



**Purkei v Xfor Security Solutions Kenya Limited (Cause 1777 of 2017)
[2023] KEELRC 1027 (KLR) (27 April 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1027 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1777 OF 2017
K OCHARO, J
APRIL 27, 2023**

BETWEEN

JACOB MATIKO PURKEI CLAIMANT

AND

XFOR SECURITY SOLUTIONS KENYA LIMITED RESPONDENT

JUDGMENT

1. Through a Memorandum of Claim dated September 1, 2017, the Claimant instituted a Claim against the Respondent seeking the following reliefs:
 - a. A declaration that the Respondent's failure to pay the Claimant his terminal dues was unfair and unlawful and totally failed to follow due process.
 - b. An order for the Respondent to pay the Claimant his terminal dues and compensatory damages totalling Ksh 220,654 with the interest thereon.
 - c. The Respondent to pay the costs plus interest.
2. The Memorandum of Claim was filed together with the Claimant's witness statement and a bundle of documents that he intended to place reliance on as documentary evidence in support of his claim.
3. Having been served with the summons to enter appearance, the Respondent entered appearance on the October 24, 2017 and filed a memorandum of reply on December 1, 2017 and later an amended Memorandum of reply on January 17, 2020. In it the Respondent denied the Claimant's Claim and his entitlement to the reliefs sought.
4. Subsequent to the close of the pleadings, the matter was heard inter-partes on merit on the May 4, 2022
5. At the hearing of the parties' respective cases, the witness statements that they had filed were adopted as part of their evidence in chief and the documents adopted as their documentary evidence.



The Claimant's Case

6. The Claimant stated that he first came into the employment of the Respondent as a guard on about the December 2012. At all material times to this suit, his salary was Ksh 13,400 per month.
7. The Claimant contended that due to the hostile working environment he decided to resign from the Respondent's said employment by giving a one month's notice. The resignation was attracted by the fact that the Respondent was not paying him his monthly salary consistently and transfers were so often. The notice was issue at the end of July 2016, and was to take effect on the 31st August 2016. Consequently, on the August 31, 2016, he handed over all the Respondent's property but this notwithstanding, the latter refused to pay him his terminal dues.
8. Due to this, the he claims his terminal dues against the Respondent as tabulated hereunder:
 - i. Unpaid/untaken leave for the entire period of service being Ksh 13,400 X 4 years.....Ksh 53,600.
 - ii. Unpaid /untaken public holiday for the entire period of service being $11/30 \times 13,400 = 4 \text{ years} \times 2 \text{ (double rate)}$ Ksh 39, 303.
 - iii. Overtime for the 4 extra hours worked daily being $13,400/30 \times 1/8 \times 4 \text{ hours} \times 30 \text{ days} \times 12 \text{ months} \times 4 \text{ years} \times 1.5$Ksh 482,371.
 - iv. Service/gratuity at 15 days for the completed year of service being $15/30 \times 13,400 \times 4 \text{ years}$Ksh 26,800.
9. Cross-examined by Counsel for the Respondent he told the Court that he left the Respondent's employment in June 2013 temporarily as he was not being allocated work, it was a downtime for it. However, he was later recalled to join the Respondent's workforce.
10. Asked to comment on the handwritten letter dated August 23, 2016, the Claimant stated that he authored the same. He subsequently worked up to August 31, 2018. He wrote the letter on the advice of one Mr Collins Otieno.
11. On re-exam, he told the Court that he had resigned because of the unsuitable working environment.

The Respondent's Case

12. At the hearing, the Respondent presented one Lenus Mwakio, its Human Resource Manager, to testify on its behalf. The witness testified that the Claimant first came into the employment of the Respondent in the month of December 2012. He worked up to June 2013, when he disengaged from service without notice. After a short while, in October 2013, he went back to the Respondent seeking for employment, the Respondent decided to reemploy him, with effect, October 17, 2013.
13. Under the new employment contract, the Claimant worked up until August 24th 2016 and did not turn up. Therefore, he absconded duty. On the August 29, 2016, he delivered to the Respondent a backdated resignation letter, indicating that he had resigned.
14. The witness asserted that the Claimant didn't resign because of any unsuitable working circumstances, but because he wanted to proceed with his studies. In the resignation letter, he even thanked the Respondent for the support it had accorded him so far.



15. When cross-examined, he told the court that though his witness statement gives an impression that the Claimant deserted duty, the true position is that he wilfully resigned.
16. The allegation that he deserted duty, is not fortified by any documentary evidence for instance an attendance register.
17. It was his testimony that the Claimant was paid his terminal dues including the days worked for in the last month of his employment. The Claimant had no outstanding leave. Compensation for Public holidays worked and overtime was always paid alongside his salary.

The Claimant's Submissions

18. The Claimant filed his Submissions on June 10, 2022 ventilating two issues for determination thus:
 - a. Whether the Claimant is entitled to his terminal dues as prayed.
 - b. Who should bear the costs of the suit.

Whether the claimant is entitled to the terminal dues as prayed.

19. It was submitted on behalf of the Claimant that there cannot be any difficulty for this Court conclude that the employment separation between him and the Respondent occurred when he resigned. The Respondent has not been forthright on how the separation occurred, but the fact that it acknowledged having received the resignation letter, makes it difficult for anyone to believe that he deserted duty.
20. The Claimant's claim that he was not paid his terminal dues was not at all rebutted. The Respondent did not place on the table any documents to support its allegation that it did. The Respondent was duty bound to demonstrate to the court by way of documents that indeed at all material times the Claimant did utilise his leave days. Reliance was placed on section 28 of the *Employment Act* 2007 and the case of *Katana Mwagadi vs Board of Governors Takaye Primary School* (2017) eKLR.
21. The Claimant submitted that the Respondent did not produce any documents or records to confirm their assertion that the Claimant was paid for the public holidays worked, consequently he is entitled to the relief under this head. Reliance was placed on the case of *Edwin Odhiambo Sindala vs Samba Enterprise Limited & another* (2018) eKLR.
22. The Claimant further submitted that he was entitled to the overtime payment by dint of section 79 of the *Employment Act*. It was submitted that he was also entitled to service pay since the Respondent never paid for the NSSF. Reliance was placed on the case of *Elijah Kipkoros Tonui vs Ngara Opticians T/a Bright Eyes Limited* (2014) eKLR.

The Respondent's Submissions

23. Despite directions by this Court filing of submissions, the Respondent failed to file the same.

Analysis and Determination

24. From the pleadings, evidence on record as well as the submissions by the Claimant, the following issues present themselves for determination thus:
 - a. How did the employment separation between the Claimant and the Respondent occur?
 - b. Whether the Claimant is entitled to the reliefs sought.



- c. Who should pay the costs.

How did the separation occur?

25. It was the Claimant's position that through his letter of resignation dated August 23, 2016, he resigned from his employment with the Respondent. The resignation took effect, September 1, 2016. In its amended reply to the memorandum of claim, paragraph 10 and 11, the Respondent gave a clear signal that its position as regards the separation, was that the claimant deserted duty. The position was maintained in its witness's statement. Worth stating that pressed under cross-examination, the witness admitted that contrary to the impression, the Claimant actually resigned.
26. By reason of the premises, I conclude that the separation occurred when the Claimant resigned from employment resignation which took effect on the date hereinabove stated.

Whether the claimant is entitled to the reliefs sought.

27. Payment of remuneration to an employee who has rendered services under a contract is a statutory duty on the part of the employer and the right of an employee. Any delays concerning the payments of remuneration or default in the payment of the same amounts to a breach to remunerate, both under the law and the contract of employment.

a. Unpaid/untaken leave.

28. The Claimant urged the court to award him compensation for unused leave days, Ksh53,600. Section 28 of the *Employment Act* bestows upon the employee a right to proceed for his or her annual leave. In my view the provision on the other hand places upon the employer a duty to facilitate the proceeding. Where it is demonstrated that the employee didn't utilise his or her statutory leave days fully or at all, he is entitled to compensation in lieu thereof to the extent of the unused days. The Claimant entered the Respondent's service on December 2, 2012 and separated on August 31, 2016, a period of 3 years and seven months.
29. Despite the Respondent arguing that it paid the Claimant all his dues, as he always proceeded for his leave, it did place before this Court any record to support its assertion. One would reasonably expect an employer faced with a dispute as is herein, to tender the records. Section 74 of the *Employment Act* deems the employer the custodian of all the employment documents. Noting the limitation of causes of action imposed by section 90 of the *Employment Act*, I hereby award the Claimant compensation only to the extent of three years' unutilised leave days as tabulated hereunder:

13,400 X 21/30 x 3 Years = Ksh 28,140.

(b) Overtime pay

30. I have carefully considered the resignation letter by the Claimant. I have no doubt that therein he was sure and particular as to what was due and owing to him from the Respondent, in the letter he stated in part;

“I hereby request to pay me my services, holidays and leaves since I joined this Company 2012, till this year September 2016.”

The item “overtime” was not mentioned at all in the letter. If indeed he was owed anything for overtime worked he would definitely have mentioned that in the letter. Further, he



didn't at all lead evidence to establish his claim. The relief sought under this head is for the declining.

c) Payment for the untaken public holidays.

31. The Claimant urged this court to award him Ksh 39, 304, being compensation for holidays worked. Imperative to state that on this benefit, the Claimant had, pre-filing this matter, signalled the Respondent through the resignation letter that he was claiming as against them the compensation. Further in his statement of claim, he specifically pleaded the relief and the amount he was claiming thereunder. In these circumstances, a reasonable employer would not be expected to just make a bald assertion as the Respondent did, that the employee [read the Claimant] was always paid compensation for public holidays worked, without placing forth any documentary evidence for instance a pay roll or pay slip. The Claimant's evidence in support of this claim was not rebutted. In fact, the benefit sought under this head was provided for under the Claimant's employment contract.
32. By reason of the premises, I award the Claimant the sum claimed under the head, Kshs 39,307.

(d) Service /gratuity.

33. The Court of Appeal in *Bamburi Cement Ltd v William Kilonzi* (2016) eKLR wherein it was stated:
- “Turning to the award of gratuity, the first thing that we must emphasise is that gratuity, as the name implies, is a gratuitous payment for services rendered. It is paid to an employee or his estate by an employer either at the end of a contract or upon resignation or retirement, or upon the death of the employee, as a lump sum amount at the discretion of an employer.... Being a gratuitous payment, the contract of employment may provide that the employer shall not pay gratuity if the termination of employment is through dismissal arising from gross or other misconduct.”
34. In the persuasive authority of the then Industrial Court Case No 871 of 2012, Rika, J. held as follows:
- “This law is intended to ensure employees do not enter into retirement without social security. At the same time, the interest of employers is safeguarded, through the restriction on employees being paid double social security benefits. Service pay is therefore payable under Section 35(5) only to employees who are not covered under the different social security mechanisms elaborated under section 35(6).”
35. On strength of the authorities above, it was not right for the Claimant to claim for gratuity as if it is synonymous to service pay. Gratuity is a contractual benefit. The contract between the Respondent and the Claimant didn't provide for it. However, I see not any evidence by the Respondent, from which any limitation imposed by section 35[5] for an employee's entitlement to service pay, can be discerned. Consequently, I find that the Claimant is entitled to the relief of service pay, Kshs 24,008.30.

Who should bear the cost of the suit

36. The cost of this suit shall be borne by the Respondent.
37. In upshot, judgment is hereby entered for the Claimant against the Respondent in the following terms:
- a. Compensation for unutilized leave Ksh 28, 140
 - b. Compensation for public holidays worked Kshs 39,307.



- c. Service Pay..... Kshs 24,008.30.
- d. Interest on the sums hereinabove awarded from the date of this Judgment till full payment.
- e. Cost of the suit.

READ, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 27TH DAY OF APRIL 2023.

OCHARO KEBIRA

JUDGE

In the presence of

Omamo for the Claimant.

Mr. Munguti for the Respondent.

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 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.

A signed copy will be availed to each party upon payment of court fees.

