



Muthami v Intersecurity Services Ltd (Employment and Labour Relations Cause 2172 of 2015) [2023] KEELRC 283 (KLR) (6 February 2023) (Judgment)

Neutral citation: [2023] KEELRC 283 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 2172 OF 2015**

JK GAKERI, J

FEBRUARY 6, 2023

BETWEEN

MUSANGO MUTHAMI CLAIMANT

AND

INTERSECURITY SERVICES LTD RESPONDENT

JUDGMENT

1. The Claimant initiated this Claim vide a Memorandum of Claim filed on December 8, 2015 alleging that the Respondent was withholding his dues.
2. The Claimant avers that he was employed by the Respondent as a guard in March 2003 and voluntarily resigned on August 1, 2014 upon issuing notice as required by law.
3. The Claimant further avers that on October 16, 2014, the Kenya National Private Security Union demanded the sum of Kshs 566,231.00 from the Respondent but to no avail.
4. That a further request for submission of the Respondent's proposal from the Ministry of Labour, Social Security Services was also dishonoured.
5. That the Claimant's due remain outstanding.
6. That as at the date of termination, the Claimant's net salary was Kshs 10,475.07 per month.
7. The Claimant prays for;
 - a. A declaration that the Respondent's action of withholding the Claimant's dues and/or benefits is unlawful, illegal and without any basis at all.
 - b. The Respondent to pay the Claimant the following admitted dues and benefits as applicable.



- i. Underpayment of wages, unpaid overtime, unpaid rest/off days and other dues for 11 years Kshs 472,220/=
- ii. Leave for 11 years worked Kshs 10,912/=
- iii. Service for 11 years worked Kshs 83,099/=
- iv. Interest at court rates from July 31, 2014 till payment in full.
- v. Costs.

Respondent's case

8. In its Memorandum of Defence filed on June 8, 2017, the Respondent avers that the Claimant was employed by the Respondent on March 8, 2003 and left on July 31, 2014 pursuant to a resignation letter dated June 29, 2014 and was paid all dues in full.
9. That apart from one incident that was amicably resolved, the Claimant had a good working relationship with the Respondent.
10. The Respondent denies having received a letter from the Ministry of Labour but admits receipt of the demand from the union dated October 16, 2014.
11. It admitted that the Claimant's net salary was Kshs 10,475.07
12. The Respondent further avers that it did not owe the Claimant any dues.
13. The Respondent prays for;
 - a. Declaration that the Claimant was paid all sums owed to him after resignation.
 - b. Dismissal of the Claimant's case with costs.
 - c. Any other reliefs the court may deem fit and just to grant.

Claimant's evidence

14. The Claimant testified that he was paid the salary for July 2014 and was claiming dues for 11 years.
15. That the Ministry of Labour and the Respondent did not meet.
16. That the union told him that he was being underpaid.
17. The Claimant testified that he was not a casual employee but permanent and his dues amounted to Kshs 566,237.00.
18. On cross-examination, the witness confirmed that he did not proceed on annual leave and had a warning letter.
19. It was his testimony that he was a member of the NSSF and the payslip on record had a NSSF number and an entry for overtime for the time worked.
20. That he used to work for 6 days a week and rested on Sunday and he had no record of the agreement that he would be paid his dues.
21. On re-examination, the witness testified that he used to receive overtime pay but was claiming what he had not been paid as well as leave days.



Respondent's evidence

22. RWI, Mr Isaac Okwiri confirmed on cross-examination that the Claimant's salary was Kshs 10,475.07 per month and he served for 11 years. That the Respondent computed and paid the Claimant's dues but he had no evidence of payment.
23. It was RWI's testimony that the Respondent did not respond to the union's letter.
24. The witness testified that the Claimant resigned on account of his age and had not proceeded on leave.
25. On re-examination, RWI testified that the Claimant resigned on his own volition and had not raised the issue of underpayment and was not denied annual leave.
26. That the Claimant used to receive overtime as part of the salary.

Claimant's submissions

27. The Claimant's counsel relied on the decision in [*Naftali Mogaka Nyaboga V Kisii County Government & another \(2022\) eKLR*](#) to urge that withholding of the Claimant's dues was unfair and unlawful and contrary to the provisions of Sections 5, 17 and 18 of the [*Employment Act*](#).
28. Reliance was also made on the sentiments of Mbaru J. in [*Jason Mogaka Otiso V Shadrack Obuga Mukanda \(2016\) eKLR*](#) on failure by an employer to pay the employee for their labour.
29. The court was urged to make a similar holding.
30. The decision in [*Isaiab Gathogo Kamau V Board of Management St Antony Schools & another \(2021\) eKLR*](#) was relied upon to urge that the Claimant was entitled to recover the underpaid wages and overtime.
31. The court was urged to award the prayers made as the court had awarded in previous decisions.
32. Finally, reliance was also made on the decision in [*Wycliffe Juma Ilukol V Board of Management Father Okodui Secondary School \(2022\) eKLR*](#) to buttress the submission.
33. As regards other reliefs, the decisions in [*Jane Achieng & another V University of Nairobi \(2015\) eKLR*](#) and [*Stephen Miheso V Kaimosi Tea Estate Ltd \(2014\) eKLR*](#) were relied upon. In the latter case, the court granted service gratuity as computed.

Respondent's submissions

34. According to the Respondent, the only issue for determination is whether the Claimant is entitled to the dues he was claiming.
35. It was submitted that the Claimant had on a balance of probabilities failed to prove the claim against the Respondent.
36. On underpayment, it was submitted that the Claimant did not provide the relevant Regulation of Wages Orders to demonstrate the alleged underpayments and the payslips for 2010, 2011, 2012 and 2013. It was urged that the claim was unproven.
37. As regards unpaid house allowance, it was submitted that the payslip on record showed that the Respondent paid a housing allowance contrary to the union's letter. The court was urged not to award any housing allowance



Unpaid Rest/off-days

38. The Respondent submitted that according to the letter by the union, the Claimant worked for 4 years without a break, which was highly unlikely. That the Claimant adduced no evidence that he worked without rest.

Unpaid overtime pay

39. It was submitted that this prayer had to fail because the Claimant's payslip on record had an entry for overtime and there was no indication that the Claimant did not receive overtime pay the previous months.

Public holidays worked and not paid

40. The Respondent submitted that the claim lacked particulars on the public holidays in question and what year. That it was not automatic that all the years had similar public holidays.

Leave earned and not taken

41. It was submitted that the Claimant's claim that he worked for 11 years without leave was untruthful as the Respondent provided evidence of applications for leave by the Claimant. The court was urged not to award the claim.

Service pay

42. The Respondent submitted that since the Claimant's payslip for June 2014 showed that he was a member of the National Social Security Fund (NSSF), the Claimant was not entitled to service pay by virtue of the provisions of Section 35(6) of the *Employment Act*.
43. Finally, it was submitted that the Claimant acted in bad faith by filing this suit as he resigned voluntarily and had not raised these issues when in employment and accepted his dues as computed by the Respondent. That the Claimant had a plan to sue the Respondent even before he resigned.
44. The court was urged to dismiss the suit with costs.

Determination

45. The only issue for determination is whether the Claimant is entitled to the reliefs sought.
46. It is not in dispute that the Claimant was an employee of the Respondent from March 2003 to July 2014 and the two separated voluntarily after the Claimant gave a one (1) month notice vide a letter dated June 29, 2014.
47. The Claimant thanked the Respondent for having given him opportunity to be part of its team for 11 years.
48. The penultimate sentence of the letter requested the Respondent to compute the Claimant's 'benefits and dues accordingly.'
49. Puzzlingly, while the Claimant alleges that the Respondent unlawfully and illegally refused and/or neglected to pay his dues/benefits, the Respondent averred that the Claimant was paid all amounts owed to him.



50. The Claimant testified that the Respondent paid the July 2014 salary only and that was why he sought assistance of the union which wrote to the Respondent on October 16, 2014 and the Ministry of Labour, Social Security and Services letter dated December 15, 2014 and none of the letters was responded to by the Respondent.
51. Although RWI confirmed on cross-examination that the Respondent computed and paid the Claimant's dues, he provided no documentary evidence of the particulars and payment.
52. The court is left wondering why the Respondent did not furnish the court with evidence that it indeed computed and paid the Claimant's dues when they separated.
53. RWI was categorical that he had no evidence of any payment made to the Claimant.
54. From the evidence on record, the court is persuaded and finds that the Respondent has on a balance of probabilities failed to prove that it computed and paid the Claimant's dues other than the salary for July 2014.
- 55.

On non-payment of dues and/or benefits to an employee, the court is in agreement with the sentiments of Mbaru J cited by the Claimant's counsel as follows;

' However, an employer who fails to pay the employee for their labours, puts such an employee to live in servitude, it is inhumane, degrading and a serious violation of Constitutional rights to earn a living and live a life of dignity. An employee who has laboured for a full month and depends on such a wage to support his basic needs, and such wage is denied of him is not only denied such wage unlawfully but is reduced to his lowest ebb in his life. Such becomes a death warrant.'

56.

57. I will now proceed to examine the claims or reliefs the Claimant is entitled to as follows;
 - i. Underpayment for 11 years
58. From the evidence on record, it is clear that the Claimant did not raise the issue of underpayment with the employer and duly learnt of it from the union after the Claimant left employment.
59. Contrary to the Respondent counsel's submission that the Claimant did not provide the relevant Regulation of Wages Orders or payslips to prove the alleged underpayment, the Regulation of Wages Orders are legal and accessible to the court and the fact of underpayment is discernible by perusal of the law.
60. Puzzlingly, neither the Claimant nor the Respondent provided evidence as to whether the Claimant was a day or night guard. To ensure fairness to the Claimant, the court will presume he was a night guard.
61. As at the date of resignation, the Claimant's salary was Kshs 10,052 while the prescribed minimum wage for a night guard was Kshs 10,911.70 per month exclusive of house allowance. On the face of it, the Claimant was underpaid by Kshs 859.70 per month from May 1, 2013.



62. As observed by Mbaru J in *Jason Mogaka Otiso V Shadrack Abuga Mukanda* (Supra),
- ' The Wage Orders are set to regulate the employment of security guards such as the Claimant was. A minimum wage is set to guide employers in ensuring a fair remuneration of its employees. Such minimum does not prevent an employer to increase the wage.'
63. Equally, the Regulation of Wages Orders which predate the *Constitution* of Kenya, 2010 were and are intended to enhance the right to fair remuneration.
64. Without other payslips or other evidence of the Claimant's wages or salary before May 1, 2014, it is difficult for the court to determine whether or not the Claimant was indeed underpaid.
65. Contrary to the Claimant's counsel's submission that the Claimant was underpaid for 11 years, the Claimant adduced no evidence to that effect except for 2013/2014 which is apparent. However, since the same had accrued, it became an entitlement and is recoverable but for upto 3 years only consistent with the provisions of Section 90 of the *Employment Act*, 2007.
66. The Regulation of Wages (General) Orders 2010, 2011, 2012 and 2013 prescribed the minimum basic wage of a Night guard as follows; Kshs 7,523, Kshs 8,463, Kshs 9,571.65 and Kshs 10,911.70 respectively.
67. For the above-stated reasons, the Claimant is awarded underpayment for 3 years effective the date of separation. Counsel for both parties shall compute and file the same for adoption by the court.
- ii. Unpaid overtime
68. The court is in agreement with the Respondent's Counsel's submission that this prayer must fail. The Claimant adduced no evidence on when he rendered the services. He did not disclose his reporting and exit times or work schedule, the number of hours is uncertain as it is the time frame.
69. Relatedly, the Claimant's payslip on record reveals that the Claimant received overtime pay at the end of the month for the time served and led no evidence to show that it was not paid the previous months. Significantly, RWI confirmed the Claimant was paid monthly.
70. The claim for overtime lacks the necessary particulars. It is unsustainable and is accordingly dismissed.
- iii. Unpaid rest/off-days
71. On cross-examination, the Claimant testified that he had one day off, on Sundays per week consistent with the provisions of Section 27(2) of the *Employment Act*. Equally, RWI confirmed that the Claimant used to apply for off or rest days other than annual leave.
72. From the evidence on record, it is unclear as to how many off/rest days the Claimant is claiming payment for and when the Claimant on rest days.
- The prayer lacks the necessary particulars and fails.
- iv. Leave for 11 years worked Kshs 10,912.00
73. The Claimant testified that he did not proceed on leave during his employment though records show that he applied for off-days in 2004, 2006 and 2007.



74. Similarly, RWI confirmed on cross-examination that he did not proceed on leave for the duration of employment. It is unclear why the Claimant did not apply for annual leave and did not testify that he applied and the same was denied.

In the premise, the Claimant is awarded leave pay for 3 years.

v. Service pay for 11 years Kshs 83,099/=

75. The Claimant adduced no evidence of entitlement to service pay and counsel and did not submit on it.
76. On cross-examination, the Claimant confirmed that he was a member of the NSSF and the Respondent remitted contributions as evidenced by the payslip provided by the Claimant.
77. Significantly, Section 35(6)(d) of the *Employment Act* provides that service pay provided by Section 35(5) is not payable to an employee who is a member of the National Social Security Fund (NSSF) as the Claimant herein.

The prayer for service pay is unsustainable and is disallowed.

78. The Claimant did not pray for public holidays and house allowance contrary to the submissions by the Respondent.
79. In the end, judgement is entered for the Claimant against the Respondent in the following terms;
- a. Underpayment for last 3 years served to be computed by counsel for both parties and filed for adoption by court.
 - b. Leave pay for 3 years.
 - c. Costs of this suit.
 - d. Interest at court rates from date of judgement till payment in full.
80. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 6TH DAY OF FEBRUARY 2023

DR. JACOB GAKERI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI



JUDGE

