



**Maina v Standard Group Limited (Cause 1922 of 2016)  
[2023] KEELRC 2086 (KLR) (13 July 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2086 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 1922 OF 2016**

**K OCHARO, J  
JULY 13, 2023**

**BETWEEN**

**JULIUS PETER MAINA ..... CLAIMANT**

**AND**

**STANDARD GROUP LIMITED ..... RESPONDENT**

**JUDGMENT**

1. Through a statement of claim dated September 19, 2016, the claimant sued the respondent, seeking the following reliefs:
  - a. Kshs 3,928,032/-.
  - b. Costs of the suit.
  - c. Interest
2. Subsequent to the service of summons upon it, the respondent filed a reply to the claim dated October 18, 2016, denying the claimant's cause of action and entitlement to the reliefs sought. Consequently, the matter got destined for hearing on merit.
3. Imperative to state that on the September 29, 2019, the respondent filed a notice of preliminary objection seeking that the claimant's suit herein be struck out as it was filed out of time.
4. Through a ruling dated April 4, 2022, the court dismissed the preliminary objection holding:
  19. In my view what is being raised as a preliminary objection is not purely on a point of law. It is a mixture of facts and law in the peculiar circumstances of this matter."
  20. By reason of the premises foregoing, I hold that this matter cannot be disposed of by way of a preliminary objection. As to whether the same is time-barred or not needs to be determined upon taking evidence."



5. No point the ruling burdens this court to, anchored on the evidence on record make a determination in this judgment as to whether the suit herein is time barred or not. This I shall do shortly hereinafter.

### **The Claimant's case**

6. The claimant's case was heard on the October 6, 2022, when he adopted his witness statement filed herein dated September 19, 2015 as part of his evidence in chief. In addition to the witness statement, he gave a brief oral testimony clarifying some matters of the witness statement, and documents that he tendered before this court as his documentary evidence.
7. It was the Claimant's case that on the December 20, 2012, he entered into a contract of employment with the respondent. Under the contract, the respondent employed him as an Alternative Editor for the Sunday Standard at a basic salary of Kshs 550,000/- per month with effect from January 3, 2013. The term of employment was 4 (four) years.
8. The claimant further contended that the contract of employment provided for payment of gratuity at 12.5% of the basic pay for every year of service.
9. Courtesy of his hard and exemplary dedication and commitment for work, he was promoted to the position of Managing Editor Daily Standard, on the April 26, 2012. However, despite the fact that the promotion set in with additional responsibilities, the promotion letter was express, the terms and conditions of his employment were to remain the same.
10. The claimant further asserted that for reasons that were not explained to him, the respondent reduced his basic salary by kshs 200,00/= for the months of May and June 2013. Consequently, he received kshs 350,000/- instead of kshs 550,000/-.
11. He further stated that through its letter dated July 18, 2013, the respondent unilaterally without informing and/or consulting him, reduced his basic salary from kshs 550,000/- per month to kshs 450,000/- with effect July 1, 2013. The reduction was unlawful.
12. Despite the reduction, he continued to faithfully and diligently work for the respondent until July 31, 2015 when he opted to voluntarily take early retirement after 31 (thirty-one months of service, 25 (twenty-five) of which were at the reduced salary of kshs 550,000/- to kshs 450,000/-.
13. The claimant testified that he was entitled to a car allowance of kshs 200,000/- a benefit that he started enjoying in the month of May 2013. The payslip for the month clearly indicates this. The kshs 200,000/- was therefore not part of the basic salary.
14. The claimant contended that the respondent's letter dated July 18, 2013, was captioned "redesignation and salary review". The basic salary was increased to kshs 450,000/- with the car allowance maintained at kshs 200,000/-. This new salary was still less than the contractual salary.
15. The claimant further stated that in the said letter, the respondent company appreciated his past performance. The new position was higher in rank than his entry position.
16. The claimant contended further that he numerously complained to the respondent's human resources director about the reduction, despite promises that the issue was to be looked into, it was never.
17. He further stated that in the year 2015, the respondent company rolled out an early retirement program, and he retired under the program.
18. At his retirement, the respondent company computed his gratuity applying the basic salary of kshs 350,000/- for the period up to June 2013, and kshs 450,000/- for the period between July 1, 2013 –



July 31, 2015, instead of kshs 550,000/-. This culminated to him receiving less than he was entitled to. He was paid kshs 3,928,032/-.

19. Further that the above-stated amount was paid in instalments, however, cumulatively the instalment amounts did not add up to the figure that had been computed by the respondent.
20. Cross-examined by the respondent's counsel, the claimant testified that the substratum of his case was the reduction of his basic salary from kshs 550,000/-. At the time of employment, he was earning kshs 550,000/- as his basic salary. This amount was exclusive of any allowance. Further that he earned his 1<sup>st</sup> car allowance in the month of May 2013. The payslip for the month indicated the basic salary as kshs 550,000/-.
21. He further testified that the changes in his salary were not communicated and explained through any letter. Too, the change was without any consultation.
22. He discounted the allegation that the said figure was inclusive of his allowance, stating that the respondent's letter dated July 18, 2013 was clear on the specific items of his emoluments.
23. In his evidence under re-examination, the claimant testified that the basic salary of kshs 550,000/- was contractual. It was expressly provided for in the contract of employment.

### **The Respondent's case**

24. The respondent's case was heard on the January 23, 2013. The respondent's case was presented by its Human Resource Manager, Joy Kaguri. She states that the claimant was employed on December 20, 2012 as an Alternate Editor at a monthly salary of kshs 550,00/-. The salary compositely included kshs 350,000/- as basic salary and kshs 200,000/- car allowance. That although the contract of employment did not break down the figure, kshs 550,000, the pay slips did.
25. Contrary to the claimant's assertion, the respondent did not at any time review his salary downwards. Through the letter dated July 18, 2013, the respondent increased the claimant's basic salary to kshs 450,000/- but maintained the car allowance at kshs 200,000/-.
26. In her evidence under cross-examination by counsel for the claimant, the witness confirmed that the letter of appointment dated December 20, 2012, provided for a basic salary of kshs 550,000/-. The letter provided for basic salary only.
27. The claimant started working on the January 3, 2013. The was paid the agreed salary of kshs 550,000/- up to June 30, 2013. The witness further stated that when one is employed, her basic salary and allowances are to be clearly spelled out.
28. She stated that the payslip for the month of May 2013, indicated his basic salary as kshs 350,000/- and car allowance as kshs 200,000/-. In the letter dated July 18, 2013, the basic salary was stated as kshs 450,000/-.
29. The claimant chose an early retirement under a program that had been initiated by the respondent. Under the program, those who desired to pick early retirement were entitled to specific benefits that were computed on the employee's earnings at the material time.
30. The claimant's gratuity was computed by applying the basic salary of kshs 450,000/-. Computation for his benefits were computed under two periods, using different rates; for the period 3<sup>rd</sup> January to June 30, 2013, the basic salary of kshs 350,000/-, and for July 1, 2013 to the date of separation, the basic pay of kshs 450,000/-.



31. The witness stated that car allowance appeared for the 1<sup>st</sup> time on the respondent's pay slip for May 2013. The claimant started enjoying his allowance some time into his employment.
32. In his evidence under re-examination, the witness stated that at the time of appraisal, the claimant's basic pay was kshs 350,000/- and car allowance of kshs 200,000/-.

### **The Claimant's submissions**

33. Counsel for the claimant submitted that in the month of May 2013, the respondent reduced the claimant's basic salary to kshs 350,000/- from the contractual amount of kshs 550,000/-. This was an act in derogation of the provisions of section 17(1) of the *Employment Act*. In the months of May and June 2013, the claimant suffered an unjustified reduction to kshs 450,000/-.
34. It was further submitted that from the month of July 2013, until July 31, 2015, a period of 25 months, the respondent was earning a basic salary of kshs 450,000/-, therefore kshs 100,000/- less the contractual basic pay of kshs 550,000/-. During that period, he was therefore underpaid by kshs 2,500,00/-.
35. It was submitted that in her evidence under cross-examination, the respondent's witness submitted that basic pay is different from gross pay. Clearly, this supports the claimant's case that her basic pay was reduced and that the reduction at the end of the day affected his terminal dues.
36. By not employing the contractual basic pay of kshs 550,000/-, the respondent at the end of the day underpaid the claimant's dues, thus, pending leave days, by kshs 43,333/- salary in lieu of notice kshs 300,000/-; exgratia payment by kshs 200,000/-; arrears for the 20 days worked, kshs 112,199/-; salary by kshs 2,900,000/-; and gratuity by kshs 312,500/- therefore a total of kshs 3,928,032/-. The claimant should be awarded this figure.

### **The Respondent's Submissions**

37. According to the respondent's counsel, three issues present themselves for determination, thus; whether the claimant has discharged his burden of proof; whether kshs 550,000/- included the car allowance before promotion; and whether there was any denial of income by the respondent.
38. Counsel submitted by dint of the provisions of section 107 of the *Evidence Act*, the claimant had the burden to prove by adduction of sufficient evidence that his salary was reduced from kshs 550,000/- to kshs 350,000/-. To support this submission, counsel put reliance in the decision in *Muriungi Kanoru v- Stephen Ungu M' Mwirabua* [2015] eKLR.
39. In the circumstances of the instant matter-conflicting accounts on whether the sum of kshs 550,000/- was inclusive of allowances, it was imperative for the claimant to place before the court a pay slip bearing the sum as his basic salary. He didn't, therefore, discharge the burden.
40. On the second issue, counsel submitted that the contract of employment didn't specifically refer to allowances separately as the same was included compositely in the kshs 550,000/-. To remedy this, the payslips issued by the respondent distinctively gave a breakdown of the basic pay and allowances.
41. The court was urged not to lose sight of the fact that though the claimant had pleaded that the payslip for May 2013 only indicated the figure kshs 550,000/- compositely, he didn't tender the payslip in evidence. With this failure, the court should be persuaded to take the respondent's position to the effect that in the figure kshs 550,000/- was a car allowance of kshs 200,000/-, as the truth.



42. It was further submitted that the claimant failed to prove that at all material times, his basic salary was kshs 550,000/-. It follows therefore that the computation of his gratuity and other terminal dues was done properly using the figures kshs 350,000/- and kshs 450,000/- for the various periods.

### **Analysis and Determination**

43. From the material placed before this court, the following issues emerge for determination:
- a. Whether the claimant's claim herein is time barred.
  - b. Whether or at any point in the course of the claimant's employment his salary was reduced by the respondent.
  - c. Whether the claimant is entitled to the reliefs sought.

Whether the claimant's suit herein is time barred

44. As hereinabove indicated, this court reserved the determination of this issue to this point. The issue being a jurisdictional issue it has to be determined before the court delves into the other issues.
45. Imperative to state that the parties herein did not address the court on the issue in their final submissions. This notwithstanding, the court must discharge itself of the burden, herein above mentioned by determining the issue.
46. The respondent contended in the preliminary objection that what necessitated the filing of the suit herein, as pleaded in the claimant's statement of claim, was the deductions of salary that happened in the months of May and July 2013. Consequently, the claimant should have brought the claim within 3 years from July 2013. The claim was filed on September 16, 2016. The limitation period was surpassed by 3 months. The claim is time barred, therefore.
47. On his part the claimant argued that the deduction of his salary did not stop in the month of July 2013, his pleadings are clear that the deductions continued until the October 27, 2015. The deduction was a continuing injury that ceased on this date. He had therefore up to the October 27, 2016 to file the claim but filed it earlier on the September 19, 2016. The objection was anchored on a total misapprehension of his pleadings, he argued.
48. No doubt, section 90 of the *Employment Act* came in with a twin effect on litigations emanating from contracts of employment and or matters under the Act. The litigations were brought out of the purview of the *Limitation of Action Act*, cap 22 Laws of Kenya, and the period for initiation of the suits lessened to three years, from the date of accrual of the cause of action, down from 6 (six) years that was applicable to contracts generally inclusive contracts of employment. The section provides:
- “Notwithstanding the provisions of section 4(1) of the *Limitations of Actions Act* (cap 22) no civil action or proceedings based or arising out of this Act or a contract of service in general shall be instituted unless it is commenced within three years next after the act, neglect or default complained or in the case of continuing injury or damage within twelve months next after the cessation thereof.”
49. Lawsuits must be filed within a certain period of time after the accrual of a cause action. The period varies depending on the basis of the lawsuit, e.g. breach of contract, pecuniary injury, etc. The limitations are statutorily set. In the context of section 90 of the *Employment Act*, the period is three



years not unless the circumstances of the suit place it under the proviso to the section, claims with a component of continuing injury or damage.

50. The *Employment Act* has not defined the term “continuing injury or damages”. In my view, a continuous injury exists where a wrongful act occurs repeatedly occasioning multiple injuries or damages. A continuous injury involves repeated wrongful conduct, each one a separate act.
51. In my view therefore, where an employer unlawfully deducts an employee’s salary, each time he or she does so, constitutes a separate incident but cumulatively the act is a continuous damage. As a result, the employee can recover the wrongfully deducted sums even if the deductions commenced outside of the limitation period. However, he or she can only recover for those deductions which occurred within the limitation period. In the context of section 90 of the *Employment Act*, this means that even if the wrongful deductions before 6 years ago, the employee could still sue, but only recover damages for three years up to the date that he commences his lawsuit.
52. By reason of the foregoing premises, I conclude that the claimant had a right to sue on the alleged wrongful and unlawful deductions of his salary, but any recovery of the deducted sum, if proved, shall be for those that were done within the period, three years to the date when he commenced his suit, September 19, 2016. Therefore, those that were effected between September 18, 2013 – September 19, 2016. Consequently, applying the proviso to section 90 of the *Employment Act*, the court holds that the claimant’s suit is not wholly time barred.

Whether at any time the Claimant’s basic salary was reduced by the Respondent

53. At the centre of this matter is the question whether at the various times pointed out in the claimant’s pleadings and evidence, the respondent unilaterally reviewed his salary downwards. It is not in dispute that the claimant came into the employment of the respondent, under a contract of employment dated December 20, 2012. The contract in clause 5 provided for his emoluments, thus:

5. Basic Pay

You are entitled to a monthly basic pay of kshs 550,000/- (five hundred and fifty thousand shillings only)”.

54. The respondent contended that the amount was a composite amount inclusive of allowances. The claimant on the other hand took a divergent position, the amount was a basic salary exclusive of any allowance. These diametrically opposite positions taken can only be reconciled by first differentiating basic salary from gross or composite salary, and second, by understanding how a term[s] of a contract can be legally proved.
55. In the case of *George Otieno Rambo vs. Nation Media Group Ltd* (2021) eKLR this court defined gross salary thus:

113. Gross salary is the term used to describe all the money the employee has made which is without any deduction like income tax. It is, however, inclusive of bonuses, overtime pay, holiday pay, and over differentials. Some of the components of gross salary should include basic salary, house allowance, medical allowance, car allowance, and conveyance allowance.

114. Gross salary is different from basic salary, it is a figure agreed upon between the employer and the employee without factoring in bonus, overtime pay, or pay of other kind of extra income.”



This court maintains the views expressed on basic pay and gross pay, in the decision above stated.

56. On this count, I am not persuaded that the figure kshs 550,000/- which the parties expressly termed “basic pay” was a composite amount as argued by the respondent.
57. In trying to convince the court that the amount was a composite amount, the respondent’s witness testified that though the contract of employment provided for a basic pay of kshs 550,000/-, pay slips that were issued to the claimant, itemized the figure, initially, thus; Basic allowance, kshs 350,000/- and car allowance kshs 200,000/-.
58. I have carefully considered the employment contract, and the same does not provide a car allowance of kshs 200,000/- or any amount. In my view it was a duty upon the respondent to avail evidence before the court, to demonstrate where the allowance of kshs 200,000/- flowed from, and upon what basis it would be considered to be part of the contractual basic salary of kshs 550,000/-. It is by giving the provisions of section 10[7] of the *Employment Act*, that I discern this duty as being on the Respondent.
59. The respondent cannot be allowed to explain a term of the contract of employment which is in any event express and without ambiguity using the pay slips. This view finds support in what the Court of Appeal stated in the case of *Grain Pro (Kenya Inc vs Andrew Waitthaka Kiragu)* (2019) eKLR, thus:

13. Looking at the letter of appointment which is subject contract against the above provisions of law and while conscious that it is not within the scope of courts to rewrite a contract but merely to interpret, we find the contract of employment did not indicate the sum of USD 600 included house allowance and specifically provided that the Respondent was to be paid “other benefits”. The Judge interpreted that contract although she did not specifically mention this particular clause to mean that the appellant was liable to pay the respondent house allowance... ..

We hold the primary document of the contract here was the letter of appointment as the pay slip does not constitute a contract. It is merely issued by the employer, the employee has no part in its preparation or even place to sign for it. For avoidance of doubt, we clarify that had the contract expressly stated that the salary of 450,600/- was inclusive of house allowance, we would not have used the clause “other benefits as required by law” in the contract to award house allowance, we would have applied section 31(2)(a) of the *Employment Act* to exclude it.”

60. It has not escaped the sight of this court, that the pay slips tendered in court show the kshs 550,000/- as “gross salary” not basic salary as described in the employment contract.
61. To hold that the kshs 200,000/- was part of the contractual remuneration, kshs 550,000/- shall be going against the known definition of “basic salary,” and a clear term of the contract of employment. It shall be tantamount to rewriting a contract for the parties. This, the law does not allow me to do. In the case of *Ronald Ogeri -vs- Styroplast Ltd* (2022) eKLR, this court expressed itself:

“The function of our courts is to give effect to the intention of the parties as expressed. In the English Court of Appeal case above – *Globe Motors Inc & others vs TRW Electric Steering Ltd & others* (supra) Lord Justice Beatson stated as follows:

“Absent of statutory or common law restrictions, the general principle of English Law of contract is that parties that contract are free to determine for themselves what obligations



they will accept. The parties have the freedom to agree to whatever terms they chose to undertake and can do so in a document, by word of mouth or by conduct.”

62. In the premises, it is my conclusion that the kshs 550,000/- was contractually provided for as a basic salary. There is no basis to see it in any other manner. Consequently, the act of the respondent to turn it to be gross salary in the pay slips had the effect of suppressing the basic salary of the claimant by the margins, initially kshs 200,000/-, and subsequently kshs 100,000/- as was pleaded and testified on, by him.

Whether the Claimant is entitled to the reliefs sought

63. Having stated as I have hereinabove on the effect of the respondent’s action, I find no difficulty in holding further that the effect affected the computation of terminal dues and amounts that the respondent found due to the claimant. Lower figures were applied as basic pay to arrive at the terminal dues. I agree with the claimant.
64. Hereinabove I did find that considering the character of continuous injury or damage, the employee can only claim on incidents that occurred within 3 years immediately before the commencement of the suit herein, I am not persuaded to grant the claimant, the kshs 400,000/- under the head “income at the rate of kshs 200,000/- per a month for a period of two months from May 1, 2013 to June 30, 2013”.
65. In the circumstances of this matter, and having found as I have hereinabove, I find that the claimant is entitled to the other reliefs sought.
66. In the upshot, judgment is hereby entered in favour of the claimant in the following terms:
- a. Kshs 3,528,032.00, a cumulative figure under the various heads pleaded.
  - b. Costs of this suit.
  - c. Interest at court rates from the date of this judgment till full payment.

**Read, Signed and Delivered this 13<sup>th</sup> day of July, 2023.**

**OCHARO KEBIRA**

**JUDGE**

**In Presence of:**

Mwangi Chege for the Claimant

Mr. Wepoh for 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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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.

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**OCHARO KEBIRA**

**JUDGE**

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