



**Makau v Cook N Lite Ltd (Cause 902 of 2016)
[2023] KEELRC 1113 (KLR) (4 May 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1113 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 902 OF 2016**

**AK NZEI, J
MAY 4, 2023**

BETWEEN

MAURICE MWENDWA MAKAU CLAIMANT

AND

COOK N LITE LTD RESPONDENT

JUDGMENT

1. The suit herein was instituted by the Claimant vide a statement of claim dated November 14, 2016 and filed in Court on November 25, 2016. An amended statement of claim, dated April 17, 2018, was subsequently filed in Court on April 18, 2018. It was pleaded in amended statement of claim, *inter-alia*:
 - a. that the Claimant was employed by the Respondent, first known as Kalu Works Limited and later changed to Cook Lite Limited, (now sister companies), and his services were transferred from 1996 to August 2, 2016, working as a casual earning Kshs 243.48 per day, as a contract earning Kshs 7,824.60 per month, and as a permanent working as a Chief Cashier earning a basic salary of Kshs 22,080; which was an underpayment as the proper government salary scale of a Cashier was Kshs 35,760.
 - b. that on or about August 22, 2016, the Claimant resigned from the Respondent's employment due to frustration, whereupon the Respondent worked out the Claimant's terminal dues at Kshs 54,855.30, that the Claimant was not satisfied with the calculation.
2. It was the Claimant's pleading that in January 2012, he was promoted to Accounts department as an Accounts Assistant and was assigned duties that included daily/weekly payment of casuals, doing monthly production reports, monthly stock taking and positing goods receipt notes to the system.
3. It was the Claimant's further pleading that on April 1, 2014, he took over as the Respondent's Chief Cashier, a position previously held by one Victor Omondi who was earning Kshs 35,760.



That although the Claimant held the position of the Respondent's Chief Cashier with increased responsibilities for 29 months, the Respondent never increased his salary, which remained at Kshs 22,050.

4. The Claimant further pleaded:-
 - a. that on April 20, 2016 at 5.00pm, the Claimant handed over the Respondent's strong room keys to his boss, one Emmanuel, as was the daily routine, but when he reported to work on April 21, 2016, he found the strong room entrance open and two padlocks missing though the Claimant's safe in which was kept some petty cash totaling Kshs 773,294.23 was intact.
 - b. that at the request of the Claimant's boss, the Claimant handed over the said petty cash and sales totaling Kshs 12,635 to one David Marindi, and that no police action could be taken against the Claimant as nothing was lost from him.
 - c. that on April 22, 2022, the Claimant's duties were assigned to other employees and the Claimant was eventually given a letter of transfer to the production department which the Claimant had left in 2012 when he was promoted to the post of an Accounts Assistant, from which he had risen to the rank of Acting Chief Cashier. That the transfer was meant to humiliate the Claimant.
5. The Claimant set out his claim against the Respondent as follows:-
 - a. service gratuity 2006 to 2012.....Kshs 102,819
 - b. salary underpayment (scale Kshs 35,760 per month), amount paid per month for 29 months @Kshs 22,050.....Kshs 396,720
 - c. overtime not paid from March 2012 to November 2015..Kshs 45,743
 - d. causal leave paymentKshs 56,974.32
 - e. casual service gratuity.....Kshs 32,868
 - f. service gratuity for service period.....Kshs 3,912
 - g. compensation for unfair labour practice demotionKshs 200,000Total Kshs 839,036.32
 - h. costs of the suit and interest.
6. Other documents filed by the Claimant included his written witness statements filed on November 25, 2016 and April 18, 2018 respectively, a list of documents dated November 14, 2016 listing 12 documents and a supplementary list of documents dated April 17, 2018. Documents listed on the said list of documents included the Claimant's contracts of employment dated November 12, 2004 and 18/7/2005 respectively, a letter of appointment dated January 1, 2006, Claimant's payslip for August 2016, letter of department transfer dated July 21, 2016 and the Claimant's resignation letter dated August 22, 2016, among others.
7. The Respondent filed an amended response to the Claimant's claim on May 14, 2019, dated May 14, 2018, and denied the Claimant's claim. The Respondent pleaded:-



- a. that the Respondent company was incorporated in 1999 and commenced business thereafter, with the Claimant being engaged as a casual thereafter in 2004. That the Claimant was employed as a production clerk on contractual basis.
 - b. that the Claimant was later transferred to the Accounts department as a clerk until 22nd August 2016 when he resigned from duty upon being transferred to the production department under the same terms, conditions salary.
 - c. that the Claimant was transferred for the reason that he himself had informed the Accounts head and the personnel officer that he was unable to handle cash anymore following a theft that occurred at the factory on April 20, 2016 which resulted in all the staff in the accounts department being investigated by the police.
 - d. that the Claimant is not entitled to service gratuity as the same is not provided for in the contract of employment, and neither is it a statutory requirement.
 - e. that the Claimant was a member of NSSF.
 - f. that the Claimant's claim for compensation for unfair labour practice/demotion was untenable as transfer of a worker from one department to another without changing the terms of contract is not an unfair labour practice.
8. When trial opened on June 9, 2022, the Claimant adopted his two filed witness statements referred to in paragraph 6 of this judgment. He also produced in evidence the documents listed on his list and supplementary list of documents, also referred to in paragraph 6 of this judgment.
9. Cross-examined by Counsel for the Respondent, the Claimant testified:-
- a. that he started working with the Respondent in 1999 as a production clerk and was in January 2012 taken to Accounts department where he worked until 21st April 2016 when police went to investigate a theft incident.
 - b. that the Claimant asked his employer to assign the petty cash docket to another employee upon which the Respondent transferred him to the production department, with his salary remaining the same at 22,050.
 - c. that the Claimant resigned on August 22, 2016 and the Respondent computed his terminal dues at Kshs 54,855.30, but the Claimant refused to take the money because the same was an under-calculation.
 - d. that the Claimant served as the Respondent's Cashier for 29 months, and was never asked for his Accounts qualifications which he would have availed had he been asked to do so.
10. Re-examined, the Claimant testified that when he was transferred to the production department on 21st July 2016, he was not told what his new role would be. That he was taken to the furnace, to work with the juniors whom he had been paying. That he felt humiliated and demeaned; and felt that his employer wanted him to leave employment. That he refused to take the computed dues because the computation was based on Kshs 22,050 instead of a Cashier's salary; and did not include the 29 months' salary underpayment and overtime. That the Respondent did not compute the Claimant's gratuity from the date he started working, and only computed from 2006 to 2012, leaving out service from 1996 to 2005, and from 2013. That the Claimant was under pension scheme from 2013 to 2016.
11. The Respondent did not adduce any evidence as there was no Court attendance on the part of the Respondent when the suit came up for defence hearing on September 20, 2022, a date taken in Court



on September 9, 2022 in the presence of both parties. The Respondent's case was closed by the Court on September 20, 2022. An application by the Respondent to re-open the defence case was dismissed by this Court vide a Ruling delivered on 24th November 2022.

12. In view of the foregoing, the Claimant's evidence on record stands uncontroverted, notwithstanding the Respondent's pleadings and documents on record. It was stated as follows in the case of *Trust Bank Limited -vs- Paramount Univesal Bank Limited & 2 others*, Nairobi [Milimani] HCCC No. 1243 of 2021:-

it is trite where a party fails to call evidence in support of his case, that party's pleadings remain mere statements of fact, in so doing the party fails to substantiate its pleadings. In the same vein the failure to adduce any evidence means that the evidence adduced by the plaintiff against them is unconverted and therefore unchallenged."

13. It was held as follows in *Chrispine Otieno Caleb -vs- Attorney General* [2014] eKLR:-

"Although the defendant has denied liability, in an amended defence and counter-claim, no witness was called to give evidence on his behalf. That means that not only does the evidence rendered by the 1st plaintiff's case stand unchallenged but also that the claims made by the defendant in his defence and counter-claim are unsubstantiated. In the circumstances, the counter-claim must fail."

14. Having considered the Claimant's pleadings and the uncontroverted evidence adduced by him, the single issue that falls for determination is whether the Claimant is entitled to the reliefs sought by him.

15. The claim for gratuity, regardless of the period of the Claimant's employment covered, must fail as it was not based either on terms of the contract of employment or a Collective Bargaining Agreement. The court of Appeal stated as follows in the case of *Bamburi Cement Limited -vs- William 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."

16. In *Pathfinder International Kenya Limtied -vs- Stephen Ndegwa Mwangi* [2019] eKLR, the Court of Appeal while referring to its 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 statute. Suffice to state that the *Employment Act* of 2007 does not make it mandatory for employers to pay gratuity to employees."

17. On the claim for 29 months' salary underpayment, the Claimant pleaded and testified that although he was transferred to the accounts department in January 2012 whereat he subsequently worked as the Respondent's Cashier and Acting Chief Cashier from 1st April 2014 upto July 2016 (for 29th months), his salary remained at Kshs 22,050 and was never increased to the 2015 Minimum Wage rates for a Cashier which was Kshs 35,750. It was the Claimant's testimony (see his witness statement filed in Court on 18th April 2018) that he was underpaid for 29th months at the rate of Kshs 13,360. One of



the documents produced in evidence by the Claimant was the Minimum Wage Schedule for 2013 and 2015 whereby a Cashier's daily wage is indicated as having been Kshs 1,192. This translates to Kshs 35,760 per month. The Claimant testified that he was underpaid for a total period of 29 months (Kshs 396,430). He claimed the said sum of Kshs 396,430 under the underpayment heading. I award the same.

18. Underpayments by an employer over a period of employment are in the nature of continuing injury that happens in one month and is carried on to the next month when the next underpayment occurs. Limitation period regarding underpayments starts running upon cessation of the underpayments (continuing injury) as envisaged in Section 90 of the *Employment Act*. Cessation in the case herein was in July 2016 and the present suit was filed in November 2016. This was within time.
19. The claim for Kshs 45,743 being overtime payment from March 2012 to November 2015 was not specifically pleaded and was not proved. The same is declined.
20. The claim for casual leave payment was not specifically pleaded, was not proved and is declined. Further, the Claimant demonstrated by his pleadings and by documentary evidence that he worked for the Respondent in three phases, the first phase being as a casual from 1999 to 12/11/2004 when he signed a 6 months' contract of employment with the Respondent. He subsequently signed another 6 months' contract on 18/7/2005 and was permanently employed vide a contract of employment dated 1st January 2006 and signed on 26/5/2006.
21. Any claim flowing from or arising from the Claimant's first phase of employment (when he worked as casual) became statute barred three years after that phase ended. The phase ended on 12/11/2004 when the Claimant signed the first six months' contract. The claim is therefore not only unproved, but is statute barred as well.
22. On the claim for compensation for unfair labour practice (demotion), the Claimant produced in evidence the Respondent's letter to him dated July 21, 2016, which states in part:-

"Re: Department Transfer

This is to officially inform you that your services have been transferred from Accounts Department to Enamel Department effective from July 22, 2016.

Other terms and condition of service will remain the same."

23. The Claimant testified in Court that the foregoing transfer letter did not tell him what his new role would be. He testified that he was taken to the furnace to work with the juniors whom he had been paying, and that he felt humiliated and demeaned, and further felt that his employer wanted him to leave employment. He resigned vide a resignation letter dated August 22, 2016; and stated in part:-

"Re: Resignation

Due to the embarrassment I got from my boss through transfer letter dated July 21, 2016, I wish to notify that am resigning from my position as Accounts Assistant with Cook N Lite from August 22, 2016.

.....I kindly request you to prepare my terminal dues from the time I joined Kalu Works upto the time I left my employment on August 22, 2016."

24. I have noted that the Claimant did not plead constructive dismissal. He did not plead unfair termination of employment. He however claimed Kshs 200,000 being compensation for unfair labour practice (demotion).



25. The Claimant testified that he requested that petty cash duties be given to another employee after a theft incident in the Respondent's factory. His letter of transfer to the Enamel Department clearly stated that his other terms and conditions would remain the same. The Claimant however felt humiliated and embarrassed because he was sent to work manually with his juniors at the furnace. It was stated as follows in [Godfrey Odipo Tom -vs- Tabasamu Sacco Limited](#) [2022] eKLR:-

“.....a demotion means the emplacement of an employee by the employer to a position or grade or rank to which is attached a lower salary or allowance or both than the salary and allowance attached to the position held prior to such emplacement....”

26. As already stated in this judgment, the Claimant did not plead constructive termination of employment or unfair termination of employment. He did not demonstrate that his transfer, though embarrassing and humiliating, amounted to demotion. The claim for Kshs 200,000, which the Claimant did not even tell the Court how it was arrived at, is declined.

27. Finally, and having considered written submissions filed by Counsel for both parties, judgment is hereby entered for the Claimant against the Respondent for Kshs 396,720 being salary underpayment for 29 months' commencing April 2014.

28. The awarded sum shall be subject to statutory deductions under Section 49(2) of the [Employment Act](#).

29. The Claimant is also awarded costs of the suit and interest at court rates.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 4TH MAY 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:

Ms. Mwakireti for Claimant

Ms. Orengo for Respondent

