



**Anzemo v Promasidor Quality Food Products (alias) Promasidor (Kenya) Ltd
(Cause 873 of 2018) [2023] KEELRC 1356 (KLR) (30 May 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1356 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 873 OF 2018**

JK GAKERI, J

MAY 30, 2023

BETWEEN

EVERLYN ANZEMO CLAIMANT

AND

**PROMASIDOR QUALITY FOOD PRODUCTS (ALIAS) PROMASIDOR
(KENYA) LTD RESPONDENT**

JUDGMENT

1. The Claimant initiated this Claim by a Memorandum of Claim filed on 6th June, 2018 stating that she was employed by the Respondent from 9th May, 2013 and performed duties diligently and was evaluated annually.
2. The Claimant avers that on 30th November, 2017, she received a letter notifying her that the contract of employment would end on 31st December, 2017 and would not be renewed and no reason was given.
3. That during the subsistence of the contract, she worked for 12 hours per day contrary to paragraph 5 of the Employment Contract and the *Employment Act*, 2007.
4. The Claimant prays for;
 - a. Overtime for the 4 years worked Kshs.229,282.40
 - b. Unpaid NSSF for August 2014 Kshs.400.00
 - c. Certificate of service.
 - d. Costs of the suit.
 - e. Interest on (a), (b) and (d) until payment in full.



- f. Any other relief that the court may deem fit to award.

Respondent's case

5. In its response to the Claimant's Memorandum of Claim filed on 23rd August, 2018, the Respondent admits that the Claimant was its employee from 9th May, 2013 under different contracts.
6. It also admits having issued a termination notice on 30th November, 2017, effective 1st December, 2017.
7. It is the Respondent's case that the contract of employment dated 16th July, 2015 did not require a termination notice.
8. The Respondent avers that it was not humanely possible to work for 12 hours every day for 4 years.
9. That all overtime dues owed to the Claimant were paid.
10. That the Respondent paid the Claimant's National Social Security Fund contribution for August 2014 and issued a certificate of service together with the final dues.

Claimant's evidence

11. The Claimant testified that she was employed on 9th May, 2013 as a General Worker at Kshs.8,000/= and the contract was renewed in 2014, 2015 and 2016.
12. The Claimant testified that she worked for 12 hours every day.
13. It is the Claimant's testimony that when she visited the NSSF offices for a statement, she discovered that the Respondent deducted NSSF contribution in August 2014 but did not remit the same to the NSSF.
14. That the unpaid overtime, leave and unremitted NSSF deduction for August 2014 remained unpaid.
15. The Respondent did not adduce evidence but filed a bundle of documents.

Claimant's submissions

16. The Claimant's counsel isolated no specific issue for determination but submitted that the Claimant's evidence was uncontroverted.
17. Counsel submitted that the Claimant was not paid salary for December 2017, Kshs.13,785/=, overtime for 4 years, unremitted NSSF for August 2013, pay in lieu of notice.
18. Counsel urged that the Claimant was entitled to the foregoing including a certificate of service.
19. Notably, counsel appear to have introduced new prayers not in the Memorandum of Claim. No decisions or statutory provisions were relied upon.

Findings and determination

20. From the pleadings and the Claimant's evidence, it is unambiguous that the Claimant is not challenging the termination of employment by the Respondent.
21. This is also evident from the prayers sought, namely; overtime for 4 years, NSSF deduction for August 2014 and certificate of service.
22. The singular issue that commends itself for determination is whether the Claimant is entitled to the reliefs sought.



23. Before delving into the issue of reliefs, it is essential to restate the principles applicable in undefended suits or where the Respondent does not participate in the proceedings.
24. In *Humphrey Munyithia Mutemi v Soluxe International Group of Hotels and Lodges Ltd* [2020] eKLR, Onyango J. stated as follows;

“In the case of *Monica Kanini Mutua v Al- Arafat Shopping Centre and another* [2018] eKLR, the court held that in an undefended claim, it is trite that the Claimant establishes all the facts of the claim and must establish the existence of an employment relationship with the Respondent as a preliminary issue before establishing the alleged termination of the employment.”
25. Similarly, in *Nicholus Kipkemoi Korir v Hatari Security Guards Ltd* [2016] eKLR, Abuodha J. held that;

“This burden of proof does not become any less on the employee simply because the employer has not defended the claim or absent at the trial. The Claimant must still prove his case. It is therefore not enough for the employee to simply make allegations on oath or in the pleadings, which are not backed by any evidence and expect the court to find in his or her favour.”
26. The foregoing sentiments embellish the provisions of the *Evidence Act* on burden of proof, specifically the provisions of Sections 107, 108 and 109 of the Act.
27. Section 107(1) of the *Evidence Act* provides that;

Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.
28. In the instant suit, it is the duty of the Claimant to establish all the facts she alleges to have been in existence during her employment with the Respondent.
29. As adverted to elsewhere in this judgement, the Respondent admitted that the Claimant was its employee from 9th May, 2013 and also admitted having issued the notice dated 30th November, 2017 on non-renewal of the contract of employment.
30. Since the Claimant is not challenging the termination of employment by the Respondent and tendered no evidence that the termination was unfair or unlawful, I will now proceed to determine whether the Claimant is entitled to the reliefs sought.
31. Documentary evidence on record reveals that the Claimant’s first 3 year fixed term employment contract dated 12th June, 2013 provided for a 48 hour week spread over 6 days with specific reporting times as communicated by management. It is also provided for 21 days leave.
32. The Claimant signed the contract on 13th June, 2013.
33. The second and last 2 year contract was executed on 7th August, 2015.
34. Both contracts had a three (3) month probationary period.
35. The Claimant received salary reviews in September 2013, April 2015 and May 2016.
36. The Claimant alleges that she worked for 12 hours per day for all the days she reported to work from the date of employment, 9th May, 2013 to 30th November, 2017 and attached payslips for May 2017, July



2017, August 2017, September and October 2017. Whereas the payslips for May and July 2017 show that the Claimant was paid overtime designated as 'normal' at Kshs.795.29 and 994.11 respectively, the other payslips have no entry for overtime.

37. Surprisingly, the Claimant's case is not for unpaid overtime for the months none was paid but for overtime payment for the entire duration of employment.
38. Regrettably, the only evidence relied upon by the Claimant reveals that she did not earn any overtime in August, September and October 2017 and no demand appear to have been made to the Respondent before she left employment.
39. The court is struggling to understand how the Claimant worked for the Respondent for 12 hours every day and was not paid for it and did not raise the issue with the employer at any point during the 4 year she was an employee of the Respondent.
40. Equally, neither the Claimant's written statement nor the oral testimony adduced in court make reference to the Claimant's work day i.e reporting and exit times and whether they used to sign in and out and how.
41. There is no shred of evidence on record to show that the Claimant worked for 12 hours per day for the duration of her employment.
42. In view of the foregoing, it is the finding of the court that the Claimant has failed to prove on a balance of probabilities that she indeed worked for 12 hours per day from the first day of employment till the date of termination in November 2017.
43. The materials before the court are patently insufficient to establish the fact of overtime.
44. In sum, the Claimant has failed to demonstrate entitlement of overtime pay for 4 years as prayed.

Unpaid NSSF for August 2014

45. The Claimant's evidence on this issue is contradictory. While she testified that her NSSF contribution for the month of August 2014 was deducted but not forwarded to the NSSF, the NSSF statement she produced as evidence reveals that the sum of Kshs.400/= for August 2014 was indeed paid to the NSSF.
46. Intriguingly, in the submissions, the Claimant changed the tune and argued that the month in question was August 2013 which contradicts the Claimant's prayer and testimony and is thus untenable.
47. It is trite that submissions are neither pleadings nor evidence.
48. Worthy to note, the NSSF statement produced by the Claimant show that all the Claimant's NSSF deductions for 2014, 2015, 2016 and 2017 were duly remitted.
49. The Claimant has failed to demonstrate entitlement to the sum of Kshs.400/=.

Certificate of service

50. The Claimant is entitled to a certificate of service by dint of Section 51 of the [Employment Act, 2007](#).
51. All the other prayers introduced in the submissions but missing in the Memorandum of Claim are unsustainable and are accordingly dismissed.
52. Flowing from the foregoing, it is clear to the court that the Claimant's case is for dismissal and it is accordingly dismissed with no orders as to costs.
53. Respondent to provide the Claimant with a certificate of service within 30 days.



Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 30TH DAY OF MAY 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

