



**Makhanu v PG Security Limited (Cause 191 of 2018)
[2023] KEELRC 516 (KLR) (23 February 2023) (Judgment)**

Neutral citation: [2023] KEELRC 516 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE 191 OF 2018
HS WASILWA, J
FEBRUARY 23, 2023**

BETWEEN

SALOME NASIMIYU MAKHANU CLAIMANT

AND

PG SECURITY LIMITED RESPONDENT

JUDGMENT

1. The Claimant sued the Respondent by a memorandum of claim dated June 5, 2018, claiming payment of her terminal dues upon resignation. She stated that she was underpaid throughout her employment. The Claimant testified that she worked for more than 12 hours each day but was not paid overtime and also that she worked on all public holidays without pay. She stated that she was not granted leave or pay in lieu, neither was she refunded her uniform money upon resignation. She prayed for the following reliefs;
 - a. Arrears of Kshs 23, 246.34
 - b. Underpayments of Kshs 259,732.87.
 - c. Overtime pay of Kshs 286,237.82.
 - d. Off duty pay of Kshs 186,855.57.
 - e. Public holidays pay
 - f. Leave pay of Kshs 19,355.40
 - g. Interest and cost of suit.
2. The summary of the claim is that the Claimant was employed by the Respondent sometimes in June, 2015 as a night guard until June, 2016 when she was shifted to day Guard. Her salary ranged from Kshs 5,100 to Kshs 7500 as indicated in the claim.



3. She stated that she resigned from the Respondent's employ in February, 2018 however she was not paid her terminal dues as provided for under the law, leading to her filling this claim.
4. The Claimant stated that she was not paid her December, 2016 and January, 2017 salary to date.
5. She stated further that she worked for 12 hours a day without overtime pay. Also that they were allowed off duty but the same was unpaid. She added that she was not granted leave for the period worked and worked on all public holidays.
6. Upon resignation, she was only paid Kshs 19,765 which amount covered her uniform deduction but not terminal dues she was entitled to upon resignation.
7. In her reply to defence, the Claimant stated that she did her KCPE examination in 2000 and not 2012 as alleged by the Respondent. She alleged that the documents marked at 'PG5' are forged or fraudulent and she is not privy to any of the documents in that bundle.
8. It is her case that the documents cannot be relied upon because she was born in 1983 and to produce a KCPE certificate indicating that she did her KCPE in 2012 would mean that she sat for that exam when she was 29 years and started school at 17 years which is not practicable. She also stated that the handwriting of her application marked as ' PG3' is glaringly different from the one in the application letter marked as 'PG5' produced by the Respondent. She denied producing the KCPE certificate marked as Exhibit' PG6' and maintained that she did her KCPE in 2000 and the certificate produced in her further list of documents is the authentic one.
9. The Claimant stated that she resigned in February, 2018 and the allegation that she caused the contract between the Respondent and its client to be terminated is not true. She also denied signing the clearance certificate.
10. During hearing the Claimant testified as CW-1 and adopted her witness statement dated October 22, 2021 and a further statement of November 15, 2021. She produced the list of document dated June 6, 2018 and a further list of October 22, 2021 as her exhibits. She added that she was the one that wrote the application letter but not the one that filled the application form. She reiterated that she was a holder of KCPE and KCSE certificate.
11. Upon cross examination, she testified that she sought for employment and brought with her KCPE Certificate, application letter, chief's letter, NHIF & NSSF cards. She was interviewed in June, 2015 by Charles who asked her questions and filled a form. She denied fixing her thumb print on the filled documents.
12. She stated that she was employed in June, 2015 as a night guard for a year and thereafter she was changed to be a day guard till her resignation in 2018. She testified that there was no complain raised in relations to her job save for one time when a client quarreled them for opening the gate for a visitor and failing to search the said visitor. She denied receiving any warning letters or suspension letter. She also denied receiving her salary for December but admitted to receiving her January, 2017 salary but admitted that her salary was channeled through Equity Bank.
13. It was her testimony that she was not subjected to any disciplinary hearing and that she only resigned later in 2018 for personal reasons. She maintained that she reported to work at 6 am and clocked out mostly at 6:30pm and at times late at night. She admitted signing the attendance sheet at times and failing to sign some other time. She stated that she was given off duty but Kshs 1000 was deducted from her salary. She also denied receiving the Kshs 19,000 indicated as her terminal dues.



Respondent's case.

14. The Respondent entered appearance and filed a defence to claim and counterclaim dated October 7, 2021, denying the entire claim and stated that although they employed the Claimant, she never adhered to the terms and conditions of her employment and failed to execute the basic security assignment given.
15. It is averred that the Respondent advertised for the position of security guards and drivers with the basic minimum qualification being a KCPE Certificate, to be accompanied with an application letter. Consequently, the Claimant submitted her KCPE certificate together with an application letter and interviews were carried out and she was employed after submitting her personal details which were filled in an employment form.
16. The Respondent avers that the Claimant was deployed to Milimani phase II to guard however her work was wanting, earning her a warning letter in 2016 for allowing visitors into the premises without following due procedure and occasionally leaving the gate unmanned causing losses to the residents.
17. It is stated that the clients were dissatisfied with the services rendered by the Claimant and even threatened to terminate the contract with the Respondent which they terminated in December, 2018. The Respondent issued warning letters upon the Claimant on diverse dates in the year 2017 for defying instruction, flouting rules and regulations and for non-adherence to the assignment instructions. Additionally, that the Claimant, while guarding Grill park, stored some stolen goods at the guard house, causing the client to complain bitterly and refused to pay for the services rendered, occasioning the Respondent loss.
18. The Respondent stated that upon resignation, the Claimant was paid all her dues, which she confirmed by signing a clearance certificate on February 19, 2018 affirming that she does not have any further claim against the Respondent.
19. On the claim for overtime, the Respondent stated that the Claimant worked during normal hours and never worked for any overtime as pleaded. The Respondent also denied the allegation of salary deductions pleaded.
20. It is averred that, later on and upon scrutinizing the Claimant's documents, the Respondent noted some inconsistencies in the Claimant's KCPE Certificate and sought clarification from the Kenya National Examination Council through the DCIO-Central Division Nairobi, who wrote a letter to KNEC dated August 24, 2021. In response, the Kenya National Examination Council, by a letter dated 3rd and 7th September, 2021 wrote a report highlighting and confirming that the Claimant did not sit for National Examination in 2012 under index number 39XXXXX9 and that for that year the center code belonged to Kibos Annex Prison.
21. The conclusion of the finding by KNEC was that the KCPE certificate, which the Claimant used to secure employment was forged, therefore that the employment was fraudulently acquired, as such the Respondent prayed for an order for the Court to order the Claimant to refund all the monies earned as salary through the misrepresentation from July, 2015 to February, 2018.
22. In the counterclaim, the Respondent stated that since the employment contract was entered into in the mistaken belief that the Claimant was qualified, the same ought to be rescinded for being based on a fraudulent representation.



23. The Respondent also prayed for the claim to be dismissed with costs and the Court return a verdict that the Respondent does not owe the Claimant any dues. Instead that costs and interest of the counterclaim be awarded to the Respondent.
24. In the further response, the Respondent stated that the Claimant was issued with three warning letters on the September 7, 2016 for flouting assignment instructions and failing to control access to the premise, which infact earned her suspension with effect from September 8, 2016 where she acknowledged her wrongdoing, during the disciplinary hearing scheduled for September 14, 2016. On January 23, 2017 for allowing an employee to keep stolen goods in the guard house while she was working at Grill park and on August 22, 2017 for leaving the Gate open and unmanned while working at Milimani Industries.
25. On allegedly unpaid for December, 2016 and January, 2017, the Respondent stated that the same was paid by Pramukh G System the trading name of the Respondent on the December 6, 2016 and January 3, 2017 respectively.
26. During hearing, the Respondent summoned Catherine Wanjohi Mwathi, the Respondent's Human Resource and Administration officer as it's RW-1. She adopted her statement dated October 7, 2021 and produced the documents dated October 7, 2021 as exhibits 1-17 and the further list dated November 9, 2021 marked as Exhibit 18-26 respectively. She testified in addition that the Claimant submitted during interview; her KCPE certificate, application letter, chiefs letter and three referees and on the date of interviews she was asked questions and the details filled in a form which she signed thereafter to confirm and authenticate the information therein. She added that the Claimant informed the interviewer that she went to Luanda Primary School and exhibited a KCPE Certificate indicating that she started school in 2000 and cleared in 2012. She was trained and taken up as a guard.
27. The witness testified that the Claimant worked for a while but got herself involved in some misconduct that earned her a warning letter on November 25, 2017, which she acknowledged receipt by signing on it. she was also issued with another warning letter for keeping stolen goods at the Guard house while working at Grill park. The client in that case refused to pay the Respondent because of the actions of the Claimant. While working at Milimani phase 2 she opened the gate without following protocol of searching the visitors. That she was suspended and subjected to hearing, where she admitted her wrongdoing and wrote a commitment letter.
28. It was her case that the Claimant was paid her December, 2016 salary and January, 2017 salary. On the KCPE Certificate, the witness testified that the Respondent noted that the certificate was not proper and informed the DCIO Nairobi Central division who confirmed the same after seeking authentication from KNEC.
29. Upon cross examination, the witness testified that the Claimant signed on the application form and the employment form. She confirmed that the details were taken by the interviewer but that the Claimant is the one who signed it. She testified that the issue of forged certificate was reported to the police, who issued the Respondent with OB number CID 4XXX.

Claimant's Submissions.

30. The Claimant submitted that his employment relationship with the Respondent is not contested and argued that the employment relationship was entered into devoid of fraud as alleged by the Respondent. She argued firstly that the marks indicated in the employment form is 280 / 500 which cannot amount to D+ rather that it ought to have been C+. Secondly, that the age of the Claimant ought to have raised question when she stated that she cleared her KCPE in 2012, when she had



indicated that she had 3 children by 2015. Thirdly that the interviewer who filled the forms was not called as a witness to verify the information indicated in the forms. Fourthly that based on the allegations of fraud, the Respondent could have raised the issue with the police, but that the Claimant was never arrested or charged with any criminal offense for the alleged criminal acts of forgery.

31. The Claimant submitted that she resigned from employment on January 12, 2018, while the contract between the Respondent and Milimani phase II was terminated in December, 2018, a clear indication that the Claimant was not the cause for the termination of the contract between the Respondent and their client. Secondly that in the letter of December 3, 2018, Milimani phase II required the Respondent to apply for the contract afresh which they failed to indicate whether they applied or not. On the allegation of keeping stolen property, the Claimant submitted that there was no evidence or criminal charges preferred against her as such the allegations remain unsubstantiated.
32. The Claimant submitted that she worked for the Respondent continuously from June, 2015 till February, 2018 and in fact that she gave the Respondent one-month resignation notice effective January 12, 2018 till February 12, 2018, which duration the Respondent ought to have taken steps to raise any issue it had on the Claimant's employment.
33. Based on the foregoing, the Claimant submitted that she ought to have been paid his terminal dues on resignation in addition to the claim of underpayment elaborated in the claim, in line with Section 26 of the *Employment Act* as read with Section 48 of the *Labour Institutions Act*. The Claimant also prayed for overtime pay, arguing that she worked for 12 hours each day. She also prayed for leave pay and salary arrears as shown in the bank statement exhibited.
34. In the further submission, the Claimant submitted that the allegation of forgery has not been strictly proved by the Respondent as require under Section 107 of the *Evidence Act*. In this she relied on the case of *Ndolo V Ndolo [2008] 1KLR (G&F) 742*.
35. On the underpayments admitted, the Claimant submitted that the calculations made by the Respondent was in exclusion of House allowance when the said House allowance was not paid as such form part of the underpayment calculations. She thus urged the Court to follow the calculations on her claim in considering the prayer for underpayment. On unpaid salary the Claimant maintained that the statement does not indicate the payment alluded to by the Respondent and prayed for the claim of salary arrears to be allowed.
36. The Claimant submitted that the Respondent has failed to produce the authentic record of the attendance sheet in proving the overtime claim, when it is the custodian of all records. She thus urged this Court to allow the overtime sought in the claim as prayed.

Respondent's Submissions.

37. The Respondent on the other hand submitted from the onset that the Claimant was employed through fraudulent means because the KCPE certificate presented in order to obtain the said employment was forged as affirmed by the Kenya National Examination Council through the letter written to DCIO- Nairobi central Division. It was argued that the information given and filled in the recruitment form was given by the Claimant and the interviewer was one Charles that was confirmed by the Claimant in cross examination. He argued further that though an OB was not exhibited the Letter from the DCIO was a clear testament that the certificate was forged. Therefore, that since the contract was based on a forged Certificate, the same should be declared null and void. On this they relied on the case *Mapis Investment(K) Limited V Kenya Railways Corporation[2006] eklr* where the



Court of Appeal on an issue of enforcement of illegal contract cited the case of Scott v. Brown, Doering, McNab & Co (3), [1892] 2 QB 724 Lindley LJ at p.728 which held that:-

' Ex turpi causa non oritur actio. This old and well-known legal maxim is founded in good sense, and expresses a clear and well recognized legal principle, which is not confined to indictable offences. No Court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of the Court, and if the person invoking the aid of the Court is himself implicated in the illegality. It matters not whether the defendant has pleaded the illegality or whether he has not. If the evidence adduced by the plaintiff proves the illegality the Court ought not to assist him.'

38. It was submitted that no person can claim a right or remedy whatsoever under an illegal transaction in which it participated, also that no Court ought to enforce an illegal contract where the illegality is brought to its notice and if the person invoking the aid of the Court is himself implicated in the illegality. In this they relied on the case of *Kenya Airways Limited V Satwant Singh Flora [2013] eKLR*.
39. The Respondent also relied on the case of *Abdi Mohammed Daib V Kenya Ports Authority [2016] eKLR* where the Court declined to give compensation for unfair and unlawful termination where investigations were carried out and it revealed that the Claimant had presented forged academic certificates for the purposes of employment.
40. Based on the above case law, the Respondent submitted that since the Claimant presented a forged KCPE certificate she should not be awarded any of the reliefs sought, because to do so, the Court will be perpetuating an illegality. Further that it is the actions of the Claimant of failing to follow assignment instruction that cause it to lose employment from Milimani Phase II.
41. On the reliefs sought, it was submitted with regard to salary arrears that the Claimant was paid Kshs 7,400 and Kshs 6300 on December 6, 2016 and January 3, 2017 respectively by the Respondent whose name in the bank appears as Pramukh G Systems. Therefore, she is not entitled to any claim under this head. On overtime it was submitted that the Claimant clocked in mostly at 8am and left some minutes to 5 Pm as appearing in the attendance sheet. On off duty, the Respondent maintained that the Claimant was entitled to off duty and that the Respondent never deducted any money, thus the allegation that Kshs 1,000 was deducted is not proved and should fail. Furthermore, that during cross examination, she denied any claim for off duty.
42. On the claim for underpayment, the Respondent submitted that as per Legal notice number 117 of 2015 a night guard was to be paid Kshs 11, 330 translating to Kshs 51,751 for the 10 months worked as night guard. In the statement she received a cumulative sum of Kshs 61,550 therefore the balance for the 10 months should be Kshs 51,751. On the years worked as a day guard, the Respondent submitted that from May, 2016 to April, 2017 the Claimant ought to have been paid Kshs 101,107 but the money reflected on her account is Kshs 75,450, therefore the difference should have been Kshs 25,657 and Between May 2017 to February, 2018 she ought to have been paid a cumulative sum of Kshs 107,337.60 instead of the Kshs. 73,120, leaving a balance of Kshs 34,217. 60 In total that the cumulative underpayment which the Claimant ought to be paid is Kshs 111,625.60 only.
43. In conclusion, the Respondent submitted that the basis for the entire claim is a fraudulent contract entered into based on misrepresentation of fact and presentation of a forged Certificate, which should nullify the entire contract and deny the Claimant any of the reliefs sought herein. On that note, the Respondent urged this Court to disallow the claim with costs to the Respondent.



44. I have examined the evidence and submissions of the parties herein. The claim by the Claimant is for payment of her terminal dues upon resignation from the Respondent's employment.
45. The Respondents have indicated that indeed the Claimant resigned and was paid all her dues and she confirmed this by signing the clearance certificate.
46. The Respondent also averred that the Claimant worked normal hours and there was no need to pay her overtime as pleaded.
47. The Respondents further pleaded that the Claimant was involved in misconduct and is therefore not entitled to the prayers sought.
48. My understanding of this claim is that the Claimant resigned from duty and which the Respondents acknowledges. Whether the Claimant was involved in misconduct or not is not material as we are not dealing with a claim of unlawful termination.
49. That being the position, it is clear that the Claimant was a member of NSSF as per her documents and so is not entitled to payment of service pay.
50. As concerns overtime, the Claimant has not demonstrated by way of any documents the times she clocked in and out.
51. No master roll has been submitted before me and I cannot award the Claimant anything on this prayer.
 - a. The Claimant is however entitled to payment of leave for her last year of service being 7,074.97/ = plus 4,349.36 = 11,424/=
 - b. She is also entitled to payment of her salary for December 2016 as prayed = 11,623.17.
 - c. As concerns underpayments, the Claimant submitted that she was underpaid. She explained how much salary she was underpaid and as considered against the Legal notices 117/2015 and Legal notice No 112/2017, it is clear that she was indeed underpaid and I find for her as pleaded to the tune of 286,237.82/=.
 - d. Overtime pay = 286,237.82/=
Total awarded = 309,284.99/=
Less statutory deductions
 - e. The Respondent will pay costs of this suit plus interest at Court rates with effect from the date of this judgement.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 23RD DAY OF FEBRUARY, 2023.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Sally Mbeche for Respondent – present

Maragia for Claimant – present

Court Assistant – Fred

