



Kamwega v Wananchi Group Kenya Limited (Employment and Labour Relations Cause 1420 of 2017) [2024] KEELRC 546 (KLR) (8 March 2024) (Judgment)

Neutral citation: [2024] KEELRC 546 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 1420 OF 2017**

K OCHARO, J

MARCH 8, 2024

BETWEEN

JOSEPHINE KAMWEGA CLAIMANT

AND

WANANCHI GROUP KENYA LIMITED RESPONDENT

JUDGMENT

Introduction

1. At all material times the Claimant was an employee of the Respondent whose employment came to an end on or about the 9th June 2017, through a redundancy declaration. At the time of settling her terminal dues, the Respondent deducted a sum of Kshs. 455,339/-, on the basis that at some point in the course of her employment, she had been paid a bonus erroneously yet she was not entitled to the same. Contending that the deduction was unlawful and unfair, she sued the Respondent herein seeking; a declaration to that effect; General damages for unfair labour practice; and a refund of the Kshs. 455,339; costs and interest.
2. The Respondent resisted the Claimant's claim through a Memorandum of Reply dated 13th August 2017. It denies her claim in toto and entitlement to the reliefs.
3. The matter was heard on 9th June 2022. At the conclusion of the hearing, this Court directed the parties to file their respective submissions on the matter. The Claimant filed submissions dated 16th September 2022; and the Respondent filed theirs dated 19th September 2022, together with Authorities.

Claimant's case

4. The Claimant's case is that she is a former employee of the Respondent who was declared redundant on 9th June 2017. About three months before the separation termination of her employment through redundancy, the Respondent on the 26th of April 2017, had her account credited with a sum of Kshs.



- 779,193/-. Immediately, upon noting the credit, she sought clarification from the Human Resources Manager and payroll Assistant, about what the payment was for. The Manager informed her that the amount was her earned bonus which was paid with the approval of her boss, Michael Dabaly.
5. With the explanation, she applied and appropriated the same towards her needs in the knowledge that it was her surplus income. Shockingly, during the clearance process with the Respondent on 12th June 2017, she was informed by the Human Resource Manager that the bonus had been paid erroneously and was therefore to be deducted from her terminal dues. She protested the deduction on the basis that it could be unfair of the Respondent to take away the sum as it was a bonus that had been approved, approval which was confirmed by the two officers hereinabove mentioned. The protest yielded no fruit.
 6. Cross-examined by Counsel for the Respondent, the Claimant testified that in April 2017, she received into her account an amount which was more than her salary. Further, Clause 3 of her contract of employment provided her remuneration to include basic salary and commissions at the discretion of the Respondent. The contract did not specifically provide for bonus benefits. Prior to the crediting, she had not received any bonus payment from the Respondent.
 7. The notification that the sum, the subject matter of this suit had been credited to his account was by her bank, not the Respondent. The payment of the sum into her account was not preceded by any letter from the Respondent. She didn't have any document to establish that she was entitled to a bonus payment.
 8. Referred to the pay slip for April 2017, the Claimant admitted that it bore both an item for commission and a bonus. The sum of Kshs. 650,484.00 under the narrative, bonus. Normally, the Respondent could issue letters declaring payment of bonus with specificity as regards the employees to benefit.
 9. The Claimant asserted that when she sought clarification as regards the sum, she was told that the same was a bonus for her exemplary performance.
 10. She testified that clause 20.2 of the contract of employment allowed the Respondent the discretion to make a deduction on any amount owed to it by an employee.
 11. She contended that there was no communication to her as regards the error before she exited employment. The amount having been credited into his account was even taxed. Further, all her terminal dues were paid apart from the amount sought.
 12. In her evidence under re-examination, the Claimant testified that the persons she sought clarification from, knew the processes of bonus payment within the Organization. She used the money after the clarification was given.

Respondent's case

13. The Respondent presented, Tim Kajune, to present its case. The witness adopted his witness statement dated 3rd June 2022 as his evidence in chief. The witness stated that the Claimant was employed on 29th April 2014 as a SME/Vertical Sales Manager, and promoted to the position of Regional Sales Manager – Nairobi, on 12th October 2016.
14. The Claimant's remuneration consisted of a salary and commissions per Clause 3 of her Contract of Employment. The contract did not provide for payment of or entitlement to bonuses. Further, the Respondent had a scheme for incentivizing its employees. Incentives by the Respondent are structured into bonuses or commissions and are based on performance and evaluations.



15. The witness further stated that in her position, the Claimant was eligible to receive commissions that were based on targets that she achieved. She was however not entitled to and could not receive bonuses since she was already enjoying commissions.
16. On 26th April 2017, while the Respondent was paying out bonuses to employees who were entitled to the same, it erroneously made a payment of Kshs. 779,193/- to the Claimant's account, which included a gross bonus amount of Kshs.650,484/- (which after tax is Kshs.455,339/-) which the Claimant was not entitled to.
17. The witness testified that the Claimant's assertions that the Human Resource Manager and Payroll Officer informed her that the amounts had been approved by Mr. Michael Dabaly is untrue. The erroneous payment was detected during an ongoing restructuring process and audit of its payroll, operations and staff. It dawned on the Respondent that the Claimant and other employees who were not entitled to bonuses were mistakenly paid.
18. The witness further stated that on realizing the mistake, the Respondent promptly informed the Claimant and all the affected employees of it and advised that rectification would be made with the Respondent recovering the wrongly transferred amounts from the Claimant's terminal payments. The exercise affected all employees whose accounts were credited mistakenly. In computing her terminal dues, the Respondent deducted the money which had been erroneously paid to the Claimant's account.
19. Cross-examined by Counsel for the Claimant, the witness testified that he joined the Respondent Organization in 2018. The events relevant to this matter had already happened.
20. The witness further testified that bonuses were computed based on the Organization's performance and individual employee performances. The payment was erroneously made after the Claimant had been promoted. The error was dealt with immediately after it was discovered.
21. The Respondent hasn't provided any document to show that there were letters sent to other employees who had benefitted by error and that amounts paid to them in error were recovered.

Claimant's Submissions

22. The Claimant's Counsel identified two issues for determination, whether the Claimant's claim is merited; and who should bear the costs of this Claim.
23. The submitted that immediately she got a notification of the credit into his account, she sought clarification from the Human Resources Manager and the Payroll Assistant on the same. They expressly confirmed that the amount had been approved by their boss, Michael Dabaly. It cannot be true therefore that the payment was erroneous as alleged by the Respondent.
24. From May 2017 to June 2017, she did not receive any communication from the Respondent about any error in the payment. The issue was only raised when she was receiving her terminal dues in late June 2017. Further, the redundancy notice did not speak to the alleged erroneous payment and the deduction of the sum. The Claimant had a legitimate expectation that he could receive the entire of her terminal dues, with no deductions. To support the submissions that in the circumstances of the matter, a legitimate was aroused in her, reliance was placed on the case of *Republic v Attorney General & Another ex-parte Peter Waswa & 2 Others* [2005] 1 KLR 280.
25. The Claimant submitted that the arbitrary deduction of the surplus amount received in April 2017, was tantamount to an abuse of power on the part of the Respondent.



26. In interrogating the existence of legitimate, the Courts apply a two-step approach. First, they assess whether the action of one party created a reasonable expectation in the mind of the other party; and secondly, they assess whether that expectation is legitimate. The requirements for the establishment of a claim for legitimate expectation were aptly put forth in the South African case of *National Director of Public Prosecutions v Philips*.
27. In the present case, the Claimant argues that the representation made by the Respondent was lawful, clear and unambiguous, and the Claimant's expectation was reasonable and legitimate per the standard set in the *National Director of Public Prosecutions case (Supra)*.
28. It was further submitted that the doctrine of estoppel bars the Respondent from altering its earlier confirmed position that the money remitted to the Claimant was warranted. The Respondent had sufficient time to inform the Claimant of the error and rectify the same, it didn't seize the opportunity. Where one, by his words or conduct, willfully causes another to believe in the existence of a certain state of things and induces him to act on that belief, so as to alter his own previous position, the former is precluded from averring against the latter a different state of things at the existing time, see. *Pickard versus Sears* 113 E.R 179.
29. On costs of the suit, the Claimant submits that costs follow the event as provided by Section 27 of the *Civil Procedure Act* 2010 and discerned from *Halsbury's Laws of England* (4th Edition) Vol. 37, page 552.

Respondent's Submissions

30. In its submissions dated 19th September 2022, the Respondent identifies the following issues for determination; whether the Claimant was entitled to a bonus; whether the actions of the Respondent in deducting the amount paid by error were unlawful and unfair; whether the Respondent should pay the Claimant the error bonus of KShs. 455, 339; whether the Claimant is entitled to general damages; and costs of the suit.
31. It was submitted that the contract of employment defined the remuneration of the Claimant as basic salary and commissions. It never provided that a bonus could be paid to her. In her evidence under cross-examination, she admitted that she hadn't received any bonus before the payment the subject matter of this suit. In the absence of any contractual provision for payment of a bonus in her favour, there can be no basis for the alleged legitimate expectation.
32. The material placed before this Court by the Claimant expressly indicates that when the sum of Kshs. 779,193/-, hit her account she found it quite unusual. The fact that she so did is a testament that she knew that she was not entitled to the money.
33. To buttress its submissions that in the circumstances of this matter, the Claimant cannot successfully argue legitimate expectation, the Respondent placed reliance on the case of *Onesimus Kinyua Magoiya v Prudential Life Assurance Kenya* [2022] eKLR, where the Court held;

“While an employee may operate a non-contractual discretionary bonus scheme if an employee is regularly awarded a discretionary bonus and has a reasonable expectation that he will receive a bonus, he may seek to argue that it has become contractual through custom and practice.”
34. On whether the deduction of the erroneous bonus payment from the Claimant's terminal dues was unfair and unlawful, the Respondent postulates that Section 19 (1) (e) of the *Employment Act* 2007



authorizes an employer to deduct from an employee's wages any amount paid in error in excess of the employee's wages.

35. The Respondent submitted further that the principle of unjust enrichment provides that any person who has unjustly received a benefit at the expense of another should not be allowed to retain it. The legal remedy for unjust enrichment is restitution. To support this point, reliance was placed on the case of *Samuel Kamau Macharia v Kenya Commercial Bank* (2003) eKLR. Further reliance was placed on the case of *Stephen Karanja Kibuku v Safaricom Limited* [2018] eKLR.
36. The Respondent submitted that in the circumstances of this matter, there cannot be any doubt that the principle of unjust enrichment applies against the Claimant as; she received a benefit in the sum of a gross bonus amount of Kshs. 650,484/- which was erroneously paid out by the Respondent; she was enriched at the expense of the Respondent; the Respondent timely informed her and all the affected staff that recovery of the money that had been paid to them by error would be made through deductions from their terminal dues; it would be unjust to allow the Claimant to retain the benefit as she was not entitled to a bonus, and had received all her commissions. To allow her to retain the bonus sum could amount to a double benefit to her, to the prejudice of the Respondent's financial position.
37. The Respondent was entitled to recover any money that was paid out to the Claimant by mistake. Further, the Claimant is estopped from deriving any benefit from such money. To buttress this point, the decision in *Tibbs Vincent Robert v SGS Kenya Limited* [2022] eKLR was cited.
38. It was further submitted that payment of bonuses must flow from a term of the contract. The Claimant's employment contract did not provide her with the benefit. The Respondent cannot be compelled to pay a benefit outside the terms of the contract, and one whose requirement for payment hasn't been justified.
39. On general damages, the Respondent submits that general damages are usually awarded for infringement of a legal right or duty. In this case, the Claimant has not proved damage, loss or injury to be entitled to such damages.

Analysis and Determination

40. It is not in dispute that the Claimant was employed by the Respondent herein vide a Contract of Employment dated 26th April 2014, which was placed before this Court by both the Claimant and Respondent under their respective Lists of Documents. It is also not in dispute that the Claimant's employment was terminated on 9th June 2017 on account of redundancy.
41. Other issues not in dispute are that a sum of Kshs. 779,193/- was paid into the Claimant's on 26th April 2023, which sum included a bonus amount, and the bonus sum was deducted from the Claimant's terminal dues.
42. The parties herein did not identify agreed issues for determination in this matter, it behoves this Court therefore to draw the issues for determination. I have carefully considered the pleadings, evidence and submissions by the parties and distil the following issues for determination;
 - a. Whether the Claimant was entitled to a bonus payment.
 - b. Whether, if the answer to [a] above is in the negative, the Claimant had a legitimate expectation that the bonus paid would not be deducted from her terminal dues;
 - c. Whether the deduction of the bonus from the Claimant's terminal dues was lawful and justified;



- d. Whether the Claimant should be granted the prayers sought in her Memorandum of Claim dated 17th July 2017.

Whether the Claimant was entitled to a bonus payment.

43. From the onset, it is imperative to point out that the Claimant's pleadings suggest that she was paid the amount as a bonus she had rightfully earned and this appeared to be the anchor for her claim. From the pleadings and witness statement it was not set out unambiguously that the claim was founded on the doctrine of legitimate expectation. Having said this, I now turn to consider whether the Claimant was at the material time entitled to a bonus payment
44. Human Capital is the most vital asset to an enterprise. It is therefore not uncommon to find enterprises investing heavily in incentivizing their employees. They do this through various ways inter alia by paying them bonuses and or commissions. The incentives would be anchored on a contract of employment, an Organizational scheme, or practice.
45. A party claiming that he or she was entitled to a bonus or commission must with clarity demonstrate the basis of the claim for entitlement. In the instant case, I must state that the Claimant didn't assert that she was entitled to bonus payment under her contract of employment or any Organizational scheme, or practice. No evidence was led by her to demonstrate that she was entitled to a bonus under any of these three pillars.
46. Indeed, her contract under Clause 3 provides for her remuneration didn't incorporate bonuses as part thereof. Further, in her evidence under cross-examination, acceded to the fact that previously she had not received any bonus payment or a bonus and commission payment. Therefore, she cannot in any way assert that the payment was a result of an Organizational practice.
47. I have carefully considered the Claimant's submissions, and in my view, they are in the tone that acknowledges that the Claimant wasn't entitled to a bonus payment at the material time and that the bonus amount was erroneously paid into her account, but attempt to justify retention of the same. However, as shall come out shortly hereunder, there cannot be any justification for the retention.
48. The Claimant's own conduct immediately after she received the credit notification presents her as a person who was not entitled to and didn't expect, any bonus payment. Otherwise, she couldn't have made the effort to seek clarification from the Human Resource Manager and the Payroll Assistant on the payment.
49. The respondent's witness elaborately explained the Respondent's processes of bonus and commission payments, concluding that the Claimant was only entitled to a commission and not both. This evidence was not rebutted. It instead found fortification in the Claimant's evidence.
50. In the upshot, I have come to a clear view that the Claimant was not entitled to a bonus at the material time.

Whether the Claimant had a legitimate expectation that the bonus amount wouldn't be deducted from her dues.

51. Having found as I have hereinabove that the Claimant was not entitled to a bonus payment, I find no difficulty in agreeing with the Respondent's position that the amount that was credited into the Claimant's account as a bonus, was so credited in error. The question that springs up then is, did the claimant have a legitimate expectation that the amount erroneously paid to her wouldn't be recovered from her dues?



52. The Claimant if I get her correctly, is saying that notwithstanding that the money was erroneously paid into her account, she should be allowed to retain the same.
53. For a party to successfully argue legitimate expectation, he or she must establish the existence of specific matters, this was elaborately captured Supreme Court of Kenya in the case of *Communications Commission of Kenya & 5 Others v Royal Media Services Limited & 5 Others* [2014] eklr to be:
- a. There must be an express, clear and unambiguous promise given by a public authority;
 - b. the expectation itself must be reasonable;
 - c. the representation must be one which it was competent and lawful for the decision maker to make; and
 - d. there cannot be a legitimate expectation against clear provisions of the law or *the Constitution*.
54. Further, on the elements, the Court of Appeal in *Richard Erskine Leakey & 2 Others v Samson Kipkoech Chemai* [2019] eklr when the Court held that:
- “Lord Diplock in *Council of Civil Service Union v. Minister for Civil Service* [1985] 1 A.C.374 (at pages 408-409), stated that for legitimate expectation to arise, the contested decision must have the effect of depriving one some benefit or advantage, which he had been permitted in the past by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to enjoy, or he has received assurances from the decision-maker that it will not be withdrawn without giving him an opportunity to advance reasons for non-withdrawal.”
55. Applying the threshold in the Communications Commission of Kenya case (Supra) to the instant case, the first hurdle that the Claimant must surmount to prove legitimate expectation, is she must demonstrate that there was an express, clear and unambiguous promise given by the Respondent to her. The Claimant asserted that the Human Resource Manager and the Payroll Assistant made a representation to her that the bonus amount was an amount she was entitled. This assertion was furiously resisted by the respondent. It is the Claimant who made the assertion, it was duty upon her to prove that indeed the representation was made. She could have availed one of the officers to testify, even under witness summons. This could reasonably be expected of a prudent Claimant in the circumstances of the instant Claimant. I am not persuaded therefore that the representation was made.
56. The Claimant was under a duty to demonstrate that the expectation was reasonable. The Claimant at all material times knew that under her contract of employment, she was besides the basic salary entitled to commission, not a bonus or both. In her evidence, she admitted as much. Further, it came out clearly from her evidence that initially, she had not earned a bonus or both a bonus and commission.
57. She too admitted that the Respondent had an elaborate system of declaring bonuses and commissions for its employees and that in the process those to benefit could be notified formally. She was never notified that she was going to be a beneficiary of a bonus payment.
58. By reason of the premises, I am not convinced that there was anything that could arouse expectation in the Claimant in the manner expressed or at all. In my view, the Claimant’s expressed expectation was unreasonable.
59. In the upshot, the Claimant’s claim on legitimate expectation must be allowed to fail. It hereby fails.



Whether the deduction of the bonus from the Claimant's terminal dues was lawful and justified

60. Having found as I have hereinabove that the payment of the amount, the subject matter of this claim was mistakenly paid into the Claimant's account, and that her claim on legitimate expectation lacks merit, to hold that the Respondent was not entitled to the act complained of, could be tantamount to holding on the other hand that the Claimant could be justified to retain the money that was so mistakenly paid to her.
61. A reading of Section 19 of the [Employment Act](#) 2007, reveals that the action by the Respondent was justified under law, the section provides:

“Deduction of wages

- (1) Notwithstanding section 17(1), an employer may deduct from the wages of his employee—
- (a) any amount due from the employee as a contribution to any provident fund or superannuation scheme or any other scheme approved by the Commissioner for Labour to which the employee has agreed to contribute;
 - (b) a reasonable amount for any damage done to, or loss of, any property lawfully in the possession or custody of the employer occasioned by the wilful default of the employee;
 - (c) an amount not exceeding one day's wages in respect of each working day for the whole of which the employee, without leave or other lawful cause, absents himself from the premises of the employer or other place proper and appointed for the performance of his work;
 - (d) an amount equal to the amount of any shortage of money arising through the negligence or dishonesty of the employee whose contract of service provides specifically or his being entrusted with the receipt, custody and payment of money;
 - (e) any amount paid to the employee in error as wages in excess of the amount of wages due to him; [emphasis mine]
 - (f) any amount the deduction of which is authorised by any written law for the time being in force, collective agreement, wage determination, court order or arbitration award;
 - (g) any amount in which the employer has no direct or indirect beneficial interest, and which the employee has requested the employer in writing to deduct from his wages;
 - (h) an amount due and payable by the employee under and in accordance with the terms of an agreement in writing, by way of repayment or part repayment of a loan of money made to him by the employer, not exceeding fifty per cent of the wages payable to that employee after the deduction of all such other amounts as may be due from him under this section; and



- (i) such other amounts as the Cabinet Secretary may prescribe.
- (2) No employer shall make a deduction from the wages payable to an employee as an advance of wages in consideration of, or as a reward for, the provision of employment for that employee, or for retaining the employee in employment.
- (3) Without prejudice to any right of recovery of any debt due, and notwithstanding the provisions of any other written law, the total amount of all deductions which under the provisions of subsection (1), may be made by an employer from the wages of his employee at any one time shall not exceed two thirds of such wages or such additional or other amount as may be prescribed by the Cabinet Secretary either generally or in relation to a specified employer or employee or class of employers or employees or any trade or industry.
- (4) An employer who deducts an amount from an employee's remuneration in accordance with subsection (1)(a), (f), (g) and (h) shall pay the amount so deducted in accordance with the time period and other requirements specified in the law, agreement court order or arbitration as the case may be.
- (5) An employer who fails to comply with the provisions of subsection (4) commits an offence and shall on conviction be liable to a fine not exceeding one hundred thousand shillings or to imprisonment for a term not exceeding two years or to both.
- (6) Where proceedings are brought under subsection (5) in respect of failure by the employer to remit deductions from an employee's remuneration, the court may, in addition to fining the employer order the employer to refund to the employee the amount deducted from the employee's wages, and pay the intended beneficiary on behalf of the employee with the employer's own funds."

62. Section 19 [1][e] in my view, reinforces the employer's remedy of restitution and promotes avoidance of unnecessary suits, which will eventually lead to unnecessary costs both financially and timewise on both the employee and the employer. An unjust enrichment of employees who accidentally get paid beyond their entitlement is checkmated statutorily.

63. For the above reasons, I hereby return that the deduction of the bonus payment from the Claimant's terminal dues was lawful and fair. In reaching this conclusion, I draw support from the decision in the case of *David Wanyonyi v Attorney General & 2 Others* [2020] eKLR.

Whether the Claimant should be granted the prayers sought.

64. Having found as I have hereinabove that the recovery of the sum from the Claimant's terminal dues was fair, I won't have any legal justification to hold that the Claimant is entitled to any of those reliefs she has sought in her Memorandum of Claim.

65. In the upshot, the Claimant's claim is hereby dismissed. Each party is to bear its own costs.

66. It is so ordered.

READ, DELIVERED AND SIGNED THIS 8th DAY OF MARCH, 2024.

OCHARO KEBIRA.



JUDGE

In the presence of:

Mr. Gakunga for the Respondent

Mr. Mutavi holding brief for Mr. Okatch for Claimant

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 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.

A signed copy will be availed to each party upon payment of Court fees.

OCHARO KEBIRA

JUDGE

