



**Kiema v Segera Limited (Employment and Labour Relations Cause E019 of 2022) [2023] KEELRC 1597 (KLR) (4 July 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1597 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU  
EMPLOYMENT AND LABOUR RELATIONS CAUSE E019 OF 2022**

**HS WASILWA, J**

**JULY 4, 2023**

**BETWEEN**

**ELIZABETH K KIEMA ..... CLAIMANT**

**AND**

**SEGERA LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The claimant instituted this suit vide a memorandum of claim dated 4<sup>th</sup> May, 2022, alleging that her constitutional rights and freedoms guaranteed under the Constitution have been breached by the Respondent. That they have exposed her to unfair labour practices forcing her to resign. she prayed for the following reliefs; -
  - a. A declaration that the Respondent withheld the claimant’s overtime, being two hours per day for 24 days per month for 6 years and 7 months totaling to, 3792, hours and is liable to pay the claimant Kshs. 2,567,500.
  - b. A declaration that the Respondent breached the constitutional rights and freedoms of the claimant being unlawful and forceful detention against her constitutional rights and is liable to pay the claimant Kshs 10 Million.
  - c. A declaration that the Respondent engaged in unfair labour practices and is liable to pay to the claimant Kshs 3,000,000.
  - d. Certificate of service.
  - e. Costs and interest of this suit, and
  - f. Any other relief as the court may deem just.



### **Claimant's case.**

2. The claimant states that she was employment by the Respondent as the senior chef on permanent basis vide an employment letter dated 30<sup>th</sup> December, 2014 which was to take effect on 1<sup>st</sup> January, 2015 and was to work at Segera Retreat Lodge- Nanyuki.
3. She accepted the offer and joined the Respondent's employment then worked with utmost dedication and zeal. However, by the letter of 28<sup>th</sup> October, 2020, the claimant tendered her resignation, citing long working hours of 2 extra hours each day, without any compensation.
4. It is averred that the long hours standing exposed her to health conditions such as calcaneus spur, that made it more difficulty to work while standing for hours. That she was disrespected and accused falsely by the General manager, making the working environment non-conducive, which affected her health further as she developed blood pressure.
5. It is stated that the General Manager, together with the Human Resource officer, refused to accept the said resignation letter and advised her to tender another letter omitting the reasons for resignation. But the Claimant refused to heed to their request.
6. Before tendering her resignation and having informed her employer of her condition, the Respondent's Human Resource officer, instructed the claimant to see the Respondent's doctor who allegedly had been corrupted to alter the ailment of the claimant but the said doctor refused. She was also directed to report to the labour officer with regard to the ailment mentioned. Soon thereafter the Respondent forced the claimant to take off duty which the claimant refused but after a tussle, she bowed in to the pressure and took the off.
7. Upon resuming her duties, the claimant states that she was forced to unlawful detention at Nyakio Lodge in the pre-text of taking Covid-19 samples. That she stayed in isolation from 21<sup>st</sup> December, 2020 to 7<sup>th</sup> January, 2021 when she was released only after her lawyer intervened. She stated that the isolation room was not a government identified isolation centre as such the detention was unlawful.
8. She stated that she learnt later on that the reason for her detention was to stop her from meeting the owner of the lodge one Jochen Zeitz who was in the hotel from 19<sup>th</sup> December, 2020 till 16<sup>th</sup> January, 2021.
9. It is her case that she was eventually released from the detention and left the Respondent's employ with effect from 8<sup>th</sup> January, 2021 but was not paid her terminal dues. Her last salary at the term of exiting the Respondent's employment was Kshs 130,000.
10. She contends that her treatment before exiting the Respondent's employment was inhuman and a violation of her constitutional rights and freedoms under Article 27 of the Constitution and Section 5(3) of the *Employment Act*, which she now seeks compensation from this court. Further that the Respondent be compelled to pay her terminal dues upon resignation.
11. It is further stated that her treatment upon resignation was in violation of Sections 5(3), 45(2) and 46 of the *Employment Act* as read with Articles 27 and 41 of the Constitutions.
12. The claimant testified as CW-1 and adopted her witness statement of 4.5.2022 which reiterated the claim and in addition stated that she was forced to resign because she worked under too much pressure and her foot was ailing. She stated that she was mistreated by her employer when she was detained in a lodging and observed 4 times but never told whether she had contracted the Covid virus or not. She



also stated that she was supposed to work for 48 hours a week but at times she clocked in at 5 am and left at 10 pm.

13. Upon cross examination she stated that she was to work for 48 hours a week with one day off. She also admitted that the contract provided that she was in the management team and not entitled to overtime. She stated that she was to be given annual bonus as she was in the management but was not given any bonus as agreed that's why she is asking for overtime pay. She also stated that she was not coerced to resign but that she did it voluntary and it was accepted by the Respondent.

#### **Respondent's case.**

14. The Respondent entered appearance and filed defence to claim on the 18<sup>th</sup> July, 2022 denying the entire claim and in particular stated that as soon as the claimant began her role as a senior chef on 1<sup>st</sup> January, 2015, they accorded her all the support she needed to thrive and provided a conducive working environment at all times.
15. It is the Respondent's case that the parties herein entered into a mutually acceptable agreement which had agreed number of hours indicated at paragraph 6 of the contract of employment together with all other expectation that is aligned to her job description as the senior Chef.
16. It is averred that the claimant resigned vide the letter of 28<sup>th</sup> October, 2020 which resignation was accepted by the Respondent by the letter of 3<sup>rd</sup> November, 2020 and the claimant was duly informed and she even thanked the Respondent for accepting her resignation and promised to serve the resignation notice.
17. The Respondent denied causing the claimant illness and attributed the condition to morphology of her legs and feet.
18. It is stated that the Respondent upon receiving the resignation letter calculated the terminal dues due to the claimant which included, days worked till 25<sup>th</sup> January, 2021 accrued leave till 25<sup>th</sup> January, 2021, any days worked but no paid, service pay at the rate of 15 days for each year completed, less statutory deduction and that certificate of service was to be issued. This letter was served on the claimant who acknowledged receipt on the 8<sup>th</sup> January, 2021 and signed on the terminal dues payable, which were paid immediately. Therefore, that the Respondent's manager and Human Resource officer did not at any point refuse to accept the resignation letter as alleged.
19. The Respondent stated that they referred the claimant to Dr. Ndanya, an orthopedic specialist at Nanyuki teaching and referral hospital to aid the Claimant and not for any other reason.
20. The Respondent stated that at the time there were national Covid-19 pandemic guidelines which required that all staff that were away from the Hotel were required to take Covid-test and stay in isolation before resuming duties to protect all other person from catching the virus. Nyakio Hotel was identified as an isolation center where the Respondent entered into an agreement with the hotel to have its staff isolated before being cleared by KEMRI to join the other staff. The Bills, food and accommodation was fully paid by the Respondent, therefore that the exercise was done in good faith to protect its employees.
21. The Respondent reiterated that these containment measures were applied to all staff of the Respondent who were away from the hotel either on off or leave and therefore there was no discrimination.
22. The Respondent stated that the claimant raised this issues through her advocates by the letter of 19<sup>th</sup> October, 2020, which was comprehensively responded to by the letter of 5<sup>th</sup> November, 2021.



23. The Respondent denied the territorial jurisdiction of this Court and proposed the matter to be transferred to Nyeri Employment and Labour Relations Court.
24. The Respondent called Human Resource manager, John Ombati as its witness who testified as RW-1. He adopted his witness statement of 14.7.2022 and in addition stated that the claimant being a senior chef was part of the management of the Lodge as such is not entitled to overtime. He testified that the claimant never complained of not receiving any Bonus. she resigned and her resignation accepted by the Respondent. He testified further that the claimant was not forcefully detained but isolated in Nyakio hotel in line with Covid- 19 guidelines.
25. Upon cross examination, the witness testified that when the claimant resigned and continued serving the Respondent as the Respondent sourced for her replacement. He also admitted that some issues were raised by the claimant which were addressed by the Respondent. He testified that he did not have evidence that the certificate was served on that the claimant or whether the employees on isolation knew what was happening at Nyakio Lodge. He also testified that the claimant was paid her salary till 21<sup>st</sup> January, 2021 even though she exited the Respondent on 8<sup>th</sup> January, 2021. He confirmed that all employees were given their Covid-19 test results.
26. The witness also testified that the claimant did not indicate at any point her intention of meeting the owner of the Hotel. He maintained that the isolation was for all employees which was a private arrangement to protect its employees. However, that the test was carried out by KEMRI.

#### **Claimant's Submissions.**

27. The claimants submitted on Five issues; whether the Respondent engaged in unfair labour practices, whether the Respondent breached the constitutional rights and freedoms of the claimant, whether the Respondent withheld the claimant's overtime, whether the claimant is entitled to certificate of service and who should bear costs of this suit.
28. On the first issue, it was submitted that the Respondent engaged in unfair labour practices in failing to produce any HR polices, any medical-health and safety policy available at its workplace causing the claimant ill-health in that she developed blood pressure and calcaneous spur in the process which affected her health further, forcing her to resign. It was argued that as much as the claimant was in the management position, she was to be considered for annual bonus which was never considered for the 6 years worked. Further that the fact that she used to work for 2 extra hours each day without compensation was not denied. Also that the Respondent reviewed salaries for some staff and excluded others such as as the claimant. These, according to the claimant demonstrated that indeed the Respondent subjected the claimant to unfair labour practices.
29. To support this view, they relied on the case of *Bomas of Kenya v Thiriku* (Civil Appeal 379 of 2019) [2022] KECA 795 (KLR) (24 June 2022) (Judgment), where the Court of Appeal held that;-

“Article 41 of *the Constitution* enshrines the right of fair labour practices, a violation of which may attract, among other reliefs listed under Article 23 (3), compensation in the form of damages. There is no exhaustive list or definition of conduct that constitutes unfair labour practices offered by *the Constitution* or the *Employment Act*. The provisions of *the Constitution*, employment and labour relations legislation, common law practices, treaties and conventions, comparable foreign instruments, as well the an employer's code of conduct where available form a collective basis for determining whether particular conduct constitutes unfair labour practices. South Africa's Constitutional Court in *National Education Health & Allied Workers Union (NEHAWU) v University of Cape*



Town and Others [2002] ZACC 27 observed that;-The concept of fair labour practice is incapable of precise definition. This problem is compounded by the tension between the interests of the workers and the interests of the employers that is inherent in labour relations. Indeed, what is fair depends upon the circumstances of a particular case and essentially involves a value judgment. It is therefore neither necessary nor desirable to define this concept.”

44. It should also be noted that conduct which is lawful may nevertheless constitute an unfair labour practice – see (Council of Mining Unions v Chamber of Mines of SA (1985) 6 ILJ 293 (IC). The Supreme Court of South Africa in Media Workers Association of South Africa and Others v Press Corporation of South Africa Ltd. [1992] ZASCA 149 suggests that the question of whether a labour practice is unfair is ultimately a question of discretion and judgment of the learned trial judge than a question of law or fact:

“The position then is that the definition of an unfair labour practice entails a determination of the effects or possible effects of certain practices, and of the fairness of such effects. And, when applying the definition, the Labour Appeal Court is again expressly enjoined to have regard not only to law but also to fairness. In my view a decision of the Court pursuant to these provisions is not a decision on a question of law in the strict sense of the term. It is the passing of a moral judgment on a combination of findings of fact and opinions.”

The view of Mbaru, J. in Elizabeth Washeke And 62 Others V Airtel Networks (k) Ltd& another[2013] eKLR is also persuasive..Whether conduct is fair or not necessarily involves a degree of subjective judgement. However, this is not to suggest that the assessment of fairness is unfettered or a matter of whim. Rather, regard must be had to the residual unfair labour practice; the employment relationship would still exist. But due to the unfair labour practice the employee is left unprotected. The unfair conduct of the employer relating to a particular employee or employees can then be termed as unfair labour practice. Thus, any understanding of fairness must involve weighing up the respective interests of the parties – as well as the interests of the public”

30. On the second issue, it was submitted that the Respondent forcefully detained the claimant at Nyakio Hotel without her consent for 18 days, forcing her advocates to demand for her release. It was argued that being in Nyakio Hotel while nursing an injured foot exposed her further to Covid-19 virus instead of helping the situation. It was submitted that this treatment by the Respondent exposed the claimant to emotional stress and mental torture considering that no communication was made to the claimant on the reason for detention, neither was the result of her test issued to her. Thus the Respondent violated her constitutional rights and freedom provided under [the Constitution](#).
31. On withheld overtime party, it was submitted that the claimant worked an extra two hours each day for 24 days a month for 6 years 7 months, therefore the Respondent should be compelled to pay her overtime, more particularly because the claimant had raised the issue of working for long hours without any provision to sit or breaks.
32. On costs, the Claimant submitted that costs follow event as provided for under Section 27 of the [Civil Procedure Act](#), therefore costs be awarded to the claimant.
33. The claimant also urged this Court to compel the Respondent to issue her with certificate of service within 7 days of the judgement herein.



34. On jurisdiction raised by the Respondent, the claimant stated that the issue of territorial jurisdiction ought to have been raised in the first instance in a Preliminary Objection. Having participated till judgment, the issue should be left to lie. In any event that this Court has original and unlimited jurisdiction over labour matter all over Kenya.

### **Respondent's Submissions.**

35. The Respondent on the other hand submitted on seven issues; whether this Court has jurisdiction to determine this matter, whether there is an employer-employee relationship between the parties, whether the claimant has proved her case for overtime pay, whether the claimant's constitutional rights have been violated by the Respondent, whether the claimant has proved the Respondent engaged in unfair labour practices and who should pay costs of this suit and interest.
36. On jurisdiction it was submitted that jurisdiction is everything as held in the celebrated case of *Motor Vessel Lilian S V Caltex Oil (K) limited [1989]* . Accordingly, that since the cause of action occurred in Laikipia County, it falls within the jurisdiction of Nyeri Employment and Labour Relations Court. It was argued that when a suit is filed in a court without jurisdiction the proceedings are a nullity and even in event that parties agree, such consent cannot confer jurisdiction. In support of this they relied on the case of *George Gicheru V Senior Private Kioko & Others [2013]* eklr and the case of *Joseph Muthee Kamau and another V David Mwangi Gicheru and another [2013]* eklr.
37. On the claim for overtime, it was submitted that the terms of engagement are as indicated in the employment contract which provides at clause 6 for working hours of 48 per week and clause 12 indicates that there will be no overtime pay for the said position, it being management position. While clause 13 provide for the procedure for claiming bonus which was to be prerogative of the claimant and not the employer. Since the claimant prayed for overtime and not bonus, she is bound by per pleadings and not entitled to the said overtime pay. To support this position, the Respondent relied on the case of *Daniel Otieno Migore V South Nyanza Sugar Co. ltd [2018]* eklr. where the Court relied on *Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC SC 91/2002* where Adereji, JSC expressed himself thus on the importance and place of pleadings: -
- “.....it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded...In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.”
38. On violation of the claimant's rights and freedoms, it was submitted that the claimant has failed to particularized her claim under this head and argued that upon onset of Covid-19, many organizations adhered by the government regulations and measures of containing the pandemic, which was done by the Respondent herein. Infact that the measures employed by the Respondent was in good faith to protect the lives of its employees and reduce exposure to the virus. These measures were applied on all employees across board and all charges, food and accommodation were fully settled by the Respondent. It was argued further that the issues raised by the claimant through her advocates were duly responded to in the letter of 5<sup>th</sup> November, 2021.
39. On certificate of service, the Respondent acknowledge that it's a requirement undersection 51 of the [\*Employment Act\*](#), which they complied with and issued the same to the claimant. However, that the



- claimant decline to pick it from their officer. He confirmed that the certificate has been and is still ready for collection.
40. On allegation of unfair labour practices, it was submitted that the claimant was paid all her dues including salary increment which was effected from time to time. That upon resignation the same was accepted and the claimant allowed to serve her notice period and duly paid for this period. It was argued that the claimant's medical issue was duly attended to and referred to a specialist. therefore, she was duly taken cared of while in the Respondent's employ and the claim for unfair labour practices is unfounded. In any case that there is no evidence to support the claim under this head.
  41. On costs, the Respondent urged this Cost to dismiss the suit and award costs to the Respondent.
  42. I have examined all evidence and submissions of the parties herein.
  43. The respondents raised several issues requiring this court's consideration VIS;-
  44. That the cause of action arose in Nanyuki within the territorial jurisdiction of Nyeri ELRC.
  45. It is true that the cause of action arose in Nanyuki which would ordinarily be within the ELRC Nyeri Court.
  46. That notwithstanding, the respondent subjected itself to this court's jurisdiction and entered appearance and further participated in the hearing of this case.
  47. The issue of jurisdiction cannot be raised at the tail end of the hearing in the circumstances.
  48. This court also has territorial jurisdiction within the entire nation of Kenya and therefore the issue of this court lacking jurisdiction cannot stand and is disregarded.
  49. The claimant also sought to be paid overtime pay and also bonus pay. The claimant however admitted that she was in management and therefore overtime pay was not payable to her.
  50. On bonus pay however the claimants letter of employment dated 30th December, 2014 at paragraph 13 stated as follows;-  

“ Bonus

The company may at the absolute discretion of the director pay an annual performance related bonus at the end of the financial year.

However, you will not be eligible for such bonus until after completion of one year service”.
  51. The implication of this provision is that bonus was purely optional.
  52. It was also performance related. The claimant has not explained through her evidence how she or the company performed during the period that entitled her to bonus.
  53. The claimant also never raised this issue during her employment of 5 years.
  54. It is my finding that she is not entitled to payment of bonus as it was a discretionally payment and why the issue of whether the discretion was not exercised in her favour was never raised during her terms of employment.
  55. The claimant also averred that she was treated unfairly and inhumanly by being put in isolation at a Nyakio Hotel for 14 days.



56. The issue of isolation at the pick of COVID 19 can only be understood in the tune of COVID 19 guidelines issued by the Government at the time.
57. The claimant worked for the respondent who are a hospitality facility. She handled food as the Chief Chef.
58. She was bound to come in contact with many guests and in this could spread the disease if infected.
59. The explanation given by the respondent as to why the claimant was put in isolation is a reasonable in the circumstances and the respondent cannot be faulted for behaving in an inhumane manner.
60. The claim for damages for treating the claimant inhumanly must therefore fail.
61. The claimant also raised the issue that she was not paid her terminal dues.
62. The respondent in their evidence however indicated that they paid the claimant all her dues.
63. The claimant was a member of NSSF as per the payslip.
64. It is not clear what her terminal dues sought are. It is however evident that there are no unpaid dues owed to her in view of her membership to NSSF.
65. The upshot is that I do not find the claim by the claimant proved.
66. I dismiss this claim accordingly with no order of costs.

**DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 4<sup>TH</sup> DAY OF JULY, 2023.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

