



Langi v Spur Security Services Limited (Employment and Labour Relations Cause 1677 of 2015) [2023] KEELRC 915 (KLR) (20 April 2023) (Judgment)

Neutral citation: [2023] KEELRC 915 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 1677 OF 2015**

JK GAKERI, J

APRIL 20, 2023

BETWEEN

JOSEPH KIOKO LANGI CLAIMANT

AND

SPUR SECURITY SERVICES LIMITED RESPONDENT

JUDGMENT

1. The Claimant initiated this claim by a Memorandum of Claim filed on August 22, 2015 which was subsequently amended and filed on October 5, 2016 claiming terminal dues and benefits.
2. The Claimant avers that he was an employee of the Respondent from January 3, 2005 to July 4, 2014 working as a Security guard and served with diligence and his last computed salary was Kshs 6,000/= per month which he alleges was below the statutory minimum under the relevant Regulation of Wages (General) Orders 2010, 2011, 2012, 2013 and 2014.
3. That he voluntarily resigned on July 4, 2014 owing to unfavourable working conditions such being denied annual leave, overtime pay and off-days.
4. That the issues had been raised by the union but the Respondent did not address them.
5. The Claimant prays for;
 - a. A declaration that the non-payment of terminal dues was unfair and unlawful.
 - b. A declaration that the Claimant is entitled to payment of his terminal dues as pleaded.
 - c. Payment of the sum of Kshs 1,403,482.73 comprising;
 - i. House allowance Kshs 157,128.48
 - ii. Untaken/unpaid leave Kshs 87,293.60



- iii. Public holidays Kshs 80,017.68
 - iv. Underpayments;2010 – 2011 Kshs 26,552/=2012 Kshs 44,691.602013 Kshs 58,940.40
 - v. Off-days Kshs 306,400.54
 - vi. Overtime Kshs 883,936.80
 - vii. Service gratuity Kshs 49,102.65
- d. Interest on (c) above from date of filing suit till payment in full.
 - e. Costs of the suit plus interest.

Respondent's case

- 6. In its response filed on October 28, 2015, the Respondent denied the Claimant's allegations and avers that the suit is frivolous, scandalous and vexatious.
- 7. The Respondent stated that it would raise a Preliminary Objection which it did and the same was dismissed.
- 8. In effect, the Respondent's response consisted of mere denials.

Claimant's evidence

- 9. The Claimant's written statement rehashes the contents of the Memorandum of Claim.
- 10. The witness testified that he worked from 6 am to 6 pm with no leave or off-days and had no payslip. That he used to sign a payroll.
- 11. On cross-examination, the Claimant stated that he resigned voluntarily for underpayment, lack of overtime and leave pay and the union filed a suit on the issues but he was not paid the amount awarded by the court.
- 12. That he filed the case after he left employment and was unaware that their counsel in that matter was paid in August 2020.
- 13. He confirmed that he was a member of the NSSF and did not proceed on leave from 2011 to 2014 and was claiming underpayment for 2011 – 2014.

Respondent's evidence

- 14. RWI, Mr Elijah Waiyaki testified that he was unaware of the reasons leading to the Claimant's resignation. That all employees were entitled to annual leave but had no evidence that the Claimant proceeded on leave.
- 15. The witness confirmed that the Claimant was paid for the extra hours through the bank and was paid a consolidated salary and had 4 off-days per month as there was a reliever.
- 16. That the contractual terms were verbal and the Claimant's salary was Kshs 6,000/= and gradually rose. However, the witness had no evidence of the Claimant's salary.
- 17. It was his testimony that the Claimant was paid terminal dues but had no documentary evidence.



Claimant's submissions

18. Counsel for the Claimant submitted on whether the Claimant was entitled to the reliefs sought and costs of the suit.
19. On house allowance, counsel relied on the provisions of Section 31 of the *Employment Act* and the decision on *Ayanna Yonemura V Liwa Kenya Trust (2014) Ltd* on the need for employers to state whether salary was consolidated or not.
20. Counsel submitted that RWI had not provided evidence to show that the Claimant's salary was inclusive of house allowance and thus the allowance was outstanding.
21. As regards unpaid leave, counsel relied on Section 28 of the *Employment Act* and the decision in *Katana Mwangandi V Board of Governors Takaye Primary School (2017) eKLR* in support of the submission.
22. On unpaid holidays, reliance was made on the decision in *Edwin Odhiambo Sindala V Samba Enterprises Ltd & another (2018) eKLR* to urge that the Respondent was the custodian of all employment record.
23. As regards overtime, counsel urged that the Claimant clocked-in at 6 pm and clocked out at 6 am and was not paid overtime and the Respondent did not avail records of payment.
24. As regards underpayments, counsel stated that the Claimant was a night guard yet the witness statement is silent. The Claimant testified that he was a day guard.
25. The court was urged to adopt Kshs 8,463/= Kshs 9,571/= and Kshs 10,911/= as the Claimant's salary for 2011, 2012 and 2013 and award underpayment.
26. The court was invited to rely on its decision in *John Mogaka Okemwa V Lavington Security Guards Ltd (2013) eKLR*.

Respondent's submissions

27. Counsel submitted that by the time the Claimant filed his case, this union had a case pending in court, ELRC 1569 of 2010 where the union was claiming;
 - i. Underpayment.
 - ii. Non-issuance of Appointment letters and payslip,
 - iii. Non-payment of overtime on public holidays and overtime.
28. Counsel urged that the suits were similar and the Claimant's suit was res judicata and relied on the decision in *IEBC V Maina Kiai & 5 others (2017) eKLR* to underscore the elements of the principle of res judicata and its object.
29. Counsel urged that the only new claim by the Claimant was service gratuity.
30. Counsel submitted that the Claimant was not entitled to service gratuity as he was a member of the NSSF and the Respondent was submitting contributions.
31. Finally, counsel submitted that the Claimant's claim for house allowance, overtime, leave days and overtime on public holidays had no basis and had not been proved on a balance of probabilities.
32. Counsel urged the court to dismiss the claim.



Determination

33. The issues for determination are;
- i. Whether the Claimant's suit was res judicata.
 - ii. Whether the Claimant is entitled to the reliefs sought.
34. On res judicata, counsel for the Respondent raised this issue as a Preliminary Objection dated November 1, 2021 urging that the matters had been resolved by Wasilwa J in ELRC No 1569 of 2010 between KUCFAW V Spur Security Services Ltd and after hearing both sides the court delivered a ruling on March 23, 2022 dismissing the Preliminary Objection.
35. Counsel inter alia relied on paragraph 12 of the Judgement in ELRC Cause No 1569 of 2010 where the judge stated as follows;
- ' The Claimant's case was heard on July 19, 2018 and March 14, 2019 where Raphael Kaka testified on behalf of the Claimants save for Alfred Oduki, Joseph Mumo and Langi Kioko who did not sign the letter of Authority filed on October 31, 2018 authorising him to execute the requisite documents or give evidence on their behalf. He adopted their statements as evidence.'
36. The court was of the view that without a letter of authority signed by the Claimant, Mr Raphael Kioko lacked the legal basis to execute documents or plead the Claimant's case.
37. At paragraph 25, the court found all the claims except underpayment not properly before her and made no finding on them.
38. Claims other than underpayment were not heard and finally determined as dictated by Section 7 of the *Civil Procedure Act* and emphasized by Courts in legions such as IEBC V Maina Kiai & 5 others (Supra) relied upon by the Respondent's counsel.
39. Section 7 of the *Civil Procedure Act* uses the phrase;
- ' Suit in which such issue has been subsequently raised and has been heard and finally decided by such court.'
40. Condition number (d) of the elements of res judicata set out in IEBC V Maina Kiai & 5 others (Supra) is that;
- ' The issue was heard and finally determined in the former suit.'
41. The judgement in ELRC Cause No 1569 of 2010 made a determination on underpayment only.
42. The other claims were not determined with finality owing to procedural technicalities and since the Claimant left employment while the matter was on-going and related to claims upto the date of commencement of the claim on December 10, 2010, he was entitled to urge his case after leaving employment if he had a cause of action.
43. Having dealt with the issue of res judicata before hearing took place, the court is persuaded that enough has been said on that issue.
44. On entitlement to the reliefs sought by the Claimant, it requires no belabouring that the Claimant is duty bound to demonstrate that the benefits claimed accrued to him before he resigned from



employment and were thus due. The provisions of Section 107, 108 and 109 of the Evidence Act lay it bare that he who alleges that a fact or particular facts exist shoulders the burden of proof.

a. There is no dispute that the Claimant was an employee of the Respondent from January 3, 2005 to July 4, 2014 when he voluntarily resigned.

45. Although he alleged that he did so due to unfavourable working conditions, he did not catalogue the reasons in a document and had not previously complained to the Respondent. He however stated that he had raised the issue through the union but tendered no evidence.
46. Relatedly, having worked since 2005, the Claimant is by conduct estopped from citing the working conditions as the reason for resignation in 2014. He was categorical that the resignation was voluntary and the Respondent did not pay his terminal dues.
47. The Respondent's witness was largely unhelpful as he had no evidence of payments made or salary and could not confirm that the Claimant was indeed paid his dues after resignation.
48. The Claimant was entitled to what was due to him after resignation and his claim related to dues accruing to him from 2011 – 2014.
49. In the premise, the court is satisfied and finds that non-payment of the Claimant's dues was unlawful.

b. House allowance for the entire period

50. Although RWI testified that the Claimant's salary was consolidated, he provided no evidence to substantiate the allegation and as required by Section 10(7) of the Employment Act, 2007, the burden of proof lay on him to disprove the Claimant's allegation of non-payment of house allowance.
51. In the absence of evidence to controvert the Claimant's claim, the same is awarded.
52. However, such house allowances is only payable from January 2011 to July 4, 2014 and dependent on the minimum wage under the relevant Regulation of Wages (General) Orders.

c. Pay in lieu of untaken leave

53. The Claimant tendered no evidence that he did not proceed on leave for 8 years.
54. Other than stating that he was denied annual leave, the Claimant tendered no evidence on whether he applied for leave and was denied or whether colleagues proceeded on leave and he did not. The witness statement makes no reference to the number of days pending and when they accrued. If this had been a general complaint, it should have been raised in ELRC Cause No 1569 of 2010 as the Claimant had been an employee of the Respondent since 2005 and was thus aware of its terms of engagement. On the other hand, RWI testified that all employees were entitled to annual leave.
55. In the absence of supportive evidence, the court is unpersuaded that the Claimant did not proceed on leave for a single day for 8 years.

The Claim is disallowed for want of proof.

d. Unpaid public holidays for 10 years

56. This claim lacks the necessary particulars and is unsustainable. The Claimant tendered no evidence of the particular public holidays on which he worked and the dates of the public holiday.
57. It requires no gainsaying that public holidays are gazetted every year and vary from time to time. In the absence of particulars, the prayer is unproven and is disallowed.



e. Underpayment 2011 - 2014

58. Since the earlier suit was filed on December 10, 2010, the claim for underpayment is effective January 2011. The Claimant testified that his salary remained unchanged for the duration he was in employment. RWI adduced no evidence to contradict the Claimant's testimony on the salary payable as at the date of resignation.
59. In his written statement, the Claimant did not indicate whether he was a day or night guard. In his oral testimony, he testified that he used to work during the day and court so finds. His counsel submitted he was a night guard. The submission had no evidential support.
60. Under the Regulation of Wages Order (General) (Amendment) Order 2010, effective May 1, 2010, the minimum wage of a day guard was Kshs 6,743/= exclusive house allowance an underpayment of Kshs 743/= per month.
61. Under the 2011 Order, the minimum wage was Kshs 7,586/= an underpayment of Kshs 1,586/= per month.
62. Under the 2012 Order, the minimum wage was Kshs 8,579.80 an underpayment of Kshs 2,579.80 per month.
63. Under the 2013 Order, the minimum salary was Kshs 9,780.95 an underpayment of Kshs 3,780.95 per month.

f. Off-days for 9 years

64. The Claimant's written statement makes no reference as to when the Claimant reported to the work place or exited or the number he used to work per week.
65. RWI on the other hand testified that the Claimant had 4 off-days a month and had a reliever.
66. The Claimant alleges that he worked 7 days a week for the entire duration he was an employee of the Respondent but has no supportive evidence to buttress the claim.

The prayer is disallowed.

g. Overtime 4 extra hours daily

67. As adverted to elsewhere in this judgement, the Claimant's written statement makes no reference as to when he reported to the work place and exited but claims that he worked 4 extra hours every day for 9 years with no cogent evidence to buttress the claim.
68. The Claimant produced photocopies of a document identified as Guard Book and made no reference to it. The copies have no authentication. It is unclear who made the entries and relate to some days in December 2005 and January 2006. The lack of authentication diminishes the probative value of the photocopies. In the absence of cogent evidence to demonstrate that the Claimant worked overtime, the claim is unsustainable and is disallowed.

h. Service gratuity for 9 years

69. It is unclear as to whether this claim refers to gratuity as a contractual term or service pay. Gratuity is only payable if provided for under the terms of the contract of employment between the employer and employee or under a Collective Bargaining Agreement (CBA), if any. In this case, the Claimant adduced no evidence of entitlement to gratuity under the contract of employment or a CBA.



70. As regards service pay, the Respondent confirmed on cross-examination that the Claimant was a member of the NSSF and thus not entitled to service pay as ordained by the provisions of Section 35(6) (d) of the Employment Act, 2007.

The claim is declined.

71. In conclusion, judgement is entered for the Claimant against the Respondent in the following terms;

- a. Declaration that refusal by the Respondent to pay terminal benefits of the Claimant was unfair.
- b. Underpayments from January 2011 to March 31, 2014, Kshs 94,552.05.
- c. House allowance, Kshs 49,282.74
Total Kshs 143,834.79
- d. Costs of this suit.
- e. Interest on (b) and (c) above from date hereof till payment in full.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 20TH DAY OF APRIL 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

