



**Kavata v Mustek East Africa Limited (Cause 451 of 2018)
[2024] KEELRC 2586 (KLR) (24 October 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2586 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 451 OF 2018
BOM MANANI, J
OCTOBER 24, 2024**

BETWEEN

GLADYS ZAWADI KAVATA CLAIMANT

AND

MUSTEK EAST AFRICA LIMITED RESPONDENT

JUDGMENT

Introduction

1. This case raises a series of issues. They include the following: whether the Respondent breached the contract of service between the parties by failing to pay the Claimant various allowances including telephone and commuter allowance; whether the Respondent failed to discharge its obligation under the contract with respect to accrued commissions; whether the Respondent unlawfully withheld part of the Claimant's wages; whether the Respondent unfairly terminated the Claimant's employment; and whether the Claimant is entitled to the various reliefs which she seeks in the action.

Claimant's Case

2. The Claimant avers that the Respondent employed her as a Sales Executive as from 2nd November 2015. She contends that the contract between them provided for probation for three months. It is her case that the Respondent arbitrarily extended the probationary term without reference to her.
3. The Claimant contends that the contract between them provided for a fixed monthly salary which was to be reviewed upwards in accordance with the schedule in the contract. In addition, she contends that the contract provided for other benefits such as: commission; commuter allowance; and airtime allowance.
4. She contends that for the first three months of the contract, commuter allowance was capped at Ksh. 1000.00 per week totaling Ksh. 4000.00 per month. She further states that during this period, airtime



allowance was capped at Ksh. 1000.00 per month. It is her case that contrary to their agreement, the Respondent failed to remit the two allowances to her.

5. The Claimant contends that after her contract was confirmed, her commuter allowance was raised to Ksh. 2000.00 per week for the month of September 2016 totaling Ksh. 8,000.00 for that month. Thereafter, the allowance was revised to Ksh. 2,500.00 per week starting 1st October 2016. In effect, she implies that starting October 2016 until the time of her departure, her monthly commuter allowance was to have been Ksh. 10,000.00. As regards airtime allowance, she contends that it remained the same as had been fixed during the probationary period. It is her case that the Respondent failed to remit any of these allowances.
6. The Claimant further contends that in August 2016, she earned commission of Ksh. 250,000.00 as a result of some business that she brought in. However, the Respondent refused to pay her this amount. This is notwithstanding several requests that it be settled.
7. The Claimant asserts that on 31st March 2017, the Respondent's Managing Director told her that the Respondent no longer required her services. Consequently, he allegedly told her not to report on duty as from 3rd April 2017.
8. The Claimant contends that there was no valid reason why the Respondent arrived at the aforesaid decision. She believes that she lost her job because of her insistence that her commission of Ksh. 250,000.00 be paid.
9. She accuses the Respondent of having terminated her contract without affording her an opportunity to be heard. Further she contends that the Respondent failed to pay her salary for the month of March 2017.
10. As a consequence, she prays for the following orders:-
 - a. An order that her contract with the Respondent was unfairly terminated.
 - b. An order compelling the Respondent to pay her: salary for March 2017; commission of Ksh. 250,000.00; compensation for unfair termination of her contract; transport allowance of Ksh. 108,000.00; airtime allowance of Ksh. 17,000.00; general damages for mental anguish and loss of career; and interest.

Respondent's Case

11. In response, the Respondent denies that it unfairly terminated the Claimant's employment. It avers that prior to the Claimant's release from employment, she had absented herself from work without its permission.
12. The Respondent avers that following the Claimant's unexplained absence from duty, it issued her with a notice to show cause why disciplinary action should not be taken against her for absconding duty. It contends that the Claimant did not respond to the letter.
13. The Respondent contends that it invited the Claimant for a disciplinary hearing but she ignored the invite. As a result, her contract was terminated.
14. The Respondent contends that the Claimant was guilty of various other infractions for which she had received several warnings. For instance, she had been warned about her perennial late reporting to work and her poor performance. The Respondent asserts that despite these warnings, the Claimant did not show signs of improvement.



Issues for Determination

15. After evaluating the pleadings and evidence on record, I am of the view that the following are the issues for determination in the cause:-
 - a. Whether the contract between the parties was legitimately terminated.
 - b. Whether the Claimant was entitled to airtime and commuter allowance during the currency of the contract with the Respondent and whether these benefits were paid out.
 - c. Whether the Claimant is entitled to commission pay in the sum of Ksh. 250,000.00.
 - d. Whether the Claimant is entitled to the reliefs that she seeks through these proceedings

Analysis

16. The evidence on record shows that prior to the contract of 2nd November 2015 between the parties, they had a previous employment relation. This relation appears to have come to a close on 18th December 2014 when the Respondent terminated the contract between them.
17. With the termination of this contract on 18th December 2014, the employment relation that was premised on it was buried. As such, it is not open to the parties to refer to incidents which occurred during the currency of the aforesaid relation to anchor their cases which are founded on the relation that commenced on 2nd November 2015.
18. The evidence on record shows that the Respondent has accused the Claimant of poor performance and late reporting to duty during the currency of the contract that closed on 18th December 2014. This evidence is of no value to this case as it does not relate to the contract which the parties entered into on 2nd November 2015. The only evidence which the court is interested in to determine whether the contract of 2nd November 2015 was legitimately terminated is that which relates to events which occurred during the currency of this contract.
19. In this respect, the Respondent accuses the Claimant of having absented herself from work without authorization in April 2017. The Respondent alleges that the Claimant stayed away from work without its permission for four days from 1st April 2017.
20. In response, the Claimant admits that she was indeed away from duty for the days in question. However, she says that this was because the Respondent's Managing Director asked her towards the close of March 2017 not to report on duty from April 2017 since her services were no longer required.
21. Having regard to the foregoing, it is clear that the Claimant was indeed not at work as from 1st April 2017. However, the reason for her absence is contested. Whilst she asserts that she stayed away because the Respondent's officer told her that her services were no longer required, the Respondent avers that she absconded duty.
22. Whatever the case, the law obligated the Respondent to take the Claimant through a disciplinary process following her alleged infraction. Section 41 of the *Employment Act* required the Respondent to: notify the Claimant of the charge against her; and permit her an opportunity to respond to it.
23. The Respondent contends that it complied with this requirement. In this respect, it contends that it issued the Claimant with a notice to show cause on 5th April 2017 asking her to justify why disciplinary action should not be taken against her. However, the Claimant allegedly did not respond to the letter.



24. The Respondent further contends that on 14th April 2017, it invited the Claimant for a disciplinary hearing scheduled for 20th April 2017. However, she failed to attend the session and hence the decision to terminate her services. As such, the Respondent argues that it accorded the Claimant due process before she was released from employment.
25. Conversely, the Claimant denies that she was issued with the notice to show cause that was produced in evidence. She also denies that the Respondent invited her for a disciplinary session as asserted. She denies ever receiving the Respondent's letter dated 14th April 2017.
26. Sections 107, 108 and 109 of the *Evidence Act* place the burden of proving a disputed fact on the party who wishes to rely on the said fact to get a favourable verdict. In the instant case, the Respondent proposes to rely on the letters dated 5th April 2017 and 14th April 2017 to convince the court that it issued the Claimant with a notice to show cause and invited her for a disciplinary hearing but she ignored the requests. As such, the burden of proof lies with it (the Respondent) to establish on a balance of probabilities that it indeed delivered the two letters to the Claimant.
27. From the evidence on record, there is no evidence to suggest that the two letters were indeed delivered to the Claimant. As a matter of fact, the letter dated 14th April 2017 suggests that an advance copy thereof was to be delivered to the Claimant by email. As such, it was expected that the Respondent would produce the email by which the letter was forwarded to the Claimant to prove delivery of the advance copy. However and as the record shows, this was not done.
28. As such, there no proof on a balance of probabilities that the Respondent served the Claimant with the alleged notice to show cause letter. Similarly, there is no evidence that the Respondent served the Claimant with the letter inviting her for a disciplinary hearing.
29. Consequently, it is doubtful that the Respondent complied with the procedural strictures under section 41 of the *Employment Act* before it released the Claimant from employment. There is no evidence that it accorded her due process as required by law. In the premises, I arrive at the conclusion that even though the Respondent may have had plausible reasons to consider terminating the Claimant's employment, it did not accord her fair procedure in releasing her from employment. This is more so in view of the fact that sections 43 and 45 of the *Employment Act* place the burden of justifying the decision to terminate an employee's contract of service, both on substantive and procedural grounds, on the employer.
30. The next question to determine is whether the Claimant is entitled to commission fees of Ksh. 250,000.00 as claimed. It is true that the employment contract between the parties dated 29th October 2015 and confirmed on 11th July 2016 provided the Claimant an additional incentive of commission on sales. According to the letter of confirmation, this commission was payable from August 2016 if the Claimant attained sales of six (6) million Kenya Shillings and the sales amount was paid within thirty (30) days of raising the sales invoice. The commission was to be negotiated between the parties.
31. Evidently, the commission was pegged on the Claimant hitting a sales target of six (6) million Kenya Shillings and the sales amount being paid to the Respondent within thirty (30) days of the transaction. It was therefore for the Claimant to demonstrate to the court that the transaction(s) for which she was claiming commission were worth six (6) million Kenya Shillings and the invoices she had raised in respect of them were settled within thirty (30) days. She did not provide this evidence.
32. Absent this evidence, the court cannot arrive at the conclusion that the Claimant is entitled to the commission that she now claims. As such, the court agrees with the defense that the Claimant's plea in this respect is unfounded.



33. The next issue for determination is whether the Claimant is entitled to the commuter and airtime allowances that she has claimed. From the contract of employment dated 29th October 2015 and the letter confirming the contract dated 11th July 2016, it is apparent that in addition to basic salary, the Claimant was entitled to a monthly allowance of Ksh. 1000.00 towards airtime. The Claimant contends that she was not paid this allowance. Whilst not contesting the allowance, the Respondent's position is that the same was paid in kind through providing actual airtime to the Claimant.
34. The evidence on the court file does not support the Respondent's contention that this allowance was to be provided in kind but not cash. The documents that were signed between the parties to anchor the allowance do not corroborate this assertion.
35. The Claimant produced a series of pay slips in evidence a majority of which indicate that indeed the Respondent factored this allowance in the Claimant's monthly salary. However, it only paid Ksh. 500.00 as opposed to the contracted amount of Ksh. 1000.00 per month.
36. In my view, the fact that majority of the pay slips demonstrate that a sum of Ksh. 500.00 was paid towards this allowance every month suggests a trend which had been adopted by the Respondent in paying the allowance. This tends to support the position by the Claimant that the Respondent only partially settled the allowance each month by paying Ksh. 500.00 towards it.
37. Sections 10(6) and 74 of the *Employment Act* require every employer to keep a record of particulars of an employment contract. This includes particulars showing settlement of benefits and allowances under the contract. Therefore, the employer bears the burden of producing these records to settle any dispute relating to a term of the contract (*Jackson Muiruri Wathigo t/a Murtown Supermarket v Lilian Mutune* [2021] eKLR).
38. As such, the Respondent had the duty to maintain records showing that it either paid the Claimant Ksh. 1000.00 every month towards this allowance or provided her with actual airtime. It did not. Consequently, the court arrives at the conclusion that contrary to the agreement between the parties that the Respondent will provide the Claimant monthly airtime of Ksh. 1000.00, the Respondent only paid Ksh. 500.00 towards this allowance for the entire duration of the contract. As such, the Claimant is entitled to recover the difference.
39. The above argument applies to commuter allowance. As in the case of airtime allowance, this allowance was also anchored on the contract between the parties. However, unlike the airtime allowance, this allowance varied over the duration of the contract.
40. The Respondent contends that it provided the Claimant with transport in the form of company vehicles. However, it did not provide cogent evidence to support this assertion. For instance, it did not produce signed vehicle movement tickets to demonstrate that its employees were assigned official transport whilst on duty.
41. Importantly, the contract between the parties alludes to provision of transport allowance. It does not make provision for travel using company vehicles. For these reasons, I reject the Respondent's aforesaid explanation.
42. Although the contract between the parties entitled the Claimant to transport allowance, there is no evidence that this allowance was paid to her during the term of the contract. Again, just as in the case of airtime allowance, it was for the Respondent to have kept records regarding this allowance and produced them in evidence to settle the dispute. It did not.



43. Importantly, like any other allowance, evidence of payment of this allowance should be found in the pay slips which the Respondent issued the Claimant. However and as the pay slips on record demonstrate, this allowance was not factored in the Claimant's monthly salary.
44. Consequently, I arrive at the conclusion that contrary to the agreement between the parties, the Respondent did not pay the Claimant transport allowance for the entire duration of their contract. As such, the Claimant is entitled to recover this allowance.

Final Orders

45. Under this section, I will consider whether the Claimant is entitled to the reliefs that she has sought through these proceedings. After evaluating the evidence on record, I arrive at the conclusions below regarding the reliefs sought:-
 - a. The Respondent has failed to demonstrate that it accorded the Claimant a hearing before it terminated her contract of service. There is no evidence to suggest that the Claimant received the Respondent's letters dated 5th April 2017 and 14th April 2017. As such, there is no evidence to suggest that the Claimant was notified of the infractions that she was accused of and accorded a chance to respond to the accusations as required under section 41 of the Employment Act. Consequently, I declare the decision to terminate the Claimant's contract of service as procedurally flawed.
 - b. In view of the aforesaid, I find that the Claimant is entitled to compensation for the unfair termination of her contract of service. As such and in terms of section 49 of the Employment Act, I award her compensation for the unfair termination of her contract which is equivalent to her gross salary for four (4) months, that is to say, Ksh. 90,000.00 x 4 = Ksh. 360,000.00. In making this award, I have taken into account the fact that during cross examination of the Respondent's witness, he confirmed that the Claimant's consolidated exit salary was Ksh. 90,000.00 per month.
 - c. The Claimant has not demonstrated that she attained the threshold to earn the commission of Ksh. 250,000.00 which she seeks to recover from the Respondent. As such, I reject this claim.
 - d. I find that the Respondent underpaid the Claimant's airtime allowance by Ksh. 500.00 per month for the duration of their contract. As such, I award the Claimant the sum of Ksh. 8,500.00 to cover the deficit for this allowance between November 2015 and April 2017.
 - e. I find that the Respondent failed to pay the Claimant commuter allowance for the entire of the contractual period between the parties. Consequently, I award the Claimant the sum of Ksh. 108,000.00 being the outstanding amount on account of this allowance.
 - f. It is apparent from the evidence on record that the Claimant left employment after the close of March 2017. According to the Respondent, she left employment on 1st April 2017 after she stopped reporting on duty.
 - g. The Claimant contends that at the end of March 2017, the Respondent's management asked her not to report to work beginning April 2017. She says that the Respondent did not pay her salary for March 2017 even as it asked her to stay away from the workplace.
 - h. There is no evidence that was tabled to suggest that the Claimant's salary for March 2017 was paid to her. During cross examination, the Respondent's witness stated that he could not confirm if the Claimant was paid for this month.



- i. In terms of sections 10(6) and 74 of the *Employment Act*, the employer should have custody of the records for salary payments. As such, it is the employer to produce these records in evidence to confirm settlement of salary in the event of a dispute on this issue.
- j. As the record shows, the Respondent did not provide records to demonstrate that it remitted to the Claimant salary for March 2017. In the premises, I enter judgment for the Claimant for Ksh. 90,000.00 to cover salary for this month.
- k. The amounts which have been awarded to the Claimant are subject to the applicable statutory deductions.
- l. I award the Claimant interest on the amounts awarded at court rates from the date of this decision.
- m. I note from the Statement of Claim that the Claimant's Advocates did not ask for costs of the suit. As such, I make no orders in this respect.
- n. Any relief that was sought but which has not been expressly granted is deemed as having been declined.

DATED, SIGNED AND DELIVERED ON THE 24TH DAY OF OCTOBER, 2024

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

