



**Ndung'u v Mirimi & 3 others (t/a Murimi Ndumia Mbago & Muchela Advocates)
(Cause E038 of 2022) [2023] KEELRC 2477 (KLR) (12 October 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2477 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE E038 OF 2022
M MBARÚ, J
OCTOBER 12, 2023**

BETWEEN

KEVIN WAIRAGU NDUNG'U CLAIMANT

AND

BONIFACE NDUMIA 1ST RESPONDENT

PAUL MIRIMI 2ND RESPONDENT

ANDERSON MBAGO 3RD RESPONDENT

ASTON MUCHELA 4TH RESPONDENT

T/A MURIMI NDUMIA MBAGO & MUCHELA ADVOCATES

JUDGMENT

1. The claimant is an advocate as well as the respondents who trade as Murimi Ndumia Mbago & Muchela Advocates.
2. The claim is that the respondents recruited the claimant as a pupil in the firm in April 2014 where he trained and later retained as an advocate associate in March 2015 and then promoted to senior associate. That in February 2019 he was promoted to associate partner and which position he retained until 31st January 2022 when he resigned.
3. The claimant was not under a written contract, his employment with the respondent remained on oral terms with a salary of Kshs. 150,000 per month and entitled to commissions on files handled to conclusion and the benefit of payment for a practicing Certificate subscription together with Continuous Professional Development fees.
4. The claim is that in February 2019 the claimant's salary was reviewed from Kshs. 100,000 to Kshs. 150,000 per month but the respondent refused to implement the agreed increment and this left the



- claimant with a salary deficit of Kshs. 50,000 for 12 months from February 2019 to January 2019 when he resigned.
5. In February 2020 there was partial payment from Kshs. 100,000 to Kshs. 130,000 with an outstanding Kshs. 20,000 all amounting to Kshs. 895,483.
 6. The claimant incurred petty cash work related expenses amounting to Kshs. 179,600 but the respondent refused to pay.
 7. The claimant was entitled to a house allowance in terms of Section 31 of the *Employment Act* which the respondent failed to pay and for the entire period of employment is claiming Kshs. 2,974,954.61.
 8. As at January 2022 the claimant had 63 leave days which were not compensated.
 9. The claim is that the refusal to pay the salary increments and work benefits was wrongful and unlawful and that the respondents should be directed to pay the followings;
 - a. Petty cash reimbursements Kshs. 179,600;
 - b. 63 leave days Kshs. 450,000;
 - c. Unpaid commissions Kshs. 895,483;
 - d. Unpaid salary increments Kshs. 1,080,000;
 - e. House allowance Kshs. 2,974,954.61;
 - f. Costs of the suit.
 10. The claimant testified in support of his case he was employed by the respondent as an associate advocate without any written contract and terms and conditions of employment remained oral. The salary paid Kshs. 100,000 per month and following discussions with the Senior Partners in the firm, Mr Mbago, salary was increased to Kshs. 150,000 per month but this was never paid. In January 2020 part of the salary was paid to Kshs. 130,000 but a balance is outstanding amounting to Kshs. 1,080,000.
 11. For the entire duration of employment, the claimant was not provided with housing or a house allowance. Part of the agreed benefits was payment of commissions over matters taken up from clients and worked on until conclusion. Since his resignation in January 2022, the claimant is aware that the commissions unpaid over settled files amount to Kshs. 895,483. One employee, Eric Gitau in finance had tabulated these commissions and sent a copy to the claimant and the same is owed.
 12. For the period of employment, the claimant did not take his annual leave days.
 13. Part of the claimant's duties included attending court and required use of petty cash from the office in Nyali, Mombasa to the court houses. Despite submissions of reimbursement requests, these were not paid and despite demand, the respondent has not paid.
 14. In response, the respondent's case is that the claimant was on pupillage instructions at the firm from the year 2014 to 2015 when he was engaged as an advocate and posted to the firm's Mombasa office. In February 2019 he was promoted to the position of associate partner, a position he held until his resignation in January 2022.
 15. The claimant was not entitled to a salary of Kshs. 150,000 as alleged or entitled to any commissions as claimed. The claimant had a consolidated salary of Kshs. 100,000 per month which was fully paid there was no partial increment to Kshs. 130,000 or any other monies withheld in form of a salary.



16. The claimant had engaged the respondent in meetings seeking to have his salary reviewed but no agreement was achieved. The claimant made it his habit to annually threaten the respondent with resignations in a bid to arm-twist a favourable salary and this suit is as a result of frustrations having failed in his objectives especially after COVID pandemic when other employers were downsizing and effecting pay cuts but the respondent retained the claimant and paid his salaries.
17. On the claim for commissions, there were no agreements or assurances that the firm would pay for any concluded file. At the time the claimant resigned, he was not a partner entitled to commissions as alleged. The alleged petty cash accumulated are without proof or justification and any such expense would be through receipts submitted and a reconciliation done immediately to avoid accumulated expenses.
18. The claimant had a consolidated salary inclusive of a house allowance and cannot claim for any allowance. There was no contractual obligation to provide such an allowance.
19. The law firm would close every 15 December to 15 January to allow all staff to take annual leave including the claimant and hence, he cannot claim payment for annual leave.
20. In evidence, the respondent called Aston Muchela advocate who testified that he is a partner in the firm and the claimant was employed as an associate advocate from the year 2015 where he started at a salary of Kshs. 40,000 per month which increased to Kshs. 100,000 per month. Annually, the claimant would arm-twist the firm through threats to resign for his salary to be increased. At the time of his resignation in January 2022, the salary paid was Kshs. 130,000 all paid through his bank account. The claim that the salary due is Kshs. 150,000 is without evidence.
21. The claimant was based at the firm's branch office in Mombasa. The fees paid was to the firm that had 3 other advocates and the claimant had no agreement for payment of a commission over any given formula. All petty cash was based on reimbursement for travel costs upon the claimant submitting the requisition form verified by the respondent and the partner in Mombasa upon a confirmation that the travel was work related. The claimant was asked to attend for a reconciliation of his expenses and for verified expenses, these were paid.
22. The practice of the firm was to close for all clients and staff from 15 December to 15 January every year. This gave staff time to take leave.
23. When the claimant resigned, there was no case on a house allowance since he had a consolidated salary. At the close of the hearing, parties filed written submissions.
24. The claimant submitted that at a meeting held in Nakuru office, through letter dated 18 February 2019 he was promoted to Associate partner and his salary increased to Kshs. 150,000 with effect from 1st March 2019 but this was never paid in full. The meeting minutes were not written but there was agreement on the salary to be paid. an employer who retains an employee on oral terms and conditions of employment should not frustrate the employee by refusing to pay the due salary as held in *Robai Musinzi v Safdar Mohamed Khan* [2012] eKLR. The respondent had a duty to issue written terms pursuant to Section 9 of the *Employment Act*, 2007 (the Act) which it failed to do and the evidence on the salary due should be as submitted by the claimant at Kshs. 150,000 and the unpaid salaries should be paid. like any other contract, a contract of employment binds the parties to it as held in *National Bank of Kenya Limited v Hamida Bana & 102 others* [2017] eKLR. Upon the employer changing terms of employment, the duty is upon the employer to issue written notice as held in *Martin Wekesa Wamalwa v Barrow & Grundy (Ukunda) Limited* [2013] eKLR and to keep work records to ensure production in the event suit is filed as held in *Francis Mbugua Muthiga v Echuka Farm Limited* [2018]



eKLR. For these reasons, without any challenge to the claims made, the respondent should pay with costs.

25. The respondent submitted that the claimant does not justify his claim particularly the claim for an increased salary that is not in writing. In the case of *Philip Ndolo v Kenya Crocodile Farm Ltd* [2007] eKLR the question of salary increments without evidence that the employer has made such provision is not justified.
26. The claimant alleged to have incurred petty cash expense without the approval of the respondents. The respondent would close its offices in December to January every year allowing the claimant to take annual leave. There was no contractual obligation to pay any commissions as held in *Stephen Ndotso v Silver Hawk International Limited* [2020] eKLR. The claimant for house allowances does not arise where the claimant had a consolidated salary inclusive of all benefits and he cannot justify application for Section 31 of the Act as held in *Daniel Mburu Muriu v Hygrotech East Africa Ltd* [2021] eKLR.

Determination

27. Employment of the claimant by the respondent is not denied. What is contested is the salary payable at the end of employment and the increments.
28. Indeed, as submitted by the claimant, the duty to file work records rests on the employer in terms of Section 10(6) of the Act.
29. For terms and conditions of employment, the employer has the duty to issue in terms of Section 9 and 10 of the Act and where none exists, the Minimum Wage Orders apply.
30. Through letter dated 18 February 2019 the respondent promoted the claimant to the position of Associate Partner with effect from 1st March 2019. There is no salary review set out in the letter.
31. In an email dated 9 August 2019, the claimant returned to this letter of promotion and stated that there were salary arrears from March 2019 following his discussion with Mr Mbago that the promotion was to be accompanied by a salary raise of Kshs. 50,000 to Kshs. 150,000.
32. The claimant followed up with another email on 13 January 2020 and noted that since his issues in the email of 9 August 2019 had not been addressed, he opted to tender his resignation with effect from February 2020.
33. It is not clarified as to how the resignation was handled. Save, Mr Muchela testified that the claimant had the habit of arm-twisting the respondent with threats of resignations to push for a salary review upwards.

On 20 January 2020 the claimant wrote another email and noted that;

Thank you for your offer to raise my salary to Kshs. 130,000 in lieu of my resignation. However, please note that the resignation was as a result of failure to implement last year's raise and commissions as agreed ...

34. Without any written contract, the claimant's salary being at Kshs. 130,000 as noted in his email, to claim any other salary is without justification. Any verbal communications for an increase was not followed up with a written agreement to pay any other salary other than the one received at Kshs. 130,000 at the point of his resignation. The claimant cannot urge his case in terms of the cited cases where the subject employee had a minimum wage and there were underpayments.



35. Without any written contract on terms and conditions of his employment, the claimant was earning Kshs. 130,000 in a sector that is unregulated in terms of minimum wage due. On the paid salary, without written terms, the general wage would apply of which the claimant was earning above the minimum wage.
36. Without any agreement to secure work commissions, to claim the same within the allocated salary of Kshs. 130,000 per month is seeking unjust enrichment.
37. Equally, a house allowance tabulation of 15% is due based on the minimum wage of a general worker. For the years of service, the claimant had a generous allocation of salary beyond the general wage. to claim a house allowance is to fail to appreciate that the Wage Orders well applied, without written terms of employment, such is not due.
38. Claims in petty cash for reimbursements of expenses in their nature are like special damages based on proof of expense and submitted for assessment and on good cause, awarded.
39. Every employer is allowed the latitude to develop workplace policies and practices with regard to use of resources and employee regulations. One such practice was a Petty Cash Requisition Slip.
40. The claimant submitted the Petty Cash Requisition Slip with expenses running from 12 April 2021 to 21 July 2021 at his page 37. This is part of his petty cash claims
41. Ordinarily, petty cash translates to small little monies used for short term expenses and once incurred, there is reimbursement for good cause. From April to July 2021 the claimant seems to have gone into his pockets and spent over Kshs. 86,000 in petty cash without reimbursement.
The need and use for petty cash is lost in such accumulation.
42. As stated, petty cash use is part of special damages and without receipts, such does not issue. Save for the long table to expenses, the claimant has no receipts to claim under petty cash.
43. Taking of annual leave is a right secured under Section 28 of the Act. Every employer is required to ensure that the employee is able to take his annual leave as and when due. Indeed, where annual leave is not taken, the employee is bound to apply and ensure time off is taken in terms of Section 28(2) of the Act.
The claim is for 63 leave days not taken over a 3 years' period.
44. The respondent's case is that the office would be closed for clients and staff from 15 December to 15 January every year. Such allowed staff to take annual leave. Indeed, it is the duty of the employer to secure the right of the employee in terms of taking annual leave.
45. Ordinarily, taking of annual leave is for time less all public holidays and weekends. For a given year like 2018/2019 where the respondent closed its office on 15 December 2018, this was on a Saturday.
From 15 to 31st December 2018 available days were 9;
From 1st to 15 January 2019, available days were 10.
A total of 19 leave days for the claimant.
46. A just assessment of the matter and taking account of the right under Section 28 of the Act, the claimant is owed 3 leave days each year. On his last salary of Kshs. 130,000 per month, with a right to 21 days of annual leave secured under Section 28 of the Act, for the total 9 days rounded up to 10 days for completeness, the claimant is owed Kshs. 43,000 in untaken leave days for the period of his employment.



The claims made are largely without merit, each party will meet own costs.

47. Accordingly, the claims herein are dismissed save for award of leave pay at Kshs. 43,000. Each party to bear own costs.

DELIVERED IN OPEN COURT AT MOMBASA THIS 12TH DAY OF OCTOBER 2023.

M. MBARŪ

JUDGE

