



**Mutie v KB Sanghani & Sons (Cause 100 of 2021)
[2023] KEELRC 594 (KLR) (2 March 2023) (Judgment)**

Neutral citation: [2023] KEELRC 594 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 100 OF 2021**

**AK NZEI, J
MARCH 2, 2023**

BETWEEN

MZEE MUTHAMA MUTIE CLAIMANT

AND

KB SANGHANI & SONS RESPONDENT

JUDGMENT

1. *Vide* a Memorandum of Claim dated November 22, 2021 and filed on even date, the Claimant sued the Respondent and claimed:-
 - a. compensation for public holidayksh 70,000
 - b. service pay for 14 years 30,000x14 years..... ksh 210,000
 - c. annual leave 14 years30,000 X7 years = ksh 210,000
 - d. overtime 5.30 am to 8.30 pmksh 653,184
 - e. unremitted statutory deductionsksh 66,000Total = ksh 1,209,184
2. The Claimant pleaded that he was employed by the Respondent from November 2013 until March 2021 when he retired, earning a monthly salary of ksh 30,000 exclusive of house allowance. That he worked diligently for ten years. The Claimant further pleaded:-
 - a. that during the whole tenure of his employment, he was not paid overtime, to which he was entitled.



- b. that Section 17(1) of the Employment Act expressly provides that an employer shall pay the entire wages earned by or payable to an employee in respect of work done by the employee in pursuance of contract of service directly.
 - c. that Section 18(5) of the Employment Act further provides that upon termination of a contract of service, it shall be the duty of the employer to ensure that the employee is paid the entire amount of the wages earned by or payable to the employee and of the allowances and benefits due to him which have not been paid.
 - d. that despite notification of the intention to retire and demand made, the Respondent failed, ignored and neglected (to pay) the Claimant's terminal benefits.
3. The Respondent entered appearance January 17, 2022 and filed Response to the Claimant's claim on the same date. The Respondent denied the Claimant's claim and pleaded:-
 - a. that the Claimant was employed by the Respondent effective from November 2013 at a gross salary of ksh 30,000, which was inclusive of house allowance.
 - b. that as a truck driver, the Claimant was tasked with driving a truck loaded/unloaded with cement raw material from Kokotoni in Kilifi County to AthiRiver in Machakos County; and that as a company policy and custom, every driver was supposed to make 10 trips per month that would ordinarily translate to an average of 200 hours per month and 8 hours per day; and that the Claimant's working hours would begin after loading or off-loading of the track.
 - c. that the Claimant's working hours never exceeded the normal working hours at all material time, and that the Claimant never met the mandatory ten trips in any given month, which would translate to 7.7 hours per day; and that the Claimant was nonetheless paid ksh 682,500 as overtime which was not due to him, and which the Respondent reserved the right to reclaim. That as a result of the Claimant's poor performance, the Respondent company made a loss of ksh 3,780,000 fixed cost.
 - d. that the Claimant worked for an average of 16 days per month, and that in the event that the Claimant was required to work whenever there was a ship off-loading, he was paid an overtime allowance of ksh 300-400 per trip from the port to the off-loading site, translating to an overtime payment of ksh 130,800.
4. The Respondent did not raise any counter-claim against Claimant.
5. When trial opened on June 16, 2022, the Respondent adopted his filed witness statement dated November 22, 2021 as his testimony. He also produced in evidence some eight documents listed on his filed list of documents also dated November 22, 2021. The listed documents included copies of the Claimant's payslip, NHIF-card, Truck Movement Authorization, Shift Schedule and demand letter dated October 4, 2021, among others.
6. The Claimant further testified that:-
 - a. he worked for seven years as a truck driver and that whenever he asked for leave he was denied.
 - b. that although the Respondent company's director had directed drivers work for the normal hours, at times the nature of work demanded that they work until 10.00pm, and overtime was not paid.
 - c. that the ksh 300 paid per local trips from the port to Kokotoni in Kilifi was meant for eating or repairing tyre puncture, while the ksh 3,500 meant for Athi-River trips was paid, ksh 1,500



on departure and ksh 2,000 upon return, but on condition that the vehicle came back without any problem.

- d. that about 2018, the Claimant applied for leave and that for that (particular) one, he was paid less than ksh 15,000.
 - e. that there were no specific trips that the Claimant had to make per month.
7. Cross-examined and re-examined, the Claimant testified:-
- a. that the ksh 3500 paid per trip to Athi-River was travelling allowance.
 - b. that the Claimant was paying NSSF.
 - c. that the Claimant worked for seven years, and was paid only one leave, and that he did not sign the leave application dated March 1, 2021.
 - d. that the Claimant had not given particulars of public holidays on which he alleged to have worked.
8. The Respondent called one witness, Naredra Kumar Saghani (RW-1) who told the Court that he was a transport and general contractor in the name KB Sangani & Sons. He adopted his filed witness statement dated January 15, 2022 as his testimony. He also produced in evidence the thirteen documents listed on the Respondent's list of documents dated January 17, 2022. These included the Claimant's NSSF statement, the Claimant's payslip for April 2021, the Claimant's letter to the Respondent dated June 18, 2016 asking for payment in lieu of leave for the year 2013, 2014 and 2015, the Claimant's undated letter received by the Respondent on November 15, 2020 asking for leave payments except for 2014 for which payment had been made and an unsigned leave application form dated March 1, 2020, among other documents.
9. The witness (RW-1) further testified:-
- a. that the Claimant was not working on public holidays as no loading or off-loading is done on public holidays.
 - b. that the Claimant had 58 outstanding leave days, which were paid by cheque.
 - c. that the Claimant did not work overtime and that for every trip to Nairobi from Mombasa, the Claimant was given ksh 3,500.
 - d. that all statutory deductions were remitted.
10. Cross-examined and re-examined, RW1 testified:-
- a. that the Respondent did not have any evidence to show that he paid overtime.
 - b. that on leave payment, the Claimant had signed on the letter dated 18/5/2016 to the effect that he had received ksh 16,900, and that on 5/11/2020, the Claimant was paid ksh 30,000.
11. Upon considering the pleadings filed and evidence presented by both parties, the single issues that falls for determination is whether the Claimant is entitled to the reliefs sought.
12. The claim for ksh 70,000 regarding public holidays allegedly worked by the Claimant was not particularised in the Claimant's statement of claim. He did not state the particular public holidays on which he allegedly worked. He did not also refer to any wage regulation guidelines to aid the Court in determining the amount payable for any particular holidays worked during the period of employment. Claims of this nature are in the category of special damages, and must be specifically pleaded, with



specific particulars, and strictly proved. Claiming a global sum without particulars on how the figure was arrived at is a practice that must stop. The claim was not proved, and is declined.

13. Likewise, the claim for overtime must fail and is declined. The Claimant did not plead particulars of the claim, and did not prove the same. It was held as follows in the case of *Rogoli Ole Manadiégi vs General Cargo Services Limited* [2016] eKLR:-

“the burden of establishing hours or days served in excess of the legal maximum, rests with the employee. The Claimant did not show in the trial Court when he put in excess hours, when he served on public holidays or even rest days. The evidence on record does not even separate normal overtime from overtime on rest days and public holidays. The rates of compensation are different. He did not justify the global figure claimed in overtime, showing specifically how it was arrived at, based on the Regulations of Wages (Protective Security Services) Order 1998. He correctly urges on application of the Order, but gave no consistent evidence showing the hours worked, and how these hours gave rise to the figure of ksh 222,350 claimed as the overall overtime.”

14. The claim for service pay for fourteen years or whatever number of years must fall by the wayside. The Claimant admitted, and was shown to have been a member of NSSF and a contributor to the Fund through out the period of his employment. Section 35(6) (d) of the *Employment Act* disqualifies him from claiming service pay. The claim is declined.
15. The Claimant claimed leave pay for fourteen years, but pleaded and testified that he worked for the Respondent from November 2013 to March 2021, for a period of seven years. He testified to having received payment in lieu of leave for the year 2014, and denied having taken leave or received payment in lieu for any other year during the period of employment. Indeed, the Respondent produced in evidence letters written by the Claimant asking to be paid in lieu of leave for the period of employment, save for the year 2014. The dates of those letters are stated in paragraph 8 of this judgment.
16. The Claimant pleaded and testified that he retired from his employment with the Respondent in March 2021, after issuing a retirement notice on January 28, 2021 in that regard. The Respondent did not adduce any evidence to show that the Claimant worked beyond March 2021. It is, therefore, not clear how the Claimant could have been paid salary for April 2021 when he was already retired, and leave pay of ksh 30,000. The April 2021 payslip exhibited by the Respondent is shrouded in lack of clarity and explanation by the Respondent.
17. Section 74(1) (f) of the *Employment Act* obligates an employer to keep written records of all his employees containing an employee’s annual leave entitlement, days taken and days due as specified in Section 28 of the *Act*. The Respondent has not discharged that obligation in the present case, and it is my finding that the Claimant is entitled to payment in lieu of leave for the period of employment, save for the year 2014.
18. The Claimant was earning a gross salary of ksh 30,000 per month, according to the payslips exhibited by him, and he was entitled to a minimum of twenty one working days’ leave for each completed year of service pursuant to Section 28(1) (a) of the *Employment Act*. I award the Claimant ksh 126,000 for unpaid leave days for the years 2015 to 2020.
19. The claim for unremitted statutory deductions cannot be allowed, and is hereby declined. Once deducted from an employee’s salary, statutory deductions cease being the employee’s entitlement and become a legal entitlement of the statutory body for which the deductions are done. Statutory bodies such as NSSF, NHIF and KRA have elaborate statutory mechanisms on recovery of deductions from



employers who may attempt to hold onto such deductions. I have severally stated this position which, in my view, is in tandem with the relevant statutes.

20. Ultimately, and having considered written submissions filed by Counsel for both parties, judgment is hereby entered for the Claimant against the Respondent for ksh 126,000 being payment for unpaid leave days.
21. The awarded sum shall be subject to statutory deductions pursuant to Section 49(2) of the [Employment Act](#).
22. The Claimant is awarded costs of the suit and interest.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 2ND MARCH 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

