



**Kenya Plantation & Agricultural Workers Union v Hygrotech East Africa Ltd (Employment and Labour Relations Cause E004 of 2022) [2023] KEELRC 648 (KLR) (9 March 2023) (Judgment)**

Neutral citation: [2023] KEELRC 648 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU  
EMPLOYMENT AND LABOUR RELATIONS CAUSE E004 OF 2022**

**HS WASILWA, J  
MARCH 9, 2023**

**BETWEEN  
KENYA PLANTATION & AGRICULTURAL WORKERS UNION .. CLAIMANT  
AND  
HYGROTECH EAST AFRICA LTD ..... RESPONDENT**

**JUDGMENT**

1. The Claimant Union instituted this claim against the Respondents by a memorandum of claim dated February 14, 2022, complaining that one of its member's, Mr Samuel Osiemo, was underpaid his terminal dues upon separation from the Respondent's employment. The Union sought for the following reliefs; -
  - a. Pay of Kshs 127,499 less statutory deductions as full and final payment of the grievant's terminal benefits and any accrued interest therefrom.
  - b. Certificate of service.
  - c. Cost of suit
  - d. Any other relief that the court may deem fit to grant.

**Claimant's Case.**

2. The Claimant, a registered trade union within the meaning of section 2 of the [Labour Relations Act](#), represents unionisable employees within the agricultural sector. It institutes this suit stating that the Respondent employed their member and the grievant herein, Samuel Osiemo, as a security guard on June 1, 2008 and worked till February 28, 2019 when he was declared redundant. At the time of termination, he had served the Respondent for 11 years, earning a monthly salary of Kshs 14,000.



3. Prior to the termination, the grievant was served with redundancy notice on January 22, 2019. His terminal dues were tabulated and the breakdown served upon him on January 22, 2019 showing that the grievant was to take home Kshs 71,465.67. He registered his disapproval and informed the Respondent of his dissatisfaction of the terminal dues paid to him.
4. Since the Respondent did not take any action to address the grievant's dissatisfaction, the issue was raised with the Claimant where the Claimant took up with the Respondent, especially on the mode of calculation of the terminal dues and requested for a meeting to harmonize the tabulations of the terminal dues. Despite several follow up, the Respondent went mute on the issue.
5. Having failed to secure the audience of the Respondent, the Claimant escalated the issue to the Ministry of Labour vide a letter of April 25, 2019. The labour officer appointed a conciliator that convened a meeting for the parties scheduled for August 18, 2020 at 2:30 pm, which the Respondent failed to attend, despite service. Another meeting was convened for September 3, 2020 by the letter of August 21, 2020 which the Respondent again ignored. The conciliator was forced to issue a certificate of disagreement dated September 11, 2020 paving way for the filling of this suit.
6. During hearing the Claimant called the grievants as its witness who testified as CW-1 and adopted his witness statement and produced the documents as his exhibits and in addition stated that he was not paid the full amount of his terminal dues and also that three years preceding his redundancy, he was not granted leave.
7. Upon cross-examination by Muli Advocate, the witness testified that his claim was for payment of the difference of his terminal dues being Kshs 127,900. He stated that at the time of termination he was paid Kshs 64,000 and that he is seeking for Kshs 127,000 being leave and deductions made. He also told this Court that he was entitled to 21 days leave pay for each year having worked. He also testified that although the contract indicates that any leave not taken is considered forfeited, the Respondent had promised to pay him. He added that he joined the Claimant Union in March, 2018 and remained a member.
8. On re-examination, he stated that he was not allowed to go on leave because he did not have a reliever and thus the Respondent promised to pay him his leave dues.

### **Respondent's Case.**

9. The Respondent entered appearance on the May 18, 2022 and filed a response to claim on the June 22, 2022 denying all the contents of the claim and stating that the grievant's pay of Kshs 14,000 was the consolidated gross salary which was subject to statutory deductions. On that basis the Respondent state that the cumulative terminal dues were Kshs 94,088 which money was subject to statutory deductions.
10. It averred that, they were not aware that the grievant was a member of the Claimant and that the issue of membership was not brought to their attention, either by the employee or the Union.
11. The Respondent admitted to the fact that a conciliatory meeting was convened by the ministry of labour office and stated that the Claimant did not have any locus to represent the grievant in the conciliation process.
12. It is stated that the Claimant and the grievant protested on the cumulative terminal dues, particularly on how the Respondent had calculated the dues but did not provide alternative calculation of the terminal dues or how the grievant was underpaid, which particulars of underpayments have not been demonstrated in this claim.



13. The Respondent maintained that it calculated the terminal dues owing to the Claimant in accordance with the law and the allegation by the Claimant is without basis.
14. On the certificate of service, the Respondent stated that it prepared the same and informed the grievant of its availability in its head office in Limuru but the grievant has failed to collect it to date.
15. The Respondent also questioned the locus standi of the Claimant to bring this suit on behalf of the grievant and stated that the grievant was not a member of the Claimant and thus the Claimant does not have any authority to institute the claim on his behalf.
16. The Respondent also stated that the suit herein is time barred as it offends the provisions of section 90 of the *Employment Act* and on that basis, urged this Court to strike out the the Claimant’s Case.
17. The Respondent summoned its Head of finance, Yegon Caleb Kimutai, as its witness who testified as RW-1. He adopted his statement of June 26, 2022 and produced the documents field on even dated as Respondent’s Exhibits.
18. On cross examination, he testified that an employee could apply for leave with their supervisor and once its approved, they fill a form and proceed on leave. He stated that the grievant was granted all the leave days he requested. on the terminal dues paid, the witness testified that the dues were calculated and paid as per the pay slip of February 28, 2019 and in the pay slip it has a column for other deductions which included salary advance. He admitted that they did not explain to the grievant what ‘other deductions’ entailed.

#### **Claimant’s Submissions.**

19. The Claimant submitted on two issues; whether the grievant’s terminal benefits were underpaid and whether he deserve the reliefs sought.
20. On the first issue, it was submitted that the calculations by the Respondent of the terminal benefits that the grievant is entitled to was marred with discrepancies. He argued that the grievant was not granted leave despite applying for it and it being a right of an employee as was state in *Kenya Airline Pilots Association V Kenya Airways PLC* [2021] Eklr.
21. It was submitted that the calculation of the grievants terminal dues was not in tandem with the dictates of Section 40 of the *Employment Act* which required for the employer to pay severance pay at the rate of 15 days for each completed year of service. In this they relied on the case of *Tibbs Vincent Robert V SGS Kenya Limited*[ 2022]ekl where the Court held that;
 

“Severance pay is regulated under Section 40 [1] [f] of the Employment Act. It provides that severance shall be paid at the rate of not less than 15 days’ salary for each completed year of service. The Claimant had 7 complete years of service, which based on his monthly salary and a minimum of 15 days’ salary, for 7 years, would result in, and the Claimant is granted severance pay at Kshs 7,686,423.”
22. On the reliefs sought, the Claimant relied on the case of *Daniel Mburu Muriu V Hygrotech East Africa Limited*[2021] eklr where the Court held that;
 

“Essentially, the Act allows an employer to terminate an employee. However, the said right on the part of an employer is regulated by Sections 40, 43, and 45 of the Act. Section 40 specifically places obligations and conditions that an employer ought to meet before declaring an employee(s) redundant. Those conditions include the following:-(i) An



employer, where an employee(s) is a member of a trade union, shall issue at least one (1) month's prior notice of the intended redundancy to the union and the area labour officer.(ii) Where the employee(s) is not a member of a union, the notice shall issue to the employee(s) and the labour officer.(iii) In arriving at the decision on the employee(s) to be affected by redundancy the employer has to consider seniority in time and skill, ability and reliability especially of the employees(s) to be affected.(iv) An employer must ensure that even an employee(s) who is not a member of a trade union does not lose benefits under any subsisting collective bargaining agreement.(v) Any pending leave shall be paid for in cash before the employee is let go on redundancy (\*This part of the law needs reform as payment in cash is a rather outdated mode of payment. The provision should be to the effect that the pending leave shall be paid for promptly before the employee is released. And in any event, there is nothing that should prevent such payment to be made along with the other dues). But as it stands for now, the law is that the leave pending shall be paid in cash before the employee is let go.(vi) The employer shall pay the employee(s) affected severance pay at the rate of not less than 15 days for each completed year of service.”

23. From the foregoing, the Claimant submitted that the Respondent ought to have paid the grievant his terminal benefits in full.
24. With regard to its locus, the Claimant submitted that the grievant was their member and the fact that the union was not remitting dues to it does not disqualify the grievant from being a member. In fact, that Section 52 of the *Labour Relations Act* allows an employee to remit its union dues directly to a union.
25. On the leave forfeiture issue raised by the Respondent, the Claimant relied on the case of *Rumba Mnyika Nguta V Southern Hills Development Agency Limited t/a Radio Kaya* [2020] eklr where the Court held that;-

“The Employment Act does not support the leave forfeiture clause, contained in Claimant’s contract. The Court does not agree that leave entitlement was forfeited, when it was not utilized. There is no provision in law, supporting forfeiture. Leave, when not taken, becomes an accrued benefit, which is monetized, and paid out, at the request or demand, of the Employee. The Claimant is granted Annual Leave Pay of 11 days at Kshs 4,230.”
26. Based on the above cited case law, the Claimant submitted that the Respondent ought to have paid all the leave days not taken by the Grievant.

### **Respondent’s Submissions.**

27. The Respondent submitted on two issues; whether the claim of Kshs 127,499 is merited and whether the claim for costs is merited.
28. On the first issue, it was submitted that the claim for the sums herein is amorphous because it has not given any breakdown of what the underpayment entail. It was submitted that save for the two years leave not paid, the rest of the claim was not substantiated. He argued that the claim ought to have been specified to allow the Respondent give a substantive explanation if any, in this they relied on the case of *Republic V Commissioner of Domestic Taxes Ex parte Sony Holdings Limited* [2019] eklr where the Court held that;-

“The function of a pleading in civil proceedings is to alert the other party to the case they need to meet, (and hence satisfy basic requirements of procedural fairness) and further, to



define the precise issues for determination so that the court may conduct a fair trial. The cardinal rule is that a pleading must state all the material facts to establish a reasonable cause of action (or defence). The expression “material facts” is not synonymous with providing all the circumstances. Material facts are only those relied on to establish the essential elements of the cause of action. It is of course, a basic principle that particulars of claim should be so phrased that a defendant may reasonably and fairly be required to plead thereto. This must be seen against the background of the further requirement that the object of pleadings is to enable each side to come to trial prepared to meet the case of the other and not be taken by surprise. Pleadings must therefore be lucid and logical and in an intelligible form; the cause of action or defence must appear clearly from the factual allegations made.”

29. They also cited the case of *Independent electoral and boundaries commission and another v Stephen Mutinda Mule and 3 others* [2014] eklr where the Court cited the decision by Malawi supreme Court decision in *Malawi Railways Ltd Vs Nyasulu* [1998] MWSC 3 and Nigerian case of *ADetoun Oladeji (NIG) LTD Vs Nigeria Breweries PLC* SC 91/2002, where Judge Pius Aderemi JSC expressed himself, as follows;

“...it is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.”

30. To emphasize on their argument, they relied on the case of *Elizabeth O Odhiambo v South Nyanza sugar Co Ltd* [2019] eklr where the Court held that;

“The court, on its part, is itself bound by the pleadings of the parties. The duty of the court is to adjudicate upon the specific matters in dispute, which the parties themselves have raised by their pleadings. The court would be out of character were it to pronounce any claim or defence not made by the parties as that would be plunging into the realm of speculation and might aggrieve the parties or, at any rate, one of them. A decision given on a claim or defence not pleaded amounts to a determination made without hearing the parties and leads to denial of justice.”

31. Accordingly, it was submitted that the Claimant did not plead for leave pay either for the 9 years or 3 years as such the Claimant of leave ought to be disregarded because parties are bound by their pleadings. He argued that although the demand letter had given a breakdown of the figure of Kshs 127,000 to include; Travelling allowance of Kshs 1500, one-month salary in lieu of notice of Kshs 14,000, severance pay for 10 years of Kshs 69,999 and accrued leave for three years, it did not lay basis for the travelling allowance or the severance pay underpayment. Further that the notice pay is not payable because the grievant was given one-month redundancy notice.

32. On the leave claim, the Respondent cited the case of *Rael Namasa Likhayo V Lake Fill Station* [2022] eklr where the Court Held that;

“The Claimant sought Kshs 148,500/- on account of leave accrued over 15 years of employment. The Claimant did not disclose whether she applied for leave and was denied or whether the leave was accrued with the approval of the Respondent. Without a proper evidential foundation and in consideration of section 28(4) of the Employment Act, 2007, the Court declines to allow this head of the claim.”



33. Subsequently, it submitted that the Claimant is seeking to be awarded severance pay twice because even if the claim of Kshs 127,000 was to hold water, then they ought to have deducted the money admitted which included severance pay. The Respondent, in conclusion, urged this Court to find in their favour and dismiss the suit herein with costs.
34. I have examined all the evidence and submissions of the parties herein. The main claim by the Claimant is for payment of the grievant's terminal dues which he avers were not fully paid.
35. The grievant testified that he worked for the Respondent for 11 years and was finally terminated on redundancy. He was paid kshs 69,041.10/= as his severance pay.
36. The Claimant contends that he was underpaid in terms of notice pay, travelling allowance one way and leave for 3 years. I note that in the letter notifying the grievant of his redundancy dated 22/1/2019, the redundancy was effective after 28/2/2019.
37. Adequate notice was therefore accorded to the Claimant and he is therefore not entitled to notice pay.
38. On issue of leave, grievant had prayed for 3 years leave.
39. However, there is no indication that the grievant had sought to go on leave and the same was denied.
40. I find he is only entitled to leave for the last year of service which I grant him at 14,000/=.
41. The grievant has not also demonstrated why he prayed for travelling allowance of 1,500/= which I find he is not entitled to.
42. I only award Claimant the leave due for 1 year which is equal to 14,000/= plus costs.

**DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 9<sup>TH</sup> DAY OF MARCH, 2023.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

In the presence of:

Awino holding brief Saya for Claimant – present

Muli for Respondent – present

Court Assistant – Fred

