



**Bagha v Multi-Tools [K] Limited (Cause 713 of 2017)  
[2023] KEELRC 1081 (KLR) (20 April 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1081 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
CAUSE 713 OF 2017**

**AK NZEI, J  
APRIL 20, 2023**

**BETWEEN**  
**ALTAF MOHAMMED HUSSIEN BAGHA ..... CLAIMANT**  
**AND**  
**MULTI-TOOLS [K] LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The Claimant sued the Respondent herein vide a memorandum of claim dated 24<sup>th</sup> August 2017 and filed in Court on 5<sup>th</sup> September 2017. An amended Memorandum of Claim dated 14<sup>th</sup> July 2021 was subsequently filed on 19<sup>th</sup> July 2021. The Claimant pleaded:-
  - a. that the Claimant worked for the Respondent as a Branch Manger from June 2008 to December 2016 when he voluntarily retired, but was never issued with a formal written contract and that this was a serious omission on the part of the Respondent and was in contravention of section 9(1) of the Employment Act.
  - b. that pursuant to Section 9(2) of the Employment Act, it was the Respondent's responsibility to cause the contract of service to be drawn up, and that in the absence of a written contract stating employment particulars such as hours of work, rate of remuneration, entitlement to annual leave, pension/pension schemes and other benefits, the Claimant's terms of employment with the Respondent remained vague and ambiguous to the Claimant's disadvantage.
  - c. that the Respondent is supposed to have stated in a written contract of service particulars of pension and pension schemes applicable to the Claimant upon retirement in accordance with Section 10(3) (iii) of the Employment Act.
  - d. that the Claimant served the Respondent diligently for eight and a half years and retired upon attaining the mandatory retirement age without any prospect of landing any other



employment due to his age, and that the Respondent ought to have paid him gratuity for his long service, in the absence of other pension benefits.

- e. that the Claimant earned ksh 73,000 per month and was paid ksh 57,730 on his payslip and ksh 23,000 in cash, and that at the time of retirement, his salary had increased to ksh 80,703 per month.
  - f. that due to the absence of a written contract of service, the Claimant worked for long hours to the tune of 1 ½ hours overtime every day, including Saturdays. That the Claimant worked for a total of 216 hours per month, contrary to the legal requirement that he works for not more than 180 hours per month, and that extra hours worked be paid for by the Respondent as overtime. The Claimant claimed overtime payment for extra 36 hours per month amounting to ksh 18,180 per month, translating to ksh 1,854,360 for the eight years and a half of service.
  - g. that the Claimant used to work from 7.30 am to well past 5.30pm without lunch breaks every day during week days, and between 7.30 am to 3 pm on Saturdays, and thus worked for 52 hours instead of 45 hours every week, an equivalent of 1 ½ hours overtime per day.
  - h. that there was no contract indicating that the Claimant was a management employee and therefore ineligible for overtime payment. That the Respondent should not be left to benefit from an ambiguity created by themselves as this would amount to servitude and unfair labour practices contrary to Article 41(1) and (2) of the Constitution.
  - i. that although the Claimant was entitled to a minimum of 21 days of paid annual leave every 12 months of service in accordance with the provisions of Section 28 of the Employment Act, he was not given annual leave for 2014, 2015 and 2016, for which the Respondent ought to have compensated him, and that the Claimant claimed ksh 242,190 being compensation for unutilized 63 leave days earned over the three years.
  - j. that the Respondent failed to pay the Claimant house allowance for the entire period of service, thus contravening Section 31(1) of the Employment Act.
  - k. that the Respondent used to pay the Claimant “basic pay” as recorded in the Claimant’s payslips without an element of house allowance, and that the Claimant is entitled to claim house allowance from the Respondent at the rate of ksh 15% of the basic pay which is  $80,730 \times 15\% \times 12 \times 8.5 = \text{ksh } 1,235,220$ .
  - l. that contrary to a verbal agreement and general practice within the Respondent company, the Respondent failed to pay the Claimant commission for the period between April 2015 and December 2016 at the rate of ksh 10,000 per month, amounting to ksh 210,000.
  - m. that the Respondent’s failure to adhere to basic provisions of the Employment Act like issuing a written contract of service, providing the Claimant with a statement of employment particulars, subjecting the Claimant to long working hours without compensation, denial of annual leave and non payment of terminal dues infringed on the Claimant’s constitutional rights to fair labour practices, fair remuneration and fair administrative action. That the Claimant claims general damages and compensation from the Respondent equivalent to 12 months’ salary, amounting to ksh 968,760.
2. The Claimant set out his claim against the Respondent as follows:-
- a. Gratuity at the rate of 25% of total emoluments for 8 ½ years of service being  $80,730 \times 8.5 \times 25\% = \text{ksh } 2,058,615$ .



- b. Overtime = ..... ksh 1,854,360
  - c. Unpaid 63 annual leave days earned in 2014, 2015, and 2016. .... ksh 242,190.
  - d. Unpaid house allowance at the reate of 15% of basic pay for 8 ½ years .....ksh 1,235,220
  - e. Unpaid commission for the period between April 2015 and December 2016 at the rate of ksh 10,000 per month .....ksh 210,000
  - f. General damages .....ksh 968,760
  - g. Costs of the suit and interest.
  - h. Any other relief and remedies that the Court may deem fit and appropriate to grant.
3. Other documents filed by the Claimant included a verifying affidavit, a comprehensive witness statement dated 28<sup>th</sup> January 2022 replicating the averments made in the amended memorandum of claim and an evenly dated list of documents listing three documents; these being a letter of demand dated 5/2/2017, a letter from the Respondent dated 17/2/2017 and a bundle of the Claimant’s payslip for the years 2008 to 2016.
4. On 6<sup>th</sup> October 2017, the Respondent filed a response to claim dated 5<sup>th</sup> October 2017, and on 4<sup>th</sup> August 2021 filed an evenly dated Amended Response to Claim whereby it denied the Claimant’s claim. The Respondent further pleaded:-
- a. that the Claimant’s salary at the point of his resignation was being paid vide bank transfer and a payslip issued, and not in cash.
  - b. that the Claimant worked regular hours as statutorily mandated and his time sheets checking in and out of the Respondent’s premises attest to this fact.
  - c. that the Claimant’s salary was inclusive of house allowance.
  - d. that the Claimant is not entitled to compensation as he resigned voluntarily.
  - e. that the Claimant is not entitled to the reliefs sought.
5. Other documents filed by the Respondent included a written witness statement of one Peninah Wanjiru Njeri dated 8<sup>th</sup> November 2021 and an evenly dated list of documents listing six documents. Documents listed on the said list of documents included the Claimant’s payslips for 2016, the Respondent’s Time Sheets, Leave Application Forms, the Claimant’s NSSF Card, the Claimant’s NSSF Statement of Account and the Claimant’s resignation letter dated 1<sup>st</sup> December 2016.
6. When trial opened on 28<sup>th</sup> January 2022, the Claimant adopted his filed witness statement as his testimony and produced in evidence the documents referred to in paragraph 3 of this judgment. Paragraph 9 of the Claimant’s (further) witness statement states that the Respondent did not pay the Claimant house allowance for the entire period of service. The Claimant further testified:-
- a. that he (the Claimant) worked for the Respondent for 8 ½ years, and only took annual leave in 2010. That he was paid in lieu of annual leave for all the other years save for the years 2014, 2015 and 2016.
  - b. that the Respondent’s Mombasa shop wherein the Claimant was the manager used to open at 8.30 am and close at 5.30 pm, and that the Claimant used to go for prayers from 1.00pm to



1.15 pm or 1.20 pm, and that the extra 1 ½ hours that he put in fell within lunch hour and than 5.00pm.

- c. that the Claimant was not paid gratuity, that his last payslip, for December 2016, did not reflect any such payment; and that nothing was paid to him over and above his last salary.
  - d. that the Respondent did not pay the Claimant's commission during the period April 2015 to December 2016, and that during the preceding years, commission was paid with the Claimant's salary, and ranged between ksh 10,000 to 20,000.
  - e. that the Claimant did not have a written contract.
7. Cross-examined, the Claimant testified that he retired in December 2016 vide a resignation letter dated 1<sup>st</sup> December 2016. The Claimant further testified:-
- a. that he (the Claimant) was earning a salary of ksh 73,003 as at the time of his resignation.
  - b. that although the Respondent's shop opened at 8.30 am and closed at 5.50 pm, the Claimant did not report at 8.30 am every day, and that on some days he left earlier than 5.30pm.
  - c. that on Fridays, the Respondent's shop closed at 12.30 pm and re-opened at 2.00pm to allow Muslim employees to attend prayers.
  - d. that the total number of leave days taken by the Claimant according to the leave application forms filed by the Respondents was four (4).
  - e. that commission was paid to the Claimant by the Respondent based on sales made, and was paid not as a right. That commission was 0.5% of sales made.
  - f. that the Claimant was a member of NSSF.
8. The Respondent called two witnesses, Bilale E. Osman (RW-1), a director of the Respondent company, who adopted his filed witness statement filed on 10<sup>th</sup> November 2021 as his testimony and produced in evidence the Respondent's filed documents referred to in paragraph 5.of this judgment.
9. RW-1 further testified:-
- a. that the Claimant was the Respondent's branch manager, but not sales person. That although commissions were not payable to a manager, the Respondent at times paid commission to the Claimant out of good will, but not as an obligation.
  - b. that the Claimant's agreed salary at the time of his resignation was ksh 76,000 per month, and was inclusive of everything.
  - c. that the Claimant's working hours were 8.30 am to 5.30 pm, with one hour lunch break, and that on Fridays, the lunch break used to run from 12.00 noon to 2.00pm because of Friday prayers.
10. Cross-examined, RW-1 testified:-
- a. that the Claimant's earnings as indicated on his payslips used to fluctuate due to commission paid to him, and that without commission, his salary was ksh 76,000.
  - b. that there was no clocking in system in the Respondent's business premises, and that the clocking in documents produced in evidence by the Respondent did not relate to the years in issue.



11. The Respondent's second witness, Peninah Wanjiru Njeri (RW-2), adopted her filed witness statement dated 8<sup>th</sup> November 2021 as her testimony. Cross-examined, RW1 testified that the clocking in record produced by the Respondent was prepared at Nairobi, and that she (RW-2) did not know what period it covered.
12. RW-2 further testified that she worked with the Claimant in one shop and that they used to open the shop at 8.30am and to close at 5.30pm, with 45 minutes to one hour lunch break.
13. Having considered the pleadings filed and evidence adduced by both parties, and there being no dispute over the fact of the Claimant's employment by the Respondent, the period of such employment and the Claimant's salary at the time of resignation, the single issue that falls for determination is whether the Claimant is entitled to the reliefs sought.
14. The Claimant's claim for payment of (service) gratuity is not based either on terms of a contract of service, a Collective Bargaining Agreement or specific statutory provision. Further, the Claimant was a member of NSSF and Section 35(6) of the Employment Act disqualifies him from claiming service gratuity. The Court of Appeal stated as follows in the case of Bamburi Cement Limited v Wiliam Kilonzi [2016] eKLR:-

“turning to the award of gratuity, the first thing that we must emphasize 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 death of an employee, as a lump sum amount at the discretion of an employer. The employee does not contribute any sum or portion of his salary towards payment of gratuity. An employer may consider the option of gratuity in lieu of pension scheme.”

15. In Pathfinder International Kenya Limited v Stephen Ndegwa Mwangi [2019] eKLR the Court of Appeal, while referring to its earlier decision in the Bamburi Case (supra) added:-

“we are persuaded by the above reasoning and would further add that for an employee to claim gratuity, it must be provided in the contract of employment or provided for in a Collective Bargaining Agreement or a statute. Suffice to state that the Employment Act of 2007 does not make it mandatory for employers to pay gratuity to employees.”

16. In the present case, and as already stated in paragraph 14 hereinabove, the claim for gratuity was not based on a contract of employment or a Collective Bargaining Agreement. The employer (the Respondent) is also shown to have taken the option of Pension Scheme/NSSF in lieu of gratuity as the Claimant admitted in evidence that contributions were made to the fund. The claim for gratuity must therefore fail, and is declined.
17. The claim for overtime payment was not proved on a balance of probability and is declined. The Claimant, while admitting that the Respondent's shop where he was a manager opened at 8.30am and closed at 5.30 pm, with a lunch break at 1.00pm and which both parties testified went beyond one hour on Fridays, testified, under cross examination, that at times he reported to work after 8.30 am and left before 5.30pm. He (the Claimant) did not tell the Court on what dates he put in extra hours, and no particulars of such dates and extra hours were stated in his pleadings. A claim for overtime payment must be specifically pleaded and strictly proved as it is in the nature of special damages. The Court of Appeal held as follows in the Hahn v SIgnb, Civil Appeal no 42 of 198[ 1985] KLR 716:-

“special damages must not only be specifically claimed (pleaded) but also strictly proved....for they are not the direct natural or probable consequences of the act complained of and may



not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves.”

18. On the claim for unpaid leave days, the Claimant pleaded and testified that he took leave during the years of 2010 and was paid in lieu of (annual) leave during the other years, save for the years 2014, 2015 and 2016. I have noted from copies of the Claimant’s payslips produced in evidence by the Claimant that indeed, the Claimant received leave payment for the years 2008, 2009, 2011, 2012 and 2013. There is no indication of any leave payment during the years 2014, 2015 and 2016.
19. The Respondent produced in evidence some two leave application forms indicating that the Claimant applied for, and took a total of four (4) leave days during the year 2016. The Respondent did not present any evidence to show that the Claimant either proceeded on annual leave during the years 2014 and 2015 or that any payment in lieu thereof was made. Section 74(f) obligates an employer to keep written records on his employees’ annual leave entitlement, days taken and days due. The Respondent only demonstrated that the Claimant took 4 leave days in the year 2016.
20. Section 28(1) (a) of the *Employment Act* provides that an employee is entitled to not less than twenty one (21) working days of leave with full pay after every twelve consecutive months of service. The Claimant pleaded that he had a total 63 unutilized leave days as at the time of his resignation in December 2016. This number reduces to 59 days in view of the 4 undisputed leave days taken in 2016. Taking into account the fact that the Claimant was earning a basic salary of ksh 76,003 at the time of his resignation, as per his December 2016 payslip and as admitted by the Respondent (RW1), the Claimant is entitled to ksh 149,473, which I award him.
21. On the claim for house allowance, the Claimant testified that he was not paid house allowance by the Respondent during the entire duration of employment. There having been no written contract of employment, it was not demonstrated by the Respondent that the salary paid to the Claimant included house allowance; or that the salary was consolidated. In other words, the Respondent did not rebut the Claimant’s evidence that he was not paid house allowance during the entire period of employment. Section 10(7) of the *Employment Act* provides as follows:-

“If in any legal proceedings an employer fails to produce a written contract or the written particulars prescribed in Subsection (1), the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer.”
22. I have perused the bundles of the Claimant’s itemized pay statements (pay slips) produced by both the Claimant and the Respondent, and I have noted that none of them itemized house allowance as having been paid to the Claimant at any given point in time.
23. Further, the Respondent, having been the employer, did not demonstrate that it provided the Claimant with housing pursuant to Section 31(1) of the *Employment Act*. It is my finding that the Claimant proved his claim for house allowance on a balance of probability, and the same is allowed at ksh 1,235,220 as prayed.
24. It was held as follows in *Kenya Private Universities Workers Union v African Nazarene University*[2020] eKLR:-

“ 18. The statutory right to every worker in this country to housing accommodation and/or in lieu thereof a house allowance implicates and underlines the constitutional norm of dignity.



19. the worker's entitlement to housing has also been recognized by the International Labour Organization in Recommendation 115, Workers' Housing Recommendation.
  20. the statutory right, in the view of the Court, has many characteristics which included affordability, liability, location and accessibility because of the use of the term reasonable housing accommodation and sufficient sum as rent.
  21. such a provision, in the view of the Court, constitutes a fundamental (basic) condition under the law and which the employer may not unilaterally alter to the disadvantage of the employee during the subsistence of employment relationship, unlike the other particulars or terms envisaged under Section 10(1) as read with Section 10(5) of the employment Act, 2007."
25. The Respondent (RW-1) testified that the Claimant's earnings as indicated on his payslips used to fluctuate due to commission paid to him, and that without commissions, his salary was ksh 76,000. The Respondent did not tell the Court that the said salary included house allowance at how much or whether the same was consolidated. The said amount is stated on the payslips as being "basis pay" what is amazing is that on some of the payslips for the years 2012 and 2016, there is inserted a footnote indicating that the "basic pay is inclusive of 15% House Allowance". Whereas the Claimant produced dozens of payslips covering the period of employment to demonstrate that he a only paid "basic pay" the Respondent produced three (3) payslips for January 2016, June 2016, and December 2016, bearing the aforesaid footnote. The Claimant submitted that this was the Respondent's attempt to unilaterally alter the Claimant's terms of service without his consent. I agree with the Claimant's submission in this regard. Terms of employment cannot be changed unilaterally, and in retrospect, as appears to have been the Respondent's attempt in the present case. An employer cannot be allowed to breach the law and at a later date attempt to validate the illegalities already committed against an employer by insetting or introducing a footnote or additional clause in employment records/ documents, namely a few paylips. This Court cannot allow such illegal practice to go unnoticed and unreprimanded.
26. In my view, unpaid house allowance is a continuing injury as contemplated in Section 90 of the Employment Act which is carried on by tan employer from one month to another. Limitation regarding a continuing injury starts running from the date of cessation thereof. In the present case, the date of cessation was December 2016 when the Claimant resigned.
27. The claim for unpaid commissions was not proved, and is declined. The Claimant testified, under cross-examination that commission was paid to him by the Respondent based on the sales made, and not as a right, and that it was paid at 0.5% of sales made. The Respondent did not, however, plead and/ or adduce evidence on sales made in the Respondent's hop where the clamant was manager during the period in issue (2015 and 2016). A claim for unpaid commissions is in the nature of special damages and must be specifically pleaded and proved.
28. The claim for general damages compensation for infringement of constitutional rights to fair labour practices, fair remuneration and fair administrative action equivalent to 12 months' salary amounting to ksh 986,760 is declined. The Claimant made specific claims under the Employment act which have either been allowed or declined herein.
29. In sum, and having considered written submissions filed by both parties, judgment is hereby entered for the Claimant against the Respondent as follows:-
- a. unpaid leave days .....ksh 149,473



b. unpaid house allowance.....ksh 1,235,220

Total ksh 1,284,693

30. the awarded sum shall be subjected to statutory deductions pursuant to Section 49(2) of the Employment Act.

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

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 20<sup>TH</sup> APRIL 2023**

**AGNES KITIKU NZEI**

**JUDGE**

ORDER

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

