



Maina v Red Court Hotel Limited/Boma Hotel Limited (Appeal E255 of 2023) [2024] KEELRC 13297 (KLR) (21 November 2024) (Judgment)

Neutral citation: [2024] KEELRC 13297 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL E255 OF 2023
NJ ABUODHA, J
NOVEMBER 21, 2024**

BETWEEN

GEOFFREY KARIUKI MAINA APPELLANT

AND

RED COURT HOTEL LIMITED/BOMA HOTEL LIMITED RESPONDENT

(Being an appeal from part of the judgment and decree of Hon. Wangari Mbulikah delivered at Nairobi on 9th November 2023, CMEL Cause No. E909 of 2022; Geoffrey Kariuki Maina vs. Red Court Hotel Limited/Boma Hotel Limited)

JUDGMENT

1. Through the Memorandum of Appeal dated 8th December, 2023, the Appellant appeals against part of the Judgment of Honourable Wangari Mbulikah delivered at Nairobi on 9th November 2023.
2. The Appeal was based on the grounds that:
 - i. The Learned Magistrate erred in law and fact by declining to award the appellant his claim for salary accrued during the unlawful, illegal and unconstitutional unpaid leave.
 - ii. The Learned Magistrate erred in law and fact by declining to award the appellant his claim for payment in lieu of leave for the year 2020.
 - iii. The Learned Magistrate erred in fact by failing to award the appellant's prayer seeking service gratuity for each completed year as provided for in clause 27 of the CBA between his union and the respondent.
3. The Appellant prayed that the appeal be allowed with costs; the judgment and decree of the Chief Magistrates Court dated and delivered on 18th August 2023 be varied and set aside in part and only to the extent of this appeal and the Honourable Court be pleased to award the Appellant his salary



accrued during the unpaid leave, his payment in lieu of leave for the year 2020 and service gratuity for each completed year as per clause 27 of the CBA as prayed in the statement of claim.

4. The Appeal was disposed of by written submissions.

Appellant's Submissions

5. The Appellant's Advocates Nyabena Alfred & Co. Advocates filed written submissions dated 17th May, 2024 and on the issue of whether the Appellant was entitled to reliefs of accrued salary arrears from March 2020 and payment in lieu of leave counsel submitted that the trial court declined to award the Appellant these reliefs stating that he did not confirm the date of termination. That the trial court misdirected itself on the facts of this case as the Appellant was indefinitely sent on unpaid leave by the Respondent. That for over two years the Appellant was regarded as employee of the Respondent but without pay.
6. Counsel submitted that the unpaid leave amounted to unfair labour practices which was against Article 41 of *the Constitution* and an unlawful alteration to their employment contract where the Appellant was sent on unpaid leave for two years without termination. That since he was still the Respondent's employee then was entitled to accrued salary and allowances until his termination.
7. On the issue of whether the Appellant was entitled to service gratuity as per clause 27(b) of the CBA counsel submitted that the trial court erred in not awarding this relief on the premise that the Appellant was under NSSF and thus service gratuity was not payable. That there was no caveat on the clause indicating that employees under NSSF were exempted from gratuity. That the clause stated that where an employee was terminated gratuity for long service was payable between 5 and 10 years' service at one third of month's salary and one third of house allowance of every completed year.
8. Counsel submitted that the Appellant worked for 9 years and was entitled to Kshs 367,596.69/= as gratuity as per CBA. Counsel relied on the case of Nelson Keshei v Narok County Government & Another (2019) eKLR on entitlement of gratuity by an employee by practice of employer or under contract of service/CBA.
9. Counsel submitted that there was a CBA between the Respondent and KUDHEIHA a union which the Appellant was a member and contained terms and conditions binding upon all parties involved. That there was no dispute that the Appellant was subject to NSSF deductions but that the Appellant was not entitled to gratuity under clause 27(b)(i) of the CBA.
10. Counsel submitted that the Appellant was entitled to both and relied on the case of KUDHEIHA Workers v Ng'araria Girls Secondary School (2015) eKLR that parties can agree on payment of a further gratuity as per CBA apart from NSSF. That the Act did not provide a ceiling but a floor for parties to agree on more favorable terms and conditions of service including service pay or gratuity or pension or such other retirement or otherwise separation benefits to be paid to the employee.

Respondent's Submissions

11. The Respondent's advocates Nderu Ngaruni and Kimeru Advocates filed written submissions dated 23rd June 2024. On the issue of whether the Appellant was entitled to an award for salary accrued during the unpaid leave and payment in lieu of leave for the year 2020, counsel submitted that the Respondent, a hotel business, faced significant challenges due to the Covid-19 pandemic, which led to operational closures and a drastic reduction in customer traffic.



12. Counsel submitted that as a result, the Respondent had to place employees, including the Appellant, on unpaid leave and the decision was communicated through an internal memo and meetings, during which the Appellant expressed no objections and agreed to the unpaid leave.
13. Counsel submitted that the Appellant is therefore estopped from claiming for salary accrued during the unpaid leave period as he in fact understood the reason behind sending him on unpaid leave and subsequently consented to the same meaning that he understood that he would not be receiving a salary while on leave.
14. Counsel submitted that the Appellant is therefore not entitled to an award for salary accrued during the unpaid leave period as well as payment in lieu of leave for the year 2020.
15. On the issue of whether the Appellant is entitled to service gratuity, Counsel submitted that the Respondent has been remitting NSSF on behalf of the Appellant and as such by virtue of the above, the Claimant is not entitled to service gratuity as claimed.
16. Counsel submitted that Section 35(6) of the *Employment Act*, 2007 disentitles an employee from double payment of Social Security benefit from NSSF and a service pay scheme.
17. Counsel relied on among others the case of Joseph Monica Wanza Mbavu Versus Roofspec & Allied Works Co Ltd while submitting that to award the Appellant with Service gratuity would be tantamount to unnecessarily punishing an employer who has been faithfully remitting NSSF and the Appellant will benefit from double payment of NSSF and the payment of Service gratuity.
18. Counsel relied on the case of Board of Management Ng'araria Girls Secondary School v KUDHEIHA workers [2017] eKLR while submitting that should the Appellant be awarded the service gratuity then the same should be less the NSSF contributions made by the Respondent.
19. Counsel submitted that the Appellant started working around April 2012. The trial court determined that his employment ended in 2020 when he was placed on unpaid leave in March. Consequently, the Appellant's claim of having worked for nine years is inaccurate and misleading, as the actual duration amounts to 7 years and 11 months.
20. Counsel submitted that the pay slip presented in court shows that in December 2019, the Appellant received a service charge of Kshs.26,624, which contributed to the total amount payable by the Respondent that month, totalling Kshs.58,997/=.
21. Counsel submitted that the service charge varies each month based on sales volume and is only applicable when the individual works. The Appellant's gross salary was Kshs.34,373.30, not Kshs.58,997.30 as previously stated.
22. Counsel submitted that the Appellant calculated his service gratuity using the formula $(18/26 \times 58,997.30 \times 9)$, which included the December 2019 salary of Kshs. 58,997.30. However, the amount was not his actual monthly gross salary, as it included a service charge. Instead of following the CBA formula of $1/3 \times \text{sum of basic salary and house allowance} \times \text{number of years worked}$. That the same should be $1/3 \times 34,373.30 \times 7 \text{ years and } 11 \text{ Months}$.

Determination

23. The court has considered the pleadings and submissions filed by the parties herein and proceeds to analyse them as follows.



24. The principles which guide this court in an appeal from a trial court are now well settled. In *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR, the Court of Appeal stated that;

“[A]n appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect”

25. In this case, the Judgment of the trial court was that judgment was entered in favour of the Claimant against the Respondent in terms of three Months’ salary in lieu of notice 34,373.30 x 3=103,119.90/= Loan deduction 72,756/=, loan deduction to close back Kshs 146,718/=, 12 months’ compensation for unfair termination Kshs 412,479.60/= . The trial court declined to award accrued salary for unpaid leave and service gratuity the subject of this Appeal.

26. The court finds that the issues placed by the parties for determination in the appeal are with regard to the awards not awarded by the trial court since the issue of unfairness of termination/dismissal is not among the grounds of appeal and the court frames the issue for determination as follows: -

a. Whether the trial learned Magistrate erred in not awarding the Appellant accrued salary during the unpaid leave and notice in lieu of leave and Service pay.

Whether the trial learned Magistrate erred in not awarding the Appellant accrued salary during the unpaid leave and notice in lieu of leave and Service pay.

27. This court agrees with the trial court finding that the Appellant was silently terminated on unpaid leave because he was never called back after being sent on unpaid leave. On the claim for accrued leave while on unpaid leave and payment of notice in lieu of leave this court agrees with the trial court that the Appellant was not entitled to the same having been terminated in March 2020. That the Appellant was awarded three months’ salary as payment in lieu of notice as per the CBA and 12 months compensation for unfair termination.

28. This court notes that the Appellant was adequately compensated upon his unfair termination and claiming any further awards was to unjustly enrich himself to punish the Respondent. The law does not seek to punish the employer even where termination is said to be unfair. The Appellant understood that he was going for unpaid leave hence he could not expect to be paid yet he was also not working. The law seeks to compensate the employee upon the unfair termination as per the Act.

29. This court is guided by the holding in *Pamela K. Butalanyi Vs University Council for the Kenya Polytechnic University College* (2015) eKLR where it was held that:-

employment remedies must be proportionate to the injury sustained by the employee. They are not aimed at advancing any parties desire for unjust enrichment.

30. This court notes that the trial court after finding that the Appellant was unfairly terminated awarded him damages accordingly and he is not entitled to further remedies as claimed.

31. On the issue of the service pay this court notes that it was not in dispute that the Appellant was subject to NSSF and what was in dispute was whether the Appellant was entitled to an additional gratuity as per clause 27 of the CBA. CBA binds the parties to it and this court disagrees with the trial court that the Appellant was not entitled to the said gratuity because of the operation of section 35 of the [Employment Act](#) which excludes members who benefit from NSSF.



32. To this court the act does not bar parties from making further agreement/arrangement on gratuity apart from NSSF. The court of Appeal while agreeing with the trial court findings in Board of Management Ng'araria Girls Secondary School v KUDHEIHA workers [2017] eKLR held as follows:-

Section 35(6) of the *Employment Act*, 2007 disentitles an employee from double payment of Social Security benefit from NSSF and a service pay scheme established under clause 31 of the CBA. However, be that as it may and as rightly held by the trial Judge "... section 35 of the *Employment Act* 2007 does not preclude parties from entering an agreement for retirement benefits or gratuity over and above the statutory NSSF arrangement".

33. The court went on to ask itself if the employee would be entitled to both the NSSF and the superior service pay scheme agreed between parties and went on to state as follows: -

In our view therefore, we find and hold that the parties herein were bound by the CBA and further that an employee is entitled to have more than one social security scheme and that any pension monies paid to a scheme, such as NSSF, should be deducted from the benefit conferred by the superior social security scheme. We further find and hold that the appellant shall pay to the respondent service pay as decreed in the CBA less any pension made by the appellant to the NSSF.

34. This court therefore has nothing more to add but to find that the parties were bound by the CBA and the Appellant was entitled to the service pay as per clause 27 of the CBA minus what was deducted under NSSF. This court agrees with the trial court that the rightful salary for the Appellant was Kshs 34,373.30/= and not Kshs 58,997.30/=

35. The Appellant could also claim the said service pay for 7 years 11 months since he was terminated in 31st March 2020 and he started working with the Respondent in 2nd May, 2012 as per the appointment letter dated 22nd March 2012 which is 7 years 11 months as alleged by the Respondent. The CBA provided for 1/3 of the salary which gives us $1/3 \times 34,373.30 \times 7 \text{ years } 11 \text{ Months} = 90,707.31/=$

36. In the upshot the Appeal partially succeeds as follows; _

- a. Accrued salary during unpaid leave and payment in lieu of leave...NIL
- b. Service Pay.....Kshs 90,707.31/= minus NSSF deductions .

37. The appeal partially succeeds hence each party shall bear their own costs of this Appeal.

38. It is so ordered.

DATED AT NAIROBI THIS 21ST DAY OF NOVEMBER 2024

DELIVERED VIRTUALLY THIS 21ST DAY OF NOVEMBER 2024

ABUODHA NELSON JORUM

PRESIDING JUDGE-APPEALS DIVISION

