



Kenya National Private Security Workers Union v Wells Fargo Limited (Employment and Labour Relations Cause E983 of 2021) [2024] KEELRC 2050 (KLR) (29 July 2024) (Judgment)

Neutral citation: [2024] KEELRC 2050 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE E983 OF 2021**

K OCHARO, J

JULY 29, 2024

BETWEEN

KENYA NATIONAL PRIVATE SECURITY WORKERS UNION CLAIMANT

AND

WELLS FARGO LIMITED RESPONDENT

JUDGMENT

Introduction

1. Contending that it is a Trade Union duly registered under the provisions of the *Labour Relations Act*, with a mandate to represent the industrial interest of employees engaged and employed in the private security industry, the Claimant instituted this claim on behalf of Mr. Gerald Waikumi (the Grievant), seeking;
 - i. A declaration that the Respondent's action of failure to pay retirement benefits to the Grievant was illegal, unlawful, unfair and inhuman.
 - ii. leave earned for 24 days.
 - iii. Unpaid standard overtime Kshs 26,937x87 hrs x1.5 =225 hrs =15,623x36.
 - iv. Gratuity for 13 years worked Basic 53,358x18 days x 13 years = Kshs 416,130.00.
 - v. Damages for wrongful dismissal under section 49(c) of the *Employment Act*.
 - vi. Interest and costs incidental to this suit.
 - vii. Any such other reliefs as this Honourable court may deem fit and just to grant.
2. The Respondent resisted the Claimant's claim through a statement of Respondent dated 1st February, 2022. It denied the Claimant's cause of action, and the Grievant's reliefs sought.



The Claimant's Case

3. At the hearing, the Grievant adopted the contents of his witness statement dated 4th October, 2021 as his evidence in chief, and tendered his documents herein filed under the list of documents dated same and, the supplementary list, as his exhibits.
4. The Grievant testified that he is a member of the Claimant Trade Union, and that at all material times he was in the employment of the Respondent as a cash officer at a monthly salary of Kshs 53,350.00.
5. He stated that he first came into the employment of the Respondent as an Administration clerk, before being promoted to the position above-stated, cash officer.
6. He served the Respondent diligently till 15th December, 2018 when his services were terminated as he had attained the retirement age.
7. Upon retirement, the Respondent refused to pay him the following terminal dues;
 - a. Overtime for between December, 2017 and February, 2018.
 - b. Leave difference – Number of leave days taken between August, 2010 and December 2018, 63 days.
 - c. Service Gratuity for the 13 years worked.
8. He asserted that despite numerous follow ups, the Respondent refused and or ignored to compute and pay him his terminal dues. Further, this prompted him to report the matter to the Claimant. The Claimant wrote a letter dated 11th February, 2019, to the Respondent demanding compensation for the leave days earned but not taken.
9. The Claimant's letter did not attract any action by the Respondent, consequently, the Claimant reported existence of a trade dispute under section 62(1) of the Labour Relations Act, 2007, the issue being – failure to pay terminal dues to him having attained retirement age.
10. In accordance with section 65(1) of the Labour Relations Act, a Conciliator was appointed to arbitrate over the issue. On the 29th January 2020, upon listening to the parties, the conciliator recommended;
 - a. That the Grievant during his tenure as a cash officer, was entitled to 24 leave days. Thus, not entitled to any further claims above the 24 leave days.
 - b. There was no proof that the Grievant had submitted his overtime claim form to the Respondent's management, or having made a follow up on the same. The claim was therefore null and void.
 - c. The Grievant is entitled to gratuity.
11. The Respondent disagreed with the recommendations. As a result, the Conciliator issued a certificate of disagreement.
12. The Claimant contends that the Respondent's failure to pay him the retirement benefits was unlawful and unjustified.
13. The Claimant further asserted that in his position, he was not in the management of the Respondent.
14. Cross-examined by Counsel for the Respondent, the Claimant testified that he first came into the Respondent's employment as an Administration Clerk under a contract dated 13th July, 2005. He was subsequently promoted to a cash officer under a contract dated, 5th October, 2009.



15. The Claimant further testified that according to the first contract, Clause 9, he was not entitled to overtime payment.
16. Through its letter dated 13th December 2018, the Respondent informed him that he was entitled to salary for days worked up to and including 15th December, 2018 and payment of earned leave days.
17. The witness further testified that his pay slip for December, 2018 bore an item for leave pay, Kshs 7,113/-.
18. Shown an application form for leave for 2019, he admitted that the form indicated outstanding untaken leave days as four (4). He signed the form.
19. He testified further that the document he tendered before the court regarding the alleged overtime was not signed by the Directors of the Respondent.
20. The Claimant stated that none of his two contracts of employment had a stipulation for gratuity.
21. In his evidence under re-examination, the Claimant stated that though the 1st contract did not provide for overtime, the second one did.
22. There were several meetings over the issue of overtime between him and the Respondent but minutes thereof were not kept.

The Respondent's Case

23. The Respondent presented Willis Ayeko Onyango, its Human Resource Director to testify on its behalf. The witness adopted the contents of his witness statement dated 1st February, 2022 as his evidence in chief and produced the documents filed herein as its documentary evidence.
24. The witness stated that the Grievant was initially employed by the Respondent as an Administration Clerk under a contract dated 13th July, 2005. After about 4 years in employment, he was promoted to the role of cash officer and offered a new contract dated 5th October, 2009. The latter contract therefore superseded any previous contract of employment.
25. The Grievant's position was within the administration and management cadres. The cash officer role was a junior manager role reporting to the line supervisor – valuables in Transit division.
26. The witness stated that under Clause 10 of the contract dated 5th October, 2009 the normal retirement age was sixty (60) years. Upon the Grievant reaching this age, the Respondent issued him with a notice dated 14th September, 2018 notifying him of his last day of employment, 15th December, 2019.
27. He further stated that on the 13th December, the Respondent issued the Grievant with a retirement letter requiring him to clear with the Respondent after which he could be issued with a cheque for his retirement dues which included salary and leave days earned but not taken up to 15th December, 2018.
28. Upon clearing with the Respondent, the Grievant was issued with a cheque for his retirement dues and his certificate of service. He accepted the certificate of service but declined to accept the cheque.
29. The witness stated that he is aware of the Claimant's claim that he was entitled to twenty eight (28) leave days per a year, but was only granted twenty (24) leave days per year, and the assertion therefore that he was entitled to compensation for the difference from August, 2010 to December, 2018.
30. The witness contended that the claim and assertion were unfounded as under the contract dated 5th October, 2009 there was no provision on leave, meaning that he was entitled to the statutory minimum of twenty one (21) days. However, this notwithstanding, the Respondent gave the Grievant twenty



four leave days per year. Further, section 90 of the Employment Act militates against any claim for leave prior to November 2018 as the same is time barred.

31. The witness stated further that the Grievant held a position in the administration and management cadre of the Respondent and as such, he was not entitled to be paid overtime.
32. On the 29th of January, 2019 the Respondent received a letter from the Claimant stating that he was entitled to service gratuity. The Respondent replied through a letter dated 2nd February, 2019 indicating that according to its records, the Grievant was not a Union member and that he was not entitled to gratuity.
33. The witness stated further that it dutifully remitted contributions to the National Social Security Fund (NSSF) on behalf of the Grievant. Consequently, he is not entitled to service gratuity as alleged or at all. The fact that the Grievant became a member of the Claimant Union one year before his retirement did not entitle him to service gratuity.
34. The Grievant was paid all his terminal dues. He is entitled not to any further compensation.
35. Cross-examined by Counsel for the Claimant, the witness testified that the Grievant held an administrative and management position. Some managers could report to other managers, others could report directly to Directors.
36. The Grievant was not a member of the Claimant Union, his position could not allow. Referred to his witness statement, the witness stated that it is the Claimant who had told them that he had become a member of the Union and that he was paying membership dues directly to the union.
37. Under the 1st contract; the Grievant was entitled to twenty six (26) leave days. The contract stipulated that after 5 years of service, the days were to go up to twenty eight (28) days.
38. The Claimant was confirmed into employment. In the confirmation letter, it was indicated that the over terms and conditions of the earlier contract remained the same.
39. The witness remembered that the matter was referred for conciliation. Further, the conciliator made a finding on gratuity. The Respondent protested the finding in writing.

The Claimant's submissions

40. The Claimant submitted that the Respondent miscalculated the Grievant's terminal dues at Kshs 26,937, reason why the Grievant declined to collect a cheque for the amount.
41. At separation, the Grievant was entitled to overtime worked, earned but unutilized leave days and gratuity, benefits which the Respondent unjustifiably refused to pay.
42. The Claimant submitted further that the Grievant is its member, a right allowed to him by Article 41(2) of the Constitution, and its Constitution.
43. Being a member of the Claimant and having worked with a security firm, the regulations of wages (Protective Security Services) Order, 1998 applied to him. As a result under Clause 17 of the Regulations, he is entitled to gratuity. It is for this reason that the Conciliator found that the Grievant was entitled to gratuity. The fact that NSSF dues were remitted does not oust the Grievant's entitlement to gratuity which the regulation guarantees.
44. To support the above submission, the Claimant placed reliance on the case of *Maro Abukillah v Wine One One Licence Ltd.*



45. The Grievant's contract dated 13th July 2005, provided that he was entitled to 26 working days paid leave. Further, after 5 years' service with the Respondent, his leave entitlement could increase to 28 working days.
46. The Grievant was appointed to the position of a cash officer under a contract dated 5th October, 2009. He served a probationary period and upon a successful service, he was confirmed into employment vide a letter dated 1st February, 2010. The confirmation letter stipulated that "other terms and conditions of service remain the same". Accordingly, the right to annual leave as was in the first contract was retained.
47. It was further submitted that under Clause 7 of the Regulations of Wages, he was entitled to compensation for hours worked in excess of normal hours of work specified in Clause 6.
48. Addressing whether the Grievant held a managerial position, the Claimant submitted that none of the two contracts indicated that the Grievant was holding a managerial position. The Grievant was directly reporting to a supervisor a thing that could not happen if he was a manager. The job designation produced by the Respondent was never issued to the Grievant.

The Respondent's Submissions

49. The Respondent submitted that upon the Grievant's retirement, his terminal dues which included his salary and leave days earned but not taken up to 15th December, 2018 were computed and a cheque duly prepared. However, the Grievant declined to collect the same, alleging that it did not align with his expectations. Mere misalignment of expectations cannot be a basis for the Grievant to allege that its action(s) were illegal, unjust, unfair, and inhumane treatment.
50. The Respondent addressed the question as to whether the Grievant qualified to be a member of the Union. The Cash Officer position that was held by the Grievant was a position in the administration and management cadre. As a junior manager, he could not be a member of a Trade Union according to Clause B (10) and Appendix C of the Industrial Charter. This submission was supported by the holding in *Kenya Chemical and Allied Union v Bamburi Cement Ltd*.
51. On the terminal dues sought, the Respondent argued that the decision cited by the Claimant, Mombasa ELRC 834 of 2017 – *Maro Abdalabi Jilloh v Wine One One*, is distinguishable from, and therefore not applicable to, the instant matter. In the decision the Grievant was a security guard, and therefore was covered under the regulation of wages (Protective Security Services) Order 1998. In the instant matter, the Grievant was part of the Administration and Management Cadre of the Respondent.
52. Gratuity was not provided for in the Grievant's contract of employment and he was not covered by the Regulations forementioned. To support this point, reliance was placed on the case of *Daniel Charo Karani v Daniel Malanchini* (2022) eKLR.
53. On the relief sought for untaken leave days the Respondent submitted that the Grievant's leave days earned but not taken as of 15th December 2018, were computed and formed part of his dues which he declined to collect.
54. Any claims for leave prior to November, 2018 are time barred by section 90 of the *Employment Act*. This considering the fact that the Claimant is seeking for outstanding leave days accumulated from 2010 to December, 2018.
55. On overtime, the Respondent submitted that the contract of 13th July, 2005 expressly provided that the Grievant was not entitled to overtime pay. To hold that he was entitled to, shall amount to re-writing



the contract for the parties. That has never been the business of courts, as aptly stated in the case of *National Bank of Kenya Ltd v Pipeplastic Samkobt (K) Ltd & Another* (2001) eKLR.

56. The forms tendered by the Claimant in support of the Claimant's claim on leave are unsigned, they are of no prohibitive value.

Analysis and Determination

57. I have carefully considered the pleadings by the parties, their respective evidence and submissions, and the following issues emerge for determination;
- a. Whether the Respondent, illegally, unlawfully and unjustifiably denied the Grievant his terminal dues.
 - b. Whether the Grievant is entitled to the reliefs sought in the statement of claim.

Whether the Respondent illegally, unlawfully and unjustifiably denied the Grievant his terminal dues

58. This question can be best answered by considering and determining;
- i. Whether the contract of employment dated 5th October 2009, superseded that of 13th July 2005.
 - ii. Whether in his position under the 2nd contract of employment, the Grievant was in the Administrative and Management Cadre.
 - iii. Whether the Grievant was a member of the Claimant, Trade Union; and
 - iv. Whether the *Regulations of wages (Protective Security Services) Order* 1998 applied to the Grievant.
59. Undeniably, in the employer – employee relationship that was between the Grievant and the Respondent, the former served in two positions, under two contracts.
60. In a bid to justify the claim for unaccounted for leave days, the Claimant asserted that some terms of the contract dated 13th July, 2005 transcended it, into the 2nd contract.
61. I have carefully read the contract of employment dated 5th October 2009, and not that it did not expressly or by implication import or allow to be imported into it any term(s) of the first contract.
62. Clause 4 of the contract of employment provided for a probationary period. The Grievant was to be confirmed into the position of cash officer upon successful completion of the probation period.
63. Through its letter dated 1st February 2016, the Respondent confirmed the Grievant into employment. The confirmation letter read in part:-
- “Further to your letter of appointment dated 6th October 2009, I am pleased to inform you that having satisfactorily completed your probationary period, you are now confirmed to the position of cash officer.
- Other terms and conditions of service remain the same.”
64. The Claimant believes and wants this court to hold that the sentence, “other terms and conditions of service remain the same” was in reference to the terms and conditions in the first contract. If this was true, nothing could have been easier than the Respondent expressly so stating. In my view, and it could



be common place that the sentence was referring to the terms of the letter of appointment, it having been mentioned in the first paragraph, and if one cared to read the entire letter instead of part reading, as did the Claimant.

65. True, as stated by the Claimant, the 2nd contract did not have a term regarding leave for the Grievant. In essence, there was a lacuna as regards the same. Having held as I have hereinabove, that not a single term of the 1st contract was imported into the 2nd contract, expressly or impliedly, I quickly remind myself that statutes imply terms into an employment contract, and I do not doubt that the [Employment Act](#) does. The rights and duties of both the employer and employees as set out under employment, are implied into every contract of employment and more specifically where the contract does not provide for the right or obligation, or where it provides for enjoyment of the right or fulfilment of the obligation in a manner that is less favourable or compelling as the case may be than as contemplated in the part. As a result, I am persuaded that in view of the lacuna, section 28 of the [Employment Act](#) sets in.
66. In the upshot, I hold that the two contracts of employment were distinct and independent from each other. The second contract superseded the 1st contract. The leave clause did not transit into the 2nd contract in any manner.

(ii) Whether in his position under the 2nd contract of employment, the Grievant was in the Administrative and Management Cadre.

67. The Claimant contended that at all material times, the Grievant was not in the Administrative and Management Cadre of the Respondent enterprise. The Grievant testified so in support of this position.
68. The Respondent's witness testified in support of the Respondent's position that the Grievant's position was a managerial level position. The witness placed reliance on a job description that the Respondent tendered before court as evidence. The Grievant in his testimony denied having ever received the job description. The Respondent's witness admitted in his evidence under cross-examination, that he could not tell with certainty whether or not the Grievant was issued with the description.
69. In light of the foregoing, a reasonable employer could place before the court a document(s) demonstrating that in its multi-layered organizational structure, the position of cash officer fell under the Administrative and Managerial level. This could be either an organogram or Human Resource Policy and Procedure Manual. The Respondent did not. It is not enough to just assert that an employee was a junior manager and therefore not entitled to be a member of a Trade Union or involve himself in the activities of a trade union.
70. I have carefully considered the job description presented, it is clear, the Grievant had not acknowledged receipt of it by executing the same.
71. By reason of the foregoing, I find that it was not proved that the Grievant was at the Administrative and Managerial cadre of the Respondent, to be disenabled from joining a trade union.
72. In the upshot, if there were any terminal dues which could be paid to the Grievant but were not on account of the Respondent's position that he was part of its Administrative and Managerial cadre and therefore disentitled from joining a trade union or benefiting from results of Collective Bargaining, such could be considered unlawfully, illegally and unjustifiably not paid.
73. However, a careful consideration of the material placed before this court reveals that none of the reliefs sought was predicated upon this point or proved to be.



(iii) whether the Grievant was a member of the Claimant Trade Union

74. The Claimant contended that the Grievant was its member. According to the membership card tendered in evidence, the membership was with effect 11th November, 2017. In his witness statement the Respondent's witness acknowledged this, asserting that the Grievant joined the Trade Union, a year to his retirement date. Therefore, I have no hesitation to answer the question in the affirmative.

(iv) whether regulation of wages (Protective Security Services) Order 1998, applied to the Grievant

75. The Claimant described the Respondent as a duly registered security provider company. The Respondent admitted this description in its statement of response dated 1st February, 2022. No doubt the regulation of wages (Protective Security Services) Order, 1998 applies to the same. Section 2 of the Regulations provides;

“This order shall apply to all persons employed directly or indirectly by an undertaking or part of an undertaking which is involved in the carrying on of any of the following activities –

- a. Private investigations or security consultancy;
- b. Guarding of Industrial plants, banks, warehouses, shops, private homes or any other property or establishment against theft, illegal entry or fire; and
- c. Escort of money or other valuable property.”

76. In my view, the regulations of wages order, applies to all employees of any enterprise in the form of those described in the above stated section without categorization. As a result, I hold that the order did apply to the Grievant. Where specifically applies to guards and watchmen, it has expressly stated.

77. The Claimant contended that under section 17 of the Order, the Grievant was entitled to Gratuity and therefore the Respondent unlawfully and unjustifiably refused to pay him the same. The section provides:-

“After four years' service with an employer, the employee shall be entitled to eighteen days pay for every completed year of service by way of gratuity based on the employee's wage at the time of termination of service”.

78. This is one of those provisions that the law could imply into a contract of an employee of any of those entities set out set out under section 2 hereinabove mentioned, in the absence of an express provision in the contract.

79. This court appreciates the general principle that gratuity entitlement flows from contractual terms. However, where legislation provides for entitlement of the same as the stipulation of the order abovementioned has done, the court will not shut its eyes to the provision. It must enforce the legal obligation thereby created.

80. To this end, I come to the conclusion that the Grievant was entitled to gratuity in the manner postulated under section 17(1) of the Order. the Respondent's refusal to pay the same was therefore unlawful and unjustified.



Of the Reliefs

81. The Claimant sought for gratuity payment for the Grievant for the thirteen (13) years worked. Having found that the Grievant was entitled to gratuity under the order, I hold that the relief sought is available to him.
82. The Claimant sought for overtime compensation for between December, 2017 and February, 2018. The contract dated 13th July, 2015 Clause 9 provided:
- “Hours of work
- Your hours of work shall be from 8.00 a.m. to 1.00 p.m. and 2.00 p.m. to 5.00 p.m. Saturdays from 08.00 a.m. to 12.00 noon. Owing to the nature of your position, duties and responsibilities, you may be required and are expected to work additional hours as and when necessary.
- Your position does not receive overtime payments.”
83. In light of this stipulation, one could require sufficient evidence to justify an award for overtime compensation, which in essence shall be an exception to the contemplation of the contractual term. The Grievant’s evidence, and pleadings did not disclose any justification. The Claimant did not prove therefore that the Grievant is entitled to the relief.
84. Further, I have not lost sight of the legal principle that courts of law do not rewrite contracts for the parties.
85. The court notes that the Claimant’s claim for unpaid leave days is anchored on the assertion that the Grievant was entitled to 28 days annually. Having found as I have hereinabove, that the assertion was ill premised, the claim must fail. I am unpersuaded to grant the relief sought under this head.
86. The Claimant has sought for damages for wrongful dismissal. It was common cause that the Grievant retired. Thus, I cannot fathom what informs this relief. I cannot do better than holding that this is one of those misplaced and unmerited prayers.
87. In the upshot, judgment is hereby entered for the Grievant in the following terms.
- a. That the Respondent’s failure to pay the Grievant gratuity was unlawful and unjustified.
 - b. The Respondent to pay the Grievant gratuity computed thus $53,350 \times 18 \times 13 \div 30 = 416,130.00$.
 - c. Interest on the above stated sum at court rates from the date of retirement (15th December, 2018), till full payment.
 - d. Costs of this suit.

READ, DELIVERED AND SIGNED THIS 29th DAY OF JULY, 2024.

OCHARO KEBIRA

JUDGE

In the presence of:

Mr. Mwendwa holding brief for Ms Alosa for the Respondent

No appearance 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

