



**Matoke v Riley Services Ltd (Cause 850 of 2017)
[2023] KEELRC 421 (KLR) (16 February 2023) (Judgment)**

Neutral citation: [2023] KEELRC 421 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 850 OF 2017
AK NZEI, J
FEBRUARY 16, 2023**

BETWEEN

GEORGE OYURU MATOKE CLAIMANT

AND

RILEY SERVICES LTD RESPONDENT

JUDGMENT

1. The Claimant sued the Respondent *vide* a Memorandum of Claim dated 21st September 2017 and pleaded that he was employed by the Respondent as a security guard on 10th January 2010 to 30th January 2016, and retained continuous employment during the period of employment; and that no formal employment contract was executed between the parties. That the Claimant worked for a period in excess of six (6) years, rendering his employment status that of a permanent nature.
2. The Claimant further pleaded:-
 - a. that the Respondent paid the Claimant a basic salary of ksh. 470 per day as at the time of resignation.
 - b. that the Respondent unlawfully underpaid the Claimant during the period of employment in contravention of the Labour Institutions Act, the Regulation of Wages (General) (Amendment) Order 2009, The Regulation of Wages (General) (Amendment) Order 2010, The Regulation of Wages (General) (Amendment) Order 2011, The Regulation of Wages (General) (Amendment) Order 2012, The Regulation of Wages (General) (Amendment) Order 2013, and The Regulation of Wages (General) (Amendment) Order 2015.
 - c. that the Claimant was forced to work continuously with no rest day in every period of 7 days, contrary to section 27 of the Employment Act, and gazetted public holidays without compensation.



- d. that the Claimant was never allowed to take annual leave, and was not paid in lieu thereof, contrary to Section 28 of the *Employment Act*.
 - e. that the Respondent failed to issue the Claimant with a written contract, contrary to Section 9 of the *Employment Act*.
3. The Claimant further pleaded that on 19th February 2016, he (the Claimant) gave the Respondent a resignation notice, stating his intention to resign with effect from 1st March 2016, and requested the Respondent to tabulate his dues; but the Respondent refused and/or failed to tabulate the dues in contravention of the *Employment Act*. That the Respondent has refused to pay the Claimant's dues.
4. The Claimant set out his claim against the Respondent as follows:-
- a. salary for the month of February 2016 as per the 2015 Minimum Wage Order applicable to Night Watchmen in Mombasa (using column 2 of the said Order where basic minimum daily wage rate is ksh. 586.40. Thus $586.40 \times 30 \text{ days} = 17,592$.
 - b. accumulated leave days for a period of 6 years and 1 month. That is $30 \times \text{ksh. } 586.40 \times 6.8 \text{ years} = \text{ksh. } 106,959.36$.
 - c. Underpayment
 - i. For the period January 2010 to 31st April 2010 contrary to Regulation of Wages Order 2009 when the Claimant was paid at daily rate of ksh. 245 while the minimum daily rate was ksh. 328.20. Hence $\text{ksh. } 328.20 - 245 = 83.20 \times 30 \text{ days} \times 4 \text{ months} = \text{ksh. } 9,984$.
 - ii. for the period 1st May 2010 to April 2011 contrary to Regulation of Wages Order 2010 whereby the minimum daily wage rate was ksh. 361 while the Claimant was paid at a daily rate of 245. Hence $\text{ksh. } 361 - 245 = \text{ksh. } 116 \times 30 \times 12 = \text{ksh. } 41,760$.
 - iii. for the period 1st May 2011 to 30th April 2012 contrary to Regulation of Wages Order 2011 where the minimum daily wage rate was 406 while the Claimant was paid at the daily rate of ksh. 245. Hence $\text{ksh. } 406 - 245 = 161 \times 12 = \text{ksh. } 57,996$.
 - iv. for the period 1st May 2012 to 30th April 2013 contrary to Regulation of Wages Order 2012 where the minimum daily rate was ksh. 459.30 while the Claimant was being paid the rate of ksh. 245 per day.
Hence $\text{ksh. } 459.30 - 245 = \text{ksh. } 214.30 \times 30 \text{ days} = 6,429$. $\text{Ksh. } 6,429 \times 12 \text{ months} = \text{ksh. } 77,148$.
 - v. for the period 1st May 2013 to 31st April 2015 contrary to Regulation of Wages Order 2013 where the minimum daily rate was ksh. 523 while the Claimant was paid at the daily rate of ksh.470. Hence $\text{ksh. } 523.60 - 470 = \text{ksh. } 53.60$. $\text{kshs. } 53.60 \times 30 \text{ days} = 1,608$ per month. $\text{Ksh. } 1,608 \times 24 \text{ months} = \text{ksh. } 38,592$.
 - vi. for the period 1st May 2015 to 30th February 2016 contrary to Regulation of Wages Order 2015 where the minimum daily rate was ksh. 586.40 and the Claimant was being paid at a daily rate of ksh. 470. Hence $\text{ksh. } 586.40 - 470 = \text{ksh. } 116.40$. $\text{ksh. } 116.40 \times 30 = \text{ksh. } 3,492$. $\text{Ksh. } 3,492 \times 10 \text{ months} = \text{ksh. } 34,920$.
 - d. Certificate of Service.
 - e. Costs of the suit and interest.



5. The Claimant pleaded and claimed ksh. 260,400 being total underpayment.
6. The Respondent entered appearance on 30th November 2017 and filed a Memorandum of Reply on 22nd August 2019, denying the Claimant's claim. The Respondent further pleaded:-
 - a. that the Respondent always granted annual leave to its employees and that payment was made where an employee did not proceed on leave.
 - b. that the claim for underpayment was exaggerated and made up as the Claimant was paid as per the employment contract, which both parties had signed.
7. At the trial, the Claimant adopted his filed witness statement dated 21st September 2017 as his testimony in chief. He also produced in evidence his payslips for August 2012, July 2015 and October 2015. The Claimant's said witness statement replicates the averments made in the memorandum of claim.
8. The Claimant further testified that the wages paid to him by the Respondent were below the official wage guidelines, that he never took leave during the entire period of employment, and was not paid anything in lieu of leave. It was the Claimant's testimony that he worked on all days, including weekends and public holidays. The Claimant further testified that although he returned his uniform and staff identification documents to the Respondent upon resignation, the Respondent refused to pay his salary for February 2016 and also refused to pay the Claimant's dues. The Claimant denied having deserted work.
9. Cross-examined, the Claimant admitted to having taken annual leave during the year 2014 and 2015, having been paid in lieu. The Claimant further admitted having given the Respondent ten days' termination notice instead of 30 days' notice. It was the Claimant's further testimony that the Respondent had not issued him with a certificate of service.
10. The Respondent called one witness, Cheruiyot Elijah (RW-1) who adopted his witness statement dated 20th April 2022 and filed in Court on 21st April 2021. He also produced in evidence the Respondent's letter dated 25th February 2016 accepting the Claimant's resignation and the Claimant's letter of resignation dated 19th February 2016. The witness told the Court that the Claimant had been employed on 10th January 2010; and upon resignation, the Claimant did not return his uniform and did not clear with the Respondent, which was a condition to being paid his dues.
11. RW-1 further testified that the notice given by the Claimant was insufficient and that the Respondent had indicated in its acceptance of the Claimant's resignation that notice pay would be deducted from his salary. It was RW-1's testimony that the Claimant had not specified or particularised the years during which leave was taken, and that leave pay was paid along with salary as can be seen on the Claimant's payslip for the month of July 2015.
12. It was RW-1's further testimony that the claim for underpayment for the years 2011, 2012 and 2013 was statute barred, and that the Respondent had complied with minimum wage requirements for the years 2014, 2015 and 2016. The witness told the Court that the Claimant would be issued with a certificate of service once he clears with the Respondent.
13. Cross-examined, the Respondent's witness (RW-1) testified that the Respondent had no proof of leave payment to the Claimant, except for the year 2015, and that he had no proof of the Claimant having deserted duty.
14. Having considered the pleadings filed and evidence adduced by both parties herein, the two issues that present for determination in my view, are:-



- a. whether part of the Claimant's claim for underpayment is statute barred.
 - b. whether the Claimant is entitled to the reliefs sought.
15. On the 1st issue, underpayments by an employer over a period of employment are of the nature of a continuing injury that happens in one month and is carried on to the next month when the next underpayment occurs. Limitation period regarding underpayments of an employee's wages or salary starts running upon ceazation of the underpayment and/or the continuing injury as stated in Section 90 of the Employment Act. It is my finding that none of the claims made by the Claimant against the Respondent herein is statute-barred.
 16. On the claim for the Claimant's salary for February 2016, the Claimant's contract of employment was one to which Section 35(1) (c) of the employment Act applied. The Claimant was obligated to give a twenty eight days' termination notice to his employer or pay a one month salary in lieu thereof. He gave notice on 19th February 2016, to terminate employment with effect from 1st March 2016. This notice did not satisfy Section 35(1) (c) of the Employment Act. He must forfeit his February 2016 salary in lieu of notice. The claim is therefore declined.
 17. On the claim for unpaid leave for six years, it was a common ground that the Claimant was employed on 10th January 2010 and left employment in February 2016. The Claimant claimed unpaid leave for six years and one month (30 x ksh. 586.40 x 6.08 years = 106,959.36). The Claimant, however, testified that he had taken leave during the years 2014 and 2015. The Respondent's witness (RW-1), on the other hand testified that the Respondent had nothing to show that the Claimant had taken leave, save for the year 2015 as can be seen on the Claimant's payslip for July 2015. Section 74(f) of the Employment Act provides that an employer is the custodian of his employees' leave records on leave days taken and leave days due. In the absence of any leave documents/records, and the Claimant having admitted to having taken leave during the years 2014 and 2015, I find and hold that the Claimant is entitled to leave pay for four years. That is ksh. 586.40 X 21 X 4=ksh. 49,257.60. I award the said sum to the Claimant.
 18. The claim for underpayment was elaborately pleaded by the Appellant and proved, and the Respondent did not offer any rebuttal. Indeed, the Respondent did not challenge the validity of the Regulation of Wage Orders pleaded by the Claimant and relied on in calculating the underpayments. The Respondent did not fault the underpayment calculations. All that the Respondent's witness said was that the Claimant was paid in accordance with the contract signed by both parties, which contract the Respondent did not produce in Court. It should be noted, however, that contracting parties cannot oust provisions of the law by their contract, and applicability of the law on their contractual or employment relationship. The claim for ksh. 260,400, being salary underpayment, is allowed as prayed.
 19. The claim for issuance of a certificate of service is allowed.
 20. In sum, and having considered written submissions filed by Counsel for both parties, judgment is hereby entered for the Claimant against the Respondent as follows:-
 - a. Unpaid leaveksh. 49,257.6
 - b. Wage underpayments.....ksh. 260,400
 Total ksh. 309,657.60
 21. The sum awarded shall be subject to statutory deductions pursuant to Section 49(2) of the Employment Act.



22. The Respondent shall issue a Certificate of Service to the Claimant pursuant to Section 51 of the Employment Act within thirty days of this Judgment.

23. The Claimant is awarded costs of the suit and interest at Court rates.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 16TH FEBRUARY 2023

AGNES KITIKU NZEI

JUDGE

ORDER

In view of restrictions on physical Court operations occasioned by the COVID-19 Pandemic, this judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

.....for Claimant

..... for Respondent

