



**Owino v Gems and Industrial Minerals Limited (Cause E017 of 2023)
[2024] KEELRC 2521 (KLR) (18 October 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2521 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
CAUSE E017 OF 2023
ON MAKAU, J
OCTOBER 18, 2024**

BETWEEN

HARIZON OKONG'O OWINO CLAIMANT

AND

GEMS AND INDUSTRIAL MINERALS LIMITED RESPONDENT

JUDGMENT

1. By a memorandum of claim dated 4th July 2023, the claimant alleges that he was employed by the respondent as a Mining Engineer for two years until April, 2023 when his contract lapsed by effluxion of time. He prays for the following reliefs: -
 - a. Unpaid salary Kshs 1,728,193
 - b. Accrued leave for 2 years Kshs 300,000
 - c. Service pay Kshs 150,000
 - d. Unpaid car hire bills Kshs 450,000
 - e. Airtime/internet expenses Kshs 84,000
 - f. Refund Kshs 23,600
 - g. Certificate of service
 - h. Costs and interest at court rate
 - i. Any other relief the court may deem fit and just to grant.
2. The respondent filed a Response and counterclaim dated 25th September 2023 denying liability to pay the above claims and put the claimant to strict proof. It avers that the claimant utilized all his leave



days. It further avers that the claimant failed to manage the Mine professionally despite being provided with all the resources requested and as a result the respondent suffered huge loss.

3. Besides, the claimant caused the respondent a loss of Kshs 2,802,000 in drilling a borehole meant for CSR in a private land where he ended up marrying a daughter of the owner and the community being denied access to the Borehole. The borehole was also drilled 50 meters less than the agreed depth equaling to Kshs 375,000 excess payment. Therefore, the respondent counterclaims against the claimant is as follows: -
 - a. Drilling borehole on private land Kshs 2,802,000
 - b. Undug 50 meters in the borehole Kshs 375,000
 - c. Kshs 5,416,948.90 being 90% of the invested in June 2022 since the claimant realized only 10% of the promised output.
 - d. Transfer of ownership of motor vehicle KBV 347H to the respondent at claimant's costs.
 - e. Any other reliefs the court may deem just and fit to grant.

Facts of the case

4. On 9th January 2021, the claimant was employed by the respondent as a Mining Engineer at a gross monthly salary of Kshs 100,000. He started with a probation contract of three months followed by one-year renewable contract effective April 2021. The contract was renewed for another one year and lapsed in April 2023.
5. According to the claimant from January 2021 to April 2022, he was paid Kshs 1,767,807 towards his salary instead of Kshs 2,400,000 leaving a balance of Kshs 632,193. During the same period the respondent failed to pay him accommodation cost of Kshs 136,000 plus internet and airtime expenses of Kshs 48,000. Again, from May 2022 to April 2023, he was paid Kshs 704,000 towards salary instead of Kshs 1,800,000 leaving a balance of Kshs 1,096,000. He was also not paid Kshs 102,000 for accommodation plus Kshs 36,000 for airtime and internet expenses.
6. The claimant further avers that he was not paid Kshs 450,000 towards car hire expenses, plus Kshs 23,600 being operations expenses incurred by him on behalf of the company. He further averred that he was entitled to two years' leave equaling to Kshs 300,000 plus service pay for the two years at 15 days pay per year being Kshs 150,000.
7. During the hearing, the claimant adopted his tow written statements dated 4th July 2023 and 23rd October 2023 and produced 35 documents as his evidence. He then stated that although his monthly salary was Kshs 150,000 he was being paid in bits through Mpesa and through the bank. The said payment included operational costs with no particulars given. He further stated that his unpaid salary stood at Kshs 1,728,193.
8. On cross-examination he contended that he stopped going to the Mine after his contract lapsed in April 2023. He stated that he was being paid vide Mpesa but from June 2022 his payment went to his bank account. He admitted that he is the one who computed the amount of airtime, transport and accommodation but he had no receipts to support the same. He also did not have receipts to support the claim for operational expenses incurred of Kshs 23,600. He further admitted that the claim for car hire was in respect of his own car which he used to go to work. He contended that he disclosed that fact to the respondent's finance.



9. As regards the claim for leave, he contended that he took 12 days break from 5th-17th August 2022 during the General Elections. He denied that he took leave in November 2022 and contended that although there were no operations due to lack of materials, he continued to go to the Mine to plan the next operations. However, he did not produce the said plans when challenged.
10. He admitted that his employment contract did not provide for house allowance. He further admitted he was given a house by the company but due to its poor condition, he moved out upon the employer's promise to pay him a monthly allowance of Kshs 8,500. However, he admitted that the promise was not written down.
11. Ms.Makena Mwiraria, respondent's Director, testified as RW1. She adopted her written statement dated 3rd October 2023 as her evidence and produced 29 documents as exhibits. She admitted that the respondent employed the claimant as a Mining Engineer in Samburu for a gross monthly salary of Kshs 150,000.
12. She further stated that the claimant promised to produce 5000 metric tons if the company sent to him Kshs 5,377,120 for equipment and Kshs 641,712 for drilling. However, despite providing the claimant with all the money requested, he only produced 500 metric tons only between 29th June 2022 and 29th July 2022. As such the respondent suffered huge loss in the hands of the claimant.
13. She further stated that the company decided to drill a borehole for the surrounding community and place the claimant to oversee the project. The borehole was supposed to be 310 meters deep at a cost of Kshs 7,500 per meter for a total cost of Kshs 2,802,000. The borehole drilled was for 260 meters and therefore an excess of Kshs 375,000 was fraudulently paid. Besides the borehole was drilled in a private land and the owner denied the community access to the borehole and gave the claimant his daughter as a wife.
14. She contended that the claimant breached trust by failing to act professionally as the senior most manager in the Mine. She accused him of acting in conflict of interest in the drilling of the said borehole and also in secretly hiring his own car to the company without disclosing that fact. She also accused him of registering his own business to compete with the respondent.
15. On cross examination, she contended that she is the only Director of the respondent. She contended that she has filed documents to prove that she paid the claimant all his salary for the months he served. She contended that she was paying the claimant according to the production he made from the Mine. She reiterated that his gross Monthly pay was Kshs 150,000 and he was to pay statutory deductions directly.
16. She admitted that no disciplinary action was taken against the claimant for failure to produce 5000 tons as promised. When called to explain, he alleged lack of materials. She contended that the claimant was always away from the Mine when clients went for materials at the Mine.

Submissions

17. It was submitted for the claimant that the claim for unpaid salary of Kshs 1,728,193 has been proved on a balance of probability. Reliance was placed on *Nduku v Osteria Group (Kenya) Limited* (Cause E002 of 2002) (2023) KEELRC 2699 (KLR) (27 October 2023) (Judgment) and *Peter Ngunjiri Kariuki v BOM Magomano Secondary School* (2022) eKLR.
18. It was further submitted that under section 28 (1) of the *Employment Act* the claimant was entitled to 21 annual leave days and therefore, for two years, he earned 42 leave days equaling to Kshs 300,000. Reliance was placed on *Martin Ireri Ndwiga v Olerai Management Company* (2017) eKLR.



19. It was further submitted that the claimant is entitled to service pay by dint of section 35 (5) and (6) of the *Employment Act* because the employer never deducted and remitted statutory deductions as required under section 20 and 21 of the Act. It was urged that he is entitled to 15 days per year of service equaling to 30 days, hence the claim for Kshs 150,000. Reliance was placed on *Joab Ashitiba Hashon v Samaritan Medical Services* (2017) eKLR.
20. It was also submitted that the claimant is entitled to the claim for Kshs 238,000 being accommodation/housing allowance for two year by dint of section 31 of the *Employment Act*, 2007. The amount is calculated as 15% of his monthly salary. The claim was fortified by *Joshua Libanda v Outdoor Occasions Limited* (2014) eKLR.
21. As regards the claim for unpaid car hire bills of Kshs 450,000 was submitted that, there is uncontroverted evidence that the respondent authorized the claimant to look for a motor vehicle for hire from June 2022 to April 2023, since the employer could not get a vehicle at the time to transport him to the Mine at the Archers Post. It was urged that there is also evidence to show that the claimant was unable to get a vehicle for hirer as a result of which he bought his own car and the respondent Kshs 180,000 for hiring the car between February 2022 and May 2022.
22. As regards the claim for airtime and internet, it was submitted that the respondent had orally made a commitment to pay for the said expenses. It was submitted that section 51 of the *Employment Act* entitled to claimant to a certificate of service. Finally, the court was urged to dismiss the counterclaim and grant the reliefs sought in the memorandum of claim plus costs.
23. On the other hand, it was submitted for the respondent that the claimant has not proved his claim on a balance of probability. To begin with, it was submitted that clause 5 of his contract, provided for a gross monthly salary and therefore the burden of proof lies with the claimant to prove that he is entitled to those other claims. No documentary evidence was adduced to prove the said entitlement to allowances or bills or even receipts to support the said claim for airtime/internet, transport, operational expenses or accommodation.
24. It was further submitted that the claim for leave had no merits because the claimant took all his leave. Reliance was placed on Exhibit D, where the claimant wrote to the employer indicating that he had been away on leave for one month in November and December.
25. As regards the claim for house allowance, it was submitted that the claimant was provided with reasonable house but he voluntarily left alleging that he was not comfortable there and demanded a better house. He did not produce medical report to prove that he was falling sick because of the house he was allocated. Consequently, it was submitted that the respondent was not responsible to pay house allowance to the claimant.
26. For emphasis, reliance was placed on *Stephen Miheso v Kaimosi Tea Estate Ltd* (2024) eKLR where the court dismissed a claim for house allowance because the employee was provided with housing but he opted to find alternative accommodation. Further reliance was placed on *Joseph Sani Orina v Hiprora Business Solution (EA) Limited* (2017) eKLR, *Evans Gato Orina v Aggreko International Project* (2019) eKLR *Postal Corporation of Kenya v Andrew K Tanui* (2019) eKLR and *Charity Wambui Muriuki v M/s Total Security Surveillance Ltd* (2017) eKLR where the court held that consolidated or gross salary includes basic salary, house allowance and other allowance.
27. In the end, it was submitted that the claimant's suit should be dismissed for lack of evidence to substantiate it as required under the *Evidence Act*.



Issues for determination

28. There is no dispute that the claimant was employed by the respondent. The issues for determination therefore are: -
- a. Whether the claimant is entitled to the reliefs sought in his claim.
 - b. Whether the respondent is entitled to the reliefs sought in the counter-claim.

Claimant's claim

29. The first claim is for unpaid salary of Kshs 1,728,193. The contract provided for a gross monthly salary of Kshs 150,000. He contended that from January 2021 to April 2022 he was paid Kshs 1,767,807 instead of Kshs 2,400,000 leaving a balance of Kshs 632,193. From May 2022 to October 2022 he was paid Kshs 704,000 instead of Kshs 900,000 leaving a balance of Kshs 196,000. Finally, from November 2022 to April 2023 he was not paid any salary and therefore he is entitled to Kshs 900,000.
30. To support the claim, he filed a schedule of money received and how it was spent including his salary. The respondent has filed a schedule of the amounts it sent to claimant some with breakdown of how the same was to be applied. All the payment through claimant's account or Mpesa was therefore not meant for his salary alone. Consequently, I find that the schedule of salary payment filed by the claimant establishes a prima facie case that the claim for unpaid salary from January 2021 to April 2023 is valid.
31. However, the respondent has contended that the claimant stopped attending work from October and therefore he was not entitled to salary. The claimant has not adduced any evidence to prove that he was on duty during that period. There is however evidence of letters he wrote to the employer about Mr. Ayub Mugambi having taken over his roles and made the work environment toxic.
32. There is also another evidence, that is, a text message he wrote stating that he was away on leave for one month. The leave allegedly ended on 2nd December 2022 but there is no evidence of when he started the leave. In fact, he prayed for 42 leave days for the two years contract and stated in his witness statement that he never took any leave during his serve.
33. Having considered the pleadings and evidence before the court, I find that the respondent has proved on a balance of probability that the claimant absconded work from October 2022. There is evidence that the claimant took a break of 12 days in August due to general election and reported work a couple of days in September 2022 and then stopped going to work in October 2022. The only reasonable explanation for absconding is that the working environment was toxic due to posting of Mr. Ayub Mugambi to the Mine and also due to lack of resources due to the failure by the claimant to meet the production targets he promised in his Projection Report dated 14th June 2022. Consequently, he is not entitled to salary for November 2022 to April 2023 equaling to Kshs 900,000. He is also not entitled to salary for October 2022 because he did not work.
34. It follows that the claimant is only entitled to salary for the period from January 2021 to September 2022 being Kshs 3,150,000 less paid Kshs 2,485,812 leaving a net of Kshs 664,188 which I award to him.
35. As regards the claim for house allowance, I do not need to belabor the point. Clause 5 of the claimant's contract of employment stated that his pay was a gross salary of Kshs 150,000 per month. He further admitted that the employer gave him a house to live in but he sought alternative accommodation due to discomfort in the house allocated. Section 31 of the [Employment Act](#) obliges an employer to provide



reasonable housing or pay the employee house allowance. By the employer paying gross salary, it was not under any legal duty to pay house allowance to the claimant.

36. It follows that the house, which the claimant found to be uncomfortable was gratuitous benefit from the employer. I gather support from *Postal Corporation of Kenya v Andrew K.Tanui* (2019) eKLR where the Court of Appeal held that:-

“Gross salary would then be the amount calculating by adding up one’s basic salary and allowances, before deductions of taxes and other deductions.”

37. As regards the claim for airtime and internet totaling to Kshs 84,000, the claimant did not adduce any evidence to prove that the said benefit was provided in his contract of employment. In addition, he admitted that he had no receipts or bills to support the claim. Consequently, I find that the said claim is without any merits and it is declined. Even if the respondent ever gave any money for airtime, the same was gratuitous.
38. The claim for refund of Kshs 23,600 for operational expenses is equally not supported by receipts or any documentary proof that the expense was incurred on behalf of the respondent. Consequently, the said claim must also fail.
39. The claim for service pay is granted but for only one year because the claimant never served for two complete years. Consequently, I award him 15 days pay equaling to Kshs 75,000.
40. The claim for annual leave is also granted but only on prorated basis. The claimant served for 21 months, earning 1.75 leave days per month under section 28 of the *Employment Act*, 2007. Hence 36.75 leave days were earned less the 12 days taken in August 2022 leaving a net of 24.75 leave days outstanding equaling to Kshs 123,750.
41. The claim for transport equaling Kshs 45,000 per month has been denied by the respondents mainly because it was not provided for in the contract and secondly, because it was fraudulent and exaggerated. The claimant maintained that the respondent had agreed to pay for his transport costs through car hire. He admitted that the car involved belonged to him but the respondent contended that the claimant did not disclose that the vehicle belonged to him.
42. Having considered the evidence before me, it is clear that there was no agreement between the claimant and the respondent for hire of his car at Kshs 45,000 per month. The said consideration was decided unilaterally by the claimant. Secondly, the claimant did not disclose to the respondent that he was hiring his own car. Thirdly, there is no basis upon which the sum of Ksh.45,000 was based. Fourthly, the claimant did not use the car for official work only. Finally, it is a fact that in August 2022 the claimant was on leave and from October 2022 to April 2023 he had absconded work.
43. However, there is evidence that the respondent paid for the car hire in February-May 2022 and therefore the only valid claim would be for the month of June, July and September. The respondent had consented to the car hire and chose not to verify the owner. Hence, I award Kshs 45,000 x 3 =Kshs 135,000.
44. The claim for a certificate of service is fairly straight forward and I allow it as prayed because it meets the threshold provided under section 51 of the *Employment Act*, 2007.

Counter-claim

45. The respondent accused the claimant of fraud and breach of trust which led to huge financial loss. First, the claimant prepared a production projection of 5000 metric tons of minerals if the company



invested Kshs 5,377,120 for equipment hire plus a further Kshs 641,712 for drilling among other expenses. Relying on the said projection by the claimant, the respondent invested the money but to its dismay, the claimant only produced less than 500 metric tons, about 10% of the projected production. Consequently, the respondent prays for 90% of its investment capital which was a loss caused by the claimant.

46. However, the claimant denied liability and accused the respondent of failure and reluctance to implement geological assessments reports and explanation proposals which could have assisted in meeting the production targets. He further blamed the respondent of persistent failure to meet daily operations cost at the Mine which also contributed to the failure to meet the production target of 5000 metric tons.
47. Having considered the evidence on record, I find that the claimant was not solely to blame for the failure to meet the production target of 5000 metric tons. The respondent had its fair share of blame for failure to fund the project adequately and timely, and also to implement the geological assessment reports. Besides there is no evidence that the claimant had bound himself to refund the capital investment if he failed to meet targets.
48. As regards the claim for borehole drilling at a cost of Kshs 2,802,000. I find that no evidence was tendered to support the allegation that the community had been denied access to the water. No representative of the community gave evidence in this case. There is also no evidence to prove that the claimant has married the daughter of the owner of the land where the borehole was drilled, nor was the name of the said person been given. Therefore, the said allegations are treated as, mere allegations.
49. Likewise, the allegation that the borehole in issue was drilled up to 260 meters as opposed to 310 meters paid for lacks proof. Even if the borehole was drilled for lesser depths than the amount, the contract was between the respondent and the driller and therefore the respondent ought to sue the driller (Simba Drilling Company) who was paid the extra cash. I have considered the cheques and bank deposits and confirmed that the claimant was not the payee but the driller directly. Consequently, the claim for refund of Kshs 375,000 also fails.

Conclusion

50. I have found that the claimant's case partially succeeds as highlighted above while the respondent's counter-claim fails entirely. Accordingly, I enter judgment for the claimant as follows: -
 - a. Unpaid salary.....Kshs 664,188.00
 - b. Leave..... Kshs 123,750.00
 - c. Car hire.....Kshs 135,000.00
 - d. Service pay.....Kshs 75,000.00
Kshs 997,938.00
 - e. The award is less statutory deductions.
 - f. The claimant is awarded costs of the suit plus interest at court rates from the date of filing suit.
 - g. The claimant is awarded certificate of service.

DATED, SIGNED AND DELIVERED AT NYERI THIS 18TH DAY OF OCTOBER, 2024.

ONESMUS N MAKAU



JUDGE

Order

This judgment has been delivered to the parties via Teams video conferencing with their consent, 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.

