Claimant is awarded kshs.600/=.

Counter-claim

57. Although the Respondent did not render oral evidence, the resignation letter shows that the Claimant did not accord the Respondent the requisite one (1) month's notice and the same was not waived as alleged by the Claimant's counsel.
58. The Respondent is entitled to one (1) month's salary in lieu of notice and the same is awarded, Kshs.14,054.27 with interest at court rates from date hereof till payment in full.
59. In the upshot, judgement is entered in favour of the Claimant against the Respondent as follows;
- a. Underpayment Kshs.214,256.54/= less Kshs.14,054.27 = Kshs.200,202.27.
 - b. Unremitted NSSF deductions Kshs.600/=
 - c. Interest at court rates from date hereof till payment in full.
60. As both parties are successful in their respective claims, each party shall bear its own costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 6TH DAY OF FEBRUARY 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

